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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\*

I. SUMMER HEAT..... 1

II. THE HOTTEST LAW OF ALL: MEDIA BLITZ AND TEACHABLE MOMENTS..... 3

III. THE HOT STORY AND THE HOT BOOK OF THE SIZZLING SUMMER OF 2010 ..... 5

IV. HOT LESSONS ABOUT EMPLOYMENT DISCRIMINATION LAW..... 9

    A. *Appearance-Based Discrimination—Coverage, Noncoverage, and How to Fit a Claim Under Existing Employment Discrimination Laws*..... 11

        1. *Why Appearance-Based Discrimination Never Will Be Generally Covered (But I Could Be Wrong)* ..... 11

            a. *The Coverage Problem: “I’m Ugly, and Even if I’m Not, They Think I am.” ..* ..... 12

            b. *Fighting Against Nature: People Are Hard-Wired to Be Attracted to Beauty* 16

            c. *Prognosticating and Disclaiming* ..... 17

        2. *“Fitting” Appearance Claims Under Other Protected Characteristics*..... 21

            a. *How the Courts Fit Claims Under Covered Characteristics*..... 21

            b. *Fitting—Courts Properly Patrolling the Fringes of Employment Discrimination Law* ..... 25

    B. *Discriminating Against Hot People: The Challenges of Reverse Discrimination* . 27

    C. *Would Hotness or Lack Thereof Be a Bona Fide Occupational Qualification?*..... 31

    D. *Retaliation: The Most Potent/ Dangerous Claim* ..... 38

    E. *The Admissibility and Significance of Evidence of Appearance and Peripheral Conduct in Employment Discrimination Cases* ..... 42

    F. *Why are Hot People and Ugly People Employees at Will?*..... 46

CONCLUSION..... 49

I. SUMMER HEAT

It is summer, and it is sizzling hot! The stories about Debrahlee Lorenzana’s claims regarding being fired by Citibank are rampant. It is the summer’s hottest story about “getting hot” over being fired for “being hot”! One might surmise that the pivotal word here is “hot.”<sup>1</sup>

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\* © 2010 Frank L. Maraist Professor of Law, Paul M. Hebert Law Center of Louisiana State University. I thank Professor Michael J. Zimmer for reading and commenting on a draft. I am grateful for a summer research grant from the Law Center.

<sup>1</sup> “Hot” is a word that has multiple meanings, and it is one of the hottest words in the vernacular. One obvious meaning is “having a relatively high temperature.” See <http://www.merriam-webster.com/dictionary/hot>. As used in the “too hot to work” stories, a slang meaning of the word is “sexually excited or exciting.” See <http://www.thefreedictionary.com/hot>. Also relevant is an informal

During summer it's normally like a sauna in south Louisiana where I live,<sup>2</sup> but this summer the most sensational story on the Internet and in print<sup>3</sup> is a steamy one, and it is making me more anxious than ever for fall (semester). I admit that the story has me very excited—about employment discrimination and employment law.

A few years ago I predicted that appearance-based discrimination never will be covered by federal employment discrimination law or by many state or local employment discrimination laws.<sup>4</sup> Nonetheless, I posited that appearance discrimination provides a mirror for reflecting on some of the most difficult and intriguing issues in employment discrimination law and thereby developing an appreciation for the complexities and nuances of that body of law.<sup>5</sup> I also argued that appearance discrimination provides a gauge for understanding the limitations of discrimination law.<sup>6</sup> Accordingly, I always begin my employment discrimination course by raising questions about appearance-based

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meaning—“currently very popular.” *Id.* One additional definition is implicated: “quickly angered: easily provoked or aroused” *Id.*

<sup>2</sup> Virtually all the stories about Ms. Lorenzana's case use the terminology “too hot” and “steamy.” The sex/weather double entendre is common. The 1981 movie *Body Heat* used the steamy settings of south Florida and the boiling passion of characters played by William Hurt and Kathleen Turner very evocatively. See *BODY HEAT* (Warner Bros. 1981).

<sup>3</sup>The article breaking the story apparently was Elizabeth Dwoskin, *Is This Woman Too Hot to be a Banker?* THE VILLAGE VOICE, June 1, 2010, available at <http://www.villagevoice.com/2010-06-01/news/is-this-woman-too-hot-to-work-in-a-bank/> From that point the story caught fire. See Jen Doll & Elizabeth Dwoskin, *Debrahlee Lorenzana Story Goes Global, Viral, Crazy*, THE VILLAGE VOICE, June 7, 2010, available at [http://blogs.villagevoice.com/runninscared/archives/2010/06/debrahlee\\_loren\\_1.php](http://blogs.villagevoice.com/runninscared/archives/2010/06/debrahlee_loren_1.php). As one story put it, when you achieve your own Wikipedia listing, you have arrived. *Id.* (citing [http://en.wikipedia.org/wiki/Debrahlee\\_Lorenzana](http://en.wikipedia.org/wiki/Debrahlee_Lorenzana)); see also Susan Antilla, “Too Hot” Banker Lawsuit Misses Real Issues, THE SYDNEY MORNING HERALD, Business Day (June 8, 2010), available at <http://www.smh.com.au/business/world-business/too-hot-banker-lawsuit-misses-real-issues-20100608-xtdn.html> (stating “[i]n case aliens sequestered you in a spaceship for the past week,” and summarizing story). Ms. Lorenzana appeared on both *Today* and *Good Morning America* less than a week after *The Village Voice* published the story. *Id.* As has been pointed out, the photos of Ms. Lorenzana accompanying the first story probably helped attract attention to the story. *Id.*

<sup>4</sup> 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 (2007).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 160-62.

discrimination as a way of introducing many of the issues that we will discuss in the course.

Developments this summer demonstrate that I am not alone in my interest in the topic of appearance discrimination: about the time that the Lorenzana story was spreading like wildfire, Stanford Law School Professor Deborah Rhode's book about American society's obsession with physical beauty and the phenomenon of appearance-based discrimination was published.<sup>7</sup> With a sizzling summer story that went "global, viral, crazy"<sup>8</sup> and a book on the topic by one of academia's most prolific scholars,<sup>9</sup> appearance-based discrimination is the torrid topic in employment discrimination law. The hottest topic of the summer should make my August classes more enthralling and heat them up through the cool breezes of October and the frosts of December.

Enough heat? Okay, let's cool this down.

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

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<sup>7</sup> DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* (Oxford Univ. Press 2010); see also Deborah L. Rhode, *The Injustice of Appearance*, 61 *STAN. L. REV.* 1033 (2009). 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 (2000); James Desir, Note, *Lookism: Pushing the Frontier of Equality by Looking Beyond the Law*, 2010 *U. ILL. L. REV.* 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 (2005); Stacey S. Baron, Note, *(Un)lawfully Beautiful: The Legal (De)construction of Female Beauty*, 46 *B.C. L. REV.* 359 (2005).

<sup>8</sup> See Doll & Dwoskin, *supra* note \_\_\_ (reporting that in less than a week after the story broke in *The Village Voice*, it had been covered in Mexico, India, Colombia, Ireland, Canada, and the United Kingdom); see also David Weidner, "Too Hot" for this Column: Commentary: Debrahlee Lorenzana is the Talk of Wall Street—Why? MarketWatch, June 15, 2010, available at <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 . . .").

<sup>9</sup> Rhode's book immediately attracted attention. See Emily Bazelon, *Just One Look*, *N.Y. TIMES*, Sunday Book Review (May 13, 2010), available at <http://www.nytimes.com/2010/05/23/books/review/Bazelon-t.html>; Dahlia Lithwick, *Our Beauty Bias Is Unfair: But Should It Also Be Illegal?*, *NEWSWEEK* (June 4, 2010), available at <http://www.newsweek.com/2010/06/04/our-beauty-bias-is-unfair.html>.

Lawyers of all types, and perhaps particularly law professors, think that the subject matter that is our stock in trade is inherently interesting. I think the general public often finds the law less interesting than we lawyers do—at least many of the aspects of it in which we immerse ourselves.<sup>10</sup> On the first day of my employment discrimination class, I always tell my students that they have chosen a good course because we will be addressing some of the most interesting and difficult issues that a society faces, and that much is at stake in a society’s resolution of those issues. Beyond salesmanship, I believe what I tell them. I proudly proclaim that we will deal with controversial issues such as affirmative action, reverse discrimination, appearance discrimination, and sexual harassment. From there we plunge into the exhilarating pool of material on proof structures developed by the Supreme Court in *McDonnell Douglas v. Green*<sup>11</sup> and *Price Waterhouse v. Hopkins*<sup>12</sup> to evaluate disparate treatment employment discrimination claims. Although I think these proof structures are about the most titillating things in the world, I don’t think my students wake up again until we get to sexual harassment—many weeks after we slug through the morass that the proof structures have become.<sup>13</sup>

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<sup>10</sup> I realize that this statement is debatable. For example, there are legal issues that get people terribly excited, such as abortion, affirmative action, bearing arms, etc. Furthermore, lawyers have been the subject of numerous books, television shows and movies. However, people often engage the legal issues that interest them on an emotional level. How many people who get hot and bothered about affirmative action understand the legal analysis under the fourteenth amendment or Title VII? Moreover, the television shows and movies often focus on the action-filled, dramatic lives of the lawyers—lives very different from those of most lawyers I know. Consider, for example, the television series *L.A. Law*, *The Practice*, and *Boston Legal*. See generally PRIME TIME LAW (Robert M. Jarvis & Paul R Joseph eds. 1998).

<sup>11</sup> 411 U.S. 792 (1973).

<sup>12</sup> 490 U.S. 228 (1989).

<sup>13</sup> Professor Martin Katz labeled the current state regarding the disparate treatment proof structures “a quagmire.” See Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643 (2008). See also Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83 (2004); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2004) Jeffrey A. Van Detta, “*Le Roi Est Mort; Vie le Roi!*” *An Essay on the Quiet Demise of McDonnell-Douglas and the Transformation of Every Title*

Many have decried the handling of Ms. Lorenzana's story and claim<sup>14</sup>-- what with the slideshow of her photos that accompanies the stories.<sup>15</sup> As one commentator put it, for example, "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 essay is neither to determine the veracity of Ms. Lorenzana's allegations nor to judge the manner in which she or her attorney or anyone else involved is handling her story and claim. Juxtaposed with Professor Rhode's book, this sensational story about what is essentially appearance-based discrimination<sup>17</sup> provides an opportunity to ponder (and teach) about a number of significant employment discrimination issues. It is important to seize the day, as media blitzes only occasionally create such teachable moments.

### III. THE HOT STORY AND THE HOT BOOK OF THE SIZZLING SUMMER OF 2010

Ms. Lorenzana filed a lawsuit in November 2009, alleging that she was fired by Citibank in violation of employment discrimination laws.<sup>18</sup> The claimant is a 33-year old woman and a single mother. She often is described as very physically attractive—more precisely the stories describe her as "hot!" She came to New York from Puerto Rico at age 21.<sup>19</sup> She quit a job in 2003 as a sales representative, and in her resignation letter she

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*VII Case After Desert Palace, Inc. v. Costa into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71 (2003); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549 (2005).

<sup>14</sup> See Antilla, *supra* note \_\_\_\_.

<sup>15</sup> Ms. Lorenzana's first attorney arranged the photo shoot, filed the complaint, and represented her for a while, but he was replaced within three weeks of the story breaking. See Edecio Martinez, *Debrahlee Lorenzana: "Too Sexy for Citibank" Hires Celebrity Lawyer Gloria Allred*, cbsnews.com, June 15, 2010, available at [http://www.cbsnews.com/8301-504083\\_162-20007652-504083.html](http://www.cbsnews.com/8301-504083_162-20007652-504083.html).

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

<sup>17</sup> Of course, because appearance is not a covered characteristic under the applicable laws, she pled sex discrimination, sexual harassment, and retaliation. See *infra* notes \_\_\_\_ and accompanying text.

<sup>18</sup> See Complaint, *Lorenzana v. CitiGroup Inc.*, No. 116382/09 (N.Y. Sup. Ct., filed Nov. 20, 2009), court documents available at <http://iapps.courts.state.ny.us/iscroll/SQLData.jsp?IndexNo=116382-2009>.

<sup>19</sup> Dwoskin, *supra* note \_\_\_\_.

cited the hostile work environment that she said developed after she reported sexual harassment. She was hired by Citibank as a business banker in 2008. She says that soon after she was hired, she was told by a colleague that the bank branch was known for hiring “pretty girls.” Lorenzana alleges that her two male supervisors began making comments to her about her dress and appearance.<sup>20</sup> She says they told her not to wear certain types of clothes, types that are not particularly revealing or provocative, but she alleges that she was told that on her they were too provocative and that she distracted her male colleagues. In short, she says she was told to wear looser fitting clothing.<sup>21</sup> She did not comply with their directives because she could not afford a new wardrobe, and she claims that it is part of her Latin (Puerto Rican) culture that women spend time and effort on their feminine appearance for work. She alleges that she was not provided with adequate training for her job, and that she was sent out to bring in business, which then was assigned to her male colleagues. Lorenzana alleges that she complained to the human resources department about the comments of her supervisors regarding her clothing and about two male supervisors meeting with her without another woman present. She claims that she was placed on probation allegedly because of inadequate

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<sup>20</sup> See Complaint in *Lorenzana v. Citigroup Inc.*, *supra* note \_\_\_\_.

<sup>21</sup> See *id.* 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 these other comparator females may wear what they like, as they 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.* ¶ 7.

sales credits. She alleges that the letter notifying her of her probation mentioned that she was late for work on two days, but this reason obviously was fabricated because on those two days the branch office was closed. She sent a long email to two regional vice presidents in which she complained about the hostile work environment. Although the vice presidents never responded, she eventually was transferred to another branch, where she alleges that she was not permitted to do the work for which she was hired. The manager of the branch eventually fired her, mentioning her dress issues at the first branch and saying that she did not fit the culture of Citibank. Ms. Lorenzana filed a lawsuit 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>22</sup> Because she signed a mandatory arbitration agreement, the lawsuit was dismissed, and the claim was submitted to arbitration.<sup>23</sup>

Ms. Lorenzana subsequently was hired by JPMorgan Chase. Her story hit the stands, the Internet, and the airwaves at the beginning of June 2010. Her new employer apparently was less than pleased with the attention that she was attracting. Ms.

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<sup>22</sup> *Id.* ¶¶ 25-26, 28-29 & 31-32.

<sup>23</sup> *See* Defendant Citigroup Inc.'s Notice of Motion to Compel Arbitration and/or Stay the Proceedings, available at court documents *supra* note \_\_\_. The enforceability of mandatory arbitration agreements with respect to statutory employment discrimination claims is a significant hot issue. *See, e.g.*, Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58 (2007). A bill introduced in Congress, the Arbitration Fairness Act of 2009, would invalidate pre-dispute mandatory arbitration agreements in employment, consumer, and franchise agreements unless provided for in collective bargaining agreements. *See* S. 931, 111<sup>th</sup> Cong. (2009); *Bill Introduced in Senate Would Bar Mandatory Arbitration of Employment Claims*, Daily Lab. Rep. (BNA) No. 85, at A-9 (May 6, 2009). That topic is beyond the scope of this Essay, but one point seems pertinent here. One of the policy arguments against mandatory arbitration of employment discrimination claims is that the public needs to be made aware of the adjudication and resolution of these claims involving the important public policy of antidiscrimination. *See, e.g.*, EEOC Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997). Although Ms. Lorenzana's claims have been submitted to arbitration, the public is keenly aware of her story and her claims. I do not suggest that this undermines the argument against mandatory private arbitration of discrimination claims, but it does seem to demonstrate that in the current and evolving state of media and information and communication technology, a captivating story will come to the public's attention. It should come as a surprise to no one that sex and sexiness arouse public interest.

Lorenzana claims that her new employer ordered her to stop speaking to the media about her claim against Citibank and threatened to fire her if she did not desist.<sup>24</sup> According to her, a manager told her that she was violating a written code of conduct that prohibits employees from criticizing the financial industry.<sup>25</sup>

Soon after the story lit up cyberspace and the airwaves, a 2003 video clip featuring Lorenzana surfaced. The video, *Plastic Surgery: Transforming Lives*, featured Lorenzana discussing her breast augmentation surgeries and saying, among other things, that she wants to look like a “Playboy playmate.”<sup>26</sup> The story provoked a sensational and scathing backlash.<sup>27</sup> Then, Lorenzana changed attorneys, hiring a high-profile attorney who has represented a number of “celebrity” women.<sup>28</sup> Her new attorney immediately launched a counteroffensive against the negative stories.<sup>29</sup>

Professor Rhode’s book hit the stands about the time the Lorenzana story was breaking. In *The Beauty Bias*, Rhode, one of academia’s most productive scholars, provides a careful study of the current phenomenon of appearance-based discrimination and puts it in cultural and historical perspectives, finding that appearance bias is not new, although it has been whipped to a fever pitch by contemporary market forces, technology,

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<sup>24</sup> Elizabeth Dvoskin, *Debralee Lorenzana Now Also Too Hot for JP Morgan Chase*, THE VILLAGE VOICE, June 6, 2010, available at [http://blogs.villagevoice.com/runninscared/archives/2010/06/debralee\\_loren.php](http://blogs.villagevoice.com/runninscared/archives/2010/06/debralee_loren.php).

<sup>25</sup> *Id.*

<sup>26</sup> See Helena Andrews, *Debralee Lorenzana: A Double Take on Those Double D’s*, politicssdaily.com, available at <http://www.politicssdaily.com/2010/06/11/debralee-lorenzana-a-double-take-on-those-double-ds/>.

<sup>27</sup> See Andrea Peyser, *Call Off the Bod-Squad—This Boob Has Been Exposed*, NYPost.com, June 24, 2010, available at [http://www.nypost.com/p/news/local/call\\_off\\_the\\_bod\\_squad\\_this\\_boob\\_ETk59Mw6O7C2cMTOdVJlG](http://www.nypost.com/p/news/local/call_off_the_bod_squad_this_boob_ETk59Mw6O7C2cMTOdVJlG) (with video).

<sup>28</sup> See, e.g., Martinez, *supra* note \_\_; Romy Ribitzky, *Allred to the Rescue*, Portfolio.com, June 15, 2010, available at [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).

<sup>29</sup> See *Woman Fired for Being Too Hot Says Her Boob Job Not a License to Stare!*, Radaronline.com, June 15, 2010, available at <http://www.radaronline.com/exclusives/2010/06/exclusive-woman-fired-being-too-hot-says-her-boob-job-not-license-stare>.

and media.<sup>30</sup> She surveys the body of existing employment discrimination law and challenges the assertion of other commentators that appearance cannot or should not be added as a covered characteristic.<sup>31</sup> Finally, Professor Rhode considers strategies for changing the culture of appearance discrimination other than legal prohibitions.<sup>32</sup>

#### IV. HOT LESSONS ABOUT EMPLOYMENT DISCRIMINATION LAW

In this part, I consider several salient employment discrimination issues raised by appearance discrimination, some of them highlighted in Professor Rhode's book and/or Ms. Lorenzana's claims. First, physical appearance, although it probably is one of the most commonly practiced types of employment discrimination,<sup>33</sup> generally is not covered by employment discrimination laws, and I have predicted (and continue to predict) that it never will be. Nevertheless, numerous claims that essentially allege appearance discrimination have been fit under characteristics that are covered by existing law. The potentially uncovered claims that can be made barely covered claims should raise some questions about the "slippery" nature of our employment discrimination law. Second, reverse discrimination claims challenge some of the basic principles of our employment discrimination law. When a woman sues claiming that she was discriminated against because she is "too hot" or too attractive, we should consider whether Caucasians should be able successfully to sue for race discrimination, Christians for religious discrimination, young people for age discrimination, and so on. Third, what are the limits of the concept bona fide occupational qualification (BFOQ), whereby employers are permitted to discriminate based on protected characteristics if they can demonstrate that being male,

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<sup>30</sup> RHODE, *supra* note \_\_\_, at 49-68.

<sup>31</sup> *Id.* at 101-116

<sup>32</sup> *Id.* ch. 7.

<sup>33</sup> *Id.* at 2 & ch. 2.

being younger, etc. is essential to the job? BFOQ is a statutorily recognized defense to discrimination based on a few covered characteristics, and the appropriate breadth or narrowness of the defense is a controversial and persistent topic. Appearance provides an effective mirror for reflecting on this topic because appearance can fall somewhere along a continuum of relevant to essential for many jobs. Fourth, retaliation is the most potent/dangerous claim under employment discrimination laws, and retaliation can provide some measure of protection for appearance-based discrimination. Fifth, the Lorenzana case raises questions about the appropriate role in an employment discrimination case, particularly a sex discrimination case, of evidence of the alleged victim's dress or peripheral conduct, such as the 2003 video of Ms. Lorenzana. Finally, the overarching issue for appearance-based discrimination is the current predominance of employment at will in this nation, whereby employers generally can fire employees for any reason, good or bad, as long as the reason does not fall under the exceptions carved out by statute or case law. If 49 states in the United States followed the lead of Montana and abrogated employment at will, employers would be able to fire legally only if they had good cause, and that would obviate our asking whether appearance should be covered under employment discrimination laws. In sum, in thinking about appearance discrimination, we can gain insight into several of the most significant and controversial issues in employment discrimination law and perhaps a better understanding of the complexities and nuances of this body of law. Thus, even if I am correct that appearance never will be generally covered by employment discrimination laws in the United States, delving into the topic nonetheless offers the opportunity to improve our existing law.

A. *Appearance-Based Discrimination—Coverage, Noncoverage, and How to Fit a Claim Under Existing Employment Discrimination Laws*

1. *Why Appearance-Based Discrimination Never Will Be Generally Covered (But I Could Be Wrong)*

The United States has no federal employment discrimination laws that prohibit discrimination based on physical appearance,<sup>34</sup> unless the particular aspect of appearance constitutes a disability under the Americans with Disabilities Act of 1990.<sup>35</sup> One state and the District of Columbia have laws that prohibit at least some types of appearance-based discrimination.<sup>36</sup> There also are a handful of city and county ordinances that prohibit appearance-based discrimination.<sup>37</sup> Although the United States often lags behind other nations in protective employment laws,<sup>38</sup> the absence of appearance discrimination protection is not an example of “American exceptionalism.”<sup>39</sup>

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<sup>34</sup> See, e.g., Corbett, *supra* note \_\_, at 155.

<sup>35</sup> Obesity is one of the most commonly discussed appearance claims under the ADA. See, e.g., RHODE, *supra* note \_\_, at 122-25; Jane Korn, *Too Fat*, 17 VA. J. SOC. POL’Y & L. 209 (2010); Corbett, *supra* note \_\_ at 164 (discussing *Goodman v. L.A. Weight Loss Centers, Inc.*, No. 04-CV-3471, 2005 WL 241180, 16 A.D. Cas. 732 (D. Pa. Feb. 1, 2005)). There have been a few other disability discrimination cases that might be characterized as appearance discrimination cases. See, e.g., *Johnson v. American Chamber of Commerce Pub., Inc.*, 108 F.3d 818 (7<sup>th</sup> Cir. 1997) (man missing 18 teeth stated viable claim for disability discrimination under “regarded as” definition of disability).

<sup>36</sup> D.C. CODE ANN. §§ 2-1401.02 (22) & 2-1402.11 (2001) (personal appearance); MICH. COMP. LAWS § 37.2202 (West 2001) (height and weight). See generally RHODE, *supra* note \_\_, at 126-134 (surveying state and local laws).

<sup>37</sup> CODE OF ORDINANCES CITY OF URBANA, ILL. §§12-37 & 12-62 (personal appearance); CITY OF MADISON, WIS. CODE OF ORDINANCES § 3.23 (2)(bb) (physical appearance); SANTA CRUZ, CAL. MUN. CODE §§ 9.83.010 & 9.83.020 (13) (physical characteristic)

<sup>38</sup> 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 known, the United States historically has provided comparatively meager formal legal protections of the employment relationship. Foreign observers typically characterize us as a ‘hire and fire’ society, . . .”).

<sup>39</sup> No other nation has such national law. See RHODE, *supra* note \_\_, at 134-35. Regarding American exceptionalism generally, see Harold Hongju Koh, Foreword, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003) (“Since September 11, “American Exceptionalism” has emerged as a dominant leitmotif in today’s headlines.”).

Most people probably believe that discrimination based on physical appearance is commonplace in employment and in most facets of life.<sup>40</sup> Furthermore, attention to appearance and appearance discrimination seem to be more significant issues for women than for men.<sup>41</sup> Indeed, contemporary society seems to be utterly and completely obsessed with physical attractiveness—particularly that of women.<sup>42</sup> My guess is that many also believe that such discrimination is morally wrong or at least unfair.<sup>43</sup> Furthermore, many people probably erroneously believe that an employer cannot legally fire someone based on their physical attractiveness or lack thereof.<sup>44</sup> So, why don't we have a federal law and laws in many or most states that prohibit appearance-based discrimination? We do not have many such statutes, and we never will. There may be many reasons, but I will address two.<sup>45</sup>

*a. The Coverage Problem: “I’m Ugly, and Even if I’m Not, They Think I am.”*

The most significant reason is that the protected characteristic could be so amorphous that analysis of claims would focus on the initial issue of who possessed the covered characteristic. On this point, appearance would present more difficulties than any characteristic that currently is covered by the federal employment discrimination laws. As a preliminary matter, what would the statute say? As Rhode explains, appearance bias falls along a continuum.<sup>46</sup> Would the law list specific aspects of

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<sup>40</sup> See Corbett, *supra* note \_\_\_, at 157.

<sup>41</sup> RHODE, *supra* note \_\_\_, at xv & 30-32.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 173.

<sup>44</sup> Many people in the U.S. do not seem to appreciate the meaning of employment at will, which is the law in 49 states. See generally Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, And Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002). Employment at will is discussed further in Part IV.F *infra*.

<sup>45</sup> For further discussion of reasons, see Corbett, *supra* note \_\_\_.

<sup>46</sup> RHODE, *supra* note \_\_\_, at 25

appearance such as height, weight, facial characteristics, body shape, dress, and grooming?<sup>47</sup> If the statute included such a list of specific covered characteristics, determining coverage might not be so difficult, but would the list be underinclusive, failing to capture much of the type of discrimination with which we are concerned?<sup>48</sup> If a plaintiff sued for weight discrimination, could an employer escape liability by claiming it discriminated based on general appearance rather than weight?

If the statute were drafted to eschew specifics and instead covered the general characteristic of “appearance,” that is, attractiveness or unattractiveness, how does one decide whether a claimant is unattractive (or attractive) enough to make a claim for such discrimination.<sup>49</sup> As one commentator expressed this idea: “Will there be a national standard of attractiveness established by EEOC rulemaking?”<sup>50</sup> Compare this coverage issue with that under the American with Disabilities Act, which covers the amorphous characteristic of “disability.”<sup>51</sup> Much of the litigation under the ADA focuses on whether one has a disability that substantially limits a major life activity, and plaintiffs have lost a stunning percentage of ADA cases because of failure to satisfy the definition.<sup>52</sup> Similar difficulties arise with religion under Title VII. What constitutes religious beliefs? While there are mainline religious groups and traditional beliefs and practices that clearly fall

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<sup>47</sup> *Id.*

<sup>48</sup> This issue arose regarding the definition of “disability” in the discussions and negotiations leading up to the passage of the ADA. See 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).

<sup>49</sup> See RHODE, *supra* NOTE \_\_\_, 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 \_\_\_, at 174.

<sup>50</sup> See James J. McDonald, Jr., *Civil Rights for the Aesthetically-Challenged*, 29 EMP. REL. L.J. 118, 127 (2003), *quoted in* RHODE, *supra* note \_\_\_, at 111.

<sup>51</sup> See, e.g., Selmi, *supra* note \_\_\_ 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.”).

<sup>52</sup> See, e.g., Sandra B. Reiss & J. Trent Scofield, *The New and Expanded Americans With Disabilities Act*, 70 ALA. LAW. 38, 39 (2009); Corbett, *supra* note \_\_\_, at 173-74.

under the protected characteristic,<sup>53</sup> much as there are disabilities that unquestionably are covered by the ADA, the EEOC adopted a very broad definition of religion in the regulation it promulgated: “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”<sup>54</sup> Is a belief that a person’s eating a particular brand of cat food is necessary for good health a covered religious belief?<sup>55</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, it seems likely that the stigma attached to being considered unattractive, much less publicly proclaiming oneself to be so, would dissuade victims from asserting claims.<sup>56</sup> One can imagine a colloquy between a judge and a plaintiff at a hearing on a motion for summary judgment or at trial:

*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.*

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<sup>53</sup> See 29 C.F.R. 1605.1 (1980) (“In most cases whether or not a practice or belief is religious is not at issue.”).

<sup>54</sup> *Id.*

<sup>55</sup> See *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977), *aff’d*, 589 F.2d 1113 (5<sup>th</sup> Cir. 1979) (concluding it is not).

<sup>56</sup> See *RHODE*, *supra* note \_\_\_\_, at 111-112.

I suppose the concern with stigma and resulting plaintiff reluctance does not apply to reverse appearance discrimination cases, like that of Ms. Lorenzana. Plaintiffs may be more willing to claim that they were victimized because of their beauty or hotness. However, there may be some risk that gives plaintiffs pause--the fact finder may disagree with the plaintiff's assertion that she is hot.

The hypothetical colloquy above suggests that the coverage issue actually is more complicated than I have depicted so far. The elusive fact of beauty, hotness, or ugliness is not the dispositive issue on coverage. The linchpin for coverage would be how one was regarded by the discriminators. That is, the dispositive question actually is not whether one is pretty or ugly, but whether one was so regarded by the discriminators.<sup>57</sup> This differs somewhat from other protected characteristics. For example, with race and sex, these are matters of fact that usually are readily observable by potential discriminators. When a Caucasian employee sues for race discrimination, we waste little time 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. While national origin is a factual matter, it is not always known or observable. For example, people sometimes harass a person because of what they erroneously think her national origin to be.<sup>58</sup> This was such a significant concern under the ADA, that Congress drafted a three-pronged definition of "disability," one of which is

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<sup>57</sup> A similar but not identical aspect of appearance that is different from some other characteristics covered under current law is that the appearance characteristic usually is not absolute, but relative. One is male or female, and one is Caucasoid or Mongoloid, but most often attractive and unattractive are judged comparatively. The relative nature of a covered characteristic was recognized by Congress in the ADA. To be covered, it is not enough for one to have a physical or mental impairment. The ADA requires that one have an impairment that substantially limits a major life activity. 42 U.S.C. § 12102 (2) (A).

<sup>58</sup> *See, e.g.,* EEOC v. WC&M Enters., Inc., 469 F.3d 393 (5<sup>th</sup> Cir. 2007) (although plaintiff was Indian, coemployees harassed him and made statements about plaintiff being Arab and Muslim).

“being regarded as having an impairment.”<sup>59</sup> With appearance, meaning physical attractiveness or unattractiveness, the fact is so subjective that every case actually is about how one was regarded by the alleged discriminators. There may be cases of *res ipsa loquitur*, but most will depend upon proof of how the plaintiff was regarded. Even disability is more concrete, with numerous impairments that clearly satisfy the definition.

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

A second reason that appearance-based discrimination never will be covered is that it seems very likely that we cannot significantly reduce this type of discrimination through law,<sup>60</sup> and it is far from clear that we want to do it anyway. People are attracted to those who are physically attractive. Contemporary American society celebrates and embraces physical beauty with an inexhaustible fervor. In a visual age of computers, Internet, and three-dimensional images, we display beauty everywhere.<sup>61</sup> However, American culture is not deviant in the world today in rhapsodizing about beauty, and this is not the first decade or century in which beautiful people have been placed on a pedestal.<sup>62</sup> One of the concerns many commentators have with our employment discrimination law is that we focus on intentional discrimination and require plaintiffs to prove the motive of the discriminator at the time of the discriminatory act, while there is evidence that the way in which discrimination occurs in the brain is largely subliminal

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<sup>59</sup> 42 U.S.C. § 12102 (2)(C).

<sup>60</sup> Although Professor Rhode disagrees with this point, she discusses the argument: “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.” RHODE, *supra* note \_\_, at 13-14.

<sup>61</sup> See, e.g., RHODE, *supra* note \_\_, at 52-68 (discussing the effects of technology, media, and advertising).

<sup>62</sup> See generally *id.* ch. 3.

and unconscious.<sup>63</sup> Thus, there is a disconnect between the analyses we use to prove discrimination and the way the actual phenomenon occurs. With appearance-based discrimination, this disconnect may be exacerbated because we may be confronting one of the most hard-wired of all types of discrimination.<sup>64</sup> Studies indicate that babies shown images of faces favor the attractive faces.<sup>65</sup> Although we often repeat the adage that “beauty is only skin deep,” it is questionable whether we have either the same moral conviction about that type of discrimination that we do about racial, sexual, and national origin discrimination or the ability to regulate and deter it through law. Preference for beauty is old, deeply ingrained, and probably hard to extirpate.<sup>66</sup>

*c. Prognosticating and Disclaiming*

Considering the difficulty of writing a law with an appropriate balance between specificity and breadth of coverage, identifying those who are covered by the law, and the unlikelihood of significantly displacing the beauty bias, I reiterate my prediction that there will be no federal employment discrimination law prohibiting appearance-based discrimination and few state and local laws. However, as a prognosticator on developments in the law with a less than unblemished record, I wish to add that I could be wrong. How does a characteristic come to be covered by federal, state, or local employment discrimination laws? I listed five factors in my prior article: 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

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<sup>63</sup> 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 (1995); Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443 (2010).

<sup>64</sup> See RHODE, *supra* note \_\_\_\_, at 45-46.

<sup>65</sup> *Id.* at 26.

<sup>66</sup> *But see id.* at 14 (“[C]onsiderable evidence suggests racial, gender, and disability biases are also deeply rooted, but nonetheless subject to change through legal prohibitions.”); *id.* at 112-16.

the characteristic to work.<sup>67</sup> Also, there must be sufficient political backing to achieve passage of the law, which often requires supporters to engage in activism and build coalitions with advocates of other interests.<sup>68</sup> In light of the Lorenzana claim and publicity and the publication of Professor Rhode's book, it is worth noting that captivating stories and scholarship<sup>69</sup> can help move the law in directions that it otherwise may not have moved.

Stories that capture the public's attention can find their way into legislative chambers. When the stories are supported by scholarship, the chances for passage of the laws sometimes increase. Consider, for example, the case of genetic discrimination. The Genetic Information Nondiscrimination Act (GINA) was signed into law by President Bush on May 21, 2008.<sup>70</sup> By the time GINA became a federal employment discrimination law, it had been introduced in Congress several times, and a majority of the states had amended their state laws to include genetic information discrimination.<sup>71</sup> Considering the five factors listed above,<sup>72</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 federal employment discrimination laws. Particularly lacking is a well-chronicled history of discrimination based on genetic information.<sup>73</sup> No other

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<sup>67</sup> See Corbett, *supra* note \_\_, at 171-77.

<sup>68</sup> *Id.*

<sup>69</sup> Perhaps relevant here is the argument by Professor Anita Bernstein that one key to adoption of new torts is the paradox of agency, meaning that they have an advocate who disclaims such a role. See Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1552-59 (1997).

<sup>70</sup> Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

<sup>71</sup> See generally Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 447-48 (2010).

<sup>72</sup> See *supra* text accompanying note \_\_.

<sup>73</sup> See Roberts, *supra* note \_\_, at 441:

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

discrimination statute has been enacted without a substantial history of discrimination. There were a few stories of such discrimination,<sup>74</sup> and the EEOC suit against Burlington Northern Railroad was a headline grabber.<sup>75</sup> In addition to the big story, there was a large and growing body of scholarship advocating passage of a genetic discrimination law.<sup>76</sup> And in 2009, genetic information joined the list of protected characteristics in federal employment discrimination law.

There are other examples of laws aided by stories and scholarship. Sexual harassment (hostile environment) was recognized as a type of sex discrimination supported by many cases and stories of sexual harassment and the influential scholarship of Professor Catherine McKinnon.<sup>77</sup> The recognition in most states of the tort of wrongful discharge in violation of public policy owes much to an article written by Professor Lawrence Blades<sup>78</sup> and stories of some abusive terminations of employees. Although I always have doubted its prospects for success, anti-bullying legislation is being considered in several state legislatures, aided by stories and scholarship.<sup>79</sup>

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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.

<sup>74</sup> See *id.* at 466-68.

<sup>75</sup> See, e.g., Steven Greenhouse, *Law Seeks to Ban Misuse of Genetic Testing*, N.Y. TIMES, Nov. 16, 2009, available at <http://www.nytimes.com/2009/11/16/business/16genes.html?scp=1&sq=genetic%20and%20%22burlington%20northern%22&st=cse>; Tamar Lewin, *Commission Sues Railroad to End Genetic Testing in Work Injury Cases*, N.Y. TIMES, Feb. 21, 2001, available at <http://www.nytimes.com/2001/02/10/us/commission-sues-railroad-to-end-genetic-testing-in-work-injury-cases.html?scp=4&sq=genetic%20and%20%22burlington%20northern%22&st=cse>.

<sup>76</sup> See, e.g., Roberts, *supra* note \_\_ (citing sources); Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. HEALTH CARE L. & POL'Y 225 (2000).

<sup>77</sup> See, e.g., CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

<sup>78</sup> Lawrence E. Blades, *Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). See Bernstein, *supra* note \_\_, at 1523 n.13 (citing Blades as a scholar praised for formation of the new tort).

<sup>79</sup> The Workplace Bullying Institute was established by Drs. Gary and Ruth Namie. See <http://www.workplacebullying.org/tools/book.htm>. Professor David Yamada has brought considerable attention to the issue through his scholarship and work with Suffolk's New Workplace Bullying Institute

So, it is possible that stories of appearance-based discrimination and scholarship, such as Professor Rhode's book, may bolster the prospects and spur the adoption of more state and possibly even federal law prohibiting appearance-based discrimination. However, with respect to the effect of scholarship, Professor Anita Bernstein has argued that although new torts have been aided by scholars, the courts are receptive when a tort, although advocated by a scholar, is made to appear "independent of individual human creation."<sup>80</sup> It is difficult to predict the effect of Rhode's book. With regard to stories, it also is difficult to gauge the effect of the Lorenzana story. A well-publicized story about a woman who says she was fired because of her appearance could bolster prospects for passage of an appearance discrimination law. However, one readily can see how this story may have the opposite effect. Were Lorenzana an appearance-challenged (ugly) person suing for an unfair termination, she would be likely to evoke sympathy, but ironically not nearly as much publicity. It is far from clear that legislators or judges will be moved by a claim that is characterized as "Don't hate me because I'm beautiful"—the infamous line from a 1980s shampoo commercial.<sup>81</sup> I don't want to appear naïve in underestimating the beauty bias, however; it is true that attractive people sometimes evoke sympathy, admiration, forgiveness, or other milk of human kindness in situations in which unattractive people do not. Beyond a possible sympathy deficit, the story may focus legislators on some of the legal analytical problems that would come as part of such

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and 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 *GEORGETOWN L.J.* 475 (2000).

<sup>80</sup> Bernstein, *supra* note \_\_, at 1552.

<sup>81</sup> *See* Pantene shampoo commercial, available at <http://www.bing.com/videos/watch/video/1980s-pantene-commercial-dont-hate-me/b42bdb9626db232e7bb6b42bdb9626db232e7bb6-61273014918>.

legislation—such as coverage (who is protected) and whether reverse discrimination claims are permitted.

In the end, I adhere to my prediction that few appearance discrimination laws will be enacted. Nonetheless, considering the prospects for enactment of an appearance discrimination law helps us understand 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 federal, state, or local law prohibiting appearance-based discrimination applicable to Ms. Lorenzana’s claim, how does she or her attorney think she will recover? To recover under employment discrimination laws (other than in those few places that have appearance laws), one must “fit” appearance-based discrimination under another expressly protected characteristic. This is what Lorenzana has attempted, characterizing her claim, in part,<sup>82</sup> as sex discrimination and sexual harassment (hostile environment) under New York City employment discrimination law. The key to a sex discrimination claim is proving that a plaintiff was treated differently than a similarly situated member of the other sex.<sup>83</sup> In appearance cases, one viable theory is different dress and grooming standards for male and female employees. This theory does not even stretch sex discrimination because it is in fact different treatment of men and women. Although different requirements for men and women obviously is discrimination based on sex, courts have recognized that employers usually are not going to have the same

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<sup>82</sup> She also asserts a retaliation claim.

<sup>83</sup> See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (“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.”).

dress and grooming codes for men and women. Generally, different standards are permitted as long as they do not impose unequal burdens on men and women.<sup>84</sup> Alas, this theory of appearance discrimination as sex discrimination does not seem applicable to Lorenzana's claim because she asserts that she was told to dress differently than other employees, but her comparators are other women, not men. As her complaint states it, "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>85</sup> Such an allegation does not suggest that plaintiff will succeed; this is not the stuff of disparate treatment of men and women.

There are, however, theories available for "fitting" appearance-based discrimination under sex discrimination in which "because of . . . sex" is satisfied through some forcing of appearance into sex. One might question whether this phenomenon of fitting nonprotected characteristics under expressly protected characteristics is a healthy approach to permitting some plaintiffs to recover rather than simply amending the laws to expressly cover the characteristic, but more about that momentarily. Appearance claims have been fit under statutorily protected characteristics in numerous cases. For example, Abercrombie & Fitch, a clothing store chain emphasizing young people's fashions, has been sued for requiring that its sales associates have the "A&F Look."<sup>86</sup> While this is appearance-based discrimination, it was brought under race because the A&F Look was

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<sup>84</sup> See, e.g., *Jespersion v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9<sup>th</sup> Cir. 2006).

<sup>85</sup> Complaint, *supra* note \_\_, ¶ 7.

<sup>86</sup> 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, 654-56 (2008) (discussing A&F's practice of hiring "brand representatives" that "look great").

characterized as young, white and preppie.<sup>87</sup> Another lawsuit alleged that female hires at A&F stores were restricted in number, thus bringing the claims under sex.<sup>88</sup> Abercrombie settled three such lawsuits, including a lawsuit filed by the EEOC, for about \$50 million.<sup>89</sup> In an even more creative type of claim, an employee claimed that the type of clothing that employees were required to wear violated her religious beliefs.<sup>90</sup> Ms. Lorenzana has couched her claim in terms of sex discrimination, but this is unlike some of the claims against Abercrombie & Fitch and other cases in which a woman claims to be disadvantaged because the appearance favored for employment or other positive employment action is male. Essentially, Lorenzana is claiming that she was discriminated against because she was a sexy-looking woman.

Another theory employed to fit various types of claims under sex discrimination is gender or sex stereotyping. This theory is used most often to fit sexual orientation claims under sex discrimination, and most commonly in sexual harassment cases. Gender stereotyping traces its origins to the Supreme Court's decision in *Price Waterhouse v. Hopkins*.<sup>91</sup> Essentially, this theory argues that a person is discriminated against on the basis of sex because the victim does not fit the stereotype held by the discriminators of a man or a woman or a man or woman in that type of job—that is, that the victim is not manly or womanly enough, either in general or specifically in the job at issue.<sup>92</sup> In *Price Waterhouse*, for example, the plaintiff, an associate in a major accounting firm, was a

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<sup>87</sup> See Joyce E. Cutler, *Abercrombie & Fitch Settles Race, Sex Discrimination Lawsuits for \$50 Million*, Daily Lab. Rep. (BNA) No. 218, at A-2 (Nov. 11, 2004).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See Lawrence E. Dubé, *Court Sends Religious Bias Case to Trial; Employee Quit Over Retailer's "Look Policy"*, Daily Lab. Rep. (BNA) No. 211 (Nov. 4, 2009) (discussing EEOC v. Abercrombie & Fitch Stores Inc., No. 4:08CV1470 (E.D. Mo. Oct. 26, 2009)).

<sup>91</sup> 490 U.S. 228 (1989).

<sup>92</sup> See, e.g., Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L & POL'Y 467 (2007).

woman who has denied partnership in part because she was too “abrasive” and “macho,” a woman who would benefit from “tak[ing] a course at charm school.”<sup>93</sup> The gender stereotyping theory actually may work for Lorenzana’s claims. The argument could be framed as she was too sexy to satisfy the stereotype her supervisors had for a woman in her job. This theory would be strengthened (more clearly satisfy “because of sex”) if she could prove that the male supervisors did not have any qualms about sexy or hot men in the same or similar jobs.

Other than sex, are there other protected characteristics into which Lorenzana might fit her claims? Probably not, but there is at least one interesting possibility. Lorenzana mentioned that it is part of her Latin culture for a woman to spend time making herself look very feminine for work.<sup>94</sup> There are the seeds of a national origin claim there. 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 the equivalent of discrimination based on race or national origin.<sup>95</sup> Although I think it would be difficult for her to prove that the look that she was told to change was characteristically Latin, this is one approach to fitting appearance claims under protected characteristics. I do not see how Lorenzana’s claims could be fit into any other protected characteristics.<sup>96</sup> Although it is not her case, it is easy to see how many appearance claims could be fit under age. In a society that is obsessed and infatuated

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<sup>93</sup> Price Waterhouse v. Hopkins, 490 U.S. at 235.

<sup>94</sup> Dwoskin, *supra* note \_\_\_\_.

<sup>95</sup> See, e.g., McManus v. MCI Communications Corp., 748 A.2d 949 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001).

<sup>96</sup> I dare not suggest this possibility in text, but I raise it here because it is farfetched yet intriguing. Could one fit an appearance claim such as this under the ADA? I think not. One writer sardonically put it this way: “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 \_\_\_\_.

with youth, a certain look, such as the “A&F look,” may be a youthful look unattainable by persons in the protected class over 40.<sup>97</sup>

Fitting is not limited to appearance claims. Consider, for example, claims for sexual orientation discrimination, which is not yet covered by federal employment discrimination law,<sup>98</sup> although it is covered by the law of 21 states<sup>99</sup> and many local ordinances.<sup>100</sup> Some plaintiffs have been able to fit claims of sexual orientation discrimination or harassment under sex discrimination.<sup>101</sup> Yet another example is claims for discrimination based on caregiver or family responsibility status, which often are couched in terms of sex, race, or disability (often relational) discrimination.<sup>102</sup>

*b. 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, should this practice cause concern? Are employment discrimination laws being stretched in unintended ways, and could this phenomenon bring discredit on employment discrimination law? I think there is no great danger here,

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<sup>97</sup> See Mark R. Bansuch, *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. . .”).

<sup>98</sup> See, e.g., *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, 111<sup>th</sup> Cong. (2009), 123 HARV. L. REV. 1803 (2010).

<sup>99</sup> See Derrick Cain, *Supporters Tell Senate Panel ENDA Necessary, Opponents Criticize Provisions*, Daily Lab. Rep. (BNA0 No., 213, at A-10 (Nov. 6, 2009).

<sup>100</sup> See, e.g., Tripp Baltz, *Salt Lake City Adopts Ban on Job, Housing Bias Based on Sexual Orientation*, Daily Lab. Rep. (BNA) No. 221, at A-11 (Nov. 19, 2009).

<sup>101</sup> See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9<sup>th</sup> Cir. 2002), *cert. denied*, 538 U.S. 922 (2003).

<sup>102</sup> The EEOC issued a guidance document in 2007 on such discrimination. See *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (No. 915.002, May 23, 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).

and I go further to argue that this is how employment discrimination law should function—a core of protected characteristics with a penumbra of characteristics that can be fit under them in appropriate cases.

In some cases, courts' acceptance of theories of fit presages legislative action. For example, gender stereotyping and other theories that have been used to fit sexual orientation under sex are harbingers of the eventual passage of federal law prohibiting employment discrimination based on sexual orientation.<sup>103</sup> On the other hand, courts are able to control fit when they believe that it stretches too far the existing law. For example, a husband, wife and daughter who were fired by a company sued alleging, in part, that terminating the three of them constituted sex discrimination.<sup>104</sup> The court rejected the plaintiffs' claims, stating that familial status is not protected under Title VII.<sup>105</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 laws adding covered characteristics means that not many new characteristics will be added, and it will not happen often. This is particularly true in the global economy in which the argument is raised when new employment laws are proposed that we will drive businesses out of the country by over-regulating.<sup>106</sup> Fitting also provides courts a vehicle for reining in employers who are abusing the

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<sup>103</sup> See *supra* note \_\_\_\_.

<sup>104</sup> *Adamson v. Multi Community Diversified Servs., Inc.*, 514 F.3d 1136 (10<sup>th</sup> Cir. 2008).

<sup>105</sup> *Id.* at 1141.

<sup>106</sup> See Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces*, 76 IND. L.J. 29, 34 (“[M]ore 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”); 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).

prerogative to terminate without reason afforded them by the employment at will doctrine.<sup>107</sup>

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

Ms. Lorenzana’s claim illustrates a question that I previously raised about appearance discrimination if it were covered: “Would there be reverse discrimination claims for the appearance-gifted?”<sup>108</sup> “Reverse discrimination” refers to discrimination against a member of a group that historically has not been commonly discriminated against, such as a race discrimination claim by a Caucasian.<sup>109</sup> When we discuss the unfairness of discrimination against people because of their physical appearance, we seldom have in mind 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 who are so attractive or so sexy that their appearance is the dominant impression they make on coworkers and/or customers. Thus, her claim is a reminder of the difficulties presented by reverse discrimination claims—difficulties that challenge the very foundations of our employment discrimination law.

There is a cogent argument that reverse discrimination claims are merely discrimination claims, and they should be treated no differently than traditional discrimination claims. That argument posits that to treat them differently is in itself discrimination and is violative of the equal treatment underpinnings of our employment discrimination statutes and perhaps the equal protection clause of the fourteenth amendment. On the other hand, there is an argument that Congress was not principally

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<sup>107</sup> See *infra* Part IV.G.

<sup>108</sup> Corbett, *supra* note \_\_, at 171.

<sup>109</sup> 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).

addressing problems of reverse discrimination when it passed employment discrimination laws, and perhaps it did not intend to cover such discrimination at all. Thus, the first question is whether a reverse discrimination claim is covered by a particular employment discrimination law? The answer has varied depending upon the discrimination statute at issue. The Supreme Court clearly has held that reverse discrimination claims are viable under Title VII for race<sup>110</sup> and sex,<sup>111</sup> and it has been assumed by the courts that this principle holds for all characteristics covered by Title VII.<sup>112</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>113</sup> That result was not obvious, and there are good arguments in both the majority and dissenting opinions in the 6-3 decision. Reverse discrimination claims are a debatable issue under Title VII because everyone is covered by most of the protected characteristics; that is everyone has a race, color, sex, and national origin, although everyone may not have a religion. *General Dynamics Land Systems* debated the issue of reverse claims because everyone 40 or older is protected by the ADEA; thus, in theory a 42-year old could be discriminated against based on her youth in favor of an older employee. The Americans With Disabilities Act, in contrast, protects only qualified

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<sup>110</sup> See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

<sup>111</sup> Cf. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). *Oncale* was a claim by a man, but it was not a typical reverse discrimination claim because the male plaintiff alleged same-sex sexual harassment. Still, *Oncale* supports the proposition that the class without a history of discrimination (harassment) may sue 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 (7<sup>th</sup> Cir. 2010) (noting that sexual harassment law is not limited to the typical case of a woman harassed by men).

<sup>112</sup> See, e.g., *Noyes v. Kelly Servcs.*, 488 F.3d 1163 (9<sup>th</sup> 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.”).

<sup>113</sup> 540 U.S. 581 (2004).

individuals with disabilities; thus there can be no reverse claims by the nondisabled .<sup>114</sup>

If physical appearance were a protected characteristic, would courts permit beautiful, sexy, or attractive plaintiffs to recover for reverse discrimination, as in Ms. Lorenzana's case? The answer is not obvious, and existing discrimination law does not furnish a definitive answer.

Second, after resolving that plaintiffs can bring most types of reverse discrimination claims, some court have required plaintiffs in such cases to prove their cases differently than plaintiffs in traditional discrimination cases. The most common example is the requirement that a plaintiff go beyond the typical prima facie case by proving "background circumstances" which establish that the subject employer is the unusual type that engages in nontypical discrimination.<sup>115</sup> This is a controversial principle because, as noted above, it does not treat all persons equally, and thus seems to violate a core principle of discrimination law.<sup>116</sup> However, the usual assumptions on which the analytical frameworks were based do not apply equally to reverse discrimination cases.<sup>117</sup>

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<sup>114</sup> *But see* Woods v. Phoenix Society of Cuyahoga County, 10 A.D. Cases 1086, 2000 WL 640566 (Ohio App. 2000 (in wrongful discharge case by plaintiff claiming he was discriminated against in job because he had no mental illness, court declared that it was a viable reverse).

<sup>115</sup> *See, e.g., Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985). *See also* Sullivan, *supra* note \_\_\_, at 1065-71 (discussing background circumstances). The background circumstances requirement also has been applied to a reverse disparate impact claim. *See* Livingston v. Roadway Express, Inc., 802 F.2d 1250 (10<sup>th</sup> Cir. 1986).

<sup>116</sup> *See, e.g., Lind v. City of Battle Creek*, 681 N.W.2d 334 (Mich. 2004); *see also* Cline v. General Dynamics Land Sys., Inc., 296 F.3d 466 (6th Cir. 2003), *rev'd*, 540 U.S. 581 (2004):

[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.

*Id.* at 471.

<sup>117</sup> *See, e.g., Sullivan, Circling, supra* note \_\_\_, at 1061-65.

Thus, reverse discrimination claims cause considerable difficulty in employment discrimination law. Treating reverse discrimination claims differently than traditional discrimination claims, although quite reasonable, at least in terms of the proof structures under which they are analyzed, poses at least two dangers: 1) possible constitutional infirmity under the fourteenth amendment;<sup>118</sup> and 2) adverse reaction from judges and perhaps ultimately the public who believe that discrimination law should not discriminate. So, it is an intriguing question whether an employment discrimination law prohibiting discrimination based on physical appearance would cover reverse discrimination claims. Further, if reverse discrimination claims were recognized for appearance, would plaintiffs be required to prove more in such cases, as with background circumstances? While 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, it is less likely that there is much sympathy for the appearance-gifted needing protection from the disadvantages imposed on them because of their beauty. In the context of Lorenzana's suit, writers have conjured up the infamous line from a 1980s shampoo commercial: "Don't hate me because I'm beautiful."<sup>119</sup> The 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 the rationale of the Supreme Court in *General Dynamics Land Systems* that when Congress used the term "age discrimination" it had in mind the meaning that most

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<sup>118</sup> Compare *id.* at 1099-1118, with Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

<sup>119</sup> See Pantene shampoo commercial, available at <http://www.bing.com/videos/watch/video/1980s-pantene-commercial-dont-hate-me/b42bdb9626db232e7bb6b42bdb9626db232e7bb6-61273014918>.

people have in common usage—discrimination against older people.<sup>120</sup> However, there undoubtedly are jobs for which employers do not hire very attractive people, and probably almost always women, because the stereotype is that beautiful women may lack intelligence or gravitas.<sup>121</sup> Another likely type of discrimination against attractive women is that they may be segregated 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. Thinking about the issue and considering the inconsistent answers we have arrived at for 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 fide occupational qualification reasonably necessary to the normal operation of that particular business.”<sup>122</sup> The “BFOQ” affirmative defense, although expressly provided for in Title VII, applies to only sex, national origin, and religion-- not race and color. The BFOQ defense as provided for in the statutory language and 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. The test developed by the courts to determine the

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<sup>120</sup> *General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 597-98 (2004).

<sup>121</sup> See RHODE, *supra* note \_\_, 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.”).

<sup>122</sup> 42 U.S.C. § 2000e-2(e) (Title VII BFOQ); 29 U.S.C. § 623(f)(1) (ADEA BFOQ).

applicability of the BFOQ defense is very difficult for a defendant to satisfy.<sup>123</sup> The test first identifies the essence of the business, as determined by the court, not the employer, and then asks whether the essence of the business makes it essential for the employer to discriminate on the basis of the protected characteristic.<sup>124</sup>

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

Although it is a district court decision, perhaps the most famous BFOQ case is *Wilson v. Southwest Airlines Co.*<sup>125</sup> In *Wilson*, the fledgling Southwest Airlines hired only women for the high customer contact positions of flight attendant and ticket agent. Men who were denied those jobs sued for sex discrimination, and Southwest defended on the ground of BFOQ. The argument deviated from the usual version of BFOQ (*i.e.*, 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. 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,

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<sup>123</sup> See generally, Katie Manley, Note, *The BFOQ Defense: Title VII’s Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL’Y 169 (2009); 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 (2007).

<sup>124</sup> See, e.g., *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (interpreting BFOQ for sex under Title VII); *Western Air Lines v. Criswell*, 472 U.S. 400 (1985) (interpreting BFOQ for age under the ADEA).

<sup>125</sup> 517 F. Supp. 2d 292 (N.D. Tex. 1981).

friendly air, her wit ... yet she is quite efficient and approaches all her tasks with care and attention. . . .<sup>126</sup>

The court in *Wilson* rejected the BFOQ defense because under the two-part test, Southwest could not satisfy the first part of the test. The essence of its business was transporting passengers safely and quickly; the court rejected Southwest's argument that the essence of its business was to transport passengers with a certain panache—with love. Having stripped the essence of what Southwest did to, well, 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>127</sup>

*Frank v. United Airlines* is another airline case that involved the BFOQ defense.<sup>128</sup> The airline used weight tables based on body frames to set maximum body weights for flight attendants. However, the maximum weight for males was based on large body frames, and the maximum weight for females was based on medium body frames. Consequently, only females who were substantially lighter than males qualified for jobs. The airline defended, in part, under BFOQ,<sup>129</sup> arguing that overweight flight attendants could not perform some of the functions, such as providing physical assistance in emergencies. The court found that the airline failed to satisfy the BFOQ test.

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<sup>126</sup> *Id.* at 294. 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.* n.4.

<sup>127</sup> *Id.* at 302.

<sup>128</sup> 216 F.3d 845 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 914 (2001).

<sup>129</sup> Before reaching the BFOQ test, the court explained that employers are permitted to maintain different dress and grooming standards for female and male employees. However, because the standard at issue was more burdensome on females, it was necessary for the employer to defend it as a BFOQ. *Id.* at 854-55.

Finally, in a famous case that never went to trial, the Equal Employment Opportunity Commission filed an action against Hooters restaurants for the company's refusal to hire men as servers, instead restricting the position of "Hooters Girls" to females.<sup>130</sup> Hooters staked out a legal argument that being female was a BFOQ for being a Hooters girl.<sup>131</sup> The EEOC had the better of the argument based on precedent, but Hooters embarked on an aggressive public relations campaign apparently intended to make the EEOC's position look foolish. Eventually Hooters reached a settlement with the EEOC, but the settlement permitted Hooters to continue its hiring practice.<sup>132</sup>

The BFOQ cases discussed above and many others 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, it was not just women that they were hiring, but attractive and/or slim and/or sexy women whom the employers believed would satisfy their customers' preference. Abercrombie and 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, to which BFOQ does not apply.<sup>133</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 we let employers argue that they make more money when customers are drawn to their

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<sup>130</sup> See, e.g., Kenneth L. Schneyer, *Hooting: Public and Popular and Popular Discourse About Sex Discrimination*, 31 U. MICH. L.J. 551 (1998); 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 (2003).

<sup>131</sup> See Patricia A. Casey, *Does Refusing to Hire Men as Food Servers Violate the Civil Rights Act? No: A Business Has a Right to Choose its own Character*, 82 ABA J. 41 (1996).

<sup>132</sup> Kamer & Keller, *supra* note \_\_\_\_, at 341.

<sup>133</sup> See *supra* text accompanying notes \_\_ - \_\_.

attractive employees, the heretofore narrow BFOQ defense would be greatly expanded.<sup>134</sup> Indeed, our experience with the BFOQ cases under existing law may suggest a reason 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, many employers do it as a matter of policy or practice. Some employers may simply prefer as a matter of personal taste to hire attractive women, but many believe that their business will enjoy higher profits as a result of such hires. An extreme version of the higher profits rationale is that some businesses actually build attractive or sexy women, and perhaps fewer such men, into their business identity. Thus, Southwest Airlines argued that the women in certain jobs were part of the essence of the business. Although the court rejected that argument as a matter of law, it was true as a matter of fact. Hooters and Abercrombie and Fitch seem to have arguments at least as strong as a factual matter: although they sell food and clothing, respectively, what they market is sexy, young people, often marketed to sexy, young people.<sup>135</sup>

The BFOQ defense rarely has been successful when the argument has been customer preference<sup>136</sup> or profits,<sup>137</sup> but the inclination to prohibit employers from discriminating based on appearance has seemed weak. Consider, for example, that Hooters' aggressive public relations campaign, including appeals to legislators, caused the EEOC to drop the suit. In the *Wilson* case, the court, although it held that Southwest

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<sup>134</sup> See *Wilson*, 517 F. Supp. 2d at 304 (“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 qualification for any public contact position where customers preferred employees of a particular sex.”).

<sup>135</sup> See Kevin P. McGowan, *Panel Discusses Legal Issues Arising from Job Segregation in the Workforce*, Daily Lab. Rep. (BNA) No. 63, at C-1 (April 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).

<sup>136</sup> See, e.g., *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052 (D. Ariz. 1999).

<sup>137</sup> See, e.g., *UAW v. Johnson Controls*, 499 U.S. 187 (1991).

Airlines could not satisfy the BFOQ defense, closed the opinion with the following passage, which suggests the court's 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 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>138</sup>

Thus, we see that appearance discrimination is a pervasive practice of employers, it usually is 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 were influential in Congress not including a race or color BFOQ in Title VII.<sup>139</sup> In the end, however, my guess is that BFOQ would be recognized as a defense to appearance discrimination, primarily because we, and Congress, do not have the same moral revulsion toward appearance discrimination that we have about race discrimination.

If appearance were a protected characteristic and BFOQ were a recognized defense to appearance-based discrimination, it is clear that employers would be able to argue for some jobs that attractiveness or sexiness or slimness was a BFOQ. However,

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<sup>138</sup> *Wilson v. Southwest Airlines*, 517 F. Supp. 2d 292, 304-05 (D. Tex. 1981).

<sup>139</sup> *See Manley, supra* note \_\_\_, at 196-98; *Putnam, supra* note \_\_\_, at 663-64.

consider the opposite issue raised by Ms. Lorenzana's claim: would employers be able to argue successfully that for some jobs unattractiveness, lack of sexiness, or nonslimness was a BFOQ? Of course this would be an issue only if reverse appearance discrimination claims were recognized.<sup>140</sup> If the law followed Title VII law on sex as a BFOQ, the defense would work both ways. But would legislatures and courts think that employers need or should have a BFOQ to defend discriminating against beautiful people in favor of ugly people?

Might some employers in fact 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. 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>141</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 or woman in that job should be like.<sup>142</sup> Finally, some employers might avoid hiring very attractive or sexy women (or perhaps men) based on fear that their other employees would be inclined to sexually harass the beautiful person, with the employer being required to address the harassment and perhaps to incur liability. Thus, it is not unreasonable to suggest that some employers might discriminate against the appearance-gifted. Would they be afforded the BFOQ defense?

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<sup>140</sup> For discussion of the issue of reverse discrimination, see *supra* text accompanying notes \_\_-\_\_. For example, because the Supreme Court held that there is no reverse discrimination under the Age Discrimination in Employment Act, a younger person has no claim that she was discriminated against on the basis of her youth in favor of an older person. Thus, an employer never would be in the position of needing to assert older age as a BFOQ.

<sup>141</sup> See RHODE, *supra*, note \_\_, at 31. Compare *Fernandez v. Wynn Oil*, 20 Fair Emp. Prac. Cas. (BNA) 1162 (C.D. Cal. 1979) (employer unsuccessfully arguing that clients in other nations would not take seriously a woman in a particular position).

<sup>142</sup> See *supra* text accompanying notes \_\_-\_\_.

This discussion of BFOQ should elucidate much about employment discrimination law. The law of BFOQ indicates the difficulty posed by, on the one hand, prohibiting discrimination based on a particular characteristic but, on the other, admitting that the characteristic in some cases will be so relevant to a job that employers ought to be able to take it into account. The balance between prohibiting discrimination and accommodating employers' interest is hard 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. 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' interest. 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/ 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>143</sup> The antiretaliation clauses declare it to be an unlawful employment practice to discriminate against an employee for opposing discriminatory practices under the statute or for participating in investigations, proceedings, or hearings under the statute. Employers should fear retaliation claims more than any other

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<sup>143</sup> 42 U.S.C. § 2000e-3(a) (Title VII antiretaliation provision); 29 U.S.C. § 623(d) (ADEA antiretaliation provision); 42 U.S.C. § 12203 (ADA antiretaliation provision). *See generally* George B. Glenn, *Revenge*, 83 TUL. L. REV. 439 (2008).

discrimination claims<sup>144</sup> for at least two reasons: 1) a claimant can win a retaliation claim even if she loses the predicate discrimination claim<sup>145</sup>; and 2) the elements of proof for a retaliation claim are the most easily satisfied of all discrimination claims.<sup>146</sup> Claimants often make a prima facie showing on causation merely by establishing temporal proximity between the protected activity and the adverse employment action.<sup>147</sup> The Supreme Court in 2006 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>148</sup> Retaliation claims have been on the rise in recent years,<sup>149</sup> and plaintiffs have enjoyed considerable success on such claims.<sup>150</sup>

Retaliation claims are important to appearance-based discrimination because, if as I predict, federal and most state employment discrimination laws are not amended to cover that characteristic, the existing antiretaliation provisions of Title VII, the ADEA, and the ADA offer an avenue of recovery. Plaintiffs often assert their appearance claims

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<sup>144</sup> See, e.g., Glenn, *supra* note \_\_, at 467; Eve I Klein, *A Rising Tide of Retaliation Claims Challenges Employers to Adopt Adequate Preventive Measures*, 71 N.Y. St. B.J. 51 (Sept./Oct. 1999).

<sup>145</sup> See, e.g., *Wright v. CompUSA*, 352 F.3d 472 (1<sup>st</sup> Cir. 2003); Klein, *supra* note \_\_, at 52.

<sup>146</sup> See Glenn, *supra* note \_\_, 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: 1) the claimant engaged in protected activity—opposition or participation activity; 2) the employer took adverse action against the employee; and 3) existence of a causal connection between the protected activity and the adverse employment action. *Id.* at 455-59.

<sup>147</sup> *Id.* at 458-59.

<sup>148</sup> 548 U.S. 53, 68 (2006).

<sup>149</sup> See EEOC Charge Statistics, FY 1997 Through FY 2009, at <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (indicating increase from 22.6% of all charges filed in 1997 to 36% in 2009). In 2009, retaliation tied with race discrimination as the most frequently asserted charge of discrimination. See Glenn, *supra* note \_\_, at 441-42 (discussing the increasing number of retaliation charges filed).

<sup>150</sup> See, e.g., Glenn, *supra* note \_\_, at 467.

by “fitting” them under Title VII or the ADEA.<sup>151</sup> It is not necessary that the plaintiff prevail on such a claim in order to have a successful retaliation claim. However, it is necessary for the claimant to establish a reasonable and good faith belief that the employer’s action is a violation of Title VII or the ADEA.<sup>152</sup> Ms. Lorenzana asserts a retaliation claim in her complaint,<sup>153</sup> and it seems the most promising basis for recovery. If a plaintiff can make a claim that an employer discriminates on the basis of appearance and tie that to a characteristic covered by Title VII, the ADEA, or the ADA, report that conduct internally and then suffer adverse action, the prospect for a successful retaliation claim does not look bad at all. Of course, a claim of appearance-based discrimination that was not linked to a protected characteristic would not set up a viable retaliation claim.

The range of protection afforded by anti-retaliation law is demonstrated not just by the retaliation claim Lorenzana asserted in her complaint, but also by the retaliation claim that her first attorney threatened to file against her current employer, JPMorgan Chase. She says her current employer warned her to stop speaking out in the media about her claims against Citibank, saying that she was violating an employee code of conduct that prohibits employees from doing things that damage the reputation of the financial industry.<sup>154</sup> Her first attorney threatened that if she were fired or disciplined, his client would sue JPMorgan. It seems clear that her conduct would come under the opposition clause. As mentioned above, one must have a reasonable and good faith belief that the

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<sup>151</sup> See *supra* Part IV.A.2.

<sup>152</sup> The Supreme Court has never expressly approved this standard, but it has been routinely applied by the lower federal courts. See Glenn, *supra* note \_\_, at 449 & n.38.

<sup>153</sup> See Complaint, *supra* note \_\_, ¶¶ 11-12, 16, 21 & 30-32.

<sup>154</sup> See Dwoskin, *supra* note \_\_; Paul Thompson, *Bank Girl Faces Being Fired from Latest Job for Talking About Dismissal From Citigroup for Being “Too Sexy,”* Mail Online, June 9, 2010, available at <http://www.dailymail.co.uk/news/worldnews/article-1285026/Debralee-Lorenzana-faces-fired-JPMorgan-Chase-talking-dismissal-Citigroup-sexy.html?ITO=1490#ixzz0rX6Gogju>

action one is opposing is illegal under the relevant employment discrimination law.<sup>155</sup> It seems clear that Lorenzana was speaking out against what she believed to be discriminatory conduct.

There is a second limit on conduct that is protected by the antiretaliation provisions: opposition conduct that is unlawful loses protection, and it is possible that extremely disloyal conduct also loses protection.<sup>156</sup> Would Lorenzana's high-profile approach of taking her case to the media and perhaps violating a code of conduct of her current employer cause her otherwise protected activity to lose protection? Probably not, but the facts present interesting issues. Many employees think that they have First Amendment rights of free speech and expression in the workplace, which they do not have because they work for private employers which, unlike governmental employers, generally are not subject to the limitations imposed by the First Amendment.<sup>157</sup> Even with employees of private employers, however, there are some federal laws that provide protection to some forms of employee speech and expression, such as the National Labor Relations Act<sup>158</sup> and antiretaliation provisions of the employment discrimination laws. 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. Codes of conduct, such as the one apparently maintained by JPChase

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<sup>155</sup> See *supra* note \_\_\_ and accompanying text.

<sup>156</sup> See, e.g. Glenn, *supra* note \_\_\_, at 449 & n.41. The Supreme Court has clearly held that illegal conduct can lose protection. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). What is not clearly resolved is the extent to which legal but disloyal conduct loses protection. See *Hochstadt v. Worcester Found. For Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976) ("balanc[ing] the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel").

<sup>157</sup> See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1524 (2007).

<sup>158</sup> 29 U.S.C. §§ 151-169. Regarding 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 (2002).

have become a fairly common way for employers to state their expectations regarding employee conduct and loyalty. Still such codes of conduct may, as written or as applied, infringe on statutory rights of employees.

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 laws expand 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.

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

Ms. Lorenzana's chances of success on her claim may be affected by her appearance and some of her nonwork-related conduct. As mentioned above, some criticism in the media has been directed at her for the photographs made available with the lawsuit and story, but even more came when the 2003 video about her second breast augmentation surfaced.<sup>159</sup> A number of Ms. 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>160</sup> Yet, if the allegations of her complaint are correct, is what she said in a video in 2003 relevant to her claims? Should such evidence even be admissible in a trial or arbitration? A frequent issue in sexual harassment cases is whether evidence of the alleged victim's appearance and/or nonwork conduct is admissible, and if it is what effect it has on the case.

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<sup>159</sup> See *supra* text accompanying notes \_\_ - \_\_.

<sup>160</sup> See *supra* note \_\_ and accompanying text.

The issue of the plaintiff's appearance and conduct arose in the Supreme Court's first major decision regarding sexual harassment. In *Meritor Savings Bank, FSB v. Vinson*, the defendant argued that the plaintiff, who was sexually harassed by her supervisor, wore provocative clothes and had sexual fantasies.<sup>161</sup> The Court concluded that such evidence is "obviously relevant" and that there was no per se rule against its admissibility; rather, the Court remanded to the district court with instructions that it weigh "the applicable considerations" in deciding whether the evidence was admissible.<sup>162</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 is welcome. After the *Meritor* case, Congress enacted a rule of evidence that renders evidence of the alleged victim's other sexual behavior or sexual predisposition generally inadmissible.<sup>163</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>164</sup> Even if the party seeking to have such evidence admitted satisfies the standard, the rule provides specific procedures that must be followed to have the evidence admitted.<sup>165</sup>

A case somewhat analogous to Ms. Lorenzana's case is *Burns v. McGregor Elec. Industries*.<sup>166</sup> In that case, which predated the 1994 amendment of Federal Rule of Evidence Rule 412, the district court had held that a woman who was a victim of sexual harassment could not recover because she would not have been offended by the conduct,

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<sup>161</sup> 477 U.S. 57 (1986).

<sup>162</sup> *Id.* at 68-69.

<sup>163</sup> FED. R. EVID. Rule 412.

<sup>164</sup> *Id.* ¶ b(2)

<sup>165</sup> *Id.* ¶ c.

<sup>166</sup> 989 F.2d 959 (8<sup>th</sup> Cir. 1993).

although a reasonable woman would have been. The district court reached that conclusion based on the fact that the plaintiff had posed nude for some magazines outside of the workplace and having no connection to her work.<sup>167</sup> The court of appeal 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>168</sup>

Thus, the general rule has developed that in sexual harassment cases, evidence regarding sexual activity and predisposition, including dress, is not generally admissible. Would evidence of the 2003 video be admissible in Lorenzana's case? It is difficult to predict, first because she stated her claims under the New York City employment discrimination law. The analogous state evidence rule<sup>169</sup> appears to apply to criminal cases only, unlike Federal Rule of Evidence Rule 412, which applies to criminal and civil cases. However, if a court applied a balancing test, like that under the federal rule, between the probative value of the evidence and the unfair prejudice that would result, I think different courts would strike that balance differently. Even if the evidence were admitted, would it have much impact on whether the plaintiff established her claims?

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<sup>167</sup> *Id.* at 962.

<sup>168</sup> *Id.* at 963.

<sup>169</sup> McKinley's CPL § 60.42.

Although there is a good argument that even if the evidence were admitted, it should not have much effect on the plaintiff's claims, as in the *Burns* case,<sup>170</sup> it is not farfetched to suggest that a jury or a judge may not look sympathetically upon a plaintiff suing for sex (and appearance) discrimination if shown a video in which she 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 Abercrombie and Fitch required her to wear clothes at work that were "sexy, form-fitting, and designed to show off body contours and draw attention to the wearer."<sup>171</sup> The employee objected to the dress requirement, explaining that because of her religious beliefs, she must wear skirts that came below her knee and shirts with sleeves that came below her forearm. Discussions regarding a possible accommodation of her religious beliefs proved unavailing, and the employee resigned. The EEOC filed a lawsuit based on the charge. The court denied a motion for partial summary judgment by the EEOC because there was a genuine issue regarding whether the plaintiff sincerely held the asserted religious belief. The genuine issue was created by the employee's wearing a formfitting skirt to her deposition in the case.<sup>172</sup> The court explained that the former employee's dress at her deposition was "potentially inconsistent with her alleged faith."<sup>173</sup>

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<sup>170</sup> See *supra* text accompanying notes \_\_- \_\_.

<sup>171</sup> See Dubè, *supra* note \_\_, (discussing EEOC v. Abercrombie & Fitch Stores Inc., E.D. Mo., No. 4:08CV1470, 10/26/09).

<sup>172</sup> *Id.* When questioned by the defendant's attorney about wearing the skirt, she argued that the skirt was not "tight," but she admitted that it was "body conscious." *Id.*

<sup>173</sup> *Id.*

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

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

Appearance-based discrimination and Lorenzana's claim also provide a reminder of the most important principle in U.S. employment law, employment at will, and how it interacts with employment discrimination laws. Professor Rhode notes that only one jurisdiction in another nation (the Australian state of Victoria) has appearance discrimination law.<sup>174</sup> However, if the facts alleged by Ms. Lorenzana are correct, she would have a cognizable claim in most nations, not under their employment discrimination laws, but under their general termination laws. Most nations have laws that require employers to have a job- or business-related reason to terminate an employee. The U.S. is a maverick,<sup>175</sup> with forty-nine of fifty states clinging 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>176</sup> Thus, if Ms. Lorenzana was fired for her appearance or for complaining

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<sup>174</sup> RHODE, *supra* note \_\_, at 134-36.

<sup>175</sup> See, e.g., 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."); Donald C. Dowling, Jr., *The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium*, 17 LAB. LAW. 1, 13 (2001) ("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."). 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 Labor Organization, Termination of Employment Convention, June 22, 1982, available at <http://www.ilo.org>. The convention has been ratified by 32 countries.

<sup>176</sup> 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 (2002).

about how her supervisors treated her, she would have a claim for dismissal without good cause in most nations and in the state of Montana, unless the employer could demonstrate that appearance was related to job performance.<sup>177</sup> In 49 U.S. states, however, the employer does not have to offer good cause for termination unless the employee claims that the reason for termination constitutes a breach of contract, constitutes a tort, or violates a statute. Federal, state, and local employment discrimination statutes are by far the most significant restriction in the U.S. on employment at will.

Employment at will is relevant to appearance discrimination in another way. One argument made against passing a federal law prohibiting appearance discrimination is the anticipated backlash from businesses.<sup>178</sup> It is true that businesses generally prefer not to have additional characteristics covered by employment discrimination laws, and that is because they prefer to operate without regulation or with as little as possible. On the matter of termination of employment, employment at will is the ultimate expression of the absence of regulation. However, employment at will provides employers far less freedom to fire than appears at first blush. There are numerous exceptions to employment at will, including numerous federal and state statutes, tort theories including wrongful discharge in violation of public policy, and contract theories. Thus, when an

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<sup>177</sup> As discussed above in the context of bona fide occupational qualification, there may be jobs for which courts would accept that an employee's appearance is relevant, and perhaps essential, to acceptable job performance. As has been discussed in this article, there are jobs for which an employer will not hire someone for a job unless she is attractive enough. However, once a person is hired, terminations for insufficient attractiveness are less likely. Still, there are numerous possible scenarios. Ms. Lorenzana, for example, claimed that her employer contended that her appearance became distracting to her male colleagues. Thus, an employer may hire a person and then find the employee's appearance to be a problem based on the reactions of coworkers or customers. Also, appearance can change all at once; suppose, for example, 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 more wrinkled distinction and experience.

<sup>178</sup> See RHODE, *supra* note \_\_, at 110 (citing RICHARD FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 176 (Farrar, Strauss & Giroux 2007)). Professor Ford expressed it this way: "[A] business community united in frustration at a bloated civil rights regime could become a powerful political force for reform or even repeal."

employee is fired, the question is whether the employee can fit her termination into one of these exceptions. However, employment at will is vastly overrated in its value to employers. With the existing employment discrimination statutes and other exceptions to employment at will, there are few situations in which employers would terminate an employee and believe that they could rely on not giving a good reason for the termination in litigation.<sup>179</sup>

It probably is true that most people in the United States think that it is unfair to terminate an employee based on her physical appearance, yet our most important employment law principle permits such a termination. Why? Employment at will is greatly valued by employers and we preserve it. Nonetheless, we recognize numerous exceptions, and employers must exercise caution and not act as though they have unfettered employment at will because they may lose cases that squarely fit within exceptions, and they may lose cases that can be made to fit within exceptions.

Some of the media reports about the Lorenzana case and other appearance discrimination cases may cause people to misunderstand the current state of the law. There is some evidence that most people do not understand the meaning of employment at will—that workers can be fired for any reason.<sup>180</sup> People who hear stories about employers being sued for appearance-based discrimination may understand, regardless of the accuracy of the reporting, that our current law prohibits this type of discrimination. The story actually provides a good opportunity to explain that in most countries, a person

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<sup>179</sup> See, e.g., Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 113 & 129 (2006) (“The 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, continuous documentation of even minor employee misconduct, and failing to fire poor performers.”).

<sup>180</sup> Estlund, *supra* note \_\_.

fired based on her appearance would have a claim, but it would be under the for-cause termination laws, not the discrimination laws.

Some claim that our discrimination laws are becoming too bloated, covering too many characteristics.<sup>181</sup> This argument may miss an important point: if we had a just-cause termination law, there may not be as much clamoring for expansion of coverage under the employment discrimination laws. The answer to Lorenzana's claim and Professor Rhode's call for expansion of discrimination laws may be that we should consider another option—modification of employment at will.<sup>182</sup> The relationship and balance between employment at will and employment discrimination law is at least worth considering.

#### CONCLUSION

Appearance discrimination unquestionably is the hot employment law topic of the summer. Debralee Lorenzana's claims against Citibank for hotness discrimination and Professor Rhode's book about beauty bias have 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 someday commentators will write about the law developing under the Appearance Nondiscrimination Act of 2015. However, I predict that will not come to pass. Yet, appearance discrimination is a very real and common form of

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<sup>181</sup> See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); WALTER OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* (1997).

<sup>182</sup> There is no dearth of scholarship calling for the abrogation or modification of employment at will. See, e.g., Libenson, *supra* note \_\_. A recent ambitious proposal is for enactment of a national termination law. See Jeffrey M. Hirsch, *The Law of Termination: Doing More With Less*, 68 MD. L. REV. 89 (2008). I myself have a proposal for modifying employment at will. Alas, we have reached that part in the article at which the reader knows that the foundation is being laid for the sequel. So, look for William R. Corbett, *Firing Employment at Will: The Big Trade* (working title) coming to a law review near you next year, hopefully.

discrimination in employment and other areas of life, and it provides a most effective mirror for reflecting on many of the intriguing and controversial issues in our current employment discrimination law. Even if appearance discrimination law never is enacted, more discussion and understanding of the existing discrimination laws and perhaps resulting opportunities to improve them would not be a bad legacy for the hot summer of 2010.