Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards under Title VII

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In July 2000, Darlene Jespersen faced a difficult choice. She could either comply with Harrah's Casino's ("Harrah's") requirement that all of its female beverage servers wear makeup, or she could risk losing her job.[1] Jespersen chose to violate her employer's requirement rather than bear the feelings of degradation that she felt accompanied wearing makeup.[2] Ultimately, Harrah's terminated Jespersen for her decision to violate the grooming policy by not wearing makeup.[3] Jespersen challenged her termination under Title VII of the Civil Rights Act of 1964, which makes it unlawful for employers to discriminate on the basis of sex.[4] Courts have said that Title VII is "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[5] Yet, this promise has not yet been realized when it comes to grooming standards. Thus far, courts have been unable to find a workable method for evaluating the harmful discrimination that often arises when employers utilize sex-differentiated grooming standards.[6]

In *Jespersen v. Harrah's Operating Co.*,[7] a three-judge panel of the United States Court of Appeals for the Ninth Circuit evaluated Harrah's grooming standard under the unequal burdens test, an approach which weighs the burdens imposed by a grooming standard

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1. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1078 (9th Cir. 2004), *aff'd en banc*, No. 03-15045, 2006 U.S. App. LEXIS 9307 (9th Cir. Apr. 14, 2006). After rehearing *Jespersen* en banc, the Ninth Circuit affirmed the three-judge panel's decision on April 14, 2006. Jespersen v. Harrah's Operating Co., No. 03-15045, 2006 U.S. App. LEXIS 9307, at *5 (9th Cir. Apr. 14, 2006). The facts cited in this Recent Development refer to the three-judge panel's decision and are substantially the same as those included in the en banc decision. *See id.* at *5–9.

2. *Jespersen*, 392 F.3d at 1078 ("[Jespersen] found that wearing makeup made her feel sick, degraded, exposed and violated.").

3. *Id.*

4. 42 U.S.C. § 2000e-2(a) (2000).

5. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (describing the interpretation of Title VII).

6. *See* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2556–59 (1994) (evaluating the various approaches adopted by courts when applying Title VII).

7. *Jespersen*, 392 F.3d 1076.

on one gender relative to the other.[8] The three-judge panel affirmed the district court's grant of summary judgment in favor of the defendant, Harrah's.[9]

The Ninth Circuit reheard *Jespersen* en banc on June 22, 2005 and affirmed the three-judge panel's decision on April 14, 2006.[10] In the en banc decision, the Ninth Circuit reaffirmed the unequal burdens approach to evaluating grooming standards. The Ninth Circuit went on to hold that appearance standards may be the subject of a Title VII claim for sex stereotyping but that Jespersen failed to raise an issue of triable fact under such a claim.[11] The en banc court took the opposite position from the three-judge panel, which had refused to extend the law regarding sex stereotyping to grooming cases.[12]

This Recent Development argues that the unequal burdens test, as applied by the three-judge panel in *Jespersen*,[13] is flawed in two critical ways and, therefore, does not protect employees from harmful sex discrimination. First, the test allows courts to balance away harmful discrimination by pointing to a corresponding burden on the other gender. Second, the unequal burdens test fails to consider the presence of harmful sex stereotypes, the real burden created by grooming standards. After discussing these flaws, this Recent Development argues that the en banc Ninth Circuit was correct in holding that a plaintiff could state a Title VII claim for sex stereotyping in a grooming standard case, but that the court should have done more to clarify the claim and to give it force. In conclusion, this Recent Development proposes a more stringent sex stereotyping evaluation and offers two guiding criteria for courts applying the test.

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8. *Id.* at 1081.

9. *Id.* at 1083.

10. Jespersen v. Harrah's Operating Co., No. 03-15045, 2006 U.S. App. LEXIS 9307 (9th Cir. Apr. 14, 2006).

11. *Id.* at *5.

12. *Jespersen*, 392 F.3d at 1083.

13. This Recent Development focuses on the unequal burdens analysis of the three-judge panel rather than on the en banc Ninth Circuit's analysis. The en banc court reaffirmed the Ninth Circuit's approach to unequal burdens but granted summary judgment against Jespersen on an evidentiary issue, rather than performing a full analysis. *See Jespersen*, 2006 U.S. App. LEXIS 9307, at *16–17 (holding that the time and cost of makeup is not within the category of facts of which courts take judicial notice). Meanwhile, the three-judge panel performed a more in-depth evaluation of the facts under the unequal burdens test. *See Jespersen*, 392 F.3d at 1080–82 (applying the unequal burdens test).

At issue in *Jespersen* was Harrah's grooming policy, which required female employees to wear face powder or concealer, blush, mascara, and lip color at all times.[14] The policy for male employees merely required that males not wear makeup, that hair be cut above the collar, and that fingernails be clean and trimmed.[15] Jespersen chose not to wear makeup, in violation of Harrah's mandatory policy, because the makeup policy "made her feel extremely uncomfortable and 'degraded' that she had to 'cover [her] face and become pretty or feminine' in order to keep her job."[16] Jespersen, who had worked for Harrah's Casino in Reno, Nevada, for twenty years as a bartender, was fired from her job for her choice not to comply with the company's makeup policy.[17]

In order to understand the *Jespersen* unequal burdens analysis, a discussion of the trends in evaluating grooming standards is useful. Initially, courts held that sex-specific grooming standards did not violate Title VII because they did not involve "immutable" characteristics but instead covered traits that could be "readily changed."[18] Next, courts established the slightly broader unequal burdens test. The unequal burdens test finds Title VII violations when an employer's grooming standard regulates mutable characteristics of one gender in a stricter way than those of the other gender.[19] The Ninth Circuit defined the test for these types of violations in *Frank v. United Airlines, Inc.*,[20] holding that "a sex differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment."[21] The unequal burden in *Frank* stemmed from a grooming standard that imposed stricter weight requirements on female flight attendants relative to their male

14. *Jespersen*, 392 F.3d at 1078 n.2. For a more complete discussion of Harrah's makeup policy, see *infra* note 33.

15. *Jespersen*, 392 F.3d at 1078 n.2.

16. Appellant's Corrected Opening Brief at 3, *Jespersen*, 392 F.3d 1076 (No. 03-15045).

17. *Jespersen*, 392 F.3d at 1078. Prior to her termination, Jespersen consistently received praise from supervisors and customers for her excellent service. *Id.* at 1077.

18. Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1125–26 (D.C. Cir. 1973) (holding that hair length requirements for men did not constitute unlawful sex discrimination under Title VII); *see also* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (holding that hair length standards did not touch upon an immutable characteristic or a protected right).

19. *See, e.g.*, Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 605–06 (9th Cir. 1982).

20. 216 F.3d 845 (9th Cir. 2000).

21. *Id.* at 855.

counterparts.[22] The *Frank* court held that the plaintiffs were entitled to summary judgment, not simply because the requirement for female employees was different from the requirement for male employees, but because the sex-differentiated standard was more burdensome on the female flight attendants.[23]

A majority of the three-judge panel in *Jespersen* adopted the *Frank* unequal burdens approach to determine whether Harrah's grooming standards violated Title VII.[24] The court evaluated the relative burdens of Harrah's policy by assessing "the actual impact that it ha[d] on both male and female employees."[25] In applying the unequal burdens test, the court compared the cost and time burdens necessary for male and female employees to comply with the grooming policy.[26]

Two important flaws, however, render this approach ineffective at adequately protecting employees from harmful sex discrimination. First, the unequal burdens approach allows harmful discrimination caused by sex-differentiated grooming standards to persist as long as the discriminatory burden is balanced against a corresponding burden on the other gender. Second, the unequal burdens test is artificial because it fails to address the persistence of sex stereotypes, the real burden created by grooming standards.

Craft v. Metromedia, Inc.[27] illustrates the first flaw in the unequal burdens approach. In *Craft*, the United States Court of Appeals for the Eighth Circuit held that the defendant, a local news station, did not discriminate against a female news anchor when its management criticized her appearance, imposed a "clothing calendar" on her, and forced her to meet with an image consultant.[28] The plaintiff was reassigned after failing to conform to the viewing audience's image of

22. *Id.* at 854 (explaining that the airline's policy required female flight attendants to maintain a body weight that corresponded to a relatively smaller frame category than male flight attendants).

23. *Id.* at 854–55. Title VII provides a defense for intentional gender discrimination if the characteristic is found to be "a bona fide occupational qualification" ("BFOQ"). 42 U.S.C. § 2000e-2(e)(1) (2000). The BFOQ defense, however, did not apply in *Jespersen*, *see* 392 F.3d 1076, 1079 n.3 (9th Cir. 2004), *aff'd en banc*, No. 03-15045, 2006 U.S. App. LEXIS 9307 (9th Cir. Apr. 14, 2006), and it is only available in very limited circumstances, *see, e.g.*, Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991) ("The BFOQ defense is written narrowly, and this Court has read it narrowly.").

24. *Jespersen*, 392 F.3d at 1081.

25. *Id.*

26. *Id.*

27. 766 F.2d 1205 (8th Cir. 1985).

28. *Id.* at 1208–09.

an anchorwoman and ultimately left the station.[29] The court's decision in *Craft* highlighted that the news station was concerned with the appearance of both male and female news anchors.[30] Because the *Craft* court was able to point to a grooming standard for men, in addition to the one so rigorously applied to the female plaintiff, it found that there was no Title VII violation.[31]

Two members of the three-judge panel in *Jespersen* adopted an approach similar to *Craft*, defining the unequal burdens test as "weighing the relative burdens that particular requirements impose on workers of one sex against the distinct requirements imposed on workers of the other sex."[32] The majority's application of the unequal burdens test, however, did not compare the makeup policy for women to the corresponding no-makeup policy for men.[33] Instead, the court evaluated the makeup policy for female employees against the entire grooming policy for male employees.[34] Approaching the issue in this way, the court held that Jespersen failed to produce evidence that the grooming standard imposed unequal burdens on female employees relative to their male counterparts.[35]

The *Jespersen* court's approach of comparing the makeup policy for female employees against the entire grooming policy for male employees exemplifies the first flaw of the unequal burdens test—that the test allows harmful discrimination to persist by balancing away the discriminatory burden. A strict adherence to the unequal burdens approach allows the most offensive sex discrimination to go unchecked so long as employees of the other gender are subjected to

29. *Id.* at 1209.

30. *Id.* at 1217 (accepting the district court's findings with regard to the relative policies for male and female news personnel).

31. *Id.* at 1209–10, 1217; *see* Bartlett, *supra* note 6, at 2563–65 (arguing that *Craft* exemplifies the difficulty of demonstrating that a female's appearance has been judged more stringently than a male's appearance).

32. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1081 (9th Cir. 2004), *aff'd en banc*, No. 03-15045, 2006 U.S. App. LEXIS 9307 (9th Cir. Apr. 14, 2006).

33. *Id.* The makeup policy to which Jespersen objected required that " 'makeup (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complimentary colors' and that 'lip color must be worn at all times.' " *Id.* at 1078 n.2. Women were also required to keep their hair "teased, curled, or styled." *Id.* at 1078 n.1. Meanwhile, male employees were only required to keep their hair above their shirt collar and to keep their hands clean and fingernails trimmed. *Id.*

34. The majority defined its task as weighing "the cost and time necessary for employees of each sex to comply with the policy." *Id.* at 1081. In so doing, the majority rejected the better approach proposed by Jespersen of measuring the makeup policy for female employees against the no-makeup policy for male employees. *Id.* If the court had adopted this more reasonable approach, then Harrah's grooming policy may have failed the unequal burdens test, in spite of the test's inherent flaws.

35. *Id.* at 1081.

comparable time and cost burdens. For example, a grooming standard requiring women to wear sexually revealing outfits, while requiring men to wear business casual attire clearly constitutes harmful discrimination. Under a strict application of the unequal burdens test, however, the policy would not violate Title VII because it does not impose a greater time or cost burden on one gender relative to the other.

As the dissent from the three-judge panel pointed out, by the majority's logic "a sex-differentiated appearance requirement that burdens women . . . could be permissible if the employer unfairly burdened men via another sex-differentiated appearance requirement."[36] By this logic, both men and women may be subject to grooming policies that are offensive and based on harmful sex stereotypes but would find no recourse under the unequal burdens test because the grooming policies would impact both genders equally.[37] Accordingly, the unequal burdens test leaves employees unprotected because courts can simply point to burdens imposed on the other sex to balance away harmful discrimination.[38]

The second major flaw in the unequal burdens test is that it fails to consider the harmful effects of sex stereotyping as one of the burdens faced by plaintiffs.[39] In assessing the unequal burdens on male and female employers, the majority of the three-judge panel only considered evidence of tangible burdens, such as the time and monetary cost associated with the makeup policy for females relative to the grooming policy for males.[40] While this approach of weighing the tangible burdens of a grooming standard may have been suitable in *Frank*, where female flight attendants took extreme measures to lose weight to comply with the policy,[41] it was ill-suited to address the harmful discrimination faced by the plaintiff in *Jespersen*. Although Jespersen presented evidence at trial regarding the cost and time

36. *Id.* at 1085 (Thomas, J., dissenting).

37. *See infra* text accompanying notes 50–52 (arguing that grooming standards based on harmful sex stereotypes perpetuate harmful societal preconceptions and should be invalidated under Title VII).

38. *See Jespersen*, 392 F.3d at 1085 (Thomas, J., dissenting) (offering the example that a more stringent weight limit for women may be permissible if there is an equivalent burden on men).

39. *See id.* at 1082–83 (majority opinion) (explaining the rationale for rejecting sex stereotyping as a basis for invalidating a grooming standard under Title VII).

40. *See id.* at 1081.

41. *See* Frank v. United Airlines, Inc., 216 F.3d 845, 848 (9th Cir. 2000) ("[P]laintiffs attempted to lose weight by various means, including severely restricting their caloric intake, using diuretics, and purging."); *see also infra* note 63.

burden of the makeup policy,[42] the real burden imposed by the requirement was that it "made her feel sick, degraded, exposed, and . . . 'forced her to be feminine.' "[43]

In *Price Waterhouse v. Hopkins*,[44] the United States Supreme Court explained that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[45] The plaintiff in *Price Waterhouse* was not promoted to partner partially because she was perceived as too "macho" by evaluating partners.[46] The partners told the plaintiff that her chances for promotion would improve if she acted in a more feminine manner, including wearing makeup and jewelry.[47] The Court held that it was unlawful for employers to evaluate employees by insisting that they conform to stereotypes associated with their gender.[48]

The three-judge panel in *Jespersen*, however, rejected the plaintiff's claim that *Price Waterhouse* provided an independent basis for invalidating the defendant's grooming standard regarding women.[49] In so holding, the court foreclosed the possibility of sex stereotyping entering into their evaluation of grooming standards and ignored the plaintiff's most compelling argument for discrimination in violation of Title VII.

Grooming standards that force compliance with gender stereotypes often perpetuate harmful societal preconceptions that place one gender, typically women, in a lower position.[50] As the dissent in *Jespersen* argued, the sex-differentiated grooming standards

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42. *Jespersen*, 392 F.3d at 1081.
43. *Id.* at 1077.
44. 490 U.S. 228 (1989).
45. *Id.* at 251.
46. *Id.* at 235.
47. *Id.*
48. *Id.* at 251.
49. *See* Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1083 (9th Cir. 2004), *aff'd en banc*, No. 03-15045, 2006 U.S. App. LEXIS 9307 (9th Cir. Apr. 14, 2006) (holding that *Price Waterhouse* should not be extended to apply to grooming cases). Some courts have, however, extended the holding in *Price Waterhouse* to sexual harassment cases. *See* Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (holding that a transsexual faced discrimination when he was criticized for failing to conform to sex stereotypes); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001) (holding that a waiter who was harassed for failing to conform to sex stereotypes stated a valid claim under Title VII).
50. *See* Bartlett, *supra* note 6, at 2556–59. *See generally* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 29 (2000) (arguing that grooming standards that conform to community standards are generally held not to be discriminatory, while those that do not conform to such standards are more likely to be found discriminatory).

promulgated by Harrah's denigrated women by forcing them to conform to sex stereotypes unrelated to their ability to perform job-related tasks.[51] All too often, courts assume that the costs on employees of grooming standards are "nominal" or "non-existent."[52] By weighing only time and cost burdens, courts ignore the feelings of degradation that accompany grooming standards based on harmful prejudices and stereotypes.

Carroll v. Talman Federal Savings & Loan Ass'n[53] illustrates the problems that arise when a company bases its grooming standards on harmful sex stereotypes. In *Carroll*, the employer required female employees to wear a five-item uniform, while male employees were required only to wear customary business attire.[54] The employer in *Carroll* justified the distinction by arguing that women were more likely to engage in "dress competition" with other women and that "women who have excellent business judgment somehow follow the fashion" and "don't seem to equate [choices of attire] with a matter of business judgment."[55] The Ninth Circuit observed that the proffered justifications indicated that the grooming standard was based on harmful sex stereotypes and held that the standard violated Title VII.[56]

In *Jespersen*, the defendant's grooming standard, requiring female employees to wear makeup, forced compliance with the stereotype that women should adorn their faces to be more attractive and to appear more feminine.[57] The requirement, however, went beyond merely mandating good grooming habits, as required by the grooming standard for men. Instead, the policy forced women to

51. *Jespersen*, 392 F.3d at 1086 (Thomas, J., dissenting).

52. Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1123 (D.C. Cir. 1973) (quoting Baker v. Cal. Land Title Co., 349 F. Supp. 235, 237–38 (C.D. Cal. 1972)).

53. 604 F.2d 1028 (9th Cir. 1979).

54. *Id.* at 1029. One could argue that the unequal burdens test would invalidate the grooming standard in *Carroll* because women were forced to bear a greater cost than men to comply with the sex-differentiated standard. *See id.* at 1030 (explaining that the cost of the uniform is treated as income to female employees for tax purposes and detailing the time burdens associated with cleaning and maintaining the uniform). The time and cost associated with the standard, however, were not the real burdens felt by female employees. The real discrimination was the message conveyed by the paternalistic policy—that women cannot be trusted to dress themselves in appropriate business attire—and the perpetuation of a harmful stereotype regarding women. *See supra* notes 50–52 and accompanying text.

55. *Carroll*, 604 F.2d at 1033.

56. *Id.*

57. *See generally* CHRISTINE L. WILLIAMS, GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS 63 (1989) (explaining that women marine recruits are required to wear makeup to preserve a sense of femininity).

project an image of femininity that many, like Jespersen, would find offensive and degrading.[58] Under the unequal burdens test, harmful sex stereotypes go unchecked and continue to adversely impact employees because the test does not consider whether the grooming policy perpetuates such harmful stereotypes.

The en banc Ninth Circuit was correct to reverse the three-judge panel's holding that a plaintiff could not state a valid Title VII claim for sex stereotyping in a grooming standards case.[59] By extending *Price Waterhouse* to apply to sex stereotyping in grooming cases,[60] the en banc Ninth Circuit mitigated some of the shortcomings of the unequal burdens approach. The en banc court, however, did not offer sufficient guidance for plaintiffs stating a claim of sex stereotyping under Title VII. Instead, the Ninth Circuit merely distinguished *Jespersen* from the facts of *Price Waterhouse* and stated that "[i]f a grooming standard ... amounts to impermissible stereotyping, something [the record of *Jespersen*] does not establish, a plaintiff ... may challenge that requirement under *Price Waterhouse*."[61] The en banc court adopted the correct rule but failed to provide sufficient guidance to give the rule any meaningful force.

This Recent Development proposes a more complete approach to evaluating grooming standards under Title VII. Applying *Price Waterhouse*, courts should examine grooming policies to determine whether those standards perpetuate outmoded, archaic sex stereotypes that serve to disadvantage or stigmatize one gender.[62] This proposed more stringent examination should precede any evaluation of relative cost or time burdens. In effect, courts would

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58. *See* Brief of Amici Curiae American Civil Liberties Union of Nevada et al. in Support of Plaintiff-Appellant, Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2003 WL 24133171, at *7–11 [hereinafter ACLU Brief] (discussing the historical significance of wearing makeup as an explanation for why many women perceive makeup requirements as "offensive and disempowering"); Bartlett, *supra* note 6, at 2547 (asserting that, while male grooming standards emphasize strength and competence, requirements for women force them to strike a balance between being too much like a woman and not being enough like one).

59. *See* Jespersen v. Harrah's Operating Co., No. 03-15045, 2006 U.S. App. LEXIS 9307, at *5 (9th Cir. Apr. 14, 2006) ("[W]e hold that appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping ....).

60. *See id.* at *18–22 (discussing the application of *Price Waterhouse* to the facts of *Jespersen*).

61. *Id.* at *21–22.

62. *See* Craft v. Metromedia, Inc., 766 F.2d 1205, 1215 (8th Cir. 1985) ("[T]he primary thrust of Title VII ... is to prompt employers to 'discard outmoded sex stereotypes posing distinct employment disadvantages for one sex.' " (quoting Knott v. Mo. Pac. R.R., 527 F.2d 1249, 1251 (8th Cir. 1975))); Bartlett, *supra* note 6, at 2569.

utilize a two-prong test in which they first would evaluate grooming standards to determine whether they perpetuate harmful stereotypes and second would perform the traditional unequal burdens test, weighing the costs and burdens imposed by the sex-differentiated grooming standards.[63] Failure to satisfy either prong of the test would constitute a violation of Title VII.

Furthermore, this Recent Development offers two guiding criteria to reduce potential inconsistency and narrow the focus of the evaluation for sex stereotyping in grooming standard cases. First, when community standards are used to justify a sex-differentiated grooming requirement, courts should look to the root or historical basis of the community standard. If this investigation reveals that the requirement is based on a sex stereotype that is offensive or demeaning, the court should invalidate the standard under Title VII.[64] Second, courts should evaluate the degree to which the sex-differentiated grooming standard impairs the employee's ability to complete job-related tasks.[65] These two guiding criteria will hone the proposed more stringent sex stereotype evaluation to weed out grooming standards based on harmful sex stereotypes, while leaving benign sex-differentiated grooming standards untouched. Now that

63. This Recent Development does not argue that the proposed approach should entirely supplant the unequal burdens test because the test is useful in the situation where the tangible burdens of a grooming standard are more onerous for one gender relative to the other, similar to the example of the flight attendants from *Frank v. United Airlines*, 216 F.3d 845, 848 (9th Cir. 2000). *See supra* notes 22, 41 and accompanying text.

64. *See* ACLU Brief, *supra* note 58, at *6–11 (proposing that norms should be evaluated for their cultural meanings). There are several social science authorities available that discuss the historical basis of the community standard that women should wear makeup. *See* KATHY PEISS, HOPE IN A JAR: THE MAKING OF AMERICA'S BEAUTY CULTURE 7–8 (1998) (presenting a balanced comparison of beauty as a commercial myth); NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN 12–14 (1991) (describing the "beauty myth" as being about "politics, finance, and sexual repression"). These types of sources would be useful to courts in performing the proposed investigation into whether a grooming requirement is based on harmful sex stereotypes. See ACLU Brief, *supra* note 58, at *7–11, for an example of how these authorities may be useful to understanding the historical basis of a grooming requirement. There will certainly be cases, however, where this type of social science authority is unavailable. In those cases, and even in cases where there are such sources, courts will be forced to make subjective determinations. While these determinations may be criticized as unjustifiably subjective, they are the very type of judgments that courts are called upon to make all the time.

65. *See generally* Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295 (1997) (arguing that requiring female flight attendants to wear high heels poses a significant health risk and may constitute sex discrimination under Title VII).

the Ninth Circuit recognizes a claim for sex stereotyping, it should adopt these guiding criteria to give the claim meaning and force.

A comparison of two common appearance standards illustrates the usefulness of the first criteria. Employers often require male employees to wear ties and business suits. This attire was traditionally worn to convey confidence and command respect.[66] As such, a requirement mandating that men wear ties and suits—while clearly based on a sex-specific stereotype—does not demean or stigmatize the gender but instead is a relatively benign requirement.[67] On the other hand, an appearance standard requiring women to wear skirts may be based on stereotypes that women should be relegated to a more passive role in business or, worse, that women should have a certain sexual appeal.[68] Accordingly, courts should view the skirt requirement, where the underlying basis for the distinction may demean one gender, more skeptically than those, like the tie requirement, that do not have such harmful roots.[69]

Moving to the second guiding criteria, the en banc Ninth Circuit in *Jespersen* held that Jespersen was not a case where the grooming standard tended to stereotype women as sex objects.[70] In support of that holding, the en banc court distinguished *Jespersen* from *Equal Employment Opportunity Commission v. Sage Realty Corp.*,[71] a case that invalidated a grooming standard because it impeded the plaintiff's ability to do her job.[72] In *Sage Realty*, the plaintiff, a lobby attendant, was required to wear a uniform that was too revealing and

66. Bartlett, *supra* note 6, at 2547 ("Throughout European history, men's clothing has emphasized strength and competence . . . .").

67. *See, e.g.*, Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755 (9th Cir. 1977) (holding that requiring employees to wear ties is not discrimination under Title VII).

68. *See* Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1419 (1992) ("[E]mployer bans on wearing pants to work are based almost entirely on sex stereotypes: that women are less capable than men, that they are better suited for less active or assertive roles, that women must do more to appear serious and business-like . . . .").

69. In an amicus brief filed in support of Jespersen, the ACLU and others argued that

> [c]onventions about male appearance and grooming, e.g., that men should have short hair, and not wear makeup or jewelry, serve to reinforce stereotypes of men as functional, efficient and competent, rather than ornamental. In contrast, conventions about female appearance and grooming—for example, that women should wear makeup and style their hair carefully—serve to reinforce stereotypes of women as decorative and ornamental.

ACLU Brief, *supra* note 58, at *27.

70. *Id.* at *22.

71. 507 F. Supp. 599 (S.D.N.Y. 1981).

72. *Id.* at 605.

consequently impaired her ability to perform her job by subjecting her to harassment.[73] The uniform the plaintiff's employer required her to wear was too short and left her thighs and buttocks exposed.[74] The court in *Sage Realty* held that the defendant's uniform requirement constituted unlawful discrimination under Title VII.[75]

In *Jespersen*, the en banc Ninth Circuit compared Harrah's uniform requirement to the uniform required in *Sage Realty* and held that Harrah's "Personal Best" policy does not "indicate any discriminatory or sexually stereotypical intent on the part of Harrah's."[76] *Sage Realty*, however, should serve as an extreme example of when courts should be on notice for unlawful discrimination due to a grooming standard that makes it difficult for any employee to perform her job.[77] Surely a plaintiff does not have to show that a grooming standard left her exposed to the public before stating a claim for sex stereotyping under Title VII. The en banc Ninth Circuit was right to evaluate the degree to which a grooming standard prevented the plaintiff from performing job related tasks, but the court should have performed a more probing analysis of the grooming requirement rather than simply comparing the policy to the egregious conduct of the employer in *Sage Realty*.

There are several potential criticisms of the proposed more stringent sex stereotype evaluation. First, critics may argue that the proposed test is not useful because it requires courts to make a subjective determination as to what constitutes a harmful sex stereotype.[78] As a result, courts may reach inconsistent results in determining the meaning of harmful sex stereotype under Title VII. Courts, however, make subjective evaluations all the time. Applying the proposed guiding criteria will help narrow the courts' focus and reduce subjectivity. The en banc Ninth Circuit predicts that as the

73. *Id.*

74. *Id.* at 604.

75. *Id.* at 611.

76. Jespersen v. Harrah's Operating Co., No. 03-15045, 2006 U.S. App. LEXIS 9307, at *23 (9th Cir. Apr. 14, 2006). The court's analysis is meaningless because it compares Harrah's requirement that beverage servers wear a unisex uniform to *Sage Realty* rather than analyzing the makeup requirement, which is the focus of Jespersen's claim. *See id.*

77. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22 . . . ."); Frank v. United Airlines, Inc., 216 F.3d 845, 855 (9th Cir. 2000) (arguing that weight requirements impair emergency response).

78. *See generally* Bartlett, *supra* note 6, at 2556–65 (evaluating the various approaches courts have taken to challenges of grooming standards).

law on sex stereotyping in grooming cases progresses, claims will be refined and standards will be come clearer over time.[79]

Second, critics may contend that extending the precedent of *Price Waterhouse* to cases concerning grooming standards would result in an overly broad prohibition on the use of any sex stereotype in the formation of appearance standards.[80] Presumably, all sex-differentiated grooming standards are based on some form of sex stereotype or community standard. Consequently, a blanket rule against the use of such stereotypes would eliminate requirements based on harmful stereotypes, as well as those based on community standards that may be useful and not harmful at all.[81] The proposed evaluation, however, does not offer a blanket prohibition. Rather, applying the proposed guiding criteria, courts would focus more narrowly on harmful discrimination while leaving more benign grooming standards untouched.

Finally, another criticism of the proposed test, which is not directly addressed by the guiding criteria, is that the test unjustly impairs an employer's ability to run her own business and to control the company's public image.[82] In the past, courts have highlighted this consideration, recognizing that "perhaps no facet of business life is more important than a company's place in public estimation."[83] These courts have held that grooming standards fall within a business's important ability to control the image it projects to the community.[84] In *Jespersen*, Harrah's argued that the makeup requirement, as part of its Personal Best program, was intended to

79. *See Jespersen*, 2006 U.S. App. LEXIS 9307, at *25 (predicting that as claims of sex stereotyping in grooming cases are considered over time the bases for such claims will be "refined as the law in the area evolves").

80. *See* Appellee's Answering Brief at 36–38, *Jespersen*, 392 F.3d 1076 (9th Cir. 2005) (No. 03-15045) (contending that the argument for extending *Price Waterhouse* amounts to an attempt to create an asexual workplace by using Title VII to eradicate all sex stereotypes and is, therefore, against public policy).

81. *E.g.*, Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1087 (5th Cir. 1975) (stating that a short haircut requirement came in response to a pop festival in the area that soured the attitude of customers toward "long-haired males"); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1117 (D.C. Cir. 1973) (stating that a prohibition on long hair came in direct response to customer complaints regarding careless grooming).

82. *See* Brief of the Equal Employment Advisory Council as Amicus Curiae on Rehearing En Banc in Support of Defendant-Appellee and in Support of Affirmance, Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2005 WL 1501597, at *8 ("Projecting a positive, professional image is of vital importance to most employers, particularly in today's highly competitive business environments."); Bartlett, *supra* note 6, at 2553–54 (discussing the employer's potential "appearance interest" in its employees).

83. *Fagan*, 481 F.2d at 1124–25.

84. *Id.*

create a "brand standard of excellence" throughout its casinos.[85] Applying the reasoning of previous court decisions, it would follow that Harrah's should receive a degree of deference in crafting its grooming standards and in "running its own shop."[86]

As a matter of policy, however, sex-differentiated grooming standards should not be entitled to such deference when they perpetuate harmful sex stereotypes. Rather, courts must intervene when businesses base grooming standards on community expectations that are archaic or outmoded.[87] If courts continue to give businesses deference to conform to community expectations that perpetuate harmful sex stereotypes, then these stereotypes will persist, and the private biases of the community will be allowed to dictate the outcome in discrimination cases.[88] The proposed first prong evaluation attempts to distinguish between grooming standards based on benign community standards and those that are based on harmful stereotypes. Given the risk of perpetuating damaging societal preconceptions, if a court finds that a grooming standard is founded on a harmful stereotype or inhibits an employee's job performance, it should not defer to the employer's argument that such policies are in place simply to meet community expectations.

In order to illustrate the practical application of the more stringent sex stereotyping evaluation, it is useful to explore the facts of *Jespersen* under the proposed test. The first step, applying the first of two proposed guiding criteria, would be to determine whether Harrah's makeup policy was founded on a sex stereotype and to explore the historical origin or basis of that stereotype.[89] Under the first criteria, in arguing that the policy is not grounded on a harmful stereotype, Harrah's may contend that the makeup requirement is simply meant to reflect or enhance the natural beauty of female

85. *Jespersen*, 392 F.3d at 1077–78. Trade groups argued that Harrah's has a greater interest in requiring employees to wear makeup, given the nature of customer expectations in the casino industry and in a city like Reno, Nevada. *See* Brief of Amici Curiae Council for Employment Law Equity et al. in Support of Defendant-Appellee, *Jespersen*, 392 F.3d 1076 (No. 03-15045), 2003 WL 22340442, at *10.

86. *See Willingham*, 507 F.2d at 1092.

87. *See supra* note 50 and accompanying text (arguing that sex stereotypes are perpetuated if they are allowed to persist in the form of grooming standards).

88. Harmful stereotypes are perpetuated when casino owners require female bartenders to wear makeup because patrons expect them to be "dolled up" when they come to drink. *See Jespersen*, 392 F.3d at 1077 (explaining that the plaintiff felt that wearing makeup " 'forced her to be feminine' and to become 'dolled up' like a sexual object").

89. *See supra* notes 62–63 and accompanying text.

employees.[90] Makeup requirements, however, are typically grounded on a stereotype that women should be ornamental and feminine in appearance, a community expectation that is archaic and offensive to many.[91] Judge Pregerson's analysis, in dissent, further illustrates the application of the first criteria. Judge Pregerson argued that Harrah's makeup policy was based on a "cultural assumption . . . that women's faces are incomplete, unattractive, or unprofessional without full makeup."[92]

Moving to the second criteria, one must next determine whether the makeup policy hinders female bartenders in the performance of job-related tasks.[93] Jespersen argued that her ability to handle unruly patrons was compromised by the makeup requirement.[94] According to Jespersen, the presence of makeup "took away her credibility" with the customers.[95] One could imagine a scenario, similar to the one in *Sage Realty*, where a female bartender was subjected to harassment from male customers because a makeup requirement required her to look ornamental or sexually appealing.[96] Accordingly, the impairment of an employee's ability to perform job-related tasks should raise the court's awareness to the potential presence of unlawful discrimination.

If the Ninth Circuit had considered *Jespersen* under the proposed sex stereotyping evaluation, it should have found that the district court erred in granting summary judgment to the defendant.[97] Applying the proposed test, Jespersen, as demonstrated above, met

90. Harrah's potential argument is somewhat unpersuasive because the policy is highly specific as to what it requires of female employees. *See supra* note 33.

91. *See* ACLU Brief, *supra* note 58, at *11 ("[B]eing forced to wear makeup at work has a long-standing social and historical significance that is specifically sex-linked and is deeply offensive and disempowering to many women.").

92. Jespersen v. Harrah's Operating Co., No. 03-150145, 2006 U.S. App. LEXIS 9307, at *36 (9th Cir. Apr. 14, 2006) (Pregerson, J., dissenting). Judge Kozinski referred to the concept that women should wear makeup as a "cultural artifact." *Id.* at * 40 (Kozinski, J., dissenting).

93. *See supra* notes 65, 70–77 and accompanying text.

94. *Jespersen*, 392 F.3d at 1077.

95. *Id.*

96. *See supra* notes 74–75 and accompanying text.

97. While the approach proposed by this Recent Development retains the unequal burdens evaluation, the facts of *Jespersen* are not reevaluated here under the second prong of the test. As explained above, the unequal burdens approach is retained for the narrow situation where the tangible burdens of a grooming policy are more onerous for one gender relative to the other. *See supra* note 63. In dissent, Judge Kozinski argued that Jespersen raised a triable issue of fact under the unequal burdens test. *See Jespersen*, 2006 U.S. App. LEXIS 9307, at *37 (Kozinski, J., dissenting) (contending that the court should take judicial notice of the time and cost burdens associated with the makeup requirement).

her burden of proof by raising an issue of material fact for trial.[98] In dissent, Judge Pregerson argued that Harrah's grooming policy was motivated by sex stereotyping and, therefore, violated Title VII.[99] As the law of sex stereotyping in grooming cases progresses, the Ninth Circuit should adopt an approach similar to the one proposed in this Recent Development so that plaintiffs have access to a meaningful claim in the area.

In order to fully realize the promise of Title VII, courts must adopt a more effective approach to evaluating sex-differentiated grooming standards. The *Jespersen* unequal burdens approach is rendered ineffective when courts balance out potentially harmful discrimination by pointing to corresponding burdens imposed on the other gender. Furthermore, the unequal burdens test, as applied by the three-judge panel in *Jespersen*, fails to consider sex stereotyping, which is the most common form of harmful discrimination present in grooming standard cases.

A better approach would be to perform a meaningful evaluation of the degree to which requirements perpetuate harmful sex stereotypes. Such an evaluation should look for both for the historical root underlying the sex-differentiated standard and also any impairment of the employee's ability to perform job-related tasks. Courts must reform their approach so that employees like Darlene Jespersen are not forced to decide between sacrificing their career or conforming to stereotypes that they feel are harmful to themselves and their gender.

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98. *See Jespersen*, 392 F.3d at 1079 (explaining the burden of proof for surviving a motion for summary judgment as raising a genuine issue of material fact).

99. *Jespersen*, 2006 U.S. App. LEXIS 9307, at *27 (Pregerson, J., dissenting).