

TITLE VII — GENDER DISCRIMINATION — NINTH CIRCUIT
HOLDS THAT WOMEN CAN BE FIRED FOR REFUSING TO WEAR
MAKEUP. — *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th
Cir. 2006) (en banc).

Gender inequality continues to permeate American culture, affecting women both socially and economically. In their personal lives, many women experience insecurity about their appearance on a daily basis. In the workplace, women with all levels of educational experience earn substantially less than their male counterparts.¹ Gender inequality is exacerbated when the personal effects of the narrow standard of beauty are combined with economic barriers facing women. In *Jespersen v. Harrah’s Operating Co.*,² the Ninth Circuit held that a female bartender terminated for refusing to wear makeup did not establish a prima facie case of gender discrimination under Title VII.³ Future plaintiffs should respond by presenting evidence of economic, physical, and psychological harms to prove that a requirement that women wear makeup imposes an unequal burden based on gender.

Darlene Jespersen was a bartender at Harrah’s casino in Reno, Nevada, for over twenty years.⁴ During that time, she was an exemplary employee who received positive reviews from both customers and supervisors.⁵ In February 2000, Harrah’s instituted a “Beverage Department Image Transformation” program requiring all bartenders, male and female, to wear a standard uniform and “be well groomed, appealing to the eye, [and] be firm and body toned.”⁶

In addition to these general requirements, the policy contained gender-specific requirements. Men had to keep short hair and trimmed fingernails.⁷ Women were required to have their hair “teased, curled, or styled every day”⁸ and were also required to wear makeup — including foundation, blush, mascara, and lipstick — every day.⁹ The policy required women to meet with image consultants and wear their makeup as the consultants directed.¹⁰

¹ LESLIE HARRIS ET AL., FAMILY LAW 500 (3d ed. 2005).

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

³ *Id.* at 1106.

⁴ *Id.* at 1106–07.

⁵ *Id.* at 1107.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 1114 (Pregerson, J., dissenting). Men were prohibited from wearing makeup. *Id.* at 1107 (majority opinion).

Jespersen complied with the appearance policy in every respect except for the makeup requirement.¹¹ She did not wear makeup on or off the job and said that “wearing it would conflict with her self-image.”¹² She found the makeup requirement offensive and saw it as further evidence that Harrah’s “sells’ and exploits its women employees.”¹³ She “felt very degraded and very demeaned,”¹⁴ claiming that the makeup requirement “prohibited [her] from doing [her] job”¹⁵ because “[i]t affected [her] self-dignity”¹⁶ and “took away [her] credibility as an individual and as a person.”¹⁷ For these reasons, she refused to wear makeup, and she “was effectively terminated for that reason.”¹⁸

Jespersen sued Harrah’s for gender discrimination under Title VII of the Civil Rights Act of 1964,¹⁹ arguing that the appearance standards imposed unequal burdens on women and required women to conform to gender stereotypes.²⁰ The United States District Court for the District of Nevada granted summary judgment for Harrah’s, finding that, although women were required to wear makeup, men were required to have short hair, so the burdens imposed by the policy were equal.²¹ The district court also held that, under Ninth Circuit precedent, appearance standards were not impermissible gender stereotyping.²² A three-judge panel of the Ninth Circuit affirmed, holding that Jespersen had failed to submit sufficient evidence to show that the burdens imposed by the policy were unequal and that the appearance standards did not constitute impermissible gender stereotyping.²³

On rehearing en banc, the Ninth Circuit affirmed by a 7–4 vote. Writing for the court, Chief Judge Schroeder²⁴ stated that there was no evidence in the record to support a finding of unequal burdens.²⁵ Jespersen argued that the makeup requirement, on its face, imposed unequal burdens.²⁶ However, Chief Judge Schroeder explained that em-

¹¹ See *id.* at 1107–08 (majority opinion).

¹² *Id.*

¹³ *Id.* at 1108 (internal quotation marks omitted).

¹⁴ *Id.* (internal quotation marks omitted).

¹⁵ *Id.* (alterations in original) (internal quotation mark omitted).

¹⁶ *Id.* (alterations in original) (internal quotation mark omitted).

¹⁷ *Id.* (alteration in original) (internal quotation mark omitted).

¹⁸ *Id.* at 1106.

¹⁹ 42 U.S.C. §§ 2000e to 2000e-17 (2000).

²⁰ *Jespersen*, 444 F.3d at 1109.

²¹ *Jespersen v. Harrah’s Operating Co.*, 280 F. Supp. 2d 1189, 1193 (D. Nev. 2002).

²² *Id.*

²³ See *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1081–83 (9th Cir. 2004). For a complete discussion of the factual background, district court decision, and panel decision, see Recent Case, 118 HARV. L. REV. 2429 (2005).

²⁴ Chief Judge Schroeder was joined by Judges Rymer, Silverman, Tallman, Clifton, Callahan, and Bea.

²⁵ *Jespersen*, 444 F.3d at 1110–11.

²⁶ *Id.* at 1109.

ployers can distinguish between genders with different standards for appearance, as long as one gender is not burdened more than the other.²⁷ Chief Judge Schroeder held that a further showing of disparate effects was required and that Jespersen had failed to produce any evidence regarding the cost of makeup or the time it takes to apply makeup.²⁸ The majority determined that, lacking evidence in the record, it could not take judicial notice of the time and cost of applying makeup because judicial notice is reserved for “generally known” facts.²⁹ Chief Judge Schroeder also concluded that the policy did not constitute illegal gender stereotyping because Jespersen had failed to produce any evidence beyond her “subjective reaction” that the policy was adopted based on a gender stereotype.³⁰

Judge Pregerson dissented,³¹ agreeing with the majority that Jespersen had failed to submit enough evidence to establish unequal burdens³² but disagreeing with the majority’s conclusion that Jespersen had failed to satisfy her burden of showing illegal gender stereotyping.³³ He argued that the policy required a “facial uniform” for women, while men were not required to wear such a uniform.³⁴ As a result, the policy discriminated based on gender, and Jespersen had therefore established a prima facie case of gender discrimination.³⁵

Judge Kozinski also dissented,³⁶ concluding that Jespersen had presented enough evidence to survive summary judgment on the unequal burdens issue. Conceding that the makeup requirement must be viewed in the context of the overall policy, Judge Kozinski argued that the policy as a whole burdened women much more than it burdened men.³⁷ Although Jespersen had failed to submit evidence on point, Judge Kozinski argued that the majority should have taken judicial notice of obvious facts, asking: “[I]s there any doubt that putting on makeup costs money and takes time?”³⁸ Judge Kozinski reasoned that the makeup requirement did impose a burden on women that was not shared by men.³⁹ Furthermore, Judge Kozinski noted that Jespersen had in fact presented evidence of the harms of the makeup policy

²⁷ *Id.* at 1110.

²⁸ *Id.* at 1111.

²⁹ *Id.* at 1110 (quoting FED. R. EVID. 201) (internal quotation mark omitted). For an extensive analysis of the gender stereotyping claim, see Recent Case, *supra* note 23.

³⁰ *Jespersen*, 444 F.3d at 1111–12.

³¹ Judge Pregerson was joined by Judges Kozinski, Graber, and William Fletcher.

³² *Jespersen*, 444 F.3d at 1113 (Pregerson, J., dissenting).

³³ *Id.* at 1114.

³⁴ *Id.* at 1116.

³⁵ *Id.* at 1116–17.

³⁶ Judge Kozinski was joined by Judges Graber and William Fletcher.

³⁷ *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting).

³⁸ *Id.*

³⁹ *Id.*

when she testified as to the negative effects of makeup on her self-image and the impairment of her ability to perform effectively at work.⁴⁰ As a result, Judge Kozinski concluded, Jespersen had presented a prima facie case of gender discrimination under Title VII.⁴¹

It is important to note the narrowness of the Ninth Circuit's holding. The court did not hold that the makeup policy was immune from a Title VII challenge. Instead, the court only held that "*on this record*, Jespersen ha[d] failed to present evidence sufficient to survive summary judgment."⁴² In other words, the court left open the possibility that a future plaintiff who submits more evidence of unequal burdens may succeed in a Title VII action.⁴³ Ninth Circuit precedent suggests that this showing can be made by evidence of an unequal economic burden,⁴⁴ unequal physical burden,⁴⁵ or unequal psychological burden.⁴⁶ Future plaintiffs can (and should) show that makeup policies like Harrah's impose all three types of burdens unequally on women.⁴⁷

Of the three types of burdens, the economic burden imposed by Harrah's policy is perhaps the most apparent. The only costs to men were the price of a monthly haircut and a trivial one-time investment in fingernail clippers. Women, by contrast, were required to have their hair styled and teased and purchase makeup, which gets used up and must be continually replenished.

Moreover, the policy required women to spend considerably more time preparing for work without any additional salary. To meet the appearance requirements, a male bartender at Harrah's needed to do nothing more than maintain short hair and trimmed nails. A male bartender at Harrah's did not even have to shave, nor did his hair need to be washed or neatly combed. Women, on the other hand, were required to do a great deal more. Their hair had to be "teased, curled,

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1106 (majority opinion) (emphasis added).

⁴³ A plaintiff can also succeed by showing illegal gender stereotyping. *See id.* at 1111 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989)).

⁴⁴ *See, e.g.,* *Gunther v. County of Washington*, 623 F.2d 1303, 1308–09 (9th Cir. 1979) (holding that unequal compensation based on gender can satisfy the requirements for showing gender discrimination under Title VII).

⁴⁵ *See, e.g.,* *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (holding that weight restrictions for female employees imposed an unequal physical burden, thus violating Title VII).

⁴⁶ *See, e.g.,* *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 871 (9th Cir. 2001) (noting that "it is by now clear that sexual harassment in the form of a hostile work environment constitutes gender discrimination").

⁴⁷ Title VII allows for disparate treatment based on gender for any "bona fide occupational qualification." 42 U.S.C. § 2000e-2(e)(1) (2000). Requiring makeup that is legitimately essential to job performance would not be illegal. Because Harrah's did not argue that its makeup policy was a bona fide occupational qualification, Jespersen was only required to demonstrate an unequal burden. *Jespersen*, 444 F.3d at 1114 n.2 (Pregersen, J., dissenting).

or styled *every day*.⁴⁸ They were required to wear foundation, blush, mascara, and lipstick *every day*.⁴⁹ In addition, their makeup and hair had to meet the approval of an image consultant. The daily requirements imposed on women stood in stark contrast to the standards for men, who had no time-consuming daily requirements.

The cumulative effect of the extra time requirements imposed a significant burden on women. Suppose that it takes ten minutes for a woman to put on foundation, mascara, eyeliner, and lipstick. Assume also that it takes ten more minutes for a woman to curl, tease, or style her hair. The total daily allotment for these activities can therefore be estimated at approximately twenty minutes.⁵⁰ If a woman works five days per week, she spends over ninety minutes *every week* dedicated to improving her appearance. And if she works fifty weeks per year, then she spends over eighty hours on her appearance *every year*. For most jobs, that is more than two weeks' worth of time for which she is not paid.

The economic burden imposed by Harrah's makeup policy has another effect as well. Because men face a lower time burden, they have more time to gain extra job skills, work overtime, or take on additional responsibilities. And because women lack this extra time, they may be less likely to advance, so their job opportunities may be limited. In this long-term sense, the makeup policy lessens women's job opportunities and thereby imposes an unequal economic burden.

In addition to economic burdens not shared by men, women at Harrah's face unequal physical burdens. Makeup is made with many synthetic products, all of which, according to one commentator, "add up to a massive load of poisonous chemicals."⁵¹ In the short term, makeup can cause allergic reactions in women.⁵² In fact, each year, "more than 200,000 visits to the emergency room are related to allergic reactions from cosmetics use."⁵³

Independent from the short-term health risks associated with makeup, some believe that the toxic ingredients in makeup can cause serious long-term effects. Most seriously, according to the Cancer Pre-

⁴⁸ *Jespersen*, 444 F.3d at 1107 (majority opinion) (emphasis added).

⁴⁹ *Id.*

⁵⁰ These are conservative estimates. It might easily take a woman much more than twenty minutes to style, curl, and tease her hair and put on full makeup.

⁵¹ PAULA BAILLIE-HAMILTON, TOXIC OVERLOAD 99 (2005).

⁵² *Id.* at 101.

⁵³ KIM ERICKSON, DROP-DEAD GORGEOUS: PROTECTING YOURSELF FROM THE HIDDEN DANGERS OF COSMETICS 31 (2002) (citing RUTH WINTER, A CONSUMER'S DICTIONARY OF COSMETIC INGREDIENTS (1999)). Judge Kozinski also noted that makeup can cause allergic reactions. *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting).

vention Coalition, cosmetics “can be cancer risks.”⁵⁴ Dr. Christine Farlow agrees that ingredients in makeup may cause cancer, explaining that “[s]ome of the most commonly used ingredients combine with other ingredients to form cancer-causing substances.”⁵⁵ Another commentator notes that these effects are common in everyday cosmetics.⁵⁶

The simple act of wearing makeup can cause these chemicals to enter the bloodstream.⁵⁷ Harrah’s required mascara and eyeliner, and one doctor has stated that “[e]ye makeup can be absorbed by the highly sensitive mucous membranes covering the eyeball.”⁵⁸ Lipstick, which is also required under Harrah’s policy, “is often chewed or licked off and swallowed.”⁵⁹ In addition, chemicals can be absorbed through the skin, and “if [a female employee has] a cut or a flare-up of acne, [her] skin is more susceptible to chemical absorption.”⁶⁰

Although some might believe that toxic chemicals in makeup are a remnant of the past, in fact “the practice of using toxic substances in cosmetics appears to be still going strong today.”⁶¹ Moreover, “the government does not require health studies or premarket testing for cosmetics.”⁶² Worse yet, “a cosmetics manufacturer may use almost any raw material as a cosmetic ingredient and market the product without an approval from the FDA.”⁶³ Government regulation of makeup is essentially nonexistent: “Recalls of defective or hazardous products are left to the discretion of the cosmetics company.”⁶⁴ Toxic chemicals can enter the market with no safety testing and, as a result, the threats of makeup are very real. These risks are a severe burden imposed by Harrah’s makeup policy. Because only women are subject to these risks, Harrah’s policy imposes unequal burdens.

⁵⁴ Cancer Prevention Coal., *Cosmetics and Personal Care Products Can Be Cancer Risks*, http://www.preventcancer.com/consumers/cosmetics/cosmetics_personal_care.htm (last visited Nov. 12, 2006).

⁵⁵ CHRISTINE HOZA FARLOW, *DYING TO LOOK GOOD: THE DISTURBING TRUTH ABOUT WHAT’S REALLY IN YOUR COSMETICS, TOILETRIES, AND PERSONAL CARE PRODUCTS* 12 (2000).

⁵⁶ See ERICKSON, *supra* note 53, at 18 (“Many of these carcinogenic chemicals can be found in everyday cosmetics.”).

⁵⁷ FARLOW, *supra* note 55, at 12.

⁵⁸ BAILLIE-HAMILTON, *supra* note 51, at 101.

⁵⁹ *Id.*

⁶⁰ ERICKSON, *supra* note 53, at 16.

⁶¹ BAILLIE-HAMILTON, *supra* note 51, at 99.

⁶² *Id.* at 99–100; see also FDA, *FDA Authority over Cosmetics*, <http://www.cfsan.fda.gov/~dms/cos-206.html> (last visited Nov. 12, 2006) (“Cosmetic products and ingredients are not subject to FDA premarket approval authority.”).

⁶³ BAILLIE-HAMILTON, *supra* note 51, at 100; see also FDA, *supra* note 62 (“Manufacturers are not required to register their cosmetic establishments, file data on ingredients, or report cosmetic-related injuries to FDA.”).

⁶⁴ ERICKSON, *supra* note 53, at 16; accord FDA, *supra* note 62 (“Recalls of cosmetics are voluntary actions taken by manufacturers or distributors.”).

In addition to the economic and physical harms they face as a result of Harrah's policy, women are subject to an unequal psychological burden. Whereas men are only told to keep short hair and nails, women must literally change their natural appearance. They must meet with image consultants to create a "facial template."⁶⁵ Unlike the men at Harrah's, the women were implicitly told that their faces had to be modified before they could be suitable for work. As Judge Pregerson put it, "[t]he inescapable message is that women's undoctored faces compare unfavorably to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption — and gender-based stereotype — that women's faces are incomplete, unattractive, or unprofessional without full makeup."⁶⁶ This message is perhaps the reason that Jespersen felt "very degraded and very demeaned."⁶⁷ Moreover, unlike men at Harrah's, Jespersen was subjected to daily requirements to look attractive. Being told every day that she was not attractive enough for work, despite having proven herself an excellent employee for twenty years, Jespersen felt a burden not shared by the men with whom she worked.⁶⁸

There is a plausible causal relationship between a requirement to wear makeup and the psychological burdens such a requirement may impose. By definition, putting on makeup is a superficial action. Makeup lies only on the surface; it does not cover an individual's thoughts, values, or beliefs. Makeup does not change a person's character or personality; it only changes her physical appearance. Makeup does not make a bartender better at serving drinks. The superficiality of makeup directs attention away from an employee's actual job performance. Deeper qualities, such as skill, competence, and work ethic, are much more significant in evaluating a person's work. It is precisely because a makeup requirement focuses on the superficial appearance of women that deeper qualities may be ignored.

Naomi Wolf observes that focus on "trivial concerns" like makeup can result in "shame, guilt, and denial" in women.⁶⁹ A woman who is told that she must wear makeup to be physically attractive, and that she must be physically attractive to be suitable for work, may experience exactly the kind of shame Wolf describes. Such messages are likely to cause insecurity because they communicate the harmful belief

⁶⁵ *Jespersen*, 444 F.3d at 1114 (Pregerson, J., dissenting).

⁶⁶ *Id.* at 1116.

⁶⁷ *Id.* at 1108 (majority opinion).

⁶⁸ This argument only addresses whether the psychological harms imposed on women constitute an unequal burden in violation of Title VII. It does not address whether such harms also constitute illegal gender stereotyping under Title VII.

⁶⁹ NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 9 (1991).

that a woman cannot be successful merely by excellent performance — she must also have the “right” look. By integrating physical appearance into the evaluation of work, Harrah’s sends the message that women are not good enough unless they are physically attractive by superficial social standards. This harmful message creates a psychological burden that men do not experience.

The psychological burden imposed on women is a result of the societal role of gender.⁷⁰ No authority need be cited for the claim that, in modern American culture, women are held to a narrower standard of beauty than men. It is a tragic but undeniable fact of American culture that women experience beauty differently than men. Requirements for women to wear makeup are more deeply intertwined with self-image than requirements for men to have short hair. The twenty minutes a woman spends every day applying makeup and styling her hair is twenty minutes in front of a mirror, and twenty minutes dedicated to nothing more than changing her appearance. One’s experience of one’s self, and of beauty, is heavily dependent on gender. Men at Harrah’s simply do not experience the economic, physical, and psychological burdens that are imposed on women. Not only do men face different standards, but they also experience those standards differently.

Gender inequality continues to permeate American culture. Women are still underrepresented in positions of power. Harrah’s is a company dominated by men.⁷¹ The makeup industry is similarly dominated by men.⁷² The federal judiciary is also dominated by men.⁷³ Perhaps because of the gross inequalities that pervade so much of American culture, the burdens imposed by makeup are underappreciated by employers, the makeup industry, and the federal judiciary alike. Hopefully, as we continue to progress toward gender equality, the harms imposed on women will receive greater recognition, and the federal judiciary may just be the best place to start.

⁷⁰ Cf. Phil Telfeyan, Comment, *Sexual Violence, Counting to Twenty, and the Metaphysics of Criminal Acts: An Analysis of Valentine v. Konteh*, 29 HARV. J.L. & GENDER 493, 499 (2006) (noting that, given the cultural effects of gender, sexual violence results in unique “physical, psychological, and emotional harms” on its victims and advocating legal recognition of these harms).

⁷¹ Ten out of eleven members of Harrah’s board of directors are men. Harrah’s Entm’t, Harrah’s Corporate Governance, <http://investor.harrahs.com/phoenix.zhtml?c=84772&p=irol-govCommComp> (last visited Nov. 12, 2006). There are no women on the executive committee, the human resources committee, or the corporate governance committee. *Id.*

⁷² Of the thirteen makeup and personal care companies in the Fortune 1000, only one has a female CEO: the Avon Corporation. Fortune 500 2006: Women CEOs for Fortune 500 Companies, <http://money.cnn.com/magazines/fortune/fortune500/womenceos> (last visited Nov. 12, 2006).

⁷³ As of 2003, approximately 16% of federal judges were women. AM. BAR ASS’N, CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY 5 (2006).