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(Un)Lawfully Beautiful: The Legal (De)Construction of Female Beauty

Stacey S. Baron

(UN)LAWFULLY BEAUTIFUL: THE LEGAL (DE)CONSTRUCTION OF FEMALE BEAUTY

Abstract: Beautiful women are more revered, more desirable, and often times more employable than average-looking women. Despite an ever-increasing awareness of women's issues today, little progress has been made to reverse the objectification of women's bodies. This Note asserts that various courts are helping deconstruct the idea that beautiful women should receive preferential treatment in the workplace, simply because they are beautiful. This Note contends that the law progressively is challenging social assumptions that favor traditionally beautiful women by telling employers that they can no longer demand a certain level of female attractiveness in certain contexts. By deemphasizing the general importance of the female body, the law implicitly is doing women of all shapes and sizes, races and skin tones, a favor immeasurable by any scale.

INTRODUCTION

The 2003 California Court of Appeal case, *Yanowitz v. L'Oreal USA, Inc.*, invigorated the debate about the importance of beauty and the pervasiveness of appearance and sex discrimination in the workplace.[1] Although this decision addressed a claim of unlawful retaliation under California's Fair Employment and Housing Act ("FEHA"), the first prong of the court's analysis invoked protections against sex discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII").[2] The controversial conclusion made by this court was that an

[1] *See* 131 Cal. Rptr. 2d 575, 582 (Ct. App. 2003). *Compare, e.g.*, Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 219, 223 (2000) (arguing for statutory protection of physical appearance because of the harmful, unfair, discriminatory effects in which appearance bias results), *with, e.g.*, James J. McDonald, Jr., *Civil Rights for the Aesthetically-Challenged*, 29 EMPLOYEE REL. L.J. 118, 127–28 (2003) (arguing that legally protecting personal appearance is an unacceptable extension of civil rights law that may encourage employers to favor unattractive applicants to avoid "lookism lawsuits").

[2] *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000); CAL. GOV'T CODE § 12940(h) (West 1992) (making it unlawful for an employer to terminate an employee who has opposed practices prohibited by California's Fair Employment and Housing Act ("FEHA") or filed a complaint, testified, or assisted a person in any proceeding under FEHA); *Yanowitz*, 131 Cal. Rptr. 2d at 585–90, 587 n.5. In *Yanowitz*, the plaintiff asserted an unlawful retaliation claim in violation of FEHA because she herself was terminated for not firing an unattractive employee, which the court deemed to be a protected activity. 131 Cal. Rptr. 2d at 585–90. The pivotal question was whether the plaintiff [illegible] in a pro-

employer's order to fire a female cosmetic associate for "not being hot enough" was an act of sex discrimination—a conclusion that evidences the law's growing willingness to protect women who may not meet society's rigorous standards of physical attractiveness.[3]

By holding that a male executive may not insist on the termination of a female associate who was not sexually appealing to him, this decision raises critical questions for many employers who prefer to hire aesthetically pleasing employees.[4] For example, how far can employers go when using physical attractiveness as an employment requirement, and can employers require their female employees to be "hot" or "sexy"?[5] Legal commentary has argued both for and against this proposition.[6] Recently, scholars even have suggested that local legislation prohibiting appearance discrimination is a possible means of addressing the problems arising from our "lookist" culture.[7] Such growing attention to issues of "lookism" in the law indicates that this topic is noteworthy, although it is not new.[8]

When courts addressed the airline industry's systemic patterns of only hiring attractive, thin flight attendants in the late 1970s and early 1980s, attention surrounding the issue of appearance discrimination became amplified.[9] Similarly, this debate generated scrutiny of the news reporting and hotel industries for requiring their female employees to meet certain criteria of beauty and femininity.[10] As the service industries expanded during the 1980s, however, and a culture of

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tected activity under FEHA. *Id.* Given FEHA's similarity to Title VII of the Civil Rights Act ("Title VII"), the court applied a Title VII sex discrimination analysis to determine if the plaintiff engaged in a protected activity. *Id.* at 587 n.5.

[3] *See Yanowitz*, 131 Cal. Rptr. 2d at 588.

[4] *See id.*

[5] *See id.*; McDonald, *supra* note 1, at 127–28 (arguing that employers have a right to hire employees that meet certain standards of presentation).

[6] *Compare, e.g.*, Adamitis, *supra* note 1, at 219–20 (arguing for statutory protection of physical appearance through state and local laws), *with, e.g.*, McDonald, *supra* note 1, at 118, 127 (arguing against any form of legal protection of physical appearance).

[7] *See, e.g.*, Adamitis, *supra* note 1, at 219. *But see* Lynn T. Vo, *A More Attractive Look at Physical Appearance-Based Discrimination: Filling the Gap in Appearance-Based Anti-Discrimination Law*, 26 S. ILL. U. L.J. 339, 357 (2002) (arguing for a narrow statutory approach to appearance discrimination, limiting protection to instances when victims are offered no other legal remedy).

[8] *See Yanowitz*, 131 Cal. Rptr. 2d at 587 (noting the long-established principle that an employer may not insist hiring only attractive women).

[9] *See, e.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388–89 (5th Cir. 1971); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 296 (N.D. Tex. 1981).

[10] *See, e.g.*, Tamimi v. Howard Johnson Co., 807 F.2d 1550, 1550–51 (11th Cir. 1987); Craft v. Metromedia, Inc., 766 F.2d 1205, 1209 (8th Cir. 1985).

consumerism began to define American life, a social obsession with looking at and commercializing the female body exploded.[11] The use of the female body as a consumer artifact became popular, and the technology of modern image production continually recreated the image of the perfect body, providing evidence of a consumer society built on visual stimulation and male economic agency.[12] Attention, therefore, increasingly turned to the regulation of female appearance in the workforce because the growing consumer society demanded the specularization of women.[13] The litigation surrounding such beauty requirements adopted by certain industries helped formulate a legal response to appearance discrimination, a response that has underlying meaning for many women whose looks concern them.[14]

The *Yanowitz* case highlights modern day pressures women feel to be beautiful.[15] This Note focuses on the contention that the law need not be criticized so severely for perpetuating harmful notions of female beauty.[16] Rather, the evolution of appearance law exemplified by *Yanowitz* evidences glimmers of hope for dealing with such harmful social stereotypes.[17] Although *Glamour* and *Maxim* magazines may not be following suit in proffering divergent forms of female beauty, a judicial and statutory trend is emerging that potentially could help women redefine what is an acceptable and attractive form of personal appearance.[18]

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[11] *See* ALAN HYDE, BODIES OF LAW 111–12 (1997).

[12] *Id.* at 116.

[13] *See, e.g., Craft*, 766 F.2d at 1209; HYDE, *supra* note 11, at 115–17.

[14] *See infra* notes 58–216 and accompanying text.

[15] *See* 131 Cal. Rptr. 2d at 586.

[16] *See infra* notes 58–310 and accompanying text.

[17] *See* 131 Cal. Rptr. 2d at 588; DEBRA L. GIMLIN, BODY WORK: BEAUTY AND SELF-IMAGE IN AMERICAN CULTURE 8–9 (2002) (arguing that as women engage in exhaustive body work trying to attain the perfect female body, they have the ability to transform cultural meanings about ideologies of beauty); NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN 9–11 (1991) (arguing that as women become more powerful, influential, and capable of transforming society, ideals of female beauty become more rigid and unattainable, resulting in a form of female disempowerment that has women starving themselves to death and consuming their lives with self-loathing as opposed to self-production); Reena N. Glazer, *Women's Body Image and the Law*, 43 DUKE L.J. 113, 115–17 (1993) (arguing that laws criminalizing the exposure of women's breasts reinforce the ideas that the female body must be hidden in shame, and that women's desires about how to present their bodies need strict male regulation).

[18] *See* 131 Cal. Rptr. 2d at 588; *see also* Steven Greenhouse, *Going for the Look, but Risking Discrimination*, N.Y. TIMES, July 13, 2003, at A12 (accusing the popular clothing store Abercrombie & Fitch of actively seeking out and giving hiring preferences to sleek, sexy, white, attractive sales associates); Erin Schneweis, *Top-Selling Female Magazines Exploit Female Body, Not Unlike Maxim Magazine*, KANSAS STATE ECOLLEGIAN (Apr. 7, 2000), *at* http://www.kstatecolle-

This Note explores a modern legal trend to protect varying forms of "femininity" or female beauty under Title VII and the Americans with Disabilities Act (the "ADA").[19] The end result of this trend is a noteworthy break from social constructions that narrowly define female beauty, helping to foster social acceptance of more diversified forms of female appearances.[20] Instead of focusing on how the law perpetuates negative female body images, this Note exposes the positive results for women flowing from appearance-based litigation.[21]

Part I of this Note reviews the role of beauty in society, examining how many women continuously struggle to attain an ideal form of beauty.[22] This Part lays out a foundation for why and how women feel the way they do about their bodies, highlighting the problems many women face because of the social pressures to be beautiful.[23] Part II focuses on how the law historically has approached issues related to the physical appearance of women in the workforce, providing a discussion of appearance discrimination under (1) the liberty protections of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, (2) Title VII, and (3) the ADA.[24] Because these areas of the law implicitly address the issue of women's body image, they provide a background as to how the law relates to the subject.[25] Part III provides a two-fold analysis of the case law.[26] It analyzes how the law both reflects and influences popular images of female beauty.[27] In addition, it argues that the law is moving in a positive direction when it comes to defining diverse forms of female beauty, implicitly sending the important message to women that their bodies need not conform to the traditional ideal form.[28] This Note contends that such a trend is

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gian.com/issues/v104/sp/n131/opinion/opn.friday.schneweis.html. *But see* McDonald, *supra* note 1, at 118 (arguing that judicial recognition of appearance discrimination under the rubric of sex discrimination is "disturbing").

[19] *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213.

[20] *See infra* notes 217–310 and accompanying text.

[21] *See infra* notes 217–310 and accompanying text.

[22] *See infra* notes 30–57 and accompanying text.

[23] *See infra* notes 30–57 and accompanying text.

[24] U.S. CONST. amend. XIV, § 1; 42 U.S.C. §§ 2000e–2000e-17; *id.* §§ 12101–12213; *see infra* notes 58–216 and accompanying text.

[25] *See infra* notes 58–216 and accompanying text.

[26] *See infra* notes 217–310 and accompanying text.

[27] *See infra* notes 217–310 and accompanying text.

[28] *See infra* notes 217–310 and accompanying text.

good for women because it helps deconstruct the social value placed on their bodies.[29]

I. The Role of Beauty in Society

Across the United States, many young girls and grown women alike wake up each morning, look in the mirror, and ask the fateful question, "Am I thin enough yet?"[30] The statistics are striking: seventy-five percent of all women feel that they are fat, eighty-one percent of ten-year-olds are afraid of being fat, and two out of five women would trade three to five years of life to achieve their ideal body weight.[31] Such negative body image perceptions do not result just from a woman's natural, innate tendencies, but rather spring from a variety of sources.[32] Historically, social convention, capitalism, and male desire have all operated conjunctively to impact how women feel about and act towards their bodies.[33] Together, these influences create an image of the beautiful body that is, for many women, a physical impossibility.[34]

The ideal female form is a thinly structured, large-breasted body.[35] Scholars like Naomi Wolf argue that society alienates women from their bodies and their sexuality.[36] Furthermore, psychologists contend that a woman has a strong need to pursue and preserve her beauty because a woman's body image is at the core of who she is.[37] As current social commentary reflects, many American women consequently respond to these social pressures by engaging in a form of war with their bodies.[38] As a result, they often develop unhealthy eating disorders, and possess low self-esteem.[39] Such physical and mental deficiencies overly influence the excessive amounts of time and

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[29] *See Yanowitz*, 131 Cal. Rptr. 2d at 588; *cf.* Gimlin, *supra* note 17, at 9 (noting that "group forces," such as commercial interest and professional preferences, influence women's body image); *infra* notes 217–310 and accompanying text.

[30] Sharlene Hesse-Biber, Am I Thin Enough Yet?: The Cult of Thinness and the Commercialization of Identity 31 (1996).

[31] Alliance for Eating Disorders Awareness, Eating Disorders Statistics, *at* http://www.eatingdisorderinfo.org/eating_disorders_statistics.htm (last visited Mar. 15, 2005).

[32] *See* Hesse-Biber, *supra* note 30, at 30.

[33] *See id.* at 31–32.

[34] *See id.* at 50.

[35] *See id.* at 28–29 (arguing that the Barbie doll provides young girls with a false conception of what a beautiful female body looks like).

[36] *See* Wolf, *supra* note 17, at 11–12; Wendy Smith, *Naomi Wolf: Confessions of a Feminist*, Publishers Wkly., June 30, 1997, at 56 (revising Wolf, *supra* note 17).

[37] *See* Gayle Greene, *The Empire Strikes Back*, The Nation, Feb. 10, 1992, at 166.

[38] *See* Smith, *supra* note 36, at 56–57.

[39] *Id.*

money they spend on attempts to achieve the ideal form of female beauty.[40] Sociologists argue that this is time and money that could be spent doing more economically, professionally, and socially productive activities.[41] To understand how the law intersects with these societal pressures and women's resulting body image, one first needs to understand the origins of the idea and obsession with beauty.[42]

Historically, beauty is a virtue that reflects notions of goodness, purity, and honesty.[43] Society considers a beautiful person more desirable on various levels—for example, in cultural, sexual, and professional arenas—and this bias influences women more than men.[44] Because of its physical basis in the human body, corporeal beauty often overpowers other personal characteristics in any interaction of first impression.[45] Researchers claim that a physically attractive appearance is the most powerful trait a person can possess, opening doors to interpersonal relationships and even jobs that others may not have.[46] Similarly, researchers even suggest that a person's degree of physical attractiveness may explain more accurately instances of disparate treatment in society than other characteristics like race or sex.[47] In short, a person's physical appearance quite possibly is his or her most influential characteristic.[48]

This striking importance of beauty in society is one reason why self-esteem correlates to how physically attractive a woman feels.[49] Naomi Wolf argues that images of the "impossibly beautiful" barrage young women today, more so than they did in the past.[50] Because of

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[40] *See* HESSE-BIBER, *supra* note 30, at 38–39.

[41] *See id.* at 26.

[42] *See* Meg Gehrke, *Is Beauty the Beast?*, 4 S. CAL. REV. L. & WOMEN'S STUD. 221, 227–30 (1994).

[43] *Id.* at 230–33.

[44] *See id.* at 226.

[45] *See* David L. Wiley, *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27 ST. MARY'S L.J. 193, 201–03 (1995).

[46] *See id.* at 207–11.

[47] *See id.* at 218 (arguing that attention to race and sex considerations in American criminal law is widespread, whereas physical appearance discrimination is largely ignored).

[48] *See id.* at 194–97.

[49] *See* GIMLIN, *supra* note 17, at 8–9 (emphasizing the complexities of American women who continually must negotiate their identities through constructions of beauty).

[50] *See* WOLF, *supra* note 17, at 16–17; Greene, *supra* note 37, at 56–57 (highlighting in a review of Naomi Wolf's book *The Beauty Myth* that the beauty myth acts as a form of social coercion upon women who have found themselves liberated by feminism because the myth propels the idea that a woman is her body and her body is not good enough, and makes women anxious, insecure, and vulnerable by barraging them with images of physical perfection).

these highly sexualized, physically stunning images, women often find themselves trying to achieve higher and higher levels of physical beauty.[51] As a result, beauty may be oppressive to women because its endless pursuit forces women to engage in self-destructive bodily harm, such as excessive dieting, exercising, bingeing, or purging.[52] Furthermore, women who rely so strongly on personal beauty as a means of manipulating power from men also find themselves in destructive and oppressive positions.[53] In a power-driven social system such as ours, women often use their beauty to get what they want from men, yet they may still find themselves being controlled by male notions of the beautiful female body.[54]

In sum, being and becoming beautiful is a common preoccupation of many women today, who often take extreme measures to attain such a preferred status.[55] As Part II discusses, when these women enter the workforce, they not only take these preoccupations with them, but also find their employers to be preoccupied with the same notions of physical appearance and beauty.[56] Policies and procedures that reflect such beauty stereotypes implicitly create appearance discrimination in the workplace.[57]

II. Personal Appearance Discrimination in the Workplace

Many employers reinforce stereotypical norms of beauty in their hiring practices, using a person's level of attractiveness as an important employment criterion.[58] One survey of employers even found physical appearance to be the single most important factor in the hiring-decision process.[59] Unsurprising to even a casual observer, employers are likely to want their employees to conform to the culture of the organization, which often requires meeting certain standards of dress or appearance.[60] Some economists argue that an attractive

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[51] *See* Hesse-Biber, *supra* note 30, at 11.

[52] *See id.* at 14.

[53] *See* Gehrke, *supra* note 42, at 243.

[54] *Id.* at 246–47.

[55] *See id.* at 237–38.

[56] *See, e.g.*, Yanowitz v. L'Oreal USA, Inc., 131 Cal. Rptr. 2d 575, 586 (Ct. App. 2003); *infra* notes 58–216 and accompanying text.

[57] *See Yanowitz*, 131 Cal. Rptr. 2d at 586; *infra* notes 220–310 and accompanying text.

[58] *See Yanowitz*, 131 Cal. Rptr. 2d at 586; Vo, *supra* note 7, at 342.

[59] Vo, *supra* note 7, at 342.

[60] *See id.* at 342–43; Davis Bushnell, *Personal Image as Business Strategy*, Boston Globe, Mar. 21, 2004, at G1 (showing that appearance is emerging as an important issue in the workplace, that employees with a sharp appearance can stand out with [illegible] ers and hir-

workforce equals a more productive workforce, and therefore taking appearance into consideration is a wholly justifiable hiring practice.[61] Similarly, if a customer values an employee's appearance, then an employer argues that it serves as a legitimate ground for job qualification.[62] Such employers assert that an attractive, female workforce positively impacts profitability.[63] Given this socioeconomic importance of physical beauty, the following discussion addresses the legal contexts through which courts have addressed workplace appearance.[64]

Part II.A explores appearance discrimination under the liberty Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[65] In such cases, plaintiffs claim that personal liberty is infringed upon by appearance-related regulations.[66] Next, Part II.B discusses appearance discrimination under Title VII's protection against sex discrimination.[67] The related case law focuses on instances when private employers seek to impose both grooming regulations and standards of attractiveness on employees.[68] Part II.C examines legal protection for appearance discrimination under federal disability laws, most notably the ADA.[69] The discussion focuses on instances of obesity discrimination as related to female appearance issues.[70] Lastly, Part II.D briefly discusses certain state and local statutes that address appearance discrimination more specifically than other areas of the law.[71]

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ing managers in today's tight job market, and that employees themselves realize the need for a positive appearance and for employing tactics such as image consulting and cosmetic surgery to put forth positive physical appearances).

[61] Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, Bus. Wk., Mar. 16, 1998, at 18.

[62] *See* Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 303 (N.D. Tex. 1981). Defendant airline argued that physical appearance was an essential characteristic in hiring flight attendants because its marketing campaign had been based on female sex appeal. *Id.*

[63] *See id.* at 303–04.

[64] *See infra* notes 72–216 and accompanying text.

[65] *See* U.S. Const. amend. XIV, § 1; *infra* notes 72–103 and accompanying text.

[66] *See infra* notes 72–103 and accompanying text.

[67] *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000); *infra* notes 104–166 and accompanying text.

[68] *See infra* notes 104–166 and accompanying text.

[69] *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213; *infra* notes 167–202 and accompanying text.

[70] *See infra* notes 167–202 and accompanying text.

[71] *See infra* notes 203–216 and accompanying text.

A. *Legal Protection Under the Due Process Clause of the Fourteenth Amendment*

Employers often attempt to regulate what employees wear and how they may appear in the workplace.[72] Such policies often include the regulation of hair length, dress code requirements, and mandatory makeup application.[73] When employees challenge such practices, a popular, but frequently unsuccessful, avenue for challenging such policies is under the constitutional guarantee of liberty contained in the Due Process Clause of the U.S. Constitution.[74]

The U.S. Supreme Court has offered minimal protection against governmental interference in personal appearance choices under the Fourteenth Amendment.[75] The Due Process Clause of the Fourteenth Amendment requires that no person shall be deprived of life, liberty, or property without due process of law.[76] This substantive Due Process Clause provides that in some cases, excessive governmental regulation of appearance may be an impermissible intrusion upon liberty.[77] Nevertheless, the liberty interest receives little favorable consideration from courts because such an interest must be balanced against the public employer's interest.[78] In most instances, the public employer's interest prevails, which allows managerial decisions to control the acceptability of physical appearances.[79]

For instance, in 1976, in *Kelley v. Johnson*, the U.S. Supreme Court upheld hair grooming standards for police officers against the plaintiff's claim that the regulation unconstitutionally intruded upon his liberty by unduly restricting his activities.[80] The officer in *Kelley* chal-

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[72] *See, e.g.*, Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1029 (7th Cir. 1979) (holding that an employer's dress policy requiring women to wear uniforms and men to wear business casual clothes qualifies as sex discrimination).

[73] *See, e.g.*, Kelley v. Johnson, 425 U.S. 238, 239–40 (1976) (pertaining to hair length and hair style regulations for police officers); Tamimi v. Howard Johnson Co., 807 F.2d 1550, 1554 (11th Cir. 1987) (pertaining to make-up requirements for women); *Carroll*, 604 F.2d at 1029 (requiring women to wear work uniforms).

[74] U.S. CONST. amend. XIV, § 1 (stating that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law").

[75] Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1402 (1992).

[76] U.S. CONST. amend. XIV, § 1.

[77] *See, e.g.*, *Kelley*, 425 U.S. at 249 (Powell, J., concurring).

[78] *See id.* at 246–47; Klare, *supra* note 75, at 1402.

[79] Klare, *supra* note 75, at 1402.

[80] 425 U.S. at 248 (noting that police department regulations prohibited beards and goatees and required hair to conform to a certain length).

lenged the police department's regulation of facial hair.[81] The Court held that forced similarity in police officer appearance was rationally related to public safety because the grooming standards would make the officers uniformly recognizable to the public and would increase the force's esprit de corps.[82] The Court determined that both of these ends were ample justification for the regulation.[83]

The Court opined that the defendant county should be afforded deference in organizing its police force.[84] More specifically, in carrying out its law enforcement and public safety duties, the defendant county could adopt employment policies it deemed most efficient.[85] The hair-length regulation was not considered in isolation, but rather in the context of how the defendant county chose to organize itself structurally.[86] Given that the primary responsibility of police officers is the safety of people and property and that all police forces set rules regarding organized dress, the Court did not find a regulation to groom oneself in a particular manner to be an arbitrary deprivation of liberty.[87]

Also in 1976, in *Tardiff v. Quinn*, the First Circuit Court of Appeals addressed a liberty claim relating to the socio-legal expectation of female physical appearance, upholding a governmental actor's regulation of female clothing.[88] In *Tardiff*, a public high school official fired a teacher because he disapproved of her short skirt.[89] The plaintiff teacher argued that the termination for wearing a short skirt violated her liberty interest.[90] The trial court found that the teacher's outfit was within reasonable limits, was not lewd, and was similar to outfits worn by other professional women.[91] The court further found that her clothing did not have an adverse or startling effect on her students or her ability to teach effectively.[92]

Despite its findings, the trial court failed to reach the question of whether the teacher's termination violated her Fourteenth Amendment right to liberty.[93] The First Circuit Court of Appeals sustained

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[81] *Id.* at 239–40.
[82] *See id.* at 248.
[83] *Id.*
[84] *Id.* at 246.
[85] *See Kelley*, 425 U.S. at 246.
[86] *Id.* at 247.
[87] *Id.* at 248.
[88] 545 F.2d 761, 764 (1st Cir. 1976).
[89] *Id.* at 762.
[90] *Id.* at 763.
[91] *Id.*
[92] *Id.*
[93] *Tardiff*, 545 F.2d at 763.

the plaintiff's termination, finding that the government's interest in approving a public school teacher's image and in assuring productivity through proper dress sufficiently outweighed the plaintiff's interest in being free to choose her clothing.[94] Furthermore, the First Circuit determined that the plaintiff's clothes could have negatively impacted her ability to teach.[95] Here, the government's managerial discretion and public policies prevailed over the plaintiff's personal liberty to define her style and appearance.[96] The First Circuit did not consider the invasion of the plaintiff's freedom of choice in personal appearance to be so irrational or motivated by bad faith as to constitute a violation of Fourteenth Amendment liberty guarantees.[97]

Both *Kelley* and *Tardiff* present unsuccessful attempts to apply substantive due process liberty protections to appearance-based litigation.[98] Decided in the mid-1970s, these two cases rejected the plaintiffs' claims that government-propounded appearance regulations compromised their liberty interests.[99] In effect, this liberty theory offered little protection to government workers harmed by alleged appearance discrimination.[100] The liberty argument, however, can be used only in cases involving an employer that is a state actor.[101] As a result, plaintiffs seeking to address appearance discrimination against private employers had to develop a more applicable and effective legal argument.[102] The next Section discusses this evolution by examining the application of Title VII sex-discrimination protection to cases involving appearance issues.[103]

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[94] *Id.* at 764.

[95] *See id.* at 763.

[96] *See id.*

[97] *See id.*

[98] *See Kelley*, 425 U.S. at 248; *Tardiff*, 545 F.2d at 764.

[99] *See Kelley*, 425 U.S. at 248; *Tardiff*, 545 F.2d at 764.

[100] *See Kelley*, 425 U.S. at 248; *Tardiff*, 545 F.2d at 764.

[101] *See Kelley*, 425 U.S. at 248; *Tardiff*, 545 F.2d at 764.

[102] *See Kelley*, 425 U.S. at 248; *Tardiff*, 545 F.2d at 764.

[103] *See Kelley*, 425 U.S. at 248; *Tardiff*, 545 F.2d at 764; *supra* notes 104–166 and accompanying text.

B. *Legal Protection Under Title VII of the 1964 Civil Rights Act: Sex Discrimination*

When a party raises a claim of appearance discrimination, the individual may be afforded protection under Title VII.[104] This statute makes it unlawful to discriminate based on sex or gender in employment.[105] Generally, when an appearance issue is litigated under Title VII, it arises for one of two reasons: (1) a plaintiff is challenging an employer's rule that unfairly regulates appearance, such as mandatory uniforms or makeup application for women, or (2) an employer has required an attractive or beautiful appearance as a condition of employment.[106]

1. Employer Grooming Regulations

In cases where employers regulate employee grooming, courts may afford substantial deference to managerial discretion in framing workplace dress codes.[107] Nevertheless, because one goal of the Civil Rights Act of 1964 was to address gender discrimination and even to help break down some of the negative stereotypes affecting women, employers cannot impose unequal grooming standards for men and women.[108] Such behavior constitutes sex discrimination.[109]

For example, in 1979, in *Carroll v. Talman Federal Savings & Loan Ass'n*, the Seventh Circuit Court of Appeals held that an employer's policy requiring women to wear a uniform, but allowing men to wear customary business attire, constituted sex discrimination.[110] The court reasoned that this dress policy resulted in disparate treatment because no business necessity existed for subjecting employees who all perform the same functions to different dress codes based on sex.[111] Further, the court determined that such a policy reinforced notions of women having a less professional status than men because society

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[104] *See, e.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971) (finding a Title VII sex discrimination violation because being female is not a bona fide occupational qualification for the job of flight attendant).

[105] Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000).

[106] *Carroll*, 604 F.2d at 1029; *Yanowitz*, 131 Cal. Rptr. 2d at 586.

[107] *See infra* notes 108–117 and accompanying text; *see also* Klare, *supra* note 75, at 1432–33 (arguing that such discretion generally reinforces sexist social norms of how women should dress and look).

[108] *See Carroll*, 604 F.2d at 1032–33; Klare, *supra* note 75, at 1416.

[109] *See, e.g.*, *Carroll*, 604 F.2d at 1032–33.

[110] *Id.*

[111] *Id.* at 1032.

generally views uniformed workers as less professional.[112] Implicitly, it reasoned that both men and women should be able to make appearance decisions for themselves in this particular work environment.[113] The court refused to endorse a code that exhibited the gender stereotype that women cannot exercise sound judgment in choosing business attire and need a uniform to aid them.[114]

Title VII also may be used to address the gender stereotype that women are sexual beings who can be exploited for the pleasure of men.[115] For instance, requiring women to wear sexually provocative clothing easily may subject them to verbal or sexual harassment, yet it remains a common practice in many bars and restaurants.[116] Requiring women to look or dress a certain way may or may not be an acceptable employment policy, depending on how justified the policy is for the advancement of business.[117]

For instance, in 1981, in *EEOC v. Sage Realty Corp.*, the United States District Court for the Southern District of New York found that a policy requiring women to wear a revealing uniform was unlawful because of its sexually exploitive nature.[118] In that case, the plaintiff was a lobby attendant who had to wear a uniform that she found too short and too revealing of her thighs and buttocks.[119] The court found that, but for her gender, the plaintiff would not be required to wear a uniform that subjected her to sexual harassment.[120] Because the defendant did not offer any legitimate, nondiscriminatory explanations for the uniform, the court would not accept the uniform policy as reasonable.[121] Recognizing the correlation between skimpy uniforms and sexual harassment, the court refused to allow employers to encourage such abuse.[122]

Both *Carroll* and *Sage* apply Title VII sex discrimination protection to cases involving appearance regulations.[123] Decided in the late 1970s and early 1980s, these cases limited an employer's ability to

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[112] *Id.* at 1033.

[113] *See id.*

[114] *See Carroll*, 604 F.2d at 1032–33.

[115] *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000); *infra* notes 118–126 and accompanying text.

[116] *See* EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608 (S.D.N.Y. 1981).

[117] *See id.* at 611.

[118] *Id.*

[119] *Id.* at 604.

[120] *Id.* at 607.

[121] *Sage*, 507 F. Supp. at 608–09.

[122] *See id.* at 611.

[123] *See Carroll*, 604 F.2d at 1033; *Sage*, 507 F. Supp. at 611.

mandate certain codes of dress, most notably for women.[124] They preceded opinions in the mid-1980s, which addressed an employer's ability to mandate specific levels of attractiveness—again, most notably for women.[125] The following discussion examines this precise context.[126]

2. Employer Standards of Attractiveness

Discrimination claims based on an employer's desire for an "attractive" or "sexy" employee also may be litigated under Title VII.[127] This preference creates an implicit "attractiveness" requirement for many jobs.[128] Employers generally prefer beautiful women to unattractive women, a common preference that can be applied to society at large.[129] Scholars agree that attractive people have an automatic advantage in the workplace in finding employment and advancing their careers.[130] Furthermore, a court is likely to validate the claim that employers may engage in appearance discrimination when an employee's appearance serves as a bona fide occupational qualification that is reasonably necessary for the normal operations of a business.[131]

The litigation involving the airline industry's attempts to impose strict beauty requirements on female flight attendants exemplifies the limits of claiming such an occupational qualification.[132] For example, in 1981, in *Wilson v. Southwest Airlines Co.*, the United States District Court for the Northern District of Texas held that female sex appeal was not a necessary qualification for performing the primary business duties of an airline attendant.[133] The defendant airline employed a marketing strategy of femininity, love, and sex appeal to attract male clientele.[134] To promote its image of "spreading love all over Texas,"

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[124] *See Carroll*, 604 F.2d at 1033; *Sage*, 507 F. Supp. at 611.

[125] *See Carroll*, 604 F.2d at 1033; *Sage*, 507 F. Supp. at 611; *see infra* notes 127–166 and accompanying text.

[126] *See infra* notes 127–166 and accompanying text.

[127] *See, e.g., Wilson*, 517 F. Supp. at 296–97.

[128] *See id.* at 296.

[129] Klare, *supra* note 75, at 1421; *see also* Note, *Facial Discrimination: Extending Handicap Law to Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2040 (1987) (noting that people in American society have a visceral dislike for all things and people unattractive and that unattractive people generally are treated worse than those considered attractive).

[130] *See* Klare, *supra* note 75, at 1421.

[131] *See* Craft v. Metromedia, Inc., 766 F.2d 1205, 1213, 1215–17 (8th Cir. 1985); *infra* notes 147–153 and accompanying text.

[132] *See, e.g., Wilson*, 517 F. Supp. at 303.

[133] *Id.*

[134] *Id.* at 294.

the defendant dressed its female employees in high boots and revealing hot pants.[135] The airline claimed that female sex appeal was a bona fide occupational qualification that was necessary to fulfill its promise of bringing passengers airborne with love.[136] The airline argued that it could hire only sexy, attractive, female flight attendants because only they would personify the sexy image of its marketing campaign.[137]

The *Wilson* court disagreed.[138] It rejected this claim, contending that sex appeal had no bearing on how a woman or a man performed the primary duties of being a flight attendant.[139] The court did not find this requirement to be one of business necessity, but rather one of business convenience.[140] It characterized the contention that business success relied on the sexy female image as "speculative at best."[141] It further found that the defendant adopted the female image "at its own discretion, to promote a business unrelated to sex."[142] The court implicitly rejected the idea that female sexuality can be exploited as a marketing tool simply because of male preferences for attractive women.[143]

Despite this holding, employers still may be able to impose "attractiveness" requirements if the same standards are applied equally to men and women.[144] For example, the *Wilson* court explained that being a woman could be a bona fide occupational qualification for the position of a Playboy bunny because female sexuality and attractiveness furthered the purpose of the business—to entice male customers.[145] In certain instances, therefore, female sex appeal and a beautiful appearance are sustainable, acceptable employment qualifications.[146]

Under this theory, in 1985, in *Craft v. Metromedia, Inc.*, the Eighth Circuit Court of Appeals dismissed a sex discrimination case against a news station that demoted a female anchor because of negative reac-

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[135] *Id.* at 294–95.

[136] *Id.* at 293.

[137] *Wilson*, 517 F. Supp. at 293.

[138] *Id.* at 302.

[139] *Id.*

[140] *Id.* at 303; *see also Diaz*, 442 F.2d at 388 (noting that discrimination based on sex is valid only for business necessity, not business convenience).

[141] *Wilson*, 517 F. Supp. at 303.

[142] *Id.*

[143] *See id.*

[144] *See Craft*, 766 F.2d at 1209–10 (8th Cir. 1985); *see also* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms and Workplace Equality*, 92 MICH. L. REV. 2541, 2544 (1994) (noting that courts rationalize appearance requirements by reference to social and community norms that simply reinforce and legitimize gender stereotypes).

[145] *Wilson*, 517 F. Supp. at 301.

[146] *See id.*

tions to the anchor's physical appearance.[147] The court rejected the female anchor's argument that the station's appearance standards were based on stereotypical characterizations of the sexes, and that standards of attractiveness were applied more strictly to women than to men.[148] It held that the employer could rely on sex stereotypes of beautiful women given the conservative market in Kansas City and the technical matters of lighting and color coordination.[149] The court then concluded that the appearance requirements were not unduly burdensome to women and that the requirements were not guided by stereotypical notions of female roles and appearances.[150] Such standards were the product of professional and technical considerations, making them reasonable business qualifications.[151] Consequently, the court decided that the employer had a "legitimate need" to address the plaintiff's growing indifference to the type of image that the station wanted her to display.[152] Relying on a dependable market survey, the court found that the station made a reasonable decision in removing the plaintiff from her news anchor position.[153]

Recently, in 2003, in *Yanowitz v. L'Oreal USA, Inc.*, the California Court of Appeal addressed the issue of appearance discrimination in the context of Title VII, holding that an order to fire a female employee for not meeting a male executive's standards of sexual desirability constituted sex discrimination.[154] The plaintiff was a manager of a cosmetics counter who refused to terminate an employee because her boss did not find the employee physically attractive enough.[155] The manager explained to the plaintiff that he did not think the woman was "good looking enough" for the position and told her to "get me somebody hot."[156] When the plaintiff refused this order, the manager pointed to a young blonde and said, "God damn it, get me one that looks like that."[157] The manager allegedly preferred fair-skinned blondes, and the female employee was darker skinned.[158] The

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147 766 F.2d at 1215–16.
148 *Id.* at 1213, 1216.
149 *Id.* at 1215.
150 *Id.* at 1215–16.
151 *Id.*
152 *Craft*, 766 F.2d at 1217.
153 *Id.*
154 131 Cal. Rptr. 2d at 588.
155 *Id.* at 586.
156 *Id.*
157 *Id.* at 582.
158 *Id.* at 586.

plaintiff never carried out the order and lost her job as a result.[159] The trial court analyzed this behavior as an act of sex discrimination, questioning whether a male executive could order a woman to be terminated for not hiring women who were sexually appealing to him when the same appearance standards did not apply to male employees.[160]

The appellate court reversed the trial court's decision, holding that a clear order to fire a female employee for failing to meet the male manager's personal standards for sexual attractiveness amounted to sex discrimination.[161] The appellate court contended that the evidence allows for an inference that the executive would not have ordered the firing of a male employee because a man's physical attractiveness would not have been an issue.[162] Implicitly, this case establishes a potential cause of action for appearance discrimination under Title VII.[163]

Plaintiffs often seek to assert Title VII sex discrimination protections when employers mandate certain levels of attractiveness, just as they do in cases involving employer grooming regulations.[164] *Wilson* and *Yanowitz* exemplify an application of this protection; *Craft* exemplifies a rejection of this protection.[165] The next Section moves away from sex discrimination protection and discusses how disability case law addresses appearance issues.[166]

C. *Legal Protection Under Federal Disability Laws*

Employees who find themselves victims of appearance discrimination also may be able to seek relief under the ADA.[167] If an appearance trait qualifies as a disabling condition, the victim of appearance discrimination may be afforded legal protection.[168] The definition of a disability under the ADA is a mental or physical impairment that creates a substantial limitation of a major life activity.[169] The statute

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[159] *Yanowitz*, 131 Cal. Rptr. 2d at 586.

[160] *See id.*

[161] *Id.* at 588.

[162] *Id.*

[163] McDonald, *supra* note 1, at 127; *see Yanowitz*, 131 Cal. Rptr. 2d at 587 n.5, 588.

[164] *Compare supra* notes 107–126 and accompanying text (addressing employer grooming regulations), *with supra* notes 127–163 and accompanying text (addressing Title VII sex discrimination).

[165] *See Craft*, 766 F.2d at 1215–16; *Wilson*, 517 F. Supp. at 303; *Yanowitz*, 131 Cal. Rptr. 2d at 588.

[166] *See infra* notes 167–196 and accompanying text.

[167] Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000).

[168] *Id.* § 12102(2); Adamitis, *supra* note 1, at 200.

[169] 42 U.S.C. § 12102(2)(A)–(C).

allows an individual to have a record of impairment or simply be perceived as being impaired.[170]

Appearance discrimination claims that rely on the ADA often deal with obese individuals.[171] Certainly, obese people generally do not fit the norm of American beauty.[172] In comparison to those of average weight, obese individuals earn less money, are less likely to marry, and are subject to more discrimination in the workplace.[173] Despite this discrimination, to have a cause of action under the ADA, obese people first must show that obesity is a disability.[174] To claim that obesity is a disability, individuals must prove that obesity substantially limits a major life activity, such as walking, talking, or working.[175] Alternatively, individuals must show that others regard them as being limited in a significant life activity.[176]

Courts, however, have not applied a consistent standard to determine whether obesity qualifies as a disability.[177] In 1993, in *Cassista v. Community Foods, Inc.*, the Supreme Court of California held that an obese woman was not disabled because her excessive weight condition did not affect a basic bodily system or inhibit a major life activity.[178] After a health food store refused employment to an obese woman because of the management's concerns about her heavy weight, the woman sued for employment discrimination.[179] Here, the court held that weight, unrelated to a physiological, systematic disorder, does not constitute a handicap or disability.[180] As such, for obesity to be pro-

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[170] *Id.* § 12102(2)(B)–(C).

[171] Adamitis, *supra* note 1, at 201; *see* Peter J. Perroni, Cook v. Rhode Island, Department of Mental Health, Retardation & Hospitals: *The First Circuit Tips the Scales of Justice to the Overweight*, 30 NEW ENG. L. REV. 993, 994–1004 (1996) (providing relevant background on obesity discrimination under the Americans with Disabilities Act (the "ADA")).

[172] *See* Jane Byeff Korn, *FAT*, 77 B.U. L. REV. 25, 25–26 (1997).

[173] Perroni, *supra* note 171, at 993.

[174] 42 U.S.C. § 12112(a); *see also* Kimberly B. Dunworth, Cassista v. Community Foods, Inc.: *Drawing the Line at Obesity?*, 24 GOLDEN GATE U. L. REV. 523, 531 (1994) (noting that the majority of cases considering weight-based discrimination do not consider obesity to be a disability).

[175] 42 U.S.C. § 12102(2)(A).

[176] *Id.* § 12102(2)(C).

[177] *Compare, e.g.*, Cook v. R.I., Dep't of Mental Health, Retardation & Hosps., 10 F.3d 17, 26 (1st Cir. 1993) (holding that an obese woman was not disabled), *with, e.g.*, Cassista v. Cmty. Foods, Inc., 856 P.2d 1143, 1153 (Cal. 1993) (holding that an obese woman was disabled).

[178] 856 P.2d at 1154.

[179] *Id.* at 1145, 1149–50 (explaining that the plaintiff brought her claim of handicap discrimination under California's FEHA, which was modeled after the ADA and forbids employment discrimination based on disability); *see* CAL. GOV'T CODE § 12940(h) (West 1992).

[180] *Cassista*, 856 P.2d at 1154.

tected under the law, an employee must show some physiological basis for the weight problem.[181] The court contended that the plaintiff did not provide any evidence that she suffered from, or that the employer regarded her as suffering from, a form of physiologically induced obesity.[182] The fact that the plaintiff considered herself to be a healthy, fit individual aside from her weight problem helped the court conclude that she did not demonstrate an actual or perceived physical handicap.[183] Rather, the court concluded that her obesity was a "transitory or self-imposed condition" which she could alter voluntarily, as opposed to a condition that was immutable or irreversible.[184]

Conversely, in 1993, in *Cook v. Rhode Island, Department of Mental Health, Retardation & Hospitals*, the First Circuit Court of Appeals held that an overweight person could be protected statutorily as disabled.[185] Unlike any previous decision before it, this case represented a groundbreaking step in addressing the pervasive problem of weight-based appearance discrimination.[186] In this case, the plaintiff applied for employment at a mental health facility.[187] Her routine pre-hire physical indicated that she was morbidly obese.[188] The defendant health facility claimed that this condition jeopardized her ability to evacuate patients in the event of an emergency and left her susceptible to various health risks.[189] The plaintiff claimed that the defendant refused to hire her because of her perceived disability, and she sued for disability discrimination.[190]

Relying on a perceived disability theory, the court held that obesity may be categorized as a disability entitled to protection under federal law.[191] The court rejected the argument that obesity should not receive disability protection because it is a voluntary, mutable

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[181] *Id.* at 1153.

[182] *Id.* at 1154.

[183] *Id.*

[184] *See id.* at 1152.

[185] 10 F.3d at 26.

[186] *See Cook*, 10 F.3d at 24; Perroni, *supra* note 171, at 1018.

[187] *Cook*, 10 F.3d at 20.

[188] *Id.* at 20–21.

[189] *Id.* at 21.

[190] *Id.*; *see* Perroni, *supra* note 171, at 994–96. Congress enacted the Rehabilitation Act of 1973 to prohibit discrimination by recipients of federal funding against otherwise qualified people with disabilities. *See* 29 U.S.C. §§ 701–797 (2000); Perroni, *supra* note 171, at 994–96. The Rehabilitation Act is the precursor to the ADA, which defined disability similarly and extended disability protection to the private sector. Perroni, *supra* note 171, at 994–96; *see* 29 U.S.C. §§ 701–797; Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213.

[191] *Cook*, 10 F.3d at 24.

characteristic, noting that numerous conditions, which often may be caused or exacerbated by voluntary conduct, receive disability protection.[192] Furthermore, the court held that sufficient evidence existed to prove that obesity was caused by a permanent condition—a dysfunctional metabolism.[193] Finding the plaintiff to be otherwise qualified for the position, the court decided that an employer cannot refuse to hire someone merely because the individual possesses an obesity handicap.[194] Perceived inability to function in a certain context due to the possession of either a perceived or real handicap was not a sufficient ground for an unfavorable employment hiring decision.[195] The employer's decision must be objectively reasonable, and given that the plaintiff's duties would be similar to those she had performed positively in the past, the appellate court determined that the lower court's finding was unreasonable, and the action was unlawfully discriminatory.[196]

Both *Cook* and *Cassista* address appearance issues through the invocation of disability law.[197] These two courts assume varying approaches in the classification of obesity as a disability.[198] They offer examples of another legal theory that claimants can utilize in seeking redress for appearance discrimination.[199]

The legal theories that this Part has examined thus far—constitutional liberty, sex discrimination, and disability discrimination—do not focus explicitly on appearance discrimination.[200] Rather, they address it implicitly through broader legal protections.[201] Some state and local governments, however, address the issue through specific appearance discrimination statutes.[202]

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[192] *Id.* (listing heart disease, alcoholism, and cancer from cigarette smoking as examples of conditions that receive disability protection despite their potential to be caused or exacerbated by voluntary conduct).

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *See Cook*, 10 F.3d at 27.

[197] *See Cook*, 10 F.3d at 24; *Cassista*, 856 P.2d at 1154; *supra* notes 167–196 and accompanying text.

[198] *See Cook*, 10 F.3d at 24; *Cassista*, 856 P.2d at 1154; *supra* notes 167–196 and accompanying text.

[199] *See Cook*, 10 F.3d at 24; *Cassista*, 856 P.2d at 1154; *supra* notes 167–196 and accompanying text.

[200] *See supra* notes 72–196 and accompanying text.

[201] *See supra* notes 72–196 and accompanying text.

[202] *See infra* notes 203–212 and accompanying text.

D. *State and Local Statutes Prohibiting Appearance-Based Discrimination*

A limited number of jurisdictions have laws banning appearance-based discrimination.[203] For example, the District of Columbia enacted a statute prohibiting employment discrimination and included personal appearance as a protected category.[204] This statute defines personal appearance as 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."[205] In 1986, in *Atlantic Richfield Co. v. District of Columbia Commission on Human Rights*, the District of Columbia Court of Appeals upheld a finding of personal appearance discrimination in violation of this appearance discrimination law.[206] In this case, an employer criticized a female employee for her provocative clothing.[207] Because the employee's appearance was similar to her colleagues and the company had not enacted a dress code or any other physical appearance standards, the court held that sufficient evidence in the record existed to justify a finding of appearance discrimination.[208]

Other jurisdictions that seek to curb appearance discrimination include the state of Michigan and the city of Santa Cruz, California.[209] Michigan bans appearance discrimination based on height and weight.[210] Santa Cruz, California likewise bans discrimination based on physical characteristics that result from events beyond a person's control, including physical mannerisms.[211] As a result, state and local appearance statutes like those mentioned above provide yet another avenue for addressing instances of appearance discrimination.[212]

In sum, when faced with an instance of appearance discrimination, a victim may have a cause of action under the Due Process Clause of the U.S. Constitution, Title VII, the ADA, or state and local statutes that provide additional protection against appearance dis-

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[203] Adamitis, *supra* note 1, at 209.

[204] D.C. CODE ANN. § 2-1402.11(a) (2001).

[205] *Id.* § 2-1401.02(22).

[206] 515 A.2d 1095, 1100–01 (D.C. 1986).

[207] *Id.*

[208] *Id.*

[209] *See* SANTA CRUZ, CAL., PROHIBITION AGAINST DISCRIMINATION ch. 9.83 (1995); MICH. COMP. LAWS § 37.2202 (2004).

[210] MICH. COMP. LAWS § 37.2202.

[211] SANTA CRUZ, CAL., PROHIBITION AGAINST DISCRIMINATION ch. 9.83.

[212] *See supra* notes 203–211 and accompanying text.

crimination.[213] Liberty arguments do not fare well against the government's legitimate need to regulate appearances.[214] Sex discrimination and disability discrimination claims may offer some protection for victims of appearance discrimination, though this protection often is implicit or peripheral.[215] State and local statutes offer the most explicit form of protection against appearance discrimination.[216]

III. Analysis: The Favorable Impact of Appearance Discrimination Law on the Female Body

The law is moving in a positive direction for women as it begins to proffer the idea that women need not meet certain standards of beauty.[217] Implicitly, this signals to women that their bodies need not conform to one ideal form in order to be beautiful, and also that a positive body image need not be constrained by man's demand for the perfect female body.[218] Such a trend is good for women because it helps deconstruct the social and economic value placed on their bodies, while deemphasizing the importance of physical perfection.[219]

A. *How the Law Reflects Conceptions of Female Beauty*

The legal discourse on appearance issues implicitly reflects social constructions of female beauty.[220] Society compels many women to become obsessed with their personal appearance and the physical attainment of beauty.[221] Women's obsession with beauty perpetuates their subordinate status in society.[222] It exposes them to male habits of exploitation as well as to the dangers inherent in the beauty industry.[223] The messages women receive at young ages from these sources include the idea that a woman's role in life is to be beautiful, and that

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[213] *See supra* notes 72–211 and accompanying text.

[214] *See supra* notes 72–103 and accompanying text.

[215] *See supra* notes 104–199 and accompanying text.

[216] *See supra* notes 203–211 and accompanying text.

[217] *See infra* notes 220–310 and accompanying text.

[218] *See infra* notes 220–310 and accompanying text; *cf.* Wolf, *supra* note 17, at 10 (noting that although women today have more legal and economic power than ever before, they actually feel worse physically about themselves than their "unliberated grandmothers").

[219] *See infra* notes 220–310 and accompanying text.

[220] *See, e.g.*, Craft v. Metromedia, Inc., 766 F.2d 1205, 1216 (8th Cir. 1985); Yanowitz v. L'Oreal USA, Inc., 131 Cal. Rptr. 2d 575, 586 (Ct. App. 2003); McDonald, *supra* note 1, at 118.

[221] *See* Hesse-Biber, *supra* note 30, at 28–29 (noting the pervasive impact of the media on women's body image).

[222] Gehrke, *supra* note 42, at 238.

[223] *Id.* at 237–38.

women should become beautiful at any painstaking cost.[224] Despite the liberating efforts of the modern women's movement, society at large still determines a woman's self worth by her ability to attract a man.[225] Likewise, the law contributes to and often reflects this impulse in its treatment of appearance discrimination cases.[226]

In cases where an employer may need to take personal appearance into consideration as a business necessity, the employer may assert a bona fide occupational qualification.[227] Yet such a rule can place women in precarious situations because justifying a type of discrimination based on social affinity for the beautiful may impact adversely those who cannot meet such strict aesthetic standards.[228] Consequently, such discrimination can have negative effects on a woman's perception of self worth, making her increasingly preoccupied with her body, her weight, and her degree of physical attractiveness.[229] Given this culture of bodily obsession in which images of thin, beautiful women permeate everyday life, the law often reflects the ingrained and unchallenged idea that women must conform to traditional notions of beauty and physical appearance.[230] Such traditional norms are thoroughly sexist and patriarchal.[231]

Although in 1976, the U.S. Supreme Court addressed the grooming requirements of a male police officer in *Kelley v. Johnson*, the decision illustrates how the law favors socially ingrained standards of appearance, intimating that a pattern needs to be followed to sustain social order.[232] This case exemplifies the law's readiness to subvert personal autonomy and appearance diversity.[233] Such a tendency certainly has a more significant impact on women than men given the social importance of female appearance.[234] A consequential effect for women is that the law reinforces idealized notions of beauty—forms of appearance that do not and cannot represent reality for many women.[235]

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[224] *See id.*

[225] HESSE-BIBER, *supra* note 30, at 13.

[226] *See, e.g., Craft*, 766 F.2d at 1217 (holding that a news station was justified in terminating a news anchor for not meeting attractiveness standards).

[227] *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971).

[228] *See* Adamitis, *supra* note 1, at 213–14.

[229] *See* Glazer, *supra* note 17, at 115–16.

[230] *See, e.g., Craft*, 766 F.2d at 1217.

[231] *See* Klare, *supra* note 75, at 1420.

[232] *See* 425 U.S. 238, 248 (1976).

[233] *See id.*

[234] *See* HESSE-BIBER, *supra* note 30, at 29.

[235] *See Craft*, 766 F.2d at 1217.

In 1976, in *Tardiff v. Quinn*, the First Circuit Court of Appeals offered an example of how physical appearance stereotypes imbue the law.[236] In this case, the First Circuit found a school's concern with the short length of a teacher's skirt to be reasonable.[237] The government's managerial discretion prevailed over the plaintiff's sense of personal liberty to define her style and appearance.[238] In effect, the court stifled the teacher's creativity and definition of personal beauty by finding in favor of the school.[239] It insisted on reinforcing socially normative behavior.[240]

Furthermore, the government employer, a public school department official, never explained the effects of skirt length on professional productivity.[241] The court implicitly showed great deference to stereotypical social norms of what is an acceptable form of dress for a school teacher.[242] When the law reinforces socially normative behavior or appearances, whether conservative dress standards for a school teacher or large breasts for Playboy bunnies, it reminds women that they need to meet certain preordained standards of appearance in order to be accepted and successful in society.[243] Placing so much emphasis on female appearance only makes women increasingly obsessed with their bodies and their beauty, lessening the importance of other personal characteristics like intellect or economic potential.[244]

In contrast to *Tardiff*, in 1979, the Seventh Circuit Court of Appeals, in *Carroll v. Talman Federal Savings & Loan Ass'n*, recognized how simple regulations like dress codes can subtly perpetuate sexism.[245] In holding that an employer cannot mandate uniforms for women without requiring the same for men, this court combated a culture of sexism that reflects the idea that women are not capable of choosing appropriate clothes to wear to work.[246] This case provided a strong message to women—one that said that their appearances need not be prescribed through rules, but rather should be defined through per-

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[236] *See* 545 F.2d 761, 761–63 (1st Cir. 1976).

[237] *See id.*

[238] *Id.*

[239] *See id.* at 763.

[240] *See id.* at 764. At the time of this case in 1976, socially normative behavior for female school teachers was to wear longer length skirts. *See id.*

[241] *See Tardiff*, 545 F.2d at 763–64.

[242] *See id.*

[243] *See id.*

[244] *See* WOLF, *supra* note 17, at 10.

[245] *See* Carroll v. Talman Fed. Savings & Loan Ass'n, 604 F.2d 1028, 1032 (7th Cir. 1979).

[246] *See id.*

sonal choice and autonomous decision making, an important objective for the attainment of an equal society.[247]

Despite this strong message, Title VII permits the equal application of grooming or appearance standards to both sexes because Title VII only requires that male and female employees be treated in an equal manner.[248] Because social norms decide what are acceptable behavior and appearances, the law reinforces the dominant form of female beauty.[249] When a social custom or practice is widely accepted, such as the objectification of the female body, these patriarchal, heterosexist sensibilities are not challenged.[250] Therefore, the encouragement and perpetuation of gender inequality results because employers are allowed to require employees to engage in socially accepted behavior, so long as they require all employees to do so.[251]

Employers encourage the perpetuation of bodily perfection and obsession when they set strict grooming or physical attractiveness standards.[252] Employer regulations of personal appearance often reinforce sexist notions of how women should look and dress because they demand a certain type of physical appearance.[253] Additionally, when employers set standards of attractiveness for female employees, they can perpetuate a normative culture that values a particularized form of female physical beauty and sex appeal over female intellectual and practical skills.[254] Given the heightened sensitivity to female exploitation in the workforce and growing concerns about sexual harassment today, the law may offer more protection to women who face sexually exploitative treatment in the workforce as opposed to the more subtle form of exploitation through grooming regulations.[255]

In 1982, in *Wilson v. Southwest Airlines Co.*, the United States District Court for the Northern District of Texas bravely challenged the socially accepted desire to sexualize women.[256] The court was not willing to uphold an employer's female-only hiring policy that demanded

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[247] *See id.*

[248] *Id.* at 1031.

[249] *See* Klare, *supra* note 75, at 1417–18.

[250] *See id.*

[251] *See Craft*, 766 F.2d at 1209–10; Klare, *supra* note 75, at 1417–18 (noting that conventional social norms are often sexist and patriarchal).

[252] *See, e.g., Yanowitz*, 131 Cal. Rptr. 2d at 582.

[253] *See id.*

[254] *See* Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 302 (N.D. Tex. 1981).

[255] *Compare Kelley*, 425 U.S. at 239–40 (exemplifying the use of grooming regulations to enforce socially normative behavior), *with Wilson*, 517 F. Supp. at 303 (exemplifying the legal and social impropriety of the sexual exploitation of women in the workplace).

[256] *See Wilson*, 517 F. Supp. at 303.

that its airline attendants display a certain degree of sexiness or attractiveness.[257] The effect that this decision has on feminist sensibilities related to women's body images is noteworthy.[258] In holding that female sex appeal was not necessary for ordinary business operations, the court focused on job performance and business purpose and not on the female body and sex appeal.[259] In striking down its female-only hiring policy, the court did a great service for both men and women.[260] In opening up employment opportunities to men, this court also implicitly told women that they did not have to exploit their bodies in order to perform the functions of airline attendants.[261] In effect, this court combated the popular marketing strategy of using female sex appeal for the attainment of market success.[262] It recognized that the temptation of employers to use sex as a marketing tactic is real and widespread.[263] It also recognized that women specifically would benefit from a legal ban on such exploitative behavior.[264]

Although a sexualized market culture may be pleasing to many men (and women, too), the *Wilson* decision lends support to the idea that it is not intrinsically good for women, either physically or psychologically.[265] Branding sex appeal or an attractive physical appearance as an employment qualification or business necessity tells women that they have to look a certain way to be professionally successful.[266] It makes them use their bodies for economic gain, diminishing the importance of intelligence and skill level.[267] Given the harmful effects such exploitation has on women and their body images, this court did a service for women by disallowing physical sex appeal to be a bona fide employment qualification for flight attendants.[268]

Despite the holding in *Wilson*, the court still recognized certain instances where appearance standards can be justified as a business necessity.[269] Such exceptions may continue to have harmful effects on women's self-image because they still allow for the exploitation of the

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[257] *See id.*
[258] *See id.*
[259] *See id.* at 301.
[260] *See id.* at 303.
[261] *See Wilson*, 517 F. Supp. at 302.
[262] *See id.* at 303.
[263] *See id.*
[264] *See id.*
[265] *See id.* at 304.
[266] *See Wilson*, 517 F. Supp. at 304.
[267] *See id.*
[268] *See id.* at 302.
[269] *Id.* at 304.

female body—just so long as a business necessity justifies such exploitation.[270] Furthermore, because women are often held to stricter standards of beauty and physical attractiveness than men, the law implicitly resists opportunities to help reverse the effects of a society obsessed with "beautiful" women.[271] In this way, the law accepts and reinforces the social norm that physical beauty is natural, favored, and even beyond the law's control.[272]

In 1985, the Eight Circuit Court of Appeals in *Craft v. Metromedia, Inc.* offered a good example of this assertion.[273] The court took a predictable approach to the problem of the high demand on female appearance and levels of attractiveness by reinforcing normative conceptions of beauty.[274] This case, in which the court upheld the employer's decision to terminate a female news anchor because of her unfavorable physical appearance, demonstrates how the law reinforces what women should look like.[275] Implicitly, the case exemplifies how personal appearance discrimination encompasses judgments about women's bodies and personas.[276] It evidences how ingrained, traditional notions of beauty affect employment opportunities by permitting criteria that often are unrelated to fundamental job performance, yet are viewed as a natural part of women's being and employability.[277] Because employers are given the opportunity to frame attractiveness as a bona fide occupational qualification, they possess a certain degree of leeway in requiring attractiveness or sex appeal in female employees.[278] Demanding such physical capabilities can be damaging to women's self-esteem because it does not help them foster a diverse conception of what constitutes a beautiful body.[279]

The *Craft* court could have taken a bold step and rejected the social affinity for beautiful women, but it refused to do so.[280] Rather, it strengthened a social norm that says that beauty is a female trait that

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[270] *See id.* at 301.

[271] *See Craft*, 766 F.2d at 1215–16; Adamitis, *supra* note 1, at 209.

[272] *See Craft*, 766 F.2d at 1215–16; Adamitis, *supra* note 1, at 209.

[273] *See* 766 F.2d at 1215–16.

[274] *See id.*

[275] *See id.*

[276] *See id.*; Klare, *supra* note 75, at 1415.

[277] *See Craft*, 766 F.2d at 1216.

[278] *See* Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. MICH. J.L. REFORM 551, 569 (1998) (noting the significant degree of uncertainty as to what extent sex appeal can be used as a bona fide occupational qualification).

[279] *See* HESSE-BIBER, *supra* note 30, at 58.

[280] *See Craft*, 766 F.2d at 1215–17.

is natural, expected, and valued.[281] It reinforced socially accepted ideas of what a female news anchor should look like, including how she should dress and how young she should be.[282] The court saw nothing wrong with the status quo beautification of women, and likewise did nothing to help rectify the dangers associated with a culture obsessed with beautiful girls.[283]

B. *Redefining Female Beauty and Body Image Through the Law*

The preceding discussion emphasizes how the law reflects social stereotypes of female beauty for women and why this is bad for women.[284] In measuring themselves against such standards, many women often are left feeling not good enough, not beautiful enough, and not worthy enough for certain jobs or relationships.[285] Yet as states and localities recognize the harmful effects of appearance discrimination, legislation protecting the aesthetically challenged offers a possible remedy.[286] These local statutes evidence that at least some jurisdictions see value in remedying the harmful effects of appearance discrimination.[287]

In addition, as appearance issues become more widely publicized in the media and academia, more victims of appearance discrimination may file lawsuits against employers who use hiring practices that favor the beautiful.[288] A statement made by the Equal Employment Opportunity Commission suggests that many more lawsuits addressing appearance issues lie ahead because of the emerging idea that the chance to make a living should not be restricted to models and movie stars, but rather should be given to all people with the requisite talent and abilities.[289] Implicitly, this heightened sensitivity to appearance

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[281] *See id.*

[282] *See id.*

[283] *See id.*

[284] *See supra* notes 217–283 and accompanying text.

[285] *See* Gehrke, *supra* note 42, at 233.

[286] *See supra* notes 203–212 and accompanying text.

[287] *See supra* notes 203–212 and accompanying text

[288] *See* McDonald, *supra* note 1, at 121–22, 129 n.13 (citing EEOC v. R.H.P Mgmt., No. 03-RRA-502-J (N.D. Ala. filed Mar. 7, 2003), which is a pending lawsuit against McDonald's for refusing to hire a woman with a port wine birthmark on her face); *see also* Morley Safer, CBSNEWS.com, *The Look of Abercrombie & Fitch*, *at* http://www.cbsnews.com/stories/2003/12/05/60minutes/main587099.shtml (Nov. 24, 2004) (accusing Abercrombie & Fitch of hiring only attractive, young, white people).

[289] *See* Press Release, U.S. Equal Employment Opportunity Commission, EEOC Sues McDonald's Restaurant for Disability Bias Against Employee with Facial Disfigurement (Mar. 7, 2003), http://www.eeoc.gov/press/3-7-03.html.

discrimination is beneficial for women because it will help break down and challenge the historic value placed on the physical attractiveness of their bodies.[290] By accepting more diverse forms of appearance and extending civil rights through appearance law, women may come to understand more readily that they do not have to conform to one specific body type and that many forms of beauty can and do exist.[291] In effect, they may be able to focus their energies away from bodily preoccupation and towards more socially and economically productive endeavors.[292]

Two recent cases offer support for the contention that the law is beginning to foster more positive and diverse body images for women: the First Circuit Court of Appeals' 1993 decision in *Cook v. Rhode Island, Department of Mental Health, Retardation & Hospitals*, and the California Court of Appeal's 2003 decision in *Yanowitz v. L'Oreal USA, Inc.*[293] Given the resistance of the market and media to physical appearance diversification, these decisions are bold steps for the courts.[294] These two courts should be applauded for the implicit messages that they send to women—your body does not have to define the entire person you are; your body is not everything.[295] Furthermore, employment opportunities, success, and happiness should not be reserved for those who meet certain physical standards of beauty.[296]

In *Cook*, the First Circuit Court of Appeals sought to rectify the injustice suffered by an obese woman whose job application was denied due to her weight.[297] As many women struggle with weight issues, this case exemplifies a cutting-edge sensitivity to a form of prejudice that is both dangerous and wrong.[298] This opinion helps fight the socially accepted belief that obesity is always a voluntary and mutable characteristic.[299] It challenges traditional assumptions about what a woman must look like, and it values a woman's ability to work over her

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[290] *See id.*

[291] *See id.*

[292] *See* WOLF, *supra* note 17, at 16.

[293] *See* Cook v. R.I., Dep't of Mental Health, Retardation & Hosps., 10 F.3d 17, 27–28 (1st Cir. 1993); *Yanowitz*, 131 Cal. Rptr. 2d at 588.

[294] *See* Cook v. R.I., Dep't of Mental Health, Retardation & Hosps., 10 F.3d 17, 27–28 (1st Cir. 1993); *Yanowitz*, 131 Cal. Rptr. 2d at 588; *see also* Safer, *supra* note 288 (reporting on Abercrombie & Fitch's employment preferences for "all-American" salespeople, especially "Caucasian, football-looking, blond hair, blue-eyed males").

[295] *See Cook*, 10 F.3d at 27–28; *Yanowitz*, 131 Cal. Rptr. 2d at 588.

[296] *See Yanowitz*, 131 Cal. Rptr. 2d at 588.

[297] *See* 10 F.3d at 27–28.

[298] *See id.*

[299] *See id.*

ability to be sexually attractive.[300] In this way, this watershed opinion helps women, many of whom struggle with their weight in a variety of contexts, feel more accepted and protected under the law.[301] This opinion raises social awareness about appearance discrimination, letting women know that the law will not allow physical appearance to determine who they are and what they can achieve.[302]

Furthermore, in *Yanowitz*, where an employer wanted an employee terminated for not being good looking enough, the California Court of Appeal refused to tolerate the employer's desire to have only sexually attractive employees working for him.[303] Inferring that a male employee's physical attractiveness would not have been an issue, the court would not allow discrimination against women based on sexual desirability.[304] This opinion is also a positive step forward for addressing issues related to female bodily obsession and exploitation, practices that perpetuate notions of women as sex symbols and objects of desire.[305] Just because society accepts a certain type of behavior as normal does not mean that such behavior is healthy, fair, or practical.[306] When the law recognizes the harm done to women's bodies and psyches through the perpetuation of traditional female stereotypes, it does a great service to them by attempting to challenge such stereotypes.[307] An opinion like *Yanowitz* is just one of the many ways that our society can help women gain more positive self-images, allowing them

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[300] *See id.*

[301] *See id.*

[302] *See Cook*, 10 F.3d at 27–28.

[303] *See* 131 Cal. Rptr. 2d at 588.

[304] *See id.*

[305] *See id. But see* McDonald, *supra* note 1, at 127–28. James McDonald argues against the extension of civil rights to the aesthetically challenged. McDonald, *supra* note 1, at 127–28. His discussion rejects the idea that appearance should become protected, highlighting definitional difficulties of terms such as "hot" or "ugly." *Id.* at 127. It contends that national standards of attractiveness would have to be developed through rulemaking and common law. *Id.* McDonald is outraged by the idea that beauty contest judges could find new livelihoods as experts in appearance litigation, and that employers would have to hire a certain quota of "ugly" employees. *Id.*

[306] *Cf.* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 41–43 (1993). Cass Sunstein argues that the U.S. Supreme Court in *Plessy v. Ferguson* conceived of segregation as a state of nature—a pre-political condition that merely reflected the desires and customs of people. *Id.* at 41 (discussing generally 163 U.S. 537 (1896)). Segregation, therefore, could not be changed by the law or challenged from the standpoint of justice. *Id.* Given the subsequent history of segregation, the error in this argument is apparent. *See id.* at 41–43. Yet if one conceives of the modern favoritism for beautiful people as a natural, pre-political condition, then any attempts to alter this state of nature through the law are futile. *See id.* Like segregation, error possibly exists in this argument. *See id.*

[307] *See Yanowitz*, 131 Cal. Rptr. 2d at 588.

to accept their bodies for what they are and have more fulfilling lives because of the development of this more positive self-image.[308] The law should continue to applaud and to strengthen this trend, which discourages restrictions on weight, appearance, and physical beauty.[309] In this way the law can contribute to the deconstruction of stereotypes that keep women intensely concerned, and too often debilitated by, their physical appearance.[310]

Conclusion

Physical appearance discrimination reflects the preference society has for beautiful women. Taken to an extreme, this tendency toward beauty and physical appearance can have harmful effects on women's body image and self-esteem. Because appearance often affects employment opportunities, the legal treatment of appearance discrimination issues has important consequences for women in particular.

The airline and news reporting industries began the debate about appearance issues by insisting upon sexy, attractive female employees. In the absence of specific appearance discrimination laws, victims often framed their claims of appearance discrimination in terms of sex discrimination. From the 1970s until now, courts have exhibited an increasing willingness to protect women from appearance discrimination, producing a legal trend that is good for women and their body images.

This trend helps deconstruct socially normative behavior that emphasizes the importance of female beauty and physical appearance. Social favoritism of the beautiful is not healthy or productive for women. With cases like *Yanowitz v. L'Oreal USA, Inc.* raising awareness about and protection for appearance discrimination in the workforce, women may begin to realize that being sexy and beautiful is not a prerequisite for success. The end result should be a strong body of law that breaks from social norms and that provides protection for those whom society considers physically undesirable.

Stacey S. Baron

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[308] *See id.*

[309] *See id.*; Glazer, *supra* note 17, at 147.

[310] *See Yanowitz*, 131 Cal. Rptr. 2d at 588.