

BRANDED: CORPORATE IMAGE, SEXUAL STEREOTYPING, AND THE NEW FACE OF CAPITALISM

DIANNE AVERY* AND MARION CRAIN**

I. INTRODUCTION	15
II. BRANDING, MARKETING, AND APPEARANCE STANDARDS	
IN SERVICE BUSINESSES.....	17
A. Branded Service	18
B. Mechanisms of Control.....	19
1. <i>Production Line Routinization</i>	20
2. <i>Standardization by Transformation</i>	22
3. <i>Effects of Routinization on Customers and Culture</i>	24
C. The Walt Disney Model of Branded Service	26
1. <i>Hiring and Training for Branded Service</i>	26
2. <i>Branded Workers: Appearance Codes</i>	27
III. BRANDING: SANCTIONED BY LAW	28
A. Trade Dress: Protecting an Employer’s Property-Like Interest in Its Brand	28
B. Appearance Regulation in the Workplace.....	31
1. <i>Cases in the Union Context</i>	32
2. <i>Constitutional Challenges to Appearance Codes</i>	39
3. <i>Privacy-Based or Wrongful-Discharge Claims</i> <i>at Common Law</i>	41
4. <i>Statutory Sex Discrimination Claims</i>	42
5. <i>A Case Study of Corporate Branding Accomplished</i> <i>Through Appearance Codes and the Law’s Response</i>	45
IV. THE <i>JESPERSEN</i> LITIGATION: AN INDIVIDUAL WORKER RESISTS CORPORATE BRANDING	45
A. The Facts	45
B. The State Lawsuit: Common Law Claims	48

* Professor of Law, University at Buffalo Law School, State University of New York. B.A., 1966, Duke University; M.A.T., 1967, Wesleyan University; J.D., 1982, University at Buffalo Law School, State University of New York. I thank Fred Konefsky for his insightful comments and suggestions on many drafts of this Article.

** Paul Eaton Professor of Law and Director, Center on Poverty, Work and Opportunity, University of North Carolina at Chapel Hill. B.S. 1980, Cornell University; J.D., 1983, UCLA. Marty Rosenbluth and Elliott Dube provided outstanding research assistance. I thank Mitu Gulati for encouraging me to write on this topic.

Both authors are grateful to Jim Atleson, Mark Bartholomew, and Jack Schlegel, and to the participants at the symposium on “Makeup, Identity Performance & Discrimination” sponsored by the *Duke Journal of Gender Law & Policy* for insightful comments on earlier drafts of this Article.

C.	The Title VII Lawsuit: Discrimination Claims	49
1.	<i>The Complaint</i>	49
2.	<i>The District Court Decision</i>	50
3.	<i>The Ninth Circuit Panel Decision</i>	51
4.	<i>The Ninth Circuit En Banc Decision</i>	54
V.	BRANDING, SEX STEREOTYPING, AND EMPLOYMENT DISCRIMINATION	
	LAW IN <i>JESPERSEN</i>	57
A.	Creating and Defending the Harrah's Brand	57
1.	<i>"If one employee failed to comply, the brand standard failed."</i>	58
2.	<i>The Cult of Personal Loyalty</i>	59
3.	<i>Bill Harrah's Feminization of Casinos</i>	63
4.	<i>The Rise of the Bureaucratic Ethic and Corporate Loyalty</i>	65
5.	<i>Technology and Marketing</i>	70
6.	<i>Refining the Brand Through Expertise: The Image Consultant</i>	76
B.	Commodification: Sexualizing Female Bartenders	78
1.	<i>Wearing Makeup: Branding Darlene Jespersen</i>	78
2.	<i>Selling Sexuality: The Business of Casino Gaming</i>	80
3.	<i>Sexualized Branding: The "Harrah's Look"</i>	85
4.	<i>Property Rights in Work Law, Redux</i>	89
VI.	THE FEMINIZATION OF BARTENDERS: FROM BARMAIDS TO BARTENDERS TO BAR BABES	92
VII.	(RE)FRAMING JESPERSEN'S CLAIM: RESISTING BRANDING	100
A.	Finding Allies in Community Organizations: The Alliance for Workers' Rights	103
B.	Modes of Resistance at Law: Individual Lawsuits	105
1.	<i>The Administrative Process</i>	105
2.	<i>The Plaintiffs' Bar: The Solo Attorney Takes on Harrah's</i>	106
3.	<i>Lambda Legal Defense and Education Fund: The Discrimination Claim</i>	108
4.	<i>Individual Rights Versus Collective Rights: What Difference Does Framing Make?</i>	109
C.	Recasting the Claim as a Collective Rights Claim: The Role of Unions	110
1.	<i>HERE and Nevada's Culinary Union Locals</i>	110
2.	<i>Successful Union Strategies in Other Branding Cases</i>	114
VIII.	CONCLUSION	121

I. INTRODUCTION

In the hypercompetitive American economy, marketing and advertising are critically important for businesses that seek to edge out the competition, attract new customers, and build customer loyalty. One online casino has found a way to cut through the clutter of advertising messages in a uniquely attention-getting way: branding the faces and bodies of human beings with its corporate logo. In June 2005, GoldenPalace.com paid Kari Smith \$15,000 to have “GOLDEN PALACE.COM” tattooed permanently on her forehead. Smith auctioned her forehead as marketing space via eBay, apparently in an effort to raise funds to pay for private school for her son.¹ The resulting notoriety and news coverage was extremely beneficial to GoldenPalace.com, according to its marketing department.² GoldenPalace.com CEO Richard Rowe explained: “Conventional forms of advertising just don’t cut it anymore. To get people’s attention, you have to stand out from the crowd.”³

Whatever one may believe about the wisdom or ethics of contracting to use human beings as billboards, Kari Smith was paid for the exact thing that she sold—her appearance, her personhood, her identity. Suppose, however, that a service business “brands” its workers by adopting compulsory appearance codes as part of a marketing strategy to promote distinctive services that will appeal to customers and so garner greater profits. Although the “branding” does not take place literally, through tattooing, it operates upon the bodies and psyches of employees in ways that certainly follow employees when they leave the workplace at the end of a shift, and that are sometimes permanent. Should

1. See Lester Haines, *Online Casino Tattoos Woman’s Face*, REGISTER, July 1, 2005, http://www.theregister.co.uk/2005/07/01/casino_tattoos_womans_face; *Utah Woman Uses Head to Get Child in School*, June 30, 2005, <http://www.goldenpalaceevents.com>.

2. Aaron Falk, *Mom Sells Face Space for Tattoo Advertisement*, DESERET MORNING NEWS, June 30, 2005, <http://deseretnews.com/dn/view/1,1249,600145187,00.html>.

3. Haines, *supra* note 1. Smith was the first woman to bear GoldenPalace.com’s brand permanently; however, just a few months earlier GoldenPalace.com had contracted with twenty-seven-year-old Angel Brammer to have its URL (Uniform Resource Locator) tattooed temporarily over her cleavage. Lester Haines, *Casino Brands eBay Cleavage Woman*, REGISTER, Feb. 4, 2005, http://www.theregister.co.uk/2005/02/04/casino_brands_cleavage.

GoldenPalace.com has also contracted with four athletes—all boxers—to have “Golden Palace.com” temporarily tattooed on their bodies while they are competing. The athletes commanded higher payments than Ms. Smith or Ms. Brammer: Middleweight champion Bernard Hopkins fought twice while displaying the GoldenPalace.com tattoo on his back and received a \$100,000 endorsement. Charlie Bachtell, *To Tattoo or Not to Tattoo?*, <http://www.goldenpalaceevents.com/sports/tattoo02.php> (last visited Oct. 15, 2006). The Nevada Athletic Commission banned this body advertising on the basis that it was distracting to judges, demeaning to the sport, and potentially unsafe since the ink could rub off and contaminate the athletes’ eyes. *Id.* GoldenPalace.com challenged the ruling, and a Clark County district court judge overturned it as a violation of the boxers’ First Amendment rights. *Id.*

Pundits predict that this form of advertisement will become increasingly popular. A new Web site, <http://www.leaseyourbody.com>, has been established to connect companies seeking to locate independent contractors who are willing to serve as temporary human billboards. In addition to GoldenPalace.com, Toyota and Dunkin’ Donuts have experimented with “body advertising.” Christopher Simmons, *Body Advertising: Pittsburgh Waitress Paid to Wear Lease Your Body Tattoo*, SEND2PRESS NEWSWIRE, Aug. 19, 2005, http://www.send2press.com/newswire/print/news_2005-08-0819-002.shtml.

service workers who are required to conform to these codes receive compensation for the lease of their bodies and psyches as the locus of the employer's brand? If the branding encodes sexual stereotypes that the law seeks to eradicate, should it be tolerated at all?

In this Article, we show how the adoption of increasingly sophisticated forms of marketing and branding strategies by service businesses creates property-like interests—separate and distinct from workers' physical and mental labor—from which employers profit: branded service.⁴ We then analyze the role that law has played in reinforcing the practice of branding. In particular, work law defers to managerial prerogative to construct the business image and to control the workforce as the public face of that image, affirming the employer's power under the doctrine of employment at will to command adherence to appearance codes. The combined effect of the employment-at-will rule and workers' lack of bargaining power at an individual level thus permits employers to extract this additional value from workers above and beyond the compensated value of their labor, without cost. In the context of unionized workforces covered by collective bargaining agreements, companies have—at most—been required to demonstrate a reasonable relationship between the grooming code and the business's effort to project a corporate image that it believes will result in a larger market share.⁵ In a small number of cases, sexualized branding that exposes workers to sexual harassment or is predicated upon sexual stereotypes not essential to performance of the job has been curtailed by the antidiscrimination mandate of Title VII.⁶ However, challenges under Title VII have been effective only where corporate branding is at odds with community norms; where the branding is consistent with community norms that encode sexual stereotypes, customer preferences and community norms become the business justification for branding.

We explore the marketing of branded service and the law's response through an analysis of *Jespersen v. Harrah's Operating Co.*,⁷ in which the Ninth Circuit rejected a female bartender's Title VII challenge to Harrah's "Personal Best" grooming and appearance policy, which required (among other things) that women wear makeup, a practice that Darlene Jespersen found both personally and sexually demeaning. We examine the marketing and branded service strategy that Harrah's adopted, explain how it created a new and valuable property-like right for Harrah's, and describe Jespersen's reaction to her sexualized commodification.⁸ We discuss the law's failure to respond to her individual claim, regardless of how it was bracketed. In analyzing the legal doctrine that emerged under Title VII, we pay particular attention to the ways in which judicial acceptance of the cultural stereotypes that shaped Harrah's branded service limited the law's ability to respond.⁹ Next, we place Harrah's

4. See *infra* notes 12–80 and accompanying text.

5. See *infra* notes 81–177 and accompanying text.

6. See *infra* notes 159–77, 618–64, and accompanying text.

7. 444 F.3d 1104 (9th Cir. 2006) (en banc).

8. See *infra* notes 178–275 and accompanying text.

9. See *infra* notes 276–464 and accompanying text.

sexualized branding in the historical context of the gendered structure of work in the gaming industry and the bartending occupation.¹⁰

Finally, we make suggestions for reframing claims arising from branded service and the appearance and grooming codes associated with it. We urge reconceptualization of sex-stereotyped corporate branding as a collective harm to workers and evaluate avenues of resistance, including union organizing and collective bargaining, class-action sex discrimination or sexual harassment claims, and public consciousness-raising by social justice and community groups. Although these strategies, too, are limited—by the law’s assumptions about the primacy of employer property rights, the tendency of majoritarian labor unions to focus on the economic interests common to all workers in the bargaining unit (rather than issues pertaining directly to gender identity), and judicial hostility toward collective action more generally—they afford the most powerful lever for altering community norms and, ultimately, for reshaping the values that guide the law.¹¹

II. BRANDING, MARKETING, AND APPEARANCE STANDARDS IN SERVICE BUSINESSES

Like GoldenPalace.com, businesses operating in the competitive American marketplace are developing increasingly sophisticated strategies designed to help them “stand out in the crowd.”¹² Using market surveys of consumer tastes and preferences, businesses look to customers for information about what attracts them to a particular product or service. Ultimately, businesses hope to develop a “brand” that will draw and retain customers.¹³ A “brand” in this context means the set of practices, products, and marketing that create a unique identity that becomes associated in the public mind with a particular business.¹⁴ Advertising that educates the consumer about the brand and reinforces its association with the particular business is critical to the success of branding.¹⁵ Ultimately, successful branding yields high profit margins: Customers will pay more for a strong brand, and stock prices are considerably stronger for popular brands.¹⁶

Effective corporate branding produces a distinct emotional response in the customer which in turn leads to a predictable pattern of behavior: repeat business, willingness to pay higher prices, tolerance for errors, joining clubs that

10. See *infra* notes 465–521 and accompanying text.

11. See *infra* notes 522–664 and accompanying text.

12. See *supra* note 3 and accompanying text.

13. The branding concept is not limited to businesses—it can be linked to an industry, an occupation, or even a city. Las Vegas, for example, is a branded city; despite efforts during the 1980s to brand itself as a city where family fun and entertainment abounded, it ultimately retained its strong brand as “Sin City.” JANELLE BARLOW & PAUL STEWART, *BRANDED CUSTOMER SERVICE: THE NEW COMPETITIVE EDGE* 25 (2004).

14. *Id.* at 1. Brands have traditionally been associated with ownership (cattle and horses are branded) and with status (criminals and adulteresses were branded in early America; Jews and homosexuals were branded during the Nazi regime). See *id.* at 23–24.

15. *Id.* at 2–3.

16. *Id.* at 32–33 (reporting that customers will pay nineteen percent more for a leading brand name than for a weak brand and that strong brands are associated with stock prices that are five to seven percent higher than weak brands).

relate to brands, and providing favorable word-of-mouth advertising about the brand.¹⁷ Customers who form an affective connection to a business's products and services develop loyalty and commitment to—even passion for—the brand.¹⁸ Consumers who feel passion for the brand typically also embrace brand ownership as a means of self-expression: “[C]onsumers choose brands in great part to tell the world and themselves who they are. . . . The consumer in effect believes, ‘The only way I can be who I am is to have specific products or services.’”¹⁹

A. Branded Service

While branding in the product context is a familiar concept, “branded service” is relatively new. Service businesses theorize that just as customers become attached to brands in the product market, they seek out familiar brands in the service market as well. “Brand atmospheres,” “brand standards,” and “branded customer service” draw the consumer, creating a “quasi-monopoly” for the business and helping it to stand out from the many businesses offering similar products and services.²⁰ Thus, customers will return to familiar restaurant chains and hotels as they travel through various cities, seek out the same airline for all their travel needs, and prefer the same vacation resorts in various locales (e.g., Sandals Resorts for couples, Club Med for singles) in order to gain access to the quality of service, amenities, and comfort to which they have grown accustomed.

In the service economy, the service “produced” is created and consumed simultaneously, so that no tangible product remains.²¹ Because customers often participate in producing the service, management strategies that are customer-focused are the linchpin of successful business practice.²² The interactive nature of service work means that in order to affect customer behavior and to conform to customer expectations, employers must regulate workers’ personal characteristics, appearance, and behavior in more sophisticated and potentially invasive ways. Sociologist Robin Leidner explains:

By definition, nonemployees are a part of the work process of interactive services. Their presence decisively changes the dynamics of workplace control,

17. *Id.* at 20.

18. *Id.* at 3–4, 18. Many customers willingly adopt and display the corporate brand, sometimes paying premium prices for the privilege as they purchase shirts, shoes, bags and other items emblazoned with the corporate logo. Harley Davidson’s brand spawned a club with 750,000 members, the Harley Owners Group (HOG); many members have the HOG brand tattooed on their bodies. *Id.* at 32.

19. *Id.* at 1.

20. See Jill Esbenshade et al., *Profits, Pain, and Pillows: Hotels and Housekeepers in San Diego*, 9 WORKINGUSA 265, 270 (Sept. 2006); BARLOW & STEWART, *supra* note 13, at 1–2.

21. Sometimes it is difficult to separate the branded service from products that become associated with the service. For example, in 1999 Westin Hotels introduced the “Heavenly Bed,” the first branded hotel bed. This luxury bed, advertised as “an oasis for the weary traveler,” contributed significantly to Westin’s increased occupancy rates. Esbenshade, *supra* note 20, at 270.

22. Cameron Lynne Macdonald & Carmen Sirianni, *The Service Society and the Changing Experience of Work*, in WORKING IN THE SERVICE SOCIETY 1, 3 (Cameron Lynne Macdonald & Carmen Sirianni, eds., 1996).

since service recipients may both try to exert control themselves and be the target of workers' and managers' control efforts. Also, because the quality of the interaction is frequently part of the service being delivered, there are no clear boundaries between the worker, the work process, and the product in interactive service work. For this reason, employers often feel entitled to extend their control efforts to more and more aspects of workers' selves. Workers' looks, words, personalities, feelings, thoughts, and attitudes may all be treated by employers as legitimate targets of intervention.²³

Branded service, then, refers to the process of integrating the business image into the service itself through human resource policies.²⁴ Since it is the service that ultimately creates the emotional connection between the consumer and the brand in a service business, regulation of workers' self-presentation and interactions with customers is critical.²⁵ Helena Rubenstein advises that "only people can brand products or services effectively—. . . we are not just selling a branded product but *a mass of branded* people who support and deliver it."²⁶ Thus, the service employer's regulation of workers essentially imprints the business brand on the worker's person.

B. Mechanisms of Control

One of the unique attributes of service work is its "emotional labor" component.²⁷ The emotional state of service-sector workers, unlike that of manufacturing workers, is a critical part of the service rendered. An unhappy, alienated factory worker may not be fond of her employer or the day-to-day tasks that she performs, but she is still able to perform them competently with a frown upon her face. The same cannot be said for many service workers, whose jobs require face-to-face, or at least voice-to-voice, interaction with customers. Such workers must convey the impression that they will provide willing service to the customer's satisfaction. Their goal—to produce a particular "feeling state" in the customer (i.e., satisfaction, pleasure)—requires that they suppress any contradictory feelings to maintain the outward appearance of a cheerful demeanor in order to produce the appropriate state of mind in customers.²⁸ In short, "the emotional style of offering the service is part of the service itself."²⁹

23. Robin Leidner, *Rethinking Questions of Control: Lessons from McDonald's* [hereinafter Leidner, *Rethinking Questions of Control*], in *WORKING IN THE SERVICE SOCIETY*, *supra* note 22, at 29, 30. See also ROBIN LEIDNER, *FAST FOOD, FAST TALK: SERVICE WORK AND THE ROUTINIZATION OF EVERYDAY LIFE* 26–27 (1993) [hereinafter LEIDNER, *FAST FOOD, FAST TALK*].

24. BARLOW & STEWART, *supra* note 13, at 2, 11–12, 18–19. Experts also recommend exposing staff to advertising and marketing. As part of the company's internal communication network, advertising reinforces and builds brand culture. See *id.* at 217–18.

25. *Id.* at 29.

26. *Who Said What?: Making Work Meaningful*, ON-BRAND, OFF-BRAND: VIEWS AND NEWS FOR BRAND ENABLERS, Sept. 2006, at 4, http://www.brandedservice.com/ZoneUsersFolder/Documents/on-brand_off-brand_Sept06.pdf.

27. See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 5–7 (1983). Hochschild explains: "I use the term *emotional labor* to mean the management of feeling to create a publicly observable facial and bodily display. . . ." *Id.* at 7.

28. Macdonald & Sirianni, *supra* note 22, at 3. The burnout rate for workers required to perform emotional labor is high; alienation from one's emotions is common. *Id.*

29. HOCHSCHILD, *supra* note 27, at 6.

Service businesses have developed two primary strategies for minimizing their dependence on workers' natural feeling states and controlling and standardizing the service-sector work process. The "production line" approach is oriented toward scripting and routinizing customer interactions, substituting technology and patterns of interaction for skill and motivation. Primarily appropriate for use with low-skilled, low-waged workers, this strategy gained popularity and acceptance through its use by McDonald's and other fast-food restaurants.³⁰ Production line routinization techniques allow management to hire fungible, low-cost labor and to tolerate high turnover rates.

The second method, the "transformation" or "empowerment" approach, confers control over the work process by transforming the worker into one whose personal characteristics, appearance, and values match the image that the company is seeking to project and market, and then allowing the worker to make his or her own judgments in interactions with customers. Such "self-regulation" techniques seek to create workers who act like managers without sharing managerial control or receiving managerial pay. Management control over self-regulated, empowered workers is inevitably more invasive of workers' private and psychic lives than more traditional means of supervision.³¹ Because worker identification with the company and its image in consumers' minds is critical, workers' demographic characteristics (age, sex, race, education level, class status, etc.), presentation, dress, grooming, and behavior must fit the prescribed corporate image.³² Advantages of the transformative approach include cost-savings realized from reduced middle management, increased productivity, and reduced union activity because the participatory management techniques tend to engage workers in a way that their hunger for respect and voice is diminished.³³

1. *Production Line Routinization*

Standardization of service is not a new concept. Principles of scientific management were first applied to routinize industrial manufacturing work during the first half of the twentieth century. The goal of scientific management was to shift knowledge and control over the work process (and therefore power) from workers to management: By splitting up high-skilled jobs into their constituent parts and assigning the parts to less-skilled workers, costs could be reduced and efficiency (and therefore output) increased. At the same time,

30. Macdonald & Sirianni, *supra* note 22, at 6–7. Scripting and routinization may also be used with professional workers, however, where the employer seeks ideological control over the substantive skill set. For example, doctors employed by many managed-care health organizations must follow scripted "critical pathways"—total-quality-management techniques consisting of roadmaps that suggest the course of treatment once a diagnosis is made. Deviations from the pathway can be tracked and recorded, so that hospital oversight over nonconforming physicians is maximized. Alternatively, "protocols"—flow charts that dictate which decisions will be made at each stage in a diagnostic process—effectively allow management to control the practice of medicine by physician-employees. See Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543, 567 (2004).

31. Macdonald & Sirianni, *supra* note 22, at 9, 10–11.

32. *Id.* at 7.

33. *Id.* at 8.

control over the work process was centralized.³⁴ The assembly line was the prototype of technological control achieved through application of scientific management principles to industrial production processes: Production was divided into discrete tasks that could be most efficiently performed by the worker who specialized in that particular assembly, and workers' movements were standardized. No worker possessed a complete picture of the production process; the work's conception was divorced from its execution.

In the service sector, routinization may be applied to the noninteractive aspects of the work—such as clerical aspects or assembly of fast food on a tray—exactly as it would in an industrial context. For the interactive aspects of the work, however, the form that routinization assumes will turn on how complex the task is. For the simplest interactive work, scripting, uniforms, and rules about worker demeanor and behavior may be sufficient.

McDonald's is the prototype for "production line" routinization in the service sector, particularly in low-waged, fast-moving, consumer-goods businesses. McDonald's systematically breaks down the service interaction into its component parts and scripts it in order to achieve uniformity. It regulates workers' clothing (uniforms are required), haircuts, jewelry, makeup, fingernail length and color, demeanor, words, mood, and manner (requiring smiling, eye contact, and a pleasant countenance, as well as a scripted series of questions and responses in interchanges with customers).³⁵ Ray Kroc, McDonald's founder, succeeded in controlling work routines and product quality on a massive scale, yielding an immensely popular and profitable brand.³⁶ The combination of detailed training, automation, and a "Hamburger University" (where managerial practices are inculcated) created front-line, low-waged service jobs that are

34. Frederick Winslow Taylor is credited with developing the principles of scientific management for the express purpose of controlling labor. Through the use of time and motion studies designed to maximize output, Taylor sought to convert autonomous, skilled craftsmen into fungible automatons governed by the technology of the assembly line. In 1911, Taylor wrote: "The foreman and superintendents . . . know better than anyone else that their own knowledge and personal skill falls far short of the combined knowledge and dexterity of all the workmen under them." FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* 31–32 (1911). Taylor exhorted managers: "The duty of gathering in all of this great mass of traditional knowledge and recording it, tabulating it, and in many cases, finally reducing it to laws, rules, and even to mathematical formulae, is voluntarily assumed by the scientific managers." FREDERICK WINSLOW TAYLOR, *SCIENTIFIC MANAGEMENT, COMPRISING SHOP MANAGEMENT, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT AND TESTIMONY BEFORE THE SPECIAL HOUSE COMMITTEE* 40 (1947), available at <http://ets.umdl.umich.edu/cgi/t/text/text-idx?c=acls;idno=heb01156>. See generally HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 85–121 (1974); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1915*, at 9–57, 214–56 (1987); DAVID MONTGOMERY, *WORKERS' CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLES* 9–10 (1979). For an interesting analysis of these issues as they pertain to the question of who owns the new technology and intellectual property of today's workplace, see Nathan Newman, *Trade Secrets and Collective Bargaining: A Solution to Resolving Tensions in the Economics of Innovation*, 6 *EMP. RTS. & EMP. POL'Y J.* 1 (2002).

35. Leidner, *Rethinking Questions of Control*, *supra* note 23, at 29, 34.

36. *Id.* at 31–32.

“almost idiot-proof”; workers became fungible and high turnover was no longer costly.³⁷

From the workers’ perspective, production line routinization tends to rob workers’ tasks of their variety and interest, and is associated with higher injury rates (particularly repetitive-motion injuries) because it affects the nature and pace of the work.³⁸ It is also linked to stagnation of workers’ creative and problem-solving capacities, and to boredom and alienation.³⁹ Its primary psychological effect is to require suppression of the self in the service of others and enforced depersonalization; workers must separate themselves emotionally from the scripts they are required to utter or the responses that customers make to them that deviate from the script. The effects of such scripting and the requirement of service with cheer are potentially demeaning. However, routines may also be embraced by workers as functional, either because the routines assist them in controlling service interactions or because the routines provide shields behind which workers can take shelter from the insults and indignities that come with contact with the public.⁴⁰

2. *Standardization by Transformation*

For more complex interactive work, such as the jobs of bartenders, cocktail servers, and flight attendants, scripting is inadequate to the task. Such work is typically branded and controlled in two ways: (1) the employer deliberately selects employees with characteristics that dovetail with the brand service that the employer seeks to market; and (2) the employer then builds on that “fit” with training that orients the workers psychologically toward the business’s brand values and with regulations that script worker self-presentation (uniforms, appearance codes, and grooming rules).⁴¹

a. *Selecting for “Brand Fit”*

Transforming workers into “brand partners” inevitably impacts selection processes: Human-resources professionals are advised to select for “brand fit.”⁴² Barlow and Stewart suggest hiring applicants “who have a natural resonance” with the business brand.⁴³ Consider the retailer Abercrombie & Fitch. It actively sought college students who resembled its brand image: young, attractive,

37. *Id.* at 33, 35–36.

38. *See, e.g.*, Esbenshade, *supra* note 20, at 270, 282 (discussing spillover effects of Westin’s Heavenly Bed program on housekeeping staff, who were required to make up larger, heavier beds with more intricate pillow and sheeting arrangements; the luxury beds were associated with unsafe lifting ratios and additional time spent on making up beds).

39. LEIDNER, FAST FOOD, FAST TALK, *supra* note 23, at 4. *See generally* BARBARA GARSON, THE ELECTRONIC SWEATSHOP: HOW COMPUTERS ARE TRANSFORMING THE OFFICE OF THE FUTURE INTO THE FACTORY OF THE PAST (1988); BARBARA GARSON, ALL THE LIVELONG DAY: THE MEANING AND DEMEANING OF ROUTINE WORK (1975).

40. LEIDNER, FAST FOOD, FAST TALK, *supra* note 23, at 5.

41. *Id.* at 25–27.

42. ON-BRAND, OFF-BRAND: VIEWS AND NEWS FOR BRAND ENABLERS, June 2006, at 2, http://www.brandedservice.com/ZoneUsersFolder/Documents/on-brand_off-brand_june06.pdf.

43. BARLOW & STEWART, *supra* note 13, at 214.

white, male, and preppie—”walking billboards”⁴⁴ who sported “the A & F look.”⁴⁵ This sort of selection obviously risks violating antidiscrimination laws.⁴⁶ The significance of the law’s sanction of branding is clearest here: The remedy for discriminatory selection processes may trigger judicial orders aimed at marketing practices themselves. In the Abercrombie & Fitch settlement, for example, the consent decree obligated the company to alter its marketing materials to reflect diversity.⁴⁷

A more subtle example of selecting for brand fit involves Southwest Airlines’ highly successful effort to brand its customer service as fun and high-spirited. Despite customer disenchantment with the no-frills aspects of Southwest such as no reserved seats and no first-class seats, the comedic philosophy of the airline persuades customers to tolerate the no-frills aspects and to book repeat business in spite of it.⁴⁸ Southwest searches carefully for workers who will be capable of providing branded service: As part of its interview process, it tests applicants for their ability to make fun of themselves and for their altruistic propensities (selecting workers who display both comedic and caring qualities).⁴⁹

b. *Inculcating Brand Values*

Although employers may seek to script or routinize emotions at work—obligating employees to personalize the script with simulated sincerity, eye contact, and a smile⁵⁰—maximally-effective branding is not completely scripted. A scripted encounter is unlikely to be perceived as authentic, and thus the emotional connection that allows the business to exploit the brand will not be made.⁵¹ Accordingly, employers may institute training programs that seek to transform workers’ personalities, appearances, and thought-processes so that

44. *Id.* at 158–59.

45. Patrick F. Dorrian, *Pending Ninth Circuit Case Key to Viability of Image-Based Bias Claims, Panelists Say*, EMP. DISCRIMINATION REP., May 25, 2005, <http://emlawcenter.bna.com/pic2/em.nsf/id/BNAP-6CPKWH?OpenDocument>.

46. *See id.* Abercrombie & Fitch was sued for race and sex discrimination based on this hiring practice. Plaintiffs (female, Latino/Latina, African-American, and Asian-American applicants) who did not fit the company’s “look” brought a class-action discrimination suit. In November 2004, the company agreed to settle the suit for \$40 million plus \$10 million in costs and attorneys’ fees. Barbara L. Jones, *Keeping Up Appearances: How to Advise Your Employer Clients on Addressing Issues of Dress*, MINN. LAW., Aug. 15, 2005, available at http://findarticles.com/p/articles/mi_qn4185/is_20050820/ai_n14916495. The settlement was approved by the court in December 2005. Afjustice.com, \$40 Million Paid to Class Members in December 2005 in Abercrombie & Fitch Discrimination Lawsuit Settlement, <http://www.afjustice.com> (last visited Dec. 24, 2006).

Similarly, a temporary employment agency in France has been sued for rating job applicants according to skills and skin color, in an effort to provide employees who conformed to their business clients’ demographic preferences for frontline service positions. Some clients, including the Disneyland Resort Paris theme park, imposed explicit limits on the number of black workers they would accept. Molly Moore, *French Discrimination Suit Calls Égalité into Question*, WASH. POST, Jan. 15, 2006, at A20.

47. Dorrian, *supra* note 45.

48. BARLOW & STEWART, *supra* note 13, at 79–80.

49. *Id.* at 175.

50. Leidner, *Rethinking Questions of Control*, *supra* note 23, at 35.

51. *See* BARLOW & STEWART, *supra* note 13, at 64–65.

they make predictable judgments that the employer would approve—even in variable work scenarios that are themselves not always predictable.⁵² Therefore, the most sophisticated branding integrates the personalities of the workers with the service, positioning them as an “essential living expression” of the brand: “the brand in action.”⁵³ Human-resources policies seek to brand workers “from the inside out”; training programs and policies should produce a staff that acts, looks, sounds, and even feels in sync with the brand.⁵⁴ Ideally, the brand and the service should merge with one another in the customer’s mind.⁵⁵

Because it impacts personality and psyche, this form of routinization affects workers’ identities more deeply than simple production line routinization does. For example, Amway Corporation has a sophisticated branding program that utilizes the transformational form of routinization to maximize the efficacy of its distributors as salespeople and recruiters for other distributors. Robin Leidner explains:

Amway goes far beyond providing distributors with routines for doing their work. The company tries to affect their lives in a global and permanent way, molding them through a process it calls “duplicating.” There is no part of distributors’ lives that Amway does not see as relevant to the success of the business, and therefore none is immune from corporate influence. Amway tries to shape the workers’ family lives, political convictions, religious beliefs, personal goals, and self-concepts. It encourages distributors to break off ties with friends or relatives who are critical of Amway⁵⁶

Workers subject to transformative routinization must either embrace the changes or don false personalities at work. For workers whose identities conflict with the employer’s imposed norms of behavior, attitude, and appearance, the effect can be self-alienating.⁵⁷ In an effort to make this process easier for workers and to minimize their resistance, employers often furnish psychic strategies to help workers reconcile the conflicts between their work and their self-image.⁵⁸

3. *Effects of Routinization on Customers and Culture*

In addition to its benefits for management and impact on workers, routinization of service-sector work has spillover effects on customers and on the surrounding culture.

a. *Effects of Routinization on Customers*

A significant difference between routinization in the industrial context and routinization in the service context is the replacement of the dyadic struggle for control with a triad of workers, management, and customers. In order to be

52. LEIDNER, FAST FOOD, FAST TALK, *supra* note 23, at 36–38.

53. BARLOW & STEWART, *supra* note 13, at 74–75.

54. *See id.* at 116.

55. *Id.* at 76.

56. LEIDNER, FAST FOOD, FAST TALK, *supra* note 23, at 38.

57. Indeed, the difficulty of retaining one’s authenticity and personal autonomy is experienced by some workers as a challenge to gender identity. *Id.* at 184 (noting that requiring insurance agents to conform to a script potentially challenged their sense of manliness).

58. *Id.* at 189.

effective, routinization must also control the behavior of customers. Routines associated with front-line customer service standardize customers' behavior by limiting their demands to a predetermined spectrum (e.g., a menu notice that instructs “no substitutions”).⁵⁹ Where the routine denies workers the flexibility to respond to customers' requests, or the logic of the routine does not match social norms, or the customer simply refuses to participate, customers are likely to respond with frustration directed at the workers.⁶⁰ Interactions can be scripted to reduce or prevent customer resistance, or to mute the effects of customer frustration by using empathic or choice-preserving language.⁶¹

Routinization can also entail the involuntary shifting of labor to the consumer, as Nona Glazer has explained.⁶² Consumers scan and bag their own groceries, serve themselves at buffets, salad bars, and soft drink machines, bus their own tables in quick-order restaurants, and pump their own gasoline—all work that was once paid labor. Employers use routinization and technology to break the service into its component parts and shift work to the consumer that the employer previously paid workers to perform.

b. *Effects of Routinization on Culture*

Finally, routinization impacts the culture at large by shaping social norms. Because “[r]outinization assumes that people are largely interchangeable, that they are not deserving of sincerity, [and] possibly that they can easily be duped,”⁶³ it contributes to an atmosphere of deception and illusion. Consider sociologist Robin Leidner’s analysis of the cultural impact of routinization:

The efforts of service organizations to routinize human interactions violate important cultural standards about the status of the self, standards that honor authenticity, autonomy, sincerity, and individuality. Although these values are compromised daily in countless ways, they are ideals most Americans take seriously. In routinized service interactions, the collision between ideals and practices is particularly marked, and the uncomfortable contradictions are hard to ignore. Service routines compromise the identities of workers most obviously, but the principles and self-conceptions of service-recipients are challenged as well as they are forced to respond to organizational manipulation.

. . . .

Authenticity, autonomy and sincerity allow the development and expression of the unique self that is culturally ascribed to every person. Individuality is highly honored in American culture (even though conformity is richly rewarded), and this value is especially hard to reconcile with routinized interactions. . . . Routinized interactive service affronts the individuality of both worker and service-recipient. It assumes that workers' individuality is not substantial enough or worthy enough of deference to interfere with their

59. *Id.* at 31–32.

60. *Id.* at 8.

61. *Id.* at 32–33.

62. See generally Nona Y. Glazer, *Servants to Capital: Unpaid Domestic Labor and Paid Work*, in *FAMILIES AND WORK* 236 (Naomi Gerstel & Harriet Engel Gross eds., 1987); NONA Y. GLAZER, *WOMEN'S PAID AND UNPAID LABOR: THE WORK TRANSFER IN HEALTH CARE AND RETAILING* (1993).

63. LEIDNER, *FAST FOOD, FAST TALK*, *supra* note 23, at 11 (alterations added).

adoption of qualities designed for them by others. And it further assumes that service-recipients, grouped according to market segment, will be able and willing to fit into standard procedures and accept standardized treatment.⁶⁴

C. The Walt Disney Model of Branded Service

In the early 1980s, Tom Peters and Robert Waterman revolutionized management strategy with a best-selling book that explored the art and science of management techniques used by leading companies with records of profitability and innovation.⁶⁵ One of the companies featured was Walt Disney, which subsequently established the Disney Institute to teach its branded quality service and management to others. Because Disney's sophisticated service-branding methodologies and human-resources policies have become so influential, they are worth summarizing here.

1. *Hiring and Training for Branded Service*

Disney begins by looking for "brand fit." Its interviews are designed to ferret out workers who will have the attitude that Disney seeks. Disney adheres to the maxim, "Hire for attitude, train for skill."⁶⁶ During the application process (which Disney refers to as "casting the show"),⁶⁷ Disney shows a video that gives prospective applicants information about employment conditions, including its dress code and grooming regulations; about ten percent of applicants leave at that point, but those who stay accept the circumstances of their employment.⁶⁸ Once a worker is hired, "basic training" at "Disney University" takes a full week.⁶⁹ The training covers Disney's history, a cultural indoctrination to the Walt Disney philosophy, and an overview of all aspects of the Disney property.⁷⁰ The message is that Disney cast members are a team with a uniform look; individuality or anything that tends to attract attention (other than the scripted Disney theme look) is discouraged.⁷¹ In an effort to inculcate the proper worker attitude towards service, Walt Disney refers to its workers as "cast members" or "hosts" and its customers as "guests"; uniforms are "costumes" and workers—from sweepers to bakery workers to Mickey Mouse and Donald Duck—put on a "show."⁷² Turnover is low (fifteen percent in the 1990s), morale is high, and customer service touted as outstanding.⁷³

64. *Id.* at 216–17, 218–19.

65. See THOMAS J. PETERS & ROBERT H. WATERMAN, IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES (1982).

66. See Douglas P. Shuit, *Magic for Sale: Part 2 of 2*, WORKFORCE MGMT., Sept. 1, 2004, at 35.

67. *Id.*

68. *Id.*

69. Cheryl Hall, *Disney School Fashions Workers in Its Image*, DALLAS MORNING NEWS, May 9, 1993, at 1H; see Disney Institute, <http://www.disneyinstitute.com> (last visited Dec. 24, 2006).

70. Hall, *supra* note 69, at 1H.

71. Dianne Klein, *Disney Hotel Crew Gets the Word: No Beards and No Glitz*, L.A. TIMES, Mar. 8, 1988, § 2, at 1.

72. Dan Malovany, *Backstage at Disney World: The International Theme of the Disney World Bakery*, 25(4) BAKERY PROD. & MKTG. 120, Apr. 24, 1990; Hall, *supra* note 69, at 1H.

73. Hall, *supra* note 69, at 1H.

2. *Branded Workers: Appearance Codes*

Disney's appearance regulations are legendary and have been emulated by many other companies.⁷⁴ When Disneyland first opened in 1955 in California, Walt Disney established appearance-code guidelines in an effort to distance its facilities from the American image of amusement parks as "sleazy carnivals," instead portraying itself as "a clean, wholesome family environment."⁷⁵ The purpose of the appearance code was to ensure that workers appeared clean-cut and fresh-faced, without gaudy makeup, excessive jewelry, disheveled locks, or outlandish hairdos. By 1958, the general guidelines had metamorphosed into strict and specific quality standards that took the form of do's and don'ts: do wear undergarments; don't wear fingernails extending more than one-quarter of an inch past the fingertips; don't wear eye shadow; no frosting or streaking of hair; only certain colors of nail polish were acceptable; limitations on the amount and size of jewelry applied; men could not grow beards, mustaches (although Walt Disney himself had a mustache), or wear sideburns below the ears.⁷⁶ Violation of the code was grounds for discharge.

The strict 1950s standards were modified slightly over the years as fashion trends shifted: earrings were permitted for women (at first only studs, then later larger earrings); a summer uniform of Bermuda shorts and knee socks was instituted; eye shadow and eye liner were authorized in 1994; mustaches (but not beards) were permitted in 2000; cornrows and hoop earrings were embraced in 2003.⁷⁷ The "Disney look" is defined in a forty-page book, complete with sketches of do's and don'ts.⁷⁸

Disney's brand-service standards and the human-resources strategies that create them have been so successful that Disney has profited from marketing the branding method itself. A visit to the Disney Institute's Web page reveals a diverse and impressive array of corporate clients who have traveled to Florida for instruction.⁷⁹ Perhaps not coincidentally, Gary Loveman, who became the chief operating officer of Harrah's Entertainment in 1998 (and later its CEO), consulted for Disney in his early days as an academic at Harvard.⁸⁰ Clearly, branded service and its associated human-resources policies are big business.

74. David Cole, *Hospital Strengthens Dress Code; Policy Covers Hairdos, Makeup, Tattoos*, MILWAUKEE J. SENTINEL, May 30, 2000, at 2B (describing Kenosha Hospital and Medical Center dress code that spells out strict rules on makeup, hairstyles, jewelry, and tattoos, modeled on the Walt Disney appearance code).

75. Leslie Doolittle, *Disney's All-America Look Now Includes Eye Shadow*, ORLANDO SENTINEL, June 29, 1994, at A1.

76. *Id.*

77. Jeff Gottlieb, *Whiskers While You Work? Disney May Change Rules*, L.A. TIMES, Mar. 26, 2000, at B1; E. Scott Reckard, *Bare Upper Lip No Longer a Must for Disney Workers*, L.A. TIMES, Mar. 28, 2000, at C1; Richard Verrier, *For Disney Workers, A Hipper Place on Earth*, L.A. TIMES, July 12, 2003, § 3, at 1.

78. Hall, *supra* note 69, at 1H.

79. Disney Institute, *supra* note 69. Duke University is among the clients that has received training from the Disney Institute. *Id.*

80. See *infra* notes 360-61 and accompanying text.

III. BRANDING: SANCTIONED BY LAW

The law's response to corporate branding signals deference to corporate interests in developing and marketing a public image. In the service economy, the firm's interest in branding its workforce has been elevated to quasi-property status. In this Part we outline the law's apparent sanction of branding through trade dress protection under the Lanham Act and through protection under the work law of managerial prerogative to control the workforce.

A. Trade Dress: Protecting an Employer's Property-Like Interest in Its Brand

The way that service workers and their services are "packaged"—the design and color of their uniforms, the scripted routines they use to deliver their services, or the décor of the company's retail premises—are elements of the employer's branding of its service/product that are described in trademark law as "trade dress." One court defined the term as follows:

"Trade dress" refers to 'the image and overall appearance of a product.' It embodies 'that arrangement of identifying characteristics or decorations connected with a product, whether by packaging or otherwise, [that] make[s] the source of the product distinguishable from another and . . . promote[s] its sale.'" Trade dress "'involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.'"

. . . [R]ecently "'trade dress' has taken on a more expansive meaning and includes the design and appearance of the product as well as that of the container and all elements making up the total visual image by which the product is presented to customers." . . . [A]ny "thing" that dresses a good can constitute trade dress. Protectability is another matter entirely.⁸¹

An employer's investment in trade dress that arises out of the creation and enforcement of dress codes, such as uniforms, creates a property-like interest that is protected from infringement by competitors under common-law and statutory trademark law only if the unregistered "trade dress" is both "distinctive in the marketplace, thereby indicating the source of the good it dresses," and "primarily nonfunctional," and, in addition, "the trade dress of the competing good is confusingly similar."⁸² For example, the Court of Appeals

81. *Abercrombie & Fitch Stores v. Am. Eagle Outfitters*, 280 F.3d 619, 629–30 (6th Cir. 2002) (citations omitted). For a summary of the development of trade dress protection under the Trademark Act of 1946 (Lanham Act), P.L. 79-489, 60 Stat. 427 (codified as amended at 15 U.S.C. §§ 1051–1141n (West Supp. 2007)), and its relation to image branding, see Joseph Cockman, Note, *Running from the Runway: Trade Dress Protection in an Age of Lifestyle Marketing*, 89 IOWA L. REV. 671 (2004).

82. *Abercrombie & Fitch Stores*, 280 F.3d at 629. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992) (holding that restaurant décor that is inherently distinctive and nonfunctional is trade dress entitled to protection from infringement by a competitor under § 43(a) of the Lanham Act, 60 Stat. 441 (codified as amended at 15 U.S.C. § 1125(a)); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995) (holding that a color is protectible as a trademark under § 43(a) of the Lanham Act only if it has acquired a secondary meaning). See also *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205 (2000) (holding that "product-design trade dress can never be inherently distinctive" and that "a

for the Second Circuit found that the Dallas Cowboys Cheerleaders, Inc., had “a valid trademark in its cheerleader uniform,” which consisted of “white vinyl boots, white shorts, a white belt decorated with blue stars, a blue bolero blouse, and a white vest decorated with three blue stars on each side of the front and a white fringe around the bottom.”⁸³ The court found that “the particular combination of colors and collocation of decorations that distinguish [the Dallas Cowboys Cheerleaders’] uniform from those of other squads” constituted an “arbitrary design which makes the otherwise functional uniform trademarkable” under the Lanham Act.⁸⁴ Moreover, the court found that Pussycat Cinema—in producing a sexually-explicit film featuring an actress who wore an “almost identical” cheerleader’s uniform—not only created the “likelihood of confusion” about whether the Dallas Cowboys Cheerleaders sponsored or approved the use of the trademarked uniform in the film, but also risked injuring the Dallas Cowboys Cheerleaders’ good name and reputation.⁸⁵

While distinctive, nonfunctional aspects of service workers’ uniforms, appearance, and service routines may in some circumstances be protectible “trade dress,” many elements of an employer’s investment in “packaging” its service workers can be freely copied by competitors.⁸⁶ For example, in *HI Limited Partnership v. Winghouse of Florida*,⁸⁷ Hooters claimed that Winghouse, a competing sports bar and grill in Florida, was liable for trade-dress infringement because it required its female employees to wear uniforms of black tank tops and black running shorts that Hooters alleged were “confusingly similar” to the uniforms worn by Hooters Girls. The district court concluded that, “as a matter of law, the Winghouse Girl, with her black tank top and black running shorts, is not a ‘knockoff’ of the Hooters Girl.”⁸⁸ The court explained that

what distinguishes the Hooters Girl from other sports bar and grill servers is her distinctive uniform, consisting of a white tank top shirt prominently featuring the Hooters name and “owl” logo across her chest, and orange nylon running shorts. Although Hooters Girls occasionally wear black uniforms, as a matter of law, those uniforms are not distinctive, nor have they acquired secondary meaning associated with Hooters restaurants.

. . . .

. . . Hooters simply cannot prevent a competitor from using a server outfit as different as a black tank top and black running shorts. If Hooters could stop

product’s design is distinctive, and therefore protectible [under § 43(a) of the Lanham Act], only upon a showing of secondary meaning”).

83. *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 202, 203 (2d Cir. 1979).

84. *Id.* at 203–04.

85. *Id.* at 205. For a discussion of the gender stereotyping in the court’s analysis of the “likelihood of confusion” element in the *Dallas Cowboys Cheerleaders* case, see Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 726, 813–14 (2004).

86. The Supreme Court observed that “[t]rade dress must subsist with the recognition that in many instances there is no prohibition against copying goods and products. In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying.” *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001).

87. 347 F. Supp. 2d 1256 (M.D. Fla. 2004), *aff’d*, 451 F.3d 1300 (11th Cir. 2006).

88. 347 F. Supp. 2d at 1259.

Winghouse from using that particular color and combination, then it could prevent any other competitor from using *any* color combination of tank top and running shorts. This would be an impermissible burden on competition. Moreover, a server uniform consisting of a tank top t-shirt and nylon running shorts is fairly common to sports bar and grills. Hooters cannot monopolize this generic theme any more than an upscale steak restaurant featuring tuxedo-clad servers could preclude competitors from using the same or similar uniform.⁸⁹

In some situations, the human being wearing the “trade dress” merges with the brand image delineated by the employer’s appearance code. In such cases, the “functionality” and centrality of the human being in conveying (or in *being*) the employer’s branded product disqualifies the employer’s interest from trade dress protection under the law.⁹⁰ Moreover, the more ephemeral aspects of the way an employer literally dresses and markets its workers—such as a uniform’s “professional” or “sexy” appearance—also cannot be protected as “trade dress,” even though these may be essential components of the brand image the employer intends to convey to its customers:

Although producers and marketers of goods can adopt and seek to protect a seemingly infinite variety of product packages and product configurations, the recognition that trade dress can comprise “any thing,” “even particular sales techniques,” should not be taken to mean that a company can protect a product’s marketing theme or any other incorporeal aspects of the good incapable of being perceived by the senses. The aura about a product, the cachet that ownership or display of it creates, and the kind of appeal it has to certain consumers do not dress a good in trade. Rather, those intangible “things” emanate from the good, its dress, and the marketing campaign that promotes the dressed good.⁹¹

The difficulty of protecting its investment in employee dress and grooming styles from copying by competitors, however, does not leave an employer without means to build up its own “brand” of employee appearance and set itself apart from its competitors. The mechanism employed will be rigorous

89. *Id.* at 1258–59.

90. For example, in the *Winghouse* case, the district court noted that the “Hooters Girl” is “[t]he only component of [Hooters’] trade dress that is either distinctive or has achieved secondary meaning.” *Id.* at 1259. The court observed that, because the “elements of trade dress must be considered *in toto*, the overwhelmingly predominant feature of Hooters’ trade dress is the Hooters Girl.” *Id.* at 1258.

The Hooters Girl is not entitled to trade dress protection because the evidence establishes a legal certainty that the Hooters Girl is primarily functional. As Hooters has represented to state and federal regulatory agencies investigating complaints of discrimination, the Hooters Girl is not a marketing tool. Rather, Hooters has admitted that the Hooters Girl’s predominant function is to provide vicarious sexual recreation, to titillate, entice, and arouse male customers’ fantasies. She is the very essence of Hooters’ business. This essential functionality disqualifies the Hooters Girl from trade dress protection.

Id. at 1258–59. The EEOC at one point instituted an investigation of Hooters’ restaurant chain for its refusal to hire men to work as servers. After the company mounted a public relations campaign against the EEOC, the agency dropped the investigation. See *Hooters Chain Is Freed of Job Bias Inquiry*, N.Y. TIMES, May 2, 1996, at B10. See also *infra* text accompanying note 555.

91. *Abercrombie & Fitch Stores v. American Eagle Outfitters*, 280 F.3d 619, 630–31 (6th Cir. 2002).

enforcement of employee dress and grooming rules: all other things being equal, the employer whose employees deliver the brand image best, measured by strict conformance with its appearance rules, will be the employer who attracts the most customers. Moreover, regardless of whether aspects of an employer's trade dress are protected from infringement by common law or statutory trademark law, the notion that service employees' dress and appearance (as regulated by the employer's rules) are part of the company's brand means that employers have a property-like interest *not simply in their branded service, but in their employees*. The employer "owns" (or leases, for the duration of work time) the rights to use the employee's face, body type, manner, and even emotions in service of pleasing the customer. The worker who is required to wear a particular uniform, hairstyle, facial expression, or amount and style of makeup—a "facial uniform"—is donating body space for the employer's branding objectives. Under the prevailing understanding of the employment contract, workers are compensated for physical and mental labor, but not for the "human billboard" function that they may also perform.

The law participates in this exchange by ignoring the value of the employees' autonomy and identity, while at the same time protecting employers' rights to use the brand standards that they have developed to extract significant additional value from workers without compensating them for it. Even where the Lanham Act or the common law does not confer trade dress protection for the brand, the laws governing the employment relation protect the employer against workers' efforts to resist the imposition and effects of branding. The primary source of protection is employment at will, but the various legal regimes ostensibly designed to create or enforce workers' rights—including labor law, constitutional doctrine, the common law, and antidiscrimination law—are generally interpreted to protect the employer's interests in branding as a part of its managerial prerogative to control production. We turn next to an examination of the ways in which various legal doctrines operate to protect the employer's property-like interest in advancing its brand whenever it conflicts with employee rights.

B. Appearance Regulation in the Workplace

Work law's response to branding has been played out in cases challenging employers' uniform requirements, appearance codes, and grooming policies. Many other commentators have reviewed the law's treatment of appearance regulations in the workplace, and we do not wish to cover the same ground.⁹²

92. See, e.g., Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994); Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000); Gowri Ramachandran, *Intersectionality as "Catch-22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299 (2005-06); Mary Whisner, *Gender Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73 (1982); Kimberly A. Yuracko, *Trait Discrimination as Sex*

We summarize here a few of the major doctrinal bases for challenges, using illustrative cases that highlight the role of branding in defending appearance codes against legal challenge.

The cases arise in four arenas: (1) in the union context, either under the National Labor Relations Act (NLRA)⁹³ or pursuant to grievances subject to arbitration under collective bargaining agreements; (2) as constitutional challenges brought by public sector employees; (3) as common-law privacy and wrongful-discharge claims brought by private sector employees; and (4) as discrimination claims. In all of these cases, employers defend the employment practices that are linked to branding by showing the connection between their property interest in managing and controlling the business and the brand's efficacy in conveying a particular corporate image to the public.

1. *Cases in the Union Context*

Cases under the NLRA deal with workers' rights to organize and to bargain collectively over conditions of work, including appearance codes. They require the Board and the courts (or, in cases arising under collective bargaining agreements, the arbitrator) to balance employers' rights to manage and control the operation of the business against workers' statutory rights to engage in concerted activity for the purposes of mutual aid or protection, which are explicitly protected against employer interference by NLRA sections 7 and 8(a)(1). In addition, a unionized employer that promulgates a grooming or appearance standard without first negotiating with its union violates NLRA section 8(a)(5); grooming and appearance standards are changes in working conditions and therefore are "mandatory" subjects of bargaining under the Act, meaning that the employer must bargain to impasse with the union prior to implementing the rule.⁹⁴

a. *Cases Involving Union Insignia*

The Supreme Court held early on that workers covered by the NLRA have a statutorily-protected right to wear union insignia (e.g., buttons, pins) in the workplace. In *Republic Aviation Corp. v. NLRB*,⁹⁵ the Court ruled that employers may restrict the wearing of union insignia only where "special circumstances" justify the restriction. The employer bears the burden of proof to establish that special circumstances exist.⁹⁶ Although cases from the manufacturing context typically involve production or safety justifications, cases from the service sector added an additional justification. Where workers have contact with the public, the Board and courts give weight to the employer's "image"-based justification,

Discrimination: An Argument Against Neutrality, 83 TEX. L. REV. 167 (2004); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004).

93. 29 U.S.C. §§ 151-188.

94. *Transp. Enters.*, 240 N.L.R.B. 551 (1979); Michael J. Yelnosky, *What Do Unions Do About Appearance Codes?*, 14 DUKE J. GENDER L. & POL'Y 521 (2007). Unions typically cede control over appearance codes and other work rules to the employer through the vehicle of the "management rights clause" that appears in most labor contracts. See Klare, *supra* note 92, at 1426.

95. 324 U.S. 793, 801-03 (1945).

96. *Pathmark Stores, Inc.*, 342 N.L.R.B. 378, 379 (2004).

particularly where the image is adopted to render the business competitive.⁹⁷ In the image cases, employers who rigorously enforce dress and grooming codes against all incursions are most likely to prevail because it is difficult to establish anti-union animus; in addition, rigorous enforcement of the code supports the employer's argument that maintenance of its image through the branded appearance of its workers is vital to its business interests.

In one of the earliest cases arising from a service sector environment, *NLRB v. Harrah's Club*,⁹⁸ the Ninth Circuit refused to enforce the Board's ruling that a Harrah's resort in Stateline, Nevada, had violated section 8(a)(1) of the NLRA by enforcing a nonadornment policy that prohibited the wearing of union buttons on workers' uniforms. The court noted Harrah's longstanding and strict regulation of employee dress and appearance, as well as its consistent enforcement of the policy through daily inspections by management personnel.⁹⁹ The policy was unrelated to union activity and was not limited to union buttons; it was enforced rigorously against badges, pins, and buttons proclaiming religious, political, or social affiliations. Moreover, no labor organizing campaign was ongoing; indeed, workers at this facility were already unionized and had a labor contract. The court reasoned that, although the wearing of union buttons is generally a protected activity under section 7 of the NLRA, in this case there was no evidence that the "several" workers wearing union buttons had a protected purpose that fit within the "collective bargaining or other mutual aid or protection" language of section 7.¹⁰⁰

The court also refused enforcement on the separate ground that, in striking a balance between workers' rights to self-organization under section 7 and the employer's right to operate its business, the Board had accorded too little deference to Harrah's right to "maintain discipline." The court explained the special deference that it felt was necessary to appearance codes and uniforms in a service business that seeks to project a particular image:

Most business establishments, particularly those which, like respondent, furnish service rather than goods, try to project a certain type of image to the public. One of the most essential elements in that image is the appearance of its uniformed employees who furnish that service in person to customers. The evidence shows that respondent has paid close attention to its public image by a uniform policy of long standing against the wearing of jewelry of any kind on the uniform. Respondent should not be required to wait until it receives complaints or suffers a decline in business to prove special circumstances. Businessmen are required to anticipate such occurrences and avoid them if they wish to remain in business. This is a valid exercise of business judgment, and it is not the province of the Board or of this court to substitute its judgment for

97. The Board recently outlined the special circumstances that will typically justify deviation from the rule as follows: "[Restrictions on union insignia are justified] when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.*, 342 N.L.R.B. 649, 650 (2004).

98. 337 F.2d 177 (9th Cir. 1964).

99. *Id.* at 177-78.

100. *Id.* at 179.

that of management so long as the exercise is reasonable and does not interfere with a protected purpose. . . . We think that the regulation in question, under the circumstances, is reasonable.¹⁰¹

Service businesses are not automatically exempt from the requirement that special circumstances be shown; however, an investment in and a commitment to a distinct corporate image appears to be critical. An employer's desire to present to the public an image of a neatly groomed and uniformed driver may not suffice—particularly where the employer allows other types of pins or buttons unrelated to its business.¹⁰² Nor will the Board and courts countenance restrictions where there is no showing by the employer that the button or insignia interferes with customer service or patient care.¹⁰³ However, where the employer can show that its goal is consistent with improved customer service, a valid business justification, courts generally allow the restriction. In *Burger King v. NLRB*,¹⁰⁴ for example, the court ruled that a fast-food chain could prohibit the wearing of union buttons on employer-supplied uniforms; the chain had a right to “project a clean, professional image to the public.”¹⁰⁵

In *Starwood Hotels & Resorts Worldwide Inc.*,¹⁰⁶ the Board ruled that a San Diego-based Starwood resort hotel was justified in prohibiting in-room, food-delivery servers from wearing union buttons in public areas. The Board gave great weight to the hotel's efforts to project a “Wonderland” image, as expressed through marketing campaigns that emphasized that guests could fulfill their “fantasies and desires” and get “whatever [they] want whenever [they] want it.”¹⁰⁷ The hotel also adopted the host/guest metaphor, referring to its lobby as its “living room,” and viewed itself as performing its branded customer service, referring to its employees as “talent” or “cast members,” their supervisors as “talent coaches,” and the hotel experience itself as “wonderland.”¹⁰⁸ In an effort to further its image, the hotel commissioned uniforms, at considerable expense, that provided a “trendy, distinct, and chic look” for workers who have public contact.¹⁰⁹ It required workers to wear a small “W” pin on their upper-left chest area and prohibited all other uniform adornments. In addition, the hotel instructed workers to interact with guests by introducing themselves by name to each guest and to make every interaction “Genuine, Authentic, Comfortable,

101. *Id.* at 180.

102. *See* *United Parcel Serv.*, 312 N.L.R.B. 596 (1993), *enforcement denied*, 41 F.3d 1068 (6th Cir. 1994).

103. *See* *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837 (6th Cir. 2003) (allowing wearing of union buttons on uniforms of hospital workers); *Meijer, Inc. v. NLRB*, 130 F.3d 1209 (6th Cir. 2003) (allowing wearing of union pins on uniforms of employees in retail store).

104. 725 F.2d 1053 (6th Cir. 1984).

105. *Id.* at 1055. *But see* *Wal-Mart Stores, Inc.*, 340 N.L.R.B. No. 76 (2003) (employer violated NLRA when it refused to allow an off-duty employee to wear a pro-union T-shirt in its retail store, since no interference with the on-duty work environment was shown).

106. 348 N.L.R.B. No. 24 (Sept. 29, 2006), 180 L.R.R.M. (BNA) 1321 (NLRB 2006), 2006 NLRB LEXIS 437.

107. 2006 NLRB LEXIS 437, at *4 (alterations added).

108. *Id.* at *30 (factual statement in decision of administrative law judge).

109. *Id.* at *4 (Board decision).

Engaging, Conversational, with Personality, Fun.”¹¹⁰ The hotel’s goal was to “create ‘an emotional attachment’ for guests, to move from ‘never say no to let me work the magic,’ to look for opportunities to ‘grant wishes,’” and to make the “W” experience “[a] dream come true.”¹¹¹

Against this backdrop, the hotel argued that the union button was the equivalent of “graffiti on the Mona Lisa.”¹¹² The Board refused to second-guess the legitimacy of the employer’s business plan to compete effectively with other resort hotels, ruling that it had met its burden of showing special circumstances justifying the prohibition. The combination of the employer’s investment in developing its branded service and the employer’s painstaking efforts to enforce the brand convinced the Board that the brand was sufficiently central to promoting the employer’s corporate image to trump employees’ rights under the NLRA to wear union buttons.

b. *Refusals to Bargain over Appearance Codes*

Although the law is settled that appearance and grooming codes are mandatory subjects of bargaining, most unions (at least in the last twenty-five years or so) seem to have accepted appearance and grooming codes without objection at a collective level.¹¹³ Rather than challenging the codes themselves as invasions of employee privacy or autonomy, unions shifted to grieving individual cases where the codes were applied in inequitable ways or the disciplinary sanction was disproportionate to the rule violation. This is consistent with a more general reluctance by unions to mount collective challenges to workplace rules as dignity invasions, at least when the rules are consistent with prevailing social norms. Pauline Kim observed the same trend in the context of challenges to workplace drug-testing rules: Although unions initially brought workforce-wide challenges to drug-testing rules, over time the disputes became both more individualized and more narrowly limited to economic relief.¹¹⁴ Kim explains:

The early workforce-wide cases spoke in terms of basic human dignity and fundamental rights, asking what types of interests were sufficiently weighty to justify burdening these important rights. By contrast, the later cases hardly speak at all in terms of privacy or dignity. Rather, they focus on compliance with procedural safeguards and the protection of the material interests, for example jobs and wages, of their members. Workers who felt aggrieved because of the *manner* in which a test was administered, or by the intrusiveness of the test itself, could not recover damages for dignitary harms, and those who suffered no tangible job loss were essentially remediless under the collective bargaining system. Thus, although the presence of a union undoubtedly insured that its members received procedural protections they otherwise might not have had and likely worked to check the worst abuses, collective resistance to

110. *Id.* at *4–5.

111. *Id.* at *31 (factual statement in decision of administrative law judge).

112. *Id.* at *42.

113. *Cf. Klare, supra* note 92, at 1396 (describing case from the 1970s in which worker resistance to a ban on tank-top shirts inside a plant precipitated a lockout).

114. Pauline T. Kim, *Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing*, 66 LA. L. REV. 1009 (2006).

mandatory drug testing became routinized over time, focusing on consistent application of the rules, rather than on protecting the dignitary and privacy interests of workers.¹¹⁵

There have been two deviations from this general pattern in the context of corporate appearance codes. The first involves situations where the appearance code imposes costs that could be readily monetized. In these cases, unions demand bargaining over the costs of compliance with the codes (such as costs of purchasing or laundering uniforms)¹¹⁶ and, when necessary, have brought so-called donning and doffing claims under the Fair Labor Standards Act¹¹⁷ seeking payment for time necessary to change in and out of uniforms, to put on and take off safety gear, etc.¹¹⁸

The second involves appearance codes that are imposed upon a unionized workforce that was not previously exposed to such requirements. For example, Disney's American unions—bowing to the wishes of the majority of their memberships, who had been indoctrinated by the Disney screening and training process to accept Disney's appearance code as a condition of employment—tolerated Disney's code as long as it was "reasonable."¹¹⁹ However, unions at the Disneyland Hotel raised challenges to the code when Disneyland was acquired by Disney in the 1980s. Disney resisted, and the challenges were apparently unsuccessful.¹²⁰ A few workers did flaunt the appearance code by wearing union buttons, and the unions apparently pressed the workers' rights in these cases before the NLRB.¹²¹ Subsequently, some of Disney's unions successfully

115. *Id.* at 1029.

116. In one interesting case, an arbitrator found that an employer violated the collective bargaining agreement where it unilaterally implemented casual "dress down days" and mandated a dress code for workers on those days. Because the mandated casual dress code was very rigid and specified the color and type of clothing each employee must wear, it imposed significant costs on workers who attempted to comply with it; accordingly, the arbitrator viewed it as violating the wage provision in the collective bargaining agreement. *Aerospace Cmty. Credit Union*, 112 Lab. Arb. Rep. (BNA) 58 (1999) (Kelly, Arb.).

117. 29 U.S.C. §§ 201–219 (2004).

118. *See, e.g.,* *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

119. *See* Carla Rivera, *Unions Vow to Fight Disneyland Hotel Code*, L.A. TIMES, Mar. 18, 1988, § 1, at 3 (quoting union business representative for workers at a newly acquired Disneyland Hotel, who commented, "We have no problem with a reasonable dress code, but this one is ridiculous and outdated."). Disney representatives maintained that they have never negotiated over the appearance code with any union and they refused to begin in the 1980s at the Disneyland Hotel. Ted Appel, *Disney Employees Criticize Dress Code*, UNITED PRESS INT'L, Mar. 22, 1988.

120. These unions represented workforces attached to business operations that had been acquired by Disney, so that the employees had not been through the Disney screening and training process and thus were not accustomed to the Disney appearance standards; they saw them as a change in the rules. *See* Klein, *supra* note 71, at 2 (reporting that news of the Disney appearance code upset employees of the newly acquired Disneyland Hotel, and union representatives for the Operating Engineers reported plans to file grievances over the code); Rivera, *supra* note 119, at 3 (reporting planned union challenge to prohibition on mustaches, beards, heavy makeup, and long fingernails). Union business agents demurred, however, when asked whether the union would use the strike weapon to press its demands. *Id.*

121. *See* Andrea Ford, *Disney Looks for the Union Label*, L.A. TIMES, Apr. 20, 1989, § 2, at 3 (reporting that one employee at the Disneyland Hotel had union lapel pins, commemorating the worker's number of years of union membership, made into earrings in an effort to conform to the appearance code, but was ordered not to wear them because they were still "insignia"; the union

negotiated for worker-friendly rules on uniform care¹²² and sought and obtained compensation for the time spent changing into the costumes from street clothes.¹²³ French labor unions at Euro-Disney, accustomed to a culture and legal context more protective of worker autonomy, have been far less tolerant; they vigorously protested the appearance code, arguing that it represented an “attack on individual liberty.”¹²⁴

c. *Cases Arising Under Collective Bargaining Agreement Just-Cause-for-Discharge Clauses*

Arbitrators are frequently presented with cases where individual workers are discharged or disciplined for failure to comply with employer appearance codes. Appearance codes related to employers’ desire to project a particular image to customers are generally considered to be within managerial prerogative, particularly where the nature of the business is sensitive to the image portrayed and the workers have contact with the public.¹²⁵ However, the right to regulate appearance is not absolute: Employers must establish the relationship between the image that they seek to project and the need to regulate employee appearance.¹²⁶ Arbitrators are particularly sensitive to employer work rules that extend beyond the work arena and encroach on workers’ private lives.¹²⁷

Arbitrators follow the lead of the Board and courts in the union insignia cases, requiring employers to produce evidence that workers’ failure to comply with the grooming rule or appearance code will damage the business’s public image or otherwise negatively impact customer service. Arbitrators in such cases typically acknowledge the employer’s legitimate interest in constructing and maintaining its public image, and uphold “reasonable” grooming, dress, and appearance codes. However, most arbitrators hold the employer to a high standard of proof to demonstrate the link between the policy and the image that the employer seeks to portray.

Customer disapproval or complaints are significant in establishing the justification for appearance codes and grooming policies. For example, in *Pacific Southwest Airlines*,¹²⁸ the arbitrator rejected the airline’s argument that its rule requiring male flight attendants to be beardless was essential to convey a conservative image, consistent with perceptions of competence and reliability. The airline argued that its image constituted a vital asset in a competitive industry. The arbitrator rejected that justification, finding no evidence that the type of beard that the grievant wished to grow (one inch long, neatly trimmed)

challenged the code in this application even where it declined to challenge the facial hair restrictions).

122. See Tim Barker, *Disney, Union Agree on Underwear*, VENTURA COUNTY STAR, June 8, 2001, at A7 (describing Teamsters’ effort to negotiate for proper cleaning of undergarments).

123. See *Labor Board Gets Disney Case*, UNITED PRESS INT’L, Jan. 4, 2000.

124. *A Disney Dress Code Chafes in the Land of Haute Couture*, N.Y. TIMES, Dec. 25, 1991, § 1, at 1.

125. See FRANK ELKOURI & EDNA ELKOURI, *HOW ARBITRATION WORKS* 1119–20 (6th ed. 2003).

126. *Id.* at 1117.

127. See *Northwest Airlines*, 68 Lab. Arb. Rep. (BNA) 31, 34–36 (1977) (Bloch, Arb.); *Badger Concrete Co.*, 50 Lab. Arb. Rep. (BNA) 901, 908–09 (1968) (Krinsky, Arb.).

128. 73 Lab. Arb. Rep. (BNA) 1209 (1979) (Christopher, Arb.).

would damage the airline's public image or its business activities. The absence of customer complaints or statistical evidence supporting the airline's beliefs about customer perceptions was fatal. The arbitrator set a high bar for the employer's proof: "The Company was required to prove that if flight attendants were allowed to wear neatly trimmed beards, passengers would choose not to fly with PSA."¹²⁹ Finding that the employer's asserted justification was "speculative," the arbitrator voided the rule.

These references to the relevance of customer reaction show how important cultural norms are in arbitrators' assessments of the reasonableness of employer appearance codes. Employer appearance codes are directly tied to social norms regarding dress, hair length, and fashion trends. Because these trends shift over time, employer appearance codes that are considered reasonable in one era may not be so in another, particularly if they impact workers' off-duty appearance.¹³⁰ For example, in the 1960s and 1970s, hair length and the presence of beards or facial hair became associated with nonconformity and radical political views. In an effort to project a conservative business image, many employers imposed restrictions on men's hair length or facial hair. Arbitrators enforced these rules in some cases but were sensitive to their application outside the workplace in other cases, often referencing cultural norms.

When the employer's policy is consistent with cultural norms, arbitrators have been more likely to view it as reasonable and related to the employer's interest in controlling its public image. For example, in *Alpha Beta Co.*,¹³¹ the arbitrator deferred to management's judgment in enforcing a "good grooming" rule against a clerk's helper who had cut his hair in three different lengths (one inch long on top of his head and tapered to a point on the back of his head, cropped close to the scalp on the sides, and shaved along a thin six-inch line on each side of his head). The arbitrator noted that the store was located in a small farming community and that coworkers described the grievant's hair cut as "outlandish" and "bizarre."¹³² Nevertheless, the arbitrator found that suspension of the grievant was too severe a penalty when reasonable alternative job positions not involving public contact were available.¹³³

By contrast, in *Big Star No. 35*,¹³⁴ the arbitrator reinstated a supermarket cashier and checkers who had been terminated for failure to maintain proper hair length and for having "unkempt" or "messy" hair. The arbitrator found that the employer had failed to establish a sufficient connection between hair length and business necessity and expressed concern that the hair length rule would affect the checkers' appearance outside the workplace, requiring the young

129. *Id.* at 1213–15.

130. *See, e.g.*, *Springday Co.*, 53 Lab. Arb. Rep. (BNA) 627, 629 (1969) (Bothwell, Arb.) (observing that "[c]ustom and fashion in dress and behavior change from time to time, and employees should be permitted to conform reasonably with these changes").

131. 93 Lab. Arb. Rep. (BNA) 855 (1989) (Horowitz, Arb.).

132. *Id.* at 857, 858 (noting that "considerable deference must be given to store management in rural areas where local standards may not be the same as those in the more populated areas . . .").

133. *Id.* at 859.

134. 73 Lab. Arb. Rep. (BNA) 850 (1980) (Murphy, Arb.).

grievants to “deviate sharply from the standards of their male and female associates or sacrifice their jobs and tenure.”¹³⁵

Finally, in particular cases the arbitrator may accept the validity of the rule itself but second-guess its application to the grievant, either because the grievant as an individual seems sympathetic¹³⁶ or because the disciplinary action taken by the employer seems excessive or disproportionate to the offense under traditional indicia of industrial due process imported into the collective bargaining agreement through the just-cause-for-discharge clause.¹³⁷

2. *Constitutional Challenges to Appearance Codes*

In the public sector, employees have challenged appearance codes that infringe their constitutional rights to liberty, speech, or expression. Courts in these cases weigh the state’s interest as an employer in managing, controlling, and directing its workforce to provide efficient public service, against the employees’ constitutionally protected liberty and expression or speech interests. In the seminal case, *Kelley v. Johnson*,¹³⁸ the Supreme Court sustained a county police force’s grooming code against a constitutional challenge. With the support of his union,¹³⁹ a police officer challenged the police department’s grooming regulation requiring that an officer’s sideburns not flare beyond two inches in width or connect to his mustache. The Court assumed *arguendo* that public sector workers possess a Fourteenth Amendment liberty interest in matters of personal appearance, but nonetheless found that the grooming regulation was justified by the police department’s interests in ensuring that officers are recognizable to the public and in supporting the police force’s “*esprit de corps*.”¹⁴⁰

Subsequent public employment cases have been fairly consistent in sustaining grooming regulations and appearance codes in deference to a state’s rights to manage and control its public service operations. Workers seeking to challenge such rules have been required to show that the state’s regulations are “wholly irrational,” thus erecting “a very powerful, almost irrebuttable

135. *Id.* at 855–56. *See also* Rome Cable Commc’ns, 70 Lab. Arb. Rep. (BNA) 28, 32 (1978) (Dallas, Arb.) (refusing to accept company’s image justification where grievant’s hairstyle was “similar to the hair styles worn by a large proportion of young men in his age group throughout the country” and, therefore, was unlikely to negatively impact the company’s image or sales).

136. *See, e.g.*, Dravo-Doyle Co., 54 Lab. Arb. Rep. (BNA) 604, 605–07 (1971) (Krimly, Arb.) (refusing to apply a rule barring long hair and beards to an employee who worked in an area where there was only incidental contact with the public, and noting that, despite the grievant’s long hair, sideburns, and short “Vandyke” beard, his general appearance was one of “cleanliness and neatness”).

137. *See, e.g.*, Alpha Beta Co., 93 Lab. Arb. Rep. (BNA) 855, 859 (1989) (Horowitz, Arb.) (finding that even though grooming rule’s application was valid, suspension was an excessive penalty in light of reasonable alternative of requiring grievant to wear a hat until the hair grew back); *see generally* Roger Abrams & Dennis Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 DUKE L.J. 594.

138. 425 U.S. 238 (1976).

139. The union that represented the officer, the International Brotherhood of Police Officers, filed an amicus brief arguing that the regulation was unconstitutional. *See id.* at 255 n.6.

140. *Id.* at 248.

constitutional presumption that work rules devised by management” are valid.¹⁴¹

Judicial review is only marginally less deferential to managerial authority when the desired worker “dress” takes the form of speech and is pro-union in content, such as where workers wear union buttons in violation of nonadornment codes. A recent union insignia case involved a public sector employer; therefore, the NLRA was not applicable. In *Communications Workers v. Ector County Hospital District*,¹⁴² the Court of Appeals for the Fifth Circuit (sitting en banc) confronted a First Amendment challenge to a hospital’s uniform nonadornment policy brought by a carpenter who had been disciplined for wearing a “Union Yes” button on his uniform while working in patient-care areas of the hospital.¹⁴³ The court first asked whether the button represented speech on a matter of public concern, the threshold inquiry in First Amendment employee-speech cases under *Connick v. Myers*¹⁴⁴ and *Garcetti v. Ceballos*.¹⁴⁵ Taking judicial notice of the fact that Texas law prohibited collective bargaining for political subdivisions (including county hospitals),¹⁴⁶ the court found that the union button “touched upon or involved matters of public concern only insubstantially and in a weak and attenuated sense” and that the speech was not made in a traditional public forum; rather, communication was incident to the worker’s performance of his duties while wearing the hospital’s uniform.¹⁴⁷

Nevertheless, the court proceeded to balance the interests of the employer hospital in promoting efficient public service against the worker’s First Amendment interests as a citizen in commenting on a matter of public concern, and it found that the employer’s interests outweighed the worker’s speech interests. The court sanctioned uniform requirements on the basis that they “foster[] discipline, promote[] uniformity, encourage[] esprit de corps, and increase[] readiness,” and noted that “*standardized* uniforms encourage[] the subordination of personal preferences and identities in favor of the overall group mission,” a permissible employer goal because of its efficiency-enhancing tendency.¹⁴⁸ In addition, uniform requirements provide a “neat and professional appearance to members of the public served by the employer . . . and . . . allow patients and visitors to identify the employees.”¹⁴⁹ Allowing workers to adorn their uniforms with buttons would undermine these purposes by signaling

141. Klare, *supra* note 92, at 1405.

142. 467 F.3d 427 (5th Cir. 2006).

143. The hospital’s dress code policy required all employees to wear a uniform while on duty (gray work shirt and gray pants for carpenters, electricians, and plumbers) and specified that the only pins permissible were professional association pins and current hospital service award pins. The hospital made three other exceptions as a matter of practice: in conjunction with the annual football game between two competing high school teams, employees were permitted to wear the school colors of the school that they supported; pins relating to the “Great American Smoke Out” encouraging cigarette smokers to quit smoking were permitted; and during blood drives, employees were permitted to wear “donor” pins. These exceptions were justified on *esprit de corps* grounds.

144. 461 U.S. 138 (1983).

145. 126 S. Ct. 1951 (2006).

146. *Ector County Hosp.*, 467 F.3d at 433 n.10.

147. *Id.* at 437–38.

148. *Id.* at 439 (emphasis in original).

149. *Id.* at 440.

defiance against supervisors, exacerbating tensions between workers over an emotional subject, and thus adversely affect “mission, discipline and esprit de corps.”¹⁵⁰ The court also worried about the slippery slope effect of allowing union buttons on uniforms: “If ‘Union Yes’—and/or ‘Union No’—buttons are allowed, so must employees be allowed to wear on their uniforms at work buttons addressing other topics of equal or greater public concern, such as, for example, ‘Abortion is Murder,’ ‘No Gay Marriage,’ ‘Deport Illegals Now’ and the like,” that would “plainly be deleterious to the Hospital’s mission.”¹⁵¹ Refusing to accord any deferential level of protection to labor speech, the court deemed the hospital’s nonadornment policy “content and viewpoint neutral,” and therefore sustainable.¹⁵²

3. *Privacy-Based or Wrongful-Discharge Claims at Common Law*

Common law claims made by nonunion workers squarely confront both the employer’s property rights to manage its business and the presumption that all employment is at-will. Whether framed as invasion of privacy claims by current employees or as wrongful discharge claims by workers terminated for refusing to comply with appearance codes, such claims are typically unsuccessful.¹⁵³ This outcome is not unique to the appearance code context; it applies to most employer-promulgated workplace rules.¹⁵⁴ Appearance regulation, however, directly links management’s property interest in shaping and controlling its corporate image and its property-like interest in regulating the appearance of its workers, particularly in a service sector business. This linkage creates a powerful elixir of property interests that dictates the outcome of employee challenges to workplace appearance codes.

In effect, appearance regulations signal the employer’s quasi-ownership of the worker’s person. As Catherine Fisk observed when discussing George Steinbrenner’s requirement that Johnny Damon cut his hair as a condition of signing on with the Yankees, “[i]nsisting on adherence to the dress code says to the world, ‘you’re my player now and I can make you wear your hair any way I please.’”¹⁵⁵ Corporate branding enforced through appearance regulation expands the scope of managerial control over the workers’ bodies, in ways that undermine individual autonomy and identity (such as Johnny Damon, whose identity as a “marquee player” had become uniquely recognizable to the public).¹⁵⁶ Nevertheless, because the employer’s property-based business

150. *Id.* at 447.

151. *Id.* at 441.

152. *Id.*

153. See Fisk, *supra* note 92, at 1127 (arguing for application of a privacy-based analysis to workplace appearance codes, because imposition of such codes is as much about managerial power over workers as a group as it is about gender discrimination, but noting that in most states workplace privacy rights are “narrow and weak”).

154. See, e.g., Kim, *supra* note 114, at 1023–26 (discussing challenges by individuals to workplace drug testing policies).

155. Fisk, *supra* note 92, at 1121. The difference between Johnny Damon and the workers upon whom we focus in this Article is that, as Fisk points out, professional athletes are well-compensated for enduring such infringements on their autonomy. *Id.*

156. *Id.*

management and marketing interests intersect with its common-law right to control and discipline its workforce, courts are likely to uphold such regulations, even when the appearance regulation is unreasonable and extends substantially beyond the practices of other businesses in the same industry.¹⁵⁷

The same combination of managerial interests combines to trump workers' interests in job security, as the wrongful discharge case law demonstrates. In the next Part, we further examine the common law's response to appearance code regulation through the vehicle of the wrongful discharge claims filed in Nevada state court in the *Jespersen* case.¹⁵⁸

4. *Statutory Sex Discrimination Claims*

Statutory challenges to sex-based dress, grooming, and appearance policies under federal and state antidiscrimination laws have occasionally been successful. Nevertheless, as a general rule, the courts tend to uphold employers' "reasonable" sex-based appearance regulations under a variety of theories.¹⁵⁹ Some federal courts have found that Title VII's prohibition of sex discrimination in employment¹⁶⁰ either does not reach sex-specific dress and grooming rules at all,¹⁶¹ or it does not reach appearance rules that impose only a de minimus burden on one sex.¹⁶² Similarly, some federal courts have concluded that only employer rules that are based on an immutable trait (such as sex or race) or sex "plus" a fundamental right (such as religion or the right to marry) can be challenged under Title VII, and that dress and grooming requirements do not affect either immutable characteristics or fundamental rights.¹⁶³ Moreover, sex-specific dress and grooming rules that reflect prevailing community standards have been found not "discriminatory" under the rationale that an employer has to take gender into account in order to treat men and women equally in devising appearance regulations.¹⁶⁴ More recently, several federal courts have ruled that

157. For example, one commentator noted that both state and federal courts upheld Harrah's right to enforce its sex-based grooming policy even though owners of other casinos and the president of the Rhode Island Hospitality and Tourism Industry characterized Harrah's employee appearance standards as "offensive" and as going "overboard"—outside the norm of employer-promulgated appearance standards for the industry. See Scott Mayerowitz, *Harrah's Draws Criticism; Employee Appearance Standards Go "Overboard,"* PROVIDENCE J. (R.I.), July 13, 2004, available at http://www.hotel-online.com/News/PR2004_3rd/Jul04_HarrahsPolicies.html. See *infra* note 190 and accompanying text (describing Harrah's grooming policy).

158. See *infra* notes 195–205 and accompanying text (discussing *Jespersen v. Harrah's Operating Co.*, 131 P.3d 614 (Nev. 2004) (unpublished table decision), No. 40587 (Nev. June 7, 2004) (on file with authors)).

159. Many commentators have argued that the doctrinal approaches by the courts have significant conceptual failings. See, e.g., Fisk, *supra* note 92, at 1131–36 (discussing failings and citing commentators). See generally ROBERT BELTON ET AL, EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 380–94 (7th ed. 2004) (discussing Title VII challenges to workplace dress, grooming, and appearance requirements).

160. Title VII § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2000).

161. See *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc); *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (per curiam).

162. See *Dodge v. Giant Food, Inc.* 488 F.2 1333, 1337 (D.C. Cir. 1973); *Tavora*, 101 F.3d at 908.

163. See *Willingham*, 507 F.2d at 1091; *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896–97 (9th Cir. 1974).

164. See *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973).

sex-specific appearance codes are discriminatory only if they impose “unequal burdens” on women and men.¹⁶⁵ The problem, of course, is in determining what constitutes a “burden” and how burdens should be weighed and compared.

In examining the relative burdens of dress and grooming rules on male and female workers, courts have sometimes scrutinized the sex stereotypes underlying the employer’s regulation, upholding sex-specific rules based on “common” but (presumably) benign stereotypes and invalidating rules based on offensive stereotypes that are demeaning to women as a class.¹⁶⁶ For example, an employer’s even-handed enforcement of sex-differentiated “professional” dress and grooming requirements that emphasized a pleasing appearance for both male and female television anchors withstood a Title VII challenge.¹⁶⁷ On the other hand, it was found to be sex discrimination for a bank to require only female workers to wear uniforms based on the employer’s sex-stereotyped assumptions that women (but not men) are not likely to know how to dress in an appropriate “professional” manner for work.¹⁶⁸

If a court finds that an employer’s express gender-specific dress and grooming policy discriminates on the basis of sex under one of these theories, the court will rule that the policy is an unlawful employment practice unless the employer can defend it as a bona fide occupational qualification (BFOQ) under section 703(e)(1) of Title VII.¹⁶⁹ The critical question is whether the employer’s discriminatory policy is “reasonably necessary” to the “normal operation” of the “particular” business—the “essence of the business” test.¹⁷⁰ The Supreme Court has construed the statutory BFOQ defense to sex discrimination “narrowly.”¹⁷¹ In addition, the courts have ruled that customer preferences cannot be used as a BFOQ defense to justify sex discrimination.¹⁷² Consequently, employers have a major hurdle in litigation if they are required to prove that a female-only hiring practice or a sex-based dress and grooming rule is a BFOQ.

165. See *Frank v. United Airlines*, 216 F.3d 845 (9th Cir. 2000); *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985). The EEOC Compliance Manual expressly permits different dress codes for men and women as long as employers impose “equivalent” burdens on both sexes. EEOC Compliance Manual § 619.4(d).

166. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality) (finding direct evidence of an unlawful employment decision based on sex where an employer relied on sex stereotypes in recommending that a female accountant would have a better chance of becoming a partner if she would “walk more femininely, talk more femininely, dress more femininely, have her hair styled, and wear jewelry”).

167. *Craft*, 766 F.2d at 1215–16 (upholding the district court’s view that a television station’s “appearance standards were shaped only by neutral professional and technical considerations and not by any stereotypical notions of female roles and images”); Judith Olans Brown, Lucy A. Williams & Phyllis Tropper Baumann, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN’S L.J. 457, 511 (1996).

168. *Carroll v. Talman Fed. Sav. & Loan Ass’n of Chi.*, 604 F.2d 1028 (7th Cir. 1979).

169. 42 U.S.C. § 2000e-2(e)(1) (2000).

170. *Id.* See *Wilson v. Sw. Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981); *Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5th Cir. 1971).

171. See *Int’l Union, UAW v. Johnson Controls*, 499 U.S. 187, 201 (1991).

172. See *Diaz*, 442 F.2d at 389 (“[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act [Title VII] was meant to overcome.”).

Defining what constitutes the “essence of the business” for purposes of a BFOQ defense is not always easy, and these determinations implicate an employer’s decisions about its business purpose as well as how it will market or brand its products. For example, if the employer’s business consists of selling sexual titillation or entertainment, such as in a strip club or Playboy Club, the employer may discriminate on the basis of sex by hiring only attractive women as strippers or Playboy “Bunnies” and requiring them, as a part of the job, to dress and groom themselves (and to appear and behave) in a manner that will be sexually provocative.¹⁷³ In these circumstances, sex-stereotyped (and sexualized) “branding” of the worker is permissible. On the other hand, where the “essence” of an employer’s business does not involve sex, the courts have prohibited requirements that women workers wear provocative clothing or revealing uniforms that subject them to unwelcome sexual harassment from other employees or customers.¹⁷⁴

The difficult sex discrimination/BFOQ cases arise when employers hire only young attractive women for certain service jobs or require female service workers to wear sexually provocative clothing and glamorous makeup. Assuming that a court finds the hiring practices or appearance regulations to be discriminatory, the success of an employer’s BFOQ defense rests on discerning whether the employer is primarily in the business of selling “sex” or is using sexual allure to market other services and products, such as a restaurant meal (served by buxom Hooters waitresses wearing tank tops and running shorts)¹⁷⁵ or airline travel (served by young, sexy female flight attendants in “hot pants”).¹⁷⁶ At least in principle, if not always in practice, sex discrimination doctrine offers a means to restrain employer branding practices that sexualize and demean women workers by requiring that they appear, dress, and groom themselves in sex-stereotyped ways that are not necessary to perform their jobs. We discuss these issues further below, in conjunction with our case study of *Jespersen v. Harrah’s Operating Co.*¹⁷⁷

173. See Yuracko, *Private Nurses and Playboy Bunnies*, *supra* note 92, at 157; *Wilson*, 517 F. Supp. at 301.

174. See, e.g., *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (“While it may well be a [BFOQ] for [an employer] to require female lobby attendants in its buildings to wear certain uniforms designed to present a unique image, in accordance with its philosophy of urban design, it is beyond dispute that the wearing of sexually revealing garments does not constitute a [BFOQ].”).

175. For example, see the discussion of Hooters’ attempts to protect its “trade dress” interests in its skimpy Hooters Girls’ waitress uniforms from a competitor, *supra* notes 87–90 and accompanying text. A challenge to Hooters Restaurants’ female-only hiring policies for its front-of-the-house serving jobs is discussed *supra* note 90 and *infra* text accompanying note 555.

176. Flight attendants’ challenges to airline female-only hiring policies, to restrictions on marital status for female attendants, and to dress codes, appearance rules, and weight limits for female attendants are discussed *infra* notes 618–64 and accompanying text.

177. 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). See *infra* Parts IV.C, V.B, VII.B.

5. *A Case Study of Corporate Branding Accomplished Through Appearance Codes and the Law's Response*

The law's response to corporate branding has been highly contextual, differing by industry and by employer practice. Accordingly, discussing branding in the abstract risks missing the deeper insights available through study of a more nuanced and contextualized factual setting. In the next three Parts, we utilize a case study to inform our examination of how the corporate branding process functions and how work law responds. We chose *Jespersen v. Harrah's Operating Co.* for several reasons. First, it has sparked a great deal of interest among scholars. Second, it offers a useful factual context for assessing how the practice of branding has evolved as corporations have morphed into national and multinational enterprises in which both marketing and human resources practices are centrally controlled, and how these shifts have affected the gender composition of occupations. Third, *Jespersen's* storied travels through state and federal court offer an unparalleled window onto how the law responds to individual efforts to resist branding, whether framed as a common law claim or as an antidiscrimination claim. In addition, although Harrah's Reno casino (where Darlene Jespersen worked) was not unionized, other Harrah's facilities are. Because Harrah's grooming code was applied on a corporate-wide basis, an opportunity existed to frame the legal claims in collective terms, had Harrah's union chosen to intervene. These facts provide the foundation for our consideration in the final section of this Article as to how, if at all, the law's response might be different were the resistance to occur at a collective level.

IV. THE *JESPERSEN* LITIGATION: AN INDIVIDUAL WORKER RESISTS CORPORATE BRANDING

A. The Facts¹⁷⁸

In August 2000, Darlene Jespersen was terminated from her employment at Harrah's casino in Reno, Nevada, where she had worked for over twenty years as a bartender in the sports bar. She was fired solely because she refused to comply with a new company-wide grooming policy that required Harrah's female beverage servers, including female bartenders and barbacks, to wear makeup consisting of foundation, blush, mascara, and lipstick. Men working in these jobs were prohibited from wearing facial makeup of any kind.

Jespersen's work history at Harrah's was exemplary. After being hired as a dishwasher in 1979, she was rapidly promoted to a job as a barback and then bartender, a position she held until 2000. Her supervisors consistently praised her work, and her customers wrote that her "excellent service and good attitude enhanced their experience at the sports bar and encouraged them to come back."¹⁷⁹ Although she had never worn makeup, she briefly tried using makeup

178. The following facts are taken from the en banc decision, *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc), the three-judge panel decision, *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004), the Corrected Opening Brief of Plaintiff-Appellant, *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), and contemporaneous media reports.

179. *Jespersen*, 392 F.3d at 1077.

at her supervisor's request when Harrah's first instituted a makeup requirement for female employees in the early 1980s, but she abruptly stopped and never wore it again. She testified in her deposition that wearing makeup had made her feel "‘very degraded and very demeaned,'" that it adversely affected her "‘credibility as an individual and as a person,'"¹⁸⁰ and "‘forced her to be feminine' and to become 'dolled up' like a sexual object."¹⁸¹ Subsequently, despite the existence of an informal makeup policy, Harrah's supervisors relented and did not require her to wear makeup; Jespersen continued to receive outstanding evaluations.

In early 2000, Harrah's instituted a "Beverage Department Image Transformation" (BDIT) program at twenty of its twenty-six casinos throughout the nation, including the Reno casino where Jespersen worked.¹⁸² "The goal of the program was to create a 'brand standard of excellence' throughout Harrah's operations, with an emphasis on guest service positions."¹⁸³ The BDIT program initially had grooming and appearance requirements for beverage servers, called the "Personal Best" program, which mandated "unisex" uniforms for all bartenders—consisting of "black pants, white shirt, black vest, and black bow tie"¹⁸⁴—as well as some sex-based grooming standards about hair, nails, and makeup for all beverage servers,¹⁸⁵ which Jespersen agreed to follow.¹⁸⁶

Harrah's required the beverage service employees to undergo "Personal Best Image Training" before their final fittings for their uniforms.¹⁸⁷ Following the training, Harrah's took both a portrait and a full-body photograph of each employee looking his or her "Personal Best."¹⁸⁸ These two photographs were placed in each employee's personnel file, to be used by supervisors each day "as an 'appearance measurement' tool"¹⁸⁹ to monitor whether the employee was living up to the new standards. In April 2000, relying on the advice of an image consultant, Harrah's amended the "Personal Best" policy to require that all

180. *Jespersen*, 444 F.3d at 1108 (quoting Jespersen's deposition testimony).

181. *Jespersen*, 392 F.3d at 1077 (quoting Jespersen's deposition testimony).

182. Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 7.

183. *Jespersen*, 392 F.3d at 1077.

184. *Jespersen*, 444 F.3d at 1107. The en banc majority in *Jespersen* referred to the bartenders' uniforms as "unisex." *Id.* at 1112.

185. *Id.* at 1107. The text of these standards are quoted in *Jespersen*, 392 F.3d at 1077 n.1.

186. The policy prohibited male bartenders and barbacks from wearing "[e]ye and facial makeup," but said nothing about makeup for female bartenders and barbacks. *Jespersen*, 392 F.3d at 1077 n.1 (alteration added).

187. *Jespersen*, 392 F.3d at 1078.

188. *Id.* Harrah's "Personal Best" photographs of Darlene Jespersen are available on the Web site of Lambda Legal Defense and Education Fund, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record2.html?record=1614> (last visited Dec. 30, 2006). In an interview after she was fired, Jespersen described how she was photographed for her "Personal Best" photos: "I go there with no make-up. They put on some clear lip gloss. They also wanted to put some powder on my face so I wouldn't shine in the photo and I agreed to that because they had done that to some of the guys for their photos." Gender Public Advocacy Coalition, GenderPAC National News Interviews Darlene Jespersen, GPAC NEWS, Jan. 29, 2001 (quoting Darlene Jespersen), available at <http://www.gpac.org/archive/news/notitle.html?cmd=view&archive=news&msgnum=0273> [hereinafter GPAC Interview with Jespersen].

189. *Jespersen*, 392 F.3d at 1078.

female beverage servers—including female bartenders—wear foundation, blush, mascara, and lipstick at all times.¹⁹⁰ Jespersen continued to work without makeup, and on July 30, 2000, Harrah's sent her home for violating the "Personal Best" policy,¹⁹¹ giving her thirty days to apply for another job in the company.¹⁹² Over the next month, she was unable to find another position at Harrah's Reno properties that she was qualified to fulfill, that did not require makeup, and that offered compensation comparable to her bartender job.¹⁹³

190. The amended "Personal Best" policy provided, in 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.
 - Shoes will be solid black leather or leather type with rubber (non skid) soles.
 - *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, 444 F.3d at 1107 (emphasis added by court).

191. Jespersen later said, "I was told it was because of the lighting, that the (casino) lighting washed my face out. . . . But the men didn't have to do it." Peter Schelden, *Gay, Transgendered Seek Workplace Equality*, SPARKS TRIB. (Nev.), Mar. 17, 2005, available at <http://www.nevadalabor.com/unews/jesprallytrib.html> (last visited June 21, 2005). Jespersen argued on appeal that Harrah's "has . . . [not] explained how its lighting conditions could operate differently on the faces of male and female employees." Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 33 (alteration added).

192. *Jespersen*, 392 F.3d at 1078.

193. GPAC Interview with Jespersen, *supra* note 188. According to a news account of a televised interview on "CBS This Morning," with Jespersen and Jan Jones, Harrah's vice president for communications and government relations, Jones, told the CBS anchor that Harrah's had "'over 74 positions' . . . available to Jespersen which paid the same but did not require makeup. Jespersen twice refuted [Jones], stating 'I was reassigned back to personnel. I had 30 days to find another job. For those 30 days, I was not being paid. None (of the jobs) would support me and makeup would be

Harrah's terminated her employment on August 10, 2000.¹⁹⁴ Jespersen subsequently brought two lawsuits against Harrah's, one in Nevada state court based on tort and contract law and the other in federal court based on antidiscrimination law.

B. The State Lawsuit: Common Law Claims

Other than a few Nevada newspaper reports,¹⁹⁵ little attention has been paid to the legal claims that Jespersen pursued in Nevada state court concurrently with her federal discrimination lawsuit. Jespersen brought three claims in Washoe District Court against Harrah's Operating Company: tortious discharge in violation of public policy, breach of an implied contract of continued employment, and breach of the implied covenant of good faith and fair dealing.¹⁹⁶ The district court ruled in favor of Harrah's motion for summary judgment. On appeal, following a *de novo* review, a three-judge panel of the Nevada Supreme Court unanimously affirmed the judgment of the lower court in an unpublished decision issued on June 7, 2004.¹⁹⁷

Following Nevada precedent,¹⁹⁸ the Nevada Supreme Court refused to allow a tort claim for violation of Nevada's public policy of prohibiting discrimination on the basis of sex¹⁹⁹ where "the Legislature has provided an adequate remedy for injuries of this type."²⁰⁰ Moreover, going beyond its statutory preemption analysis, the court refused to recognize a tort claim for what must have seemed a rather novel legal claim asserted by Jespersen's counsel—that Nevada should recognize "a public policy against gender stereotyping or generally against employers terminating employees for violating a company policy."²⁰¹ The court observed that Jespersen had not alleged a "retaliatory" discharge and the "circumstances of Jespersen's termination are not so 'rare and exceptional' as to warrant recognition of a tortious discharge

an issue again,' she politely noted." Andrew Barbano, *The True Face of Nevada Gambling*, SPARKS TRIB. (Nev.), Oct. 8, 2000, available at <http://www.nevadalabor.com/barbwire/barb00/barb10-8-00.html>.

194. Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 7.

195. See, e.g., Ed Vogel, *Nevada Supreme Court: Court Upholds No-Cosmetics Firing*, LAS VEGAS REV.-J., June 8, 2004, available at http://www.reviewjournal.com/lvrj_home/2004/Jun-08-Tue-2004/news/24055099.html.

196. See *Jespersen v. Harrah's Operating Co.*, 131 P.3d 614 (Nev. 2004) (unpublished table decision), No. 40587, slip. op. at 1 (Nev. June 7, 2004) (on file with authors).

197. *Id.* The Nevada Supreme Court reviews all cases that are appealed from the trial courts in nine judicial districts. Since 1999, most cases are reviewed by three-judge panels rather than the full court of seven judges, which reviews cases en banc twice a year. See The Supreme Court of Nevada, Overview of the Nevada Supreme Court, <http://www.nvsupremecourt.us/info/about/> (last visited Dec. 20, 2006).

198. The *Jespersen* court cited *Chavez v. Sievers*, 43 P.3d 1022 (Nev. 2002), for the proposition that the state antidiscrimination statute, NEV. REV. STAT. ANN. § 613.330, "provides a remedy for employment discrimination to the exclusion of any claims for tortious discharge, at least when the employee has already recovered tort damages under the statute." *Jespersen*, No. 40587, slip op. at 3.

199. *Jespersen*, No. 40587, slip op. at 4 n.7 (noting that NEV. REV. STAT. ANN. § 233.010 "states that Nevada's public policy prohibits discrimination on the basis of sex").

200. *Id.* at 4.

201. *Id.*

claim in this case.”²⁰² In other words, employers are generally free to fire or otherwise retaliate against at-will employees who violate company rules, even if those rules stereotype employees on the basis of gender. The underlying assumptions are that gender stereotyping in the workplace is common and not unlawful, that company rules—regardless of how personally offensive, silly, stupid, or unlawful they might seem to an employee—are meant to be obeyed except in (undefined) “rare and exceptional” circumstances, and that a request that a woman either put on makeup or lose her job, in the circumstances Jespersen described, was not one of those “rare and exceptional” cases. What the Nevada Supreme Court described is the essence of employment at will: The employee must take it (the job on the employer’s terms) or leave it.

Even employment at will can be modified in Nevada by an implied contract of “continued employment” found in the “circumstances of employment” or “established policies and procedures.”²⁰³ The Nevada Supreme Court wrote:

Jespersen does not assert that Harrah’s promised to forgo enforcing a makeup requirement during the entirety of her employment, or not to change or modify its policy, or that her employment would be terminated only for cause, or that she would have employment for life or for a specified period of time. Thus, even if the non-enforcement of the policy did create an expectation that Jespersen would be continually allowed to forgo wearing makeup, this expectation is insufficient to convert an at-will employment into one allowing termination only for cause.²⁰⁴

Jespersen’s mere “expectation” that the company’s makeup rules did not apply to her, even considered in light of the facts that led her to form the expectation in the course of her more than twenty years of employment at Harrah’s, was not sufficient, as a matter of law, to alter her status as an employee at will. Her “expectation,” although based on past practices, did not give rise to legal rights. In addition, because Jespersen’s claim for breach of the implied covenant of good faith and fair dealing depended on a finding that she had an implied contract of continued employment, that legal claim also failed as a matter of law.²⁰⁵

C. The Title VII Lawsuit: Discrimination Claims

1. *The Complaint*

On October 18, 2000, Jespersen filed a sex discrimination complaint with the EEOC and the Nevada Equal Rights Commission.²⁰⁶ On July 6, 2001, after exhausting her administrative remedies, Darlene Jespersen filed a federal civil rights complaint in the United States District Court for the District of Nevada

202. *Id.* at 4–5.

203. *Id.* at 5–6.

204. *Id.* at 6.

205. *Id.* at 5, 6.

206. Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 7.

against her former employer, Harrah's Operating Company.²⁰⁷ Jespersen claimed that Harrah's had engaged in unlawful employment practices under Title VII²⁰⁸ by intentionally discriminating against her on the basis of sex. Jespersen's claim for disparate treatment was framed under three interrelated theories with different legal and factual bases. First, she alleged that Harrah's policy requiring women, but not men, to wear makeup was "discriminatory per se" because it imposes different "terms and conditions of employment" on male and female employees on the basis of their sex, and because it "requir[es] that women conform to . . . sex-based stereotypes as a term and condition of employment."²⁰⁹ Second, Jespersen alleged the classic elements of a *McDonnell Douglas*²¹⁰ prima facie case of sex discrimination—that she was a female who "performed her job satisfactorily" and that she was terminated from employment and replaced by a male who was "as qualified or less qualified" than she was.²¹¹ And third, Jespersen alleged that Harrah's had "engaged in intentional discrimination" by enforcing its makeup policy against her "because of [her] gender and because of its stereotypical views concerning [her] gender."²¹² She asked the court to declare Harrah's sex-based grooming policy in violation of federal law and to enjoin its enforcement. For herself, she sought backpay and frontpay, compensatory and punitive damages, and attorneys fees.²¹³

2. *The District Court Decision*

The district court granted Harrah's motion for summary judgment on all of her Title VII claims.²¹⁴ The court had three rationales for denying her claims for disparate treatment on the basis of sex. First, noting that "grooming and appearance standards that have different but equal requirements for men and women are not violative of Title VII," the court concluded that Harrah's grooming policy "imposed different but equal burdens on both sexes," because

207. Complaint & Jury Demand, *Jespersen v. Harrah's Operating Co.*, 280 F. Supp.2d 1189 (D. Nev. 2002), <http://www.nevadalabor.com/unews/jespersuit.html> [hereinafter *Jespersen Complaint*].

208. 42 U.S.C. § 2000e-2 (2000).

209. See First Claim for Relief, *Jespersen Complaint*, *supra* note 207, at 2.

210. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

211. See Second Claim for Relief, *Jespersen Complaint*, *supra* note 207, at 3. This claim also alleged that men who were "similarly situated" to her "were not required to comply with the same policy, and thus did not suffer the same adverse employment action." *Id.*

212. See Third Claim for Relief, *Jespersen Complaint*, *supra* note 207, at 3.

213. See *id.* at 2–3.

214. *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189, 1195 (D. Nev. 2002). Jespersen's remaining claims were either withdrawn or dismissed and not appealed. Jespersen alleged that Harrah's makeup policy had a disparate impact on female employees in violation of Title VII, 42 U.S.C. § 2000e-2 (2000). In response to Harrah's motion for the court to reconsider its denial of summary judgment on this claim, the district court on December 4, 2002, dismissed this claim as a matter of law. *Jespersen*, 280 F. Supp. 2d at 1195. Jespersen's Title VII claim of retaliation for both opposition and participation conduct was voluntarily withdrawn by the plaintiff. *Id.* at 1190 n.1. In addition, in response to Harrah's motion for summary judgment, Jespersen's pendent state law claims for intentional infliction of emotional distress and for negligent supervision and training were dismissed by the district court as a matter of law because of lack of evidence supporting the claims. *Id.* at 1194–95.

“prohibiting men from wearing makeup may be just as objectionable to some men as forcing women to wear makeup is to [Jespersen].”²¹⁵ Moreover, the policy “allowed women to wear their hair up or down without restriction on length, but prohibited men from having their hair reach below the tops of their shirt collars.”²¹⁶ Second, the court also cited holdings from 1970s circuit court cases for the “premise” that it is only a violation of Title VII for an employer to discriminate on the basis of “immutable characteristics,” not aspects of appearance such as hair styles, dress, or grooming that the employee can control and alter.²¹⁷ Finally, the court rejected Jespersen’s claim that, because Harrah’s grooming policy “negatively impacts women by portraying them in [a] stereotypical manner,”²¹⁸ it was unlawful under the sex discrimination analysis adopted in *Price Waterhouse v. Hopkins*.²¹⁹ Citing recent Ninth Circuit case law, the court concluded that *Price Waterhouse* does not extend to sex-based dress, appearance, and grooming standards.²²⁰

3. *The Ninth Circuit Panel Decision*

Jespersen appealed to the Ninth Circuit Court of Appeals, challenging the grant of summary judgment to Harrah’s on her Title VII disparate treatment claims. In late 2004, a three-judge panel issued a decision affirming the judgment of the district court, although the majority disagreed with some of the analysis of the lower court and one judge dissented.²²¹ First, the court agreed with Jespersen’s argument²²² that the district court’s reliance on 1970s cases holding “that Title VII only prohibit[s] discrimination based on ‘immutable characteristics’ associated with a worker’s sex” was not a correct statement of the law.²²³ The court acknowledged that its “later cases recognized . . . that an employer’s imposition of more stringent appearance standards on one sex than

215. *Jespersen*, 280 F. Supp. 2d at 1192, 1193 (alteration added).

216. *Id.* at 1192–93.

217. *Id.* at 1192.

218. *Id.* at 1194.

219. 490 U.S. 228 (1989).

220. *Jespersen*, 280 F. Supp. 2d at 1193 (citing *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001)). The district court in *Jespersen* articulated the “rule” in *Price Waterhouse* as being “that employers cannot discriminate on the basis of sex stereotyping.” *Id.* There is now a debate in the federal courts and among legal academics about whether the plurality’s analysis of sexual stereotyping in *Price Waterhouse* was a “ruling” of the Court, providing a separate (and rather broad) basis for a sex discrimination claim, or whether it was merely a statement that evidence of sexual stereotyping, as a part of an employer’s decision-making process that results in an adverse employment action, may be used as direct evidence of unlawful discriminatory intent. See, e.g., *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066–68 (7th Cir. 2003) (Posner, J., concurring). For a scholarly critique of the stereotyping theory, see Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL’Y 467, 472–79 (2007).

221. *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004). Judge Wallace Tashima, joined by Judge Barry Silverman, issued the opinion of the court, and Circuit Judge Sidney Thomas filed a dissenting opinion, *id.* at 1083. For a description of the background of the judges in the panel decision, see Devon Carbado et al., *The Story of Jespersen v. Harrah’s: Makeup and Women at Work, in EMPLOYMENT DISCRIMINATION STORIES* 105, 127–28 (Joel W. Friedman ed. 2006).

222. See Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 12–19.

223. *Jespersen*, 392 F.3d at 1080.

the other constitutes sex discrimination even where the appearance standards regulate only ‘mutable’ characteristics such as weight.”²²⁴

The “later cases” of the Ninth Circuit that the court relied on were two class-action sex discrimination claims brought by female flight attendants who successfully challenged airline sex-based weight restrictions: *Gerdom v. Continental Airlines*²²⁵ and *Frank v. United Airlines*.²²⁶ The court noted that in both cases “it was apparent from the face of the policies . . . that female flight attendants were subject to a more onerous standard than were males.”²²⁷ The *Jespersen* court concluded that employers violated Title VII only when they adopted different sex-based appearance standards that impose unequal burdens on each sex.²²⁸ A grooming code that was more burdensome for one sex than the other constituted disparate treatment that is unlawful unless it is justified as a BFOQ.²²⁹

The court concluded that Jespersen had not produced sufficient admissible evidence to raise a jury question on the “unequal burdens” test.²³⁰ The court wanted admissible evidence of “the cost and time necessary for employees of each sex to comply with the policy.”²³¹ Moreover, the burden of the makeup policy for women had to be measured in relation to the burdens of all the grooming requirements for both sexes, “beyond the requirements of generally accepted good grooming standards.”²³²

Jespersen had submitted no evidence to the district court of the cost of makeup required for a female bartender under Harrah’s policy or the time it would take for her to apply, maintain, and remove the makeup each day.²³³

224. *Id.*

225. 692 F.2d 602 (9th Cir. 1982) (en banc).

226. 216 F.3d 845 (9th Cir. 2000).

227. *Jespersen*, 392 F.3d at 1080. In *Gerdom*, the weight limitation applied only to women, and not to men, because at the time the rule was adopted and enforced, only women were allowed to be flight attendants. See *Gerdom*, 692 F.2d at 604. In *Frank*, the airline, using insurance company sex-based height and weight tables, required female attendants to maintain the “medium” build for women, but allowed male flight attendants to maintain a “large” build for men. *Frank*, 216 F.3d at 848.

228. See *Jespersen*, 392 F.3d at 1080.

229. *Id.* Because this was a *de novo* review of the district court’s granting of a summary judgment motion, the Ninth Circuit panel reevaluated the evidence that had been submitted by the parties below. *Id.* at 1079.

230. *Id.* at 1081–82. The evidence in the record consisted of the grooming policy itself; a letter from Harrah’s Food and Beverage Manager to its Reno employees; Jespersen’s deposition testimony about her personal reactions to the makeup requirement; Harrah’s positive performance reviews of her work over the years, including a 1996 award for “outstanding” work; letters and notes from Harrah’s customers praising her work; and signed declarations by several members of Harrah’s management and by the image consultant who had developed the grooming policy. See, e.g., *Jespersen*, 280 F. Supp. 2d 1189, 1191 (D. Nev. 2002) (overruling Jespersen’s evidentiary objections to declarations submitted by Harrah’s). The letter and declarations were prepared by Harrah’s employees, Greg Kite and Brent F. Skidmore, Harrah’s Food and Beverage Manager, and the image consultant, Reimi Marden, the president and owner of The Winning Edge. See Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 7, 30, 33.

231. *Jespersen*, 392 F.3d at 1081.

232. *Id.* at 1081 & n.4.

233. *Id.* at 1081.

Although Jespersen’s appellate brief had cited published academic literature that analyzes the high cost of cosmetics and the time it takes to apply them,²³⁴ the court refused to take judicial notice of this generalized data in the face of no record evidence of the comparative time and cost burdens of the company’s policies on male and female bartenders as compared to “ordinary good-grooming standards.”²³⁵ Nor would the court allow the question to go to a jury to resolve it based on “simple common sense,” where Jespersen had produced no admissible evidence in support of her factual assertion.²³⁶

The Ninth Circuit panel majority did not address Jespersen’s appellate argument that she satisfied the “unequal burdens” test as articulated in *Carroll v. Talman Federal Savings & Loan Ass’n of Chicago*,²³⁷ a case that the Ninth Circuit had cited with approval in *Frank v. United Airlines*.²³⁸ *Carroll* held that a bank that required female employees to wear uniforms but allowed male employees to dress in professional attire had discriminated on the basis of sex in violation of Title VII. The bank’s uniform requirement for only female employees was found to be “demeaning to women” because it was “based on offensive stereotypes.”²³⁹ Jespersen had argued that Harrah’s, like the employer in *Carroll*, was requiring that women “must don a ‘uniform’ consisting of a facial makeover applied with exacting detail to present an approved image of feminine attractiveness, while men are deemed sufficiently professional and attractive in their natural state.”²⁴⁰

Again, before the three-judge panel, Jespersen argued that even if Harrah’s sex-based grooming policy was valid under an “unequal burdens” test, it was unlawful under *Price Waterhouse v. Hopkins*²⁴¹ because it required Darlene Jespersen to conform to a “stereotypical feminine beauty: a rosy cheek, a darkened eyelash, a fair complexion, a captivating lip color.”²⁴² Like the district court below, the panel, citing Ninth Circuit precedent,²⁴³ held that *Price Waterhouse* gender-stereotyping analysis applied to sexual harassment cases, but

234. Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 28 n.4 (citing NAOMI WOLF, *THE BEAUTY MYTH* 120–21 (1991)).

235. *Jespersen*, 392 F.3d at 1081.

236. *Id.*

237. 604 F.2d 1028 (7th Cir. 1979).

238. *Frank*, 216 F.3d 845, 855 (9th Cir. 2000). For Jespersen’s argument relying on *Carroll*, see Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 19–25.

239. *Carroll*, 604 F.2d at 1032–33.

240. Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 21.

241. 490 U.S. 228 (1989).

242. Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 39. A partner at Price Waterhouse told Anne Hopkins that she could improve her candidacy for partnership in the accounting firm if she would “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.” *Price Waterhouse*, 490 U.S. at 235. The Supreme Court found this to be evidence of unlawful sex discrimination. *Id.* at 251. See *supra* note 166 and accompanying text.

243. In *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001), a male waiter whose behavior did not conform to traditional male stereotypes was permitted to sue his employer for same-sex sexual harassment under the reasoning of *Price Waterhouse*. The *Nichols* court observed, however, that “[o]ur decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards.” *Id.* at 875 n.7.

not to cases involving only grooming and appearance standards.²⁴⁴ The court concluded that the “unequal burdens” test was the only test adopted by the Ninth Circuit for sex-based grooming codes.²⁴⁵

Judge Thomas dissented, arguing that Jespersen had raised a triable issue of fact on two theories: (1) that Harrah’s had acted on the basis of unlawful sex stereotypes, and (2) that the makeup policy “imposed unequal burdens on men and women, because the policy imposes a requirement on women that is not only time-consuming and expensive, but burdensome for its requirement that women conform to outdated and impermissible stereotypes.”²⁴⁶ The dissent was concerned, in part, about the distinctions of social class that followed from the majority’s attempt to distinguish Harrah’s use of sex-based grooming standards from the sex-stereotyped assumptions about grooming that were found unlawful in *Price Waterhouse*: “The distinction created by the majority opinion leaves men and women in service industries, who are more likely to be subject to policies like the Harrah’s ‘Personal Best’ policy, without the protection that white-collar professionals receive.”²⁴⁷ Under an unequal-burdens analysis, Judge Thomas would require an examination of the comparative burdens of each sex-based rule, not a comparison of the effects of the overall standards on men and women. Significantly, he would prohibit employer dress and grooming standards “that rest upon a message of gender subordination,”²⁴⁸ not just those that cost more in time and money.

4. *The Ninth Circuit En Banc Decision*

On May 13, 2005, the Court of Appeals for the Ninth Circuit ordered a rehearing en banc in *Jespersen v. Harrah’s Operating Co.*, and, on June 22, 2005, eleven circuit judges heard oral arguments in San Francisco.²⁴⁹ On April 14, 2006, the Ninth Circuit issued its en banc decision, with four judges dissenting in two separate opinions.²⁵⁰ The majority opinion, written by Chief Judge Mary Schroeder, affirmed the determinations of both the district court below and the panel majority that Jespersen had not presented sufficient evidence to survive summary judgment under an “unequal burdens” test of Harrah’s grooming policy.²⁵¹ But the majority disagreed with the conclusions of the lower court and the panel majority that sex stereotyped appearance standards can never violate Title VII. Rather, the court ruled:

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

245. *Id.*

246. *Id.* at 1083 (Thomas, J., dissenting).

247. *Id.*

248. *Id.* at 1086.

249. Rehearing en banc was ordered in *Jespersen*, 409 F.3d 1061 (9th Cir. 2005). At oral argument before the en banc court, Jespersen’s counsel, Jennifer Pizer, senior counsel of the Lambda Legal Defense and Education Fund, Inc., argued, among other things, that “her client was androgynous, and it was an affront to her to wear makeup.” David Kravets, *Court Argues If Employers Can Demand Women Wear Makeup*, ASSOCIATED PRESS, June 22, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/06/22/state/n170801D13.DTL&hw=jespersen&sn=001&sc=1000>.

250. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc); *id.* at 1113 (Pregerson, J. dissenting); *id.* at 1117 (Kozinski, J., dissenting).

251. *Id.* at 1106 (majority opinion).

With respect to sex stereotyping, we hold that appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping, but that on this record Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping.²⁵²

In applying the “unequal burdens” test, the court ruled that, to establish a prima facie case of discriminatory intent in cases involving an employer’s sex-based appearance standards, the plaintiff must produce evidence of the disparate effects that the policy—considered in its entirety—has on men and women.²⁵³ The court distinguished Jespersen’s situation from the *Gerdom* and *Frank* cases,²⁵⁴ which had invalidated weight restrictions for female flight attendants, on the grounds that these involved policies that on their face burdened only women.²⁵⁵ Moreover, whereas the weight restrictions in *Gerdom* had also been found to be facially discriminatory because they attempted “to create a sexual image for the airline,”²⁵⁶ the *Jespersen* court made the (conclusory) assertion that Harrah’s “Personal Best” requirements were not “on their face . . . more onerous for one gender than the other” because they “appropriately differentiate[d] between the genders.”²⁵⁷ The court also refused Jespersen’s invitation to take judicial notice of the different burdens for men and women—in terms of time and cost—of meeting Harrah’s grooming requirements. Because Jespersen had presented no evidence on this issue, she failed to meet her burden for purposes of opposing Harrah’s motion for summary judgment.

Jespersen similarly failed to defeat summary judgment on her theory of sex stereotyping, although the court did “not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes.”²⁵⁸ The court distinguished the facts underlying Jespersen’s sex-stereotyping claim from the facts in *Price Waterhouse*,²⁵⁹ by emphasizing that Harrah’s policy “[did] not single out Jespersen,” and the policy applied to both male and female bartenders, who all wore the same “unisex” uniforms “while interacting with the public in the context of the entertainment industry.”²⁶⁰ In addition, the court concluded that—unlike the situation in *Price Waterhouse* where a female accountant was expected “to be aggressive and masculine to excel at her job, but then was denied

252. *Id.*

253. *Id.* at 1109.

254. *Gerdom v. Cont’l Airlines*, 692 F.2d 602 (9th Cir. 1982) (en banc); *Frank v. United Airlines*, 216 F.3d 845 (9th Cir. 2000).

255. *Jespersen*, 444 F.3d. at 1109–10.

256. *Id.* at 1109.

257. *Id.*

258. *Id.* at 1113. The recognition of the validity of a theory of sex-stereotyping in *Jespersen* was a significant change in the Ninth Circuit’s approach to sex-based dress and grooming codes, which Jespersen’s attorney, Jennifer Pizer, described as a “silver lining” in the court’s decision, which was “actually a step forward” from its analysis in its panel decision and in prior cases. *Analysis of the Humpty Dumpty Decision from Jespersen Attorney Jenny Pizer: Addendum to the 4-16-2006 Barbwire*, “*Humpty Dumpty Justice*,” BARBWIRE, Apr. 14, 2006, available at <http://www.nevadalabor.com/barbwire/barb06/docs/barb4-16-06pizer.html>.

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

260. *Jespersen*, 444 F.3d at 1111–12.

partnership for doing so because of her employer's gender stereotype" that she should appear and behave "more femininely"²⁶¹—

[t]here is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear. The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.²⁶²

In response to Jespersen's argument that the makeup requirement "invites sexualized attention from the public,"²⁶³ the court responded that "[t]his is not a case where the dress or appearance requirement is intended to be sexually provocative, and tending to stereotype women as sex objects. . . . Nor is this a case of sexual harassment."²⁶⁴ First, because Jespersen was "asked only to wear a unisex uniform that covered her entire body and was designed for men and women," Harrah's overall dress and grooming policy did not "on its face, indicate any discriminatory or sexually stereotypical intent."²⁶⁵ Second, unlike the situations in the *Rene* and *Nichols* cases,²⁶⁶ where the plaintiffs made actionable Title VII claims based on the "sexual harassment of an employee because of that employee's failure to conform to commonly-accepted gender stereotypes,"²⁶⁷ Jespersen did not allege that Harrah's "Personal Best" policy subjected her to a hostile work environment. The court concluded that—faced with only "the subjective reaction of a single employee" and "no evidence of stereotypical motivation on the part of the employer"—it could not let Jespersen's case go to trial under a theory of sex-stereotyping.²⁶⁸

Judge Pregersen's dissent, joined by Judges Kozinski, Graber, and W. Fletcher, agreed with the majority that Jespersen had failed to produce sufficient evidence under an "undue burdens" analysis and that dress and grooming

261. *Id.* at 1111.

262. *Id.* at 1112. When the en banc majority in *Jespersen* articulated its views on Jespersen's subjective response to wearing makeup, it implicitly invoked both "slippery slope" and "floodgates" metaphors:

We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.

Id.

263. Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 25.

264. *Jespersen*, 444 F.3d at 1112.

265. *Id.* The court distinguished Harrah's bartender uniforms from the revealing uniform the female lobby attendant was required to wear in *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981), which subjected her to offensive stares and sexual comments from men using the building lobby.

266. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

267. *Jespersen*, 444 F.3d at 1112. See generally *id.* at 1112–13.

268. *Id.* at 1113.

standards motivated by sex-stereotyping can be challenged under Title VII.²⁶⁹ Nevertheless, he believed that Jespersen had presented sufficient evidence to support a claim of sex-stereotyping: Harrah's fired her for refusing to wear "a facial uniform (full makeup)" that was required only for female bartenders, and the company's image consultants "created a facial template for each woman" and "dictated how and where the makeup had to be applied."²⁷⁰ Moreover, Harrah's reliance on sex-stereotyped cultural assumptions about whether and how women should use cosmetics to achieve a "professional appearance" was sufficient evidence of its discriminatory intent to defeat a summary judgment motion.²⁷¹

In a separate dissent joined by Judges Graber and W. Fletcher, Judge Kozinski agreed with and joined in Judge Pregersen's dissent, except for its conclusion that Jespersen had not produced sufficient evidence of "undue burden" to create a triable issue of fact.²⁷² Asking "Is there any doubt that putting on makeup costs money and takes time?," Judge Kozinski concluded that the court "could—and should—take judicial notice of these incontrovertible facts."²⁷³ He also believed it was inappropriate for the court to dismiss Jespersen's "discomfort" about wearing makeup as "unreasonable or idiosyncratic."²⁷⁴ Judge Kozinski wrote:

Women's faces, just like those of men, can be perfectly presentable without makeup: it is a cultural artifact that women raised in the United States learn to put on—and presumably enjoy wearing—cosmetics. But cultural norms change [A] large (and perhaps growing) number of women choose to present themselves to the world without makeup. I see no justification for forcing them to conform to Harrah's quaint notion of what a "real woman" looks like.²⁷⁵

V. BRANDING, SEX STEREOTYPING, AND EMPLOYMENT DISCRIMINATION LAW IN *JESPERSEN*

A. Creating and Defending the Harrah's Brand

Why would Harrah's Operating Company, a wholly owned subsidiary of Harrah's Entertainment (which, by 2006, was "the largest casino operator in the world"),²⁷⁶ choose to litigate the *Jespersen* case through several appeals when, at any point, it could have easily made a substantial monetary settlement offer²⁷⁷ to

269. *Id.* (Pregersen, J., dissenting).

270. *Id.* at 1114.

271. *Id.* at 1116–17. *See also infra* text accompanying notes 449–52 (discussing Judge Pregersen's dissent).

272. *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting).

273. *Id.*

274. *Id.*

275. *Id.* at 1118.

276. Peter Edmonston & Michael J. de la Merced, *\$15 Billion Deal for Harrah's May Put Other Casinos into Play*, N.Y. TIMES, Oct. 3, 2006, at C3. *See also infra* note 355 and accompanying text.

277. To put a potential monetary settlement with Jespersen in perspective with other expenses a major gaming operator like Harrah's would have, it is interesting to consider what Harrah's

one former service employee? For Harrah's both the costs and risks of litigating were high, but the stakes were worth the gamble: Harrah's Entertainment was determined to protect its ability to create, maintain, and improve the Harrah's brand by regulating the dress, appearance, and grooming of every frontline service worker. From the beginning of the lawsuit, Harrah's and its industry supporters in the sales, service, entertainment, and hotel industries²⁷⁸ viewed the case as a threat to corporate branding. Harrah's 2003 brief to the Ninth Circuit argued that the company's dress and grooming program "was a comprehensive initiative to improve the overall service performance of the Beverage Department, which included the creation of a national brand standard. If one employee failed to comply, the brand standard failed."²⁷⁹

1. "If one employee failed to comply, the brand standard failed."

The notion that one employee's failure to wear makeup could destroy Harrah's corporate brand, which on its face seems hyperbolic, is explained by the history of how the brand was created (and is enforced) and how its meaning has evolved with changes in the form and structure of the corporate organization. Darlene Jespersen, positioned near the bottom of Harrah's corporate hierarchy and bound to the company by her own notions of loyalty and her pride in her abilities to serve her customers, could scarcely have understood how her bare, clean face could threaten the Harrah's brand.

At Harrah's, the company brand was initially created in 1937 by the founder of the company, Bill Harrah, and enforced primarily through personal loyalty to him and his philosophy, but also by the bureaucratic rules and hierarchies of management he created to run his casinos. After his death in 1978, and during a period of expansive growth and corporate reorganization, the bureaucratic ethic and loyalty to the norms and rules of the corporation replaced personal dependence on the founder.²⁸⁰ By 1998, the enterprise—now a giant

ordinarily spends on "comps" in order to earn and maintain the loyalty of valued customers. Business writer Robert L. Shook reported that "[i]n the year ending 2002, Harrah's comped an estimated \$300 million to customers, or about 7.5 percent of the company's gross revenues" ROBERT L. SHOOK, JACKPOT! HARRAH'S WINNING SECRETS FOR CUSTOMER LOYALTY 288 (2003). See also *infra* note 371 and accompanying text.

278. Three amici curiae jointly authored a brief in support of Harrah's Operating Company before the Court of Appeals for the Ninth Circuit. See Brief of Counsel 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 WL 22340442. The Council for Employment Law Equity ("CELE") is a nonprofit organization of major employers in sales and service operations. *Id.* at 1. The other two organizations, the American Hotel and Lodging Association and the California Hotel and Lodging Association, are national and statewide associations that promote the interests of the hotel and lodging industry.

279. Appellee's Answering Brief at 34, *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2003 WL 22716702. The fact that Harrah's offered Jespersen her job back without requiring her to wear makeup belies Harrah's claim about the effect of one employee's noncompliance with the makeup rule on its brand. See *infra* notes 561-62 and accompanying text. See also *Jespersen*, 444 F.3d at 1114 n.2 (Pregersen, J., dissenting) (noting that "there is little doubt that [Harrah's] 'Personal Best' policy is not a business necessity, as Harrah's quietly disposed of this policy after Jespersen filed suit").

280. See CHARLES HECKSCHER, WHITE-COLLAR BLUES: MANAGEMENT LOYALTIES IN AN AGE OF CORPORATE RESTRUCTURING 19-21 (1995).

entertainment business—had a new leader, Gary Loveman, an outsider brought in from the Harvard Business School, who introduced new technologies and marketing strategies, fired long-time managers and replaced them with professional managers, thereby breaking old ties to the Harrah's bureaucracy.²⁸¹ What Loveman demanded of his managers and service employees was complete fealty to the corporate mission of creating customer loyalty.²⁸² Branding, and enforcing the brand through regulation of service employees, became central to that mission. Loveman assumed that uniform appearance of the service workers added value to the services they delivered to customers.²⁸³ Moreover, the assumption underlying the new grooming rules was that they also pleased the employees, aligning the interests of corporation, customer, and employee for the profit of the corporation.²⁸⁴

2. *The Cult of Personal Loyalty: Bill Harrah's Image—Honest, Clean, and Trustworthy*

The company that Darlene Jespersen sued in 2001 was quite different from the company that hired her as a dishwasher in 1979 and shortly thereafter promoted her to bartender. The transformation of Harrah's from an owner-operated local bingo parlor into the world's largest gambling corporation—which overlaps, in part, with the twenty years of Jespersen's tenure as a Harrah's bartender—helps explain the disjunction between the views of the plaintiff and the defendant in the *Jespersen* lawsuit about the nature of the employment relationship, about gender relations in the workplace, and about management prerogatives and employee autonomy. Her story begins not long after the death of its founder, Bill Harrah, and ends after a number of significant transformations. During this time, Jespersen was unwittingly caught up in, and subjected to, changes in corporate operating and marketing strategies, in technology, in financing and investment, and in management style. All of these changes were facilitated by changing legal regimes that expanded legalized gambling outside of Nevada—throughout the United States and on Native American lands. Many of the changes were underway in the late 1970s, but the next two decades witnessed significant alterations in the way that Harrah's ran its business and managed its employees.

The transformative nature of these developments was perhaps felt most strongly at Harrah's Reno casino where Jespersen worked. After opening a small bingo parlor in Reno, Nevada, in 1937, William F. ("Bill") Harrah began to build his gaming and entertainment empire in earnest in 1946 with the opening of his first casino in Reno.²⁸⁵ Within a decade, Harrah expanded his gaming operations

281. See *infra* text accompanying notes 360–62, 368–71.

282. See, e.g., SHOOK, *supra* note 277, at 174.

283. In this, Loveman was following the lead of many other corporate service providers such as Disney and McDonald's. See, e.g., KARL ALBRECHT, *AT AMERICA'S SERVICE: HOW CORPORATIONS CAN REVOLUTIONIZE THE WAY THEY TREAT THEIR CUSTOMERS* 130 (1988) (discussing the value of employee appearance at Disney theme parks).

284. See SHOOK, *supra* note 277, at 174.

285. SHOOK, *supra* note 277, at 11, 21, 315. For a biography of Bill Harrah, see LEON MANDEL, *WILLIAM FISK HARRAH: THE LIFE AND TIMES OF A GAMBLING MAGNATE* (1981).

to Lake Tahoe,²⁸⁶ and by 1962, he had added a 400-room hotel to his Reno casino.²⁸⁷ The financial success of these expansions was to a great degree assured by the Nevada monopoly on legalized gambling.²⁸⁸ Unlike the rapidly growing casino operations in Las Vegas, Bill Harrah's northwestern Nevada gaming operations had never been associated with criminals or with underworld financing, and he had a personal reputation of being honest, meticulous, and above-board in his accounting practices.²⁸⁹ The enhanced regulatory regime that Nevada adopted in the 1950s leveled the playing field for casino operators like Bill Harrah who did not use their casinos to launder money from illegal criminal activities elsewhere and who eschewed skimming and violent debt collection tactics.²⁹⁰ Significantly, the Harrah's name and image was built on the personal reputation of a man who had no taint of crime and no link to the notorious Italian and Jewish mobsters who made their fortunes on the Las Vegas Strip.²⁹¹

From the beginning, Bill Harrah relied on the image of honesty and respectability he cultivated at his casinos in order to expand his customer base.²⁹² Harrah was a strict disciplinarian when it came to punctuality, honesty, and fair treatment of customers.²⁹³ In 1975, he told the new Harrah's president, Lloyd Dyer, "[T]he three things I want done are: I want the customer treated properly; I want the employees treated properly—if we do that we won't have to worry about unions; and I want the place maintained and clean at all times."²⁹⁴ As Harrah's company grew, it was able to build on the early reputation of the Harrah's name, stressing the distinctions between respectable gaming with honest employees in the clean, well-lighted environment of his casinos and crooked gambling with sleazy dealers in the dark casinos that were typical in the early years of Nevada gambling.²⁹⁵ To increase customer confidence in his employees, Harrah tended to hire "wholesome young people from places such as Idaho and Utah [who] would present a more trustworthy image."²⁹⁶ During the early years when Harrah's Lake Tahoe casino was only a summer resort and

286. SHOOK, *supra* note 277, at 57, 315.

287. *Id.* at 21, 315.

288. The Nevada monopoly effectively resulted from the 1950 anti-gambling crusade of Senator Estes Kefauver. *See, e.g.*, DAVID G. SCHWARTZ, *SUBURBAN XANADU: THE CASINO RESORT ON THE LAS VEGAS STRIP AND BEYOND* 68–72 (2003); SHOOK, *supra* note 277, at 112.

289. *See, e.g.*, SHOOK, *supra* note 277, at 28, 30–31.

290. Nevada established tighter regulatory controls over casinos with the establishment of the Gaming Control Board as part of the Nevada Tax Commission in 1955, followed by the Nevada Gaming Commission in 1959. *See, e.g.*, SHOOK, *supra* note 277, at 41, 112–13.

291. SCHWARTZ, *supra* note 288, at 103 ("[F]or many observers, Harrah stood out favorably, in stark contrast to operators of Jewish and Italian extraction with 'tarnished' images.").

292. SHOOK, *supra* note 277, at 28.

293. *Id.* at 30–33.

294. *Id.* at 28 (quoting from interview with Lloyd Dyer, president of Harrah's from 1975 to 1980, about Bill Harrah's "philosophy").

295. *See* SHOOK, *supra* note 277, at 29 (quoting Lloyd Dyer about how the "physical atmosphere of Harrah's was different than other casinos"); *see also id.* at 28 (discussing Bill Harrah's refusal to hire "shills"—"casino employees who played alongside the real customers"—because even if the shill did not cheat, "customers might feel that the shills could hurt their odds" and, "[t]o Bill Harrah, customer perception of other customers mattered a lot").

296. *Id.* at 34.

the Reno casino business surged in summers, Harrah would staff his service jobs with college students because they were “bright and eager” and “their clean-cut looks presented a sense of trust.”²⁹⁷

To create the right look, the appearance of Harrah’s employees was highly regulated. Business writer Robert Shook observes,

Everyone [on the casino floor] was required to wear a pair of black pressed slacks and a clean white shirt. The keno girls wore black skirts, and it was imperative for their stocking seams to be straight. Bill Harrah also insisted that his people having contact with customers be in good physical condition. Employees who were excessively overweight were told to shed some pounds or risk being let go. . . . When senior managers reported to work each morning, they were required to “weigh in.”

....

It was always easy to spot a new Harrah’s employee on a break from the casino floor because that was the person constantly studying a notebook of the company’s training rules and regulations. In addition to dress codes, the notebook outlined details about hairstyle and the use of cosmetics. Men, for example, were not permitted to have beards.

....

The rules were strict, but there were few complaints. . . . Being employed by Harrah’s was viewed in the community as being somebody special. Harrah’s employees held their heads high—they were among the elite of casino workers.²⁹⁸

Employee appearance reinforced Bill Harrah’s brand message that gaming at his properties was clean, honest, and reputable. As Harrah’s industry supporters wrote in their amici curiae brief in the *Jespersen* case:

From times past there is a perception—more properly a misconception—that within the gaming industry there is an image often cast in the media as unsavory. The gaming industry has worked tirelessly to change this image, in part through dress and grooming standards for its employees that reflect a professional norm. The cities of Reno and Las Vegas, and employers in the gaming and resort industries, have made extensive efforts to distance themselves from the antiquated and archaic perception of gaming establishments.

....

Harrah’s is a respected name in the casino entertainment industry. It has carved a niche for itself at the top. Although there may be a lesser expectation of professionalism at some gaming establishments, there are higher standards of professionalism, responsibility and appearance for employees at an established,

297. *Id.*

298. *Id.* at 35. Harrah’s no longer prohibits facial hair on male beverage servers or bartenders. See *supra* note 190 (quoting Harrah’s amended “Personal Best” policy). See generally Harrah’s Operating Co., *Brand Standard Grooming and Appearance*, Def.’s Ex. E, at 79, *Jespersen v. Harrah’s Operating Co.*, 280 F. Supp. 2d 1189 (2002) (on file with authors) [hereinafter Harrah’s *Brand Standard*].

respected property, such as Harrah's. Customers expect, and are more comfortable with, employees who reflect such standards.²⁹⁹

Bill Harrah's solid reputation and sound business practices enabled the company to begin public trading of its shares in the early 1970s, the first "pure gaming company" to do so.³⁰⁰ Like other casinos that were then corporatizing and merging with national hotel chains,³⁰¹ Harrah's shifted from a privately-held proprietorship to a publicly-traded corporation in order to raise money for expansions and renovations.³⁰² Although the ownership of Harrah's Corporation was diluted through the public sale of its stock, Bill Harrah continued to be the majority shareholder³⁰³ and exerted his own personal management style and authority on the running of the company and the operations of his casinos.³⁰⁴

When Bill Harrah died in 1978, he left a legacy of sorts. In his casinos, Harrah had both demanded and rewarded the loyalty of his employees. When Darlene Jespersen began working for Harrah's Reno Casino in 1979, many of the managers and supervisors that Bill Harrah had hired and trained when he was the on-site owner were still employed there. The cult of personal loyalty and the employment practices he encouraged would have been very much evident in the behavior and attitudes of the managerial and supervisory employees throughout the casino hierarchy.³⁰⁵ This cult of loyalty was cemented through the company's adoption of favorable employee benefits,³⁰⁶ routinized, rationalized management practices, oral promises of "lifetime" job security to managers,³⁰⁷ written employee handbooks establishing fair procedures for

299. Brief of Council for Employment Law Equity et al., *supra* note 278, at 18.

300. Harrah's first sold shares to the public in 1971. SHOOK, *supra* note 277, at 61-62. This was made possible by Nevada's enactment of the Corporate Gaming Acts of 1967 and 1968, which loosened restrictions requiring all stockholders in gaming establishments to have gaming licenses. See SCHWARTZ, *supra* note 288, at 160; see also SHOOK, *supra* note 277, at 41. In 1973, Harrah's was the first casino to be listed on the New York Stock Exchange. *Id.* at 62, 315.

301. At the same time, other Nevada casinos were being acquired by major hotel chains. For example, in 1971, Hilton Hotels, "the first major hotel chain to move into the gaming industry," acquired the Las Vegas casino properties belonging to Kirk Kerkorian, including the Flamingo and the International. SCHWARTZ, *supra* note 288, at 162. See also SHOOK, *supra* note 277, at 72.

302. SCHWARTZ, *supra* note 288, at 114.

303. At the time of his death, Bill Harrah owned eighty-six percent of the company's stock. SHOOK, *supra* note 277, at 73.

304. SCHWARTZ, *supra* note 288, at 162 ("William Harrah in Reno . . . retain[ed] control over this operations while offering shares to the general public. Public ownership did not necessarily mean any major changes in the management or personnel of casinos.") (alteration added).

305. The cult-like devotion of Harrah's employees to their company has been compared to that of Disney World's and Nordstrom's employees. See SHOOK, *supra* note 277, at 170-71.

306. In 2000, Harrah's senior vice president of human resources said: "We pay people well, give them excellent benefits, and treat them fairly. We also recognize good performance and reward them for it." Interview by Robert L. Shook with Marilyn Winn, Senior Vice President of Human Resources, Harrah's Entertainment (May 13, 2000), *in id.* at 274, 313.

307. See, e.g., *Yeager v. Harrah's Club, Inc.*, 897 P.2d 1093, 1095 (Nev. 1995) (holding that plaintiff's "uncorroborated assertions" of oral promises by Bill Harrah and other Harrah's executives "that his employment would continue until retirement unless he was terminated for cause" are not sufficient for purposes of a summary judgment motion to "overcome the presumption of at-will employment" in Nevada).

discipline,³⁰⁸ as well as its practice of hiring from within the company, with well-publicized examples of managers who had worked their way up through the enterprise.³⁰⁹ As sociologist Charles Heckscher has observed, these paternalistic corporate structures and practices—“personal dependence” on an “autocratic[,] . . . successful founder,” “near-guarantees of employment security,” bureaucracy, and internal labor markets³¹⁰—both create loyalty from middle managers in corporations and, paradoxically, can lead to instability in the organization.³¹¹ By the year 2000, when Jespersen was fired, many, but not all, aspects of the paternalistic norms of loyalty to Bill Harrah’s image and philosophy had given way to new styles of management and new assumptions about the relationship between service workers, the customers, and the company.

3. *Bill Harrah’s Feminization of Casinos: “A Safe Place to Visit”*

Jespersen’s rapid advance from a lowly dishwasher to a position as a bartender was not unusual for a woman, neither within the culture of Harrah’s company nor within the community of Reno, but it would have been somewhat unusual in one of the major casinos in Las Vegas at the time.³¹² Jespersen worked as a dishwasher at Harrah’s for about six months and then as a barback for about six months before her promotion to bartender. During this time, she attended bar school³¹³ and began her acculturation into the job of a bartender and the organization of the casino. The operational hierarchy of most casinos at that time was generally gendered from top to bottom. The casino managers, shift managers, dealers, pit bosses, floormen, bartenders, and security guards were invariably men; and women were either entertainers (showgirls), cocktail waitresses, or “change girls,” who made change for the slot machines.³¹⁴ In the 1970s, the casinos on the Strip in Las Vegas finally lifted their ban on women dealers.³¹⁵ Nevertheless, historian David G. Schwartz notes that “[o]pportunities for women, as for minorities, began to expand in the 1970s, but it would take years for these changes to become readily apparent.”³¹⁶

The situation for women in Reno was quite different. Schwartz writes that, in Reno,

308. *Id.* at 1097 (discussing plaintiff’s claims that his reliance on “written promises in the employee handbook converted his employment status into termination only for cause”).

309. See SHOOK, *supra* note 277, at 181–86 (discussing the company’s long practice of “hiring from within”).

310. HECKSCHER, *supra* note 280, at 19, 20, 24. For a helpful summary of the literature on internal labor markets, see KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 51–63 (2004).

311. HECKSCHER, *supra* note 280, at 11.

312. For a discussion of the feminization of the occupation of bartending generally, see *infra* Part VI.

313. See Deposition of Darlene Betty Jespersen, at 12, *Jespersen v. Harrah’s Operating Co.*, 280 F. Supp. 2d 1189 (D. Nev. May 22, 2002) (No. CV-N-01-0401-ECR-VPC), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/365.pdf.

314. SCHWARTZ, *supra* note 288, at 57.

315. *Id.* at 171. See also Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 67 n.10 & accompanying text (2006) (discussing the ban on female blackjack dealers in Las Vegas).

316. SCHWARTZ, *supra* note 288, at 171.

women made up the bulk of the dealing corps and handled most daily patron-casino interactions. Most contemporary accounts depicted Reno women as mundane and unglamorous. In [Las Vegas's] Strip resorts, by contrast, women employees made their strongest impressions onstage, and they were usually depicted as exotic, desirable, and quite possibly attainable.³¹⁷

Bill Harrah was instrumental in breaking down the gender barrier in Reno casinos. In his book about Harrah's business successes, Robert L. Shook writes that Harrah began hiring women dealers during the 1950s after he noticed that female dealers were working in a competitor's gambling club.³¹⁸ Shook reports that Harrah responded to the protests of his "old-time employees," who "claim[ed] that women couldn't deal or keep control of the game," with a business rationale:

[T]he big thing with women and the reason I did it, was because tourists would look in, but they wouldn't *come* in. I overheard people say that there were no women in there. We did have cocktail waitresses, but they'd look in and see all these men standing at the tables and it was kind of scary. But when they looked in Harold's Club they could see ladies there, so in they'd go. They figured that if women were working in the casino, it was a safe place to visit. As far as I was concerned, that's what convinced me.³¹⁹

So, female employees were good for business, as were fresh-faced, young employees, hired and retained for their personal qualities of honesty, trustworthiness, and ability to relate to customers.³²⁰ Darlene Jespersen, hired in her twenties, would have fit these requirements. She would have been comfortable working as a female bartender in a casino with female dealers on the floor. Her personal qualities would have been highly valued for a bartender position. Beverage industry managers generally look for employees who are "motivated, open-minded, and enjoy working with people," but above all, honest.³²¹ The fact that she is a big, tall woman³²² no doubt helped her win her entrée into the bartender position, where her height and physical presence would be an asset in dealing with intoxicated customers. Her pleasant, clean-scrubbed, open face would have been reassuring and inviting to bar patrons of both sexes.³²³ A study of beverage management practices reported that "[o]ne industry executive looks for, 'Qualities that cannot always be taught. I push for

317. *Id.* at 57–58. See also David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 240 (2004) (quoting SCHWARTZ, *supra* note 288, at 57–58).

318. SHOOK, *supra* note 277, at 35.

319. *Id.* (quoting Bill Harrah).

320. See *id.* at 193 (discussing Harrah's "long history of selecting friendly people with a desire to serve people"). Female dealers were also good for business because they would work for lower wages than male dealers. McGinley, *supra* note 315, at 67 n.10.

321. DAVID K. HAYES & JACK D. NINEMEIER, *BAR AND BEVERAGE MANAGEMENT AND OPERATIONS* 63 (1987).

322. Darlene Jespersen has been described as being "big and tall" with "strong hands" and "project[ing] the calm, commanding, but friendly, presence of an old-fashioned barkeep." Jon Christensen, *Rouge Rogue*, MOTHER JONES, Mar.–Apr. 2001, at 22, available at <http://web.ebscohost.com/ehost/detail?vid=3&hid=120&sid=79e9fc34-ba19-4fb2-ad09-99ebe4296c00%40sessionmgr105>. Jespersen reports that she is "5 feet 9 1/2 inches" tall. *Id.*

323. Jespersen has been described as having a "naturally ruddy, clear complexion." *Id.*

speed, efficiency, and courtesy. . . . I also judge them by their appearance. If they're unkempt, they're not for us."³²⁴ At Harrah's Reno casino, Jespersen was not exceptional in being a woman doing a "man's job," and she had the qualities necessary to deliver on the quality of customer service promised by the Harrah's name.

Nevertheless, even with Bill Harrah's feminization of many of the traditionally male casino jobs, the industry remained highly gendered in Reno and elsewhere. A study of cocktail waitress jobs in Reno casinos conducted from 1988 to 1995 concluded that the sexualized environment of casinos, including dress codes, contributed to "gender hegemony."³²⁵ Significantly, the study found that, although "[b]artending has historically been a male job in the United States"³²⁶—and by the 1980s feminization of bartending throughout the country was well underway,³²⁷ "Reno casino bartenders [were] predominantly male."³²⁸ Thus, within the local Reno job market, Jespersen would have been viewed as holding a "man's job," distinguishing her work and status as a bartender from the predominantly female "beverage servers"—the casino cocktail waitresses.

4. *The Rise of the Bureaucratic Ethic and Corporate Loyalty: "A Cookie-Cutter Employment Policy"*

Why would Harrah's allow Jespersen to ignore its makeup rules for female beverage servers for so many years and then, suddenly, demand compliance in 2000, even if it meant losing a valued employee?³²⁹ A sociological perspective takes into account the changes in Harrah's size, structure, management, marketing, and operations between 1980 and 2000. Charles Heckscher's 1995 study of management loyalty, *White-Collar Blues*,³³⁰ offers a framework for understanding this history. He writes, "The historical patterns of motivation, at least those identifiable in business organizations, are three: personal dependence, the bureaucratic ethic, and corporate loyalty. The first two have largely been relegated by their limitations to the waste heap of history; but the third remains dominant in most large corporations."³³¹

324. HAYES & NINEMEIER, *supra* note 321, at 63.

325. Lorraine Bayard de Volo, *Service and Surveillance: Infrapolitics at Work Among Casino Cocktail Waitresses*, 10 SOC. POL. 346, 359–61 (Fall 2003).

326. *Id.* at 361.

327. See *infra* Part VI (discussing the feminization of bartending).

328. Bayard de Volo, *supra* note 325, at 361.

329. Catherine Fisk has suggested that the answer may lie in an attempt by Harrah's management to exert more control over its employees. See Fisk, *supra* note 92, at 1116–17. Mitu Gulati observed that this effort was specifically targeted at its unionized facilities in Las Vegas, where workers were less malleable and more difficult to discipline. Conversation with Mitu Gulati, Professor of Law, Duke University School of Law, in Chapel Hill, NC (June 2006). If this account is true, it is only a partial explanation, which describes a particular response to a local situation. It is also not very satisfactory in explaining why Jespersen, who worked in Reno, in a casino that was not unionized, was fired. There is no suggestion that Jespersen was part of an incipient union organizing campaign. In fact, firing a well-liked, loyal employee like Jespersen might invite an organizing campaign, which may explain why Harrah's offered to rehire her and waive its makeup requirement in her case.

330. See generally HECKSCHER, *supra* note 280.

331. *Id.* at 18–19.

In 1980, not long after Jespersen was hired, Harrah's was acquired by Holiday Inns, then "the largest lodging company in the world,"³³² which was building a casino in Atlantic City, New Jersey.³³³ Holiday's acquisition of Harrah's company was a logical marriage of its well-established national hotel business with the burgeoning gaming business. For the next decade, however, the Harrah's headquarters stayed in Reno. During this period, the culture of Harrah's Reno casino would continue to maintain a degree of local autonomy within the Holiday Inn corporate structure, balancing the inevitable passing of the personal style of on-site ownership and management characterized by Bill Harrah and his loyal, job-trained team of managers against the impersonal dictates of a distant parent corporate board dealing with multiple properties throughout the United States with professional managers drawn from both the casino and hotel industries.³³⁴ Inevitably there were clashes between the corporate cultures of Harrah's and the much larger Holiday Inns—Holiday Inns was "more structured . . . , and because of its sheer size, the company had become bureaucratized."³³⁵

It was during the early 1980s that Darlene Jespersen, then still a young woman in her twenties, first encountered Harrah's grooming code. One commentator has written that the company "always had a cookie-cutter employment policy" and that Bill Harrah himself "promulgated appearance rules."³³⁶ Whether Bill Harrah required or encouraged female beverage service employees to wear makeup is not clear.³³⁷ What is certain is that in 1980, by the time Jespersen began working at the Reno casino, Bill Harrah was no longer alive to enforce his appearance rules for frontline service workers and the merger with Holiday Inns may have affected the way mid-level managers and frontline supervisors enforced bureaucratic rules. This might have made a difference when Jespersen was required to get a makeover for work to demonstrate how makeup would improve her looks, and then, just a few weeks later was permitted to come to work without makeup. In her Nevada state court lawsuit, Jespersen alleged that "she had worn makeup for a brief period early-on in her employment," but the policy was not enforced even though the "the

332. SHOOK, *supra* note 277, at 87.

333. *Id.* at 67–68, 73–74, 315. On February 29, 1980, Holiday Inns acquired Harrah's, buying out the six million shares then held in Bill Harrah's estate for \$213 million. *Id.* at 73. At the time, Holiday Inns owned 1,600 hotels and was expanding into the gaming business in Atlantic City and Las Vegas. *Id.* at 67, 73–74, 315.

334. For example, Schwartz describes "the managerial and operational splicing between hotel corporations and 'casino people' that went on in the 1970s" when Hilton acquired the Flamingo and other Las Vegas properties. SCHWARTZ, *supra* note 288, at 162.

335. SHOOK, *supra* note 277, at 88. *See generally id.* at 87–91 (describing differences between the corporate culture of Harrah's and Holiday Inns in 1980).

336. Barbano, *supra* note 193.

337. Shook reports that Harrah's employees were given a "notebook [that] outlined details about hairstyle and the use of cosmetics." SHOOK, *supra* note 277, at 35. The *Jespersen* en banc decision states that Harrah's "maintained a policy encouraging female beverage servers to wear makeup. . . . [H]owever, . . . the policy was not enforced until 2000." *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1107 (9th Cir. 2006) (alteration added).

makeup policy had been in place for over ten years.”³³⁸ Indeed, one of the theories of her state law suit was that “by allowing her to forgo wearing makeup for over twenty years despite the alleged existence of a handbook policy requiring its use, Harrah’s impliedly promised not to fire her for non-compliance with a makeup requirement, and she relied on this promise by continuing to work for Harrah’s.”³³⁹

Rather than an enforceable promise, however, sociologist Charles Heckscher would describe Harrah’s complicity in Jespersen’s rule breaking as an example of the workings of the bureaucratic ethic which would permit the local casino managers and supervisors to interpret bureaucratic rules flexibly in light of the particular situations they encountered.³⁴⁰ The creation and evolution of Harrah’s gaming “brand” were critically dependent on the forms of loyalty Heckscher describes. Today, Harrah’s management ethos could be described as being in an uncomfortable transition—abandoning total reliance on corporate loyalty, as well as other forms of paternalistic control, and, in part, embracing scientific norms that Heckscher refers to as characterizing a “professional” community, one that is “moving from an inward focus on building capacity to an outward focus on meeting the needs of markets and customers.”³⁴¹

The Nevada Supreme Court, with no prompting from sociologists, of course found that “even if the non-enforcement of the policy did create an expectation that Jespersen would be continually allowed to forgo wearing makeup, this expectation is insufficient to convert an at-will employment into one allowing termination only for cause.”³⁴² Under employment-at-will, employees should understand that managerial consent to deviations from bureaucratic rules are not promises upon which employees can rely, but are rather evidence of the smooth functioning of the bureaucracy and the efficacy of the bureaucratic ethic. Moreover, while Jespersen may have viewed her refusal to wear makeup as a form of individual resistance to employer control, from a

338. *Jespersen v. Harrah’s Operating Co.*, 131 P.3d 614 (Nev. 2004) (unpublished table decision), No. 40587, slip. op. at 1 (Nev. June 7, 2004) (on file with authors).

339. *Id.* at 5.

340. See generally HECKSCHER, *supra* note 280, at 20–23. Heckscher writes,

The great advantage of the bureaucratic form of loyalty is that it directs members’ attachment not toward an individual, but toward an impersonal task. It therefore allows a great expansion of the scope of coordination. It requires neither emotional reinforcement from the leader—the satisfaction comes from a job well done rather than from personal rewards—nor detailed dictates. The loyal bureaucrat figures out how to carry out the directions received. . . .

. . . The bureaucratic ethic, in short, leads the employee to do anything asked by the leader that is *proper* (by the rules), but not anything that is improper.

Id. at 21.

341. HECKSCHER, *supra* note 280, at 145, 173. Heckscher writes,

The ideal image in the dynamic companies [which he studied] . . . is a voluntary coming together of *individuals with commitments* and an *organization with a mission*. This is the relationship that I have referred to as a “professional” one, forming a community of purpose. It is not a full reality anywhere, but it is in some places an ideal shaping definitions of who owes what to whom.

Id. at 145 (alteration added).

342. *Jespersen v. Harrah’s Operating Co.*, 131 P.3d 614 (Nev. 2004) (unpublished table decision), No. 40587, slip. op. at 1 (Nev. June 7, 2004) (on file with authors).

management perspective, her resistance was co-opted in the 1980s and transformed into an opportunity for the corporation to display the flexibility and autonomy of the local managers and to cement her loyalty to the company.

From 1980 to 1990, Holiday Inns, now renamed Holiday Corporation, expanded its hotel business into the all-suite and extended-stay hotel market,³⁴³ while Harrah's looked for new markets in order to remain competitive in the now-corporatized casino industry.³⁴⁴ In 1990, further corporate reorganization resulted in Harrah's coming under the umbrella of Promus Companies.³⁴⁵ Shortly thereafter, Harrah's relocated its headquarters from Reno to Memphis, the "birthplace and hometown of Holiday Inns."³⁴⁶ Under the leadership of the new president and CEO of Promus, Philip G. Satre—an attorney who joined Harrah's shortly after Bill Harrah died, Harrah's reasserted its competitive posture in the Las Vegas gaming market by renovating the Holiday Casino in 1992 and renaming it Harrah's Las Vegas.³⁴⁷ With the loosening of anti-gaming laws in other states, Harrah's then began a period of unprecedented expansion, building new casinos throughout the South and the American heartland, wherever state gaming regulations and local politics permitted.³⁴⁸ Even the Native American gaming market, which other casino operators viewed as unwelcome competition, drew Harrah's interest: Between 1994 and 1998, Harrah's opened casinos in partnership with Native American tribes on their lands in Arizona, North Carolina, and Kansas.³⁴⁹ In the midst of this rapid expansion, in 1995, Promus spun off its hotel assets into a new corporation and renamed the remaining Harrah's assets Harrah's Entertainment.³⁵⁰ In addition to building new casinos, Harrah's Entertainment continued its growth through acquisitions of other casinos.³⁵¹ Through the 1990s Harrah's went from owning

343. See SHOOK, *supra* note 277, at 316.

344. In 1988, Harrah's opened a new casino in Laughlin, Nevada, defying the trend of building up and out in Las Vegas and along the Strip, and of locating casinos in destination locales. *Id.* at 103, 139–40.

345. Holiday Corporation sold its Holiday Inns hotel business to Bass PLC, and placed its remaining properties—including Harrah's, Embassy Suites, Hampton Inn, and Homewood Suites—under a new entity, Promus Companies. SHOOK, *supra* note 277, at 140, 316. For a history of the Promus Companies, see generally TAKIA MAHMOOD & STEPHEN P. BRADLEY, HARV. BUS. SCH., CASE STUDY NO. 9-795-039: THE PROMUS COMPANIES (1995).

346. Harrah's headquarters remained in Memphis until 1999. SHOOK, *supra* note 277, at 161.

347. *Id.* at 70, 316.

348. Harrah's opened a riverboat casino in Joliet, Illinois, and casinos in Vicksburg and Tunica in 1993; casinos in Shreveport and North Kansas City in 1994; a second casino in Tunica in 1996, a second riverboat casino and hotel in North Kansas City in 1996; and a riverboat casino in Missouri in 1997. See *id.* at 317; see also MAHMOOD & BRADLEY, *supra* note 345, at 3–5.

349. In 1994 Harrah's opened Harrah's Ak-Chin casino on Indian land outside Phoenix. This was followed in 1997 by Harrah's Cherokee Smoky Mountains on Native American land in North Carolina and in 1998 by Prairie Band outside Topeka, Kansas. See SHOOK, *supra* note 277, at 317–18; see also SCHWARTZ, *supra* note 288, at 182–83, 186–92; SHOOK, *supra* note 277, at 115–16 (discussing the effect of the 1988 Indian Gaming Regulatory Act on development of new casinos).

350. Once again, as in 1980, the Harrah's name was listed on the New York Stock Exchange. SHOOK, *supra* note 277, at 97.

351. Harrah's Entertainment acquired Showboat in 1998, which then owned casinos in Atlantic City, New Jersey; East Chicago, Indiana; Las Vegas; and Sydney, Australia. SHOOK, *supra* note 277, at 147, 318.

five to fifteen casinos, and from managing 5,000 to 30,000 employees,³⁵² putting further strain on the enterprise.

In 1999, Harrah's Entertainment again moved its headquarters, this time from Memphis back to Nevada, to the heartland of the gaming industry, Las Vegas.³⁵³ Through these periods of growth, transition, and geographical dislocation, the Harrah's brand—linked to the gaming enterprise built by Bill Harrah—risked being diluted and submerged by competing demands for employee loyalty to different corporate entities with different missions designed to serve different consumers. To succeed, a mid-level manager would have to follow the corporation, moving to new communities and submerging his or her individual identity into the corporate image.³⁵⁴ Jobs of service employees, too, could become casualties of the rise of corporate loyalty as supervisors and managers were fired and replaced, both diminishing the significance of ties of personal loyalty up and down the hierarchy and devaluing the importance of the experience and local knowledge possessed by long-time frontline service workers.

When Darlene Jespersen began working for Harrah's in 1979, the company owned just two casinos in northern Nevada and was run very much in the way it had been during Bill Harrah's lifetime. The company's headquarters was in Reno. Not long after she became a bartender, the significant changes in corporate ownership had begun—the buyout by Holiday Inns, the move of its headquarters to Memphis, the Promus merger, followed by the rapid nationwide expansion of new Harrah's casinos during the 1990s. By the time she was fired, in 2000, the company owned twenty-six casino properties in thirteen states and one foreign country. Her employer, now Harrah's Operating Company, a wholly-owned subsidiary of Harrah's Entertainment, had been bought, submerged within a larger corporation, repackaged, and disbursed throughout the nation. Though Harrah's Entertainment was not yet the largest gaming corporation in the world, it was then well on its way to that outcome, which occurred in 2005, when Harrah's bought Caesar's Entertainment.³⁵⁵

Harrah's went from local and personal ownership with on-site management and control to disbursed, impersonal ownership with

352. VICTORIA CHANG & JEFFREY PFEFFER, STAN. GRAD. SCH. BUS., CASE STUDY NO. OB-45: GARY LOVEMAN AND HARRAH'S ENTERTAINMENT 3 (2003).

353. At the time, Harrah's Entertainment acquired the Rio All-Suites Casino in Las Vegas "with the intention of owning one of the premier resort casinos in Las Vegas." SHOOK, *supra* note 265, at 253.

354. Heckscher, drawing on the work of other sociologists, such as William Whyte in *The Organization Man*, describes the "mechanisms" that corporations use to enforce corporate loyalty, which include the following: "policies of frequent geographic transfers, which had the effect of weakening competing ties to other communities and friends; codes of presentation that defined the 'right' kind of behavior; rituals of passage that reinforced the company image; an ideology of being a good 'member of the team.'" HECKSCHER, *supra* note 280, at 24.

355. According to Wikipedia, "[t]he merger [with Caesar's] made Harrah's the largest gambling company with over 4 million square feet (370,000 m²) of casinos, almost 100,000 employees and over 40 casinos." http://www.en.wikipedia.org/wiki/Harrah%27s_Entertainment (alteration added) (last visited Aug. 11, 2006). At the time of the merger, the prior year's combined revenue of the two corporations was \$8.75 billion. Daniel McGinn, *From Harvard to Las Vegas*, NEWSWEEK, Apr. 18, 2005, at 32.

geographically distant, professionalized management and control. These changes would have necessarily reduced the autonomy and power of the managers of individual casinos. As the corporation grew and added new properties, the consolidation and centralization of human resources and marketing decisions would inevitably reduce the distinctiveness of each casino in these areas. In particular, the idiosyncratic workplace culture of Harrah's Reno Casino where Jespersen worked—which once reflected the personality of its founder, Bill Harrah, the character and history of the city of Reno and its casinos (in opposition to Las Vegas and the Strip), and the attitudes of a devoted (and nonunion) workforce—would be subject to pressures to conform to the new reality of a massive, national (even global) corporation selling a branded, homogenized product that looked the same from Topeka to Tunica, or from Lake Tahoe to Atlantic City.

During Harrah's rapid expansion, the company tried to improve the Harrah's brand and attract new customers. A 1995 Harvard Business School case study of Promus Companies observed, "Each Harrah's property was quite different. . . . In 1994, Harrah's developed brand standards for the signage, entryways, safety features, and the overall feel of its properties. . . ." ³⁵⁶ Then, in 2000, Harrah's adopted and began to enforce new, stricter brand standards for the appearance of its frontline service workers, a shift in marketing strategy that flowed from further changes in the corporate leadership, structure, and mission, as well as uses of technology. Quality customer service has always been a significant component of the Harrah's gaming experience, but employee appearance, like signage, also delivers the corporate brand to customers. Branding means holding supervisors and managers accountable for the hiring and retention of employees based on their "brand delivery competence"—not only their ability to perform their jobs, but also whether they are "the type of person who will best deliver the brand's promise." ³⁵⁷ Darlene Jespersen was fired because Harrah's assumed that, without makeup, she could not deliver the uniform, professional brand of gaming experience promised by the Harrah's name.

5. *Technology and Marketing: Gary Loveman Focuses on Harrah's Branding*

Technology and innovative marketing strategies implemented in the late 1990s speeded up the change in how Harrah's ran its casinos, as well as how it thought about and treated its customers and employees. In 1997, Harrah's began its "Total Gold" program, ³⁵⁸ a computerized database that permitted the casinos to track customer gambling activity and offer rewards to patrons at various levels of play at all Harrah's gaming locations—similar to receiving "free" miles

356. MAHMOOD & BRADLEY, *supra* note 345, at 11.

357. BARLOW & STEWART, *supra* note 13, at 158. Barlow and Stewart describe the practice of Abercrombie & Fitch of hiring "good-looking and young" college students "who look like its catalog models" as an "extreme" example of hiring for "brand delivery competence." *Id.* See *supra* notes 44–46 and accompanying text.

358. SHOOK, *supra* note 277, at 318; see generally *id.* at 216–43 (discussing Harrah's use of technology for customer tracking). In 1998, Harrah's received a patent on its Total Gold tracking program, which it called its "National Customer Recognition System and Method." *Id.* at 318.

from an airline “frequent flyer” program or points toward awards for using a particular credit card.³⁵⁹ This tracking and reward system was taken to a new level of sophistication after Gary Loveman joined Harrah’s Entertainment, Inc., in 1998 as its chief operating officer.³⁶⁰ Unlike the Harrah’s managers who came up through the gaming industry, Loveman, an M.I.T.-trained economist, left a position as an untenured associate professor at Harvard Business School, where he had taught Service Management, consulted for large businesses like Disney and McDonald’s,³⁶¹ and wrote about how corporations could improve profits in service industries.³⁶²

Harrah’s became a giant laboratory for Loveman to test out his marketing and management theories: He would be managing “15 casinos with more than 10,000 hotel rooms, and over 35,000 employees.”³⁶³ In 2000, Loveman recalled his decision to move from academe to industry:

[A]fter nine years of telling people how they ought to do something that I’ve never done myself, I had the desire to see if I could actually do it and make it work. [Harrah’s] offer was the right challenge, because the company wasn’t doing what I thought it should do, so now I had the opportunity to do the job right.³⁶⁴

Doing it “right” meant, in part, implementing ideas in an article he co-authored at the Harvard Business School: “Putting the Service-Profit Chain to Work.”³⁶⁵ The thesis of the article was that successful service managers of the 1990s “understand that in the new economics of service, frontline workers and customers need to be the center of management concern.”³⁶⁶ Drawing on examples from successful service companies like Southwest Airlines and Taco Bell, the article demonstrates how “innovative measurement techniques” can quantify the relationship between “employee satisfaction, loyalty, and productivity” and “the value of products and services delivered.”³⁶⁷

In order to improve Harrah’s “service-profit chain,” Loveman “overhauled Harrah’s marketing, replacing the industry veterans with customer-relationship-

359. See *id.* at 144–45.

360. See *id.* at 318.

361. *Id.* at 175.

362. Loveman received a B.A. in economics from Wesleyan University and was an Alfred Sloan Doctoral Dissertation Fellow at M.I.T. where he earned a Ph.D. See Corporate Governance—Biography—Gary Loveman, Chairman, Chief Executive Officer, and President, <http://investor.harrah.com/phoenix.zhtml?c=84772&p=irol-govBio&ID=143793> (last visited Aug. 8, 2006); CHANG & PFEFFER, *supra* note 352, at 2; see also Julie Schlosser, *Teacher’s Bet*, FORTUNE MAG., Mar. 8, 2004, at 19 (cataloguing Loveman’s educational history).

363. CHANG & PFEFFER, *supra* note 352, at 1.

364. Interview by Robert L. Shook with Gary Loveman, CEO, Harrah’s Entertainment, Inc., (July 18, 2000), *quoted in* SHOOK, *supra* note 277, at 178, 307.

365. James L. Heskett et al., *Putting the Service-Profit Chain to Work*, HARV. BUS. REV., Mar.–Apr. 1994, at 164.

366. *Id.* at 164.

367. *Id.*

management ‘rocket scientists.’”³⁶⁸ He also transformed the Total Gold program, which he described as “a customer-recognition rewards program,” into the Total Rewards program, which he described as “a loyalty program” that created “loyalty incentives” for customers to do more of their gaming at Harrah’s properties.³⁶⁹ One aspect of the transformation of the Total Gold program in 2000 into the Total Rewards program was to take away from individual property managers and certain other casino employees the discretion to “comp” guests. In 1999, Loveman believed the way of dealing with the “fickleness of gamblers” who, “[w]hen they are on a losing streak[,] . . . tend to head for the exits to try their luck elsewhere,” was “to stem the exodus by giving even low-level employees the authority to dole out coupons for free drinks, chips and the like.”³⁷⁰ But Loveman understood the risks of placing the discretion and judgment about the amount of comping within the authority of Harrah’s employees, particularly low-level employees. In a 2000 interview, Loveman said:

There’s an emotional attachment between a purchaser and a provider that exists with great brands in the automotive, cosmetics, garment, and pharmaceutical industries. We want the same sort of thing to exist with all of our brands in our business. Each year, we give back in excess of \$300 million to our customers in what is referred to as reinvestment, or, in this industry, comps or givebacks. This process is rife with lack of sophistication. It’s done in a careless and costly fashion. Our objective is to improve it, and by doing so, we can make considerably more money.³⁷¹

With the growth in both the number of casinos under Harrah’s ownership and management, and the increase in the number of customers served, Loveman believed that to compete effectively in the gaming industry, Harrah’s needed to rationalize comping. In effect, the Total Rewards program took information about each customer’s age, sex, home address, gaming habits and history, and their consumption preferences—for restaurants, hotel accommodations, spa treatments, golf, whatever—away from employees and placed it under control of the corporation. Harrah’s customer database grew from 5.3 million customers in 1995, to 23 million customers in 2000, and 26.6 million customers in 2002.³⁷² Business writer Robert Shook described the significance of this shift:

Under the old business model that was used in the casino industry for years, customer relationships were limited to individual employees who worked with a small number of key customers. However, with the growth and increase in number of Harrah’s properties, that business model no longer worked. The old method had still another flaw—customer loyalty was to an individual employee

368. Interview by David O. Becker with Gary Loveman, CEO, Harrah’s Entertainment, Inc., quoted in David O. Becker, *Gambling on Customers*, MCKINSEY Q., Feb. 1, 2003, available at <http://www.marketingpower.com/content17906.php> (last visited Dec. 22, 2006).

369. *Id.*

370. Roy Furchgott, *Private Sector: Practicing What He Preaches?*, N.Y. TIMES, Feb. 21, 1999, § 3, at 2.

371. Interview by Robert L. Shook with Gary Loveman, CEO, Harrah’s Entertainment, Inc. (Sept. 28, 2000), quoted in SHOOK, *supra* note 277, at 292, 313.

372. Becker, *supra* note 368, at Ex. 3.

as opposed to the company. Today, the customer receives value from the company that is delivered by employees.³⁷³

This approach to comping enables Harrah's to spread incentives and rewards to customers at all levels of play—from the high roller playing baccarat in Las Vegas to the grandmother playing the dollar slot machines in East Chicago, Indiana³⁷⁴—and at all Harrah's properties. The technology also permitted another Harrah's innovation: “cross-marketing” of Harrah's brand. In an interview in 2000, Phil Satre recounted what he and Harrah's head of strategic marketing had learned from their player tracking data collected in the late 1980s:

First, we had customers who gamble at multiple locations. Our Atlantic City customers come to Las Vegas. Our Reno customers go to Lake Tahoe, and so on. Second, . . . we estimated 25 percent of our regular Atlantic City customers make an annual pilgrimage to Las Vegas. This planted a seed that there was an opportunity to create a loyalty marketing program to establish relationships with customers who bridge multiple gaming environments.³⁷⁵

When he became chief operating officer in 1998, Gary Loveman worked on building the Harrah's brand by “orienting the company toward influencing consumer choice.”³⁷⁶ Loveman described gaming branding:

I've always been fascinated by the power of brands to influence consumer decisions. The gaming business is a service that provides deep enjoyment. People are very caught up in gaming. . . . [I]t's every bit as personally rewarding as fragrances, fashion, automobiles, resort destinations We could step up by creating a national gaming brand, and no one else could. We operate 26 casinos in 13 states, and with a brand we could influence players to visit a casino close to them or to come visit us anywhere, coast to coast.³⁷⁷

With cross-marketing and branding, Harrah's was attempting to create a distinctive, predictable, uniform experience at every Harrah's casino through the delivery of a certain type and style of customer service that would be instantly recognizable at every Harrah's property, despite the differences in the niche markets that they had historically tended to serve. In the past, the general manager of a particular casino would have attempted to build on the distinctiveness of his own casino and its geographic location, treating his casino as a profit center for himself (as well as the company) by nurturing customer loyalty to him, his staff, and his casino.³⁷⁸ Loveman wanted to break these

373. SHOOK, *supra* note 277, at 226.

374. Harrah's research on its customers identified its target market as an “avid experience player” or “AEP,” who “typically has an annual budget of \$1,000 to \$5,000 to payroll his recreational gaming activities.” *Id.* at 138.

375. Interview by Robert L. Shook with Phil Satre, CEO, Harrah's Entertainment, Inc. (July 18, 2000), *quoted in id.* at 142.

376. Becker interview with Loveman, *quoted in* Becker, *supra* note 368.

377. *Id.*

378. The use of male pronouns here is intentional. Harrah's did not hire a female general manager until 1994, when Janet Beronio became manager of the Harrah's Ak-Chin casino, one of the Native American casinos that it partnered with. SHOOK, *supra* note 277, at 182. By the time Loveman was on board, the managers were no longer all male, but a female general manager was a rarity and

personal ties to particular persons and locations, and replace them with ties to the Harrah's brand—the gaming experience at any Harrah's location in the nation. The transformation required that Loveman bring his general managers into line with the new way of looking at customer loyalty, so he replaced a few general managers, including the manager of Harrah's Reno casino where Jespersen worked.³⁷⁹ Reflecting on his many changes in management personnel, Loveman later commented: “We also proved to the property general managers that our approach would work, starting with the early experiments we ran in December 1998. As operators, property managers are greedy buggers. If something works and they can make more money, they'll get on it at some point.”³⁸⁰

The role and authority of the casino general manager changed in other ways as well. Previously, the general manager of a particular casino essentially “ran his own show,” in part because “the consensus was nobody knew his customers better than the boss who worked every day in the trenches.”³⁸¹ Even under Phil Satre's leadership of Harrah's from 1993 to January 2003, the management of each casino was still somewhat decentralized.

Although everything [in 2002] is centralized, the casino general manager is still boss of his own show. He may receive his orders from the home office, but he's clearly in charge of his property. In this respect, corporate management plays an advisory role, providing support in areas such as human resources, law, marketing, public relations, and technology services.³⁸²

Loveman and his Total Rewards program challenged these assumptions. In an interview in 2003, Loveman, by then the CEO and president of Harrah's Entertainment, said,

We . . . collect a tremendous amount of information on what players do with us. We know when you arrive at a casino, what you do there, and when you leave. We have information on 26 million customers. And we measure everything. . . . When our employees use the words “I think,” the hair stands up on the back of my neck. We have the capacity to know rather than guess at something because we collect so much information about our customers.³⁸³

Under Loveman, compensation for general managers became linked to the results of surveys of customer satisfaction at their casinos.³⁸⁴ More importantly, final authority and autonomy in hiring and firing decisions was shifted from the general manager to corporate headquarters in Las Vegas. Loveman said,

no woman was heading up any of the major corporate-owned casinos. *Id.* As of October 2006, however, three of the ten senior vice presidents of Harrah's Entertainment were female: Jan Jones, Senior Vice President, Communications and Government Relations; Ginny Shanks, Senior Vice President, Brand Management; and Mary Thomas, Senior Vice President of Human Resources. See Harrah's Entertainment, Corporate: Investor Relations—Management Team, <http://investor.harrah.com/phoenix.zhtml?c=84772&p=irol-aboutusManage> (last visited Dec. 20, 2006).

379. CHANG & PFEFFER, *supra* note 352, at 9.

380. Becker interview with Loveman, *quoted in* Becker, *supra* note 368.

381. SHOOK, *supra* note 277, at 161.

382. *Id.* at 161–62.

383. Becker interview with Loveman, *quoted in* Becker, *supra* note 368.

384. Becker, *supra* note 368.

I wanted to instill the notion that jobs didn't belong to people; jobs belong to a company.

...

... I had a lot of bloody battles where I'd have to tell a general manager to fire this person tomorrow or I would do it myself. It was ugly. I mean, for a long time there was a lot of antipathy among a lot of people, and it continues to some degree to this day. It was a big change in the history of Harrah's. People say this used to be a safe, family company, and now that damned professor has turned this into a place where nobody can feel safe. And there's an element of truth to that, because it is results that make any of us safe.³⁸⁵

The diminution in the authority of the general manager at each casino had consequences throughout the supervisory hierarchy. When Darlene Jespersen was fired, her supervisor was just carrying out orders. Jespersen said,

The supervisor said this was a corporate decision. I said this has nothing to do with my job, and I'm not doing it. It's degrading. I said, I'm 44 years old and I'm tired of being told how to look and dress. I'm tired and I'm not doing it, not after you let me do this for 20 years. I could tell the supervisor was concerned about my job.³⁸⁶

Jespersen's supervisor may have been "concerned" about her job and may have been reluctant to enforce the Harrah's new "Personal Best" policy, but the Harrah's management structure under Loveman would not have permitted a supervisor to make exceptions to corporate policies. Ironically, the personal loyalty that had developed between Jespersen and her customers, as demonstrated by the fact that some of them referred to the sports bar in Harrah's Reno Casino where she worked as "Darlene's Bar,"³⁸⁷ was precisely the type of personal loyalty that Loveman was trying to break down and replace with loyalty to the Harrah's brand. Employees had become commodified as part of the product that Harrah's sold—a particular type of gaming experience—as well as part of the delivery system for that product. As Loveman said: "[W]e focus on just one thing: a great gaming experience. We are not primarily for families or for destination getaways. We're a gambling joint. We're there for people who want to gamble, and that's where we wanted to center the brand."³⁸⁸ Because of the importance of cross-marketing between Harrah's properties, it was therefore important that employees in certain positions—delivering the branded experience through certain services—have a uniform look at all locations in addition to uniform training.³⁸⁹

385. Becker interview with Loveman, *quoted in* Becker, *supra* note 368.

386. Gender Public Advocacy Coalition interview with Darlene Jespersen (Jan. 17, 2001), *quoted in* Serafina Raskin, *Sex-Based Discrimination in the American Workforce: Title VII and the Prohibition Against Gender Stereotyping*, 17 HASTINGS WOMEN'S L.J. 247, 258 (2006).

387. Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 5.

388. Becker interview with Loveman, *quoted in* Becker, *supra* note 368.

389. Regarding training of service employees, Loveman noted that, under his leadership, he instituted a company-wide training program "for the first time in the company's history," which "every single employee attended," including tipped employees who were paid their "tipped wages" in order to create incentives to attend. The training programs were run "24 hours a day" to accommodate employees on all shifts. Loveman said: "At the Rio, in Las Vegas, for example, we ran

6. *Refining the Brand Through Expertise: The Image Consultant—“Harrahizing” Employees*

To achieve the appropriate look for its employees, Harrah's turned to an outside expert, much as it had turned to outside experts to transform its approach to marketing and operations.³⁹⁰ Harrah's contracted with The Winning Edge, a Las Vegas company, which advertises on its Web site that it is “one of the leading image consulting and corporate training firms in the gaming and hospitality industry.”³⁹¹ The company, founded by its owner Reimi Marden in 1991,³⁹² is one of hundreds of companies throughout the world that now offer image consulting to individuals and business, for fees that in 2006 could range up to \$350 an hour for an individual consultation and up to \$10,000 for a full-day seminar.³⁹³ The Harrah's “Personal Best” makeovers for its beverage servers and bartenders were “supposedly worth \$3,000 each.”³⁹⁴ Whatever amount Harrah's paid on its contract with The Winning Edge in 2000 per employee or per casino for developing its appearance policy and training employees, it was clearly substantial, and the corporation no doubt viewed the expense as a worthwhile investment in improving its brand as part of Harrah's strategy to gain a competitive advantage in the gaming industry. Moreover, Harrah's corporate headquarters would likely have viewed any single employee's refusal to conform to the new grooming rules as evidence of disloyalty and even as grounds for discipline or discharge.

Harrah's, to be sure, has been enormously successful in its marketing and operating strategies. Its investment in intellectual property—e.g., its patented Total Rewards program—rather than in themed casinos like Circus Circus has given it a significant competitive advantage in the gaming industry. Even its “Harrahized” employees—deskilled, uniformed, constantly monitored and measured—have seemed rather content with their good pay, good benefits, and

200 sessions with 20 people in each to get through 4,000 employees in just five months. At the end of the program, you had to pass a test—otherwise you could not keep your job. You can imagine the anxiety that percolated through the system.” Becker interview with Loveman, *quoted in Becker, supra* note 368.

390. *See id.* (“We get field and corporate people together with outside experts, build the stuff, and then make it mandatory throughout the company.”). *See also supra* text accompanying note 368.

391. *See* The Winning Edge, About The Winning Edge, <http://www.the-winning-edge.com/about.php> (last visited Dec. 20, 2006) [hereinafter About The Winning Edge]. Harrah's “Grooming and Appearance” policies include the following: “Brand Operations has contracted with *The Winning Edge*, a national Image Consulting firm located in Las Vegas, to set up and monitor Personal Best image training for each property including a ‘Train the Trainer’ element to develop property Personal Best Image facilitators.” *See* Harrah's *Brand Standard, supra* note 298. For The Winning Edge clients, see The Winning Edge, Client List, <http://www.the-winning-edge.com/clients.php>. The list includes properties owned by Harrah's major gaming competitors, MGM Grand Hotel & Casino, Bellagio Resort & Casino, and the Mirage Hotel & Casino, as well as the U.S. Army, Nevada Power Company, Nevada Welfare Division, and various other firms, including a Washington, D.C., law firm, several major banks, auto dealers, manufacturers, and a high school faculty.

392. *See* About The Winning Edge, *supra* note 391.

393. *See* Association of Image Consultants International (AICI), Finding Image Consultants, <http://aici.org/find/finding.htm> (last visited Nov. 19, 2006).

394. Barbano, *supra* note 193. According to a news report, in 2000 female employees at Harrah's St. Louis casino “were given \$50 in gift certificates for makeup and salon services.” Mayerowitz, *supra* note 157.

opportunities for internal advancement.³⁹⁵ Employee turnover, which is generally high in casinos and in the food and beverage industry,³⁹⁶ dropped under Gary Loveman.³⁹⁷ To low-skilled workers with no or limited post-high school education,³⁹⁸ Harrah's frontline service positions may look like very good entry-level jobs.

The story of the changes in Harrah's marketing and operations between 1980 and 2000, and their effects on the Harrah's service employees, is not new. It recalls the consequences of the deskilling of work in the steel industry in the early twentieth century and the introduction of scientific management, new technologies, and new workplace rules throughout manufacturing and retail businesses, all of which reduced worker autonomy and control. Gary Loveman's mock horror at the idea that his employees might have the discretion to "think" is reminiscent of how Frederick Taylor might have reacted a century ago to Big Bill Haywood's trenchant observation that "the manager's brains are under the workman's cap."³⁹⁹ Harrah's goal of replacing customer loyalty to individual Harrah's employees with loyalty to its brand is being accomplished by creating a uniform and gendered "Harrah's" look for frontline service workers, by removing discretion to award even small comps from its low-level employees and replacing it with the technologically sophisticated Total Rewards program, by discouraging its employees from "thinking" rather than "knowing," by reducing the autonomy of general managers to run their own casinos, and by limiting supervisors' discretion in hiring and firing.⁴⁰⁰ Data, technology,

395. A 1996 study by Arthur Andersen found that in 1995 casino employees earned on average \$26,000 a year, which was higher than the average wages earned by employees performing similar types of work in related fields. Cory Aronovitz, *The Regulation of Commercial Gaming*, 5 CHAP. L. REV. 181, 184 & n.16 (2002) (citing *National Gambling Impact Study Comm'n, Final Report* (1999)). Casinos in general offer their employees "tremendous opportunities to advance within the company" and "tend to promote from within, through in-house training programs." *Id.* at 184. Aronovitz notes that in 2002 Harrah's advertised on its website that it provides "one-to-one mentoring, ongoing skills training, and outstanding opportunities for advancement." *Id.* at 184 n.20.

396. SHOOK, *supra* note 277, at 174. *See infra* note 496 and accompanying text (reporting data on job tenure for food and beverage workers).

397. Harrah's annualized employee turnover dropped from forty-five percent in 1998 to twenty-four percent in 2001. Becker, *supra* note 368.

398. In 1980, when Harrah's merged with Holiday Inns, many casino employees in the industry, even at management levels "grew up in the business . . . [and] didn't have a strong educational background." SHOOK, *supra* note 277, at 90. While lack of formal education is still not a barrier to entry-level jobs at Harrah's, Loveman made it clear that he is looking for highly educated, sophisticated managers: "He shook up Harrah's culture with a new human-resources approach that valued brainpower and leadership over industry experience." Becker, *supra* note 368. One of the first things he did as COO was to replace "practically the entire corporate marketing department" with "the kind of people we have now, who have the horsepower to do this kind of [mathematical] work." *Id.* The result is a widening of the gap between managers (who are generally highly educated) and frontline service workers (who may have limited post-secondary education).

399. MONTGOMERY, *supra* note 34, at 9 (citing FRANK BOHN & WILLIAM D. HAYWOOD, *INDUSTRIAL SOCIALISM* 25 (1911)). *See supra* note 34 and accompanying text (discussing Taylorism as routinization).

400. Leidner describes how service workers are expected to personalize routines so that customers do not resent them. LEIDNER, *FAST FOOD, FAST TALK*, *supra* note 23, at 35-36. Harrah's collects extensive information about customers' preferences in food, wine, lodging, and entertainment and requires its service workers to utilize this information in serving its customers.

surveillance, and rules have replaced human relationships built on communication, memory, experience, and trust.⁴⁰¹ The knowledge about the customers that service workers are expected to utilize to satisfy the customers' needs is knowledge that resides in a computer memory—in bits and bytes.⁴⁰² The result is a dehumanized workforce in which the individual frontline service worker is treated as a product or delivery system—robotized, homogenized, and fungible.

B. Commodification: Sexualizing Female Bartenders

1. *Wearing Makeup: Branding Darlene Jespersen*—“*I was a sexual object.*”

Darlene Jespersen's brief experience wearing makeup in the 1980s was memorable for her. During a deposition in 2002 pursuant to her discrimination suit, in response to questions by Harrah's counsel, Jespersen recounted the circumstances when she first learned how she felt about wearing makeup:

Q: And after he applied makeup on half your face and left the other half normal, did there come a time when you looked in the mirror?

A: Yes.

Q: And tell me your reaction.

A: I felt very degraded and very demeaning [sic]. I actually felt sick that I had to cover up my face and become pretty or feminine in a sex stereotyping role to keep my job or to do my job. I actually felt ill and I felt violated.

Q: Did you attempt thereafter to actually wear makeup and comply with your employer's desire that you have a makeup look versus your normal face?

A: Yes.

Q: How long did you try to wear makeup?

A: Just a couple of weeks.

Q: And what was that experience like?

See Harrah's *Brand Standard*, *supra* note 298, at 83 (requiring, as part of their job description, that Harrah's bartenders “provide personalized service and use[] guest names”). In defending this practice against claims that it “is intrusive and smacks of ‘Big Brother,’” Jan Jones, a Harrah's senior vice president, said “‘I look at it as being smart marketers.’” SHOOK, *supra* note 277, at 292 (quoting interview by Robert L. Shook with Jan Jones, Senior Vice President, Harrah's Entertainment, Inc. (May 16, 2000)).

401. Shook reports that “[Bill] Harrah is . . . credited as the originator of the first ‘eye in the sky.’” SHOOK, *supra* note 277, at 113. Hidden cameras and security guards are ubiquitous in casinos to guard against theft and cheating, and have been mandated by gaming commissions. *Id.* at 113–14. The hidden cameras can also be used to observe and record how employees appear. One scholar, drawing on the work of Foucault, writes, “Casinos’ sophisticated surveillance mechanisms ensure that subjects are never sure when they are being observed (or believe they are always being observed) and thus discipline themselves.” Bayard de Volo, *supra* note 325, at 349.

402. Cameron Lynne Macdonald and Carmen Sirianni would describe this as “routinization and scripting,” a “management approach [that] advocates the ‘substitution of technology for motivation,’ replacing spontaneous interaction with predetermined scripts and supplanting worker decision-making with management design. Proponents of this model argue that it provides both managers and customers with a modicum of consistency and few surprises.” Macdonald & Sirianni, *The Service Society*, *supra* note 22, at 6.

A: It was—I felt that it—it prohibited me from doing my job. I felt exposed. I actually felt like I was naked. I mean, I—I felt that I—was being pushed into having to be revealed or forced to be feminine to do that job, to stay employed, when it had nothing to do with the making of a drink. I felt that I had become dolled up and that I was a sexual object.

Q: And how long did you then, even though feeling that way, attempt to comply? How long did you make it?

A: I could only do it for a couple of weeks.

Q: And then what happened?

A: It—it was too harmful. It affected my self-dignity. It portrayed me in a role that I wasn't comfortable, that I wasn't taken seriously as myself. I also feel that it took away my credibility as an individual and as a person. I was—it demanded that—that my job performance was based on how I look and not on how I did my work.

Q: So what did you do? How did you stop?

A: I went—I just stopped. And I went home and threw the makeup in the garbage.

Q: And when you showed back up for work after a two-week period of wearing makeup and then came in not wearing makeup again, what, if anything, occurred—

A: Nothing.

Q: —between you and your employer?

A: Nothing was ever said for several years.⁴⁰³

This incident, occurring many years before Harrah's adopted and began to enforce its "Personal Best" grooming policy in 2000, determined both Jespersen's response to the new policy and her expectations of how she would be treated. But her narrative of the incident raises several questions. Why would a young, clean-scrubbed, fresh-faced, twenty-something woman, working as a bartender at a casino in Reno, Nevada, in the 1980s, have had—and continue to have—such a strong reaction to wearing makeup, even if it might cost her her job? It is tempting to assume Jespersen abhorred wearing makeup because it subverted her sexual identity as a lesbian and that her lawsuit was about the rights of lesbians to express their sexual identity in the workplace.⁴⁰⁴ The focus on Jespersen's sexual identity as an explanation for her aversion to makeup, however, draws attention away from the role of social class, sex, and sexuality in the casino industry generally (and particularly at Harrah's), in branding employees along explicitly sexualized and heterosexual lines that enforce subordination of female service workers.

403. Deposition of Darlene Betty Jespersen, *supra* note 313.

404. See generally Kirsten Dellinger & Christine L. Williams, *Makeup at Work: Negotiating Appearance Rules in the Workplace*, 11 GENDER & SOC'Y 151, 160–61, 164 (Apr. 1997).

2. *Selling Sexuality: The Business of Casino Gaming*

a. *Showgirls*

Casinos in Nevada and elsewhere sold, and continue to sell, the sexual display of women's bodies in elaborate staged shows and the allure of service by beautiful and skimpily clad cocktail waitresses on the casino floor.⁴⁰⁵ Patrons arrived at casino resorts with the expectation that part of the experience might include sexual relations with a companion, a colleague, or a stranger who might be a waitress, a showgirl, or even a prostitute. As historian David Schwartz reported:

[B]y the late 1940s, casino resorts were inexorably identified in the public mind as a landscape of sexual possibility—no coincidence, since casino publicists relentlessly peppered the popular press, visitors, and anyone who got near with visions of off-duty showgirls lounging by the pool or fluttering about the craps tables.⁴⁰⁶

Beginning in the late 1950s, shows on the Las Vegas Strip featured topless female dancers in elaborately staged productions.⁴⁰⁷ These stylized shows became “a staple of the Strip”⁴⁰⁸ that is only now in decline.⁴⁰⁹ They are being replaced in casinos on the Las Vegas Strip and elsewhere with “Broadway musicals on one end of the spectrum and sexually explicit female revues on the other.”⁴¹⁰

Bill Harrah's Reno and Lake Tahoe casino shows, however, were always slightly more modest than the topless shows of the Las Vegas Strip. The head of entertainment at Harrah's casinos in the 1960s and 1970s described Bill Harrah's views:

We had a policy that no act could appear at Harrah's that couldn't be viewed on television. . . . This meant no nudity or obscene language. Bill didn't want

405. See Bayard de Volo, *supra* note 325, at 347.

406. SCHWARTZ, *supra* note 288, at 58–59.

407. *Id.* at 94. Schwartz writes, “[s]hows like this defined casino resort entertainment for a generation: gala topless French-themed extravaganzas became a sine qua non of a Strip vacation.” *Id.* at 95. Schwartz notes that installation of a casino show could cost “over \$5 million by the early 1960s.” *Id.* Despite their high initial production cost, semi-nude female revues proved to be relatively less expensive than contracting with star performers. *Id.*

408. *Id.* at 94.

409. One of the last surviving major shows, “Jubilee,” just completed its twenty-fifth-year anniversary at Bally's Las Vegas casino resort, a property now belonging to Harrah's Entertainment. The New York Times review of the show offered this description:

Just as in the old days, the show features 3,000 gallons of water spilling from a sinking Titanic; a hypersexed Samson and Delilah doing a balletic duet in G-strings; girls in baroque but brief costumes floating down from the ceiling on platforms above the audience's head. The show culminates with a “Presentation of Our Grand and Glorious Beauties,” who plume with ostrich- or pheasant-feather headdresses, some on scaffolds as wide as their arm spans.

Erika Kinetz, *The Twilight of the Ostrich-Plumed, Rhinestone-Brassiered Las Vegas Showgirl*, N.Y. TIMES, Aug. 13, 2006, § 2 (Arts & Leisure), at 1.

410. *Id.*

any of his customers to ever come in and be embarrassed by a show. He didn't think you should take your wife out and have her be offended.⁴¹¹

Historian David Schwartz notes that, as casinos became corporatized during the 1970s, "casino operators continued to use sex to sell the casino resort experience."⁴¹² Las Vegas, as always, led the way: "Seminude revues continued to be the extravagant centerpieces of Strip showrooms, the Las Vegas News Bureau persisted in churning out 'cheesecake' photos of smiling nubile young women in Las Vegas, and promotional advertisements and brochures, if anything, became racier in the corporate years."⁴¹³ By 1980, Harrah's, now owned by Holiday Inns and moving into the Atlantic City market, would have felt pressure to compete with the entertainment found in Las Vegas showrooms.

These shows, with their glamorous but untouchable showgirls, were ubiquitous in the Nevada casino industry that Jespersen entered in the 1980s. Erika Kinetz writes that "what's changed since [the early 1980s] are attitudes toward women's bodies, naked bodies in particular. Once upon a time the chance to gaze at these inaccessible beauties was rare enough to be titillating, while still respectable enough to bring the missus to."⁴¹⁴ On-stage, the showgirls were (and are) beautiful, but it is an artificial and exaggerated beauty achieved with heavy use of cosmetics—liquid eyeliner, false eyelashes, blush.⁴¹⁵ By 2000, when Harrah's changed its grooming code for female bartenders, the nudity and sexuality in "adult" casino revues was becoming more and more explicit, with no pretense of being "respectable."⁴¹⁶ Kinetz notes, "Today . . . the sight of topless women is no longer so shocking; they are a common enough sight in movies and on cable television."⁴¹⁷

411. Interview by Robert L. Shook with Holmes Hendricksen, Vice President, Harrah's Entertainment, Inc. (Sept. 21, 2000), *quoted in* SHOOK, *supra* note 277, at 51, 299; *see also id.* at 36 (identifying interviewee).

412. SCHWARTZ, *supra* note 288, at 166.

413. *Id.* at 166. Schwartz offers the following example of the nature of the advertising: "A 1977 Aladdin promotional brochure, for example, featured an attractive, bikini-clad woman emerging from a swimming pool and lounging on a bed." *Id.*

414. Kinetz, *supra* note 409, at 20.

415. *Id.* at 1 (describing the transformation of a self-described "plain" dancer in the "Jubilee!" troupe into a "showgirl" through the use of cosmetics).

416. For example, Harrah's official Web site, www.Harrah's.com, advertised sexually explicit "adult" revues showing at two of Harrah's casinos during October, 2006. At Harrah's Reno Casino, the show *Rock My Ride* was described as "the solution for guests looking for something steamy. . . . With sexy choreography and high-energy music, . . . this late-night adult revue may be 'every working man's fantasy.'" *See* <http://www.harrah.com/EventsDetail.do?locationCode=REN&detailName=rock-my-ride-detail&eventTitle=Rock%20My%20Ride> (last visited Oct. 11, 2006). Harrah's Las Vegas Casino was featuring the revue, *Bareback*, described as "a rowdy, wild and sultry show [which] is sure to have both men and women dancing in their seats. Beautiful, scantily clad cowgirls and handsome strapping cowboys electrify the audience with racy renditions of new country music's most popular hits. . . . Ladies will love 'The Wild Bunch,' a group of 4 hunky Cowboys who get up close and personal." *See* <http://www.harrah.com/EventsDetail.do?locationCode=LA&detailName=bareback-detail&eventTitle=Bareback> (last visited Oct. 11, 2006).

417. Kinetz, *supra* note 409, at 20.

b. *Prostitutes*

Legalized prostitution in Nevada's licensed brothels is a sexually provocative backdrop to the explicit sexual display of women's bodies in casino revues.⁴¹⁸ To the audience at a casino show, a dancer—the original showgirl—could be an object of desire, remote and unattainable.⁴¹⁹ To the passerby in the streets outside the casinos in Nevada, reading a flyer or business card, a “showgirl” might mean a prostitute.⁴²⁰ True “showgirls” were and are “entertainers and not prostitutes,”⁴²¹ but even the reputable, corporate-owned casinos have benefited from the tantalizing ambiguity of whether showgirls are sexually accessible or off-limits.

The fact that prostitution is not legal in either Clark County or Washoe County, Nevada⁴²²—where the major Las Vegas and Reno casinos are located—has not hampered but rather helped casino operators in those cities. In complying with the law by strictly banning known prostitutes from their premises, the casino resorts can promote their entertainment venues as ideal sites for both conventions and family vacations. And no casino in Las Vegas or Reno can gain a competitive advantage by offering sex for sale next to the craps tables and slot machines. Yet, sexual services can readily be purchased from licensed, inspected prostitutes in adjacent counties—a limousine ride away⁴²³—

418. See generally McGinley, *supra* note 315, at 83–84 (describing the work of prostitutes in Nevada brothels).

419. “Even when they’re down to G-strings and pasties, which is the farthest the most daring of them go, these skilled dancers are otherworldly, untouchable, too beautiful, too quick and too much in the light for the mere mortals watching them.” Kinetz, *supra* note 409, at 20.

420. See, e.g., *id.* at 20 (describing the men on the Las Vegas Strip who “purport to be trafficking in showgirls” and the women who sell their sexual services in “the free full-color publication called Adult Informer: Déjà Vu Showgirl News”). Newsstands along the Strip display print advertisements for escort services and entertainers. See 2005 photo of newsstands on Las Vegas Blvd., Las Vegas, http://en.wikipedia.org/wiki/Prostitution_in_Nevada (last visited Dec. 20, 2006). Shook writes:

On any given day or night, a single man walking down the Strip will be approached by solicitors who pass out X-rated leaflets advertising the services of women who will make room calls. These explicit brochures tout everything from full-body massage to totally nude dancing in the privacy of a customer's room. They leave little to the imagination.

SHOOK, *supra* note 277, at 46.

421. SCHWARTZ, *supra* note 288, at 58. Schwartz writes that “after the final show, [the dancers] mingled with casino patrons. Contrary to legend, the showgirls were not required nor even requested to sleep with high rollers[,] . . . but were intended to ‘decorate the casino.’” *Id.* Most showgirls then, as now, “were working in fields typical to unmarried middle-class women, usually as secretaries or receptionists, although some were models . . .” *Id.* See, e.g., Kinetz, *supra* note 409, at 20 (describing a Las Vegas show dancer who works a second job as a mortgage broker during the day).

422. Nevada permits licensing of brothels in counties with population less than 400,000. NEV. REV. STAT. ANN. § 244.345(8) (West 2005). Counties smaller than 400,000, can choose to prohibit brothels. See *Kuban v. McGimsey*, 605 P.2d 623, 626 (Nev. 1980) (finding that “[Nevada’s] legislature did not intend to deprive counties of the power to ban brothels completely”). Clark County in 2005 was the only Nevada county with population greater than 400,000, but brothels are also illegal in three other counties, including Washoe County. See Wikipedia, Prostitution in Nevada, http://en.wikipedia.org/wiki/Prostitution_in_Nevada (last visited Dec. 20, 2006); see also McGinley, *supra* note 315, at 83.

423. According to Shook, “[m]any out-of-county bordellos provide round-trip limousine services.” SHOOK, *supra* note 277, at 46. See also McGinley, *supra* note 315, at 84, n.139.

and prostitutes may even be available or tolerated in casinos (as in hotels nearly everywhere) when they are clandestine and unobtrusive, and particularly when they are in the company of guests.⁴²⁴ The ubiquity of advertising by sexy “entertainers,” nevertheless, conveys an unmistakable message: Sex in Nevada culture is a commodity, like gambling, a fancy meal, a luxurious hotel room, or a ticket to see an exciting show.

c. *Cocktail Waitresses*

Harrah’s amended “Personal Best” grooming rules explicitly treated female bartenders the same as other female beverage servers—specifically, cocktail waitresses. Within the hierarchy of the casino or hotel bar, the status distinction between a bartender and a cocktail waitress is significant.⁴²⁵ Jespersen had achieved her authority as a bartender with her customers and co-workers by dint of her personality and hard work and without the aid of a cosmetic mask defining her as a “pretty” (and possibly sexy or sexually available) woman. A female bartender, like Jespersen, who had never worn makeup could have reasonably understood the makeup requirement—imposing on her the same grooming requirements as the cocktail waitresses—as lowering her status from bartender to barmaid.

Although Harrah’s management may not have self-consciously set out to make its female bartenders into “barmaids” in 2000, it was certainly conscious of the sexy image of the cocktail waitress in American culture, in general, and in the casino industry, in particular.⁴²⁶ The link between showgirls, cocktail waitresses, and prostitution has a well-known history in Las Vegas casinos:

Vegas had a reputation for providing free sex for its best customers. During the days of the Mob, a high roller had only to suggest that he wanted female company, and a pit boss or casino host would have a bevy of girls lined up to

424. Shook writes:

In today’s Las Vegas, sex for sale is available but it’s not like the old days. The major casinos don’t allow prostitutes to solicit in their properties because it’s against the law. For the same reason, casino employees don’t provide sex to high rollers. They simply won’t do anything to jeopardize their gaming licenses. They have too much to lose. Security guards and plainclothes officers at Harrah’s and other major casinos who spot a female soliciting on the casino floor or in a lounge will promptly escort her out the door with instructions not to come back. A photograph is taken so she will be easily recognized if she returns. If a customer, however, is with a prostitute, as long as she’s his guest, that’s another matter. “What we don’t want is people on vacation being solicited,” said a Harrah’s security guard. “But a guy with a broad—that’s his business. Besides, who knows, she may be his wife or girlfriend.”

SHOOK, *supra* note 277, at 45–46. See NEV. REV. STAT. ANN. § 207.030(1)(b) (West 2005) (prohibiting “aid[ing] and abet[ting] any act of prostitution”).

425. See Bayard de Volo, *supra* note 325, at 349 (noting that “[b]artenders are at the top of a casino bar hierarchy supported by a complicated gender hegemony”) (alteration added); *id.* at 361–62 (discussing wage and power distinctions between casino bartenders and cocktail waitresses). See also Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL’Y 257, 262, 274 (2007) (discussing the gender hierarchy between female cocktail servers and male casino hosts in Nevada casinos).

426. McGinley, *supra* note 425, at 262 (“Nevada casinos openly and self-consciously sell sexual appeal by limiting cocktail serving jobs to women dressed in alluring outfits.”).

accommodate him. Chorus girls and cocktail waitresses commonly volunteered their services as a special favor to a casino manager.⁴²⁷

During her participant observation of Reno cocktail waitresses in the late 1980s and early 1990s, Lorraine Bayard de Volo found “no evidence, not even rumors, that any waitress was involved in prostitution. Still, this is an apt description of the popular image of casino cocktail waitresses outside of Nevada—a showy yet unobtrusive appendage to the gambling atmosphere who is sexually available for a price.”⁴²⁸

Although Bill Harrah distanced himself and his casinos from many of the more tawdry and illicit aspects of mob-run casinos, the sexual allure of the cocktail waitress, who dispenses free drinks with a smile,⁴²⁹ has always been a stock-in-trade of the gambling floor. In entering new gaming markets outside the orb of Las Vegas and the Strip, Harrah’s, like other casino operators, has struggled to negotiate delicately the boundary between commercially viable sexiness and unpalatable (if not clearly illegal) sexual exploitation of female service workers. One news account about a proposed casino in Rhode Island reported that “[w]hen Harrah’s New Orleans casino opened in 1999, women who wanted to be cocktail waitresses needed to ‘audition’ wearing a one-piece French-cut swimsuit, sheer stocking [sic] and pumps with medium heels.”⁴³⁰ Harrah’s senior vice president for communications and government relations, Jan Jones, defensively and rather disingenuously attempted to distance Harrah’s from this story, observing that Harrah’s was only a minority owner of this particular casino in 1999: “‘The local partners were running all the hiring,’ Jones said. ‘None of the employees actually worked for Harrah’s.’”⁴³¹ Nonetheless, the cocktail waitresses hired through this process all worked under the Harrah’s name and were creating and selling the Harrah’s brand in New Orleans.

When Darlene Jespersen was asked to put on makeup for her job in Harrah’s casino in the 1980s and again in 2000, makeup for a female service worker in that hypersexualized environment would have connoted, at least in part, sexuality and sexual allure. Bayard de Volo observed that “[a] waitress could habitually serve drinks without a smile or pleasant conversation without attracting much management concern, yet she had to wear makeup.”⁴³² For a woman like Jespersen who had never worn makeup, Harrah’s makeup requirement could have been reasonably understood as an attempt to make her appear more like the “other” women performing services for customers at the casino—the semi-nude showgirls and attractive cocktail waitresses—as well as

427. Shook, *supra* note 277, at 45. See also Bayard de Volo, *supra* note 325, at 355 (“Casino waitresses have also been portrayed as after-hours prostitutes, keeping the high rollers happy for the casino and making extra money for themselves.”).

428. Bayard de Volo, *supra* note 325, at 355–56.

429. *Id.* at 364 (observing that “many [cocktail waitresses] donned unfamiliar smiles and expressions that disappeared once they returned to the semiprivacy of the waitress station”).

430. Mayerowitz, *supra* note 157.

431. *Id.* As of December 2006, Jan Jones still held the same position in Harrah’s corporate hierarchy. See Management Team: Biography, Jan Jones, Senior Vice President, Communications & Government Relations, <http://investor.harrahs.com/phoenix.zhtml?c=84772&p=irol-aboutusManagementBio&ID=144675> (last visited Dec. 20, 2006).

432. Bayard de Volo, *supra* note 325, at 365.

the women who advertised their sexual services outside the doors of the casino—the prostitutes in the next county. The community activists who publicly protested Harrah’s grooming rules “compare[d] them to those of the Moonlite Bunny Ranch, a brothel whose owner calls himself the ‘pimpmaster general of America.’”⁴³³

3. *Sexualized Branding: The “Harrah’s Look”*

The restaurant and hotel industry has long understood the significance of gender-specific appearance codes for creating a particular image for its establishments. Harrah’s “Personal Best” grooming rules as applied to Darlene Jespersen can be characterized as an attempt to assure that its female bartenders are as pretty as they can be within an environment that places a premium on sexy, beautiful, painted women who have as part of their job descriptions to be decorative and sexually alluring to men. Enforcing the rule imposes hardships on any woman who chooses not to wear makeup, whether because of sexual identity, politics, religion, allergies, or just personal expression. As Judge Kozinski noted in his dissent in *Jespersen*, “a large (and perhaps growing) number of women choose to present themselves to the world without makeup.”⁴³⁴ But Harrah’s rules also limit the makeup choices of the majority of women who prefer to wear makeup in both their private and their work lives. Harrah’s grooming rules require a particular look, with particular types of makeup—all dictated by image consultants who train the female employees how to be “properly made-up,” after which their “Personal Best” image is “captur[ed] in two photographs that are placed in their file and used on a daily basis “as the appearance standard to which [the] employee will be held.”⁴³⁵ Employees are even expected to use copies of these “Personal Best” photos as a “visual aid while dressing for the floor.”⁴³⁶

Harrah’s hired its image consultant, Reimi Marden, to define and implement the “Harrah’s look.” In light of the fact that Marden had a background in cosmetic sales⁴³⁷ and was being paid to improve and standardize the appearance of Harrah’s frontline service employees, she could hardly have been expected to conclude that Harrah’s employees—male or female—looked just fine the way they were. The women, in particular, would need specific guidance in use of makeup to achieve the proper look—pretty and feminine (beautified), but definitely not cheap. Although the Ninth Circuit en banc majority did not believe that *Jespersen* was “a case where the dress or appearance requirement is intended to be sexually provocative, and tending to stereotype

433. *Harrah’s Dress Rules Draw Protest*, LAS VEGAS REV.-J., Feb. 17, 2001, available at http://www.reviewjournal.com/lvrj_home/2001/Feb-17-Sat-2001/business/15468450.html. The owner of the Bunny Ranch insisted that at his brothel women have more choices about makeup: “[M]akeup is optional, hair must be clean. Jeans are not allowed, nor are bare feet or house slippers. Everything else goes.” *Id.* (alteration added).

434. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1118 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting).

435. See Harrah’s *Brand Standard*, *supra* note 298, at 80.

436. *Id.*

437. Marden was “Sales Director and National Trainer for BeautiControl Cosmetics, an international image company.” About The Winning Edge, *supra* note 391.

women as sex objects,”⁴³⁸ the court ignored the context of Jespersen’s work environment and the fact that, as far back as the 1940s and 1950s, “beauty ads [have] explicitly connected makeup and sex appeal.”⁴³⁹

Harrah’s adoption of its makeup requirement for its female service workers is, of course, all about gender, social class, and work status.⁴⁴⁰ Dress and grooming rules have traditionally been used to restrain female service workers from looking too much like the negative stereotypes associated with their class and type of job. For example, cultural anthropologist Greta Foff Paules worked at a New Jersey restaurant—apparently in the late 1980s—that had a dress code for its waitresses specifying the length of uniform skirts (“no shorter than 1 and 1/2 inches above the knee cap”), and prohibited “elaborate makeup,” as well as “dark hose, runs, dark-red or brown nail polish, visible hair roots, and ‘visible tattoos.’”⁴⁴¹ Paules writes:

These injunctions seem intended to ensure that waitresses will not appear cheap, an important consideration in a line of work that has traditionally been identified with promiscuity and even prostitution. Fifty years ago [in the mid-1940s] a girl who left her hometown to become a waitress in the regional metropolis was “generally assumed to have become a prostitute also,” and there is evidence that for some categories of waitresses the stigma persists.⁴⁴²

In 2004, Jan Jones, a Harrah’s vice president, defended Harrah’s dress and grooming rules as “nothing more than human resource appearance guidelines similar to what you’d find at any major company in America.”⁴⁴³ Moreover, Harrah’s knew from its customer surveys that “[o]ur customers have said that when they go to a casino, they’re looking for a night out and they want people to be well-groomed and have standardized appearances.”⁴⁴⁴ The Harrah’s makeup design would necessarily have to achieve a look that was classy and attractive—just “sexy enough” to fit into the exciting, titillating casino

438. *Jespersen*, 444 F.3d at 1112.

439. KATHY PEISS, *HOPE IN A JAR: THE MAKING OF AMERICA’S BEAUTY CULTURE* 249 (1998). Peiss writes that, beginning in the late 1940s and 1950s, the advertising of beauty products sent this message: “A woman acted upon her desire for a man by making herself beautiful, in order to catch his attention and awaken *his* desire.” *Id.*

440. Judge Thomas recognized the role of social class in his dissent on the panel decision in *Jespersen*. *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1083 (9th Cir. 2004). See *supra* text accompanying note 247.

441. GRETA FOFF PAULES, *DISHING IT OUT: POWER AND RESISTANCE AMONG WAITRESSES IN A NEW JERSEY RESTAURANT* 103 (1991).

442. *Id.* at 103–04 (citations omitted). Paules offers this example: “A cocktail waitress interviewed by Spradley and Mann [in the 1970s] . . . was initially hesitant about serving cocktails because she had always associated bars with ‘loose living,’ and thought of ‘hardcore’ barmaids as ‘hustlers.’” *Id.* at 104 (quoting JAMES P. SPRADLEY & BRENDA J. MANN, *THE COCKTAIL WAITRESS: WOMAN’S WORK IN A MAN’S WORLD* 20 (1975) (alteration added)). See also DOROTHY SUE COBBLE, *DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY* 24–26 (1991) (describing assumptions in the 1920s that waitresses were “loose women” or prostitutes and the persistence of these assumptions, “[d]ecades later, [when] waitresses still complained of male customers who automatically assumed waitresses were sexually available”) (alteration added).

443. Mayerowitz, *supra* note 157.

444. *Id.* The results of Harrah’s “gambler focus groups” also led Harrah’s in 2001 to require its cocktail waitresses to “wear their hair down” and to wear shoes with high heels. *Id.*

environment—but that was not tacky or garish—not “too sexy” so that the wearer looks like a cheap hooker.

Harrah’s image consultant might have anticipated that, in implementing the “Personal Best” policies, Harrah’s would have more difficulty getting low-wage, female workers to use *less* or *different* makeup than they normally used,⁴⁴⁵ and in getting them to apply it in the *standardized* way required,⁴⁴⁶ than in getting women—like Darlene Jespersen—to even apply makeup at all. Whatever the expectations were, the psychological effects of the Harrah’s grooming requirements fell on all female employees much more harshly than on any male employee. Kirsten Dellinger and Christine Williams argue that, although “women who wear makeup are seeking empowerment and pleasure,” “wearing makeup does contribute to the reproduction of inequality at work,” and that “institutionalized norms about appearance effectively limit the possibilities for resistance.”⁴⁴⁷ The burden of a makeup requirement for women has less to do with the time and cost of applying makeup (as opposed to not applying any makeup at all), than with the class assumption that Judge Thomas recognized in his dissent in the panel decision in *Jespersen*—that all women subject to the rule were assumed to be “incapable of exercising professional judgment” about how (or whether) to apply makeup at work.⁴⁴⁸ As Judge Pregersen acknowledged in his dissent in the en banc *Jespersen* decision,⁴⁴⁹ analyzing the relative “burdens” of Harrah’s grooming requirements in this way places the case squarely within the sex stereotype and class-based analysis of *Carroll v. Talman Federal Savings & Loan Ass’n of Chicago*.⁴⁵⁰ Judge Pregersen wrote: “Just as the bank in *Carroll* deemed female employees incapable of achieving a professional appearance without assigned uniforms, Harrah’s regarded women as unable to achieve a neat, attractive, and professional appearance without the facial uniform designed by a consultant and required by Harrah’s.”⁴⁵¹

But Judge Pregersen did not take his analysis far enough. While it is undeniably true that, as he wrote, “[t]he inescapable message is that women’s undoctored faces compare unfavorably to men’s . . . because of a cultural assumption—and gender-based stereotype—that women’s faces are incomplete, unattractive, or unprofessional without full makeup,”⁴⁵² it is also true that there

445. For example, when McDonald’s began hiring women in the late 1960s, management policy dictated that “[h]air styles had to be short and simple and makeup kept to a minimum. False lashes, eye shadow, colored fingernail polish, iridescent lipstick, rouge, and ‘excessive use of strong perfumes’ were prohibited.” JOHN F. LOVE, MCDONALD’S: BEHIND THE ARCHES 294 (1986) (alteration added).

446. The study of women’s attitudes about wearing makeup in the workplace conducted by Dellinger and Williams found that “[n]one of the women interviewed recalled a specific written requirement for makeup use even when their workplace was regulated by a formal dress code policy. Women said that they themselves—as opposed to formal regulations—determine what constitutes an appropriately attractive appearance and whether they attempt to meet those standards.” Dellinger & Williams, *supra* note 404, at 154, 156 (alteration added).

447. *Id.* at 153.

448. *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1086 (9th Cir. 2004).

449. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc).

450. 604 F.2d 1028 (7th Cir. 1979).

451. *Jespersen*, 444 F.3d at 1116 (Pregersen, J., dissenting).

452. *Id.*

is a cultural assumption—and gender-based stereotype—that lower-class working women, left to their own devices, are likely to look “unattractive” or “unprofessional” because they wear too much makeup or the wrong kind of makeup. Thus, a specific makeup requirement, like the one adopted by Harrah’s, relies on both class and gender stereotypes.

Kathy Peiss offered an historical perspective on the beauty industry from the vantage point of the end of the twentieth century:

The connections between appearance, identity, and consumption, forged initially by women beauty culturists at the beginning of the century, have inexorably tightened at its end. Moreover, the cosmetics industry has hastened to absorb and profit from the challenges mounted against it, even as it produces the normative ideals of beauty for which it is criticized. If image and style have long offered women a way to express cultural identities, now these identities offer business a new set of images to sell.⁴⁵³

Peiss’s reference to “business[es]” selling “images” refers, of course, to the cosmetics industry. Yet the connections she describes go much deeper and broader in society, as she recognizes,⁴⁵⁴ for the lone service worker is helpless to resist whatever “images” of women the large corporate employer wants to use to sell services to customers in its markets throughout the nation or even the world. The professional image consultant, for a fee, mediates the relationship between the beauty industry, the corporate employer, and the employee who is both a consumer and is consumed as a commodity (being the product served up to the employer’s customers). Whether collective action would alter this dynamic is far from certain, as will be discussed below.

While the Ninth Circuit Court of Appeals in the *Jespersen* case “do[es] not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress and appearance codes,”⁴⁵⁵ it sets the bar for asserting such a claim very high. If Darlene Jespersen’s case was not the “right” case for such a claim to get to trial on the record presented because “it is limited to the subjective reaction of a single employee, and there is no evidence of a stereotypical motivation on the part of the employer,”⁴⁵⁶ how would one go about finding the test case that addresses these supposed defects? Recasting her claim as objectively reasonable in light of the context of the casino industry and the history of her employment relationship with Harrah’s, and framing her harm as an injury to women of her social class, might help. As would questioning where the grooming rule comes from: Harrah’s grooming rules about makeup were prescribed by an image consultant, whose job was to satisfy customer preferences about employee appearance as determined by her assumptions about appearance, gender, class, and cosmetics, as well as by information from Harrah’s surveys and focus groups. If these grooming rules—deliberately and carefully designed to deliver

453. PEISS, *supra* note 439, at 269.

454. In the very next paragraph to the one quoted above, *supra* text accompanying note 453, Peiss discusses the role of employer-mandated appearance requirements as but one of the “many forces”—ranging from socialization by families, peers, and others to individual expressions of status and identity—“shap[ing] the cultural practice of beautifying.” *Id.* at 269.

455. *Jespersen*, 444 F.3d at 1113 (majority opinion).

456. *Id.*

the Harrah's brand—were not *intentionally* based on stereotypes about women, it is difficult to imagine what would be.

Should a woman be denied the opportunity to work because her face does not satisfy a culturally defined, historically contingent, class-biased, and gender-stereotyped image of the “appropriate,” beautified, feminine face, when having such a made-up face is not necessary to perform the job? *Price Waterhouse* seemed to answer this in the negative; the *Jespersen* en banc majority says, in theory, “maybe yes, maybe no,” but, in fact, we cannot even permit a court to examine the facts of the issue on the basis of this meager record. Implicitly, the court said that a company should not be denied the prerogative to fire an employee because her face does not satisfy the company's chosen brand image for its female employees—which is a culturally defined, historically contingent, class-biased, and gender-stereotyped image of the “appropriate,” beautified, feminine face—regardless of whether having such a made-up face is necessary to perform the job.

Darlene Jespersen's strong reaction to being told to apply certain makeup to her face in order to keep her job as a bartender must be placed within the context of the gendered hierarchy of the casino industry in general and Harrah's commodification and deskilling of its workers in particular, of the sexualized environment of casino shows and gaming floors, of the open and legalized sex trade in Nevada, of the persistent myth of the cocktail waitress as a “loose woman” or prostitute, of the ubiquity of image consultants and their cozy relationship with the cosmetics industry, of the class-based distrust of women's judgment about using cosmetics, and of the story of the feminization of bartending and the role that male-dominated unions and gender-based assumptions played in keeping women from working “behind the bar” for so long. Seen from this perspective, Jespersen's aversion to having a painted face—and the extreme psychological discomfort it caused her for the two weeks that she wore makeup on the job—does not seem personal or idiosyncratic, or an attempt to assert in the workplace her sexual identity as a lesbian, either as an individual or as a representative of a group. Rather it seems an objectively reasonable response in light of all of the circumstances—an attempt to preserve her identity as a bartender and her dignity as a worker.

4. *Property Rights in Work Law, Redux*

Harrah's could not have looked to trade dress law to prevent a competing casino from adopting a dress and grooming code for bartenders identical to the bartenders' requirements in Harrah's “Personal Best” policy. There is nothing particularly distinctive or nonfunctional about the bartenders' uniform or color, and the makeup requirement, which is arguably nonfunctional, is hardly distinctive. But Harrah's could and did use its ability to fire at will to enforce its dress and grooming rules in nonunionized casinos, and because of federal court interpretations of Title VII law in this area—which legitimate the employer's sex-based branding efforts—the statute operates to facilitate exacting regulation of employee appearance.

Neither unions nor (most) employees seem to comprehend the property-like aspects of this intersection between branding and the law. Employees undervalue what they are asked to give up in terms of autonomy—if they place

a value on it at all—and employers, after their initial investment in developing the branding concept and the rules to enforce it, are able at low cost or no cost (because, in the case of makeup rules, the employee pays for the makeup and applies it on her own time) to use the brand standards to extract significant additional value from employees without paying them for this value.

Even if the employer pays its female employees for the cost in time and money to purchase and apply makeup under a mandatory makeup rule for women only—thus equalizing the cost and time burdens on each sex—the employees would not receive compensation for the extra value that the made-up face adds to the brand. By rigorously enforcing its employee-appearance brand the employer receives and keeps the “free” added value of the brand. The laws governing the employment relation, not the laws of unfair trade, protect the employer against employee attempts to resist the imposition and effects of branding. The primary source of protection is employment at will, but the various legal regimes ostensibly designed to create or enforce employee rights, including Title VII, are generally interpreted to protect the employer’s branding interests whenever they conflict with employee interests.

Perhaps this should not surprise us. The law’s reverence for property rights is well-established, especially in the context of work law.⁴⁵⁷ As James Atleson has persuasively argued, a set of unarticulated assumptions structures American labor law, including the notion that continuity of production must be maintained, that workers will act irresponsibly unless controlled, that workers are the junior partners in the management-labor partnership and are obligated to respect and defer to employers, that the workplace is the property of the employer, and that managerial rights are inherent and exclusive.⁴⁵⁸ These assumptions, Atleson explains, trace back to the primacy of property rights in American law.⁴⁵⁹ They undergird and structure not only the interpretation of NLRA law, but also the common law doctrine of master-servant relations that continues to guide employment law and employment discrimination law. Atleson explains:

During the act of hiring, the employer technically concludes a contract, but, essentially, it hires an asset that is expected to bring a return. Over the course of the work relationship, the employer has the power to seek to enlarge the return. The goal, of course, is to create the largest possible gap between the yield of this asset and the terms of its hire.⁴⁶⁰

But suppose the law required employers to pay workers for this added value? Karl Klare proposed that the default rule in the appearance code cases be shifted so that employers would be required to bargain for waivers to

457. See Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994). Almost as well-established is the law’s hostility toward group action and labor unionism. See James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1738–41 (1999) (finding bipartisan drop in judicial support for the legal positions taken by organized labor, and ascribing it to declining popularity of unions and loss of political salience of union issues in the eyes of the general public).

458. JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 7–9 (1983).

459. *Id.* at 9.

460. *Id.* at 14.

discriminate against, discipline or discharge workers for their failure to comply with personal appearance rules.⁴⁶¹ The employer could thus purchase the right to control worker appearance, but should be required to pay a premium in order to obtain such control. However, changing the default rule on workplace appearance codes would be unavailing as long as at-will employment continues to structure the work relation and workers are bargaining individually with the employer, because individual workers lack the leverage to resist the employer's power to contract out of the default. Shifting the default rule would be meaningful only in a unionized workplace where workers have just-cause job security and sufficient bargaining power to resist employer requests without sacrificing their jobs.

However, labor unions are no panacea. First, the oft-discussed weakness of the National Labor Relations Board's remedial powers and the deference to employers' property rights to manage and control their businesses, evident in both Board and court decisions under the NLRA, cabin workers' collective power.⁴⁶² Second, as majoritarian institutions, unions are likely to be reluctant to advance the interests of numerical minority groups or outlier employees in the workplace.⁴⁶³ Claims like Jespersen's, if not supported by a majority of the workers in the bargaining unit, would not receive union support and thus would have little influence on union bargaining positions. Accordingly, Title VII protection is a vital complement to changes in underlying common-law default rules and to efforts to shore up workers' collective power at law under the NLRA. Some aspects of appearance autonomy should be made nonwaivable because of their relationship to Title VII's nondiscrimination mandate, including employer regulations based on gender stereotypes or discriminatory customer preferences, or that expose workers to sexual harassment or abuse.⁴⁶⁴

Stereotypes, here, play a crucial role. Because brand images for sex-based appearance codes are produced through market surveys of consumer tastes and preferences, the results of these surveys are necessarily aggregates of consumer tastes and demands—reflecting contemporary stereotyped assumptions about gender, sexuality, social class, and power. Where corporate branding attempts to capitalize on these stereotypes, the employer realizes a profit by perpetuating the stereotypes. Similarly, the union's role in an organized workforce is to assess the competing interests of workers and to allocate its resources toward advancing the desires and views of the majority. The majority position will likely reflect prevailing community norms, which may in turn encode stereotyped assumptions about gender and sexuality. Thus, unions cannot necessarily be trusted to resist stereotyped branding that tracks community norms.

461. Klare, *supra* note 92, at 1448.

462. See generally ATLESON, *supra* note 458; Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).

463. See Marion Crain & Ken Matheny, "Labor's Divided Ranks:" *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542 (1999).

464. Klare, *supra* note 92, at 1449.

As the *Jespersen* case demonstrates, workers who lack both the protections of Title VII law and the power of a collective voice through union representation are doubly disadvantaged. Ultimately, women like Jespersen are put to a Hobson's choice: Sell their faces to serve the brand or resist and place their jobs in jeopardy.

VI. THE FEMINIZATION OF BARTENDERS: FROM BARMAIDS TO BARTENDERS TO BAR BABES

How does Darlene Jespersen's challenge to Harrah's use of makeup to brand its female bartenders as "feminine," fit into a larger historical, cultural, and sociological narrative of women in bartending in the United States and the role that gender stereotypes, sex-typed branding, law, and unions have played in that account? Bartending in the United States was an almost exclusively male calling until the 1970s, due in large part to the success of union efforts to maintain a male monopoly on the occupation.⁴⁶⁵ Then, within less than two decades, bartending was feminized more rapidly and extensively than any other predominantly male profession, primarily because of changing attitudes that challenged old stereotypes that had served to support the exclusion of women.⁴⁶⁶ Federal antidiscrimination law led the way, but changes in community norms about women—their work lives, their appropriate sex roles, and their relationship to alcohol consumption and public morality—shaped both the legal discourse and the behavior of male and female culinary workers.⁴⁶⁷

In 1890, according to U.S. Census Data, less than one percent of bartender jobs in America were held by women.⁴⁶⁸ Labor shortages during World War I briefly created opportunities for women to work in bartending and serving liquor, but by 1917, "twenty-six states and three territories were dry,"⁴⁶⁹ and in 1920 the Eighteenth Amendment decimated what was left of the legal bartending jobs.⁴⁷⁰ Following the end of Prohibition in 1933, opportunities for women bartenders grew only slightly. During this time, male members of the Hotel and Restaurant Employees and Bartenders International Union, known as the Bartenders Union, played an important role in keeping women out of

465. See generally Dorothy Sue Cobble, "Drawing the Line": *The Construction of a Gendered Work Force in the Food Service Industry*, in *WORK ENGENDERED: TOWARD A NEW HISTORY OF AMERICAN LABOR* 216 (Ava Baron ed., 1991).

466. BARBARA F. RESKIN & PATRICIA A. ROOS, *JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN'S INROADS INTO MALE OCCUPATIONS* 52 (Barbara F. Reskin & Patricia A. Roos eds., 1990).

467. Cobble writes that

where and when *female* food service workers drew the line also played a critical role in shaping the gendered labor force. The elite position of men within the industry was sustained in part by the reluctance of unionized waitresses to challenge men's claim to own both the waiting work in the fancier, more formal all-male houses and the coveted work of mixing and pouring drinks.

Cobble, *supra* note 465, at 240.

468. Linda A. Detman, *Women Behind Bars: The Feminization of Bartending*, in RESKIN & ROOS, *supra* note 466, at 241.

469. MATTHEW JOSEPHSON, *UNION HOUSE, UNION BAR: THE HISTORY OF THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO* 129 (1956).

470. Detman, *supra* note 468, at 242.

bartender jobs in order to preserve a male monopoly. Initially, the Bartenders Union adopted resolutions that imposed “blanket restrictions on women serving liquor because it would morally corrupt them.”⁴⁷¹ Waitresses, who wanted access to the higher paying food and beverage service jobs in union establishments where liquor was sold, eventually prevailed with the union locals, but in exchange they relinquished their claim to bartender positions.⁴⁷² As Dorothy Sue Cobble has observed, “for many waitresses, to be a bartender was not only unladylike, but also unwaitresslike.”⁴⁷³ These shared attitudes about sex-appropriate craft divisions in the food service industry helped perpetuate the traditional sex-segregation of unions of waiters, waitresses, and bartenders. By 1940, women held a mere 2.5 percent of bartender positions,⁴⁷⁴ and most of these jobs were in nonunion establishments.

With the onset of World War II, the Hotel and Restaurant Employees and Bartenders International, by then the seventh largest union in the United States,⁴⁷⁵ again faced labor shortages in the industry: 25,000 men and women from the union joined the armed forces and about another 25,000 went to work in war industries.⁴⁷⁶ The wartime demand for bartenders loosened union restrictions on women working behind the bar. As an historian of the Bartenders Union wrote, “The sturdy bartenders marched off to war, and barmaids often replaced them.”⁴⁷⁷

Following the war, many returning union veterans reclaimed their bartender jobs, displacing the female bartenders who had been welcomed into the union and into bars during the war. In many jurisdictions, locals of the Bartenders International Union lobbied for and obtained state legislation that banned females from the job of “barmaid,” unless the woman was the wife or daughter of the male owner of a licensed liquor establishment. Sex stereotypes were used as “powerful justifications” in passing and upholding these laws.⁴⁷⁸ In 1948, in *Goesaert v. Cleary*,⁴⁷⁹ the United States Supreme Court upheld Michigan’s statute against an Equal Protection challenge to its classification distinguishing “between wives and daughters of owners of liquor places and wives and daughters of non-owners.”⁴⁸⁰ Justice Frankfurter wrote for the majority:

Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic. The Constitution

471. *Id.* at 243.

472. *Id.*

473. COBBLE, *supra* note 442, at 168.

474. Detman, *supra* note 468, at 241.

475. JOSEPHSON, *supra* note 469, at 284 n.

476. *Id.* at 297.

477. *Id.*

478. RESKIN & ROOS, *supra* note 466, at 52.

479. 335 U.S. 464 (1948).

480. *Id.* at 465.

does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.⁴⁸¹

As for stereotypes about men's and women's roles, Justice Frankfurter had this to say:

[B]artending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight.⁴⁸²

As for the role of bartenders' unions in enacting such legislation, Frankfurter concluded that "[s]ince the line [Michigan has] drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."⁴⁸³

Over the next two decades, *Goesaert v. Cleary*—and its sex-stereotyped vision of bartending—buttressed union efforts to keep women out of bartending through state laws and collective bargaining agreements. Between 1948 and 1960, the number of states that prohibited women from working as bartenders increased from seventeen to twenty-six.⁴⁸⁴ As Cobble noted,

[b]artenders contended that barmaids lowered the standards of the craft by working for less, were incapable of being "proficient mixologists," and were not "emotionally or temperamentally suited for the job." They maintained that women could not handle unruly customers without male support; that female "moral and physical well-being" was endangered by exposure to alcohol. . . . One union official went so far as to argue that "a bartender must be a good conversationalist or know when or when not to talk, and you show me the woman who knows that."⁴⁸⁵

The enactment of Title VII in 1964 changed everything. But it took some time. The male monopoly over bartending continued until the early 1970s, when state statutes—like the one upheld in *Goesaert v. Cleary*—were struck down under Title VII challenges, as well as challenges under the Equal Protection Clause and state constitutional grounds. An example was the 1971 California Supreme Court case of *Sail'er Inn v. Kirby*,⁴⁸⁶ in which the Attorney General of California defended the state statute on the basis of stereotypes—that female bartenders could not "preserve order and protect patrons," that women needed to be protected from being injured by inebriated customers, and that hiring female bartenders would lead to "improprieties and immoral acts" and be an

481. *Id.* at 465–66.

482. *Id.* at 466.

483. *Id.* at 467.

484. COBBLE, *supra* note 442, at 166.

485. *Id.* at 166–67.

486. 485 P.2d 529 (Cal. 1971) (en banc). *See also* Detman, *supra* note 468, at 245.

“unwholesome influence” on the public.⁴⁸⁷ The California Supreme Court found the law to be invalid, and the state bans on female bartenders began to lift.

Similarly, during the 1970s, sex-segregated locals for waiters and waitresses within the Hotel and Restaurant Employees and Bartenders International Union were found to be unlawful under Title VII.⁴⁸⁸ After sex discrimination lawsuits broke down the legal and contractual barriers to women entering bartending, “the female tide surged forward.”⁴⁸⁹ In their study of sex-segregation of jobs, Barbara Reskin and Patricia Roos concluded that “[t]he most dramatic effect of Title VII on women’s access to male jobs occurred in bartending.”⁴⁹⁰ Cobble noted that “[b]artending feminized more rapidly in the next two decades than virtually any other occupation; by the end of the 1980s, a majority of bartenders were women. After close to a century of resistance, the union opened its doors to women mixologists.”⁴⁹¹

Today, although the vast majority of bartenders are part-time employees, a substantial number work full-time: In 2004, the Bureau of Labor Statistics reported that 197,000 individuals held jobs as full-time bartenders in the United States, out of a total of 474,000 jobs in bartending.⁴⁹² Of the full-time bartenders in 2004, 95,000 were men and 102,000 were women.⁴⁹³ Bartenders’ earnings are low: Nationwide, in 2004, full-time male bartenders earned \$482 a week, while full-time female bartenders earned \$392 a week.⁴⁹⁴ Though the wage gap between men and women in their median weekly earnings is substantial—women bartenders earn about 80 percent of what men bartenders earn—it closely approximates the difference between the median earnings of men and women generally.⁴⁹⁵ Turnover for culinary workers is high: According to the Current Population Survey, in 2004 the median years of tenure in jobs in “food services and drinking places” was 1.6 years, compared to a median of 4.0 years

487. 485 P.2d at 533, 534, 541, 542.

488. See, e.g., *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974). In *Evans*, with sex-segregated union locals, the waiters were assigned lucrative bar and banquet service, while the waitresses were assigned lower-paying jobs in the hotel restaurant. *Id.* at 184–86.

489. See COBBLE, *supra* note 442, at 170.

490. RESKIN & ROOS, *supra* note 466, at 54.

491. COBBLE, *supra* note 442, at 170.

492. For full-time jobs, see data on “Bartenders” in *Table 2. Median Usual Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex, 2004 Annual Averages*, in BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2004, REP. NO. 987, at 10 (2005) [hereinafter HIGHLIGHTS OF WOMEN’S EARNINGS IN 2004], available at <http://www.bls.gov/cps/cpswom2004.pdf>. For all bartender jobs in 2004, see *Food and Beverage Serving and Related Workers*, in BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, BULL. 2600, at 5 (2006–2007 ed.) [hereinafter OCCUPATIONAL OUTLOOK HANDBOOK], available at <http://www.bls.gov/oco/print/ocos162.htm>.

493. See employment figures for “Bartenders” in *Table 2. Median Usual Weekly Earnings*, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2004, *supra* note 492, at 10.

494. See *id.* (giving median weekly earnings figures for “Bartenders”).

495. “In 2004, median weekly earnings for women who were full-time wage and salary workers were \$573, or 80 percent of the \$713 median for their male counterparts. . . . In 1979, the first year of comparable earnings data, women earned 63 percent as much as men did.” HIGHLIGHTS OF WOMEN’S EARNINGS IN 2004, *supra* note 492, at 1.

in jobs with all employers.⁴⁹⁶ Moreover, unionization of employees working in these establishments is low: In 2004, only 4.7 percent of all employees in occupations related to preparing and serving food were represented by unions.⁴⁹⁷ By contrast, Cobble noted that “[b]y the early 1950s, more than a quarter of all workers in eating and drinking establishments were organized under the HERE [Hotel Employees and Restaurant Employees Union] banner, and in labor strongholds such as San Francisco, New York, and Detroit unionization approached 80 percent.”⁴⁹⁸

The fact that women now outnumber men in the job of full-time bartender is no doubt in large part attributable to the changing legal regime of Title VII and heightened scrutiny of sex-based classifications in Equal Protection doctrine that broke the state-sanctioned male monopoly on bartending jobs. Many aspects of the job and industry, however, contributed to the rapid and extensive feminization of bartending since the 1970s: the decline in real wages (partly attributed to a 1966 Amendment to the Fair Labor Standards Act that allowed bartenders to be paid less than the minimum wage as “tipped workers”),⁴⁹⁹ the rapid growth in the number of new jobs (due in part to the expansion of corporate-owned restaurant chains and franchises, hotels, and casinos, and the decline in bars and restaurants owned by individual proprietors and partners),⁵⁰⁰ the increase in female customers, the high turnover in jobs, the decline in union membership and union representation in the industry, the decline in median weekly hours worked and the increase in part-time work,⁵⁰¹ the availability of flexible hours,⁵⁰² the deskilling of bartending tasks through standardized procedures and the introduction of liquor guns and other machines,⁵⁰³ the proliferation of bartending schools⁵⁰⁴ and the easy availability of on-the-job training for barbacks and cocktail waitresses, and the differential in wages⁵⁰⁵ and status⁵⁰⁶ between waitresses and bartenders. Linda Detman would add to this list

496. Table 5. *Median Years of Tenure with Current Employer for Employed Wage and Salary Workers by Industry, Selected Years, 2000–04*, in BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CURRENT POPULATION SURVEY (2006) [hereinafter CURRENT POPULATION SURVEY], available at <http://www.bls.gov/news.release/tenure.t05.htm>. The 2004 Employee Tenure Summary reports, “Nearly 31 percent of workers age 25 and over had 10 or more years of tenure with their current employer in January 2004.” *Employee Tenure Survey*, in BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CURRENT POPULATION SURVEY, available at <http://www.bls.gov/news.release/tenure.nr0.htm>.

497. See data on “Service occupations: Food preparation and serving related occupations” in Table 3. *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, in CURRENT POPULATION SURVEY, available at <http://www.bls.gov/news.release/union2.t03.htm> (last visited June 16, 2006).

498. Cobble, *supra* note 465, at 218.

499. Detman, *supra* note 468, at 251.

500. *Id.* at 249.

501. *Id.*

502. RESKIN & ROOS, *supra* note 466, at 63.

503. Detman, *supra* note 468, at 248.

504. RESKIN & ROOS, *supra* note 466, at 60–61; Detman, *supra* note 468, at 250.

505. RESKIN & ROOS, *supra* note 466, at 63.

506. Detman, *supra* note 468, at 251.

“changing social attitudes about the acceptability of bartending for women, and the growth of a sex-specific demand for female bartenders.”⁵⁰⁷

Much of the “sex-specific demand” for “barmaids” and “bar babes” rather than “bartenders” is clearly driven by gender stereotypes. One union official “attributed women’s influx into bartending to their appeal to bar owners, who believe that women enhance their trade, do not steal, are better equipped than men to respond to an increased female clientele, and will work for less money.”⁵⁰⁸ The rapid and extensive feminization of bartending is also attributable to the sexualization of the job of female bartenders. Some employers have deliberately recast the nature and requirements of the job of bartending to lure attractive (and, perhaps not coincidentally, lower-paid) women to jobs behind the bar where their pleasing, feminine—and even sexy—appearance is as important as their ability to mix a drink.⁵⁰⁹ For example, a July 2005 job posting on the Internet sought a “sexy bartender for a metal bar.”⁵¹⁰ The bar was looking for “girls to bartender, you have to be 21+, open mind, energetic, sexy and like metal music. . . . You have to dress sexy and black, wear make up.”⁵¹¹ Such ads for female bartenders are ubiquitous in postings on Internet job sites. Popular films such as *Coyote Ugly*⁵¹² portray female bartenders as scantily-clad, sexualized performers, dancing provocatively on the bar while preparing drinks for cheering, inebriated male (and female) patrons. In justifying its 1971 *Sail’er Inn* decision to abolish the state ban on female bartenders, the Supreme Court of California wrote, “Today most bars, unlike the saloons of the Old West, are relatively quiet, orderly and respectable places patronized by both men and women.”⁵¹³ The irony is, perhaps, that the “improprieties and immoral acts” that the California Attorney General feared would result from hiring female

507. *Id.* at 252.

508. *Id.* at 253.

509. The following news account describes some female bartenders in New York City:

Shot glasses and bottles of liquor aren’t all you juggle when you’re a woman behind a bar in New York.

On any night, countless men tell a female bartender how good she looks, why they like her and exactly what they would like to do with her before they’ve even ordered a drink.

. . . .

“We like to provide eye candy,” says Charles Milite, co-owner of Union Square’s Coffee Shop. He estimates that 75% of his bartending staff is female.

. . . .

But many women work at places where their job is to just serve drinks and make chatter &- [sic] and no more.

They’re concerned that the R-rated antics at some of the wilder places lead men to expect salacious theatrics from any woman mixing cocktails.

Rebecca Louie, *Bar Babes*, N.Y. DAILY NEWS, July 23, 2003, available at <http://www.nydailynews.com/front/v-pfriendly/story/103205p-93398c.html>.

510. Advertisement for “SEXY BARTENDER FOR A METAL BAR,” <http://newyork.craigslist.org/> (posted June 9, 2005, 12:49 EDT) (on file with authors). The ad also specifies that “the most important part is that you are bi or willing to put on a show (lesbian show) we have to admit that that shit sells.” *Id.*

511. *Id.*

512. (Buena Vista Pictures 2000).

513. *Sail’er Inn v. Kirby*, 485 P.2d 529, 533–34 (Cal. 1971) (en banc).

bartenders in the early 1970s have become the reason that many bars today want to hire them—the more “improper” and “immoral” the better.⁵¹⁴

Harrah’s Reno casino, however, did not hire Darlene Jespersen to be a showgirl, a “coyote,” a “bar babe,” or even a cocktail waitress who was expected to wear a revealing uniform.⁵¹⁵ She was hired to be a bartender, a job that—according to descriptions of the job functions found either on Harrah’s website⁵¹⁶ or in the U.S. Department of Labor, Occupational Outlook Handbook⁵¹⁷—does not require being either female or male, and certainly does not require being a female who is beautified with makeup. Jespersen willingly wore a uniform consisting of white shirt, black vest, black bow tie, black pants, and black, nonskid shoes, which the *Jespersen en banc* majority described as “for the most part unisex,”⁵¹⁸ though it was the traditional uniform of the stereotypical male bartender harking back to the days when male bartenders had a monopoly on the craft. The uniform was functional, comfortable, and safe, enabling the Harrah’s bartenders to perform their work efficiently. When Harrah’s added standardized makeup as a new uniform requirement for female bartenders, it attempted to get from these women service workers additional entertainment value—to emphasize their feminine appearance as barmaids. In this sense, the female bartenders’ faces were commodified and sold to the customers as part of the Harrah’s branded service exchange. Not only did the female bartenders have

514. See *supra* text accompanying note 487.

515. Bayard de Volo commented that, at the Reno casinos she observed between 1988 and 1995,

Reno cocktail waitress uniforms vary yet tend to involve either a low-cut dress with a short skirt or a low-cut glitter vest and leotard topped with a tuxedo jacket with tails reaching mid-thigh in back. It is tempting to focus on how these uniforms objectify and thus oppress women. They are designed with heterosexual male desires in mind and imposed on female workers. Thus, they invite the male gaze, celebrate male leers, and position women as objects, potential prizes to be won by the lucky (male) winners.

... [T]he waitresses in my study did not experience their uniforms as oppressive. Sometimes, they expressed some sort of satisfaction and pride in their uniform.

Bayard de Volo, *supra* note 325, at 356 (alteration added).

516. A 2006 Harrah’s Internet job posting for bartender position in Reno, Nevada, describes the job functions as follows:

Provides wine, liquor and related bar service to guests at assigned station, including slot change for bars equipped with poker slot machines. Provides fast, efficient service and courteous guest service. Mixes drinks according to prescribed recipes.

Maintains assigned station in a clean and sanitary condition. Keeps assigned station stocked with all liquor, glasses and accessories necessary. Accounts for beginning cash register bank, all cash, complimentary drink coupons and charge receipts.

Serves no minors or obviously intoxicated persons.

Must be at least 21 years of age. Successfully complete a Harrah’s Bartender school. Fluent and literate in English. Excellent guest service interaction skills.

Harrah’s Employment, Search Jobs, http://harrahs.hodesiq.com/careers/job_detail.asp?JobID=783702 (last visited Dec. 20, 2006).

517. OCCUPATIONAL OUTLOOK HANDBOOK, *supra* note 492, at 5. See generally BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, THE 2006–07 CAREER GUIDE TO INDUSTRIES, BULL. 2601, *Food Services and Drinking Places*, available at <http://www.bls.gov/oco/cg/cgs023.htm>.

518. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc).

to pay for the makeup—in unreimbursed cost and time⁵¹⁹—they were not paid for the value their feminized looks presumably added to the Harrah’s brand.

Powerful male bartenders’ unions once actively and successfully fought, sometimes with the complicity of unionized female waitresses, to keep women out of bartending in the United States and preserve union hegemony; yet, today’s much less powerful unions of food and beverage workers—no longer segregated by sex—seem disinterested in fighting for dress, grooming, and appearance codes that would ensure equal working conditions and opportunities for both men and women workers in their industry. Title VII was once a powerful tool used to challenge gender stereotypes underpinning laws and contracts that kept women out of bartending jobs; yet, it is today a weak and ineffectual law in the hands of judges who affirm corporate reliance on “reasonable” gender stereotypes as a barrier to jobs opportunities for women. The fact that there are now more women than men in bartending has not given them more power and status, rather it has contributed to the sexualizing and devaluing of their jobs nationwide. The history and demographics of the bartending profession suggest that both unions and antidiscrimination law can be important agents, both promoting and resisting change. If unions and jurists defer meekly and unreflectively to the prerogative of corporations to appropriate and sell gender stereotypes as part of their brands, the promise of worker dignity and sexual equality will remain unfulfilled.

When male bartenders persuaded states to ban bartending jobs for women, they relied on sex-stereotyped images of what attributes bartenders must exhibit. These were masculinized images of strong, honest, level-headed individuals—good conversationalists who could perform well as members of the male club. Whether he was in a high-class gentlemen’s club, a middle-class neighborhood tavern, or a low-class rowdy bar, the bartender ruled a male domain. The introduction of females was always in a subordinate status—as wife or daughter of the barkeep, as bar maid, bar girl (“B-girl”), or cocktail waitress. When this gender hegemony was broken by Title VII, and women first entered these traditional male jobs in large numbers, questions would inevitably arise for each woman becoming a bartender: Would she be expected to perform her job like a woman or like a man? Are the job functions essentially masculine or only socially constructed to be masculine?

Darlene Jespersen initially fit Harrah’s image of a good male bartender in all of her personal characteristics—her manner, her honesty, her friendliness, her physiognomy, her size and strength; her ability to manage the bar, the money, and mixing drinks; her ability to handle unruly customers and be a good conversationalist. The only “problem” was that she was a woman. Critically, even though for years Harrah’s recognized that she was very good at fulfilling the functions of the job of a traditional (male) bartender—in ways that women historically had been assumed to be incapable of performing—that was not enough in 2000 when Harrah’s required that she wear makeup. At that point, she also had to display conspicuously, to both her customers and her supervisors, her identity as a *female* bartender. Being a bartender, which for her

519. See *id.* at 1117 (Kozinski, J., dissenting) (discussing the reasons the court should give judicial notice to the fact that “putting on makeup costs money and takes time”).

twenty previous years at Harrah's was a "unisex" (or no particular sex) job—open to men and women on equal terms—had become "sexed up" and "feminized," meaning that the company used biological sex to segregate its bartenders into male and female, and then imposed only on female bartenders the sexual status marker of a mandatory, feminine makeup requirement.

Harrah's enforcement of its "Personal Best" branding standard for female bartenders thus turned history on its head, banning Jespersen from a job solely because she was a woman who appeared and acted too much like a man, despite that fact that she was hired precisely because she could do what had traditionally been defined as a man's job, just like a man (indeed maybe even better because as a female bartender she would attract costumers who would see her bar as "a safe place to visit"). Darlene Jespersen, like Ann Hopkins in *Price Waterhouse*,⁵²⁰ was truly caught in "an untenable Catch-22"⁵²¹—required to display what are considered strong masculine traits for her job and fired for refusing to display a feminine, painted face that would undermine her (masculine) authority in performing her job. Harrah's' sex-stereotyped "brand standard" image for its female bartenders was just as pernicious, and just as sexist, as the sex-stereotyped images of bartenders once used by male bartenders' unions, legislators, and courts to keep most women out of bartending jobs altogether. Both then and now, sexual stereotypes—whether used to rationalize and legitimate the sex-based line-drawing found in mid-twentieth-century state statutes, constitutional law decisions, and union contracts or in today's corporate branding as reaffirmed by the courts—have the same effect: They deny women the opportunity to work as bartenders because of their sex.

VII. (RE)FRAMING JESPERSEN'S CLAIM: RESISTING BRANDING

Viewed from a pragmatic perspective, the *Jespersen* Title VII lawsuit seems rather puzzling. Harrah's offered to rehire Jespersen as a bartender and allow her to work without makeup, but Jespersen turned down the offer because Harrah's refused to grant her backpay and also because they refused to abandon their makeup requirement for all female beverage servers.⁵²² Why would the

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

521. *Jespersen*, 444 F.3d at 1111 (discussing the way *Price Waterhouse* placed Ann Hopkins in a "Catch-22" because "the very traits that she was asked to hide were the same traits considered praiseworthy in men" and distinguishing this from Harrah's treatment of Darlene Jespersen); see also Carbado et al., *supra* note 221, at 144–48 (discussing the analysis of the "double bind" (or "catch 22") theory in *Price Waterhouse* and the *Jespersen* panel decision and concluding that "one can argue, as Jespersen herself has always maintained, that acting feminine simply has nothing to do with being a great bartender"). Jespersen should have prevailed under either a narrower "Catch-22" theory of sex discrimination or a broader gender nonconformance theory of sexual stereotyping. See Cynthia Estlund, *The Story of Price Waterhouse v. Hopkins*, in *EMPLOYMENT DISCRIMINATION STORIES*, *supra* note 221, at 65, 91–103.

522. See Rhina Guidos, *Fired Bartender Sues Harrah's Over Makeup Policy*, RENO GAZETTE-J., July 7, 2001, http://www.rgj.com/cgi-bin/printstory.cgi?publish_date=20010707&story=994571740; see also Carbado et al., *supra* note 221, at 120.

plaintiff—a single woman in her mid-forties, living in a double-wide trailer,⁵²³ and surviving on retail service jobs⁵²⁴—not accept this offer?⁵²⁵ Why did she choose to oppose Harrah’s ability to impose its rules on other women service workers? Who were her allies?

When Darlene Jespersen first challenged Harrah’s sex-based grooming rules and was fired, a variety of circumstances—some historical, some accidental, some inevitable, and some serendipitous—shaped the subsequent decisions about how her claim was framed in her own mind, in her community, in the media, by various public interest organizations, her lawyers, and, ultimately, by the courts. Jespersen very early identified her claim as one asserting collective rights for working women.

As her claim moved through the legal system, however, this notion of collective rights was difficult to sustain, despite support from various local and national public interest groups that assisted during the appeal of her Title VII lawsuit in the name of workers’ rights, women’s rights, or rights for gays and lesbians. Ultimately, Jespersen lost her opportunity to take her Title VII case to trial because Harrah’s succeeded in convincing the court that she was an outlier, supporting her legal case with evidence only of her own subjective, idiosyncratic, individual claim, not of harms to women as a class.

After she lost her job at Harrah’s, Jespersen’s options were limited, and her financial circumstances were dire. The beverage servers at Harrah’s Reno casino were not unionized, so she could not bring a grievance to a union. She was an employee at will, so she had no contractual guarantees of continued employment. As a female challenging a sex-based grooming rule, she had a tenuous discrimination claim under existing Nevada antidiscrimination law and Title VII, and pursuing a lawsuit beyond administrative remedies would require the assistance of a lawyer. Moreover, her former employer was one of the largest casino operators in the nation, much less in Nevada, with enormous resources to defend against any legal action she might bring.

523. In 2001, *Mother Jones* magazine reported that Jespersen was then living in a “double-wide mobile home she shares with a menagerie of stray cats and dogs on the outskirts of Reno, Nevada.” Christensen, *supra* note 322.

524. According to Kenneth McKenna, one of Jespersen’s attorneys, after she was fired from Harrah’s and sued the company, she was “blackballed from working in the gaming industry and now holds a job in a retail store.” Vogel, *supra* note 195. Jespersen reported that, after she was fired at Harrah’s, she had to take jobs through “temp services” for two-and-a-half years before she obtained “a real job.” Schelden, *supra* note 191; *see also* Carbado et al., *supra* note 221, at 120 (reporting the “significant costs” Jespersen experienced as a result of losing her job at Harrah’s).

525. A Harrah’s spokesman, Gary Thompson, reported to the press at the time that Jespersen lost her first appeal to the Ninth Circuit, that “Jespersen was later offered her job back, which she declined, and Harrah’s has since modified its policy—although women are still required to wear makeup.” *Court: It’s OK to Fire Woman Who Wouldn’t Wear Makeup*, USA TODAY, Dec. 28, 2004, http://www.usatoday.com/money/workplace/2004-12-28-makeup_x.htm. The dissent in *Jespersen* noted that Harrah’s had “quietly disposed of [its ‘Personal Best’] policy after Jespersen filed [her] suit.” *Jespersen*, 444 F.3d at 1114 n.2 (Pregersen, J., dissenting) (alterations added).

A rational economic choice would have been to take her job back on the terms offered. Jespersen was earning \$30,000 a year when Harrah's fired her.⁵²⁶ As a long-time Harrah's employee, she had received excellent benefits—including five weeks of vacation a year and a 401(k) plan.⁵²⁷ Unable to find work immediately after she was fired, she filed for unemployment insurance from the State of Nevada. The Nevada Department of Employment, Training and Rehabilitation first sent her a letter stating: “‘You have refused to wear makeup because you feel that it is degrading and demoralizing.’ . . . ‘The employers [sic] request was not unreasonable. Refusing to follow company policy is misconduct in connection with work. You are ineligible for benefits.’”⁵²⁸ Two days later (and rather inexplicably since she had not yet taken any action challenging the denial of benefits), Jespersen received a second letter announcing that the Department had reversed its prior decision and was granting her unemployment benefits.⁵²⁹ This second letter asserted that she would be granted unemployment because she had no record of insubordination for more than twenty years of working for her employer and because “the employer changed the conditions of employment.”⁵³⁰

Not surprisingly, Jespersen did not object to this second determination. But neither did Harrah's: The company probably hoped that unemployment compensation would mollify Jespersen until she found another job, and they would not have welcomed the publicity an unemployment compensation hearing might have provoked. Nevertheless, unemployment insurance could not come close to replacing Jespersen's full wages and benefits at Harrah's.⁵³¹ And wages for other bartender positions in Reno—if she could obtain one—would not be likely to compare favorably to her earnings and benefits at Harrah's.⁵³² Even with the financial mitigation of the state-provided, income-security safety net, to face unemployment after twenty years of rewarding work

526. Rhina Guidos, *Reno Bartender Terminated Because She Wouldn't Wear Makeup*, RENO GAZETTE-J., Oct. 1, 2000, http://www.rgj.com/cgi-bin/printstory.cgi?publish_date=20001001&story=970454561.

527. *Id.*

528. *Id.* (quoting from letter to Darlene Jespersen from State of Nevada Department of Employment, Training & Rehabilitation).

529. *Id.*

530. *Id.*

531. For example, as of December 2006, the maximum amount an individual could receive under the Nevada unemployment insurance system was \$362 per week (or \$18,824 per year). See Nevada Department of Employment, Training & Rehabilitation, Unemployment Insurance Claim Filing System, Frequently Asked Questions, How Much Is My First Check?, <http://detr.state.nv.us/uiben/faq.htm> (last visited Dec. 20, 2006).

532. For example, in 2005, five years after Jespersen left Harrah's, the mean annual wage of bartenders for the Reno-Sparks area was \$15,950. Even the ninetieth-percentile wage for this area was \$21,310. By comparison, in 2005 the national mean annual wage was \$17,640, and the ninetieth-percentile wage was \$26,480; in the Las Vegas-Paradise area the mean annual wage was \$21,600, and the ninetieth-percentile wage was \$33,820. These estimates are found in the *Occupational Employment Statistics Survey*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS FOR MAY 2005 FOR BARTENDERS (SOC Code 353011), available at <http://data.bls.gov/oes/search.jsp>. The large disparity in mean annual wages for bartenders between Reno and Las Vegas can be explained to a great degree by the differences in the extent of unionization of food and beverage workers in the two cities, as discussed *infra* Part VII.C.1, notes 534–605 and accompanying text.

for a single employer would be difficult for anyone—a hard consequence for refusing to wear makeup. Yet, the local newspaper reported that Jespersen “said her dignity and self-esteem were worth more than financial comfort.”⁵³³ Unemployed and seemingly alone in challenging a rule that no other female beverage server at Harrah’s Reno Casino had publicly opposed,⁵³⁴ Jespersen told a reporter in the fall of 2000, “This is about our civil rights.”⁵³⁵

A. Finding Allies in Community Organizations: The Alliance for Workers’ Rights

Jespersen found her first ally in a local group of community activists, the Alliance for Workers’ Rights (“the Alliance”), a relatively small public advocacy organization in Nevada that is based in Reno.⁵³⁶ Early in 2000, the Alliance had formed a coalition with two other community groups—the Nevada Empowered Women’s Project and Planned Parenthood—to put pressure on Nevada casinos to abandon mandatory dress codes that required cocktail waitresses to wear high heels on the job.⁵³⁷ Concerns about the health risks of high-heel shoes for women have long been raised by medical professionals,⁵³⁸ as well as by labor scholars.⁵³⁹ However, the Culinary Workers Union, which represents most of the cocktail waitresses on the Las Vegas Strip, had apparently never raised the issue of mandatory shoe style for women in contract negotiations, although the union had dealt with individual complaints about the policy.⁵⁴⁰ The union’s lack of involvement in this issue is understandable: A lobbyist for the Nevada Resort Association probably captured the union’s view when commenting that the high-heel shoe issue was “much to do [sic] about nothing,”⁵⁴¹ and indeed many

533. Guidos, *supra* note 526.

534. When the Harrah’s Reno female beverage servers were asked to sign Harrah’s amended Personal Best policy, requiring all female beverage servers to wear prescribed makeup, Jespersen was the only woman in the group who refused to sign. See GPAC Interview with Jespersen, *supra* note 188. According to Jespersen’s attorney Jennifer Pizer, other female beverage servers at Harrah’s Reno Casino found the “Personal Best” policy offensive but were afraid to express their views to their supervisors. Conversation with Jennifer C. Pizer, Senior Counsel, Lambda Legal Defense and Education Fund, in Durham, N.C. (Oct. 20, 2006).

535. Guidos, *supra* note 526.

536. In its statement of interest in its Amici Brief, the Alliance claimed to have about 300 members in 2003. Brief of the National Employment Lawyers Association et al. as Amici Curiae Supporting Plaintiff-Appellant at 1, *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), available at http://www.lambdalegal.org/binary-data/Lambda_PDF/pdf/361.pdf. The significance of community-based organizations for workers’ rights has been explored by Alan Hyde and Jim Pope. See, e.g., Alan Hyde, *Who Speaks for the Working Poor? A Preliminary Look at the Emerging Tetralogy of Low-Wage Service Workers*, 13 CORNELL J. L. & PUB. POL’Y 599 (2004); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889 (1991).

537. David Strow, *Casino High Heel Policies Targeted*, LAS VEGAS SUN, Feb. 11, 2000, available at <http://www.lasvegassun.com/sunbin/stories/text/2000/feb/11/509835722.html>.

538. See *id.*

539. See, e.g., Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295 (1997).

540. See Strow, *supra* note 537.

541. *Id.*

cocktail waitresses do not object to wearing high heels on the job.⁵⁴² For example, one waitress asserted that high-heel shoes “are a part of the identity of waitresses across Las Vegas,” that they “just make the uniform look better,” and in Las Vegas “people want to see cocktail waitresses that look nice.”⁵⁴³

The Alliance for Workers’ Rights perceived Darlene Jespersen’s dispute with Harrah’s over its makeup rules as a corollary to the Alliance’s statewide “Kiss My Foot” campaign protesting mandatory high-heel policies in casinos.⁵⁴⁴ On February 16, 2001, the Alliance sponsored a demonstration in front of the main entrance to Harrah’s Reno Casino publicizing Jespersen’s story and protesting mandatory high-heel shoe requirements.⁵⁴⁵ Jespersen joined about fifty Alliance members and other community activists and cocktail servers; some of the signs they carried read: “Harrah’s Makes a Lousy Pimp” and “Harrah’s: Stop Pimping Up Profits.”⁵⁴⁶ By this time, Jespersen’s story had come to the attention of national media, starting her on her way to becoming a minor local celebrity⁵⁴⁷ and eventually provoking other protests in front of other casinos in Reno and Las Vegas.⁵⁴⁸ Her story was told in newspapers, on television, and on the Web sites of a number of organizations devoted to rights for workers, for women, for gays and lesbians.⁵⁴⁹ In June 2001, when about fifty Alliance members and casino cocktail servers demonstrated in front of the Venetian in Las Vegas, their signs read “Kiss My Foot” and “Dangerous Not Sexy.” Representatives from the Culinary Workers Union were not present,⁵⁵⁰ but

542. A female HERE representative from Las Vegas, explaining the union’s opposition to the community coalition spearheaded by the Alliance for Workers’ Rights, told one reporter that “‘A nice heel slenderizes the leg. . . . Most waitresses are not opposed to wearing a heel. I personally prefer wearing a heel.’” John Kass, “Consultant” *Cash from Union Leaves Levar Well-Heeled*, CHI. TRIB., Feb. 17, 2000, at 3N.

543. Strow, *supra* note 537.

544. See Bayard de Volo, *supra* note 325, at 370–71.

545. See Gender Public Advocacy Coalition, *Darlene Jespersen Protest in Reno, Nevada*, GPAC NEWS, Mar. 30, 2001, <http://www.gpac.org/archive/news/notitle.html?cmd=view&archive=news&msgnum=0293> (reporting on Reno protest sponsored by Nevada Alliance for Workers’ Rights on February 16, 2001).

546. *Harrah’s Dress Rules Draw Protest*, *supra* note 433. See also the photograph of Darlene Jespersen with protesting cocktail servers holding signs, in Andrew Barbano, *Humpty Dumpty Justice*, BARBWIRE, Apr. 14, 2006, <http://www.nevadalabor.com/barbwire/barb06/barb4-16-06.html> (last visited Dec. 31, 2006).

547. See Barbwire by Barbano, Bulletin, Mar. 28, 2001, <http://www.nevadalabor.com/bulletins.html#foxoff> (discussing stories about the Jespersen lawsuit published in various national media, including *Mother Jones* magazine (Mar.–Apr. 2001), *People* magazine (Dec. 11, 2000), and the website of Oprah Winfrey’s Oxygen cable television channel), <http://www.oxygen.com/oprah>.

548. Guidos, *supra* note 522.

549. See, e.g., Gender Public Advocacy Coalition, <http://www.gpac.org/>; Lambda Legal Defense and Education Fund, <http://www.lambdalegal.org/cgi-bin/iowa/index.html>; Barbwire, <http://www.nevadalabor.com/barbwire/barbcontents.html>.

550. Because of the nature of the signs used in some of these protests, the officials and members of the Culinary Workers Union would have no doubt felt constrained by the limitations on product disparagement imposed by the Supreme Court in *NLRB v. IBEW Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953), a legal constraint not faced by the community activists, as well as questions about the purpose of the picketing, i.e., whether it was informational, organizational, a secondary boycott, etc. See, e.g., NLRA §§ 8(b)(7), 8(b)(4), *codified at* 29 U.S.C. §§ 158(b)(7), 158(b)(4) (2000).

Darlene Jespersen was. Although Harrah's asserted that she was the only person out of its 4,200 employees who had complained about its "Personal Best" dress and grooming policy,⁵⁵¹ by the time she filed her lawsuit, Jespersen's challenge to Harrah's sexualization of its female beverage servers was part of a larger dispute brought by community activists and female casino employees against how the casinos generally used sexualized dress, appearance, and grooming codes to exploit, harm, and demean female beverage servers. Whether they were required to wear high-heel shoes, or makeup, or small-size, tight uniforms, many women workers felt the casinos were "pimping" them.

B. Modes of Resistance at Law: Individual Lawsuits

1. *The Administrative Process*

In an interview with GenderPAC National News in January, 2001, Jespersen described how she came to file a sex discrimination lawsuit against Harrah's Operating Company:

I felt it was wrong what Harrah's was doing. I felt there had to be some legal recourse. I spoke to the Nevada Equal Rights Commission . . . even before I got terminated. . . . The Equal Rights Commission said it [Harrah's makeup requirement] was a reasonable request. I asked whether it was discrimination. They said it had been tried in court and that it was decided that employers could ask women to wear make-up because women were supposed to wear makeup.⁵⁵²

Given the difficulty of prevailing in legal challenges to sex-based dress and grooming policies, it is not surprising that the Nevada Equal Rights Commission saw Harrah's makeup policy as nondiscriminatory and essentially tried to discourage Jespersen from pursuing a claim against the company. Nor is it unusual that the EEOC did not pursue Jespersen's sex discrimination claim against Harrah's on its own initiative, or later intervene in her lawsuit when it became clear that the case raised important interpretive and doctrinal issues under Title VII.⁵⁵³ Michael Selmi has described many of the reasons that the EEOC avoids initiating or intervening in controversial employment

It is difficult to fault the union for its failure to intercede given the Supreme Court's clear message in the *Jefferson Standard* case that workers' sense of self-worth derived from the quality of the product or service that they produce has no protectible value at law. See 346 U.S. at 476 (finding that the workers' attack on the quality of the television programming of their employer had nothing to do with the labor dispute because it "made no reference to wages, hours or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible.").

551. Peter Schelden, *Appeals Court to Hear Harrah's Gender Discrimination Case*, SPARKS TRIB. (Nev.), Dec. 2, 2003, available at <http://www.nevadalabor.com/barbwire/barb03/tribjespg616.html>.

552. GPAC Interview with Jespersen, *supra* note 188. Jespersen also said in this interview that she had called the Nevada Labor Board and that they told her that Harrah's "could fire [her] for any reason because it's a right-to-work state." *Id.*

553. After the oral arguments before the en banc Ninth Circuit, EEOC General Counsel Eric Drieband commented that "[t]he sex stereotyping issue may eventually go all the way to the U.S. Supreme Court." 23 Hum. Resources Rep. (BNA) No. 27, at 735 (July 11, 2005).

discrimination cases.⁵⁵⁴ As he notes in his examination of EEOC employment cases from 1994 to 1996, all of the high-profile, class-action cases the EEOC litigated in that period were originally filed by private attorneys, and the only case the government initiated—the infamous Hooters Restaurant case—was dropped after the agency faced embarrassing news reports and congressional hearings.⁵⁵⁵ One can only imagine the uproar—in the media and Congress—that would have been likely if the EEOC had intervened in what has come to be known as the “Lipstick Lawsuit.”⁵⁵⁶ Yet Jespersen’s challenge to Harrah’s sex-based grooming policy was precisely the sort of difficult case—against a high-profile, wealthy defendant—that could have benefited from a sophisticated class-action approach by a team of career attorneys backed by the resources and expertise of the United States government.⁵⁵⁷ Of course no one, other than the community activists who saw the connections between makeup and high-heel shoes, conceptualized Jespersen’s case as a potential class-action sex discrimination claim. Going forward on her legal claim as an individual, private plaintiff meant that her case would be “notoriously difficult to win.”⁵⁵⁸

2. *The Plaintiffs’ Bar: The Solo Attorney Takes on Harrah’s*

When Jespersen first called the Alliance for Workers’ Rights, it referred her to a lawyer in Reno, Jeffrey A. Dickerson, a solo practitioner who specializes in employment law and employment discrimination claims for plaintiffs.⁵⁵⁹ After assisting her through the administrative process, Dickerson prepared her Title VII complaint and filed it on July 6, 2001, in the United States District Court for the District of Nevada.⁵⁶⁰ In settlement negotiations, Harrah’s again offered to rehire Jespersen in her bartending job without requiring her to wear makeup.⁵⁶¹ But they also did not offer her backpay or agree to change their grooming policy for other workers. She again turned them down.⁵⁶² Reportedly, Jespersen scrambled to find an attorney who could take her case to trial, and another solo attorney in Reno—Kenneth J. McKenna—took over the file.⁵⁶³ He handled the

554. See generally Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. Rev. 1401 (1998).

555. *Id.* at 1429, 1439, 1444.

556. See Barbano, *supra* note 546.

557. Selmi, *supra* note 554, at 1475.

558. *Id.* at 1452. See also Christine Jolls, *Public-Interest Organizations in the Enforcement of Employment Laws*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 144–47 (Richard B. Freeman et al., eds., 2005) (discussing the limited efficacy of private legal representation in the employment law context).

559. Dickerson’s Internet site indicates that he practices in the areas of “Employment Law; Sexual Harassment; Discrimination; Wrongful Termination; Civil Rights; Business Litigation.” See <http://jdickersonlaw.com/jsp2184799.jsp> (last visited Aug. 25, 2006). See generally Carbado et al., *supra* note 221, at 120–21 (discussing Jespersen’s search for legal counsel).

560. See Jespersen Complaint, *supra* note 207.

561. Schelden, *supra* note 551.

562. See Carbado et al., *supra* note 221, at 120 (reporting that, in addition to being unhappy about not receiving backpay, “Jespersen was worried about how her co-workers would react to her receiving a special exemption. And, she was angry.”).

563. See *id.* at 121. McKenna’s name appears as Jespersen’s counsel on the 2004 Nevada Supreme Court decision in *Jespersen v. Harrah’s Operating Co.*, 131 P.3d 614 (unpublished table decision),

case alone, opposing Harrah's summary judgment motion with an evidentiary record that no doubt seemed strong at the time, but later proved to be inadequate as a matter of law. Moreover, the resources of a solo attorney in Reno were vastly inferior to what Harrah's could afford.

From the beginning Harrah's was represented by Littler Mendelson, a large law firm specializing in "defend[ing] employers in civil rights and wrongful discharge litigation," that boasts that "[b]y the end of the 1970s, . . . [it had] acquired a reputation for aggressive representation of employer interests in union-related matters and the emerging area of employment law."⁵⁶⁴ By the 1990s, in addition to offices convenient for Harrah's business in Las Vegas and Reno, Littler Mendelson had offices throughout the country, with more than 150 attorneys.⁵⁶⁵ By 2006, when the *Jespersen* case ended, Littler Mendelson, "with more than 485 attorneys and 36 offices in major metropolitan areas nationwide," could claim that it "is the largest law firm in the country exclusively devoted to representing management in employment, employee benefits, and labor law matters."⁵⁶⁶ The fact that Harrah's was represented throughout the course of the *Jespersen* litigation by a major management-side employment law firm like Littler Mendelson was particularly significant at the summary judgment stage of the litigation, when Jespersen was represented by a solo practitioner.⁵⁶⁷ It was perhaps less important once Lambda Legal Defense and Education Fund stepped in to handle the appeals.⁵⁶⁸ In the end, however, the case was "lost"—in terms of obtaining relief for Jespersen—in the district court at the summary judgment stage, and the imbalance in the legal resources available to the parties early in the litigation may well have been a factor.⁵⁶⁹

No. 40587, slip op. at 7 (Nev. June 7, 2004) (on file with authors), as well as co-counsel on the appellate briefs prepared by Lambda Legal Defense and Education Fund, and as counsel in the published district court and en banc court of appeals decisions in her federal discrimination case. See, e.g., Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178, at 53; *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189, 1190 (D. Nev. 2002); *Jespersen*, 444 F.3d 1104, 1105 (9th Cir. 2006) (en banc).

564. See Littler Mendelson—The National Employment & Labor Law Firm, Firm History, <http://www.littler.com/aboutus/index.cfm?event=detail&childViewID=157> (last visited Dec. 20, 2006).

565. *Id.*

566. *Id.*

567. Two Littler Mendelson attorneys, Patrick H. Hicks, a "founding shareholder of Littler Mendelson's Las Vegas and Reno, Nev. offices" and Veronica Arechederra Hall, "a shareholder in Littler Mendelson's Las Vegas office," "represented Harrah's Operating Company throughout the legal proceedings in the case brought by Darlene Jespersen." Patrick H. Hicks et al., *Reasonable Dress and Grooming Requirements Survive Court Scrutiny*, 10 GAMING L. REV. 342, 342 n.a1 (2006).

568. Lambda Legal Defense and Education Fund did not begin representing Jespersen until after she had brought her state law suit and after Harrah's had prevailed on its motion for summary judgment in federal district court. Conversation with Jennifer Pizer, *supra* note 534.

569. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974), reprinted in IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 11 (Herbert M. Kritzer & Susan S. Silbey eds., 2003); see also Donald R. Songer et al., *Do the "Haves" Come Out Ahead Over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, in IN LITIGATION, *supra*, at 86, 99 (confirming, in a study of decisions of the federal courts of appeals, Galanter's thesis that "repeat players"—including businesses—tend to prevail over individual litigants who are "one-shot players," and concluding that "parties that may be presumed to be repeat players with superior resources consistently fared better than their weaker

3. *Lambda Legal Defense and Education Fund: The Discrimination Claim*

In her appeal to the United States Court of Appeals for the Ninth Circuit⁵⁷⁰ and subsequent petition for rehearing and rehearing en banc,⁵⁷¹ Jespersen was represented by Lambda Legal Defense and Education Fund (“Lambda Legal”), a national not-for-profit organization dedicated to the rights of gay, lesbian, bisexual, and transgender (GLBT) individuals. Lambda Legal is what Christine Jolls describes as a “national issue organization”—a public-interest legal organization “that focus[es] on a particular set of issues or topics . . . and [is] funded largely or exclusively by sources other than the government.”⁵⁷² Like other national issue organizations, such as the American Civil Liberties Union (ACLU) and the NAACP Legal Defense and Education Fund, Lambda Legal “tend[s] to focus on high-profile, publicly charged issues such as discrimination and tend[s] to work on a few important or influential cases rather than a large number of more day-to-day claims.”⁵⁷³ Lambda Legal agreed to take Jespersen’s appeal after the ACLU turned her down.⁵⁷⁴ Jespersen’s case suited Lambda Legal’s purposes well. The only problem was that, as is usual with nonprofit organizations who undertake impact litigation, Lambda Legal did not take her case from the outset;⁵⁷⁵ rather, it entered the case after Harrah’s had won its motion for summary judgment in District Court.

Darlene Jespersen’s decision to keep appealing after every loss seemed to be personal and idiosyncratic. It can be explained in part by her character and principles, but also by Lambda Legal’s decision to take up her cause as its own. Once Lambda Legal recast the case as being about a legal principle at the core of protecting the rights of gays, lesbians, bisexuals, and transgenders generally, and not just about Jespersen’s job, her personal autonomy, or her financial well-being, Lambda Legal had no choice but to continue appealing and to continue funding the costs of the appeals.⁵⁷⁶

opponents and the disparity in success rates was greatest when the disparity in strength was greatest”).

570. See Corrected Opening Brief of Plaintiff-Appellant, *supra* note 178; Reply Brief of Appellant Darlene Jespersen, *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), available at http://www.lambdalegal.org/binary-data/Lambda_PDF/pdf/360.pdf.

571. See Petition for Rehearing and Rehearing on Banc, *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/362.pdf.

572. Jolls, *supra* note 558, at 147.

573. *Id.* at 158.

574. See Carbado et al., *supra* note 221, at 125.

575. Jolls reports that, unlike government-funded legal service organizations, privately-funded public-interest organizations do not provide direct legal advice to clients but focus on cases at the appellate level. Jolls, *supra* note 558, at 163.

576. Citing the 1974 work of Marc Galanter, Catherine Albiston observes that

public interest organizations may better represent the collective interests of one-shot employee litigants than individual one-shot players and therefore be less likely to trade rule gain for monetary compensation. In addition, public interest organizations sometimes engage in strategic litigation to further social change and occasionally engage in strategic settlement themselves to avoid developing a negative legal precedent.

Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 L. & SOC’Y REV. 869 (1999), reprinted in *IN LITIGATION*, *supra* note 569, at 168, 173.

Lambda Legal decided to represent Jespersen in her appeals because the doctrinal treatment of gender stereotypes in Title VII cases is an issue of great importance to the organization and its goals of improving employment opportunities for gay, lesbian, bisexual, and transgender individuals. Lambda Legal correctly understood the significance of Jespersen’s case for the GLBT community and for women generally, and the case’s legal significance did not hinge on whether Jespersen was a lesbian who believed that makeup connotes heterosexuality—and thereby undermined her own sexual identity⁵⁷⁷—or just a woman (lesbian, bisexual, or heterosexual) who did not like makeup or want to wear it, perhaps because it connotes gender subordination. Jespersen was not identified as a lesbian in any court documents; rather, she was described by her own counsel as wishing to be “androgynous” in the workplace—in effect, she chose to identify herself neither as a man nor as a woman.⁵⁷⁸ She was, however, sometimes described as a “lesbian” in media stories about her case.⁵⁷⁹ To ascribe the significance of Jespersen’s aversion to wearing makeup solely to her sexual identity, however, is to dismiss her choices for how to present her appearance as being at best purely personal or idiosyncratic and at worst deliberately nonconforming or even deviant. It is also too simplistic in light of the complex and highly diverse attitudes about cosmetics and appearance among women generally and, in particular, among lesbians.⁵⁸⁰

4. *Individual Rights Versus Collective Rights: What Difference Does Framing Make?*

At the outset of her litigation—both her employment law action in state court and her discrimination lawsuit in federal court—Jespersen did not identify herself as lesbian or frame her case as an assertion of gay rights. The nature of the legal claims shaped her understanding of her rights and the harms that she had suffered. In state court—her direct challenge to employment at will—her claim was cast in terms of broken promises that Harrah’s had implicitly made to her individually. Her understanding of these promises was based on her

577. See Dellinger & Williams, *supra* note 404, at 160–61.

578. David Kravets, *Court Argues If Employers Can Demand Women Wear Makeup*, S.F. CHRONICLE, June 22, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/06/22/state/n170801D13.DTL&hw=jespersen&sn=001&sc=1000>. Harrah’s attempted to use this as evidence that Jespersen was making “an improper attempt to impose an androgynous identity on her female coworkers.” See Appellant’s Reply Brief in Support of Petition for Rehearing and Rehearing En Banc at 2, *Jespersen*, 444 F.3d 1104 (No. 03-15045) (citing Appellee’s Answer at 3).

579. See, e.g., Ann Rostow, *Court Hears Lesbian’s Gender Bias Case*, PLANETOUT NETWORK, June 23, 2005, <http://www.gay.com/news/article.html?2005/06/23/3> (reporting that “Jespersen’s sexual orientation was not at issue in the case, but the lesbian bartender did not feel comfortable with the new regulations”).

580. Historian Kathy Peiss writes:

In the 1970s, many lesbian feminists adopted the natural aesthetic, simultaneously rejecting the look of heterosexual femininity and the tradition of butch-fem role-playing. By the mid-1980s, however, a new appreciation for camp and drag, and a fervent debate over sexuality, caused a reassessment of androgynous looks. As gay theorists in the academic writings condemned notions of the natural, “lipstick lesbians” appeared all made up on the street.

PEISS, *supra* note 439, at 267.

assumption that reciprocal duties of loyalty and good faith defined her twenty-year relationship with Harrah's. She had lived up to her end of the bargain by giving Harrah's twenty years of excellent personal service; it had a duty, she believed, to refrain from requiring that she change her appearance. She was wrong about the law, of course, but the state lawsuit—challenging employment at will—was about her individual employment relationship with Harrah's, and not at all about gay rights, or women's rights, or collective rights of any sort.

Her Title VII lawsuit, on the other hand, was potentially a case about collective rights—about women's rights, workers' rights, and the rights of gender nonconformists, including some members of the gay and lesbian community. But as others have argued, the fact that Lambda Legal represented Jespersen in her appeals and that the two other significant national women's rights groups, ACLU's Women's Rights Project and the NOW Legal and Educational Defense Fund, did not file briefs may have suggested to the Ninth Circuit that this was solely a case about gay rights.⁵⁸¹ While local civil rights and workers' rights groups, including the Alliance for Workers' Rights, filed amicus curiae briefs,⁵⁸² no union filed an amicus brief. Moreover, Jespersen was a single plaintiff, not a member of a class filing a class-action lawsuit. All of these factors likely eased the way for the Ninth Circuit to characterize her claim as the idiosyncratic, subjective grumbling of one nonconforming employee.⁵⁸³

C. Recasting the Claim as a Collective Rights Claim: The Role of Unions

Notwithstanding Harrah's efforts to frame Jespersen's claim as personal and idiosyncratic, her Title VII challenge to Harrah's appearance code was an action that Jespersen, at least, saw as an assertion of group rights. In unionized workplaces, workers might look to a union to mount broad-based challenges against workplace grooming rules. Where were the unions in this case?

1. *HERE and Nevada's Culinary Union Locals*

Jespersen had no union to turn to because she happened to be employed at a Harrah's property located in Reno rather than at one of Harrah's unionized properties in Las Vegas.⁵⁸⁴ Outside of Reno, a number of Harrah's gaming properties throughout the United States have collective bargaining relationships with locals of HERE, the Hotel Employees and Restaurant Employees

581. See Carbado et al., *supra* note 221, at 125–27.

582. *Id.* at 125–26. The following four amicus curiae briefs supporting Jespersen were filed by various public interest and governmental organizations: (1) the National Employment Lawyers Association, the Alliance for Workers' Rights, and the Legal Aid Society—Employment Law Center (June 23, 2003); (2) American Civil Liberties Union of Nevada, Northwest Women's Law Center, California Women's Law Center, and the Gender Public Advocacy Coalition (June 23, 2003); (3) the National Center for Lesbian Rights and the Transgender Law Center (June 7, 2005); and (4) the Hawai'i Civil Rights Commission (June 9, 2005).

583. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000) (finding that amicus briefs affect success rates in a variety of contexts).

584. See Barbano, *supra* note 193 (describing a televised interview with Jespersen in 2000 in which she said, "Las Vegas is union and in Reno, we're not."); see also www.unitehere.org (UNITE HERE listing of unionized hotels) (last visited Oct. 17, 2006).

International Union.⁵⁸⁵ In 2000, the Culinary Workers Union, locals of HERE, represented more than 50,000 food and beverage workers in Nevada, with most employed in and around Las Vegas.⁵⁸⁶ At the time, Culinary Workers Union Local 226 represented about 1,500 employees at Harrah's Las Vegas.⁵⁸⁷ With the exception of Reno's Circus Circus, which the Culinary Workers Union organized in 1981, and several other small bargaining units of other unions at other properties, the casinos in Reno in 2000 were more or less union-free; but this environment was beginning to change.⁵⁸⁸ From the mid-1990s, Culinary Workers Union Local 86 had been engaged in organizing at the Reno Hilton and Flamingo Hilton-Reno.⁵⁸⁹ In June 2001, around the time Jespersen was filing her discrimination lawsuit, the union signed a contract with the two Reno Hilton properties covering 1,575 food and beverage workers.⁵⁹⁰

Because Harrah's Reno casino was neither organized nor a focus of the Culinary Workers Union's organizing efforts in 2000, Jespersen was not likely to have conceived of her dispute about the makeup rule as an issue that the union might support. Once her dispute became public and was transformed into a lawsuit with potential significance for female service workers generally, however, it is less clear why the local union or HERE did not perceive her individual claim as helpful to their organizing and outreach efforts locally or nationwide. Nor is it clear why no union challenged the makeup rule at any of Harrah's unionized casinos.⁵⁹¹ At the time that Harrah's was beginning to roll out its "Beverage Department Image Transformation Initiative" (BDIT) at its Las Vegas casinos in May 2000, the new makeup policy did provoke criticism from a staff director of Las Vegas's Culinary Workers Local 226, who called it

585. The Hotel Employees and Restaurant Employees International Union (HERE) merged with UNITE (Union of Needletrades, Industrial and Textile Employees) in 2004 to form UNITE-HERE. By 2006, UNITE-HERE represented more than 90,000 workers in the gaming industry in casinos located in Nevada, New Jersey, Michigan, Illinois, Indiana, Missouri, California, and Washington. See <http://www.unitehere.org/about/> (last visited Nov. 7, 2006).

586. Bill O'Driscoll, *Nongaming Workers Get Union Pact at Hilton Hotels in Reno*, RENO GAZETTE-J., June 29, 2001, available at http://www.rgj.com/cgi-bin/printstory.cgi?publish_date=20010629&story=993871598. In 1938, HERE chartered Local 226 of the Culinary Workers Union in Las Vegas, and despite lengthy strikes against several casinos, the union has flourished in Las Vegas, claiming to have organized more than 22,000 new workers since the opening of the Mirage "mega-resort" in 1989 and to be the fastest growing local in America in 2006. See Culinary Workers Union Local 226, Las Vegas, History, <http://www.culinaryunion226.org/english/pages/history.html> (last visited Dec. 20, 2006).

587. Phil Levine, *Harrah's Sets Appearance Standards*, LAS VEGAS SUN, May 11, 2000, available at <http://www.lasvegassun.com/sunbin/stories/text/2000/may/11/510243167.html>. Harrah's Rio Suites hotel-casino in Las Vegas, however, was not unionized. *Id.*

588. O'Driscoll, *supra* note 586.

589. *Id.*

590. *Id.*

591. Union locals at other Harrah's casinos did, however, bring grievances under their collective bargaining agreements over hair length and styling policies implemented as part of the Harrah's appearance code in 2002. See, e.g., *Wiseley v. Harrah's Entm't*, No. 03-1540 (JBS), 2004 WL 1739724 (D. N.J. Aug. 4, 2004) (noting that union obtained reinstatement for one male server at Harrah's in New Jersey who was discharged for refusing to comply with hairstyle aspect of 2002 grooming code).

“intrusive and an invasion of individual choice”⁵⁹² The union official said, “The idea that the company thinks it can impose an image is outrageous.”⁵⁹³ But the union focused on the impact of the waitresses’ uniform requirements on women returning from maternity leave—an issue affecting a contractual leave policy⁵⁹⁴—and not on the new makeup requirement.

Unions’ failure to challenge Harrah’s “Personal Best” grooming rules for female beverage servers at casinos where they had collective bargaining relationships, or to support Jespersen’s appeals as *amicus curiae*, may be explained, if not justified, in several ways. First, if no other female beverage servers at any of Harrah’s casinos complained about the makeup requirements, as Harrah’s contended, the union locals may have concluded that it was not a very significant issue. Harrah’s female beverage servers and bartenders may have been willing to go along with the new grooming policy because they wore similar makeup anyway, or because they believed the makeup rule conformed to societal gender norms, or because they were willing to be branded by Harrah’s if it was part of the job, or because they believed they would earn more tips if they wore cosmetics that made them appear more attractive, or because they were so used to dress and grooming rules that sexualized women workers that they did not see themselves as being commodified.⁵⁹⁵ When Jespersen filed her lawsuit, one news report observed,

From shoes to makeup, casinos traditionally have mandated different dress codes for men and women. Sit at a slot machine or roulette table, and a female server in a uniform that includes a short skirt, high heels, and makeup will stop to offer a drink. The few male servers must wear long pants and look clean.⁵⁹⁶

One of Harrah’s female bartenders who reported that she was happy to go along with the casino’s new makeup policy said, “This is nothing new to us.”⁵⁹⁷ Jespersen agreed that “[t]his has been going on forever. . . . You take it until it pushes that button. And that’s what this did with me.”⁵⁹⁸

Alternatively, the union may have viewed the grooming policy as business as usual—falling within managerial prerogative to create the product, which in the case of a frontline beverage service worker, is the employee. The unions’ 1964 loss before the Ninth Circuit on the union insignia/nonadornment policy

592. Levine, *supra* note 587.

593. *Id.*

594. The BDIT required that female beverage servers be able to fit into their old uniforms following twelve weeks of maternity leave. This requirement conflicted with the eighteen-month maternity leave policy under the Culinary Workers Union contract with Harrah’s in Las Vegas. *Id.*

595. A less-benign explanation is suggested in one news account, which quotes cocktail waitress comments made in reaction to newly-imposed grooming standards at Harrah’s Casino in Maryland Heights, Missouri. While workers praised the company’s BDIT program during interviews held in casino offices, workers interviewed off premises described the policy as “extremely restrictive,” “rigid and intrusive.” These workers (unlike those interviewed in casino offices) refused to give their names for fear of reprisal by Harrah’s. *Policy at Harrah’s Governs Appearance of Servers*, GAMBLING MAG., June 4, 2000, <http://gamblingmagazine.com/managearticle.asp?c=400&a=640>.

596. Rhina Guidos, *Fashion Checklist: No Blush, No Lipstick . . . No Job*, CHRISTIAN SCI. MONITOR, July 18, 2001, available at <http://www.csmonitor.com/2001/0718/p1s4.html>.

597. *Id.* (quoting statement of Harrah’s bartender, Regina Hearrell).

598. *Id.* (quoting statement of Darlene Jespersen).

might long ago have convinced unions that resistance to the appearance code was futile.⁵⁹⁹ Or perhaps the management rights clause in Harrah's collective bargaining agreement had been construed by arbitrators (in unreported decisions) as including managerial rights to establish and enforce appearance codes. The record of successful union challenges to dress and grooming codes is rather dismal: Unions lose most substantive challenges to employer dress and grooming rules as long as management can justify them as being "reasonable."⁶⁰⁰ Unions are behaving rationally by not devoting scarce resources to losing cases, which was how HERE and the Las Vegas Culinary Workers Union Local 226 apparently characterized Jespersen's fight with Harrah's.

Still another possibility is that the union's interests have become aligned with the employer's in perpetuating the success of the corporate brand. The union might have viewed Jespersen's claims as a challenge to Harrah's corporate branding choices and processes, a realm of decision-making so central to the success and continued expansion of the enterprise that the union either had no right to interfere, or, if it had a right, no interest in interfering. The collective bargaining agreement between Harrah's and HERE included a card check agreement and neutrality pledge pursuant to which Harrah's agreed to recognize and bargain with HERE based upon a majority card count and to remain neutral during organizing campaigns conducted by HERE at any new Harrah's operation.⁶⁰¹ In exchange, HERE agreed to cooperate with Harrah's in its efforts to expand into new markets, assisting Harrah's in its lobbying efforts with state legislatures and sending casino employees to testify before state legislative committees in other states about Harrah's beneficence as an employer.⁶⁰²

Thus, the union's interest in expanding its membership base through card check recognition at all new Harrah's operations became aligned with Harrah's interest in expansion.⁶⁰³ From the union's perspective, this partnership conferred more bargaining leverage to seek better wages and benefits, and HERE capitalized on this leverage in core economic areas: In 2001, HERE Las Vegas

599. See *supra* text accompanying notes 98–101 (discussing *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964)).

600. See *supra* Part III.B.

601. David Moberg, *Organization Man*, NATION, July 16, 2001, available at <http://www.thenation.com/doc/20010716/moberg>. Neutrality pledges have become an extraordinarily valuable tool for unions seeking to organize workers outside the NLRB's election processes. Unions with sufficient bargaining leverage to obtain neutrality pledges enjoy a relatively smooth and speedy path to recognition as the majority bargaining representative at all subsequently opened stores. For a full discussion of the operation and significance of neutrality pledges, see James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828 (2005) (noting that eighty percent of the workers who became union members between 1998 and 2003 did so outside the NLRB election process).

602. See Mayerowitz, *supra* note 157 (reporting that the Providence, Rhode Island, local chapter of HERE "has been one of Harrah's biggest supporters, flying in casino workers to testify before the General Assembly [of Rhode Island] on how great it is to work for Harrah's"); Andrew Conte, *Second Day of Gambling Hearings More Sedate*, PITTSBURGH TRIB.-REV., Apr. 19, 2006 (referencing neutrality pledge) (alteration added).

603. David Moberg reports that ninety percent of the Culinary Workers' growth in Las Vegas between 1989 and 2001 was attributable to card check agreements. Moberg, *supra* note 601.

hotel room cleaners earned \$22,000 per year—forty-four percent more than similar workers in nonunion Reno—plus benefits.⁶⁰⁴ Nevertheless, skeptics wonder whether the partnership between HERE and casino employers comes at the expense of enhanced contract rights in noneconomic areas. The staff director for the Las Vegas Culinary Workers admitted to one reporter “‘if we ditched [the card-check and neutrality agreements in contracts] we could get a little more money or one or two more rights.’”⁶⁰⁵ Is the tradeoff of easier organizing and enhanced bargaining leverage on economic issues worth the potential sacrifice of noneconomic rights, particularly those involving the interests of workers historically subjected to discrimination on the job?

2. *Successful Union Strategies in Other Branding Cases*

Other unions have made different decisions about resisting branding, with more encouraging results. Below we recount two contrasting stories. Common to both situations are two complementary factors: (1) the presence of a union committed to resisting branding that demeans workers and (2) the use of Title VII litigation as a tactical strategy to advance the union’s objectives in bargaining.

a. *The “Safeway Smile”*

In the early 1990s, Safeway Grocery Stores implemented a “Superior Service” policy, which required workers to be outgoing, friendly, and helpful. Specifically, workers were instructed to make eye contact with customers, smile and greet them by name at the checkout counter (names were derived either from credit cards or from store-issued customer cards), offer samples, and accompany them to locate items that they could not find.⁶⁰⁶ Customer response was very positive, but workers resisted. To enforce the policy, Safeway instituted a “Mystery Shopper” evaluation system in which workers were graded by secret shoppers who pretended to be regular customers. The Mystery Shoppers used a nineteen-point rating scorecard to assess workers’ friendliness as a part of the Superior Service program; results affected performance evaluations and eligibility for bonuses and stock incentives.⁶⁰⁷ Reports on workers’ cheeriness were posted in store break rooms, and unfriendly cashiers were sent to “smile school.”⁶⁰⁸ One long-time cashier was discharged for failing to comply with the policy.⁶⁰⁹ Others complained that the policy had provoked sexual harassment or unwanted advances from male customers.⁶¹⁰ Some workers

604. *Id.*

605. *Id.*

606. See Kristin Downey Grimsley, *Service with a Forced Smile; Safeway’s Courtesy Campaign Also Elicits Some Frowns*, WASH. POST, Oct. 18, 1998, at A1.

607. *Id.*

608. Kelly Barron, *The Sam Walton of Supermarkets?*, FORBES, Oct. 19, 1998, at 64; Michael Harrison, *EEOC Charges Filed Against Safeway*, SUPERMARKET NEWS, Nov. 23, 1998, at 6.

609. See Larry Parsons, *Safeway Fires 20-Year California Veteran for Violating Friendliness Rules*, MONTEREY COUNTY HERALD, Oct. 10, 1998 (describing termination of twenty-year veteran employee Sandi Lewtschuk for failure to smile and failure to use customer’s last name when thanking the customer; her union grieved the termination under the arbitration provision in its labor contract).

610. Barron, *supra* note 608; Harrison, *supra* note 608.

were disturbed by the policy because it required them to engage in behavior that seemed socially inappropriate: Male clerks complained that some female customers displayed body language that suggested that they felt stalked or harassed; others felt uncomfortable with overriding their instincts and following corporate policy with customers who indicated that they were harried and wished to be left alone. One worker, afflicted with Bell's Palsy and unable to smile, was written up for not smiling despite his inability to control the muscles in his face.⁶¹¹

In November of 1998, male and female workers filed charges with the EEOC alleging that the Superior Service policy exposed them to sexual harassment by customers, creating a hostile work environment. By forcing them to suspend their natural defense mechanisms and act against their social instincts, the policy made them vulnerable to offensive actions by customers. The complaints alleged inappropriate customer comments, notes proposing sexual acts, physical assaults in the grocery stores and in adjacent parking lots, and stalking.⁶¹²

Although the complaints were filed by both male and female workers, it was clear that there was a gendered component to the rule. One female worker described her concerns in this way: "[A]s a woman, I am offended that a group of men have come up with a policy to make me front like I'm a Playboy bunny. That's ridiculous. I'm not here to sell sex."⁶¹³ Another worker commented, "When I'm asked to look up every few seconds and make eye contact with the customers, I feel as though I'm flirting."⁶¹⁴ And a third put it most bluntly, "It's like a form of prostitution to me."⁶¹⁵

The plaintiffs were assisted in filing charges by their unions, United Food and Commercial Workers' Locals 1179 and 373. They did not seek a significant financial settlement; instead, they asked for a written statement from Safeway preserving worker discretion to suspend compliance with company policy and conform to their own social instincts when confronted with a situation that made them uncomfortable.⁶¹⁶ The unions simultaneously filed charges with the National Labor Relations Board alleging that the employer's Superior Service program was adopted unilaterally, without bargaining with the unions, thus violating the NLRA. Both complaints were dropped when the cases were settled in early 2000; Safeway agreed to work with the unions to develop and communicate expectations under its Superior Service program in writing.⁶¹⁷

611. Grimsley, *supra* note 606.

612. Sarah L. Ream, Note, *When Service with a Smile Invites More Than Satisfied Customers: Third-Party Sexual Harassment and the Implications of Charges Against Safeway*, 11 HASTINGS WOMEN'S L.J. 107, 118 (2000).

613. Transcript of ABC's 20/20 News Show, *The Safeway Smile*, Oct. 30, 1998 (statement of Amy Kinyon) (on file with authors).

614. *Id.* (statement of Joyce Lindberg).

615. *Id.* (statement of Frances Work).

616. Specifically, the plaintiffs said that they sought a statement to the effect that "if somebody's coming on to you, you don't have to smile at them or put on a happy face like a robot." *Daily Briefing*, SEATTLE TIMES, Nov. 1, 1998, at A12.

617. Michael Liedtke, *Smiles More Discerning at Safeway*, CONTRA COSTA TIMES (Knight Ridder/Trib. News Serv.), Jan. 18, 2000.

b. *The Flight Attendants' Challenges*

In perhaps the best-known example of explicitly gendered branding, airlines portrayed flight attendants—known as “stewardesses” until the 1970s—as “alluring and nurturing hostesses.”⁶¹⁸ Originally, both commercial airline piloting and taking care of passengers’ needs in the cabin were male jobs. With the advent of World War II, however, men were pulled from the labor market and into the military, and women stepped into the gap as airline cabin attendants.⁶¹⁹ Although the job entailed a combination of waitressing (serving food and drinks), nursing (caring for youthful, elderly, and infirm passengers),⁶²⁰ and safety officer duties (enforcing safety rules, monitoring for emergency situations),⁶²¹ airlines selected for brand fit, hiring only white, young, single, slender, attractive women.⁶²²

Airline marketing and cultural representations exploited stewardesses’ femininity and its association with titillation and comfort.⁶²³ The early stewardesses were branded as “the girl next door”: They were white, middle-class, youthful, and unmarried.⁶²⁴ The no-marriage rule—initiated first by United Airlines and later adopted by others—was defended on multiple bases, including concern about the conflict between stewardesses’ travel schedules and their roles as wives, and the airlines’ desire to avoid calls from overprotective husbands seeking their wives’ whereabouts.⁶²⁵ At bottom was the airlines’ effort to portray stewardesses as “vestal virgins,” in a 1950s-era version of sexualization.⁶²⁶ Ideal job tenure from the airlines’ perspective was approximately eighteen months, by which time the stewardesses were expected to secure suitable husbands.⁶²⁷ The job was a short-term interlude and gateway to marriage, which made it difficult for the stewardesses to be taken seriously as members of a craft or profession.

618. Kathleen Barry, “*Too Glamorous to Be Considered Workers*”: *Flight Attendants and Pink-Collar Activism in Mid-Twentieth-Century America*, 3 LAB.: STUD. WORKING-CLASS HIST. AM. 119, 119 (Fall 2006).

619. Alice Cook, *Introduction* to GEORGIA PANTER NIELSEN, *FROM SKY GIRL TO FLIGHT ATTENDANT: WOMEN AND THE MAKING OF A UNION* xiii, xvii (1982).

620. Indeed, airlines required that stewardesses possess nursing degrees until World War II, when nursing shortages made this impracticable. Barry, *supra* note 618, at 123.

621. Stewardesses reassured nervous passengers, made sure they did not mistake the exit door for the restroom, and answered questions about the terrain below. In the early days of air travel, particularly on the smaller airlines, stewardesses were also responsible for a great deal of manual labor, including joining bucket brigades to fuel the airplanes, helping pilots push planes into hangars, and loading all baggage on board. NIELSEN, *supra* note 619, at 11.

622. Barry, *supra* note 618, at 121. The specifications for stewardesses in the 1930s required applicants to be less than twenty-five years of age, weigh 115 pounds or less, and stand not more than five-feet four-inches tall. NIELSEN, *supra* note 619, at 10.

623. Barry, *supra* note 618, at 121.

624. NIELSEN, *supra* note 619, at 20.

625. *Id.* at 19.

626. *Id.* at 20.

627. *Id.* The airlines’ policy was reportedly, “‘Use them till their smiles wear out; then get a new bunch.’” *Id.* at 81. Those who stayed in the job longer than thirty-five months were labeled “the wrong kind of girl,”—i.e., unmarriageable. *Id.* at 83.

Airline rules mandated charm and attractive grooming, and imposed prototypical demands for emotional labor.⁶²⁸ Airlines developed the earliest metaphor of workers as “hostesses” and customers as “guests,” which rendered the stewardesses’ emotional labor invisible and secured their complicity in this presentation of their efforts. The airlines’ marketing strategy thus minimized the economic value of their labor: As a “natural, voluntary expression of female domesticity,” their efforts lacked economic value.⁶²⁹

Stewardesses’ appearance was governed by policies that were almost “paramilitary” in stringency; “appearance counselors” monitored compliance with the codes, and scales were an important feature in the appearance rooms.⁶³⁰ Georgia Panter Nielsen describes the appearance code at United Airlines:

Girdles were to be worn, and periodic checks were made by some supervisors. Nail polish and lipstick were required, and the colors were selected from an approved list. Hair could not extend over the uniform blouse collar and could not be worn in an upswept fashion. Dyeing of hair or bleaching of hair was prohibited. Straightening of hair for black women was acceptable, but Afro, cornrow, and braided hairstyles were taboo. Hats and gloves were to be worn at all times. Part of the routine flight duties included appearance checks by the flight attendant herself to ensure that her appearance was not disheveled. Hosiery with runs was expected to be replaced by an extra pair of stockings carried as important equipment. During the early 1960s white uniform blouses were often checked for perspiration stains.⁶³¹

Cultural representations of stewardesses further glamorized them: journalists, filmmakers, and novelists depicted stewardesses as eminently desirable—the girl next door, dressed up, enjoying the freedom to travel and training for the “ultimate female ‘profession’ of homemaking.”⁶³² The jobs were highly sought after: throughout the mid-twentieth century, airlines averaged one hundred applicants for every three to five stewardesses hired.⁶³³ The popularity of the job was understandable. Stewardessing was a near-certain path to the altar and featured opportunities to meet high-income men (encounters with celebrities and VIPs were common); it also offered travel and an independent lifestyle, rare opportunities for women of the postwar era.⁶³⁴

These “wages of glamour”⁶³⁵ came at considerable cost, however. Once married, stewardesses were grounded. By age thirty-two, they were considered

628. Barry, *supra* note 618, at 122; see HOCHSCHILD, *supra* note 27.

629. Barry, *supra* note 618, at 122; see also Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) (explaining why labor that is perceived to be primarily affective, such as housework and caretaking, is defined as not-work, and those who perform it—primarily women—are not seen as workers).

630. NIELSEN, *supra* note 619, at 99.

631. *Id.* at 98–99.

632. Barry, *supra* note 618, at 124.

633. *Id.* at 124–25. United Airlines reported receiving an average of fifty thousand applications a year for the job. NIELSEN, *supra* note 619, at 82.

634. Barry, *supra* note 618, at 124.

635. *Id.* at 125; see DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 13 (1991) (describing social and psychological “wages of whiteness” enjoyed by white workers: whites’ feelings of racial privilege relative to blacks muted their hostility

past their prime and forced to retire. Long-term benefits and promotional opportunities were nonexistent. Glamorization in marketing invited sexual harassment in the air.⁶³⁶

Seeking respect as “real workers, with economic needs and skills as real as men’s,”⁶³⁷ stewardesses turned to unionization. In order to gain respect and the attendant economic benefits, they needed to shed their “mystique of glamorous femininity,” which “made them unrecognizable as workers of any kind.”⁶³⁸ Overcoming barriers of a transient workforce with high turnover, little experience with labor unions, and a self-consciously elitist attitude, the stewardesses organized independent unions.⁶³⁹ Initially, the AFL denied their independent union affiliate status, and they were forced to affiliate with the Air Line Pilots’ Association (ALPA), an AFL union. ALPA was determinedly white and male in its membership.⁶⁴⁰ This partnership provided resources and clout, but trapped the stewardesses in a subordinate relationship structured by yet another gender hierarchy. Both ALPA and the Transport Workers’ Union (TWU)—a CIO union which ultimately affiliated a national local of stewardesses—embraced the stewardesses primarily to keep the group from bringing in a more powerful rival union and to restrict them to a narrow range of issues at the bargaining table.⁶⁴¹ The airlines’ occupational segregation by sex of pilots (male) and stewardesses (female), together with the male-dominated unions’ turf-guarding strategies, yielded sex-segregated unions.⁶⁴²

Though the unions protested the age limits and marriage bans at the bargaining table and by filing grievances under collective bargaining agreements, their efforts were sporadic and produced no widespread change. First, many stewardesses supported the age limits, weight restrictions, and marriage bans.⁶⁴³ Second, airlines strenuously resisted alteration of the branded image at the bargaining table and in arbitration, and only piecemeal progress was made.⁶⁴⁴ Without a clear-cut cultural norm of antidiscrimination stemming from a federal statute, unions had difficulty persuading arbitrators to reject the well-accepted practice in the industry.⁶⁴⁵

With the enactment of Title VII and parallel state legislation prohibiting sex discrimination, the tide turned. With union support, stewardesses initiated legal

toward employers; employers deployed racial privilege to “make up for alienating and exploitative class relationships”).

636. Barry, *supra* note 618, at 125.

637. *Id.* at 120.

638. *Id.* at 121.

639. *Id.* at 126; NIELSEN, *supra* note 619, at 36. It appears, however, that airlines did not resist the unionization of stewardesses, believing it easier to deal with a recognized agent on behalf of the predominantly short-term, temporary workforce. *Id.* at 32.

640. Until 1942, the ALPA constitution contained a clause restricting membership to “white males of good moral character.” Cook, *supra* note 619, at xv.

641. *Id.* at xx.

642. *See id.*; Barry, *supra* note 618, at 127.

643. NIELSEN, *supra* note 619, at 84, 102.

644. Barry, *supra* note 618, at 132; NIELSEN, *supra* note 619, at 87–90.

645. *See* NIELSEN, *supra* note 619, at 84.

challenges to the airline age limits and marriage bans.⁶⁴⁶ Stewardesses also exploited their public personas to tell their story through the media. They held press conferences, testified before congressional committees, and initiated protests, sparking a public debate. Gradually, public opinion shifted. Changing sexual mores and the demands of the women's movement for equality were inconsistent with the marriage ban and the early-retirement rule.⁶⁴⁷ By the early 1970s, the age limits and marriage bans had been denounced by the EEOC⁶⁴⁸ and the federal courts.⁶⁴⁹

Throughout this period, however, stewardesses were careful not to challenge the airlines' branded marketing, the appearance policies, or the employment restrictions themselves in the court of public opinion. Instead of accusing airlines of exploiting women by creating "flying bunny clubs" that valorized youth and sexual availability, the stewardesses emphasized the unfairness and illogic of generic rules that applied to stewardesses who still fit the branded occupational image—still youthful, slim, and attractive—albeit married and/or over thirty-two years of age.⁶⁵⁰

During the 1970s, the airlines turned to more explicitly sexualized branding and marketing campaigns. Stewardesses went from "vestal virgins"⁶⁵¹ to "sexy swingers" in marketing campaigns: Instead of portraying the stewardess as the fresh-faced girl next door in search of a suitable husband, airlines sought to cast stewardesses as provocative teases, "commercial standardbearer[s] of the sexual revolution."⁶⁵² Marketing slogans were explicitly sexualized: National advertised "Hi, I'm Cheryl—Fly Me"; Continental's slogan was "We Really Move Our Tails For You"; and Braniff instituted an "Air Strip" in which stewardesses shed parts of their uniforms in flight.⁶⁵³ Uniform trends shifted from tailored suits to miniskirts and hot pants.

In response, stewardesses' demands for respect as workers intensified. They advanced challenges to the sexual subordination that was intermingled with exploitation of their labor, and for the first time sought to distance themselves from their glamour-girl image. Their movement for dignity coalesced with the feminist movement of the 1970s, and they collaborated with the National Organization for Women and formed alliances with prominent feminists like Betty Friedan and Gloria Steinem. They protested both their cultural representation and the airline marketing strategies, and sought respect for their skilled labor. As one member of Stewardesses for Women's Rights explained, "I don't think of myself as a sex symbol or a servant. I think of myself as somebody who knows how to open the door of a 747 in the dark, upside

646. *Id.* at 91.

647. Barry, *supra* note 618, at 129–31.

648. NIELSEN, *supra* note 619, at 86.

649. *See* Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971) (striking down marriage ban); Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1971) (striking down policy of hiring only women for cabin service).

650. Barry, *supra* note 618, at 131.

651. NIELSEN, *supra* note 619, at 20.

652. Barry, *supra* note 618, at 134.

653. *Id.*

down and in the water.”⁶⁵⁴ They also cast the airlines’ sexualized marketing strategy as potentially dangerous, implicating public safety if passengers did not take stewardesses seriously in an emergency.⁶⁵⁵

The transition from stewardesses to “flight attendants” with autonomous unions and long-term career prospects soon followed. In 1973, the stewardess division of ALPA split away from the pilots’ union and initiated its own union, the Association of Flight Attendants (AFA), which subsequently obtained an AFL-CIO charter of its own. From its earliest days, the AFA was chaired and led by women, with a predominantly female executive board and collective bargaining committees.⁶⁵⁶ In the mid- to late 1970s, other unionized flight attendants split away from the Transport Workers’ Union, where they had maintained a national “local” of stewardesses, and formed new, autonomous unions.⁶⁵⁷

Legal challenges to maternity bans and weight restrictions⁶⁵⁸ soon followed, directly confronting the airlines’ branded image of sexual availability and standardized image of an attractive woman. One of the most famous cases of the era, *Wilson v. Southwest Airlines Co.*,⁶⁵⁹ involved a challenge to Southwest Airlines’ practice of hiring only women as flight attendants in order to further its branded service as the “love airline.” Southwest raised a BFOQ defense, arguing that its practice of hiring women was essential since the female sex appeal of its flight attendants was a critical part of its marketing strategy designed to appeal to its “predominantly male businessmen” customer base.⁶⁶⁰ Among other things, Southwest television commercials promised “inflight love” and depicted scantily clad female flight attendants serving male passengers “love bites” (toasted almonds) and “love potions” (cocktails).⁶⁶¹ The court rejected the airline’s defense, concluding that sex was not essential to the airline’s primary business purpose, which was transporting passengers safely and quickly.⁶⁶² The court explained, “[S]ex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool, or to better insure profitability.”⁶⁶³

The flight attendants’ effort to resist sexualized branding was relatively successful. The flight attendants conceptualized sex-stereotyped appearance

654. *Id.* at 135.

655. *Id.*

656. Cook, *supra* note 619, at xix.

657. Barry, *supra* note 618, at 136.

658. See *Gerdomb v. Cont’l Airlines*, 692 F.2d 602 (9th Cir. 1982) (en banc) (denouncing strict weight limits on female flight attendants where no such restriction applied to male flight attendants); *Frank v. United Airlines*, 216 F.3d 845 (9th Cir. 2000) (striking down weight policy that applied different weight standards to female and male flight attendants, but was based upon large frame norms for men and medium frame norms for women, rendering compliance more burdensome for women than for men); see also *Laffey v. Nw. Airlines*, 366 F. Supp. 763 (D.D.C. 1973), *vacated and remanded in part and aff’d in part*, 567 F.2d 429 (D.C. Cir. 1976) (striking down a rule forbidding female flight attendants to wear eyeglasses).

659. 517 F. Supp. 292 (N.D. Tex. 1981).

660. *Id.* at 294.

661. *Id.* at 294 n.3.

662. *Id.* at 302.

663. *Id.* at 303.

codes as an issue impacting workers' collective rights as workers and as women. They challenged the branding process as an unacceptable form of social control that occurred upon gendered as well as classed terrain.⁶⁶⁴ The presence of unions and the flight attendants' alliances with feminist groups at the height of their power and influence played a significant role in turning the tide of community opinion in their favor, and with it, ultimately, courts' views about the legitimacy of the sexualized branding practices employed by the airlines.

VIII. CONCLUSION

Katharine Bartlett observed more than a decade ago that courts interpreting Title VII have paid excessive deference to community norms and used them as an objective standard for evaluating employer practices, exacerbating the gap between the law's aspirations and its actual impact.⁶⁶⁵ This trend has been particularly noticeable in the appearance code cases, where the appearance codes are predicated on established community norms that simply encode sexual stereotypes.⁶⁶⁶

In this Article, we argued that employers' increasingly sophisticated branding strategies create a property-like interest that is engrafted onto the faces, bodies, and psyches of service sector workers through appearance codes. The codes reflect the cultural stereotypes of the day, based as they are upon customer surveys or feedback. The workers thus become uniformed, painted, smiling, talking billboards mirroring the cultural stereotypes of the employer's target market. When the law enforces such codes, it authorizes employers to convert cultural stereotypes into a form of property—separate and distinct from the workers' actual physical and mental labor—and to seize the profits.

To the extent that the law reflects and is steeped in the social practices and biases that it seeks to eradicate, it should not surprise us to learn that it is incapable of rising above these practices and biases. As critical race feminists have repeatedly reminded us, “the master's tools will never dismantle the master's house.”⁶⁶⁷ This is particularly apt as a description of antidiscrimination law. As Judith Butler recently explained,

[W]e ought not to idealize the law as a neutral instrument that might intervene in the social operation of such categories [of discrimination] in order to eliminate them. Antidiscrimination law participates in the very practices it seeks to regulate; antidiscrimination law can become an instrument of discrimination in the sense that it must reiterate—and entrench—the stereotypical or discriminatory version of the social category it seeks to eliminate. . . . Insofar

664. See Eileen Boris, *Desirable Dress: Rosies, Sky Girls, and the Politics of Appearance*, 69 INT'L LAB. & WORKING CLASS HIST. 123, 127 (Spring 2006).

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

666. *Id.* at 2543–44.

667. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in THIS BRIDGE CALLED MY BACK: RADICAL WRITINGS BY WOMEN OF COLOR 108, 109 (Cherrie Moraga & Gloria Anzaldúa eds., 1981).

as . . . society is underwritten by stereotype, it is hard to see that antidiscrimination law might transcend the stereotypes it seeks to eliminate.⁶⁶⁸

The law does not simply reflect the underlying social norms and values, however; it also reaffirms and enforces them, creating as well as reflecting consensus and, ultimately, distributing power.⁶⁶⁹ This is particularly true where social movements animate the evolution of law, as in the case of both antidiscrimination law and labor law. The law that has developed around the regulation of worker appearance has functioned to delegate to employers the power “to enforce the dominant expectations about appearance and to discipline deviance from the approved social norms,” including “policing and reinforcing gender lines,” enforcing “social norms regarding proper behavior,” and “insist[ing] that employees conform to socially constructed norms and expectations about how the sexes should act and look.”⁶⁷⁰ Thus, we should look to law to intervene toward the end of changing those social norms.

As scholars ranging from Cass Sunstein⁶⁷¹ to Pauline Kim⁶⁷² to Cynthia Estlund⁶⁷³ to Duncan Kennedy⁶⁷⁴ and Karl Klare⁶⁷⁵ have suggested, shifting the ground or “default” rules in the employment context would be a desirable step toward altering the ground rules for the exercise of power at work. Even with a shift in default rules underlying the at-will employment contract, however, individual workers are unlikely to have the bargaining leverage to negotiate fair compensation or to resist altogether the imposition of corporate branding that undermines individual autonomy. Only by standing together—as the Safeway workers did against the Smile program, or the flight attendants did against the airlines’ sex stereotyped branding strategies—might workers have the strength to demand appropriate compensation or to resist branding.

While necessary, however, collective action may not be sufficient. Darlene Jespersen’s story tells us why: Even the best-intentioned efforts of majoritarian labor unions seeking to advance the interests of workers qua workers overlook the interests of outlier individuals—those who comprise a numerical minority in the occupational category at issue. Moreover, labor unions confront the same sorts of underlying assumptions about the primacy of employer property rights

668. Judith Butler, *Appearances Aside*, 88 CAL. L. REV. 55, 62 (2000). For example, the *Jespersen* court effectively took judicial notice of cultural norms regarding the widespread use of makeup by women in American society in concluding that Harrah’s policy was not unreasonable, hinting that it was relying upon norms of the “entertainment industry.” *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc). At the same time, however, the court refused to take judicial notice of the time it takes to put makeup on and the expense of makeup, instead requiring Jespersen to present evidence of the time and cost involved in complying with the rule. In constructing antidiscrimination doctrine, then, the court chose to reify a particular set of cultural stereotypes.

669. See DUNCAN KENNEDY, *SEXY DRESSING ETC.* 107 (1993).

670. Klare, *supra* note 92, at 1398, 1420.

671. Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002).

672. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 147–55 (1997).

673. Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 21–28 (2002).

674. KENNEDY, *supra* note 669, at 107.

675. Klare, *supra* note 92, at 1448.

to manage and control their businesses and their workforces that plaintiffs in individual employment discrimination cases must overcome, and in a far more hostile, ossified, and weakened legal arena.⁶⁷⁶ Finally, sexualized branding in nonsexualized contexts imposes burdens that workers should not be required to accept, regardless of the compensation offered. As Darlene Jespersen's case illustrates, progressive doctrinal reform in antidiscrimination law is an essential piece of a platform for progressive change.

At the end of the day, Darlene Jespersen's story demonstrates that the most promising strategies are those that connect workers' identities as workers with their status-based identities and proceed simultaneously on multiple legal and social fronts. Collective organizing and bargaining strategies, Title VII litigation, and community activism and media campaigns are all necessary to alter both legal rules and cultural norms that drive sex-stereotyped corporate branding. Sometimes legal reform will bring pressure to bear on cultural norms, while on other occasions or in other contexts, cultural norms will cause doctrinal shifts in law. Law is both constitutive and reflective, but it always matters.

676. See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).