Enforcing Femininity: How *Jespersen v. Harrah's Operating Co.* Leaves Women in Typically Female Jobs Vulnerable to Workplace Sex Discrimination

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Introduction

AS A SENIOR SALES ASSOCIATE at a high-end jewelry store, Alicia Jenkins consistently exceeded her sales quotas and earned high commissions. She had been working at the same store for more than seven years, and in this time had built up a client base of faithful customers. Alicia's clients trusted her taste and relied on her to set aside new inventory for them, often asking her to choose styles that suited them or to help select pieces for purchase.

One day, Alicia's supervisor informed her that the company was instituting a new grooming and appearance policy. Female employees were now required to wear their hair long, blonde, and clipped with a jeweled barrette manufactured by the company. The policy also required that all male employees keep their hair above shoulder length. Alicia's hair was short and naturally dark brown. She told her supervisor that she didn't feel comfortable dyeing her hair and growing it out long, since she preferred the ease of short hair and wanted to keep her hair's natural color. Her supervisor informed her that the company was invested in presenting a uniform "look" for its sales force and that management wanted its employees to reflect the company's traditional feminine aesthetic. Unless Alicia agreed to comply with the new policy, she would be fired. Unwilling to compromise, Alicia refused to dye her hair blonde and was fired as a result.[1]

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1. Although this situation is a hypothetical one, it illustrates the problem faced by employees who refuse to conform to employer dress and grooming codes.

Can Alicia bring a claim against her former employer for illegal sex discrimination? Does requiring female employees to conform to a traditional feminine aesthetic constitute sex stereotyping? The answer depends on what definition of sex stereotyping the court chooses to apply.

In the past thirty years, popular understandings of gender roles and gender discrimination have undergone a radical transformation. The notion that gender may be socially rather than biologically constructed is increasingly accepted by scholars, legal theorists, and the general public.[2] As conceptions of gender and gender roles continue to change, society is confronted with a growing number of people who resist conforming to traditional gender norms.

In response to this ongoing transformation, courts have begun to shift the ways in which they understand gender and sex discrimination. Title VII of the Civil Rights Act of 1964 ("Title VII") states that employers may not discriminate "because of sex."[3] Since 1964, however, judicial understandings of what constitutes discrimination "because of sex" have changed.[4] The pivotal case in this area is *Price*

2. *See generally* Julie A. Seaman, *Form and (Dys)Function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII*, 37 ARIZ. ST. L.J. 321, 358 (2005) ("[I]n its starkest form, the social constructionist understanding of gender difference posits that observed differences do not have any objective or biological basis."); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 74 (2002) ("Gender is better conceptualized as an institution, a social process of exclusion that distinguishes persons based on their sex . . . . Gender is a social practice that is produced not only at the level of individuals, but within institutions as well.").

3. 42 U.S.C. § 2000e-2(a) (2000). The statute states that:

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

Id.

4. See *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), for a discussion of how courts' interpretations of Title VII's "because of sex" language have changed over the years. The *Schwenk* court stated:

> In the context of Title VII, federal courts (including this one) initially adopted the approach that sex is distinct from gender, and, as a result, held that Title VII barred discrimination based on the former but not on the latter. . . . The initial judicial approach . . . has been overruled by the logic and language of *Price Waterhouse*. . . . Thus, under *Price Waterhouse*, "sex" under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender.

Id. at 1201–02 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

Waterhouse v. Hopkins,[5] a 1989 case in which the Supreme Court held that discrimination based on a plaintiff's failure to conform to traditional sex stereotypes is prohibited under Title VII.[6]

In 2006, the Ninth Circuit Court of Appeals heard a case en banc involving a female bartender who was fired for refusing to wear a full face of makeup to work.[7] The case is *Jespersen v. Harrah's Operating Co.*,[8] and the court held that although male bartenders were not required to wear makeup to work, the plaintiff nevertheless had not suffered sex-based discrimination under Title VII.[9] In its ruling, the court improperly held that the makeup policy at issue in *Jespersen* was not an instance of sex stereotyping under the Supreme Court's articulation of the rule in *Price Waterhouse*.[10] The Ninth Circuit based this holding on irrelevant factual distinctions between the two cases, and incorrectly read the Supreme Court's *Price Waterhouse* holding as only narrowly applicable. By upholding a separate and less stringent sex-stereotyping test for sex-differentiated grooming and appearance policies, the Ninth Circuit created a legal loophole that leaves employees in typically female industries with weaker legal protection than women working in typically male industries.

This Comment argues that the Ninth Circuit was mistaken in concluding that *Jespersen* fell outside of the Supreme Court's rule on sex-stereotyping discrimination under Title VII. Part I provides background information on Title VII, describes how sex-discrimination claims are brought under the statute, and examines the development of the sex-stereotyping claim under Title VII. Part II looks at the *Jespersen* holding and argues that the court misconstrued the limits of the Supreme Court's sex-stereotyping rule. Part III then argues that the *Jespersen* holding was incorrect in two key ways. First, the Ninth Circuit made incorrect factual distinctions between *Jespersen* and *Price*

5. 490 U.S. 228 (1989).

6. *Id.* at 251. The Court held that:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Id. (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

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

8. *Id.*

9. *Id.* at 1106.

10. *Id.* (holding that the district court's observation that "the Supreme Court's decision in *Price Waterhouse v. Hopkins* prohibiting discrimination on the basis of sex stereotyping, did not apply to this case") (citations omitted); *Price Waterhouse*, 490 U.S. at 250.

Waterhouse. Second, the Ninth Circuit improperly limited the *Price Waterhouse* holding to a particular set of factual circumstances. Part IV analyzes the negative impact that the *Jespersen* precedent will have on women in typically female industries, and argues that the holding creates a precedent under which women in typically female industries have less protection against sex stereotyping than do women in typically male industries.

I. The Development of the Sex-Stereotyping Doctrine Under Title VII

A. Bringing a Sex-Discrimination Claim

Title VII declares, "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[11] In order to bring a sex-discrimination claim under Title VII, a plaintiff may argue that an employment practice creates a disparate impact on members of a protected group or that it constitutes disparate treatment of a protected group or group member. Disparate-impact claims allege that though an employer's policies are facially neutral, they negatively impact one group and not another.[12] Disparate-treatment claims, on the other hand, allege that an employer is intentionally treating certain employees less favorably than others because of characteristics protected by Title VII.[13]

The statute provides one exception to each type of prohibited discriminatory practice. In disparate-impact cases where employers have policies that are facially neutral, but nevertheless impact a protected group differently, the policy or practice may be justified by arguing that it is "job related for the position in question and consistent with business necessity."[14] In disparate-treatment cases where employers *intentionally* institute policies which treat members of a protected group differently, such treatment may still be justified under the Bona Fide Occupational Qualification ("BFOQ") defense.[15] A BFOQ exists

11. 42 U.S.C. § 2000e-2(a)(1) (2000).

12. Frank v. United Airlines, Inc., 216 F.3d 845, 853 (9th Cir. 2000).

13. *Id.* Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).

14. *Id.* § 2000e-2(k)(1)(A)(i).

15. *Id.* § 2000e-2(e). This Comment will address only the issue of sex stereotyping since previous commentators have already analyzed other aspects of sex discrimination as it relates to *Jespersen*. For a discussion of the unequal burdens test and other problems

in circumstances where discrimination against members of a particular religion, sex, or national origin group is "reasonably necessary to the normal operation of that particular business or enterprise."[16] Courts have agreed that employers may refuse to hire men, for instance, in "jobs where sex or vicarious sexual recreation is the primary service provided, e.g. a social escort or topless dancer."[17] The BFOQ defense also applies in situations where employees are personal caretakers, such as nurses and hospital staff whose jobs include bathing patients and assisting them in using the restroom.[18] In occupations that require less intimate contact, such as flight attendant and other service professions, courts have uniformly held that mere customer preference for one sex over another is not sufficient to create a BFOQ under Title VII.[19]

In *Jespersen*, the plaintiff alleged only that her employer intentionally discriminated against her, not that the policy unintentionally impacted women more than men. The focus of this Comment, therefore, is on how to prove a claim of disparate treatment under Title VII.

B. Defining Intent

There is little legislative history to guide courts in deciphering Congress's intent in passing the sex discrimination provisions of Title VII. This is because the addition of "sex" as a basis for discrimination was added at the last minute without prior hearings or congressional debate.[20] In fact, the term "sex" was added as an amendment to the statute by Virginia Representative Howard Smith in the hopes that the

raised by *Jespersen*, see Megan Kelly, Note, *Making-Up Conditions of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in* Jespersen v. Harrah's Operating Co., 36 GOLDEN GATE U. L. REV. 45 (2006). *See also* William M. Miller, *Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII*, 84 N.C. L. REV. 1357 (2005).

16. 42 U.S.C. § 2000e-2(e).

17. Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 301 (N.D. Tex. 1981).

18. *See* Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 133 (3d Cir. 1996); Jennings v. N.Y. State Office of Mental Health, 786 F. Supp. 376, 381–82 (S.D.N.Y. 1992); Jones v. Hinds Gen. Hosp., 666 F. Supp. 933, 935 (S.D. Miss. 1987).

19. Levin v. Delta Airlines, 730 F.2d 994, 997 (5th Cir. 1984); Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1029 (7th Cir. 1979); Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir. 1971).

20. *See* Nicole Anzuoni, *Gender Non-Conformists Under Title VII: A Confusing Jurisprudence in Need of a Legislative Remedy*, 3 GEO. J. GENDER & L. 871, 880–81 (2002).

entire bill would fail.[21] The last-minute passage of Title VII has thus left courts without sufficient guidance in determining how the legislature meant the phrase "because of sex" to be construed.

Before *Price Waterhouse*, courts tended to understand Title VII as providing narrow protection against sex discrimination.[22] That is, most courts held that "the phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."[23] Discrimination because of gender nonconformity, including homosexuality, was considered outside of the purview of Title VII.[24]

In *Price Waterhouse*, the Supreme Court ruled that an accounting firm's refusal to promote a female accountant to partner because she failed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry"[25] was sex stereotyping and constituted prima facie evidence of a violation of Title VII.[26] The *Price Waterhouse* holding transformed Title VII jurisprudence[27] by unequivocally stating that employers could not discriminate against an employee because she did not conform to traditional sex stereotypes.[28] In holding that sexual stereotyping fell within the statutory definition of sex discrimination, the Supreme Court ex-

21. *Id.*; *see also* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (noting that the "sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act").

22. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977) (holding that sex discrimination occurs where an employment policy "deprive[s] . . . [women] of employment opportunities because of their different role"); deLaurier v. S.D. Unified Sch. Dist., 588 F.2d 674, 677 (9th Cir. 1978) ("[S]ex discrimination results when the opportunities or benefits offered by the employer to one gender are less valuable or more restricted than those offered to the other.").

23. *Ulane*, 742 F.2d at 1085.

24. *Id.*; *see also* Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979); De Santis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979); Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098 (N.D. Ga. 1975).

25. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

26. *Id.* at 251.

27. *See* Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) ("[T]he approach in *Holloway*, *Sommers*, and *Ulane*—and by the district court in this case—has been eviscerated by *Price Waterhouse*."); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) ("*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes."); Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) ("The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*."); *see also* STEVEN C. KAHN & BARBARA BERISH BROWN, LEGAL GUIDE TO HUMAN RESOURCES § 7:23 (2006) (referring to *Price Waterhouse* as "[t]he key decision" in the area of sex stereotyping and women's role in the workplace).

28. *Price Waterhouse*, 490 U.S. at 251.

panded the term "sex" to include the notion of gender.[29] The Court's ruling in *Price Waterhouse* thus brought Title VII jurisprudence into accord with modern notions of what constitutes sex discrimination.

Current understandings of Title VII protection against sex stereotyping have been shaped largely by *Price Waterhouse*.[30] The Supreme Court used the legislative ambiguity around the meaning of Title VII as a means to open the door to a broader reading. The Court's holding has potentially far-reaching effects since it recognizes that Title VII protects not only against discrimination based on one's biological sex, but also against discrimination based on one's degree of conformance to sex stereotypes or traditional gender roles.

Other federal courts have similarly held that the lack of clear legislative intent signals that courts should read protection against discrimination on the basis of gender non-conformity into the statute.[31] The Seventh Circuit Court stated: "[Because] the legislative history suggests that legislators had very little preconceived notion of what type of sex discrimination they were dealing with when they enacted Title VII[,] . . . [i]t is, ultimately, the plain, unambiguous language of the statute upon which we must focus."[32] Furthermore, "Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."[33]

This shift towards a broader reading of Title VII indicates that courts are starting to transform their understanding of what constitutes sex discrimination. Sex discrimination, once understood as negative treatment based on pure biological difference, is now read as incorporating discrimination based on gender and gender non-con-

29. While "sex" is usually understood in a biological sense, gender refers to the socially-constructed means by which sex is experienced and performed. *See* Vojdik, *supra* note 2. Sex stereotyping is a facet of gender discrimination because it requires a person to conform to particular notions of how gender should be performed. Rather than being passed over for promotion simply because she was a woman, Ann Hopkins was passed over for promotion because she failed to present herself in a manner that conformed to traditional notions of how a woman should appear. *Price Waterhouse*, 490 U.S. at 255–59.

30. *See, e.g.*, Ellen M. Martin et al., *Evolving Theories of Sex, Race, and Color Discrimination Under Title VII*, 763 P.L.I. LIT. 153, 159 (2007) ("*Price Waterhouse* extended 'sex' to include 'gender' which refers to 'socially-constructed norms associated with a person's sex.'"); Michael Starr & Amy L. Strauss, *Sex Stereotyping in Employment: Can the Center Hold?*, 21 LAB. LAW. 213, 213 (2006) ("Courts and commentators have concluded from the *Price Waterhouse* plurality that gender stereotyping is, in and of itself, a form of sex discrimination actionable under Title VII."); *see also* KAHN & BROWN, *supra* note 27.

31. *See, e.g.*, Doe v. City of Belleville, 119 F.3d 563, 572–73 (7th Cir. 1997).

32. *Id.*

33. *Id.* at 580.

formity.[34] By incorporating protection against discrimination based on *gender*, and not a purely biological definition of sex, into Title VII, the Supreme Court recognized that sex discrimination operates in complex ways,[35] and is not simply discrimination against "women because they are women and men because they are men."[36]

II. *Jespersen v. Harrah's Operating Company*

The *Price Waterhouse* holding created a remedy under Title VII for employees who had not suffered sexual harassment or negative employment consequences solely and directly on the basis of their sex, but who nevertheless had been the subject of intentional sex discrimination. A recent ruling by the Ninth Circuit, however, challenges the broad protections against sex stereotyping that *Price Waterhouse* offers. In *Jespersen v. Harrah's Operating Co.*, the Ninth Circuit interpreted the *Price Waterhouse* sex-stereotyping rule in a new and narrow way,[37] and as a result, left women in typically female jobs with decreased protection against sex discrimination.

A. Factual Background

Darlene Jespersen was a bartender at Harrah's Casino for nearly twenty years.[38] Until she was fired, Jespersen was an outstanding employee and regularly received praise from both her supervisors and customers.[39] In February of 2000, Harrah's implemented a "Beverage Department Image Transformation" program at select casinos, including the one where Jespersen worked.[40] Part of the new policy was a "Personal Best" appearance standard, which required women to have "teased, curled, or styled [hair] every day."[41] Furthermore, "[h]air . . .

34. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) ("*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes."); *City of Belleville*, 119 F.3d at 580.

35. *Price Waterhouse*, 490 U.S. at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

36. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984).

37. *See infra* Part III.

38. Jespersen v. Harrah's Operating Co. (*Jespersen II*), 392 F.3d 1076, 1077 (9th Cir. 2004) (en banc), *aff'd by* Jespersen v. Harrah's Operating Co. (*Jespersen III*), 444 F.3d 1104 (9th Cir. 2006) (en banc).

39. *Id.*

40. *Id.*

41. *Jespersen III*, 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc).

[was to] be worn down at all times, [with] no exceptions."[42] Women also had to wear stockings, nail polish, and "face powder, blush and mascara . . . worn and applied neatly in complimentary [sic] colors."[43] Lip color was also required "at all times."[44] Men, on the other hand, had to refrain from wearing hair that fell below the top of their collars, were required to keep their nails trimmed, and were not permitted to wear makeup or nail polish.[45]

As part of the new appearance and grooming policy, the casino hired "Personal Best Image Facilitators" to instruct Harrah's employees on how to meet the new appearance requirements.[46] These Image Facilitators were also instructed to test employees on their ability to recreate their new "look."[47] Harrah's then took two photos (one a full body photo, the other a head shot) of each employee looking his or her "Personal Best," and filed these photos with each employee's supervisor.[48] The supervisors were to use the photos as an "appearance measurement" tool and to hold each employee accountable to looking his or her personal best, as measured against the photographs.[49]

Jespersen had tried wearing makeup to work in the past, since she knew that Harrah's preferred its female bar employees to do so.[50] When she wore makeup, however, Jespersen said she felt "sick, degraded, exposed, and violated."[51] She explained that she felt that wearing makeup sexually objectified her by forcing her into a traditionally feminine mold.[52] She also felt that it interfered with her ability to do her job effectively, since she sometimes had to manage drunken, rowdy guests who would not take her seriously when she was wearing makeup.[53] For these reasons, Jespersen refused to comply with the new appearance policy's makeup requirement.[54] As a result, Harrah's fired her.[55]

42. *Id.*
43. *Id.*
44. *Id.*
45. *Jespersen II*, 392 F.3d at 1077 & n.1.
46. *Id.* at 1078.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 1077.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 1078.
55. *Id.*

B. The Unequal Burdens Test and Sex Stereotyping

In appearance and grooming cases, there are two ways in which a plaintiff may prove an employer's intent to discriminate on the basis of sex.[56] The first method is to prove that the grooming or appearance policy imposes objectively unequal burdens on men and women.[57] This is generally referred to as the "unequal burdens test." The second method, from *Jespersen*, requires a showing that the grooming or appearance policy is motivated or shaped by sex stereotyping.[58] In arguing her case, Jespersen used both theories to demonstrate that she had been the victim of intentional sex discrimination.

Jespersen first claimed that the casino's Personal Best grooming and appearance policy imposed unequal burdens on men and women.[59] Jespersen lost on her first claim because the Ninth Circuit found that she failed to present evidence, apart from "her own subjective reaction,"[60] that the makeup policy imposed unequal burdens on men and women.[61]

The unequal burdens test presents a significant hurdle because plaintiffs must present evidence that the policy in question places an objectively heavier burden on women than on men.[62] In practice, a court's decision as to whether or not a policy imposes unequal burdens on men and women is largely determined by its own subjective understanding of what constitutes a "burden."[63] In the *Jespersen* case,

56. *See* Frank v. United Airlines, Inc., 216 F.3d 845, 853 (9th Cir. 2000); Gerdom v. Cont'l Airlines, 692 F.2d 602, 605–06 (9th Cir. 1982).

57. *Jespersen III*, 444 F.3d 1104, 1110 (9th Cir. 2006). The unequal burdens test examines whether an employer's grooming and appearance code "regulates mutable characteristics of one gender in a stricter way than those of the other gender." Miller, *supra* note 15, at 1359. For example, the Ninth Circuit has held that an airline regulation that imposed stricter weight requirements on female flight attendants than on male flight attendants was an unequal burden. *Frank*, 216 F.3d at 854–55.

58. *Jespersen III*, 444 F.3d at 1106.

59. *Id.* at 1108–09.

60. *Id.* at 1108.

61. *Id.* For a more in-depth analysis of the court's rejection of Jespersen's unequal burdens claim, see Dianne Avery, *The Great American Makeover: The Sexing Up and Dumbing Down of Women's Work After* Jespersen v. Harrah's Operating Company, Inc., 42 U.S.F. L. REV. 299 (2008).

62. *Jespersen III*, 444 F.3d at 1110. The *Jespersen* court held that "[u]nder established equal burdens 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." *Id.*

63. See *Jespersen II*, 392 F.3d 1076, 1081 (9th Cir. 2004) (en banc), *aff'd by* Jespersen v. Harrah's Operating Co. (*Jespersen III*), 444 F.3d 1104 (9th Cir. 2006) (en banc), for the Ninth Circuit's discussion (in Jespersen's first appeal) of how to evaluate the unequal burdens test.

the court understood this burden to include only tangible things, such as the cost of buying makeup, and the time spent applying it.[64]

Jespersen's second claim was that the policy constituted sex stereotyping under the Supreme Court's *Price Waterhouse* holding.[65] In determining that the casino's grooming and appearance policy did not constitute sex stereotyping under *Price Waterhouse*, the court drew three distinctions between the two cases. First, the court pointed out that the sex stereotyping in *Price Waterhouse* actually impaired the plaintiff's ability to perform her job successfully, while wearing makeup did not impede Jespersen in performing her job as a bartender.[66] Second, the court noted that Jespersen was subject to the same uniform and grooming requirements as all of the other casino employees, while the plaintiff in *Price Waterhouse* was held to a standard which did not necessarily apply to her co-workers.[67] Finally, the court observed that in *Price Waterhouse* the plaintiff was singled out by her employer, while Jespersen was treated in the same manner that any other employee refusing to comply with the grooming policy would have been.[68] All together, the court decided that these three distinctions were enough to conclude that Jespersen's claim was "limited to the subjective reaction of a single employee, and there [was] no evidence of a stereotypical motivation on the part of the employer."[69]

III. How the *Jespersen* Court Got It Wrong: The Sex-Stereotyping Holding

The *Jespersen* holding incorrectly and unnecessarily narrowed the *Price Waterhouse* sex-stereotyping rule in several ways. First, the court factually distinguished *Jespersen* from *Price Waterhouse*, and in doing so, constructed a false framework for analyzing whether sex stereotyping existed. Second, the court limited the *Price Waterhouse* sex-stereotyping rule to particular circumstances rather than applying it broadly, as other courts have done. Third, the court's holding created a two-tier system of protection which leaves women in typically female jobs more vulnerable to sex stereotyping.

64. The unequal burdens issue is beyond the scope of this Comment. For references to other pieces analyzing this issue, please see *supra* note 15.

65. *Jespersen III*, 444 F.3d at 1112.

66. *Id.* at 1111.

67. *Id.* at 1111–12.

68. *Id.* at 1113.

69. *Id.*

A. The Factual Distinctions Between *Jespersen* and *Price Waterhouse* Are Insufficient to Support a Finding of No Sex Discrimination in *Jespersen*

The Ninth Circuit concluded that because there were three important factual distinctions between the *Price Waterhouse* and *Jespersen* cases, Harrah's Personal Best appearance policy was not "adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear"[70] in contravention of the *Price Waterhouse* rule.[71] Upon closer inspection, however, these factual distinctions prove irrelevant to the real issues at play in the *Jespersen* and *Price Waterhouse* cases.

1. The Makeup Requirement as an Impediment to Success at Work

One of the primary arguments that the Ninth Circuit used in distinguishing *Jespersen* from *Price Waterhouse* was that the alleged sex stereotyping in *Jespersen* did not put the plaintiff into "an intolerable and impermissible catch-22,"[72] in the way that sex stereotyping in *Price Waterhouse* did.[73] According to the Supreme Court, Price Waterhouse engaged in illegal sex discrimination when it employed Hopkins in a position which required aggressiveness, but then refused to promote her because she demonstrated this very trait.[74] According to the Ninth Circuit, this type of catch-22, which confirms the existence of sex discrimination, was not present in Jespersen's case.[75]

In reaching this conclusion, however, the Ninth Circuit gave no weight to Jespersen's own testimony about the effect of the makeup requirement on her ability to perform successfully at work. According to Jespersen, the makeup requirement "took away [her] credibility as an individual and as a person" and made it difficult for her to deal with unruly guests at the bar.[76] Furthermore, she felt "sick, degraded,

70. *Id.* at 1112.

71. *Id.* at 1113.

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

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

74. *Price Waterhouse*, 490 U.S. at 251.

75. *Jespersen III*, 444 F.3d at 1111–12 ("Impermissible sex stereotyping was clear [in the *Price Waterhouse* case] because the very traits that . . . [the plaintiff] was asked to hide were the same traits considered praiseworthy in men. Harrah's 'Personal Best' policy is very different.").

76. *Jespersen II*, 392 F.3d 1076, 1077 (9th Cir. 2004) (en banc), *aff'd* Jespersen v. Harrah's Operating Co. (*Jespersen III*), 444 F.3d 1104 (9th Cir. 2006) (en banc).

exposed, and violated" when she had to wear makeup to work.[77] The failure of the court to concede the importance of these facts demonstrates both a lack of understanding of what is required for a bartender to perform successfully at work and a failure to recognize that the makeup policy did in fact place Jespersen in an intolerable catch-22.

A bartender's social skills and self-presentation are crucial to his or her success.[78] The ability to socialize comfortably with customers, make them feel at home, and develop genuine and friendly relationships are all crucial to attracting repeat customers and earning tips.[79] A bartender must also be able to effectively handle drunken, rowdy, or hostile customers without losing composure, creating a scene, or unnecessarily disturbing other guests. In order to do this, a bartender must be authoritative and confident. While being a good bartender certainly requires a degree of skill in pouring, mixing, and serving drinks, true success depends more on social skill than on practical skill.[80]

Jespersen's testimony that she felt uncomfortable, degraded, and no longer credible when wearing makeup clearly shows that she was unable to relate to guests at the bar while wearing makeup in the same way that she could when barefaced. Her success as a bartender depended in large part on her comfortable, confident, and authoritative interactions with customers. When she was forced to wear makeup, she lost this crucial piece of her job performance.[81]

In *Jespersen*, the Ninth Circuit stated that "[i]mpermissible sex stereotyping was clear [in *Price Waterhouse*] because the very traits that [plaintiff Ann Hopkins] was asked to hide were the same traits considered praiseworthy in men."[82] Yet in Jespersen's case, the same dynamic existed. Jespersen was asked to wear makeup, which made it

77. *Id.*

78. *See* Gary Regan, *Service Skills on the Rocks: A Bad Attitude Behind the Bar Can Ruin What's in the Glass*, 40 NATION'S REST. NEWS, Apr. 17, 2006, at 28. "Being able to serve good drinks is obviously one important aspect of the bartender's job, but having a good rapport with customers is surely every bit as important as being blessed with good mixology skills. Perhaps it's even more important." *Id.*

79. *See id.*; *see also* Vicky Elmer, *Behind the Bar They Learn How to Mix; Skills with People Determine These Workers' Success*, WASH. POST, Feb. 11, 2007, at K1. "Bartenders need strong people skills, including an ability to converse easily with both men and women." *Id.*

80. *See supra* notes 78–79.

81. *Jespersen III*, 444 F.3d 1104, 1108 (9th Cir. 2006) (en banc) ("Jespersen testified that '. . . [the makeup policy] prohibited [her] from doing [her] job' because '[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person.'").

82. *Id.* at 1111.

impossible for her to present the persona which made her a successful bartender.[83] When she refused to wear makeup so that she could continue to do her job well, she was told that she could no longer work as a bartender at Harrah's. The same paradox was at play in both *Price Waterhouse* and *Jespersen.*

Furthermore, in its *Jespersen* opinion, the Ninth Circuit created an unspoken gender-based distinction between the two cases. In *Price Waterhouse,* the plaintiff worked in accounting, a traditionally male industry.[84] Because financial management has traditionally been a male-dominated industry, the court implicitly assumed that forcing Hopkins to present a stereotypically-feminine manner would put her at a disadvantage.[85] In *Jespersen,* however, where the plaintiff was working in the service and hospitality industry, which has traditionally employed female workers,[86] the court jumped to the opposite assumption, concluding that being forced to don a stereotypically-feminine face would *not* put Jespersen at a disadvantage.[87] By making this incorrect assumption, the court created a rule which automatically disadvantages women in typically female jobs when they bring Title VII sex-stereotyping claims.

2. The Ninth Circuit's False Framework: Across-the-Board Grooming and Appearance Requirements and the Equality of Treatment Accorded to *Jespersen*

The second and third factual distinctions which the Ninth Circuit drew between the two cases can be collapsed into one argument. The court concluded that unlike Hopkins, Jespersen was subject to the same grooming and appearance policy as all of the other casino employees—she was not singled out by her employer or subjected to a

83. *See supra* note 81 and accompanying text.

84. For more on historically gender-segregated occupations, see *infra* notes 134–36.

85. *Jespersen III,* 444 F.3d at 1111 ("[It was] impermissible for Hopkins's employer to place her in an untenable Catch-22: she needed to be aggressive and masculine to excel at her job, but was denied partnership for doing so because of her employer's gender stereotype.").

86. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, 20 Leading Occupations of Employed Women 2006 Annual Averages, http://www.dol.gov/wb/factsheets/20lead2006.htm (last visited Jan. 25, 2008) [hereinafter U.S. Dep't of Labor] (showing that as of 2006, 71.5% of waiters and waitresses are female).

87. *Jespersen III,* 444 F.3d. at 1112 ("The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.").

unique punishment for failing to conform to the policy.[88] According to the Ninth Circuit, Hopkins, unlike Jespersen, had been singled out for special discriminatory treatment.[89] The court's conclusion is based on a false framework, as the two cases are in fact quite similar. The real difference lies not in whether Jespersen was singled out, but in whether the employer imposed sex stereotyping via formal policy or informal censure. In *Price Waterhouse,* there was no written policy that the defendants could point to in arguing that everyone was subject to the same requirements,[90] whereas in *Jespersen,* a written policy did exist.[91] In practice, however, whether the policy was written or unwritten, both employers imposed requirements rooted in sex stereotypes on their employees, and both Jespersen and Hopkins were punished for failing to meet these requirements.

In Hopkins's case, there was no written policy requiring female associates to behave in a stereotypically-feminine manner. The company's requirement was enforced through other means, such as refusing to hire or promote women who failed to meet the firm's gendered expectations.[92] The Ninth Circuit implied that this policy singled Hopkins out by subjecting her to different standards than those applied to other employees.[93] The fact that no other woman at Price Waterhouse actually brought a suit against the company, however, does not mean that there were no other women who refused to conform to the firm's stereotypical gender expectations and, as a result, were subject to censure, discrimination, or negative employment decisions. In fact, the *Price Waterhouse* opinion itself states that "other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, . . . '[c]andidates were viewed favorably if

88. *Id.* at 1111–12.

89. *Id.*

90. See *Price Waterhouse v. Hopkins,* 490 U.S. 228, 234–36 (1989), for a description of how Hopkins's employers treated her differently than her co-workers when considering her bid for partnership.

91. *Jespersen III,* 444 F.3d at 1107.

92. *See Price Waterhouse,* 490 U.S. at 236. In *Price Waterhouse,* the plaintiff successfully argued that she was denied partnership because she was not as stereotypically feminine as her employers wanted her to be. *Id.* at 251 ("Hopkins proved that Price Waterhouse invited partners to submit comments [on her candidacy for partnership]; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations.").

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

partners believed they maintained their femin[in]ity while becoming effective professional managers' . . . ."[94]

The Ninth Circuit's attempt to distinguish *Price Waterhouse*, however, rests on the assumption that Hopkins was especially singled out, that she was the *only one* amongst many gender non-conforming women who was actually subject to stereotyped expectations or punished for failing to be feminine enough. In reality, it is much more likely that the firm's unspoken rule requiring women to behave in a feminine manner applied across the board to all female employees, and that the employer would have punished equally all female employees breaking the rule.

In Jespersen's case, the policy was formal and memorialized in writing.[95] When Jespersen violated the policy, she was fired. Likewise, when Hopkins violated her firm's unwritten policy, she was denied promotion to partner.[96] The only difference between the two cases was that one company put its gender requirements into writing, and the other did not. This distinction between a written code (which clearly applies to all employees) and an unwritten code (which will also usually apply to all employees) is irrelevant in determining whether an employer has subjected employees to sex stereotyping. In basing its decision on the notion that Hopkins was singled out by Price Waterhouse's discriminatory policy,[97] the *Jespersen* court relies on a false premise to support its reasoning.

B. *Price Waterhouse* Does Not Limit Sex Stereotyping to a Particular Type of Fact Pattern

While some factual distinctions may accurately be drawn between the two cases, there is no logical reason to conclude that simply because the facts in the two cases are different, no sex stereotyping occurred in *Jespersen*. The only meaningful distinction between the two cases was that the written policy in *Jespersen* applied to both men and women, while the unwritten policy in *Price Waterhouse* (presumably) applied only to women.[98] This factual distinction is irrelevant in deter-

94. *Price Waterhouse*, 490 U.S. at 236 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.C. Cir. 1985)).

95. *Jespersen III*, 444 F.3d at 1107.

96. *Price Waterhouse*, 490 U.S. at 233 n.1.

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

98. *See id.* at 1107. Harrah's Personal Best policy stated that "[o]verall Guidelines [are] (applied equally to male/female)" employees. *Id.*; *see also Price Waterhouse*, 490 U.S. at 236 ("In previous years, other *female* candidates for partnership also had been evaluated in sex-based terms." (emphasis added)).

mining whether the employer engaged in sex stereotyping. The *Price Waterhouse* Court held that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[99] In making this statement, the Supreme Court left the door open as to what sorts of facts may give rise to sex-stereotyping claims. There was no indication that the Court meant to require that a laundry list of factors be met before conceding that sex stereotyping has occurred.

1. Sex Stereotyping Occurs Even Where Men and Women Are Equally Subject to Stereotypes

While it is undoubtedly true that employers should be able to impose certain types of appearance standards on their employees in order to create a professional and appropriate image for the company, such standards should not be permitted to perpetuate outdated sexual stereotypes simply because they require both men and women to meet some sort of grooming or appearance requirement. Even where employer-mandated appearance requirements *do* impose similarly on men and women, such standards should not slip past legal scrutiny simply because they place equally stereotypical requirements on members of both sexes.

Not all sex-differentiated appearance and grooming codes are inherently based on sex stereotypes. The mere fact that such a code imposes requirements on both men and women, however, does not mean that the policy is *not* based on sex stereotypes. Yet courts have generally held that as long as the grooming and appearance policy is "reasonable," it does not violate Title VII.[100] The problem is, however, that judges have too much freedom to impose their own prejudices and preconceptions in defining what constitutes a "reasonable" gender-specific policy.[101] In other words, the current rule on employer grooming standards provides that it is legal for:

99. *Price Waterhouse*, 490 U.S. at 251 (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

100. *Jespersen III*, 444 F.3d at 1113 ("[I]n commenting on grooming standards, the touch-stone is reasonableness."); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 875 n.7 (9th Cir. 2001) ("[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.").

101. An excellent example of this is *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985), in which a female news anchor was told to wear:

> blouses with "feminine touches," such as bows and ruffles, because many of her clothes were "too masculine." The general wardrobe hints for females developed by Media Associates warned that women with "soft" hairstyles and looks should

> dress codes [to] distinguish between men and women on the basis of "commonly accepted social norms" or "generally accepted community standards of dress and appearance." . . . Thus, as the law stands, an employer may hold women to different standards from men, as long as it . . . "merely" enforces prevailing prejudice.[102]

This Title VII loophole for grooming and appearance standards imposed on both men and women is particularly egregious given that expectations around grooming and appearance are intimately connected to, and highly dependent upon, sexual stereotypes. Women in particular have traditionally been rigorously constrained in the ways in which they are expected to present themselves physically.[103] In fact, women's social capital—the degree of desirability and power that women hold in the social and economic spheres—has always been closely tied to physical appearance.[104]

This same principle holds true within the realm of business and employment. In one study, more than 650 managers were asked to rank a number of factors which help people succeed within organizations.[105] Out of twenty factors, personal appearance was ranked number eight.[106] As one article points out:

> wear blazers to establish their authority and credibility while women with short "masculine" hairstyles shouldn't wear "masculine" clothing in dark colors and with strong lines because they would appear too "aggressive."

Id. at 1214. The court held that "[w]hile there may have been some emphasis on the feminine stereotype of 'softness' and bows and ruffles and on the fashionableness of female anchors," such an emphasis was "reasonable" and therefore the policy was not shaped by "any stereotypical notions of female roles and images." Id. at 1215–16 & n.12.

102. Karl E. Klare, *For Mary Joe Frug: A Symposium on Feminist Critical Legal Studies and Postmodernism, Part Two: The Politics of Gender Identity: Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1417–18 (1992) (quoting Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028, 1032 (7th Cir. 1979) and Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975)).

103. *Id.* at 1421 ("[It is] obvious that the burdens of societal appearance expectations fall most heavily on women. In the world of employment, women are routinely and reflexively evaluated and stringently judged on the basis of their appearance and dress, regardless of other, legitimately job-related qualifications. Employers in every type of industry will prefer and advance women who are more 'attractive' and disadvantage 'unattractive' women. This phenomenon is pervasive in American life.").

104. *See, e.g.*, Margaret L. Hunter, *If You're Light You're Alright: Light Skin Color as Social Capital for Women of Color*, 16 GENDER & SOC'Y 175, 177 (2002) ("[B]eauty operates as social capital for women. Women who possess this form of capital (beauty) are able to convert it into economic capital, educational capital, or another form of social capital. . . . I define 'social capital' as a form of prestige related to things such as social status, reputation, and social networks.").

105. *See* Nick Nykodym & Jack L. Simonetti, *Personal Appearance: Is Attractiveness a Factor in Organizational Survival or Success?*, 24 J. EMP. COUNSELING 69, 74–75 (1987).

106. *Id.*

> Attractive women can gain an advantage from the earliest stages of employment through the later ones. For instance, when photographs are attached to resumes, research indicates that attractive women will be favored over unattractive women. These results are consistent even when the attractive women are rated as less competent in terms of experience and education. Studies have shown that managers are likely to recommend higher starting salaries for more attractive people. Attractive women are evaluated higher than unattractive women in terms of task performance. When making decisions about promotions, attractive persons in general even tend to be favored over people with a better work record.[107]

Other research also indicates that women who are considered attractive earn more than their less attractive counterparts.[108] The fact that a woman's social capital is often closely tied to her perceived attractiveness demonstrates that appearance and grooming standards should be examined within the larger context of sex stereotyping. Exempting grooming and appearance standards which apply to both men and women from the more general sex-stereotyping test articulated in *Price Waterhouse* makes little sense when viewed within the context of gendered appearance standards.

In *Jespersen*, both men and women were required to follow a grooming and appearance code which relied heavily on traditional notions of femininity and masculinity. As discussed above, the policy required that female employees wear face powder, blush, mascara, and lip color at all times,[109] and keep their hair "teased, curled, or styled" and "worn down at all times."[110] Men, on the other hand, were not allowed to wear makeup or nail polish, and had to keep their hair above their collars.[111] These appearance requirements are clearly based on traditional notions of how women and men should present themselves in order to comport with gendered expectations. The fact that the policy subjected both men and women to gendered appearance regulation did not mitigate the stereotyped nature of the regulation.

107. M. Neil Brown & Andrea Giampetro-Meyer, *Many Paths to Justice: The Glass Ceiling, the Looking Glass, and Strategies for Getting to the Other Side*, 21 HOFSTRA LAB. & EMP. L.J. 61, 92–94 (2003).

108. *Id.* at 94.

109. *Jespersen III*, 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc).

110. *Id.*

111. *Id.*

2. Sex Stereotyping Occurs Where Employees Are Punished for Their Gender Non-Conformity

Other courts have interpreted *Price Waterhouse* as prohibiting employment discrimination based on a person's failure to conform to traditional gender stereotypes.[112] Unlike the Ninth Circuit in *Jespersen*, these courts have not read the *Price Waterhouse* rule as limited to the particular type of fact pattern presented in the *Price Waterhouse* case. Instead, they have extended the rule to cases where employees are punished for failing to conform to traditional gender stereotypes and norms.

According to contemporary sociological theory, gender is the socially-constructed manner in which we act out biological sex.[113] "Gender is not a natural occurrence resulting from biology, but a socially constructed phenomenon. Gender is an institution, a social structure that is reinforced by a set of practices."[114] People who fail to conform to the gender norms assigned to their biological sex are often the victims of discrimination, both in the workplace and outside of it.[115] For instance, a man who speaks softly, uses feminine mannerisms, and wears only soft pastel colors would generally be considered insufficiently masculine, and may become the victim of homophobic comments and behavior. A woman (like Darlene Jespersen) who refuses to wear makeup or style her hair might be considered similarly un-

112. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (holding that because the male plaintiff "alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions" he had "sufficiently pleaded claims of sex stereotyping" according to the *Price Waterhouse* precedent); Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) ("There are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex—the harasser was motivated by sexual desire, the harasser was expressing a general hostility to the presence of one sex in the workplace, or the harasser was acting to punish the victim's noncompliance with gender stereotypes."); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." (citations omitted)); Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997) ("The Supreme Court's decision in *Price Waterhouse v. Hopkins* makes clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles." (citations omitted)).

113. *See* Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 369 (2004).

114. *Id.*

115. See *supra* note 112 for a list of cases involving workplace discrimination based on gender non-conformity.

feminine and subject to workplace retaliation for her refusal to conform to gender norms.

In *Smith v. City of Salem*,[116] the plaintiff alleged that he had been discriminated against because his behavior at work did not conform to traditional gender expectations.[117] The Sixth Circuit Court of Appeals agreed, stating that "[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex."[118] A year later, the Sixth Circuit confirmed this approach in *Barnes v. City of Cincinnati*,[119] holding in favor of a pre-operative male-to-female transsexual police officer who was demoted because of her failure to conform to traditional gender stereotypes.[120] According to the court, "Barnes established that he was a member of a protected class [under Title VII] by alleging discrimination against the City for his failure to conform to sex stereotypes."[121]

In *Bibby v. Philadelphia Coca Cola Bottling Co.*,[122] the plaintiff was a gay man who brought a hostile-work-environment claim.[123] He alleged that he was harassed by his peers and supervisors because he was homosexual.[124] The court ruled that discrimination based on homosexuality is not protected under Title VII,[125] but in doing so pointed out that discrimination based on sex stereotyping is indeed a violation of the statute.[126] The court noted that the plaintiff could have brought a more successful Title VII claim by alleging that the harassment constituted "discrimination because of sex by presenting evidence that the

116. 378 F.3d 566 (6th Cir. 2004).

117. *Id.* at 571. In *Smith*, the plaintiff was born a man, but was diagnosed with gender identity disorder ("GID"). *Id.* at 568. As a result he began "expressing a more feminine appearance on a full-time basis—including at work—in accordance with international medical protocols for treating GID. Soon thereafter, Smith's co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not masculine enough." *Id.* (internal quotations omitted).

118. *Id.* at 574.

119. 401 F.3d 729 (6th Cir. 2005).

120. *Id.* at 738.

121. *Id.* at 737.

122. 260 F.3d 257 (3d Cir. 2001).

123. *Id.* at 260.

124. *Id.*

125. *Id.* at 265.

126. *Id.* at 263 n.5 ("[I]f proof of sex discrimination [i]s necessary, the evidence that the victim's harassers sought to punish him for failing to live up to expected gender stereotypes [is] sufficient to prove such discrimination.").

harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender."[127]

In *Doe v. City of Belleville*,[128] the Seventh Circuit likewise affirmed this reading of the statute by ruling in favor of two plaintiffs who claimed that they were repeatedly harassed for failing to act masculine enough at work. According to the court, "H. Doe was harassed 'because of' his gender . . . [which] can be inferred from the harassers' evident belief that in wearing an earring, H. Doe did not conform to male standards."[129]

Even the Ninth Circuit itself has stated that Title VII bars discrimination based on gender non-conformity, holding that "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."[130] Thus, both the Ninth Circuit and other federal courts have consistently interpreted the *Price Waterhouse* holding as expanding Title VII protections, and have therefore held that discrimination which is based on a person's failure to conform to sex stereotypes violates the law.[131]

By refusing to wear makeup and openly declaring that wearing makeup made her feel sick, Jespersen transgressed the boundaries of traditional gender expectations. She did not behave in the way that her employer expected a traditionally feminine woman to behave. Yet the Ninth Circuit, directly contradicting its own earlier statement,[132] ruled that Title VII did not protect Jespersen's gender non-conformity.

IV. The *Jespersen* Holding Creates an Unfair Legal Dichotomy in which Women in Typically Male Industries Are Afforded More Protection than Women in Typically Female Industries

The *Jespersen* holding creates a legal dichotomy under which some employers can discriminate against women on the basis of sex stereotypes. Because the Ninth Circuit held that the *Price Waterhouse* sex-stereotyping rule did not apply to the grooming and appearance

127. *Id.* at 262–63.

128. 119 F.3d 563 (7th Cir. 1997).

129. *Id.* at 575.

130. Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

131. *City of Belleville*, 119 F.3d at 575, 580, 581.

132. *Schwenk*, 204 F.3d at 1202.

standards in *Jespersen*,[133] women in industries which typically employ women may be left vulnerable to being fired, harassed, and discriminated against because they fail to conform to traditional appearance-based standards for women. Since women in typically female jobs tend to face more appearance regulations than do women in typically male jobs, those in typically female jobs will be left with a lesser degree of protection against sex stereotyping.

A. Women in Typically Female Jobs Are Subject to Heightened Appearance-Based Regulations

Although the labor market is no longer as rigidly sex-segregated as it once was,[134] particular occupations continue to be associated with either men or women.[135] Certain jobs have traditionally been held by women, and continue to be typically female jobs, such as cocktail waitresses, hostesses, secretaries, nurses, school teachers, and beauty salon employees.[136] Most, though not all, of these jobs tend to be ones in

133. *Jespersen III*, 444 F.3d 1104, 1112 (9th Cir. 2006) ("There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.").

134. *See* Thomas L. Ruble et al., *Sex Stereotypes: Occupational Barriers for Women*, 27 AM. BEHAV. SCIENTIST 339, 339 (1984) ("[C]hanging patterns of employment reflect the heightened occupational aspirations of women[;] . . . more women are attending college, including professional schools such as medicine, law, and business."); Louis Uchitelle, *Gaining Ground on the Wage Front*, N.Y. TIMES, Dec. 31, 2004, at C1, C2 (noting that the percentage of women in executive, administrative, and managerial occupations has grown from 32% in 1983, to 40% in 1990, to more than 46% today).

135. *See* U.S. Dep't of Labor, *supra* note 86 (listing secretaries/administrative assistants, registered nurses, cashiers, and school teachers as the top four occupations in which women are currently employed); William T. Bielby & James N. Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 AM. J. SOCIOLOGY 759, 760 (1986) ("[T]he level of occupational sex segregation has changed very little since 1900, . . . [and] the occupational structure is divided substantially along gender lines."); Nancy F. Rytina & Suzanne M. Bianchi, *Occupational Reclassification and Changes in Distribution by Gender*, 107 MONTHLY LAB. REV. 11, 11 (1984) ("It is well known that women are concentrated in different occupations than men."); *see also* Uchitelle, *supra* note 134 (noting that for some experts, "the spectacle of women gaining ground in harder times is vivid evidence that most occupations are still largely segregated by sex and that men's occupations, while often higher paying, are also more vulnerable to business cycles").

136. According to the United States Department of Labor, secretaries, waitresses, hair dressers, sales workers, receptionists, cashiers, and customer service representatives all numbered among the top twenty occupations in which women were most strongly represented. U.S. Dep't of Labor, *supra* note 86; *see also* Sylvia Nasar, *Women's Progress Stalled? Just Not So*, N.Y. TIMES, Oct. 18, 1992, § 3, 1 (acknowledging that occupations such as management, medicine, law enforcement, and construction are traditionally "male-dominated professions" while service sector occupations, such as clerking, nursing, and retail sales "still employ the overwhelming majority of women"); Thomas L. Ruble et al., *supra* note 134, at 341–42 ("A sex typed occupation is one typically identified with one sex. For example,

which appearance is perceived as being just as, or even more, important than skills and capability.[137] Physical appearance and grooming are more highly regulated and highly valued in these jobs.[138] As one scholar notes, "requiring women to wear sexually provocative clothing easily may subject them to verbal or sexual harassment, yet it remains a common practice in many bars and restaurants."[139] A well-groomed and stereotypically-attractive woman is far more likely to be hired for, and retained in, any of these positions than is a masculine-looking, unkempt, or very overweight woman.[140] One way to understand this phenomenon is the "sex role spillover" theory.[141] According to this theory, women who work in typically female jobs will experience a "spillover" in the form of a merger between their gendered sex roles

masculine occupations include auto mechanic, company president, and high government official, while feminine occupations include nurse, elementary school teacher, and librarian."); Francine Blau Weisskoff, *"Women's Place" in the Labor Market*, 62 AM. ECON. REV. 161, 163 (1972) ("[T]raditionally female jobs . . . [are found] in the clerical and service category.").

137. *See* Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1177 (1994) (noting that being beautiful has been found to be an advantage for women seeking clerical jobs, but not for women seeking managerial and professional jobs); Ruble et al., *supra* note 134, at 343 ("[O]ccupations with high pay, prestige, and challenging work tend to be dominated by males and sex typed as men's work. If women aspire to professions with high salaries and prestige, however, they are probably violating normative occupational expectations.").

138. *See Jespersen III*, 444 F.3d at 1113 (holding against a plaintiff-bartender who challenged her employer's policy of requiring female employees to wear makeup); Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (holding for plaintiffs-flight attendants who challenged their employer's policy of requiring only female flight attendants to meet strict weight requirements); Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028 (7th Cir. 1979) (holding for a plaintiff-bank teller who challenged her employer's dress code for women); Laffey v. Nw. Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973) (holding for plaintiffs-flight attendants who challenged their employer's rule allowing male flight attendants to wear glasses, but requiring female flight attendants to wear contact lenses); Equal Employment Opportunity Comm'n, 27 Fair Empl. Prac. Cas. (BNA) 1791, 1981 WL 40388 (E.E.O.C. 1981) (holding for a plaintiff-receptionist who brought suit against her employer for requiring her to wear revealing clothing). The prevalence of appearance and grooming codes within particular industries and jobs, such as airline stewardesses, restaurant and hospitality workers, and clerical workers indicates that these jobs, which tend to require less formal education or skills, are also jobs in which appearance is more highly regulated.

139. Stacey S. Baron, Note, *(Un)Lawfully Beautiful: The Legal (De)Construction of Female Beauty*, 46 B.C. L. REV. 359, 371 (2005).

140. *See, e.g.*, Yanowitz v. L'Oreal USA, Inc., 131 Cal. Rptr. 2d 575 (Ct. App. 2003) (holding in favor of a plaintiff who brought a discrimination suit claiming that her employer had ordered her to fire a retail saleswoman for being insufficiently sexually attractive).

141. Barbara A. Gutek & Aaron Groff Cohen, *Sex Ratios, Sex Role Spillover, and Sex at Work: A Comparison of Men's and Women's Experiences*, 40 HUM. RELAT. 97, 97 (1987).

and work roles.[142] In other words, where the job is a typically female occupation, unspoken expectations of femininity are built into the job description. Employers looking to fill positions in typically female industries prefer to hire women who appear traditionally feminine and attractive,[143] because such appearances conform to traditional expectations around femininity.

Jobs in female-dominated industries (or female-dominated sectors of other industries), such as service and hospitality,[144] are generally considered less prestigious and less skilled than jobs in traditionally male and professional industries, such as medicine, financial services, and law. The fact that many typically female jobs require little formal education or training often translates into an employer preference for attractive and "feminine" female employees. These jobs are also the "ones which capitalise on the qualities and capabilities a woman has by virtue of having lived" her life as a woman,[145] and thus emphasize traditionally feminine traits, such as beauty, over other qualities. One study of sexual harassment in the service industry notes that expectations of beauty and "sexiness" for women in service work has become the cultural norm.[146] The study observes:

> In customer contact jobs, women's appearance is typically of great importance. Strictly enforced dress and grooming codes are found in all kinds of service operations, particularly evident in airlines, hotels, restaurants, banks, health services, and personal care services; and "attractiveness" is always at the core of these codes. There is also a certain acceptance of peculiarly "liberal" dress-codes in parts of the service industries. Topless serving and bikini carwashing are regarded as tasteless rather than ridiculous, whereas the mere suggestion of half-naked electricians or engineers would prompt great guffaws. In the same vein, service advertisements regularly display unbuttoned, invariably beautiful and smiling women, not infrequently headed with slogans like "Spend the night with me" (used by American Airlines in 1976) or "Planemate of the month."[147]

Thus, a woman working as a restaurant hostess will almost always be subject to much more specific requirements around dress, groom-

142. *Id.*

143. Ingebjorg S. Folgero & Ingrid H. Fjeldstad, *On Duty — Off Guard: Cultural Norms and Sexual Harassment in Service Organizations*, 16 ORG. STUDIES 299, 303 (1995).

144. *See* U.S. Dep't of Labor, *supra* note 86 (showing that as of 2006, 71.5% of waiters and waitresses are women).

145. Celia Davies & Jane Rosser, *Gendered Jobs in the Health Service: A Problem for Labour Process Analysis*, *in* GENDER AND THE LABOUR PROCESS 103 (David Knights & Hugh Wilmott eds., 1986).

146. *See* Folgero & Fjeldstad, *supra* note 143, at 303.

147. *Id.*

ing, and physical attractiveness than will a woman working as a financial analyst.[148] While the analyst may be required to wear suits or otherwise maintain a "professional" look, she is unlikely to be rejected for employment because she does not style her hair, is overweight, or is considered conventionally unattractive. A financial analyst, furthermore, is unlikely to be hired purely on the basis of her looks, while a restaurant hostess is.[149]

This emphasis on appearance as a substitute for skills and training within typically female jobs reinforces the notion that women are valued for their beauty rather than for their intellect or skills. As one scholar points out, "when employers set standards of attractiveness for female employees, they can perpetuate a normative culture that values a particularized form of female physical beauty and sex appeal over female intellectual and practical skills."[150]

One striking example of this is the recent *Yanowitz v. L'Oreal USA, Inc.*[151] case. In *Yanowitz*, a regional sales manager for L'Oreal (a cosmetics and perfume company) was forced to leave her job after she refused to dismiss a female sales associate whom her male supervisor deemed to be insufficiently sexually attractive, or "hot."[152] Yanowitz's supervisor told her to terminate the aforementioned sales associate and ordered her to replace the associate with a woman who was "a young attractive blonde girl, very sexy."[153] While Yanowitz ended up prevailing against attempts to block her suit for unlawful retaliation,[154] the case presents a striking example of the way in which women in typically female jobs (such as cosmetics sales) are often

148. This conclusion is echoed by other studies, one of which states:

> Many of the women in the study [which looks at women working in restaurants] indicated women's bodies and appearance were of the utmost importance in being hired and working in the restaurant industry. Interestingly, women often cited that this was no coincidence on the part of restaurant owners and managers who strategically desired to hire front of the house (FOH) staff (those who deal directly with customers such as hostesses, servers, bartenders, and managers) who were thin, attractive, young, outgoing, and mostly white.

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), *available at* http://etd.fcla.edu/UF/UFE0004961/dirks_d.pdf.

149. While it is arguable that the average person walking off the street with no previous experience could more easily learn how to perform as a restaurant hostess than as a financial analyst, both positions require a particular skill set and a degree of experience which the average person does not have.

150. Baron, *supra* note 139, at 383.

151. 116 P.3d 1123 (Cal. 2005).

152. *Id.* at 1125.

153. *Id.* at 1127–28.

154. *Id.* at 1129–30.

evaluated on the basis of their physical beauty rather than their experience and skills.

In contrast, traditionally male-dominated, professional industries tend to emphasize appearance less than they do professional training and skills. Women who are not stereotypically beautiful or feminine are less subject to regulation and censure if they are doctors than if they are airline stewardesses, retail salespeople, or beauty salon employees. To the extent that female professionals, who by definition are working in more traditionally male industries, *are* subject to such regulation and censure, they will have an easier time invoking the protection granted by *Price Waterhouse* since the facts in their cases are likely to be more analogous to the facts in *Price Waterhouse.*

B. Women in Typically Female Jobs Are Left with Diminished Legal Protection Under the *Jespersen* Ruling

In ruling as it did, the Ninth Circuit created a sweeping normative exception to the *Price Waterhouse* rule by dramatically narrowing its applicability to sex stereotyping. Reading between the lines, the Ninth Circuit's opinion suggests that women in the service industry, and other industries where appearance is highly regulated, *should* in fact conform to traditional appearance-based sex-stereotypes since such conformance is simply a part of the job. This result is at odds with both the *Price Waterhouse* holding,[155] and the purpose of Title VII.[156]

As an accountant in a professional firm, Ann Hopkins (the plaintiff in *Price Waterhouse*) was granted Title VII protection by the Supreme Court when it held that it was illegal for her firm to deny her partner status, either in part or in whole, because she was not "feminine" enough in her appearance and demeanor.[157] As a bartender in a casino, Darlene Jespersen was denied protection because she failed to wear the full face of makeup required by her employer.[158] The Ninth Circuit held that the makeup requirement was not based on the desire to ensure that female employees conformed to "a commonly-

155. The Supreme Court's declaration that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group" was not followed by a qualification that limited this holding to employers in particular industries. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

156. *See* L.A. Dep't of Water & Power v. Manhart, 735 U.S. 702, 708 n.13 (1978) ("[In passing Title VII and] forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (citations omitted)).

157. *Price Waterhouse,* 490 U.S. 228.

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

accepted stereotypical image of what women should wear,"[159] but rather that the policy simply reflected a reasonable expectation as to how women in a service-industry context should look.[160]

Allowing appearance and grooming standards to slip past Title VII's prohibition on sex stereotyping leaves women in typically feminine industries less protected than those in more typically masculine and professional industries. The outcome in *Jespersen* contradicts both the letter and the spirit of Title VII, which was not enacted with the intent of granting greater or lesser protection against sex-based discrimination to plaintiffs according to the type of employment the plaintiff holds.

C. The Impact of *Jespersen* on Future Grooming and Appearance Cases

The Ninth Circuit's holding in *Jespersen* essentially closed the door to bringing a successful sex-stereotyping claim in a grooming and appearance policy case. By focusing on the factual differences between *Jespersen* and *Price Waterhouse*, the court avoided examining both the substance and the effect of Harrah's grooming and appearance policy. The court's opinion ignored the stereotypical nature of the policy itself, and instead focused on how closely the facts in *Jespersen* mirrored, or did not mirror, those in *Price Waterhouse*.[161] In the end, by ruling against Jespersen and for Harrah's, the Ninth Circuit granted their judicial stamp of approval to a grooming and appearance policy based on outdated sex stereotypes.[162]

The *Jespersen* ruling effectively removes any bite that the sex-stereotyping test may have had within the context of appearance and grooming policies. Future challenges to grooming and appearance codes will thus likely be evaluated according to the alternative method for proving sex discrimination: the unequal burdens test. As discussed above, however, the unequal burdens test is not only difficult to meet, but also depends largely on the subjective standpoint of the judges who are applying it. Although *Jespersen* is still a recent case, it is not too

159. *Id.* at 1112.

160. *See id.* at 1113 ("This record . . . is devoid of any basis for permitting this particular claim to go forward, as it is limited to the subjective reaction of a single employee, and there is no evidence of a stereotypical motivation on the part of the employer. . . . [I]n commenting on grooming standards, the touch-stone is reasonableness.").

161. *See id.* at 1111–12.

162. *See id.* at 1113.

soon to predict that it will have a large impact on future grooming and appearance cases.[163]

V. Conclusion

The Ninth Circuit's ruling in *Jespersen* creates a hierarchy of protection in which women in typically male industries will enjoy greater protection against discrimination based on sex stereotyping than those women who work in typically female industries. This is because women in typically female industries and job sectors are generally more subject to grooming- and appearance-based regulation than are women in typically male jobs. The court's refusal to evaluate sex-specific grooming- and appearance-based regulations within the same framework as other forms of sex discrimination creates a two-tier system in which women in typically male jobs will enjoy more protection against sex discrimination under Title VII.

The Ninth Circuit should have followed the lead of other circuits, most notably the Sixth Circuit, and held that all discrimination based on sex stereotyping, including an employee's refusal to conform to a gender-specific grooming code, constitutes illegal discrimination under Title VII.[164] While employers should be allowed to impose a degree of regulation regarding grooming and appearance standards, those codes which clearly rely on traditional sex-specific expectations to impose differing requirements on men and women should not be permitted under Title VII. Requiring employees to present a neat, well-groomed appearance (such as requiring hair to be brushed, nails to be trimmed, and clothing to be ironed), or requiring a particular uniform for all employees, is not a form of sex stereotyping, and therefore does not constitute intentional discrimination because of sex. Other gender specific requirements which do not rely on traditional gender norms, such as requiring black uniforms for men and white ones for women, are also permissible under Title VII.

Unless a gender-specific appearance or grooming requirement is a BFOQ, there is little need for appearance regulations which rely on

163. *Jespersen* has already been cited in one such case to support the holding that where a "policy imposes requirements on both sexes and does not appear to impose unequal burdens on its face . . . [the] dress code policy is not facially discriminatory." Rohaly v. Rainbow Playground Depot, Inc., No. 56478-1-I, 2006 Wash. App. LEXIS 1917, at *17 (Ct. App. Aug. 28, 2006).

164. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999); Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997).

traditional gender stereotypes.[165] Appearance and grooming standards which are based on stereotypical notions of how men and women should present themselves only reinforce these harmful stereotypes. By applying the outdated unequal burdens test, the Ninth Circuit backtracked on the Supreme Court's sex-stereotyping test and turned its back on women in typically female jobs, leaving them with substantially diminished protection against sex discrimination.

165. In certain professions, such as acting, gender obviously plays an important role in the decision of who to hire, and therefore sex discrimination in this context is a legitimate BFOQ.