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APPEARANCE MATTERS: A PROPOSAL TO PROHIBIT APPEARANCE DISCRIMINATION IN EMPLOYMENT

Elizabeth M. Adamitis

Abstract: The consideration of appearance in employment decisionmaking context is prevalent and widely accepted. Nonetheless, statutory protection against such discrimination remains limited. Federal protection applies only to claims related to already-protected categories of discrimination, including disability, race, color, religion, sex, national origin, and age. Only one state and a small number of cities and counties explicitly prohibit appearance discrimination in employment. This Comment argues that consideration of appearance in employment decisions is not justified, rational, or beneficial to society unless a bona fide occupational qualification or reasonable business purpose exists. States should adopt statutory protection for appearance to protect otherwise qualified applicants and employees from arbitrary and harmful discrimination. This protection will promote the practice of hiring and retaining employees based solely on relevant qualifications and criteria. It also will assist in repairing the inequities that result from the legitimizing of appearance discrimination in employment, as well as in society as a whole.

*“An individual’s personal appearance may reflect, sustain, and nourish his personality and may well be used as a means of expressing his attitude and lifestyle.”*¹

One survey of interviewers found appearance to be the single most important factor in employee selection for a wide variety of jobs.² A study found that attractive attorneys earned more than their less attractive classmates after five years of practice, a gap that increased after fifteen years of practice.³ Society considers an attractive appearance to be a highly valued commodity. Indeed, good looks may translate into a better education, better job, bigger income, and generally a happier life.

Appearance is widely accepted as a legitimate consideration in employment matters. However, for most jobs appearance has no bearing on an individual’s ability to perform. Further, the focus on appearance serves to perpetuate and foster harmful societal inequities. Protection from appearance discrimination is extremely limited, with most remedies

1. Kelley v. Johnson, 425 U.S. 238, 250–51 (1976) (Marshall, J., dissenting).

2. See Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 Harv. L. Rev. 2035, 2040 (1987) (citing R. Gatewood et al., *Effects of Training on the Selection Interview* 17 (1985)).

3. See Jeff E. Biddle & Daniel S. Hamermesh, *Beauty, Productivity and Discrimination: Lawyers’ Looks and Lucre*, 16 J. Lab. Econ. 172, 185–90 (1998). “The evidence strongly suggests that beauty is not merely correlated with but actually causes differences in earnings.” *Id.* at 197.

restricted to suits implicating already-protected categories, such as disability, race, color, religion, sex, national origin, and age.⁴ Only Michigan⁵ and a limited number of cities and counties⁶ directly protect their citizens from varying types of appearance discrimination.

This Comment argues that states should add protection for appearance to their employment discrimination laws. Appearance discrimination is pervasive and harmful and has not been meaningfully curtailed by existing laws. States should protect applicants and employees from discrimination based on physical characteristics, and based on grooming and attire associated with disability, race, color, religion, sex, ethnicity, age, or of some other cultural or historical significance. Part I of this Comment discusses the existence and effect of appearance discrimination in employment. Part II explores currently available legal remedies for appearance-discrimination victims. Part III outlines the justification for protecting victims of appearance discrimination and describes the shortcomings and inapplicability of existing remedies. Finally, Part IV proposes a statutory framework for protecting appearance through state employment-discrimination laws and anticipates and responds to possible criticisms of such protection.

I. PREVALENCE OF APPEARANCE DISCRIMINATION IN EMPLOYMENT

A. *The Role of Beauty in Society*

Our society places an undeniable emphasis on the value of physical beauty.⁷ Despite popular belief to the contrary, evidence shows wide uniformity in people's perceptions of what constitutes beauty or

4. See, e.g., Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994) (age); Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) (disability); Civil Rights Act of 1866, 42 U.S.C. § 1981 (1994) (race); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994) (race); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994) (race, color, religion, sex, national origin); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117 (1994) (disability); Wash. Rev. Code § 49.60.180 (1998) (Washington's law against discrimination) (age, sex, race, creed, color, national origin, disability).

5. See Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. § 37.2202 (West 1999).

6. See, e.g., Santa Cruz Prohibition Against Discrimination, Santa Cruz, Cal., Code § 9.83 (1995); D.C. Code Ann. § 1-2512 (1981); Jane Byeff Korn, *Fat*, 77 B.U. L. Rev. 25, 28 n.17 (1997) (noting cities and counties prohibiting physical appearance-discrimination, including Urbana, Illinois; Madison, Wisconsin; and Howard County, Maryland).

7. See generally Meg Gehrke, *Is Beauty the Beast?*, 4 S. Cal. Rev. L. & Women's Stud. 221 (1994).

attractiveness.⁸ We commonly associate physical traits with perceived correlating qualities or characteristics.⁹ Attractiveness corresponds with attributes such as virtue, integrity, intelligence, sensitivity, kindness, and honesty,¹⁰ whereas excess weight or obesity corresponds with perceptions of laziness, lack of discipline, incompetence, lack of productivity, and slovenliness.¹¹ This attribution process is both legal and socially acceptable.¹² Its existence in early childhood and its extension into virtually every facet of and relationship in our adult lives exemplify its pervasiveness.¹³

B. *Appearance Discrimination in Employment*

Appearance discrimination in employment is likewise ubiquitous.¹⁴ Employers use appearance traits as indicators of employee worth or qualification.¹⁵ In fact, from an economic perspective, some argue appearance is a valid indicator of productivity, to the extent that produc-

8. See Gordon L. Patzer, *The Physical Attractiveness Phenomena* 15–17 (1985); see also Nancy Etcoff, *Survival of the Prettiest: The Science of Beauty* 137–39 (1999) (citing studies reflecting cultural and cross-cultural agreement on beauty); Gehrke, *supra* note 7, at 229–30 (noting different cultural preferences in regard to height, weight, and features, but “basic principles of beauty—namely, symmetry, balance and wholeness of form” consistent across cultures). Perceptions of beauty may even be innate. See Etcoff, *supra*, at 31–32 (describing study in which three- to six-month-old babies were shown slides of faces rated for attractiveness and stared significantly longer at faces deemed attractive regardless of sex, age, or race of individuals pictured).

9. See David L. Wiley, Comment, *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27 St. Mary’s L.J. 193, 201–03 & nn.31–39 (1995) (describing process of drawing inferences based on appearance and citing studies finding association of positive characteristics with attractiveness and negative characteristics with unattractiveness).

10. See Patzer, *supra* note 8, at 8; Gehrke, *supra* note 7, at 230–32.

11. See Esther D. Rothblum et al., *The Relationship Between Obesity, Employment Discrimination, and Employment-Related Victimization*, 37 J. Vocational Behav. 251, 252–53 (1990).

12. See Patzer, *supra* note 8, at 5 (noting that although public reaction to differential treatment based on attractiveness typically takes form of indifference, disagreement, or anger, the practice is widespread and extensively documented).

13. See *id.* at 9 (citing studies on infants, children, middle-aged, and elderly); Wiley, *supra* note 9, at 207–11 (citing studies on children, teachers, educational administrators, employers, doctors, constituents, lawyers, and juries showing preferences based on attractiveness).

14. Discrimination based on attractiveness may be more prevalent than discrimination based on race, sex, or religion. See Patzer, *supra* note 8, at 11; see also Note, *supra* note 2, at 2041 (citing study concluding it may be easier for thin African-American to find employment than overweight Caucasian).

15. See Patzer, *supra* note 8, at 1.

tivity is measured by personal, customer, or coworker satisfaction.¹⁶ Aside from characteristics already proscribed for consideration, employers generally retain discretion to consider whatever factors they deem important in their employment decisions.¹⁷ Employers routinely acknowledge the importance of an attractive appearance in employee selection.¹⁸ Given the immediate visibility of physical attributes, grooming, and attire, appearance often constitutes an employer's first impression of an applicant's employability.¹⁹

The results of numerous studies and surveys reflect the reality of appearance discrimination in employment. 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.²⁰ Another study found an eight- to twenty-percent increase in salary offers to applicants perceived as being more attractive.²¹ Forty percent of males and sixty percent of females considered overweight reported past incidences of employment discrimination because of their weight.²² A study found that overweight females had incomes averaging \$6710 less than non-overweight females, while short men had incomes averaging \$3037 less than men of average height.²³

16. See Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, Bus. Wk., Mar. 16, 1998, at 18. *But see infra* note 69.

17. See 1 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 197 (3d ed. 1996).

18. See *supra* note 2 and accompanying text; see also Wiley, *supra* note 9, at 209 n.60.

19. See generally Patzer, *supra* note 8, at 1. "[A] good deal of control over appearance is exercised at the hiring stage . . . [particularly] with respect to appearance characteristics that the employer assumes the applicant would not be able to change . . ." Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 Mich. L. Rev. 2541, 2551 (1994). Evidence suggests that most employment is obtained through direct contact with employers. See Bureau of Labor Statistics, 37 *Employment & Earnings* 34 (Gloria Peterson Green & Rosalie K. Epstein eds., Jan. 1990).

20. See Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, Am. Econ. Rev., Dec. 1994, at 1174, 1186.

21. See Patzer, *supra* note 8, at 109 (citing study).

22. See Christopher J. Martin, *Protecting Overweight Workers Against Discrimination: Is Disability or Appearance the Real Issue?*, 20 *Employee Rel. L.J.* 133, 134 (1994) (citing study). See also *infra* note 42 for definitions of overweight and obesity.

23. See Stephen L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, New Eng. J. Med., Sept. 30, 1993, at 1008, 1010-11; see also James D. Sargent & David. G. Blanchflower, *Obesity and Stature in Adolescence and Earnings in Young Adulthood*, *Archives of Pediatrics & Adolescent Med.*, July 1994, at 681, 683-84 (finding 10-centimeter increase in height raised males' earnings by 2.7% and females' earnings by 2%).

The legitimizing of appearance discrimination adversely impacts employment and society as a whole. Employers are free to use criteria not indicative of or correlated with satisfactory job performance. Appearance discrimination in employment validates appearance traits deemed socially acceptable and desirable and adversely impacts individuals who fall short of these standards. Appearance discrimination rests on stereotypical notions about particular appearances²⁴ and, especially for women, can result in preoccupation with appearance and associated disorders.²⁵ The impact of such discrimination is particularly relevant with respect to weight, given that overweight and obese individuals constitute between one-third and one-half of the U.S. population.²⁶ Appearance discrimination in employment is, thus, both common and harmful.

II. EXISTING LEGAL REMEDIES FOR APPEARANCE DISCRIMINATION

Recourse for appearance discrimination is limited. Unless a person resides within one of the few jurisdictions explicitly prohibiting appearance discrimination,²⁷ victims must be able to tie their appearance claims to an already-protected category. The Americans with Disabilities Act (ADA),²⁸ Title VII of the 1964 Civil Rights Act (Title VII),²⁹ and the Age Discrimination in Employment Act (ADEA),³⁰ which together prohibit discrimination based on disability, race, color, religion, sex, national origin, and age, are the most important federal employment discrimination laws.³¹ States, counties, and cities also protect their citizens from these and other types of discrimination.³² Discrimination

24. See *supra* Part I.A.

25. See *infra* notes 87, 147–52, and accompanying text.

26. See Christine L. Kuss, Comment, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under the Americans with Disabilities Act*, 12 J. Contemp. Health L. & Pol'y 563, 563–64 n.5 (1996); *Are We Really Getting Fatter?*, Bus. & Health, July 1998, at 12.

27. See *supra* notes 5–6 and accompanying text.

28. 42 U.S.C. §§ 12101–12213 (1994).

29. 42 U.S.C. §§ 2000e–2000e-17 (1994).

30. 29 U.S.C. §§ 621–634 (1994).

31. Claims may also arise under other federal laws, such as the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) (prohibiting disability discrimination by institutions receiving federal aid); the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1994) (prohibiting racial discrimination); and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994) (prohibiting racial discrimination).

32. State statutes typically mirror their federal counterparts. *But see infra* note 53.

claims generally involve either disparate treatment, where an employer intentionally treats an individual in a protected category differently than others,³³ or disparate impact, where some otherwise neutral pattern or practice adversely impacts members of a protected category.³⁴

A. *Appearance-Related Disability Discrimination Under the ADA*

When an appearance trait constitutes a disabling condition, the ADA may³⁵ provide relief.³⁶ The ADA prohibits discrimination against “qualified” disabled individuals, which the statute defines to include those who can perform essential job functions with or without reasonable accommodation.³⁷ To be disabled under the ADA, an individual must be substantially limited in a major life activity by a physical or mental impairment,³⁸ have a record of such an impairment,³⁹ or be perceived as

33. See Lindemann & Grossman, *supra* note 17, at 9.

34. See *id.* at 81–83 (noting that courts are split as to application of disparate impact under ADEA).

35. Employers may dispute an individual’s inclusion within the ADA; proffer a legitimate, nondiscriminatory reason for the employment action, see 29 C.F.R. § 1630.15(a) (1998); show that challenged selection criteria are job related and consistent with business necessity, and that performance could not be accomplished with reasonable accommodation, see 42 U.S.C. § 12113(a) (1994); 29 C.F.R. § 1630.15(b)(1)–(c) (1998); or show that required accommodation would impose an undue hardship, see 42 U.S.C. § 12112(b)(5)(A) (1994); 29 C.F.R. § 1630.15(d) (1998).

36. Given the ADA’s wide application to private employers with fifteen or more employees, see 42 U.S.C. § 12111(5)(A) (1994), this Comment focuses on the ADA instead of the Rehabilitation Act to discuss the available federal coverage for appearance-related claims through the filing of a disability discrimination claim. See *supra* note 31. Given the similarity between the ADA and the Rehabilitation Act, case law interpreting one statute is used in interpreting the other. See, e.g., Francis v. City of Meriden, 129 F.3d 281, 284 n.4 (2d Cir. 1997).

37. See 42 U.S.C. §§ 12111(8), 12112(a) (1994); 29 C.F.R. § 1630.2(n)–(o) (1998).

38. The Equal Employment Opportunity Commission (EEOC) enforces Title I of the ADA, see 42 U.S.C. §§ 12111–12117 (1994), and has authority to issue regulations and offer technical assistance on the subchapters for which they are responsible. See 42 U.S.C. §§ 12116, 12206(c)(1) (1994). *But see* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2145–46 (1999) (holding that no agency has been given authority over generally applicable ADA provisions, including meaning of “disability,” but declining to consider deference due to regulations and interpretative guidance in this respect). The EEOC defines the relevant “disability” terms as follows:

Substantially limits . . . means . . . [u]nable to perform . . . or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a . . . major life activity as compared to the . . . average person in the general population.

29 C.F.R. § 1630.2(j) (1998).

Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 C.F.R. § 1630.2(i) (1998).

impaired.⁴⁰ For example, an individual not hired as a sales representative because of the perception that a facial disfigurement will dissuade customers may find recourse under the ADA if perceived as impaired in the major life activity of working.⁴¹

Most appearance-related disability claims under the ADA thus far have considered whether an overweight or obese⁴² individual is “disabled.”⁴³ An ADA “impairment” does not include ordinary physical characteristics, height, weight, or muscle tone within “normal” range and not resulting from an underlying physiological condition.⁴⁴ An extreme deviation in height or weight or one resulting from an underlying

Physical . . . impairment means . . . any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

29 C.F.R. § 1630.2(h)(l) (1998). The EEOC has also issued interpretative guidance and a compliance manual. These documents do not command the degree of deference owed the regulations. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

39. *See* 29 C.F.R. § 1630.2(k) (1998) (defining as having “a history of, or ha[ving] been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities”).

40. *See* 29 C.F.R. § 1630.2(l) (1998) (including impairment that does not substantially limit major life activity but is treated as such; substantially limiting impairment solely as result of others’ attitudes; or no impairment, but treatment as though there was substantially limiting impairment); *see also Sutton*, 119 S. Ct. at 2149–52.

41. *See, e.g., Hodgdon v. Mt. Mansfield Co.*, 624 A.2d 1122, 1131–32 (Vt. 1992) (finding chambermaid lacking upper teeth regarded as substantially limited in working under state law because she was perceived to be unfit to be seen by guests); EEOC, *Definition of the Term “Disability,” reprinted in Disability Discrimination* § 902.8(d), at 902–48 (1998) (new section to *EEOC Compliance Manual*, Vol. 2 (Mar. 1995)) (giving example of prominent facial scar). A substantial limitation in working requires a significant restriction in performing “either a class of jobs or a broad range of jobs . . . as compared to the average person having comparable training, skills and abilities” as opposed to a “single, particular job.” 29 C.F.R. § 1630 (j)(3) (1998); *see also Sutton*, 119 S. Ct. at 2151.

42. Obesity is defined generally as a weight thirty percent or more over the norm for one’s height. *The Merck Manual of Diagnosis and Therapy* 58 (Mark H. Beers et al. eds., 17th ed. 1999). In this Comment, “overweight” will refer generally to a weight over the norm for a person’s height.

43. *See* Gregory B. Reilly, *Employees’ Personal Appearance*, 11 Lab. Law. 261, 268–69 (1995).

44. *See* 29 C.F.R. app. § 1630.2(h) (1998) (giving examples of eye color, hair color, or left-handedness as ordinary physical characteristics). The Supreme Court recently noted that the ADA allows employers to prefer certain physical attributes, including height or build, and establish physical criteria, so long as they do not make decisions based on real or imagined substantially limiting impairments. *See Sutton*, 119 S. Ct. at 2150.

disorder may constitute an impairment,⁴⁵ but obesity qualifies only in rare circumstances.⁴⁶ The Equal Employment Opportunity Commission (EEOC) has noted that severe obesity qualifies as an impairment and that an obese individual suffering from an underlying or resultant physiological disorder, such as hypertension or a thyroid condition, is similarly impaired.⁴⁷ Such individuals would still have to show, however, that the obesity substantially limited, had a record of substantially limiting, or was regarded as substantially limiting a major life activity.⁴⁸

Courts entertaining ADA obesity-discrimination claims have taken different approaches and reached different conclusions.⁴⁹ In *Cook v. Rhode Island*,⁵⁰ the First Circuit concluded that an applicant's morbid obesity was a disabling impairment⁵¹ and that the employer regarded her as substantially limited in working in a broad range of jobs.⁵² However, in the majority of reported cases,⁵³ courts have declined to find obesity a disability, particularly in the absence of any associated physiological condition.⁵⁴ In *Cassista v. Community Foods, Inc.*,⁵⁵ the Supreme Court

45. See EEOC, *supra* note 41, § 902.2(c)(5), at 902-11. Compare *Dexler v. Tisch*, 660 F. Supp. 1418, 1425 (D. Conn. 1987) (finding four-foot-five-inch-tall man with achondroplastic dwarfism impaired under ADA), with *American Motors Corp. v. Labor & Indus. Review Comm'n*, 350 N.W.2d 120, 121 (Wis. 1984) (concluding four-foot-ten-inch-tall stature not result of underlying condition, not impairment under state law).

46. See 29 C.F.R. app. § 1630.2(j) (1998).

47. See EEOC, *supra* note 41, § 902.2(c)(5)(ii), at 902-12.

48. See *id.* at 902-13 n.16.

49. See Korn, *supra* note 6, at 40-68.

50. 10 F.3d 17 (1st Cir. 1993).

51. See *id.* at 23.

52. See *id.* at 26.

53. Many cases involve state laws that vary in their definitions of disability. For example, Washington's law against discrimination, Wash. Rev. Code § 49.60.180 (1998), protects individuals disabled by a "sensory, mental, or physical condition if . . . discriminated against because of the condition and the condition is abnormal." Wash. Admin. Code § 162-22-040(1)(a) (1999) (emphasis added). See, e.g., *Doe v. Boeing Co.*, 121 Wash. 2d 8, 17-18, 846 P.2d 531, 536 (1993); see also *infra* note 57 and accompanying text. The Supreme Court of North Dakota determined that because disability had not been defined, it would be construed in its ordinary sense to mean either a condition that hindered, impeded, or incapacitated, or a disadvantage making achievement unusually difficult, particularly where it limited a capacity to work. See *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 796 (N.D. 1987) (finding 300-pound woman not disabled because her weight was not disability and there was no underlying physical condition). Other state laws fail to cover perceived disabilities or appear to exclude individuals mistakenly perceived as disabled. See Michael D. Moberly, *Perception or Reality?: Some Reflections on the Interpretation of Disability Discrimination Statutes*, 13 Hofstra Lab. L.J. 345, 347-48 (1996).

54. See Korn, *supra* note 6, at 40 & n.107. Compare *Civil Serv. Comm'n v. Pennsylvania Human Relations Comm'n*, 591 A.2d 281, 283-84 (Pa. 1991) (holding obesity was not handicap under

of California held a plaintiff's severe obesity was not a disability because it did not result from a physiological condition or disorder.⁵⁶ In *Greene v. Union Pacific Railroad Co.*,⁵⁷ a federal district court found that an individual's morbid obesity was not a disability under Washington state law because his condition was mutable.⁵⁸ In *Smaw v. Virginia Department of State Police*,⁵⁹ a federal district court held that an obese employee who was demoted failed to prove a substantial limitation in working or a perception of a disability.⁶⁰ In general, while overweight-to-moderately-obese individuals will not be found impaired unless they are perceived as disabled,⁶¹ severely obese individuals or individuals overweight or obese from an underlying physiological disorder might succeed in a claim under the ADA.⁶²

B. Appearance-Related Discrimination Under Title VII and the ADEA

Appearance-discrimination claims also may constitute discrimination based on protected categories under Title VII or the ADEA. Taken together, these statutes protect individuals from discrimination based on race, color, religion, sex, national origin, and age.⁶³ In addition to physical characteristics, these claims may involve grooming or attire.

The success of an appearance discrimination claim implicating one or more of these protected categories will depend upon the circumstances and the availability of a defense. Courts will generally attempt to balance

Pennsylvania law if it was not physiological disorder, cosmetic disfigurement, or anatomical loss affecting major body system), *with State Div. of Human Rights v. Xerox Corp.*, 480 N.E.2d 695, 698 (N.Y. 1991) (determining that clinically diagnosed obesity was impairment under New York law).

55. 856 P.2d 1143 (Cal. 1993).

56. *See id.* at 1153.

57. 548 F. Supp. 3 (W.D. Wash. 1981).

58. *See id.* at 5.

59. 862 F. Supp. 1469 (E.D. Va. 1994).

60. *See id.* at 1475.

61. *See, e.g., Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (holding that physical characteristics not resulting from physiological disorders are not disabling impairments; finding firefighter failed to allege he had disabling impairment as defined under act and that employer believed weight condition constituted disabling impairment); *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (finding flight attendant who exceeded weight guidelines due to body building not impaired, given that she was only excluded from single job, her condition was voluntary, and it did not stem from underlying condition).

62. *See, e.g., Cook v. Rhode Island*, 10 F.3d 17 (1st Cir. 1993).

63. *See supra* note 4.

the applicant or employee's interests against the interests of the employer.⁶⁴ With grooming or attire cases, deference may be given to employers' managerial discretion and to attempts to minimize the burdens or barriers imposed on employees.⁶⁵ With intentional discrimination based on religion, sex, national origin, and age, an employer may assert a "bona fide occupational qualification" (bfoq) reasonably necessary to the normal operations of employers' business.⁶⁶ An employer may demonstrate an inability to provide reasonable accommodation for a religious observance or practice without undue hardship.⁶⁷ With disparate impact claims based on race, color, religion, sex, or national origin, employers may prove that the challenged policy or practice is job related and consistent with business necessity.⁶⁸ As a general rule, however, employers may not justify their appearance-related objections based on customer preference.⁶⁹

1. *Appearance Attributes Associated with Race, Color, Religion, and National Origin*

Discrimination based on physical characteristics, grooming, or attire, associated with race, color, religion, or national origin may be actionable under Title VII.⁷⁰ The viability of claims based on immutable appearance attributes depends on an employer's ability to establish a reasonable-

64. See Reilly, *supra* note 43, at 263.

65. This is particularly true with sex discrimination. See Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 New Eng. L. Rev. 1395, 1418-19 (1992); Reilly, *supra* note 43, at 267-68.

66. 29 U.S.C. § 623(f)(1) (1994); 42 U.S.C. § 2000e-2(e) (1994). There is generally no bfoq for race or color. See Lindemann & Grossman, *supra* note 17, at 350. The bfoq defense is both narrowly written and construed. See *id.* at 382, 394, 616; see also *Western Air Lines Inc. v. Criswell*, 472 U.S. 400, 412-14 (1985) (finding bfoq must be reasonably necessary to business and employer compelled to rely on it as proxy); *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996) (noting bfoq applicable only where within "essence" of business or when essence would be undermined in its absence).

67. See 42 U.S.C. § 2000e(j) (1994).

68. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

69. See Reilly, *supra* note 43, at 263 n.8; see also 29 C.F.R. § 1604.2(a)(1)(iii), (a)(2) (1998) (providing no bfoq based on preference of coworkers, employer, clients, or customers; for authenticity or genuineness will consider sex bfoq); *Gerdom v. Continental Airlines Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (noting gender discrimination based on customer preferences unrelated to job performance cannot be upheld and invalidating policy requiring only female flight attendants to comply with weight parameters); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (denying gender as bfoq for position requiring work with international clientele).

70. See generally Klare, *supra* note 65; Reilly, *supra* note 43.

business-necessity defense.⁷¹ A number of cases involve psuedo-folliculitis barbae (PFB), which inhibits face shaving and disproportionately affects African-Americans.⁷² In *Fitzpatrick v. City of Atlanta*,⁷³ the Eleventh Circuit upheld a no-beard policy as applied to firefighters suffering from PFB because facial hair interfered with respirators and thus imperiled the firefighters' health and safety.⁷⁴ Conversely, in *Bradley v. Pizzaco, Inc.*,⁷⁵ the Eighth Circuit rejected an employer's argument that its no-beard policy bolstered pizza delivery sales.⁷⁶ Disparate treatment claims based on skin color⁷⁷ and height or weight requirements adversely impacting certain nationalities may also be successful.⁷⁸

Claims based on mutable appearance characteristics have met with mixed success. Courts have denied claims of African-American women with beaded and/or braided hair,⁷⁹ as well as claims filed by Sikhs, whose religious beliefs prohibit the cutting of their hair.⁸⁰ In *Rogers v. American*

71. See Lindemann & Grossman, *supra* note 17, at 343–44.

72. Although relatively uncommon among Caucasians, PFB affects approximately 25% of African-American males. See Reilly, *supra* note 43, at 264.

73. 2 F.3d 1112 (11th Cir. 1993).

74. See *id.* at 1120–21. The employees failed to show that “shadow” beards would have satisfied health and safety standards. See *id.* at 1122–23.

75. 7 F.3d 795 (8th Cir. 1993).

76. See *id.* at 799. But see *Woods v. Safeway Stores, Inc.*, 420 F. Supp. 35, 43 (E.D. Va. 1976) (finding no-beard policy justified as business necessity based on customer preference for grocery store hygiene and cleanliness).

77. See Lindemann & Grossman, *supra* note 17, at 343. But see *Sere v. Board of Trustees*, 628 F. Supp. 1543, 1546 (N.D. Ill. 1986) (noting intra-racial suits not actionable under § 1981).

78. See Lindemann & Grossman, *supra* note 17, at 380. See also, e.g., *Craig v. County of Los Angeles*, 626 F.2d 659, 667 (9th Cir. 1980) (finding minimum-height requirement unlawful due to discriminatory effect on Mexican-Americans).

79. See *McBride v. Lawstaf, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 1758, 1759–60 (N.D. Ga. 1996) (holding refusal of staffing agency to place women with braided hair not actionable because it was not illegal under Title VII and plaintiff's belief rule was racially biased was not reasonable); *Carswell v. Peachford Hosp.*, 27 Fair Empl. Prac. Cas. (BNA) 698, 699–700 (N.D. Ga. 1981) (finding no evidence that rule against cornrows had disparate impact or that grooming standards were arbitrarily applied); *Rogers v. American Airlines Inc.*, 527 F. Supp. 229, 231–34 (S.D.N.Y. 1981) (dismissing plaintiff's claim that ban on “cornrow” style hair (beaded and braided) was discriminatory).

80. *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383–84 (9th Cir. 1984) (dismissing claim because defendant required all employees to shave facial hair and made efforts to accommodate); *EEOC v. Sambo's, Inc.*, 530 F. Supp. 86, 90 (N.D. Ga. 1981) (holding denial of promotion due to refusal to shave facial hair based on valid business necessity of sanitation and “clean-cut image”). But see *Sadrudin v. City of Newark*, 34 F. Supp. 2d 923, 926 (D.C.N.J. 1999) (finding prima facie case of religious bias where Muslim was terminated for not shaving beard).

Airlines,⁸¹ the plaintiff asserted that braided hair was historically and culturally valuable to African-American women.⁸² The court dismissed the claim based on its determination that the policy applied to both genders and all races, did not regulate immutable characteristics, and was of relatively negligible importance.⁸³ However, an early decision found a policy prohibiting “bushy” hair racially discriminatory based on its adverse impact on African-Americans, given the relationship between hair texture and the “afro” hairstyle, as well as its racially symbolic importance.⁸⁴

2. *Appearance Attributes Associated with Sex and Age*

Appearance-related claims also may implicate discrimination based on sex, age, or both.⁸⁵ In fact, the largest number of appearance-related claims appear to involve sex or gender in some respect.⁸⁶ The consideration of appearance in this context also may impact women disproportionately.⁸⁷ Although many age-discrimination complaints are

81. 527 F. Supp. 229 (S.D.N.Y. 1981).

82. *See id.* at 231–32.

83. *See id.*

84. EEOC Decision No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18, 19 (1971); *cf.* *Keys v. Continental Ill. Nat'l Bank & Trust Co.*, 357 F. Supp. 376, 380 (N.D. Ill. 1973) (dismissing claim where plaintiff alleged that facial hair was symbol of black pride); *see also* EEOC Decision No. 7090, 2 Fair Empl. Prac. Cas. (BNA) 236, 236–37 (1969) (finding reasonable cause that employer discriminated against black applicant based on distinctive racial feature (large lips)). Claims alleging religious discrimination based on grooming or attire may be similarly actionable. *See, e.g.,* *Calloway v. Gimbel Bros.*, 19 Fair Empl. Prac. Cas. (BNA) 705, 707–09 (E.D. Pa. 1979) (denying dismissal where employer refused to assign work to black Muslim employee wearing religious skull cap); *cf.* *McGlothlin v. Jackson Mun. Separate Sch. Dist.*, 829 F. Supp. 853, 866 (S.D. Miss. 1992) (dismissing discrimination claims based on religion when teacher terminated for “African-style headwraps” and uncombed hair, when plaintiff failed to show employer had knowledge of religious foundation for practices, and plaintiff instead expressed that practices were based on African culture and heritage).

85. *See Wiley, supra* note 9, at 218 n.87 (citing comparisons made between appearance, sex, and age discrimination).

86. *See Reilly, supra* note 43, at 266; *see also Klare, supra* note 65, at 1414 (suggesting gender-based grooming regulations most frequently litigated appearance issues).

87. *See, e.g.,* *Bartlett, supra* note 19, at 2564–65 (describing heightened standards used to evaluate female appearance); *Korn, supra* note 6, at 29–36 (discussing equation of thinness with beauty and disproportionate effects on women); *Wiley, supra* note 9, at 216–18 (noting women are more likely than men to encounter-physical appearance discrimination in society, employment, and judicial system). *See generally* Naomi Wolf, *The Beauty Myth: How Images of Beauty Are Used Against Women* (1991) (describing deleterious effects of obsession with beauty on women). *See also infra* notes 147–52 and accompanying text.

not based on appearance per se, they may implicitly involve an applicant's or employee's "old" or "older" appearance and the stereotypical assumptions derived from that visual perception. Further, for women in particular, age and beauty often may be intertwined in an appearance-related discrimination claim.⁸⁸

Physical-attribute requirements or criteria exclusively applying to or adversely impacting one sex may be found unlawful. In the absence of a legitimate defense, height and weight requirements may constitute disparate treatment or result in a disparate impact based on sex. Therefore, minimum height and weight requirements not job related and having a disparate impact on women seeking jobs as prison guards have been found unlawful,⁸⁹ as have maximum-weight requirements imposed solely on female flight attendants in an attempt to increase sales by having "attractive" attendants.⁹⁰ However, courts have upheld differential weight requirements for male and female flight attendants based on the idea that weight was a matter of personal appearance, subject to an individual's own control, and not a fundamental aspect of life.⁹¹

Grooming and attire regulations may constitute illegal discrimination where they impose different standards based on gender,⁹² reflect gender-based stereotypes,⁹³ or expose employees to sexual harassment.⁹⁴ In *Carroll v. Talman Federal Savings & Loan Ass'n*,⁹⁵ the Seventh Circuit found disparate treatment based on sex where an employer required women to wear a uniform but men to wear only "customary" business attire.⁹⁶ In *EEOC v. Sage Realty Corp.*,⁹⁷ a district court concluded that

88. See *infra* note 111 and accompanying text.

89. See *Dothard v. Rawlinson*, 433 U.S. 321, 329-31 (1977).

90. *Gerdom v. Continental Airlines Inc.*, 692 F.2d 602, 609-10 (9th Cir. 1982).

91. See *Air Line Pilots Ass'n v. Western Air Lines, Inc.*, 23 Fair Empl. Prac. Cas. (BNA) 1042, 1045 (N.D. Cal. 1979).

92. See, e.g., *Department of Civil Rights v. Edward W. Sparrow Hosp. Ass'n*, 377 N.W.2d 755, 764 (Mich. 1985) (finding uniform requirement for females only violated state law); *infra* note 96 and accompanying text.

93. See, e.g., *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263, 266 (S.D. Ohio 1987) (holding requirement that only females must wear smock was result of sexual stereotype); *infra* note 98 and accompanying text.

94. See, e.g., *infra* note 98 and accompanying text. *But see* EEOC Decision No. 85-9, 37 Fair Empl. Prac. Cas. (BNA) 1893, 1895-96 (1985) (dismissing charge where female employees required to wear swimsuits to work).

95. 604 F.2d 1028 (7th Cir. 1979).

96. See *id.* at 1029, 1032-33.

97. 507 F. Supp. 599 (S.D.N.Y. 1981).

forcing female employees to wear a revealing uniform both exposed women to sexual harassment and promoted the stereotype of women as objects of sexual exploitation.⁹⁸ However, where grooming and attire policies apply to both sexes, they may distinguish between the sexes based on generally accepted social norms or standards.⁹⁹ For example, men alone may be required to keep their hair short,¹⁰⁰ and women alone may be required, or permitted, to wear skirts.¹⁰¹

Discrimination claims based on sex, age, or a combination of the two also may result from an employer's preference for attractive or youthful appearances.¹⁰² These issues have been particularly relevant for women working in the airline industry¹⁰³ and broadcast journalism.¹⁰⁴ Where only women are hired to promote a sexually appealing image, but without a bfoq,¹⁰⁵ or where gender-based stereotypes are reflected,¹⁰⁶ these types of claims may succeed. Generally, however, employers may freely impose

98. *See id.* at 607–08.

99. *See, e.g.,* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (upholding sex-based differential hair-length regulations); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1334, 1337 (D.C. Cir. 1973) (finding no sex discrimination in distinct male and female hair regulations).

100. *See, e.g.,* Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387–90 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 509 (1998).

101. *See, e.g.,* Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979).

102. Title VII recognizes a “sex plus” theory, wherein a subclass is discriminated against based on sex plus another characteristic. These cases are typically more successful where the “plus” is an immutable characteristic; a fundamental right; or a characteristic significantly affecting the opportunities and terms or conditions of employment afforded one sex. *See* Lindemann & Grossman, *supra* note 17, at 457. The most common plus factors are marriage, family, race, and appearance. *See id.* at 458. Federal district courts, but no federal appellate courts, have addressed “sex-plus-age” under Title VII. *See* Sabina F. Crocette, Comment, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis—A Pragmatic Model*, 28 Golden Gate U. L. Rev. 115, 140–44 (1998). There has not yet been recognition of an “age plus” theory under the ADEA. *See id.* at 149.

103. Early cases struck down female-only flight attendant policies based on alleged customer preference and sex appeal as a job requirement. *See, e.g.,* Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 303–04 (N.D. Tex. 1981) (holding airline failed to show that feminine sex appeal was legitimate job requirement for flight attendants and ticket agents, and striking female-only hiring policy).

104. *See generally* Joanne Bal, Comment, *Proving Appearance-Related Sex Discrimination in Television News: A Disparate Impact Theory*, 1993 U. Chi. Legal F. 211; Patti Buchman, Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 Colum. L. Rev. 190 (1985).

105. *See supra* note 103.

106. *See supra* notes 93, 98, and accompanying text.

gender-neutral grooming standards including attractiveness components.¹⁰⁷ Yet even with supposedly gender-neutral application, females may disproportionately fall victim to attractiveness-based grooming standards.¹⁰⁸ In *Craft v. Metromedia, Inc.*,¹⁰⁹ the Eighth Circuit dismissed a sex discrimination claim filed by a female television news anchor reassigned after customer surveys ranked her lower than other female anchors based on her dress and appearance, despite proffered evidence of differential and stereotypical attractiveness requirements for men and women.¹¹⁰ Given the common correlation of beauty with youth, these types of claims also disproportionately impact older females.¹¹¹ Finally, the recognition of a bfoq within this context arguably provides the opportunity for employers explicitly to require attractiveness or sexual appeal in their female employees.¹¹²

C. State and Local Statutes Prohibiting Appearance Discrimination

Individuals may directly pursue appearance-discrimination claims in a limited number of jurisdictions.¹¹³ Michigan prohibits discrimination based on height or weight.¹¹⁴ The District of Columbia proscribes discrimination based on “personal appearance,” defined as: “the outward appearance of any person, irrespective of sex, with regard to bodily

107. See Klare, *supra* note 65, at 1423–24.

108. See, e.g., Barlett, *supra* note 19, at 2553 (noting studies showing view of women’s competence and authority is often based in part on their outward appearance).

109. 766 F.2d 1205 (8th Cir. 1985).

110. See *id.* at 1209, 1217. Females were instructed to wear “feminine touches,” avoid excessive aggressiveness or softness, more frequently change outfits, and were told to remember “professional elegance,” while male anchors were told to remember “professional image.” *Id.* at 1214. The plaintiff was assigned a “clothing calendar.” *Id.* at 1214. But see Mike Allen, *Anchorwoman Wins \$8.3 Million Over Sex Bias*, N.Y. Times, Jan. 29, 1999, at B1 (reporting \$8.3 million judgment for anchorwoman’s sex and retaliation, but not age, discrimination claims).

111. Christine Craft alleged she was told “the audience perceived her as . . . too old, too unattractive, and not deferential enough to men.” *Craft*, 766 F.2d at 1209.

112. Although all claims have been settled, Hooters Restaurant has asserted a gender bfoq for its servers, arguing its “core marketing strategy [is] to sexually attract and titillate heterosexual males.” Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. Mich. J.L. Reform 551, 569 (1998). Whether sex-appeal can in itself qualify as a bfoq is not entirely clear. See *id.* at 558 (mentioning author could locate only two decisions validating, in dicta, women-only hiring policy based on job requirement of sexual attractiveness; but noting subsequent decision dismissing sex bfoq based on desire to increase sales with female servers in alluring costumes).

113. See *supra* notes 5–6 and accompanying text for jurisdictions that have laws prohibiting appearance discrimination.

114. See Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. § 37.2202 (West 1999).

condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards."¹¹⁵ A number of counties and cities protect their inhabitants from different types of appearance discrimination. For example, Santa Cruz, California, bars discrimination based on height, weight, or "physical characteristics," defined as "a bodily condition or bodily characteristic of any person which is from birth, accident or disease, or from any natural physical development, or any event outside the control of that person including individual physical mannerisms."¹¹⁶

These laws provide employers with defenses for differential treatment based on appearance. A bfoq or reasonable business necessity may be established in Michigan.¹¹⁷ The District of Columbia statute provides that protection from personal-appearance discrimination does not apply to

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 personal grooming presents a danger to the health, welfare or safety of any individual.¹¹⁸

Similarly, the Santa Cruz statute exempts physical-appearance discrimination with regard to "health, welfare or safety" concerns.¹¹⁹

Michigan interprets and applies its appearance statute in a fashion similar to existing employment discrimination laws. In *Lamoria v. Health Care & Retirement Corp.*,¹²⁰ a Michigan appellate court held weight discrimination could be established where weight was a determinative factor in an employment action.¹²¹ The court found direct evidence, including derisive comments, sufficient to permit the conclusion that weight was a determinative factor in the termination.¹²² In contrast, the plaintiff in *Byrnes v. Frito-Lay, Inc.*¹²³ failed to show weight discrimination where there was only one slur and no evidence

115. D.C. Code Ann. § 1-2512 (1981).

116. Santa Cruz Prohibition Against Discrimination, Santa Cruz, Cal., Code § 9.83 (1995).

117. *See, e.g.*, *Micu v. City of Warren*, 382 N.W.2d 823 (Mich. 1985) (holding fire department may not discriminate based on height without bfoq).

118. D.C. Code Ann. § 1-2512.

119. Santa Cruz Prohibition Against Discrimination, Santa Cruz, Cal., Code § 9.83.

120. 584 N.W.2d 589 (Mich. Ct. App. 1998).

121. *See id.* at 594.

122. *See id.* at 595.

123. 811 F. Supp. 286 (E.D. Mich. 1993).

beyond speculation of a link between the harassment and weight.¹²⁴ The statute has also resulted in the satisfactory settlement of a number of claims and the consequent revision of discriminatory employment policies and standards.¹²⁵

The District of Columbia prohibition has resulted in a wide variety of court decisions. In *Atlantic Richfield Co. v. District of Columbia Commission on Human Rights*,¹²⁶ an appellate court found personal-appearance discrimination where an employee was criticized for her allegedly provocative clothing, despite the fact that her clothing was apparently similar to her coworkers' and there was no uniformly prescribed standard of dress.¹²⁷ In *Underwood v. Archer Management Services, Inc.*,¹²⁸ a federal district court found an unlawful discharge where an employee was terminated because she was a transsexual with some masculine traits.¹²⁹

The D.C. Court of Appeals explored the defense of a "uniform prescribed standard" with a "reasonable business purpose" in *Turcios v. United States Service Industries*.¹³⁰ The court held that an employer must demonstrate the existence of the standard, its uniform application to a class of employees, and a reasonable business purpose.¹³¹ A reasonable business purpose need only show an objective, reasonable justification, and need not rise to the level of a business necessity.¹³² Outside of the small number of jurisdictions in which appearance discrimination is prohibited, the remedies currently available for appearance-discrimination victims are insufficient to address this problem adequately.

124. *See id.* at 293.

125. *See* Patricia Harnett, Note, *Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers*, 24 Rutgers L.J. 807, 838 n.169 (1993) (noting conciliation conferences wherein employers settled and revised weight and height policies in conformance with state law).

126. 515 A.2d 1095 (D.C. 1986).

127. *See id.* at 1100.

128. 857 F. Supp. 96 (D.D.C. 1994).

129. *See id.* at 98–99.

130. 680 A.2d 1023, 1027–29 (D.C. 1996) (holding hairstyle standard communicated general rule of conformity to traditional grooming and ban on ponytails reasonable and foreseeable interpretation and finding reasonable business purpose based on complaints and fear that ponytails would jeopardize contract); *cf.* *Kennedy v. District of Columbia*, 654 A.2d 847, 854–56 (D.C. 1995) (ruling fire department failed to establish legitimate defense for prohibition on facial hair since rule was not uniformly applied, was not safety based, was not essential aspect of uniform, and did not foster *esprit de corps*). The regulations did contain a PFB exception. *See id.* at 854.

131. *See Turcios*, 680 A.2d at 1027.

132. *See id.* at 1028.

III. VICTIMS OF APPEARANCE DISCRIMINATION SHOULD BE PROTECTED FROM ITS HARMFUL, UNWARRANTED, AND UNJUST EFFECTS

The establishment of state and local appearance-discrimination employment statutes would benefit aggrieved individuals, employers, and society as a whole. Employers would be encouraged to hire applicants based solely on legitimate qualifications and business concerns, instead of on stereotypical and unfounded assumptions. Individuals who may be otherwise hampered or harmed by their appearances would have a mechanism to fight back.

Most applicants and employees receive inadequate protection from appearance discrimination. Although some appearance claims might fall within the scope of Title VII, the ADA, or the ADEA, the vast majority of appearance-discrimination claims are not actionable. Furthermore, even where a connection to a protected category can be argued, many claims likely will fail because they actually involve discrimination based on appearance, as opposed to a characteristic related to the existing category.

Appearance-discrimination victims should not be limited to existing laws. Clearly, disabled individuals and those perceived as disabled should utilize the ADA. Claims under Title VII and the ADEA should similarly be pursued where appropriate and possible. However, an avenue of relief should also exist for individuals who face and endure real and damaging discrimination based on their outward appearance.

A. *Appearance Discrimination Is a Pervasive and Harmful Problem Warranting Statutory Protection*

1. *Appearance Discrimination Is Arbitrary, Irrational, and Unfair*

Appearance discrimination is arbitrary, irrational, and unfair because no correlation exists between appearance and performance for most jobs.¹³³ If the rhetoric of the anti-affirmative-action debate is to be believed, hiring the most qualified individual for a job constitutes the ideal for employee selection. Appearance does not relate to a job

133. *But see* Hamermesh & Biddle, *supra* note 20, at 1177 (noting theory that attractive individuals may earn more and advance higher by being more productive and employers may benefit by having attractive employees in positions involving customer or coworker interactions).

qualification unless a bfoq or business necessity exists.¹³⁴ For example, one study found that an employee's weight does not affect ninety percent of work-related activities.¹³⁵ Yet employers often equate excess weight or obesity with attributes indicating a lack of fitness for employment.¹³⁶

Arguments supporting appearance discrimination to please customers¹³⁷ fail in the face of the general prohibition on using customer preference as an excuse to discriminate.¹³⁸ Both the lack of a correlation between appearance and job qualification and the harm resulting from appearance discrimination detracts from this argument. Just as an employer may not refuse to hire women or minorities because of some perceived or even real customer preference, employers should not be justified in denying qualified applicants employment because their customers would prefer to interact with someone physically attractive.¹³⁹

2. *Appearance Discrimination Derives from Prejudice and Its Prohibition Would Further the Intent of Existing Laws*

Prohibiting appearance discrimination serves the larger societal goal of protecting individuals subject to adverse treatment based on prejudices and stereotypes. Antidiscrimination laws create legal mechanisms to protect individuals from disadvantageous treatment based on membership in a particular group.¹⁴⁰ These laws thus combat the use of prejudices and stereotypes, and the misperceptions that result. However, only certain groups are protected.¹⁴¹ A ban on appearance discrimination would require employers to disregard the way that an applicant or employee looks, unless relevant to the position in question. Appearance discrimination is similar to already-proscribed discrimination based on an employee's outward appearance and the negative stereotypes associated

134. See *supra* notes 66–69 and accompanying text.

135. See Kara Swisher, *Overweight Workers Battle Bias on the Job; Looks Discrimination Called Common, but Hard to Prove*, Wash. Post, Jan. 24, 1994, at A1.

136. See Rothblum et al., *supra* note 11, at 252–53.

137. See Barro, *supra* note 16, at 18.

138. See *supra* note 69 and accompanying text.

139. Customer-preference considerations are likely to cause particular harm to the obese, who are commonly perceived with feelings of “repulsion and disgust.” Korn, *supra* note 6, at 64 n.248.

140. See Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 Mich. L. Rev. 564, 568 (1998).

141. See generally Peter Brandon Bayer, *Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 Wash. & Lee L. Rev. 1, 52 (1988).

with those groups.¹⁴² Using appearance not only implicates criteria already proscribed, it also harms an additional group similarly discriminated against based on the way that they look and the negative associations made with respect to their appearance. Failure to prohibit appearance discrimination legitimizes the practice and perpetuates society's discriminatory tendencies.¹⁴³ Consequently, prohibiting consideration of appearance in employment actions will reinforce existing prohibitions, as well as protect a group not yet afforded protection.

3. *Appearance Discrimination Fosters Societal Inequities and Triggers Larger Societal Problems*

Pervasive and systematic discrimination in employment based on appearance necessarily impacts individuals both socially and financially. The findings of numerous studies support the conclusion that appearance discrimination is common and harmful.¹⁴⁴ Due to its prevalence, a substantial number of otherwise qualified individuals are less likely, or even unable, to find employment and less likely to advance and earn equitable pay when they do secure employment.¹⁴⁵ Given the clear extension of this practice beyond employment, these same individuals may be less likely to marry, continue their education, or generally improve their lives.¹⁴⁶ Discrimination in employment, therefore, compounds the social implications of an unattractive appearance. Because many appearance attributes will be passed on to future generations, this cycle of discrimination and its effect will likely continue in perpetuity.

142. See Simon J. Nadel, *Discrimination: Studies Show Appearance May Influence Employers' Decisions to Hire, Fire Workers*, Emp. Pol'y & L. Daily (BNA), Apr. 5, 1999 (noting employment attorneys' observations that appearance-based bias "often is at the heart of other types of discrimination" and is "usually only a piece of the pie").

143. See Patzer, *supra* note 8, at 11.

144. See *supra* notes 2-3, 14, 18, 20-26, and accompanying text.

145. See *supra* Part I.A-B.

146. See, e.g., Susan Averett & Sanders Korenman, *The Economic Reality of the Beauty Myth*, 31 J. Human Resources 304, 314-18 (1996) (finding obese women have lower family incomes and hourly wages, are less likely to be married, and have lower spousal income); Gortmaker et al., *supra* note 23, at 1008 (finding overweight adolescents less likely to marry and have lower household incomes than nonoverweight counterparts regardless of socioeconomic class or aptitude test scores); Hamermesh & Biddle, *supra* note 20, at 1188-89 (finding unattractive women have lower employment participation and marry men of lesser means).

Appearance discrimination in employment also may disproportionately affect women and their health.¹⁴⁷ Women are often both considered and expected to be more attractive than men.¹⁴⁸ In a world where job opportunity, advancement, and income level correlate to an attractive appearance, but where an attractive appearance for women continues to reach ever-more-unrealistic heights,¹⁴⁹ women may more directly and frequently feel the effect of appearance discrimination in employment.¹⁵⁰ Evidence suggests that obese women suffer greater economic and social harm than do obese men.¹⁵¹ The prevalence of frequent dieting and eating disorders, as well as the disproportionate use of plastic surgery and other beauty-enhancement techniques among women, illustrates the greater pressure women face to maintain an attractive appearance.¹⁵²

147. The disproportionate effect on women supports an argument for a more strenuous pursuit of these types of claims under Title VII. *See supra* note 87 and accompanying text.

148. *See Gehrke, supra* note 7, at 225 (citing Jefferson B. Fletcher, *The Religion of Beauty in Women* 3 (1996)); *see also* Etoff, *supra* note 8, at 61 (noting “[m]en value looks more than women do in virtually every culture where the question has been asked” and citing studies); Hamermesh & Biddle, *supra* note 20, at 1179 (noting common finding in social-psychological literature that “women’s appearances evoke stronger reactions, both positive and negative, than men’s”).

149. *See, e.g.,* Korn, *supra* note 6, at 29–36 (describing increasingly slim ideal body type for women and its consequences).

150. *See supra* note 87 and accompanying text; *see also* Bartlett, *supra* note 19, at 2546–47 (arguing appearance standards for women are harder to attain, matter more, and subordinate women to men); Klare, *supra* note 65, at 1414–15 (arguing existing laws reinforce gender stereotypes and legitimize sexist understandings of gender difference and inequality). *But see* Patzer, *supra* note 8, at 7 (finding effects of physical attractiveness as being “relatively universal” for both men and women). *See generally* Wolf, *supra* note 87, at 20–57 (arguing idea of beauty as currency has increased as women entered workforce and achieved economic prominence and has been used to undermine women’s advancement).

151. *See, e.g.,* Korn, *supra* note 6, at 32–35.

152. *See* Etoff, *supra* note 8, at 60 (noting more women than men diet, women outnumber men nine to one in eating disorders, and 89% of aesthetic-surgery procedures reported in one year were performed on women); Wolf, *supra* note 87, at 179–217 (describing pervasive dieting and eating disorders among women); Reena N. Glazer, *Women’s Body Image and the Law*, 43 *Duke L.J.* 113, 115 (1993) (noting increasingly thin female body standard has led to obsession with body image and low self-esteem); Korn, *supra* note 6, at 29–36. Interestingly, a woman’s attractiveness may work against her as she attempts to advance in a professional setting, while the same does not hold true for men. *See, e.g.,* Etoff, *supra* note 8, at 83–85 (citing studies showing attractiveness in women can “backfire” in workplace and noting this may happen based on stereotypes of attractive women as being submissive, overly sexual or feminine, or due to sexual harassment by men or envy of other women); Biddle & Hamermesh, *supra* note 3, at 18–20 (finding more-attractive female attorneys less likely to achieve early partnership, while more-attractive male attorneys more likely to do so); Gehrke, *supra* note 7, at 236 (citing studies showing that while attractiveness was advantage for men seeking clerical, managerial, and professional positions, attractive female applicants were advantaged with respect to clerical but not managerial positions, and noting attractiveness can be a complicating factor for women in and seeking professional positions).

B. Current Employment Discrimination Statutes Inadequately Protect Appearance-Discrimination Victims

1. The ADA Definition of Disability Does Not Encompass the Vast Majority of Appearance-Discrimination Victims

The ADA definition of “disability” dilutes or eliminates the statute’s value as a method of recourse for appearance-discrimination victims. To be protected under the ADA, individuals must actually be substantially limited by an appearance-related impairment, have a record of such an impairment, or be perceived as so impaired.¹⁵³ Employers will likely consider unattractive individuals generally unappealing or undesirable, instead of perceiving them as disabled.¹⁵⁴ Further, many individuals will not likely consider themselves disabled. Individuals would also face difficulty in proving a substantial limitation in either a class or broad range of jobs.¹⁵⁵

The ADA’s failure to protect the vast majority of individuals discriminated against on account of their weight demonstrates its limitations. Despite the EEOC’s determination that severe obesity “clearly” qualifies as a disability,¹⁵⁶ both professional commentary and court interpretation on this issue have not been uniform or clear.¹⁵⁷ Many courts have focused on the perceived mutability or voluntary nature of obesity,¹⁵⁸ despite substantial evidence to the contrary¹⁵⁹ and even though voluntary conditions are not per se excluded from ADA coverage.¹⁶⁰ Even a severely obese individual still would need to show a substantial

153. See *supra* notes 38–40 and accompanying text.

154. See, e.g., *Fredregill v. Nationwide Agribusiness Ins. Co.*, 992 F. Supp. 1082, 1089–90 (S.D. Iowa 1997) (finding perception of undesirable image did not support inference that weight problem was physical impairment, and evidence that weight was viewed as inconsistent with corporate image did not show perceived disability).

155. See, e.g., *id.*

156. See EEOC, *supra* note 41, § 902.2(c)(5)(ii), at 902-12.

157. See *supra* notes 49–62 and accompanying text.

158. See, e.g., *Green v. Union Pac. R.R. Co.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981). *But see* *Cook v. Rhode Island*, 10 F.3d 17, 23–24 (1st Cir. 1993) (finding alleged “voluntariness” of condition irrelevant and “mutability” relevant only as to whether it had substantially limiting effect, and irrelevant where employer regarded condition as immutable).

159. There is ample evidence suggesting weight gain or loss may be outside an individual’s control, particularly with respect to obesity. See Korn, *supra* note 6, at 45–51.

160. Voluntariness is irrelevant when determining whether a condition constitutes an impairment. See EEOC, *supra* note 41, § 902.2(e), at 902-14. For example, lung cancer resulting from smoking constitutes an impairment. See *id.*

or perceived limitation on a major life activity.¹⁶¹ The actual number of individuals who would ultimately benefit by this application of the ADA would be minute because morbid obesity is rare and obesity caused by an underlying condition is relatively uncommon.¹⁶²

Even where an individual who suffers appearance discrimination fits within the ADA, the chance of success may be minimal. A recent study of reported ADA cases found that employers prevailed in ninety-two percent of final court decisions and eighty-six percent of administrative resolutions.¹⁶³ The more attenuated these claims are, the less likely they are to succeed. Forcing appearance-discrimination victims to pursue their claims under disability statutes will thus result in trivializing many legitimate claims due to the lack of association with a traditional disability.

2. *Title VII and the ADEA Provide Only Limited Protection from Appearance Discrimination*

An appearance-related claim under Title VII or the ADEA must be tied to an already-protected category, necessarily limiting the potential for redress under these statutes. Essentially, a claimant must allege that the real reason or impact of the employment action involved either race, color, religion, sex, national origin, or age, and not appearance alone. In the case of immutable characteristics, claims under Title VII or the ADEA may be successful where there is no legitimate defense.¹⁶⁴ Yet the allowance for differential weight requirements, as well as the disproportionate application and effect of “attractiveness” requirements, illustrates the limits of these suits, particularly for female and some older claimants.¹⁶⁵

Mutable appearance attributes are even more problematic. For example, beaded and braided hairstyles are disproportionately worn by African-American women and have a long history of use and cultural

161. See *supra* note 48 and accompanying text.

162. See Kom, *supra* note 6, at 43 & nn.124, 127 (noting approximately one-half of one percent of obese individuals are morbidly obese and approximately five percent of obesity is caused by underlying physiological disorder).

163. See John W. Parry, *Executive Summary and Analysis: ADA and Other Federal Disability Civil Rights*, 22 *Mental & Physical Disability L. Rep.* 282, 282 (1998).

164. See *supra* notes 71–78, 89–90, and accompanying text.

165. See *supra* notes 91, 107–12, and accompanying text.

significance.¹⁶⁶ Yet many courts either fail to recognize the association between the hairstyles and racial identification or trivialize it as one of personal preference or style, easily changed and not of particular importance.¹⁶⁷ The differentiation between male and female grooming and attire based on “generally accepted norms” essentially results in the legal imposition of stereotypical notions concerning the appearance of men and women.¹⁶⁸ In addition, because Title VII protects religion,¹⁶⁹ it has no immutability requirement, yet some courts continue to minimize the relative importance or harm resulting from discrimination based on mutable appearance characteristics, expressly because of their mutability.¹⁷⁰ Finally, the fact that certain professions may legally include attractiveness components into their appearance standards may disproportionately impact female employees who are often held to higher, more rigid, or more unrealistic criteria.¹⁷¹

3. *Existing Statutes Were Not Designed to Protect Against Most Appearance Discrimination*

Using the ADA to pursue appearance-discrimination claims may dilute its strength and purpose as a remedy for conditions clearly intended to be treated as protected disabilities. Although the ADA was intended to protect a large and ever-growing group of individuals,¹⁷² its focus, intent, and purpose likely never included the plight of people who are unattractive, overweight, or the otherwise discriminated against because of their appearance. The filing of complaints not necessarily intended for coverage and not neatly falling into common perceptions of disabling conditions may increase public cynicism and jeopardize the claims of clearly disabled individuals.¹⁷³

Similarly, other statutes were likely never intended to provide recourse for most appearance-discrimination victims. Courts have frequently noted

166. See *Rogers v. American Airlines Inc.*, 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981); see also Klare, *supra* note 65, at 1413–14.

167. See, e.g., *Rogers*, 527 F. Supp. at 232.

168. See *supra* notes 99–101 and accompanying text.

169. See 42 U.S.C. § 2000e-2 (1994).

170. See *supra* notes 65, 79–83, 99–101, and accompanying text.

171. See *supra* notes 148–52 and accompanying text.

172. See 42 U.S.C. § 12101(a)(1) (1994) (describing some 43,000,000 Americans as being disabled, with that number growing as population grows older).

173. See Margaret Carlsen, *And Now, Obesity Rights*, *Time*, Dec. 6, 1993, at 96.

that Title VII was not meant to furnish a mechanism for employees to dispute their employer's personal-appearance regulations.¹⁷⁴ Although the pervasive and harmful effect of appearance discrimination should not be minimized, a clear distinction can be made with respect to the historical significance of those categories protected by Title VII.¹⁷⁵

C. *State and Local Appearance-Discrimination Laws Are the Most Appropriate Avenue for Relief*

State and local laws offer the most hope for providing protection from appearance discrimination. The inclusion of appearance into Title VII is unrealistic.¹⁷⁶ Conventional wisdom appears adverse to a greater expansion of protected categories at this time.¹⁷⁷ Therefore, the likelihood of a specific federal statute prohibiting appearance discrimination appears equally unrealistic. Given their more limited scope, state and local attempts at protecting appearance-discrimination victims provide a more likely avenue for success.¹⁷⁸ State and local statutes typically provide more expansive coverage than federal laws,¹⁷⁹ and in many instances extend coverage to smaller employers¹⁸⁰ not covered under federal laws.¹⁸¹ State and local legislatures should thus protect applicants and employees from appearance discrimination.

174. See, e.g., *Garcia v. Gloor*, 618 F.2d 264, 269–70 (5th Cir. 1980); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1090–92 (5th Cir. 1975).

175. See, e.g., *Karl V. Mason, Employment Discrimination Against the Overweight*, 15 U. Mich. J.L. Reform 337, 355 n.101 (1982) (arguing “a separate statute, rather than amendment of Title VII, is warranted because the overweight have not experienced the history of purposeful, unequal treatment that typifies those classes protected by Title VII.”).

176. See *supra* note 175 and accompanying text.

177. See generally *Rubin, supra* note 140 (discussing perception that protection from discrimination based on certain characteristics provides “special rights”).

178. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (noting Congress did not intend Title VII to “occupy the field” to the exclusion of state laws).

179. See, e.g., *Barbara Kate Repa, Your Rights in the Workplace: A Complete Guide for Employees*, 8/19 to 8/29 (3d ed. 1996) (listing categories protected under state laws, including marital status, sickle-cell traits, political affiliation, sexual orientation, family responsibilities, HIV/AIDS, receipt of public assistance, and arrest or conviction records).

180. See, e.g., *Wash. Rev. Code* § 49.60.040(3) (1998) (eight or more employees).

181. See *Age Discrimination in Employment Act*, 29 U.S.C. § 630(b) (1994) (20 or more employees); *Title VII of the Civil Rights Act of 1964*, 42 U.S.C. § 2000e(b) (1994) (15 or more employees); *Americans with Disabilities Act*, 42 U.S.C. § 12111(5)(A) (1994) (15 or more employees).

IV. STATE AND LOCAL LAWMAKERS SHOULD PROHIBIT APPEARANCE DISCRIMINATION

A. *Appearance-Discrimination Statutes Should Protect Appearance Characteristics, and Some Grooming and Attire*

Protection should be provided for discrimination that is based on (1) physical characteristics, (2) grooming and attire that is associated with some already-protected category, and (3) grooming and attire that has some other cultural or historical significance. This coverage will incorporate all aspects of physical-appearance, as well as the vast majority of grooming and attire claims likely to arise. Although a number of these claims may be pursued under existing laws, this protection will more directly and successfully address appearance discrimination. That is, while a court may be disinclined to hold that an obese individual is disabled or that a ban on braided hair results from or effectuates a racial bias, protection from appearance discrimination would more squarely confront this type of adverse employment action.

Appearance-discrimination claims should be pursued and evaluated with the same standards used for currently protected categories. Generally, an individual pursuing a disparate treatment claim would first have to make out a prima facie case of discrimination.¹⁸² For example, an individual alleging a discriminatory nonhiring based on obesity would be required to show a condition of obesity; application and qualification for the job; a rejection; and that the position remained open and the employer continued to seek applicants, or filled the position with a nonobese individual.¹⁸³ The employer would then be required to provide a legitimate, nondiscriminatory reason for the rejection.¹⁸⁴ The plaintiff then would be required to show that this proffered justification was mere pretext for discriminatory intent.¹⁸⁵ A disparate impact claim generally would entail a showing that an otherwise facially neutral employment practice adversely impacted individuals with certain appearance

182. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

183. See *id.* The prima facie case would vary depending on the type of discrimination and adverse action involved. See *id.* at 802 n.13.

184. See *id.* at 802; see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (confirming this requirement is limited to burden of production and ultimate burden of persuasion remains with plaintiff).

185. See *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804-05.

attributes.¹⁸⁶ For example, an obese individual would have to show that a weight restriction or guideline adversely impacted obese individuals.

In an ideal world, no aspect of appearance would be considered in employment matters. However, society may be unwilling to protect characteristics that are clearly mutable, voluntary, and in no way associated with some already-protected category. For instance, an individual with tattoos, facial piercing, or green hair would not likely engender much support as an individual in need of protection. Although these individuals do not deserve arbitrary, irrational, and unfair discrimination, the degree to which coverage should be provided may more appropriately depend on the relative need for protection as well as the significance of the appearance attribute at issue.

B. Employers Should Be Allowed to Present a Legitimate Defense for Discriminatory Treatment Based on Appearance Characteristics

Appearance-discrimination statutes also should provide employers with the opportunity to present a legitimate defense. Employers could show a bfoq or business necessity for an appearance regulation or requirement. These defenses could be construed and applied in accordance with their interpretation and application under existing statutes.¹⁸⁷ Employers could thus establish an appearance bfoq exists by showing that a certain appearance or appearance traits are reasonably necessary to, or within the essence of, normal business operation.¹⁸⁸ Employers also could create policies requiring cleanliness, certain attire, or other uniformly prescribed standards where a reasonable business purpose or a health or safety concern exists.¹⁸⁹ An employer should be required to demonstrate the existence of the standard, its uniform application, and an objectively reasonable business purpose.¹⁹⁰ As with the ADA or religious discrimination under Title VII, employers would need to show that a reasonable accommodation could not be provided without undue hardship.¹⁹¹ Thus, while employers would be required to consider accommodation where possible, applicants and employees

186. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

187. See generally *supra* Part II for discussion of defenses existing and construed under current laws.

188. See *supra* note 66 and accompanying text.

189. See *supra* notes 117–19 and accompanying text.

190. See *supra* note 131 and accompanying text.

191. See *supra* notes 35, 67, and accompanying text.

would be advised to request reasonable accommodation when notified of a policy inhibiting their hiring or advancement. The statute and its defenses would likewise provide employers with an incentive to establish and communicate clear guidelines regarding their appearance regulations and requirements.

C. *The Proposed Appearance-Discrimination Statute Withstands Anticipated Criticisms*

Obvious criticisms and concerns regarding protection for appearance discrimination include its potential for overinclusiveness, the threat of a flood of litigation, problems of proof, a possible extension of coverage already provided, and the difficulty of combating an engrained and generally accepted discriminatory practice. The protection for physical characteristics would ostensibly protect, for example, individuals who are left-handed, mildly overweight, or redheaded. Discrimination based on either real or perceived attractiveness or unattractiveness may sometimes be difficult if not impossible to assess or compare. Grooming and attire may be considered unworthy of protection given their mutable and voluntary nature. Furthermore, existing laws arguably already protect grooming and attire because they would generally be tied to an already-protected category. Many claims based on physical characteristics, such as obesity or traits common to certain ethnic groups, could also conceivably be pursued successfully under existing laws. Finally, the pervasiveness of appearance discrimination in professional, social, and personal settings may render it largely accepted as either an appropriate or unavoidable fact of life.

Concerns of overinclusiveness, excessive litigation, and difficulty of proof are dispelled by requiring that claimants follow existing formulas for proving their claims.¹⁹² If an individual or a class could not show discriminatory treatment or impact based on appearance, they would be unable to make out a claim of discrimination. Therefore, although redheads could pursue a claim based on hair color, they would be required to show that they were in fact discriminated against because of their red hair. Because there are presumably very few occurrences of discrimination of this kind, the likelihood of redheads, or other unlikely appearance-discrimination victims, storming the courtrooms en masse is an illusory concern. The fact that some of these claims could be pursued

192. See *supra* Part IV.A.

under existing statutes does little to refute the need for explicit protection, given the demonstrated failure of existing statutes in protecting many appearance-discrimination victims.¹⁹³ Finally, the fact that appearance discrimination appears largely engrained and accepted is an unsatisfactory and historically unsound justification for allowing a harmful, unwarranted, and unjust practice to continue unabated, given the fact that many currently protected categories were arguably equally engrained and accepted at times prior to their protection. The need for protection from appearance discrimination outweighs any concerns such laws might create.

V. CONCLUSION

Societal tendencies to differentiate, categorize, and judge individuals based on appearance are deeply entrenched. Yet the harms resulting from the legitimization of appearance discrimination extend far beyond any social implications. An individual's relative attractiveness can profoundly impact employment opportunities and earning potential. Our society has armed itself with the tools to fight arbitrary, irrational, and unfair discrimination in employment. We should extend protection to individuals discriminated against because of their appearance. Of course, appearance-discrimination claims would face the same difficulties of proof that exist with any currently protected category. However, where individuals could show that employers have unjustly judged them based on their appearance, they would have an opportunity to pursue a claim of discrimination. Furthermore, employers would be both encouraged and required to use only relevant criteria in hiring and other employment decisions. In this respect, we would at least be one step closer to eliminating the impulse to discriminate based on some irrelevant aspect of an individual's identity.

193. See *supra* Part III.B.

