THE PREVALENCE OF "LOOK"ISM IN HIRING DECISIONS: HOW FEDERAL LAW SHOULD BE AMENDED TO PREVENT APPEARANCE DISCRIMINATION IN THE WORKPLACE

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I. INTRODUCTION

The following is a hypothetical situation. Two friends, Julie and Claire, applied to work at Abercrombie & Fitch, a popular clothing store. Both girls were sophomores in college, had equivalent work experience, had fair skin, brown hair and blue eyes, and were approximately five feet, five inches tall. Despite their almost identical qualifications, Julie was hired to be a sales associate at Abercrombie while Claire was not. The reason? The hiring manager determined that Julie, who was widely considered to be an attractive woman, fit the “Abercrombie look,” while Claire, who was of average attractiveness, did not.

Is it illegal for Abercrombie to limit their hiring practices to good-looking people? Although there has not been a specific lawsuit against Abercrombie for this issue, it has largely been discussed, as recent lawsuits against Abercrombie have thrust the company’s general hiring practices into the spotlight.1 Several ex-employees of Abercrombie argue that they

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Even the clothing that Abercrombie requires its sales staff to wear has produced controversy. Abercrombie was recently sued by employees in California, who alleged that Abercrombie compelled its sales force only to wear clothing that Abercrombie was currently selling at full price. See The “Uniform” of the Retail Employee, DILLINGHAM & MURPHY ON THE JOB – EMPL. L. NEWSL., Aug. 15, 2003 at 2 available at

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were compelled to hire people based on their appearance—whether the applicant would “look good” in the clothes. Abercrombie wanted a sales force that effectively portrayed the image that Abercrombie was trying to sell—“all-American” and “cool, yet seductive.” As a result, the less attractive employees were either not hired, or were granted fewer hours than the attractive employees. Are those employees who have suffered appearance discrimination granted legal remedy in the American court system?

This Comment argues that federal law should be amended to include protections for height, weight, and appearance. It first provides rationale for treating immutable traits of appearance as a class protected under Title VII. Next, it examines Title VII and ADEA jurisprudence generally and determines whether Abercrombie’s alleged hiring practices are appropriate under the current law. It then examines the civil rights laws of Michigan, the District of Columbia, and Santa Cruz, California, which prevent certain types of appearance discrimination. Next, using these laws as models, this Comment describes the structure and enforcement of a law preventing appearance discrimination. Finally, this Comment explores the difficulties in expanding Title VII to include protections for the appearance-challenged, and presents possible solutions to these difficulties.

II. APPEARANCE DISCRIMINATION GENERALLY

An individual’s appearance is often the first thing that others notice. As such, it is a trait that is often used to judge and compare people.
Attractive people are generally viewed as being more intelligent, likeable, honest, and sensitive than their less attractive counterparts. These preconceived notions about appearance often develop at a very young age.

Appearance not only affects our social interactions with others, but impacts our ability to obtain employment. Studies have shown that attractive people are more successful at obtaining employment than their less attractive counterparts. In addition, evidence shows that attractive individuals enjoy greater opportunities at their places of employment.

Appearance and attractiveness are suspect qualifications upon which to base employment decisions and should therefore be protected from discrimination.

(2001) (discussing how weight-based discrimination began in America at the turn of the twentieth century, at the same time that scientific evidence began linking gluttony with certain medical problems).

6. See generally Elizabeth M. Adamitis, Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment, 75 WASH. L. REV. 195, 196–98 (2000) (discussing how perceptions of appearance can impact one’s social interaction as well as one’s employment potential); Facial Discrimination, supra note 5, at 2037–2038 (discussing the tendency of people to either consciously or subconsciously attribute negative personality traits to those who are physically unattractive).

7. For example, ABC News conducted a study showing that young children had preconceived notions of height and attractiveness. The results were as follows:

ABC News gave elementary school students a test, asking them to match a small, medium or large figure of a man with a series of words. The kids overwhelmingly linked the tall figure to the words strong, handsome and smart. The [sic] linked the short figure to the words sad, scared and weak. More than half of the kids also chose to link the short figure to the words, dumb, yucky and no friends.


8. See, e.g., Facial Discrimination, supra note 6, at 2040 (“One of the primary methods of assessing applicants for all levels of jobs is the personal interview, in which the applicant’s appearance is a central criterion”); Stossel, supra note 7 (describing an experiment in which the success of attractive job applicants was compared against that of unattractive applicants, where “[h]idden cameras captured interviewers being warmer and friendlier to the better looking applicants and being less friendly to the other applicants”).

9. See Adamitis, supra note 6, at 198 (“One study concluded that ‘plain’ people earned five to ten percent less than ‘average’ looking people, who in turn earned five percent less than ‘good-looking’ people.”); Stossel, supra note 7 (“Anna Kournikova is ranked 37th in women’s tennis, and has never won a major singles championship. So, why is it that Kournikova makes millions more dollars from endorsements than players ranked higher?”).

10. See, e.g., Adamitis, supra note 6, at 196 (suggested that states should adopt statutory protection for appearance to protect otherwise qualified applicants and employees from arbitrary and harmful discrimination, promote the practice of hiring and retaining employees based solely on relevant qualifications and criteria, and assist in repairing the inequities that result from the legitimizing of appearance discrimination in employment); Jane Byeff Korn, FAT, 77 B.U. L. REV. 25, 27 (1997) (arguing that anti-discrimination statutes protecting the disabled should be extended to protect the obese).
individual is being judged regarding an immutable characteristic that does not relate to the actual performance of the work at issue. Because appearance discrimination has the same harmful effect as gender, racial, religious, or national origin discrimination, it should also be prohibited by statute. Like gender, national origin, or religion, appearance should only be considered by employers when it is found to be a bona fide occupational qualification (BFOQ).

There are several arguments in favor of preventing appearance-based discrimination. One problem with allowing employers to hire individuals based on looks is that society will become more focused on appearance and less focused on academic, career, or personal accomplishments. People will compete for jobs not based on substantive factors, but on how attractive they are. This may result in a less-accomplished workforce. Attractiveness will be looked at as an accomplishment in itself.

Different cultures have historically held different standards for beauty. However, as Western culture spreads to other areas, these standards of beauty have been becoming more and more homogeneous. The workplace is becoming more and more international and American practices of preferring the attractive over the unattractive will likely spread to these areas that are highly influenced by American culture.

III. TITLE VII AND THE ADEA

Title VII of the Civil Rights Act of 1964 generally prevents employers

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11. But see Adamitis, supra note 6 at 197–198 (discussing how some employers consider appearance to be "a valid indicator of productivity, to the extent that productivity is measured by personal, customer, or coworker satisfaction."); Robert J. Barro, So You Want to Hire the Beautiful. Well, Why Not?, BUSINESS WEEK, Mar. 16, 1998, available at http://www.businessweek.com/1998/11/b3569031.htm (last visited Jan. 22, 2005) ("A worker's physical appearance, to the extent that it is valued by customers and co-workers, is as legitimate a job qualification as intelligence, dexterity, job experience, and personality."). These arguments, which cite customer satisfaction as one justification for using appearance as a hiring criterion, are addressed, infra Parts IV.B., VII.C.

12. See, e.g., Theran, supra note 5, at 113 (arguing that anti-discrimination laws should be expanded to prevent weight-based discrimination); Facial Discrimination, supra note 6 at 2035 (stating that appearance, like race and gender, is almost always an inappropriate employment criterion, and that "it is frequently used to make decisions based on personal dislike or prejudicial assumptions rather than actual merit").

13. Adamitis, supra note 6, at 221 (stating that the consideration of appearance in employment contexts is justified only when it is a BFOQ reasonably necessary to carry out the job function).

14. Leela Jacinto, Ouch! Western Beauty Norms Head East: Global One Vision of Beauty Heads East, ABC NEWS, (Nov. 14, 2003), at http://abcnews.go.com/International/print?id=84642 (describing how, as Western culture has spread to China, India, and Africa, the beauty norms for these areas has shifted to a taller, slimmer, and fairer standard).
from refusing to hire or promote individuals based on "race, color, religion, sex, or national origin." The Age Discrimination in Employment Act (ADEA) extends the protection of Title VII to prevent employers from refusing to hire or promote individuals based on age.

In a claim for discrimination under Title VII, a plaintiff must either show direct evidence of discrimination or provide circumstantial evidence that meets the requirements of a prima facie case. Direct evidence establishes the conclusion that unlawful discrimination was a motivating factor for the employment action. Direct evidence can include statements made by a manager that show illegal motive in employment decisions. For example, racial slurs made by a decision-maker are sufficient direct evidence of illegal motive to constitute a prima facie case of employment discrimination.

However, if the plaintiff can provide only circumstantial evidence of discrimination, she must establish a prima facie case under the McDonnell Douglas framework. This framework requires the plaintiff in an employment discrimination lawsuit to have evidentiary proof of the following: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances supporting an inference of discrimination.

15. 42 U.S.C. §§ 2000e-2(a)(1)-(2) (2000); see United Steelworkers of Am. v. Weber, 443 U.S. 193, 202–07 (1979) (presenting several senators' remarks that Congress's primary concern in enacting the prohibition against racial discrimination in Title VII was the economic disadvantages experienced by the African American population); see also Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("[S]ex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender."); Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1119–20 (9th Cir. 1998) (holding discrimination on the basis of membership in Hopi Indian tribe constitutes national origin discrimination).


17. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358–60 (1977) (illustrating several means through which a plaintiff can satisfy his burden in a Title VII case).


19. Id.

20. Miles v. M.N.C. Corp., 750 F.2d 867, 875–76 (11th Cir. 1985); see also LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 380 (6th Cir. 1993) (holding sufficient as direct evidence of employment discrimination a union decision-maker's repeated negative statements regarding older workers).


22. See id. at 802–05 (holding that, where an employer sought a mechanic, which was the complainant's trade, and continued to do so after complainant's rejection, and employer did not dispute complainant's qualifications, complainant proved prima facie case under
Once the plaintiff establishes a prima facie case of discrimination, the defendant must clearly set forth reasons for its actions, which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the challenged employment action.\textsuperscript{23} When the employer effectively shows nondiscriminatory reasons for its actions, the burden shifts back to the plaintiff to show, by a preponderance of the evidence, that the employer’s reasons are mere pretext.\textsuperscript{24}

IV. BFOQ EXCEPTIONS TO TITLE VII PROTECTIONS

A. BFOQs Generally

Despite the anti-discriminatory purposes of the ADEA and Title VII, both statutes allow employers to base hiring decisions on restricted characteristics in certain circumstances. Title VII contains an exception allowing an employer to base an employment decision on gender, religion, or national origin when such a classification is considered “a bona fide occupational qualification [‘BFOQ’] reasonably necessary to the normal operation of that particular business or enterprise . . . .”\textsuperscript{25} A BFOQ cannot be based on stereotypical assumptions about a particular class.\textsuperscript{26} In order for gender to be considered a BFOQ, the employer must have a factual basis to believe that all or substantially all of the excluded sex would not be able to perform the job safely and efficiently.\textsuperscript{27} Likewise, employer

\textsuperscript{23} McDonnell Douglas, 411 U.S. at 804; see also St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 517 (1993) (“It is important to note, however, that although the McDonnell Douglas presumption shifts the burden of production to the defendant, ‘[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.’” (internal citation omitted)).

\textsuperscript{24} McDonnell Douglas, 411 U.S. at 804; see also Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1084 (6th Cir. 1994) (“[T]he plaintiff is ‘required to show by a preponderance of the evidence either (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge.’” (internal citation omitted)).


\textsuperscript{26} International Union v. Johnson Controls, Inc., 499 U.S. 187, 206–07 (1991) (holding that gender was not an acceptable BFOQ where women were prevented from working in jobs involving a high risk of lead exposure unless they could provide documentation of infertility).

\textsuperscript{27} See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 333–34 (1977) (stating that sex cannot be a BFOQ if the exception is being claimed on the basis of a stereotypical characterization of the sexes); Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (holding that the telephone company failed to meet the burden of showing that switchman’s position came within exception to general prohibition where sex is bona fide occupational qualification reasonably necessary to normal operation of particular business or enterprise).

For an example of when a BFOQ involving gender was established, see Fesel v.
discrimination against or in favor of particular religions or nationalities cannot be based on employer preference, but must have a rational purpose. In theory, employers are not allowed at all to apply the BFOQ standard to racial characteristics. However, in practice, courts have allowed employers to use the BFOQ exception for situations involving race.

The ADEA recognizes a similar exception. To establish bona fide occupational qualification defense, the employer must establish that the job qualification is “reasonably necessary,” and that “either (a) . . . it had reasonable cause to believe that all or substantially all persons over the age qualification would be unable to perform safely the duties of the job, or (b)

28. See, e.g., EEOC v. Kamehameha Schools/Bishop Estate, 990 F.2d 458, 466–67 (9th Cir. 1993) (striking down a school’s requirement that all teachers be Protestant, because the Protestant faith could only be considered a BFOQ with regard to religious education instructors); Kern v. Dynlectron Corp., 577 F. Supp. 1196, 1203 (N.D. Tex. 1983) (holding that the requirement of pilot to convert to Moslem religion was a bona fide occupational qualification, which warranted employer’s religious discrimination because it reflected the fact that non-Moslem employees caught flying into Mecca would, under Saudi Arabian law, be beheaded).

29. Although Title VII contains BFOQ exceptions for gender, national origin, and religion, it does not contain a BFOQ exception for race or color. See Ray v. Univ. of Ark., 868 F. Supp. 1104, 1126–27 (E.D. Ark. 1994) (holding that the University was not justified in terminating a white police officer solely because some of the students at the predominantly black university were prejudiced against white officers).

30. See, e.g., Wittmer v. Peters, 87 F.3d 916, 921 (7th Cir. 1996) (holding that, because necessity for a black officer was shown, a county boot camp did not violate equal protection laws when it gave preference on racial grounds to a black applicant over other white applicants); Miller v. Tex. St. Bd. of Barber Exam’rs, 615 F.2d 650, 654 (5th Cir. 1980) (“A business necessity exception may also be appropriate in the selection of actors to play certain roles. For example, it is likely that a black actor could not appropriately portray George Wallace, and a white actor could not appropriately portray Martin Luther King, Jr.”); Baker v. City of St. Petersburg, 400 F.2d 294, 301 nn.10–11 (5th Cir. 1968) (citing examples of when it is acceptable for a police department to use race as a factor in determining officers’ assignments).


“It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.”

Id.
that it is highly impractical to deal with the older employees on an individualized basis." Therefore, like the BFOQ exception in Title VII, the ADEA exception can only be used where the characteristic is directly related to one’s ability to perform a particular job function.

The BFOQ is an affirmative defense in a Title VII discrimination suit. Therefore, in order for a BFOQ defense to apply, the employer must allege that he or she properly made an employment decision based on one of the protected classes.

B. Impact of Customer Preference

Courts have recognized customer preference exceptions in employment discrimination cases in the areas of religion, gender, and national origin. However, this exception was intended to be extremely limited in scope. Courts have held that it is generally inappropriate to

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32. W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 401 (1985); see also Trans World Airlines v. Thurston, 469 U.S. 111, 130 (1985) (holding that airline violated equal protection laws by not applying the same transfer policy for employees over sixty years-old); Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353, 369 (1985) (holding that a provision in the federal civil service statute requiring most federal fire fighters to retire at age fifty-five did not establish that age fifty-five was a bona fide occupational qualification for non-federal fire fighters).

33. See, e.g., Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 134 (3d Cir. 1996) (holding that in a disparate treatment case, the defendant’s affirmative defense must be that its policy, practice, or action is based on a BFOQ); Gately v. Massachusetts, 2 F.3d 1221, 1225–26 (1st Cir. 1993) (determining that the employer must show the characteristic at issue is reasonably necessary to the essence of its business).

34. See EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 748 (S.D. Fla. 1989) (holding that an employer did not have to prove a BFOQ defense in a case where the employer did not allege he refused to hire the plaintiff because of his national origin).

35. See Detroit Police Officers Ass’n v. Young, 446 F. Supp. 979, 1005 (E.D. Mich. 1978), rev’d on other grounds, 608 F.2d 671 (6th Cir. 1979) (recognizing that the legislature sanctioned limited customer preference exception in employment discrimination cases in the areas of religion, sex, and national origin, but not in the areas of race or color); Diaz v. Pan Am. World Airways, Inc., 311 F. Supp. 559, 569 (S.D. Fla. 1970), rev’d on other grounds, 442 F.2d 385 (5th Cir. 1971). Specifically, the court stated:

The clear import of this legislative history is that customer preference can provide a basis for an employer’s selecting employees on the basis of their sex where the preference is a legitimate one, related to differences in the ways in which the work will be performed by persons of different sexes, and the manner in which such performance will be received by the customer because of such differences.

Id.

36. Feder v. Bristol-Myers Squibb Co., 33 F. Supp. 2d 319, 333 n.114 (S.D.N.Y. 1999) ("The weight of authority is that customer antipathy to members of protected groups does not make membership in a more favored group a bona fide occupational qualification." (alterations in original)).
allow the preferences and prejudices of the customers to determine whether
gender discrimination would be appropriate.\textsuperscript{37} Despite the fact that the
public may be uncomfortable with a person of one gender working in a
position traditionally held by an individual of the opposite gender, this
should not prevent individuals from working in positions they are qualified
to hold.\textsuperscript{38} In addition, the pressure to appeal to an international clientele is
not sufficient to impose gender discrimination.\textsuperscript{39} "Though the United
States cannot impose standards of non-discriminatory conduct on other
nations through its legal system,... [n]o foreign nation can compel the non-
enforcement of Title VII here."\textsuperscript{40} Likewise, courts have refused to allow
employers to base employment decisions solely on consumers' racial
preferences.\textsuperscript{41}

It is appropriate for an entity to use customer interest as a clear
guideline for hiring purposes only when customer privacy is at issue\textsuperscript{42} and
when the entity is unduly burdened by a hiring decision that goes against
customer preference.\textsuperscript{43} These decisions often involve employment of

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\item \textsuperscript{37} See Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) ("Diaz
II") (stating that it would be inappropriate for a BFOQ to be based on the preferences of co-
workers, the employer, clients, or customers); Olsen v. Marriott Int'l., Inc., 75 F. Supp. 2d
1052, 1065 (D. Ariz. 1999) (recognizing that Ninth Circuit courts have rejected BFOQs
based on customer preference for members of one sex); Witt v. Sec'y of Labor, 397 F. Supp.
673, 678 (D. Me. 1975) (holding that discrimination on the basis of gender was
inappropriate, despite the fact that a beauty salon owner, whose customers preferred male
hairdressers over female hairdressers, would experience increased business if a male
hairdresser was hired).
\item \textsuperscript{38} See Diaz II, 442 F.2d at 389 (holding that an airline could not refuse to hire a male
flight attendant solely on the grounds that passengers preferred to be served by female
attendants); see also EEOC Decision No. 70-11 (July 8, 1969) (rejecting an unsupported
contention by an employer that he would lose customers if he hired a woman to perform the
work because the customers would feel that a woman could not provide the security needed
in performance of the work).
\item \textsuperscript{39} See Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1277 (9th Cir. 1981) (rejecting an
oil company's refusal to promote the female plaintiff based on the fact that its Latin
American clients would react negatively to a female executive).
\item \textsuperscript{40} Id.
\item \textsuperscript{41} See Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1181 (7th Cir. 1982) (holding that,
in determining whether to retain a white employee, the Higher Educational Aids Board
could not consider the preferences of its clientele for African American counselors).
\item \textsuperscript{42} See Backus v. Baptist Med. Ctr., 510 F. Supp. 1191, 1196 (E.D. Ark. 1981),
vacated on other grounds, 671 F.2d 1100 (8th Cir. 1982) (finding that a BFOQ was
established on privacy grounds, where a hospital's refusal to transfer a male nurse to the
labor and delivery department was based upon concern for the female patients for privacy
and personal dignity which makes it impossible for a male employee to perform the duties
of the position effectively); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1354
(D. Del. 1978) (upholding nursing home's refusal to hire a male nurse where the record
revealed that a majority of the home's residents were females who objected, on grounds of
privacy, to having their personal needs attended to by a male).
\item \textsuperscript{43} See Backus, 510 F. Supp. at 1196–97 (holding that hospital's refusal to hire male

health care workers who have close contact with clientele. In upholding the privacy BFOQ, courts have generally focused on whether the employment duties affect customers’ physical modesty interests. However, recent scholarship opposes the tendency of courts to focus on modesty, favoring instead a general three-pronged test to determine whether a privacy BFOQ exists.

The employer has the burden of meeting certain elements to show that its hiring practices protect the privacy of a customer. When an employer defends a gender discrimination action by raising the privacy interests of its customers as the basis for a BFOQ defense, the employer must prove (1) that it had a factual basis for believing that the hiring of any members of one sex would directly undermine the essence of the employer’s business and (2) that the employer could not assign responsibilities selectively in such a way that there would be minimal clash between the privacy interests of the patients and the nondiscrimination principle of Title VII. The employer must also show that this customer preference actually exists and is not just an assumption based on the gender composition of the customers.

V. DISPARATE IMPACT CLAIMS

The protections in Title VII also extend to facially neutral employment practices that have a discriminatory impact. Once the nurse was justified because adherence to the hospital’s policy, which required that a second nurse be present when a male nurse attended to a patient in the labor and delivery department, would cause strain upon the nursing staff, an increase in hospital costs, and a reduction in the hospital’s efficiency; see also Norwood v. Dale Maint. Sys., Inc., 590 F. Supp. 1410, 1417–23 (N.D. Ill. 1984) (upholding employer’s decision to restrict female attendants to working in female washrooms because employer established that occupants of the building would have objected to a member of the opposite sex entering their washrooms during the day to perform cleaning duties, that if the procedure were instituted it would detrimentally affect the building, and that no reasonable alternatives existed).

46. Id. at 363–64 (suggesting that three factors be required in determining that a privacy BFOQ exists: (1) the customer preference is for same-gender service, (2) the employment at issue implicates privacy or therapeutic interests that are gender related, and (3) the preference for same-gender service does not derive from harmful stereotypes).
47. Fesel, 447 F. Supp. at 1351.
48. Id. at 1350–51.
49. See EEOC Decision No. 71-2410 (June 5, 1971) (holding that, although three-quarters of the residents of a nursing home were female, the home’s practice of only hiring female nurses was not justified under the BFOQ exception because there was no evidence in the record that all of the female residents of the home shared this preference).
50. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that an employer cannot require high school diplomas or standardized general intelligence tests as conditions
employee successfully shows that an employment practice results in a discriminatory impact, the burden shifts to the employer to show that there is a business necessity for the practice.\textsuperscript{51} Business necessity is certainly not synonymous with "convenience,"\textsuperscript{52} and requires more than what is required of an employer to establish legitimate business purpose.\textsuperscript{53} Once the employer successfully shows business necessity,\textsuperscript{54} the plaintiff has an opportunity to rebut this claim by showing an alternative employment practice that would achieve this same business purpose.\textsuperscript{55}

The business necessity doctrine is distinguishable from the BFOQ exception in discrimination actions under disparate treatment.\textsuperscript{56} First, the BFOQ exception is a statutory exception applicable to overtly discriminatory practices, while the business necessity doctrine is a court-developed exception to the rule preventing discriminatory impact.\textsuperscript{57} Second, the BFOQ exception does not apply to racial discrimination, whereas business necessity can apply to all types of discrimination.\textsuperscript{58}

of employment where neither standard is significantly related to successful job performance, both conditions operate to disqualify African Americans at a higher rate than white applicants, and the jobs at issue formerly had been filled only by white employees as part of a longstanding discriminatory hiring practice).

\textsuperscript{51} Id.

\textsuperscript{52} See United States v. Jacksonville Terminal Co., 451 F.2d 418, 433 (5th Cir. 1971) (determining whether the Terminal showed a business necessity in its continued use of craft and class seniority systems, which had a disparate impact on African American employees).

\textsuperscript{53} See Griggs, 401 U.S. at 431–32 (rejecting the Court of Appeals’ holding that because a policy requiring a high school diploma serves the business purpose of improving the overall quality of the work force, such policy is justified despite the discriminatory impact against African Americans); see also Robinson v. Lorillard Corp., 444 F.2d 791, 796–98 (4th Cir. 1971) (stating that business purpose is concerned with the motive behind employment practice, whereas business necessity relates to the validity of such a practice under Title VII).

\textsuperscript{54} See Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 645–46 (1989) (holding that a facially neutral employment practice may be deemed to violate Title VII without evidence of the employer’s subjective intent to discriminate required in a disparate treatment case).

\textsuperscript{55} Richard A. Primus, \textit{Equal Protection and Disparate Impact: Round Three}, 117 HARV. L. REV. 493, 517 (2003) ("[T]he plaintiff may respond by suggesting an ‘alternative employment practice’ that would achieve the employer’s legitimate job-related aims as efficiently as the challenged practice but without causing a disparate impact."); see also Lee Franck, \textit{The Cost to Older Workers: How the ADEA has been Interpreted to Allow Employers to Fire Older Employees Based on Cost Concerns}, 76 S. CAL. L. REV. 1409, 1432 (2003) (discussing how the mechanism of disparate impact analysis is intended to achieve the same anti-discriminatory purposes as Title VII and the ADEA).

\textsuperscript{56} Despite the fact that these two doctrines are distinct, courts have sometimes applied the improper doctrine. \textit{See, e.g.}, Chastang v. Flynn & Emrich Co., 365 F. Supp. 957, 966–68 (D. Md. 1973) (using business necessity analysis in determining whether a retirement plan granting benefits for females to vest twice as quickly as benefits for men fell within the BFOQ exception).

\textsuperscript{57} \textit{See supra} text and accompanying notes 26, 51–57.

\textsuperscript{58} \textit{See discussion supra} notes 30–31.
Third, and most notably, the business necessity doctrine focuses on whether the facially neutral employment practice is necessary to the employer's business. Conversely, the focus in a BFOQ analysis centers on whether the requirement of a particular gender, religion, or national origin is necessary to the employer's business.

VI. TITLE VII DOES NOT RECOGNIZE "APPEARANCE-CHALLENGED" INDIVIDUALS AS A PROTECTED GROUP

As discussed above, Title VII was intended to protect employees from discrimination based on their race, color, gender, religion, or national origin. Title VII, however, was not intended to protect individuals from discrimination based on appearance or attractiveness. As long as attractiveness criteria are applied to different classes of people equally and do not result in disparate impact, the practice is not actionable. In addition, courts have found that employers generally have the right to mandate reasonable dress or grooming codes, as long as these requirements are applied equally to everyone. Therefore, under Title VII, employers are not restricted from making employment decisions based on appearance or attractiveness.

59. See supra text and accompanying note 55.
60. See discussion supra Part IV.
62. See Alam v. Reno Hilton Corp., 819 F. Supp. 905, 914 (D. Nev. 1993) ("No Court can be expected to create a standard on such vagaries as attractiveness or sexual appeal."); Malarkey v. Texaco, Inc., 559 F. Supp. 117, 122 (S.D.N.Y. 1982) (holding that although employer's alleged act of favoring more attractive women over less attractive women was abhorrent, it did not fall within the proscriptions of Title VII).
63. See Alam, 819 F. Supp. at 913–14 (holding that the defendant employer's practice of hiring individuals based on their sexual attractiveness was not actionable under Title VII).
64. See, e.g., Craft v. Metromedia, Inc., 766 F.2d 1205, 1215 (8th Cir. 1985) ("As television is a visual medium, television networks and local stations clearly have a right to require both male and female anchors to maintain a professional appearance while on camera."); Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028, 1032–33 (7th Cir. 1979) (holding that an employer can require all employees to wear sex-differentiated uniforms, but it cannot require only female employees to wear uniforms); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1125–26 (D.C. Cir. 1973) (upholding an employer's requirement that all male employees keep their hair short and neatly trimmed); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979) (holding that the defendant employer did not have to provide evidence showing the "business necessity" for having a dress code that prevented women employees from wearing pantsuits); Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763, 790 (D.D.C. 1973), vacated on other grounds, 567 F.2d 429 (1979) (holding that an airline cannot require only female employees to wear contact lenses).
A. Requirement that Violation Must be Against a Protected Class

In order for an individual to successfully argue appearance discrimination, this discrimination must also be in violation of a class protected by Title VII. Most often, these allegations touch upon either discrimination by gender or by national origin, and involve either attractiveness, height, or weight.

Gender-plus discrimination (also referred to as "sex-plus" discrimination) can be alleged when one experiences gender discrimination plus another type of discrimination. In order to demonstrate gender-plus discrimination, the plaintiff must argue that the employer’s actions were motivated by gender. In these circumstances, employees can successfully bring forth appearance discrimination suits. However, in situations where sex discrimination cannot exist, appearance discrimination is not actionable.

Discrimination based on height and weight can be argued by members of a protected gender or national origin class. Generally, it is a violation of Title VII to deny equal opportunity to persons who, as a class, tend to fall below national norms for height, where height is unnecessary to the performance of the job in question. For example, unnecessary height requirements are violative if they have a disproportionate effect on smaller-built ethnicities, such as Hispanics. In addition, these height requirements violate equal protection rights if they disproportionately impact women.

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66. See Barnes v. Costle, 561 F.2d 983, 989 n.49 (D.C. Cir. 1977) ("The vitiating sex factor . . . stemmed not from the fact that what appellant’s superior demanded was sexual activity . . . but from the fact that he imposed upon her tenure in her then position a condition which ostensibly he would not have fastened upon a male employee."); Tomkins v. Public Service Elec. & Gas Co., 568 F.2d 1044, 1047 n.4 (3d Cir. 1977) ("It is only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff 'had been a man she would not have been treated in the same manner.'"); King v. Palmer, 598 F. Supp. 65, 68 (D.D.C. 1984), rev’d on other grounds, 778 F.2d 878 (1985) ("[E]mployers may not explicitly apply different indicia of personal attractiveness to burden one gender more than the other.").

67. Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981) ("Sexual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII.").

68. See Malarkey v. Texaco, Inc., 559 F. Supp. 117, 122 (holding that when a female employee is in competition with only other women, an employer may choose a better-looking woman and not violate Title VII).

69. See, e.g., Guardians Ass’n of New York City Police Dep’t, Inc. v. CSC, 431 F. Supp. 526, 551 (S.D.N.Y. 1977), vacated and remanded, 562 F.2d 38 (2d Cir. 1977) (holding that evidence established that the 67-inch minimum height requirement of a police department had a racially disproportionate impact and was not job-related).

However, discrimination based on height is only violative of Title VII when a protected class has been infringed upon.\textsuperscript{71}

In addition, weight discrimination exists where there is violation of a protected class. For example, an employer violates Title VII protections if he or she enforces a minimum weight requirement in a disparate fashion, making exceptions for men, but not for women.\textsuperscript{72} However, weight discrimination alone is not protected under the language of Title VII.\textsuperscript{73}

\textbf{B. Permissible Discrimination Against Job Applicants Based on Attractiveness}

Under current federal law, Abercrombie's alleged practice of restricting its hiring to only attractive people is lawful. As long as Abercrombie respects the protections of Title VII and the ADEA, it is allowed to employ its sales force based exclusively on attractiveness. Abercrombie can even base its decision on height or weight, as long as equal burdens are imposed on all protected classes.\textsuperscript{74}

However, Abercrombie's hiring strategy would be unlawful if it violated classes protected by Title VII or the ADEA. For example, Abercrombie's practices would be violative of Title VII if it blatantly required high physical standards for women, but did not require these

\textsuperscript{71} See Costa v. Markey, 706 F.2d 1, 8 (1st Cir. 1983) (holding that a minimum height requirement did not constitute sex discrimination where it was used to select employees from an all-female hiring list, and Title VII did not provide a remedy since the sexes were not in competition).

\textsuperscript{72} See, e.g., Frank v. United Airlines, Inc., 216 F.3d 845, 855 (9th Cir. 2000) (holding that United Airlines' practice of using one set of weight tables for female flight attendants but another for male attendants was violative of Title VII, absent a showing that its use of different standards was a BFOQ); Meadows v. Ford Motor Co., 62 F.R.D. 98, 100 (W.D. Ky. 1973), judgment modified on other grounds, 510 F.2d 939 (6th Cir. 1975) (holding that although a 150 pound minimum weight requirement was neutral on its face, it had discriminatory impact upon women seeking to be employees).

\textsuperscript{73} Although weight is not a protected class under Title VII, obesity is considered a protected disability under the Americans with Disabilities Act. 42 U.S.C. § 12101, et seq. (2000).

\textsuperscript{74} See 29 A.L.R. Fed. 792, § 2 (stating that height and weight requirements are discriminatory only if they have disparate impact on groups protected in Title VII).
standards for men. In addition, if Abercrombie refused to hire applicants who they feel are “too old” for the brand, the company would be in direct violation of the ADEA. Moreover, plaintiffs can potentially make disparate impact claims if these attractiveness requirements inadvertently impacted protected classes.

VII. STATE LAWS PROHIBITING APPEARANCE-BASED EMPLOYMENT DECISION CAN SERVE AS A MODEL FOR FEDERAL LAWS

Some jurisdictions have laws specifically banning appearance from being considered in employment contexts. Michigan’s Elliot-Larsen Act (the Elliot-Larson Act) explicitly prevents discrimination on the basis of height and weight. The District of Columbia Human Rights Act goes even further by also preventing discrimination on the basis of appearance. Also, an ordinance passed by the City Council of Santa Cruz, California bans employment decisions based on physical characteristics. These laws and their application by the courts can serve as models for changes to Title VII.

A. Michigan Elliot-Larsen Civil Rights Act

The Elliot-Larsen Civil Rights Act prevents an employer from discriminating on the basis of “religion, race, color, national origin, age, sex, height, weight, familial status, or marital status.” Although the Act does not directly address the issue of attractiveness, it is important because, unlike Title VII, it explicitly addresses issues of height and weight, which are factors of appearance. As under Title VII claims, in order to recover under the Elliot-Larson Act, the claimant must either show direct evidence of discriminatory animus or show circumstantial evidence that meets the

75. Frank, 216 F.3d at 853.
77. See discussion supra Part V. While this is true of actions under Title VII, it is undecided whether disparate impact can be argued in claims under the ADEA. The Supreme Court will be deciding this issue in the upcoming year in the case of Smith v. City of Jackson, 124 S. Ct. 1724 (2004). Oral arguments were held on November 3, 2004. Id.
82. In addition, unlike Title VII, the Elliot-Larsen Act protects individuals on the basis of marital status. Mich. Comp. Laws § 37.2102.
requirements of a prima facie case. If the plaintiff produces direct evidence, he or she is not required to make a prima facie case. However, if the plaintiff can only provide circumstantial evidence, the *McDonnell Douglas* framework must be adhered to.

In order to recover, the plaintiff must show either through direct evidence or a prima facie case that height or weight discrimination is a "but for" cause of his or her termination. "[T]he Michigan Supreme Court made clear that the appropriate inquiry is whether [the employee's] termination would have occurred even if the Defendants had not considered [height or] weight." If termination would have occurred regardless of weight or height, the plaintiff cannot recover. However, the plaintiff does not need to prove employer discrimination against his or her height or weight was the sole reason or even the main reason for discharge.

At first glance, the protections of the Elliot-Larson Act may seem very similar to those granted by Title VII. Federal courts applying Title VII requirements have ruled in favor of claimants arguing discrimination of height and weight. However, these federal cases have required that the claimant show membership within a group explicitly protected by Title VII, usually gender, race, and/or ethnicity. Michigan's statute, however,
expands this protection, forbidding discrimination based on height and weight even when the claimant is not a member of a Title VII protected class.91

The Elliot-Larson Act, like Title VII, allows exceptions for bona fide occupational qualifications.92 The BFOQ exception in these cases applies when the defendant presents sufficient evidence showing that a height or weight requirement was reasonably necessary to the ordinary operation of business.93 For example, in *Ross v. Beaumont Hospitals*, the court held that it was reasonable for a fact-finder to dismiss the defendant’s claims that weight fell within the BFOQ exception.94 Although the defendant hospital produced evidence including doctors’ testimony that plaintiff’s weight prevented her from wearing the appropriate sterile gowns, the plaintiff countered that these same doctors continued to work with her in the operating room.95 In addition, plaintiff produced the testimony of several doctors stating that excessive weight did not prevent physicians from reaching into the depths of patients’ wounds.96

**B. The District of Columbia Human Rights Act**

Although the Elliot-Larsen is quite progressive, it still does not specifically address discrimination based on an individual’s appearance or attractiveness. Conversely, the District of Columbia recently enacted a statute, the District of Columbia Human Rights Act (D.C. Act), explicitly prohibiting appearance-based discrimination, in addition to prohibiting discrimination based on height, weight, and all classes of Title VII.97 Specifically, the Act prevents employers from discriminating on the basis

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91. See Micu v. City of Warren, 382 N.W.2d 823, 828 (“In [Dothard v. Rowlinson, 433 U.S. 321 (1977)], the height and weight requirements were disallowed because of their disparate impact upon a protected class, i.e., females. In Michigan, height itself is the protected characteristic.”).

92. MICH. COMP. LAWS § 37.2208 (2004) (“An employer may have a bona fide occupational qualification on the basis of religion, national origin, sex, age, or marital status, height and weight without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business.”).

93. See Micu, 382 N.W.2d at 828 (requiring that the case be remanded to determine whether the proposed height requirement was reasonable to ensure the proper and efficient running of a fire department).


95. Id.

96. Id.

97. District of Columbia Human Rights Act, D.C. CODE ANN. § 2-1402.11 (2001). The D.C. Act prevents discrimination based on based on “the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual....” Id.
of “personal appearance,” which the Act defines. The purpose of the D.C. Act is to protect from employment discrimination those who may not fall into the protected classes of Title VII.

Actions under the D.C. Act mimic those actions brought under Title VII with respect to the allocations of burdens of proof. As in Title VII actions, plaintiffs in actions under the D.C. Act always maintain the ultimate burden of proof in establishing unlawful discrimination practices.

An example of this burden-shifting can be seen in *Atlantic Richfield Co. v. District of Columbia Commission on Human Rights*, where the D.C. Court of Appeals affirmed the Commission’s finding that the plaintiff, Elisa Janetis, was discriminated against by her employer, ARCO, on the basis of her personal appearance. At the Commission’s hearing, the plaintiff presented sufficient evidence to constitute a prima facie case of discrimination. Specifically, Janetis showed that, although her clothes were similar to that of other similarly situated employees, she was singled out by ARCO for her appearance and behavior. Upon shifting the burden

98. D.C. CODE ANN. § 2-1401.02 (2001). The D.C. Act defines “personal appearance” as follows:

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

*Id.*

99. The purpose of the D.C. Act is as follows:

Aware that there were certain classes of persons whose characteristics placed them at a disadvantage in some segments of the labor market, e.g., persons with physical handicaps, unprepossessing appearance, homosexual proclivities, or burdensome domestic obligations, the Council decided to add persons thus afflicted as well as others to the list of categories protected against employer disfavor.


100. See *Atlantic Richfield Co. v. D.C. Comm’n on Human Rights*, 515 A.2d 1095, 1099 (D.C. Cir. 1986) (describing how the plaintiff’s burdens of proof for actions under the D.C. Act are the same as those required in actions brought under Title VII); see also McManus v. MCI Communications Corp., 748 A.2d 949, 955–57 (D.C. Cir. 2000) (holding that plaintiff failed to meet the burden of proof when she failed to show evidence that her manager’s comments about her appearance were malevolent, and failed to produce evidence that she was replaced by a candidate with a more favorable appearance); discussion supra Part III.


102. *Id.* at 1101.
to the defendants, the Commission found that ARCO's claim that Janetis violated standards of appropriate office attire was a legitimate nondiscriminatory reason for its actions. After the burden shifted back to Janetis, the Commission found that she properly showed that ARCO's claims were merely pretextual by providing evidence that her appearance was similar to that of her coworkers. Ultimately, the court of appeals upheld the Commission's finding that ARCO's complaints focused much less on the appropriateness of Janetis's work attire than on her physical structure and cost of the clothes in question.

Despite the D.C. Act's prohibition of appearance discrimination, employers can regulate employees' appearance in certain circumstances. The Act does not apply to appearance regulations that require cleanliness, uniforms, or prescribed standards. In order to fall within the "prescribed standard" exception, the employer must demonstrate (1) that there actually exists a prescribed standard; (2) that this standard is uniformly applied to a class of employees; and (3) there exists a reasonable business purpose for the prescribed standard.

In order for prescribed standards to be acceptable, they first must be sufficiently specific. Unwritten standards do not suffice. These regulations need not expressly state every appearance-based rule of the employer; so long as the interpretation is a reasonable and foreseeable interpretation of the policy, it is appropriate. For example, the D.C. Court of Appeals found it appropriate for an employer to prohibit males from wearing ponytails, even though the written policy did not expressly prevent the hairstyle. The employer's "no ponytail" rule was acceptable because it was universally applied and was a reasonable and foreseeable interpretation of its written requirement of a "neat hairstyle."

103. Id. at 1100. However, the Court of Appeals also noted the Commission's finding that ARCO failed to assert a legitimate, nondiscriminatory reason for termination because it did not have "a uniformly prescribed standard of dress applied for reasonable business purpose." Id.

104. Id. To illustrate its point, the Court of Appeals included the following statement made by the Commission: "the nature of Morgret's criticism of the complainant's personal appearance manifests a preoccupation with the complainant's physique and the cost of her clothes.' The character of the criticism progressed from comments about articles of attire to the comparison of her conduct with that of a prostitute." Id.


106. Turcios v. U.S. Servs. Indus., 680 A.2d 1023, 1027 (D.C. Cir. 1996); see also Kennedy v. Dist. of Columbia, 654 A.2d 847, 858 (D.C. Cir. 1994) (finding a fire department's grooming policy discriminatory because it was not universally applied).

107. Turcios, 680 A.2d at 1027.

108. Id.

109. Id. at 1027–28.

110. Id.

111. Id.
As stated above, for an employer to regulate appearance, prescribed standards must be uniformly applied and intended to promote a reasonable business purpose. For example, in Kennedy v. District of Columbia, the fire department prohibited firefighters from growing beards. However, there was an exception for men who had a skin condition, pseudofolliculitis barbae (razor bumps), because allowing the beard to grow is the most effective treatment for curing these lesions. The department maintained that the restrictions were put in place for reasonable business purposes: safety reasons with respect to the breathing apparatus as well as for morale purposes. However the department failed to produce sufficient evidence to show that well-trimmed beards would prevent the breathing apparatus from working properly. In addition, the court found that because the rule was applied inconsistently and improperly, it was regarded as "silly" by the firefighters, and thus failed to achieve its purpose of boosting morale. Although the court struck down this particular appearance regulation, it stressed that the department was free to develop a similar regulation limiting facial hair growth so long as it was universally applied.

Like Title VII and the Michigan Statute, the D.C. Act contains an exception to these protections, stating that an employer may use practices that have discriminatory impact on one of the protected classes only if the discrimination is unintentional, and if it is required by business necessity. Business necessity requires that an employer would be unable to carry out its business without using the specific employment practice. "[A] 'business necessity' exception cannot be justified by the facts of increased cost to business, business efficiency, the comparative characteristics of one group as opposed to another, the stereotyped characterization of one group as opposed to another, and the preferences of co-workers, employers, customers or any other person."

The business necessity exception differs from the reasonable business purpose standard listed above. First, the business necessity exception applies to all classes protected by the D.C. Act, while the reasonable

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113. Id. at 851.
114. Id. at 851 n.1.
115. Id. at 854–55.
116. Id. at 855–56.
117. Id.
118. Id. at 856–57.
119. D.C. CODE ANN. § 1-2503(a). The business necessity exception states, in part "[a]ny practice which has a discriminatory effect and which would otherwise be prohibited by this chapter shall not be deemed unlawful if it can be established that such practice is not intentionally devised or operated to contravene the prohibitions of this chapter and can be justified by business necessity." Id.
120. Id.
121. Id.
business purpose standard applies only to those individuals claiming appearance discrimination. Further, the reasonable business purpose standard applies only to cases where the employer has shown that the discrimination was the result of a prescribed standard.

C. Santa Cruz Ordinance

In 1992, the Santa Cruz City Council approved an ordinance intended to prevent discrimination based on “height, weight, physical characteristic, or sexual orientation” among other classes cited in Title VII protections. When this statute was first proposed, it was intended to prohibit discrimination based on “personal appearance.” However, in a location where many young adults took intentional and extreme steps to alter their image, the public responded harshly to the notion that personal appearance should be protected. In response, the legislature quickly altered the language of the ordinance to prevent discrimination against physical characteristics specifically, and not prevent discrimination against personal appearance generally. The language specifically protects individuals on the basis of characteristics that are derived from birth, accident, or disease.

122. See Turcios v. United States, 680 A.2d 1023, 1028–29 (D.C. Cir. 1996) (discussing the differences between these two concepts).
123. Id.
124. Santa Cruz, Cal., Mun. Code § 9.83.010 (1992). The intent of the ordinance is “to protect and safeguard the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight, or physical characteristic.” Id.
126. The public responded by deeming the law the “purple hair ordinance” or the “ugly ordinance.” Id. In addition, the following appeared in an article in the Washington Times:

Out in Santa Cruz, Calif., the weirdos are on the march double time. The City Council is considering enacting a law that would forbid discrimination on the basis of personal appearance. As a result, every geek in the country seems to be flying, flapping, crawling or hopping into town to squeak and gibber in support of this measure. If it passes next month, the city’s population may soon resemble nothing so much as the cast of a 1950’s drive-in horror movie. . . .

127. Post, supra note 125, at 6.
128. “Physical characteristic” is defined in the statute as:

a bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person including individual physical
The Santa Cruz ordinance contains a "reasonable business purpose" exception, similar to that in the D.C. Act. However, use of this exception is not justified "based upon the comparative characteristics of one group in contrast to another, or a stereotyped characterization of one group in contrast to another."  

VIII. PROPOSED AMENDMENT FOR PREVENTING APPEARANCE DISCRIMINATION

A. Expansion of Title VII

Title VII should be expanded to recognize appearance as a protected class. It has been argued that attempts to amend Title VII would be futile; that creating state laws would better achieve the goal of preventing appearance discrimination. However, reliance on state laws to attack the problem of appearance discrimination is unlikely to yield uniform results. For example, although an unattractive person may be protected from employment discrimination in the District of Columbia, this person would not be protected in Michigan unless the alleged discrimination relates to height, weight, or Title VII protections. Thus, if individual states are solely responsible for preventing appearance discrimination, citizens in certain areas are unlikely to receive equal protection, if any protection at all.

Although courts have noted that Title VII was not meant to protect mannerisms. Physical characteristic should not relate to those situations where a bodily condition or characteristic will present a danger to the health, welfare or safety of any individual.


129. Id. at § 9.83.080(1) ("[a]ny practice which has a discriminatory effect and which would otherwise be prohibited by this chapter shall not be deemed unlawful if it can be established that the practice is not intentionally devised to contravene the prohibitions of this chapter and can be justified by a reasonable business purpose.").

130. Id.

131. It has also been posited that the Americans with Disabilities Act (ADA) should be expanded to include the appearance-challenged. See Facial Discrimination, supra note 5, at 2042-43 (discussing how protection for appearance can be found in the Rehabilitation Act of 1973 (the precursor to the ADA)). For reasons against expanding the ADA to include this group, see Adamitis, supra note 6, at 216 (stating that the ADA would not provide sufficient protection because most victims of appearance discrimination would not fall under its requirements: employers would not view the unattractive as disabled, and individuals would have a difficult time showing substantial impairment).

132. See Adamitis, supra note 6, at 218-19 (citing the difficulties of expanding Title VII to include appearance as a protected class).

133. See discussion supra Part VII (noting how the laws of Michigan, District of Columbia, and Santa Cruz provide different levels of protection for their citizens).
individuals with respect to appearance, courts have generally aimed this criticism at protection of mutable traits, not on immutable ones. As the court in Willingham v. Macon Telegraph Publishing Co. stated,

Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer’s choice of how to run his business than to equality of employment opportunity. Based on this argument, it remains a possibility that Title VII protections may one day be expanded to include another immutable trait: appearance.

In addition, the fact that appearance-challenged individuals have faced significant discrimination, especially in the employment context, means that they should be protected by federal law. However, because the unattractive do not constitute a coherent, readily identifiable unit, there has been less desire to alter Title VII to include this group. Commentators have argued that because, as a class, the unattractive have not experienced the type of discrimination as other classes protected by Title VII, legislators would be loath to expand federal law. However, these arguments neglect two key points. First, the unattractive actually have faced systematic discrimination in the United States. Several cities once enforced “ugly laws,” which prevented disabled, physically maimed, or very unattractive people from appearing in public. It is certainly true, though, that

134. Garcia v. Gloor, 618 F.2d 264, 269–70 (5th Cir. 1980) (holding that, except with respect to religion, Title VII focuses mainly on characteristics that are beyond the victim’s power to control); Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (“Hair length is not immutable and . . . enjoys no constitutional protection. If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job.” (emphasis added)).

135. 507 F.2d at 1091.

136. See discussion supra Part II.

137. See Adamitis, supra note 6, at 219 (recognizing a “clear distinction” between the historical experiences of those currently protected by Title VII from those who suffer from appearance discrimination); Karl V. Mason, Employment Discrimination Against the Overweight, 15 U. Mich. J. L. Reform 337, 355 & n.101 (1982) (proposing that protection for the overweight should be contained in a separate statute, rather than an amendment to Title VII, because the overweight have not faced a history of purposeful discrimination like that faced by Title VII classes).

138. See supra text and accompanying note 5. “People who are regarded as unattractive are, for example, the only noncriminal, noncontagious group in America ever to have been barred by law from appearing in public.” Facial Discrimination, supra note 5, at 2035.
appearance discrimination has never risen to the level of racial
discrimination in United States history. Nonetheless, because the effects of
appearance discrimination likewise impair individuals' employment
opportunities (as discussed supra Part II), appearance should be a protected
trait under Title VII.

Second, these commentators' arguments point out differences between
appearance and other traits protected by Title VII, without recognizing that
differences also exist between traits within Title VII coverage. For
example, racial discrimination is fundamentally different from gender
discrimination, in that there exist actual biological differences between the
male and female genders that do not exist between different racial groups.
However, although the characteristics of, and resulting discrimination
against, gender are different from the characteristics of, and discrimination
against, race, both traits are protected under Title VII. Federal law
accounts for the difference in these traits and the prejudice against these
traits by prohibiting race, but not gender, from being used as a BFOQ.
Therefore, federal law has adjusted to the different needs of the Title VII
classes. Likewise, just because discrimination against appearance works
differently than prejudice against traits protected by Title VII does not
mean that appearance should not be protected. Instead, lawmakers should
include appearance as a protected trait under Title VII, in recognition that
appearance discrimination, as with other types of prejudice, impairs
employment opportunities.

B. Requirement of Immutability

The proposed law would protect the immutable aspects of appearance.
Each of the state and local laws mentioned above protect immutable traits
relating to appearance, but not those within the direct control of the
individual. For instance, Michigan recognizes height and weight as
protected traits, disregarding altogether the gray areas inherent in
preventing "appearance discrimination."\textsuperscript{139} In addition, the Santa Cruz
ordinance specifically states which types of physical traits are unacceptable
bases for an employer to consider.\textsuperscript{140} Although the D.C. statute
theoretically protects mutable characteristics, in practice this protection is
much weaker.\textsuperscript{141} Employers are free to regulate mutable characteristics so
long as the regulation is part of a written policy, applied uniformly, and
performed to achieve a reasonable business purpose.\textsuperscript{142}

\textsuperscript{139} See discussion supra Part VII.A. Although it is arguable whether weight is truly an
"immutable" characteristic, this Article considers it as such.
\textsuperscript{140} See supra text and accompanying note 128.
\textsuperscript{141} See discussion supra Part VII.B.
\textsuperscript{142} Id.
Not all aspects relating to appearance should be protected in a work environment. A statute protecting all aspects of appearance—especially those including self-expression—would be contradictory. Essentially, if an individual chooses to alter his appearance to express himself, how is it proper to force an employer to ignore this individual’s choice of self-expression? Imagine the public outcry against such a law. Instead, it is appropriate to protect individuals from discrimination based on characteristics that are immutable, so long as these qualities are not necessary to the performance of the job at issue.

In addition, if the aspect of appearance is to be placed on par with the other protected classes of Title VII, it is important that only immutable traits are considered. Protection for Title VII classes is based largely on the fact that certain persons experience discrimination through no fault of their own. These individuals are born with characteristics that place them at a disadvantage in the workplace and elsewhere. Therefore, granting protection for appearance traits that are fully within the control of the individual will undermine the entire purpose of Title VII.

C. Disparate Treatment

If these protections are to be embedded within Title VII, courts will use the same analysis in determining whether an employer has engaged in appearance discrimination. Essentially, the same burden-shifting requirements will exist, placing the ultimate burden of proof on the plaintiff. However, the plaintiff’s ability to effectively prove her case is complicated by the subjective nature of attractiveness and appearance.

Attractiveness and unattractiveness cannot be objectively measured. This differs from the qualities of other classes protected by employment law, which can be objectively measured. The issue of whether a person belongs to a particular protected class is usually fairly straightforward; the question of whether an individual belongs to a particular race, sex, or national origin is not open to nearly as much interpretation. Even certain

143. Post, supra note 125, at 5 (“The theme of self-expression... rests on the seemingly paradoxical notion that persons have the right both to use their appearance to communicate meanings, including messages of "threat," and simultaneously to require others to ignore these messages.”).
144. See supra text and accompanying note 126.
145. Although religion is not truly immutable, it is protected under Title VII possibly because “religion was originally seen as a status, like race and sex, and the problem of discrimination based upon belief or religious needs was not well thought through.” Steven D. Jamar, Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom, 40 N.Y.L. Sch. L. Rev. 719, 741 (1996).
146. See discussion supra Parts II, VIII.A.
147. See discussion supra Part III.
aspects within the realm of appearance can be objectively measured. For example, even though different people have different opinions as to what the "ideal weight" for the human body should be, the medical community has issued general guidelines categorizing people based on weight.\footnote{148} Therefore, there is an objective range in which most people consider individuals to be overweight or of normal weight. In contrast, the guidelines determining attractiveness are not as clear, and they rely on a number of different factors.\footnote{149} In addition, different people and different cultures have different opinions on what they perceive beauty to be.\footnote{150}

These issues of enforcement and subjectivity are especially important when considering how an employee alleging appearance discrimination is going to overcome her burden of proof. This problem comes into play mainly when an individual is only able to provide circumstantial evidence to support her case.\footnote{151} The subjectivity inherent in the qualities of attractiveness and appearance is problematic in proving employment discrimination via the \textit{McDonnell Douglas} framework. This problem of subjectivity is especially apparent in steps one and four of the test. How can one show that he or she is a member of a class of "unattractive people"? Further, how can one prove that the position at issue went to a person or persons who are not part of this class? Arguing appearance discrimination under the \textit{McDonnell Douglas} framework would essentially put the courts in the position of judging the parties' looks, not the validity of their legal arguments.

Although the subjectivity inherent in attractiveness seems problematic, courts are accustomed to making similar rulings. Courts have ruled on subjective areas in many types of cases, including those in tort, copyright, and trademark law.\footnote{152} For example, one area in tort law that has

\begin{footnotes}
\footnote{148} Body Mass Index Calculator, National Center for Chronic Disease Prevention and Health Promotion, \textit{available at} http://www.cdc.gov/nccdphp/dnpa/bmi/calc-bmi.htm (last reviewed Dec. 16, 2004) (outlining categories for the body mass index, the ratio between weight and height: a BMI under 18.5 is underweight, a BMI between 18.5 and 24.9 is normal weight, a BMI between 25 and 30 is overweight, and a BMI over 30 is obese).
\footnote{149} \textit{BeautyCheck}, \textit{at} http://www.uni-regensburg.de/Fakultaeten/phil_Fak_II/Psychologie/Psy_II/beautycheck/english/index.htm (last modified Sept. 6, 2003) (describing attractive faces as generally having clear skin, symmetry, and averaged features).
\footnote{150} \textit{See} Meg Gehrke, \textit{Is Beauty the Beast}, 4 S. CAL. REV. L. & WOMEN'S STUD. 221, 229 (1994) (describing how different cultures have distinct preferences in "height, weight, and prominence of features").
\footnote{151} This issue of subjectivity is not as problematic when an employee is able to provide direct evidence of appearance discrimination. In these circumstances, the employee can sufficiently meet her burden if she provides evidence that an employer has made statements disparaging the employee's appearance, which served as a motivating factor in the employee's discharge. \textit{See discussion supra Part III.}


received criticism for its inherent subjectivity is a court's application of the supposedly objective "reasonable person" standard. Subjectivity is also inherent in situations where fact-finders attempt to determine whether an author's work is original enough to be copyrighted. In addition, trademark infringement liability is based not on actual confusion, but a more subjective "likelihood of confusion" standard. Therefore, although judging a claimant's looks would be a task laced with subjectivity, courts are accustomed to this type of analysis.

In light of the fact that courts are accustomed to handling subjective issues, the application of the McDonnell Douglas framework for proving appearance discrimination is not as daunting as it first seems. Therefore, plaintiffs alleging appearance discrimination under the proposed law will be able to meet their initial burden of proof by presenting either direct or circumstantial evidence.

Under the proposed law, if the allegations against Abercrombie of "lookism" are true and Abercrombie admits to them, the company is likely to argue that attractiveness is a BFOQ. The company would probably maintain that it must limit its hiring to attractive people, because they represent the Abercrombie brand more effectively than their less attractive counterparts. People will want to buy Abercrombie clothes because the clothes look good on the sales force. In addition, many of these sales representatives attend local high schools and colleges. If these students are attractive, it is likely that they will draw other students in from those schools to purchase the clothing. Therefore, hiring attractive people is a good marketing strategy — one that is likely to bring Abercrombie greater profits than hiring average-looking people.

However, in order for appearance to be a BFOQ, the employer must show that the ability to carry out the necessary tasks lies solely with attractive people. In the context of the Abercrombie salesperson, it is highly difficult to argue that only an attractive person is capable of performing these job responsibilities. For example, the Abercrombie

What is dangerous is failing to recognize subjectivity and appropriately constraining it.


154. Julia Reytblat, Is Originality in Copyright Law a "Question of Law" or a "Question of Fact": The Fact Solution, 17 CARDOZO ARTS & ENT. L.J. 181, 181–82 (1999) (advocating the position that determination of originality is a "question of fact" because originality is an inherently subjective issue).

website lists the qualities they are looking for in a "Brand Representative." "We’re looking for Brand Representative[s] who have the following: an eye for quality and style; an appreciation for the A&F lifestyle: cool, casual, classic and fun; high energy and an interest in interacting with people-the ability to have fun." This job description fails to mention the necessity of hiring attractive people. In addition, the attractive and unattractive alike are capable of performing basic salesperson tasks: stocking shelves, greeting customers, and operating a cash register.

Under the proposed amendment, customer interest and preference could not be used in this scenario by Abercrombie to justify hiring individuals based on their looks. As mentioned in Part IV.B. above, customer preference can only be taken into account when doing otherwise would render the employer unable to perform the primary function or service it offers. Therefore, an employer can base his decision to hire an individual based on a customer’s perception of attractiveness if, and only if, that particular line of work requires an individual to look a certain way.

For example, the careers of models and actors are directly dependent on how they look; therefore, employers in these fields have greater range in using appearance in employment decisions.

D. Disparate Impact

Protections against appearance discrimination can also come into play in a disparate impact context. For example, it is alleged that Abercrombie had a policy requiring all employees to wear their brand-name clothing during all work hours. However, because Abercrombie clothing is only made in a particular set of sizes, overweight and obese individuals may not be able to fit into the clothing. Thus, although this policy is neutral on its face, it could potentially prevent certain people (i.e., overweight individuals) from obtaining or continuing employment.

If accused of violating the proposed law, Abercrombie may attempt to argue business necessity in this case. The business necessity rule requires

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158. See, e.g., Ford Modeling Agency web site, Frequently Asked Questions, at http://www.fordmodels.com/content.cfm?content_id=6&client_id=&client_email= (last visited on Jan. 22, 2005) (“What if I’m not tall and slim? Even if shorter models have found success in the modeling industry, these few represent the exception to the rule. Clothing for runway shows and magazine shoots tends to come in one size. If you can’t fit into a designer’s garments, you will face difficulty in finding work.”).
159. See Facial Discrimination, supra note 5, at 2046 (discussing how exceptions to appearance discrimination rules would apply to models and actors, “who perform clearly appearance-related work”).
160. See The “Uniform” of the Retail Employee, supra note 1.
that in order for an employer to factor appearance into its hiring decisions, appearance must be a necessary component of the job. For example, in this case, if Abercrombie is confronted by evidence that the uniform requirement disparately impacts a certain class of employees, Abercrombie must show that this uniform requirement is necessary to the operation of the business. It is unlikely that this requirement would be acceptable under the proposed law.

However, Abercrombie may successfully argue that a uniform requirement is necessary in the marketing and promotion of the product. In response, the plaintiff may be able to show that there exist alternative methods for carrying out this proposed purpose. One alternative method would be to split the duties of salesperson and model: one group could perform sales tasks, while another group could model the clothing. Therefore, although it would be entirely appropriate for Abercrombie to enforce “prescribed standards” of cleanliness and presentation (as in the D.C. Act), the proposed law would likely prohibit Abercrombie from requiring its sales force to wear its own brand-name clothing.

IX. THE DIFFICULTIES IN ADMINISTERING AN APPEARANCE-BLIND SYSTEM

Aside from the difficulties presented in the legal enforcement of this proposed amendment, cultural issues also work to prevent protection of appearance. Many people view attractiveness as a personal accomplishment; they assume that individuals can control the way they look. This viewpoint becomes more reasonable in light of the wide assortment of products and services available that promise to beautify, to slim, and to refresh one’s looks. For example, plastic surgery, which was once considered available only to the wealthy and famous, is now available to the public at large. In addition, the availability of gym memberships is at an all time high. Also, the number of makeup products and anti-aging

161. Primus, supra note 55, at 507.
162. See discussion supra Part V.
165. See Eric Harr, How to Pick the Perfect Gym, THIRD AGE, available at http://thirdagemedia.com/news/archive/ALT02030418-01.html?ta100 (last visited Jan. 22, 2005) (stating that, as of 2003, “over the past decade, the total number of health club members has increased a whopping seventy-six percent, from 17.4 million to 30.6
serums continues to grow, as the public (especially women) continue to purchase them.  

Even height, which at one time was only altered by an individual’s choice of footwear, is not truly considered an immutable characteristic anymore. A new surgical procedure has been developed to make people taller by a few inches.  

With all the cosmetic products, services, and techniques on the market, it is not surprising that people generally view one’s attractiveness to be attributed less to fortuitous genetics than to one’s desire to become more beautiful. Thus, the line between mutable and immutable characteristics becomes blurred, making it more difficult to draft and enforce laws targeted at protecting appearance traits that are immutable.

In addition, it is difficult to separate pure attractiveness from other mutable characteristics that determine how well a person will perform on the job. For example, it makes sense that an employer would want to hire an individual with good eye contact, an inviting smile, and a well-fitting suit.  

These traits may speak to an individual’s desire to have a job, and how well that person will perform in the position. However, it is difficult to determine how much these traits can be attributed to personal choice, versus how much they are attributable to one’s attractiveness.

Although it would be favorable for individuals to obtain employment based solely on their achievements and accomplishments and not on their looks, this is a very daunting task. An individual’s appearance is often the first thing that is noticed by others, making it a difficult characteristic for them to ignore. Moreover, the concepts of beauty, attractiveness, and appearance are so ingrained in members of our culture that it would be a difficult task to remove them altogether from the hiring process. However, laws prohibiting employment discrimination would not force employers to be blind to the appearance traits of employees and prospective hires – this would be an impossible task to require. Instead, protections for appearance

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167. Jacinto, supra note 14 (describing how, in order to make themselves a couple of inches taller, some Chinese women are undergoing debilitating surgery, which involves sawing one’s tibia just below the knee with a metal apparatus of levers and nails forcing the bone apart until it regenerates and heals).

should, like other Title VII protections, compel the employer to recognize that, although certain differences exist, these differences do not constitute sufficient grounds on which to base hiring decisions.169

On a final note, the difficulty of implementing appearance-blind protections should not serve as a barrier to this much-needed reform. In the recent past, our society has created statutory protection against discriminatory practices based on race, gender, religion, and national origin, despite the difficulty in doing so.170

X. CONCLUSION

Although Title VII effectively protects several classes of individuals against employment discrimination, it does not currently extend this protection to those who suffer appearance-based discrimination. Title VII must be expanded to prevent appearance-challenged individuals from suffering employment discrimination. Although the task of imposing appearance-based protections seems difficult, it is important to ensure that employment is obtained through hard work, not good looks.

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169. See Theran, supra note 5 at 135 ("[W]hile antidiscrimination law cannot and should not blind us to one another's appearances, it should require us to think very carefully about what criteria actually matter before making decisions that discriminate against others . . . ").

170. See Adamitis, supra note 6 at 222–23 (discussing how the enactment of Title VII challenged widespread societal notions of the classes it was intending to protect).