Appearance Discrimination, Title VII, and the BFOQ: A Cross-Circuit Analysis of Sexually Discriminatory Appearance Policies

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I. Introduction

Darlene Jespersen was a bartender at a Harrah's casino in Reno, Nevada for twenty years before she was abruptly fired in 2000. She had worked her way up the ranks, starting out as a dishwasher in 1979 before becoming a barback and finally a bartender in the casino's sports bar.[1] By all accounts, she was an outstanding employee. Not only did she receive high marks from her supervisors, but customers consistently applauded her positive attitude and excellent service in employee feedback forms.[2]

All that changed in 2000, when Harrah's began enforcing its new "Personal Best" program of grooming and appearance policies. Although both men and women were required to wear the same uniform (black pants, white shirt, black vest, and black bow tie), the company applied sex-differentiated standards for hair, nails, and makeup. Specifically, women were required to wear their hair "teased, curled, or styled" every day and apply "face powder, blush, and mascara" as well as lip color.[3] In addition, female employees had to meet with "Personal Best Image Facilitators" who would ensure that their makeup was applied appropriately.[4] Men, meanwhile, were prohibited from wearing makeup or nail polish and had to cut their hair short.

Jespersen took issue with the makeup requirement because wearing makeup made her feel "very degraded and very demeaned."[5] She had tried wearing makeup back in the 1980s but stopped after only a few weeks because she felt so uncomfortable. At the time, Harrah's did not formally require female

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1: Nicole Anzuoni, *Gender Non-Conformists Under Title VII: A Confusing Jurisprudence in Need of Legislative Remedy*, 3 Geo. J. Gender & L. 871, 873 (2001).

2: *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1077-79 (9th Cir. 2004).

3: *Id.* at 1077. See Appendix B for Harrah's complete "Personal Best" policy.

4: *Id.* at 1078.

5: *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1108 (9th Cir. 2006) (en banc).

beverage servers to wear makeup, although doing so was highly encouraged. Given that bartenders often have to deal with disruptive and intoxicated customers, Jespersen felt that looking like a sex object "took away [her] credibility as an individual and as a person" and interfered with her ability to do her job effectively.[6] When she refused to comply with the new "Personal Best" policy, Harrah's issued Jespersen an ultimatum: apply for a position that did not require wearing makeup within thirty days, or be fired. She chose not to apply for a new job and was terminated at the end of the period.

Outraged, Jespersen sought administrative relief through the Equal Employment Opportunity Commission before filing a lawsuit against Harrah's on the grounds that its makeup requirement amounted to sex discrimination and violated Title VII of the 1964 Civil Rights Act. The case made its way to the Ninth Circuit Court of Appeals, which affirmed the district court's decision in favor of Harrah's.[7] According to the Circuit Court, Jespersen failed to demonstrate either that the makeup policy imposed an unequal burden on women, or that the policy was motivated by offensive sex stereotypes.

A remarkably similar turn of events transpired in 2005. The plaintiff, Brenna Lewis, alleged that she was fired from her job as a hotel front desk worker because she failed to conform to sex stereotypes. Much like Jespersen, Lewis received favorable reviews from her manager and customers, but Director of Operations Barbara Cullinan thought she was not a "good fit" for the front desk because she lacked the "Midwestern girl look."[8] Lewis admitted that her appearance was "slightly more masculine" in that she preferred to wear loose fitting clothing and avoided makeup.[9] The job description in Heartland's personnel manual did not mention appearance as a requirement for the position, but Cullinan nonetheless thought that being "pretty" was essential for women working the front desk.[10]

After observing Lewis on the job, Cullinan ordered Lewis's supervisor to put her back on the overnight shift. Heartland then informed its general managers that all applicants for the front desk position would have to complete a second interview. Lewis heard from her manager that Cullinan disapproved of her appearance, and she protested that other employees in the same position had not been required to undergo a second interview to keep their jobs. In a tense meeting with Cullinan, Lewis questioned whether

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6: *Jespersen*, 392 F.3d at 1077.

7: *Jespersen*, 444 F.3d at 1106.

8: *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033, 1036 (8th Circ. 2010).

9: *Id.*

10: *Id.*

the second interview was lawful and criticized the company's new policies. She was fired three days later, despite never having received any customer complaints or disciplinary action from Heartland.[11]

In her lawsuit against Heartland, Lewis chose not challenge the company's official dress code, which mandated similar standards of professional dress for both men and women. Rather, she argued that Heartland "enforced a *de facto* requirement that a female employee conform to gender stereotypes" in order to work the prime daytime shift.[12] The case was decided in favor of Heartland at the district level, but the Eighth Circuit Court of Appeals reversed and remanded their decision in favor of Lewis. A jury later awarded her both compensatory and punitive damages because of her retaliation claim against Heartland.[13]

At first glance, the two cases seem nearly indistinguishable. Much like Darlene Jespersen, Brenna Lewis was fired essentially for not wearing makeup. Also like Jespersen, Lewis was a well-liked and respected employee. Although Heartland's appearance code was not as strict as Harrah's, both Lewis and Jespersen preferred to adopt a more masculine look by avoiding makeup in their professional and private lives. The biggest difference between the two cases, however, is their outcomes. Lewis won a relative victory when the district court's decision was reversed and remanded, but Jespersen lost her appeal. Why did the Eighth and Ninth Circuits rule differently on such similar cases? This study will examine what the cross-circuit split between the Eighth and Ninth Circuits reveals about the limitations of Title VII to combat appearance discrimination in the workplace.

Part of the confusion surrounding appearance discrimination litigation stems from the controversial manner in which *sex* was included in Title VII of the 1964 Civil Rights Act.[14] In earlier drafts of the bill, Title VII was intended to ban employment discrimination only on the basis of race, color, religion, and national origin, not sex. Southern Democrats, who opposed civil rights legislation, hoped to weaken the bill by adding superfluous amendments that would make it cumbersome to enforce and difficult to pass. Thus, when Representative Howard Smith of Virginia, a conservative Democrat, suggested adding "sex" to the list of prohibited forms of discrimination, the proposal was met with laughter.[15] Two days after the debate over the gender

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11: *Id.* at 1037.

12: *Id.*

13: *Lewis v. Heartland Inns of America, L.L.C.*, 764 F. Supp. 2d 1037, 1039 (2011).

14: See Appendix A for excerpts from relevant sections of 42 USCS § 2000e-2 ("Title VII").

15: Cynthia Deitch, *Gender, Race, and Class Politics and the Inclusion of Women in Title VII*, 7 Gender & Soc'y 183, 186 (1993).

amendment, the bill nonetheless passed in the House, and the new provision was largely overshadowed by the historic civil rights victory that the rest of the bill represented. In this way, Joan Hoff argues that, "the word *sex* was added to the 1964 Civil Rights Act more by accident than by design, and there is every indication that Congress did not act with full knowledge of what it was doing."[16]

Because "sex" was included in the bill largely as a joke rather than in response to popular demand, federal judges have struggled to determine the legislative intent behind Title VII's gender discrimination provision. In the absence of a statutory definition of "sex" in the Act itself, courts have been forced interpret the bill's "because of … sex" language on their own.[17] At the very least, federal courts have agreed that Title VII was intended to provide economic opportunity for women, but the problem of defining sexually discriminatory employment practices has proven much more complex.[18] How courts choose to construe this simple phrase has serious implications for women and men alike because Title VII has become the legal basis for the vast majority of gender discrimination policy in the United States.[19]

Price Waterhouse v. Hopkins[20] dealt with precisely this problem. Ann Hopkins was a senior manager at Price Waterhouse, a professional accounting firm, when she was recommended for partnership in 1982. As part of the nomination process, current partners were asked to submit written comments about each candidate. Although Hopkins was generally perceived as extremely qualified, several partners complained that she was overly aggressive and lacked interpersonal skills. One partner described her as "macho", while another suggested that she should "take a course at charm school."[21] These negative opinions about her personality ultimately doomed her bid for partnership, and Price Waterhouse decided to put her application on hold for a year. Hopkins was told that in order to improve her chances of making

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16: Joan Hoff, *Law, Gender, and Injustice: a Legal History of U.S. Women* at 233 (New York 1994).

17: Anzuoni, 3 Geo. J. Gender & L. at 881 (cited in note 1). See also Appendix A.

18: As Elizabeth Malcolm writes, "In the absence of Supreme Court guidance, circuit courts have developed multiple, often conflicting tests to determine whether an employer runs afoul of Title VII when it imposes different appearance requirements upon male and female employees," such as the mutability doctrine, offensive stereotype analysis, and the unequal burdens test. Elizabeth Malcolm, '*Looking and Feeling Your Best': A Comprehensive Approach to Groom and Dress Policies Under Title VII*, 46 San Diego L. Rev. 506 (2009).

19: Deitch, 7 Gender & Soc'y at 183 (cited in note 15).

20: 490 U.S. 228 (1989).

21: *Id.* at 235.

partner, she should learn to "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry."[22] When the partners failed to nominate her the following year, Hopkins resigned and sued Price Waterhouse for sex discrimination under Title VII, believing that the firm's evaluations of her had been marred by sex stereotypes.

Although *Price Waterhouse* is widely recognized as the case that established a Supreme Court precedent for sex stereotyping, much of the Court's plurality, concurring, and dissenting opinions actually focused on the semantics of Title VII's "because of… sex" language and the respective burdens of proof that defendants and plaintiffs are required to provide in mixed-motive suits. Most of the justices agreed with the D.C. Circuit's conclusion that Hopkins was a victim of sex-stereotyping; they disagreed only about what standards employers should be held to when employees demonstrate that sex discrimination may have played a role in an adverse employment action.[23] In his plurality opinion, Justice Brennan argued that the words "because of" do not mean "solely because of," and therefore "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[24] In other words, even if an employer had some legitimate reasons for making an employment decision that would negatively impact an employee, if sex discrimination was a significant factor in that decision, then the employer is in violation of Title VII.

By contrast, Justice Kennedy's dissenting opinion advocated a much narrower interpretation of Title VII. He believed that the Act's "because of" language could be understood only in the context of a "'but-for' standard of causation."[25] According to Kennedy, "Congress could not have chosen a clearer way to indicate that proof of liability under Title VII requires a showing that race, color, religion, sex or national origin caused the decision at issue."[26] The mere presence of impermissible motives, such as sex stereotyping, is not enough to prove that an employer has sexually discriminated against an employee. Rather, by this line of thinking, Title VII was intended to ban only

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22: *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.C. Cir. 1985).

23: Justices Marshall, Blackmun, and Stevens joined Justice Brennan's plurality opinion, while Justices White and O'Connor wrote their own concurring opinions. All agreed that the circuit court had incorrectly ruled that defendants must be held to a "clear and convincing" standard of proof. Instead, defendants need only meet the less stringent "preponderance of evidence" standard, which is traditionally applied in civil cases. See *Price Waterhouse*, 490 U.S. at 252-53; *Id.* at 260 (White, J., concurring); and *Id.* at 261 (O'Connor, J., concurring).

24: *Id.* at 241.

25: *Id.* at 281.

26: *Id.* at 281-82.

those employment decisions that result directly from discrimination.

The Supreme Court's internal debate over the precise meaning of Title VII still bears significance for sex discrimination cases today. As this study will demonstrate, the Eight and Ninth Circuits' divergent understandings of *Price Waterhouse* account in large part for the contradictory outcomes of *Jespersen v. Harrah's* and *Lewis v. Heartland*. In the majority opinion for *Jespersen*, the Ninth Circuit claimed that *Price Waterhouse* did not apply because Harrah's makeup requirement was not based on sex stereotyping. The Eighth Circuit, however, argued that Lewis's situation was analogous to Hopkins's in *Price Waterhouse*.

Further complicating matters is the question of whether sex-differentiated grooming and appearance codes fall under *Price Waterhouse*'s definition of sex stereotyping. As Joel Friedman observes, "Cases like *Jespersen* remind us that employers readily have imposed a wide range of appearance, behavior, and dress standards on their employees, many of which derive directly from traditional conceptions of how men and women should appear, dress, and behave."[27] Indeed, Courts have generally allowed companies to apply different grooming rules to men and women, arguing that Title VII protects "equality of employment opportunities" rather than absolving employees' responsibility to adhere to "generally accepted community standards."[28] Yet these "community standards" become particularly problematic for certain groups, such as women of color, because they often reflect white ideals of beauty. For example, many grooming codes specify that employees cannot wear their hair in braids, dreadlocks, or cornrows–hairstyles that are relatively common among African American women.[29] Some dress codes, particularly those that require women to wear high heels, even pose health hazards over the long-term.[30] Thus, despite court rulings against employer requirements for women to be thin or wear provocative uniforms that invite sexual harassment, further reforms are necessary.[31]

Another important aspect of Title VII relevant to both *Jespersen* and *Lewis* is the bona fide occupational qualification (BFOQ). Section 703(e)(1) grants employers the ability to discriminate, "in those certain instances where religion, sex, or national origin is a *bona fide occupational qualification*

27: Joel Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 Duke J. Gender L. & Pol'y 205, 217 (2007).

28: Deborah Rhode, *The Beauty Bias: the Injustice of Appearance in Life and Law* at 120 (Oxford 2010).

29: Angela Onwuachi-Willig, *Another Hair Piece,* 98 Geo. L.J. 1079, 1080 (2010).

30: Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers*, 22 J. Corp. L. 295 (1996).

31: Rhode, *The Beauty Bias* at 120 (cited in note 28).

reasonably necessary to the normal operation of that particular business or enterprise."[32] At first, it was unclear whether this loophole would prove so large as to render sex discrimination litigation meaningless.[33] Congress created the Equal Employment Opportunity Commission (EEOC) specifically to enforce Title VII, but sex discrimination claims were not seriously considered for over a decade. According to EEOC guidelines, the bona fide occupational qualification (BFOQ) is usually limited to occupations like modeling and acting, in which physical attributes are considered essential to job performance and authenticity. In practice, however, "a heavy burden of persuasion is placed on the individual litigant to overturn a BFOQ exception claimed by an employer."[34] Therefore, although federal courts significantly narrowed acceptable uses of the BFOQ defense by the 1980s, serious inequalities endure today.[35]

In light of *Jespersen* and *Lewis*'s contradictory rulings, this study analyzes the cross-circuit split between the Eighth and Ninth Circuits in order to determine Title VII's capacity to fight appearance discrimination in the workplace. In Part II, I outline the existing literature on appearance discrimination, Title VII, and the BFOQ. I then provide a brief description of my methodology in Part III, followed by a cross-circuit analysis of the *Jespersen* and *Lewis* opinions in Part IV. Finally, in Part V, I explore the implications of this study for appearance discrimination litigation, discuss the need for greater guidance from the Supreme Court and Congress, and suggest avenues for further research.

32: Quoted by Susan Gluck Mezey, *In Pursuit of Equality: Women, Public Policy, and the Federal Courts* at 43 (St. Martin's 1992) (emphasis added).

33: Hoff, *Law, Gender, and Injustice* at 484 (cited in note 16).

34: *Id.*

35: Mezey, *In Pursuit of Equality* at 51 (cited in note 32). See also Rachel Cantor, *Consumer Preferences for Sex and Title VII*, 1999 U. Chi. Legal F. 493 (1999) and Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 Duke J. Gender L. & Pol'y 169 (2009), for history of the BFOQ defense. For example, in *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), the court ruled that sex was not a BFOQ for flight attendants because "the primary function of an airline is to transport passengers safely from one point to another," and women's supposedly unique talent for reassuring nervous passengers was not "reasonably necessary to the normal operation" of an airline.

II. Literature Review

Considerable debate exists among legal scholars about the BFOQ as it relates to sex-dependent dress and grooming codes.[36] While some identify appearance discrimination as the final frontier of gender oppression, others insist that it is either unrealistic or unnecessary to outlaw such discrimination. This discussion has become particularly heated in the wake of *Jespersen v. Harrah's Operating Co.*, in which the Ninth Circuit Court of Appeals ruled in favor of Harrah's that female employees could be fired for not wearing makeup in compliance with the company's grooming code.[37] The case attracted national attention because it appeared to undermine the ability of employees to challenge sexually stereotypical appearance codes mandated by their employers. Despite intense scrutiny of the Ninth Circuit's decision, there has been little research since then regarding either the impact of *Jespersen* on subsequent appearance discrimination cases, or how such cases are decided differently across circuits. My study will attempt to fill this gap in the existing scholarship.

Legal scholars have examined many aspects of Title VII's sex discrimination provision, from its impact on protective laws to its role in the shift towards gender equality under the law. Protective legislation is based on the theory of essential difference between the sexes, and it assumes that women should not be held to the same standards or face the same risks as men on the job. Susan Mezey argues that Title VII effectively doomed state protective labor laws once the Equal Employment Opportunity Commission decided that Title VII superseded such laws.[38] Leslie Goldstein agrees, adding that this shift away from protective legislation was part of the broader egalitarian women's

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36: See Jennifer Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence,* 14 Duke J. Gender L. & Pol'y 243 (2007); Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 Duke J. Gender L. & Pol'y 467 (2007); Patrick Shin, *Vive la Difference—A Critical Analysis of the Justification of Sex-Defendant Workplace Restrictions on Dress and Grooming*, 14 Duke J. Gender L. & Pol'y 491 (2007); Avery, *The Great American Makeover: the Sexing up and Dumbing Down of Women's Work After* Jespersen v. Harrah's Operating Company, Inc, 42 USF L. Rev. 299 (2007); and Ann McGinley, *Babes & Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 Duke J. Gender L. & Pol'y 257 (2007). For a cross-circuit analysis of grooming and appearance policies under Title VII, see Malcolm, 46 San Diego L. Rev. at 506 (cited in note 18).

37: *Jespersen*, 444 F.3d 1104.

38: Mezey, *In Pursuit of Equality* at 45 (cited in note 32).

movement of the 1970s.[39] After the tide turned in favor of egalitarianism, scholars like Catherine MacKinnon and Deborah Rhode articulated two alternative paths to legal equality for women: one that emphasizes sameness with men, and another that emphasizes difference.[40] Patricia Cain, however, suggests that equality itself is a social construct, and that utopian ideals of sexual neutrality under the law are unrealistic.[41]

Other scholars have questioned whether the BFOQ is even necessary today. Katie Manley's 2009 study compares successful and unsuccessful uses of the BFOQ defense and highlights inconsistencies in recent court rulings. Ultimately, she argues that although the BFOQ is theoretically problematic, it remains an essential part of Title VII.[42] Rachel Cantor applies economic analysis to the BFOQ, arguing that, "Despite a presumption in the law against permitting BFOQ defenses based on consumer preferences, courts applying the 'essence of the business' test often rule in favor of such defenses."[43] In this way, a restaurant chain like Hooters can avoid charges of sex discrimination by demonstrating that attractive female employees are essential to its business model.

Appearance discrimination in employment has come under intense scrutiny from feminist critics who argue that women should be evaluated solely on the basis of their job performance, not how they look. In her book *The Beauty Bias*, Deborah Rhode observes that appearance discrimination is particularly hard on career women, who face a sex-based double standard that men do not.[44] Specifically, women who are too attractive are often perceived as incompetent, while those who are not attractive enough can be stigmatized as inadequately feminine.[45] Naomi Wolf mockingly coined the phrase "Professional Beauty

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39: Leslie Friedman Goldstein, *Contemporary Cases in Women's Rights* at 207 (Wisconsin 1994).

40: Catharine MacKinnon, *Toward a Feminist Theory of the State* at 221 (Harvard 1989).

41: Patricia Cain, *Feminism and the Limits of Equality*, 24 Ga. L. Rev. 803, 805 (1989), and Deborah Rhode, *Feminist Critical Theories,* 42 Stan. L. Rev. 617 (1989).

42: Manley, 16 Duke J. Gender L. & Pol'y at 170 (cited in note 35).

43: Cantor, 1999 U. Chi. Legal F. at 494 (cited in note 35). According to EEOC guidelines, consumer preferences for one sex over another cannot justify BFOQ defenses, see 29 § CFR 1604.2(a)(1)(iii) (quoted in Cantor).

44: Rhode, *Beauty Bias* at 96 (cited in note 28).

45: See Peter Glick, et. al., *Evaluations of Sexy Women in Low and High Status Jobs*, 29 Psych. Women Q. 389 (2005), and Megumi Hosoda, Eugene Stone-Romero, & Gwen Coats, *The Effects of Physical Attractiveness on Job-Related Outcomes*: *a Meta-Analysis of Experimental Studies,* 56 Personnel Psych. 431

Quotient," or PBQ, to describe the fine line that women walk between appearing professional and overly sexual.[46] Much like the BFOQ, Wolf argues that, "The actual function of the PBQ in the workplace is to provide a risk-free way to discriminate against women."[47] Similarly, Rhode observes that, "Although women have been moving into upper level professions in greater numbers, they have not attained the positions of greatest power, prestige, and economic reward," because of lingering informal barriers against them.[48]

For legal scholars who agree that appearance discrimination should be remedied by law, the *Jespersen* decision threatens the ability of employees to bring legal challenges against sex-dependent dress and grooming codes in the future. Dianne Avery bemoans the Ninth Circuit's opinion, writing, "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."[49] Similarly, Jennifer Levi exasperatedly asks, "Why are the courts so seemingly entrenched in their rejection of dress-code challenges?" in her comparative analysis of *Schroer v. Library of Congress* (D.D.C. 2006) and *Jespersen*.[50] Ann McGinley is somewhat more optimistic. After arguing that being a woman should not constitute a BFOQ for being a cocktail server in Las Vegas casinos, she observes that, "*Jespersen* raises the question of whether casinos may legally hire both men and women, and dress both in sexy costumes, which in essence, sexually stereotypes both men and women."[51] Finally, Gretchen Myers draws upon Judith Butler's theory of gender performativity to argue that sex-based appearance standards are not trivial at all because they "highlight the personal and cultural impact of sex stereotypes on gender performance."[52]

Other scholars, however, claim that appearance discrimination is not a

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(2003).

46: Naomi Wolf, *Beauty Myth* at 27 (HarperCollins 2009).

47: *Id.* at 28.

48: Deborah Rhode, *Perspectives on Professional Women,* 40 Stan. L. Rev. 1163 (1988).

49: Avery, 42 USF L. Rev. at 300 (cited in note 36).

50: Levi, 14 Duke J. Gender L. & Pol'y at 246 (cited in note 36). See also *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

51: McGinley, 14 Duke J. Gender L. & Pol'y at 259 (cited in note 36).

52: Gretchen Adel Myers, *Why Personal Presentation in the Workplace is Not Trivial: Performativity Theory Applied to Title VII Sex-Dependent Appearance Standard Cases,* 7 Dukeminier Awards: Best Sexual Orientation & Gender Identity L. Rev. 173, 175 (2008). See also Jutih Butler, "Imitation and Gender Insubordination," in *The Lesbian and Gay Studies Reader* at 314-18 (Routledge 1993) (Henry Abelove, ed.).

serious problem and that the law is not a viable means to solve it. Michael Selmi, for example, believes that the *Jespersen* decision was correct, calling Jespersen's sexual stereotype argument a slippery slope. He suggests, "A better approach to issues of identity in the workplace might be to conceive of our work selves as separate from our authentic selves, acknowledging that at work, we all perform and act out of character."[53] Patrick Shin goes even further, claiming, "[There is a] positive value of preserving a social state of affairs in which men and women enjoy economic equality but adhere to sex-dependent social norms in respect of the outward presentation of their bodies to others."[54] In other words, women should settle for achieving economic parity with men even if appearance codes impose a greater burden on them than men. William Corbett is more sympathetic to the injustice of appearance discrimination, but he nonetheless predicts that, "federal employment discrimination law will never prohibit appearance-based discrimination, and few if any state discrimination laws will add appearance as a protected characteristic."[55] In this way, despite their ideological and methodological differences, scholars like Avery, Cain, Rhode, and Corbett agree that the current body of federal sex discrimination law is too weak to combat effectively appearance discrimination in the workplace.

Surprisingly little research has been done on the *Lewis v. Heartland* decision, particularly given the intense scholarly attention that *Jespersen* attracted. A few commentators, such as Maritza Gómez, have noted inconsistencies in circuit courts' application of *Price Waterhouse v. Hopkins*, of which *Jespersen* and *Lewis* were two examples, but no one has undertaken an extensive cross-circuit analysis of these cases.[56] Friedman also offers important observations about gender nonconformity and *Price Waterhouse* post-*Jespersen*, yet he focuses primarily on whether Title VII's ban on sex discrimination extends to gay, lesbian, and transsexual individuals.[57] Therefore, my study will attempt to provide new insight about circuit courts' conflicting applications of Title VII and Supreme Court precedent in appearance discrimination suits.

53: Selmi, 14 Duke J. Gender L. & Pol'y at 469 (cited in note 36).

54: Shin, 14 Duke J. Gender L. & Pol'y at 493 (cited in note 36).

55: William Corbett, *The Ugly Truth about Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 Duke J. Gender L. & Pol'y 153, 158 (2007).

56: Maritza Gómez, *Gender Stereotyping Discrimination under Title VII: Alive and Well After More than 20 Years of* Price Waterhouse v. Hopkins *(but Applied Somewhat Differently Among the Circuits*, 58 Fed. Lawyer 30-31 (2011).

57: Friedman, 14 Duke J. Gender L. & Pol'y at 205 (cited in note 27).

III. Methodology

In this study, I conducted a cross-circuit analysis of *Jespersen v. Harrah's* and *Lewis v. Heartland Inns of America, L.L.C.* Specifically, I compared the majority and dissenting opinions from both cases in order to determine how the Eighth and Ninth Circuits reached such different decisions. Circuit Courts of Appeal are not legally bound to abide by decisions made in other circuits, but in theory they should all be applying the same Supreme Court precedent. For this reason, I paid particular attention to any and all references to *Price Waterhouse v. Hopkins* in the *Jespersen* and *Lewis* opinions because *Price* set the federal standard for sex stereotyping claims under Title VII. When relevant, I also examined district-level stages of *Jespersen* and *Lewis* for more detailed information about the facts of each case.

IV. A Cross-Circuit Analysis Of *Jespersen* And *Lewis*

I begin my analysis by examining the Ninth Circuit's rationale for affirming the District Court of Nevada's decision. In her lawsuit against Harrah's, Jespersen argued (1) that the "Personal Best" policy imposed *unequal burdens* on male and female employees and (2) that the makeup requirement forced women to adhere to a *sex-based stereotype*. The unequal burdens test compares the relative burdens that an appearance policy imposes on women and men. If the court determines that the policy unfairly impacts one group of employees more than another, then the policy violates Title VII.[58] By contrast, under offensive stereotype analysis, an appearance policy violates Title VII if it is based on offensive or degrading sex stereotypes.[59] The Ninth Circuit affirmed the district court's summary judgment in favor of Harrah's on both counts.

With respect to Jespersen's claim that the makeup requirement placed unequal burdens on women and men, the majority opinion rejected her argument. According to Chief Judge Mary Schroeder, although Harrah's "Personal Best" policy imposed sex-differentiated grooming standards for employees' hair, fingernails, and faces, "Grooming standards that appropriately differentiate between the genders are not facially discriminatory."[60] She added that, "While those individual requirements differ according to gender, none

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58: Malcolm, 46 San Diego L. Rev. at 528 (cited in note 18). See also *Jespersen*, 444 F.3d at 1110: "Under established equal burden 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."

59: Malcolm, 46 San Diego L. Rev. at 523.

60: *Jespersen*, 444 F.3d at 1109-10.

on its face places a greater burden on one gender than another."[61] Schroeder further justified her opinion by pointing to precedent in the Ninth Circuit and other circuit courts. She writes, "We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and *so have other circuits*."[62] Thus, although Harrah's required female employees to wear makeup, this burden was supposedly balanced out by other requirements for men, such as the need to get regular haircuts.[63]

The Ninth Circuit also dismissed Jespersen's suggestion that wearing makeup necessitates a much greater investment of time and money than the comparable requirements for male employees. "Jespersen asks us to take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short," but according to Schroeder, "these are not matters appropriate for judicial notice."[64] Because Jespersen failed to submit any documentary evidence that applying makeup is significantly more costly for women, she was unable to prove that Harrah's makeup requirement imposed an unequal burden on women.[65]

Jespersen's inability to convince the Ninth Circuit that Harrah's makeup requirement violated the unequal burdens test bodes ill for employees hoping to use this strategy to challenge sex-differentiated grooming codes. Joel Friedman agrees, noting that, "the Ninth Circuit's recent *en banc* opinion in *Jespersen v. Harrah's Operating Co., Inc.,* forcefully demonstrates [that] the presence of the "undue burden" operation proves to be of marginal utility" for plaintiffs.[66] Elizabeth Malcolm adds that courts often overlook the emotional costs of discriminatory policies.[67] She argues that courts should examine

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61: *Id.*

62: *Id.* at 1110. (emphasis added).

63: See Appendix B for the full text of Harrah's "Personal Best" policy.

64: *Jespersen*, 444 F.3d at 1110. Schroeder defines *judicial notice* as being "reserved for matters 'generally known within the territorial jurisdiction of the trial court' or 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Id.* (citing FRE 201).

65: In his dissent, Circuit Judge Alex Kozinski vehemently disagrees with the notion that Jespersen should have been expected to provide such evidence: "It is true that Jespersen failed to present evidence about what it costs to buy makeup and how long it takes to apply it. But is there any doubt that putting on makeup costs money and takes time?" See *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting). Incidentally, Kozinski replaced Schroeder as Chief Judge of the Ninth Circuit in 2007.

66: Friedman, 14 Duke J. Gender L. & Pol'y at 209 (cited in note 27).

67: Malcolm, 46 San Diego L. Rev. at 529 (cited in note 18).

requirements for men and women individually, rather than evaluating an appearance policy in its totality, as the Ninth Circuit does. "Once the individual requirements are broken down, it becomes apparent that the Personal Best policy imposed a heavier burden upon female employees."[68] In other words, courts should consider not only whether employers have the same number of restrictions for male and female employees, but also whether any of those requirements places a qualitatively greater burden on one gender than another.

In terms of sex stereotyping, the Ninth Circuit was slightly more sympathetic to Jespersen, but ultimately sided with Harrah's. The court pointed out that the bartenders' uniforms were unisex and thus did not force women to dress in a sexually provocative way.[69] Chief Judge Schroeder wrote, "We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world," but warned that if makeup requirements could be considered sex stereotyping under Title VII, "we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination."[70] In other words, Jespersen's argument was a slippery slope and did not amount to impermissible stereotyping.[71]

However, the Ninth Circuit remained open to the possibility that sex-differentiated appearance policies could be challenged under Title VII. Schroeder conceded, "We do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes."[72] In this way, the court admitted the plausibility of such claims, but nonetheless maintained

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68: *Id.* at 530. In his dissent, Judge Pregerson takes precisely this approach: "By refusing to consider the makeup requirement separately… the majority's approach would permit otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender, or by some separate non-discriminatory requirement that applies to both men and women." *Jespersen*, 444 F.3d at 1116 (Pregerson, J., dissenting).

69: Schroeder pointed to *EEOC v. Sage Realty Corp.* 507 F.Supp. 599 (S.D.N.Y. 1981), in which a female hotel lobby attendant was forced to wear a revealing uniform that invited sexual harassment. Schroeder argues that Harrah's uniforms were unisex and thus did not demonstrate sexually stereotypical intent. Jespersen, however, did not actually challenge this part of the "Personal Best" policy.

70: *Jespersen*, 444 F.3d at 1112.

71: See *Price Waterhouse*, 490 U.S. at 228.

72: *Jespersen,* 444 F.3d at 1113.

that Harrah's makeup requirement fell within the bounds of reasonableness for workplace grooming standards.[73] Commenting on the inconsistency with which lower courts accept sex-stereotyping charges under Title VII, Friedman cynically remarks:

> While giving lip service to the notion that any plaintiff can fall within Title VII's protective umbrella when alleging a case of sex-based discrimination, the lower courts typically reject claims by plaintiffs whose unconventional behavior or presentation of self can be seen to implicate their sexual orientation or transgendered identity.[74]

Thus, it appears that circuit courts, while agreeing in principle that sex-differentiated appearance codes may violate Title VII, are often reluctant to declare such policies discriminatory.[75]

The Ninth Circuit also drew a sharp distinction between *Price Waterhouse* and *Jespersen*. In the case of Ann Hopkins, "Impermissible sex stereotyping was clear because the very traits that she was asked to hide were the same traits considered praiseworthy in men."[76] By contrast, "Jespersen's claim

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73: Schroeder compared Jespersen's claim to *Nichols v. Azteca Restaurant Enters., Inc.,* 256 F.3d 864 (9th Cir. 2001), in which a male waiter was sexually harassed by his coworkers for failing to conform to gender stereotypes. Unlike *Nichols*, Jespersen was not subjected to sexual harassment as a result of Harrah's policies.

74: Friedman, 14 Duke J. Gender L. & Pol'y at 218 (cited in note 27). He adds, "Moreover, they ignore the fact of the imperfect linkage between sexual orientation or transgendered status and nonconforming behavior. The courts do not acknowledge that there are straight men and women who do not conform to gendered behavior or appearance norms and gay men and women who do." *Id.* Although Jespersen did not publically identify herself as lesbian during the case, she was represented by Lambda Legal, a legal organization that promotes civil rights for gay men and lesbians. Jennifer C. Pizer represented Jespersen on behalf of Lambda Legal before the Ninth Circuit. See Jennifer Pizer, *Facial Discrimination: Darlene Jespersen's Fight Against the Barbie-Fication of Bartenders*, 14 Duke J. Gender L. & Pol'y 285 (2007).

75: For example, "With respect to sex stereotyping, we hold that appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping, but that on this record Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping." *Jespersen*, 444 F.3d at 1106.

76: *Jespersen*, 444 F.3d at 1111. Also see *Price*, 490 U.S. at 251, where the plurality notes: "An employer who objects to aggressiveness in women but whose

here differs materially from Hopkins' claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender."[77] Aside from Jespersen's "subjective reaction to the makeup requirement," the court record was insufficient to prove that Harrah's "Personal Best" policy fell under *Price*'s definition of sex stereotyping.[78]

The Ninth Circuit's narrow interpretation of *Price Waterhouse* contrasts markedly with the Eighth Circuit's decision in *Lewis v. Heartland*. Circuit Judge Diana Murphy's majority opinion openly acknowledged the similarities between Lewis and Hopkins, in that, "Like the plaintiff in *Price Waterhouse*, Lewis alleges that her employer found her unsuited for her job not because of her qualifications or her performance on the job, but because her appearance did not comport with its preferred feminine stereotype."[79] Murphy believed that Lewis's argument was compelling, writing, "Cullinan's criticism of Lewis for lack of 'prettiness' and the 'Midwestern girl look' before terminating her may also be found by a reasonable factfinder to be evidence of wrongful sex stereotyping."[80] Hence, she concluded, "Lewis has presented sufficient evidence to make out a *prima facie* case on her claims for sex discrimination and retaliation and a sufficient showing at this stage that Heartland's proffered reason for her termination was pretextual."[81]

One major similarity between *Jespersen* and *Lewis* is that neither plaintiff challenged the dress code requirement. For Lewis, "The theory of her case

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positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."

77: *Jespersen*, 444 F.3d at 1113.

78: *Id.* at 1112. According to Ninth Circuit precedent, *Price Waterhouse* does not apply to grooming standards: "The district court further observed that the Supreme Court's decision in *Price Waterhouse v. Hopkins* … did not apply to this case because in the district court's view, the Ninth Circuit had excluded grooming standards from the reach of *Price Waterhouse*." *Id.* at 1106.

79: *Lewis*, 591 F.3d at 1038.

80: *Id.* at 1039.

81: *Id.* at 1043. According to Rachel Cantor, "Under Title VII, once a plaintiff proves a *prima facie* case of employment discrimination, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment practices at issue." See Cantor, 1999 U. Chi. Legal F. at 496 (cited in note 35) and *McDonnell Douglas Corp. v. Green,* 411 US 792, 802-04 (1973) for necessary elements of *prima facie* cases under Title VII.

is that the evidence shows Heartland enforced a *de facto* requirement that a female employee conform to gender stereotypes in order to work the A shift. There was no such requirement in the company's written policies."[82] Indeed, Cullinan apparently bragged about the appearance of female employees at Heartland and even told a hotel manager not to hire a potential employee because she was not "pretty" enough.[83] In Jespersen's case, Harrah's did in fact have an explicit dress code, yet Jespersen raised no objection to it because it imposed unisex standards on women and men.[84] Despite employing a similar legal approach, Lewis was successful where Jespersen failed. This inconsistency suggests that courts may view *de facto* appearance requirements as more arbitrary than written policies and thus unfair. As a result, courts may be more inclined to condemn *de facto* standards as sexually discriminatory, while formal appearance codes merely reflect community standards.

Another important parallel between the two cases is their treatment of the BFOQ. Jespersen claimed that, "the makeup requirement itself establishes a *prima facie* case of discriminatory intent and must be justified by Harrah's as a bona fide occupational qualification."[85] The Ninth Circuit countered, "Our settled law in this circuit, however, does not support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a *prima facie* case."[86] Moreover, Jennifer Pizer, Jespersen's attorney, points out that, "the court did not consider the needs a casino might assert because it held that Jespersen did not make out a *prima facie* case of sex-based disparate treatment and, therefore, the burden never shifted to Harrah's to justify its appearance policy."[87] For this reason, Harrah's was not required to mount a BFOQ defense for its "Personal Best" policy, nor did it attempt to do so.

Similarly, in *Lewis*, Heartland did not bother to offer a BFOQ defense

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82: *Lewis,* 591 F.3d at 1037. "The front desk job description in Heartland's personnel manual does not mention appearance. It states only that a guest service representative '[c]reates a warm, inviting atmosphere' and performs tasks such as relaying information and receiving reservations." *Id.* at 1036.

83: *Id.* at 1036.

84: *Jespersen*, 444 F.3d at 1107. "The program contained certain appearance standards that applied equally to both sexes, including a standard uniform of black pants, white shirt, black vest, and black bow tie. Jespersen has never objected to any of these policies." *Id.*

85: *Id.* at 1109.

86: *Jespersen,* 444 F.3d at 1109.

87: Pizer, 14 Duke J. Gender L. & Pol'y at 289 (cited in note 74). See also the burden shifting framework described in *McDonnell Douglas Corp. v. Green,* 411 US 792 (1973).

for its decision to fire Lewis. The Eight Circuit noted, "Heartland has not tried to suggest that the 'Midwestern girl look' or prettiness were bona fide occupational qualifications for its clerk job… Such an affirmative defense requires proof that the qualification is 'necessary to the normal operation of that particular business or enterprise.'" [88] Director of Operations Cullinan may have personally believed that prettiness was essential to work at the hotel front desk, but as a corporation, Heartland chose not to pursue this legal strategy.[89] In this way, much like Harrah's, Heartland did not claim that attractiveness was a BFOQ for female employees.

On the one hand, Harrah's and Heartland's reluctance to assert the BFOQ exception may be a sign of progress. As old stereotypes that segregate jobs by sex break down, the BFOQ defense should become less common.[90] Yet this trend is also disconcerting for plaintiffs because it may signal that employers are moving away from *de jure* BFOQs to *de facto* appearance requirements, as in *Lewis*.[91] Jespersen's experience demonstrates the difficulty of challenging sexually stereotypical grooming policies, and for every Darlene Jespersen or Brenna Lewis willing to bring her case to court, who knows how many other employees stay silent in the face of sex discrimination.

Interestingly, the *Lewis* decision makes no reference whatsoever to *Jespersen*. In light of the fact that *Jespersen* attracted such widespread attention in the media and within the legal community, it seems unlikely that the Eighth Circuit panel was completely unaware of the case. Certainly, circuit courts are under no obligation to follow precedents from other circuits, but given that the *Jespersen* and *Lewis* opinions frequently referenced notable cases from other circuits, the absence of any mention of *Jespersen* in *Lewis* seems even more jarring.[92] Two scenarios seem plausible: either the Eighth Circuit mistakenly

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88: *Lewis,* 591 F.3d at 1043 (footnote). 42 U.S.C. § 2000e-2(e)(1). The Eight Circuit also points to *Wilson v. Southwest Airlines Co.,* 517 F.Supp. 292 (N.D. Tex. 1981), which determined that "female sex appeal" is not a BFOQ to be a flight attendant or ticket agent.

89: *Lewis,* 591 F.3d at 1036.

90: Ann McGinley argues that there are only three remaining acceptable uses of the BFOQ: (1) in situations where consumers' right to privacy is at stake, (2) if selling sex is essential to a company's business model, or (3) to ensure authenticity in dramatic productions. McGinley, 14 Duke J. Gender L. & Pol'y at 258 (cited in note 36).

91: See *Lewis,* 591 F.3d at 1037, in which Lewis argued that Heartland "enforced a *de facto* requirement that a female employee conform to gender stereotypes in order to work the A shift."

92: For example, both *Jespersen* and *Lewis* cite *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). In that case, a transsexual firefighter alleged that city officials

overlooked the many similarities between the two cases, or it intentionally omitted references to *Jespersen* because it disagreed with the Ninth Circuit's ruling. The latter seems more likely, particularly because the circuits offered such different interpretations of *Price Waterhouse*.

As a case in point, Judge Harry Pregerson's dissent in the Ninth Circuit draws upon some of the very same language in *Price Waterhouse* as the Eighth Circuit majority opinion. Pregerson described Harrah's makeup policy as a "facial uniform" that applied only to female bartenders.[93] He then claimed that, "Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that 'gender must be *irrelevant* to employment decisions.'"[94] Hence, Pregerson argued, "I believe that Jespersen articulated a classic case of *Price Waterhouse* discrimination and presented undisputed, material facts sufficient to avoid summary judgment."[95]

Evidently, however, the language of *Price Waterhouse* is not as clear-cut as Pregerson assumed. Just as Pregerson claimed that the Ninth Circuit misapplied the precedent of *Price Waterhouse*, Chief Judge James Loken declared that the Eighth Circuit's opinion was "an unwarranted misreading of the plurality and concurring opinions in *Price Waterhouse v. Hopkins*."[96] He continued, "Apparently the majority would hold that an employer violates Title VII if it declines to hire a female cheerleader because she is not pretty enough, or a male fashion model because he is not handsome enough, unless the employer proves the affirmative defense that physical appearance is a bona fide occupational qualification."[97] According to Loken's understanding of Title VII's "because of…sex" provision, an adverse employment action based on appearance should qualify as sexually discriminatory only if the employer disadvantages all female candidates, not women as individuals.[98]

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forced him to resign after he began presenting himself as a woman at work. The Sixth Circuit held that the plaintiff had satisfied the requirements for a *prima facie* case of sex discrimination under Title VII.

93: *Jespersen,* 444 F.3d at 1114 (Pregerson, J., dissenting).

94: *Id.* (emphasis in original) (citing *Price Waterhouse*, 490 U.S. at 240). Pregerson adds, "Moreover, *Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves, not only as to how they should behave." *Jespersen,* 444 F.3d at 1115.

95: *Id.* at 1115-16 (Pregerson, J., dissenting).

96: *Lewis,* 591 F.3d at 1043 (Loken, Chief J., dissenting).

97: *Id.*

98: In response, the majority opinion countered, "The focus of [Loken's] decision was the mistaken view that a Title VII plaintiff must produce evidence that she was treated differently than similarly suited males. Our court has explicitly

Thus, serious disagreement about the language and intent of Title VII, as well as *Price Waterhouse*, seems to persist both among and within federal circuit courts.

V. Conclusion

This study demonstrates the limited efficacy of using Title VII as a weapon against appearance discrimination. Although *Lewis* won in the Eighth Circuit, when her case returned to the district level for trial, the jury's verdict was in favor of her retaliation claim only, not her sex-stereotype discrimination claim.[99] Meanwhile, *Jespersen* lost her appeal under both the unequal burdens test and offensive sex stereotype analysis.[100] In light of these facts, the current body of case law surrounding appearance discrimination is not encouraging for plaintiffs.

Several scholars have already identified the need for legislative reforms to Title VII so that it can more effectively handle sex-stereotype discrimination claims. In her analysis of consumer preferences and Title VII, Cantor proposes an economic model in which, "Ultimately, if the defendant can prove that sex defines the market in which the defendant competes—by examining the specific product's pricing structure and the cross-elasticities of demand to other products—then the defendant can properly assert that sex is a BFOQ for employment."[101] This strategy would place a higher burden of proof on employers seeking to use a BFOQ defense. Similarly, Anzuoni suggests that Title VII's "because of…sex" clause should be defined as broadly as possibly to protect gender non-conformists. "Specifically, I believe language that gives legislative backing to the decision in *Price Waterhouse* would be highly useful."[102] In fact, some lawyers have already drawn up potential amendments to Title VII in response to cases like *Jespersen*.[103] Other scholars have emphasized the need for additional Supreme Court precedent to clarify

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rejected that premise." See *Lewis,* 591 F.3d at 1039.

99: *Lewis*, 764 F. Supp. 2d at 1039 (2011).

100: After the Ninth Circuit's ruling, Harrah's actually offered Jespersen her job back (with an exemption from the makeup requirement), but Jespersen declined. Unfortunately, the cost of her legal battle was a huge financial burden, and according to her attorney, she now works three part-time jobs after being effectively blacklisted from other casinos in Reno. See Pizer, 14 Duke J. Gender L. & Pol'y at 317 (cited in note 74).

101: Cantor, 1999 U. Chi. Legal F. at 495 (cited in note 35).

102: Anzuoni, 3 Geo. J. Gender & L. at 892 (cited in note 1).

103: *Id.* at 892-893. Anzuoni profiles an amendment by Dana Priesing, an attorney for Gender PAC who advocates for labor and employment issues.

the issue of sex discrimination as it applies to appearance codes.[104]

In addition to these reforms, further research is necessary on the topic of appearance discrimination claims and Title VII. Future projects could expand upon the cross-circuit analysis offered in this study by incorporating additional circuits. Other studies could examine the correlation between a plaintiff's occupation and his or her ability to win a sex discrimination lawsuit. For example, are women in service sector jobs, such as waitresses and hotel clerks, positioned differently than professional women like Ann Hopkins in *Price Waterhouse*?[105] Finally, scholars should continue to study the impact of *Jespersen*, both within the Ninth Circuit and nationwide, to see if the case has in fact made it more difficult for employees to bring Title VII charges against their employers.

104: See Gómez, 58 Fed. Lawyer at 31 (cited in note 56) and Malcolm, 46 San Diego L. Rev. at 506 (cited in note 18).

105: Amy Lifson-Leu also proposes this line of analysis in Amy Lifson-Leu, *Enforcing Femininity: How* Jespersen v. Harrah's Operating Co. *Leaves Women in Typically Female Jobs Vulnerable to Workplace Sex Discrimination*, 42 USF L. Rev. 849 (2007). Yet, further research is necessary.

Appendix A: Excerpts from Title VII

42 USCS § 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or other wise 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 (emphasis added); or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, *because of* such an individual's race, color, religion, sex, or national origin (emphasis added).

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion. Notwithstanding any other provision of this title [42 USCS § 2000e et seq.]:

> (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, 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* (emphasis added), and
>
> (2) it shall not be an unlawful practice for a school, college,

university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Appendix B: Harrah's "Personal Best" Policy

All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

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

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