Sexy Sex Discrimination: Why Appearance-Based Discrimination Is Sex Discrimination

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I. INTRODUCTION

In 2010, Iowa dental assistant Melissa Nelson and her employment became front-page news both in Iowa and across the nation.[1] Her employer, James Knight, fired Nelson for being so attractive that she was irresistible to him, and therefore, she threatened his marriage.[2] Nelson fought the termination, suing him for wrongful discharge, and her case eventually made its way to the Iowa Supreme Court.[3] In 2013, that court held in Knight's

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1. *See* Jeff Eckhoff, *Iowa Supreme Court Takes Another Look at 'Irresistible Employee' Case*, DES MOINES REG. (Jan. 26, 2013, 1:45 PM), http://blogs.desmoinesregister.com/dmr/index.php/2013/06/26/iowa-supreme-court-pulls-back-decision-on-irresistible-employee-lawsuit-for-another-look/article (discussing Nelson's case from when she was fired until before the Iowa Supreme Court decided to rehear it); *see* Alyssa Newcomb, *Melissa Nelson: Dental Assistant Fired for Being "Irresistible" Is "Devastated*,*"* ABC NEWS (Dec. 23, 2012, 10:16 AM), http://abcnews.go.com/blogs/headlines/2012/12/melissa-nelson-dental-assistant-fired-for-being-irresistible-is-devastated/ (showing the national news coverage Nelson's story received).

2. Nelson v. Knight, 834 N.W.2d 64, 66 (Iowa 2013).

3. *Id.* at 67.

favor, finding Nelson's claim insufficient to establish sex discrimination.[4] Nelson was not the first employee terminated because of her appearance, nor was she the first fired for being too attractive.[5] Nelson's case, however, generated significant media attention and provoked public outrage; the decision that an employer could fire an otherwise qualified and well-performing employee because of her attractive appearance shocked many.[6]

This Note argues that claims such as Nelson's are sex discrimination claims that courts should analyze under Title VII of the Civil Rights Act of 1964 (Title VII).[7] Part II establishes the context for appearance discrimination claims by first discussing the status of American employment discrimination law and then exploring new psychological research that suggests attractiveness has different consequences for men than women. Part III then examines employment discrimination in more detail, analyzing why discrimination is detrimental to both employers and employees, and evaluating courts' responses to specific appearance-based discrimination claims. Part IV ultimately recommends that courts redefine sex discrimination to include appearance-based discrimination and protect against such discrimination under Title VII or, alternatively, establish appearance-discrimination as its own distinct category of prohibited employment discrimination.

II. BACKGROUND

People often consider an attractive appearance a positive attribute, but this Note argues it may have potentially harmful consequences in the employment context, especially for women. This Part first examines the current environment of American employment law, focusing on the at-will employment doctrine, which favors employers and is followed throughout the United States.[8] Congress, however, has long curbed the at-will doctrine with anti-discrimination laws, such as Title VII, which prevents employers, even in the at-will employment context, from terminating employment for discriminatory reasons based on race, sex, or other types of prejudice.[9] This Part next addresses appearance-based discrimination, explaining that the United States has yet to recognize it as a prohibited type of discrimination, which may be due to misunderstandings and outdated research about how our perceptions of beauty affect us and our interactions with others.[10] Finally, this

4. *Id.* at 73.

5. *See infra* Part II.B (examining notable appearance-based discrimination cases).

6. *See, e.g.*, Rekha Basu, *Courts Need Female Justices' Perspective*, DES MOINES REG. (June 25, 2013), http://www.desmoinesregister.com/article/20130625/BASU/306250086/Basu-Courts-need-female-justices-perspectives (criticizing the *Nelson* opinion and the lack of women in the judiciary generally); Jeff Eckhoff, *Updated: Iowa Supreme Court Out of Touch with Women's Concerns, Says Nelson's Lawyer*, DES MOINES REG. (July 12, 2013, 4:15 PM), http://blogs.desmoinesregister.com/dmr/index.php/2013/07/12/iowa-supreme-court-do-over-irresistible-employee-fired-because-personal-connection-not-discrimination/article (exemplifying *Nelson*'s case media coverage and criticism).

7. 42 U.S.C. § 2000e-2 (1991) (prohibiting employment discrimination on the basis of race, sex, religion, or national origin; commonly known as Title VII of the Civil Rights Act of 1964).

8. *See infra* Part II.A (defining and explaining the at-will employment doctrine and how it has shaped American employment law).

9. 42 U.S.C. § 2000e-2 (prohibiting discrimination by employers on the basis of race, sex, religion, or national origin).

10. *See* 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, 157–58 (2007) (explaining that "attractiveness is favored, and the relatively unattractive . . . lose out on opportunities and benefits that are generously bestowed on the attractive" and the importance of physical beauty to many employers).

Part discusses new research that suggests a gender disparity in the consequences of being attractive,[11] supporting the proposition that appearance-based discrimination is simply another form of sex discrimination.

A. Employment Law Background

One of the fundamental struggles in employment law is balancing the need to respect employers' autonomy[12] as they operate their private businesses with the need to protect employees from unjust discrimination.[13] While it may seem intuitive that an employee can, and should, only be fired for violating policy or failing to perform adequately, in the United States, most employers have a legally protected right to terminate an employee for any reason—"a good reason, a bad reason or no reason at all . . . as long as that decision is not unlawful as a result of a specific law, such as . . . [an] antidiscrimination statute[] . . . ." [14] This right is known as the at-will employment doctrine and has been the common law and default rule for the last 130 years in the United States.[15]

Every state but Montana recognizes this preference for the employer.[16] As long as an employer does not terminate an employee for reasons prohibited by "federal, state, or local antidiscrimination statutes," the at-will employment relationship gives an employer autonomy, allowing him almost complete discretion in his choices regarding whom he employs.[17] The United States remains one of the only industrialized countries to rely exclusively on "general employment at-will"; other industrial powers require employers to show just cause in employee dismissals.[18] Collective bargaining by unions may offer a degree of protection to employees, in some cases only allowing an employer to terminate an employee for "good reason or just cause."[19] However, because this safeguard is not prevalent—93.4% of the private workforce is not currently unionized[20]—employers are primarily limited only by antidiscrimination statutes.

Title VII is the prevailing federal statute creating an exception to the at-will doctrine. This section of the statute prohibits employers from "fail[ing] or refus[ing] to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or

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11. Stefanie K. Johnson et al., *Physical Attractiveness Biases in Ratings of Employment Suitability: Tracking Down the "Beauty Is Beastly" Effect*, 150 J. SOC. PSYCHOL. 301, 313–16 (2010).

12. Barry D. Roseman, *Just Cause in Montana: Did the Big Sky Fall?*, 3 ADVANCE: J. ACS ISSUE GROUPS 173, 173 (2009) (explaining that one of the arguments for the at-will employment doctrine is employer autonomy—the idea that the free market is best served by giving employers freedom to make hiring and firing decisions), *available at* http://www.acslaw.org/sites/default/files/Advance_Volume_3_Number_1_Spring_2009.pdf.

13. William R. Corbett, *Hotness Discrimination: Appearance Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law*, 60 CATH. U. L. REV. 615, 649 (2011).

14. Roseman, *supra* note 12, at 173 (employers in every state but Montana have this right because of the at-will employment rule governing those states).

15. *Id.*

16. *See* Corbett, *supra* note 13, at 624 n.58 (noting that Montana codified a "cause of action for wrongful discharge, which prohibits termination that is not for good cause").

17. Roseman, *supra* note 12, at 173.

18. *Id.* at 174.

19. *Id.* at 173.

20. Jake Blumgart, *It's All Too Easy to Get Fired in America: In 49 of 50 States, You Can Be Fired for Any Reason*, ALTERNET (Apr. 30, 2013), http://www.alternet.org/economy/its-all-too-easy-get-fired-america-49-50-states-you-can-be-fired-any-reason.

national origin."[21] While this law protects against some serious forms of discrimination, it is not all-inclusive, and some see it as missing key types of discrimination.[22] For example, the statute does not prohibit an employer from terminating an employee on the basis of sexual identity or orientation.[23] Due to the law's limited scope, many plaintiffs assert a cause of action even when the action is not one specifically enumerated by the statute.[24]

While employees may believe employment discrimination laws do not accomplish enough, employers argue these laws "imping[e] too much on the workplace and employer decision making . . . ."[25] Title VII, however, does give employers some flexibility. The statute permits employers to hire an individual based on his religion, sex, or national origin, if that characteristic is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . . ."[26] This is known as the bona fide occupational qualification (BFOQ) exception.[27] For example, an employer may discriminate based on sex when hiring an actor or actress to ensure "the authenticity of the production."[28] The Supreme Court analyzes the BFOQ defense using two tests:[29] employers can use a BFOQ defense when "the essence" of the position demands an employee be of a certain sex, religion, or national origin[30] or when "all or substantially all" of the people discriminated against would be unable to perform the job.[31] Defining when the BFOQ exception is met—when a protected characteristic is necessary for a job—is a complex and evolving task that accounts for a highly controversial area of employment discrimination law.[32]

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21. 42 U.S.C. § 2000e-2(a).

22. Blumgart, *supra* note 20.

23. *Id.*

24. *See* Corbett, *supra* note 13, at 633 (discussing that when there is "no applicable federal, state, or local law" prohibiting a specific type of discrimination, an employment-discrimination claim must "'fit' under another expressly protected characteristic").

25. Corbett, *supra* note 10, at 160.

26. 42 U.S.C. § 2002e-2(e)(1).

27. Corbett, *supra* note 10, at 166.

28. Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 181 (2009) (citing 29 C.F.R. § 1604.2(a)(2) (2008)).

29. *Id.* at 175 (citing Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (holding that the Court recognizes both the "essence of the business" and the "all or substantially all" tests and applies them concurrently)).

30. *Id.* (citing Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (holding Pan Am's policy of hiring only female flight attendants was not valid under a BFOQ defense because "[d]iscrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively")).

31. *Id.* at 174 (citing Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 232–34 (5th Cir. 1969) (holding that an employer who refused to hire women for positions that required employees to lift more than 30 pounds was not protected by the BFOQ defense because the employer failed to prove that "all or substantially all" women could not lift 30 pounds)).

32. DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW 107 (Oxford University Press, Inc. 2010). The controversial issue of when the BFOQ exception is satisfied, however, is beyond the scope of this Note.

B. Legal Background

As a result of the lack of bright line rules in Title VII, employment discrimination litigation has increased dramatically.[33] Since 1970, these cases have shifted from plaintiffs initially claiming discrimination in hiring, to plaintiffs largely alleging wrongful discharge for discriminatory dismissal.[34] While Title VII does not recognize appearance-based discrimination, litigants are beginning to bring this issue to the courts.[35] These plaintiffs originally claimed employers wrongfully discharged or wrongfully refused to hire them because of their unattractive physical appearance.[36] Recently, however, plaintiffs have argued "reverse appearance-based discrimination," claiming employers fired them for being too attractive.[37] These cases include the stories of Desiree Goodwin,[38] Debrahlee Lorenzana,[39] and Melissa Nelson.[40] Goodwin, a librarian at Harvard University, filed suit after allegedly being "passed over for numerous promotions because she was 'just a pretty girl,' who wore 'sexy outfits'" which caused people not to take her seriously.[41] She asserted a claim for sex discrimination, but the jury disagreed with her argument.[42] Five years later, Lorenzana claimed Citibank fired her for being too "hot" after repeatedly telling her to "wear looser-fitting cloth[es]" because her figure made the clothes appear "too provocative and distracted her male colleagues," even when her attire met the office's dress code requirements.[43] This case was ultimately settled out of court.[44] Most recently, the Iowa Supreme Court rejected Melissa Nelson's claim of sex discrimination after her employer, dentist James Knight, fired her because he felt her attractive appearance was a threat to his marriage, partly due to the close personal relationship the two shared.[45]

As exemplified in these recent decisions, courts have largely rejected the idea of prohibiting employment discrimination based on "lookism" or appearance.[46] Currently,

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33. John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984, 1016 (1991).

34. *Id.*

35. *See* Corbett, *supra* note 13, at 619–21 (highlighting a few recent and highly publicized appearance-based discrimination cases).

36. Mila Gumin, Note, *Ugly on the Inside: An Argument for a Narrow Interpretation of Employer Defenses to Appearance Discrimination*, 96 MINN. L. REV. 1769, 1769 (2012) (discussing a Hooters employee whose employer told her she would be fired if she did not improve her appearance and lose weight, despite "excellence in . . . dealing with customer complaints and customer satisfaction"); 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, 431 (2005).

37. Corbett, *supra* note 13, at 641 (discussing Debrahlee Lorenzana's case specifically).

38. Corbett, *supra* note 10, at 162; *National Briefing | New England: Massachusetts: Harvard Cleared in Bias Case*, N.Y. TIMES (Apr. 5, 2005), http://query.nytimes.com/gst/fullpage.html?res=9C05E6DB1F3FF936A35757C0A9639C8B63 [hereinafter *Harvard Cleared in Bias Case*].

39. Corbett, *supra* note 13, at 618–19.

40. Nelson v. Knight, 834 N.W.2d 64 (Iowa 2013).

41. Corbett, *supra* note 10, at 162.

42. *Id.*

43. Corbett, *supra* note 13, at 618–19.

44. *Id.* at 619.

45. *See infra* Part III.B (discussing the court's reasoning about a close personal relationship negating a gender discrimination claim). *See generally Nelson*, 834 N.W.2d at 64 (holding Nelson's termination, based largely on her attractive appearance, was not gender discrimination).

46. *See* Zakrzewski, *supra* note 36, at 442 (noting that "as long as attractiveness criteria are applied to different classes of people equally and do not result in disparate impact, the practice is not actionable").

the only way appearance-based discrimination claims make it to court is through the "fitting" phenomenon—an appearance-based discrimination claim that "'fits' under another expressly protected characteristic."[47] Historically, judicial acceptance of new discrimination claims has begun with plaintiffs "fitting" their claims into existing discrimination causes of action, leading to later legislation protecting these newer types of discrimination.[48] Courts' history of expanding what qualifies as employment discrimination prior to federal or state legislation[49] "may have the capacity to influence and shift the direction of the law," especially in conjunction with highly publicized cases like *Lorenzana* and *Nelson*.[50]

C. Empirical Background

While many may presume that attractive people are at an advantage in life, legal scholar Deb Rhodes argues that we underestimate how prevalent appearance bias is and how much "attractiveness skews [people's] evaluations" of one another.[51] Perceptions about others' physical appearance can lead to snap judgments that attractiveness corresponds positively with intelligence, friendliness, likeliness of finding a mate, and satisfaction or happiness in life.[52] These perceptions are widespread, affecting who we befriend, who we condemn as a criminal, and who we hire and promote—people like attractive people more than their unattractive counterparts, juries are less likely to convict an attractive individual of a violent crime, and "beauty is associated with upward economic mobility," including higher salaries.[53] Studies focusing specifically on employment have shown that employers are more likely to hire attractive people over equally qualified but less attractive candidates,[54] and that attractive employees often receive higher performance evaluations.[55]

Attractiveness, however, is not always beneficial to an individual. For years, experts have hypothesized that "attractiveness [may] be detrimental to women" in certain fields, known as the "beauty is beastly" phenomenon, but the research for this novel idea remained inconsistent with the more commonly accepted "beauty is good" theory.[56] Recent psychological research challenges these beliefs by showing that there may be significant

47. Corbett, *supra* note 13, at 632.

48. *Id.* at 639.

49. *See infra* notes 153–61 and accompanying text (discussing that courts have already broadly interpreted Title VII regarding sexual orientation discrimination as sex discrimination under the theory of gender stereotyping).

50. *Id.*

51. RHODE, *supra* note 32, at 23.

52. Anthony C. Little & S. Craig Roberts, *Evolution, Appearance, and Occupational Success*, 10(5) EVOLUTIONARY PSYCHOL. 782, 785 (2012) (citing Karen Dion et al., *What Is Beautiful Is Good*, 24 J. PERSONALITY SOC. PSYCHOL. 285 (1972) (noting that "being attractive clearly has its own advantages," for example, attractive people are perceived to have positive personality attributes including, among others, "more prestigious occupations, more competent spouses with happier marriages, and have better prospects for personal fulfillment")).

53. *See id.* (highlighting more of the positive consequences for attractive individuals).

54. Cynthia M. Marlowe et al., *Gender and Attractiveness Biases in Hiring Decisions: Are More Experienced Managers Less Biased?*, 81 J. APPLIED PSYCHOL. 11, 11–12 (1996).

55. Johnson et al., *supra* note 11, at 302.

56. *Id.*

support for the "beauty is beastly" theory.[57] Most importantly, this new research distinguishes between men and women and the consequences of being attractive as determined by a person's sex.[58] While attractive *males* are more likely to be hired, promoted,[59] and become CEOs of major corporations,[60] attractive *females* are less likely than unattractive women to be hired and more likely to work in low-level positions as compared to managerial positions.[61] These differences are only exacerbated in certain industries: the "beauty is beastly" theory is most evident in fields that are historically male-dominated or considered masculine.[62] Further suggesting a disparity between the sexes, males face no equivalent "beauty is beastly" obstacle in applying for or performing feminine jobs.[63] These sex-based disparities in preferences for attractiveness may have significant implications in the near future.[64] This Note explores the potential legal repercussions for these differences in terms of employment discrimination law.[65]

III. ANALYSIS

This Part addresses the implications of sex-based discrimination in the workplace as well as the courtroom. Section A will examine why discrimination—particularly the emerging theory of appearance-based discrimination—is a serious issue for employers, employees, and society as a whole. Section B then discusses what courts have interpreted as sex discrimination, specifically focusing on what has distinguished the few cases bringing appearance-based sex discriminations claims and why none of these claims have been successful.

A. Why Discrimination in the Workplace Matters

Although employment discrimination has traditionally been framed as a matter of fairness, it is also a serious economic issue, harming employees, employers, and our national economy.[66] Discrimination in the workplace decreases efficiency[67] and reinforces negative stereotypes for employees.[68] These problems suggest that both employers and

57. *See generally id.* at 313–16 (discussing findings in recent studies supporting the "beauty is beastly" phenomenon).

58. *Id.* (finding different results for attractive men and attractive women).

59. *Id.*

60. *See* Gene Marks, *Why Most Women Will Never Become CEO*, FORBES (Oct. 31, 2011, 7:42AM), http://www.forbes.com/sites/quickerbettertech/2011/10/31/why-most-women-will-never-become-ceo/ (discussing many factors that contribute to the significant gender gap amongst CEOs and pointing out that "men are still trying to take women seriously in the workplace," which is partly due to sexism, especially evident with attractive female employees).

61. Johnson et al., *supra* note 11, at 313–16.

62. *Id.* at 314.

63. *Id.* at 313.

64. *See infra* Part IV (explaining how the gender disparities in appearance discrimination suggest appearance-based discrimination is truly sex discrimination, and Title VII should prohibit it as such).

65. *Id.*

66. *See supra* Part II.A (discussing the consequences of discrimination for various parties).

67. Gumin, *supra* note 36, at 1174.

68. Ritu Mahajan, Note, *The Naked Truth: Appearance Discrimination, Employment, and the Law*, 14 ASIAN AM. L.J. 165, 173–76 (2007) (discussing the adverse impacts of gender assumptions and stereotypes in the workplace on employees).

employees should be worried about many types of discrimination at work, including appearance-based discrimination.[69]

1. Harms to the Employer: Decreased Employee Efficiency

For most employers, the ultimate goal is to maximize profits.[70] To do this, employers seek to make their businesses as efficient as possible, conserving and using resources to maximize their effectiveness. In the realm of employment, employers have an incentive to hire and retain employees who contribute the most by being productive employees.

Employers who base their hiring decisions on physical appearance are less likely to hire the most productive—and thus profitable—employees.[71] An attractive appearance does not necessarily correlate with better job performance in the majority of industries.[72] Productive employees are those who are most qualified for the job and are, therefore, hired based on their merits rather than their appearance.[73] By overlooking a candidate's skills and talents, society's focus on appearance is exacerbated while qualification in employment is largely ignored.[74]

The "halo/horn effect" helps explain why employers often make such a clear error.[75] Based on this theory, a job candidate's positive or negative rating in one category—such as appearance—can impact the overall perception of the candidate.[76] This creates a "halo effect" for an attractive candidate who the employer will then view positively overall.[77] Such appearance-based hiring decisions ultimately undermine the ideal of a merit-based hiring system, which is crucial to efficient workplaces.[78] Employers suffer as a result of their own, sometimes unconscious, discrimination by possibly passing over ideal candidates for attractive ones and diminishing their businesses' potential profitability.

2. Harms to the Employee: Gender Stereotypes Reinforced

Because appearance-based discrimination reinforces stereotypical gender roles and a patriarchal culture,[79] it seems akin to other traditionally recognized types of discrimination and therefore, constitutes sex discrimination by another name. These stereotypes are dangerous in the workplace and are potentially detrimental to females in general.[80] These

69. *Id.* at 169–70 (explaining that appearance-based decisions in the employment context "are problematic on several levels," from job performance to prejudice).

70. *See* Rosabeth Moss Kanter, *How Great Companies Think Differently*, HARV. BUS. REV. (Nov. 2011), http://hbr.org/2011/11/how-great-companies-think-differently/ (discussing various goals employers have and how they try to accomplish these goals).

71. *Id.*

72. *See* Gumin, *supra* note 36, at 1774 (explaining that "[a] focus on appearance . . . contributes to inefficiency in the workforce").

73. *See id.* (citing James Desir, Note, *Lookism: Pushing the Frontier of Equality by Looking Beyond the Law*, 2010 U. ILL. L. REV. 629, 637 (2010)) (discussing the merit-based approach to hiring).

74. Mahajan, *supra* note 68, at 170 (discussing the adverse effects of considering appearance when making hiring decisions).

75. *Id.* at 167–68.

76. *Id.*

77. *Id.*

78. *See* Gumin, *supra* note 36, at 1774 (explaining that employers who hire based on appearance over merit are "less likely to hire the best candidate").

79. Mahajan, *supra* note 68, at 172.

80. *Id.* at 173.

stereotypes place value on members of society for prejudiced and irrelevant reasons and, if allowed to persist, place women in an inferior position.[81]

These negative stereotypes about women can have adverse effects on female job performance. Encouraging traditional gender norms puts women in complicated situations. Consider, for example, a female manager. While she must try to appear feminine due to gender norms, she must also exhibit stereotypical male characteristics, such as assertiveness, to do her job well.[82] Feminine women are less likely to be hired or promoted in typically male-dominated fields, partly because some employers and workplaces do not believe women are as capable as men for certain jobs and partly because women in those jobs struggle to meet the double standards such jobs and workplaces impose.[83] Women must fight for others in the office to perceive them as feminine enough to fulfill gender stereotypes promoted in the workplace while also trying to appear masculine enough to be qualified for certain types of jobs.[84]

To further employer goals of workplace efficiency, employers often encourage employee conformity to increase employee productivity as well as employee motivation by creating a strongly regulated workplace culture.[85] Conforming to one homogenous employee ideal again means women must somehow strike a balance in terms of appearance.[86] Women must find a way to downplay their attractiveness and femininity to conform to the employee ideal, while also fitting the stereotypes employers and fellow employees expect them to fulfill.[87]

B. How Courts Define Appearance-Based Discrimination and Why They Reject It as Sex Discrimination

Currently, Title VII does not explicitly prohibit appearance-based discrimination, allowing employers to make hiring and firing decisions based upon an employee's attractiveness.[88] Title VII is purposefully limited in its scope, giving employers discretion to make some discriminatory choices, but this scope naturally limits a potential plaintiff's options if she wants to bring a claim for appearance-based discrimination.[89] She must attempt to "fit" her claim into one of the other protected classes of Title VII: race, gender,

81. *Id.*

82. *See* Marks, *supra* note 60 (stating that women who fail to comply with traditionally male characteristics are also less likely to succeed in the workplace).

83. Johnson et al., *supra* note 11, at 313–16.

84. Mahajan, *supra* note 68, at 175.

85. *Id.* at 176.

86. *Id.* at 174 (discussing how minorities need to "present themselves in an 'appropriate' manner . . . to attain a look more consistent with white norms" and that women must often act accordingly to appear consistent with men).

87. *Id.* at 174–75 (citing Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 648 (2005)) (explaining that "work cultures that develop along racial and gender lines" force women and people of color to "signal, by conforming to work culture, that they are the exceptions rather than the rule").

88. 42 U.S.C. § 2000e-2 (prohibiting discrimination by employers only on the basis of race, sex, religion, or national origin); *see* Roseman, *supra* note 12, at 174–76 (discussing the at-will employment doctrine, giving employers broad discretion in employment decisions unless prohibited under statutes such as Title VII).

89. *See* Corbett, *supra* note 13, at 633 (explaining that Title VII is narrow in scope, covering only the explicitly enumerated classes).

national origin, color, or religion.[90] An appearance-based discrimination plaintiff faces a double burden: she must battle all of the traditional challenges discrimination plaintiffs face while also overcoming the obstacle of trying to "fit" her claim into a recognized cause of action. Discrimination plaintiffs have the burden to prove their employers showed them disparate treatment and took an adverse employment action against them as a result of their protected class designations as enumerated under Title VII.[91] This is made even more difficult because such discriminatory actions are often unconscious on the part of an employer, making it difficult for a plaintiff to show "purposeful discrimination."[92]

The idea of an employer discriminating against an employee because of her appearance is still relatively novel and not many cases have yet addressed this issue. The lack of litigation is potentially the result of plaintiffs who must try to "fit" their appearance claims into poorly defined categories, but this task is difficult for plaintiffs because appearance can be considered part of one's sex, race, or national origin.[93] This difficulty means many plaintiffs either try to "fit" their claims into a category enumerated in Title VII but not truly representative of the discrimination they have faced, or they fail to bring a suit altogether.[94] To better understand the evolution, or lack thereof, in this area of the law, this Note examines four women and their appearance-based discrimination claims: Desiree Goodwin,[95] Elysa Yanowitz,[96] Debrahlee Lorenzana,[97] and Melissa Nelson.[98] Unsurprisingly, in almost every case of appearance-based discrimination litigation, the plaintiff–employee is female and the defendant–employer (or, at least, the supervisor responsible for the adverse employment action) is male.[99]

Goodwin was one of the first people to bring an appearance-related claim.[100] She was a librarian at Harvard University when she alleged that the school had passed her over for numerous promotions and advancement opportunities.[101] According to Goodwin, Harvard promoted far less qualified candidates instead of her because she was a "pretty girl" who wore "sexy" clothing.[102] She claimed her lack of advancement was because she was too attractive to fit the stereotypical image of a librarian,[103] and she claimed her supervisor told her she would "never be promoted at Harvard" because her appearance made her "a

90. 42 U.S.C. § 2000e-2; *see* Corbett, *supra* note 13, at 633 (discussing that when there is "no applicable federal, state, or local law" prohibiting a specific type of discrimination, an employment-discrimination claim must "'fit' under another expressly protected characteristic"); *supra* notes 48–49 and accompanying text.

91. Mahajan, *supra* note 68, at 178.

92. *Id.*

93. *See* Corbett *supra* note 13, at 633 (discussing how "fit[ting]" is often unsuccessful for plaintiffs).

94. *Id.*

95. Corbett, *supra* note 10, at 162; *Harvard Cleared in Bias Case*, *supra* note 38.

96. Yanowitz v. L'Oreal, 116 P.3d 1123 (Cal. 2005).

97. Corbett, *supra* note 13, at 618–19.

98. Nelson v. Knight, 834 N.W.2d 64 (Iowa 2013).

99. In the research for this Note, I did not come across any case with a fact pattern inconsistent with this assertion. While there may be some, a generalization can be made that female employees are the ones bringing appearance-based discrimination claims against their male employers.

100. Corbett, *supra* note 10, at 162 (reviewing several high profile cases involving appearance-based discrimination, including Goodwin's).

101. *Id.*

102. *Id.*

103. *Id.*

joke" at the library.[104] Ultimately, she sued for discrimination on the basis of race and sex, but the jury returned a verdict finding that Harvard's actions were not discriminatory.[105]

While this case was decided by a jury and has no judicial opinion, the jury likely grounded its verdict on Harvard's argument that gender played no role as "five positions were [eventually] filled by women" and a woman made the promotion decisions.[106] Goodwin's story suggests, then, that the jury was unwilling to find that appearance-based discrimination was sex discrimination. Her case, however, does appear to be rooted in sex discrimination: Harvard passed her over for promotion because of her attractive appearance, which was incompatible with that of a stereotypical librarian, while promoting less attractive women in her place. An unattractive female or a man of any level of attractiveness likely would not have faced the same discrimination because neither would have been expected to fit such a double standard—being attractive enough to be feminine but not too attractive to be a librarian.[107]

Elysa Yanowitz's story is distinguishable from Goodwin's. Yanowitz quit her job because of the negative work environment that had resulted after she refused to fire another employee for not meeting a corporate manager's standards of attractiveness.[108] Yanowitz was a regional manager for L'Oreal when her boss ordered her to fire a high-performing fellow employee with no justification other than wanting "somebody hot" instead.[109] Yanowitz refused, believing the order constituted illegal sex discrimination.[110] The California Supreme Court ruled in her favor.[111]

Yanowitz is one of the only successful plaintiffs with an appearance-based discrimination claim. In her case, the court held that the discrimination she would have participated in if she had followed her superior's order—firing an employee because she was not "hot" enough—was sex discrimination.[112] Because Yanowitz's boss never asked her to fire a male employee "because he was not sufficiently attractive," there was disparate treatment of the sexes with regard to appearance standards.[113] This, the court held, was prohibited sex discrimination, and Yanowitz's refusal to follow the illegal order was protected conduct.[114]

Debrahlee Lorenzana brought one of the most notorious appearance-based discrimination claims.[115] After working as a banker for Citibank, she alleged her employers passed her over for multiple promotions and ultimately fired her because she

104. Associated Press, *Librarian Accuses Harvard of Discrimination*, NBC NEWS (Mar. 21, 2005, 6:30 PM), http://www.nbcnews.com/id/7259979/ns/us_news-life/#.UwZLdUJdWH0 (describing the progress of Goodwin's case).

105. *Harvard Cleared in Bias Case*, *supra* note 38 (summarizing the result of *Goodwin*).

106. Robin M. Peguero, *Harvard Cleared of Discrimination*, THE HARVARD CRIMSON (Apr. 5, 2005), http://www.thecrimson.com/article/2005/4/5/harvard-cleared-of-discrimination-a-jury/ (discussing the outcome of *Goodwin*).

107. *See supra* Part II.B (suggesting attractive men in traditionally female-dominated fields see no negative ramifications as compared to attractive women in traditionally male-dominated fields who are less likely to be hired or promoted and more likely to be fired).

108. Corbett, *supra* note 10, at 164.

109. *Id.* at 162–63.

110. *Id.* at 163; Yanowitz v. L'Oreal, 116 P.3d 1123, 1131–32 (Cal. 2005).

111. *Yanowitz*, 116 P.3d at 1144.

112. *Id.*

113. *Id.*

114. *Id.*

115. Corbett, *supra* note 13, at 616.

was too attractive.[116] Bank managers told her she was one of the "pretty girls" the branch was known for hiring.[117] Her managers told her she could not wear certain clothing, even though her apparel met the dress code requirements, and told her to wear looser clothing because clothes looked "too provocative [on her] and distracted her male colleagues."[118] Ultimately, Lorenzana settled with Citibank.[119]

Most recently, Melissa Nelson brought a claim of sex discrimination after her male employer, dentist James Knight, terminated her employment as his dental hygienist.[120] Nelson and Knight were initially colleagues but quickly became close friends.[121] Knight informed Nelson that he found her very attractive and that he had developed feelings for her, but Nelson rejected this advance and continued to work for him as only a close friend.[122] Knight eventually felt Nelson's attractive appearance was a threat to his marriage, and he terminated her employment.[123]

The Iowa Supreme Court initially held for the employer, stating that the termination was not a sex discrimination action.[124] On rehearing the case, the court reached the same conclusion, again reasoning Nelson's termination was a result of her consensual and close personal relationship with Knight, rather than her status as a woman.[125] According to the court, Knight only employed females, further suggesting no discriminatory action against Nelson because of her sex.[126] Nelson, however, argued that "neither the relationship nor the alleged threat would have existed" if not for her sex as a woman.[127]

The court's analysis here is flawed, specifically in its reasoning that the discrimination could not be sex-based because a relationship existed. The court found that all consensual relationships include a physical attraction but that this attraction alone cannot lead to the conclusion that there is sex discrimination.[128] Nelson believed she "did not do anything to get herself fired except exist as a female."[129] The beauty bias suggests, however, that humans are drawn to attractive faces; even babies are more likely to pick an objectively beautiful face over a less attractive one.[130] Arguably because of this beauty bias, Knight never would have developed a relationship with Nelson if he had not first been attracted to her as an attractive female. Nelson did not dress provocatively or encourage Knight's suggestive behaviors; she actively rejected his advances.[131] Nelson did nothing but exist as an attractive woman, immutable characteristics over which she had no control, and

116. *Id.* at 619–20.
117. *Id.* at 619.
118. *Id.*
119. *Id.* at 620.
120. Nelson v. Knight, 834 N.W.2d 64, 65–66 (Iowa 2013).
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 64.
125. *Nelson*, 834 N.W.2d at 73.
126. *Id.* at 66.
127. *Id.* at 67.
128. *Id.* at 79 (Cady, C.J., concurring specially) (Cady, C.J., wrote separately to "further explain the basis and rationale for the decision," concurring fully with the majority).
129. *Id.* at 69.
130. Judith H. Langlois et al., *Infant Preferences for Attractive Faces: Rudiments of Stereotype?*, 23 DEV. PSYCHOL. 363, 369 (1987).
131. *Nelson*, 834 N.W.2d at 65–66.

Knight fired her because he was unable to handle her attractiveness and stay faithful to his wife.[132]

The court believed Knight likely found Nelson attractive because of his consensual relationship with her. However, the relationship just as likely—if not more likely—developed, at least initially, because of Nelson's appearance as an attractive female. Further, the court ignores the fact that most individuals are attracted to one gender or the other: even if physical attraction is merely a characteristic of close relationships, Knight likely would not have developed such a close relationship or attraction to a male employee or a less attractive female employee, suggesting that appearance-based sex discrimination was the underlying cause of Nelson's termination.

Together, these cases serve as examples of courts' current uncertainty about how to address appearance-based discrimination claims. Due to changing understandings about the employment consequences of appearance for men and women,[133] however, courts' flawed reasoning regarding appearance-based discrimination claims, and the introduction of statutes banning appearance-based discrimination in a number of cities and states,[134] it seems this area of employment law is still evolving. Appearance-based discrimination has become a more common claim and seems to be one that will increasingly arise in employment discrimination litigation in the immediate future.

IV. RECOMMENDATION

Given the increasing number of appearance-based discrimination claims as well as the recent publicity of high-profile cases such as Lorenzana's and Nelson's,[135] courts and legislatures need to address this type of discrimination directly. This Part acknowledges the key role that courts, rather than legislatures, could play in this evolution of employment law. Ideally, courts can create the opportunity for legislatures to consider legislation prohibiting appearance-based employment discrimination while still allowing plaintiffs to bring this type of discriminatory claim. This Part specifically recommends recognizing appearance-based discrimination as sex discrimination based, in part, on new empirical research on appearance[136] and the possible difficulty in defining it as a separate category of discrimination. This Part then argues that courts, and eventually Congress, should include appearance-based discrimination as prohibited sex discrimination under Title VII. Alternatively, this Part argues courts and legislatures could explicitly address appearance as a distinct type of unlawful discrimination, creating an additional protected class under Title VII.

A. Title VII Should Prohibit Appearance-Based Discrimination as a Type of Sex

132. *Id.* at 66.

133. *See supra* Part II.C (discussing research that highlights disparities in the consequences of an attractive appearance for males and females, particularly in the workplace).

134. Corbett, *supra* note 13, at 624.

135. *Id.* at 615 (discussing the extensive media attention such cases have generated).

136. *See supra* Part II.C (discussing new research findings that attractive appearance can have positive consequences for males but negative consequences for females, suggesting sex differences in the advantageous nature of being attractive).

Discrimination

Because the majority of appearance-based claims have been from female plaintiffs against a male employer,[137] there appears to be, at the very least, a strong correlation between appearance-based discrimination and one's sex as a female. Imagine *Nelson*[138] with the genders reversed: it seems incredible that a man would allege his female boss fired him because he was too attractive and that his boss's uncontrollable attraction to him created a threat to his boss's marriage. In this hypothetical, even if he rejected his boss's advances, his existence alone as an attractive man was problematic for her—the female employer—and therefore, his termination would be lawful.

Such a situation is implausible. There is, generally, more pressure on females to be beautiful.[139] Additionally, there is a cultural belief that men cannot help but succumb to sexual urges because "boys will be boys." An attractive woman threatens a man's marriage if she works for him because her beauty will tempt him, leaving him unable to control his behavior. This is reinforced by the sexual double standard where men are rewarded socially for having many conquests, while women are shamed for similar behavior.[140] These societal expectations make it far more likely that a female boss would be able to resist the temptation of an attractive male employee.

While this sexual double standard is important, the recent psychological research suggests that women are playing a zero sum game with appearance while men only benefit from being attractive.[141] This disparity between the sexes in appearance suggests that appearance-based discrimination is truly a women's issue and, thus, is sex discrimination because women will suffer from such discrimination in disproportionately higher numbers than men, if males confront it at all. Because of these noticeable sex differences in appearance-based discrimination, it seems to make the most sense for courts to include this type of discrimination as a subset of sex discrimination and protect it as such under Title VII.

B. Establishing Appearance-Based Discrimination as a Separate Class of Discrimination

Alternatively, Congress and courts should act to make appearance-based discrimination distinct from sex discrimination and define it as a separate type of unlawful discrimination. This approach might be more effective, as it could theoretically protect a broader range of plaintiffs, especially those whose appearance-based claims have a weaker correlation with their sex. It is, however, potentially problematic because appearance is so subjective that it would be difficult to define it as necessary to legislate against such

137. *See supra* note 99 (explaining that this is not a conclusive fact but a reasonable generalization based on leading cases in this area).

138. Nelson v. Knight, 834 N.W.2d 64 (Iowa 2013).

139. RHODE, *supra* note 32, at 30 (discussing how appearance is more important for women than men and that a woman's self-worth is often closely tied to physical attractiveness due to societal pressures).

140. Mary Crawford & Danielle Popp, *Sexual Double Standards: A Review and Methodological Critique of Two Decades*, 40 J. SEX RES. 13, 13 (2003) (explaining that women are "stigmatized for engaging in any sexual activity outside of heterosexual marriage" and face a "Madonna-whore dichotomy" while men are rewarded for "sow[ing] their wild oats").

141. *See supra* Part II.C (explaining that recent psychological research has found that women suffer under the "beauty is beastly" theory while the traditionally-accepted "beauty is good" theory applies more accurately only to men).

discrimination.[142] Appearance determinations exist on a continuum, making it much harder to differentiate between what qualifies under such a claim, unlike any other characteristics Title VII protects.[143] Because "beauty is in the eye of the beholder," it is more likely a judge or jury would disagree with a plaintiff's purely appearance-based claim, either believing the plaintiff is too attractive to conclude her employer fired her for being ugly or not attractive enough to bring a claim for wrongful termination because she was too sexy.[144]

Further complicating the possibility of defining appearance-based discrimination as a distinct category of discrimination is human nature's celebration of physical beauty and America's willingness to "embrace[ ] [it] with an inexhaustible fervor."[145] The focus on beauty is so engrained in Americans that prohibiting this type of discrimination may be difficult because society refuses to view such discrimination with the same reprehensibility as it does racial or sexual discrimination; the celebration of beauty, then, subtly encourages discrimination based on appearance. This discrimination is often unconscious, making it even harder for plaintiffs to prove the employer's motive was discriminatory because the employer himself may be unaware of his bias.[146]

It is, however, important to remember that Title VII includes the BFOQ exception.[147] The BFOQ exception allows employers to discriminate on certain generally protected characteristics if the characteristic is "reasonably necessary" to the job.[148] This exception ensures some employer autonomy and flexibility in employment decisions by allowing appearance-based discrimination by employers whose businesses rely on their employees' appearance[149] to continue their normal operations. This exception would help balance the employer's hiring and employee retention interests with the employee's interest in not being discriminated against.

Legislatures have begun enacting legislation that prohibits appearance-based discrimination, suggesting societal support for it. The District of Columbia bans all "personal appearance discrimination"; Madison, Wisconsin, has an ordinance banning discrimination based on physical appearance; and Urbana, Illinois, has an ordinance prohibiting "personal appearance" discrimination.[150] While this legislation is on a much

142. Corbett, *supra* note 13, at 626 (explaining that the "task of defining covered appearance-related features . . . [would be a] significant hurdle[] in enacting such legislation").

143. 42 U.S.C. § 2000e-2 (Title VII prohibits discrimination on the basis of race, sex, religion, or nationality. These factors are evident and objective on their face as to whether a person fits into a protected category; for example, it is an objective fact whether a person is male or female.).

144. Corbett, *supra* note 13, at 627–28 (using an example of a judge disagreeing with a plaintiff who alleged he was discriminated against by his employer because of his ugly appearance, to which the judge responded "[w]ell, you are not the most attractive person I have ever seen, but I have seen worse . . . . I doubt your employer discriminated against you because you are ugly because you are not all that ugly").

145. *Id.* at 629.

146. *Id.* at 630.

147. *See supra* notes 26–32 and accompanying text (describing the BFOQ exception to Title VII).

148. 42 U.S.C. § 2002e-2.

149. *See* Gumin, *supra* note 36, at 1791 (explaining that actors would qualify under the BFOQ because their employment is dependent on "appearing to be a certain character, with his or her own distinctive look," while servers at Hooters would not qualify because the establishment "portray[s] [itself] primarily as [a] restaurant[ ]" so a server's attractive appearance would not be necessary for the job).

150. Marks, *supra* note 60; D.C. CODE § 2-1402.11 (2007); MADISON, WIS., GEN. ORDINANCE § 3.23(1) (2006); URBANA, ILL., CODE OF ORDINANCES §§ 12–37, 12–62 (2003).

smaller scale than Title VII, it reflects a changing attitude that may bode well for larger-scale legislation prohibiting appearance-based discrimination.

C. Courts Can Play a Crucial Role in Establishing Appearance-Based Discrimination as Sex Discrimination

Until federal legislation either conclusively establishes appearance-based discrimination as sex discrimination or as its own protected class, courts can mirror these local laws[151] and the changing understanding of beauty[152] by creating a common law doctrine to reflect these changing views. Courts, therefore, can create an incentive for Congress to prioritize the issue. By establishing precedents that protect appearance-based discrimination plaintiffs, courts will be an essential player in the evolution of employment law. Courts have the power to change the cultural dialogue and understanding of discrimination, laying the foundation for legislation following their precedents.

Title VII does not currently protect against sexual orientation discrimination,[153] but a growing number of Americans have begun to view this type of discrimination as morally reprehensible.[154] The Equal Employment Opportunity Commission (EEOC)—the agency responsible for enforcing federal laws prohibiting employment discrimination[155]—has officially held that lesbian, gay, bisexual, and transgender individuals can bring a sex discrimination claim under Title VII.[156] Courts have largely refused to extend Title VII protections to sexual orientation claims.[157] They have, however, carved out some relief for these plaintiffs, holding that gender stereotyping discrimination is prohibited as unlawful sex discrimination under Title VII.[158] America's gradual rejection of sexual orientation discrimination along with courts starting to prohibit these types of claims has laid the groundwork for the proposed Employment Non-Discrimination Act. This proposal would "outlaw workplace discrimination based on sexual orientation or gender identity."[159] It

151. D.C. CODE § 2-1402.11; MADISON, WIS., GEN. ORDINANCE § 3.23(1); URBANA, ILL., CODE OF ORDINANCES §§ 12–37, 12–62.

152. *See supra* Part II.C (explaining that the traditionally accepted "beauty is good" theory is undermined by recent research showing disparities between the sexes in the consequences of appearance, suggesting that, for females at least, "beauty is beastly").

153. 42 U.S.C. § 2002e-2.

154. *See Gay and Lesbian Rights*, GALLUP, http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx#2 (last visited Feb. 15, 2015) (suggesting increasing acceptance for gay and lesbian orientations in the last ten years, which, in turn, implies a declining acceptance for discrimination on the basis of sexual orientation).

155. *Overview*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/index.cfm (last visited Feb. 15, 2015).

156. *Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/federal/otherprotections.cfm (last visited Feb. 15, 2015).

157. *See, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (holding that "Title VII does not prohibit discrimination based on sexual orientation. Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.").

158. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (holding that a woman who was not made partner at her firm because she "overcompensated for being a woman" and was too "macho" was a victim of gender stereotyping and that employers cannot discriminate based on sex stereotypes).

159. Employment Non-Discrimination Act, S. 815, 113th Cong. (2013) (as passed by Senate, Nov. 7, 2013); Jeremy W. Peters, *Bill Advances to Outlaw Discrimination Against Gays*, N.Y. TIMES (Nov. 4, 2013), http://www.nytimes.com/2013/11/05/us/politics/bill-on-workplace-bias-appears-set-to-clear-senate-hurdle.html?_r=0.

would be the culmination of years of discrimination claims based on sexual orientation and gender identity, and courts helped set the stage for Congress to propose this legislation.

Courts should move away from antiquated views about appearance and begin to hold that such discrimination is a type of sex discrimination, rather than being a separate but lawful type of discrimination. This conclusion is supported by both empirical research[160] and the genders of the parties involved in these types of claims.[161] This will help create the political landscape necessary to instigate change and push Congress, or at least state legislatures, to enact legislation prohibiting this type of discrimination or explicitly including it as a type of prohibited sex discrimination under Title VII.

V. CONCLUSION

While women have seen much progress in the last century, appearance-based discrimination lingers today as lawful sex discrimination that must be recognized and prohibited. Courts can remedy this situation by properly identifying appearance-based discrimination as sex discrimination prohibited under Title VII.[162] Women, such as Nelson, who do nothing but exist as beautiful women around male employers who are unable to control themselves, should not need to worry about their job security merely because they are attractive women.

160. *See supra* Part II.B (finding that attractive men benefit from their appearance while attractive women often face negative consequences, especially in employment).

161. *See supra* note 99 and accompanying text (explaining that most of these claims are brought by female plaintiffs against male employers, suggesting a correlation with gender underlying these claims).

162. 42 U.S.C. § 2000e-2.