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Female bartender's termination for failure to wear makeup as required by her employer's dress and grooming standards was upheld en banc by the 9th Circuit.

## Ninth Circuit Upholds Makeup Requirement

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On April 14, 2006, the Ninth Circuit Court of Appeals issued its *en banc* opinion in *Jespersen v. Harrah's Operating Co.*, No. 03-15045 (9th Cir. Apr. 14, 2006), affirming the court's prior ruling that it was not unlawful gender-based discrimination for an employer to dismiss a female bartender for noncompliance with its dress and grooming standards that included a requirement that female bartenders wear makeup. The seven-four majority opinion affirmed the right of employers in the Ninth Circuit to enforce reasonable dress and grooming standards in the workplace.

### Factual & Procedural Background

Darlene Jespersen was a bartender at the sports bar in Harrah's Casino ("Harrah's") in Reno, Nevada, for nearly 20 years. She was an outstanding employee and was recognized by Jespersen's supervisors and the customers she served.

Throughout the 1980s and 1990s, Harrah's encouraged its female beverage servers to wear makeup, but wearing makeup was not a formal requirement at that time. Although Jespersen never cared for makeup, she tried wearing it for a short period of time during the 1980s. After a few weeks, however, Jespersen stopped wearing makeup because she felt that wearing makeup "forced her to be feminine" and "took away [her] credibility"

In February 2000, Harrah's implemented a "Beverage Department Image Transformation" program at twenty Harrah's locations, including the location where Jespersen worked. Part of this image transformation included The "Personal Best" program, which set forth new grooming and appearance standards for Harrah's beverage servers. Some of these grooming and appearance standards applied equally to both sexes, including the standard uniform of black pants, white shirt, black vest, and black bow tie. Other standards, including those relating to hair, nails and makeup, were differentiated on the basis of sex. For instance, female beverage servers were required to wear their hair "teased, curled or styled." Stockings were to be of "natural color consistent with employee's skin tone" without "runs", and nail polish could only be "clear, white, pink or red." By contrast, male beverage servers were prohibited from wearing makeup or nail polish, and were required to maintain short haircuts and neatly trimmed fingernails.

In April 2000, Harrah's amended its policy to require that female beverage servers wear makeup, including face powder, blush, mascara and lip color. After Jespersen refused to comply with the makeup policy, she was given 30 days to apply for a new position that did not require makeup. At the expiration of the 30-day period, Jespersen had not applied for another job and was

terminated by Harrah's.

During the administrative process before the Equal Employment Opportunity Commission (EEOC), Harrah's offered to reinstate Jespersen in her former position with an exemption from the makeup rule. However, Jespersen declined Harrah's offer of reinstatement because she did not want to be an exception to the rule, and, after exhausting her administrative remedies, she filed a civil lawsuit against Harrah's. In her Complaint, Jespersen alleged that Harrah's "Personal Best" policy discriminated against women in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) ("Title VII") by "(1) subjecting them to terms and conditions of employment to which men are not similarly subjected, and (2) requiring that women conform to sex-based stereotypes as a term and condition of employment."

Harrah's moved for summary judgment, arguing that the "Personal Best" policy created similar standards for both men and women, and to the extent that there were any sex-based differences in these standards, they imposed equal burdens on both male and female bartenders. In support of its motion, Harrah's relied on documentation that established nondiscriminatory business reasons for the appearance and grooming policy.

In opposition to Harrah's motion, Jespersen relied solely on her deposition testimony regarding her own subjective reaction to the makeup policy, and upon favorable customer feedback and employer evaluation forms regarding her work performance. Jespersen had testified that she "felt very degraded and very demeaned" by wearing makeup and that it "prohibited [her] from doing [her] job" because it "took away [her] credibility as an individual and as a person." However, she presented no affidavit or other evidence to establish that complying with the "Personal Best" standards imposed an unequal burden on women, nor did

she present any evidence that Harrah's motivation in implementing the policy was to stereotype its female bartenders.

After the district court granted Harrah's motion for summary judgment on Jespersen's claims, she appealed to the Ninth Circuit. On December 28, 2004, a three judge panel for the Ninth Circuit affirmed the district court's decision granting summary judgment. Thereafter, Jespersen sought *en banc* review of the decision.

## The Court's Analysis

As Chief Judge Mary Schroeder explained in her majority opinion, the Ninth Circuit decided to review the panel decision *en banc* "in order to reaffirm our circuit law concerning appearance and grooming standards, and to clarify our evolving law of sex stereotyping claims." The panel first addressed Jespersen's claim that the makeup requirement imposed an "unequal burden" on women, and then addressed her claim that the makeup requirement was an unlawful "sex stereotype." Considering the grooming policy as a whole, the majority found no evidence that it was unduly burdensome to women, and found the policy to be objectively reasonable.

## Unequal Burden Analysis

Although Jespersen had argued that any requirement that women wear makeup is, itself, discriminatory under Title VII, the majority reiterated that sex-based differences in appearance or grooming standards are not, *per se*, discriminatory. Instead, the majority explained that "[t]he material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an 'unequal burden' for the plaintiff's gender."

The majority considered Harrah's appearance policy as a whole, as it applied to both male and female bartenders, and found that it created a uniform

and professional look common to all employees. The court found no evidence that the policy was part of an overall program to create a sexual image for Harrah's. Although the "Personal Best" policy contained sex-differentiated requirements regarding employees' hair, hands and face, the court found that none of those requirements were, on their face, unduly burdensome to either gender. Further, the majority declined to take judicial notice of Jespersen's claim that it "costs more money" and "takes more time" for women to comply with the makeup requirement. As she had failed to create a record establishing that Harrah's appearance and grooming policy was more burdensome to women than to men, the panel concluded that summary judgment had been properly granted on Jespersen's unequal burden claim.

## Sex Stereotyping

As for Jespersen's alternate claim that the makeup requirement constituted discriminatory "sex stereotyping", the court found that Jespersen's personal objection to Harrah's makeup requirement was "very different" from the sex stereotyping claim successfully advanced by the plaintiff in *Price Waterhouse v. Hopkins*. In *Price Waterhouse*, a female accountant was denied a partnership at her accounting firm because some of the partners felt she was too aggressive and not feminine enough. There, the United States Supreme Court found that a gender stereotype about how women should behave impacted the employer's decision not to promote the plaintiff because the very traits that she was asked to hide were the same traits considered praiseworthy in men. The *en banc* majority distinguished Harrah's "Personal Best" policy, noting that it did not single out Jespersen, but applied across the board to *all* bartenders, both male and female. The majority found no evidence that the policy was adopted to make women bartenders conform to a stereotypical image of what women

should wear. Further, the majority found no evidence that the makeup requirement was intended to be sexually provocative or stereotype women as sex objects, nor did the majority find any evidence that the makeup requirement subjected Jespersen to sexual harassment. Finally, the majority found that when analyzing workplace appearance standards, these standards must be considered as a whole and not analyzed individually.

## Lessons Learned

The *Jespersen* decision makes it clear that sex-based differences in workplace appearance standards are not, in and of themselves, discriminatory. Appearance policies that appropriately distinguish between the genders based on accepted social norms will be upheld in the absence of objective evidence that such policies are unduly burdensome to one gender. Although the *Jespersen* majority left the door open for future sex stereotyping claims based on appearance or grooming standards, the court reiterated that the “touchstone” for evaluating all workplace appearance and grooming standards is “reasonableness.” At the end of the day, reasonable appearance policies should be upheld unless there is objective evidence of discriminatory impact or motive.

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