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## Hotness Discrimination: Appearance Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law

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# HOTNESS DISCRIMINATION: APPEARANCE DISCRIMINATION AS A MIRROR FOR REFLECTING ON THE BODY OF EMPLOYMENT-DISCRIMINATION LAW

*William R. Corbett*<sup>+</sup>

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The hottest story in the sizzling summer of 2010 was about someone “getting hot” over being fired for “looking hot.”<sup>1</sup> As the media reported it,

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1. Jen Doll & Elizabeth Dwoskin, *Debralee Lorenzana Story Goes Global, Viral, Crazy*, VILLAGE VOICE BLOGS (June 7, 2010, 5:21 PM), [http://blogs.villagevoice.com/runninscared/2010/06/debralee\\_loren\\_1.php](http://blogs.villagevoice.com/runninscared/2010/06/debralee_loren_1.php); see Elizabeth Dwoskin, *Too Hot for Citibank?*, VILLAGE

Debrahlee Lorenzana claimed that Citibank fired her for being too hot.<sup>2</sup> This sensational and steamy story focused media attention, albeit briefly, on some of the most interesting aspects of employment-discrimination law.

However, Lorenzana's claim was by no means the first sex-discrimination case focusing on appearance or hotness issues. In the 2005 case, *Yanowitz v. L'Oreal USA, Inc.*, a male division manager of a cosmetics company was not satisfied with the attractiveness of a female sales associate and instructed the associate's immediate supervisor to terminate her and "get [him] somebody hot."<sup>3</sup> The manager later returned and found that the insufficiently hot sales associate was still working.<sup>4</sup> The manager pointed out an attractive blonde woman to the immediate supervisor and instructed her to find an employee who looked like that woman.<sup>5</sup> When the immediate supervisor failed to follow that order, the manager terminated the immediate supervisor, and she thereafter sued for retaliation under the state employment-antidiscrimination statute.<sup>6</sup>

The *Yanowitz* case led me to posit that appearance-based discrimination, although it is a common occurrence, will never be covered by federal employment-discrimination law or by many state or local employment-discrimination laws.<sup>7</sup> Nonetheless, appearance discrimination provides a

VOICE, June 2, 2010, at 18 [hereinafter Dwoskin, *Too Hot for Citibank?*]. The word "hot" has multiple meanings. The most obvious definition is "having a relatively high temperature." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 601 (11th ed. 2003). As used in the "too hot to work" context, a slang meaning of the word is "sexually excited or receptive." *Id.* Another relevant, informal definition is "currently popular or in demand." *Id.* One additional meaning is also implicated: "angry." *Id.*

2. Ms. Lorenzana's complaint did not use the term "hot," but it did use other terms to describe her employer's reaction to her physical attractiveness and sexiness. See generally Complaint, *Lorenzana v. Citigroup, Inc.*, No. 116382/09 (N.Y. Sup. Ct. filed Nov. 20, 2009), available at <http://iapps.courts.state.ny.us/iscroll/SQLData.jsp?IndexNo=116382-2009>. The media injected the concept of "hotness." See, e.g., Dwoskin, *Too Hot for Citibank?*, *supra* note 1, at 1. From that point, the story caught fire. Doll & Dwoskin, *supra* note 1; see also Susan Antilla, "Too Hot" Banker Lawsuit Misses Real Issues, SYDNEY MORNING HERALD (June 8, 2010), <http://www.smh.com.au/business/world-business/too-hot-banker-lawsuit-misses-real-issues-2010-0608-xtdn.html> (stating in a sarcastic manner the prevalence of the story—"[i]n case aliens sequestered you in a spaceship for the past week"). Lorenzana appeared on both *Today* and *Good Morning America* less than a week after *The Village Voice* published the story. Doll & Dwoskin, *supra* note 1. As the *Village Voice Blog* stated, "you know you've made it when you get your very own Wikipedia entry." *Id.* (citing *Deborahlee Lorenza*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Debrahlee\\_Lorenzana](http://en.wikipedia.org/wiki/Debrahlee_Lorenzana)). Alas, the Wikipedia entry was deleted on June 14, 2010, after a debate on its permanent removal. See *Debrahlee Lorenzana - Wikipedia Article*, MILOWENT (June 14, 2010), <http://milowent.blogspot.com/2010/06/debrahlee-lorenzana-wikipedia-article.html>. As has been noted, the photos of Lorenzana that accompanied the first story probably helped attract attention to the story. Antilla, *supra*.

3. *Yanowitz v. L'Oreal USA, Inc.*, 116 P.3d 1123, 1127 (Cal. 2005).

4. *Id.* at 1127-28.

5. *Id.*

6. *Id.* at 1125-26.

7. William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 158 (2007).

mirror for reflecting on some of the most difficult and intriguing issues in employment-discrimination law and creates an appreciation for the complexities and nuances of that body of law.<sup>8</sup> Appearance discrimination also provides a gauge for understanding the limitations of discrimination law.<sup>9</sup>

Developments during the summer of 2010 demonstrate the popular interest in the phenomenon of appearance discrimination. Around the time the Lorenzana story hit the press and spread like wildfire, Stanford Law School Professor Deborah Rhode published a book about American society's obsession with physical beauty and the phenomenon of appearance-based discrimination.<sup>10</sup> The rapid dissemination of Lorenzana's story<sup>11</sup> and the arrival of Professor Rhode's book,<sup>12</sup> indicated that appearance-based discrimination was the torrid topic in employment-discrimination law.

### I. THE HOTTEST LAW OF ALL: MEDIA BLITZ AND TEACHABLE MOMENTS

Lawyers, particularly law professors, tend to find their practice or research areas fascinating, whereas the general public often finds many aspects of the law to be less enthralling.<sup>13</sup> Employment-discrimination law should be one of

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8. *Id.* at 159.

9. *Id.* at 162. Because appearance discrimination is such a useful model for exploring employment-discrimination law, I always begin my employment-discrimination course by raising questions about appearance-based discrimination as a way of introducing many of the issues that the course will discuss.

10. DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* (2010) [hereinafter RHODE, *THE BEAUTY BIAS*]; see Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1034–35 (2009) [hereinafter Rhode, *The Injustice of Appearance*] (discussing some of the material that later appeared in the book). In addition to Rhode's work, other recent scholarly commentary has considered appearance discrimination. See, e.g., Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 1 (2000); Stacey S. Baron, Note, *(Un)lawfully Beautiful: The Legal (De)construction of Female Beauty*, 46 B.C. L. REV. 359 (2005); James Desir, Note, *Lookism: Pushing the Frontier of Equality by Looking Beyond the Law*, 2010 U. ILL. L. REV. 629, 629; Karen Zakrzewski, Comment, *The Prevalence of "Look"ism in Hiring Decisions: How Federal Law Should be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 432 (2005).

11. See Doll & Dwoskin, *supra* note 1 (reporting that less than a week after the story broke in *The Village Voice*, it had been covered "in Mexico, India, Colombia, Ireland, Canada, and the UK"); see also David Weidner, "Too Hot" for This Column: Commentary: Debrahlee Lorenzana is the Talk of Wall Street—Why?, MARKETWATCH (June 15, 2010, 12:01 AM), <http://www.marketwatch.com/story/the-banker-too-hot-for-wall-street-2010-06-15?dist=beforebell> ("For all of the attention Lorenzana claims to have received at work, it doesn't compare to the stalking by the media. First, the Village Voice, then the New York Post, The CBS Early Show, NBC's Today Show, ABC's Good Morning America, and the New York Daily News . . .").

12. Rhode's book immediately attracted attention. See Emily Bazelon, *Just One Look*, N.Y. TIMES, May 23, 2010, at 8 (book review); Dahlia Lithwick, *Our Beauty Bias is Unfair: But Should It Also Be Illegal?*, NEWSWEEK, June 4, 2010, at 20.

13. Although this statement is debatable, people often engage with the legal issues that interest them on an emotional level. People may get hot and bothered about affirmative action,

the exceptions, as it addresses some of the most riveting and difficult issues that society faces. This body of law includes issues such as affirmative action, reverse discrimination, appearance discrimination, and sexual harassment. However, when one actually works with or studies employment-discrimination law, the interesting issues can get lost beneath the procedural structures and evidentiary rules with which the law has been filled, such as the *McDonnell Douglas* pretext proof structure and its companion, the mixed-motives proof structure.<sup>14</sup>

Many have decried the handling of Lorenzana's story, in part because of the slideshow of her photos that accompanied the stories.<sup>15</sup> As one commentator stated, "Gender discrimination and sexual harassment are serious workplace issues—and in our opinion, Ms. Lorenzana's tale does female employees no service."<sup>16</sup> However, the purpose of this Article is neither to determine the veracity of Ms. Lorenzana's allegations nor to judge the manner in which she,

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but only a few are likely to understand the legal analysis under the Fourteenth Amendment or Title VII. Moreover, television shows and movies often focus on the action-filled, dramatic, and unrealistic lives of fictional lawyers, including television series like *Boston Legal*, *L.A. Law*, and *The Practice*. See John Bringham, *L.A. Law*, in *PRIME TIME LAW* 21, 21, 27 (Robert M. Jarvis & Paul R. Joseph eds., 1998).

14. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246–47, 258 (1989) (plurality opinion), *superseded by statute in part*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76, *as recognized in* *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2351 n.5 (2009); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973). The analysis of individual disparate-treatment claims is one of the most complicated and uncertain areas of employment-discrimination law. To evaluate disparate-treatment claims, courts must employ the pretext proof structure developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802–05, or the mixed-motives proof structure developed in *Price Waterhouse v. Hopkins*, 490 U.S. at 246–47, 258, which was subsequently modified by the Civil Rights Act of 1991. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76. This already complex area of employment-discrimination law was rendered all the more complex by the Supreme Court's decision in *Desert Palace, Inc. v. Costa*. See 539 U.S. 90, 101–02 (2003) (holding that "direct evidence of discrimination is not required in mixed-motive cases," and that a plaintiff need only submit sufficient evidence to allow a jury to conclude by a preponderance of the evidence that a protected characteristic was a factor in certain employment activity). Professor Martin Katz labeled the current state of the disparate-treatment proof structures "[t]he swamp." See Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 645 & n.8 (2008); see also Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83–84 (2004) (discussing the likely effects of *Desert Palace* on use of the proof structures); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1888–89 (2004) (predicting that the logic of *Desert Palace* will have a "profound effect" on Title VII cases).

15. See Antilla, *supra* note 2. Lorenzana's first attorney arranged the photo shoot, filed the complaint, and represented her for a while; however, he was replaced by Gloria Allred within three weeks of the story breaking. See Edecio Martinez, *Debralee Lorenzana: "Too Sexy for Citibank" Hires Celebrity Lawyer Gloria Allred*, CBSNEWS.COM (June 15, 2010, 6:25 AM), [http://www.cbsnews.com/8301-504083\\_162-20007652-504083.html](http://www.cbsnews.com/8301-504083_162-20007652-504083.html).

16. Tim Gould, *Too Sexy for Work: Would That Be an ADA Issue?*, HR MORNING (June 3, 2010), <http://www.hrmorning.com/too-sexy-for-work-would-that-be-an-ada-issue/>.

her attorney, or anyone else involved, handled her story or claim. Juxtaposed with Professor Rhode's book, this Article seeks to use this sensational story about alleged appearance-based discrimination to ponder a number of significant employment-discrimination issues.<sup>17</sup> It is important to seize the day, as media blitzes only occasionally create such teachable moments.

## II. HOT BANKERS AND THE HOT BOOK OF THE SIZZLING SUMMER OF 2010

At age twenty-one, Deborahlee Lorenzana moved to New York City from Puerto Rico.<sup>18</sup> In 2010, she was a thirty-three-year-old single mother.<sup>19</sup> She often was described as very physically attractive, or, as the stories described her, "hot!"<sup>20</sup> In 2002, Lorenzana landed her first position in finance as a sales representative.<sup>21</sup> She resigned from this job in 2003, citing a hostile work environment that had developed after she reported sexual harassment.<sup>22</sup> In 2008, Citibank hired her as a business banker.<sup>23</sup> Soon after, a colleague told her that the bank branch was known for hiring "pretty girls."<sup>24</sup> Lorenzana alleged that her two male supervisors began making comments to her about her dress and appearance.<sup>25</sup> They purportedly told her not to wear clothes common in a business office, such as fitted suits and other properly tailored clothing, because with her figure, such clothing was too provocative and distracted her male colleagues.<sup>26</sup> Instead, she said that she was told to wear looser-fitting clothing.<sup>27</sup> She did not comply with their directives because she could not

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17. Of course, because appearance is not a covered characteristic under applicable laws, Lorenzana pled sex discrimination, sexual harassment, and retaliation. Complaint, *supra* note 2, at 7–9.

18. Dwoskin, *Too Hot for Citibank?*, *supra* note 1, at 18.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 20.

24. *Id.*

25. See Complaint, *supra* note 2, at 2.

26. *Id.*

27. See *id.* at 3. The complaint states as follows:

Plaintiff opposed these unlawful workplace practices and complained to management, pointing out that other female colleagues wore similar professional attire. In a regressive response more suitable for reality television than a white-shoe corporation in the twenty-first century, Plaintiff was advised that told that [*sic*] these other comparator females may wear what they like, as they [*sic*] general unattractiveness rendered moot their sartorial choices, unlike Plaintiff, whose shapeliness could not be heightened by beautifully tailored clothing. Plaintiff experienced these distressing comments as sexist, objectifying, humiliating and discriminatory.

*Id.*

afford a new wardrobe, and she claimed that, as part of her Latin culture, women spend time and effort on their feminine appearance.<sup>28</sup>

Lorenzana alleged that she complained to the human resources department about her supervisors' comments regarding her clothing.<sup>29</sup> In reaction to her complaint, she claimed that her supervisors did not provide her with adequate training and that the business she brought in was assigned to other colleagues.<sup>30</sup> Her supervisor then placed her on probation because of alleged tardiness and inadequate sales.<sup>31</sup> In her defense, Lorenzana asserted that she could not have been tardy on the cited days because the branch office was closed, and her failure to meet sales goals was a direct result of the discrimination.<sup>32</sup>

Lorenzana thereafter sent an e-mail to two regional directors, in which she complained about the hostile work environment.<sup>33</sup> Although she did not receive a response, she was transferred to another branch, where she alleged that she was not permitted to do the work for which she was hired.<sup>34</sup> She alleged that Citibank ultimately fired her due to her clothing choices and failure to meet new account quotas.<sup>35</sup> Lorenzana filed suit against Citibank, stating claims under New York City law for sex discrimination in termination, hostile work environment, sexual harassment, and retaliation for opposing or complaining of sex discrimination.<sup>36</sup> Because she had signed a mandatory arbitration agreement, the court dismissed her suit, and the claim was submitted to arbitration.<sup>37</sup>

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28. See Courtney Comstock, *Woman Says Citibank Fired Her Because She Was Too Hot*, BUSINESS INSIDER (June 2, 2010, 7:49 AM), <http://www.businessinsider.com/debrahlee-lorenzana-citi-2010-6>.

29. Complaint, *supra* note 2, at 4.

30. *Id.*

31. *Id.*

32. *Id.* at 4–5.

33. *Id.* at 5.

34. *Id.* at 5–7.

35. *Id.* at 7.

36. *Id.* at 7–9.

37. See Defendant Citigroup Inc.'s Notice of Motion to Compel Arbitration and to Dismiss and/or Stay the Proceedings, *Lorenzana v. Citigroup, Inc.*, No. 116382/09 (N.Y. Sup. Ct. filed Nov. 20, 2009), available at <http://iapps.courts.state.ny.us/iscroll/SQLData.jsp?IndexNo=116382-2009>. The enforceability of mandatory arbitration agreements with respect to statutory employment-discrimination claims is a significant, hot issue. See Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58, 60 (2007). Had it been enacted, the Arbitration Fairness Act of 2009 would have invalidated pre-dispute mandatory arbitration agreements in employment, consumer, and franchise agreements, unless provided for in collective-bargaining agreements. See S. 931, 111th Cong. (2009); *Bill Introduced in Senate Would Bar Mandatory Arbitration of Employment Claims*, [2009] Daily Lab. Rep. (BNA) No. 85, at A-9 (May 6, 2009). Although this topic is beyond the scope of this Article, the argument that mandatory arbitration in employment discrimination prevents the public from knowing of the adjudication and resolution of these claims, given the important public policy of antidiscrimination, is pertinent. See EQUAL EMP'T

JP Morgan Chase subsequently hired Lorenzana before her story emerged in the beginning of June 2010.<sup>38</sup> Likely less than pleased with all the attention, her new employer purportedly ordered her to stop speaking to the media about her claim against Citibank and threatened to fire her for noncompliance.<sup>39</sup> According to her, a manager told her that she was violating a written code of conduct prohibiting employees from criticizing the financial industry.<sup>40</sup>

Soon after the story gained prominence, a 2003 video clip featuring Lorenzana surfaced. The video, entitled *Plastic Surgery: Transforming Lives*, featured Lorenzana discussing her breast augmentation surgeries and saying that she wants to look like a “Playboy playmate.”<sup>41</sup> The story provoked a sensational and scathing backlash.<sup>42</sup> Then, Lorenzana hired a high-profile attorney, Gloria Allred, who has represented a number of “celebrity” women.<sup>43</sup> Her new attorney immediately launched a counter-offensive against the negative stories.<sup>44</sup>

Although not the *cause célèbre* that the Lorenzana lawsuit was, a second case involving appearance issues and related conduct was decided in the summer of 2010—*Willingham v. Regions Bank*.<sup>45</sup> Interestingly enough, Willingham was also an apparently attractive banker who was terminated, making it a particularly challenging summer for appearance-gifted bankers.<sup>46</sup> Although there are numerous distinctions between Lorenzana’s lawsuit and

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OPPORTUNITY COMM’N, EEOC NOTICE NO. 915.002, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (1997), available at <http://www.eeoc.gov/policy/docs/mandarb.html>. Lorenzana’s claims have ceased to command a significant amount of media attention since the court dismissed her claims and they were submitted to arbitration. The diminished publicity may demonstrate the more private nature of arbitration. However, an equally plausible explanation is the fickle and fleeting attention of contemporary media. Although sex and sexiness always arouse public interest, new stories arise every day. The hot topic of today will be old news in short order.

38. Elizabeth Dwoskin, *Debralee Lorenzana Now Also Too Hot for JP Morgan Chase*, VILLAGE VOICE BLOGS (June 6, 2010, 11:29 PM), [http://blogs.villagevoice.com/runnin scared/archives/2010/06/debralee\\_loren.php](http://blogs.villagevoice.com/runnin scared/archives/2010/06/debralee_loren.php) [hereinafter Dwoskin, *Lorenzana Too Hot*].

39. *Id.*

40. *Id.*

41. See Helena Andrews, *Debralee Lorenzana: A Double Take on Those Double D’s*, POLITICS DAILY (June 11, 2010), <http://www.politicsdaily.com/2010/06/11/debralee-lorenzana-a-double-take-on-those-double-ds/>.

42. See Andrea Peyser, *Call Off the Bod-Squad—This Boob Has Been Exposed*, NYPOST.COM (June 24, 2010) [http://www.nypost.com/p/news/local/call\\_off\\_the\\_bod\\_squad\\_this\\_boob\\_ETk59Mw6O7C2cMTodVJIgL](http://www.nypost.com/p/news/local/call_off_the_bod_squad_this_boob_ETk59Mw6O7C2cMTodVJIgL).

43. See, e.g., Martinez, *supra* note 15; Romy Ribitzky, *Allred to the Rescue*, PORTFOLIO.COM (June 15, 2010), [http://www.portfolio.com/views/blogs/daily-brief/2010/06/15/bank-babe-debralee-lorenzana-hires-feminist-lawyer-gloria-allred?ana=from\\_rss](http://www.portfolio.com/views/blogs/daily-brief/2010/06/15/bank-babe-debralee-lorenzana-hires-feminist-lawyer-gloria-allred?ana=from_rss).

44. See *Exclusive: Woman Fired for Being Too Hot Says Her Boob Job Not a License to Stare!*, RADARONLINE.COM (June 15, 2010), <http://www.radaronline.com/exclusives/2010/06/exclusive-woman-fired-being-too-hot-says-her-boob-job-not-license-stare>.

45. No. 2:09-cv-02289, 2010 WL 2650727, at \*1–3 (W.D. Tenn. July 1, 2010).

46. *Id.* at \*1.



*Willingham*, there are also a few interesting similarities. Ultimately, *Willingham*'s termination was not because of her appearance, but rather because of how she used it—she brought to work copies of a magazine with photographs of herself posing in swimwear for her co-workers to enjoy.<sup>47</sup> The bank allegedly fired her for violating the company's code of conduct and for potentially damaging the reputation of the bank.<sup>48</sup> Notwithstanding this difference, the case revealed the various roles that physical appearance and appearance-related conduct can have in the workplace and workplace regulation.<sup>49</sup>

Professor Rhode's book hit the stands about the time the *Lorenzana* story was breaking. In *The Beauty Bias*, Rhode provides a careful study of the current phenomenon of appearance-based discrimination and explores its cultural and historical underpinnings, which led her to find that appearance bias is not new, but rather has been exacerbated by contemporary market forces, technology, and media.<sup>50</sup> She surveys existing employment-discrimination law and challenges commentators who argue that appearance should not be added as a covered characteristic.<sup>51</sup> Finally, Rhode considers strategies other than legal regulation for changing the culture of appearance discrimination.<sup>52</sup>

### III. HOT LESSONS ABOUT EMPLOYMENT-DISCRIMINATION LAW

This section discusses several salient employment-discrimination issues raised by appearance discrimination, some of which are highlighted in Rhode's book and by *Lorenzana*'s claims. First, although physical appearance may be one of the most commonly practiced types of employment discrimination,<sup>53</sup> antidiscrimination laws do not, and likely never will, protect against such discrimination.<sup>54</sup> Nevertheless, numerous claims alleging appearance discrimination have been fit under characteristics that are covered by existing law.<sup>55</sup> This strained approach to appearance-discrimination claims should raise questions about the slippery nature of employment-discrimination law and whether it is appropriate to fit such claims within existing coverage. This Article argues that fitting has long been a part of employment-discrimination

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47. *Id.* at \*1, \*7.

48. *Id.* at \*3.

49. For further discussion of *Willingham*, see *infra* notes 142–60 and accompanying text.

50. RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 49–68.

51. *Id.* at 101–02, 117–18, 125–40.

52. *Id.* at 145–61.

53. *Id.* at 2, 23–28.

54. See Corbett, *supra* note 7, at 158 (predicting that no federal and few state or local employment-discrimination laws will cover appearance discrimination).

55. See Complaint, *supra* note 2, at 7–9 (stating claims for sex discrimination, harassment, and retaliation).

law and that it is an appropriate way for courts to address claims at the margins of coverage.

Second, reverse-discrimination claims challenge some of the basic principles of employment-discrimination law. If appearance were covered, a reverse-discrimination suit would arise when a person faced discrimination for being too attractive; this would differ from the typical or traditional claim in which a person alleges that he or she was discriminated against because he or she was not attractive enough. Considering such hypothetical reverse appearance-discrimination claims raises questions about whether a historically favored racial, religious, sex, national origin, or age group should be able to pursue reverse-discrimination claims. Moreover, if reverse-discrimination claims are cognizable, perhaps they should not be evaluated in the same way as traditional discrimination claims.

The third issue is the concept of a bona fide occupational qualification (BFOQ), which permits employers to discriminate based on protected characteristics if they can demonstrate that the trait, such as being male, is essential to the job. BFOQ is a statutorily recognized defense to certain types of discrimination; the appropriate breadth or narrowness of the defense is a controversial and persistent topic. Appearance provides an instructive vehicle for thinking about the appropriate scope of the BFOQ defense in employment-discrimination law because, depending on the job, appearance may fall anywhere along the continuum of relevant to essential.<sup>56</sup>

Other issues for which appearance discrimination serves as a useful analytical device include retaliation, evidentiary concerns, and at-will employment. Retaliation is the most potent claim under employment-discrimination law and can provide some measure of protection against appearance-based discrimination. Lorenzana's case raises questions regarding the appropriate role in employment discrimination cases of evidence of the victim's dress or peripheral conduct, such as the controversial 2003 video of Lorenzana. Finally, the predominant and pervasive U.S. doctrine of at-will employment, which allows employers to terminate an employee for any reason (good, bad, or no reason at all), is particularly problematic for victims of appearance-based discrimination in trying to prove their claims.<sup>57</sup> If the forty-nine states permitting at-will employment followed Montana's lead in

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56. See, e.g., *Brice v. Resch*, No. 10-C-711, 2011 WL 284182, at \*4 (E.D. Wis. Jan. 24, 2011). The *Brice* court explained that

[f]ashion boutiques, restaurants, modeling agencies, real estate companies, television stations and countless other businesses rely overtly on staffing at least certain positions within their companies based on physical attributes of their employees. Plaintiff was hired as a sales specialist, and it is well known that appearance is particularly important in the sales world.

*Id.*

57. See, e.g., *id.* (explaining that permitting a lawsuit based on termination for appearance "would lead to a seismic disruption in the at-will employment relationship").

abolishing employment at will,<sup>58</sup> employers would need good cause to fire an employee, a standard that may or may not be satisfied in cases involving appearance. The abrogation of employment at will would diminish both plaintiffs' and the law's reliance on employment-discrimination laws when an employee is terminated.<sup>59</sup>

In sum, ruminating about appearance discrimination provides insight into several of the most significant and controversial issues in employment-discrimination law and yields a better understanding of its complexities and nuances. Thus, even if few employment-discrimination laws in the United States cover appearance, delving into the topic nonetheless offers the opportunity to better understand and perhaps improve existing law.

#### *A. Appearance-Based Discrimination: Coverage, Non-Coverage, and How to Fit a Claim Under Existing Employment-Discrimination Law*

##### *1. Why Appearance-Based Discrimination Never Will Be Generally Covered*

The United States has no federal employment-discrimination law that prohibits discrimination based on physical appearance,<sup>60</sup> unless the particular aspect of appearance constitutes a disability under the Americans with Disabilities Act (ADA) of 1990.<sup>61</sup> The District of Columbia and Michigan prohibit some types of appearance-based discrimination.<sup>62</sup> Additionally, there are a handful of city and county ordinances that prohibit appearance-based discrimination.<sup>63</sup> Although the United States often lags behind other nations in

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58. See MONT. CODE ANN. §§ 392–904 (2009) (creating a cause of action for wrongful discharge, which prohibits termination that is not for good cause).

59. Under a good-cause regime, for a termination allegedly due to appearance, the question would not be whether the employer discriminated on the basis of appearance. Rather, the question would be whether the employer had a job-related reason for discharging the employee.

60. See Corbett, *supra* note 7, at 155 (noting the lack of federal appearance laws).

61. *Id.* at 164 (noting employers may discriminate based on weight unless specifically prevented by law, such as the ADA); see Goodman v. L.A. Weight Loss Ctrs. Inc., No:04-CV-3471, 2005 WL 241180, at \*3 (E.D. Pa. Feb. 1, 2005) (stating, in deciding an ADA claim, that “an employer is permitted to make hiring decisions based on certain physical characteristics”). Obesity gives rise to “[m]ost appearance-related disability claims,” which typically are unsuccessful. RHODE, THE BEAUTY BIAS, *supra* note 10, at 122–23; see Jane Korn, *Too Fat*, 17 VA. J. SOC. POL’Y & L. 209, 232 (2010) (reasoning that obesity is not an “impairment” for purposes of claiming disability). Some disability-discrimination cases can be characterized as appearance discrimination. See, e.g., Johnson v. Am. Chamber of Commerce Publishers, Inc., 108 F.3d 818, 819–20 (7th Cir. 1997) (permitting a man missing eighteen teeth to claim disability under the ADA).

62. D.C. CODE ANN. §§ 2-1401.02(22), 2-1402.11 (2001) (personal appearance); MICH. COMP. LAWS ANN. § 37.2202 (West 2001) (height and weight); see RHODE, THE BEAUTY BIAS, *supra* note 10, at 125–34 (surveying state and local laws prohibiting appearance-based discrimination).

63. SANTA CRUZ, CAL., MUN. CODE §§ 9.83.010, .020(13) (2010), <http://www.codepublishing.com/CA/SantaCruz/>; URBANA, ILL., CODE §§ 12-37, -62 (1998),

protective-employment law,<sup>64</sup> the absence of appearance-discrimination protection is not an example of “American exceptionalism.”<sup>65</sup>

Most people probably believe that discrimination based on physical appearance is commonplace in employment, as well as in most facets of life.<sup>66</sup> Furthermore, appearance discrimination seems to be a more significant issue for women than men.<sup>67</sup> Indeed, contemporary society seems to be utterly and completely obsessed with physical attractiveness,<sup>68</sup> and society’s affinity for beauty seems to have real economic consequences for people.<sup>69</sup> Recent research indicates that there is a high correlation between beauty and happiness, with a significant part of the happiness attributable to the beautiful person’s higher earnings, and the higher earnings of the beautiful person’s beautiful spouse.<sup>70</sup> However, many also believe both that such discrimination is morally wrong, or at least unfair,<sup>71</sup> and that surely employers cannot legally fire someone based on physical appearance alone.<sup>72</sup> This is not the case, however, because most legislatures have not enacted laws prohibiting

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<http://urbanillinois.us/citycode/TOC016>; MADISON, WIS., CODE OF ORDINANCES § 39.03(2)(bb) (2007), <http://library.municode.com/index.aspx?ClientID=50000&StateID=49&StateName=Wisconsin>.

64. See Thomas C. Kohler, *The Employment Relation and Its Ordering at Century’s End: Reflections on Emerging Trends in the United States*, 41 B.C. L. REV. 103, 103–04 (1999) (“As is generally well known, the United States historically has provided comparatively meager formal legal protections of the employment relationship.”).

65. See RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 134–35 (noting Australia’s state of Victoria is the only foreign jurisdiction with a law explicitly prohibiting appearance discrimination). Regarding the issue of American exceptionalism generally, see Harold Hongju Koh, Foreword, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1481 n.4 (2003) (defining “American Exceptionalism” as “the perception that the United States differs qualitatively from other developed nations”).

66. See Corbett, *supra* note 7, at 157.

67. See RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 30–32; see also Jason Abrevaya & Daniel S. Hamermesh, “Beauty is the Promise of Happiness”? 12 (Dec. 2010) (unpublished manuscript), available at [http://www.iza.org/en/papers/122\\_18012011.pdf](http://www.iza.org/en/papers/122_18012011.pdf) (“The impacts of beauty or its absence on satisfaction/happiness generally seem slightly larger among women than among men . . .”).

68. RHODE, *THE BEAUTY BIAS*, *supra* note 10, at xv, 30–32.

69. See Abrevaya & Hamermesh, *supra* note 67, at 21 (“The majority of the impact of beauty on satisfaction/happiness appears to be economic—through its effects on outcomes in various markets.”).

70. See *id.* (“Among both men and women at least half of the increase in satisfaction/happiness generated by beauty is indirect, resulting because better-looking people achieve more desirable outcomes in the labor market (higher earnings) and the marriage market (higher-income spouses).”).

71. RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 9–11.

72. See Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 7 (2002) (explaining that most people do not understand that they are employees at will and terminable without cause). Employment at will is discussed *infra* in Part III.F.

appearance-based discrimination, and most never will. Although there may be many reasons for the paucity of such laws, two are subsequently addressed.

*a. The Coverage Problem: "I'm Ugly, and Even If I'm Not, They Think I Am."*

In order to proscribe appearance-based discrimination, legislatures would have to define the protected trait. As a threshold matter, drafting a statute may be difficult given that appearance bias falls along a continuum.<sup>73</sup> Assuming, nonetheless, that a legislature enacted a law, the coverage problems would persist. Due to the amorphous nature of physical characteristics, courts would inevitably spend a significant amount of time determining whether the claimant possessed the protected characteristic, no matter which characteristics were selected for coverage in the law. This initial task of defining covered appearance-related features is therefore one of the most significant hurdles in enacting such legislation and could potentially present more difficulties than any characteristic currently covered by federal employment-discrimination law.<sup>74</sup>

In drafting the definition of a protected class, one option is to list specific aspects of appearance, such as height, weight, facial characteristics, body shape, dress, or grooming.<sup>75</sup> Although enumerating particular characteristics would make coverage determinations easier, the approach is unattractive because it is likely to be underinclusive and thus may fail to capture much of the type of discrimination with which we are concerned.<sup>76</sup> For example, if a plaintiff sued for weight discrimination, an employer may be able to escape liability by claiming it discriminated based on general appearance rather than the particular covered trait. If drafters eschewed specifics and instead opted to broadly prohibit all discrimination based on "appearance," meaning attractiveness or unattractiveness, this could lead to the difficult situation of determining whether a claimant is unattractive, or attractive, enough to make a claim for such discrimination.<sup>77</sup> As one commentator succinctly expressed the

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73. RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 25.

74. See Rhode, *The Injustice of Appearance*, *supra* note 10, at 1068, 1097–98 (recognizing the problem for employers and courts in determining what aspects of appearance are protected, but nonetheless proposing general-appearance discrimination law).

75. *Id.* at 1081–83.

76. By comparison, in discussions and negotiations preceding the passage of the ADA, the drafters had to determine whether "disability" should be defined using a broad definition or a list of specifics. Michael Selmi, *Interpreting the Americans With Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 539–44 (2008). The broader and more amorphous coverage term prevailed. *Id.* at 526.

77. See RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 101 ("Unlike sex, race, or ethnicity, 'unattractiveness' falls on a continuum and who even falls within that category can be open to dispute."); Corbett, *supra* note 7, at 174.

problem, “Will there be a national standard of attractiveness established by EEOC rulemaking?”<sup>78</sup>

For existing discrimination laws, the ADA protects the most amorphous trait—disability. The main issue that arises under the ADA is whether an individual has a “disability.”<sup>79</sup> Much of the litigation under the ADA focuses on whether the claimant has a disability that substantially limits a major life activity.<sup>80</sup> The ambiguous definition of disability is a significant factor in the well-known staggering loss rate of ADA plaintiffs.<sup>81</sup> Similar difficulties arise with religion under Title VII; courts have wrestled with the determination of what constitutes a “religion” beyond the major, protected religious groups and traditional beliefs and practices.<sup>82</sup> The Equal Employment Opportunity Commission (EEOC) adopted a broad definition of “religion” in its regulation: “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”<sup>83</sup> Though expansive, this definition does not include all beliefs, such as the quaint belief that eating a particular brand of cat food is necessary for good health.<sup>84</sup>

Similar difficulties and uncertainties regarding coverage would pertain to physical appearance. As the old adage goes, “Beauty is in the eye of the beholder.” Moreover, the stigma attached to being considered unattractive and, worse, being required to publicly proclaim oneself so, likely would dissuade victims from asserting claims.<sup>85</sup> Vague definitions could result in a colloquy between a judge and a plaintiff as follows:

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78. James J. McDonald, Jr., *Civil Rights for the Aesthetically-Challenged*, 29 EMP. RELATIONS L.J. 118, 127 (2003).

79. See, e.g., Selmi, *supra* note 76, at 533 (“[T]he need to define the protected class renders disability statutes different from other antidiscrimination statutes, and there is no accepted way to define disability.”).

80. See, e.g., Corbett, *supra* note 7, at 173–74; Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 139–41 (2000); Sandra B. Reiss & J. Trent Scofield, *The New and Expanded Americans with Disabilities Act*, 70 ALA. LAW. 38, 39 (2009).

81. See, e.g., Corbett, *supra* note 7, at 174 (“The ADA did not limit the meaning of disability to particular mental and physical impairments, but the multi-part definition has generated much of the legal analysis in cases and spelled the defeat of many ADA plaintiffs.”); Feldblum, *supra* note 80, at 91–94, 139 (discussing the formation of the definition of “disability” and how courts have construed such); Sandra B. Reiss & J. Trent Scofield, *The New and Expanded Americans With Disabilities Act*, 70 ALA. LAW. 38, 39 (2009) (“Legislative proponents note that, in 2004, plaintiffs lost 97 percent of the ADA employment discrimination claims that actually made it to trial, often due to the interpretation of the definition of the term ‘disability.’”).

82. See 29 C.F.R. § 1605.1 (2010) (“In most cases whether or not a practice or belief is religious is not at issue.”).

83. *Id.*

84. See *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (concluding that such a belief is not religious), *aff’d*, 589 F.2d 1113 (5th Cir. 1979).

85. See RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 111–12.

Judge: You say your employer discriminated against you because of your appearance. What do you mean?

Plaintiff: I mean because I am ugly, Your Honor.

Judge: Well, you are not the most attractive person I have ever seen, but I have seen worse. Take my clerk, for example. I doubt your employer discriminated against you because you are ugly, because you are not all that ugly.

Plaintiff's Counsel: With all due respect, Your Honor, my client is hideous. To wit, *res ipsa loquitur*.

The stigma that might prompt some plaintiffs' reluctance would not be present in reverse appearance-discrimination cases, like that of *Lorenzana*; that is, plaintiffs may be less hesitant to file a suit if they think that they were victimized because of their beauty or hotness.<sup>86</sup> The fact finder, however, may disagree with the plaintiff, creating some risk aversion on the part of plaintiffs who believe that they are attractive.

The hypothetical colloquy above suggests that the coverage issue actually is more complicated than the legendary one-to-ten rating scale of attractiveness. The elusive trait of beauty, hotness, or ugliness would not be the dispositive issue on coverage. The linchpin for coverage would be how the discriminators regarded the victim.<sup>87</sup> This differs somewhat from most other protected characteristics. For example, with race and sex discrimination, these traits are matters of fact that usually are readily observable by potential discriminators. When a Caucasian employee sues for race discrimination, rarely is time spent in litigation trying to determine whether the plaintiff is, in fact, Caucasian and whether the alleged discriminators regarded her as such. This is not always true of all covered characteristics. National origin, for example, is not always known or observable.<sup>88</sup> People sometimes harass or discriminate against a person because of what they erroneously think his or her national origin to be.<sup>89</sup>

The ADA, which prohibits discrimination based on disability<sup>90</sup>—the most amorphous of all traits currently covered by federal discrimination law—is

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86. This proposition may be undercut by the shame and humiliation suffered by victims of sexual harassment that impedes their assertion of claims. See, e.g., Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133, 182 (2005).

87. Often, attractiveness and unattractiveness are judged comparatively. The determination of a protected trait by comparison is not unknown in existing employment-discrimination laws. Congress recognized relative characteristics in the ADA. To be covered, a physical or mental impairment is insufficient; an impairment must substantially limit a major life activity. 42 U.S.C. § 12102(1)(A) (Supp. III 2009).

88. See, e.g., *Equal Emp't Opportunity Comm'n v. WC&M Enters.*, 469 F.3d 393, 397 (5th Cir. 2007) (noting that co-workers harassed plaintiff by making statements that he was Arab and a part of the Taliban, despite the fact that he was Indian).

89. *Id.*

90. See 42 U.S.C. § 12112 (2006).

instructive on the difficulty of determining whether any particular individual would be covered by an appearance-discrimination law. Recognizing the reality of discrimination based on perceived disabilities, Congress drafted a three-pronged definition of “disability,” which included “being regarded as having an impairment.”<sup>91</sup> Thus, Congress recognized that disability, like beauty or lack thereof, is often in the eye of the beholder. However, not all disability-discrimination cases are “regarded as” cases. Given the subjective nature of physical attractiveness or unattractiveness, the coverage question in all cases would be whether the discriminators thought the person was attractive or unattractive. Though there may be cases of *res ipsa loquitur*—“the thing speaks for itself”<sup>92</sup>—most will depend upon the plaintiff’s ability to prove how he or she was regarded. Even disability is more concrete, with numerous impairments that clearly satisfy the definition.<sup>93</sup>

*b. Fighting Against Nature: People Are Hard-Wired to Be Attracted to Beauty*

The reluctance to sanction appearance discrimination through law evinces a belief that law cannot significantly reduce this type of discrimination, and perhaps conveys a lack of moral conviction that such discrimination should be regulated. Contemporary American society celebrates and embraces physical beauty with an inexhaustible fervor.<sup>94</sup> American culture is not alone in this obsession, nor is this a recent phenomenon.<sup>95</sup> Preference for beauty is old, deeply ingrained, and probably hard to extirpate. Moreover, in a visual age of computers, the Internet, and three-dimensional images, beauty seems to be everywhere.<sup>96</sup> Thus, policy-makers probably lack confidence that appearance-based discrimination law would be capable of significantly reducing this type of discrimination.<sup>97</sup> Even if policy-makers believed that such discrimination could be reduced through regulation, it is questionable whether society has the same moral conviction about this type of discrimination that it has about racial and sexual discrimination, for example. In short, Americans may have qualms about the fairness of favoring beautiful people without believing that such a preference is morally wrong, or wrong enough to invoke legal regulation.

91. *Id.* §§ 12102(1)(C), 12102(3).

92. BLACK’S LAW DICTIONARY 1424 (9th ed. 2009).

93. *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act as Amended, 76 Fed. Reg. 16,978, 16,990 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630) (listing several physical and mental impairments that “should easily be concluded [to] . . . substantially limit . . . major life activities”).

94. *See* RHODE, THE BEAUTY BIAS, *supra* note 10, at 53–68 (discussing the effects of technology, media, and advertising on the obsession with physical beauty).

95. *See id.* at 45–68.

96. *See id.* at 53–68.

97. *Id.* at 13–14 (“To some courts and commentators . . . a ban on appearance discrimination asks too much. From their perspective, even if such discrimination is unfair, the law is incapable of eliminating it and efforts to do so will result in unwarranted costs and corrosive backlash.”).



One significant concern about employment-discrimination law that is pertinent to appearance discrimination is the focus on intentional discrimination and the requirement that plaintiffs prove the discriminator's motive, despite evidence that discrimination is largely subliminal and unconscious.<sup>98</sup> Thus, there is a disconnect between the analysis used to prove discrimination and the way the actual phenomenon occurs. With appearance-based discrimination, this disconnect may be exacerbated because appearance preferences may be one of the most hard-wired types of discrimination.<sup>99</sup> It seems likely that people discriminate in favor of attractive people often without being aware of the reason for their actions. In fact, studies indicate that babies favor attractive faces.<sup>100</sup> However, as Rhode notes, "considerable evidence suggests racial, gender, and disability biases are also deeply rooted, but nonetheless subject to change through legal prohibitions."<sup>101</sup>

In sum, legislators likely would have difficulty moving past two threshold questions. First, can a law be fashioned that would significantly reduce appearance discrimination? Second, assuming such a law could be drafted, would prohibiting such discrimination run counter to a general societal value that beauty is good and desirable, and prohibit a type of discrimination about which society is morally ambivalent?

*c. Prognosticating and Disclaiming*

Considering the difficulty of writing a law that strikes an appropriate balance between specificity and breadth of coverage, the problem of identifying those who are covered by the law, and the unlikelihood of significantly displacing the beauty bias, there will likely be no federal employment-discrimination law prohibiting appearance-based discrimination, and few state or local laws.<sup>102</sup> Yet, it is worth considering how a characteristic comes to be covered by federal, state, or local employment-discrimination laws. Although not an exhaustive list, five significant factors that lead to coverage of a characteristic include: (1) "moral objection to the type of discrimination"; (2) "cohesive and identifiable group"; (3) "history of discrimination on that basis"; (4) "immutability of the characteristic"; and (5) "irrelevance of the characteristic" to work.<sup>103</sup> There also must be sufficient political backing for the law to pass, which often requires activism and coalition-building.<sup>104</sup> Captivating stories

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98. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1211 (1995); Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443, 443–44 (2010).

99. See RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 45–46.

100. *Id.* at 26.

101. *Id.* at 14, 112–16.

102. See Corbett, *supra* note 7, at 178.

103. *Id.* at 171–77.

104. *Id.* at 171.

and scholarship,<sup>105</sup> such as Lorenzana's much-publicized claim and Rhode's book, may have the capacity to influence and shift the direction of law. When scholarship supports the captivating stories, the chances of a law passing sometimes increase.<sup>106</sup> Once such example is the Genetic Information Nondiscrimination Act (GINA), which was signed into law by President George W. Bush on May 21, 2008.<sup>107</sup> By the time of its enactment, GINA had been introduced in Congress several times, and genetic-information discrimination laws had been enacted by a majority of the states.<sup>108</sup> Considering the aforementioned factors,<sup>109</sup> the case for the genetic-discrimination law was far less compelling than was the case for race, sex, age, or any other characteristic covered by the present federal employment-discrimination laws.<sup>110</sup> Notably, a well-chronicled history of discrimination based on genetic information was lacking, and no other discrimination statute has been enacted without a substantial history of discrimination.<sup>111</sup> A few stories of such discrimination existed,<sup>112</sup> including an EEOC suit against Burlington Northern Railroad that received considerable media attention.<sup>113</sup> In addition to this big story, a large and growing body of scholarship advocated for passage of a genetic-discrimination law.<sup>114</sup> As a

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105. Professor Anita Bernstein has argued that one key to the adoption of new torts is the paradox of agency, meaning that they have an advocate who disclaims the advocacy role. See Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1552–59 (1997).

106. Although scholars have influenced the creation of new torts, Bernstein has argued that the courts prefer torts that appear “independent of individual human creation.” *Id.* at 1552.

107. Pub. L. No. 110-233, 122 Stat. 881.

108. Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 446 & n. 28, 446–48 (2010).

109. See *supra* note 103 and accompanying text.

110. See Roberts, *supra* note 108, at 441 (describing GINA as preemptive because there was no significant history of genetic discrimination).

111. See *id.* Roberts observed:

While some examples do exist, both GINA's advocates and adversaries agreed that scant evidence indicated a significant history of genetic-information discrimination. Thus, whereas the preceding laws were retrospective, GINA is preemptive. It anticipates a form of discrimination that may pose a future threat. GINA's opponents cited the lack of existing genetic-information discrimination as evidence that the law was premature or unnecessary. Its proponents, however, presented GINA as a unique opportunity to stop discrimination before it starts. It is this preemptive nature, basing protection on future—rather than past or even present—discrimination, that truly makes GINA novel.

*Id.*

112. See *id.* at 466–68.

113. See, e.g., Steven Greenhouse, *Law Seeks to Ban Misuse of Genetic Testing*, N.Y. TIMES, Nov. 16, 2009, at B5; Tamar Lewin, *Commission Sues Railroad to End Genetic Testing in Work Injury Cases*, N.Y. TIMES, Feb. 10, 2001, at A10.

114. See, e.g., Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. HEALTH CARE L. & POL'Y 225, 263–65 (2000).

result, genetic information joined the list of characteristics that federal employment-discrimination law protects.<sup>115</sup>

Stories and scholarship have also aided the passage of other laws. Many cases and stories of sexual harassment, and the influential scholarship of Professor Catherine McKinnon, led to the recognition of sexual harassment as a form of sex discrimination.<sup>116</sup> The common law recognition of wrongful discharge in violation of public policy owes much to an article written by Professor Lawrence Blades<sup>117</sup> and stories of some abusive terminations of employees.<sup>118</sup> Currently, several state legislatures, prompted by stories and scholarship, are considering antibullying legislation.<sup>119</sup>

Theoretically, stories of appearance-based discrimination, such as Lorenzana's case, and scholarship, such as Rhode's book, may bolster the prospects and spur the adoption of more state laws—and possibly even a federal law—prohibiting appearance-based discrimination. Predicting the effect of scholarship and stories in the context of appearance-based discrimination, however, is difficult. The potential influence of Lorenzana's story is particularly difficult to gauge. A well-publicized story about a woman allegedly fired because of her appearance could bolster prospects for passage of an appearance-discrimination law. If Lorenzana were an unattractive person suing for unfair termination, she likely would evoke sympathy, but, ironically, not nearly as much publicity. However, with an attractive woman, this story may have the opposite effect. Legislators or judges may or may not be moved by a claim that can be restated as "Don't hate me because I'm beautiful."<sup>120</sup> Conversely, attractive people often evoke sympathy, admiration, forgiveness, or other milk of human kindness in situations in which unattractive people do

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115. See 42 U.S.C. §§ 2000ff to 2000ff-11 (Supp. III 2009) (prohibiting genetic discrimination in employment).

116. See CATHARINE A. MCKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* 173–213 (1979) (making the case that sexual harassment is sex discrimination).

117. Lawrence E. Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1435 (1967); see Bernstein, *supra* note 105, at 1523 & n.13 (citing Blades as a scholar instrumental in the formation of the new tort).

118. See Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 747–49, 772 (1991) (describing examples of abusive discharges found in cases and stating that there are a substantial number of abusive discharges every year).

119. Drs. Gary and Ruth Namie established the Workplace Bullying Institute. See *History of Workplace Bullying Institute*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/about/history.html> (last visited Apr. 8, 2011). Professor David Yamada has brought considerable attention to the issue through his scholarship and work with Suffolk's New Workplace Institute and his drafting of the proposed Healthy Workplace Bill. See, e.g., David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protections*, 88 GEO. L.J. 475, 492–93 (2000).

120. See 1980s Pantene Commercial, *Don't Hate Me . . .*, YOUTUBE (Jan. 16, 2006), <http://www.youtube.com/watch?vhz8ul-gmlya> [hereinafter *Pantene Commercial*].

not.<sup>121</sup> In addition to a possible sympathy deficit, the story may cause legislators to realize the legal and analytical complexities involved in establishing the scope of coverage and the possible recognition of reverse-discrimination claims.

In the end, it seems unlikely that appearance-discrimination laws will be enacted. Nonetheless, considering the prospects for enactment of an appearance-discrimination law fosters a better understanding of why some characteristics come to be protected by law and others do not.

## 2. "Fitting" Appearance Claims Under Other Protected Characteristics

### a. How the Courts Fit Claims Under Covered Characteristics

Because there is no applicable federal, state, or local law prohibiting appearance-based discrimination, Lorenzana will need to establish another basis for her claim. To recover under employment-discrimination law, appearance-based discrimination must "fit" under another expressly protected characteristic.<sup>122</sup> Thus, instead of alleging appearance discrimination, Lorenzana presented her claim, in part, as sex discrimination and hostile-environment sexual harassment under New York City employment-discrimination law.<sup>123</sup>

There are some plausible theories available for fitting appearance-based discrimination under sex discrimination.<sup>124</sup> To prevail in a sex-discrimination claim, the plaintiff must prove that he or she was treated differently than a similarly situated member of the other sex.<sup>125</sup> In appearance cases, one basis for a claim of sex discrimination is different dress and grooming standards for male and female employees.<sup>126</sup> Different dress and grooming standards involves no stretching of sex discrimination because, on its face, it calls for different treatment of similarly situated men and women. Nonetheless, courts have recognized that employers usually are not going to have the same dress and grooming codes for men and women.<sup>127</sup> Generally, the courts tolerate

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121. Rita Mahajan, *The Naked Truth: Appearance Discrimination, Employment, and the Law*, 14 ASIAN AM. L.J. 165, 166 (2007).

122. Corbett, *supra* note 7, at 158.

123. Complaint, *supra* note 2, at 7–9. She also asserted a retaliation claim. *Id.*

124. See Heather R. James, Note, *If You Are Attractive and You Know It, Please Apply: Appearance-Based Discrimination and Employers' Discretion*, 42 VAL. U. L. REV. 629, 650 (2008).

125. See, e.g., *Oncle v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring))).

126. Corbett, *supra* note 7, at 178.

127. *Jespersion v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006).

some clear discrimination in dress and grooming standards, permitting different standards as long as the burdens on men and women are equal.<sup>128</sup>

Nonetheless, this theory of appearance discrimination as sex discrimination is not applicable to Lorenzana's claim because she allegedly was told to dress differently than other women, not men.<sup>129</sup> As her complaint states, "Plaintiff was advised that told [sic] that these other comparator females may wear what they like, as they [sic] general unattractiveness rendered moot their sartorial choices, unlike Plaintiff, whose shapeliness could not be heightened by beautifully tailored clothing."<sup>130</sup> Thus, she likely would not succeed with this argument because this is not disparate treatment of men and women.

There are, however, other theories available for "fitting" appearance-based discrimination under sex discrimination, in which the "because-of-sex" standard is satisfied through forcing appearance into the category of sex. For example, Abercrombie & Fitch, a clothing retailer that markets primarily to a young customer base, has been sued for requiring its sales associates to have the "A&F Look."<sup>131</sup> Although requiring a certain look is appearance-based discrimination, the plaintiff in one case filed a race-discrimination lawsuit because the "A&F Look" was characterized as young, white, and preppie.<sup>132</sup> Another lawsuit alleged that Abercrombie & Fitch engaged in sex discrimination by restricting the number of women hired.<sup>133</sup> Abercrombie settled three such lawsuits, including a lawsuit filed by the EEOC, for about \$50 million.<sup>134</sup> In a more creative lawsuit, an employee claimed that the type of clothing Abercrombie & Fitch required its employees to wear violated her religious beliefs.<sup>135</sup> Lorenzana couched her claim in terms of sex discrimination, but it is unlike the Abercrombie & Fitch cases and other claims in which an individual purports to be disadvantaged because the employer favors the appearance of one protected class over another.<sup>136</sup> Lorenzana claimed that she was discriminated against because she was an attractive woman, not that her superiors favored the appearance of males instead.

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128. *Id.* at 1109–10.

129. Complaint, *supra* note 2, at 3.

130. *Id.*

131. See Rhode, *The Injustice of Appearance*, *supra* note 10, at 1064 (noting "Abercrombie & Fitch's celebrated policy of hiring sexually attractive, 'classic American,' white salespersons"); James, *supra* note 124, at 654–56 (discussing the Abercrombie & Fitch suit and describing the image the company seeks to portray).

132. See Joyce E. Cutler, *Abercrombie & Fitch Settles Race, Sex Discrimination Lawsuits for \$50 Million*, [2004] Daily Lab. Rep. (BNA) No. 218, at A-2 (Nov. 11, 2004).

133. *Id.*

134. *Id.*

135. See Lawrence E. Dube, *Court Sends Religious Bias Case to Trial; Employee Quit Over Retailer's "Look Policy"*, [2009] Daily Lab. Rep. (BNA) No. 211, at A-6 (Nov. 4, 2009) (discussing EEOC v. Abercrombie & Fitch Stores, Inc., No. 4:08CV1470 JCH, 2009 WL 3517578 (E.D. Mo. Oct. 26, 2009)).

136. See James, *supra* note 124, at 654.

Gender stereotyping is another theory within the purview of sex discrimination. This theory is used often to fit discrimination based on sexual orientation within sex discrimination, and is common in sexual-harassment cases.<sup>137</sup> The gender stereotyping theory posits that a person is discriminated against because the victim does not fit the discriminator's desired stereotype—the victim is not stereotypically “manly” or “womanly” enough for the job.<sup>138</sup>

Gender stereotyping traces its origin to the Supreme Court's decision in *Price Waterhouse v. Hopkins*.<sup>139</sup> In this case, the plaintiff, an associate in a major accounting firm, claimed that she was denied partnership because she was too “abrasive” and “macho,” a woman who would benefit from “tak[ing] a course at charm school.”<sup>140</sup> Applying the gender-stereotyping theory to Lorenzana's claim, she could make a comparable contention by arguing that she was too sexy to satisfy the stereotype of female bankers held by her supervisors. This claim would be further strengthened if she could produce comparative evidence that her male supervisors did not have any qualms about employing sexy men in the same or similar jobs.

In fact, other cases have used the gender-stereotyping theory to bring appearance discrimination under sex discrimination.<sup>141</sup> In *Lewis v. Heartland Inns of America*, Lewis, a desk clerk at a hotel in Iowa, was considered a very good employee by her immediate supervisors.<sup>142</sup> The director of operations did not share this positive view because the plaintiff did not have that “Midwestern girl look.”<sup>143</sup> Indeed, Lewis herself described her appearance as “slightly more masculine,” and her immediate supervisor described it as “an Ellen DeGeneres kind of look.”<sup>144</sup> Lewis was fired—as was her supervisor who refused to fire her—and she subsequently sued for sex discrimination under the theory of sex stereotyping.<sup>145</sup> She alleged the employer “enforced a de facto requirement that a female employee conform to gender stereotypes in order to work [a particular] shift.”<sup>146</sup> The court of appeals, reversing summary judgment in favor of the defendant, found sufficient evidence that the employer had made an adverse employment decision based on a gender stereotype.<sup>147</sup> The court explained, “Companies may not base employment

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137. Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL'Y 467, 468 (2007).

138. See, e.g., *id.*

139. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), *superseded by statute in part*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76.

140. *Id.* at 234–35.

141. See, e.g., *Lewis v. Heartland Inns of America*, 591 F.3d 1033 (8th Cir. 2010).

142. *Id.* at 1035–36.

143. *Id.* at 1036.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 1042.

decisions for jobs such as Lewis' on sex stereotypes, just as Southwest Airlines could not lawfully hire as flight attendants only young, attractive, 'charming' women 'dressed in high boots and hot-pants....'”<sup>148</sup> The court did not insist on comparative evidence that women were treated differently than men because of the use of a sex-specific derogatory term; the expression “[m]idwestern girl look” applied only to women.<sup>149</sup>

*Willingham v. Regions Bank* featured an interesting, but ultimately unsuccessful, twist on the gender-stereotyping theory.<sup>150</sup> The plaintiff, Rhonda Willingham, worked as a private banker for Regions Bank.<sup>151</sup> She worked in the Morgan Keegan Tower in downtown Memphis to give her “more visibility and a better opportunity to expand her client base” via relationships and referrals from within the building.<sup>152</sup> However, Willingham’s other high-visibility activity troubled her employer.<sup>153</sup> Featured as “Ms. Cruzin’ South August 2008,” she was on the cover and in photographs, wearing a bikini and sitting on motorcycles and cars.<sup>154</sup> The caption of one photo read “I have been Primped,” with the “r” distinguished by a different font and color.<sup>155</sup> The magazine included a brief autobiography of Willingham that mentioned her employment, but did not disclose the name of the bank.<sup>156</sup> In recompense for her posing, she received about fifty complimentary copies of the magazine.<sup>157</sup> Willingham took several of the copies to work and gave them to co-workers.<sup>158</sup> Her supervisor got a copy and forwarded it to the human resources department, which resulted in Willingham’s termination.<sup>159</sup> She signed a termination notice stating that her conduct was potentially damaging to her reputation as a personal banker as well as to the reputation of Regions Bank.<sup>160</sup> The notice also stated that she violated the employer’s code of conduct and demonstrated poor judgment.<sup>161</sup>

Willingham sued the bank for sex discrimination in violation of Title VII.<sup>162</sup> She argued a sex-stereotyping theory to satisfy the “because-of-sex”

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148. *Id.* (alteration in original).

149. *Id.* at 1041.

150. *Willingham v. Regions Bank*, No. 2:09-cv-02289, 2010 WL 2650727, at \*3–4 (W.D. Tenn. July 1, 2010).

151. *Id.* at \*1.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at \*1 & n.3.

156. *Id.* at \*1 & n.2.

157. *Id.* at \*1.

158. *Id.*

159. *Id.* at \*1–2.

160. *Id.* at \*2.

161. *Id.*

162. *Id.* at \*3.

requirement.<sup>163</sup> She alleged that “her physical appearance in a non-work related magazine did not comport with [the employer’s] feminine stereotype which . . . required her to dress or appear ‘conservatively’ at all times.”<sup>164</sup> The court rejected her claim on the ground that she did not allege that her employer reacted to her nonconformity to a gender stereotype *at work*; her employer reacted to her “non-work-related activity.”<sup>165</sup> The court also rejected her disparate treatment claim under the *McDonnell Douglas* analysis because her comparator was not similarly situated.<sup>166</sup> Willingham produced evidence that a website for a five-kilometer road race used a picture of a male Regions Bank employee running shirtless and wearing “skimpy” running shorts.<sup>167</sup> The court found that the male comparator was not similarly situated to Willingham because he worked for a subsidiary of the plaintiff’s employer, had a different supervisor, and did not distribute copies of his picture at work.<sup>168</sup>

These cases demonstrate that some appearance cases fit under the category of sex discrimination using the theory of sex or gender stereotyping. These cases also demonstrate some of the limitations of the theory. The principal limitation is that the plaintiff must prove that the employer acted based on a stereotypical view of how men or women should look in the workplace.<sup>169</sup> The absence of comparators often is fatal to these claims.<sup>170</sup> Typically, the gender-stereotyping theory will not help either beautiful or ugly men and women who are fired for appearance unless they connect it with different treatment of the sexes, although as *Lewis* demonstrates, comparative evidence is not always required.<sup>171</sup>

Other than sex, Lorenzana may have been able to fashion her claim as discrimination covered by existing laws by relying on a national origin argument. Lorenzana mentioned that it is part of her Latin culture for a woman to spend time making herself look very feminine for work.<sup>172</sup> This argument presents the seeds of a national-origin claim. For example, plaintiffs have argued that a particular fashion was so closely associated with a particular race or national-origin group that to discriminate on the basis of that fashion was

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163. *See id.*

164. *Id.*

165. *Id.* at \*4.

166. *Id.* at \*4, \*6.

167. *Id.* at \*6.

168. *Id.*

169. *See id.* at \*3–4.

170. *See, e.g., id.* at \*6–7. *But see* *Lewis v. Heartland Inns of Am.*, 591 F.3d 1033, 1040–41 (8th Cir. 2010) (holding that comparative evidence is not required to succeed on a gender-stereotype sex-discrimination claim).

171. *See supra* note 149 and accompanying text.

172. *Dwoskin, Too Hot for Citibank?*, *supra* note 1, at 23.



the equivalent of discrimination based on race or national origin.<sup>173</sup> Although Lorenzana may have some difficulty proving that the look she was told to change was characteristically Latin, this is one possible approach to fitting appearance claims under protected characteristics. Lorenzana's claims would likely not fit into any other protected characteristics.<sup>174</sup> Although this is not her argument, it is easy to see how a number of appearance claims could fit under age discrimination. In a society that is obsessed and infatuated with youth, a youthful look may be unattainable for persons in the protected class over forty.<sup>175</sup>

Fitting claims of discrimination based on characteristics not expressly covered by existing employment-discrimination laws into protected characteristics is not limited to appearance claims. For example, claims for sexual-orientation discrimination are not yet covered by federal employment-discrimination law,<sup>176</sup> although they are addressed by the law of a substantial number of states<sup>177</sup> and many local ordinances.<sup>178</sup> However, some plaintiffs have been able to fit claims of sexual-orientation discrimination or harassment under sex discrimination.<sup>179</sup> Yet another example is discrimination

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173. See, e.g., *McManus v. MCI Commc'ns Corp.*, 748 A.2d 949, 952–54 (D.C. 2000) (concerning the discrimination claim of a woman who dressed in African-styled attire and wore her hair in traditional African fashions).

174. One may consider whether an appearance claim could be placed under the coverage of the ADA. This is unlikely. One writer, attempting to answer this question, sardonically mused: "Perhaps this case should spark new legislation to protect those unfortunates who, through no fault of their own, are so attractive that they're an irresistible workplace distraction. Maybe it's a new form of disability." Gould, *supra* note 16.

175. See Mark R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 1006–07 (2009) ("The current culture's obsession with youth and beauty also manifests a form of appearance discrimination against the elderly and the ugly. Businesses that pursue youthful looking employees may run counter to the prohibitions of the ADEA . . .").

176. See *Recent Proposed Legislation: Employment Discrimination—Congress Considers Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity—Employment Nondiscrimination Act of 2009, H.R. 3017, 111th Cong. (2009)*, 123 HARV. L. REV. 1803, 1803 (2010) (noting that "no federal statute expressly proscribes employment discrimination on the basis of sexual orientation" and describing the proposed Employment Nondiscrimination Act).

177. See Derrick Cain, *Supporters Tell Senate Panel ENDA Necessary: Opponents Criticize Provisions*, [2009] Daily Lab. Rep. (BNA) No. 213, at A-10 (Nov. 6, 2009) ("12 states and the District of Columbia have enacted statutes that prohibit discrimination on the basis of sexual orientation and gender identity. Another nine states bar job discrimination on the basis of sexual orientation alone.").

178. See, e.g., Tripp Baltz, *Salt Lake City Adopts Ban on Job, Housing Bias Based on Sexual Orientation*, [2009] Daily Lab. Rep. (BNA) No. 221, at A-11 (Nov. 19, 2009).

179. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002) (finding that the plaintiff stated a claim for sexual harassment under Title VII notwithstanding the fact that harassment may have been motivated by the victim's sexual orientation).

claims based on caregiver or family-responsibility status, which often are couched in terms of sex, race, or disability discrimination.<sup>180</sup>

### 3. “Fitting”: Courts Properly Patrolling the Fringes of Employment-Discrimination Law

Considering the phenomenon of “fitting” in the context of appearance-based claims and claims for other characteristics, one may question whether this practice should cause concern. Specifically, are employment-discrimination laws being stretched in unintended ways, and could this phenomenon discredit employment-discrimination law in general? This is unlikely. Arguably, fitting is how employment-discrimination law should function—a core of protected characteristics with a penumbra of characteristics that can fit under them in appropriate cases.

In some cases, courts’ acceptance of fit theories presages legislative action. For example, gender stereotyping and other theories that have been used to fit sexual orientation under sex discrimination likely are harbingers of the eventual passage of a federal law prohibiting employment discrimination based on sexual orientation.<sup>181</sup> Yet, courts are able to control theories when they believe that they stretch the existing law too far.<sup>182</sup> For example, a husband, wife, and daughter who were fired by a company filed suit alleging, in part, that their termination constituted sex discrimination.<sup>183</sup> The court rejected the plaintiffs’ claims, stating that familial status is not protected under Title VII.<sup>184</sup>

Thus, fitting affords courts some discretion in patrolling the fringes of employment-discrimination law. Enacting new employment-discrimination laws is difficult, contentious, and costly. The political battles, the controversy, and the potential backlash involved in attempts to enact statutes that add protected characteristics to discrimination-law coverage present obstacles that often stymie such efforts. This is particularly true in the global economy; some argue that new employment laws will over-regulate and drive businesses out of the country.<sup>185</sup> Fitting also provides courts a vehicle for reining in

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180. The EEOC issued a guidance document in 2007 on such discrimination. See EQUAL EMP’T OPPORTUNITY COMM’N, NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>. See generally Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. KAN. L. REV. 355 (2010) (discussing discrimination claims of caregivers).

181. See, e.g., *supra* notes 176–80 and accompanying text.

182. See, e.g., *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1141 (10th Cir. 2008) (noting that a sex-discrimination claim was, in fact, a claim of discrimination based on familial status, a classification that is outside the scope of Title VII).

183. *Id.* at 1140.

184. *Id.* at 1141, 1148–49.

185. See Kenneth Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L.J. 685, 697–98 (1993) (arguing that too much regulation of employment will put the United States at a competitive disadvantage);

employers who are abusing their prerogative under the employment-at-will doctrine.<sup>186</sup>

*B. Discriminating Against "Hot" People: The Challenges of Reverse Discrimination*

Lorenzana's claim illustrates an interesting question about appearance discrimination: "Would there be reverse-discrimination claims for the appearance-gifted?"<sup>187</sup> "Reverse discrimination" refers to discrimination against a member of a group that historically has not been discriminated against, such as a race-discrimination claim by a Caucasian.<sup>188</sup> When discussing the unfairness of discrimination against people because of physical appearance, one seldom considers discrimination against "hot" or beautiful people. Yet, that is Ms. Lorenzana's claim, and it is plausible that some employers would prefer not to have employees whose attractive or sexy appearance is the dominant impression they make on co-workers, customers, or both. Thus, her claim is a reminder of the difficulties presented by reverse-discrimination claims—difficulties that challenge the very foundations of American employment-discrimination law.

There is a cogent argument that reverse-discrimination claims are merely discrimination claims, and they should be treated the same as traditional discrimination claims.<sup>189</sup> To treat them differently is itself discrimination and violates the equal-treatment underpinnings of employment-discrimination statutes and perhaps the Equal Protection Clause of the Fourteenth Amendment.<sup>190</sup> Alternatively, there is a counterargument that Congress was not principally addressing problems of reverse discrimination when it passed employment-discrimination laws, and perhaps did not intend to cover such discrimination at all.<sup>191</sup> Thus, the first question is whether a reverse-discrimination claim is covered by a particular employment-discrimination law. The answer has varied based upon the

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Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces*, 76 IND. L.J. 29, 34 ("More frequently will the argument be heard and accepted that a country cannot afford extravagant employment-law protections when other countries are only providing efficient protections.").

186. See *infra* Part III.F.

187. Corbett, *supra* note 7, at 171.

188. See Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1034–36 (2004) (discussing the concept of reverse discrimination).

189. *Bass v. Bd. of Cnty. Comm'rs*, 256 F.3d 1095, 1102–03 (11th Cir. 2001) (rejecting the phrase "reverse discrimination" as having no bearing on the Title VII analysis and stating that "[d]iscrimination is discrimination no matter what the race, color, religion, sex, or national origin of the victim"), *overruled in part on other grounds*, 529 F.3d 961 (11th Cir. 2008).

190. Sullivan, *supra* note 188, at 1099–1118.

191. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (holding that Congress did not intend the ADEA to prohibit employers from favoring older employees).

discrimination statute at issue. The Supreme Court has held that reverse-discrimination claims are viable under Title VII for race<sup>192</sup> and sex,<sup>193</sup> and courts have assumed that this principle holds for other characteristics covered by Title VII.<sup>194</sup>

In contrast, in *General Dynamics Land Systems, Inc. v. Cline*, the Court held that reverse age-discrimination claims are not actionable under the Age Discrimination in Employment Act (ADEA).<sup>195</sup> That result was not obvious, and there are strong arguments in both the majority and dissenting opinions in the 6-3 decision.<sup>196</sup> Reverse-discrimination claims are a viable issue under Title VII because everyone is covered by at least some of the protected characteristics.<sup>197</sup> Although the ADEA differs because it does not cover all ages, it does encompass a broad band of ages, applying to employees forty-years-old or older; thus, in theory, a forty-two-year-old could be discriminated against based on her relative youth in favor of an older employee.<sup>198</sup> However, the Court in *General Dynamics* rejected the concept that employees between forty and fifty years old could challenge an employment action as discriminating against them because they were too young to qualify for the benefit.<sup>199</sup> The ADA, in contrast, protects only qualified individuals with disabilities; thus, there can be no reverse claims by the nondisabled.<sup>200</sup> If physical appearance were a protected characteristic, it is

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192. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (explaining that the provisions of Title VII were intended to apply to white individuals as well as those of minority races).

193. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–80 (1998) (recognizing that a claim by a man for same-sex sexual harassment is cognizable under Title VII). The *Oncale* decision supports the proposition that a class without a history of discrimination, which includes harassment, may file suit under Title VII. Moreover, the courts routinely have assumed that men could sue for discrimination and harassment. See, e.g., *Turner v. The Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (noting that sexual-harassment law is not limited to the typical case of a woman harassed by men).

194. See, e.g., *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1165 (9th Cir. 2007) (“In this employment discrimination case, we address the plaintiff’s burden to raise a triable issue of fact as to pretext under the familiar *McDonnell Douglas* burden-shifting regime in the context of a less familiar claim of ‘reverse’ religious discrimination.”).

195. 540 U.S. 581, 600 (2004).

196. See *id.* at 596–98; *id.* at 601–02 (Scalia, J., dissenting); *id.* at 602–13 (Thomas, J., dissenting).

197. See *Ballance v. City of Springfield*, 424 F.3d 614, 617 (7th Cir. 2008) (noting that Title VII provisions are not applicable only “to members of historically discriminated-against groups”).

198. See *Gen. Dynamics Land Sys., Inc.*, 540 U.S. at 591–92; *id.* at 604–05 (Thomas, J., dissenting).

199. *Id.* at 584–85, 600 (majority opinion).

200. See 42 U.S.C. § 12201(g) (Supp. III 2009). This point seemed clear under the original ADA, see Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 101(8), 102(a), 104 Stat. 327, 331–32, but Congress expressly provided the following in the ADA Amendments Act of 2008: “Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of

unclear whether courts would permit beautiful or attractive plaintiffs to recover for reverse discrimination, and existing discrimination law does not furnish a definitive answer.

Given that plaintiffs can pursue reverse-discrimination claims for most of the protected traits, some courts have required these plaintiffs to prove their cases differently than plaintiffs in traditional discrimination cases.<sup>201</sup> The most common example is the requirement that a plaintiff go beyond the typical *McDonnell Douglas* prima facie case by proving “background circumstances” that establish that the subject employer engages in nontypical discrimination.<sup>202</sup> This is a controversial principle because it does not treat all persons equally and therefore seems to violate a core principle of discrimination law.<sup>203</sup> However, the usual assumptions on which the analytical frameworks for intentional discrimination were based do not apply equally to reverse-discrimination cases.<sup>204</sup>

Thus, reverse-discrimination claims cause considerable difficulty in the existing employment-discrimination law. Treating reverse-discrimination claims differently than traditional discrimination claims, although reasonable—at least in terms of the proof structures under which they are analyzed—poses at least two dangers: (1) possible constitutional infirmity

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disability.” ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6(a)(1), 122 Stat. 3553, 3557–58 (codified at 42 U.S.C. § 12201(g) (Supp. III 2009)). Perhaps the perceived need to make this clear came from cases such as *Woods v. Phoenix Society*, in which a plaintiff claimed he was discriminated against because he did not have a mental illness. No. 76286, 2000 WL 640566, at \*3 (Ohio Ct. App., May 18, 2000).

201. See, e.g., *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 66–67 (6th Cir. 1985) (requiring a plaintiff in a reverse-discrimination case to establish, not only the standard prima facie case, but also certain “background circumstances”).

202. See *id.* at 67 (requiring a showing of background circumstances in a reverse-discrimination claim); Sullivan, *supra* note 188, at 1065–71 (discussing background circumstances). Courts have also applied the background-circumstances requirement to reverse disparate-impact claims. See, e.g., *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986).

203. See, e.g., *Lind v. City of Battle Creek*, 681 N.W.2d 334, 335 (Mich. 2004) (explaining that the “background circumstances” requirement imposed on plaintiffs in reverse-discrimination claims “draws a distinction between plaintiffs on account of race . . . and is thus inconsistent with the Civil Rights Act). Additionally, the Sixth Circuit in *Cline v. General Dynamics Land Systems, Inc.*—the precursor to the aforementioned Supreme Court’s decision in the same case—stated:

[W]e do not share the commonly held belief that this situation is one of so-called “reverse discrimination.” Insofar as we are able to determine, the expression “reverse discrimination” has no ascertainable meaning in the law. An action is either discriminatory or it is not discriminatory, and some discriminatory actions are prohibited by the law. . . . [T]he protected class should be protected; to hold otherwise is discrimination, plain and simple.

296 F.3d 466, 471 (6th Cir. 2003), *rev’d*, 540 U.S. 581 (2004).

204. See, e.g., Sullivan, *supra* note 188, at 1061–65.

under the Fourteenth Amendment<sup>205</sup> and (2) adverse reaction from judges, and perhaps the public, who believe that discrimination law should not itself discriminate. Therefore, whether an employment-discrimination law prohibiting discrimination based on physical appearance would cover reverse-discrimination claims is an intriguing question. Further, if reverse-discrimination claims were recognized for appearance, it is unclear whether plaintiffs would be required to prove more, such as background circumstances, to prevail. Although a strong case can be made that the appearance-challenged need legal protection to prevent the disadvantages likely to be visited upon them because of their relative unattractiveness, the argument for the appearance-gifted needing protection from the disadvantages imposed on them because of their beauty is less compelling.

With regard to Lorenzana's suit, writers have often referenced the infamous line from a 1980s shampoo commercial: "Don't hate me because I'm beautiful."<sup>206</sup> Reverse-discrimination appearance claims likely would evoke about as much sympathy as the pleas of the model in the shampoo commercial. The courts might reject such claims, invoking a rationale similar to that of the Supreme Court in *General Dynamics*, in which the Court reasoned that when Congress used the term "age discrimination" it had in mind the meaning that most people have in common usage—discrimination against older people.<sup>207</sup> However, there are undoubtedly jobs for which employers do not hire very attractive people; for example, women may not be hired or promoted to some jobs because of the stereotype that beautiful women lack intelligence or gravitas.<sup>208</sup> Another likely type of discrimination against attractive women is that they may be relegated to jobs or job duties that utilize their looks for gain, regardless of what other abilities and skills they possess.

It is not clear whether reverse-discrimination claims would be cognizable if appearance were a covered characteristic, and if they were, whether the analysis of such claims would differ from traditional appearance-discrimination claims. The inconsistencies in the law regarding the currently covered characteristics reveals the nuanced complexity and controversy of the employment-discrimination laws.

### C. *Would Hotness or Lack Thereof Be a Bona Fide Occupational Qualification?*

Both Title VII and the ADEA include a statutory defense for discriminating on the basis of protected characteristics if the characteristic constitutes a "bona

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205. See *id.* at 1102 (noting that the use of different proof structures for reverse-discrimination claims is problematic under the Fourteenth Amendment).

206. See *Pantene Commercial*, *supra* note 120.

207. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 597–98 (2004).

208. See RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 31 ("[I]n upper-level positions that historically have been male-dominated, beautiful or 'sexy' workers are subject to the 'boopsy effect': their attractiveness suggests less competence and intellectual ability.").

fide occupational qualification" (BFOQ) that is essential to a particular business's operations.<sup>209</sup> The BFOQ affirmative defense, although expressly provided by Title VII, applies to only sex, national origin, and religion claims, not race or color claims.<sup>210</sup> The BFOQ defense, as developed in the case law, recognizes that there are narrow circumstances in which a covered characteristic actually may be relevant and "reasonably necessary" to the job.<sup>211</sup> The test the courts have developed to determine the applicability of the BFOQ defense is very difficult for a defendant to satisfy.<sup>212</sup> The test first identifies the essence of the business, as determined by the court, not the employer, and then asks whether that essence makes it necessary for the employer to discriminate on the basis of the protected characteristic.<sup>213</sup>

Some of the most significant cases in which defendants raised BFOQ defenses involved claims of sex and appearance discrimination. Although the claims against employers have been for sex discrimination because they hired only women for particular jobs, the employers actually were hiring women with a certain appearance, whether it be attractive, sexy, or slim.

Although it is a district court decision, one of the best-known BFOQ cases is *Wilson v. Southwest Airlines Co.*<sup>214</sup> In *Wilson*, Southwest Airlines hired only women for the high customer-contact positions of flight attendant and ticket agent.<sup>215</sup> Wilson and over one hundred other men who were denied those jobs sued for sex discrimination, and Southwest defended on the ground of

209. 29 U.S.C. § 623(f)(1) (2006); 42 U.S.C. § 2000e-2(e). The ADEA states that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). Title VII similarly provides that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e).

210. 42 U.S.C. § 2000e-2(e).

211. *Id.*; see also 29 U.S.C. § 623(f)(1) (providing the BFOQ affirmative defense for the ADEA).

212. See Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 173–90 (2009) (noting that, if a plaintiff makes a prima facie case, the employer may raise BFOQ as an affirmative defense, but "the burden of proof . . . is difficult to meet"); Claire Tower Putnam, Comment, *When Can a Law Firm Discriminate Among Its Own Employees to Meet a Client's Request? Reflections on the ACC's Call to Action*, 9 U. PENN. J. LAB. & EMP. L. 657, 666–71 (2007) (discussing the BFOQ defense as interpreted in case law).

213. See, e.g., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 195, 202–03, 206 (1991) (interpreting BFOQ for sex under Title VII); *W. Air Lines v. Criswell*, 472 U.S. 400, 407, 420 (1985) (interpreting BFOQ for age under the ADEA).

214. 517 F. Supp. 292, 293 (N.D. Tex. 1981); see also Kimberly Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 40 COL. L. REV. 147, 158 (2004) ("The most famous plus-sex BFOQ case is that of *Wilson v. Southwest Airlines*.").

215. 517 F. Supp. at 293.

BFOQ.<sup>216</sup> The argument deviated from the usual version of BFOQ—that only a woman could do the job—and instead took the form that Southwest’s clientele, businessmen flying between major Texas cities, preferred the female image that was at the heart of the airline’s “Love” market brand.<sup>217</sup> The agency that developed the marketing campaign described the desired female employee as follows: “This lady is young and vital . . . she is charming and goes through life with great flair and exuberance . . . you notice first her exciting smile, friendly air, her wit . . . yet she is quite efficient and approaches all her tasks with care and attention . . . .”<sup>218</sup>

The court in *Wilson* rejected the BFOQ defense.<sup>219</sup> It found that the essence of the airline’s business was transporting passengers safely and quickly, rejecting Southwest’s argument that the essence of its business was to transport passengers with a certain panache—with love.<sup>220</sup> Having stripped Southwest’s hiring practice to its essence, the court concluded that females did not uniquely possess the ability to perform the job duties of ticket agent and flight attendant.<sup>221</sup>

*Frank v. United Airlines* is another airline case that involved the BFOQ defense.<sup>222</sup> In *Frank*, the defendant airline used weight tables based on body frames to set maximum body weights for flight attendants.<sup>223</sup> The maximum weight for males was based on large body frames, and the maximum weight for females was based on medium body frames.<sup>224</sup> Consequently, only females who were substantially lighter than males qualified for these jobs.<sup>225</sup> The airline defended on the ground that its practice was an appearance standard and, therefore, nondiscriminatory.<sup>226</sup> The court conceded that employers are permitted to have different, but equally burdensome, dress and grooming standards for female and male employees; however, the airline’s standards

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216. *Id.*

217. *Id.* at 294–96, 300.

218. *Id.* at 294 (alterations in original). The court further described how Southwest’s marketing campaign relied on appearance and sex:

Unabashed allusions to love and sex pervade all aspects of Southwest’s public image. Its T.V. commercials feature attractive attendants in fitted outfits, catering to male passengers while an alluring feminine voice promises in-flight love. On board, attendants in hot-pants (skirts are now optional) serve “love bites” (toasted almonds) and “love potions” (cocktails). Even Southwest’s ticketing system features a “quickie machine” to provide “instant gratification.”

*Id.* at 294 n.4.

219. *Id.* at 304.

220. *Id.* at 302.

221. *Id.*

222. 216 F.3d 845, 854 (9th Cir. 2000).

223. *Id.* at 848.

224. *Id.*

225. *Id.*

226. *Id.* at 854.



placed a greater burden on women and were thus facially discriminatory, and could only be lawful if a BFOQ defense applied.<sup>227</sup> The court found that the airline failed to put forth evidence that the standard it applied to its employees was a BFOQ, such as evidence of how weight affected the employees' ability to provide physical assistance in an emergency.<sup>228</sup> As such, the airline's defense did not prevail.<sup>229</sup>

Finally, in a famous case that never went to trial, the EEOC investigated Hooters restaurants for the company's refusal to hire men as servers, and for restricting the position of "Hooters Girls" to females.<sup>230</sup> Hooters argued that being female was a BFOQ for being a Hooters girl.<sup>231</sup> The EEOC had the better of the legal arguments, but "Hooters embarked on a public relations campaign apparently intended to make the EEOC's position look foolish."<sup>232</sup> Eventually Hooters reached a settlement with the EEOC in an agreement that required Hooters to create gender-neutral positions, but permitted the company to continue its hiring practice for servers.<sup>233</sup>

The BFOQ cases demonstrate the importance of appearance to many employers in many jobs. Although Southwest, United Airlines, and Hooters were sued for hiring exclusively women for particular jobs, they were focused on women with a particular look in order to satisfy what they perceived to be their customers' preferences. Abercrombie & Fitch also has been sued for hiring only sales associates that have the "A&F look," but those suits were couched in terms of race claims to which BFOQ does not apply.<sup>234</sup>

If appearance were a protected characteristic, would BFOQ be a recognized defense? The problem is precisely the one identified by the court in *Wilson*: if employers could argue that they make more money when customers are drawn to their attractive employees, the otherwise narrow BFOQ defense would be greatly expanded.<sup>235</sup> Indeed, BFOQ cases under existing law suggest a reason

227. *Id.* at 854–55.

228. *Id.* at 855.

229. *Id.*

230. Gregory J. Kamer & Edwin A. Keller, Jr., *Give Me \$5 Chips, a Jack and Coke—Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry*, 7 GAMING L. REV. 335, 341 (2003); Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. MICH. L.J. 551, 567–68 (1998).

231. Schneyer, *supra* note 230, at 567–68; see Patricia A. Casey, *Sex Discrimination: Does Refusing to Hire Men as Food Servers Violate the Civil Rights Act?: No: A Business Has a Right to Choose Its Own Character*, A.B.A. J., Feb 1996, at 41, 41 (discussing whether the hiring practices of Hooters constitute sex discrimination).

232. Schneyer, *supra* note 230, at 568.

233. Kamer & Keller, *supra* note 230, at 341.

234. See *supra* text accompanying notes 131–32, 210.

235. See *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 304 (1981). Specifically, the *Wilson* court noted that

Southwest's position knows no principled limit. Recognition of a sex BFOQ for Southwest's public contact personnel based on the airline's "love" campaign opens the door for other employers freely to discriminate by tacking on sex or sex appeal as a

why physical appearance is not, and never will be, a characteristic generally covered by employment-discrimination laws. Not only do people routinely discriminate based on appearance, but many employers also do it as a matter of policy or practice. Some employers may simply prefer to hire attractive women as a matter of personal taste, but many believe that their business will enjoy higher profits as a result of such hires. Some businesses actually build attractive individuals into their business identity,<sup>236</sup> as did Southwest Airlines in the *Wilson* case.<sup>237</sup> In *Wilson*, though the court rejected that argument as a matter of law, it was true as a matter of fact.<sup>238</sup> Hooters and Abercrombie & Fitch also seem to have strong arguments with regard to the facts; although one sells food and the other clothing, respectively, the companies also market their employees—sexy, young people.<sup>239</sup>

The BFOQ defense rarely has been successful when the argument has been customer preference<sup>240</sup> or lost profits,<sup>241</sup> but the inclination to prohibit employers from discriminating based on appearance is weak. Consider, for example, that Hooters' aggressive public-relations campaign, including appeals to legislators, caused the EEOC to drop the case.<sup>242</sup> In the *Wilson* case, although the court held that Southwest Airlines could not satisfy the BFOQ defense, it closed its opinion with the following passage, which suggests the court had some discomfort with the litigation and the result:

One final observation is called for. This case has serious underpinnings, but it also has disquieting strains. These strains, and they were only that, warn that in our quest for non-racist, non-sexist goals, the demand for equal rights can be pushed to silly extremes. The rule of law in this country is so firmly embedded in our ethical

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qualification for any public contact position where customers preferred employees of a particular sex.

*Id.*

236. See Rhode, *The Injustice of Appearance*, *supra* note 10, at 1064 (“[E]mployees’ attractiveness can be an effective selling point, and part of a strategy to ‘brand’ the seller through a certain look.” (footnote omitted)).

237. *Wilson*, 517 F. Supp. at 295.

238. *Id.* (noting that Southwest’s image “played and continues to play an important role in the airline’s success,” but that it was not “necessary for the continued success of its business”).

239. See Kevin P. McGowan, *Panel Discusses Legal Issues Arising from Job Segregation in the Workforce*, [2009] Daily Lab. Rep. (BNA) No. 63, at C-1 (Apr. 6, 2009) (quoting attorney Bill Lann Lee as saying that Abercrombie & Fitch had a “very deliberate marketing strategy” of “selling not just a product, but an image” to white, teenage consumers).

240. See, e.g., *Olsen v. Marriott Int’l, Inc.*, 75 F. Supp. 2d 1052, 1068 (D. Ariz. 1999) (rejecting a BFOQ defense based on customer preference).

241. See, e.g., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (holding that cost alone cannot justify discrimination, although the Court observed that it was not faced with a case in which the business would be financially ruined by the requirement of nondiscrimination).

242. See Schneyer, *supra* note 230, at 568; see also *About Hooters*, HOOTERS.COM, <http://www.hooters.com/About.aspx> (last visited Apr. 8, 2011) (recounting Hooters’ publicity campaign).

regimen that little can stand up to its force—except literalistic insistence upon one's rights. And such inability to absorb the minor indignities suffered daily by us all without running to court may stop it dead in its tracks. We do not have such a case here—only warning signs rumbling from the facts.<sup>243</sup>

Thus, appearance discrimination is a pervasive practice of employers and a matter of customer preference and business marketing, and, if BFOQ were recognized as a defense, it would be asserted often by employers. Those same considerations influenced Congress not to include a race or color BFOQ in Title VII.<sup>244</sup> In the end, however, Congress likely would recognize a BFOQ defense to appearance discrimination because society does not possess the same moral revulsion toward appearance discrimination that it does toward race discrimination.

If appearance were a protected characteristic and BFOQ were a recognized defense to appearance-based discrimination, employers would be able to argue that attractiveness, sexiness, or slimness was a BFOQ for some jobs. However, consider the opposite issue raised by Ms. Lorenzana's claim—there are occasions where employers would argue that unattractiveness, lack of sexiness, or an unslim figure was a BFOQ. Of course, this would be an issue only if reverse appearance-discrimination claims were recognized.<sup>245</sup> If appearance-discrimination law followed Title VII with regard to its recognition of sex as a BFOQ, the defense would work both ways.<sup>246</sup> But legislatures and courts would undoubtedly question whether employers need or should have a BFOQ to defend discriminating against beautiful people in favor of unattractive people.

In fact, some employers may not hire very beautiful or sexy people for some jobs. Ms. Lorenzana claims that her supervisors told her that she distracted her male colleagues from their jobs.<sup>247</sup> It is not hard to imagine a case in which an employer would think that a stunningly attractive or sexy woman would not be taken seriously in a particular job.<sup>248</sup> This concept relates to the theory of sex or gender stereotyping, which posits that people discriminate against a man or woman in a job who does not fit the discriminator's stereotype of what a man

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243. *Wilson*, 517 F. Supp. at 304–05.

244. See Manley, *supra* note 212, at 196–98; Putnam, *supra* note 212, at 663–64. Indeed, had Congress, by excluding race and color from BFOQ, and the courts, by developing a stringent BFOQ test, not made BFOQ such a narrow defense, a customer preference BFOQ very well may have eviscerated the prohibitions on discrimination.

245. For a discussion of the issue of reverse discrimination, see *supra* Part III.B.

246. See Manley, *supra* note 212, at 174–76.

247. Complaint, *supra* note 2, at 2.

248. See RHODE, THE BEAUTY BIAS, *supra* note 10, at 31; see also *Fernandez v. Wynn Oil*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting the argument that sex was a BFOQ because clients in Southeast Asia and Latin America would not take seriously a woman serving as Director of International Operations of a company).

or woman in that job should be.<sup>249</sup> Finally, some employers might avoid hiring very attractive or sexy women, or perhaps men, because they fear liability resulting from other employees sexually harassing the beautiful person. Thus, it is not unreasonable to suggest that some employers might discriminate against the appearance-gifted. The question, then, becomes whether they would be afforded the BFOQ defense.

This discussion of BFOQ elucidates much about employment-discrimination law. BFOQ law indicates the difficulty posed by prohibiting discrimination based on a particular characteristic on the one hand, and, on the other, admitting that the characteristic in some cases will be so relevant to a job that employers ought to be able to consider it. The balance between prohibiting discrimination and accommodating employers' interests is difficult to strike. It is made more difficult because the test developed to evaluate BFOQ strikes at the heart of employer autonomy and prerogative, as courts define the essence of a business and often reject employers' conceptions of their essence.<sup>250</sup> The omission of race and color from the Title VII BFOQ shows that when Congress is very serious about a type of discrimination, it will not even try to accommodate employers' interests.<sup>251</sup> Finally, appearance has been a dominant theme in BFOQ cases because employers frequently discriminate based on appearance and then argue the common-sense relevance of appearance to jobs.

#### *D. Retaliation: The Most Potent and Dangerous Claim*

Even if appearance never becomes a protected characteristic, there still is some refuge for victims of such discrimination under the antiretaliation provisions of Title VII, the ADEA, and the ADA.<sup>252</sup> The antiretaliation clauses provide that it is an unlawful employment practice to discriminate against an employee for opposing discriminatory practices that violate the statute or for participating in investigations, proceedings, or hearings that are conducted under the statute.<sup>253</sup> Employers should fear retaliation claims more than any other discrimination claims<sup>254</sup> for at least two reasons: (1) a claimant can win a retaliation claim even if she loses the predicate discrimination

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249. See *supra* text accompanying notes 139–41.

250. Yaracko, *supra* note 214, at 169; see *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 302 (N.D. Tex. 1981) (rejecting Southwest's contention that providing air travel with a "love" atmosphere is the essence of its business).

251. See Manley, *supra* note 212, at 195–99.

252. 29 U.S.C. § 623(d) (2006) (ADEA antiretaliation provision); 42 U.S.C. § 2000e-3(a) (Title VII antiretaliation provision); 42 U.S.C. § 12203 (ADA antiretaliation provision). See generally B. Glenn George, *Revenge*, 83 TUL. L. REV. 439 (2008).

253. 29 U.S.C. § 623(d); 42 U.S.C. §§ 2000e-3(a), 12203.

254. See, e.g., George, *supra* note 252, at 467; Eve I. Klein & Rosemary Halligan, *A Rising Tide of Retaliation Claims Challenges Employers to Adopt Adequate Preventive Measures*, N.Y. ST. B.J. Sept./Oct. 1999, at 51, 51.

claim;<sup>255</sup> and (2) the elements of proof for a retaliation claim are more easily satisfied than those of other discrimination claims.<sup>256</sup> Claimants often make a prima facie showing of causation—one element of a retaliation claim—merely by establishing temporal proximity between the protected activity and the adverse employment action.<sup>257</sup> In 2006, the Supreme Court adopted a plaintiff-friendly definition of the adverse-employment-action element in *Burlington Northern & Santa Fe Railway v. White*, holding that a claimant establishes an adverse employment action if the action taken by the employer “might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”<sup>258</sup> Retaliation claims have been on the rise in recent years,<sup>259</sup> and plaintiffs have enjoyed considerable success in pursuing such claims.<sup>260</sup>

Retaliation claims are important to appearance-based discrimination because, if federal and most state employment-discrimination laws are not amended to cover appearance as a characteristic, the existing antiretaliation provisions of Title VII, the ADEA, and the ADA offer an avenue of recovery.<sup>261</sup> Plaintiffs often assert their appearance claims by “fitting” them under Title VII or the ADEA.<sup>262</sup> It is not necessary that the plaintiff prevail on such a claim in order to assert a successful retaliation argument.<sup>263</sup> However, the claimant must establish a reasonable and good-faith belief that the employer’s action is a violation of Title VII or the ADEA.<sup>264</sup> Therefore, if a plaintiff can claim that an employer discriminated on the basis of appearance; make a connection to a characteristic covered by Title VII, the ADEA, or the

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255. Klein & Halligan, *supra* note 254, at 52; see *Wright v. CompUSA, Inc.*, 352 F.3d 472, 477 (1st Cir. 2003) (“An ADA plaintiff need not succeed on a disability claim to assert a claim for retaliation.”).

256. See George, *supra* note 252, at 467 (“The success of retaliation claims, as compared to the underlying complaint of discrimination, may be due in part to the more relaxed standard of ‘discrimination.’”). There are three elements to a retaliation claim: (1) the claimant engaged in protected activity-opposition or participation activity; (2) the employer took adverse action against the employee; and (3) a causal connection exists between the protected activity and the adverse employment action. *Id.* at 445.

257. *Id.* at 458–59.

258. 548 U.S. 53, 68 (2006).

259. See CHARGE STATISTICS, FY 1997 THROUGH FY 2010, EQUAL EMP’T OPPORTUNITY COMM’N, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Apr. 8, 2011) (indicating an increase from 22.6% of all discrimination charges filed in 1997 to 36.3% in 2010). In 2010, retaliation was the most frequently asserted discrimination charge, narrowly edging out race discrimination. *Id.*

260. See George, *supra* note 252, at 467 (“[R]etaliation claims had a higher success rate than any of the underlying claims of discrimination.”).

261. See *supra* notes 252–53 and accompanying text.

262. See *supra* Part III.A.

263. See *supra* note 255 and accompanying text.

264. The Supreme Court has never expressly approved this standard, but it has been routinely applied by the lower federal courts. George, *supra* note 252, at 449 & n.38.

ADA; report that conduct internally; and then suffer adverse employment action, there is a viable prospect for a successful retaliation claim. Of course, a claim of appearance-based discrimination that was not linked to a protected characteristic would not set up a viable retaliation claim.

Ms. Lorenzana asserted a retaliation claim in her complaint,<sup>265</sup> and it seems the most promising basis for recovery. Notably, the range of protection afforded by antiretaliation law is demonstrated not only by the retaliation claim asserted in her complaint, but also by the retaliation claim that her first attorney threatened to file against her subsequent employer, JPMorgan Chase.<sup>266</sup> Lorenzana alleged that her employer warned her to stop speaking out in the media about her claims against Citibank because she was violating an employee code of conduct that forbids employees from doing things that damage the reputation of the financial industry.<sup>267</sup> Her first attorney threatened that if Lorenzana were fired or disciplined, she would sue JPMorgan.<sup>268</sup> Her conduct would likely come under the opposition clause.<sup>269</sup> As mentioned above, one must have a reasonable and good-faith belief that the action one is opposing is illegal under the relevant employment-discrimination law.<sup>270</sup> It seems clear that Lorenzana was speaking out against what she believed to be discriminatory conduct; the resulting analysis likely would focus on whether it was a reasonable belief.<sup>271</sup>

Another limit on conduct protected by the antiretaliation provisions is that both unlawful opposition conduct and extremely disloyal conduct lose protection.<sup>272</sup> As such, Lorenzana's high-profile approach of airing her case in the media and perhaps violating a code of conduct imposed by her subsequent employer could have caused her otherwise protected activity to lose protection.

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265. See Complaint, *supra* note 2, at 4–5, 7–9.

266. Paul Thompson, *Bank Girl Faces Being Fired from Latest Job for Talking About Dismissal from Citigroup for Being "Too Sexy,"* MAIL ONLINE, <http://www.daily mail.co.uk/news/worldnews/article-1285026/Debralee-Lorenzana-faces-fired-JPMorgan-Chase-talking-dismissal-Citigroup-sexy.html> (last updated June 9, 2010).

267. Dwoskin, *Lorenzana Too Hot*, *supra* note 38; see also Thompson, *supra* note 266.

268. Thompson, *supra* note 266.

269. 42 U.S.C. § 2000e-3(a) (2006) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII].").

270. See *supra* note 264 and accompanying text.

271. See Complaint, *supra* note 2, at 3–4.

272. See, e.g., George, *supra* note 252, at 449 & n.41. The Supreme Court has held that illegal conduct can lose protection. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803–04 (1973) (explaining that Title VII does not work to "compel[] an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it"). What is not clearly resolved is the extent to which legal, disloyal conduct loses protection. See *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976) (explaining that courts must "balance the purpose of the Act to protect persons engaging reasonably in activities opposing sexual discrimination, against Congress' [sic] equally manifest desire not to tie the hands of employers in the objective selection and control of personnel").

Although this is unlikely, the facts present interesting issues. Many employees think that they have First Amendment rights of free speech and expression in the workplace, but they do not have these rights because they work for private employers who, unlike government employers, are not subject to the limitations imposed by the First Amendment.<sup>273</sup> However, some federal laws provide protection to some forms of private-sector employee speech and expression, such as the National Labor Relations Act (NLRA)<sup>274</sup> and antiretaliation provisions of employment-discrimination laws.<sup>275</sup> With both the NLRA and the antiretaliation provisions, however, the courts are mindful of employers' reasonable expectation of loyalty and their right to maintain discipline in the workplace.<sup>276</sup> Codes of conduct, such as the one allegedly maintained by JPChase,<sup>277</sup> have become a common way for employers to state their expectations regarding employee conduct and loyalty.<sup>278</sup> Still, such codes of conduct may, as written or as applied, infringe on statutory rights of employees.<sup>279</sup>

The retaliation claim that Lorenzana asserted in her complaint and the one that her lawyer threatened are reminders that the antiretaliation provisions in existing employment-discrimination law significantly broaden coverage beyond the expressly covered characteristics. Moreover, retaliation claims are the most potent and feared discrimination claims, and they are being used by plaintiffs more often than ever before.<sup>280</sup>

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273. See *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (describing First Amendment rights of public employees); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1524 (2007) ("The First Amendment, like much of the rest of the Constitution, erects a line between private actors and state actors.").

274. 29 U.S.C. § 158(c). For a discussion of the NLRA as a source of protection for employee speech and expression, see William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 286–96 (2002).

275. See *supra* note 255.

276. See *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 477–78 (1953) (holding that legal but disloyal employee disparagement of the employer lost protection under the NLRA); *Hochstadt*, 545 F.2d at 230 (observing, in the context of a Title VII claim, that "[a]n employer remains entitled to loyalty and cooperativeness from employees").

277. See *supra* notes 38–40, 48, 161 and accompanying text.

278. See Matt McKay, *Employee Code of Conduct*, CHRON, <http://smallbusiness.chron.com/employee-code-conduct-2731.html> (last visited Apr. 8, 2011).

279. See *Hochstadt*, 454 F.2d at 230–31 (noting that, under Title VII, employees are protected from being discharged "for filing complaints in good faith"); see also William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 41–45 (2006) (discussing cases involving employer rules that, as written or as applied, violate the NLRA by restricting employee communication).

280. See *supra* notes 254–60 and accompanying text.

*E. The Admissibility and Significance of Evidence Regarding Appearance and Peripheral Conduct in Employment-Discrimination Cases*

Lorenzana's chances of success on her claim may be affected by her appearance and some of her nonwork-related conduct. Some criticism in the media was directed at the handling of the case for the photographs accompanying the original *Village Voice* story<sup>281</sup> and, to a greater extent, for the 2003 video about her second breast augmentation that surfaced.<sup>282</sup> A number of Lorenzana's statements in the video provoked writers to question whether she was a victim of discrimination or a person seeking attention and, perhaps, fortune.<sup>283</sup> Yet, the relevance of her statements in the video as well as their admissibility in a trial or arbitration proceeding is debatable. A common issue in sexual-harassment cases concerns whether evidence of the alleged victim's appearance or nonwork conduct is admissible, and, if it is, the effect it has on the case.<sup>284</sup>

The issue of a plaintiff's appearance and conduct arose in 1986 with the Supreme Court's first major decision regarding sexual harassment.<sup>285</sup> In *Meritor Savings Bank, FSB v. Vinson*, the defendant argued that the plaintiff, who was allegedly sexually harassed by her supervisor, wore provocative clothes and had sexual fantasies.<sup>286</sup> The Court concluded that such evidence was "obviously relevant," and that there was no per se rule against its admissibility.<sup>287</sup> Accordingly, the Court remanded to the lower court with instructions that it weigh "the applicable considerations" in deciding whether the evidence was admissible.<sup>288</sup> The Court's point was that the evidence is relevant to one element of the prima facie case for hostile-environment sexual harassment: whether the harassment was unwelcome.<sup>289</sup> After the *Meritor* case, Congress amended a rule of evidence to make evidence of the alleged victim's other sexual behavior or sexual predisposition generally inadmissible.<sup>290</sup> The rule provides an exception and renders such evidence admissible if "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."<sup>291</sup> Even if the party who

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281. See *Antilla*, *supra* note 2 (discussing the photos of Lorenzana in "sexy poses" that were included in a June 1, 2010, article in the *Village Voice* newspaper).

282. See *supra* text accompanying notes 41–42.

283. See *supra* note 47.

284. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68–69 (1986) (discussing the admissibility of evidence of the plaintiff's dress).

285. See *id.* at 57–63.

286. *Id.* at 65.

287. *Id.* at 69.

288. *Id.*

289. *Id.* at 68–69.

290. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 40141(a)–(b), 108 Stat. 1796, 1919.

291. FED. R. EVID. 412(b)(2).



seeks to have such evidence admitted satisfies the standard, the rule provides specific procedures that must be followed for the evidence to be admitted.<sup>292</sup>

A notable case raising issues of dress and nonwork conduct is *Burns v. McGregor Electronic Industries, Inc.*<sup>293</sup> In this case, which predates the 1994 amendment of Federal Rules of Evidence Rule 412,<sup>294</sup> the district court held that a woman who was a victim of sexual harassment could not recover because she would not have been offended by the conduct,<sup>295</sup> although a reasonable woman may have been. The district court reached that conclusion because the plaintiff had posed nude for some magazines outside of the workplace, which had no connection to her work.<sup>296</sup> The Eighth Circuit reversed, stating as follows:

The plaintiff's choice to pose for a nude magazine outside work hours is not material to the issue of whether plaintiff found her employer's work-related conduct offensive. This is not a case where Burns posed in provocative and suggestive ways at work. Her private life, regardless how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer. To hold otherwise would be contrary to Title VII's goal of ridding the work place of any kind of unwelcome sexual harassment.<sup>297</sup>

Thus, a general rule has emerged that, in sexual-harassment cases, evidence regarding other sexual activity and predisposition, including dress, is not generally admissible.

Given this rule, it is questionable whether evidence of Lorenzana's 2003 video would be admissible in her case. The answer is difficult to predict because she stated her claims under the New York City employment-discrimination law.<sup>298</sup> The analogous state evidence rule applies to criminal cases only,<sup>299</sup> unlike Federal Rules of Evidence Rule 412, which applies to criminal and civil cases.<sup>300</sup> However, if courts applied a balancing test, like that under the federal rule, that weighs the probative value of the evidence against the unfair prejudice that would result,<sup>301</sup> various courts would likely strike that balance differently. Even if the evidence were admitted, it is unclear whether it would have much impact on the successful establishment of

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292. *Id.* 412(c).

293. 989 F.2d 959, 961 (8th Cir. 1993).

294. *Compare* Violent Crime Control and Law Enforcement Act of 1994 § 40141(a)–(b), *with Burns*, 989 F.2d at 959.

295. *Burns*, 989 F.2d at 962.

296. *Id.* at 962–63.

297. *Id.* at 963.

298. Complaint, *supra* note 2, at 1, 7–9.

299. *See* N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2004).

300. FED. R. EVID. 412(a).

301. *See id.* 412(b)(2).

Lorenzana's claims. Although there is a good argument that, even if the evidence were admitted, it should not affect the plaintiff's claims, as in the *Burns* case,<sup>302</sup> it is not farfetched to suggest that a fact-finder may not look sympathetically upon a plaintiff suing for sex and appearance discrimination after it is shown a video in which the plaintiff says she wants to look like "a Playboy playmate."

Issues regarding evidence of peripheral conduct are not limited to sexual-harassment cases. In a religious-discrimination case, an employee charged that her employer, Abercrombie & Fitch,<sup>303</sup> required her to wear clothes that conformed to the company's brand, which she described as "ripped-up jeans, a little revealing, sporty, California beach style, laid back," and, notably, "the length of skirts and dresses sold by Hollister at that time as falling just below the buttocks."<sup>304</sup> Although the employee initially conformed to the dress requirement, after having a religious experience, she objected to the dress requirement, explaining that, because of her recently adopted religious beliefs, she must wear skirts that fell below her knee.<sup>305</sup> She alleged that the employer made no effort to accommodate her religious beliefs, and she resigned.<sup>306</sup> The EEOC filed a lawsuit on the employee's behalf.<sup>307</sup> The court denied the EEOC's motion for partial summary judgment because there was a genuine issue regarding whether the employee sincerely held the asserted religious beliefs.<sup>308</sup> The issue was created when the former employee wore a formfitting shirt to her deposition in the case.<sup>309</sup> The court explained that the former employee's dress at her deposition was "potentially inconsistent with her alleged faith."<sup>310</sup>

Thus, contemplating appearance discrimination serves as a reminder that the admissibility and relevance of appearance and other conduct evidence are common and controversial issues under existing discrimination law.

#### *F. Why Are Hot People and Ugly People Employees at Will?*

Appearance-based discrimination and Lorenzana's claim also highlight the most important principle in U.S. employment law, employment at will, and its interaction with employment-discrimination law. Rhode notes that only one

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302. See *Burns*, 989 F.2d at 963; see also *supra* text accompanying notes 293–97.

303. *Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 107 Fair Empl. Prac. Cas. (BNA) 1029, 1029 (E.D. Mo. Oct. 26, 2009).

304. *Id.* at 1029–30.

305. *Id.* at 1030.

306. *Id.*

307. *Id.*

308. *Id.* at 1031.

309. Dube, *supra* note 135, at A-6. When questioned by the defendant's attorney about wearing the shirt, she argued that the shirt was not "tight," but she admitted that it was "body conscious." *Id.*

310. *Abercrombie & Fitch Stores, Inc.*, 107 Fair Empl. Prac. Cas. (BNA) at 1031.

jurisdiction in another nation—the Australian state of Victoria—has an appearance-discrimination law.<sup>311</sup> However, if the facts alleged by Lorenzana are correct, she would have a cognizable claim in most nations, not under their employment-discrimination laws, but under their general termination laws.<sup>312</sup>

Most nations have laws that require employers to have a job- or business-related reason to terminate an employee.<sup>313</sup> The United States is a maverick, with forty-nine of fifty states adhering to employment at will, pursuant to which employers may fire an employee “for a good reason, a bad reason, or no reason at all.”<sup>314</sup> Therefore, in every U.S. state except Montana, an employer does not have to offer good cause for termination unless the employee claims that the reason for termination constitutes a breach of contract, amounts to a tort, or violates a statute.<sup>315</sup> As such, federal, state, and local employment-discrimination statutes are the most significant restriction on the U.S. employment-at-will regime.<sup>316</sup> Thus, if Lorenzana was fired for her appearance or for complaining about how her supervisors treated her, she would have a claim for dismissal without good cause in most nations and in

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311. RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 134–36.

312. See Donald C. Dowling, Jr., *The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium*, LAB. LAW., Summer 2001, at 1, 13 (“American businesses are steeped in their unique and peculiar employment-at-will doctrine, which even other Anglo-system countries like England, Canada, and Australia rejected years ago.”); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000) (“The United States, unlike almost every other industrialized country and many developing countries, has neither adopted through the common law or by statute a general protection against unfair dismissal or discharge without just cause, nor even any period of notice.”). Unsurprisingly, the United States has not ratified the convention of the International Labour Organization on Termination of Employment, which provides that “employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment, or service.” International Labour Organization, C158 Termination of Employment Convention, art. 4, June 22, 1982, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158>. The convention has been ratified by thirty-two countries. CONVENTION NO. C158, INT’L LABOUR ORG. (2006), <http://www.ilo.org/ilolex/cgi-lex/ratifice.pl?C158>.

313. See Summers, *supra* note 312, at 65–66.

314. David C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)*, 57 MONT. L. REV. 375, 376 & n.3 (1996) (quoting *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1054 (5th Cir. Unit A July 1981) (internal quotation marks omitted)). Forty-nine states are characterized as employment-at-will states. The Montana Wrongful Discharge from Employment Act of 1987 removes that state from the list, although weakly. MONT. CODE ANN. §§ 39-2-901 to -914 (2009).

315. See Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 862–71 (1994) (discussing statutory, contract, and tort exceptions to employment at will).

316. See *Laws Enforced by the EEOC*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/statutes/>.

Montana, unless the employer could demonstrate that appearance was related to job performance.<sup>317</sup>

Employment at will is relevant to appearance discrimination in another way. Specifically, some argue that federal law prohibiting appearance discrimination would result in backlash from businesses.<sup>318</sup> Businesses generally prefer not to have additional characteristics covered by employment-discrimination laws because they would rather operate without regulation, or at least with as little as possible.<sup>319</sup> On the matter of employment termination, employment at will is the ultimate expression of the absence of regulation. However, employment at will provides employers far less freedom to discharge employees than appears at first blush, and it is vastly overrated in its value to employers. There are numerous exceptions to employment at will contained in federal and state statutes, tort theories such as wrongful discharge in violation of public policy, and contract concepts, among others.<sup>320</sup> Thus, when an employee is fired, she will explore whether she can fit her termination into one of these exceptions. With the existing employment-discrimination statutes and other exceptions to employment at will, there are few situations in which employers could terminate an employee without providing a good reason and then adequately defend themselves in any resultant litigation.<sup>321</sup>

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317. As discussed, in the context of a BFOQ, there may be jobs for which courts would accept an employee's appearance as relevant, and perhaps essential, to adequate job performance. See *supra* Part III.C. There are jobs for which an employer will not hire someone unless she is attractive enough. See *supra* text accompanying notes 227–37. However, once a person is hired, her termination for insufficient attractiveness is less likely. Still, there are numerous possible scenarios in which this may occur. Lorenzana, for example, claimed that her employer contended that her appearance became distracting to her male colleagues. Complaint, *supra* note 2, at 2. Thus, an employer may hire a person and later find the employee's appearance is problematic because of the reactions of co-workers or customers. Moreover, appearance can change suddenly; for example, a person's image may be altered after an accident that causes scarring. Appearance also can change over time. Aging affects appearance, and an employer may prefer the appearance of youthful beauty to the appearance of wrinkled distinction and experience.

318. See RHODE, *THE BEAUTY BIAS*, *supra* note 10, at 110 (“[A] business community united in frustration at a bloated civil rights regime could become a powerful political force for reform or even repeal.” (quoting RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 176 (2008))).

319. See Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. RICH. L. REV. 757, 792 (1997) (describing likely business opposition to an amendment of the ADEA as “opposition to a radical expansion of federal regulation of the employment relationship”); cf. RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 86 (1992) (“The employment relation provides a far less suitable target for state regulation.”).

320. See *supra* note 315 and accompanying text.

321. See Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 113 (2006). Libenson explains that

[t]he fear of being sued by a former employee based on one of the growing number of exceptions to the at-will rule causes employers to engage in a variety of expensive and inefficient self-protective activities, including intrusive pre-hire background checks,

Although most people in the United States likely think that it is unfair to terminate an employee based on her physical appearance, the basic premise of U.S. employment law—employment at will—permits such a termination. This tension exists because employers greatly value the employment-at-will doctrine. Nonetheless, the law recognizes numerous exceptions, and employers must exercise caution and understand that employment at will does not give them an unfettered right to terminate for any reason.

The connections between employment at will, contract, and tort theories of recovery, and employment-discrimination law are highlighted in an unusual, recent case alleging appearance discrimination—*Brice v. Resch*.<sup>322</sup> The plaintiff alleged that, after she accepted a job offer, it was rescinded because the company's CEO did not like her "body shape" and "did not consider her the kind of woman he would be inclined to sexually harass or with whom he would want to have a consensual romantic relationship."<sup>323</sup> The plaintiff sued based on her termination, asserting state law claims of tortious interference with contract and breach of contract and a violation of Title VII.<sup>324</sup> The court dismissed both her state contract and tort claims on the ground that they would contravene employment at will.<sup>325</sup> The plaintiff argued that the state recognizes a tort of wrongful discharge in violation of public policy.<sup>326</sup> The court acknowledged that the state recognizes a narrow public-policy tort exception to employment at will, but did not find it applicable to the plaintiff's alleged claim.<sup>327</sup> The court stated that "accepting [the plaintiff's] position [regarding the public policy tort] would lead to a seismic disruption in the at-will employment relationship."<sup>328</sup> The court further noted that many types of businesses, under the protection of employment at will, make employment decisions "based on physical attributes of their employees."<sup>329</sup> The court then commented on the questionable morality but clear legality of such discrimination:

This is not to say that discrimination on the basis of appearance is praiseworthy or a noble product of our culture. But I do not believe Wisconsin courts would conclude that a CEO who prefers to hire attractive women (in his subjective view) for sales jobs has violated any public policy. To hold otherwise would open a Pandora's box

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continuous documentation of even minor employee misconduct, and failing to fire poor performers.

*Id.*

322. No. 10-C-711, 2011 WL 284182, at \*1 (E.D. Wis. Jan. 24, 2011).

323. *Id.*

324. *Id.*

325. *See id.* at \*1–4.

326. *Id.* at \*3.

327. *Id.* at \*3–4.

328. *Id.* at \*4.

329. *Id.*

and create a protected class out of millions of at-will employees who could allege they were fired or passed over because they had gained a few pounds over the holidays or developed a pimple.<sup>330</sup>

The *Brice* court well understood and succinctly articulated all of the following: the freedom of employers to engage in appearance discrimination afforded by employment at will when unchecked by employment-discrimination laws, the common occurrence of such discrimination in many types of jobs, and some of the difficulties that would be posed if legislatures embarked on regulating such discrimination. Although the court engaged in hyperbole, citing hypothetical claims based on additional pounds or pimples,<sup>331</sup> it correctly noted the significant incursion on employment at will if employees generally could contest terminations.<sup>332</sup>

Media coverage about this and other appearance-discrimination cases may cause people to misunderstand the current state of the law. Most people do not appreciate the meaning of employment at will—that workers can be fired for any reason.<sup>333</sup> People who hear stories about employers being sued for appearance-based discrimination may incorrectly believe that that current law prohibits this type of discrimination, regardless of the accuracy of the reports. The Lorenzana story provides a good opportunity to explain that, in the United States, a person fired based on her appearance would have a viable claim only under employment-discrimination laws. In contrast, in many nations under for-cause termination laws, a person fired for appearance would have a claim for wrongful termination, not a violation of discrimination laws.<sup>334</sup>

Some claim that American discrimination laws are becoming bloated and cover too many characteristics.<sup>335</sup> This argument may miss an important point: if a just-cause termination law existed, there would be less clamor for an expansion of coverage under employment-discrimination law. The answer to Lorenzana's claim and Rhode's call for expansion of discrimination laws may be that we should consider another option, the modification of employment at will.<sup>336</sup> The relationship and balance between employment at will and employment-discrimination law is at least worth considering.

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330. *Id.*

331. *See id.*

332. *See id.*

333. Estlund, *supra* note 72, at 9.

334. *See supra* note 315 and accompanying text. Note, however, that the employee may not prevail even in a good-cause regime if appearance is significantly related to job performance.

335. *See, e.g.,* EPSTEIN, *supra* note 319, at 1–5 (noting the scope and effects of antidiscrimination laws); WALTER OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE 48–49 (1997) (noting the vast number of statutes, lawsuits, and literature addressing discrimination).

336. There is no dearth of scholarship calling for the abrogation or modification of employment at will. *See, e.g.,* Libenson, *supra* note 321, at 114. A recent ambitious proposal calls for enactment of a national termination law. *See* Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 91–92 (2008). Another recent proposal

#### IV. CONCLUSION

Appearance discrimination unquestionably was the hot employment-law topic of the summer of 2010. Debrahlee Lorenzana's claims against Citibank for sex discrimination and Professor Rhode's book about beauty bias converged to bring the issue to the attention of the public and the legal profession. Ironically, appearance-based discrimination is not covered by federal employment-discrimination laws or by many state or local laws. Perhaps future developments will lead to a federal appearance-based discrimination law. However, such a statute is unlikely. Regardless, appearance discrimination is a very real and common form of discrimination in employment and in life generally, and it provides a most revealing mirror for reflecting on many of the intriguing and controversial issues in current employment-discrimination law. Even if an appearance-based discrimination law never is enacted, more discussion and greater understanding of the existing discrimination laws and resultant opportunities to improve them would provide an attractive legacy to the hot summer of 2010.

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calls for a "pay-or-play" regime in which employers would be required to give notice followed by a period of continued employment or payment in lieu of notice for terminations not based on employee misconduct. See Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 7 (2010).