

in this issue:

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Female bartender's termination for failure to wear makeup as required by her employer's dress and grooming standards was upheld by the Ninth Circuit Court of Appeals.

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Makeup Rule Upheld By Ninth Circuit

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On December 28, 2004, the Ninth Circuit Court of Appeals in a 2-1 decision affirmed the dismissal of a female bartender's termination for failing to comply with her employer's dress and grooming standards, which included a requirement that female bartenders wear makeup. *Jespersen v. Harrah's Operating Company, Inc.*, 9th Cir., No. 03-15045, 12/28/04. The decision upholds the right of employers to enforce reasonable dress and grooming standards as long as they do not impose unequal burdens on either sex.

Factual Background

Jespersen was a bartender at Harrah's Casino in Reno, Nevada, for nearly 20 years. She was an outstanding employee, which was recognized by Jespersen's supervisors and the customers she served.

Throughout the 1980s and 90s Harrah's encouraged its female beverage servers to wear makeup, but wearing makeup was not a formal requirement. Although Jespersen never cared for makeup, she tried wearing it for a short period of time during the 1980s. After a few weeks, Jespersen stopped wearing makeup because she disliked the way it made her feel, including a feeling that she was being forced to be feminine.

In February 2000, Harrah's implemented its "Beverage Department Image Transformation" program at 20 Harrah's locations, including its casino in Reno. The goal of the program was to create a "brand standard of excellence" throughout Harrah's operations, with an emphasis on guest service positions. The program imposed specific "appearance standards" on employees in guest services, including heightened requirements for beverage servers (i.e., cocktail servers, bartenders, and barbacks). All beverage servers were required to be "well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform." In addition to these general appearance

standards applicable to both sexes, there were gender-specific standards for male and female beverage servers. Female beverage servers were required to wear stockings and nail polish, and they were required to wear their hair "teased, curled, or styled." Male beverage servers were prohibited from wearing makeup or nail polish, and they were required to maintain short haircuts and neatly trimmed fingernails. Jespersen acknowledged receipt of the policy and committed to adhere to the appearance standards in March 2000.

Shortly thereafter, the standards were modified to include a requirement that all female beverage servers wear makeup, including foundation/concealer and/or face powder, blush, mascara, and lip color. Jespersen refused to comply with the policy. She was given 30 days to apply for a new position. Jespersen refused to apply for a new position, and she was terminated. Jespersen filed suit against Harrah's alleging that the makeup requirement for female beverage servers constituted disparate treatment sex discrimination in violation of 42 U.S.C. § 2000e-2(a) ("Title VII"). The district court granted Harrah's motion for summary judgment, holding that the appearance standards were not violative of Title VII because (1) they did not discriminate against Jespersen on the basis of "immutable characteristics" associated with her sex, and (2) they imposed equal burdens on both sexes. Jespersen appealed.

The Court's Analysis

In affirming the district court's dismissal of the case, the Ninth Circuit looked at its historical treatment of sex-differentiated grooming and appearance standards. In the 1970s, the court held that such standards were entirely outside the purview of Title VII because Congress intended that Title VII only prohibit discrimination based on "immutable" characteristics. On the other hand, grooming and dress standards that

regulate “mutable” characteristics, such as hair length, were deemed distinctions based on appearance, not sex, and therefore not discriminatory.

In later cases, the Ninth Circuit recognized that an employer’s imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination even where the appearance standards regulate only “mutable” characteristics such as weight. For example, weight restrictions that applied to both men and women, but applied a more strict weight limitation on women amounted to sex discrimination. The court held that “[a] sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment . . .” In other words, “Although employers are free to adopt different appearance standards for each sex, they may not adopt standards that impose a greater burden on one sex than the other.”

In evaluating Harrah’s appearance standards, the court recognized that it had not had the occasion to apply the “unequal burdens” test to gender-differentiated dress and grooming requirements. Nevertheless, to evaluate the burdens imposed by the appearance standards the court had to assess the actual impact the standards have on both male and female employees, including weighing the cost and time necessary for employees of each sex to comply with the policy. Harrah’s contended that the burden of the makeup requirement must be evaluated with reference to all of the requirements of the policy, including those that burden men only, such as the requirement that men maintain short haircuts and neatly trimmed nails. Jespersen contended that the only meaningful appearance standard against which the makeup requirement can be measured is the corresponding “no makeup” requirement for men. The court agreed with Harrah’s approach.

As to the burdens imposed by the policy, Jespersen contended that the makeup requirement imposes “innumerable” tangible burdens on women that men do not share because cosmetics can cost hundreds of dollars per year and putting on makeup requires a significant investment in time. The court found, however, that there was no evidence in the record to support the contention, including the burdens the policy imposes on male bartenders. Furthermore, the court refused to allow the case to go to a jury under a theory that a jury could apply simple common sense without specific supporting evidence. In other words, the court found that Jespersen failed to meet her burden of production, and, thus, her case was properly dismissed.

Jespersen also contended that even if Harrah’s makeup requirement survives the “unequal

burdens” test, her claim should be analyzed under the sex stereotyping theory derived from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the Supreme Court held that an employer may not force its employees to conform to the set stereotype associated with their gender as a condition of their employment. Although the Ninth Circuit recognized that it had applied the reasoning of *Price Waterhouse* to sexual harassment cases, it had not done so in the context of appearance and grooming standards cases and declined to do so in Jespersen’s case. Furthermore, *Price Waterhouse* did not address employer imposed sex-differentiated appearance and grooming standards, nor had the Ninth Circuit’s subsequent cases “invalidated the ‘unequal burdens’ test as a means of assessing whether sex-differentiated appearance standards discriminate on the basis of sex.” Accordingly, the Ninth Circuit affirmed the dismissal of Jespersen’s case.

Lessons Learned

Employers can take comfort that their reasonable appearance standards will not be second-guessed by the courts as long as they are applied evenhandedly. Courts have also required that gender specific standards be based on accepted social norms. Accordingly, appearance policies should (1) apply to both sexes, with reasonable distinctions as necessary, and (2) not be unduly burdensome to one sex.

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