

# Appearance Discrimination, “Lookism” And “Lookphobia” In The Workplace

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## ABSTRACT

*This article focuses on appearance and attractiveness discrimination in the American workplace. As such, this article discusses issues related to “lookism” and “lookphobia” as a real challenge for managers who are recruiting, attracting, interviewing, hiring, appraising, and promoting employees. The article provides a discussion of societal norms concerning “attractiveness,” the existence of appearance discrimination in employment, the presence of “preferring the pretty”, and then the authors examine important civil rights laws that relate to such forms of discrimination. Finally, recommendations for employers and managers are provided for fair and non-discriminatory hiring and promotional practices.*

**Keywords:** Appearance Discrimination in the Workplace; Lookism; Lookphobia

## INTRODUCTION

It has been said that “A fair exterior is a silent recommendation” (Publilius Syrus, *circa* 42 B.C.). Furthermore, “Beauty itself doth of itself persuade the eyes of men without an orator” Said William Shakespeare (1564-1616). As the preceding quotations indicate, appearance is part of a person’s non-verbal communication; and appearance is tied directly to “attractiveness.” And physical attractiveness, one readily must admit is a “prized possession” as well as an esteemed one, in U.S. society today. James (2008, p. 637) states that “several positive qualities such as happiness and success are associated with attractiveness.” Corbett (2011, p. 629) declares that “contemporary American society celebrates and embraces physical beauty with an inexhaustible force.” Corbett (2007, p. 153) also underscores that “at the beginning of the twenty-first century, American society was obsessed with physical appearance....Moreover, the curvaceous became loquacious, and presumptively and presumptuously sagacious.” Similarly, James (2008, pp. 629-30) points out that when two equally qualified women apply for a position: “You would rather hire the applicant that you find more attractive because society taught you to associate beauty with other favorable characteristics.” These appearance norms, and especially attractiveness, “good looks,” and beauty, are based on and shaped by culture, cultural norms, and society and community standards (Mahajan, 2007; Steinle, 2006). However, Mahajan (2007, p. 182) warns that “relying on culture-bound judgments for appearance may reinforce existing prejudices and stereotypes. Such judgments have less to do with the importance of...appearance to individuals or employers and more to do with society’s...appearance expectations.” Nevertheless, Corbett (2011, p. 625) states that “society’s affinity for beauty seems to have real economic consequences for people.”

Accordingly, when it comes to business, one is reminded of the old adage: “Soap doesn’t sell, sex sells.” Clearly, U.S. society is concerned with appearance, attractiveness, “good looks,” and sexiness; and thus so is business (Mujtaba, 2010). Mahajan (2007, p. 166) asserts that “our society is obsessed with appearance.” Corbett (2007, p. 157) concurs: “Appearance matters in our society today more than it ever has before.” Corbett (2011, p. 625) further declares that “indeed, contemporary society seems to be utterly and completely obsessed with physical attractiveness.” In a business context, employers often make hiring decisions based on the appearance and attractiveness of the job applicants. James (2008, p. 229) indicates 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.” Corbett (2007, p. 157) also points out that in an appearance-based society such as the U.S. today, “...many employers care very much about the physical appearance of their employees, and some make employment decisions based, at least in part, on the physical appearance of employees and applicants.” Steinle (2006, pp. 262-63) emphasizes that “the commercial appeal of ‘cool, yet seductive, teenage sales associates, ‘hot’ women at cosmetics and lingerie counters, and waitresses who resemble ‘scantly clad Barbie doll(s)’ is clear.” Mahajan (2007, pp. 169-70) concurs, emphasizing: “From an economic standpoint, employers have incentive to hire based on physical appearance.” Physically attractive job applicants apparently benefit financially from this incentive since according to Daniel Hamermesh, an economist at the University of Texas, over a lifetime and assuming today’s mean wages, “attractive” American workers on average make \$230,000 more than their very plain-looking co-workers (Hamermesh 2011, p.47).

Just as appearance affects an employer’s judgment about the qualifications of a particular employee, so does it affect a customer’s perception of the company and its products or services (Cavico, Muffler, and Mujtaba, 2012). Thus many employers use appearance-based hiring as a marketing technique.” To illustrate the point that “looks do indeed matter” in the employment context, James (2008, pp. 636-37) relates that the ABC television news show “...20/20 conducted an experiment in which two women with virtually identical resumes and behaviors applied for the same job. Not surprisingly, the interviewer was friendlier to the more attractive applicant and extended the job offer to her; whereas, the less attractive applicant never even received a return phone call.” Corbett (2007, p. 154) relates that “clothing stores were hiring young, shapely, beautiful people who had ‘the look’ to be sales associates. Bars and restaurants were hiring pretty people.” To illustrate, the *Miami Herald* (Greenhouse, 2003) reported on a steadily growing trend in retailing; that is, many companies, for example, Abercrombie & Fitch, the Gap, cosmetics company L’Oreal, and the W hotel chain, are taking an aggressive approach to develop an attractive sales force; and as such they are openly seeking workers who are pretty, handsome, good-looking, and sexy. Greenhouse (2003, p. 21A) quoted the Abercrombie communications director who said that his company preferred to hire sales assistants, who are known as “brand representatives,” who “looked great” and who will serve as “ambassadors” for the brand. Abercrombie has had the brand of the “classic American” and “preppy” look and style, which, as will be seen, could be problematic if the company preferred young, white, blond-haired, blue-eyed applicants but discriminated against black applicants. In fact, Greenhouse (2003) extolled the Gap as well as Benetton since these companies pride themselves on hiring attractive people, but people from many different backgrounds and races.

Evidently, appearances do matter in U.S. society today; and physical appearance, particularly in the sense of “attractiveness,” is highly favored by society. Employers, therefore, in order to survive, let alone prosper, in a very competitive and difficult economy, as well as in a society which places a premium on “good looks, very well might take steps to build an “attractive,” and concomitantly marketable, image, brand, or culture. Preferring employees who are deemed to be attractive, and consequently discriminating against those deemed to be unattractive, is one way to achieve this business objective. Accordingly, a fundamental question arises: Is such discrimination in employment based on personal appearance, particularly on attractiveness, illegal under civil rights laws in the United States or is favoring a worker’s physical beauty a legitimate, strategic marketing tool in the ever increasingly competitive “at will” employment marketplace.

## **EMPLOYMENT AT-WILL DOCTRINE**

The employment at-will doctrine is a fundamental principle of employment law in the United States. The doctrine holds that if an employee is an employee at-will, that is, one who does not have any contractual provisions limiting the circumstances under which the employee can be discharged, then the employee can be terminated for any reason – good, bad, or morally wrong, or no reason at all – and without any warning, notice, or explanation (Corbett, 2011, Cavico and Mujtaba, 2008). As emphasized by Corbett (2011, p. 623) this doctrine will emerge as “particularly problematic for victims of appearance-based discrimination in proving their claims.” The employment at-will doctrine can engender a legal but immoral discharge, but not an illegal discharge, that is, one that is in violation of some other legal provision, the prime example being the Civil Rights Act of 1964. Corbett (2011, 2007) raises the concern that including physical appearance as part of civil rights laws would make too much of an inroad into the traditional employment at-will doctrine and the employer’s concomitant freedom to manage its workforce. Corbett (2007, p. 173) explains: “The less cohesive and identifiable (and the more amorphous) a group characteristic

is, the more it arguably intrudes on the freedom of employers to make decisions without fear of liability for violating an employment discrimination law. Consider an employer contemplating firing an employee. The employer may want to know whether it is likely it will be sued and incur substantial costs in defending an employee discrimination lawsuit. For race, color, sex, and to some extent national origin, the employer can observe or discern the potential plaintiff's characteristics." Nonetheless, Corbett (2011, p. 658) concludes that "although most people in the United States think that it is unfair to terminate an employee based on her physical appearance, the basic premise of U.S. employment law – employment at will – permits such a termination." Accordingly, if an employee is an employee at-will, and the employee is discharged for his or her appearance, the employee will have no recourse under the traditional employment at-will doctrine. The employee may have a valid wrongful discharge case only if he or she can directly link the appearance-based discrimination to one of the protected categories, also called protected characteristics, pursuant to civil rights laws.

## **CIVIL RIGHTS LAWS**

Civil rights laws in the United States make it illegal for an employer to discriminate against an employee or job applicant because of a person's race, color, religion, sex, national origin, age (40 or older), and disability (Equal Employment Opportunity Commission, Prohibited Employment Policies/Practices, 2011). Civil rights laws are enforced in the United States primarily by the federal government regulatory agency – the Equal Employment Opportunity Commission (EEOC). Congress has delegated to the EEOC the power to interpret, administer, and enforce Title VII of the Civil Rights Act of 1964. The EEOC is permitted to bring a lawsuit on behalf of an aggrieved employee, or the aggrieved employee may bring a suit himself or herself for legal or equitable relief. However, Stoter (2008) points out that Congress only empowered the EEOC to institute a lawsuit against employers who engaged in a "pattern or practice" of discrimination; and as a result, the private cause of action allowed in Title VII became an instrumental component in employment anti-discrimination law and practice (pp. 601-02). Individual actions can be filed by workers, but only after they conform to strict pre-suit procedures which include filing their initial administrative complaint with the EEOC and "706" corresponding state agency. The Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), it must be stressed, are federal, that is, national laws. Since the U.S. is a federal system, it accordingly must be noted that almost all states in the U.S. have some type of anti-discrimination law – law which may provide more protection to an aggrieved employee than the federal law does.

The Civil Rights Act allows any person who is aggrieved by a violation of the statute to institute a civil action in any court of competent jurisdiction for any and all legal redress which will effectuate the purposes of the statute. However, a plaintiff must first fulfill certain administrative prerequisites (Lynch, 2006, pp. 70-73). When the EEOC finds "reasonable cause," the agency grants the aggrieved party a "right-to-sue" letter which allows the employee to proceed to the federal courts (Lynch, 2006 pp. 71-73). Moreover, it should be noted that normally individuals who feel they have been discriminated against in the workplace have 180 days to file a complaint with the EEOC and their state's corresponding "706 agency," which is the individual state's administrative agency charged with investigating allegations of discrimination in the workplace, such as the State of Florida's Commission on Human Relations or the Texas Workforce Commission. Thereafter, aggrieved parties have 90 days to file their lawsuit when their "right to sue" letter is received. Failing to follow these pre-suit procedures can result in a dismissal of the future federal court action as well as separate specific state antidiscrimination lawsuits (*Olivarez v. University of Texas at Austin*, 2009). In certain circumstances, these strict deadlines can be satisfied by either a work sharing agreement between the EEOC and local 706 agency, or "relation back" theories of tagging along additional discrimination claims after the filing of the lawsuit, such as was the case in *Ivey v. District of Columbia* (2008). In *Ivey*, the work sharing agreement between the federal and local agency expanded the 180 day deadline to 300 days, and the plaintiff's allegations of discrimination based on "personal appearance" related back to the original filing, although the claim was under an additional separate theory of recovery sounding in the violation of the District of Columbia's Human Rights Act.

The EEOC itself actually may go to court on behalf of the complaining employee, or the employee may also choose to be represented by private legal counsel. Regardless, in either situation, the *prima facie* case is the required initial case that a plaintiff employee asserting discrimination must establish. Basically, *prima facie* means the presentment of evidence which if left unexplained or not contradicted would establish the facts alleged.

Generally, in the context of discrimination, the plaintiff employee must show that: 1) he or she is in a class protected by the statute; 2) the plaintiff applied for and was qualified for a position or promotion for which the employer was seeking applicants; 3) the plaintiff suffered an adverse employment action, for example, the plaintiff was rejected or demoted despite being qualified, or despite the fact that the plaintiff was performing his or her job at a level that met the employer's legitimate expectations; 4) after the plaintiff's rejection or discharge or demotion, the position remained open and the employer continued to seek applicants from people with the plaintiff's qualifications. These elements, if present, give rise to an inference of discrimination. The burden of proof and persuasion is on the plaintiff employee to establish the *prima facie* case of discrimination by a preponderance of the evidence (*Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.*, 2009). Regarding the employment relationship, the most important statute on the federal level in the United States is Title VII of the Civil Rights Act of 1964.

#### **TITLE VII OF THE CIVIL RIGHTS ACT OF 1964**

The Civil Rights Act of 1964 is of prime importance to all employers, managers, employees, job applicants, and legal professionals in the United States. This statute prohibits discrimination by employers, labor organizations, and employment agencies on the basis of race, color, sex, religion, and national origin (Civil Rights Act, 42 U.S.C. Section 2000-e-2(a)(1)). Regarding employment, found in Title VII of the statute, the scope of the statutory legal provision is very broad, encompassing hiring, apprenticeships, promotion, training, transfer, compensation, and discharge, as well as any other "terms or conditions" and "privileges" of employment. The Act applies to both the private and public sectors, including state and local governments and their subdivisions, agencies, and departments. An employer subject to this act is one who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year (42 U.S.C. Section 2000e(b)). One of the principal purposes of the Act is to eliminate job discrimination in employment (Cavico and Mujtaba, 2008). This Act was amended in 1991 to allow for punitive damage awards against private employers as a possible remedy (*Civil Rights Act of 1991, Public Law 102-166, as enacted on November 21, 1991*). This amendment gives employers even more incentive to conform their workplace employment policies to the law and thus to avoid potential costly liability in this area of employment law. Liability pursuant to the Civil Rights Act can be premised on two important legal theories – disparate treatment and disparate impact.

#### **Disparate Treatment v. Disparate Impact Theories**

There are two important types of employment discrimination claims against employers involving the hiring, promotion, or discharge of employees – disparate treatment and disparate (or adverse) impact – that initially must be addressed. "Disparate treatment" involves an employer who intentionally treats applicants or employees less favorably than others based on one of the protected classes of color, race, sex, religion, national origin, age, or disability (Cavico and Mujtaba, 2009). The discrimination against the employee is willful, intentional, and purposeful; and thus the employee needs to produce evidence of the employer's specific intent to discriminate. However, intent to discriminate can be inferred. So, for example, when the employee is a member of a protected class, such as a racial minority, and is qualified for a position or promotion, and is rejected by the employer while the position remains open, and the employer continues to seek applicants, then an initial or *prima facie* case of discrimination can be sustained (Cavico and Mujtaba, 2008). The "disparate treatment" doctrine was articulated by the U.S. Supreme Court case of *McDonnell Douglas Corp. v. Green* (1973) and modified by *Community Affairs v. Burdine* (1981) and *St. Mary's Honor Center v. Hicks* (1993). The analysis for a "disparate treatment" claim involves a shifting burden of proof as follows: (1) first, the complainant must put forth credible evidence to establish a *prima facie* case of discrimination; (2) then if such evidence is established, the defendant employer must next articulate, through admissible evidence, a legitimate, non-discriminatory explanation or reason, such as a business necessity, for its actions; and finally (3) the burden shifts to the plaintiff employee to establish that the employer's proffered reason was merely a pretext to hide discrimination (Cavico and Mujtaba, 2008; Mahajan, 2007; *McDonnell Douglas*, 1973, pp. 802-04; *Burdine*, 1981, pp. 252-56). If the plaintiff employee cannot offer any evidence to show that the defendant employer's articulated, facially neutral reason for the termination was a fake one and a subterfuge to mask discriminatory intent, the employee's case cannot be sustained (Cavico and Mujtaba, 2008).



Accordingly, “burden-shifting” typically arises in a discrimination case when the plaintiff utilizes the disparate treatment legal theory. That is, the plaintiff, the allegedly aggrieved employee, is arguing that his or her employer intentionally discriminated against him or her because of a protected characteristic, such as age pursuant to the Age Discrimination in Employment Act or race pursuant to Title VII of the Civil Rights Act of 1964. In order to sustain his or her initial burden of proof, the plaintiff must introduce evidence that the employer intended to discriminate against the employee, who thereby suffered an adverse employment action, due to the employee’s age or race or other protected characteristic. The evidence the employee can offer can be direct evidence of discrimination, such as an express comment indicating a bias against older or minority workers, or circumstantial, such as a comment that an employee is “over-qualified” which can be the basis of an inference of a discriminatory animus based on age. Once the plaintiff establishes this initial or *prima facie* case, the burden then shifts to the employer to present a legitimate, *bona fide*, and non-discriminatory reason for the adverse employment action. Next, if the employer can meet this burden, then the burden shifts back to the plaintiff employee to demonstrate that the purportedly legitimate reason offered by the employer is in fact fake and a mere pretext for an underlying discriminatory motive (Cavico and Mujtaba, 2008; Mahajan, 2007). Regarding disparate treatment in the context of sex discrimination, Steinle (2006, pp. 277-78) explains that “members of one sex must establish that they have been treated differently from comparators of the opposite sex by being saddled with calculable unequal burdens in conforming to an employer’s standards.” However, Mahajan (2007, p. 178) counsels that “...because appearance policies are often based on unconscious biases, a plaintiff will be unlikely to satisfy her burden of proof since intent to discriminate under this theory usually requires a showing of conscious bias or purposeful discrimination.”

The other legal avenue claimants may travel to prove their employment discrimination claims is called “disparate impact,” or at times “adverse impact.” Pursuant to this theory, it is illegal for an employer to promulgate and apply a neutral employment policy that has a disparate, or disproportionate, negative impact on employees and applicants of a particular race, color, religion, sex, or national origin, unless the policy is job related and necessary to the operation of the business, or, in the case of age, the policy is based on a reasonable factor other than age (Equal Employment Opportunity Commission, Prohibited Employment Policies/Practices, 2011). This disparate impact legal doctrine does not require proof of an employer’s intent to discriminate (Cavico and Mujtaba, 2008). Rather, “a superficially neutral employment policy, practice or standard may violate the Civil Rights Act if it has a disproportionate discriminatory impact on a protected class of employees” (Cavico and Mujtaba, 2008, p. 501). Accordingly, such a practice will be deemed illegal if it has a disproportionate discriminatory impact on a protected class and the employer cannot justify the practice out of legitimate business necessity (Cavico and Mujtaba, 2008; Mahajan, 2007). However, Mahajan (2007, p. 178) warns that “...it is difficult for a plaintiff to prove that a specific practice has a disparate impact on members of a protected group if there are not many other employees that are members of the group in question, if other employees who are members of the group choose to abide by the employer’s appearance policy.” Disparate impact as a legal doctrine was first solidified in case law by the U.S. Supreme Court case of *Griggs v. Duke Power* (1971), further refined by the Court in *Albemarle Paper Co. v. Moody* (1975); codified in statute by the Civil Rights Act of 1991 (Civil Rights Act of 1991); and reaffirmed by the Supreme Court in *Raytheon Co. v. Hernandez* (2003). For example, a minimum height and weight requirement for a correctional counselor position had a disproportionate and adverse impact on women and was not job-related or necessary, and thus was deemed to be illegal (*Dothard v. Rawlinson*, 1977). However, Mahajan (2007, p. 177) warns generally that “even if an appearance policy implicates one of Title VII’s protected categories, the framework of Title VII’s two main theories of liability, disparate treatment and disparate impact, makes it difficult for employees to challenge discriminatory appearance policies to obtain relief.”

### **The General “Appearance” Rule**

Title VII of the Civil Rights Act protects employees and job applicants from discrimination based on the protected categories of race, color, sex, national origin, and religion. Appearance, let alone “attractiveness” (or the lack thereof), is not a protected category. Consequently, it is not necessarily illegal to discriminate based on appearance, for example, by hiring only attractive people.

### **Appearance as Race or Color Discrimination**

If an appearance-based case can be connected to race or color discrimination then the plaintiff employee may have a viable civil rights lawsuit. As such, Corbett (2007, p. 155) notes that "...some plaintiffs have successfully pursued claims under then-existing laws if the appearance-based discrimination could be characterized as...race-based.... These plaintiffs only succeeded when the attractive look the employer was seeking was not just pretty, but pretty and white...." James (2008, pp. 648-49) states that appearance policies can be tied to race discrimination "when the policies involve race-linked or race-specific physical traits." Skin tone and facial hair would be examples of a possible race linkage. In one recent case cited by the Equal Employment Opportunity Commission, the agency instituted a race discrimination lawsuit against a restaurant and pub in Georgia because the employer wanted employees who were "attractive cast members" and who would fit in with the business' "festive atmosphere." The EEOC contended that the restaurant and pub violated Title VII for firing an African-American employee due to her race and color because she was "too dark" (Equal Employment Opportunity Commission, Press Release, 9/26/11). Similarly, the *Wall Street Journal* (Zimmerman, 2011) reported that the EEOC is bringing an appearance race- and color-based lawsuit against Bass Pro Shops because company managers repeatedly refused to hire non-white workers as clerks, cashiers, and managers. One specific allegation made by the agency was that a manager in a Louisiana store refused to hire a qualified black applicant because he did not fit in with the "company profile" (Zimmerman, 2011). Another allegation in the Bass Pro case was that a senior level employee based in Indiana was seen discarding employment applications based on the job-seekers' names, which the senior employee said he could tell were "black" names (Zimmerman, 2011). The *Miami Herald* (Greenhouse, 2003) reported on a case brought by the EEOC against the Mandarin Hotel in West Hollywood, California, which was settled for over \$1 million. The EEOC accused the hotel of race discrimination for discharging nine valet attendants and bellhops, eight of whom were non-white, because they were "too ethnic" and did not fit in with the hotel's goal of creating a "trendier group" of employees (Greenhouse, 2003). Similarly, Corbett (2011, p. 634) relates the case of the clothing retailer, Abercrombie & Fitch, which due to its young customer base, wanted its sales personnel to have an "A&F Look." However, the company was sued for race discrimination because the "A&F Look" was accused of being a young, "preppie," and "white" look. Corbett (2011, p. 634) further relates that such a lawsuit as well as others, including one filed by the EEOC, some contending sex discrimination, were settled by the company for approximately \$50 million. James (2008, p. 655) also points out that the plaintiffs in the A&F case successfully connected appearance-based discrimination to race, resulting in a large settlement as well as a great deal of criticism and negative publicity regarding the company's hiring policies and practices. Accordingly, so long as any appearance discrimination is not connected to race or color discrimination the appearance discrimination is legal.

### **Appearance as Sex Discrimination**

Appearance in the form of an attractiveness standard can result in illegal sex discrimination pursuant to civil rights laws when the appearance standard is applied to women but not men; that is, the female employee or job applicant must demonstrate that she was treated differently than a similarly situated male employee or applicant (Corbett, 2011). Furthermore, appearance requirements that are based on sexual stereotypes are impermissible (James, 2008). For example, in the California appeals court case of *Yanowitz v. L'Oreal* (2003), a male executive's order to a manager to fire a female employee because the employee was not sufficiently "good looking enough" and not "hot enough" to sell perfume was deemed to be illegal sex discrimination when no similar attractiveness standards were applied to male employees. Women, therefore, cannot be subject to different and more severe and burdensome appearance requirements than men. Another leading case is the federal appeals court decision in *Craft v. Metromedia, Inc.* (1985), where a media company reassigned a female news anchor to a different job because of her looks. She claimed that the company's appearance standards were applied more strictly to women than to men. The court, however, ruled against her, explaining that the evidence indicated that the company was concerned with the appearance of all its on-air personnel, that all employees were required to have a professional and business-like appearance in conformity with community standards, based in part on viewer surveys, that these standards were neutral, and, significantly, that the company's policies and standards were critical to the media company's economic well-being (*Craft v. Metromedia, Inc.*, 1985). Another leading case is the federal Court of Appeals decision in *Jespersen v. Harrah's Operating Company* (2006). In *Jespersen*, the plaintiff female employee was discharged for refusing to wear facial make-up in conformity with the company policy, claiming that wearing the make-up conflicted with her self-image. She sued, asserting sex discrimination because the company's policy required female

employees to conform to sex-based stereotypes. However, the court rejected her claim, holding that the employer's appearance standards did not impose unequal burdens on men and women, and consequently there was no sex discrimination. Significantly, the court explained its rationale for rejecting her claim: Otherwise, "we would come perilously close to holding that every...appearance requirement that an individual finds personally offensive, or in conflict with his or her self-image, can create a triable issue of sex discrimination" (Jespersen, 2006, p. 1112). One of the more recent cases on this issue is *Lewis v. Heartland Inns of America, LLC* (2010), in which a female employee brought a discrimination and retaliation action against her employer under Title VII and Iowa Civil Rights Act because she transferred to the "graveyard shift." In *Lewis*, the court held there was a genuine issue of fact because of the existence of allegations that the hotel front desk worker was required to be "pretty" and have a "Mid-western girl" look to remain at this visible shift position could be actionable if the allegations were proven to be pretextual to further stereotypical attitudes and discrimination against females.

Regarding height and weight requirements, if an employer is going to establish them, they must be applied to both male as well as female employees; otherwise, the employer could be liable for disparate treatment based on sex pursuant to Title VII. For example, in one federal appeals court case, the court ruled that the employer acted illegally when the employer's maximum weight standards were applied to the exclusively female position of "flight hostess" but not to a similar though exclusively male position of "director of passenger service" (*Gordon v. Continental Airlines*, 1982). Similarly, Fowler-Hermes (2001) relates a federal appeals case where the court found that the weight policy of United Airlines was discriminatory. Although both men and women were subject to the weight requirements, the court found that the airline was imposing a more burdensome weight policy on women by requiring that female flight attendants adhere to maximums for a medium-framed person, but male flight attendants were allowed to reach maximums for larger-framed person. However, Fowler-Hermes (2001) relates a federal district court case where the employer's appearance requirement of a "thin and cute" sales force prevented a 270 pound woman from obtaining a promotion to an outside sales position. The employer admitted that the woman was denied a promotion because of her weight, but there was no gender discrimination pursuant to Title VII because the plaintiff woman could not identify one overweight male in the outside sales force. Weight, therefore, is not a protected class under Title VII, and consequently discrimination based on weight alone is not *per se* illegal. Nevertheless, regarding height and weight requirements, the Equal Employment Opportunity Commission notes that these requirements may disproportionately limit the employment opportunities of certain protected groups; consequently, unless the employer can show that these requirements are necessary for performance of the job, they may be viewed as illegal pursuant to federal civil rights laws. Accordingly, the EEOC advises employers to avoid inquiries about height and weight unless job-related (Equal Employment Opportunity Commission, Pre-Employment Inquiries and Height and Weight, 2011).

In examining the employment-appearance-gender case law, the conclusion is that subjecting women but not men to appearance and attractiveness requirements is illegal sex discrimination. As a result, Steinle (2006, p. 267) states that "absent evidence that a policy places a calculable unequal burden on one gender over the other, Title VII is unlikely to provide a remedy for parties who believe they have been treated adversely 'because of sex.'" As such, Mahajan (2007, p. 191) adds that "employers may freely impose attractiveness requirements on women as long as members of both sexes are *supposedly* regulated" (emphasis added). In reviewing the law of sex discrimination as applied to appearance cases, Corbett (2011, p. 637) concludes that generally sex discrimination will not be an efficacious legal vehicle because the "theory will not help either beautiful or ugly men or women who are fired for appearance unless they connect it to different treatment of the sexes." Accordingly, so long as the appearance discrimination is not connected to sex discrimination and that any appearance standards are applied equally to men and women, then the appearance discrimination is legal.

### **Appearance as National Origin Discrimination**

If appearance discrimination can be connected to national origin discrimination then the aggrieved employee can have a viable civil rights lawsuit. The Equal Employment Opportunity Commission provides an example of how appearance discrimination would violate the law as national origin discrimination. The example supposes that an applicant, called Radika, a native of India, applies for a job as a receptionist. At the interview, the company representative tells her that she would not be right for the position because the company is looking for someone with "an all American front office appearance." Radika is dressed appropriately, but the only element of

her appearance that is not in conformity with the company's standard is that she is of Indian ancestry. Accordingly, the EEOC counsels that if she can demonstrate that the company representative viewed her appearance as inappropriate because of her Indian features, Radika can establish a violation of the law (Equal Employment Opportunity Commission, Fact Sheet, 2011). Corbett (2011, pp. 637-638) also notes that the "seeds of a national origin claim" can be planted when "a particular fashion was so closely associated with a particular race or national-origin group that to discriminate on the basis of fashion was the equivalent of discrimination based on race or national origin." Yet fashion is changeable; but one's height is not. Accordingly, the Equal Employment Opportunity Commission warns that an employer's minimum height requirements might have a disproportionate impact, and consequently screen out, applicants of a particular national origin, such as Hispanics and Asians; and thus such a policy would be against the law unless it is related to the job and necessary for the employer to operate its business in a safe or efficient manner (Equal Employment Opportunity Commission, Fact Sheet, 2011). Therefore, so long as the appearance discrimination is not connected to national origin the appearance discrimination is legal.

### **Business Necessity Defense**

Civil rights laws also provide a "business necessity" defense in disparate impact cases for all protected characteristics, except age where the defense is the "reasonable factors other than age" test (James, 2008, pp. 665-66; Corbett, 2007, p. 176). So, assuming that an employer's neutral employment practices or policies had a disparate or adverse impact and that appearance was a protected characteristic – directly or indirectly by a connection to a protected characteristic - the employer would have available the business necessity defense. However, James (2008, pp. 665-66) points out one major problem with this defense, that is,

*The difficulty arises...because a business necessity must also be integral to the position and attractiveness usually is not considered essential to sales. For example, attractiveness is not a necessary quality for an employee to assist customers, utilize a cash register, or fold clothing. As a result, attractiveness will not be considered a valid hiring criterion, because an unattractive person is as capable of performing the required duties as an attractive one.*

### **STATE LAWS**

Although federal civil rights laws do not protect against appearance discrimination unless the discrimination can be linked to a protected category, there are a few states and localities that do protect against appearance discrimination. Initially, the EEOC points out that regarding specifically height and weight inquiries and requirements that a number of states and localities have laws that specifically prohibit discrimination on the basis of height and weight unless the height and weight requirements are predicated on the actual requirements of the job (Equal Employment Opportunity Commission, Pre-Employment Inquiries and Height and Weight, 2011). Recognizing the underlying unfairness of "lookism" practiced by employers under the guise of the employment at-will principle, state and local governments have tried to fill the void in this area due to the federal government's inability to act. Often this situation is typical in the area of employment law, where local jurisdictions act as experimental laboratories for pressing, progressive social change to address their local populace's concerns. For example, in the void of federal level protections, many state and local jurisdictions have taken the lead in outlawing discrimination in employment based on sexual preference (Cavico, Muffler, and Mujtaba, 2012, pp. 9-13, 2012). Regarding appearance, Michigan, Santa Cruz and San Francisco, California, and Washington, D.C., have passed laws prohibiting discrimination because of weight (James, 2008; Capell, 2007; Corbett, 2007). Furthermore, the District of Columbia, Urbana, Illinois, Madison, Wisconsin, and Santa Cruz, California have passed laws prohibiting discrimination based on some aspect of personal appearance (James, 2008; Corbett, 2007).

Michigan is the one and only state addressing appearance discrimination in some fashion. Michigan passed the Elliott-Larsen Civil Rights Act 453 of 1976 which banned employment discrimination specifically based upon height and weight, along with other traditional protected classes (Mich. Comp. Laws Ann. Section 37.2102 (2004). Although the statute does not explicitly include attractiveness as a protected appearance characteristic, it specifically mentions that height and weight are appearance factors that are protected. The previously discussed evidentiary "burden shifting," used when addressing federal discrimination complaints in the workplace, also applies to allegations under this code provision (*Harrison v. Olde Financial Corp.*, 1998).



Although not a “state jurisdiction,” Washington, D.C.’s anti-discrimination laws are considered some of the broadest in the nation preventing employers from discriminating based on “looks” and actually identifying “personal appearance” as a protected class (D.C. Code Ann. § 2-1402.11(a) (2001). The provision proffers the definition of “personal appearance” as follows:

*“Personal appearance” means the 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 for admittance to a public accommodation, or 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 (D.C. Code Ann. § 2-1401.02 (22) (2010)).*

Although the District of Columbia provision states that discrimination is prohibited based on personal appearance, it allows exceptions which are available for business necessity and reasonable business purposes.

Much to worker’s or job applicant’s dismay, the vast majority of the states do not explicitly outlaw discrimination based on personal appearance. Moreover, those who sue upon such a theory can be surprised of a court’s reluctance to read into the law such appearance protections, when none specifically exist. This result was illustrated in the case in *Brice v. Resh* (2011), where the plaintiff alleged her employer’s CEO ordered her to be terminated due to her “body shape.” The court held that should claim based on sex discrimination, but could not be premised on an allegation of a separate appearance discrimination claim based on the same operative facts because the state of Wisconsin did not recognize such an action, and none would be read into the law by that court.

There is very little state and local law dealing explicitly and even indirectly with appearance discrimination. Nonetheless, people, perhaps many people, believe that appearance-based discrimination is morally wrong and unfair; and thus they may believe that “surely employers cannot legally fire someone based on physical appearance alone...(T)his is not the case, however, because most state legislatures have not enacted laws prohibiting appearance-based discrimination, and most never will” (Corbett, 2011, pp. 625-26). Furthermore, James (2008) worries that if too many state and local jurisdictions did enact appearance discrimination laws these laws will be vague and overbroad as well as not uniform and consistent, and as a result would engender inconsistent results and apprehension on the part of the business community. Nonetheless, in the vast majority of jurisdictions, appearance discrimination, particularly in the form of attractiveness, is not a protected characteristic pursuant to federal, state, or local civil rights law, and thus, as a general rule, it is legal to discriminate based on appearance. However, due to the absence of federal protection and the paucity of law on the state and local level, presently there are proposals to amend civil rights laws to encompass appearance discrimination as a protected category.

## **IMPLICATIONS AND RECOMMENDATIONS**

So, appearance discrimination is as a general rule legal as well as moral based on most ethical theories. What then are the practical implications for employers? Legally, an employer as a general rule can discriminate based on appearance in the form of attractiveness, but an employer must be very careful since an appearance standard might be connected to a Title VII or ADEA or ADA protected category, thereby triggering a civil rights discrimination lawsuit. As such, Mahajan (2007, p. 203) emphasizes that “the first step to protecting individuals adversely affected by employer-imposed appearance policies is to recognize the discriminatory potential of those policies, particularly those that serve as proxies for discrimination based on suspect categories, such as gender and race.” For example, an employer may be able to discriminate in hiring by preferring “good-looking” job applicants; but if that appearance standard results in the hiring of only young, white employees, then the employer could be sued pursuant to Title VII and the ADEA. Similarly, as explained by Corbett (2007, p. 164): “It is not illegal for employers to discriminate on the basis of certain physical characteristics – those covered by existing discrimination laws. Thus, if an employer discriminates on the basis of wanting a certain ‘look,’ and that look is ‘young’ or ‘white’ or ‘American,’ then the discrimination is illegal under the existing employment discrimination laws.” Employers, therefore, can and must take precautions to preclude attractiveness/appearance lawsuits. As such, if an employer deems it necessary or even beneficial to have an attractiveness standard, or perhaps a concomitant height or weight

standard, the employer must make sure that discriminatory elements are not built into the standard or that the standard is applied in a discriminatory manner. Most importantly, men and women, blacks and whites, and people of different races and nationalities must be treated in a comparable and fair manner. Appearance and attractiveness cannot legally or morally be used as a pretext for impermissible discrimination.

## CONCLUSION

Appearance discrimination in employment, especially based on perceived “attractiveness,” certainly has emerged as a controversial, and complicated, legal, ethical, and management concern. One point is clear, though, and that is when an appearance discrimination claim can be connected to a protected category, and thus converted into a discrimination claim based on race, color, sex, or any other protected characteristic under civil rights laws, then an aggrieved plaintiff employee or applicant may have a viable cause of action. However, if a person, perhaps regarded as “unattractive,” cannot tie his or her appearance-based lawsuit to a protected category under federal, state, or local civil rights laws, that person will not have legal redress.

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