No. 03-15045

Heard by Circuit Judges A. Wallace Tashima,
Sidney R. Thomas and Barry G. Silverman.
Opinion by Judge Tashima; Dissent by Judge Thomas.
Filed December 28, 2004.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARLENE JESPERSEN,

Plaintiff-Appellant,

v.

HARRAH'S OPERATING COMPANY, INC.,

Defendant-Appellee.

On appeal from the United States District Court
for the District of Nevada
Case No. CV-N-01-0401-ECR (VPC)
The Honorable Edward C. Reed, Jr., District Judge.

REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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I. INTRODUCTION

Darlene Jespersen maintains that Harrah's Operating Company, Inc. ("Harrah's") violated Title VII when it fired her after twenty years of exceptional service as a casino bartender because she could not continue to perform in her usual exemplary manner while also complying with Harrah's demand that all female bartenders wear a "uniform" of facial makeup every day.[1]

Jespersen petitions for rehearing and rehearing en banc of the panel majority's erroneous conclusions (1) that it need not consider here the implications of *Price Waterhouse v. Hopkins* , 490 U.S. 228 (1989), and the multiple decisions of this Court forbidding employment discrimination based on gender stereotypes, and (2) that Jespersen lacked sufficient evidence to establish triable factual issues about the makeup policy's discriminatory burdens on her and other women. 392 F.3d 1076, 1081-83; *but see id.* at 1083, 1085-87 (Thomas, J., dissenting).

In this Petition Reply, Jespersen responds to numerous errors and misleading assertions in Harrah's Answer to her rehearing petition. Jespersen also clarifies how the panel majority has created conflict within sex discrimination doctrine (i) by leaving gender nonconforming individuals like herself vulnerable

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[1] Harrah's appearance rules, including that female servers be "made over" by a consultant and then recreate that exact look every day, are attached as Exhibit 2 to the Rehearing Petition ("Rhg.Pet."), and discussed at pages 5-6 of Jespersen's Opening Brief on Appeal ("Op.Br."), which is posted for convenience at <www.lambdalegal.org/cgi-bin/iowa/documents/record?record =1614>. Also posted are Jespersen's Reply Brief ("Rep.Br.") and amici briefs of the ACLU of Nevada, et al., and the National Employment Lawyers Ass'n, et al.

to wrongful discrimination; (ii) by improperly "declining" to apply *Price Waterhouse* in this directly analogous case; and (iii) by changing the elements of employment discrimination plaintiffs' prima facie case, including by requiring those plaintiffs to quantify the absent burdens on male employees in an unprecedented, if not logically impossible, manner. *Id.* at 1081.

Given the serious inconsistencies in the law created by the majority's decision, and the importance of these issues for workers in all sectors of America's economy, this Court should grant the Rehearing Petition and set this matter for consideration by the full Court.

II. ARGUMENT

A. The Panel Majority Opinion Conflicts With Supreme Court, Ninth Circuit and Other Circuit Decisions That Title VII Protects Individuals With A Non-Stereotypical Gender Identity.

Darlene Jespersen's twenty-year track record at Harrah's proves that a woman can be an exemplary tender of a sports bar – just like her male counterparts – without changing her face to adopt a prescribed feminine look. There is no dispute that the purpose of Harrah's makeup rule is to force its female employees to conform to a feminine stereotype as a condition of employment. Harrah's contends, however, that it is privileged to make this demand and that Jespersen's objection is an improper attempt to impose an androgynous gender identity on her female coworkers. Answer at 3. Of course that is not true. Just as Ann Hopkins

sought to have her work evaluated based on her job performance, not on the extent of her femininity (490 U.S. at 228), and Antonio Sanchez sought to do his job without coworker persecution due to others' views about the proper way men should appear and act (*Nichols v. Azteca Restaurants*, 256 F.3d 864, 874 (9th Cir. 2001)), Jespersen simply seeks to be judged by her effectiveness as a bartender, rather than the fact that she may appear less feminine than some other women.[2]

As this Court has confirmed, Title VII protects individuals who "fail[] 'to act like a woman' – that is, to conform to socially-constructed gender expectations.'" *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (construing the Gender Motivated Violence Act). "[U]nder *Price Waterhouse*, 'sex' under Title VII encompasses both sex – that is, the biological differences between men and women – *and* gender." *Id.* at 1202. This Court has underscored that "gender" is not to be understood narrowly to exclude those "who do not

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[2] Throughout its Answer, Harrah's consistently distorts Jespersen's position, wrongly attributing to her a "radical"belief that *all* gender-based distinctions among employees must be erased. *See, e.g.,* Answer at 3, 6, 12, 14. Jespersen has never taken that position. To the contrary, in challenging the particular burdensome, sex-based policy based on which she was fired, she contends that Title VII requires Harrah's to respect the gender diversity among its employees, just as it must respect racial, ethnic and other forms of diversity, and not to impose sex-based rules that subordinate by gender. As she has made explicit in her prior briefing, Jespersen has no quarrel with appearance or conduct rules that differentiate by sex but do not subordinate, demean or limit professional opportunities by sex. *See, e.g.,* Op.Br. at 19-28, 48-51; Rep.Br. at 8-10, 23-29.

conform to socially-prescribed gender expectations." *Id.* at 1202 n.12.[3]

Thus, although Ann Hopkins was perceived as "tough-talking [and] somewhat masculine," Title VII prevented her employers from insisting that she act "more femininely, *wear make-up*, have her hair styled and wear jewelry." 490 U.S. at 235 (emphasis added). And likewise, when others judged Antonio Sanchez to be insufficiently masculine, the answer was *not* to require him to change his sense of his own masculinity or his expression of it through his appearance and deportment. 256 F.3d at 875.

Jespersen's deposition testimony made clear that she had a strong adverse reaction to wearing makeup in the amount and style prescribed by Harrah's consultants. *See* Appellant's Excerpts of Record ("ER") 121-22. She wore it in good faith for a few weeks, but it made her feel so awkward, "exposed," and humiliated that she was unable to work effectively. *Id.* She testified that she felt it invited others to view her as a feminine "sexual object" in a way that was unnerving to her. Although she tried, she was unable to adjust to that gender presentation. *Id.*

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[3] In *Schwenk*, the plaintiff's claim "easily survive[d] summary judgment" because she showed that the adverse treatment she had suffered was "motivated, at least in part, by [her] gender – in [that] case, by her assumption of a feminine rather than a masculine appearance or demeanor." *Id.* at 1202 . *See also Rene v. MGM Grand Hotel*, 305 F.3d 1061, 1069 (9th Cir. 2002) (Pregerson, J., conc.) (explaining that summary judgment in employer's favor was improper due to unlawful enforcement of gender stereotypes by plaintiff's coworkers). As Judge Thomas sets forth clearly in his dissent, the same result should have been reached in this case. 392 F.3d at 1086-87.

Harrah's does not dispute that this was a sincere, deeply rooted response on Jespersen's part to a demand she could not accommodate. And, again contrary to Harrah's mischaracterization of her position, Jespersen does not object if other women wish to wear makeup.[4] Instead, she contends that Harrah's is violating Title VII by restricting employment *only* to women who present an ultra-feminine look, and excluding those who cannot do so without feeling deeply uncomfortable.[5]

At a minimum, Jespersen's testimony showed there are material factual disputes for trial about the two distinct problems Harrah's policy creates. First, as the Supreme Court discussed in *Price Waterhouse*, to insist that women be ultra-feminine when a job requires commanding the respect of customers, creates a "catch 22" that violates Title VII because it impedes their success. 490 U.S. at

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[4] There is no inconsistency between Jespersen's respect for other women's wish to wear makeup and her objection to being required to wear it herself. It is well settled that an employee may object to a sex-based term or condition of employment, whether or not other employees of her "class" share the objection. In *Carroll v. Talman Federal Savings & Loan*, for example, the plaintiff presented a valid prima facie case of discrimination with her objection to her employer's policy that all female employees must wear uniforms, when it trusted its male employees to select proper business attire; the Seventh Circuit held that it was irrelevant that other female employees may have liked the uniforms (or, at least, not been willing to risk their jobs by voicing their objections). 604 F.2d 1028, 1031 (7th Cir. 1979) (opinion cited with approval by *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000); *Gerdom v. Continental Airlines*, 692 F.2d 602, 606 (9th Cir. 1982) (en banc); and the panel majority in this case, 392 F.3d at 1080).

[5] The Title VII violation inherent in Harrah's policy should be even more obvious for bartending and other jobs traditionally restricted to men, for whom a "feminine look" manifestly is not a bona fide occupational qualification ("BFOQ").

251.[6] Separately, to require women to present themselves in an ultra-feminine manner when femininity is not BFOQ violates Title VII because it precludes employment of women who express their gender in a way that is less stereotypically feminine. *See Nichols*, 256 F.3d at 875; *Rene,* 305 F.3d at 1069.[7]

Harrah's seeks to sow confusion by continuing to describe its policy inaccurately. For example, its Answer reiterates its misleadingly assertion that its male servers must be clean shaven. In fact, the policy contains no such restriction. Harrah's men are free to wear any style of facial hair, or none at all, as long as they are clean and tidy. *See* Rhg.Pet. Exh. 2. Just as in *Carroll v. Talman Savings*, 604 F.2d at 1031, Harrah's deems men capable of making mature decisions about their professional appearance, while women must wear a facial "uniform" dictated by their employer. Title VII does not permit this demeaning

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[6] By analogy, consider a rule requiring female workers to wear a prescribed "feminine" perfume. Some may like it; others may find it annoying or humiliating. But if customers are less likely to take seriously and follow instructions from an employee wearing a floral scent – whether she is an accounts manager or a bartender – the women employees will have difficulty succeeding.

[7] Were this case to proceed to Harrah's claimed BFOQ defense, it would be easy to see that certain jobs call for sex-specific costumes and job duties that Jespersen might find humiliating. Her appearance and way of expressing her female identity probably would disqualify her from being cast as a female ingenue in a play or being hired as a dancer in a "gentleman's club." But Harrah's beverage servers' duties are not gender-specific, and, under longstanding employment discrimination precedents, they cannot be. *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718 (1982) (men cannot be excluded from nursing profession); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (airline may not segregate "stewardess" and "purser" jobs by sex). Harrah's version of the legal test notwithstanding (*see* Answer at 8-9), the burden thus *should* be on Harrah's to show why its drink servers must conform to gender stereotypes.

message, and the resulting subordination of women workers.

B. By "Declining" To Apply *Price Waterhouse* To This Directly Analogous Case, The Majority Has Created Conflicts In The Law.

Harrah's begins its Answer by quoting from the Supreme Court's 1946 decision in *Ballard v. United States*, in which the Court held that exclusion of women from jury service is unconstitutional. 329 U.S. 187. The *Ballard* Court's observation that men and women are not "fungible" for purposes of determining that men cannot "represent" women in this function was a new idea at that time; indeed, the federal courts in California had ended such exclusions only two years before. 329 U.S. at 197 (Frankfurter, J., conc.). Harrah's does not explain how it believes the *Ballard* Court's half-century old observation applies in this case. And it seems an odd logic to argue that, because women must be included in juries due to the value of diversity, they can be fired for not maintaining a dictated feminine look while tending bar. Harrah's quotation may be best understood as reflecting the era of its worldview. For Harrah's belief that it can fire women – including those who work in male-dominated jobs – for not looking uniformly feminine, does seem to date not just from before the *Price Waterhouse* decision, but from before Title VII existed at all, when society did not protect working women from arbitrary sex discrimination.

Like Harrah's apparent wish to turn the clock back to the time when much

in society was segregated by sex, the panel majority also was misguided in "declining" to apply controlling Supreme Court precedent. In *Price Waterhouse*, the high court construed the plain text of Title VII and confirmed that employers may take employees' gender into account *only* "when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.' ... *In all other circumstances, a person's gender may not be considered in making decisions that affect her.*" 490 U.S. 228, 242 (1989) (citation omitted) (emphasis added). Thus, despite Harrah's argument to the contrary (Answer at 8-9), the casino should have the burden to justify its policy by showing why makeup is a BFOQ for its female employees (as the airlines unsuccessfully attempted to do in numerous similar cases).[8]

Price Waterhouse highlighted another key premises of Title VII law – that it protects individuals, not classes. *Id.* at 288; *see also Manhart*, 435 U.S. at 708. The Supreme Court recognized early "that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *Manhart*, 435 U.S. at 707. Consequently, the law secures each person's right to be evaluated based on quality of work rather than characteristics that often correlate to irrational assumptions about groups. Yet, the makeup rule at issue

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[8] *E.g., Frank*, 216 F.3d at 845; *Gerdom*, 692 F.2d at 602; *Diaz v. Pan Am World Airways*, 442 F.2d 385 (5th Cir.1971); *Laffey v. Northwest Airlines*, 366 F.Supp. 763 (D.D.C. 1973).

here seems based on precisely such "stereotyped impressions" in that, for example, Harrah's claims makeup is de rigeur for women due to the effects of casino lighting on employees' faces, but fails to explain how those effects possibly can vary by sex. *See* Marden Decl., ¶4, ER at 38; Op.Br. at 32-33; Rep.Br. at 19.

The *Manhart* decision noted that Title VII"s "simple test" inquires "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" 435 U.S. at 711. The Supreme Court applied that same test to a similar end in *Price Waterhouse*.[9] It should be obvious that Harrah's policy fails, too, because there is no dispute that, were Jespersen male, she still would be receiving effusive praise from contented guests at Harrah's Sports Bar.

The panel majority did not find it obvious, however, because years ago, this Court followed a judge-made exception to this "simple test" in order to reject "counter culture" challenges brought by men to rules that demanded conformity with "establishment" expectations regarding male grooming. *See, e.g., Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977). Rather than devise a sex discrimination principle to distinguish between policies that subordinate or demean by gender and those that do not, and although nothing in the statute's text

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[9] *Accord Smith v. Salem*, 2004 WL 1191073, *7 (6th Cir. 2004) (pointing out that, "After *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.").

supports it, the lower courts exempted all sex-based appearance rules that make different demands of women and men, as long as they do not burden "unequally." *See, e.g., id.*; *see also Gerdom*, 692 F.2d at 608. The cases never have explained how to weigh the relative "burdens" of gender stereotypes. Nor have they justified their deviation from the usual rule that workers are to be protected from employer-imposed stereotypes, rather than required to conform to them "equally" according to their group membership.

Although the Supreme Court has flagged the problem of sex stereotypes throughout its Title VII jurisprudence (*see, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973)), this Court's "equal burdens" test dates from before the high court confirmed in *Price Waterhouse* that requiring employees to conform to gender stereotypes in their appearance and deportment poses precisely the same problem as stereotypes about aptitude for particular jobs or social roles. *See, e.g., Gerdom*, 692 F.2d at 602; *Fountain*, 555 F.2d at 753. In the main Ninth Circuit "dress code" case since *Price Waterhouse*, the Court did not need to consider *Price Waterhouse*'s implications for the "equal burdens" test because United Airlines' rule that female flight attendants had to be disproportionately thinner than males failed that test without more. *Frank*, 216 F.2d at 845. But when the panel majority applied the "equal burdens" test to Harrah's policy and concluded (erroneously) that no reasonable jury could find it burdens women more than men,

the majority then should have stepped directly to the question left unaddressed in *Frank* – whether this test can survive post-*Price Waterhouse* without modification.

As the dissent explains, the majority's decision to "decline" to follow *Price Waterhouse* is not justified by the fact that this is not a harassment case. 392 F.3d at 1084-85.[10] The majority also demurred that prior decisions of this Court have tied its hands. *Id.* at 1083. If the majority were correct that prior Ninth Circuit dicta precludes it from considering the key questions presented on this appeal, that certainly would be all the more reason en banc review is warranted here.[11]

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[10] Indeed, as the dissent points out, the majority's observation that this is not a harassment case explains nothing, since it is long settled that harassment is merely one form of discrimination. *Id.* (discussing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); *see also Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Meritor Savings v. Vinson*, 477 U.S. 57, 65-66 (1986) (Rhenquist, J.). As the dissent explains, the majority appears erroneously to conflate two separate Title VII questions – whether the adverse treatment of the plaintiff was severe enough to be actionable, and whether the motive for the adverse treatment was impermissible. Here, just like in *Price Waterhouse*, there is no question that the treatment of the plaintiff was sufficiently severe to be actionable (in this case, termination; in *Price Waterhouse*, denial of a promotion). As to the second question, it is undisputed that she was fired due to "her assumption of a [masculine] rather than a [feminine] appearance." *See Schwenk*, at 1212; *see also* Dissent, 392 F.3d at 1084; *Ellerth*, 524 U.S. at 761 (cognizable employment actions include firing, failing to promote, reassignment with significantly different responsibilities, and material decreases in benefits). Thus, despite Harrah's mischaracterization of her position (*see* Answer at 6), Jespersen never has contended Title VII permits an independent claim for gender stereotyping; rather, she has sued Harrah's *for firing her* because it did so based on her gender.

[11] Harrah's rejoinder that the *Frank* decision – whether it was by a three-judge or an en banc panel – was decided correctly, is beside the point. Neither *Frank* nor *Gerdom* addressed whether an employer can require its employees to conform to stereotypes as a condition of their jobs. Because this Court found the differential weight rules in those cases to violate Title VII without needing to answer the gender conformity question, neither decision provides the rule for decision needed here.

C. The Panel Majority Appears To Have Changed The Plaintiff's Burden Of Production And To Have Imposed an Impossible Burden of Proof.

The panel majority appears to have changed the elements of employment discrimination plaintiffs' prima facie case. Until the panel majority's decision, the law was clear that "the plaintiff has the initial burden of producing sufficient evidence of discriminatory treatment, a burden which is not onerous. The burden of production then shifts to the defendant." *Gerdom*, 692 F.2d at 608.

As the dissent points out, Jespersen produced ample evidence to shift the burden. 392 F.3d at 1086-87. Her evidence that she was an exemplary employee for two decades without wearing makeup is undisputed. It also is undisputed that she was fired because she did not comply with her employer's demand that she appear more feminine. The terms of Harrah's policy are undisputed as well. Lastly, Harrah's does not dispute Jespersen's testimony about the impact of the makeup rule on her, including that she felt humiliated to have to make herself look "prettier" and more like "a sexual object" in order to keep her job. ER at 121-22. The majority erred in finding all this evidence insufficient to shift the burden of production to Harrah's, and the implications for future cases are very troubling.

Indeed, in numerous ways, the majority's analysis creates conflict with this Court's prior "appearance code" decisions in which an employer's policy itself was taken as the principal evidence to be tested by Title VII. *See, e.g., Frank*, 216

F.3d at 845; *Gerdom*, 692 F.2d at 602. In *Gerdom*, for example, "facial examination of the weight program here reveals that it is designed to apply only to females." 692 F.2d at 608. From Continental's policy itself, the Court saw that the requirement was "disparate treatment ... demeaning to women ... based on offensive stereotypes prohibited by Title VII." *Id.* at 606. This Court then concluded, "[b]ecause [the employer]'s facially discriminatory policy itself supplies the requisite elements of a prima facie case, we must look to [the employer]'s efforts to rebut it." *Id.* at 608.[12]

As in all those cases, Jespersen submitted ample evidence that Harrah's policy imposes greater burdens on female bartenders, to show that the relative burdens on men and women at least is a disputed question of material fact. The policy terms for women are twice as lengthy as those for men. Based on their common experience in the world, members of a reasonable jury easily could conclude that women bear greater burdens from their daily makeup regime (with no corollary for men).[13]

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[12] Similarly, in *Carroll*, which the panel majority and the *Frank* and *Gerdom* courts all have cited with approval, the Seventh Circuit needed little more than to review the defendant's policy to discern its stereotype-based, "demeaning" judgment that it could trust its male employees but not its female employees to select proper business attire. 604 F.2d at 1032-33.

[13] Likewise, if the overall appearance requirements are to be considered, a reasonable jury could find more burdensome the daily hair "teasing, curling, or styling" duty imposed on women (where men simply cannot grow their hair long). Certainly given *both* the more elaborate daily make-up and hair requirements for women, a jury reasonably could find a greater burden on women. On this point, Harrah's argument is peculiar because it proclaims that "it is self-evident

Moreover, in addition to the policy itself, Jespersen's prima facie case also included her testimony about the negative impacts on her of the policy, including that it interfered with her ability to do her job. In both *Gerdom* and *Frank*, the affected plaintiffs' testimony about the harmful effects *on them* of their employers' appearance rules was the principle evidence in addition to the policy itself. Harrah's mistakenly contends that Jespersen's testimony about the "intangible" burdens on her of a requirement that she experiences as demeaning is insufficient. But, as *Frank*, *Gerdom* and *Carroll* all make clear, this is not correct.[14]

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that in the context of gender-specific appearance standards the courts must be given latitude to weigh the relative burdens it imposed on each sex." Answer at 8. As the dissent explains, however, what those relative burdens may be is a factual dispute that should not have been resolved by summary judgment. This is especially evident given Jespersen's testimony regarding the burdens on her and what experience and common sense teach about the burdens of having to buy, put on, and remove make-up daily, as opposed to not doing so.

But beyond the obvious factual disputes about the burdens imposed by other features of Harrah's policy, it must be noted that *no* prior decisions support the majority's holdings (1) that sex discrimination plaintiffs must challenge their employers' policies as a whole (with specific evidence about how each element affects men as well as women), and (2) that discrimination against women in one element of an employer's policy may be offset by an unrelated restriction on men. This Court's analysis in other cases, to the contrary, has been that female employees can challenge the one feature of their employer's policy that causes them a problem, without needing to consider the employer's other rules. In fact, the *Gerdom* court specifically rejected the airlines' attempt to excuse itself this way. 692 F.2d at 606-07 (discussing "harmful effects of occupational cliches" and noting that airline's discrimination against men did not mitigate its different discrimination against women).

[14] Such evidence of "intangible" dignitary harm distinguishes cases like *Carroll* and this case from those addressing requirements that male employees keep their hair short and wear ties, or even the district court's hypothetical that there may be male employees at Harrah's who wish to wear facial makeup. *See, e.g., Fountain*, 555 F.2d at 753; *Jespersen v. Harrah's Operating Co.*, 280 F.Supp.2d 1189, 1193 (D.Nev. 2002). Unlike the policy at issue in this case, such restrictions on men cannot be said to subordinate them professionally, or to impede their chances at professional success, in the way the uniform requirement in *Carroll* and the makeup, jewelry and "soft-hued suits" requirement in *Price Waterhouse* were recognized as doing for women.

As yet further evidence, judicial notice can be taken of the fact that – whatever their actual amounts – the cost and time required to buy and apply makeup necessarily are greater than the nonexistent amounts expended by men to not do so. Indeed, it is well-settled that litigants need not introduce evidence to prove matters within the general knowledge of the jury.

The panel opinion created yet further conflict with the prior decisions by holding that Jespersen had to submit evidence not only quantifying the burdens on women that men do not bear, but also somehow quantifying the benefit to men of being free of those burdens. *None* of the cases applying this Court's "unequal burdens" test requires evidence quantifying the non-existent burdens on the favored class. For example, in neither *Frank* nor *Gerdom* did the Court require plaintiffs to produce evidence confirming that their male coworkers enjoyed their freedom to weigh proportionally more, let alone quantifying their happiness.[15] Likewise, in *Carroll*, the female plaintiffs were not required to submit evidence confirming – let alone quantifying how much – that male employees enjoyed their greater professional dignity from their freedom to wear attire of their choice rather than uniforms. Indeed, it is difficult to imagine how such an evidentiary

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[15] In fact, in *Gerdom*, the Court actually held to the contrary that discrimination of a different sort against men did *not* offset or excuse the discrimination against women, and also that female employees may challenge restrictions imposed only upon them without needing evidence about male employees who are exempt. 692 F.2d at 607-08.

requirement ever could be met. But clearly, had such a requirement been imposed in the prior cases, all would have come out the other way.

As in those cases, the disparate treatment of women is manifest in Harrah's policy. As explained in the dissenting panel opinion, at a minimum there is a triable issue regarding the relative burdens on women and men from the cost and time required of women to comply with Harrah's requirements, as well as from the subordinating message that women do not look professional unless they alter their appearance, and that they cannot be trusted to present themselves professionally without a "uniform" designed by someone else, just like the similarly "demeaning" message found discriminatory in *Carroll.*[16]

In sum, the panel majority has deviated from the prior case law, without justification. Its holding that Jespersen submitted insufficient evidence means that plaintiffs now are subject to a new, difficult, and unjustified standard of proof. This new standard is likely to create confusion for employees, employers and courts alike. It will make it harder for employees to enforce Title VII's protections, and probably will cause an increase in discrimination. These

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[16] In fact, in *Gerdom*, evidence similar to what Jespersen has submitted was enough for this Court not only to reverse the summary judgment order against the female plaintiffs, but to grant their cross motion for summary judgment. 692 F.2d at 605. Had Jespersen so moved in this case, Harrah's minimal "business necessity" evidence would not have justified the facial discrimination of this policy. *See* the discussion in Jespersen's Opening Brief at 29-35 and Reply Brief at 18-20, both of which are posted at <www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1614>.

conflicts with prior law warrant rehearing of this case by the full Court.

III. CONCLUSION

Twenty-five years ago, the Seventh Circuit panel majority in *Carroll v. Talman Savings* chided the dissent for deeming too trivial to be actionable the bank's requirement that its women employees – and only its women employees – wear uniforms. In the well-chosen words of the majority, "with all due respect for the views of a valued colleague, [the] dissenting opinion favors affirmance mainly because the sex discrimination here is not blatant. However, [Title VII] prohibits any sex discrimination with respect to compensation, terms, conditions, or privileges of employment." 604 F.2d at 1033.

If anything, this principle applies with even greater force in the present case, in which one hard-working woman bartender has sought to maintain her dignity and her job in the face of a policy imposed by one of the largest, wealthiest employers not only in Nevada, but nationwide. As Judge Thomas has explained in his dissenting opinion, the panel majority's analysis should be reconsidered. Darlene Jespersen should have the chance to present her case to a jury.

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For the foregoing reasons, Plaintiff-Appellant Darlene Jespersen respectfully requests that this Court grant her petition for rehearing and rehearing en banc.

DATE: March 7, 2005

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

By: _____
Jennifer C. Pizer

ATTORNEYS FOR PLAINTIFF-APPELLANT
DARLENE JESPERSEN

CERTIFICATE OF COMPLIANCE

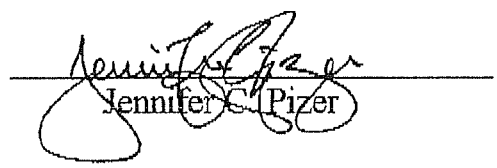
The accompanying Reply Brief in Support of Petition for Rehearing and Rehearing En Banc of Appellant Darlene Jespersen complies with the specifications of Rule 32 of the Federal Rules of Appellate Procedure, as follows:

1. The text of the Brief is double spaced. Headings, footnotes, and most quotations of more than two lines are single spaced.

2. The Brief is proportionately spaced. The typeface is Times New Roman in 14 point size.

3. The word count of the Brief is 5,034 words, based on the count of the word processing system used to prepare the Brief.

I certify that the foregoing is true and correct. Dated this 7th day of March, 2005 at Los Angeles, California.



PROOF OF SERVICE BY U.S. MAIL

I, TITO GOMEZ, declare:

That I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On March 7, 2005, I served a copy of the attached documents, described as **MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC; REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC,** by U.S. Mail, on the parties of record by placing true and correct copies thereof in sealed envelopes, with first-class postage thereon fully prepaid, addressed as follows:

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I am readily familiar with the office's practice of collecting and processing correspondence for mailing. Under that practice, this correspondence would be deposited with the U.S. Postal Service on that same day. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in this affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 7, 2005

Tito Gomez