
Note

Ugly on the Inside: An Argument for a Narrow Interpretation of Employer Defenses to Appearance Discrimination

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In May of 2010, Cassandra Smith was called into the Roseville, Michigan Hooters office for her two year review. Her managers praised her “excellence in . . . dealing with customer complaints and customer satisfaction.”¹ Then, two women from company headquarters broke the news: she had thirty days to improve her shirt and short size to meet Hooters standards.² Devastated and confused, Smith filed suit against Hooters, alleging discrimination under the Elliot-Larsen Civil Rights Act of Michigan, which prohibits discrimination on the basis of weight.³ Hooters’ response? “[I]t matters what [Hooters girls] look like in Michigan.”⁴

Why should Hooters be allowed to decide what their employees should look like in Michigan? Federal and state statutes prevent Hooters from deciding that they prefer all their

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1. Taryn Asher, *Hooters Server Cassie Smith Says She’s on Weight Probation*, MYFOXDETROIT (May 18, 2010, 5:37 PM), <http://www.myfoxdetroit.com/dpp/news/local/hooters-server-says-she’s-on-weight-probation>.

2. *Id.*

3. *Is Cassie Smith’s Hooter’s Uniform Size an Exception to Michigan Elliot-Larsen Civil Rights Act or Is Cassie Simply Already Fun Size?* LEGAL PUB (May 25, 2010, 4:29 PM), <http://legalpublication.blogspot.com/2010/05/is-cassie-smiths-hooters-uniform-size.html> [hereinafter *Hooters*].

4. *Michigan Law Opened Door to Hooters Lawsuits*, MLIVE.COM (June 6, 2010, 11:41 PM), http://www.mlive.com/news/detroit/index.ssf/2010/06/michigan-law-opened_door_to_ho.html.

employees to be black or Asian or under the age of forty.⁵ A survey showed that for interviewers, “appearance [is] the single most important factor in employee selection for a wide variety of jobs.”⁶ Yet, in the majority of jobs, appearance, just like the above mentioned factors, forms no part of the actual job function. For example, a fireman can climb ladders and hoist people out of burning buildings regardless of whether he poses for the annual firefighter’s calendar. Only a few cities and states have recognized this problem and prohibit discrimination on the basis of appearance.⁷

In its defense, Hooters may assert that attractiveness is an absolutely necessary quality for its waitresses and that the restaurant should be granted an exception to the Michigan law.⁸ Most antidiscrimination statutes include defenses that allow employers to assert that in their particular situation the discrimination in question is both necessary and appropriate.⁹ Whether “plus-sex” businesses like Hooters should be able to assert such a defense remains a controversial question.¹⁰ These businesses primarily sell food, clothing, or services, but use the image of the “sexy” employee to distinguish themselves.¹¹ A major outstanding question in the study of appearance discrimination is whether Hooters or any other businesses that uses the appearance of employees as a marketing tool should be allowed to assert the defense that an attractive appearance is absolutely necessary for their employees. Should these defenses

5. 42 U.S.C. § 2000e-2(a)(1) (1999) (prohibiting discrimination on the basis of race); 29 U.S.C. § 623 (f)(1) (2002) (prohibiting discrimination against anyone on the basis of their age).

6. Elizabeth M. Adamitis, Note & Comment, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 195 (2000) (citing Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2040 (1987)).

7. See e.g., Elliot-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2202 (2011); SANTA CRUZ, CAL., CODE § 9.83 (2011), available at <http://www.codepublishing.com/CA/SantaCruz/html/santacruz09/santacruz0983.html>; D.C. CODE § 2-1402.11 (2001).

8. See Miller Cohen PLC, *Weight Discrimination Case Involving Hooters’ Waitresses Allowed*, FINDLAW KNOWLEDGE BASE, <http://knowledgebase.findlaw.com/kb/2010/Oct/173209.html> (last visited Apr. 16, 2012).

9. See *infra* Part I.D.

10. Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 152 (2004).

11. HOOTERS, <http://www.hooters.com/About.aspx> (last visited Apr. 16, 2012).

be limited to businesses and occupations whose primary product is presenting an image, like exotic dancers or the theater?

This Note argues that exceptions to appearance discrimination statutes should be written and construed narrowly to limit employer defenses to those businesses that sell looks exclusively. The solution proposed by this Note is unique in its narrow focus on the employer defenses within proposed statutes. Although several articles have presented proposals for anti-appearance discrimination laws, none has focused extensively on the form that employer defenses should take. Part I reviews the history of appearance discrimination and its impact on employment, and presents the proposals advanced by other commentators to battle appearance discrimination. It examines the background of employer exceptions and the language and interpretation of employer exceptions in current antidiscrimination statutes. Part II analyzes the existing employer exceptions and evaluates the legal and social arguments advanced to define the limits of employer exceptions in appearance discrimination statutes. Finally, Part III suggests that to preserve the strength and effectiveness of appearance discrimination statutes, exceptions such as Bona Fide Occupational Qualification (BFOQ) and business necessity should be written and interpreted narrowly to limit their application to businesses that primarily sell looks and not other products or services.

I. APPEARANCE DISCRIMINATION AND EMPLOYER EXCEPTIONS

This Part will discuss the problem of appearance discrimination, outline its historical background, and explain why it is a problem in need of a solution. Next, it briefly describes two proposals in the academic literature that address the problem via proposed statutes. Finally, this Part will explain the meaning and development of employer exceptions in existing antidiscrimination statutes, including Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and state and local statutes currently in force which combat appearance discrimination.

A. THE ROLE OF APPEARANCE IN EVERYDAY LIFE

Even before recorded history, human decision making accounted for physical beauty and appearance.¹² An attractive appearance helped to draw the most successful mates, who helped ensure that a person's genes were passed on to the next generation.¹³ Since all people cannot achieve physical perfection at all times, even ancient cultures developed methods to improve their appearances and thus, their standing in society.¹⁴ Research shows that appearance continues to be a major decision-making factor in all areas of life today; one study demonstrated that school teachers, despite professing to love all students equally, preferred the attractive children in their evaluations.¹⁵ Simulated juries deliver smaller damage verdicts and stiffer sentences to less attractive plaintiffs.¹⁶ Study subjects associate attractive people with positive characteristics like "virtue, integrity, intelligence, sensitivity, kindness and honesty."¹⁷ Subconscious association of beauty with other positive traits manifests itself in many decision-making processes.

Early American city statutes explicitly forbade unattractive people from partaking in some activities, even leaving their homes.¹⁸ Although such explicit division no longer exists, decision making based on appearance in the employment context is permissible in all but a small number of states and localities.¹⁹

12. See GORDON L. PATZER, LOOKS: WHY THEY MATTER MORE THAN YOU EVER IMAGINED 11–12 (2008) (noting the discovery of necklaces in a 75,000-year-old archaeological site).

13. See *id.* at 13. Theorists also posit that attractiveness was preferred in leaders, who, by virtue of their height or strength, were thought to better protect the community. See *id.* at 76.

14. *Id.* at 18–19. Writings from the Greeks, early Hebrews, and Romans confirm that attractive people were desired for both marriage and leadership. *Id.* at 11.

15. Jordan Bello, Note, *Attractiveness as Hiring Criteria: Savvy Business Practice or Racial Discrimination?*, 8 J. GENDER RACE & JUST. 483, 496 (2004).

16. DEBORAH L. RHODE, THE BEAUTY BIAS 27 (2010).

17. Adamitis, *supra* note 6, at 197. Overweight people, by contrast, are associated with "laziness, lack of discipline, incompetence, lack of productivity, and slovenliness." *Id.*

18. RHODE, *supra* note 16, at 117 n.4 (noting the existence of laws, including one in Chicago, which imposed fines on "persons appearing in public who were diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object" (citation omitted)).

19. 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, 164 (2007).

A number of physical characteristics combine to form what is known as “appearance.”²⁰ These include both mutable and immutable features, including height, weight, symmetry of features, size of features, style of dress, and grooming.²¹ Although arguments have been made to the contrary, research shows that basic appearance preferences have stayed relatively constant over the years²²—“[h]uman beings find the greatest beauty in symmetry.”²³

B. APPEARANCE DISCRIMINATION AND EMPLOYMENT

Appearance discrimination in the workplace affects job prospects and advancement opportunities. People who fit the societal definition of attractiveness are more likely to be hired and have a greater probability of retaining the position and advancing in their careers.²⁴ In a survey of interviewers, appearance emerged as the “single most important factor in employee selection for a wide variety of jobs.”²⁵ This remains true even when performance of a job has no clear relationship to appearance or attractiveness.²⁶ For example, when asked to hire a truck driver, a position clearly unrelated to appearance, study subjects consistently selected the “average-looking and attractive” candidate over unattractive candidates.²⁷ Studies also show that attractive individuals earn more money throughout

20. *Id.*

21. See PATZER, *supra* note 12, at 3.

22. Adamitis, *supra* note 6, at 196–97. For purposes of studies and experiments, scientists use a “truth in consensus” approach to determining which pictures are “attractive,” asking subjects to rank pictures on a scale and averaging their scores. RHODE, *supra* note 16, at 24. *But see* Bello, *supra* note 15, at 497 (suggesting that depictions throughout history show changing standards of beauty).

23. Marquardt has formulated a theory that human aesthetic principles are based on the “golden ratio,” and also found patterns in paintings and life. PATZER, *supra* note 12, at 15.

24. See Bello, *supra* note 15, at 495–96. Even though most employers believe they personally do not hire based on personal attractiveness, studies show that even long-time managers end up selecting the more attractive applicant over his less attractive peers. PATZER, *supra* note 12, at 74. In so doing, they may consciously believe they are hiring the better qualified candidate. *Id.*

25. Adamitis, *supra* note 6.

26. See PATZER, *supra* note 12, at 76–79 (discussing the effect of personal appearance on decision making in military hiring).

27. PATZER, *supra* note 12, at 79. Patzer also notes that the same study showed limits of attractiveness. Study subjects routinely refused to select an attractive woman for a “masculine” job when a less attractive woman was available. *Id.*

their lifetimes²⁸ and are treated more leniently by their supervisors.²⁹ A focus on appearance and disregard for actual qualifications contributes to inefficiency in the workforce.³⁰ Instead of focusing on a person's intellectual merits and accomplishments, employers who hire based on the positive characteristics they associate with an attractive appearance are less likely to hire the best candidate.³¹ Furthermore, a focus on appearance can lead to stress and illness for less attractive employees who struggle to match up.³²

Appearance discrimination in the context of employment is defined by the preference for a more attractive candidate or employee, regardless of whether appearance actually forms a part of the job description. The problem is sometimes also referred to as "lookism."³³ Although appearance discrimination affects employee job prospects at all levels of the employment spectrum, very little protection or redress is available for victims in today's legal world.

C. PROPOSALS FOR PROTECTING VICTIMS OF APPEARANCE DISCRIMINATION

Today, discrimination on the basis of appearance is legal under federal antidiscrimination law and in most states and localities.³⁴ Only one state and a few localities protect victims of appearance discrimination.³⁵ In recognition of this paucity of

28. Studies have demonstrated that "[t]all men receive a pay premium, while obese women experience a pay penalty." *Id.* at 75.

29. A study in Illinois found that managers subconsciously considered appearance and gender in deciding whether to punish a violator of the employee policy. *Id.* at 87.

30. It is well established that the most meritorious candidate is one who can most efficiently and effectively perform a job. If merit is not the primary consideration in hiring, inefficiency must result. *Cf.* James Desir, Note, *Lookism: Pushing the Frontier of Equality by Looking Beyond the Law*, 2010 U. ILL. L. REV. 629, 637 (2010) ("Appearance-based discrimination is problematic . . . because it undermines merit-based decision making.").

31. See PATZER, *supra* note 12, at 74; see also RHODE, *supra* note 16, at 28.

32. This is particularly true for women and can lead to extreme results, including eating disorders. See Adamitis, *supra* note 6, at 215.

33. Desir, *supra* note 30, at 632.

34. See Corbett, *supra* note 19.

35. See Elliot-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2202 (2010); SANTA CRUZ, CAL., MUN. CODE § 9.83 (2011), available at <http://www.codepublishing.com/CA/SantaCruz/html/santacruz09/santacruz0983.html>; Human Rights Ordinance, URBANA, ILL. CODE OF ORDINANCES § 12-37 (2010); MADISON, WIS., CODE § 39.03(8) (2010), available at <http://www.cityofmadison.com/dcr/documents/MGOch39.03.pdf>; BINGHAMTON, N.Y., CODE § 45-2 (2008),

aid to victims, legal scholars have suggested an expansion of the antidiscrimination legal spectrum.³⁶

To date, scholars have made two proposals to extend a legal remedy to all victims of appearance discrimination. One scheme proposes that the states incorporate laws against appearance discrimination into their individual civil rights statutes.³⁷ Proponents of this approach believe that “inclusion of appearance into Title VII [the primary federal antidiscrimination statute] is unrealistic.”³⁸ These proposals are modeled upon appearance discrimination statutes currently in place.³⁹ Discrimination based on “physical characteristics, grooming and attire that is associated with some already protected category, and grooming and attire that has some other cultural or historical significance” is prohibited under the state-based scheme.⁴⁰ The legal framework currently applied to discrimination claims is applied to appearance claims.⁴¹ One such model statute includes both a BFOQ and business necessity defense for businesses.⁴²

Other scholars suggest that victims would be best served by a federal law incorporated into Title VII.⁴³ The recommended statute is structured narrowly and includes only the protection of immutable characteristics, like height, but not those which may be controlled by an individual.⁴⁴ Commentators ar-

available at <http://www.cityofbinghamton.com/userfiles/file/City%20Code%20&%20Legislation/City%20Charter%20and%20Code/45,%20Human%20Rights%20Law.pdf>; D.C. CODE § 2-1402.11 (2001); HOWARD CNTY., MD., CODE § 12.200 (1992), available at <http://www.co.ho.md.us/displayprimary.aspx?id=1803>; S.F., CAL., CODE § 12A.1 (2000), available at <http://www.alrp.org/wp-content/uploads/318/San-Francisco-Municipal-Code.pdf>. A few other states have considered, but not enacted, such bills. See, e.g., Gary Feldman & Judith Ashton, *Jumping the Gun on Weight Discrimination*, BOS. GLOBE ONLINE, June 2, 2007, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/06/02/jumping_the_gun_on_weight_discrimination/. The state of Victoria in Australia is the only non-U.S. government to provide remedy for appearance discrimination. RHODE, *supra* note 16, at 134–35.

36. See 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, 452 (2005).

37. Adamitis, *supra* note 6, at 196.

38. *Id.* at 219.

39. *Id.* at 218–23.

40. *Id.* at 220.

41. *Id.* at 220–21.

42. *Id.* at 221–22.

43. Zakrzewski, *supra* note 36, at 452.

44. *Id.* at 454. Scholars, lawmakers and jurists disagree about which aspects of appearance are actually immutable. See Corbett, *supra* note 19, at 175

gue that this limitation would overcome opposition to appearance discrimination laws by aligning more closely with currently protected characteristics like sex, race, and color.⁴⁵ A federal law is necessary, these proposals argue, because a state-based regime would lead to a patchwork of inconsistent laws, leaving citizens “unlikely to receive equal protection, if any protection at all.”⁴⁶

The two proposals discussed above are strong starting points for the conversation about anti-appearance discrimination statutes. The following discussion of employer defenses focuses on a part of the statutory language that the proposed solutions address only in limited ways.

D. EXISTING STATUTES AND EMPLOYER EXCEPTIONS

Most discrimination in employment laws on the federal, state, and local level include some limited defenses for employers. Exceptions were designed to provide employers with protection in the rare circumstances where the work in question could be performed by only one class of worker, forcing the employer to make discriminatory choices in the hiring process. This Section presents the several forms of employer exceptions found in the primary federal antidiscrimination statutes and the currently existing appearance discrimination statutes on the state and local level.

There is limited information available about the legislative history behind the introduction of the BFOQ, the most commonly invoked employer exception.⁴⁷ The Interpretive Memorandum of Title VII refers to the BFOQ as a “‘limited exception’ to the prohibition against discrimination and explain[s] that employers are given a ‘limited right to discriminate . . . where the reason for the discrimination is a bona fide occupational qualification.’”⁴⁸ This document provides little detail, but suggests that lawmakers believed that employers should be able to discriminate when selectiveness on the basis of the relevant

(noting the “popularly-held understanding” that employment discrimination law “forbids consideration of immutable traits” and discussing whether this is in fact true).

45. Zakrzewski, *supra* note 36, at 454.

46. *Id.* at 452.

47. Katie Manley, Note, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 171 (2009).

48. *Id.* at 172 (citation omitted).

characteristic was genuinely necessary to their business.⁴⁹ After the enactment of the ADEA, the Secretary of Labor, who is responsible for interpreting all of the federal antidiscrimination statutes, issued guidelines for the implementation of its employer exceptions.⁵⁰ “These guidelines provided that to be a [reasonable factor other than age], a criterion must be ‘reasonably necessary for the specific work to be performed’ or ‘have shown a valid relationship to job requirements.’”⁵¹ Courts have struggled to identify appropriate limits for these exceptions.⁵²

1. Employer Defenses in the Major Federal Antidiscrimination Statutes

Title VII prohibits discrimination on the basis of race, religion, color, national origin, or sex.⁵³ These categories are treated differently for purposes of employer exceptions. Race and color are not subject to employer exceptions.⁵⁴ For example, if a theater company produced a play about Malcolm X, a white man rejected for the role could initiate a claim of discrimination against the company, alleging that he was not selected for the part on account of his race. If he can meet his burden of proof⁵⁵ and show that his race was the true reason for his rejection or that without a consideration of race, he would not have been re-

49. Some of the examples provided included the “preference of a French restaurant for a French cook, the preference of a professional baseball team of male players.” *Id.*

50. *Id.*

51. See Judith J. Johnson, *Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes*, 33 SEATTLE U. L. REV. 49, 68 (2009) (noting the extensive involvement of the Secretary in the creation of the statutes and suggesting that his statements accurately reflected the legislative intent behind the employer exceptions) (citation omitted).

52. A number of articles have chronicled the confused history of business-exception interpretation. See, e.g., Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5 *passim* (1991); Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473 *passim* (2001); Yuracko, *supra* note 10 *passim*.

53. 42 U.S.C. § 2000e-2 (1999).

54. *Id.* § 2000e-2(e) (providing a defense for some employers as to discrimination on the basis of religion, sex, or national origin, excluding race and color).

55. Title VII cases that do not involve mixed motives are evaluated using the *McConnell Douglas* test, a burden-shifting analysis that derives from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–07 (1973). For more information, see Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CALIF. L. REV. 983 (1999).

jected,⁵⁶ the theater company has no defense. They will be found in violation of Title VII. However, the drafters of Title VII included defenses for employers when the discrimination involves sex, religion, or national origin.⁵⁷ If a woman proved that she was rejected for the Malcolm X role on account of her sex, the theater company could successfully assert that being male was a bona fide occupational qualification of playing an authentic Malcolm X.⁵⁸ The Title VII language thus includes two different approaches to employer exceptions.

The Age Discrimination in Employment Act (ADEA) prohibits discrimination against anyone forty years of age or older on the basis of their age.⁵⁹ Employer exceptions included in the ADEA are similar to those in Title VII.⁶⁰ The language of the statute permits an employer to assert a BFOQ and to discriminate when following an already established and enforced seniority system.⁶¹ However, the ADEA permits employers one additional defense. An adverse discriminatory action by an employer is defensible under the ADEA if the employer can demonstrate⁶² that the action was based on “reasonable factors other than age” (RFOA).⁶³ Courts have found this term to be vague. Some have interpreted it broadly, to allow employers a wide range of “reasonable” factors, even those closely tied to

56. If race was one of several factors in his rejection, the theater company would have to prove that without consideration of his race, it would still have made the same employment decision. This is part of a framework derived for “mixed motive” cases in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240–47 (1989).

57. 42 U.S.C. § 2000e-2(e).

58. In its regulations, the Equal Employment Opportunity Commission (EEOC) gave the example of authenticity in an actor as a situation where a BFOQ ought to be recognized. 29 C.F.R. § 1604.2(a)(2) (1986).

59. 29 U.S.C. §§ 623, 631(a) (2002).

60. *Id.* § 623(f)(1).

61. *Id.*

62. The *McDonnell Douglas* framework is also applied in ADEA cases. George O. Luce, *Why Disparate Impact Claims Should Not Be Allowed Under the Federal Employer Provisions of the ADEA*, 99 NW. U. L. REV. 437, 439 (2004). The reasonable-factor analysis is available as a defense to employers who are found to have discriminated. *Id.*

63. 29 U.S.C. § 623(f)(1).

age.⁶⁴ Others have pursued a more limited view that analyzes the reasonableness of other factors critically.⁶⁵

The Americans with Disabilities Act (ADA) was enacted in 1990 and protects employees who have, or are perceived to have, a “physical or mental impairment that substantially limits one or more of the major life activities.”⁶⁶ The structure of the ADA is dissimilar from either the ADEA or Title VII. In order to bring a claim under the ADA, a plaintiff must first prove that he falls within one of the three categories the Act identifies.⁶⁷ This requirement serves as a gatekeeper for the ADA and grants the employer an additional step at which they may prove that the claimant lacks a case. Once an employee has demonstrated that they are qualified to pursue a case under the ADA, the employer can defend himself only by showing that there was no reasonable accommodation that could have been implemented to avoid the adverse employment action.⁶⁸ The federal laws provided a model for current state and local laws on appearance discrimination, but the states and localities also diverged in their approaches.

2. Employer Exceptions in the Existing State and Local Appearance Discrimination Statutes

The few states and localities which have enacted appearance discrimination statutes each take a different view of employer defenses. Michigan, whose civil rights statute prohibits discrimination on the basis of height and weight, closely follows Title VII in its exceptions.⁶⁹ It provides employers with a BFOQ

64. This result was achieved by assigning the burden of proof to refute the asserted reason to the plaintiff, rather than the defendant. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 90 (2008).

65. These courts argue that many “reasonable factors,” ostensibly unrelated to age, like seniority and higher salaries, are so correlated to age that making business decisions on the basis of these factors amounts to age discrimination. *See Johnson, supra* note 51, 67 n.154 (2009). The Supreme Court assigned the burden of proof to the defendant in *Meacham v. Knolls Atomic Power Laboratory* but it remains unclear whether it endorsed a restrictive view of reasonable factors other than age. *Id.* at 60, 65.

66. 42 U.S.C. §§ 12102, 12112 (2006).

67. In order to qualify for protection, a plaintiff must demonstrate either that they have a disability or that the adverse action in question was motivated by a belief that they have a disability. *See Jane Byeff Korn, Fat*, 77 B.U. L. REV. 25, 41–42 (1997).

68. *Id.*

69. MICH. COMP. LAWS § 37.2208 (2011).

defense.⁷⁰ Few cases have arisen applying the exceptions, and it remains unclear whether Michigan has a pattern of narrow or broad application.⁷¹ The Human Rights Act in Washington, D.C. includes the most expansive protection for victims of appearance discrimination.⁷² The statute prohibits all discrimination on the basis of “personal appearance.”⁷³ The statute includes a business necessity defense, which is not available unless “it can be proved . . . that, without such exception, such business cannot be conducted.”⁷⁴ However, the drafters saw fit to include an additional defense for businesses specific to appearance discrimination.⁷⁵ Employers may assert that their act of discrimination is part of a “prescribed standard” with a “reasonable business purpose.”⁷⁶

Appearance discrimination is a problem in employment, and scholars have advanced several solutions to address it. A key portion of the proposed statutes must be the extent to which employers may obtain exceptions. The next Part analyzes the positives and negatives of these approaches and advocates for the best approach to incorporate into new laws when state legislators tackle the problem of appearance discrimination.

II. ANALYSIS OF THE CURRENT APPROACHES TO EMPLOYER EXCEPTIONS

This Part will analyze the approaches used by courts in interpreting employer defenses in antidiscrimination statutes currently in effect. It presents the positive outcomes of narrow approaches and the problems created for victims of discrimination by court permissiveness in the interpretation of employer

70. *Id.*

71. *See, e.g.*, *Micu v. City of Warren*, 382 N.W. 2d 823, 584–86 (Mich. Ct. App. 1985) (finding that the fire department could not discriminate on a basis of height unless height was established to be a bona fide occupational qualification and that remand was necessary for hearing on the issue).

72. D.C. CODE ANN. § 2-1402.11 (2010) (“It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived . . . personal appearance . . . of any individual.”).

73. *Id.*

74. *Id.* § 2-1401.3(a) (“Any practice . . . which would otherwise be prohibited by this chapter shall not be deemed unlawful if it can be . . . justified by business necessity.”).

75. *Id.* § 2-1401.02(22) (“‘Personal appearance’ . . . shall not relate, however, to the requirement of . . . prescribed standards, when uniformly applied . . .”).

76. *Id.*

defenses. Next, it identifies the arguments made by other scholars in support of narrow and broad interpretations and shows how these arguments reflect attitudes about appearance discrimination.

A. ANALYSIS OF THE DEFENSES IN FEDERAL STATUTES

By virtue of its broad reach, Title VII includes several different approaches to business exceptions. The most commonly litigated defense is the BFOQ exception for sex discrimination.⁷⁷ Courts usually interpret this exception narrowly, rejecting, for example, defenses based on customer preference.⁷⁸ One of the most well-known gender discrimination cases, *Wilson v. Southwest Airlines*, involved Southwest's attempt to assert a BFOQ defense to Title VII claims that it discriminated against men in its hiring of flight attendants.⁷⁹ In the early 1970s, Southwest, striving to set itself apart from other commuter airlines, implemented a marketing campaign centered on the concept of "love."⁸⁰ The marketing and brand image promoted "love" in the form of female sexuality.⁸¹ Therefore, Southwest asserted that the female flight attendant was essential to their business.⁸² The District Court robustly rejected Southwest's arguments.⁸³ The court found that the essence of Southwest's business was carrying passengers, not promoting female sexuality, and denied them an exception.⁸⁴ The court determined that the BFOQ exception was designed to apply only when the characteristic in question went to the heart of the business.⁸⁵ This narrow approach prevents businesses from eluding the antidiscrimination laws by simply claiming that their businesses would suffer economically if they did not exactly meet customer preferences.⁸⁶ As the *Southwest* opinion noted, allowing the opposite result would have permitted employers to perpetuate the

77. See Manley, *supra* note 47, at 170.

78. Befort, *supra* note 52, at 12.

79. *Wilson v. Southwest Airlines*, 517 F. Supp. 292, 293 (N.D. Tex. 1981).

80. *Id.* at 294–96.

81. *Id.* at 295.

82. *Id.* at 293.

83. *Id.* at 302.

84. *Id.*

85. *Id.* at 301.

86. See Manley, *supra* note 47, at 183 (arguing that the EEOC guidelines stating that "the refusal to hire an individual because of the preferences of coworkers, the employer, client or customers" does not permit a BFOQ exception).

very stereotypes that Title VII was enacted to overcome and “swallow the rule.”⁸⁷

However, courts have permitted businesses greater latitude when the customer interest in question is safety.⁸⁸ Some writers argue that this is simply another, impermissible extension of stereotyping behaviors,⁸⁹ while others suggest that the customer preferences at the heart of safety claims are fundamentally different.⁹⁰ Safety concerns may arise in the context of appearance discrimination.

As discussed previously, Title VII also includes provisions to combat race and color discrimination, but permits no defenses for a business accused of violations.⁹¹ Commentators have argued that this is due to the fact that Title VII was primarily enacted to combat racial discrimination, and the other classifications were added in the drafting process.⁹² The three different approaches outlined above highlight the range of views on interpretation that may be derived from Title VII.

The language of the ADEA is more permissive towards employers than Title VII. In addition to permitting an employer to assert that age is a BFOQ for the position in question, employers may also assert that another “reasonable factor[] other than age” (RFOA) was responsible for their employment decision.⁹³ It remains unclear whether employers should be able to argue that age-correlated reasons, like higher salary or pension benefits, were the “reasonable factors” that actually led to the

87. *Wilson*, 517 F. Supp. at 304.

88. Befort, *supra* note 52, at 19–20.

89. See Manley, *supra* note 47, at 186–88, 190–91 (reviewing courts’ rejection of customer preference BFOQ arguments and noting the inconsistency of permitting customer preferences for privacy to constitute a BFOQ).

90. See Yuracko, *supra* note 10, at 191 (arguing that the “customer-focused perfectionism” approach shows that privacy can be distinguished based on its centrality to the human self-image).

91. Frank, *supra* note 52, at 473–74.

92. See Corbett, *supra* note 19, at 172 (finding that the history of racial discrimination is much more prominent and socially understood than other forms of discrimination). Some critics argue that entirely eliminating employer defenses leaves employers without a way to defend themselves in situations where race or color legitimately relates to the job. See Frank, *supra* note 52, at 498–501 (evaluating the reasons why some believe that a race and color BFOQ should be judicially or legislatively established). *But see id.* at 506–25 (analyzing the evidence and concluding that race and color discrimination in the entertainment industry does not justify the creation of a BFOQ for race and color).

93. 29 U.S.C. § 623(f)(1) (2002).

decision.⁹⁴ The history of the RFOA demonstrates that the introduction of more employer defenses serves to create additional confusion. Defenses may be used by employers to provide themselves with cover when making decisions that are so closely correlated with age that they are guaranteed to have an adverse affect on people over the age of forty.⁹⁵ A similarly permissive defense in the appearance context would, for example, protect an employer who fired all employees who no longer fit the available size two uniforms. This “reasonable factor” is so closely correlated with weight that to permit it would destroy the purpose of an appearance discrimination statute. This analysis suggests that only the narrowest employer exceptions can be implemented while still protecting the essence of anti-discrimination statutes.

B. EMPLOYER DEFENSES IN THE STATE AND LOCAL ANTIDISCRIMINATION STATUTES

Michigan, the only state to include height and weight discrimination within its civil rights law, provides employers with a BFOQ defense.⁹⁶ The case of *Micu v. City of Warren* is, thus far, the sole case to test the BFOQ against height discrimination.⁹⁷ An applicant for a firefighting position was rejected because he did not meet the five-foot-eight inch height requirement after passing all other relevant physical tests.⁹⁸ The court applied the BFOQ exception narrowly, scrutinized the evidence presented by the department and remanded the case, finding that the department had failed to establish that height was “reasonably necessary to the normal operation of [its] business.”⁹⁹ The court approached the exception narrowly by critically examining the employer’s assertions and not permitting common assumptions about height to influence their analysis.¹⁰⁰ The court did not allow the department to simply rest on unsubstantiated statements that the height restriction was “reasonable” and based on unspecified “safety concerns.”¹⁰¹

94. See Johnson, *supra* note 51, at 49–50 (noting that despite recent Supreme Court decisions, it is still unclear whether age-correlated reasons may be “reasonable factors other than age”).

95. *Id.*

96. MICH. COMP. LAWS § 37.2208 (2011).

97. *Micu v. City of Warren*, 382 N.W.2d 823, 827 (Mich. Ct. App. 1985).

98. *Id.* at 824.

99. *Id.* at 827–28.

100. *Id.* at 828.

101. *Id.* at 827.

Such a narrow approach is preferable because it limits BFOQ exception to instances where the employer can prove, by substantial evidence, that only by discriminating can it continue to run its business. This heavy burden protects the statute from internal attack on the basis of stereotypes, which are often used to support BFOQ claims.¹⁰²

The D.C. Human Rights Law incorporates a business-necessity defense.¹⁰³ The statute specifically enumerates a number of typical employer claims which it judges to be impermissible bases for a business-necessity defense.¹⁰⁴ This language suggests that the statute should be interpreted narrowly. Washington, D.C., however, undercut this tough provision specifically with regard to appearance discrimination. The “prescribed standard” with a “reasonable business purpose” test¹⁰⁵ is much weaker than the business necessity standard.¹⁰⁶ In one case, the D.C. Court of Appeals approved an employer policy forbidding males to wear ponytails as a reasonable interpretation of a written requirement for a neat hairstyle.¹⁰⁷ This holding demonstrates the D.C. courts’ willingness to accept employer standards based on gendered stereotypes, including the presumption that long hair on a male is not neat and does not promote cleanliness.¹⁰⁸ This approach gives employers too great an opportunity to avoid the boundaries set by the antidiscrimination statute. It appears that as long as the standard is clearly written and uniformly enforced, the D.C. courts are unwilling to question whether the motivation behind the standard

102. One dominant interpretation of antidiscrimination law argues that its purpose is to protect employees from discrimination based on “stereotyped impressions.” Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 10 (2000). Businesses often seek a BFOQ based on a stereotyped presumption that a particular class would not be able to perform the job. See Manley, *supra* note 47, at 172 (discussing the EEOC guidelines as to the sex BFOQ, explaining that “stereotyped characterizations” are not an acceptable basis for refusal to hire).

103. D.C. CODE ANN. § 2-1401.03(a) (2010) (“Any practice . . . which would otherwise be prohibited by this chapter shall not be deemed unlawful if it can be . . . justified by business necessity.”).

104. *Id.*

105. See *supra* note 73 and accompanying text.

106. See *supra* note 96 and accompanying text.

107. Zakrzewski, *supra* note 36, at 449.

108. Gendered grooming standards often require men to wear their hair short to promote “neatness.” Certainly, a man is as capable of styling his long hair in a “neat” manner as is a woman. Michael Starr & Amy L. Strauss, *Sex Stereotyping in Employment: Can the Center Hold?*, 21 LAB. LAW. 213, 240–41 (2006).

violates the spirit of the law against personal appearance discrimination. This approach undermines successful protection of victims.

C. ANALYSIS OF ARGUMENTS SUPPORTING AND REJECTING EMPLOYER EXCEPTIONS

Analysts have suggested a number of arguments to support a narrow interpretation of employer defenses. These arguments should influence lawmakers as they consider whether to implement appearance discrimination statutes and as they debate the role of employer exceptions in those statutes. The case of Cassandra Smith may seem innocuous and amusing,¹⁰⁹ but it could ultimately set a dangerous precedent. Most people are not concerned when a restaurant requires its servers to maintain a particular appearance.¹¹⁰ This belief may be attributable to the perception that waiting tables is not a highly skilled profession.¹¹¹ That mindset leads many to look leniently upon restaurants that argue that the essence of their business is service provided by attractive women and that they should be able to assert a BFOQ defense to charges of discrimination on the basis of appearance.¹¹² This view is problematic on two levels. First, this approach undervalues the genuine skills involved in effectively serving patrons. These skills may include a friendly attitude, the ability to mediate disputes, provide intelligent commentary on the merits and content of food, and to serve food in a prompt and efficient manner. A lack of distinction between jobs whose essence is the provision of a look to customers, such as models or exotic dancers, and jobs where workers perform other valuable skills leads to an excessive focus on appearance to the detriment of other important qualities.¹¹³ Thus,

109. Many articles covering Smith's complaints take a humorous approach to her problem. See, e.g., *Hooters*, *supra* note 3.

110. See Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257, 262 (2007).

111. See Charlotte Hilton Andersen, *Can the Hooters Girl Fired for Weight Gain Complain?*, HUFFINGTON POST (May 20, 2010, 6:15 PM), http://www.huffingtonpost.com/charlotte-hilton-andersen/can-the-hooters-girl-fire_b_582824.html (dismissing Cassandra Smith's complaints by saying "they weren't paying her for her stellar mastery of the menu nor her uncanny ability to remember all her customer's names").

112. See, e.g., *Judge: Hooters May Have to Hire Overweight Women*, PATERICO'S PONTIFICATIONS (Aug. 25, 2010, 4:25 PM), <http://patterico.com/2010/08/25/judge-hooters-may-have-to-hire-overweight-women/>.

113. See Zakrzewski, *supra* note 36, at 434 (noting that one problem with allowing employers to hire individuals based on looks is that people will not

if restaurants are permitted to create a looks-focused atmosphere by considering attractiveness in hiring, the result may be a workforce that is not as accomplished and efficient.¹¹⁴ This result is a problem for a business culture like that of the United States, where businesses compete on the basis of efficiency and productivity.¹¹⁵

Second, allowing employers a defense against charges of discrimination in professions perceived as “low-skill” sets a precedent that may easily be applied to “high-skill” jobs.¹¹⁶ Such a pattern would essentially allow businesses to avoid antidiscrimination laws by changing the definition of their businesses.¹¹⁷ It is not unprecedented for an employer to assert that maleness was a BFOQ of the international executive position because Latin American male customers preferred to deal with a male executive.¹¹⁸ Since evidence has shown that customers respond to attractive people in all levels of employment,¹¹⁹ a law firm could presumably claim that its lawyers were engaged

compete for jobs based on substantive factors, but rather on how attractive they are).

114. A focus on appearance interferes with an employer’s focus on merit-based characteristics. Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1038 (2009) (discussing studies that show how appearance skews assessments of competence and job performance). A sexualized atmosphere where attractiveness is made a priority may actually negatively impact female intellectual ability. Yuracko, *supra* note 10, at 209 (describing an experiment where males and females took a math test while trying on a swimsuit).

115. Alan J. Meese, *Monopolization, Exclusion and the Theory of the Firm*, 89 MINN. L. REV. 743, 843 (2005) (noting that businesses “can exclude rivals on the basis of efficiency”).

116. Stereotypes about weight even prompted concerns about the health of Supreme Court nominee Sonia Sotomayor. See RHODE, *supra* note 16, at 94.

117. Kimberly Yuracko argues that permitting businesses to redefine the “essence” of their business would result in businesses avoiding discrimination charges by claiming that they are not, for example, restaurants, but “sextaurants,” for whom attractive female “sextresses” are essential. Yuracko, *supra* note 10, at 173.

118. Delia Fernandez brought suit against her former employer, Wynn Oil Company, alleging that she was rejected for an executive position because international clients preferred to deal with men. *Fernandez v. Wynn Oil Co.*, 20 Fair Empl. Prac. Cas. (BNA) 1162, 1162 (C.D. Cal. 1979), *aff’d*, 653 F.2d 1273 (9th Cir. 1981). The lower court permitted a BFOQ defense, accepting that “no customer will do business with” a female in Fernandez’s desired position. 20 Fair Empl. Prac. Cas. (BNA) at 1165. The Ninth Circuit affirmed the decision on other grounds, but rejected the BFOQ claim. *Fernandez*, 653 F.2d at 1276–77.

119. See, e.g., PATZER, *supra* note 12, at 82–84 (discussing an experiment at a Dutch advertising agency which concluded that those managers rated as more attractive did, in fact, attract more sales).

in the business of providing legal services via an attractive delivery vehicle and thereby assert that attractiveness was a BFOQ for the position. This slippery slope argument suggests that allowing customer preferences to establish an employer defense in one industry devalues the contributions of its employees and opens up all other industries to the claim that customer preferences are the essence of the business, defeating the purpose of the antidiscrimination laws.

The slippery slope argument applies in another way to appearance discrimination. Some scholars have suggested that permitting employers to escape sanctions for their appearance-based hiring, firing, and promotion decisions makes them more likely to discriminate on other more traditional grounds like race and sex.¹²⁰ Facially neutral appearance standards, such as those that might be permissible under the D.C. statute, may conceal illegitimate discriminatory intent related to classes that are currently recognized and protected from discrimination.¹²¹ This problem is particularly troubling with regard to the evolving field of sexual orientation discrimination.¹²² Typically, appearance standards reinforce traditional male and female gender roles.¹²³ Allowing employers to assert that such standards are justifications for an exception to antidiscrimination statutes leads not only to appearance discrimination, but also to hidden discrimination against more traditional protected classes.

120. See Hannah Fleener, Note, *Looks Sell, but Are They Worth the Cost?: How Tolerating Looks-Based Discrimination Leads to Intolerable Discrimination*, 83 WASH. U. L.Q. 1295, 1305–06 (2005).

121. The current prevailing standard of beauty is an Anglo-European look. RHODE, *supra* note 16, at 43. As a result, minorities are disadvantaged because, by nature, they are less likely to conform to this Anglo-European standard. Minorities are also more likely to be impacted with undesirable qualities like obesity. *Id.*

122. Sexual orientation itself is an emerging field of antidiscrimination law, though in some ways it is more advanced than appearance discrimination. See generally Dale Carpenter, *Expressive Association and Antidiscrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1533 (2001) (highlighting the challenge of finding the “appropriate constitutional boundary between protected association and permissible antidiscrimination law”).

123. For example, men are often prohibited from wearing long hair or ponytails in the interest of “neatness.” See, e.g., *Kennedy v. District of Columbia*, 654 A.2d 847, 857–58 (D.C. 1994). Similarly, women are often required to wear makeup. See, e.g., *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc).

Nevertheless, some commentators argue that wide latitude for businesses is necessary to preserve an employer's right to determine its business model.¹²⁴ They point to traditional American respect for the market economy and its promotion of the autonomy of businesses.¹²⁵ Businesses, they argue, should be able to direct their own image by hiring employees that promote it via their appearance.¹²⁶ The solutions proposed by these theorists would allow employers to argue that customer preference for attractiveness is so pervasive that without the ability to discriminate against unattractive people, they would be unable to function.¹²⁷ Customer preference has been rejected as a basis for employer exception by courts and the EEOC because it would allow employers to perpetuate the very divisions and stereotypes which antidiscrimination statutes were enacted to combat.¹²⁸ Provisions granting wide latitude to employers based upon this argument would essentially destroy statutes that attempt to prohibit appearance discrimination because customers who are accustomed to a particular method of operation often demand discrimination.¹²⁹ Part of the purpose of antidiscrimination statutes is to move society in a more equal direction¹³⁰ and allowing exceptions every time such change makes customers uncomfortable would undermine this purpose.

Other commentators believe that appearance discrimination is fundamentally different from discrimination against the traditionally protected classes, and thus, should be approached with greater leniency.¹³¹ They assert that appearance discrimination is simply not as significant of a problem because it is so

124. See Heather R. James, Note, *If You Are Attractive and You Know It, Please Apply: Appearance Based Discrimination and Employers Discretion*, 42 VAL. U. L. REV. 629, 662 (2008).

125. See Corbett, *supra* note 19, at 166.

126. See James, *supra* note 124, at 670.

127. *Id.*

128. See *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981) (“[T]he BFOQ exception should not be permitted to ‘swallow the rule.’” (quoting *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring))); Befort, *supra* note 52, at 11 (noting Judge Posner’s statement that anything but a “narrow reading” of the BFOQ exception would “gut the statute” (citing *UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 903 (7th Cir. 1989) (Posner, J., dissenting))).

129. See Zakrzewski, *supra* note 36, at 438–39.

130. See Post, *supra* note 102, at 4.

131. RHODE, *supra* note 16, at 102 (suggesting that appearance discrimination is rarely as severe as racism); Rhode, *supra* note 114, at 1068 (referencing Mario Cuomo’s observation that a New York law on appearance discrimination was one law too many).

common and natural.¹³² Such an argument devalues the difficulties experienced by individuals discriminated against on the basis of appearance.¹³³ It suggests that the harm suffered by victims of appearance discrimination is less of a problem than traditional discrimination.¹³⁴ These contentions take advantage of the lack of awareness about appearance discrimination.

A similar class of arguments assert that appearance discrimination is so trivial and pervasive that it is nearly impossible to eradicate.¹³⁵ Therefore, these commentators contend that if government even attempts to write anti-appearance discrimination statutes, it should write them permissively to reflect the fact that employers naturally discriminate based on looks and will not soon change their natural proclivities.¹³⁶ Deborah Rhode, a leading scholar on the intersection between appearance and the law, argues that similar contentions were presented against most antidiscrimination measures currently in place.¹³⁷ Changes in social attitudes following the enactment of those rules suggest that the law has led the way to more equitable social attitudes.¹³⁸ In particular, Rhode likens appearance discrimination to sexual harassment.¹³⁹ A similar focus on the unusual frivolous case and the presumed triviality of concerns attended the inclusion of sexual harassment as a form of sex discrimination.¹⁴⁰

The next Part proposes that the solution that best balances these concerns is the enactment of appearance discrimination laws in each state that permit only employers in businesses

132. See Rhode, *supra* note 114, at 1060 (describing dismissive attitudes towards the existence of appearance discrimination).

133. See *id.* (noting the way in which society underestimates the social, mental, and physical costs of appearance discrimination).

134. Evidence shows that appearance discrimination is pervasive, common, and destructive to careers. See *supra* Part I.B.

135. See Rhode, *supra* note 114, at 1067.

136. See *id.* at 1069 (discussing critics' assertions that appearance discrimination is ineradicable and comparing these criticisms to those leveled at established legislation).

137. The desire for a distinction between the races was similarly termed a "natural desire" and led to the argument that you "can't legislate morality." See RHODE, *supra* note 16, at 112.

138. See *id.* ("Legislation such as the American [sic] with Disabilities Act also has had powerful positive effects on attitudes about the capacities of disabled individuals.").

139. See *id.* at 114.

140. See *id.* ("[T]he civil rights law was not meant to be a . . . remedy for the 'petty slights suffered by the hypersensitive.'" (quoting *Zabkowitz v. W. Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984))).

that sell looks exclusively to assert a defense to appearance discrimination.

III. FUTURE LAWMAKERS MUST WRITE AND INTERPRET EMPLOYER DEFENSES NARROWLY

Serious concerns exist about the balance between the rights of employees and the rights of the employer.¹⁴¹ The purpose of antidiscrimination law is two-fold. It seeks to protect employees from discriminatory behavior but it also seeks to change societal perceptions so that, ultimately, the law becomes unnecessary and obsolete.¹⁴²

Each individual state should take action to prevent appearance discrimination by introducing statutory protections for discrimination victims. Pioneering states and cities have proven that appearance discrimination statutes are not excessively burdensome on administrative bodies and the courts.¹⁴³ Legislators and adjudicators must avoid the temptation to weaken such statutes by giving wide latitude to employers who demand exceptions for their businesses. When an anti-appearance discrimination statute is written, the language should make clear that the only businesses which deserve exceptions are those which sell looks exclusively. Arguments that business could not survive such imposition have attended the introduction of nearly every antidiscrimination statute, and should not be given more credence in the area of appearance discrimination.¹⁴⁴ This Note's proposal builds on existing statutes and proposed solutions by focusing specifically on the legislative language and interpretation of employer defenses.

A. THE RECOMMENDATION

As legislators consider new statutes, states should follow the Title VII sex discrimination model in establishing employer exceptions. Appearance discrimination is still a relatively new field of study and legislative focus. It would be excessive for legislators to entirely exclude employer exceptions like Title VII

141. See, e.g., McGinley, *supra* note 110, at 275.

142. See Post, *supra* note 102, at 8 ("Antidiscrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities.").

143. None of the jurisdictions where appearance discrimination is currently prohibited have been flooded with cases, and most cases that have appeared have been settled out of court. See RHODE, *supra* note 16, at 125–34.

144. See, e.g., *id.* at 106–07.

does for race and color discrimination.¹⁴⁵ Appearance discrimination is more akin to sex discrimination.¹⁴⁶ Therefore, politicians must ensure that genuine instances of legitimate distinction on the basis of appearance are protected.

B. WHAT MUST BE THE DEFINITION OF A GENUINE LOOKS-BASED BUSINESS?

A key factor in this Note's proposed solution is the identification of appropriate examples of exceptions. Examples may include exotic dancers, whose sole aim is to provide sexual titillation to their customers.¹⁴⁷ These are men or women who perform no meaningful function other than performance and the display of their bodies. It is important to distinguish them from servers at Hooters or similar establishments, who portray themselves primarily as restaurants.¹⁴⁸ Another possible exception should be actors, the essence of whose business is appearing to be a certain character, with his or her own distinctive look.¹⁴⁹ Courts should not extend the defense to businesses that refuse to hire a fitness instructor because she is physically large.¹⁵⁰ The primary purpose of the fitness instructor is to instruct students on fitness moves and routines and ensure the health of all students,¹⁵¹ not to provide a "gaze object"¹⁵² for

145. Racial discrimination enjoys a strong consensus as to its existence and moral reprehensibility. See Frank, *supra* note 52, at 496–97 (reviewing the numerous arguments that courts have made to suggest that Congress intentionally excluded race and color from the BFOQ defense).

146. In fact, the House Representative who sponsored the addition of sex discrimination to the bill may have intended for this provision to undermine support for the bill and prevent it from passing. Manley, *supra* note 47.

147. Yuracko defines such professions as ones where the "good for sale is . . . the use of another person as a sexual gaze object." Yuracko, *supra* note 10, at 157.

148. Compare *About Hooters*, HOOTERS, <http://www.hooters.com/About.aspx> (last visited Apr. 16, 2012) (portraying the restaurant as a "neighborhood place"), with *Entertainers*, ADMIRAL THEATRE, http://www.admiralx.com/at_entertainers.htm (last visited Apr. 16, 2012) (describing the employees as "showgirl entertainers").

149. The EEOC currently provides actors or actresses as an example of permissible discrimination under the sex BFOQ. 29 C.F.R. § 1604.2(a)(2) (2011).

150. Jennifer Portnick, a 240-pound fitness instructor, was denied a franchise with Jazzercise in San Francisco. RHODE, *supra* note 16, at 18. She later went on to successfully teach elsewhere. *Id.* at 105.

151. See, e.g., Gail Sessoms, *YMCA Fitness Instructor Certification*, LIVESTRONG.COM (Mar. 28, 2011), www.livestrong.com/article/405844-ymca-fitness-instructor-certification/ (describing the requirements for a fitness instructor position).

students. Similarly, retailers who only allow certain “attractive” individuals to work in positions on the selling floor¹⁵³ should not receive an exception, as retail floor staff are primarily expected to provide customer service, ring up sales and keep the store displays neat and organized.¹⁵⁴

C. WHAT SHOULD LEGISLATORS NOT DO?

Legislators should not adopt the approach taken by the District of Columbia, which permits employers to nearly bypass the statute by arguing that their discriminatory action was taken as part of “prescribed standards . . . for a reasonable business purpose.”¹⁵⁵ This language destroys appearance discrimination statutes by explicitly permitting businesses to set arbitrary and barely substantiated standards for any profession. The insertion of such language suggests to courts that legislators intended the exception to be read broadly and leads judges to demand less of businesses seeking the exception.

D. WHICH APPROACH WORKS BEST?

Instead, legislators should take the approach established in the sex discrimination jurisprudence and adopted by Michigan’s civil rights law. Statutes should include a BFOQ exception, and courts should recognize a business-necessity exception. These should be interpreted narrowly. In the context of appearance discrimination, narrow interpretation will mean limiting BFOQs to professions where a person’s appearance is the sole or preeminent qualification for the business. Such a distinction will preserve the impact of antidiscrimination statutes without undermining the integrity of businesses that sell looks. The business necessity defense should be limited in application to the very few cases where a different appearance might actually interfere with the execution of the job. A legitimate example might be a regulation that prohibits facial hair on firefighters because it interferes with the fit of their protec-

152. See Yuracko, *supra* note 10, at 173.

153. American Apparel received a great deal of attention in the summer of 2010 when internal documents confirmed that store managers were required to send full body pictures of potential hires to headquarters. Hamilton Nolan, *American Apparel: Internal Documents Reveal Uglies Not Welcome*, GAWKER (June 10, 2010, 3:08 PM), <http://gawker.com/5560215/american-apparels-new-standard-no-uglies-allowed>.

154. See, e.g., *REI Retail Jobs*, REI, www.rei.com/jobs-divisions# (last visited Apr. 16, 2012) (offering a description of retail jobs).

155. D.C. CODE § 2-1401.02(22) (2010).

tive masks.¹⁵⁶ Courts should not find that a particular appearance is a business necessity unless a person's appearance makes it impossible to do the work, or, as in the above example, a different appearance actually impacts the safety of the individual or others. These determinations should be made on the basis of reliable outside testimony.

Appearance discrimination is an area where each individual has already established personal biases. Courts must strive for greater objectivity. It is possible that the unconventional look of appearance discrimination plaintiffs may bias judges and juries against them.¹⁵⁷ Therefore, it is particularly important for judges to demand objective and impartial evidence from employers seeking to benefit from a defense.

Antidiscrimination statutes possess the power to drive society in a new, more equal direction. Perhaps appearance discrimination is so common because people have not learned a different method of operation. Allowing employers to escape penalty by alleging that attractive employees are necessary to their non-looks based business permits the perpetuation of attitudes about appearance and prevents society from offering more equal opportunities.

CONCLUSION

Discrimination on the basis of appearance is pervasive and common in American society. Only one state and a few cities offer direct protection to victims of appearance discrimination. Even these statutes offer possible escape routes for employers via employer defenses. These employer defenses must be policed carefully to allow only businesses who genuinely sell looks to discriminate on the basis of appearance. Appearance discrimination is equally as frequent, hurtful and inefficient as discrimination against any of the currently protected classes. It should be protected against with statutes similar to those which currently protect victims of race, sex, and age discrimination and employer defenses should be narrowly interpreted in order to begin a process of social change, leading to a society where employees are judged on the characteristics actually relevant to employment.

156. See *Kennedy v. District of Columbia*, 654 A.2d 847, 857–58 (D.C. 1994).

157. Research and anecdotal evidence combine to show that unconventional or unattractive people are more likely to be found guilty, and receive smaller awards as plaintiffs. PATZER, *supra* note 12, at 96.

State legislators must craft legislation that protects victims of appearance discrimination and clearly and narrowly defines the limited circumstances in which employers may be allowed to make appearance related distinctions. This targeted and narrow construction will protect victims of appearance discrimination and put employers on notice that judgments on the basis of appearance are acceptable only in the rarest of circumstances.