

## Ninth Circuit Affirms Ruling Upholding Makeup Requirement

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In the Fall of 2005, we reported on a ruling of the Ninth Circuit Court of Appeals in *Jespersen v. Harrah's Operating Company, Ltd.*, wherein the court determined that a former employee of Harrah's Casino had failed to present sufficient evidence that the casino's dress and grooming standards policy ran afoul of federal anti-discrimination laws by either placing an unequal burden on women or imposing impermissible gender stereotyping. On April 14, 2006, the Ninth Circuit affirmed its prior holding. However, the court explicitly cautioned employers that it may reach a different decision when faced with future challenges to sex-differentiated dress and grooming standards for employees. *Jespersen v. Harrah's Operating Company, Ltd.*

Darlene Jespersen had been employed as a bartender at Harrah's Casino for approximately twenty years when, in 2000, Harrah's Casino implemented a new dress and grooming standards policy, the "Personal Best" program. Although the "Personal Best" program set forth standards that applied equally to both male and female bartenders, the program also contained some sex-differentiated standards. Relative to Jespersen's lawsuit, the "Personal Best" program required female bartenders to wear makeup, stating: "Makeup (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times." Conversely, male bartenders were prohibited from wearing any facial makeup.

Jespersen was terminated after she refused to comply with the makeup policy and refused to apply for a position that did not require makeup under the "Personal Best" program. Subsequent to her termination, Jespersen filed suit against Harrah's Casino, alleging that the "Personal Best" program discriminated against female bartenders by: "(1) subjecting them to terms and conditions of employment to which men are not similarly subjected; and (2) requiring that women conform to sex-based stereotypes as a term and condition of employment."

In addressing Jespersen's first claim, the Ninth Circuit held that an employer may not create dress and grooming standards that impose unequal burdens on male and female employees. Jespersen, however, failed to present any evidence to the court that the requirements of the "Personal Best" program were significantly more time consuming or costly for female bartenders than for male bartenders. Affirming its prior ruling, the court concluded that the "Personal Best" program's sex-differentiated dress and grooming standards alone, without any further evidence of an unequal burden imposed on female bartenders, failed to establish the necessary elements of her case of sex discrimination.



The court rejected Jespersen's contention that the "Personal Best" program imposed an impermissible gender stereotype on the grounds that the program did "not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender." Furthermore, Jespersen's subjective, negative reaction to the makeup policy was insufficient to

establish that the "Personal Best" program was motivated by gender stereotyping.

The holding in *Jespersen* makes it clear that dress and grooming standards that set forth sex differentiated standards are not, in and of themselves, discriminatory. That said, employers should not be too quick to view Jespersen as a victory. Rather, employers should take proper notice of the warning issued by the Ninth Circuit and exercise extreme caution when implementing or enforcing gender specific dress and grooming standards. For review of workplace dress and grooming standards, please contact an attorney at Cook Brown, LLP. ■