

Articles

The Jack Pemberton Lecture Series

The Great American Makeover: The Sexing Up and Dumbing Down of Women's Work After *Jespersen v. Harrah's Operating Company, Inc.*

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GOOD EVENING DEAN BRAND, faculty, staff, alumni, students, and guests. I want to thank Professor Maria Ontiveros and the University of San Francisco Law School for inviting me to deliver the Third Annual Jack Pemberton Lecture on Workplace Justice. One of my colleagues at Buffalo, who was a staff attorney for the American Civil Liberties Union ("ACLU") in New York City in the 1970s and '80s (and still visits there occasionally), reported to me that a photograph of Jack Pemberton is prominently displayed in the national office and

* Professor of Law, University at Buffalo Law School, The State University of New York. This Article is based on remarks I delivered on March 15, 2007, at the courthouse of the United States Court of Appeals for the Ninth Circuit, for the Third Annual Jack Pemberton Lecture on Workplace Justice sponsored by the University of San Francisco School of Law. The Pemberton Lecture honors University of San Francisco Professor Emeritus John J. Pemberton, who taught at USF School of Law from 1973 to 1988. A pioneer in the field of employment law, Pemberton served as Executive Director of the American Civil Liberties Union ("ACLU") from 1962 to 1970. He was Acting General Counsel for the Equal Employment Opportunities Commission ("EEOC") from 1970 to 1971, and he later served as the EEOC Regional Attorney in San Francisco from 1986 to 1994. He currently resides in Sonoma County.

I thank Rachel MacVean at UB Law School for her enormously helpful research assistance. I owe much to Marion Crain, whose collaborative work with me on our article, Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007), has encouraged me to continue thinking and writing about this topic. Fred Konefsky patiently read and reread drafts of this lecture, endured with good humor my constant musings about dress and grooming codes, and wisely gave me just enough advice.

that his tenure as Executive Director is fondly referred to as the “good old days.” I consider it a great honor to speak to you tonight in his name and to invoke the memory of a time when many significant battles in the struggle for civil rights and civil liberties were being waged and, sometimes, won.

The “good old days,” however, may be long gone in more ways than one: they were preceded by the “not-so-good old days” and have perhaps now led to what we may look back on as the “bad old days.” My topic tonight is “The Great American Makeover: The Sexing Up and Dumbing Down of Women’s Work After *Jespersen v. Harrah’s Operating Company*.” I want to use the Ninth Circuit’s 2006 en banc *Jespersen* decision¹ to demonstrate what a story about a female bartender who gets fired for refusing to wear makeup tells us about the widespread commercialization of female sexuality, about the effects of sex-based appearance codes on women’s (and men’s) employment opportunities, and about the crabbed notion of equality that our federal antidiscrimination doctrine has produced for working women.

Like many employment lawyers and scholars, I became interested in the topic of employer dress, grooming, and appearance codes during the long saga of the *Jespersen* litigation. And I have spent a lot of time thinking about what message this case sends to workers—men and women, young and old—in American workplaces in the Ninth Circuit and elsewhere. For starters, despite some deceptively encouraging language in the opinion about the possibility of using sex stereotypes to challenge sex-based appearance rules, I think that the case insulates most employers from all but the most determined (and well-financed) challenges to sex-based dress, grooming, and appearance codes under Title VII of the Civil Rights Act of 1964.² Only the intrepid and the foolhardy will try. The analysis in the opinion is likely to influence Title VII case law in other circuits, as well as court decisions interpreting state fair-employment statutes—an outcome that will further entrench in the law an analytical framework that is incoherent at best and pernicious at worst.

What will this lead to? Well, the “sexing up” of women and young girls in advertising, retail merchandising, the media, and the gaming and entertainment industries is hard to miss in the United States today. We can’t blame Congress, the federal courts, or the Equal Employment Opportunity Commission (“EEOC”) for that. But we can

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

2. 42 U.S.C. § 2000e–2000e-17 (2000).

wonder whether the courts and the EEOC are doing their jobs when women and girls in low-wage, frontline service jobs—selling clothing, perfume, food, drinks, or casino gaming—are hired for their sex appeal and then dolled up and made up to help sell the company's product or the service. Professor Marion Crain and I recently published an article exploring the mechanisms and consequences of this sexualized “branding” of human beings through sex-based workplace dress and grooming rules.³ The phenomenon is ubiquitous. For example, on January 22, 2007, the *Seattle Times* reported that a young woman working at a drive-through espresso stand outside Seattle was wearing “a short, sheer, baby-doll negligee and coordinated pink panties.”⁴ The owner of a competing stand called the Bikini Espresso said, “The trick is to set your business apart, . . . and sex is one sure-fire way to do that.”⁵ According to the local sheriff, the law requires only that “‘employees cover their breasts and buttocks.’”⁶ A seventeen-year-old high school senior, who read about the “steamy” coffee stands in her civics class, wrote to the editor of the *Seattle Times* that she was “quite disgusted” by the story.⁷ She asked: “What are these shops teaching the women and men of America? That it's OK to objectify a woman?”⁸ She added, “I realize times are changing, but this time they aren't for the better. It's a coffee shop, not a strip club.”⁹ The story is not new—the EEOC's well publicized battles with Hooters Restaurants in the 1990s come to mind¹⁰—but the *Jespersen* decision suggests that employers who want to trade in their workers' brains for beauty, competence for cosmetics, are not likely to find that Title VII sex discrimination law stands in their way.

3. Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007).

4. Amy Roe, *Some Coffee Stands Get Steamier*, SEATTLE TIMES, Jan. 22, 2007, http://seattletimes.nwsourc.com/html/localnews/2003535398_coffeegirls22e.html.

5. *Id.*

6. *Id.*

7. Jessica Lindquist, Letters to the Editor, *Subjugation of Women: Must Today's Girls Serve the Masters of Primitive Marketing?*, SEATTLE TIMES, Jan. 24, 2007, <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=wedlets24&date=20070124&query=Letters+to+the+editor>.

8. *Id.*

9. *Id.*

10. In 1996, following much adverse publicity and threatened congressional hearings, the EEOC dropped its investigation of sex discrimination claims brought by men who had sought front-of-the-house serving positions held exclusively by females dressed as “Hooters Girls” at Hooters Restaurants. See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1431 (1998); see also Avery & Crain, *supra* note 3, at 30 n.90, 106.

Lest you wonder why so much fuss has been made—and ought to continue to be made—about the sex discrimination claims of a woman who wanted to keep her job as a bartender, I want to detour briefly through part of the history of sex discrimination law, with particular attention to some significant developments in California law involving women who worked or wanted to work in bars and taverns.

I. A Brief History of Female Bartenders and Sex Discrimination in California

In 1881, Mary Maguire was arrested and jailed in San Francisco for “waiting on persons in a bar-room where liquors were sold.”¹¹ Authorities charged her with violating a local ordinance that made her conduct, if performed by a female, a misdemeanor.¹² She brought a petition for a writ of habeas corpus challenging the ordinance under the California Constitution of 1879, article XX, section 18, which then provided: “No person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession.”¹³ The city supervisors argued that the ordinance did not disqualify her “on account of sex, but on account of . . . *immorality*; that such employment of a woman is of a vicious tendency, and hurtful to sound public morality.”¹⁴ In bold and decisive language, the California Supreme Court, en banc, struck down the ordinance as unconstitutional, finding that while the state had the power to legislate “to prevent practices hurtful to public morality,” if it enacted laws to accomplish this purpose “by affecting or operating upon lawful callings, [it] *shall affect both sexes alike*.”¹⁵ Within a few years, the California Supreme Court beat a hasty retreat. By 1893, the court upheld an ordinance nearly identical to the one struck down in 1881, prohibiting female waitresses in any establishment selling “spirituous, malt, or fermented liquors.”¹⁶

11. *In re Mary Maguire*, 57 Cal. 604, 605 (1881) (en banc).

12. *Id.*

13. CAL. CONST. art. XX, § 18. The language of article XX, section 18, of the California Constitution has been amended several times and was renumbered article I, section 8, in 1974. The present-day language in the constitution’s Declaration of Rights provides: “A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.” CAL. CONST. art. I, § 8.

14. *Mary Maguire*, 57 Cal. at 606–07.

15. *Id.* at 609 (emphasis added).

16. *Ex parte Hayes*, 33 P. 337, 337 (Cal. 1893) (per curiam). The court ruled that the constitutional provision prohibiting discrimination on the basis of sex in employment did

The effect of such ordinances limiting women's opportunities may, in any event, have only accentuated social pressures keeping women out of work in bars.¹⁷ In 1890, less than one percent of bartenders nationwide were female.¹⁸ Following the repeal of Prohibition in 1933,¹⁹ the all-male Bartenders Union asserted a rigid male monopoly on unionized bartender jobs,²⁰ and states like California once again banned most female bartenders under the newly enacted Alcoholic Beverage Control Acts.²¹ The resulting pervasive sex segregation in bartending was buttressed by societal attitudes about appropriate sex roles—attitudes that were shared by many female workers in food services.²² By 1940 only 2.5% of bartenders were women.²³ During World War II, when thousands of male bartenders left for military service and war industries, some women filled vacant bartending positions just as many others entered previously “male” jobs in the wartime economy.²⁴

When the veteran bartenders returned from the front, however, the Bartenders Union locals in many states convinced their legislatures to enact laws banning women from bartending jobs unless they were the wife or daughter of a male proprietor.²⁵ In 1948, in an opinion written by Justice Frankfurter, the United States Supreme Court upheld such a classification in a Michigan statute that had been challenged on equal protection grounds.²⁶ The Frankfurter opinion,

not limit the regulation of the “manner” and “conditions” under which businesses conducted the retail sale of liquor. *Id.* at 338.

17. The following discussion, *infra* text accompanying notes 18–56, on the history of women in bartending is based, in part, on the author's discussion of the feminization of bartending in Avery & Crain, *supra* note 3, at 92–100.

18. Linda A. Detman, *Women Behind Bars: The Feminization of Bartending*, in BARBARA F. RESKIN & PATRICIA A. ROOS, *JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN'S INROADS INTO MALE OCCUPATIONS* 241, 241 (1990).

19. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

20. Detman, *supra* note 18, at 243.

21. *See, e.g.*, *People v. Jemnez*, 121 P.2d 543, 544–45 (Cal. App. Dep't Super. Ct. 1942) (upholding the Alcoholic Beverage Control Act, 1937 Gen. Laws Ch. 681, § 56.4, which banned female bartenders who were not a licensee or wife of a licensee, against a challenge brought under article XX, section 18, of the California Constitution and Fourteenth Amendment equal protection and privileges and immunities theories).

22. DOROTHY SUE COBBLE, *DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY* 168–69 (1991).

23. Detman, *supra* note 18, at 241.

24. MATTHEW JOSEPHSON, *UNION HOUSE, UNION BAR: THE HISTORY OF THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION* 297 (1956); *see also* COBBLE, *supra* note 22, at 166.

25. Detman, *supra* note 18, at 244.

26. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

Goesaert v. Cleary,²⁷ reminds us of women's precarious legal and social status in the middle of the last century. Justice Frankfurter wrote that "Michigan could, beyond question, forbid all women from working behind a bar,"²⁸ and that equal protection doctrine "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."²⁹ Justice Frankfurter concluded that, "[s]ince bartending by women may . . . give rise to moral and social problems,"³⁰ states were free to act on even outmoded stereotypes about women in order "to devise preventive measures."³¹ The touchstone was whether the legislature's distinction between classes of women had "a basis in reason."³² With a green light from the Supreme Court, by 1960 twenty-six states had enacted new statutes banning most women from the occupation of bartending.³³

The California legislature was comfortably in the middle of the pack. By 1953, the so-called female bartender provision of the State's Business and Professions Code banned women who were not married to the licensee of a bar from "dispensing" or serving alcoholic beverages.³⁴ Well into the late 1960s and early 1970s, courts relied on *Goesaert*, as well as the State constitution and the State's authority to regulate the intrastate sale of liquor under the Twenty-First Amendment of the United States Constitution, to fend off Title VII, equal protection, privileges and immunities, and due process challenges to California's statutory sex-based bartender classification.³⁵ By 1970, wo-

27. *Id.*

28. *Id.* at 465.

29. *Id.* at 466.

30. *Id.*

31. *Id.*

32. *Id.* at 467.

33. COBBLE, *supra* note 22, at 166.

34. CAL. BUS. & PROF. CODE § 25656 (Deering 1937), *repealed by* ch. 152, § 1, 1971 Cal. Stat. 203.

35. *See, e.g., Krauss v. Sacramento Inn*, 314 F. Supp. 171, 177-78 (E.D. Cal. 1970) (citing *Goesaert*, 335 U.S. 464, and upholding California's "female bartender" ban under the theory that the Twenty-First Amendment of the United States Constitution preempted authority of Congress under section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1970), to rely on the Commerce Clause of the Constitution to enforce the ban on sex discrimination as applied to bartenders); *Hargens v. Alcoholic Beverage Control Appeals Bd.*, 69 Cal. Rptr. 868, 874-76 (Ct. App. 1968) (citing *Goesaert*, 335 U.S. 464, and upholding state ban on female bartenders not married to licensee of premises against equal protection and privileges and immunities challenges); *People v. Gardner*, 1966 WL 4085, at *4 (Cal. Mun. Ct. 1966) (ruling that, because "bad or unpopular laws can only be changed by lawful procedure," the statutory female bartender prohibi-

men held just over twenty percent of bartender positions nationwide.³⁶

Then, in 1971, in the unanimous decision *Sail'er Inn v. Kirby*,³⁷ the California Supreme Court struck down the state's female bartender statute on the grounds that (1) it violated article XX, section 18, of the California Constitution, which prohibited laws imposing sex-based qualifications on any business, vocation, or profession,³⁸ (2) it violated the equal protection clauses of both the state and federal constitutions,³⁹ and (3) it conflicted with the prohibition of employment discrimination on the basis of sex in section 703(a) of Title VII of the Civil Rights Act of 1964⁴⁰ and could not be defended under section 703(e)(1) of Title VII⁴¹ as a bona fide occupational qualification ("BFOQ").⁴² Citing the court's 1881 decision of *In re Mary Maguire*,⁴³ Justice Peters wrote that the language in section 18 of article XX of the California Constitution,⁴⁴ prohibiting sex discrimination in vocations,

does not admit of exceptions based on popular notions of what is a proper, fitting or moral occupation for persons of either sex. Although an inability to perform the tasks required by a particular occupation, sex-linked or not, may be a justification for discrimination against job applicants, under section 18, mere prejudice, however ancient, common or socially acceptable, is not.⁴⁵

With regard to the state's Title VII BFOQ defense that women as a class are incapable of dealing with inebriated customers and keeping order in the bar, the court observed that "the saloon days of the Wild West are long gone. Nowadays the typical bar does not provide a set-

tion in California Business and Professional Code section 25656 must be upheld as constitutional under California Constitution article XX, section 18).

36. Detman, *supra* note 18, at 241.

37. 485 P.2d 529 (Cal. 1971) (en banc).

38. *Id.* at 533-34.

39. *Id.* at 538-43.

40. 42 U.S.C. § 2000e-2(a) (2000).

41. 42 U.S.C. § 2000e-2(e)(1) (providing that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

42. *Sail'er Inn*, 485 P.2d at 536-38.

43. 57 Cal. 604, 605 (1881) (en banc).

44. *Sail'er Inn*, 485 P.2d at 533 & n.5 (noting that the language of article XX, section 18, of the California Constitution was amended in 1970 to read that "[a] person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation, or profession").

45. *Id.* at 533 (overruling *Ex parte Hayes*, 33 P. 337 (Cal. 1893)).

ting for violence and danger, if in fact it ever did.”⁴⁶ As to equal protection, the court adopted strict scrutiny for sex-based classifications⁴⁷—the first state high court to do so.⁴⁸ Noting the “stigma of inferiority and second class citizenship associated with [suspect classifications],”⁴⁹ the court concluded “that the [statute’s] sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment.”⁵⁰ Then, in words later “borrowed” nearly verbatim⁵¹ by the United States Supreme Court in *Frontiero v. Richardson*,⁵² Justice Peters trenchantly observed: “The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.”⁵³

Through the 1970s, female bartender statutes and male-only bartenders’ unions were abandoned in the face of Title VII challenges,⁵⁴ and many women became bartenders, rapidly feminizing the profession.⁵⁵ As the 1980s came to a close, women held a majority of jobs behind the bar,⁵⁶ a pattern that continues today. In 2004, women held more than half of the nearly 200,000 full-time bartending positions in the United States.⁵⁷

II. A Modern Tale of Sex Discrimination: *Jespersen v. Harrah’s Operating Company*

So now we come to the case of *Jespersen v. Harrah’s Operating Co.*,⁵⁸ the 2006 decision of the Court of Appeals for the Ninth Circuit, which

46. *Id.* at 538.

47. *Id.* at 539.

48. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WOMEN’S RTS. L. REP. 361, 362 (1992).

49. *Sail’er Inn*, 485 P.2d at 540.

50. *Id.* at 541.

51. See Ginsburg, *supra* note 48, at 363.

52. 411 U.S. 677, 684 (1973).

53. *Sail’er Inn*, 485 P.2d at 541.

54. See, e.g., *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 186 (D.C. Cir. 1974) (holding that sex-segregated union locals of waiters and waitresses violate Title VII).

55. COBBLE, *supra* note 22, at 170 (noting that during the 1970s and 1980s, “[b]artending [was] feminized more rapidly . . . than virtually any other occupation”); BARBARA F. RESKIN & PATRICIA A. ROOS, *JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN’S INROADS INTO MALE OCCUPATIONS* 54 (1990) (noting the same trend).

56. COBBLE, *supra* note 22, at 170.

57. See Avery & Crain, *supra* note 3, at 95 nn.492–93 (citing data from the Bureau of Labor Statistics). In 2004, there were nearly one-half million bartending jobs, including part-time positions. *Id.* at n.492.

58. 444 F.3d 1104 (9th Cir. 2006) (en banc).

it “took . . . en banc in order to reaffirm [the circuit’s] law on appearance and grooming standards, and to clarify [its] evolving law of sex stereotyping claims.”⁵⁹ To begin with the facts: In 2000, Harrah’s Operating Company, following the recommendations of a Las Vegas-based image consultant, adopted new appearance and grooming standards for beverage service employees at twenty of its casinos nationwide.⁶⁰ The new standards—named the “Personal Best” program—called for both men and women to wear “a standard uniform of black pants, white shirt, black vest, and black bow tie” and included several sex-specific requirements for hair styling, makeup use, and nail grooming.⁶¹

Within a few months, Harrah’s amended its grooming standards, mandating that all female beverage servers, including bartenders, wear face powder, blush, mascara, and lipstick in “complimentary [sic] colors.”⁶² Harrah’s professional image consultant would design the makeup “template” for each female bartender and “dictate [] where and how the makeup had to be applied.”⁶³ To ensure that female beverage workers applied and wore their makeup properly at all times, supervisors would use photographs of each employee, taken at her “Personal Best,” to evaluate her appearance on the job.⁶⁴ Female bartenders also had to wear their hair “‘down at all times,’” “‘teased, curled, or styled’”⁶⁵ and could wear nail polish only in “‘clear, white, pink or red color.’”⁶⁶ The rules, on the other hand, prohibited male bartenders from wearing any eye or facial makeup or colored nail polish, or from having their hair extend below their shirt collars or wearing ponytails.⁶⁷

Darlene Jespersen, who had “worked successfully as a bartender in Harrah’s Reno casino for twenty years,”⁶⁸ was, in effect, fired because she refused to wear the prescribed makeup.⁶⁹ There is no ques-

59. *Id.* at 1105.

60. *Id.* at 1107.

61. *Id.*

62. *Id.* (quoting Harrah’s written grooming guidelines for “Beverage Bartenders and Barbacks”).

63. *Id.* at 1114 (Pregerson, J., dissenting).

64. See *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1078 (9th Cir. 2004), *reh’g granted*, 409 F.3d 1061 (9th Cir. 2005), *aff’d*, 444 F.3d 1104 (9th Cir. 2006) (en banc); see also *id.* at 1084 (Thomas, J., dissenting).

65. *Jespersen*, 444 F.3d at 1107 (quoting Harrah’s grooming guidelines).

66. *Id.*

67. *Id.*

68. *Id.* at 1106–07.

69. *Id.* at 1108; see also *Jespersen*, 392 F.3d at 1083 (Thomas, J., dissenting).

tion that Jespersen was an outstanding bartender. Her supervisors consistently praised her work,⁷⁰ and her customers had such high regard for her that they called the sports bar where she worked "Darlene's bar."⁷¹ Nevertheless, when Harrah's asked her to comply with the new grooming standard she balked.⁷² She had tried wearing makeup briefly at work during the 1980s, in response to a supervisor's request,⁷³ and she found it made her feel "'dolloed up' like a sexual object."⁷⁴ Since that time, she had never worn makeup "on or off the job,"⁷⁵ and her sworn testimony was that she found "wearing makeup degrading and intrusive."⁷⁶

In 2001, after exhausting her administrative remedies with the EEOC, Jespersen filed a lawsuit in federal district court in Nevada, alleging disparate treatment on the basis of sex in violation of section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended.⁷⁷ The district court granted summary judgment to Harrah's.⁷⁸ In 2004, Jespersen lost her appeal to the Ninth Circuit,⁷⁹ with one judge dissenting.⁸⁰ The court then granted her petition for rehearing en banc.⁸¹ On April 14, 2006, the Court of Appeals for the Ninth Circuit issued its en banc decision affirming the judgment for Harrah's.⁸² In an opinion written by Chief Judge Schroeder, a seven-judge majority agreed with the district court and the panel majority that Jespersen had failed to present sufficient evidence to survive summary judg-

70. *Jespersen*, 444 F.3d at 1107 (noting Jespersen's "exemplary record"); see also *Jespersen*, 392 F.3d at 1077 (majority opinion) (describing supervisors' high praise of Jespersen's work).

71. Corrected Opening Brief of Plaintiff-Appellant at 5, *Jespersen*, 392 F.3d 1076 (No. 03-15045).

72. *Jespersen*, 444 F.3d at 1108.

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

74. *Id.*

75. *Jespersen*, 444 F.3d at 1107.

76. *Id.* at 1118 (Kozinski, J., dissenting); see also *id.* at 1108 (majority opinion).

77. 42 U.S.C. § 2000e-2(a)(1) (2000); see *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189, 1190 (D. Nev. 2002), 392 F.3d 1076 (9th Cir. 2004), *reh'g granted*, 409 F.3d 1061 (9th Cir. 2005), *aff'd*, 444 F.3d 1104 (9th Cir. 2006); see also *Jespersen*, 444 F.3d at 1108.

78. *Jespersen*, 280 F. Supp. 2d at 1195.

79. *Jespersen*, 392 F.3d 1076.

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

81. *Jespersen*, 409 F.3d 1061.

82. *Jespersen*, 444 F.3d 1104.

ment.⁸³ Four judges dissented in two separate opinions written by Judges Pregerson and Kozinski.⁸⁴

III. *Jespersen's Three Principles*

Although Darlene Jespersen lost her case in the sense that she never made it to trial, the Ninth Circuit clarified three important principles, which should guide plaintiffs in future dress and grooming cases. Significantly, all eleven judges agreed upon these three principles.

First, as a threshold issue, the court was unanimous in agreeing that workplace “appearance standards and grooming policies may be subject to Title VII claims,”⁸⁵ implicitly rejecting the “immutable characteristics” limitation that had been articulated in cases from the 1970s⁸⁶ and invoked by the district court.⁸⁷ This theory, now discredited in the Ninth Circuit, asserts that Title VII reaches only immutable characteristics, such as one’s race, color, or sex, and not mutable aspects of appearance such as one’s hair style, use of cosmetics, or dress.⁸⁸

Second, the court unanimously reaffirmed circuit court precedents, many of which dated from or reaffirmed case law from the 1970s,⁸⁹ on the legitimacy of the “unequal burdens” test in Title VII challenges to appearance standards and grooming policies.⁹⁰ Essentially this theory, long endorsed by the EEOC,⁹¹ posits that a grooming policy “that imposes different but essentially equal burdens on

83. *Id.* at 1106. The court held that Jespersen had failed to produce sufficient evidence to support her claims “that the [grooming] policy imposes an unequal burden on women” or “that the challenged policy was part of a policy motivated by sex stereotyping.” *Id.*

84. *Id.* at 1113 (Pregerson, J., dissenting), 1117 (Kozinski, J., dissenting).

85. *Id.* at 1113 (Pregerson, J., dissenting).

86. *See, e.g.,* Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084 (5th Cir. 1975); Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir. 1974); *see also* Jespersen v. Harrah’s Operating Co., 280 F. Supp. 2d 1189, 1192 (D. Nev. 2002) (discussing *Baker* case), 392 F.3d 1076 (9th Cir. 2004), *reh’g granted*, 409 F.3d 1061 (9th Cir. 2005), *aff’d*, 444 F.3d 1104 (9th Cir. 2006); *Jespersen*, 392 F.3d 1076, 1080 (acknowledging rejection of *Baker* in the Ninth Circuit).

87. *Jespersen*, 280 F. Supp. 2d at 1192. This proposition was rejected in the *Jespersen* panel decision, 392 F.3d at 1080, and the *Jespersen* en banc decision, 444 F.3d at 1106.

88. *See Jespersen*, 280 F. Supp. 2d at 1192.

89. *See* Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL’Y 467, 470 n.10 (2007).

90. *Jespersen*, 444 F.3d at 1108–09, 1113 (Pregerson, J., dissenting), 1117 (Kozinski, J., dissenting).

91. EEOC COMPL. MAN. (CCH) § 619.4(d), 3606 (2007).

men and women is not disparate treatment.’”⁹² Because Jespersen had failed to present comparative evidence of the discriminatory *effects* that the grooming rules imposed on men and women in terms of their time and cost, eight of the judges agreed that there was no triable issue of fact regarding unequal burdens.⁹³ Three dissenting judges, however, believed that it was appropriate to take judicial notice of the “incontrovertible facts” that “Harrah’s overall grooming policy is substantially more burdensome for women than for men.”⁹⁴ As Judge Kozinski asked in his dissent, “[I]s there any doubt that putting on makeup costs money and takes time? Harrah’s policy requires women to apply face powder, blush, mascara and lipstick. You don’t need an expert witness to figure out that such items don’t grow on trees.”⁹⁵ Nevertheless, none of the four dissenters had any quarrel with the legitimacy of the unequal burdens test in principle,⁹⁶ although three of them objected to the majority’s application of the test to the facts of the case.⁹⁷

Finally, disagreeing with both the district court and the panel majority, the en banc court in *Jespersen* unanimously adopted, for the first time in the circuit, the theory that a prima facie case of *intentional* sex discrimination can be based on evidence that an employer’s “challenged [grooming] policy was part of a policy motivated by sex stereotyping.”⁹⁸ The court held that “appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping.”⁹⁹ All eleven judges, including the four dissenters, agreed with this proposition.¹⁰⁰ Nevertheless, the majority—seven judges—ruled that Jespersen could not survive summary judgment on this theory because she had failed to present sufficient evidence that Harrah’s makeup requirement for female bartenders was motivated by sex stereotyping.¹⁰¹ The majority discounted Jespersen’s deposition

92. *Jespersen*, 444 F.3d at 1109 (majority opinion) (quoting *Frank v. United Airlines*, 216 F.3d 845, 854 (9th Cir. 2000)).

93. This position was held by the majority in *Jespersen*, *id.* at 1111, and by Judge Pregerson in his dissent, *id.* at 1113, but not by Judge Kozinski and the two judges joining his dissent, *id.* at 1117.

94. *Id.* at 1117 (Kozinski, J., dissenting).

95. *Id.*

96. *Id.* at 1113 (Pregerson, J., dissenting), 1117 (Kozinski, J., dissenting).

97. *Id.* at 1113–14 (Kozinski, J., dissenting).

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

99. *Id.*

100. *See id.* at 1113 (Pregerson, J., dissenting), 1117 (Kozinski, J., dissenting).

101. *Id.* at 1106, 1108, 1113 (majority opinion).

testimony¹⁰² that wearing makeup made her feel “‘very degraded and very demeaned,’”¹⁰³ and it treated her views as “the subjective reaction of a single employee.”¹⁰⁴ In the absence of evidence that wearing makeup “would objectively impede her ability to perform her job requirements as a bartender”¹⁰⁵ or evidence of “discriminatory or sexually stereotypical intent” on the face of the policy,¹⁰⁶ the court ruled that Jespersen could not make out a *prima facie* case of sex discrimination.¹⁰⁷

All four dissenters, however, believed that Harrah’s “‘Personal Best’ program was part of a policy motivated by sex stereotyping and that Jespersen’s termination for failing to comply with the program’s requirements was ‘because of’ her sex.”¹⁰⁸ Judge Pregerson wrote in dissent: Jespersen’s “termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination ‘because of’ sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that ‘gender must be *irrelevant* to employment decisions.’”¹⁰⁹

Previous Ninth Circuit precedent had limited gender-stereotyping analysis to sexual harassment cases.¹¹⁰ Under this theory, because

102. *Id.* at 1108.

103. *Id.* (quoting deposition testimony of Darlene Jespersen).

104. *Id.* at 1113.

105. *Id.*

106. *Id.* at 1112.

107. *Id.* at 1108–09.

108. *Id.* at 1114 (Pregerson, J., dissenting). Judge Thomas, in his dissent to the panel decision in *Jespersen*, asserted that Jespersen had raised a triable issue of fact under both a *Price Waterhouse* gender-stereotypes approach and an “unequal burdens” theory. In his view, there was no justification under Title VII for not extending to “men and women in service industries, who are more likely to be subject to policies like Harrah’s ‘Personal Best’ policy, . . . the protection that white-collar professionals receive.” *Id.* at 1085.

109. *Id.* at 1114 (Pregerson, J., dissenting) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality) (alteration by Pregerson, J.)). This position is consistent with Judge Skelly Wright’s dicta in the early hostile work environment case of *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981) (“Sexual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII.”).

110. See, e.g., *Rene v. MGM Grand Hotel*, 305 F.3d 1061, 1064–65 (9th Cir. 2002) (en banc); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (relying on *Price Waterhouse*, 490 U.S. 228, to allow a male waiter to bring a same-sex sexual harassment claim on the basis of allegations that he was harassed because he did not conform to stereotypical male behavior). The *Nichols* court, in dicta, commented: “[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.” *Nichols*, 256 F.3d at 875 n.7; see *Jespersen*, 444 F.3d at 1112–13 (majority opinion) (discussing *Rene* and *Nichols* cases).

Darlene Jespersen had not alleged that Harrah's grooming policy had subjected her to sexual harassment, she could have no claim for relief.¹¹¹ In *Price Waterhouse v. Hopkins*,¹¹² however, the Supreme Court ruled that when a senior partner at a major accounting firm told a female accountant that she could improve her candidacy for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,"¹¹³ it was direct evidence that the decision to deny her partnership was motivated, at least in part, by unlawful gender stereotypes.¹¹⁴

IV. The Ninth Circuit's Misreading of Title VII

While I agree that workplace appearance standards and grooming policies should be subject to challenges under Title VII, and I would certainly endorse the notion that such employer policies based on sex stereotypes should be subject to Title VII claims, I believe that the Ninth Circuit has gone astray in its articulation and application of both the unequal burdens and "sex stereotyping" theories in this case. Indeed, the *Jespersen* court's analysis of the theories and evidentiary burdens in both its unequal burdens and sex stereotypes prongs are completely unmoored from the statutory language of Title VII of the Civil Rights Act of 1964¹¹⁵ and its amendments in the Civil Rights Act of 1991.¹¹⁶ Essentially, the *Jespersen* court has begged and borrowed from various Title VII doctrines, including case law from the 1970s,¹¹⁷ to cobble together an incoherent framework for cases challenging sex-based grooming codes. In the end, the court has abandoned foundational Title VII principles of ensuring equality for individuals in the protected classes faced with either discriminatory treatment or arbitrary barriers to employment opportunity, thereby forcing workers to serve the hypersexualized demands of the consumer market and the sex-stereotyped whims of image consultants.

The court's approach in *Jespersen* elevates the employer's interest in profiting from the appearance—not the competence—of its employees above the principles of nondiscrimination. Such caution by the courts is, at times, warranted: nearly thirty years ago, in an oft-

111. *Jespersen*, 444 F.3d at 1112–13.

112. 490 U.S. 228.

113. *Id.* at 235 (plurality) (internal quotes and citation omitted).

114. *See id.* at 255–56, 276–79 (O'Connor, J., concurring).

115. 42 U.S.C. § 2000e–2000e-17 (2000).

116. Pub. L. No. 102-166, 105 Stat. 1071.

117. *See supra* text accompanying notes 86 and 89.

quoted passage, the Supreme Court warned that “[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress, they should not attempt it.”¹¹⁸ Congress, nevertheless, has mandated that employees should not be fired “because of . . . sex,” that employees should not be subjected to different terms and conditions “because of . . . sex,” and that employers should not “classify” their employees “because of . . . sex.”¹¹⁹ It is time for the courts to step up to their responsibilities of enforcing the civil rights laws as they were written, not as the courts wish they were written.

A. Unequal Burdens

Let me briefly sketch out why the Ninth Circuit, even the dissenting judges, got it so wrong in *Jespersen* regarding “unequal burdens.” Interestingly, the court does not cite to any statutory language to support its unequal burdens doctrine because it can’t—the court is boxed in. First, if the court were to find that Harrah’s “Personal Best” grooming policy was on its face an explicit classification on the basis of sex, then, under Supreme Court precedent, the court would be compelled to find that the policy itself “is sex discrimination . . . and thus may be defended only as a BFOQ.”¹²⁰ Jespersen’s counsel strenuously argued this position on appeal,¹²¹ but the court would have none of it, concluding, rather bizarrely, that “[g]rooming standards that *appropriately differentiate between the genders* are not *facially* discriminatory.”¹²²

How do the courts determine that facially sex-based grooming requirements are “reasonable”¹²³ and “imposed in an evenhanded manner on all employees . . . [with] only a negligible effect on em-

118. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978).

119. Title VII § 703(a)(1)–(2), 42 U.S.C. § 2000e-2(a)(1)–(2); see *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1114 n.2 (9th Cir. 2006) (en banc) (Pregerson, J., dissenting).

120. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991). The Supreme Court has long recognized that the BFOQ, or “bona fide occupational qualification,” defense under Title VII § 703(e)(1), is an “extremely narrow” statutory defense. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); see, e.g., *Johnson Controls*, 499 U.S. at 198, 201 (“The BFOQ defense is written narrowly, and this Court has read it narrowly.”); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248–49 (1989).

121. See *Jespersen*, 444 F.3d at 1109 & n.1 (majority opinion) (citing Title VII § 703(e)(1)); see also Corrected Opening Brief of Plaintiff-Appellant at 30–36, *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045); Reply Brief of Plaintiff-Appellant at 18–20, *id.* (No. 03-15045).

122. *Jespersen*, 444 F.3d at 1109–10 (emphasis added).

123. See *id.* at 1113 (concluding that, in evaluating grooming standards for sexual stereotyping, “the touch-stone is reasonableness”), 1110 (“Under established equal burdens

ployment opportunities’”¹²⁴ Perhaps in the same way that courts in the “not-so-good old days” concluded that state legislation banning women from working in bars was not a denial of equal protection on the basis of sex. What is “reasonable” about a policy that women must wear makeup as a condition of holding a job that can be performed by both men and women? What is “negligible” about being fired because you are a woman who does not want to wear makeup and has performed her job well for twenty years without makeup?

The court does not tell us on what basis it concludes that different treatment of men and women is “reasonable” and “appropriate.” Should we not be concerned, however, that the court seems to be deferring to the employer’s (and its own) unarticulated assumptions about reasonableness, rather than shifting the burden to the employer to justify the sex-based classification in its grooming policy? The court’s approach reminds me of the Supreme Court’s deferential language in *Plessy v. Ferguson*¹²⁵: “In determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people”¹²⁶

There is nothing in Title VII to suggest that, for purposes of establishing a prima facie case of discrimination, sex is to be treated any differently from race, color, religion, or national origin. The substantive elements of the claim of disparate treatment are the same regardless of the identity of the plaintiff’s protected class. Furthermore, section 703(a)(2) of Title VII,¹²⁷ which is generally relied on as statutory support for disparate impact claims,¹²⁸ expressly prohibits classifying employees on the basis of sex, as well as race, color, religion, and national origin, and courts view such “classifications” as a form of disparate treatment.¹²⁹ Thus, no one would seriously argue that an employer could lawfully classify its employees by race—whites or African-

analysis, when an employer’s grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.”).

124. *Id.* at 1110 (quoting *Knott v. Mo. Pac. R.R.*, 527 F.2d 1249, 1252 (8th Cir. 1975)).

125. 163 U.S. 537 (1896).

126. *Id.* at 550.

127. 42 U.S.C. § 2000e-2(a)(2) (2000).

128. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 448 (1982).

129. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 n.9 (1989) (observing, in dicta, that employees could challenge “segregated dormitories and eating facilities in the workplace . . . under 42 U.S.C. § 2000e-2(a)(2) [Title VII § 703(a)(2)] without showing a disparate impact on hiring or promotion”). Section 703(a)(2) makes it unlawful for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(2).

Americans—or by national origin—Japanese, Italian, or Swedish—and impose different but “reasonable” and “appropriate” dress and grooming codes on each group of employees. The classification itself violates the statute, and, other than the BFOQ defense,¹³⁰ there is no language in the statute that would permit “reasonable” classifications or “appropriate” limitations based on a protected status. As Jespersen’s attorney, Jennifer Pizer, has noted, “Title VII has no exemption for [employer] appearance rules.”¹³¹

The *Jespersen* court does rule, however, that a plaintiff can establish a prima facie case that a grooming policy imposes unequal burdens by producing admissible evidence comparing the relative time and costs imposed on each sex to comply with the policy.¹³² This places on the plaintiff the burden of coming forward with evidence that is uniquely within the control of the employer, who has studied and designed the grooming requirements. The plaintiff bears this heavy burden after she has already shown that the policy classifies and treats employees differently because of sex.

Moreover, even if plaintiffs in future cases are able to produce evidence of the relative time and cost of sex-based grooming rules, employers conceivably could just compensate the burdened employees to mitigate the burden. For example, Harrah’s could pay its female bartenders for the cost of purchasing the required makeup and allow them time on the clock to apply and remove it each day. No harm, no foul—the burden on men and women is equalized. Of course, the absurdity of such an approach is apparent when one asks if there is any limiting principle to what appearance changes an employer can buy. Is it only temporary changes like uniforms, facial or otherwise, that can be donned and doffed each work day? What about more permanent changes? Can an employer condition the employment of women, but not men, on their agreement to receive botox injections as long as the employer pays for the time, the cost, and the

130. Title VII § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1). The statutory BFOQ defense, by its own terms, does not apply to classifications on the bases of race or color. *Id.* See the text of the statute quoted *supra* note 41. Arguably the BFOQ defense applies only to decisions to “hire and employ” on the basis of sex and not to sex-differentiated terms and conditions of work. See David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 244–45 (2004). See the discussion of the BFOQ defense, *supra* note 120 and accompanying text and *infra* notes 150–51 and accompanying text.

131. Jennifer C. Pizer, *Facial Discrimination: Darlene Jespersen’s Fight Against the Barbiefication of Bartenders*, 14 DUKE J. GENDER L. & POL’Y 285, 303 n.81 (2007).

132. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1110–11 (9th Cir. 2006) (en banc).

health risks? If botox injections are okay, why not breast augmentation?

To focus only on the time and cost of sex-based grooming rules, and to ignore the status and dignitary harms to women either as individuals or as a class,¹³³ is like saying that the trip between point A and point B takes the same amount of time and costs the same whether one rides in the front of the bus or in the back. Discrimination is just not for sale.

B. Sex Stereotyping

This brings me to the court's sex stereotyping analysis in *Jespersen*. The Ninth Circuit held that *Jespersen* could not survive summary judgment on a sex-stereotyping theory because she had failed to present sufficient evidence that Harrah's was motivated by sex stereotypes in devising its appearance rules for bartenders.¹³⁴ It is important to recognize that Darlene Jespersen had produced evidence that her sex—the fact that she was a *female* bartender—was the sole reason that Harrah's required her to wear makeup, and “but for” the fact that she was a *female* bartender, she would not have lost her job for refusing to wear makeup.¹³⁵ Thus, she demonstrated with direct evidence both unlawful intent based on sex, as stated in the sex-based classifications on the face of Harrah's policy, and the strictest form of causation—“but for”—linking Harrah's intent to her firing. In such a case, to find an unlawful employment practice under Title VII, it was not necessary for *Jespersen* to prove, as the majority asserted, that Harrah's grooming policy itself was motivated by sex stereotypes.¹³⁶

In many respects, although *Price Waterhouse*¹³⁷ is instructive about the harms to women of de facto sex-stereotyped dress and grooming norms, it is inapposite to a case like *Jespersen*, which involves de jure sex-based grooming rules. In *Price Waterhouse*, the plaintiff did not have evidence of a facially discriminatory policy against promoting female accountants or a prescribed sex-based dress and grooming code that would allow only appropriately “feminine” female accountants to become partners. Therefore, the Supreme Court acknowledged the

133. See generally Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006) (analyzing the dignitary harms of workplace appearance regulation through the lens of tort law).

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

135. See *id.* at 1114 (Pregerson, J., dissenting).

136. See *id.* at 1113 (majority opinion) (“[T]here is no evidence of stereotypical motivation on the part of the employer.”).

137. 490 U.S. 228 (1989).

reasonable inferences that can be drawn from evidence of sex stereotyping in the employer's decision-making process in order to show that the employer was motivated by sex.¹³⁸ Relying on expert testimony, the Court recognized that the assumption that women—but not men—must wear makeup and appear “feminine” to look professional is based on a commonly held stereotype about women's appearance.¹³⁹ After *Price Waterhouse*, it should not take an expert to determine that Harrah's makeup policy was based on a sex stereotype.

Where, as in *Jespersen*, employees are expressly classified on the basis of sex (or race, color, religion, or national origin), subjected to different terms and conditions of employment according to their classification, and then fired if they refuse to comply with the employer's terms and conditions mandated by their classification, it really shouldn't matter what motivated the employer to create the classification. It could have been a “reasonable” and “appropriate” sex stereotype (which really isn't a sex stereotype according to the analysis of the Ninth Circuit majority); it could have been a malevolent intent to demean, humiliate, and objectify women; it could have been a benevolent intent to help female workers—to improve their psyches by improving their looks; or it could have been whim or caprice. The Supreme Court in *UAW v. Johnson Controls*¹⁴⁰ made it clear that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”¹⁴¹

In addition, the *Jespersen* majority concluded that the “record contains nothing to suggest [Harrah's] grooming standards would *objectively inhibit a woman's ability to do the job*.”¹⁴² The court thus improperly imported a requirement that *Jespersen* meet an element of a hostile work environment claim into her *prima facie* case of disparate treat-

138. *Id.* at 250–52 (plurality), 272–77 (O'Connor, J., concurring).

139. *Id.* at 235–36 (plurality), 255–56 (discussing relevance of expert testimony by Dr. Susan Fiske, a social psychologist, about the role of sex stereotypes in the defendant's evaluation of the plaintiff for promotion).

140. 499 U.S. 187 (1991).

141. *Id.* at 199. This principle was acknowledged in the now-vacated majority opinion of the three-judge panel in *Jespersen*. See *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1079 (9th Cir. 2004) (quoting *Johnson Controls*, 499 U.S. at 199), *reh'g granted*, 409 F.3d 1061 (9th Cir. 2005), *aff'd*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

142. *Jespersen*, 444 F.3d at 1112 (emphasis added); see also *id.* at 1113.

ment.¹⁴³ *Jespersen* was not a hostile work environment case.¹⁴⁴ Rather it was a claim that the employer engaged in disparate treatment by promulgating a sex-based grooming code that was a mandatory condition of employment. If an employer adopts an explicit sex-based pay differential or a sex-based bonus system, and the plaintiff has produced evidence of the policy, the plaintiff does not have to demonstrate, in addition, that the sex-differentiated policy objectively inhibits her ability to do the job in order to establish a prima facie case of sex discrimination. Indeed, if sexual harassment law has any light to shed on *Jespersen*'s claim, it is that it looks more like a quid pro quo case than a hostile work environment case (i.e., it is more like an agent of the employer saying "doll yourself up by wearing this makeup or I'll fire you").

The *Jespersen* majority, then, was wrong to require the plaintiff to go behind the express terms of the grooming policy to determine Harrah's motive in creating it. In Supreme Court cases like *Johnson Controls*,¹⁴⁵ *Dothard v. Rawlinson*,¹⁴⁶ *Los Angeles Dep't of Water & Power v. Manhart*,¹⁴⁷ and *Phillips v. Martin Marietta Corp.*,¹⁴⁸ which all dealt with explicit sex-based policies, the Court recognized that once the plaintiff proves that an employer's policy is facially discriminatory, the defendant is liable under Title VII, unless it can meet its statutory BFOQ defense. Harrah's would no doubt have lost at trial if it had been required to justify its sex-based grooming policy under the "extremely narrow"¹⁴⁹ BFOQ defense under section 703(e)(1) of Title VII,¹⁵⁰ which, among other things, does not permit employers to discriminate on the basis of customer preferences.¹⁵¹ Moreover, if sex were "a

143. See *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993) (holding that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview"). See also Justice Ginsburg's concurrence in *Harris*: "It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'" *Id.* at 25 (Ginsburg, J., concurring) (quoting *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 349 (6th Cir. 1988)).

144. See *Jespersen*, 444 F.3d at 1112 ("Nor is this a case of sexual harassment.").

145. 499 U.S. 187 (1991).

146. 433 U.S. 321 (1977).

147. 435 U.S. 702 (1978).

148. 400 U.S. 542 (1971).

149. See *Jespersen*, 444 F.3d at 1114 n.2 (Pregerson, J., dissenting) (citing *Dothard*, 433 U.S. at 334).

150. 42 U.S.C. § 2000e-2(e)(1) (2000).

151. See, e.g., *Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5th Cir. 1971), 404 U.S. 950 (1971) (holding that being female is not a BFOQ for the job of flight attendant), *cert. denied*; see also *Wilson v. Sw. Airlines*, 517 F. Supp. 292, 302 n.24 (N.D. Tex. 1981) (noting

motivating factor” in Harrah’s decision to fire Jespersen—as it quite clearly was¹⁵²—the company would have committed an unfair employment practice.¹⁵³ Even if it had other nondiscriminatory reasons to fire her, Harrah’s could, at most, limit its remedies by asserting the mixed-motive, same-decision affirmative defense under Title VII.¹⁵⁴ In addition, one of the 1991 amendments to Title VII¹⁵⁵ expressly prohibits employers from defending claims of intentional discrimination on the basis of “business necessity.”¹⁵⁶ Employers may raise the “business necessity” defense only in disparate impact cases brought under Title VII, which challenge facially neutral policies that have a discriminatory effect on protected classes.¹⁵⁷ Jespersen surely was not bringing a disparate impact claim, although the court’s unequal burdens analysis confusingly introduces examination of *disparate effects* into a disparate treatment case.

If the Ninth Circuit in *Jespersen* had followed Title VII’s statutory language and relevant Supreme Court precedent, Harrah’s would have lost not only its motion for summary judgment, but it would have been left, on these facts, without any viable defense at trial. In fact, because the case for disparate treatment seems so strong, I have wondered whether it might have made sense for Jespersen to file a cross-

that courts following *Diaz* have adopted a “very narrow standard for weighing customer preference”); see generally Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL’Y 257 (2007) (analyzing sex-specific dress codes and the BFOQ defense as applied to exclusive hiring of female cocktail servers in Nevada casinos).

152. See *Jespersen*, 444 F.3d at 1115.

153. Enacted in the Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071, Title VII § 703(m), 42 U.S.C. § 2000e-2(m) (2000), provides: “[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m).

154. Section 706(g)(2)(B) of Title VII, 42 U.S.C. § 2000e-5(g)(2)(B), provides that, if a plaintiff “proves a violation under [section 703(m) of Title VII, 42 U.S.C. § 2000e-2(m)]” and the employer proves that it “would have taken the same action in the absence of the impermissible motivating factor,” the court may award the plaintiff attorney’s fees and costs, and certain limited forms of declaratory and injunctive relief (excluding reinstatement, hiring, promotion, or back pay), but not damages. 42 U.S.C. § 2000e-5(g)(2)(B).

155. Civil Rights Act of 1991 (adding section 703(k)(2) to Title VII).

156. *Id.* (providing that “[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under [Title VII]”).

157. See Title VII § 703(k) (providing standards for the burden of proof in disparate impact cases).

motion for summary judgment.¹⁵⁸ Having argued, however, how the *Jespersen* case might have come out differently if the court had paid serious attention to the statute, I want to acknowledge the adage: “be careful what you ask for.” If courts were to strike down employer sex-based dress, grooming, and appearance standards, I can imagine Congress bowing to pressure from many service industries, particularly the powerful casino gaming industry, by amending Title VII to provide a safe harbor for sex-based dress and grooming codes.

C. The Potential Impact of *Jespersen*

The *Jespersen* decision, however, is now the law in the Ninth Circuit. What can we learn from it that might help a plaintiff survive a motion for summary judgment in challenging a makeup requirement for female workers? The court’s unequal burdens analysis requires plaintiffs to bear the burden of producing comparative evidence of the cost and time for men and women of complying with the employer’s sex-based policy. Meeting this burden would most likely be cost effective only in Title VII class action or pattern-or-practice suits,¹⁵⁹ but it is not difficult to imagine how one might go about collecting such evidence. One could start with a shopping cart at the nearest drug store and buy various brands of mascara, lipstick, blush, and foundation. But from there it would get more complicated. How often does a mascara wand have to be replaced? How much time, on average, does it take to put on the required makeup, to freshen it up, and to remove it? What about the costs and risks of allergies or infections from wearing cosmetics?¹⁶⁰

More problematic is the sex stereotyping approach. Even the Ninth Circuit is not likely to tolerate under Title VII an employer policy that makes baristas wear negligees in order to have the job of selling steamed coffee at a roadside stand.¹⁶¹ Such a policy, assuming the

158. See *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1108 (9th Cir. 2006) (en banc) (noting that “*Jespersen* makes no cross-motion for summary judgment, taking the position that the case should go to the jury”).

159. See Title VII § 707, 42 U.S.C. § 2000e-6 (providing authority for the federal government to bring “pattern-or-practice” discrimination claims in federal court).

160. See, e.g., *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting) (noting that makeup “can cause serious discomfort, sometimes even allergic reactions, for someone unaccustomed to wearing it”).

161. The en banc court in *Jespersen* distinguished Harrah’s dress code for its bartenders, a “unisex uniform that covered [*Jespersen*’s] entire body and was designed for men and women,” from the skimpy, revealing uniform a female lobby attendant was required to wear, which the district court found unlawful in *EEOC v. Sage Realty*, 507 F. Supp. 599, 604 (S.D.N.Y. 1981). *Jespersen*, 444 F.3d at 1112 (majority opinion).

employer meets the numerosity requirements of Title VII,¹⁶² would signal an intent to make the employee “sexually provocative, and tending to stereotype women as sex objects.”¹⁶³ Dress codes mandating that female employees wear sexy, revealing tops, short skirts, and high heels should be the “easy” cases under existing Title VII doctrine, whether the theory is that such dress rules demean and objectify women or that they expose women to sexual harassment from supervisors, co-workers, and customers.¹⁶⁴

The requirement that only female employees must wear makeup for a job like bartending, which is capable of being performed by both men and women, is (but should not be) the hard case. If Harrah’s can legally impose this working condition on female employees, what, other than the market, would stop any employer from adopting such policies for its female employees? If Title VII permits employers to adopt mandatory sex-based makeup rules for women, where does one draw the line between makeup and other sex-based grooming rules, for example, requiring women but not men to wear colored nail polish or perfume? How can a plaintiff ever prove that an employer adopted such a policy with “discriminatory or sexually stereotypical intent”?¹⁶⁵ The *Jespersen* en banc majority would not allow a jury to draw its own inferences about intent from the face of Harrah’s policy.¹⁶⁶ Unlike the dissenters,¹⁶⁷ the majority did not believe that the Supreme Court’s evidentiary framework in *Price Waterhouse*—ruling that sex-stereotyped assumptions, and hence, unlawful discriminatory intent, can be inferred from a partner’s suggestion that a female accountant, among other things, wear makeup, jewelry, and feminine clothing to improve her chances for promotion—would resolve the issue either.¹⁶⁸

162. Title VII, § 701(b), 42 U.S.C. § 2000e(b) (defining an “employer” covered by Title VII as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”). Many vendors of food and beverages may not have enough employees to be covered by Title VII, but may fall under analogous state fair-employment statutes.

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

164. *See id.* at 1112–13.

165. *Id.* at 1112 (concluding that Harrah’s grooming requirement “does not, on its face, indicate any discriminatory or sexually stereotypical intent on the part of Harrah’s”).

166. *Id.* at 1106, 1111–12.

167. *See id.* at 1114–16 (Pregerson, J., dissenting); *see also id.* at 1116–17 (“I believe that *Jespersen* articulated a classic case of *Price Waterhouse* discrimination.”).

168. *See id.* at 1111–12 (majority opinion) (distinguishing the facts in *Jespersen* from the facts in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

V. Evidence of the Harms of Sex Stereotyping

Under the Ninth Circuit's sex stereotyping framework in *Jespersen*, plaintiffs challenging an employer's sex-based dress or grooming policy, like the one that Harrah's adopted, may have to rely on social science evidence and expert testimony in order to establish an unlawful sex-based motive for the policy. Because a single employee's aversion to a sex-based dress or grooming requirement is subjective and idiosyncratic,¹⁶⁹ plaintiffs will need to produce objective evidence of the harms of a particular dress or grooming policy to the workers in the protected class. There is a fairly extensive body of scholarship on sex stereotyping, sex roles, and the effects of sexualization on males and females in work settings and elsewhere. Some of these studies suggest that sexualized appearance requirements in the workplace may have an impact on the perceived competence, intelligence, prestige, and status of the workers. Adolescent females appear to be particularly vulnerable to exploitation by employer sex-based grooming and appearance rules. But even older male and female workers may experience psychological harms as well as job loss because their occupations have been both feminized and sexualized. Following are several examples of social science findings that might support a plaintiff's Title VII sex-stereotyping challenge to an employer's sex-based dress or grooming policy.

Early in 2007, the American Psychological Association released its lengthy *Report of the APA Task Force on the Sexualization of Girls*,¹⁷⁰ in which it criticized the cosmetics industry for "marketing their products to younger and younger girls."¹⁷¹ The report concluded, among other things, that "[c]osmetics and perfume are often associated specifically with the desire to be sexually attractive,"¹⁷² that "[c]hronic attention to physical appearance leaves fewer cognitive resources available for other mental and physical activities,"¹⁷³ and that "self-sexualization or sexualization by others is likely to have a negative impact on women seeking professional careers."¹⁷⁴ An earlier study examined "whether the use of cosmetics significantly affect [sic] a woman's probability of gaining professional or nonprofessional employ-

169. *Id.* at 1113 (finding that Darlene Jespersen's aversion to wearing makeup was not objectively reasonable, but only "the subjective reaction of a single employee").

170. AM. PSYCHOL. ASS'N, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS (2007), available at www.apa.org/pi/wpo/sexualization.html.

171. *Id.* at 15.

172. *Id.*

173. *Id.* at 22.

174. *Id.* at 30.

ment.”¹⁷⁵ Noting that “[t]he traditional role of makeup, as indicated in media presentations by the cosmetics industry, is to enhance feminine beauty and sex appeal,”¹⁷⁶ the authors found that “perceived makeup use is positively correlated with attractiveness, femininity, and sexiness.”¹⁷⁷ The authors concluded that “[c]osmetics use may enhance physical appearance, but it may also detract from perceived competence on the job.”¹⁷⁸

A 2005 study of sex stereotypes and job status reported that “women are typically categorized into specific subtypes that cohere into three primary clusters: traditional (e.g., homemaker), nontraditional (e.g., career woman), and sexy,”¹⁷⁹ and that while “significantly altering one’s physical attractiveness is difficult, . . . women can easily emphasize or deemphasize their sexuality through clothing and demeanor.”¹⁸⁰ This study concluded that “[p]articipants viewed [a] sexy manager as less competent and less intelligent than [a] conservatively dressed manager.”¹⁸¹

A 1995 study of occupations found that “people organize their images of occupations in a highly stereotyped, socially learned manner.”¹⁸² Interestingly, the participants in this study rated the job of bartender as neutral in perceived “gender type” and relatively low on a scale measuring perceived “prestige” and “intelligence”—on the same level as the feminine-typed jobs of postal clerk, clothing sewer, and the more masculine jobs of assembler, factory machine operator, and roofer.¹⁸³ The job of bartender was also rated lower in “prestige/intelligence” than the occupation rated most feminine—receptionist,

175. Cathryn L. Cox & William H. Glick, *Resume Evaluations and Cosmetics Use: When More Is Not Better*, 14 *SEX ROLES* 51, 52 (1986).

176. *Id.* at 56.

177. *Id.* at 55.

178. *Id.* at 57. Wearing makeup had “virtually no effect if the woman applied for an accountant position,” but “there was a linear inverse relationship if the woman applied for a secretarial position.” *Id.* at 56. The authors reported that “[w]omen applying for secretarial positions with no makeup received the highest ratings” and “women with heavy makeup applying for secretarial positions were particularly negatively evaluated.” *Id.*

179. Peter Glick et al., *Evaluations of Sexy Women in Low- and High-Status Jobs*, 29 *PSYCHOL. WOMEN Q.* 389, 389 (2005); see also C. Nathan DeWall et al., *Understanding the Structure of Stereotypes of Women: Virtue and Agency as Dimensions Distinguishing Female Subgroups*, 29 *PSYCHOL. WOMEN Q.* 396 (2005).

180. Glick et al., *supra* note 179, at 389.

181. *Id.* at 393.

182. Peter Glick et al., *Images of Occupations: Components of Gender and Status in Occupational Stereotypes*, 32 *SEX ROLES* 565, 566 (1995).

183. See *id.* at 576 fig.1 (Map of Occupations by Gender-Type and Prestige/Intelligence).

as well as lower than a number of other feminine occupations in the mid-range of the “prestige/intelligence” scale.¹⁸⁴ As women have moved into the bartending profession in great numbers in the late twentieth century, the occupation has lost its salient link to the male gender that was enforced by legal rules and social norms from the late 1800s to the 1970s.¹⁸⁵ The job of bartending, like many other service-sector jobs, also appears to be losing status as it is being both sexed up and dumbed down.

As bartending becomes more sexualized, we might expect the occupation to become more stereotyped as feminine, and perhaps drop even lower in “prestige/intelligence” status, moving further down the “prestige/intelligence” scale from high-status “feminine” jobs like legal secretary and high school teacher.¹⁸⁶ If the job of bartender is being sexualized as it is being feminized, bar and casino owners may be looking for younger, thinner, sexier females to fill these positions. As one researcher noted, many front-of-the-house jobs in restaurants for hostesses, bartenders, and food and beverage servers are going to “thin, attractive, young, outgoing, and mostly white” women.¹⁸⁷ At one restaurant, the researcher reported, the pressure on a waitress to keep thin imposed “psychological harm caused by being viewed as a body rather than a skilled person.”¹⁸⁸

The sexualization of women’s work can be observed throughout the service economy in retail work,¹⁸⁹ clerical work,¹⁹⁰ and especially

184. *Id.*

185. See Avery & Crain, *supra* note 3, at 92–100 (discussing the feminization of bartending).

186. See Glick et al., *supra* note 182, at 576 fig.1.

187. Danielle Dirks, “It Comes with the Territory”: Women Restaurant Workers’ Experiences of Sexual Harassment and Sexual Objectification 27 (2004) (unpublished M.A. thesis, University of Florida) (on file with author).

188. *Id.*; see also Elaine J. Hall, *Waiting/Waitressing: Engendering the Work of Table Servers*, 7 GENDER & SOC’Y 329, 334 (1993) (examining “the way restaurants use job titles and uniforms to reaffirm the gendered service style that workers are expected to perform and the way servers use them to negotiate the gender meanings of their jobs”); Meika Loe, *Working for Men—At the Intersection of Power, Gender, and Sexuality*, 66 SOC. INQUIRY 399 (1996).

189. See, e.g., Lynne Pettinger, *Gendered Work Meets Gendered Goods: Selling and Service in Clothing Retail*, 12 GENDER WORK & ORG. 460 (2005); see also Karen D. Hughes & Vela Tadic, “Something to Deal With”: Customer Sexual Harassment and Women’s Retail Service Work in Canada, 5 GENDER WORK & ORG. 207 (1998).

190. See, e.g., Jackie Krasas Rogers & Kevin D. Henson, “Hey, Why Don’t You Wear a Shorter Skirt?": Structural Vulnerability and the Organization of Sexual Harassment in Temporary Clerical Employment, 11 GENDER & SOC’Y 215, 221 (1997) (noting that “[a]lthough temporary agencies are legally required to operate under the equal opportunity employer legislation . . . , temporaries are nevertheless often hired or placed for personal characteristics

in the casino gaming,¹⁹¹ and food and beverage industries.¹⁹² It is a world-wide phenomenon. For example, the Hooters chain is now exporting its restaurant franchises, along with job openings for Hooters Girls, in places like South Korea where waitresses are hired on the basis of “age, stature, and weight” and wear the “skimpy uniforms” of “white tank tops and small orange shorts.”¹⁹³

The burdens of the sexing up and dumbing down of women’s work do not fall just on women—who, it must be acknowledged, sometimes seek and desire many service jobs for their high tips, flexible hours, and even the life style. I believe two groups in society today are being particularly harmed by this trend. One group is adolescent female workers and the second group is older (and sometimes even not-quite-middle-aged) men and women.

The proliferation of low-wage, part-time service jobs, particularly in retail and food and beverage establishments, has both drawn on and enabled the employment of large numbers of young workers between the ages of fifteen and nineteen.¹⁹⁴ As one researcher noted:

Retail and food service companies routinely exploit the sexuality of young workers (women especially) in order to attract customers and increase sales. More generally, employers staff their stores by hiring young workers who have the right “look”—they screen, in their recruitment and hiring process, for an appearance, attitude and demeanor that is strongly age, gender, race and class based.¹⁹⁵

other than their jobs [sic] skills. Even some of the more specific and egregious requests (e.g., for a young, blond woman with great legs) are often honored”).

191. See, e.g., Gersh Kuntzman, *Must Casino Waitresses Be Thin?*, NEWSWEEK, Mar. 18, 2005, <http://www.msnbc.msn.com/id/7047491/site/newsweek/print/1/displaymode/1098/>.

192. See, e.g., *Waitresses Dressed as Naughty Nurses Rule RNs*, MSNBC.COM, Dec. 8, 2006, <http://www.msnbc.msn.com/id/16112393/> (reporting that at the Heart Attack Grill in Tempe, Arizona, the waitresses wear “naughty nurse uniforms”—“skimpy, cleavage-baring outfits, high heels and thigh-high stockings—a male fantasy that some nursing organizations say is an insult to the profession”).

193. Kim Rahn, *Girls Get Big Bucks for Short Shorts*, KOREA TIMES, Feb. 2, 2007, http://www.koreatimes.co.kr/www/news/nation/news_view.asp?newsIdx=3068355.

194. For example, the November 2000 Report on the Youth Labor Force reports that “[d]uring the 1996–98 period, 2.9 million youths aged 15 to 17 worked during school months, and 4.0 million worked during the summer months.” BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CURRENT POPULATION SURVEY, TRENDS IN YOUTH EMPLOYMENT 30 (2000). The report indicates that thirty-one percent of males aged fifteen to seventeen, and thirty-three percent of females were employed in eating and drinking establishments during the school months. See *id.* at 44 tbl.4.9.

195. Stuart Tannock, *Why Do Working Youth Work Where They Do?—A Report from the Young Worker Project 15* (Mar. 2002) (unpublished manuscript from Center for Labor Research and Education, U.C. Berkeley) (on file with author); see also Stuart Tannock & Sara Flocks, *“I Know What It’s Like to Struggle”: The Working Lives of Young Students in an Urban Community College*, 28 LAB. STUD. J., Spring 2003, at 1, 9 (observing that “[y]oung female

Not long ago, Abercrombie & Fitch, in a well-publicized settlement with the EEOC, agreed to change its allegedly discriminatory sex- and race-based hiring and marketing practices.¹⁹⁶ But one must wonder if a sixteen-year-old girl, regardless of whether she never uses cosmetics or she occasionally (or even always) wears makeup, would even consider challenging an employer's requirement that she wear a prescribed "template" of lipstick, mascara, and blush while serving hamburgers and fries. One must also wonder whether the EEOC would consider such a grooming rule, imposed on females only, to be worth pursuing on its own.

When, as in one recent case, a court must resort to state statutory rape laws in order to rule that a sixteen-year-old girl did not "welcome" sexual intercourse with her twenty-five-year-old supervisor and thus satisfied the "unwelcomeness" element of her hostile work environment claim under Title VII,¹⁹⁷ we should wonder what law or principle outside Title VII might be asserted to stop employers from *requiring* that their adolescent female workers appear sexed up and dolled up for work. Consider these facts: In 1997 "[t]eenage girls 12 to 19 years of age spent over \$8 billion on beauty products," and "[b]etween 2000 and 2005, there was a 15% increase in teen (age 18 and younger) invasive cosmetic surgery and a 7% increase in minimally invasive cosmetic procedures."¹⁹⁸ To what extent do employer appearance rules for entry-level jobs for adolescent females add fuel to these trends?

An example of the harms of these sex-based hiring practices and appearance rules to older men and women can be found in a recent, somewhat ironic, development that is a mirror image of Darlene Jespersen's lawsuit. In the summer of 2006, a group of unionized male bartenders, ranging in age from forty to almost sixty-five, who were employed at the MGM Mirage in Las Vegas, filed an age-discrimination complaint with the Nevada Equal Rights Commission.¹⁹⁹ After exhausting their administrative remedies, they brought an age

student workers, especially, are forced daily to deal with the demeaning consequences of retail and food service employers who routinely and often blatantly exploit their sexuality in order to attract customers and increase sales").

196. See Avery & Crain, *supra* note 3, at 22–23 & n.46.

197. See *Doe v. Oberweis Dairy*, 456 F.3d 704, 713–14 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1815 (2007).

198. AM. PSYCHOL. ASS'N, *supra* note 170, at 24.

199. Liz Benston, *Youth, Good Looks a Gold Mine on LV Strip*, LAS VEGAS SUN, May 19, 2006, <http://www.lasvegassun.com/sunbin/stories/sun/2006/may/19/566616673.html?Youth,%20Good%20Looks%20a%20Gold%20Mine%20on%20LV%20Strip>.

discrimination lawsuit in federal court.²⁰⁰ The essence of their claim was that they had been “passed over for plum jobs at new venues such as Jet and Stack, a hip restaurant,” in favor of young men and women.²⁰¹ The Culinary Union has contracts with the management organizations that run these new “hip” venues that permit them “to hire who they want, based on appearance.”²⁰² Even as these older Las Vegas bartenders are losing job opportunities to younger workers, experienced cocktail waitresses in their mid-to-late twenties, who are not protected by the Age Discrimination in Employment Act,²⁰³ are also finding themselves losing out on new highly paid jobs to “buxom waitresses in their early 20s, with little or no experience.”²⁰⁴

So we have come full circle in the last hundred or so years. Older, experienced male bartenders are now being kept out of good jobs because their unions and employers are enforcing a new set of sex-based stereotypes about who is qualified to do the job. Now, like Darlene Jespersen (or Mary Maguire in 1881), they can turn to the law to assert their rights to equal employment opportunity. But the path of the *Jespersen* litigation does not suggest that taking on the casino industry and its appearance standards through federal antidiscrimination law is likely to yield favorable results. If the unions oppose the older bartenders’ interests, the bartenders must seek new, more sympathetic, allies in the community, and new legal and political strategies.

VI. Conclusion

In closing I would like to leave you with this one thought that came to my mind as I reflected on the *Jespersen* case and the history of men and women in bartending in the United States. I was thinking about the male veterans who returned from World War II, reclaiming their old bartending jobs and ousting the female bartenders. I imagined a different, hypothetical, narrative for Darlene Jespersen. Suppose before Harrah’s adopted its “Personal Best” grooming code, Jespersen had left her long-time job as a Harrah’s bartender to enlist in the United States Army. After an honorable discharge, and possibly

200. Telephone Interview with Liz Benston, Reporter, Las Vegas Sun, in Las Vegas, Nev. (Mar. 9, 2007).

201. Benston, *supra* note 199.

202. *Id.*

203. The Age Discrimination in Employment Act of 1967 (ADEA), § 12(a), 29 U.S.C. § 631 (2000), covers only “individuals who are at least 40 years of age.” *Id.*

204. Benston, *supra* note 199.

valorous service in a field of war, she returns to her hometown, Reno, Nevada, and, relying on her federal rehire rights for military veterans,²⁰⁵ she seeks to return to her former job at Harrah's casino only to discover that she is now required to wear makeup as a condition of working behind the bar. Harrah's is happy to have her work without wearing makeup, earning the same pay (but, most likely, not the same tips) in a job somewhere else in the casino, just not the front of the house. Now, the Army's dress code is hardly a model of gender equality, but—even in the Army—women are “authorized” but not *required* “to wear cosmetics with all uniforms.”²⁰⁶ I am not sure what sex equality means today when a female bartender returning from military service could be *required* to wear makeup in order to reclaim her old job in a casino, but she could serve and even die for her country without being *required* to wear lipstick, powder, blush, and mascara. Of course, I am not suggesting that we doll up our female soldiers. What I am suggesting is that we seriously rethink our discrimination law on workplace appearance and grooming codes before another generation of women gets sexed up and dumbed down on the job.

205. See Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4312 (2000) (requiring employers to rehire former employees who have served in the military for five years or less).

206. U.S. DEP'T OF THE ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 1(8.b) (2005), available at http://www.apd.army.mil/pdffiles/r670_1.pdf.