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## It Can't Get that Ugly: Why Employers Should Be Able to Take Aesthetics into Consideration

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## Comment

# It Can't Get That Ugly: Why Employers Should Be Able to Take Aesthetics into Consideration

By Thomas Pagliarini\*

### I. INTRODUCTION: SELLING MORE THAN JUST THE "BEST COFFEE IN TOWN"

In the summer of 2012, the Equal Employment Opportunity Commission (EEOC) intensified an investigation into the Marylou's coffee chain on grounds that Marylou's allegedly discriminates against job applicants. In sum, seven charges were filed against the chain.<sup>1</sup> Interestingly, the investigation was not prompted by the filing of any complaints on the part of disgruntled turned-down applicants, but rather, began from within the EEOC itself as a "Commission-initiated investigation."<sup>2</sup> The general

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\*Lord of Sealand; Candidate for Juris Doctor, Roger Williams University School of Law, 2014; B.A., Bryant University, 2011. I'd like to thank the editors of the Law Review, especially Alyse Galoski and Maura Clancy for their diligent editing of this Comment. Credit to Nick Nybo for something, but mostly for the sake of symmetry. Lastly, to my parents, for everything.

1. Nicole Oliverio, *Mary Lou's Being Investigated for Discrimination*, WHDHNEWS.COM, May 24, 2012, <http://www1.whdh.com/news/articles/local/south/12007556046098/marylou-s-being-investigated-for-discrimination/>.

2. James McDonald, *Here's Looking At You, Kid" - The EEOC Looks For Beauty Bias*, FISHER & PHILLIPS, L.L.P. ATTORNEYS AT LAW (July 2, 2012), available at <http://www.laborlawyers.com/19073>.

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thrust behind the investigation was that Marylou's, with its "pink" branded image, only hires young attractive women for its barista positions and that "it's possible that applicants or employees might not know that they have been discriminated against."<sup>3</sup> In conducting its investigation, the EEOC sifted through the company's job applications and interviewed employees about the company's work environment and the age, race, and even body types of their fellow employees.

Boldly asserted on each cup of Marylou's is that the company serves the "Best Coffee in Town." However, like all other food and beverage service-based companies, Marylou's undeniably is selling more than just a simple food or beverage product. Indeed, when founder Marylou Sandry opened her first Marylou's coffee shop in 1986, she set out to build a business with a "friendly atmosphere" that would be a "fun place to visit and work."<sup>4</sup> In doing so, Sandry sought to establish a particular brand, which—with over thirty locations and counting—has been quite successful.<sup>5</sup> Sandry attributes the company's success in large part to carefully selecting "quality, dedicated people" from amongst its pool of applicants.<sup>6</sup> This careful selection process, Sandry believes, has led to the creation of "a staff which has literally become famous," and stores that "specialize" not only in assorted pastries and a "perfect coffee product," but also "in happy faces or a smile and a wink."<sup>7</sup> Such fame, no doubt, spurred the interest of the EEOC, whose investigation Sandry has described as a modern day "witch hunt."<sup>8</sup>

While ultimately Marylou's was cleared of all charges,<sup>9</sup> the

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3. *Id.*

4. *About Marylou's*, MARYLOU'S COFFEE, <http://www.marylous.com/about.html> (last visited Aug. 5, 2013) (hereinafter "Marylou's Coffee").

5. *Locations*, MARYLOU'S COFFEE, <http://www.marylous.com/locations.html> (last visited Oct. 14, 2013).

6. Crystal Haynes, *Former Employee Discusses Marylou's Coffee Culture*, MYFOXBOSTON.COM (May 26, 2012), <http://www.myfoxboston.com/story/18633001/2012/05/26/former-employee-discusses-marylous-coffee-culture>.

7. Marylou's Coffee, *supra* note 4.

8. *Federal Official Defends Discrimination Probe of Marylou's Coffee Shop Chain*, PATRIOT LEDGER (June 8, 2012), <http://www.patriotledger.com/topstories/x1222854722/Feds-defend-probe-of-Marylou-s-coffee-shop-chain#ixzz2KX1wSXMp> [hereinafter *Federal Official Defends*].

9. Cara Kenefick, *Marylou's Cleared of Discrimination Charges*,

situation provides an opportunity to explore how courts and scholars have addressed the complex nature of the role aesthetics plays in Employment Law and what the future holds for employers like Marylou's. Exploring the circumstances surrounding the investigation into Marylou's and other companies will shed light on the logic (or lack thereof) of aesthetic- or appearance-based employment discrimination claims.

Part I of this comment provides a discussion of the history of aesthetic employment discrimination litigation and various federal and state statutory proposals designed to protect against such practices.<sup>10</sup> This section will demonstrate how employees, in the absence of available legal protections for aesthetic discrimination, have attempted to "fit" arguably aesthetic-based claims into established frameworks for protected classes.<sup>11</sup>

Part II argues why aesthetic discrimination claims should not be allowed. Disallowing claims based on aesthetics would grant employers much more control over their businesses and the management of employees. Provided compliance with other antidiscrimination laws, employers would be free to shape their work environment in a manner best suited for their particular business.<sup>12</sup> Additionally, expanding the availability of exceptions

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NEWPORT PATCH (Oct., 25, 2012), <http://newport.patch.com/articles/marylou-cleared-of-discrimination-charges-fdc2113b>. Sandry was able to happily say that her company was cleared of all charges of discrimination when she received a South Shore Women's Business Network Business Achievement Award in October of 2012. *Id.* Interestingly, in a Hingham Patch online reader poll (though admittedly not scientific), readers answered the question "Do You Think Marylou's Hiring Practices are Prejudice/Sexist?" in the negative by a margin of 67% (out of 49 votes). Tony Catinella, *POLL: Do You Think Marylou's Hiring Practices are Prejudice/Sexist?*, HINGHAM PATCH (May 31, 2012), <http://hingham.patch.com/articles/do-you-think-marylou-s-hiring-practices-are-prejudice-sexist>.

10. Mila Gumin, Note, *Ugly on the Inside: An Argument for A Narrow Interpretation of Employer Defenses to Appearance Discrimination*, 96 MINN. L. REV. 1769, 1773 (2012).

11. William R. Corbett, *Hotness Discrimination: Appearance Discrimination As A Mirror for Reflecting on the Body of Employment-Discrimination Law*, 60 CATH. U.L. REV. 615, 633 (2011).

12. Alyssa Newcomb & Tanya Rivero, *Melissa Nelson: Dental Assistant Fired For Being "Irresistible" Is "Devastated,"* ABCNEWS.COM (Dec. 23, 2012), <http://abcnews.go.com/blogs/headlines/2012/12/melissa-nelson-dental-assistant-fired-for-being-irresistible-is-devastated/>. Conversely, if aesthetic-based discrimination claims were permitted, it would open the door for full-fledged reverse discrimination claims. Corbett, *supra* note 11, at 640. This

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to antidiscrimination laws based on bona fide occupational qualification and business necessity for purely aesthetic purposes would enable employers to fully deliver a holistic product of “branded service.”<sup>13</sup> Part II further argues that aesthetics should be considered a legitimate hiring criterion for all types of job positions, not just those that historically “sell looks.”

Part III explains that although empowering employers to shape their particular “branded service” based on aesthetics could lend itself to certain potential abuses, employment discrimination will not get that ugly. Desiring individuals with certain qualities (e.g. naturally blonde hair, blue eyes) may inherently have a disparate impact against certain protected classes under Title VII. Similarly, unfettered deference to a particular employer’s aesthetic preferences could be viewed as providing a backdoor way to unlawfully discriminate against protected classes (e.g. an employer’s personal aesthetic preference for a particular race). However, by ensuring robust enforcement of the current statutory and common law protections, an appropriate balance can be struck that will be beneficial to both employees and employers.

## PART I

A. *EEOC’s Investigation into Marylou’s*

The probe into Marylou’s hiring practices was part of what is called a “Commission-initiated investigation.”<sup>14</sup> Generally, the EEOC operates pursuant to its statutory authority by investigating and pressing legal action in response to charges that allege a pattern or practice of discrimination under various federal statutes that are filed by a member of the EEOC or by an aggrieved individual.<sup>15</sup> However, the EEOC is also authorized to

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would compound the unmanageable nature of finding a basis for aesthetic discrimination claims. Would a complainant have to first prove whether it would be preferable to be aesthetically more pleasing or less pleasing for the particular position before filing a claim? See Newcomb and Rivero, *supra* note 12.

13. Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL’Y 13, 18 (2007).

14. *Strategic Plan for Fiscal Years 2012–2016*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 8, [http://www.eeoc.gov/eeoc/plan/upload/strategic\\_plan\\_12to16.pdf](http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf).

15. *Id.* The EEOC enforces the following federal laws: Title VII of the

initiate its own directed investigations under the Equal Pay Act of 1963 (“EPA”) and Age Discrimination in Employment Act of 1967 (“ADEA”), even in the absence of any charge or allegation of discrimination.<sup>16</sup> Through this device, the EEOC can initiate a formal investigation against an employer, seek information and data from the employer, and then ultimately file suit for any violations of the statutes.<sup>17</sup> It appears that after a nearly year-long investigation into Marylou’s, seven charges were filed against the employer.<sup>18</sup> However, after scouring through the company’s application materials and interviewing applicants that did not gain employment, the EEOC ultimately dropped its charges.<sup>19</sup>

Throughout the investigation, the EEOC adamantly insisted that it was not trying to extend antidiscrimination protection to encompass aesthetics.<sup>20</sup> In fact, as a matter of law, the EEOC could not simply create an entirely new basis of employment

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Civil Rights Act of 1964 (“Title VII”), the Age Discrimination in Employment Act of 1967 (“ADEA”), the Equal Pay Act of 1963 (“EPA”), Section 501 of the Rehabilitation Act of 1973, Title I and Title V of the Americans with Disabilities Act of 1990 (“ADA”), and the Genetic Information Non-Discrimination Act of 2008 (“GINA”). *Id.* at 7.

16. Terrence H. Murphy & Marcy L. McGovern, *The Scope of EEOC Investigations*, 2012 A.B.A. SEC. LAB. AND EMP. LAW 2, *available at* [http://www.americanbar.org/content/dam/aba/events/labor\\_law/2012/03/national\\_conference\\_on\\_equal\\_employment\\_opportunity\\_law/mw2012eoo\\_murphy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/national_conference_on_equal_employment_opportunity_law/mw2012eoo_murphy.authcheckdam.pdf).

17. *Id.*

18. Oliverio, *supra* note 1. The article states that charges were filed “on the behalf of people who weren’t hired.” *Id.* It appears that the charges that were levied were by an EEOC Commissioner after former applicants were tracked down and interviewed by the EEOC during its investigation. John Zarembo, *Feds Talk to Marylou’s Applicants*, BOSTONHERALD.COM (June 7, 2012), [http://bostonherald.com/news\\_opinion/local\\_coverage/2012/06/feds\\_talk\\_marylou%E2%80%99s\\_applicants](http://bostonherald.com/news_opinion/local_coverage/2012/06/feds_talk_marylou%E2%80%99s_applicants). An EEOC spokesperson, Justine Lisser, explained that Commissioner charges often arise out of information gathered from victims who are too afraid to bring a charge on their own behalf and that such “charges are not tools for fishing expeditions, but are designed to institute an investigation of specific discriminatory practices.” Mary Swanton, *EEOC Investigates Coffee Chain for Barista Beauty Bias*, INSIDE COUNSEL (Aug. 23, 2012), <http://www.insidecounsel.com/2012/08/23/eec-investigates-coffee-chain-for-barista-beauty>.

19. Kenefick, *supra* note 9. Throughout, Sandry had asserted that she was merely choosing the most qualified candidates from those that applied. *Id.* Indeed, there is nothing discriminatory if certain groups are not represented at a particular firm if there is no indication that they ever applied for any positions.

20. Swanton, *supra* note 18.

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protection on its own, and there is currently no federal law that prohibits discrimination on the basis of aesthetics alone. However, the EEOC's investigation into Marylou's shares many similarities with suits filed by individuals that have tried—with varying degrees of success—to couch what were ostensibly aesthetic discrimination arguments into established employment discrimination frameworks.

B. *Fitting Aesthetics In*

In his latest piece on aesthetic employment discrimination, Professor William R. Corbett provides an outline of various examples of “fitting” within the aesthetic discrimination context.<sup>21</sup> Fitting occurs when there is no explicit statutory or common law basis for a particular claim, but in an effort to recover, an employee pulls his or her case from the periphery to fall under, or otherwise “fit,” an existing protected characteristic.<sup>22</sup> Corbett argues that fitting is one of the common ways in which employment discrimination law does—and he argues should—operate for all types of claims.<sup>23</sup> He asserts that “fitting affords courts some discretion in patrolling the fringes of employment-discrimination law,” which allows appropriate cases falling within the penumbras of protected characteristics to obtain judicial review.<sup>24</sup> Fitting compensates for the gaps in statutory protection, which exist, in part, due to the difficulty in passing truly broad, comprehensive antidiscrimination legislation.<sup>25</sup> Additionally, the ability to fit claims serves as a check on employers from abusing their power to discharge employees under an employment-at-will regime.<sup>26</sup>

The multitude of factors that shape an individual's overall outward appearance make aesthetic-based cases susceptible to attempts to fit claims under a wide range of discrimination theories. Public sector employees have attempted to challenge

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21. Corbett, *supra* note 11, at 633.

22. William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 11 *DUKE J. GENDER L. & POL'Y* 153, 158 (2007).

23. Corbett, *supra* note 11, at 639.

24. *Id.*

25. *Id.*

26. *Id.* at 639–40.

grooming policies and dress code requirements under the guarantee of liberty in the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.<sup>27</sup> These attempts to garner substantive due process protection for aesthetics have been largely unsuccessful because courts scrutinize such challenges under the heavy deference of rational basis review.<sup>28</sup> Courts have noted that even if an employee has some type of constitutional interest in his or her appearance generally, such an interest does not inherently shelter the individual from the legitimate demands of employers regarding their business and administrative judgment.<sup>29</sup>

However, instead of trying to fit an aesthetic claim under the amorphous and unpredictable protections of substantive due process, employees can also fit an aesthetic claim under the protections of Title VII.<sup>30</sup> For example, in *Sadrudin v. City of Newark*, a Muslim firefighter challenged a regulation that prohibited facial hair.<sup>31</sup> Despite the facial hair prohibition being nearly identical to the regulation in *Kelley*<sup>32</sup> and the City of Newark additionally asserting that the regulation was “necessary to safely and effectively wear the self-contained breathing apparatus (“SCBA”) used by Newark firefighters,” the court held that the firefighter stated a prima facie religious discrimination claim under Title VII.<sup>33</sup> The different outcomes in these cases

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27. Stacey S. Baron, Note, *(UN)Lawfully Beautiful: The Legal (DE)Construction of Female Beauty*, 46 B.C. L. REV. 359, 369–70 (2005). For example, in *Kelley v. Johnson*, a police officer challenged the validity of a county’s hair grooming regulation for male members of the police force. 425 U.S. 238, 239 (1976). The officer argued that the department’s facial hair regulations violated his right of free expression under the First Amendment, through the Due Process Clause, because the regulations were allegedly “not based upon the generally accepted standard of grooming in the community” and placed “an undue restriction’ upon his activities therein.” *Id.* at 240–41. Finding that the desire to have uniformity in police officer appearance in order to make officers more readily recognizable to the public and a desire to build an esprit de corps were both rationally related to public safety, the Supreme Court upheld the constitutional validity of the regulation. *Id.* at 248–49.

28. Baron, *supra* note 27, at 369–70.

29. *Tardif v. Quinn*, 545 F.2d 761, 763 (1st Cir. 1976).

30. Heather R. James, Note, *If you are Attractive and You Know It, Please Apply: Appearance Based Discrimination and Employer’s Discretion*, 42 VAL. U. L. REV. 629, 649 (2008).

31. 34 F. Supp. 2d 923, 924 (D.N.J. 1999).

32. 425 U.S. at 239.

33. *Sadrudin*, 34 F. Supp. 2d at 924.

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lend support to the proposition that “not all employment discrimination laws are equal, either when created or as applied or developed.”<sup>34</sup>

The varying degrees of successful fitting can often depend on the immutability of the characteristic that is allegedly being discriminated against.<sup>35</sup> This is true even if the employee alleges the specific characteristic’s historical and cultural value to a particular race, or even a particular sex of members of that race.<sup>36</sup> For example, in *Rogers v. American Airlines*, the court dismissed the claims of female African-American employees alleging that a grooming policy that prohibited the wearing of braided hair was discriminatory against women and, in particular, black women.<sup>37</sup> The court explained that “[a]n all-braided hair style is an ‘easily changed characteristic,’ and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.”<sup>38</sup>

Employees have also attempted to fit their claims under the Americans with Disabilities Act by asserting that being unattractive or overweight is a disability.<sup>39</sup> In most cases where employees allege discrimination because of obesity, the employees are unsuccessful because they are unable to show the requirements that their employer views them as impaired, that

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34. Corbett, *supra* note 22, at 160. In fact, not even claims alleged under the same antidiscrimination statute bear equal force. For example, in *Cloutier v. Costco Wholesale Corporation*, an employee asked for a reasonable accommodation to an employer’s “no facial jewelry policy” because of her religious beliefs as a practicing member of the Church of Body Modification. 390 F.3d 126, 128 (1st Cir. 2004). Despite this, the First Circuit held that the employer had no duty to even accommodate the employee’s religious beliefs—wearing facial jewelry—because forcing the company to do so would create an “undue hardship.” *Id.*

35. Elizabeth M. Adamitis, Comment, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 205–06 (2000).

36. *Id.*

37. 527 F. Supp. 229, 234 (S.D.N.Y. 1981).

38. *Id.* at 232. *Contra* EEOC Dec. No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971) (“[W]e note that the wearing of an Afro-American hair style by a Negro has been so appropriated as a cultural symbol by members of the Negro race as to make its suppression either an automatic badge of racial prejudice or a necessary abridgement of first amendment rights.”).

39. Baron, *supra* note 27, at 375–76.

their condition is caused by a physiological disorder, or that there is a substantial limitation upon their life activities.<sup>40</sup>

Additionally, some courts have addressed the practical concerns of an employee's weight and visual appearance in regards to the particular position the employee is applying for.<sup>41</sup> For example, in *Goodman v. L.A. Weight Loss Centers, Inc.*, a 350-pound man suffering from morbid obesity applied for a sales counselor position.<sup>42</sup> The employer was "a company that provides weight reduction plans to clients, with an emphasis on one-on-one coaching and maintenance of a healthy lifestyle."<sup>43</sup> After an initial interview, the interviewer explained to the applicant that, although on paper she thought the applicant was the "most qualified," her manager expressed concerns about the applicant's weight.<sup>44</sup> Ultimately, the employer rejected the applicant asserting that the organization "was an 'image conscious' company and his weight would send the 'wrong message' to [the company's] overweight clientele."<sup>45</sup> The court ultimately dismissed the applicant's complaint for failure to state a claim upon which relief could be granted.<sup>46</sup> Explaining its rationale, the court stated that:

*it is well established that an employer is permitted to make hiring decisions based on certain physical characteristics.* The mere fact that Defendant was aware of Plaintiff's weight and rejected his application for fear that his appearance did not accord with the company image is not improper. To hold otherwise would render an employer's ability to hire based on certain physical characteristics entirely void.<sup>47</sup>

The court explained that it was not as though the employer perceived the applicant as being "substantially limited in the performance of a wide range of work-related tasks or varying

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40. Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1080 (2009).

41. Corbett, *supra* note 22, at 164.

42. *Goodman v. L.A. Weight Loss Ctrs., Inc.*, No. 04-CV-3471, 2005 WL 241180, at \*2 (E.D. Pa. Feb. 1, 2005).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at \*3.

47. *Id.* at \*3 (emphasis added).

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positions.”<sup>48</sup> Rather, it was because, in the employer’s belief, the applicant’s obese appearance “was manifestly inconsistent with the product it was trying to sell.”<sup>49</sup>

While attempts to fit aesthetic claims arise from a variety of angles, the ones that receive a vast amount of the attention of courts and commentators—and those most relevant to Marylou’s—are those that are fit under sex (and sexual harassment) and gender-stereotype discrimination claims.<sup>50</sup> One type of sex discrimination claim involving aesthetics is dress and grooming standards. Very often, there will in fact be different dress and grooming standards for men and women.<sup>51</sup> Indeed, employers’ policies may distinguish between men and women that may be based somewhat on conventional societal norms.<sup>52</sup> However, in establishing different criteria for men and women, the purported standards must place an equal burden on each of the sexes.<sup>53</sup> For example, in *Jespersen v. Harrah’s Operating Co., Inc.*, the Ninth Circuit upheld the validity of a casino’s grooming policy that set different specific requirements for men and women regarding how each employee’s hair, hands, and face must appear.<sup>54</sup> Despite the policy’s requirement that women—and only women—must wear makeup, and the female employee’s assertion

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48. *Id.* However, in *Cook v. Rhode Island, Department of Mental Health, Retardation & Hospitals*, the First Circuit upheld a jury verdict for an employee that claimed she was refused employment because the employer perceived her obesity as a disability. 10 F.3d 17, 26 (1st Cir. 1993). The court stated that the employee could recover under a perceived disability theory by “demonstrating that she was treated as if she had an impairment that substantially limits a major life activity.” *Id.* at 25. Additionally, in addressing immutability, the court found that “the jury reasonably could have inferred that [the employer] regarded plaintiff’s morbid obesity as an ‘impairment of a continuing nature.’” *Id.* at 24. In contrast, in *Goodman*, the employer acknowledged it believed the applicant could lose the requisite weight and even encouraged him to reapply at that point. *Goodman*, 2005 WL 241180, at \*2.

49. *Goodman*, 2005 WL 241180, at \*8.

50. Mary Nell Trautner & Samantha Kwan, *Gendered Appearance Norms: An Analysis of Employment Discrimination Lawsuits, 1970–2008*, 20 RESEARCH IN THE SOCIOLOGY OF WORK 127, 135 (2010) (stating that 118 out of 201, or 58.7% of appearance discrimination cases from 1970 to 2008 involved some type of allegation of discrimination on the basis of sex).

51. Corbett, *supra* note 11, at 633.

52. Adamitis, *supra* note 35, at 208.

53. Corbett, *supra* note 11, at 634.

54. 444 F.3d 1104, 1109 (9th Cir. 2006).

of the added, unreimbursed cost and time associated with such application, the court found that the policy did not impose an unequal burden on men and women.<sup>55</sup>

While moderate leeway may be afforded to employers with regard to differentiation in grooming policies, employees can still fit an aesthetic claim under sex discrimination if the employer's actions impose an impermissible gender stereotype.<sup>56</sup> For example, in *Lewis v. Heartland Inns of America, L.L.C.*, a hotel clerk, who was generally considered a good employee by her immediate supervisor, was fired by the hotel's director of operations because the clerk did not have a "Midwestern girl look."<sup>57</sup> The plaintiff asserted that the employer had created a "de facto requirement that a female employee conform to gender stereotypes."<sup>58</sup> The court noted that the particular job description in the company's personnel manual did not mention appearance and, in reversing summary judgment, held that there was evidence that the employer could have discharged the employee based on a gender stereotype that is arguably inherent in seeking an individual to comport with the "sex-specific and derogatory term[ ]" "[m]idwestern girl look."<sup>59</sup>

Further, if employers become remiss in their duties to protect employees and maintain the proper degree of professionalism, employees may be able to assert sexual harassment claims.<sup>60</sup> An employer may be liable for tangible action harassment (or *quid pro quo*), when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment

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55. *Id.* at 1110.

56. Corbett, *supra* note 11, at 635. The seminal gender stereotype case is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion). In *Price Waterhouse*, the plaintiff was an associate at an accounting firm who alleged she was denied partnership on the basis of sex. *Id.* at 232. It was found that, among other comments, one partner advised that in order to improve her chances of becoming a partner, the plaintiff should learn to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235.

57. 591 F.3d 1033, 1036 (8th Cir. 2010).

58. *Id.* at 1037.

59. *Id.* at 1040–41.

60. Sharon Stiller, *An employer is liable under Title VII to an employee for a hostile environment created by a supervisor*, PRAC. INSIGHTS EMP. NY 0060 (2013).

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decisions affecting such individual.”<sup>61</sup> An employer may also be liable for sexual harassment if “bothersome attentions or sexual remarks [become] sufficiently severe or pervasive to create a hostile work environment.”<sup>62</sup> Additionally, an employer can be liable for sexual harassment committed by non-employees when the employer, as a condition of employment, has put the employee in a position which subjects the employee to sexual harassment.<sup>63</sup> For example, in *EEOC v. Sage Realty Corporation*, a female attendant was forced to wear a poncho uniform that exposed parts of her thighs and buttocks.<sup>64</sup> As a result of wearing the uniform, the employee was subjected to sexual propositions and lewd comments and gestures from non-employees.<sup>65</sup> The employee reported such behavior to her supervisors, refused to wear the uniform any longer, and was subsequently discharged.<sup>66</sup> The employee sued for sexual harassment and the district court agreed, finding that the employer had violated Title VII by requiring the employee “to wear, as a condition of her employment, a uniform that was revealing and sexually provocative and could reasonably be expected to subject her to sexual harassment when worn on the job and a uniform [the employers] knew did subject her to such harassment.”<sup>67</sup>

## PART II

A. *The Formation of an Antidiscrimination Law*

Many of the scholars and commentators that have addressed aesthetic discrimination have advocated for the need to create an aesthetic antidiscrimination law or to expand some of the existing

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61. *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994) (quoting 29 C.F.R. § 1604.11(a)(2) (1993)). For example, in *Karibian* the court reversed summary judgment for the employer, because the employee claimed that her direct supervisor threatened to fire her if she did not comply with the supervisor’s demands for a sexual relationship. *Id.* at 779.

62. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998).

63. Robert Aalberts & Lorne Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable*, 21 PEPP. L. REV. 447, 451 (1994).

64. 507 F. Supp. 599, 604 (S.D.N.Y. 1981).

65. *Id.* at 605.

66. *Id.* at 606–08.

67. *Id.* at 608.

antidiscrimination laws to cover aesthetic-based claims.<sup>68</sup> Standing in contrast to many of these writers, Professor Corbett has stated his belief that an “appearance-based discrimination law will not be passed” and further opining that “it is good that it will not.”<sup>69</sup> Utilizing analytical factors put forth by previous scholars regarding what leads to the development of an antidiscrimination law, Corbett discusses why support for an aesthetic antidiscrimination law is, and likely will always be, lacking.<sup>70</sup> He suggests the following factors are critical to the development of an antidiscrimination law: (1) moral objection to the type of discrimination; (2) a cohesive and identifiable group of people that would be covered; (3) a history of discrimination against those who have the characteristic; (4) immutability of the characteristic; and (5) irrelevance of the characteristic to job performance.<sup>71</sup>

In each of these factors, aesthetics generally tends to resemble what Corbett considers the weakest of the antidiscrimination laws for that particular factor.<sup>72</sup> Regarding moral qualms about aesthetic discrimination, Corbett posits that while most may find intentional discrimination based on

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68. See Gumin, *supra* note 10, at 1793–94; Rhode, *supra* note 40, at 1048; Karen Zakrzewski, Comment, *The Prevalence of “Look”ism in Hiring Decisions: How Federal Law Should be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 432 (2005); Adamitis, *supra* note 35, at 195.

69. Corbett, *supra* note 22, at 161. While this statement is seemingly clear on its face, Corbett’s position, at least what is gleaned from his pieces on aesthetic discrimination observed as a whole, does not necessarily take on an advocacy perspective. See *id.* at 160–161; see also Corbett, *supra* note 11, at 626. Further, it should also be acknowledged that while Corbett may provide one of the clearest statements regarding his view on why there will not be some type of federal aesthetic antidiscrimination statute, other writers have addressed the need to provide employers with certain devices to protect themselves against aesthetic-based claims. See James, *supra* note 30, at 672–73; see also Lynn T. Vo, Comment, *A More Attractive Look at Physical Appearance-Based Discrimination: Filling the Gap in Appearance Anti-Discrimination Law*, 26 S. ILL. U. L.J. 339, 357–58 (2002). These works are also significant, because in addition to containing some employer-deferential proposals, but also since they highlight that such views transcend gender.

70. Corbett, *supra* note 22, at 171.

71. *Id.* (citing Peggy R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 601 (2002)). Additionally, Corbett notes that generally there will need to be “sufficient political clout” in order to have a piece of legislation passed. *Id.*

72. *Id.* at 171–76.

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aesthetics to be somewhat morally disconcerting, such avulsion is not as severe as that which is associated with racial discrimination.<sup>73</sup> Additionally, moral objections are closely tied to societal conceptions of immutability; when the particular aesthetic feature is more easily improved, society may have less objection to discrimination regarding that feature.<sup>74</sup>

Just as a particular aesthetic feature is subject to change, there would be even greater difficulty trying to pin down a discernible, cohesive group to protect against aesthetic discrimination.<sup>75</sup> The timeless expression “beauty is in the eye of the beholder” succinctly highlights the subjectivity that would inherently plague aesthetic discrimination claims.<sup>76</sup> Unlike some of the more traditional protected classes (e.g., race or color), which provide a more objective basis for determining members of the particular class, there is no truly objective mechanism to determine if an individual would be a member of an “unattractive” or “not aesthetically pleasing” class.<sup>77</sup> Likewise, while there may be an array of anecdotes suggesting the enduring ills of aesthetic discrimination, the amorphous nature of such features and characteristics may make it difficult to document a truly comprehensive history of discrimination.<sup>78</sup>

Even adamant supporters of the need to protect against aesthetic discrimination recognize that “[p]art of the problem is that attractiveness and grooming standards fall along a continuum,” and are left pondering, “[h]ow would employers or courts determine what aspects of appearance are entitled to protection?”<sup>79</sup> A provocative, yet illuminating query posed by one prominent labor attorney is “[w]ill there be a national standard of

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73. *Id.* at 173.

74. *Id.* at 173, 175.

75. *Id.* at 173–74.

76. Corbett, *supra* note 11, at 627–28. Conversely, due to the stigma that is allegedly attached to being unattractive, individuals may not be so willing to come forward and assert that they believe they were fired because they are unattractive. *Id.* Rhode, *supra* note 40, at 1069. However, to save face—quite literally—proud individuals could assert some type of perceived unattractive theory, similar to the perceived disability theory. See Cook v. Rhode Island, Dep’t of Mental Health, Retardation & Hosps., 10 F.3d 17, 26 (1st Cir. 1993).

77. Corbett, *supra* note 22, at 173–74.

78. *Id.* at 175.

79. Rhode, *supra* note 40, at 1068.

attractiveness established by EEOC rulemaking?”<sup>80</sup>

The last factor, irrelevance to work, necessitates further discussion because of its particular significance in the role of aesthetic discrimination discussions. Corbett asserts that the “perceived irrelevance of a characteristic to work is one of the most complex elements in employment discrimination law.”<sup>81</sup> The relevance of aesthetics in employment, Corbett correctly acknowledges, “depends on the job and how you define it.”<sup>82</sup> Indeed, this framing issue is of critical significance. However, I argue that many courts and commentators have largely distorted the proper role that aesthetics should play in the employment and business context.

B. *The Historical Mind–Body Dichotomy*

“In an ideal world, no aspect of appearance would be considered in employment matters.”<sup>83</sup>

If the above statement represents the “ideal world” for proponents of an aesthetic antidiscrimination law, then it follows that their dystopia would be a world where “[p]eople will compete for jobs not based on substantive factors, but on how attractive they are.”<sup>84</sup> Society would become so increasingly concerned with looks and would eventually hit rock bottom as “[a]ttractiveness [would] be looked at as an accomplishment in itself.”<sup>85</sup>

Proponents of an aesthetic antidiscrimination law argue that “for most jobs appearance has no bearing on an individual’s ability

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80. *Id.* (quoting James J. McDonald Jr., *Civil Rights for the Aesthetically-Challenged*, 29 EMP. REL. L.J. 118, 127 (2003)).

81. Corbett, *supra* note 22, at 175–76.

82. *Id.*

83. Adamitis, *supra* note 35, at 221.

84. Zakrzewski, *supra* note 68, at 434. Absolutely no disrespect is intended by my use of Attorney Zakrzewski’s language. The hypothetical uber-aestheticized “dystopia” is merely used as a device to provoke thought and stimulate a dialogue about the role of aesthetics in the our society generally, and in the employment context more specifically.

85. *Id.*; *but see* PLATO, COMPLETE WORKS 493 (John M. Cooper & D. S. Hutchinson eds. 1997) (“the beauty of bodies is a thing of no importance.”); *Proverbs* 4:7 (King James) (“Wisdom is the principal thing; therefore get wisdom.”); SOPHOCLES, THE PLAYS AND FRAGMENTS, PART III: THE ANTIGONE 237 (Sir Richard Jebb trans., Cambridge University Press, ed., 1900) (440 B.C.) (“Wisdom is the supreme part of happiness.”).

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to perform.”<sup>86</sup> By providing aesthetics with heightened scrutiny, an aesthetic antidiscrimination law could serve the goal of “break[ing] down and challeng[ing] the historic value placed on [] physical attractiveness.”<sup>87</sup> In doing so, proponents hope, “[e]mployers would be encouraged to hire applicants based solely on legitimate qualifications and business concerns, instead of on stereotypical and unfounded assumptions.”<sup>88</sup>

This view, exaggerated by the hypothetical dystopia, shows that many commentators marginalize the notion that aesthetics has a legitimate value. However, even some of the staunchest advocates for aesthetic antidiscrimination protection acknowledge that in some employment contexts, such as “modeling, acting, or sexual entertainment,” aesthetics plays an “essential” role.<sup>89</sup> Yet, at times, even the slightest movement from what these proponents see as essential appearance-based jobs renders, in their view, the value of appearance to a nullity.<sup>90</sup> For example, one commentator argues that there is a distinct difference between “businesses that sell looks exclusively” and the restaurant server that is just supposed to serve food; the fitness instructor whose “primary purpose . . . is to instruct students on fitness moves and routines and ensure the health of all students, not to provide a ‘gaze object’ for students;” and retail clothing associates that are “primarily expected to provide customer service, ring up sales and keep the store displays neat and organized.”<sup>91</sup>

In like turn, however, the same splicing of job functions can be done for the model, the actor, and the sexual entertainer as well. It is the model’s job “to display, advertise and promote commercial products (notably fashion clothing).”<sup>92</sup> An actor’s job is to “interpret[] a dramatic character” and connect with an audience.<sup>93</sup> Indeed, even a stripper can justifiably be characterized as a “professional,” and one whose job is to render a

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86. Adamitis, *supra* note 35, at 195; see Gumin, *supra* note 10, at 1770.

87. Baron, *supra* note 27, at 387.

88. Adamitis, *supra* note 35, at 212.

89. Rhode, *supra* note 40, at 1065.

90. Gumin, *supra* note 10, at 1791–92.

91. *Id.*

92. “Model (Profession)” WIKIPEDIA, [http://en.wikipedia.org/wiki/Model\\_\(profession\)#cite\\_note-1](http://en.wikipedia.org/wiki/Model_(profession)#cite_note-1).

93. “Actor” WIKIPEDIA, <http://en.wikipedia.org/wiki/Actor>. See also, “Pornographic Film Actor” WIKIPEDIA, [http://en.wikipedia.org/wiki/Porn\\_star](http://en.wikipedia.org/wiki/Porn_star).

“performance” that entices customers.<sup>94</sup>

Such splicing appears to be done at the margins of many customer service-based jobs where the determination to be made is “whether the employer is primarily in the business of selling ‘sex’ or is using sexual allure to market other services and products.”<sup>95</sup> It is in these high-contact customer service positions that companies will often attempt to establish aesthetic standards or implement company-wide grooming policies.<sup>96</sup> However, issues with aesthetic discrimination claims and attempts to impose aesthetic standards no doubt can permeate into non-customer service and other professional, behind-the-scene positions as well.<sup>97</sup> Yet, whereas aesthetic discrimination may perhaps be somewhat tolerated in the former job categories, the notion of discriminating on the basis of aesthetics in the latter job categories stirs up much more controversy.<sup>98</sup>

Nevertheless, what often gets overlooked by trying to impose such a strict dichotomy of job classifications is that aesthetics may be a legitimate criterion upon which to base employment decisions throughout all job types.<sup>99</sup> Indeed, while commentators are quick to scorn the “stereotypical and unfounded assumptions,” which lead to “arbitrary, irrational, and unfair” hiring decisions made based on aesthetics, there is little acknowledgement that all hiring decisions are made on inherently improvable assumptions that bear varying degrees of success.<sup>100</sup> Employers, like every other actor, make decisions in a state of inherent uncertainty.<sup>101</sup>

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94. “Stripper” WIKIPEDIA, <http://en.wikipedia.org/wiki/Stripper#Performance>; *see also* “Prostitution” WIKIPEDIA, <http://en.wikipedia.org/wiki/Prostitute>.

95. Avery & Crain, *supra* note 13, at 44.

96. Rhode, *supra* note 40, at 1064.

97. Corbett, *supra* note 11, at 621–22.

98. Avery and Crain describe this as the difference between selling sex and using sex (to allure customers). Avery & Crain, *supra* note 13, at 44.

99. Timothy A. Judge, Charlice Hurst, and Lauren S. Simon, *Does it Pay to be Smart, Attractive, or Confident (or all Three)? Relationships Among General Mental Ability, Physical Attractiveness, Core Self-Evaluations, and Income*, 94 J. APPLIED PSYCH. 742, 751 (2009).

100. Adamitis, *supra* note 35, at 212.

101. The concept of “Bounded Rationality” was developed by the economist Herbert Simon to describe the reality that actors are constrained from making completely rational decisions because their decision environment is too complex (too much information) in relation to the actor’s mental and computational abilities (unable to process) and the lack of enough

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To compensate, decision makers rely on certain rules of thumb and other heuristics to guide their thought processes.<sup>102</sup> For example, in the employment context, an individual's résumé is used as the key starting point in the hiring process.<sup>103</sup> Armed with nothing but a candidate's résumé by itself, employers often make an initial—and perhaps even at times final—determination of whether the candidate fits with “the demands of the job vacancy” and the values of the organization.<sup>104</sup> Thus, in a way, the résumé provides a rule of thumb to guide an uncertain employment decision.<sup>105</sup> The rule of thumb operates on both sides: the candidate appeals to it by trying to convey that he or she will be able to perform competently and the employer makes a decision in hopes that a desirable feature will translate into competent performance. Acknowledging this is by no means an attack on the use of résumés in the hiring process.<sup>106</sup> Rather, it is just to highlight that, in the end, whatever the hiring decision to be made, it will rely on assumptions regarding competency that cannot be proven until after the fact.<sup>107</sup>

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time. David Dequech, *Bounded Rationality, Institutions, and Uncertainty*, 35 JOURNAL OF ECONOMIC ISSUES 911, 912–13 (2001).

102. *Id.* at 920.

103. Wei-Chi Tsai et al., *The Effects of Applicant Résumé Contents on Recruiters' Hiring Recommendations: The Mediating Roles of Recruiter Fit Perceptions*, 60 APPLIED PSYCHOLOGY: AN INTERNATIONAL REVIEW 231, 231 (2001).

104. *Id.* at 232.

105. The same holds true for certain characteristics and behaviors that are exhibited during an interview, a process which is also replete with its own problems of uncertainty. See Marc-André Reinhard, Martin Scharmach, and Patrick Müller, *It's not what you are, it's what you know: experience, beliefs, and the detection of deception in employment interviews*, JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 1, 10 (2013) (finding that sample including high percentage of experienced hiring professionals were only slightly above chance at discerning lies and truths).

106. Cf. John Sullivan, *What's Wrong With Using Resumes For Hiring? Pretty Much Everything*, ERE.NET (July 16, 2012 5:16 AM), available at <http://www.ere.net/2012/07/16/what%E2%80%99s-wrong-with-using-resumes-for-hiring-pretty-much-everything/>. Even elite law firm employers make decisions based on heuristics that they think will aid their firm. William D. Henderson, *The Bursting of the Pedigree Bubble*, 21 NALP BULLETIN 1, 12 (2009).

107. This is just an example of the discussions in philosophy regarding *a priori* versus *a posteriori* knowledge. See *A Priori and A Posteriori*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, available at <http://www.iep.utm.edu/apriori/>. The argument can be made that a resume reflects competency by

However, when an employer makes a hiring decision based on the information displayed on a résumé<sup>108</sup> or a response given to an interview question, the decision is not inherently fraught with controversy. Rather, the decision engenders notions of rationality and legitimacy by relying on what is considered socially acceptable evaluative criteria.<sup>109</sup> To hire a mega-firm, Ivy-league educated attorney to handle a sophisticated business transaction or high stakes litigation is deemed a professional, sensible decision, while staffing a restaurant with beautiful, busty women or handsome, hard-bodied men appears crude.<sup>110</sup> This reality highlights that many commentators perpetuate a classic mind–body dichotomy that has characterized much of Western thought.<sup>111</sup> Whereas things typically associated with the mind, like past academic performance, are viewed as something noble and praiseworthy, things associated with the body, like aesthetics, are not held in the same esteem.<sup>112</sup> Discriminating on the basis of mental capacity is justified, while “discrimination based on appearance is a significant form of injustice.”<sup>113</sup> Put simply, it is permissible for an employer not to hire an individual because the employer thinks the candidate is stupid, but it is wrong not to hire an individual because the employer thinks the candidate is ugly. But why?

Proponents of aesthetic antidiscrimination laws argue it is a “significant form of injustice” that attractive individuals may

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highlighting past performance, which should be indicative of future competence. However, in the end, past performance does not guarantee future success and the decision is guided—at best—by probability.

108. Assuming the decision is not driven by antiracial or antiethnic animus. See Eva Derous & Ann Marie Ryan, *Documenting the Adverse Impact of Résumé Screening: Degree of Ethnic Identification Matters*, 20 INTERNATIONAL JOURNAL OF SELECTION AND ASSESSMENT 464, 472 (2012).

109. See Adamitis, *supra* note 35, at 221.

110. Gumin, *supra* note 10, at 1769 (“Why should Hooters be allowed to decide what their employees should look like . . . ?”)

111. Steven D. Edwards, *The Body as Object Versus the Body as Subject: The Case of disability*, 1 MEDICINE, HEALTH CARE AND PHILOSOPHY 47, 47 (1998).

112. See PLATO, *supra* note 85, at 493 (“the beauty of bodies is a thing of no importance.”); Gumin, *supra* note 10, at 1774 (“Instead of focusing on a person’s intellectual merits and accomplishments, employers who hire based on the positive characteristics they associate with an attractive appearance are less likely to hire the best candidate.”).

113. Rhode, *supra* note 40, at 1035.

receive preferential treatment and other benefits.<sup>114</sup> They suggest that such unfairness manifests itself from a very early age, pointing out that teachers and parents give more attention to attractive individuals and that, later on in life, attractive individuals are more likely to be hired, promoted, and earn larger salaries than less attractive individuals.<sup>115</sup> However, as Harvard economist Robert Barro notes: “[O]utcomes based on intelligence are clearly unfair in the sense that, by and large, smarter people end up richer, and being smart is to a considerable extent a matter of luck.”<sup>116</sup> Additionally, the same “unfair” early preferential treatment holds true for intelligent children as well.<sup>117</sup> Due to the increased ease with which an intelligent child acquires education and learning skills, they are more likely “to receive psychosocial and instrumental support” from teachers than less intelligent students.<sup>118</sup>

### C. *Aesthetics as a Legitimate Hiring Criterion*

Many of the same reasons that commentators highlight to assert the unfairness created by preferential treatment for aesthetically-pleasing individuals actually work to validate the legitimacy of aesthetics as a legitimate employment criterion. Generally speaking—and commentators around agree—an individual’s visual appearance is the first thing another will notice.<sup>119</sup> This noticing of another’s appearance, it is argued, “overpowers other personal characteristics in any interaction of first impression.”<sup>120</sup> The first impression, and subsequent

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114. *Id.*

115. *Id.* at 1037–39.

116. Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, *BUS. WK.*, Mar. 16, 1998, at 18. Barro suggests—in not so many words—that for the most part we all are subject to an extent to make do with the proverbial cards we are dealt from above. *See id.*

117. *See* Judge et. al, *supra* note 99, at 744.

118. *Id.* (citing S.J. Ceci & W. M. Williams, *Schooling, Intelligence, and Income*, 52 *AMERICAN PSYCHOLOGIST*, 1051–58 (1997)).

119. *See, e.g.* Zakrzewski, *supra* note 68, at 432. A key assumption running through these various analyzes is that the vast majority of individuals do not suffer from an uncorrected visual impairment.

120. Baron, *supra* note 27, at 364 (citing David L. Wiley, *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27 *ST. MARY’S L.J.* 193, 201–03 (1995) (Wiley’s work discusses more in depth the social psychology theory of attribution that suggests individuals render

observations of another individual, drive one's evaluation of that individual's characteristics.<sup>121</sup> Research suggests that "[a]ttractiveness corresponds with attributes such as virtue, integrity, intelligence, sensitivity, kindness, and honesty."<sup>122</sup>

While these studies suggest a positive correlation between one's perceived attractiveness and the observer's likelihood of attributing positive characteristics, there is also the possibility that this perception can, in turn, foster that particular characteristic in the individual.<sup>123</sup> The research suggests that the positive characteristics that are associated with attractiveness can undergo an "expectancy confirmation."<sup>124</sup> Through this process, after "stereotypes regarding attractiveness elicit expectations that lead to consistently differential judgment and treatment[,] [t]hese outcomes are then internalized and *cause* development of differential behavior, traits, and self views."<sup>125</sup>

Additionally, to the extent that one's perception of another drives the social interaction between the two individuals, that perception becomes a tangible reality. For example, attractiveness can potentially make someone a more capable leader.<sup>126</sup> In fact, the very notion of one whose leadership capabilities are driven by charisma speaks to this point.<sup>127</sup> As

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judgment regarding a person's personality and other characteristics based on inferences drawn from the other individual's appearance).

121. Baron, *supra* note 27, at 364.

122. Adamitis, *supra* note 35, at 197 (citing GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 1, 8 (Plenum Press 1985) and Meg Gehrke, *Is Beauty the Beast?*, 4 S. CAL. REV. L. & WOMEN'S STUD. 221, 230–32 (1994)).

123. See Judge et. al, *supra* note 99, at 742.

124. *Id.* (citing J.H. Langlois, *From the Eye of the Beholder to Behavioral Reality: Physical Attractiveness*, In 3 *PHYSICAL APPEARANCE, STIGMA, AND SOCIAL BEHAVIOR: THE ONTARIO SYMPOSIUM* 23–51 (C.P. Herman, M.P. Zanna, & E.T. Higgins Eds. 1986); J.H. Langlois, et. al, *Maxims or myths of beauty? A meta-analytic and theoretical review*, 126 *PSYCHOLOGICAL BULLETIN*, 390–423 (2000)).

125. *Id.* (citing J. M. Darley & R. H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 *AMERICAN PSYCHOLOGIST* 867–881 (1980)) (emphasis added).

126. Judge et. al, *supra* note 99, at 750.

127. See *Charisma Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/charisma> (last visited Oct. 14, 2013) ("1: a personal magic of leadership arousing special popular loyalty or enthusiasm for a public figure (as a political leader) 2: a special magnetic charm or appeal.").

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Timothy Judge and his colleagues explain, “attractive people tend to be higher in extraversion, which is positively associated with transformational leadership behaviors.”<sup>128</sup> Further, they assert:

[i]mplicit leadership theory argues that people develop schemas of characteristics that indicate an effective leader. Individuals characterized and evaluated as leaders to the extent that they are prototypical of others’ schemas. In addition to being more extraverted, attractive people tend to be seen as higher in intelligence, although the actual correlation between attractiveness and intelligence is negligible. Perceptual measures of intelligence are more positively related to leader emergence than paper-and-pencil measures, indicating that those who are seen as intelligent are more likely to become leaders. Attractive people are also viewed as less self-serving when engaging in efforts to wield influence over others which suggests that people would be more receptive to their attempts to attain leadership positions.<sup>129</sup>

Likewise, to the extent that individuals are more likely to respond positively in interactions with more attractive people, the value of attractiveness may rise in work environments that are increasingly dominated by work teams.<sup>130</sup>

The point is—as many commentators acknowledge— aesthetics matters. From a practical perspective, many employers already acknowledge this fact.<sup>131</sup> Yet, instead of trying to artificially parse out job qualifications to determine when aesthetics is and is not a bona fide occupational qualification

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128. Judge et. al, *supra* note 99, at 750 (internal citations omitted).

129. *Id.* (internal citations omitted).

130. See Michael Boyer O’Leary, Mark Mortensen, & Anita Woolley, *Multiple Team Membership: A Theoretical Model of Its Effects on Productivity and Learning for Individuals, Teams*, MIT SLOAN SCHOOL WORKING PAPER 4752-09, at 2 (discussing the proliferation of workers who are members of multiple teams).

131. Adamitis, *supra* note 35, at 195 (“One survey of interviewers found appearance to be the single most important factor in employee selection for a wide variety of jobs”) (citing Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2040 (1987)).

(BFOQ)<sup>132</sup>—a task that could very quickly lead to *reductio ad absurdum*<sup>133</sup>—a more holistic view of an employee should be adopted.<sup>134</sup> In addition to what commentators refer to as “actual qualifications,” such as “a person’s intellectual merits”<sup>135</sup> and their “academic, career [and] personal accomplishments,”<sup>136</sup> employers should be able to take into consideration the value the employee can add because of the individual’s aesthetic appeal. For example, many commentators cite a study that showed more attractive attorneys make more money than less attractive

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132. A bona fide occupational qualification defense is an affirmative defense that an employer can raise after a plaintiff makes out a prima facie case of discrimination under Title VII or the ADEA. 29 U.S.C. § 623(f)(1) (2006); 42 U.S.C. § 2000e-2(e). The ADEA states that “[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.” 29 U.S.C. § 623(f)(1). Title VII provides that “it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e). Under the current framework, the court, not the employer defines the essence of the employer’s business and then determines if the discrimination is justified as being “*reasonably necessary* to the essence of his business.” *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985). An employer can prove this necessity by showing it has “reasonable cause to believe” that “all or substantially all” of the discriminated group “would be unable to perform . . . the duties of the job involved,” or that the discrimination served as a “legitimate proxy for the [ ] job qualifications . . . and that it is ‘impossible or highly impractical’ to deal with the [ ] employees on an individualized basis.” *Id.* at 414. Note however, that under the current state of the law, an employer would not necessarily have to resort to a BFOQ for a pure aesthetic-based claim because discrimination on the basis of aesthetics is not a protected class under federal law. *See, e.g.*, 29 U.S.C. § 623(f)(1); *see also* 42 U.S.C. § 2000e-2(e).

133. *See supra* notes 95–97 and accompanying text.

134. *See Avery & Crain, supra* note 13, at 19. Avery and Crain discuss the use of “branded service,” which is “the process of integrating the business image into the service itself through human resource policies.” *Id.* One method of delivering “branded service” is through the “‘transformation’ or ‘empowerment’ approach, [which] confers control over the work process by transforming the working into one whose personal characteristics, appearance, and values match the image that the company is seeking to project and market.” *Id.* at 20.

135. Gumin, *supra* note 10, at 1774.

136. Zakrzewski, *supra* note 68, at 434.

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classmates.<sup>137</sup> As the study suggests, even an attorney may be able to be more productive by being able to—quite literally— attract clients to a firm.<sup>138</sup>

While many argue against employers being able to extract value from an employee's aesthetics, it is interesting to note that aesthetics is similar to "*soft skills*, a term used by economic sociologists to refer to the personality, attitude, and behavior requirements for employment in service sector jobs" and to "emotional labor," which refers to aspects of jobs that require workers to enact particular emotional states in order to manipulate clients or customers."<sup>139</sup> Aesthetics, soft skills, and emotional labor each generally involve highly subjective assessments of value, "focus on the embodied characteristics of workers,"<sup>140</sup> and were originally "unrecognized and uncompensated" in the labor market.<sup>141</sup> However, unlike aesthetics, now "[m]uch of the sociological literature on emotional labor has argued for [soft skills and emotional labor's] recognition and compensation."<sup>142</sup> In fact, many employers now go to great lengths to nurture and develop the benefits of emotional labor for its benefit to the overall successful operation of a firm.<sup>143</sup> While the notions of soft skills and emotional labor may have their origins in prototypical customer service industry positions, both are now sought-after commodities across much of the labor force.<sup>144</sup>

While aesthetics may play a powerful implicit role in the employment context, it is time for that role to be legitimized. There are few—if any—individuals that would argue that the link

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137. Adamitis, *supra* note 35, 195 (citing Jeff Biddle & Daniel Hamermesh, *Beauty, Productivity and Discrimination: Lawyers' Looks and Lucre*, 16 J. LAB. ECON. 172, 185–90 (1998)).

138. *Id.* at 198.

139. Christine L. Williams & Catherine Connell, "*Looking Good and Sounding Right: Aesthetic Labor and Social Inequality in the Retail Industry*," 37 WORK AND OCCUPATIONS 349, 352 (2010) (emphasis in original).

140. *Id.*

141. *Id.* at 372.

142. *Id.* (citing NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* (New Press 2001)).

143. See, e.g., SENN DELANEY, *THE HUMAN OPERATING SYSTEM: AN OWNER'S MANUAL* (2011) (workbook used by a leading human capital consulting firm).

144. See, *client list*, SENN DELANEY 9 (last visited Oct. 14, 2012), available at [http://www.senndelaney.com/client\\_list.html](http://www.senndelaney.com/client_list.html).

between increased intelligence and higher wages should be severed.<sup>145</sup> Indeed, people can generally recognize the value and efficiency of allocating brainpower to its more productive uses.<sup>146</sup> As Barro asserts, however: “The same reasoning applies to physical appearance . . . it makes no sense to say that basing employment and wages on physical appearance is a form of discrimination, whereas basing them on intelligence is not. The two cases are fundamentally the same.”<sup>147</sup> Essentially, just as occurs for intelligence, “the market will generate a premium for beauty based on the values that customers and co-workers place on physical appearance in various fields.”<sup>148</sup> Like all employment relationships, the varying premiums generated by aesthetics will allow an attractive individual to demand a higher wage in particular areas (labor cost) and will also allow employers to capitalize on the surplus value that an attractive employee generates in excess of the labor cost.<sup>149</sup> Thus, a holistic view of labor—one that takes into consideration all of an employee’s desirable characteristic—can inure to the benefit of both an employee and an employer.<sup>150</sup>

Instead of having courts try to define what is the essence of an employer’s business for the purposes of a “business necessity” defense<sup>151</sup>—that is, when a business “sell[s] looks exclusively”<sup>152</sup>—

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145. See Barro, *supra* note 116, at 18.

146. *Id.*

147. *Id.*

148. *Id.*

149. See Stavros Mavroudeas & Alexis Ioannides, *Duration, Intensity and Productivity of Labour and the Distinction between Absolute and Relative Surplus-value*, 23 REVIEW OF POLITICAL ECONOMY 421, 421 (2011).

150. See Avery & Crain, *supra* note 13, at 31.

151. An employer can raise a business necessity defense against a disparate impact claim by showing that the “challenged practice is job related for the position in question and consistent with business necessity.” 42 U.S.C.A. § 2000e-2. Citing the landmark case of *Griggs v. Duke Power Co.*, the Supreme Court has affirmed that the “‘touchstone’ for disparate-impact liability is the lack of ‘business necessity,’” that is, the “employment practice . . . cannot be shown to be related to job performance.” *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). Further, as is the case with BFOQ, under the current state of the law, an employer would not necessarily have to resort to a business necessity defense for a pure aesthetic-based claim because discrimination on the basis of aesthetics is not a protected class under federal law. See *supra* note 132 and accompanying text.

152. Gumin, *supra* note 10, at 1771.

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courts should apply the normal deference that is afforded to companies regarding the management of their own internal affairs.<sup>153</sup> Though speaking about a different employment issue, Judge Frank Easterbrook observed that in some sense, “[e]verything the employer does is ‘integral’ to its business—why else do it?”<sup>154</sup> As one employment practitioner advocating for the mandatory submission of the business judgment rule jury instruction in all employment discrimination cases states, it must be clear to a “jury that the employer cannot be liable for exercising its business judgment—even if harsh, unreasonable, or irrational—provided the employer’s reasons were not discriminatory” under the specific categories protected by state and federal antidiscrimination law.<sup>155</sup>

In fact, the Supreme Court has acknowledged that “[t]he business necessity standard is more lenient for the employer than the statutory BFOQ defense.”<sup>156</sup> Employers are generally allowed to utilize an employment practice that may have a disparate impact if the employer can demonstrate its belief that the practice is related to job performance.<sup>157</sup> Courts will consider the cost and other burdens of a proposed alternative to a challenged practice in determining whether the alternative “would be equally as effective as the challenged practice in serving the employer’s legitimate business goals.”<sup>158</sup> Further, the Supreme Court has forthrightly acknowledged that “[i]n evaluating claims that discretionary

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153. *But cf.*, 42 U.S.C.A. § 12111 (“*consideration* shall be given to the employer’s judgment as to what functions of a job are essential”) (emphasis added). Under the ADA, only consideration, but not deference is afforded to an employer regarding what is an essential job function. *See id.*

154. Sec’y of Labor, U.S. Dep’t of Labor v. Lauritzen, 835 F.2d 1529, 1541 (7th Cir. 1987) (Easterbrook, J., concurring).

155. Robert L. Ortals, Jr., *The Case for A Business Judgment Instruction Under the Missouri Human Rights Act*, 64 J. MO. B. 182, 184 (2008).

156. In fact, the Supreme Court has acknowledged that “[t]he business necessity standard is more lenient for the employer than the statutory BFOQ defense.” Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991).

157. *See* James O. Pearson, Jr., Annotation, *What constitutes “business necessity” justifying employment practice prima facie discriminatory under Title VII of Civil Rights Act of 1964* (42 U.S.C.A. §§ 2000e et seq.), 36 A.L.R. FED. 9. The employer is not required to actually prove that the particular criteria will predict actual on-the-job performance. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989 (1988).

158. *Watson*, 487 U.S. at 998.

employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that courts are generally less competent than employers to restructure business practices and therefore should not attempt to do so.”<sup>159</sup>

This deference should largely be extended to how employers define what is the essence of their business, which is the first step in both BFOQ and business necessity analyses. One of the most significant cases of a court analyzing the essence of an employer's business is *Wilson v. Southwest Airlines Co.*<sup>160</sup> The case represents what I suggest is the danger of courts trying to define the essence of an employer's business. In *Wilson*, over one hundred men sued Southwest Airlines because the company openly refused to hire men for the high-customer contact positions of flight attendant and ticket agent.<sup>161</sup> Despite acknowledging that “[t]he evidence was *undisputed* that Southwest's unique, feminized image played and continues to play an important role in the airline's success,” the court ultimately rejected Southwest's “assertion that its females-only hiring policy is necessary for the continued success of its image and its business.”<sup>162</sup> Providing its own determination of the essence of Southwest's business, the court stated that, “[l]ike any other airline, Southwest's primary function is to transport passengers safely and quickly from one point to another.”<sup>163</sup>

Although not entirely foreclosing the potential validity of an argument based on customer preferences, the court asserted that “customer preference could be taken into account only when it is based on the company's inability to perform the primary function or service it offers.”<sup>164</sup> Such extreme subordination of the

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159. *Id.* at 999 (citing *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

160. 517 F. Supp. 292, 293 (N.D. Tex. 1981) (analyzing the essence of company's business for purposes of a BFOQ defense).

161. *Id.* at 295.

162. *Id.* (emphasis added). In an act of desperation, Southwest hired an advertising agency, Bloom Agency, to distinguish the company from its competitors. *Id.* at 294. Bloom came up with a “Love” campaign, which sought to differentiate Southwest from the traditional conservative airline image by projecting Southwest as the “personification of feminine youth and vitality.” *Id.*

163. *Id.* at 302.

164. *Id.* at 301 (internal quotations and citations omitted).

importance of customer preference runs afoul of one of the core principles of managerial philosophy summarized by the legendary management guru Peter Drucker, who stated aptly that: “The purpose of a business is to create a customer.”<sup>165</sup> Further, when courts try to impose their own view of a company’s business onto that employer, they create artificial and often inaccurate constraints.<sup>166</sup>

While Southwest was ultimately able to remain successful in the aftermath of the *Wilson* case, albeit with a reworking of its previous “Love” marketing scheme, had the suit come only a few years prior, the company’s outcome would have been entirely different.<sup>167</sup> As the *Wilson* court acknowledged, Southwest had been incorporated in 1967 and spent the first years of its corporate existence trying to combat legal challenges by its competitors to its entry into the Texas intrastate market.<sup>168</sup> “In December of

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165. PETER F. DRUCKER, *MANAGING FOR RESULTS: ECONOMIC TASKS AND RISK-TAKING DECISIONS* 117 (1964). See Theodore Levitt, *Marketing Myopia*, 1 HARV. BUS. REV. 1, 19 (1960) (arguing that businesses will do better in the end if they concentrate on meeting customers’ needs rather than focusing on selling products). In contrast, some argue that too much deference to customers would be against public policy. See Rhode, *supra* note 40, at 1065. Rhode asserts that Southern employers in the early civil rights era argued that hiring black employees would be bad for business because it would scare away other customers. *Id.* However, comparing the recognition of aesthetics as a valuable characteristic to the grotesque racism of the post-Civil War south is setting up a straw-man whose very establishment borders on offensive. See *id.* (comparing the hiring practices of Hooters and Southwest Airlines to the systematic refusal to hire blacks in the south after the Civil War).

166. See Corbett, *supra* note 11, at 647. In describing the *Wilson* case, Corbett notes that “[s]ome businesses build attractive individuals into their business identity . . . though the court rejected that argument as a matter of law, it was true as a matter of fact.” *Id.* (emphasis added). Additionally, most modern corporations are granted incorporation for intentionally vague business purposes, such as for “any lawful business.” Angela Schneeman, “Chapter 8: Incorporations,” *THE LAW OF CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS*, at 315 (2012). Thus, in so far as a statement of corporate purpose is to inform the public of the essence of the corporation’s business, the public should be deemed on notice that a given corporation could be engaged in *any* business. See *id.*

167. Ironically (or perhaps fortunately) it was the same maverick, never-surrender corporate personality that led Southwest to adopt its “Love” campaign that allowed the company to succeed after the fact. See KEVIN FREIBERG & JACKIE FREIBERG, *NUTS! SOUTHWEST AIRLINES’ CRAZY RECIPE FOR BUSINESS AND PERSONAL SUCCESS* 36–40 (1996).

168. *Wilson*, 517 F. Supp. at 293.

1970, Southwest had \$143 in the bank and was over \$100,000 in debt, though no aircraft had ever left the ground.”<sup>169</sup> The introduction of the “Love” campaign was, Southwest admits, in part an act of “desperation.”<sup>170</sup> However, it was a carefully calculated act to attract the type of customers that predominated the Texas intrastate market and who otherwise would travel with competitors.<sup>171</sup> Indeed, Southwest’s hiring decisions were, for all practical purposes, a necessity for the business to succeed at the time. However, if the plaintiffs in *Wilson* had filed suit merely nine years prior, there is a significant likelihood that the company might not have been able to overcome the burden that ruling would have then imposed.<sup>172</sup>

Additionally, while *Wilson* dealt with sex and accompanying sex appeal in the context of BFOQ for airline attendants and ticket agents, the court’s analysis of the proper weight to be afforded to customer preference and its imposed definition of business essence are alarming.<sup>173</sup> From a practical standpoint, would (and should) an employer first have to hire an individual and then wait for a particular negative outcome to occur before being able to be free to shape its hiring based on business necessity or BFOQ?<sup>174</sup> For example, in *Craft v. Metromedia, Inc.*, a woman was hired to be a co-anchor for a television news program.<sup>175</sup> Obviously, based on the fact that the company hired her, the company believed the anchor to be qualified. However, after almost half a year on the air, the company conducted follow-

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169. *Id.* at 294.

170. FREIBERG & FREIBERG, *supra* note 167, at 38.

171. *Id.*

172. *See id.* at 296 (indicating that the plaintiffs had filed suit prior to August 1980).

173. *Cf.* Gregory J. Kramer & Edwin A. Keller, Jr. *Give Me \$5 Chips, a Jack and Coke—Hold the Cleavage: A Look at Employee Issues in the Gaming Industry*, 7 GAMING L. REV. 335, 341 (2003) (discussing Hooters’ settlement with the EEOC to create gender-neutral positions at its restaurants after its practice of restricting the position of “Hooters Girls” to females was challenged and Hooters argued that being female was a BFOQ for the position).

174. *See, e.g.*, *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (employer not justified in rejecting promotion of woman to position based on fact that Latin American and Southeast Customers were reluctant to do business with a woman).

175. 766 F.2d 1205, 1208 (8th Cir. 1985).

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up research to evaluate how the news station's audience was responding to the anchor's performance.<sup>176</sup> The response to the anchor's appearance was "overwhelmingly negative" and the company subsequently moved the anchor to a different, off-air position, though with the same pay and benefits.<sup>177</sup> As part of its reasoning rejecting the anchor's claims of discrimination on the basis of sex, the court noted that the company's "reasonable appearance requirements were 'obviously critical' to [the company's] economic well-being."<sup>178</sup>

One has to wonder: if the *Craft* plaintiff's claim had been a pure aesthetic-based claim (presuming such a law were put in place), would the employer have had to wait until the plaintiff was unable to perform to the satisfaction of the audience, or would the employer have been empowered to exercise its judgment and determine that a more aesthetically pleasing anchor would be necessary to meet the demands of its audience? Provided compliance with all other antidiscrimination laws, based on the above scenario, I submit that it would be illogical to restrict an employer from exercising its judgment as to a potential employee's ability to perform based on aesthetics, *ex ante*, when the employer—as the Eighth Circuit found—is perfectly justified in making that same decision, *ex post*. Indeed, while some commentators suggest that a focus on aesthetics can contribute to inefficiencies in the workforce,<sup>179</sup> the above scenario shows how not empowering employers to discriminate (i.e. consider) on the basis of aesthetics undoubtedly would be tremendously inefficient.

## PART III

While I have argued that aesthetics should be a legitimate hiring criterion (across all fields and positions, not just "looks" positions) and that, like all other legitimate hiring criteria, the particular value, weight, and amount of consideration that

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176. *Id.* at 1208–09. This was done through "focus group" discussions moderated by a company representative. *Id.* at 1209.

177. *Id.*

178. *Id.* at 1215. The court also acknowledged that the "evidence shows a consistent concern by management over the appearance of all on-air personnel without regard to sex but with regard to the peculiar characteristics of each employee." *Id.* at 1213, n. 7.

179. See, e.g., Gumin, *supra* note 10, at 1774.

aesthetics should be afforded should largely be at the sole discretion and prerogative of employers, I do acknowledge the potential hazards of giving an employer complete and total unfettered discretion over all decisions in the employment context.<sup>180</sup>

Even if many employees are not aware of this fact,<sup>181</sup> the default rule in 49 out of 50 states is that all employment is at-will, wherein either party can terminate the relationship “for a good reason, a bad reason, or no reason at all.”<sup>182</sup> However, the significant caveat to that presumption is that the reason for the employer terminating the relationship cannot be one that violates local, state, or federal law.<sup>183</sup> Additionally, while the at-will doctrine is at times justified by its promotion of symmetry in the employment context (i.e. both the employer and the employee are at least theoretically on equal footing),<sup>184</sup> the doctrine cannot be analyzed outside of its practical import, and, at times, the relatively unequal balance of power between employers and their employees. In turn, by recognizing aesthetics as a legitimate employment criterion, a blind eye need not be turned to the manner in which employers take action based on that criterion.

Desiring individuals with certain qualities (e.g. naturally

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180. For a provocative, yet well-articulated piece that, as the title suggests, takes issue with the whole concept of antidiscrimination laws, see Richard A. Epstein, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992). Epstein's work is infused with his strong libertarian views and draws from the Lockean labor theory wherein individuals, as the exclusive owner of their own labor, should be free to utilize that labor as he or she sees fit. See *id.* at 20–58; see also, John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1590 (1992) (arguing that an unregulated market will actually eliminate discrimination).

181. See Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U.L. REV. 6, 7 (2002) (explaining that most employees are not aware that they are employees-at-will and terminable without cause).

182. Corbett, *supra* note 11, at 656. “Therefore, in every U.S. state except Montana, an employer does not have to offer good cause for termination unless the employee claims that the reason for termination constitutes a breach of contract, amounts to a tort, or violates a statute.” *Id.*

183. *Id.* Further, many recognize that there have been significant inroads over the years into the at-will doctrine that prevent employers from truly exercising complete control over employees. *Id.* at 657–58.

184. See, e.g., *Forrer v. Sears, Roebuck & Co.*, 153 N.W.2d 587, 589 (Wis. 1967).

blonde hair, blue eyes) could clearly have an inherently disparate impact against certain protected classes under Title VII. Further, allowing unfettered deference to an employer's aesthetic preferences could provide a backdoor way to unlawfully discriminate against protected classes. For example, an employer could try to assert that they honestly preferred the attractiveness of a particular race (or conversely, did not find a particular race attractive). However, irrespective of the honesty of the employer's personal preference, such discrimination would nonetheless run afoul of Title VII because it would be illegal discrimination on the basis of race.<sup>185</sup> Additionally, under such circumstances said employer would not be able to avail itself of a BFOQ defense.<sup>186</sup>

Proponents of an aesthetic antidiscrimination law argue that aesthetic discrimination can compound existing inequalities already suffered by protected classes.<sup>187</sup> One argument is that perceptions of what constitutes attractiveness are in part shaped by our surrounding culture and environment.<sup>188</sup> Accordingly, the argument follows that allowing employers to consider aesthetics will simply condone the imposition of the majority's view of attractiveness.<sup>189</sup> Thus, in an effort to gain acceptance (i.e. employment), members of the non-majority will be forced to "assimilate to dominant norms."<sup>190</sup> The exertion of such pressure could undoubtedly have adverse societal consequences, especially if an employer—like the one described in the paragraph above—imposed its attractiveness standards to exclude protected classes.<sup>191</sup>

Yet, even if aesthetics is treated as a legitimate hiring

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185. See 42 U.S.C.A. § 2000e et. seq.

186. Congress has not provided a BFOQ defense for discrimination on the basis of race.

187. See Rhode, *supra* note 40, at 1052.

188. Ritu Mahajan, Comment, *The Naked Truth: Appearance Discrimination, Employment, and the Law*, 14 *ASIAN AM. L.J.* 165, 167 (2007).

189. *Id.*

190. *Id.* at 174.

191. It is also important to highlight that similar arguments are raised in regard to standards of intelligence. See Roy Freedle, *How and Why Standardized Tests Systematically Underestimate African-Americans' True Verbal Ability and What to Do About It: Towards the Promotion of Two New Theories with Practical Applications*, 80 *ST. JOHN'S L. REV.* 183, 187 (2006). Freedle argues that standardized tests, including conventional intelligent quotient (IQ) tests, are biased against certain groups of minorities. *Id.*

criterion, the situation cannot get that ugly. By ensuring robust enforcement of the current statutory and common law protections, an appropriate balance can be struck that will be beneficial to both employees and employers.<sup>192</sup> Criticism that, if aesthetics was a completely valid criterion, then it would be difficult for employees to show that the particular aesthetic standard had a discriminatory impact, is largely a criticism of the general difficulties of proof that all plaintiff-employees have to bear in employment discrimination cases.<sup>193</sup>

However, opening up aesthetics as a legitimate hiring criterion could actually improve societal acceptance and norms by making employers see the aesthetic value that can transcend all protected classes. Even one of the staunchest proponents of aesthetic antidiscrimination protection notes:

[T]he globalization of mass media and information technology has brought an increasing convergence in standards of attractiveness.

Researchers on appearance have achieved a substantial measure of reliability through a “truth in consensus” method. In essence, subjects rate a photograph or an individual on a scale of attractiveness, and those ratings are then averaged to produce an overall assessment. *Such methods yield a strikingly high degree of consensus even among individuals of different sex, race, age, socioeconomic status, and cultural backgrounds.*<sup>194</sup>

This suggests a certain amount of objectivity in the evaluation

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192. In fact, this is what occurred in the Abercrombie & Fitch cases. See Lawrence E. Dube, *Court Sends Religious Bias Case to Trial: Employee Quit Over Retailer's "Look Policy,"* [2009] Daily Lab. Rep. (BNA) No. 211, at A-6 (Nov. 4, 2009) (discussing EEOC v. Abercrombie & Fitch Stores, Inc., No. 4:08CV1470 JCH, 2009 WL 3517578 (E.D. Mo. Oct. 26, 2009)). Thus, this shows that there are undoubtedly some benefits that have occurred because of lawsuits by some plaintiffs. See *id.* Abercrombie still hires for attractiveness, but does so through a very thorough diversity policy. *Id.*

193. See *e.g.*, Mahajan, *supra* note 188, at 177–80.

194. Rhode, *supra* note 40, at 1036 (citing LINDA A. JACKSON, PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES 4 (1992)(emphasis added); Patzer, *supra* note 122, at 5; Vicki Ritts, Miles Patterson & Mark E. Tubbs, *Expectations, Impressions, and Judgments of Physically Attractive Students: A Review*, 62 REV. EDUC. RES. 413, 414 (1992).

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of aesthetics. Of course, there will always be a degree of subjectivity in such an evaluation. However, just as there are different types of intelligence (e.g. logical-mathematical, linguistic, musical, etc.),<sup>195</sup> there are different types of features and characteristics that can be aesthetically pleasing (e.g. charming smile, clear skin). Just as all types of intelligence should be afforded their respective praise, so too should different types of aesthetic characteristics.

Giving full recognition to aesthetics as a legitimate employment criterion can inure to the benefit of employees by allowing individuals to extract a proper wage premium based on this characteristic and also to promote the celebration of aesthetic value across all protected classes. Additionally, employers will benefit by being more empowered to utilize the value of aesthetics for the benefit of their business. By being upfront and candid about their intent to take an employee's aesthetics into consideration, there will be less opportunity for employers to be sued under purely aesthetic-based claims.<sup>196</sup> Further, by informing employees that aesthetics is a legitimate criterion that will be taken into account, employers will be in a better position to protect themselves against retaliation claims.<sup>197</sup> Indeed, under antiretaliation provisions, a plaintiff does not necessarily have to succeed on the underlying discrimination claim in order to successfully pursue a retaliation claim.<sup>198</sup> A plaintiff need only establish a reasonable, good-faith belief that the employer's action violated either Title VII or the ADEA.<sup>199</sup> Thus, by recognizing the legitimacy of aesthetics as a valid criterion and then engaging in an effort to discuss how aesthetics will be taken into account on a

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195. See generally HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (2011). Indeed, between a mechanic that can fix anything in an automobile, a physician that can perform any surgery, a singer that can hit any note, a mathematician that can balance any equation—and the list goes on—is there really a truly objective measure of which is the most intelligent feat?

196. See *supra* Part I.

197. See Corbett, *supra* note 11, at 649–51. Under anti-retaliation clauses, retaliation claims are demonstrated by showing that the employee engaged in a protected activity, that the employer took adverse employment action against the employee, and that there is a causal connection between the protected activity and the adverse action. *Id.*

198. *Id.* at 650.

199. *Id.*

non-discriminatory, even-handed manner, employers can more adequately protect themselves from retaliation claims.

Further, such upfront discussion about the role aesthetics will play in the work environment can allow for a more candid and honest exchange between employers and employees. This can also inure to the benefit of employees that may be discharged for a purely aesthetic reason. Instead of forcing an employer to conjure up evidence to justify its decision, an employer's ability to take adverse employment action on the basis of aesthetics can reduce the amount of pretextual reasons the employer may otherwise give.<sup>200</sup> For example, the recent case of *Nelson v. James H. Knight DDS, P.C.*, highlights a perfect example of aesthetics playing a legitimate role in the employment context.<sup>201</sup> Although the Iowa Supreme Court altered its rationale with the superseding opinion of *Nelson II*, the underlying facts remained the same, providing an interesting example of someone fired for being too attractive, not for being too unattractive.<sup>202</sup> In *Nelson I*, a male dentist hired a

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200. See Rhode, *supra* note 40, at 1069 (discussing employers' reluctance to acknowledge unattractiveness as reason for employment action).

201. No. 11-1857, 2012 WL 6652747, at \*5 (Iowa Dec. 21, 2012) (hereinafter *Nelson I*), *withdrawn and superseded on rehearing by* 834 N.W.2d 64 (Iowa 2013) (hereinafter *Nelson II*). The Iowa Supreme Court granted rehearing and issued a superseding opinion in the case. Although, as Todd Pettys, Associate Dean at the University of Iowa College of Law notes, "[i]t's still not clear . . . exactly why the court agreed to rehear the case." O. Kay Henderson, *U-of-I Law Professor: Court's Second Ruling on "Too Attractive" Case "Curious"*, RADIO IOWA (July 12, 2013), <http://www.radioiowa.com/2013/07/12/u-of-i-law-professor-courts-second-ruling-on-too-attractive-case-curious>. Indeed, as Dean Pettys points out, "[n]one of the justices changed their vote." *Id.* However, one must suspect that the justices—being in a judicial election state—knew all too well the dangers of issuing an unpopular decision. See O. Kay Henderson, *National Report Tracks Spending in Iowa's 2012 Judicial Retention Election*, RADIO IOWA (Oct. 24, 2013), <http://www.radioiowa.com/2013/10/24/national-report-tracks-spending-in-iowas-2012-judicial-retention-election/> (discussing that three justices of the Iowa Supreme Court were voted off the bench as part of backlash from a decision legalizing same-sex marriage in Iowa).

202. *Nelson I*, 2012 WL 6652747, at \*5. Unfortunately, in *Nelson II*, the Iowa Supreme Court retreated from the simple and straightforward rationale of its previous opinion, by focusing on the dentist's wife's discontent with the nature of the relationship between the dentist and the assistant. 834 N.W.2d at 72. The majority, in dicta, suggested that it would be impermissible sex discrimination to take employment action "based on stereotypes related to the characteristics of . . . gender, including attributes of attractiveness." *Id.* at 77. In his concurrence, Chief Justice Mark Cady went so far as to suggest

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female dental assistant (the plaintiff).<sup>203</sup> The assistant worked for the dentist for over ten-and-a-half years, and, while the dentist had complained on several occasions that the assistant's "clothing was too tight and revealing and 'distracting,'" the dentist admitted that she "had not done anything wrong or inappropriate and that she was the best dental assistant he ever had."<sup>204</sup> Similarly, although the dentist had engaged in a few conversations via text and in-person that contained sexual content, the assistant admitted that the dentist "generally treated her with respect, and she believed him to be a person of high integrity . . . [whom she] considered [ ] to be a friend and father figure."<sup>205</sup> There was no allegation of sexual harassment in the case. However, the dentist fired the assistant, at his wife's request, because "he feared he would try to have an affair with her down the road if he did not fire her."<sup>206</sup> In short, the dentist found the assistant too attractive. However, rather than lie about the job performance of the "best dental assistant he ever had," the dentist could be upfront about his concern. In future cases, employers could utilize this reasoning and be upfront about aesthetic concerns to ensure there are no retaliation claims and no need to resort to pre-textual firing.<sup>207</sup>

Proponents of aesthetic antidiscrimination protection argue that there are tremendously dangerous costs to both society and individuals that are associated with the obsession and pursuit of attractiveness.<sup>208</sup> They argue, citing numerous studies and statistics, that obsession with appearance can lead to anxiety, low

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that, even in the absence of gender stereotyping, "an employer cannot legally fire an employee simply because the employer finds the employee too attractive or not attractive enough." *Id.* (Cady, C.J., specially concurring).

203. *Nelson I*, 2012 WL 6652747, at \*1.

204. *Id.* at \*1–\*2.

205. *Id.* at \*1.

206. *Id.* at \*2. The court noted that the dentist hired another female for the position. *Id.*

207. It is important to note that while the dentist in *Nelson I* may have been sexually attracted to the assistant, recognition of someone as aesthetically pleasing does not in any way have to be coextensive with a sexual desire. Individuals can recognize someone as aesthetically pleasing, like a work of art, without having to be sexually attracted to him or her. *But see Nelson II*, 834 N.W.2d at 77 (Cady, C.J., specially concurring) (suggesting that any decision based on attractiveness would be impermissible sex discrimination).

208. Rhode, *supra* note 40, at 1035–47.

self-esteem, and other psychological disorders, including depression.<sup>209</sup> Further, they point out the exorbitant sums of money that individuals spend on improving their appearances and the vast amount of time that is wasted in such pursuits.<sup>210</sup> But is preoccupation with intelligence any better? Take an example that is close to home. The competitive environment that surrounds law schools is well known. However, probably less well known is that:

While students enter law school suffering from clinical stress and depression at a rate that mirrors the national average . . . during the first year of law school [] [s]tudies have shown that law students suffer from clinical stress and depression at a rate that is three to four times higher than the national average . . . [and] that student stress rises steadily through the third year of law school.<sup>211</sup>

Yet, obsession with intelligence and academic performance to the point of developing unhealthy stress and other harmful consequences can begin, and often does, well before graduate school.<sup>212</sup> Though more thorough studies are needed, some estimates from doctors and students at high schools with high performance standards suggest that between 15 to 40 percent of students abuse amphetamines, like Adderall, as study aids without a prescription.<sup>213</sup> Abuse of such drugs can lead to depression, heart problems, and, for many, a path to addiction to harder substances like Percocet, OxyContin, and even heroin.<sup>214</sup> Additionally, the exponentially increasing amount of student debt racked up in pursuit of education has a profoundly negative impact not only on individual students, but on society as a whole.<sup>215</sup>

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209. *Id.* at 1040 and accompanying notes.

210. *Id.* at 1041–42 and accompanying notes.

211. HERBERT N. RAMY, *SUCCESSING IN LAW SCHOOL* 29 (2006) (citing Stephen B. Shanfield & G. Andrew H. Benjamin, *Psychiatric Distress in Law Students*, 35 J. LEGAL. EDUC. 65 n. 1 (1985)).

212. Alan Schwarz, *Risky Rise of the Good-Grade Pill*, *NEW YORK TIMES*, June 9, 2012, available at <http://www.nytimes.com/2012/06/10/education/seeking-academic-edge-teenagers-abuse-s>.

213. *Id.*

214. *Id.*

215. Charles M. Blow, *A Dangerous “New Normal” in College Debt*, *NYTIMES.COM*, Mar. 8, 2013, [http://www.nytimes.com/2013/03/09/opinion/blow-a-dangerous-new-normal-in-college-debt.html?\\_r=0](http://www.nytimes.com/2013/03/09/opinion/blow-a-dangerous-new-normal-in-college-debt.html?_r=0); John

## CONCLUSION

It is clear that there are dangers associated with obsession and blind pursuit of both attractiveness and intelligence. However, research shows that either characteristic can positively impact one's ability to succeed in life.<sup>216</sup> Yet, many of the proponents of aesthetic antidiscrimination protection can take solace in studies whose findings suggest that "the brainy are not necessarily at a disadvantage to the beautiful."<sup>217</sup> What this comment has sought to demonstrate is that both mind (intelligence) and body (aesthetics) should be considered relevant criteria for employment purposes. Both characteristics are—for better or for worse—partly controlled by the great birth lottery of luck. It is also important to remember that individuals do not necessarily remain what society may consider unattractive<sup>218</sup> or unintelligent<sup>219</sup> throughout life. Still, we should all take note that irrespective of one's attractiveness or intelligence, a high degree of confidence and self-worth can provide the same degree of success—at least financially speaking—as the lauded characteristics of attractiveness and intelligence.<sup>220</sup>

At the end of the day, employers should feel empowered to take an entirely holistic view of an employee into consideration in order to make decisions regarding the employee's actual and perceived value to the company. Individuals should recognize that there is a difference between someone's intrinsic value as a human being<sup>221</sup> versus their value to the particular demands of an

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Hechinger, *Overdue Student Loans Reach Record as U.S. Graduates Seek Jobs*, BLOOMBERG.COM, May 23, 2013, <http://www.bloomberg.com/news/2013-05-23/overdue-student-loans-reach-record-as-u-s-graduates-seek-jobs.html>.

216. See Judge et. al., *supra* note 99, at 749.

217. *Id.*

218. See, e.g., James Harris, *The Best Celebrity Yearbook Photos: George Clooney*, COMPLEXSTYLE, Feb. 6, 2013, <http://www.complex.com/style/2013/02/the-50-best-celebrity-yearbook-photos/george-clooney>.

219. See, e.g., *Biography: Richard Branson*, BIO.COM, <http://www.biography.com/people/richard-branson-9224520>.

220. See Judge et. al, *supra* note 99, at 749.

221. See IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 30, (James W. Ellington trans. 1785) (1993) (stating Kant's second categorical imperative: "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.").

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employer. Additionally, while an employer should be empowered to take both aesthetics and intelligence into account, the employer should still be respectful regarding their evaluations of employees. It is a misconception to assume that an employer cannot demand high, exacting standards from employees and still treat them with respect.<sup>222</sup> And, if we recognize all of the different types of value individuals can bring to the workforce and encourage and enforce that respect for all employees, it indeed will not get that ugly.

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222. See, e.g., FREIBERG & FREIBERG, *supra* note 167, at 315. “It’s very important to value people as individuals, not just employees . . . I don’t use the word *employees* very much, and I never use the word *management*. I just refer to the people of Southwest Airlines, and we really try to treat them as people and recognize each one’s individuality,” said Herb Kelleher, the former CEO of Southwest Airlines, whose policy of hiring attractive airline attendants many aesthetic antidiscrimination proponents have harshly criticized. *Id.*