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## If You Are Attractive and You Know It, Please Apply: Appearance-Based Discrimination and Employers' Discretion

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# IF YOU ARE ATTRACTIVE AND YOU KNOW IT, PLEASE APPLY: APPEARANCE BASED DISCRIMINATION AND EMPLOYERS' DISCRETION

## I. INTRODUCTION

*The world is governed more by appearance than reality, and therefore it is fully as necessary to seem to know something, as to know it in reality.<sup>1</sup>*

Think back to your first day of school as a child. More than likely you dressed in your "back to school" outfit in an effort to look your best and make a big impression because you realized, even as a child, that appearance mattered. Once you made it to high school, the importance of appearance probably became even more prevalent, and you likely realized that outward appearance plays a significant role in everyday life. Magazines and television programs that illustrate America's obsession with appearance overrun society. Consequently, employers realize that looks do matter, and their hiring decisions reflect this simple fact. However, the following question arises: do employers have the right to use appearance as a hiring criterion?

Imagine that you are the owner and hiring director of a world-renowned modeling agency. One day two young females bring you their modeling portfolios in hopes of being signed to your agency. In your expert opinion, you find one of the girls very attractive and marketable and the other girl less appealing. Both girls are of the same age, race, ethnicity, and size, but you agree to represent only the more beautiful girl because it is essential to the modeling business to employ attractive models. The less attractive girl is simply not qualified for the position because she does not have the appearance that your agency requires. Here, your decision to use attractiveness as hiring criteria is reasonable and completely within your discretion.<sup>2</sup>

Now, imagine instead that you are responsible for hiring factory workers at a car manufacturing plant. Two qualified young women apply for an open position and come in for an interview. Despite the fact that they seem equally capable to perform the job, you would rather hire the applicant that you find more attractive because society taught you to

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<sup>1</sup> Letter from Daniel Webster (Oct. 6, 1803), *reprinted in* THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER (Fletcher Webster ed., 1857).

<sup>2</sup> See *infra* Part II.D 2 (explaining employers' rights and defenses under Title VII).

associate beauty with other favorable characteristics.<sup>3</sup> However, in this situation you do not have the discretionary power to make employment decisions based on attractiveness because appearance is unrelated to the goal of your business.<sup>4</sup> As a result, you must hire the most qualified individual, regardless of appearance, and attractiveness is not a permissible hiring criterion.

In short, employers have discretion to make appearance based hiring decisions when appearance is essential to the business. Nonetheless, in some situations employers purport the fundamental necessity of attractiveness, but cannot prove that it goes to the very essence of their business.<sup>5</sup> For example, hiring only attractive females as waitresses at a restaurant like Hooters is impermissible, as the primary job of the waitresses is to serve food, not display female sexuality.<sup>6</sup> Also, hiring only attractive salespeople at a store like Abercrombie and Fitch (“A&F”) is likely not permissible because an employee does not have to be attractive to greet customers and work a cash register.<sup>7</sup>

Currently, very few situations allow employers to successfully demonstrate that an attractive appearance is a necessary qualification.<sup>8</sup> This Note argues that the current laws must be expanded to give employers more discretion to decide when appearance is an essential characteristic that should be considered in hiring decisions. Appearance discrimination, or making employment decisions based on an applicant’s outward appearance, is permissible in the modeling scenario but not in the factory scenario. For many of the areas in between, in which employers consider attractiveness a necessary qualification, the law should afford more protection to employers. Thus, employers require clear guidelines for discretion in their hiring decisions so that they may project their image and hire qualified, attractive employees.

First, Part II of this Note examines the background of antidiscrimination law and explains why certain groups are granted

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<sup>3</sup> See *infra* Part II.C (discussing the pervasive effects an attractive appearance has in American society).

<sup>4</sup> See *infra* Part II.D 2 (describing the necessary requirements for an employer to effectively argue a BFOQ defense).

<sup>5</sup> See *infra* Part II.D 2.

<sup>6</sup> See *infra* Part II.D 2.

<sup>7</sup> See *infra* Part III.C 1 (detailing A&F’s options in regards to hiring decisions and possible defenses).

<sup>8</sup> See *infra* Part II.D 2 (explaining employer’s difficulty with the current defenses used to justify appearance discrimination).

protected status.<sup>9</sup> Next, the importance of appearance in America—in general and in the employment context—is discussed from the perspective of both mutable and immutable characteristics.<sup>10</sup> Then, this Note considers the current federal, state, and local remedies to appearance discrimination in turn.<sup>11</sup> This Note then provides a case study of one particular business to illustrate the current issue, *i.e.* discrimination based on attractiveness.<sup>12</sup> Subsequently, the focus of this Note shifts in Part III to analyzing the cost and benefits of an appearance discrimination statute.<sup>13</sup> Afterward, the detriments of such a statute are scrutinized.<sup>14</sup> Explaining the employer defenses and their inadequacies, this Note delves into the proposals of other commentators.<sup>15</sup> Finally, a modified version of a commonly used employer defense is suggested, along with other changes to the law that would provide employers more discretion in Part IV.<sup>16</sup> Part V briefly concludes by reiterating why a change in the law is necessary in order to protect employers.<sup>17</sup>

## II. BACKGROUND

Beginning with an explanation of the necessity of antidiscrimination laws, Part II.A provides a brief overview of the necessary criteria to make a group eligible for protected status.<sup>18</sup> Part II.B explores the various types of mutable characteristics that go hand-in-hand with appearance discrimination.<sup>19</sup> Part II.C delves generally into the role appearance plays in modern society and specifically into the relationship between physical attractiveness and employment.<sup>20</sup> Next, Part II.D outlines the various legal remedies currently available to victims of

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<sup>9</sup> See *infra* Part II.A (illustrating the reasons behind antidiscrimination law).

<sup>10</sup> See *infra* Parts II.B-C (discussing the difference between mutable characteristics and physical attractiveness).

<sup>11</sup> See *infra* Parts II.D-E (detailing the current laws concerning appearance discrimination).

<sup>12</sup> See *infra* Part II.F (explaining the A&F policy and its repercussions).

<sup>13</sup> See *infra* Part III.A (clarifying the advantages and disadvantages of changing the law).

<sup>14</sup> See *infra* Part III.B (explaining the shortcomings of an appearance discrimination statute).

<sup>15</sup> See *infra* Parts III.C-D (analyzing various employer justifications and experts' suggestions).

<sup>16</sup> See *infra* Part IV (suggesting a change in the current laws to benefit employers).

<sup>17</sup> See *infra* Part V (providing a brief summation of this Note).

<sup>18</sup> See *infra* Part II.A (explaining why certain groups are in need of appearance based discrimination protection).

<sup>19</sup> See *infra* Part II.B (outlining the types of mutable characteristics and clarifying the ways employers are allowed to react to those characteristics).

<sup>20</sup> See *infra* Part II.C (explaining the importance of appearance in American culture).

appearance discrimination under federal law.<sup>21</sup> Part II.E describes the current state and local remedies.<sup>22</sup> Finally, Part II.F discusses the current laws in relation to a specific business entity.<sup>23</sup>

A. *Antidiscrimination Laws: A Beautiful Thing*

Although it is appealing to believe that people base their judgments about others on internal characteristics such as integrity, character, and selflessness, such a utopian view of human nature is hardly realistic.<sup>24</sup> Undoubtedly, people make decisions based on exterior stereotypes and frequently form opinions supported solely by prejudices.<sup>25</sup> United States antidiscrimination law addresses the unfairness that stems from these realities.<sup>26</sup> Undeniably, even employers evaluate individuals on the basis of erroneous characteristics.<sup>27</sup> Consequently, federal antidiscrimination laws currently protect individuals on the basis of race,<sup>28</sup> sex,<sup>29</sup> age,<sup>30</sup> and

<sup>21</sup> See *infra* Part II.D (setting forth the process for linking appearance to other characteristics).

<sup>22</sup> See *infra* Part II.E (discussing the ways that state and local entities expanded antidiscrimination laws).

<sup>23</sup> See *infra* Part II.F (providing a case study on A&F).

<sup>24</sup> Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2036 (1986-1987) [hereinafter *Facial Discrimination*]. The author explains, “[t]o be human is to discriminate.” *Id.* The author also describes that in the realm of employment it is impermissible to use baseless judgments; therefore, antidiscrimination laws seek to protect certain groups from this sort of treatment. *Id.*; see also Lynn T. Vo, *A More Attractive Look at Physical Appearance based Discrimination: Filling the Gap in Appearance based Antidiscrimination Law*, 26 S. ILL. U. L.J. 339, 340 (2002) (suggesting that first impressions are predominately influenced by outward appearance and the characteristics that go along with a particular appearance).

<sup>25</sup> Elizabeth E. Theran, “Free To Be Arbitrary And . . . Capricious”: *Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL’Y 113, 134 (2001) (illustrating that people are judged based on their weight rather than more accurate characteristics that are truly representative of a person).

<sup>26</sup> Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8 (2000). Post illustrates an established goal of American antidiscrimination law as follows, “[a]ntidiscrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities.” *Id.*

<sup>27</sup> *Id.* at 14. Post explains that the more restricted employers are in their hiring decisions, the more likely they are to hire employees for “pure instrumental reason.” *Id.*

<sup>28</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000). Individuals are also protected on the basis of race, sex, color, national origin, and religion under this Act. *Id.*

<sup>29</sup> *Id.*; see also Post, *supra* note 26, at 14-15. Post explains that, in order to combat sex discrimination, American orchestras require auditions to take place behind opaque screens. *Id.* at 14. Furthermore, applicants may even be asked to remove their shoes or allow someone of the opposite sex to simulate footsteps so that the employment decision will only be based truly on the talent of the applicant. *Id.* at 14-15.

<sup>30</sup> Age Discrimination in Employment Act, 29 U.S.C. § 623 (2000).

disability.<sup>31</sup> Certain groups receive legal protections because history proves the unjustness and irrationality of denying individuals employment on the basis of the aforementioned immutable characteristics.<sup>32</sup> While these antidiscrimination laws are firmly entrenched in American jurisprudence, a movement to amend current laws to include appearance discrimination with these other traditionally protected groups exists.<sup>33</sup> Unwillingness to extend protection to those who choose to alter their appearance provokes less controversy than providing redress for characteristics that a person cannot change.<sup>34</sup> Thus, the relationship between discrimination and mutable characteristics must be analyzed separately from discrimination based on physical attractiveness.<sup>35</sup>

*B. Discrimination Based on Mutable Characteristics*<sup>36</sup>

Antidiscrimination law, like society, is changing.<sup>37</sup> Employers struggle with their hiring decisions because people frequently choose to

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<sup>31</sup> Americans with Disabilities Act, 42 U.S.C. § 12112 (2000).

<sup>32</sup> Hannah Fleener, *Looks Sell, But Are They Worth the Cost?: How Tolerating Looks-Based Discrimination Leads to Intolerable Discrimination*, 83 WASH. U. L.Q. 1295, 1300-01 (2005). Fleener explains that utilizing characteristics that do not tend to relate to job competence as decisive factors in hiring procedures is illogical. *Id.* at 1302-03. Fleener also argues that protecting individuals from racial discrimination is of the utmost importance because irrational decisions have long been made on the basis of race, which have perpetuated injustice and stigma in American society. *Id.* at 1300-01. As evidenced by the Reconstruction amendments to the U.S. Constitution, along with the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 racial classifications are subject to strict scrutiny because of their shamefully harmful and unfair results. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976).

<sup>33</sup> Jennifer Fowler-Hermes, *Appearance based Discrimination Claims under EEO Laws*, 75 FLA. B.J. 32, 32 n.4 (Apr. 2001).

<sup>34</sup> See *infra* Part II.B (explaining the relationship between mutable characteristics and antidiscrimination law).

<sup>35</sup> See *infra* Part II.C (discussing the important role physical attractiveness plays in society and its connection to antidiscrimination law).

<sup>36</sup> While mutable characteristics are those that individuals come about voluntarily, immutable characteristics consist of biological traits and unchangeable qualities. Jordan D. Bello, *Attractiveness as Hiring Criteria: Savvy Business Practice or Racial Discrimination?*, 8 J. GENDER RACE & JUST. 483, 486 (2004) (arguing against using attractiveness as hiring criteria).

<sup>37</sup> Michael W. Fox, *Piercings, Makeup, and Appearance: The Changing Face of Discrimination Law*, 69 TEX. B.J. 564, 564 (2006) (explaining that when antidiscrimination law was based solely on immutable characteristics there was no confusion about which individuals were included in protected categories; however, when litigation is based on appearances that are not considered immutable, plaintiffs must argue that they fit into one of the already protected categories).

express themselves by making choices about their appearances.<sup>38</sup> Such personal decisions as getting tattoos and piercings, wearing makeup, and having unconventional hairstyles may affect employment opportunities.<sup>39</sup>

Usually, employers can require employees to not expose tattoos while in the workplace.<sup>40</sup> For instance, in *Riggs v. City of Fort Worth*,<sup>41</sup> a police officer with numerous tattoos covering his arms and legs was required to cover them while he was on duty, despite his argument that this stifled his freedom of expression.<sup>42</sup> The court agreed with the police department that Riggs's tattoos were unprofessional and unprotected by law.<sup>43</sup> Similarly, in *Inturri v. City of Hartford*,<sup>44</sup> officers with tattoos were also forced to cover them because the court found that the city's interest

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<sup>38</sup> Post, *supra* note 26, at 6. Post points out that a balance must be struck between the self expression of the employee and the business image an employer seeks to display. *Id.* at 5-6. In 1992, Santa Cruz, California drafted an ordinance that addressed the issue of appearance discrimination. *Id.* at 2. The ordinance prompted newspaper columnists, employers, and employees alike to weigh in on the issue. *Id.* at 3-4. A restaurant owner proclaimed, "[i]f someone has 14 earrings in their ears and their nose—and who knows where else—and spiky green hair and smells like a skunk. . . I don't know why I have to hire them." *Id.* at 3. In contrast, an employee was very fond of the ordinance because "[i]t gets everyone down to an equal level." *Id.* at 4. Newspaper columnists mocked the ordinance claiming that ridiculous results would come from these laws, such as: Jewish employers would be forced to hire employees despite swastika tattoos, black employers would have to hire employees that expressed white supremacy on their clothing, and newspapers would need to employ journalists even if they chose to conduct interviews in drag. Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP & LAB. L. 476, 499 (2000).

<sup>39</sup> See generally Fox, *supra* note 37 (discussing various types of mutable characteristics and the legal consequences that flow from each).

<sup>40</sup> Gregory J. Kamer & Edwin A. Keller Jr., *Give Me \$5 Chips, a Jack and Coke – Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry*, 7 GAMING L. REV. 335, 338-39 (2003) (arguing that there could be situations in which an employee could argue that his tattoo must be displayed, even at work, for religious reasons). The approach courts take in balancing employees' rights to choose their mutable characteristics with the rights of public employers is substantially similar to the analysis for private employers. See *infra* notes 41-51 and accompanying text.

<sup>41</sup> *Riggs v. City of Fort Worth*, 229 F. Supp. 2d 572 (N.D. Tex. 2002).

<sup>42</sup> Fox, *supra* note 37, at 564 (giving descriptions of Riggs' tattoos and explaining Riggs' other unsuccessful attempts to prevail).

<sup>43</sup> *Riggs*, 229 F. Supp. 2d at 572. The court cited *Connick v. Myers*, 461 U.S. 138, 146 (1983), explaining, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 580 n.11. The court noted that Riggs's tattoos were an expression of his personal beliefs rather than an expression of a topic addressing a "legitimate public concern." *Id.* at 580-81 n.11.

<sup>44</sup> *Inturri v. City of Hartford*, 365 F. Supp. 2d 240 (D. Conn. 2005).

in promoting amicable race relations outweighed the officers' rights.<sup>45</sup> Further, in 2004, the U.S. District Court in Oregon determined that prison guards with "Brotherhood of the Strong" tattoos, symbolic of kinship amongst weightlifters, were not constitutionally protected.<sup>46</sup> Rather than considering whether tattoos were unprofessional or offensive, however, the Eighth Circuit simply found that tattoos are nothing more than "self expression" and, thus, were not entitled to constitutional protection.<sup>47</sup> Also, in *Swartzentruber v. Gunito Corp.*, a Ku Klux Klan member with a tattoo of a burning cross on his arm was forced to cover it even though he claimed that his religious beliefs would be infringed because the "'Firey Cross' tattooed on his arm is one of that [his] church's seven sacred symbols."<sup>48</sup> Finally, in *Cloutier v. Costco*, the court held that Costco had a valid interest in a workforce that portrays a professional appearance and image.<sup>49</sup> As a result, the store's policy prohibiting facial jewelry was permissible.<sup>50</sup>

It is apparent, therefore, that employers have the ability to enforce appearance standards that relate to characteristics that are not considered immutable, because employee appearance affects both the

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<sup>45</sup> *Id.* In *Inturri*, an applicable appearance regulation provided, "[t]he Chief of Police has the authority to order personnel to cover tattoos that are deemed offensive and/or presenting an unprofessional appearance." *Id.* at 243. Five officers had spider-web tattoos on their arms and when the police chief was informed that these tattoos could be considered symbolic of "race hatred of non-whites and Jews" he ordered the officers to cover their tattoos even though the officers explained that their particular tattoos were not intended to have any symbolic meaning whatsoever. *Id.* at 244-46. The court held that harmonious race relations between officers and between officers and the community were necessary; therefore, forcing the officers to cover their spider-web tattoos was rationally related to a legitimate interest. *Id.* at 251.

<sup>46</sup> *Montoya v. Giusto*, 2004 WL 3030104, at \*13 (D. Or. Nov. 24, 2004) (holding that the supposed brotherhood was not the type of "political, social, economic, educational, religious, or cultural" expression protected by the First Amendment).

<sup>47</sup> *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1307 n.4 (8th Cir. 1997).

<sup>48</sup> 99 F. Supp. 2d 976, 978-79 (N.D. Ind. 2000). The court explained that the plaintiff failed to prove that covering his tattoo adversely affected his religious belief. *Id.* The court further held that even if the plaintiff had established that his religion required him to display his tattoo he would have still lost because the threat, hatred, and violence associated with a burning cross is too severe to warrant protection. *Id.* See Fox, *supra* note 37, at 567-69, for a short summary on cases that involve makeup as a factor in appearance discrimination; see also Kamer, *supra* note 40, at 339-40, for a resource on issues relating to unconventional hairstyles.

<sup>49</sup> *Swartzentruber v. Gunito Corp.*, 390 F.3d 126, 136 (1st Cir. 2004), *cert denied*, 125 S. Ct. 2940 (2005) (explaining that Costco's decision was well within its discretion).

<sup>50</sup> *Id.*; see also *Kleinsorge v. Eyeland Corp.*, 2000 WL 124559, at \*2 (E.D. Pa. Jan. 31, 2000) (holding that it is permissible for employers to have different piercing regulations for men and women so long as the requirements were not contrary to traditional ideas or practices).

image and success of public and private employers.<sup>51</sup> Still, evaluating physical attractiveness as an immutable trait is necessary.

C. *Discrimination Based on Physical Attractiveness*

Beauty indisputably plays a significant role in our society, and although beauty is subjectively “in the eye of the beholder,” there is a common objective standard of what people generally find attractive.<sup>52</sup> To illustrate, consider the presidential debates between John F. Kennedy and Richard Nixon in which radio listeners thought Nixon was triumphant, whereas TV viewers thought the more attractive John F. Kennedy was the victor.<sup>53</sup> Likewise, consider the fact that the beautiful tennis player, Anna Kournikova, has yet to win a major singles championship.<sup>54</sup> Nonetheless, she receives considerably more attention and endorsements than more highly ranked players, despite the fact that the highest ranking she ever achieved was 37th.<sup>55</sup> To prove that looks do indeed matter, even in the employment context, *20/20* conducted an experiment in which two women with virtually identical resumes and behaviors applied for the same job.<sup>56</sup> Not surprisingly, the interviewer was friendlier to the more attractive applicant and extended the job offer

<sup>51</sup> See *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985) (holding that a television news co-anchor who was reassigned to a different position because of her appearance along with negative feedback from viewers was valid); see also Karen Zakrzewski, *The Prevalence of “Look”ism in Hiring Decisions: How Federal Law Should Be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 459-60 (2005) (explaining that because of beauty enhancing products, plastic surgery, gyms, and other services people view attractiveness as an accomplishment and thus distinguishing between what is a mutable characteristic between an immutable one is a daunting task).

<sup>52</sup> See generally Meg Gehrke, *Is Beauty the Beast?*, 4 S. CAL. REV. L. & WOMEN’S STUD. 221 (1994); see also Giam J. H. Langlois et al., *Maxims or Myths of Beauty? A Meta-Analytic and Theoretical Review*, PSYCHOL. BULL. 126, 390-423 (2000). After conducting a study of facial attractiveness, the article comes to three conclusions about beauty. Langlois et al., *supra*. First, there is a common standard of beauty that transcends cultures. *Id.* Second, attractive people are seen in a more positive light than unattractive people even by people who know them. *Id.* Third, attractive people have more positive qualities than unattractive people. *Id.*

<sup>53</sup> John Stossel, *Lookism: The Ugly Truth About Beauty*, (2006), <http://abcnews.go.com/2020/story?id=123853&page=1>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* Since beautiful women are given special treatment throughout their lives, they attain desirable traits and develop empowering feelings of self-confidence and self-reliance. M. Neil Browne & Andrea Giampetro-Meyer, *Many Paths to Justice: The Glass Ceiling, the Looking Glass, and Strategies for Getting to the Other Side*, 21 HOFSTRA LAB. & EMP. L.J. 61, 99 (2003). Attractiveness gives women a source of power, allows them to use their looks to their advantage, and even gives them a starting point to gain additional qualities that help them to succeed in business. *Id.* at 99-100.

<sup>56</sup> Stossel, *supra* note 53 (illustrating the importance of appearance).

to her; whereas, the less attractive applicant never even received a return phone call.<sup>57</sup>

When employers favor attractive applicants based on their appearance, some commentators consider it a legitimate factor because several positive qualities such as happiness and success are associated with attractiveness.<sup>58</sup> Additionally, social science shows that the employment realm is not the only arena in which attractive people are granted favorable treatment.<sup>59</sup> Even though attractiveness has benefits, studies indicate that attractive women are more likely to be subject to traditional stereotypes, harassment, and scrutiny, than unattractive women.<sup>60</sup> Yet, an economic study on beauty and employment found that “plain” people earned between five and ten percent less than “average-looking” people, who earned five percent less than “good-looking” people.<sup>61</sup>

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<sup>57</sup> Stossel, *supra* note 53. A similar test was conducted with male actors to determine whether or not gender makes a difference in appearance discrimination; yet, once again, the more attractive applicant prevailed. Stossel, *supra* note 53.

<sup>58</sup> Elizabeth M. Adamitis, Note, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 196-97 (2000). Adamitis contends that judging based on appearances is prevalent from childhood through adulthood. *Id.* at 197. See also Comila Shahani-Denning, *Physical Attractiveness Bias in Hiring: What is Beautiful is Good* (2003), [http://www.hofstra.edu/Administrator/Provost/OSRP/OSRP\\_Horizons\\_Archive\\_Spring2003.cfm](http://www.hofstra.edu/Administrator/Provost/OSRP/OSRP_Horizons_Archive_Spring2003.cfm) at 14; see also Louis Tietje & Steven Cresap, *Is Lookism Unjust?: The Ethics of Aesthetics and Public Policy Implications*, 19 J. LIBERTARIAN STUD. 31, 46 (2005). The authors argue that rewarding beautiful people in the workplace is justified so long as they contribute to the success of the business or increase their coworkers’ productivity. The authors conclude that discriminating in favor of attractive people by rewarding them with promotions and pay increases because of an increase in productivity is valid.

<sup>59</sup> *Facial Discrimination*, *supra* note 24, at 2038-39. The author argues that parents have lower expectations for unattractive children, other children choose to socialize with their attractive peers, strangers are more willing to help attractive people, and attractive people receive lower sentences when convicted of crimes and receive higher damages in civil suits than their less attractive contemporaries. *Id.* Additionally, attractive children begin to benefit from their looks at a young age because teachers tend to give them more information and opportunities than their less attractive peers. Browne, *supra* note 55, at 99. See Tietje, *supra* note 58, at 46. The authors contend that religious conservatives view natural beauty as a gift from God that should be developed; whereas, nonreligious conservatives see beauty as something a person can use to his or her advantage. *Id.*

<sup>60</sup> Browne, *supra* note 55, at 100. The authors of the study suggest that employers associate attractiveness with the likelihood that a woman will marry and start a family, thereby subjecting her to traditional stereotypes. *Id.* Furthermore, the authors explain that attractive women stand out; therefore, their inability to blend in with average looking people opens them up to more scrutiny. *Id.*

<sup>61</sup> See Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1186 (1994) (arguing that beauty causes differences in earnings). The authors imply that physical attractiveness is both a relevant and important attribute that workers bring to the labor market. *Id.* at 1174. Furthermore, studies suggest that attractive people

Moreover, although Harvard economics professor, Robert Barro, argues that more attractive people should not necessarily earn more money, he insists that hiring on the basis of physical appearance can be just as important of a qualification as other valued characteristics, such as intelligence.<sup>62</sup> Similarly, employers often support using appearance as a factor in hiring when beauty has a direct effect on profitability.<sup>63</sup> Further, market analysts agree that employees' outward appearances reflect on the product and the brand's image, thus it is a wise business decision and marketing tactic to hire based on appearance.<sup>64</sup> Consequently, as society's fascination with appearance continues to

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are more influential and thus have the ability to sway people, which could account for their higher wages. Fowler-Hermes, *supra* note 33, at 32. Fowler-Hermes rationalizes employer decisions by pointing out that appearance does sell because customers will put more trust in employees that are confident and look well put together. *Id.*

<sup>62</sup> Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, BUS. WEEK, Mar. 16, 1998, at 18. Barro explains that from an economic perspective, "the only meaningful measure of productivity is the amount a worker adds to customer satisfaction and to the happiness of co-workers." *Id.* Barro places such an emphasis on customer and co-worker contentment because it follows that increased satisfaction translates into increased productivity and performance. *Id.* He equates basing decisions on employment and wages on intelligence to basing those same decisions on appearance. *Id.* Barro contends that appearance can be decidedly valuable in certain fields and disallowing employers to take this factor into consideration, "would effectively throw away national product." *Id.* Furthermore, he suggests that the difference between appearance discrimination, appearance in modeling, and appearance in acting as compared to other fields is less attenuated than it seems because the role of appearance is always significant, it just varies in degree. *Id.* Finally, Barro concludes that no matter what degree of importance appearance plays in a specific occupation, that decision should be left to employers, and not to the government. *Id.* Also, economist Michael Owyang supports using attractiveness as hiring criteria. Stephanie Armour, *Your Appearance, Good or Bad, Can Affect Size of Your Paycheck Growing Research Shows How You Look is Influential While Lawsuits Raise Awareness*, USA TODAY, July 20, 2005, available at <http://www.usatoday.com/educate/college/business/articles/20050724.htm>. Owyang contends, "[l]ooking good on the job is an intangible asset that can be important, just as sharp technology skills or the ability to be a team player can give certain workers an edge." *Id.*

<sup>63</sup> Vo, *supra* note 24, at 344. Appearance is especially important in jobs where employees both deal with the public face-to-face and have an effect on the amount of business the employer attracts. *Id.* The majority of jobs that meet this description will be in the service industry; however, she explains that employers are likely to also take other important factors into consideration, such as an applicant's disposition and other job qualifications. *Id.* at 345.

<sup>64</sup> Bello, *supra* note 36, at 483-84. Many employers, such as airlines, have used attractiveness as a factor to consider in hiring for years; however, the trend is catching on and many retailers, among other employers, use employee attractiveness to portray an image and appeal to customers. *Id.* See discussion *infra*, Part II.F for a specific example of how hiring based on appearance can be a lucrative business decision (illustrating a particular retail store that openly hires based on appearance, refers to its sales people as "brand representatives," and is not only very successful in the retail industry, but known for having attractive employees).

escalate and people continue making judgments on the basis of looks, the concern with appearance based discrimination continues to increase, even though discrimination based on looks in and of itself is not unlawful.<sup>65</sup> Therefore, because courts do not currently give appearance discrimination protected status, plaintiffs attempt to link appearance to already protected classes.<sup>66</sup>

*D. Current Federal Legal Remedies for Appearance Discrimination*

Many victims of appearance discrimination in employment have adequate avenues of redress available to them through traditional federal antidiscrimination law.<sup>67</sup> For example, the Age Discrimination in Employment Act (“ADEA”), which prohibits age discrimination, will be discussed first.<sup>68</sup> Next, the protection available for discrimination based on the well-known protected classes including an individual’s race, color, religion, sex, or national origin through Title VII of the Civil Rights Act of 1964 (“Title VII”) will be examined.<sup>69</sup> Finally, the analysis will

<sup>65</sup> Fowler-Hermes, *supra* note 33, at 32. See discussion *infra*, Parts II.D-E (delving into various cases that are related to appearance discrimination and illustrating that although the unattractive are not a protected class, there is already a body of case law pertinent to their plight); see also Bello, *supra* note 36, at 483 (explaining that businesses including L’Oreal, Gap, Abercrombie & Fitch, and the W Hotel engage in appearance discrimination in their hiring decisions).

<sup>66</sup> Fowler-Hermes, *supra* note 33, at 36. Fowler-Hermes argues that if an employee can form a link between his or her appearance and an already protected class, then that employee must prove that individuals in that particular class are not being treated the same as the rest of the employees in order to prevail. *Id.* See generally Vo, *supra* note 24; Fleener, *supra* note 32; Bello, *supra* note 36; Zakrzewski, *supra* note 51; Adamitis, *supra* note 58 (each discussing the process of linking appearance to a protected class).

<sup>67</sup> Vo, *supra* note 24, at 346 (explaining that there is already “sufficient recourse” for those who are discriminated against based on their appearance). Although victims of appearance discrimination have redressability available, employers still have some discretion. See Goodman v. L.A. Weight Loss Centers, Inc., 2005 U.S. Dist. LEXIS 1455 (E.D. Pa. Feb. 1, 2005). The court held that L.A. Weight Loss was justified in not hiring a 350 pound man as a sales counselor because employers are able to make certain hiring choices based on physicality without violating a potential employee’s rights. Specifically:

[I]t is well established that an employer is permitted to make hiring decisions based on certain physical characteristics. . . . The mere fact that Defendant was aware of Plaintiff’s weight and rejected his application for fear that his appearance did not accord with the company image is not improper. To hold otherwise would render an employer’s ability to hire based on certain physical characteristics entirely void.

*Id.* at \*7 (internal citation omitted).

<sup>68</sup> 29 U.S.C. §§ 621-634 (2000).

<sup>69</sup> 42 U.S.C. §§ 2000e-2000e-17 (2000). As enacted, Title VII provides:  
§ 2000e-2. Unlawful employment practices

shift to individuals that are protected from disability discrimination under the Americans with Disability Act ("ADA").<sup>70</sup> Therefore, when individuals are able to tie their appearance based claims to one of these statutes, and effectively associate themselves with a protected class, they will be able to evoke federal protection.<sup>71</sup> Since these statutes require various elements to prove discrimination, they must be analyzed separately.

1. Appearance Discrimination and the ADEA<sup>72</sup>

Moving from the least common avenue of redress for appearance discrimination victims to the more commonly used statutes, age discrimination represents an appropriate starting point.<sup>73</sup> Since the ADEA protects all employees over the age of forty,<sup>74</sup> a plaintiff would have to prove that an employer discriminated against her because the employer thought she looked too old.<sup>75</sup> Usually, ADEA claims do not

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(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e-2(a) (2000).

<sup>70</sup> 42 U.S.C. §§ 12101-12213 (2000). Although employees may seek redress under the ADA, some professors argue that a distinctive problem arises in this area because an employee must prove that he or she is perceived as unattractive to show that his or her unattractiveness was a factor in the discrimination. Browne, *supra* note 55, at 102. Then, the employee must also show that his or her unattractive quality is an impairment that substantially limits a major life activity under the ADA. *Id.*

<sup>71</sup> Vo, *supra* note 24, at 347 (explaining that victims of appearance discrimination have successful claims under the current antidiscrimination laws).

<sup>72</sup> The purpose behind the ADEA is to promote employment of people over age forty based on their ability to contribute in the workplace and to put a stop to arbitrary discrimination in employment. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 410 (1985).

<sup>73</sup> Perhaps age discrimination is not a commonly used avenue because most ADEA claims are brought in wrongful discharge claims rather than in hiring situations. See George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491 (1995).

<sup>74</sup> 29 U.S.C. § 631 (2000).

<sup>75</sup> Vo, *supra* note 24, at 351 (suggesting that age based claims involve appearance because physical attributes change with age).

directly relate to appearance.<sup>76</sup> However, because people make the stereotypical assumption that increased age decreases physical attractiveness, age and appearance are implicitly linked.<sup>77</sup> Yet, the ADEA largely succeeds in its goals because it limits an employer's discretion and provides appropriate redress to victims of appearance based discrimination tied to age.<sup>78</sup> Certainly, appearance based claims can be resolved under the ADEA, but often times age, sex, and appearance intertwine, which requires Title VII to be brought into the analysis.

## 2. Appearance Discrimination and Title VII

Title VII permits appearance based policies unless such policies implicate a protected category. In other words, simply possessing an unattractive appearance does not warrant protected status under Title VII.<sup>79</sup> Although redress is available to individuals who fall into one of the protected categories, employers also have defenses available to protect their interests.<sup>80</sup> When a business chooses to discriminate on the

<sup>76</sup> Adamitis, *supra* note 58, at 207 (explaining that the relationship between age and appearance is implicit).

<sup>77</sup> *Id.* Adamitis goes on to argue that age and beauty are especially related for women; therefore, they are more likely to be discriminated against on the basis of their appearance. *Id.*

<sup>78</sup> Vo, *supra* note 24, at 351. *See also* Fleener, *supra* note 32, at 1309 (arguing that if there were more prevalent evidence that the anchorwoman in *Craft v. Metromedia, Inc.* was reassigned because of her aged appearance, she would of probably had a successful ADEA claim).

<sup>79</sup> Fowler-Hermes, *supra* note 33, at 32-33 (explaining that it is permissible for employers to have "[d]ress codes, grooming requirements, or other appearance based policies. . . as long as they are enforced even-handedly."). *See* Alam v. Reno Hilton Corp., 819 F. Supp. 905, 914 (D. Nev. 1993) (holding that attractiveness and sex appeal are too vague to set standards upon); Malarkey v. Texaco, Inc., 559 F. Supp. 117, 122 (S.D.N.Y. 1982) (holding that an employer that favored more attractive women did not violate Title VII); *Craft*, 766 F.2d at 1215 (explaining that television networks have a right to require employees to have a professional appearance while broadcasting); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1126 (D.C. Cir. 1973) (holding that an employer's policy on employees' hair length was valid); Lanigan v. Bartlett & Co. Grain, 466 F. Supp 1388, 1392 (W.D. Mo. 1979) (explaining that employer's female specific dress code was authoritative).

<sup>80</sup> Adamitis, *supra* note 58, at 203-04. Courts conduct a balancing test to determine whether an employer or an employee has a higher interest. *Id.* at 204. Furthermore, in cases pertaining to grooming and attire employers have more discretion; however, when there is discrimination based on a protected category, employers have a much higher burden. *Id.*; *see also* Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 383 (2003) (explaining that employers have "outward-looking interests"). Sugarman explains that image, reputation, and attitudes of customers and the public about a business's products and or services are very important to employers. *Id.* As a result, businesses will try to avoid employees that reflect poorly on the business and have the potential to negatively affect sales and customer relations. *Id.*

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basis of religion, sex, national origin, or age, an employer can establish a bona fide occupational qualification ("BFOQ") if it is "reasonably necessary to the normal operation of that particular business or enterprise."<sup>81</sup> In the past, courts have held that customer preference may give rise to a BFOQ.<sup>82</sup> Nonetheless, courts rarely allow discrimination based solely on customer preference.<sup>83</sup>

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<sup>81</sup> 42 U.S.C. § 2000e-2(e)(1) (2000); *see also* Fleener, *supra* note 32, at 1306 (explaining that a BFOQ is a particularly narrow defense); 42 U.S.C. § 2000e(j) (2000) (explaining that employers may not have to provide for a religious observance or practice if they can prove that accommodating the employee would cause undue hardship); 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000) (stating that employers must be able to prove that their policies are both job related and necessary in order to have them upheld). Race and color can never be a BFOQ. *See* Morton v. United Parcel Serv., Inc., 272 F.3d 1249, 1260 n.11 (9th Cir. 2001). However, the BFOQ defense is available in other Title VII cases and it is also available under the ADEA. *See* 29 U.S.C. § 623(f)(1) (2000). Congress allows the exception because it is morally acceptable and because it is a rational economic idea. Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F.L. REV. 473, 476 (2001). Frank goes on to explain that the BFOQ exception applies only to hiring, firing, and promotions; however, it is not applicable to such things as harassment or discriminatory wages or benefits. *Id.* at 477.

<sup>82</sup> Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971). The court narrowly construed the use of customer preference to situations in which it is "based on the company's inability to perform the primary function or service it offers." *Id.* In *Diaz*, the appellate court reversed the trial court's finding that the airline reasonably relied on customer preference when it decided to only hire female flight attendants. *Id.* The trial court agreed with the airline's hiring policy because the passengers experienced better service from females and felt less anxious during the flight. *Id.* at 388. Nonetheless, the appellate court concluded that the airline could take these factors into consideration, but could not exclusively hire females. *Id.*; *see also* E.E.O.C. v. Sambo's of Georgia, Inc., 530 F. Supp. 86, 91 (N.D. Ga. 1981) ("Even assuming that the defendants' justification for the grooming standards amounted to nothing more than an appeal to customer preference . . . it is not the law that customer preference is an insufficient justification as a matter of law."); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1352 (D. Del. 1978). In *Fesel*, the court held that it was justified for a retirement home to only hire female nurse's aides because the guests refused to allow males to assist them in their intimate everyday tasks. *Id.* The court explained:

[T]he attitudes of the nonconsenting female guests at the Home are undoubtedly attributable to their upbringing and to sexual stereotyping of the past. While these attitudes may be characterized as 'customer preference', this is, nevertheless, not the kind of case governed by the regulatory provision that customer preference alone cannot justify a job qualification based upon sex. Here personal privacy interests are implicated which are protected by law and which have to be recognized by the employer in running its business.

*Id.*

<sup>83</sup> *See* Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 303 (N.D. Tex 1981) (stressing the unfairness that would evolve from allowing employers to legally discriminate against a group solely because customers discriminated against the group); Gerdorn v. Continental Airlines Inc., 692 F.2d 602, 609 (9th Cir. 1982) (providing no justification for discriminating based on gender because of customer preference); Fernandez v. Wynn Oil Co., 653 F.2d

In order to establish a BFOQ defense, an employer must first prove a direct relationship between the protected status of the employee or applicant and that individual's ability to perform the job.<sup>84</sup> Second, the employer must prove that the required characteristic goes to the very essence or goal of the business.<sup>85</sup> Yet, good faith alone on the part of the employer that a characteristic is necessary to the business, is not sufficient to prove a BFOQ.<sup>86</sup> Instead, the attribute must also be closely related to the protected status, concern job-related skills, and actually be considered by the employer in hiring decisions.<sup>87</sup> In addition, to prove the second half of the BFOQ defense, the employer must prove that the essential characteristic is either necessary for, or very likely predictive of, the ability to perform the job *and* that there are no less discriminatory means that would serve the same purpose.<sup>88</sup>

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1273, 1277 (9th Cir. 1981) (holding that customer preference due to cultural biases was still not a BFOQ); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (holding that discriminating because white patrons of a Barbeque restaurant did not want African American employees there was unconstitutional); *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 744 (7th Cir. 1999) (holding that assigning minority salespersons to areas with predominately minority customers is discriminatory); *Ray v. Univ. of Ark.*, 868 F. Supp. 1104 (E.D. Ark. 1994). *See also* 29 C.F.R. § 1604.2(a)(1)(iii) (2001) (explaining that no BFOQ exists based on preference of customers). *But see id.* § 1604.2 (a)(2) (giving a very narrow exception for customer preference "where it is necessary for the purpose of authenticity or genuineness"). However, the exception coincides with Title VII's legislative history because during the Congressional Hearings on the Civil Rights Act of 1964, senators conversed about circumstances in which a particular employee is necessary for authenticity. 110 CONG. REC. 7217 (1964). *See also* Frank, *supra* note 81, at 484. Frank explains that courts currently allow four different types of BFOQs: "(1) those related to the safety of customers and employees; (2) those related to the performance of necessary tasks; (3) those affecting the authenticity of the product or service; and (4) those related to the privacy of patrons." *Id.*

<sup>84</sup> Frank, *supra* note 81, at 478. Frank explains that this analysis about whether or not the means correspond with the ends is subject to heightened scrutiny by the courts.

<sup>85</sup> *Id.* *See* *St. Cross v. Playboy Club of New York*, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Human Rights App. Bd. 1971) (holding that the primary service of the club was female sexuality; therefore, the BFOQ defense was valid because the club only had to hire females that fit the image necessary for the job). However, Hooters attempted to use a similar BFOQ defense and lost because the EEOC held that the primary job of the waitresses was serving food, not female sexuality. *See* Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can it Support a Hostile Work Environment Claim Brought by a Nude Dancer?*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 291-96, n.122 (1998). *See also* *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (holding that slenderness is not essential to the job of a flight attendant and thus not a valid BFOQ).

<sup>86</sup> Frank, *supra* note 81, at 479-80 (explaining the difficult burden that employers face).

<sup>87</sup> Frank, *supra* note 81, at 480. Frank goes on to explain that neither the subjective belief of an employer nor the fact that discriminatory state laws exist are enough to prove a BFOQ. *Id.*

<sup>88</sup> Frank, *supra* note 81, at 481-82. Furthermore, studies are unnecessary to prove an employer's necessity when common knowledge or expert testimony can accomplish the same goals. *Id.* at 482. However, if other employers in the same industry do not use the

Title VII is so broad that its relation to appearance discrimination can be separated into two distinct categories. First, the relationship between appearance discrimination and gender will be examined.<sup>89</sup> Second, the relationship between appearance based discrimination and race, color, religion, and national origin will be discussed.<sup>90</sup>

*i. Appearance Discrimination Related to Gender*

Individuals often bring Title VII claims under the gender-plus discrimination theory, which allows claims when both gender discrimination and some other type of discrimination exist.<sup>91</sup> However, the plaintiff must show that gender motivated the employer's actions.<sup>92</sup> Yet, the gender-plus theory need not always be used because courts have held requirements that adversely impact only one sex unlawful.<sup>93</sup> Furthermore, grooming, dress, and appearance requirements are impermissible when based on gender stereotypes.<sup>94</sup> For instance, in *Price*

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BFOQ it is hard to demonstrate that such a qualification is necessary. *Criswell*, 472 U.S. at 423.

<sup>89</sup> See *infra* Part II.D.2.a (exploring different theories and remedies for gender discrimination based on appearance).

<sup>90</sup> See *infra* Part II.D.2.b (discussing other types of discrimination covered by Title VII that can be successfully tied to appearance).

<sup>91</sup> Browne, *supra* note 55, at 104 (discussing types of discrimination that can be paired with gender to give rise to a successful claim).

<sup>92</sup> *Id.* The authors explain that the "plus" part of the "sex plus" may consist of characteristics such as race, marriage, or appearance. *Id.* Furthermore, the "plus" factor of the equation must be either an "immutable characteristic" or a "fundamental right." Post, *supra* note 26, at 33-34. Thus, gender discrimination and a requirement such as short hair will not qualify as gender-plus discrimination under Title VII. *Id.* at 34.

<sup>93</sup> Adamitis, *supra* note 58, at 207. Adamitis cites *Dothard v. Rawlinson*, 433 U.S. 321, 329-31 (1977) (holding that a policy on height and weight that did not relate to the job in question and that in effect meant that women couldn't obtain employment as prison guards was unlawful); *Gerdorn*, 692 F.2d at 610 (invalidating a weight requirement imposed solely on female workers); *Department of Civil Rights v. Edward W. Sparrow Hosp. Ass'n*, 377 N.W.2d 755, 764 (Mich. 1985) (holding uniform policy that only applied to women invalid). However, policies that make distinctions between males and females are upheld in some cases. See *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 509 (1998) (explaining that a policy that only required men to keep their hair short was valid); *Lanigan*, 466 F. Supp. at 1392 (validating a law that only allowed, or required, females to wear skirts).

<sup>94</sup> See *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263, 266 (S.D. Ohio 1987) (invalidating a policy that only required female employees to wear smocks because of the sexual stereotype involved); see also *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006). In *Jespersen*, the plaintiff worked as a Harrah's bartender for two decades. *Id.* at 1106-07. Although an employee policy that encouraged female bartenders to wear makeup was always in place, it was not enforced until 2000 when Harrah's implemented its "Personal Best" program. *Id.* at 1107. The program included requirements that applied to both genders; however, it also included gender specific standards that required women to wear makeup. *Id.* Since Jespersen did not wear makeup, she

*Waterhouse v. Hopkins*,<sup>95</sup> the Supreme Court held that a woman who exhibited masculine rather than feminine traits could not be discriminated against solely on the basis of a gender stereotype.<sup>96</sup> Likewise, requirements that have great potential to cause sexual harassment are considered illegal.<sup>97</sup> Even though employers generally must impose gender-neutral policies, employers have trouble making valid justifications when their requirements cause unequal burdens on the genders.<sup>98</sup> For instance, in *Wilson v. Southwest Airlines Co.*,<sup>99</sup> the airline refused to hire male applicants because it wanted an attractive, all female staff to cater to its primarily male market.<sup>100</sup> The airline argued

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complained that, among other things, wearing makeup would make her uncomfortable. *Id.* at 1107-08. Consequently, Jespersen left her position and filed suit based on gender stereotyping. *Id.* at 1108. The court held that since the "Personal Best" program applied to all bartenders, regardless of sex, sexual stereotyping was not involved. *Id.* at 1111-12. The court reasoned that allowing Jespersen to prevail would open the door to discrimination suits based on grooming, uniform, or appearance requirements that employees were offended by or that employees felt conflicted with their self image. *Id.* at 1112.

<sup>95</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>96</sup> *Id.* at 251. In *Price Waterhouse*, the plaintiff, Hopkins, was not promoted to the level of partner at her accounting firm because she was thought to be too aggressive and masculine. *Id.* at 235. Although the characteristics that Hopkins possessed are favorable for males in the business world, the partners at her firm frowned upon her demeanor. *Id.* at 251. Justice Brennan concluded:

we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'

*Id.* at 251 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

<sup>97</sup> *EEOC v. Sage Realty Corp.*, 507 F. Supp 599, 608 (S.D.N.Y. 1981). In *Sage*, female lobby attendants in a hotel were required to wear ponchos that snapped at the wrist and on each side, but were otherwise open. *Id.* at 604. Underneath the ponchos the women could wear dancer pants; however, they were not allowed to wear a shirt or skirt. *Id.* As a result, some of the women were forced to expose their thighs and portions of their backsides. *Id.* The court held that forcing females to wear revealing uniforms could easily give rise to sexual harassment and was thus impermissible. *Id.* at 608. See *EEOC v. Newtown Inn Assoc.*, 647 F. Supp 957, 958 (E.D. Va. 1986). In this case, cocktail waitresses were required to wear various provocative outfits and were subjected to unwanted sexual harassment as a result. See also *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal 1986) (holding that terminating a waitress for refusal to wear provocative attire was unlawful); *Nichols v. Azteca Restaurant Enters.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that an employee that does not conform to gender stereotypes and is discriminated against may seek redress under sexual discrimination laws).

<sup>98</sup> See generally Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1423-24 (1992).

<sup>99</sup> *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

<sup>100</sup> *Id.* at 295.

the essential nature of female attractiveness in hiring women stewardesses, and attempted to use a BFOQ defense arguing that its advertising and image focused entirely on sexual appeal.<sup>101</sup> Yet, the court held that sexuality was not essential to the function of flight attendants because their primary tasks involved giving safety instructions and serving passengers, not sexuality.<sup>102</sup> The court explained that the airline could not establish a BFOQ because it could not prove that only females, and not males, could perform the essential functions of the job.<sup>103</sup>

Employers that have a preference for employees with an attractive appearance will likely face discrimination claims based on gender, allowing appearance discrimination victims the opportunity to present a viable claim under Title VII.<sup>104</sup> Nevertheless, before the implications of appearance discrimination related to race, color, religion, and national origin can be discussed, it is necessary to examine the relationship between Title VII and disparate impact.

Although employers may impose facially neutral policies, employees can bring claims asserting the invalidity of the policy because it causes a disparate impact.<sup>105</sup> First, a plaintiff must prove that a discriminatory

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<sup>101</sup> *Id.* The airline explained that sex appeal was vital to its financial success and to its "Love" campaign; therefore, the discrimination was justified. *Id.* at 294-95. The airline further argued that the required uniform consisted of hot pants and high boots and such attire was integral to the sexually charged marketing campaign. *Id.* at 295.

<sup>102</sup> *Id.* at 302.

<sup>103</sup> *Id.* Because vicarious sexual entertainment was not the primary service provided by the female airline staff, the court declined to accept the argument that sex appeal was essential to the airline's business interests. *Id.* at 302-304. Men and women alike are able to perform the necessary functions of a flight attendant; therefore, the airline did not have a valid reason to exclude qualified males from the position. *Id.*

<sup>104</sup> *Vo, supra* note 24, at 348-49 (explaining the adequacy of the current antidiscrimination laws).

<sup>105</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). In *Griggs*, an employer required new employees to meet certain criteria before being hired or transferred to higher paying jobs. *Id.* at 427. Employees needed to have a high school education and needed to pass two professional aptitude tests. *Id.* at 427-28. The court held that the employers could not impose these requirements even though they seemed neutral. *Id.* at 431. The court reasoned that neither of these standards had a significant relationship to the actual job. *Id.* at 433. The court further reasoned that these requirements hindered African Americans' employment opportunities, yet did not have the same effect on white employees. *Id.* at 429. Because these seemingly neutral requirements were not related to job performance and caused a discriminatory impact on a protected group, they were invalidated. *Id.* at 436. Therefore, "[c]laims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Teamsters v. United States*, 431 U.S.

bias motivated the employer to adopt the requirements in question.<sup>106</sup> Further, before deciding whether or not a discriminatory motive exists, a plaintiff must establish a *prima facie* case of discrimination.<sup>107</sup> If the employee can complete the task of showing the discriminatory bias, then the burden shifts to the employer to show the existence of an actual business necessity that validates the practice.<sup>108</sup> The Supreme Court explained that, “discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be ‘predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.’”<sup>109</sup> Finally, if the employer successfully proves that a business necessity exists, the burden shifts back to the plaintiff to prove the availability of an alternative employment practice that would achieve

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324, 336 n.15 (1977). The Court explained that Congress intended to put a stop to disparate treatment, and that goal was a driving force behind Title VII:

What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States.

*Id.* at 335-36 n.15 (quoting Sen. Humphrey 110 CONG. REC. 13088 (1964)).

<sup>106</sup> *Theran*, *supra* note 25, at 132. *Theran* explains that Title VII does not explicitly require intent to prove a disparate impact. *Id.* In *Teamsters*, minority employees were given less desirable jobs than their white co-workers and were also discriminated against with respect to promotions and transfers. *Teamsters*, 431 U.S. at 329-30. The Court held that the employer did engage in employment discrimination because its policies had a discriminatory effect on minority groups. *Id.* at 336. Since the Court decided *Teamsters*, courts have without fail required “proof of [a] discriminatory motive” in order for plaintiffs to win their claims. *Theran*, *supra* note 25, at 132. *Theran* suggests that proving intent is too high of an obstacle for plaintiffs to overcome, because this sort of evidence is too hard to come by and employers themselves may not even realize that their actions were based on a discriminatory motive. *Id.*

<sup>107</sup> *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Therefore, the plaintiff must first be part of a protected class. *Bello*, *supra* note 36, at 487. Next, the plaintiff must prove that he was qualified for the exact position that he had or was denied employment for. *Id.* Then, the plaintiff must prove that he was in fact fired, or not hired for that exact position. *Id.* Finally, the plaintiff must demonstrate that the employer had the requisite discriminatory bias. *Id.* *Bello* goes on to argue that *Griggs* is evidence that disparate impact claims need not be intentional so long as they have adverse effects on a protected group. *Id.* at 491.

<sup>108</sup> *Zakrzewski*, *supra* note 51, at 440-41. *Zakrzewski* explains that proving a business necessity truly exists entails a higher burden than simply establishing a legitimate business purpose. *Id.* at 441.

<sup>109</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). This “validation process” is comprised of three steps. *Id.* First, the employer must identify the characteristic that is being used to evaluate potential employees. *Id.* at 431-32. Next, the employer must show that said characteristic is integral to the function of the job. *Id.* at 432-33. Finally, the employer must prove that the process or hiring criteria being implemented is predictive of the desirable characteristic. *Id.* at 433-34.

the same result.<sup>110</sup> However, courts must consider whether or not the alternative would be too costly to the employer, and whether or not it is actually probable that employees will be more effective as a result of the less discriminatory model.<sup>111</sup>

Thus, because many race-related claims hinge on whether or not an employer can conjure up a valid business necessity defense, the other provisions of Title VII are relevant to this discussion.<sup>112</sup>

ii. *Appearance Discrimination Related to Race, Color, Religion, and National Origin*

Unwarranted appearance policies that refuse employment to applicants based on “race-linked physical traits, or of appearance practices reflecting racial identification or reflecting religious belief[s]” are actionable under Title VII.<sup>113</sup> Appearance policies can be easily tied

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<sup>110</sup> Zakrzewski, *supra* note 51, at 441. Zakrzewski goes on to distinguish a BFOQ exception from a disparate treatment claim. *Id.* First of all, the BFOQ is statutory in nature; whereas, the business necessity doctrine is a judicial creation. *Id.* Second, the BFOQ can never apply to racial discrimination, while the business necessity doctrine is relevant to all forms of discrimination. *Id.* Finally, the business necessity doctrine’s main focus is on a facially neutral employment practice; yet, the analysis of a BFOQ centers on whether discriminating against a protected class is necessary. *Id.* at 442.

<sup>111</sup> Bello, *supra* note 36, at 492. Bello explains that appearance policies are fertile ground for disparate impact claims because so often they have a facially neutral appearance. *Id.* Bello makes the argument that policies on attractiveness have a disparate impact on minorities because they are perceived as less attractive by mainstream society. *Id.* at 495-501.

<sup>112</sup> See *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993). In *Fitzpatrick*, firefighters were required to wear respirators for safety purposes. *Id.* at 1114. The only way to ensure that the masks would work properly was to require all of the fire fighters to shave their facial hair so that it could not interfere with the masks. *Id.* Yet, twelve African American firefighters claimed that this shaving requirement was discriminatory because African American men are disproportionately afflicted by a bacterial disorder known as pseudofolliculitis barbae (“PFB”) that causes infection on their faces when they shave. *Id.* The court held that although African American males are the only group predominately affected by the disease, they were not exempted from the fire department policy. *Id.* at 1120. The court reasoned that because the facial hair had the potential to interfere with respirators, thus endangering firefighters, the policy was valid. *Id.* But see *Bradley v. Pizzaco, Inc.*, 7 F.3d 795, (8th Cir. 1993). In *Bradley*, a pizza delivery driver, Bradley, was fired for violating the no facial hair policy of his employer. *Id.* at 796. Bradley explained that he was unable to shave because he suffered from PFB. *Id.* His former employer argued that there was a valid business justification because, according to a public opinion survey, customers would have a negative reaction to a delivery person with facial hair. *Id.* at 798. Nonetheless, the court held that facial hair on a delivery driver would not affect that employee’s ability to deliver pizzas and that high pizza delivery sales was not a valid justification for the policy. *Id.* at 799.

<sup>113</sup> See Klare, *supra* note 98, at 1412 (discussing unjust employer policies that join Title VII and appearance).

to race discrimination when the policies involve race-linked or race-specific physical traits.<sup>114</sup> For example, in *Craig v. County of Los Angeles*,<sup>115</sup> the court held a height requirement racially discriminatory against Mexican-Americans because it prevented them from being hired.<sup>116</sup> Thus, the race-linked quality of height was successfully tied to Title VII.<sup>117</sup>

Additionally, *Sadrudin v. City of Newark*<sup>118</sup> provides a clear illustration of the link between appearance and religion. In *Sadrudin*, the court held that an Islamic employee, who needed to wear facial hair because of his religious faith, had a potential claim for discrimination against his employer when the employer fired him for not complying with a policy forbidding facial hair.<sup>119</sup> Therefore, under the protection of Title VII, religion was appropriately tied to appearance to provide an avenue for redress.<sup>120</sup>

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<sup>114</sup> See E.E.O.C. Dec. No. 70-90, 1969 WL 2903, \*1 (Aug. 19, 1969) (explaining that denying employment to an African American woman with big lips was illegal discrimination because lip size is a racial trait).

<sup>115</sup> 626 F.2d 659 (9th Cir. 1980). In *Craig*, a sheriff's department argued that a minimum height requirement was necessary because height is directly related to strength. *Id.* at 667. Also, an alternative justification for the policy was that height gives officers a necessary psychological advantage when quarrels arise. *Id.* at 668. Because otherwise qualified applicants that did not meet the height requirement were mostly Mexican-Americans, the policy was invalidated. *Id.* *Contra* Justice Rehnquist's concurring opinion in *Dothard* where he proposed that "the appearance of strength" was a necessary requirement for prison guards and a valid justification for height requirements even if women were disparately impacted as a result. *Dothard*, 433 U.S. at 338-40. Nonetheless, the court held that police officers do not have the same duties as prison guards and the appearance of strength is not relevant to all police positions. *Craig*, 626 F.2d, at 666-67.

<sup>116</sup> *Craig*, 626 F.2d at 668.

<sup>117</sup> *Id.*

<sup>118</sup> 34 F. Supp. 2d 923 (D.N.J. 1999). In *Sadrudin*, an Islamic firefighter was ordered to shave his face because his facial hair would interfere with the required respirator, even though his faith required him to wear facial hair. *Id.* at 924.

<sup>119</sup> *Id.* at 926. Although Sadrudin's employer had a legitimate justification for sanctioning him, Sadrudin's claim survived a motion to dismiss because he argued that he could have been sanctioned in a less severe manner. *Id.* at 925-26. *But see* Bhatia v. Chevron U.S.A. Inc., 734 F.2d 1382 (9th Cir. 1984). In *Bhatia*, employees were required to shave any facial hair if their duties involved wearing a respirator. *Id.* at 1383. Bhatia, an employee, explained that his religion did not allow him to shave any body hair, so he could not comply with the policy. *Id.* Bhatia's employer attempted to find him a position that did not involve a respirator, but was unsuccessful. *Id.* The court held that although Bhatia's religious beliefs prohibited shaving, the employer treated all employees equally and attempted to make reasonable accommodations, so he was required to abide by the policy. *Id.*

<sup>120</sup> *Bhatia*, 734 F. 2d at 1383.

Height and facial hair are just two examples of appearance based qualities that have been successfully tied to a protected class under Title VII. Consequently, victims of appearance based discrimination have the ability to link the physical characteristic that an employer finds unattractive with gender, race, color, religion, or national origin in order to have a successful claim under Title VII.<sup>121</sup> Yet, appearance discrimination victims that cannot make this connection still have the alternative option of linking disability discrimination to appearance.

### 3. Appearance Discrimination and the ADA

The original purpose of the ADA was to prohibit discrimination on the basis of disability and to offer redress for individuals discriminated against because of said disability.<sup>122</sup> Yet, appearance based discrimination can fall within the ADA because an individual only needs to be “regarded as” disabled in order to be considered actually disabled.<sup>123</sup> Under the ADA, a “qualified individual with a disability” includes individuals able to effectively do their jobs “with or without a reasonable accommodation.”<sup>124</sup> Therefore, an individual with a “cosmetic disfigurement” could seek redress for appearance based discrimination.<sup>125</sup> Moreover, the Supreme Court held that the ADA covers an employer’s false opinions based on appearance that relate to an employee’s ability to do his or her job.<sup>126</sup> Accordingly, if an employer

<sup>121</sup> *Vo, supra* note 24, at 347-49 (explaining that Title VII provides significant redress to victims of appearance discrimination that can make a connection between the two).

<sup>122</sup> *See* 42 U.S.C. § 12101 (a)(4)-(8) (2000). *See also, Tietje, supra* note 58, at 47 (suggesting that “ugliness” could be a legal disability under the ADA; however, it is too difficult to prove that ugliness substantially limits a major life activity and reasonable accommodations for ugliness would be too attenuated).

<sup>123</sup> 42 U.S.C. § 12102(2) (2000). Under the ADA, “disability” is defined as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” *Id.*

<sup>124</sup> *See* U.S.C. §§ 12111(8), 12112(a) (2000); 29 C.F.R. §§ 1630.2(n)-(o) (2000). The ADA defines a “qualified individual with a disability” as: “[A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires . . . . consideration shall be given to the employer’s judgment as to what functions of a job are essential.” 42 U.S.C. § 12111(8) (2000).

<sup>125</sup> *See* 29 C.F.R. § 1630.2(h)(1) (2005); 34 C.F.R. § 104.3(j) (2005); 45 C.F.R. § 84.3(j) (2005).

<sup>126</sup> *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987). In *Arline*, the plaintiff was terminated solely as a result of her perceived disability, because she suffered from tuberculosis. *Id.* at 276. Consequently, she filed a claim based on the Rehabilitation Act. *Id.* at 275. The language “regarded as” appears in both the Rehabilitation Act and the ADA and has the same meaning in the statutory scheme. *Williams v. Phila. Hous. Auth. Police Dept.*, 380 F.3d 751, 775 (3rd Cir. 2004), *cert. denied*, 125 S. Ct. 1725 (2005) (applied *Arline* to the ADA). The Court held that the employer was required to make reasonable

chose not to hire an individual as a waiter because of the perception that a facial scar would deter diners, the waiter may have a valid claim under the ADA if he is perceived as impaired in the major life activity of working.<sup>127</sup>

Thus far, most appearance discrimination claims covered by the ADA have considered whether or not obesity is a disability even though it only qualifies in extraordinary circumstances.<sup>128</sup> For instance, in *Cook v. Rhode Island*,<sup>129</sup> an extremely obese plaintiff successfully proved that she was perceived as disabled when an employer would not hire her because the employer was convinced by looking at her size that she would not be able to do the job.<sup>130</sup> In addition to obesity, there have been a few disfigurement claims under the ADA that have largely been settled

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accommodations for the plaintiff, because she was misperceived as having a disability and was discriminated against for that reason. *Id.* at 289. The Court reasoned that the goal was to protect disabled individuals from deprivations based on prejudice and stereotypes. *Id.* at 287. The Court further reasoned that the plaintiff was an otherwise qualified person, because she met all of her employer's requirements in spite of her disability. *Id.* at 288.

<sup>127</sup> See *Hodgdon v. Mt. Mansfield Co.*, 624 A.2d 1122, 1132 (Vt. 1992) (explaining that an employee lacking upper teeth was substantially limited in working because she was perceived to be unfit to be in the presence of guests); see also 29 C.F.R. § 1630.2(h)(2)(i) (2005) (explaining that working is a major life activity). The ADA also protects individuals who are "substantially limited in a major life activity [due to] . . . society's accumulated myths and fears about disability[ies] . . . [which] are as handicapping as are the physical limitations that flow from actual impairment." *Arline*, 480 U.S. at 284. The legislative history provides the following example: "Severe burn victims often face discrimination. In such situations, these individuals are viewed by others as having an impairment which substantially limits some major life activity . . . and are discriminated against on that basis. Such individuals would be covered under the Act." H.R. Rpt. 101-485(II) (Nov. 14, 1989), reprinted in 1990 U.S.C.A.N. 335.

<sup>128</sup> *Adamitis*, *supra* note 58, at 201-02 (discussing the typical appearance based claims brought under the ADA).

<sup>129</sup> 10 F.3d 17 (1st Cir. 1993). In *Cook*, the plaintiff worked as a nurse to mentally disabled patients and met all of her employer's expectations, but she chose to leave her job. *Id.* at 20. When she reapplied for the same position a nurse explained that she was morbidly obese, but still capable of performing the necessary functions of the job. *Id.* at 20-21. However, the plaintiff was not rehired because her former employer did not believe that she would be able to assist patients in emergency situations. *Id.* at 21. The plaintiff argued that she was fully able to do the job, but that she was perceived as disabled. *Id.* at 22. The court held that the plaintiff's obesity was not a valid reason to deny her employment. *Id.* at 28.

<sup>130</sup> *Id.* at 28. Despite the fact that a nurse concluded that the plaintiff would be able to perform the necessary duties, the employer refused to hire her. *Id.* at 20-21. The court remarked that obesity can reduce the amount of employment opportunities available to an individual because today's society equates size with beauty and goodness. *Id.* at 28. *But see Cassista v. Cmty Foods, Inc.*, 856 P.2d 1143, 1153 (Cal. 1993) (holding that the claim of severe obesity did not amount to a disability because a recognized condition or disorder did not cause it); *Greene v. Union Pacific R.R. Co.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981) (explaining that morbid obesity is not considered a disability because obesity is a mutable characteristic).

out of court.<sup>131</sup> In consequence, the ADA currently offers limited redress for victims of discrimination based on some aspects of their physical appearance.<sup>132</sup>

Even though considerable avenues exist in the federal arena that individuals can take advantage of in order to make a successful appearance based discrimination claim, a few state and local statutes allow individuals to directly pursue such a claim without attaching themselves to an already protected class.<sup>133</sup> Consequently, these laws need to be examined in more depth and the legal issues in Michigan, the District of Columbia, and Santa Cruz, California will be discussed, as the laws in those jurisdictions are tailored to appearance discrimination.<sup>134</sup>

*E. Current State and Local Legal Remedies for Appearance Discrimination*

Michigan is currently the only state with an antidiscrimination law that includes a clear provision directly prohibiting discrimination based on appearance based characteristics.<sup>135</sup> Even though the statute does not expressly mention attractiveness, it is still broader than Title VII because it directly states that the appearance based factors of height and weight are protected.<sup>136</sup> Still, employers may use either a business necessity or a BFOQ as a justification for a height and weight requirement so long as the employer can prove that the requirement is reasonably necessary to the ordinary operation of business.<sup>137</sup>

The District of Columbia Human Rights Act goes a step further than the Michigan statute because it directly prohibits discrimination based on all of the already protected classes, as well as height, weight, and

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<sup>131</sup> See Fox, *supra* note 37, at 566-68. Fox discusses EEOC cases that include an employee with a "pork [sic] wine stain" on her face that was discriminated against, an employee with a cleft palate who was a victim of discrimination, and also a woman with an unattractive birth defect. *Id.* at 566.

<sup>132</sup> *Id.*

<sup>133</sup> See *supra* Part II.D (describing the various connections that can be made between current federal laws and appearance discrimination).

<sup>134</sup> See *infra* Part II.E (explaining the various appearance- related laws that are more expansive than current federal law).

<sup>135</sup> Elliot-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2102 (2004).

<sup>136</sup> *Id.* Employers are prohibited from discriminating on the basis of "religion, race, color, national origin, age, sex, height, weight, familial status, or marital status." *Id.*

<sup>137</sup> See *Ross v. Beaumont Hosp.*, 687 F. Supp. 1115, 1125 (E.D. Mich. 1988) (explaining that in this instance weight was not a BFOQ); *Micu v. City of Warren*, 382 N.W.2d 823, 828 (Mich. App. 1985) (holding that the employer could not discriminate on the basis of height unless a valid BFOQ existed). However, height and weight may be protected categories under Title VII on claims based on gender discrimination. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000).

discrimination based on personal appearance.<sup>138</sup> However, the statute provides both a business necessity exception and a reasonable business purpose exception.<sup>139</sup>

Finally, Santa Cruz, California attempted to pass an ordinance that prohibited personal appearance discrimination.<sup>140</sup> The public outcry against the ordinance, however, prompted the legislature to prohibit discrimination based on physical characteristics rather than personal appearance.<sup>141</sup> Nonetheless, the ordinance does allow an exception for a “reasonable business purpose.”<sup>142</sup>

Based on the groundwork that the current federal, state, and local laws provide for appearance based discrimination, this Note will next discuss one specific example of an employer confronted with an appearance based claim.

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<sup>138</sup> The District of Columbia Human Rights Act, D.C. CODE ANN. § 2-1401.02 (2001). Under this statute, personal appearance is defined as follows:

[T]he outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied . . . to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual.

*Id.* See *Atlantic Richfield Co. v. D.C. Comm’n on Human Rights*, 515 A.2d 1095 (D.C. Cir. 1986). In *Atlantic Richfield Co.*, Janetis, the plaintiff, was hired to work in an office setting. *Id.* at 1097. Yet, shortly after she began working, her employer criticized her for her attire and complained that she dressed too provocatively. *Id.* Janetis argued that she was treated poorly and discriminated against because of her personal appearance and that she resigned because of it. *Id.* at 1099. The court held that Janetis was discriminated against based on her personal appearance. *Id.* at 1101. The court reasoned that there was not a uniform dress code applied to all of the employees and Janetis was singled out because all of the other coworkers dressed similarly. *Id.* at 1101.

<sup>139</sup> See Zakrzewski, *supra* note 51, at 448-52 for an excellent explanation of what each of the standards entail.

<sup>140</sup> SANTA CRUZ, CAL., MUN. CODE § 9.83.010 (1992).

<sup>141</sup> *Id.* The ordinance defines physical characteristics as:

[a] bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person including individual physical mannerisms. Physical characteristic shall not relate to those situations where a bodily condition or characteristic will present a danger to the health, welfare or safety of any individual.

SANTA CRUZ, CAL., MUN. CODE § 9.83.020(13) (1992).

<sup>142</sup> *Id.* at § 9.83.080(1).

F. *Abercrombie & Fitch: A Case Study*

Abercrombie & Fitch (“A&F”) is a clothing retailer, known for its attractive employees, that markets primarily to people in the twenty-five and under age group.<sup>143</sup> A&F, like several other businesses, openly admits its desire to employ an attractive staff.<sup>144</sup> A&F employees recruit attractive shoppers, most of them college students, to join its sales staff.<sup>145</sup> A&F’s communications director, Tom Lennox, explained that the company hires salespeople, or “brand representatives” that “look great” because they represent the image the company wants to project.<sup>146</sup> Additionally, A&F portrays its image by covering the walls of its stores, the pages of its catalogs, and the pages of its websites with pictures of A&F models who represent the brand.<sup>147</sup> Moreover, on certain occasions, some of the “brand representatives” will wear a particular A&F outfit and stand outside the store to greet customers, raise money for charity, or even pose for pictures.<sup>148</sup> A&F employees are regarded as “walking billboards[,]” and most of them are college students. Because A&F merchandise can be considered expensive for the average student, A&F offers discounts to employees in order to encourage them to wear

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<sup>143</sup> The Look of Abercrombie & Fitch (Nov. 24, 2004), <http://www.cbsnews.com/stories/2003/12/05/60minutes/printable587099.shtml>. The article describes the profitability of A&F’s strategy by explaining that since the company began this marketing scheme, its annual revenues are well over one billion dollars. *Id.*

<sup>144</sup> See Steven Greenhouse, *Going for the Look, but Risking Discrimination*, N.Y. TIMES, July 13, 2003, at 12. Greenhouse explains that retailers justify hiring based on looks because it is an intelligent business practice. *Id.* Quoting Marshal Cohn, a senior industry analyst with a market research firm, Greenhouse explains that finding employees that can act as “walking billboards” is essential to creating brand awareness and appealing to community interests. *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* Mr. Lennox went on to explain that “Brand representatives are ambassadors to the brand.” Then, Mr. Lennox said, “We want to hire brand representatives that will represent the Abercrombie & Fitch brand with natural classic American style, look great while exhibiting individuality, project the brand and themselves with energy and enthusiasm, and make the store a warm, inviting place that provides a social experience for the customer.” *Id.*

<sup>147</sup> *Id.* See *Guys Have Body Issues, Too* (2006), <http://www.msnbc.msn.com/id/15160230> (explaining that the A&F image is positive because it is the “picture of health”) (quoting David Zinczenko, editor of Men’s Health magazine); see also *Wislocki-Goin v. Mears*, 831 F.2d 1374 (7th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988). In *Mears*, a teacher in a juvenile detention facility was fired because the way she wore her makeup and hair violated the requirement that she strive for the “Brooks Brothers look.” *Id.* at 1376. The requirement was upheld because the desire for government employees to look professional outweighed the teacher’s right to wear excessive makeup and leave her hair down. *Id.* at 1380.

<sup>148</sup> The Look of Abercrombie & Fitch (Nov. 24, 2004), <http://www.cbsnews.com/stories/2003/12/05/60minutes/printable587099.shtml>.

the clothing while on duty and off to further promote the company image.<sup>149</sup>

In 2004, A&F's policies came to the forefront of the media because a class action lawsuit against the retailer successfully tied appearance based discrimination to race and culminated in a large settlement.<sup>150</sup> Since this complaint made A&F appearance policies public, there have been many critics of A&F's hiring procedures.<sup>151</sup>

Although no federal law currently prohibits employers like A&F from hiring on the basis of appearance, there is a movement to amend these laws to give looks-based claims protected status.<sup>152</sup> It seems that as more employers follow in the footsteps of A&F, and decide to hire based on attractiveness, a change in the law will be necessary.<sup>153</sup> A question

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<sup>149</sup> Employees Win Dress Code Lawsuit (June 24, 2003), <http://www.cbsnews.com/stories/2003/06/24/national/printable560245.shtml>.

<sup>150</sup> *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, No. 03-2817 SI (N.D. Cal. June 10, 2004). See Fleener, *supra* note, 32 at 1295-98 for a clear explanation of the Gonzalez case, background, and complaints. The class action suit was brought by a group of Hispanics, Asians, African Americans, and women that used to be employed by A&F. Mary B. Rogers & Kimberly A. O'Sullivan, *Image Discrimination: is that Advertising Campaign Really Worth It?*, THE METROPOLITAN CORPORATE COUNSEL, Nov. 2006, at 23. They alleged that they were kept away from customers because they did not have the A&F "look." *Id.* Two years after the lawsuit was filed, A&F paid out a settlement worth approximately fifty million dollars, created new goals for hiring minorities, agreed to stop recruiting from specific fraternities and sororities, and changed their marketing campaign to reflect a more diverse workforce. *Id.*; see also EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch, <http://www.eeoc.gov/press/11-18-04.html> (last visited Sept. 29, 2006). Olophius Perry, the Director of the EEOC's Los Angeles District Office praised A&F by saying, "[b]y agreeing to resolve this case, Abercrombie & Fitch is expressing a commitment to the principles of equal employment opportunity. We commend Abercrombie & Fitch for its willingness to address our concerns head-on. We encourage employers to take a proactive approach in ensuring their workplaces are free of discrimination." *Id.*

<sup>151</sup> See generally *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, No. 03-2817 SI (N.D. Cal. June 10, 2004); Bello, *supra* note 36; Zakrzewski, *supra* note 51.

<sup>152</sup> See Fowler-Hermes, *supra* note 33, at n.4. But see Post, *supra* note 26, at 8. Post articulated a traditional slippery slope argument that if appearance is considered a protected class the next discrimination law could protect people with "whiny" voices or grouchy demeanors. *Id.* Post went on to explain that "laws prohibiting discrimination based upon appearance were somehow a *reductio ad absurdum* of the basic logic of American antidiscrimination law. Although powerfully compelling when applied to race or gender, that same logic seemed to lose its footing when applied to appearance." *Id.*

<sup>153</sup> In addition to the A&F lawsuit, another lawsuit was filed in 2005 that dealt with appearance discrimination. Mary B. Rogers & Kimberly A. O'Sullivan, *Image Discrimination: is that Advertising Campaign Really Worth It?*, THE METROPOLITAN CORPORATE COUNSEL, Nov. 2006, at 23. Two female cocktail waitresses brought a claim against their employer, the Borgata Hotel Casino & Spa. *Id.* The women claimed that the appearance standards set by Borgata, including the revealing uniform and the weight

arises as to where the line should be drawn between the goal of reducing discrimination and preventing encroachment on employer autonomy?

### III. ANALYSIS

To determine where the balance should be struck between an employer's discretionary rights in hiring and an individual's rights to possible job opportunities, Part III.A weighs the costs and benefits of allowing appearance discrimination.<sup>154</sup> Next, Part III.B outlines possible detriments associated with an appearance discrimination statute.<sup>155</sup> Then, Part III.C discusses the possible employer defenses, including BFOQs and business necessity.<sup>156</sup> Finally, Part III.D sets forth alternative proposals to expand antidiscrimination law.<sup>157</sup>

Though current laws provide vast protection to individuals that link an appearance claim to current antidiscrimination law,<sup>158</sup> this still leaves some individuals, who cannot establish such a link, without redress.<sup>159</sup> Consequently, it is necessary to investigate whether individuals who are not considered physically attractive should have the benefit of claims based on appearance discrimination when they cannot establish such a link to recognized and protected classes.

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limits, were discriminatory because they focused on appearance rather than job performance. *Id.* Borgata argued that its appearance policies were justified because the image and brand of its casino was integral to having slim, attractive women sell drinks. *Id.* Borgata further argued that when women gained too much weight they were given an opportunity to lose it within three months in order to regain their position, and the women had the benefit of a company sponsored weight loss program. *Id.* In addition to explaining current lawsuits related to appearance discrimination, the authors described different options employers have to prevent lawsuits of this nature. *Id.* First, if a business is attempting to portray a certain "look" it is important to evaluate the employees to make sure that no class of people is being excluded and no discriminatory effect occurs because of hiring practices. *Id.* Second, avoid making policies based on customer preference. *Id.* Third, pay close attention to appearance standards, allow employees to request reasonable accommodations, and make sure there are no discriminatory effects. *Id.* Lastly, check to see if marketing campaigns or any other policies are discriminatory. *Id.*

<sup>154</sup> See *infra* Part III.A (analyzing the advantages and disadvantages of permitting appearance discrimination).

<sup>155</sup> See *infra* Part III.B (explaining the drawbacks of an appearance discrimination statute).

<sup>156</sup> See *infra* Part III.C (describing when appearance discrimination should be tolerated).

<sup>157</sup> See *infra* Part III.D (detailing other commentators' suggestions).

<sup>158</sup> See *supra* Part II.D (listing the various ways victims of appearance discrimination can seek redress under the current law).

<sup>159</sup> See *supra* Part II.C (explaining that not all victims are capable of making the required connection between appearance and an already protected category).

A. *The Costs and Benefits of Permitting Appearance Discrimination*

One concern with allowing appearance based discrimination is that employers will focus on appearance and other criteria such as “academic, career, or personal accomplishments” will take on a less important role.<sup>160</sup> Accordingly, employees may be hired based on their physical attributes, resulting in a “less-accomplished workforce.”<sup>161</sup> Although maintaining a well-qualified workforce is a legitimate goal, a company such as A&F normally does not need to fear having an incompetent staff.<sup>162</sup> Most of the A&F employees are college students furthering their educational goals to eventually have other careers; as a result, being hired based on their appearance does not derail their focus on academics.<sup>163</sup> Furthermore, because the usual functions of a “brand representative” do not require much skill, an employee does not need to be very “accomplished” in order to complete these tasks.<sup>164</sup> Therefore, while appearance based discrimination may inappropriately undermine qualifications in some situations, it does not do so in other contexts.<sup>165</sup>

Another reason that some commentators seek to prohibit appearance discrimination is that individuals should be insulated from discriminatory treatment based on prejudices and stereotypes.<sup>166</sup> Yet, only narrowly drawn protected classes of people are given the benefit of

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<sup>160</sup> Zakrzewski, *supra* note 51, at 434 (explaining that employers may give appearance more weight than other, more worthwhile qualities).

<sup>161</sup> Zakrzewski, *supra* note 51, at 434. Zakrzewski goes on to argue that attractiveness is not an accomplishment and employment should be based on more substantive factors. *Id.* However, in some cases physical appearance can be considered an accomplishment. For instance, if an individual spends time and effort to stay in shape by exercising, eating right, and maintaining a healthy lifestyle, that person’s appearance could be seen as an accomplishment. See *Guys Have Body Issues, Too*, 2006, <http://www.msnbc.msn.com/id/15160230>. See also, Tietje, *supra* note 58, at 46. The authors explain that people often compliment one another on their appearances, even if the quality is a natural asset. *Id.* For instance, if somebody says, “You have beautiful eyes,” then the natural response is a “thank you.” Thus, the authors argue that people thank others for noticing their natural assets and appreciate compliments because they believe they deserve it. *Id.*

<sup>162</sup> See discussion, *supra*, Part II.F (illustrating that attractive employees still have the capability to be qualified and productive employees).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*; see also *supra* notes 85, 153 (providing other examples of positions in which employees do not need specialized skills to be qualified, but where attractiveness is important to the particular industry and discussing the Hooters case and the Borgata Hotel Casino & Spa respectively).

<sup>165</sup> Vo, *supra* note 24, at 355-56 (explaining that an employee can be both attractive and still as qualified as their less appealing counterparts).

<sup>166</sup> Adamitis, *supra* note 58, at 213. Adamitis goes on to argue that, “Failure to prohibit appearance discrimination legitimizes the practice and perpetuates society’s discriminatory tendencies.” *Id.* at 214.

antidiscrimination law and, indeed, it would be impracticable to give redress to every group of people who feel they have been mistreated.<sup>167</sup> For instance, the protected classes discussed in Section II.D above qualify for such status because they fall into historically recognized groups that suffered harmful, unfair discrimination.<sup>168</sup> On the other hand, unattractive individuals typically have not been subject to the same level of discrimination as those covered by federal statutory law.<sup>169</sup> Additionally, Congress did not intend for the existing statutes to provide recourse for individuals solely on the basis of appearance discrimination.<sup>170</sup> Nonetheless, current laws often do provide adequate redress and often sufficiently protect the less attractive.<sup>171</sup> For example, in *Gonzalez v. Abercrombie & Fitch Stores*, the plaintiffs obtained sufficient redress because they successfully linked appearance and a protected class.<sup>172</sup>

Moreover, considering the role that appearance plays in society and American culture, in order for appearance based discrimination to truly

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<sup>167</sup> *Id.* at 214. Adamitis further explains that because attractiveness may be hereditary, the cycle of discrimination will continue throughout generations. *See also* discussion *supra* Part II.

<sup>168</sup> *See* discussion *supra* Part II.D; *see also* Fleener, *supra* note 32, at 1320. Fleener explains that in order for a new group to warrant protected status:

a legal prohibition needs firmer grounding than the fact that generalizations based on a certain attribute are irrational or lead to unfair results for those individuals who display them. Rather, society must decide that a certain attribute warrants legal protection from discrimination despite the costs—cultural and financial—that the extension of such protection entails.

*Id.*

<sup>169</sup> Adamitis, *supra* note 58, at 218-19. Adamitis goes on to explain that “a clear distinction can be made with respect to the historical significance of those categories protected by Title VII.” *Id.* *But see Facial Discrimination*, *supra* note 24, at 2035. The author argues that unattractive people deserve legal protection because they are, “the only noncriminal, noncontagious group in America ever to have been barred by law from appearing in public.” *Id.*; *see also*, Zakrzewski, *supra* note 51, at 453-54. While Zakrzewski acknowledges that appearance discrimination has never been as pervasive as racial discrimination in America, she alleges that unattractive people have been discriminated against. *Id.* Zakrzewski explains that there used to be “ugly laws” that “prevented disabled, physically maimed, or very unattractive people from appearing in public.” *Id.* at 453. However, if these laws were still in place today the appearance based claim could likely be linked to the ADA, thus providing redress. *See* discussion *supra* Part II.D.3.

<sup>170</sup> Adamitis, *supra* note 58, at 218 (explaining that the legislative intent did not encompass protecting the unattractive).

<sup>171</sup> *See* discussion *supra* Part II; *see also* Zakrzewski, *supra* note 51, at 444-45 (explaining that if A&F required different standards for different sexes it would violate Title VII, and if it declined to hire people that were “too old,” it would violate the ADEA).

<sup>172</sup> *See* discussion *supra* Part II.F (illustrating the sufficiency of the current law with the A&F case study).

come to an end, the culture must change along with social attitudes.<sup>173</sup> As a result, some commentators argue that the stereotypical idea that attractive individuals possess other appealing qualities is a valuable tool upon which society depends.<sup>174</sup> Yet, other commentators believe that societal attitudes should change so that all individuals will have more confidence and diversity in the workplace can increase.<sup>175</sup> Nonetheless, it is not the duty of antidiscrimination law to make a change in a society's culture, and motivating employers to hire a diverse staff can be achieved through current laws.<sup>176</sup>

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<sup>173</sup> Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 571 (1998). Rubin goes on to explain that the laws can only combat discrimination to some extent, especially when it is difficult to tell whether or not discrimination has occurred. *Id.* at 583-84. Also, equal treatment is not always the result of antidiscrimination law because employees may bring erroneous claims or wrongfully assume that employer action was based on discrimination. *Id.* at 584. Thus, the fear and cost of litigation lead employers to try to protect themselves in a variety of ways. *Id.* As a result, individuals that are not actually suited for a particular job may be hired. See Mark A. Rothstein, *Wrongful Refusal to Hire: Attaching the Other Half of the Employment-At-Will Rule*, 24 CONN. L. REV. 97, 135 (1991). Also, other coworkers may perceive the employee that threatens litigation as receiving special treatment. Rubin, *supra* note 173, at 584. Finally, the protected employee will also not feel as though he or she is being treated equally. *Id.* at 585. Instead, said employee will probably feel that he or she is being treated differently because the employer is worried about possible litigation. *Id.*

<sup>174</sup> Rubin, *supra* note 173, at 573. Rubin explains that discrimination can sometimes provide "accurate generalizations." *Id.* See Fleener, *supra* note 32, at 1322. Fleener argues that the more qualities that employers are kept from considering in their hiring decisions, the more objectified employees become. *Id.* See also Roderick M. Hills Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1605 (1997). Hills argues that society is "committed to tolerating a lot of stigma based on involuntary traits, because we value the attitudes that underlie such stigma." *Id.* Furthermore, if the unattractive were afforded protected status society would have to disregard the "innumerable attitudes about beauty, health, intellect, and human merit generally—attitudes that have higher value than the cost of the injustice that we incur on their behalf." *Id.*

<sup>175</sup> Fleener, *supra* note 32, at 1327. Fleener explains that appearance based discrimination causes unattractive individuals to feel inadequate, which results in low productivity. *Id.* at 1326. She goes on to argue that when people are seen as attractive, they take on other positive characteristics because of their confidence. *Id.* at 1327. Also, Fleener explains that diversity in the workplace is ideal because it is positive for employers, employees, and customers. *Id.*

<sup>176</sup> See generally discussion *supra* Part II.F. In the case of A&F, the store agreed to make their staff more diverse because of a Title VII action. *Id.* See also EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch, <http://www.eeoc.gov/press/11-18-04.html> (last visited Sept. 29, 2006). The EEOC's General Counsel, Eric Dreiband explained:

The retail industry and other industries need to know that businesses cannot discriminate against individuals under the auspice of a marketing strategy or a particular 'look.' Race and sex discrimination in employment are unlawful, and the EEOC will continue to

While the current federal laws do offer sufficient redress, there have been numerous proposals to grant unattractiveness protected status.<sup>177</sup> A plethora of possible problems exist, however, with enacting such legislation, which makes the possibility of creating a new protected class for the unattractive highly unlikely.<sup>178</sup>

*B. The Detriments of an Appearance Discrimination Statute*

Despite considerable agreement that protection should not be afforded to people who claim appearance discrimination based on mutable or voluntary characteristics,<sup>179</sup> discrimination based on attractiveness has sparked quite a debate.<sup>180</sup> Yet, the implications of attractiveness legislation need to be examined in more detail.

The first issue that arises is the difficulty of defining a protected class of people based on appearance.<sup>181</sup> Whereas it is less difficult to determine who falls under Title VII categories such as gender and race, basing a law on unattractiveness is a very uncertain practice that would not produce uniform results.<sup>182</sup> Furthermore, the state and local remedies already available demonstrate the difficulty with drafting legislation aimed at attractiveness.<sup>183</sup> For instance, the District of Columbia ordinance allows redress for people who are discriminated against on the basis of their outward appearance.<sup>184</sup> Yet, one employer may discriminate against a bald applicant because he perceives baldness as unattractive, when another employer may discriminate against an

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aggressively pursue employers who choose to engage in such practices.

*Id.*

<sup>177</sup> See generally Zakrzewski, *supra* note 51; Adamitis, *supra* note 58; Fleener, *supra* note 32; Bello, *supra* note 36.

<sup>178</sup> See generally William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 165 (2007) (conceding that there are too many problems associated with granting the unattractive protected status).

<sup>179</sup> See discussion *supra* Part II.B (discussing the consistent law that exists concerning mutable characteristics). See also Vo, *supra* note 24, at 357. Vo explains that protection should not be based on mutable, voluntary characteristics, because individuals can easily control said characteristics. *Id.*

<sup>180</sup> See discussion *supra* Part II.C.

<sup>181</sup> Fleener, *supra* note 32, at 1321 (explaining the difficulty with objectively defining beauty).

<sup>182</sup> See discussion *supra* Part II.D; see also Vo, *supra* note 24, at 354 (giving credence to the theory that beauty is in the eye of the beholder).

<sup>183</sup> See discussion *supra* Part II.E (discussing the inherent uncertainty associated with appearance discrimination statutes).

<sup>184</sup> See discussion *supra* Part II.E.

applicant with dark eyes for the same reason.<sup>185</sup> This hypothetical situation illustrates the overbreadth of the District of Columbia statute and likelihood that it will produce inconsistent results.<sup>186</sup>

Additionally, the applicants described in the hypothetical situation may have redress under either the ADEA or Title VII; hence, enacting appearance discrimination laws may be unnecessary.<sup>187</sup> Consequently, another detriment to appearance discrimination laws is that they excessively overlap with the current remedies.<sup>188</sup>

Moreover, proving appearance based discrimination is no easy task, and developing a narrowly tailored statute is likewise complicated.<sup>189</sup> Under current legal remedies, proving discriminatory motive already presents a difficult task.<sup>190</sup> However, this task would become even more complicated if appearance was given protected status.<sup>191</sup> Not only would appearance discrimination be hard to prove, but employers may discriminate subconsciously, because the importance of beauty is so ingrained in American culture, which only compounds the difficulty of the task.<sup>192</sup> For that reason, the further detriment of changing societal attitudes about a long accepted discriminatory method, until now, is problematic.<sup>193</sup>

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<sup>185</sup> See *Vo*, *supra* note 24, at 354 (illustrating that attractiveness is too subjective to be given protected status).

<sup>186</sup> *Id.*

<sup>187</sup> See discussion *supra* Part II.D. Because baldness may be associated with looking too old, the applicant may be able to link appearance to the ADA. Additionally, because refusing employment based on dark eye color may be related to race, the applicant could attempt to show a disparate impact under Title VII. See also *Vo supra* note 24, at 354. *Vo* explains that appearance discrimination statutes are largely arbitrary and not specific enough to actually protect the unattractive. *Id.*

<sup>188</sup> See *Vo*, *supra* note 24, at 354. *But see* Adamitis, *supra* note 58, at 223. Adamitis argues that although there is protection offered by existing antidiscrimination law, there is still a need for an appearance discrimination law because otherwise many victims will be unprotected. *Id.*

<sup>189</sup> Adamitis, *supra* note 58, at 223 (acknowledging the difficulty in proving appearance discrimination).

<sup>190</sup> Fleener, *supra* note 32, at 1321 (admitting that proving discrimination is a heavy burden).

<sup>191</sup> *Id.* Fleener admits that if current antidiscrimination law is not altered by a new appearance category, the law will be less problematic. *Id.*

<sup>192</sup> *Vo*, *supra* note 24, at 354-55 (describing the importance appearance plays in today's society).

<sup>193</sup> *Id.* at 354. *But see* Adamitis, *supra* note 58, at 223. Adamitis argues that the fact that making assumptions based on appearances is largely accepted is not a valid justification because it is an "unsatisfactory and historically unsound justification for allowing a harmful, unwarranted, and unjust practice to continue unabated, given the fact that many

Further, another detriment of an appearance discrimination statute is that frivolous suits will be brought and the “floodgates” of litigation will be opened.<sup>194</sup> For example, anytime an employer denies an applicant a position, the applicant could argue that the employer did not extend a job offer because of his or her appearance.<sup>195</sup> Because attractiveness is largely subjective, a variety of plaintiffs could bring baseless suits that would inevitably flood the courts.<sup>196</sup> Enforcing an appearance discrimination law is wholly impracticable because if beauty truly “is in the eye of the beholder,” it will be too difficult for courts to determine when employers have such a discriminatory motive.<sup>197</sup>

Finally, a concern exists that appearance based protection will infringe on the rights of employers.<sup>198</sup> For example, financial experts and employers themselves contend the importance of appearance because it affects image and profitability. Employers, therefore, should have wide discretion.<sup>199</sup> Employers need to maintain discretion in their hiring choices.<sup>200</sup> Generally, employers weigh the factors that they consider valuable, at times including appearance.<sup>201</sup> But, even when appearance is a factor, it is not dispositive because most employers do not want a workforce of unqualified, yet attractive employees.<sup>202</sup> In view of that fact, when employers have valid reasons for appearance discrimination,

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currently protected categories were arguably equally engrained and accepted at times prior to their protection.” *Id.* However, this argument is largely unpersuasive because of the historical differences between appearance and the already protected categories. *See* discussion, *supra*, Part II.A.

<sup>194</sup> *See* Rothstein, *supra* note 173, at 141-42. *But see*, Adamitis, *supra* note 58, at 222. Adamitis argues that these arguments about an appearance discrimination statute are unfounded because, “[c]oncerns of overinclusiveness, excessive litigation, and difficulty of proof are dispelled by requiring that claimants follow existing formulas for proving their claims.” *Id.* Adamitis goes on to argue that without proof of discriminatory treatment based on appearance, there will be no viable claim. *Id.* Furthermore, she claims that this is proof that the “floodgates” won’t be opened because there are not many occurrences of undeserving people making claims of appearance discrimination. *Id.*

<sup>195</sup> *See* Rothstein, *supra* note 173, at 141-42 (explaining that an appearance discrimination statute could easily be abused).

<sup>196</sup> *See* discussion *supra* Part II.C (discussing the subjectivity of beauty).

<sup>197</sup> *Vo*, *supra* note 24, at 356 (explaining that it is too difficult to prove that an employer found an applicant unattractive and did not offer that applicant a position because of her unappealing looks).

<sup>198</sup> *Id.* at 354-55.

<sup>199</sup> *See* discussion *supra* Part II.C (explaining that appearance does matter).

<sup>200</sup> *Vo*, *supra* note 24, at 356. *Vo* suggests, “[f]ar reaching ordinances tend to infringe on employers’ rights and take away any discretion they have.” *Id.*

<sup>201</sup> *Id.* at 345.

<sup>202</sup> *Id.* Consider the A&F employment situation. While attractiveness is a factor in hiring, A&F also wants employees that are responsible, friendly to customers, and usually pursuing an education. *See* discussion *supra* Part II.F.

they should have discretion.<sup>203</sup> Yet, when qualified individuals are discriminated against, employers must be restricted.<sup>204</sup>

Consequently, it is necessary to investigate employers' possible, legitimate reasons for discrimination on the basis of appearance because employers should have the opportunity to present valid defenses.

*C. Is Appearance Discrimination Ever Justified Discrimination?*

When there is no relationship between appearance and the necessary functions or qualifications of a job, appearance discrimination is certainly "arbitrary, irrational, and unfair."<sup>205</sup> The most qualified individuals logically should be hired.<sup>206</sup> On the other hand, in some instances, an applicant may not be qualified unless he or she is attractive.<sup>207</sup> Although economists argue that appearance should always be a factor when it affects the bottom line, employers cannot use profits alone as a justification.<sup>208</sup> Instead, employers could attempt to establish a valid BFOQ.

1. Appearance Discrimination and BFOQs

Employers may consider appearance when it directly affects their businesses, but an employer will have to justify these actions.<sup>209</sup> Nevertheless, establishing a BFOQ defense is a difficult task.<sup>210</sup> For example, when an airline attempted to bring a BFOQ defense because it deemed appearance necessary to the functions of a stewardess and the image of the airline, it failed to prove the relationship between female

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<sup>203</sup> *Vo, supra* note 24, at 356 (discussing situations in which employers should be able to consider appearance).

<sup>204</sup> *Id.* *Vo* explains, "[t]he line must be drawn only when employers blatantly discriminate against qualified individuals. When an employer continually and unreasonably abuses his rights, then restriction is necessary." *Id.*

<sup>205</sup> *Adamitis, supra* note 58, at 212 (giving examples of when appearance discrimination is unjust).

<sup>206</sup> *Id.*

<sup>207</sup> *Vo, supra* note 24, at 343. *Vo* explains that in certain fields attractiveness is obviously important and it is acceptable to consider appearance in that field. *Id.* On the other hand, *Vo* makes clear that in other occupations appearance is not an important consideration. *Id.*

<sup>208</sup> *See* discussion *supra* Parts II.C-II.D (discussing justifications for discriminating based on appearance).

<sup>209</sup> *See* discussion *supra* Part II.D.2 (providing background for the BFOQ defense).

<sup>210</sup> *See Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 302 (N.D. Tex. 1981) (reasoning that marketing a specific image was not a valid reason for hiring based on female attractiveness).

attractiveness and an essential business function.<sup>211</sup> Clearly, it is challenging to prove that appearance goes to the very essence of a business, even when a company builds an entire image and marketing campaign around attractiveness.<sup>212</sup>

Accordingly, because A&F openly hires individuals with the A&F look, it would be subject to litigation under a law prohibiting appearance discrimination.<sup>213</sup> In that situation, A&F would likely argue that attractiveness is a BFOQ.<sup>214</sup> Presumably, A&F would argue that attractiveness is essential to representing the brand and that profitability is dependent on attractiveness because customers are more willing to buy the merchandise when they can see that it looks good on the attractive brand representatives.<sup>215</sup> In addition to this argument, A&F must show that attractiveness is essential to the business and that less attractive people are not qualified to perform the necessary job functions.<sup>216</sup> Even though some of the tasks a brand representative must complete are unrelated to attractiveness, certain tasks that are still essential to the business are dependent on looks.<sup>217</sup> Brand representatives perform some functions that are arguably more related to modeling than just selling clothes and, as a consequence, their attractiveness could be construed as essential to the business.<sup>218</sup> Yet, BFOQ defenses are exceedingly narrow and, in most cases, including this

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<sup>211</sup> *Id.* See discussion of this case *supra* Part II.D.2.a (explaining that the airline could not prove that discriminating against men by only hiring attractive women was necessary for the business).

<sup>212</sup> *Id.*

<sup>213</sup> See discussion *supra* Part II.F (describing the hiring practices of A&F).

<sup>214</sup> See discussion *supra* Part II.F.

<sup>215</sup> Zakrzewski, *supra* note 51, at 457-58 (providing a basis for what arguments would be made in the event of an appearance discrimination dispute).

<sup>216</sup> See discussion *supra* Part II.D.2 (establishing the necessary requirements for a BFOQ defense).

<sup>217</sup> See discussion *supra* Part II.F (explaining the image of A&F and the duties that go along with it).

<sup>218</sup> See discussion *supra* Part II.F. In addition, the employees are called brand representatives instead of sales associates because they represent A&F's image. *Id.* Thus, A&F produces clothing with the brand name emblazoned in obvious places so that the brand representatives can act as walking billboards when they are on duty and off. *Id.* A&F has been largely successful in projecting its image because mainstream music, television, and movies often refer to attractive people by explaining that they look like A&F models. *Id.* When people associate attractiveness with A&F models they are referring to the actual models and the brand representatives that are seen in the stores because both are attractive individuals that have the A&F look. *Id.* Similarly, Hooters created a sexualized image and could also argue that their waitresses are more like models. See *supra* note 85 (explaining the difficulty Hooters had in attempting to successfully argue a defense).

one, physical attractiveness will not likely qualify as essential.<sup>219</sup> Additionally, A&F would also have difficulty proving that there are no less discriminatory means of achieving its goal if attractiveness is not found to be essential to the job.<sup>220</sup>

Thus, BFOQs are difficult to establish and may not provide sufficient protection to employers. Therefore, employers must consider the alternative defense of business necessity.

## 2. Appearance Discrimination and Business Necessity

In order to establish a business necessity for appearance, there must first be discrimination against a qualified individual that belongs to a protected class.<sup>221</sup> Accordingly, if there were a prohibition on appearance discrimination, employers would have the option to argue a business necessity defense.<sup>222</sup> In the A&F scenario, employees are hired based on their looks; therefore, the burden of proving discriminatory bias based on attractiveness would not be very great.<sup>223</sup> Unfortunately for A&F, the same difficulty arises with this defense as with the BFOQ defense, because a business necessity must also be integral to the position and attractiveness is usually not considered essential to sales.<sup>224</sup> For example, attractiveness is not a necessary quality for an employee to assist customers, utilize a cash register, or fold clothing.<sup>225</sup> As a result,

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<sup>219</sup> *Vo, supra* note 24, at 344 (discussing the fact that the scope of BFOQ defenses are narrow).

<sup>220</sup> *Bello, supra* note 36, at 503. *Bello* goes on to argue that a legitimate less discriminatory practice would be to only interview the most qualified applicants based solely on their résumés. *Id.* However, A&F would argue that attractiveness is necessary; thus, unattractive people are not qualified.

<sup>221</sup> *See* discussion of *Wilson supra* Part II.D.2.a. In the A&F situation, there is the same argument under this defense that individuals must actually be attractive to be qualified. *See generally* discussion *supra* Part II.F.

<sup>222</sup> *See* discussion *supra* Part II.D.2.a (discussing the requirements for a business necessity defense).

<sup>223</sup> *See* discussion *supra* Part II.B. *See also* *Zakrzewski, supra* note 51, at 456. *Zakrzewski* argues that the inherent subjectivity involved in appearance discrimination is troublesome because it would be difficult for an individual to prove that he or she is part of the “unattractive people” class. *Id.* Furthermore, *Zakrzewski* hypothesizes that courts would be forced to judge the attractiveness of individuals rather than their legal arguments. *Id.* However, she argues that courts are capable of making these decisions because subjectivity is intrinsic to several other areas of law. *Id.* at 456-57. *See* discussion *supra* Part II.F.

<sup>224</sup> *See* *Bello, supra* note 36, at 501. *Bello* argues that a business necessity is only valid if the product being sold is something that enhances attractiveness. *Id.* *See* discussion *supra* Part II.D.2.a.

<sup>225</sup> *See* discussion *supra* Part II.F. However, attractiveness is indeed essential to the position, because it is essential to the brand image and other specialized duties of A&F employees. *Id.*

attractiveness will not be considered a valid hiring criterion, because an unattractive person is as capable of performing the required duties as an attractive person.<sup>226</sup>

Additionally, A&F's hiring policies would not be facially neutral because they would treat unattractive individuals differently. Thus, A&F's actions would probably not qualify for a business necessity defense regardless of the justifications for the facially discriminatory hiring practices.<sup>227</sup> Because A&F is openly discriminating based on attractiveness, rather than imposing facially neutral policies that result in disparate impact, business necessity is an improper defense.<sup>228</sup> Nonetheless, other employers that discriminate more discretely could attempt to use this defense if their policies were impartial on their face.<sup>229</sup>

A few other proposals have been posited to deal with this problem.<sup>230</sup> As opposed to creating a new federal statute based on appearance discrimination, some commentators argue that the current laws should be expanded in other ways.<sup>231</sup>

#### D. Other Proposals on Appearance Discrimination Law

Even though significant options exist for individuals discriminated against on the basis of their appearance, some individuals are left without recourse.<sup>232</sup> As a result, many commentators have suggested resolutions to this problem other than creating a new statute for the unattractive.<sup>233</sup>

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<sup>226</sup> *Id.*; see also *supra* notes 85, 153 (discussing the *Hooters* case and *Borgata Hotel Casino & Spa* respectively as well as the difficulty of this defense in the restaurant and casino industries where the employer would have to prove that an attractive waitress is more capable of delivering food and drinks).

<sup>227</sup> See Zakrzewski, *supra* note 51, at 459. Zakrzewski suggests an alternative method that A&F could utilize would be to have one job for the brand representatives, which she recognizes as models, and another job for salespeople. *Id.* However, this alternative would likely be too costly to A&F and nonsensical because the image of their brand would not be marketed effectively. See discussion *supra* Part II.F.

<sup>228</sup> See *supra* note 106 and accompanying text (explaining that a facially neutral policy is a prerequisite to utilizing the business necessity defense).

<sup>229</sup> See *supra* note 106 and accompanying text.

<sup>230</sup> See *infra* Part III.D (explaining other options that commentators suggest will alleviate the problem of appearance discrimination).

<sup>231</sup> See generally Adamitis, *supra* note 58; Bello, *supra* note 36; Zakrzewski, *supra* note 51.

<sup>232</sup> See discussion *supra* Part II.D (explaining that there is sufficient protection under the current laws; however, not every claim based on appearance discrimination is redressable).

<sup>233</sup> Adamitis, *supra* note 58, at 220; Bello, *supra* note 36, at 504 (recommending other options to address appearance discrimination).

To begin, some commentators argue that state and local legislators should follow in the footsteps of Michigan, the District of Columbia, and Santa Cruz, California by creating their own appearance discrimination laws.<sup>234</sup> Though this is a possibility, there is still considerable difficulty in enacting this sort of legislation.<sup>235</sup> For example, state and local laws will produce different results in different states and localities and, as a consequence, there will be no uniformity, which would stifle equal protection.<sup>236</sup> Moreover, these new laws would be inherently overbroad and vague because the term “appearance” is unclear; therefore, inconsistent results would occur even in an individual jurisdiction.<sup>237</sup> Additionally, employers and the public in general may be apprehensive about following specific appearance discrimination laws.<sup>238</sup>

Alternatively, other commentators have proposed expanding Title VII so that appearance would be a protected class.<sup>239</sup> Nonetheless, this proposition will not likely come to fruition because of the differences in unattractive individuals and the current Title VII protected classes.<sup>240</sup> For instance, the unattractive have not suffered the same, or even similar, injustices as minorities and women, and appearance based rights are not firmly entrenched or recognized in American law.<sup>241</sup>

Additionally, there is also an argument that immutable unattractiveness should be seen as a disability under the ADA.<sup>242</sup> One commentator argued that because antidiscrimination law that targets disabilities allows individuals who do not fit into any already defined category to seek redress, more qualified individuals would be hired if

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<sup>234</sup> Adamitis, *supra* note 58, at 220; Bello, *supra* note 36, at 504 (suggesting that state and local lawmakers should expand the current breadth of antidiscrimination law).

<sup>235</sup> See discussion *supra* Part II.E & Part III.B; Zakrzewski, *supra* note 51, at 452; see also Vo, *supra* note 24, at 357. Vo explains that if states and localities do offer protection for appearance discrimination they must do so with legislation that is very narrowly tailored. Vo, *supra* note 24, at 357. Vo further explains that when these statutes are enacted, there should be stringent pleading requirements to reduce erroneous claims. *Id.* at 357-58.

<sup>236</sup> See Zakrzewski, *supra* note 51, at 452 (explaining the possible negative results of state and local antidiscrimination laws).

<sup>237</sup> See discussion *supra* Part III.B (analyzing the subjectivity of attractiveness).

<sup>238</sup> See Post, *supra* note 26, at 3 (explaining that an antidiscrimination law has drawbacks and may not be well received).

<sup>239</sup> See Zakrzewski, *supra* note 51, at 452. Zakrzewski contends that because attractiveness is immutable it should be protected. *Id.*

<sup>240</sup> See discussion *supra* Part III.A (analyzing the disparity between recognizing appearance as a protected class verses already protected classes).

<sup>241</sup> See *supra* notes 14-15 and accompanying text (discussing the importance of the already protected categories).

<sup>242</sup> Fleener, *supra* note 33, at 1321 (suggesting that the unattractive can be considered disabled because of the manner in which others regard them).

the law was expanded.<sup>243</sup> In spite of this, the policy behind the ADA does not support this expansion and some unattractive individuals, who are also disabled, are already allowed sufficient redress under this statute.<sup>244</sup>

For all of the aforementioned reasons, both the proposals to create a federal law on appearance discrimination and the proposals to expand existing law are unnecessary. The current laws provide sufficient redress and there is no need to alter the laws to provide less attractive individuals more protection.<sup>245</sup> However, there does need to be a change in antidiscrimination law. Even if creating narrowly tailored state and local laws can provide needed protection to individuals who are discriminated against based on appearance, employers' rights need more protection. As previously discussed, economists, employers, and market analysts agree that appearance is often a legitimate factor in hiring.<sup>246</sup> In many situations, appearance discrimination does not undercut other credentials; thus, employers can be justified in considering appearance among other factors in hiring decisions.<sup>247</sup> Even so, in jurisdictions where appearance based discrimination is prohibited, employers are left without any viable defenses.<sup>248</sup> Consequently, employers need to be given more discretion in their hiring decisions so that they are able to project their image, while hiring qualified employees.<sup>249</sup>

#### IV. CONTRIBUTION

At the outset, a proposition that the current laws need to address the inadequate protection of employer discretion will be introduced.<sup>250</sup> First, a general rule allowing appearance discrimination is discussed.<sup>251</sup> Then, the alternative suggestion of creating a more satisfactory employer

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<sup>243</sup> *Id.* at 1328.

<sup>244</sup> See discussion *supra* Part II.D 3 (explaining that appearance can already be linked to the ADA through other means).

<sup>245</sup> See discussion *supra* Part II (showing that victims of appearance discrimination are already protected by the ADA in certain instances).

<sup>246</sup> See *supra* notes 40-42 and accompanying text (discussing the effect that attractiveness has on profits, image, and marketing).

<sup>247</sup> See discussion *supra* Part II.F (explaining that hiring attractive employees does not indicate that the employees are not qualified for their positions).

<sup>248</sup> See *supra* Parts III.C.1-2 (discussing the inadequacy of current employer defenses).

<sup>249</sup> *Vo*, *supra* note 24, at 356 (explaining that there are instances where employers should be able to chose their own hiring method).

<sup>250</sup> See *infra* Part IV.A (discussing the disparity in protection between employers and employees).

<sup>251</sup> See *infra* Part IV.A.

defense is presented.<sup>252</sup> After sufficiently analyzing these initial proposals, the focus will shift to discussing what the required changes in the law should entail if appearance discrimination was prohibited.<sup>253</sup> Specifically, a modified version of the BFOQ defense will be introduced.<sup>254</sup>

At present, the body of law regarding appearance discrimination is hardly substantial. In most jurisdictions, appearance discrimination based on attractiveness is neither unlawful nor protected.<sup>255</sup> As a result, great potential exists for this developing area of jurisprudence to burgeon into a topic of even greater consequence. Given the sparse current law on the topic of immutable appearance discrimination, the following proposal provides a framework for amending the existing laws.

*A. The Necessary Changes to the Current Appearance Based Discrimination Law*

In the limited case law that attractiveness based lawsuits have inspired, employers are predominately on the losing end of the spectrum.<sup>256</sup> Perhaps the simplest solution would be for courts to treat mutable and immutable appearance discrimination in the same way. For example, possible employer arguments such as image, profits, success, professionalism, and poor reflection on the product could be dispositive factors for both types of discrimination, rather than just for mutable appearance discrimination.<sup>257</sup> However, the simple solution is usually not the just solution, and that is especially true in this circumstance.<sup>258</sup> Nonetheless, these factors should be considered and balanced against the rights of employees; otherwise, employers' legitimate business interests are not given the proper respect. Accordingly, courts should accept the reality that appearance matters to employers, customers, and bottom

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<sup>252</sup> See *infra* Part IV.A.

<sup>253</sup> See *infra* Part IV.B (providing a modified BFOQ defense).

<sup>254</sup> See *infra* Part IV.B.

<sup>255</sup> See *supra* Part II (giving the background of antidiscrimination law as it relates to appearance).

<sup>256</sup> See *supra* Part III (illustrating that employers do not have valid defenses).

<sup>257</sup> See *supra* Part II.B (providing employer justifications for requiring employees to alter their mutable appearance characteristics).

<sup>258</sup> Mutable appearances can often be changed, and if they are permanent, they are the result of a conscious decision to alter natural appearance and suffer the consequences. See *supra* Part II.B.

lines.<sup>259</sup> Thus, a general rule should exist to guide courts in making fair, yet realistic determinations.

To begin, employers should have discretion to make hiring decisions based on attractiveness, if attractiveness is substantially related to the *functions*, not the essence, of the business.<sup>260</sup> If employers were given this deserved discretion, then airlines could hire attractive flight attendants that project the airline's provocative image.<sup>261</sup> Additionally, Hooters could hire attractive waitresses for the same reason.<sup>262</sup> Because the functions of those employees' jobs include playing a certain role, appealing to a particular market, displaying the company's image, and looking the part, attractiveness is substantially related to the functions of the job. Even though this rule has the potential to create less than identical results, it is a proper starting place that provides guidance to courts and discretion to employers. True, this rule does not give protection to unattractive applicants, but the current laws offer sufficient redress to those individuals able to link attractiveness to a protected category, and, although this leaves some employees without redress, employers should have the ability to hire based on attractiveness if it is substantially related to business functions. Thus, those who do not meet the appearance standards for these positions are simply not qualified.<sup>263</sup>

For political reasons, a rule allowing appearance discrimination will not likely be put into effect. Therefore, the alternative option of creating a legitimate defense for employers must be discussed.

In jurisdictions that currently prohibit appearance discrimination, the usual employer defenses are available.<sup>264</sup> Nevertheless, employers do not have enough discretion, even with the benefit of these defenses.<sup>265</sup> In order to give employers proper protection, the BFOQ defense should be subjective, instead of a harsh objective test.<sup>266</sup> Courts, too concerned with the plight of employees, give less deference to the rational choices that an employer should be able to make. Adjusting this test will allow

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<sup>259</sup> See *supra* Part II (explaining the importance of appearance).

<sup>260</sup> See *supra* Part II.D (discussing the current employer defenses).

<sup>261</sup> See *supra* notes 99-103 and accompanying text (discussing the *Wilson* case).

<sup>262</sup> See *supra* note 85 (discussing the *Hooters* case).

<sup>263</sup> See *supra* Parts II-III (providing a rationale for why the current laws provide victims of appearance discrimination adequate protection).

<sup>264</sup> See *supra* Part II.E (explaining that BFOQs, the business necessity defense, and reasonable business exceptions are the available defenses).

<sup>265</sup> See *supra* Part III (illustrating the inability of employers to successfully defend against an appearance discrimination accusation).

<sup>266</sup> See *supra* Part II.D (detailing the current BFOQ defense).

courts to more fully appreciate the hiring decisions of employers. This change is not drastic, but the simple change of adjusting the BFOQ defense to make it more employer friendly by recognizing what is essential and necessary from the employer's point of view will result in a fair result and a superior test.

Utilizing this improved BFOQ defense is also a viable option that can be used if appearance discrimination becomes illegal, but other options must also be considered.

*B. The Necessary Changes that an Anti-Appearance Discrimination Law Will Trigger*

If a change in the law occurs that affords more protection to employees instead of employers, then employer defenses will need to be substantially altered to afford employers more discretion. In addition to making BFOQs subjective, extending the reach of the business "essence" defense is also a possibility.<sup>267</sup> Image is of the utmost importance to employers, and is not given any real weight in analyzing the BFOQ factors of necessity or essence.<sup>268</sup> Therefore, instead of making the defense so narrow, image should be considered part of the very "essence" of the business. Then, employers that wanted to project a specific image, with the appearance of their employees, would be able to do so if they could show that their image is substantially related to attractiveness, sexuality, or whatever image they choose to cast. Additionally, instead of focusing on what businesses in the same industry do, courts should take an individualized approach and consider each employer's justification on its own merits.<sup>269</sup>

This approach will require businesses to be open about their discretionary choices and freely admit that they hire in a discriminatory manner. As a result, customers who do not agree with this sort of policy can freely choose not to support such an enterprise, and applicants will have the benefit of knowing exactly what an employer is looking for in an employee. Employers, like A&F, that openly hire based on appearance, should be rewarded for their honesty and allowed to utilize

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<sup>267</sup> See *supra* Part II.D. Currently, "essence" is a very strict standard that employers have great difficulty in proving. *Id.* (quotations omitted).

<sup>268</sup> See *supra* Part II.D.

<sup>269</sup> See *supra* Part II.D (explaining that it is difficult to show that BFOQs are necessary when other employers in the same field do not require the same qualifications).

their discretion by employing this more lenient BFOQ defense.<sup>270</sup> Consequently, businesses like A&F should be compared with other industries, such as modeling, where hiring based on appearance is considered necessary and justified. In consequence, the need for employer discretion will become more apparent as the recognition of the A&F attractive employee becomes more universal.

In summation, the BFOQ defense should be changed to a subjective test analyzed on a case by case basis, which recognizes that image is part of the very essence of the business. Again, these alterations to the well-known BFOQ defense are subtle, but they are necessary to allow employers the possibility of actually prevailing with a defense, instead of being unable to meet an unreachable standard. Although the BFOQ defense serves its purpose for more serious forms of discrimination, it is too severe in the realm of appearance discrimination.<sup>271</sup> Thus, this modified BFOQ defense will allow employers to hire qualified, attractive employees and create mutually conferred benefits for the business, the employees, and the brand.

#### V. CONCLUSION

Imagine once again that you are the hiring director for A&F, under the modified version of the BFOQ defense; you would now have the authority to hire attractive individuals that represent the A&F image. This Note has shown that appearance discrimination is in a different league from other forms of discrimination, thus explaining why employers should be given such discretion. Also, the importance of appearance in American society shows that employers that discriminate based on attractiveness should not be held to the strict standards for protected classes. Furthermore, sufficient legal options are already available to those employees able to link unattractiveness to a legally protected category. Specifically, the A&F scenario exemplified a situation where the current laws protect employees, but not employers. The detriments of an appearance discrimination statute are clear and the current employer defenses are inadequate. Finally, viable alternatives exist to modify the employer's defense so that employers can have the discretion they deserve. Therefore, courts should be more willing to

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<sup>270</sup> See *supra* Part II.F (discussing A&F and its controversial store policies). Not only would employers like A&F in the retail industry benefit from such a change, the restaurant industry, casino industry, and other industries that consider appearance important would be able to exercise their business judgment as well. See *supra* notes 85, 153 (discussing the *Hooters* case and the *Borgata Hotel Casino & Spa* respectively).

<sup>271</sup> See *supra* Part II.D (explaining that a BFOQ defense is difficult to prove).

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recognize what an employer believes is necessary to the business instead of substituting their discretion and judgment for that of the employer.

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