



Appearance discrimination in employment

Appearance
discrimination

Legal and ethical implications of “lookism” and “lookphobia”

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Abstract

Purpose – The article aims to provide 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, the authors apply ethical theories to determine whether such discrimination can be seen as moral or immoral.

Design/methodology/approach – It is a legal paper which covers all the laws related to discrimination based on look. Court cases and Americans laws related to this concept are reviewed and critically discussed.

Findings – The paper finds that appearance-based discrimination is not illegal in the USA so long as it does not violate civil rights laws.

Research limitations/implications – This research is limited to Federal and State laws in the USA and may not be relevant in other countries as the local laws might vary.

Practical implications – Managers and employees can protect themselves in the workplace from illegal discriminatory practices.

Social implications – Employees know their rights and enhance their understanding of laws related to appearance, attractiveness, and why companies look to hire those who are considered “handsome”, “pretty” and “beautiful”.

Originality/value – This is an original and comprehensive paper by the authors.

Keywords Ethnic minorities, Racial discrimination, Disabilities, Discrimination, Equal opportunities, Gender, “Lookism”, “Lookphobia”, United States of America

Paper type Research paper

Introduction

This paper is a legal, ethical, and practical examination of appearance discrimination in employment. “Appearance,” however, is a broad legal and practical aspect, encompassing not only looks, but also dress and grooming standards in the workplace. This paper focusses in on one important, and highly controversial, aspect of appearance discrimination – discrimination in favor of people who are perceived as physically attractive and against people who are not physically attractive. Like many legal terms, there is a parallel culturally coined descriptive phrase of “lookism,” which is widely used to identify this treatment of people in ways biased by their perceived individual level of physical attractiveness. The authors examine federal, state, and local statutes, case law interpreting said statutes, and legal and management commentary regarding appearance discrimination. The authors’ scrutiny exclusively focus upon employees being negatively impacted in the workplace due to their perceived “unattractiveness,” rather than the “reverse appearance discrimination” perspective, which was alleged in *Lorenzana v. Citigroup Inc* (2010) by a former



Citibank employee claiming that she was terminated for being “too hot” according to her filed complaint. Following this introduction section, the authors first provide some background material as to societal norms concerning “attractiveness,” the existence of appearance discrimination in society, especially regarding employment, and the presence of a certain “preferring the pretty” norm, and consequently discrimination against less attractive people.

The next section of the paper is the legal environment, wherein the authors initially discuss the fundamental employment law doctrine in the USA – employment at-will; and then the authors examine important civil rights laws – Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA) – and show how these laws relate to appearance discrimination in the narrow sense examined herein of “attractiveness.” In the analysis of Title VII, the authors define and differentiate, a “disparate treatment” discrimination case from a “disparate impact” one. The authors also explain two important defenses to Title VII civil rights lawsuits – the “business necessity” test and the *bona fide* occupational qualification (BFOQ) doctrine – and demonstrate how these defenses could apply to attractiveness appearance lawsuits. Regardless of any finding of legality to appearance discrimination, the logical questions that emerge from any thorough examination of this topic are: is it moral to discriminate in employment against people based on their physical appearance? And if it is immoral, should civil rights laws be changed to include “appearance” as a protected characteristic? These questions will be answered as part of the ethical analysis through several established theories. Therein, the authors define, explicate, and apply these ethical theories to the subject matter of appearance discrimination to determine whether it is moral. These ethical theories will be ethical egoism, ethical relativism, utilitarianism, and Kant’s categorical imperative. Next, based on the aforementioned legal and ethical analysis, the authors discuss the implications for employers and managers who may be contemplating certain perceived practical business, or perhaps personal, reasons to discriminate against applicants and employees based on their physical appearance and perceived “attractiveness” or lack thereof. The authors then make recommendations for employers and managers on how to achieve certain business objectives, but without violating civil rights laws or treating job applicants and employees in an immoral manner.

Background

It has been said that “A fair exterior is a silent recommendation” (Publilius Syrus, ca. 42 BC). 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 US 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: “(Y)ou 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, US society is concerned with appearance, attractiveness, “good looks,” and sexiness, and thus so is business. 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 US 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 coworkers (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. 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 US 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 USA or is favoring a worker’s physical beauty a legitimate, strategic marketing tool in the ever increasingly competitive “at-will” employment marketplace.

Legal environment

This legal section of the paper will first mention the basic, traditional, and initial principle of employment law in the USA – the employment at-will doctrine. Then the authors will provide an analysis of civil rights laws, principally Title VII of the Civil Rights Act of 1964, but also the ADEA and the ADA, in the context of appearance discrimination. Next, the authors will examine state and local civil rights laws governing appearance discrimination. Finally, the authors will discuss proposals to amend civil rights laws to explicitly add appearance as a protected class, thereby shielding employees from discriminatory workplace appearance practices by their employers.

Employment at-will doctrine

The employment at-will doctrine is a fundamental principle of employment law in the USA. 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 (2007, 2011) 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 USA think that it is unfair to terminate an employee based on her physical appearance, the basic premise of US 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 USA 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 (EEOC), 2011e). Civil rights laws are enforced in the USA primarily by the federal government regulatory agency – the 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. 601-2). 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 ADEA, and the ADA, it must be stressed, are federal, that is, national laws. Since the USA is a federal system, it accordingly must be noted that almost all states in the USA 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. 70-3). 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. 71-3). 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 anti-discrimination 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: he or she is in a class protected by the statute; the plaintiff applied for and was qualified for a position or promotion for which the employer was seeking applicants; 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; 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 USA 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 USA. 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 2000e-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 (Civil Rights Act, 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 US Supreme Court case of *McDonnell Douglas Corporation 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: first, the complainant must put forth credible evidence to establish a *prima facie* case of discrimination; 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 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 Corporation v. Green*, 1973, pp. 802-4; *Community Affairs v. Burdine*, 1981, pp. 252-6). 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 ADEA 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. 277-8) 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 (EEOC, 2011e). 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 US Supreme Court case of *Griggs v. Duke Power* (1971), further refined by the Court in *Albemarle Paper Company 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. 648-9) 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 EEOC, 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” (EEOC, 2011d). 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 v. Harrah's Operating Company*, 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 was 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 a 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 EEOC 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 (EEOC, 2011c).

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 EEOC 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 (EEOC, 2011a). Corbett (2011, pp. 637-8) 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 EEOC 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 (EEOC, 2011a). Therefore, so long as the appearance discrimination is not connected to national origin the appearance discrimination is legal.

Appearance as transgender and sexually transitioning discrimination

Finally, there is appearance discrimination based in gender stereotyping relative to the outward physical appearance of transgender or sexually transitioning workers. These

individuals are particularly vulnerable to society's unfounded prejudice and shame for their physical appearance and lifestyle; and they are afforded little, if any, legal protections other than some local ordinances. The only meaningful legal safe harbor to protect these individuals in the workplace is to link the employer's adverse action directly to the worker's sex, rather than outward appearance, and thus fall under the protective veil of Title VII.

For example, in *Smith v. City of Salem, Ohio* (2004), the Sixth Circuit Court of Appeals ruled that an employer contravenes Title VII when it discriminates against an employee who is a transgender person. The court rationalized that discrimination by employers associated with biological sexes can exist when an employee does not fit stereotypical notions of masculinity or femininity reflected by way of the employee's outward appearances and mannerisms. In doing so, the *Smith* court explained:

Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity (*Smith v. City of Salem, Ohio*, 2004, p. 575).

The Sixth Circuit Court of Appeals reinforced this principle a year later in *Barnes v. City of Cincinnati* (2005), when it affirmed the trial court's holding that a pre-operative, male-to-female transsexual law enforcement officer was discriminated against on the basis of sex in violation of Title VII, based on the officer's allegations of adverse treatment for his failure to conform to sex stereotypes relative to how a man should look and behave on the police force. Similarly, in *Etsitty v. Utah Transit Authority* (2007), the Tenth Circuit Court of Appeals recognized that Title VII protected transgender persons who are discriminated against because they do not conform to gender stereotypes regardless of the employee's status as a transgender person. However, the former employee's claim failed in *Etsitty*, as the court explained that Title VII does not protect "transgender" status alone in interpreting Title VII's language; and also there was insufficient evidence to prove discrimination based upon gender stereotypes. In doing so, the *Etsitty* court explained the current interpretation of Title VII, as applied to transgender individuals, as well as its possible future evolution, by stating:

Nevertheless, there is nothing in the record to support the conclusion that the plain meaning of "sex" encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female [...] Scientific research may someday cause a shift in the plain meaning of the term "sex" so that it extends beyond the two starkly defined categories of male and female (*Etsitty v. Utah Transit Authority*, 2007, p. 1222).

Also, in the case of *Schroer v. Billington* (2008), the plaintiff employee applied for a position at the Library of Congress as a specialist in terrorism; she initially presented as male; however, after receiving the offer, she informed her superiors that she planned to transition and present as a female at her new job; and then after which the job offer was withdrawn. Undoubtedly, her outward physical appearance proved to have negative consequences on her employability. The federal district court found that the library had engaged in impermissible sex stereotyping, despite previous cases holding that sexually transitioning or "transsexuality" status not to be protected by Title VII. (Cavico *et al.*, 2012, p. 6).

Discrimination based upon a perception of a worker's "false identity" projected by one's "transgender like" outward appearance is particularly insidious due to the vulnerability of these individuals to pervasive hurtful social stigmas, with no meaningful legal protection. The forgoing review of the current law shows just how vulnerable these transgender individuals are to appearance discrimination in the workplace. These cases also reinforce the very crucial legal nexus/connection that must exist between the incurred adverse employment action and the worker's sex and gender, rather than based on the employees or job applicant's mere physical outward appearance, for the safeguards of Title VII to apply.

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. 665-6; 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. 665-6) 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.

In addition to the business necessity defense, civil rights law provides another defense – the "BFOQ" defense.

BFOQ defense

Title VII of the Civil Rights Act does not prohibit all discrimination in employment. There is an important exception, in essence, legal discrimination – the "BFOQ" exception. Pursuant to the BFOQ doctrine, employers are allowed to discriminate based on sex, national origin, and religion (but not race or color) if a particular characteristic is reasonably necessary to the normal operations of a business or enterprise (Corbett, 2007, 2011; Cavico and Mujtaba, 2008; Mahajan, 2007; Steinle, 2006). However, Corbett (2007, p. 166) underscores that "the case law has developed a test for the BFOQ that has made it a very narrow defense, on which employers rarely can rely." James (2008, pp. 664-5) agrees that establishing a BFOQ defense would be a difficult burden: "Clearly, it is challenging to prove that appearance goes to the very essence of a business, even when a company builds an entire image and marketing campaign around attractiveness." Furthermore, Corbett (2011, p. 645) notes that "although the claims against employers have been for sex discrimination because they hired only women for particular jobs, the employers actually were hiring women with a certain appearance, whether it be attractive, sexy, or slim." Nevertheless, Corbett (2011, p. 648) explains that "if appearance were a protected characteristic and BFOQ were a recognized defense to appearance-based discrimination, employers would be able to argue that attractiveness, sexiness, or slimness was a BFOQ for some jobs." So, James (2008, p. 630) provides an illustration: "Appearance discrimination, or making employment decisions based on an applicant's outward appearance, is permissible in the modeling scenario but not in the factory scenario."

Regarding sex as a BFOQ, Steinle (2006, pp. 269-70) counsels that the EEOC does not regard assumptions or stereotypes as to what constitutes “men’s jobs” and “women’s jobs” as sufficient justifications for a BFOQ. Corbett (2007, p. 176) further notes that it is “clear” that sex is “relevant in some sense to some jobs,” but that “customers’ or coworkers’ personal preferences generally do not satisfy BFOQ.” Similarly, James (2008) relates that “courts rarely allow discrimination based solely on customer preference” (p. 642). One leading BFOQ sex appearance case was the federal district court case of *Wilson v. Southwest Airlines Company* (1981). Southwest Airlines embarked on its “Love” marketing campaign, wherein the company hired exclusively female flight attendants and ticket agents, preferring attractive ones and making them wear sexy “hot-pants” and “go-go boots,” and aimed the marketing campaign at male business fliers. The company admitted it discriminated against male applicants for customer contact positions; and offered the BFOQ doctrine as a defense, contending that hiring the females was reasonably necessary for the continued operation of the airline. The court, however, disagreed, and explained that the primary business of the airline was to provide air transportation and not to provide a vicarious sexual service; and thus the airline was denied the protection of a BFOQ exception (*Wilson v. Southwest Airlines Company*, 1981). Corbett (2007, p. 177) concludes that “if the BFOQ defense were incorporated into appearance-based discrimination law, as it almost surely would, courts would have to decide whether to interpret it as narrowly as they have for sex or age.” Probably, the most famous (or perhaps infamous) BFOQ case dealt with the Hooters restaurant chain. As related by Corbett (2007, pp. 167-8; 2011, p. 646), the EEOC commenced a lawsuit against Hooters because the restaurant refused to hire males for the position of “Hooters girls.” Hooters defended the lawsuit by contending that being a female was a BFOQ for being a Hooters girl. The restaurant chain then commenced a public relations campaign to make the federal agency look ridiculous. Ultimately, a settlement was reached that permitted Hooters to continue its hiring practice of selecting only females for “Hooters girls,” that is, servers, but which also expanded other employment opportunities for males in the form of gender-neutral positions. Hooters “victory” notwithstanding, the BFOQ defense would be a difficult defense to sustain assuming that appearance was deemed to be a protected category under civil rights laws.

Notwithstanding Hooter’s defense which seemed more successfully rooted in an “eye popping” advertisement campaign than a valid legal defense, the use of female sex appeal as a valid BFOQ was wisely not proffered by a defendant hotel employer in the aforementioned *Lewis v. Heartland Inns of America LLC* (2010). In the *Lewis* case, the front desk worker sued her company for discrimination based upon allegations that she lacked the physical beauty needed for such a position in the mid-west, according to her hotel employer. In *Lewis*, the majority opinion interjected *dicta* on this precise issue by sending a thinly veiled warning to employers by commenting on a defense, not even raised by the employer, in an appearance type discrimination case, by stating:

Heartland has not tried to suggest that the “Midwestern girl look” or prettiness were bona fide occupational qualifications for its clerk job, as might conceivably be the case with cheerleaders referenced in the dissent. Such an affirmative defense requires proof that the qualification is “necessary to the normal operation of that particular business or enterprise” (Civil Rights Act, 42 U.S.C. Sec. 2000e-2(e)(1)). For example, “female sex appeal” is not a bona fide occupational qualification for flight attendants and ticket agents (*Lewis v. Heartland Inns of America LLC*, 2010, p. 1).

Employers, therefore, should be cautious when solely relying on “prettiness” as a valid BFOQ to avoid a “lookism” type lawsuit, realizing that “beauty is in the eye of the beholder” and the beholder is blindfolded Lady Justice.

An employer, therefore, is allowed to discriminate in employment by making hiring and other business and employment determinations based on appearance in the sense of attractiveness and “good looks.” However, if the employer’s appearance standards can be connected to Title VII’s protected categories then the employer could confront “conventional” discrimination lawsuits. Discrimination appearance is not *per se* illegal under Title VII. Nonetheless, two other major civil rights laws must be considered in the context of appearance discrimination – the ADEA and the ADA.

ADEA

Appearance policies also can be challenged pursuant to the ADEA (1967), but only if the employer’s appearance policy was based on, implicates, or functions to discriminate based on age (and the employee is over 40 years of age). Yet, James (2008) points out that even though age claims may not directly relate to appearance, as “people make the stereotypical assumption that increased age decreases physical attractiveness, age and appearance are implicitly linked” (p. 641). Corbett (2007, p. 155) thus notes that “[...] some plaintiffs successfully pursued claims under then-existing laws if the appearance-based discrimination could be characterized as [...] age-based. These plaintiffs only succeeded when the attractive look the employer was seeking was [...] not just attractive, but young and attractive.” Similarly, James (2008) indicates that a plaintiff applicant or employee “[...] would have to prove that an employer discriminated against her because the employer thought she looked too old” (p. 640). Nevertheless, Mahajan (2007) emphasizes that it will be difficult for an employee to contest an employer appearance policy using the ADEA since the statute was not designed to address appearance – let alone attractiveness – discrimination. Corbett (2007, p. 176) does state that it is “clear” that age is “relevant in some sense to some jobs,” but warns that “customers’ or coworkers’ personal preferences generally do not satisfy BFOQ.”

Three federal district court case examples will show the difficulty of converting an age appearance situation into a viable age discrimination case pursuant to the ADEA. In *Brockbank v. United States Bancorp* (2011), a termination case, comments regarding the employee that her “clothes were not appropriate for her age” and that she “looked ridiculous for her age” were deemed to be insufficient direct as well as circumstantial evidence of age discrimination. Similarly, in another termination case, *Emlen v. Caterpillar Inc* (2011), comments regarding the employee’s “gray hair” and being one of the “old guys” were judged to be isolated and stray comments and thus insufficient for a jury to find an prohibited age animus. Finally, in the ADEA retaliation claim alleged by a 55-year-old former employee in the case of *Stone v. Geico General Insurance Company*, 2008, the court felt that the a supervisor’s comments about the employee’s appearance and demeanor were petty slights and not material enough to prove the plaintiff’s claims in court. The consequences of the foregoing “trifecta” precedent would chill any plaintiff’s appearance discrimination lawsuit based on age related physical traits unless commanding evidence can successfully connect the employer’s actions were centrally based on the worker’s age, rather than looks, in violation of the ADEA.

Another illustration of a recent appearance-age type case, as reported by the *Miami Herald* (Garvin, 2012), involved a health and medical news reporter and back-up anchor for a Miami, Florida television station. She was terminated when she was

52 years of age and after 17 years at the station. She stated that she had lost her anchor duties when she turned 50, that the company did not give any reason for her discharge, and that she believed that her age impermissibly played a key role in her termination. One of her witnesses testified that the company that owned the station staffed it with “sweet young things.” The executives at the station explained that the reason for her discharge was that television audiences were more interested in news about terrorism and politics after the September 11 attacks. A jury awarded the former employee \$1 million; however, the Florida appeals court reversed the jury’s decision due to a lack of specific evidence in the record of intentional age discrimination against the employee (Garvin, 2012). Accordingly, as with Title VII, unless the appearance discrimination can be connected to age, the appearance discrimination is legal and, harshly speaking, “ugliness” provides employers a “safe harbor” for questionable hiring, promoting, and discharging of otherwise qualified employees.

ADA

Similar to redress on Title VII and the ADEA, if one’s appearance can be linked to a disability, then an applicant or employee may be able to utilize the ADA to secure redress from discrimination. Corbett (2011, p. 624) notes that “the United States has no federal, employment discrimination law that prohibits discrimination based on physical appearance unless the particular aspect of appearance constitutes a disability under the ADA of 1990.” Appearance policies, therefore, can be challenged pursuant to the ADA, but only if the employer’s appearance policy was based on, implicates, or functions to discriminate based on disability. That is, as with Title VII and the ADEA, the employee or applicant will need evidence – direct or inferential, that the determination not to hire or promote him or her was based on and motivated by not appearance but a legally recognized disability. Mahajan (2007), however, emphasizes that it will be difficult for an employee to contest an employer’s appearance policy using the ADA since the statute, like the ADEA, was not designed to address appearance – let alone attractiveness – discrimination. Furthermore, James (2008, p. 608) does not believe that the policies leading to the promulgation of the ADA do not support the expansion of the ADA to encompass unattractiveness as a protected “disability.” This is a logical conclusion when reflecting upon the legal definition of a disability as involving an “impairment that substantially limits one or more [...] major life activities” (29 C.F.R. Sec. 1630.2(g)(1) 2008) and the fact that major life activities are “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working” (29 C.F.R. Sec. 1630.2(i) 2008).

An employer’s height and weight appearance requirements, however, could trigger the ADA. The EEOC, however, advises that “normal deviations” in height or weight, which are not the result of any physiological defect or disorder or physical abnormality, are not disabling impairments covered by the ADA (EEOC, 2011b). For example, in the federal district court case of *Underwood v. Trans World Airlines* (1989), the court ruled that a mildly overweight flight attendant, who had not been clinically diagnosed as having any medical disorder, did not have an impairment under the ADA. Being overweight, therefore, is not as a general rule a disability; however, severe obesity, defined as body weight more than 100 percent over the norm, is an impairment (EEOC, 2011b). Fowler-Hermes (2001) relates that for weight to be considered a disability, one must be “morbidly” obese; and emphasizes that the purpose of the ADA is to protect the truly disabled, and thus the statute should not be used as a “catch-all” for appearance discrimination. Appearance also may rise to the level of a disability

protected by the ADA when a person is deemed to have an impairment due to a “stigmatic” condition, for example, severe burns. Such impairment does not by itself substantially limit a major life activity as required by the ADA; however, such a condition is deemed by the EEOC to be an impairment because the negative attitudes and reactions of others to the condition render it a substantially limiting to the person afflicted. Consequently, such a person, the EEOC states, may be continuously denied employment due to the employers’ fears about negative reactions from customers, clients, or coworkers. Such a person would thus have a “disability” and would be protected by the ADA (EEOC, 2011b). James (2008, pp. 651-2) indicates that “a few disfigurement claims under the ADA [...] have largely been settled out of court. In consequence, the ADA currently offers limited redress for victims of discrimination based on some aspect of their physical appearance.” Accordingly, as with Title VII and the ADEA, unless the appearance discrimination can be connected to a disability or an impairment pursuant to the ADA, the appearance discrimination is legal. In addition to lawsuits based on employers violating the aforementioned civil rights statutes, federal civil rights laws also allow a lawsuit by an employee against his or her employer for retaliating against the employee for seeking to vindicate rights protected by the civil rights statutes.

Retaliation doctrine

Pursuant to civil rights laws, it is also illegal for an employer to retaliate against an employee because he or she filed a discrimination lawsuit, filed a charge of discrimination, testified, assisted, complained about discrimination, or participated in any employment discrimination investigation, proceeding, hearing, or lawsuit (Title VII of the Civil Rights Act of 1964, Section 2000e-3(a), 2011; EEOC, 2011e). Specifically, Corbett (2011) notes that Title VII of the Civil Rights Act, the ADEA, as well as the ADA, have anti-retaliation provisions; and, significantly, that an aggrieved employee can prevail in a retaliation lawsuit even if the employee cannot sustain the underlying discrimination claim. The anti-retaliation doctrine also protects employees who opposed any practice that is an unlawful employment practice pursuant to Title VII (Title VII of the Civil Rights Act of 1964, Section 2000e-3(a), 2011). However, regarding the latter “opposition” component, Mahajan (2007, pp. 196-7) points out that “generally, the opposition behavior must occur in response to some specific employer practice, and the employer has to be aware of the oppositional conduct and take adverse action in response to such conduct.” Corbett (2011, pp. 650-1) explains how an appearance-retaliation claim would work: “Therefore, if a plaintiff can claim that an employer discriminated on the basis of appearance, make a connection to a characteristic covered by Title VII, the ADEA, or the ADA; report that conduct internally; and then suffer adverse employment action, there is a viable prospect for a successful retaliation claim.” Once again, it must be emphasized that it is not necessary for the plaintiff employee to prevail on the underlying appearance discrimination claim; but it must be connected to a protected characteristic. As emphasized, the “ugly truth” is that appearance is not a protected category under federal civil rights laws; but as the USA is a federal system of government, with a national government and constituent government units – states – an examination must be made of state as well as “local” (that is, county and municipal) law.

State and municipal civil rights 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 (Rhode, 2009). 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 (EEOC, 2011c). 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 orientation or preference (Cavico *et al.*, 2012, pp. 9-13). Regarding appearance, Michigan, Santa Cruz and San Francisco, California, and Washington, DC, have passed laws prohibiting discrimination because of weight (Rhode, 2009; 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).

State level civil rights laws

Michigan is the one and only state addressing appearance discrimination in some fashion. Michigan passed the Elliott-Larsen Civil Rights Act of 1976 which banned employment discrimination specifically based upon height and weight, along with other traditional protected classes (Michigan 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, DC’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 (Washington, 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 the 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 *Debra Brice v. Richard Resch and Krueger International Inc* (2011), where the plaintiff alleged her employer's CEO ordered her to be terminated due to her "body shape." The court held that the claim should be 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.

Municipal level civil rights laws

Howard County, Maryland is the only county level governmental entity in the USA that makes it unlawful for employers, employment agencies, and unions to discriminate based on "personal appearance" (County Code of Howard, Maryland Code, Title 12, Subtitle 2, Sec. 12.208 Human Rights (2012)). This code defines personal appearance as an "outward appearance of a person with regard to hair style, facial hair, physical characteristics or manner of dress. It does not relate to a requirement of cleanliness, uniforms or prescribed attire, when uniformly applied, for admittance to a public accommodation or to a class of employees" (County Code of Howard, Maryland Code, Title 12, Subtitle 2, Section 12.201(XV) Human Rights (2012)).

Relying on city codes to protect employees and applicants from this type of workplace appearance discrimination will offer very little additional protection, as only a few of these exist. The cities of Santa Cruz, California, San Francisco, California, Urbana Illinois, Binghamton, New York, and Madison, Wisconsin extend some protections in avoiding "lookism" in the workplaces within their geographic city limits. Santa Cruz's code provision begins with explaining its very liberal public purpose of eliminating "arbitrary discrimination," including that based upon weight, height, and physical characteristics, but not necessarily outward "appearance" since this specific term was removed and replaced with "physical characteristics" in the final version of the ordinance passed in 1992 (Santa Cruz California Municipal Code, Santa Cruz, Mun, Code §9.83.010). "Physical characteristics" is defined as:

A bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person including individual physical mannerisms. Physical characteristic shall not relate to those situations where a bodily condition or characteristic will present a danger to the health, welfare or safety of any individual (Santa Cruz California Municipal Code, Santa Cruz, Mun Code §9.83.020(13)).

The substitution of "physical characteristics" for "appearance" was due to the considerable objections from local business owners who felt that "self-expression" that offends others should not be protected under the ordinance. These objections ultimately resulted in the ordinance being passed in a weaker version; and thus employers were able to legally evaluate workers based upon the messages conveyed by their outward appearances attributed to tattoos, artificial hair color, and clothing (Post, 2000).

Urbana, Illinois and Madison, Wisconsin join Santa Cruz in attempts to outlaw discrimination based on "personal appearance." Urbana's municipal code defines "personal appearance" as "the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, such as weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a

business establishment for a reasonable business purpose” (Urbana Il. Code 12-37 and 12-39). Madison’s Equal Opportunities Ordinance is very similar and defines “personal appearance” as “the outward appearance of any person, irrespective of sex, with regard to hairstyle, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose” (Madison, Wis. Gen. Ordinance, Chap. 23, Sec. 39.03(2)(bb) (2010)).

Other municipalities are not as aggressive in their efforts to address “lookism.” The remaining municipalities limit their code provisions to the physical attributes of “height and weight” rather than the more encompassing “physical appearance” definition. Article 33 of the San Francisco Municipal/Police Code bars discrimination based on one’s weight and height in both employment, housing, and in contracting and states that “It shall be unlawful for any person to do any of the following acts wholly or partially based on actual or perceived race, religion [...]. weight, height, association with members of classes protected under this chapter or in retaliation for opposition to any practices forbidden under this chapter for an employee or applicant for employment.” The city of Birmingham, New York also limits its appearance discrimination code provision to “height and weight”; and defines those terms as:

Weight is a numerical measurement of total body weight, the ratio of a person’s weight in relation to height or an individual’s unique physical composition of weight through body size, shape and proportions. “Weight” encompasses, but is not limited to, an impression of a person as fat or thin regardless of the numerical measurement. An individual’s body size, shape, proportions, and composition may make them appear fat or thin regardless of numerical weight. Height is a numerical measurement of total body height, an expression of a person’s height in relation to weight, or an individual’s unique physical composition of height through body size, shape and proportions. “Height” encompasses, but is not limited to an impression of a person as tall or short regardless of numerical measurement. The length of a person’s limbs in proportion to the person’s body may create an impression that the person is short, tall, or atypically proportioned, independent of numerical measurements of height (City of Binghamton, Chapter 45, Human Rights Law (2010)).

There is, as clearly can be seen, 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. 625-6). 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.

Proposals to amend civil rights laws

The forgoing discussion raises the questions as to whether “lookism” necessitates new employment protections, and whether social labels like “lookphobia” should suffice to identify and stigmatize employers who actively participate in appearance discrimination. Appearance standards in the workplace, particularly in the form of attractiveness, can result in discrimination against employees and job applicants who are deemed to be “unattractive.” The purpose of civil rights laws is, of course, to protect against discrimination, especially in the workplace. Accordingly, various proposals are made to amend civil rights laws to include appearance as a protected category (Steinle, 2006). Codifying protections against appearance discrimination uniquely expands the envelope of “protected classes,” as “lookism does go beyond past forms of cognizable discrimination and captures traditionally indefinable or underappreciated biases that are nevertheless real and harmful” (Desir, 2010, p. 632). Mahajan (2007, pp. 165-6), nevertheless, provides a rationale for changing the law, to wit: “The law’s failure to address appearance-based discrimination is problematic because it serves as a proxy for other forms of discrimination that are explicitly prohibited by Title VII and often disadvantages minorities and women who are unable or unwilling to conform to prevailing appearance norms.” However, people deemed “unattractive” have not undergone the same type and extent of discrimination and harassment as have minorities and women (James, 2008). There is also the very practical issue as to how physical appearance would be defined in a statute. Corbett (2011, p. 626) explains that the “initial task of defining covered appearance-related features is therefore one of the most significant hurdles in enacting such legislation and could potentially present more difficulties than any characteristic currently covered by federal employment-discrimination law.” Furthermore, Corbett (2011, p. 626) is concerned that if a statute “[...] opted to broadly prohibit all discrimination based on ‘appearance,’ meaning attractiveness or unattractiveness, this could lead to the difficult situation of determining whether a claimant is unattractive, or attractive, enough to make a claim for such discrimination.” However, Corbett (2011) also makes a valid point about misperception, that is, the aggrieved employee or job applicant could contend that the employer mistakenly believed that the employee or applicant was not sufficiently attractive and consequently treated the employee or applicant in a disparate manner based on that misperception. Nonetheless, civil rights based on appearance plainly are not well established pursuant to US law.

Accordingly, based on the law, legal analysis, and legal commentary, it appears unlikely that the national legislature has the fortitude to even attempt to vest appearance as a protected class. Two very formidable and practical challenges exist to such efforts. The first being that a law could never be fashioned to significantly reduce appearance discrimination, since such an effort would be “fighting against nature” because people are “hard-wired” to be attracted to beauty and “good looks,” and such lack of legislative reluctance “conveys a lack of moral conviction that such discrimination should not be regulated” (Corbett, 2011, p. 629). Second, assuming such a regulation is passed, it would logically necessitate a “sliding scale of ugliness,” consequently placing judges in an unenviable position to apply such a standard on a case-by-case basis to determine if a plaintiff employee or job applicant falls within this newly defined, yet descriptively abstract, new type of protected class. Finally, Corbett (2007, p. 174) finds it “difficult to imagine a plaintiff suing and claiming coverage as being ugly, aesthetically challenged, or even relatively so.” That is, “the stigma attached to being considered unattractive and, worse, being publicly required to

proclaim oneself so, likely would dissuade victims from asserting claims” (Corbett, 2011, p. 627).

What complicates the discussion to amend civil rights laws is that appearance in the sense of attractiveness is related to the “immutable characteristic” doctrine; that is, anti-discrimination law is supposed to protect more forcefully against immutable characteristics, for example, ones like age, race, color, national origin, sex, or even aspects of physical appearance which cannot be readily changed, as opposed to mutable characteristics, which can be readily changed, such as one’s grooming and dress or language capability (James, 2008; Cavico and Mujtaba, 2008; Cavico *et al.*, 2012). Corbett (2007, p. 175) emphasizes that “the concept of immutability is deeply entrenched in the law, and the more immutable a characteristic, the more unfair and immoral the discrimination is likely to be considered and the more urgent the need for the law to address the unfairness and immorality.” However, militating against the “immutable” argument is the fact that appearance, especially in the form of “attractiveness,” is, fundamentally, a cultural creation, and thus relative to societal norms on beauty, “good looks,” and sexiness (Steinle, 2006). Societal and cultural norms are, of course, relative to a particular society or culture, and thus are subjective and personal to that society or culture, as well as at times changing and evolving. Furthermore, certain aspects of appearance, even physical appearance, can be changed and perhaps improved through certain procedures. James (2008, p. 633) thus notes that “unwillingness to extend protection to those who choose to alter their appearance provokes less controversy than providing redress for characteristics that a person cannot change.” Consequently, the more personal and changeable a characteristic is the less it is deemed appropriate for civil rights protection due to its “mutability.”

Broadening civil rights laws to include appearance as a protected category also could increase the amount of civil rights litigation. That fear, especially by the courts, of a substantial increase in litigation due to appearance discrimination lawsuits is a factor militating against an expanded jurisprudence in this area of employment practice. Mahajan (2007, p. 201), moreover, points out that “allowing a private right of action would leave the courts with the job of identifying legal and illegal conduct on a case-by-case basis.” Furthermore, that task would be complicated, Mahajan (2007, p. 202) states, “because many people do not fit into within traditionally protected categories of race, gender, and sexual orientation.” Similarly, Corbett (2007, p. 173) worries that “if the plaintiffs, who are in fact covered by the law, cannot be identified as members of a protected group, then legal recognition of that coverage is unlikely because litigation is unmanageable – how can one claim the protections accorded a particular group if one’s membership therein is unclear? Race and sex have not presented difficult problems here, and national origin is not likely to present many problems.” In addition, Corbett (2011) fears that broadening employment discrimination law to encompass appearance could discredit civil rights employment laws in general. However, in arguing for a broader appearance-based standard for civil rights laws, Steinle (2006) posits that “[...] judges underestimate their ability to narrowly interpret standards on a case-by-case basis” (p. 295). Nonetheless, Corbett (2007, p. 158) declares: “I believe that federal employment discrimination law will never prohibit appearance-based discrimination. Instead, it seems that appearance-based discrimination will continue to be on the periphery, with cases being pulled under existing categories when arguably viable.”

It is summarized that there is no federal civil rights law that specifically and explicitly prohibits discrimination based on appearance – let alone an “attractiveness”

aspect of appearance. Based on the foregoing legal examination, one can plainly see that it would be most challenging to develop, let alone be enacted, an appearance-based civil rights discrimination law. As such, in order to prevail, an aggrieved employee or job applicant must somehow connect or fit his or her appearance case to one of the protected categories of Title VII or the ADEA or ADA. Steinle (2006, p. 267) asserts that for there to be legal liability, the appearance standard at issue must “[...] bear a clear and unequivocal relationship to a protected class.” The courts, nonetheless, have an obligation to look carefully at appearance standards and make individual determinations as to whether the appearance standards are impermissibly predicated on race or sex discrimination or discrimination on any other protected category. Nevertheless, as a general rule, with a handful of “local” exceptions, appearance discrimination, including, and especially, in the form of attractiveness discrimination, is legal. Corbett (2007), therefore, asserts that “appearance seems to be a deeply entrenched social practice that the law is not likely to challenge.” Nevertheless, Corbett (2007, p. 171) also relates that “still, concern that something is morally wrong often leads to either passage or consideration of a legal regulation designed to prohibit or mitigate that wrong.” So, the important, and difficult, question emerges: is appearance discrimination, particularly against the perceived unattractive person, immoral?

Ethical analysis

The subject of appearance discrimination raises two very controversial, important, and related moral issues, to wit: first, even if legal, is it moral to discriminate in employment based on physical attractiveness? Second, assuming it is immoral to discriminate against the “unattractive,” should civil rights laws then be ethically amended to incorporate appearance as a protected characteristic? Corbett (2007, p. 155) relates that “enlightened people” decry appearance-based discrimination as “morally wrong.” Moreover, Corbett (2007, p. 171) points out that “discrimination against other human beings is something we readily label as wrong.” Nonetheless, determining whether an action, rule, or law is moral or immoral, right or wrong, or just or unjust perforce brings one into the realm of ethics, which is a branch of philosophy, and then logically to ethical theories, ethical principles, applied ethics, and ethical reasoning to moral conclusions. In this ethics part of the paper, the authors will apply four major ethical theories – ethical egoism, ethical relativism, utilitarianism, and Kantian ethics – to the subject of appearance discrimination to determine if such discrimination in employment is moral. These ethical theories were chosen because they represent the essence of ethics as a branch of philosophy in western civilization, which obviously is not the only civilization, but it is one that the authors are the most familiar with, including, of course, the ethics component to western knowledge and thought, as opposed to Confucian ethical principles and the application thereof, which, although most interesting and intriguing to learn and to apply, practically would be beyond the scope of the authors’ objectives for this paper. These four western theories also were selected because they are reason-based ethical theories; as such, the authors assume that the readers of this paper possess intellect, reason, and logic, and thus will be quite “comfortable” in following the authors’ ethical “train of thought,” though, of course, perhaps not agreeing with their ultimate moral conclusions. Furthermore, religion-based ethical theories were not chosen because not all the readers will be of the same religion and, for that matter, some may have no religion at all; and, moreover, bringing in a religious-based ethical component to the paper would be to expand the paper beyond the authors’ aims. So, the focus is on western

ethics and the first ethical theory to examine in the context of appearance discrimination is ethical egoism.

Ethical egoism

The ethical theory of ethical egoism also harkens back to ancient Greece and the Sophists and their teachings of relativism and promotion of self-interest. This ethical theory maintains that a person ought to promote his or her self-interest and the greatest balance of good for himself or herself. Since this theory is an ethical theory, one thus has a moral obligation to promote one's self-interest; and so "selfishly" acting is also morally acting; and concomitantly an action against one's self-interest is an immoral action; and an action that advances one's self-interest is a moral action. An ethically egoistic person, therefore, will shrewdly discern the "pros" and "cons" of an action, and then perform the action that performs the most personal good, which also is the moral course of action. However, the ethical egoists counsel that one should be an "enlightened" ethical egoist; that is, one should think of what will inure to one's benefit in the long run, and accordingly be ready to sacrifice some short-term pain or expense to attain a greater long-term good – for oneself, of course. Also, the prudent ethical egoist would say that as a general rule it is better, even if one has a lot of power as well as a big ego, to treat people well, to make them part of "your team," and to "co-op" them. Why should one treat people well? One reason is certainly not because one is beneficent, but rather because one is "selfish." That is, one is treating people well because typically it will advance one's own self-interest in the long term to do so. One problem with ethical egoism is that one's own "good" must be defined. What exactly is one maximizing? Is it one's knowledge, power, money, pleasure, comfort, prestige, success, or happiness? Ethical egoists agree that people ought to pursue and advance their own good; but they disagree as to the type of good people should be seeking (Cavico and Mujtaba, 2009).

Employers certainly can argue that they have egoistic reasons to discriminate on the basis of appearance. James (2008, p. 664) relates that "economists argue that appearance should always be a factor when it affects the bottom line." Consequently, certain retailers proclaim that it is necessary and smart to take the "attractive" approach to employment, since preferring good-looking people in hiring pleases their customers and maintains and advances the companies' brand, style, and "look." James (2008) discusses a situation where a company is attempting to create or maintain a certain "brand," and that the attractive appearance of the company's employees is an essential component of that brand. James (2008, p. 664) explains that "even though some of the tasks that a brand representative must complete are unrelated to attractiveness, certain tasks that are still essential to the business are dependent on looks. Brand representatives perform some functions that are arguably more related to modeling than just selling clothes, and, as a consequence, their attractiveness could be construed as essential to business." Of course, if appearance is not related to the image and purposes of the business or not connected to the functions of a particular position, then the ethically egoistic employer will hire the best qualified applicant regardless of his or her appearance. Allowing the employer to discriminate based on appearance, therefore, underscores the values of economic efficiency, profitability, and employer autonomy. So, assuming an employer is not using appearance or attractiveness discrimination as a subterfuge to impermissibly discriminate, and thus risk civil rights lawsuits and the concomitant negative publicity and backlash, one can make an argument that it may be in the employer's self-interest to discriminate based on

appearance; and thus pursuant to ethical egoism it is moral for the employer to prefer the “pretty.”

Ethical relativism

Ethical relativism as an ethical theory also harkens back to ancient Greece and the philosophical school of the Sophists as well as the philosophical school of the Sceptics. Ethical relativists deny that there are any objective, universal moral rules which one can construct an absolute moral system. Ethical relativists deny that there are moral rules applicable to all peoples, in all societies, and at all times. There thus are no universal moral standards by which to judge an action's morality; rather, morality is merely relative to, and holds for, only a particular society at a particular time. “When in Rome, do as the Romans,” said the ethical relativists. Morality, therefore, is a societal-based notion; it is nothing more than the morality of a certain group, people, or society at a certain time. What a society believes is right is in fact right for that society; the moral beliefs of a society determine what is “right” or “wrong” in that society. However, different societies may have different conceptions of what is right or wrong. What one believes is right, the other may believe as wrong. Consequently, the same act can be morally right for one society but morally wrong for another. Since pursuant to ethical relativism there are no moral standards which are universally true for all peoples, in all societies, and at all times, and since there is no way to demonstrate that one set of beliefs is true and the other false, the only way to determine an action's morality is to determine what the people in a particular society believe is right or wrong at a given time. Of course, ascertaining exactly what a society is a daunting challenge. Even within a homogeneous society, there are diverse cultures, subcultures, social classes, kinship, and work groups; and in a heterogeneous society there will be many smaller sub-societies that co-exist. All these components of society may reflect different standards, mores, customs, and beliefs, including moral standards and beliefs. Yet pursuant to the doctrine of ethical relativism, one must attempt to find the pertinent “society” and then try to ascertain that society's moral beliefs; but when one does ascertain the societal beliefs, standards, and practices regarding morality, one simply has to conform and adopt, and one will be acting morally, at least according to the ethical theory of ethical relativism (Cavico and Mujtaba, 2009).

Appearance norms, especially “attractiveness,” are clearly based on, measured by, and often dictated to, by societal beliefs and norms. Accordingly, pursuant to ethical relativism, what a particular society deems to be “attractive” is the appearance standard or norm for that society. James (2008, p. 636) underscores that “beauty indisputably plays a significant role in our society, and although beauty is subjectively ‘in the eye of the beholder,’ there is a common objective standard of what people generally find attractive.” Yet Steinle (2006, p. 289) emphasizes that “beauty and sexuality are artificial cultural constructs. Moreover, they are constantly evolving and inherently subjective.” Nonetheless, these societal norms have consequences. Mahajan (2007, p. 173) opines that “judgments about appearance reflect which members of society are valued and entitled to control, and this in turn determines social and economic opportunities and outcomes.” In particular, societal norms regarding appearance can produce disparate treatment and disparate burdens on certain people. Corbett (2007, p. 154) emphasizes that “in American society, all worshiped physical attractiveness. For women, demands and expectations seemed to be greater than for men.” Furthermore, cultural norms often provide the basis for, as well as interact with, the law. Since attractiveness, appearance, and appearance discrimination are based on

societal and cultural values, Mahajan (2007) argues that society must be cognizant of cultural stereotypes and biases associated with appearance, and as a result must recognize and address any resulting appearance discrimination in the workplace. Furthermore, Mahajan (2007, p. 203) urges that society transform its social and cultural values regarding appearance, but admits that “changing social and cultural values and questioning established workplace norms are not easy tasks.” Similarly, James (2008, pp. 658-9) states that “[...] considering the role that appearance plays in society and American culture, in order for appearance-based discrimination to truly come to an end, the culture must change along with the social attitudes.” Nevertheless, appearance-based decisions in employment tend to reflect and to reinforce prevailing societal beliefs as to attractiveness. Accordingly, Corbett (2011, p. 629) opines that “Americans may have qualms about the fairness of favoring beautiful people without believing that such a preference is morally wrong, or wrong enough to invoke legal regulation.” As such, Corbett (2011, p. 630) concludes that appearance discrimination is one form of discrimination regarding which society is “morally ambivalent.” Accordingly, although it is difficult to precisely define “society” in a heterogeneous culture such as the USA, nonetheless, one can safely say that the prevailing societal norm, for better or worse, and also perhaps unduly influenced by “Hollywood” and the media, that attractiveness is “good”; and thus the employer in preferring the “pretty” would be acting in conformity with societal norms and thus also acting morally pursuant to ethical relativism.

Utilitarianism

Utilitarianism is a major ethical theory in western civilization; it was created principally by the English philosophers and social reformers Jeremy Bentham and John Stewart Mill. Their goal was to develop an ethical theory that not only was “scientific” but also would maximize human happiness and pleasure (in the sense of satisfaction). Utilitarianism is regarded as a consequentialist ethical theory, also called a teleological ethical theory; that is, one determines morality by examining the consequences of an action; the form of the action is irrelevant; rather, the consequences produced by the action are paramount in determining its morality. If an action produces more good than bad consequences, it is a moral action; and if an action produces more bad than good consequences it is an immoral action. Of course, ethical egoism is also a consequentialist ethical theory. The critical difference is that the utilitarians demand that one consider the consequences of an action not just on oneself, but also on other people and groups who are affected directly and indirectly by the action. The scope of analysis, plainly, is much broader, and less “selfish,” pursuant to a utilitarian ethical analysis. In business ethics texts and classes, the term “stakeholders” is frequently used to indicate the various groups that would be affected by a business decision. Furthermore, the utilitarians specifically and explicitly stated that society as a whole must be considered in this evaluation of the good and/or bad consequences produced by an action. The idea is to get away from a “me, me, me” mind-set and consider other people and groups affected by an action. Utilitarianism is a very egalitarian ethical theory since everyone’s pleasure and/or pain gets registered and counted in this “scientific” effort to determine morality. Yet, there are several problems with the doctrine. First, one has to try to predict the consequences of putting an action into effect, which can be very difficult if one is looking for longer-term effects. However, the utilitarians would say to use one’s “common storehouse of knowledge,” one’s intelligence, and “let history be your guide” in making these predictions. Do not

guess or speculate, but go with the probable or reasonably foreseeable consequences of an action. Also, if one is affected by an action, one naturally gets counted too, but if that same one person is doing the utilitarian analysis, there is always the all-too-human tendency to “cook the books” to benefit oneself. The utilitarians would say that one should try to be impartial and objective in any analysis. Next, one now has to measure and weigh the good v. the bad consequences to ascertain what prevails and thus what the ultimate moral conclusion will be. The utilitarians said that not only was this ethical theory “scientific,” but it was also mathematical (“good old-fashioned English bookkeeping,” they called it). But how does one do the math? How does one measure and weigh the good and the bad consequences? And for that matter how does one measure different types of goods? The utilitarians, alas, provided very little guidance. Finally, a major criticism of the utilitarian ethical theory is that it may lead to an unjust result. That is, the “means may justify the ends.” Since the form of the action is irrelevant in this type of ethical analysis, if the action produces a greater overall good, then the action is moral, regardless of the fact that some bad may be produced in this effort to achieve the overall good. The good, though, outweighs the bad; accordingly, the action is moral; and the sufferers of the bad, who perhaps were exploited or whose rights were trampled, got counted at least. Such is the nature of utilitarianism (Cavico and Mujtaba, 2009). After determining the action to be evaluated, the next step in the utilitarian analysis is to determine the people and groups, that is, the stakeholders, affected by the action. In the context herein the action is: is it moral to discriminate in employment based on appearance? The next section will designate and discuss the affected stakeholders.

Stakeholder analysis

Job applicants and employees

There are a variety of stakeholders, or constituent groups, that are affected by appearance discrimination. Notions of appearance in the sense of attractiveness, good looks, beauty, and sexiness certainly can affect employment opportunities. “Undoubtedly, people make decisions based on exterior stereotypes and frequently form opinions supported solely by prejudice” (James, 2008, p. 629). The effect thus can be deleterious. Corbett (2007, p. 157) fears that “[...] the relatively unattractive (aesthetically challenged, if you please) lose out on opportunities and benefits that are generously bestowed on the attractive.” Consequently, if an employee is not deemed to be sufficiently attractive, this appearance factor can supersede more pertinent criteria, such as the employee’s knowledge, skills, and qualifications. Mahajan (2007, p. 170) deems appearance policies to be “troubling because they facilitate the judging of employees based on qualities unrelated to job performance.” Moreover, “appearance policies can reflect certain prejudices, and adversely affect the individuals against whom they are enforced” (Mahajan, 2007, p. 170).

However, if the employee has a “good” appearance, his or her attractiveness may unduly influence the perception of the employer as to the capabilities and qualifications of the employee. Corbett (2011, pp. 632-3) opines that “attractive people often evoke sympathy, admiration, forgiveness, or other milk of human kindness in situations in which unattractive people do not.” Similarly, Mahajan (2007, pp. 167-8) deems this psychological phenomena to be the “halo effect,” whereby an employee is rated positively on one criterion, appearance in the context herein, and this factor unduly influences the employer’s evaluation of the employee on other criteria, such as abilities and qualifications. Furthermore, Mahajan (2007, p. 168) relates: “In fact, the empirical

evidence suggests that in the context of employment decision-making, the more attractive a person, the more likely she (or he) is to be hired and the more highly she will be paid." As such, Mahajan (2007, pp. 166-7) points to a study which "found that more socially desirable traits, such as likeability, honesty, and competence, were attributed to the attractive individuals, whereas less attractive individuals were deemed lazy and counterproductive." Furthermore, James (2008, p. 637) relates an economic study on beauty and employment which "found that 'plain' people earned between five and ten percent less than 'average-looking' people, who earned five percent less than 'good-looking' people." So, while there certainly may be negative consequences for the "appearance challenged," at least for securing some employment opportunities, that "pain" is counterbalanced to some degree by the "pretty" who are preferred and hired.

Employers and managers

Employers are granted certain discretion pursuant to civil rights laws on how they run their businesses. Not all discrimination is illegal. Managing a workforce in an efficient, effective, and profitable manner is surely a legitimate interest. As Corbett (2007, p. 166) explains, in US society, in addition to preventing employment discrimination, "a very strong goal at the other extreme is respecting employers' prerogatives to operate their businesses in ways they deem appropriate to create jobs, generate profits, and contribute to a robust economy." Moreover, as emphasized in the legal analysis, an appearance policy is not automatically illegal pursuant to Title VII and other civil rights laws unless the employer's appearance policies and standards can be connected to one of the protected categories in Title VII or other laws. Employers could have very practical, and quite rational, business reasons for preferring the "pretty" in employment. Image can be a very important factor for an employer; and attractiveness can be an essential component of that image. Employers, for example, could be seeking to satisfy perceived customer preferences or to maintain a certain image or brand with the public. James (2008, p. 638) states that "employers often support using appearance as a factor in hiring when beauty has a direct effect on profitability." Furthermore, James (2008, p. 638) relates that "market analysts agree that employees' outward appearances reflect on the product and the brand image." Similarly, as emphasized by Corbett (2007, p. 154), "businesses were convinced that customers would buy what they had to sell if their employees were attractive." Furthermore, attractiveness may be directly related to the functions of a particular job. Modeling, of course, emerges as an obvious example. As further explained by James (2008, p. 670), these functions can "[...] include playing a certain role, appealing to a particular market, displaying the company's image, and looking the part." Moreover, "some employers may simply prefer to hire attractive women as a matter of personal taste, but many believe that their businesses will enjoy higher profits as a result of such hires" (Corbett, 2011, p. 646). Similarly, Steinle (2006, pp. 262-3) points out that "to survive in a competitive marketplace, employers increasingly seek to tap into today's 'lookist' culture by ensuring that their employees create a salable image. Often, this is achieved through hiring on the basis of personal attractiveness." Similarly, Mahajan (2007, p. 173) relates that employers can "[...] capitalize on women's sexuality in order to attract customers [...]." As such, broadening civil rights laws to encompass appearance protections, particularly as to attractiveness, would certainly undermine employers' discretion to establish appearance standards. Employers are also concerned about being mired in frivolous appearance lawsuits, especially by "eccentric" employees (Steinle, 2006).

Corbett (2007, p. 166) agrees, noting: “When the goal of reducing discrimination would encroach too much on other important goals, such as employer’s autonomy of decision-making, some in society will speak up about the potential excesses of employment discrimination law.” Employers, therefore, in the form of image, customer satisfaction, profitability, and success, surely can benefit from having the discretion to hire and to keep attractive (as well as presumably qualified) employees.

Women and minority group members

Appearance standards and requirements can have adverse consequences for women and minority group members. Regarding the latter, Mahajan (2007, p. 167) argues that in a society, “the majority, which is often made up of one racial or ethnic group, tends to shape the general cultural consensus of which attributes are considered attractive. For instance, in the USA, the norms of attractiveness have created a culture in which whites are deemed more attractive than other racial groups.” Regarding women, Corbett (2011, p. 625) indicates that “[...] appearance discrimination seems to be more of a significant issue for women than men.” Steinle (2006) argues that appearance standards in the workplace, particularly in the form of “looks” and attractiveness, impose greater burdens on women. Similarly, Mahajan (2007) relates that because of stereotypes, expectations, and judgments about the attractiveness of women in US society, appearance norms that are based on attractiveness are not capable of gender neutrality. Attractiveness standards “disproportionately burden women, as society’s expectations and standards of appearance tend to fall more heavily on women than men. Such requirements reinforce stereotypes about the images of femininity and beliefs about female behavior and worth” (Mahajan, 2007, p. 173). Attractiveness standards consequently can have harmful consequences to women – to their economic well-being, to their social well-being, and to their self-esteem (Mahajan, 2007). In particular, Mahajan (2007, p. 191) notes that “in the television industry, both men and women are judged based on their appearance, but such standards are likely higher for women.” Mahajan (2007) also argues that appearance policies can be very harmful when enforced against minorities as well as women because such standards are premised on white-male norms for attractiveness, which undermine the value of minorities regarding their appearance. Mahajan (2007, p. 170) notes that “while work cultures delineate appropriate standards of appearance and behavior, these standards tend to reflect the dominant group’s (i.e. male, white, heterosexual) ideals of appearance and aesthetics.” Mahajan (2007, p. 171) also relates an argument that “as the dominant group in the USA, whites determine what is beautiful and force their values of appearance, aesthetics, and grooming on the rest of society.” Moreover, “appearance practices and expectations preserve the existing social, political, and economic domination of subordinated groups” (Mahajan, 2007, pp. 174-5). Of course, all the foregoing “pain” will be counterbalanced in some degree by women and minority group members who are deemed attractive and thus who will be more readily employed.

Customers

Customer and clients are naturally part of society and thus generally would subscribe and conform to the societal norm that posits attractiveness as “good” and desirable. As such, customers and clients surely will be pleased to be served by and taken care of by attractive personnel. James (2008, p. 664), furthermore, points out that “[...] customers are more willing to buy the merchandise when they see that it looks good on

the attractive brand representatives.” However, if customers do not like the fact that a particular employer discriminates on the basis of appearance, for example, by hiring only attractive people, then these customers can choose not to use, support, or do business with these “discriminatory” employers.

Legal system

Now, if appearance was deemed to be a legally protected category under civil rights laws, judges would have to interpret and apply any broadened appearance or attractiveness standard, and make determinations of legal and illegal conduct on a case-by-case basis, which could emerge as a herculean judicial undertaking. By narrowly construing the present law, and thus allowing employers to discriminate based on appearance in the form of personal attractiveness, the courts may be thinking in terms of their own judicial workload and the efficiency of the legal system. Corbett (2007, p. 174) underscores that “[...] with appearance, the difficulty of defining the protected characteristic suggests coverage would produce much litigation in which the principal issue would be whether the plaintiff was covered. Many plaintiff losses would be likely.” Similarly, James (2008) worries that if attractiveness is deemed to be protected under an appearance standard, the courts will have the herculean task of defining just who is, and is not, “attractive.” The result will be inconsistent court decisions based on subjective standards of attractiveness. James (2008) also is concerned that having appearance as a protected category will result in frivolous and baseless lawsuits; and consequently the “floodgates” of litigation will be open. Courts already have the duty as well as the challenge to determine if any appearance discrimination in employment is impermissibly linked to a protected category as well as to determine whether cultural-based appearance norms set forth by employers impose a disparate burden on protected groups. Thus, currently, there is legal protection if appearance is tied to impermissible discrimination. The fear is that to expressly designate appearance as a protected category under civil rights laws would overwhelm the courts since, in essence, any aggrieved employee could claim appearance discrimination as the illegal reason for a negative employment determination. Consequently, any employee discharge could be a “wrongful discharge.”

Society

Society in the US today clearly places a “premium” on “good looks” and physical attractiveness. Consequently, regarding appearance discrimination, “even if such discrimination could be reduced through regulation, it is questionable whether society as the same moral conviction about this type of discrimination that it has about racial or sexual discrimination, for example” (Corbett, 2011, p. 629). Furthermore, society as a whole, along with employers and the legal system, are also concerned about being mired in frivolous appearance lawsuits, especially by “eccentric” employees (Steinle, 2006). Allowing employers to discriminate based on appearance emphasizes the value of economic efficiency in permitting employers to establish and manage their businesses as they deem proper and profitable. Corbett (2011, p. 639) also raises the concern that “in the global economy [...] some argue that new employment laws will over-regulate and drive businesses out of the country.” Yet Mahajan (2007) posits that appearance standards in the workplace can harm society by affirming societal stereotypes and biases as to attractiveness, by undercutting more pertinent employment factors, such as academic, career, or personal accomplishments, and by “perpetuat(ing) society’s obsession with looks” (p. 170). Mahajan (2007, p. 171) notes

another negative consequence for society: “Employer appearance standards generally devalue racial, cultural, and religious diversity, often requiring conformity to white, heterosexual notions of beauty and appearance.” Mahajan (2007, p. 201), however, also worries that allowing lawsuits for appearance discrimination “would lead to increased efforts by employers to regulate employee social relations.” So, the interests of the society stakeholder group would be advanced by allowing the employer to prefer the “pretty” in hiring, and by not amending civil rights laws to include appearance as a protected category.

In examining the consequences of appearance discrimination, as required by the utilitarian ethical theory, and measuring and weighing these consequences, the result appears to be that there are more good consequences than bad in allowing the employer to discriminate legally based on appearance; and thus pursuant to utilitarianism appearance discrimination in employment is moral. Nevertheless, regardless of any utilitarian moral conclusion based on the “greater good,” Steinle (2006, p. 283) points out that “many academics, practitioners, and civil rights advocacy groups are troubled by a teleological business-oriented approach to appearance and grooming standards.” One of these “academics,” at least historically, would be Immanuel Kant.

Kant’s categorical imperative

The German professor and philosopher, Immanuel Kant, condemned utilitarianism as an immoral ethical theory. How is it logically possible, said Kant, to have an ethical theory that can morally legitimize pain, suffering, exploitation, and injustice? Disregard consequences, declared Kant, and instead focus on the form of an action in determining its morality. Now, of course, since Kantian ethics is also one of the major ethical theories in western civilization, a huge problem arises since these two major ethical theories are diametrically opposed. Is one a Kantian or is one a utilitarian? (Or is it all relative as the Sophists and Machiavelli stated?) For Kant, the key to morality is applying a formal test to the action itself. This formal test he called the categorical imperative. “Categorical” meaning that this ethical principle is the supreme and absolute and true test to morality; and “imperative” meaning that at times one must command oneself to be moral and do the right thing, even and especially when one’s self-interest may be contravened by acting “rightly.” The categorical imperative has several ways to determine morality. One principal one is called the Kingdom of Ends test. Pursuant to this Kantian precept, if an action, even if it produces a greater good, such as an exploitive but profitable overseas “sweatshop,” is nonetheless disrespectful and demeaning and treats people as mere means, things, or as instruments, then the action is not moral. The goal, said Kant, is for everyone to live in this “Kingdom of the Ends” where everyone is treated as a worthwhile human being with dignity and respect. Related to the Kingdom of Ends precept and also part of the categorical imperative is the agent-receiver test, which asks a person to consider the rightfulness of an action by considering whether the action would be acceptable to the person if he or she did not know whether the person would be the agent, that is, the giver, of the action, or the receiver. If one did not know one’s role, and one would not be willing to have the action done to him or her, then the action is immoral. Do your duty, said Kant, and obey the moral “law,” based on his categorical imperative (Cavico and Mujtaba, 2009).

Sex, sexuality, and sex stereotypes, which obviously are prevalent in US society, are often disrespectful and demeaning to women; and thus if an employment appearance

standard treated women as merely sexual objects that standard would be immoral pursuant to the Kingdom of Ends test of Kantian ethics. If an appearance standard, especially in the form of an “attractiveness” requirement, allowed employers to implicitly discriminate against job applicants and employees based on their race, color, sex, religion, national origin, age, or disability, then the standard would be immoral pursuant to the agent-receiver test of Kantian ethics. Appearance also would be immoral pursuant to Kantian ethics if appearance as a characteristic was not related to the job in question. That is, to use appearance, particularly in the form of attractiveness, in making hiring and employment determinations, when appearance is not relevant to the employee’s ability to do the job, would be disrespectful, demeaning, and unfair to job applicants and employees. However, if the requirements of a particular job or business are the controlling criteria, then appearance can be construed as a legitimate factor in business determinations to a rational person. As Corbett (2007, p. 173) explains: “How do we evaluate the moral blameworthiness of appearance-based discrimination? To the extent that it is a response to actual or presumed customer preference, it seems to be more about stereotyping and proxy discrimination than bias.” Furthermore, James (2008, p. 663) points out that “[...] in some instances, an applicant may not be qualified unless he or she is attractive.” That is, the employer must demonstrate that attractiveness is essential to the business and consequently that less attractive people are not qualified to perform the necessary job functions (James, 2008). Particularly in the latter situation, one can make a reasoned argument that attractiveness discrimination is not arbitrary, irrational, or unfair, and thus immoral pursuant to Kantian ethics. Actually, one can make an argument that not to allow the employer to discriminate based on attractiveness when attractiveness is critical to an image for the business or necessary for certain job functions is disrespectful to the employer by not taking into account its legitimate business needs and encroaching on the employer’s justifiable autonomy to hire, staff, and manage its business. Appearance even in the form of attractiveness can be a legitimate factor in hiring employees that one must be cognizant of – ethically as well as legally. Therefore, initially, based on a Kantian ethical analysis, one would say that it is morally wrong to discriminate in employment based on appearance, and especially so when appearance is tied to an immutable characteristic, such as one’s physical appearance and especially in the form of attractiveness. Nevertheless, in certain limited circumstances, where attractiveness is directly related to the company’s brand or image or the functions of the job, attractiveness discrimination could be construed as moral pursuant to Kantian ethics, since, perhaps sad to say, though rationally so, unattractive people are simply not qualified for the job.

Hiring attractive people certainly can be said to advance the self-interest of the employer, which would make the practice moral pursuant to ethical egoism. Preferring the “pretty” surely can be said to be a societal norm, which would make the practice moral pursuant to ethical relativism. Furthermore, an argument can be made that discriminating based on attractive achieves more good consequences than bad, which would make the discrimination (or perhaps “classification” is a better word!) moral pursuant to utilitarianism. Finally, for Kantian ethics, by focussing on the employer and the essential business needs of the employer to hire and to staff its business with attractive personnel, one can make a reasoned argument that attractiveness discrimination is fair and moral. So, ethically, based on the analysis herein, one can conclude that appearance discrimination is moral.

Management implications and recommendations

So, appearance discrimination is as a general rule legal as well as moral. 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.” The employer must be cognizant that the employee will need sufficient evidence to sustain a case of impermissible discrimination. Perhaps there will be direct evidence, such as a memo or e-mail, stating that an applicant was not hired or promoted because he or she was “black” or “too old,” that will reveal evidently the employer’s intent to discriminate, not on appearance *per se*, but on illegal race or age grounds. Such a direct evidence approach naturally would be a more effective legal tactic; yet obtaining direct evidence of a wrongful intent to discriminate is difficult. However, the employer also must be cognizant that indirect or inferential evidence can also be used to demonstrate a wrongful intent to discriminate. For example, the use of such “code words” in making negative employment determinations, such as, “too ethnic,” “too foreign-looking,” “too dark,” “young bloods,” “young guns,” “go-getters,” “youthful appearance,” “appeal to youth demographics,” “appeal to youth market,” “all American look,” “trendy,” “preppie,” “hip,” and “with it,” may take the case out of the non-actionable appearance category, and place it squarely by means of inferential evidence in a viable civil rights violation category, such as race, color, or age discrimination.

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. Managers should be particularly sensitive to insidious prejudice exhibited against transgender and transsexual individuals in the workplace based purely on their outward appearance and mannerisms. There should be “zero tolerance” for the use of insulting code words like “cross-dressers” or “drag queens” in the workplace to describe these individuals. Like so many areas of correcting social unfairness, business managers should take the lead, where the legal system falls short, in preventing this type of real discrimination against such a vulnerable group of individuals. Confronting such prejudice “head on,” by articulating a corporate code of conduct to protect against

such foregoing physical appearance discrimination, is a characteristic of an ethical, forward thinking and socially responsible employer.

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. Accordingly, the issue emerged as to whether the appearance discrimination, even if legal, is moral. Pursuant to the ethical analysis, the authors concluded that appearance discrimination in employment can be moral under certain ethical theories and limited circumstances. A key factor in the ethical analysis of appearance discrimination analysis is whether the characteristic of appearance, particularly in the form of physical attractiveness, is directly relevant to the business or work in question. The ultimate conclusion to the analysis conducted for this paper is that appearance discrimination, particularly in the form of attractiveness, and perhaps contrary to the initial impressions of the readers as well as the authors, is legal and moral. Accordingly, this is an area of employment law where business managers can lead by example with forward thinking, protective written policies, where the legal system has so far fallen short in offering sufficient protections to all workers regardless of appearance.

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