

Appearance Discrimination in the United States of America and Why We Should Think About It

Patricia Ruth McWilliam*

Contents

I . Introduction	2. Reinforcement of Group Subordination
II. Does it Matter if Employers Care about Appearance?	3. Restrictions on Self-Expression and Cultural Identity
III. Why We Should Care About Appearance Discrimination	IV. Unattractive Employees
1. Principles of Equal Opportunity	V. Appearance Discrimination Laws in Action
	VI. Conclusion

I . Introduction

The United States of America has worked very hard to level the playing field in public life for those classes of people that were once considered unequal. At one time, women were considered the property of their fathers, and then they became the property of their husbands. Minorities were not considered citizens and were afforded very little protection under the law. This situation changed after the Civil War; all enslaved persons were freed and the Fourteenth and Fifteenth Amendments were passed. The Civil Rights movement was the push the United States needed to ensure that the rights guaranteed by the Fourteenth and Fifteenth Amendments were being upheld.¹⁾

* Assistant professor at Law School, Konkuk University.

The Civil Rights Act gave Congress the power to prohibit discrimination on the basis of race, religion, national origin and sex.²⁾ The Americans with Disabilities Act (ADA) made it illegal for discrimination on the basis of disability.³⁾ The Age Discrimination in Employment Act⁴⁾ and Genetic Information Nondiscrimination Act⁵⁾ also afford protection against discrimination based on age and genetic information. Looking at the situation in the United States of America today, it is clear that anti-discrimination laws are still needed, but also that there has also been real progress.

Society says that people should not be discriminated against because of physical traits they have no control over. It is much easier to find support to protect immutable traits and much harder to argue for protection of mutable traits. At one end of the spectrum, there is sex, race and ethnicity and at the other end are purely voluntary characteristics, such as grooming and fashion choices.⁶⁾ The most well-known local ordinance against appearance-related bias is from Santa Cruz, California. The law in Santa Cruz makes discrimination on physical characteristics outside of a person's control illegal.⁷⁾ Even though discrimination on physical characteristics is not allowed by the local law, an employee's personal choices can be subject to discrimination, such as

1) The 14th Amendment freed the slaves and made everyone born or naturalized by the government an American citizen. The 15th Amendment gave all men the right to vote, regardless of race. U. S. Const. amend. XIV–XV.

2) 42 U.S.C. Section 2000e(1994).

3) 42 U.S.C. Section 12101(1990).

4) 29 U.S.C. Sections 621–34(1964).

5) 42 U.S.C. Section 2000ff(2008).

6) Deborah L. Rhode, *The Beauty Bias* (New York: Oxford University Press, 2010), p.92.

7) Santa Cruz, Cal., Mun. Code Section 9.83.020(13)(2008)(defining “physical characteristic”).

unnatural hair color, piercings and tattoos.⁸⁾ The law only protects against discrimination on physical traits the employee has no control over.

People are discriminated against for all sorts of reasons. Women are often discriminated against because of their appearance. Men are less likely to face appearance discrimination, but short men are at risk. Tall men are considered to be intelligent, competent, trustworthy and even kind.⁹⁾ Even the average height of American presidents is 180 centimeters.¹⁰⁾ The public clearly prefers taller men to shorter men. Men and women suffer from obesity, but it is typically women who are punished by society for being overweight. In some circumstances, obesity can be protected by the ADA if the condition affects the person's ability to complete daily tasks. Obesity would probably fall somewhere in the middle of the spectrum of immutable versus mutable traits because obesity comes from biological sources, as well as personal choices.¹¹⁾ It does not seem fair or right to discriminate against someone because of physical traits they did not choose. We offer protection for some characteristics that people cannot choose. Why not include others?

Two years ago, a Stanford law professor, Deborah Rhodes published a

8) Rhode, *The Beauty Bias*, p.127.

9) *Id.*, 27, citing Stephen S. Hall, *Size Matters: How Height Affects the Health, Happiness and Success of Boys, and the Men They Become* (Boston: Houghton Mifflin, 2006); Bonnie Berry, *Beauty Bias* (New York: Westport, CT: Praeger, 2007) p.60; Natalie Angier, "Short Men, Short Shift: Are Drugs the Answer?," *New York Times* (June 22, 2006), section 4, 12.

10) "Heights of Presidents of the United States and presidential candidates", *Wikipedia* (Feb. 3, 2012) http://en.wikipedia.org/wiki/Heights_of_Presidents_of_the_United_States_and_presidential_candidates(lasted visited Feb. 14, 2012).

11) H  l  ne Choquet and David Meyre, "Genetics of Obesity: What have we Learned?", *Curr Genomics* (2011 May) 12(3), pp. 169–179. Available online at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3137002/>(last visited June 4, 2012).

book entitled The Beauty Bias.¹²⁾ The author brought attention to an interesting topic that has been discussed before, but never in so much detail and with a view towards legal and communal change. This book deals with the effect that appearance has on employment and society, whether there should be appearance discrimination laws and how those laws could work within America's current system. There are no federal laws against appearance discrimination. Professor Rhodes believes there should be, while other scholars disagree.¹³⁾ This paper examines why we should think about appearance discrimination, focusing on arguments raised by Professor Rhodes in her book, what laws are already in place, how the court deals with appearance discrimination, and whether we need federal appearance discrimination laws. The world is changing and the laws are more proactive in fighting discrimination in the workforce. It's not okay to discriminate against a woman because she is a woman. Maybe it shouldn't be okay to discriminate against an ugly person just because he is ugly.

II . Does it Matter if Employers Care about Appearance?

We, as a society, should ask ourselves why it matters if people get treated differently based on appearance. Everyone knows that good-looking people get treated better than those that are beauty-challenged.¹⁴⁾ Scholars who want

12) Rhode, *The Beauty Bias*.

13) William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 Duke J.G.L.P. 153 (2007).

14) For an interesting social experience, watch "Sexy Girls Have It Easy", *Current* (2008), found at http://current.com/entertainment/comedy/89199963_sexy-

to fight against the “beauty bias”, such as Professor Rhode, believe this type of discrimination is wrong because people should be judged on their “merit and performance” instead of on “irrelevant” physical appearance.¹⁵⁾ It makes sense for a company to hire the person most suitable for the available position, instead of the one he finds most attractive. But people do not always make the logical choice. One study in the *Journal of Social Psychology* reported that the people surveyed believed, overall, that people who were less attractive were less suitable for all categories of jobs, regardless of whether the job was considered “feminine” or “masculine”.¹⁶⁾ What this study, and others like it, point out is that appearance plays a real role in the hiring practices of employers. It seems unfair that a less attractive person would be passed over in favor of an equally qualified, but better looking person. But hiring managers might not even realize why they think one applicant is better suited for the job than the other. People can be influenced by appearance without even realizing they are doing it. Some jobs require a lot of interaction with clients and potential clients, and those clients might be more willing to part with their money to an attractive salesperson. Employers should have some discretion in who they hire if they think that person will profit the company.

In Professor Rhode’s book, she points out the fact that just because clients and customers prefer attractive people does not create an excuse for

girls—have-it—easy.htm(last visited Feb. 14, 2012).

15) Rhode, *The Beauty Bias*, p. 93.

16) Except that attractive women were viewed as less suitable for masculine jobs in which appearance was unimportant(such as a prison security guard). Stefanie K. Johnson/Kenneth E. Podratz/Robert L. Dipboye/Ellie Gibbons, “Physical Attractiveness Biases in Ratings of Employment Suitability: Tracking Down the ‘Beauty is Beastly’ Effect”, *The Journal of Social Psychology* (2010). 150(3), p. 301, 310.

employers to pass over unattractive applicants.¹⁷⁾ Currently, the law does not allow appearance preferences of employers to be based on race, ethnicity, sex, age or disability. Customer preferences cannot be used as a defense to only hire white people or sexy women. The same argument was made in the past for employers who did not want to hire minorities. The only way to stop prejudice was “to deprive people of the option to indulge it.”¹⁸⁾ After the Civil Rights Act was passed, it was illegal to discriminate on the basis of race or sex. It used to be socially acceptable to express racist ideas. Now, society as a whole frowns upon the expression of such ideas.¹⁹⁾ Just as the court didn’t allow airlines to only hire attractive women because the airlines’ male travelers preferred attractive flight attendants,²⁰⁾ so too could the law be changed so that companies cannot give preference to hiring attractive cocktail servers. Most people love it when an attractive server comes over to take their order. But people would enjoy their dining experience more if they had a competent server, rather than one who is good-looking and forgetful.

Whenever we consider anti-discrimination laws and issues involving affirmative action, there are good arguments for and against. Employers should have the freedom to hire whomever they like, barring some discrimination based on illegal characteristics. Employers consider many factors when making employment decisions, which includes whether an

17) Rhodes, *The Beauty Bias*, p. 107.

18) *Id.*

19) Not to say that racism and sexism don’t exist. But, those sorts of ideas are usually publically denounced by the general population in the USA.

20) *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292(S.W. Texas, 1981) and *Diaz v. Pan American Airways*, 442 F. 2d 385(5th Cir.), cert. denied, 404U.S. 950(1971).

employee will be profitable and whether the employee will be a good fit into the company's environment. But people in charge of hiring are also human and can be influenced by factors that have nothing to do with improving the company employment base. Studies show that good looking people are preferred even by infants, who will stare at attractive faces longer than unattractive faces.²¹⁾ It is natural for humans to be drawn towards attractive people. By creating appearance discrimination laws, it would raise awareness of the issue, so that employers might consciously only hire employees with the most merit and not just go for the more aesthetically pleasing candidate.

As previously mentioned, sex discrimination is illegal. But sometimes employers are allowed an exception if the employer can show a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise."²²⁾ This exception can be used by companies to making hiring decisions on the basis of sex, but only under limited circumstances, which the Equal Employment Opportunity Commission(EEOC) has made clear. The BFOQ has been narrowly interpreted by the EEOC to include occupations that require privacy, authenticity, or sexually explicit entertainment.²³⁾ Companies are allowed to hire female employees to do strip searches of female prisoners and it is acceptable for Playboy to only hire female models. It is not okay for airlines to exclusively hire sexy women as flight attendants. Male customer preference is not an

21) Charles Feng, "Looking Good: The Psychology and Biology of Beauty", *Journal of Young Investigators* (Vol. 6, issue 6, December 2002). Found at <http://www.jyi.org/volumes/volume6/issue6/features/feng.html>(last viewed Feb. 10, 2012).

22) 42 U.S.C. Section 703(6).

23) Rhode, *The Beauty Bias*, p. 107, citing 29 Code of Federal Regulations, Section 1604.2(a)(December 2005).

adequate BFOQ. The court said that sexiness was not essential to the job of a flight attendant and that customer preference was not enough for the courts to allow such discrimination.²⁴⁾ A flight attendant does not need to be attractive to carry out his or her duties.

Personal appearance is an ingrained aspect of public life. People judge other people all the time on what they look like, what they are wearing, and other person decisions that are publically viewable. Employers don't always consciously decide to hire people based on their appearance, but a person's appearance can affect how others view them. Other times, employers are quite clear that they want an attractive employee, and are not concerned with the employee's merit as a worker or an asset to the company. Some might not view this beauty bias as a problem, but it can be when the wrong people are hired and the best employees are overlooked. Employees should be able to focus on doing their jobs well, instead of worrying about how they look in the mirror. When employers care about appearance, it can reinforce stereotypes and keep excellent workers out of their company. Employers are required to be colorblind under the law. They might have a better workforce if they totally blind, instead.

III. Why We Should Care About Appearance Discrimination

We know that employers cannot discriminate on the basis of sex, race, national origin, disability or genetic information. Maybe that's the protection that employees can reasonably expect. Critics of expanding discrimination laws will often say they don't want the courts to get bogged down in frivolous

24) *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 299-303(S.W Texas, 1981).

suits. But the cities and state with laws against appearance-based bias have not been bombarded with lawsuits.²⁵⁾ And there are laws and sanctions available to the courts to deal with frivolous lawsuits. Another argument against appearance discrimination laws is that it is more difficult to identify the victims of appearance discrimination versus victims of race or sex discrimination.²⁶⁾ But appearance discrepancies can be judged by juries and people who believe they have been discriminated against can self-select. There is no need to go out in the world and point out who belongs in what category. In other discrimination cases, it is the victim's job to prove she is a member of a protected class. The public might even be receptive to appearance discrimination laws. According to national surveys, between 12 and 16 percent of workers believe that they have been victims of appearance-related discrimination.²⁷⁾ To put that in perspective, in 2010, 12.6 percent of Americans were black.²⁸⁾ Roughly the same percentage of society believes they were suffered from appearance discrimination as there are black people in America. If such a large portion of the population is suffering from appearance discrimination, it might be a big enough problem that offering protection might be meaningful and worth the effort of doing so.

It is easier to make a case for protecting against appearance discrimination when physical features a person has no control over, such as facial features, height, natural hair color, and scars, are at issue. When it comes to overweight people, the argument is a bit more difficult. Weight is linked to biological reasons and personal choice. Presently, there are no federal laws that protect

25) Rhode, *The Beauty Bias*, see generally, pp. 126–134.

26) *Id.*, p. 101.

27) *Id.*, p. 102, fn. 53.

28) "State and County Quick Facts", *U.S. Census Bureau*, <http://quickfacts.census.gov/qfd/states/00000.html>(last visited Feb. 14, 2012).

against weight discrimination, though there have been cases brought under the ADA. In *E.E.O.C. v. Texas Bus Lines*, the victim was denied a job because the company doctor did not believe she was healthy enough to perform the job's duties.²⁹⁾ He based that decision on the fact that she was overweight, without considering any other factors. The doctor never checked to actually confirm the victim was unhealthy. By only considering her appearance, the doctor had engaged in appearance discrimination and unfairly caused her to be rejected from a job she had already been offered pending the results of her physical examination.

When we consider appearance that is completely voluntary, it can be difficult to be sympathetic to any discrimination a person faces as a result of their personal choices. Many employers want employees that fit with the company image. Of course, that public image cannot be All-American White Boys as observed in an Abercrombie & Fitch lawsuit where the company was accused of only letting white, male employees work upfront in their stores, while minorities and female employees worked in the back.³⁰⁾ A company is allowed to say it wants its employees to be neat and clean. The courts afford companies much discretion in deciding what that entails, and the courts only demand that the standards apply to both men and women, regardless of race.

Professor Rhode, in her book, pointed out three reasons why we should care about appearance discrimination. The first was that it goes against the principles of equal opportunity.³¹⁾ As discussed above, it doesn't seem fair

29) *E.E.O.C. v. Texas Bus Lines*, 923 F.Supp. 965(S.D.Tex., 1996).

30) Steven Greenhouse, "Abercrombie & Fitch Bias Case Is Settled", *New York Times* (Nov. 17, 2004) <http://www.nytimes.com/2004/11/17/national/17settle.html> (last visited Feb. 14, 2012).

31) Rhode, *The Beauty Bias*, p. 93.

that one person is favored over another just because one employee happens to be better looking. The whole point of other anti-discrimination laws is to give people a fair chance in the marketplace. Banning appearance discrimination would only be helpful in this endeavor. A second reason we should care is that it reinforces group subordination because it amplifies the disadvantages people already face based on their circumstances.³²⁾ This idea can be linked to affirmative action, which gives disadvantaged people a little push so that they can compete. And the last is that it restricts self-expression and cultural identity.³³⁾ Individuality and freedom of expression should merit some protection. This freedom should not override all company goals, but be considered in conjunction with whatever restrictions the company wants to enforce.

1. Principles of Equal Opportunity

In a purely economic system, the best employees would be hired, without regard to what they look like. The only consideration an employer would have was if the applicant could perform the job better than any other applicant and make the employer money. But the employer needs to figure out the potential employee in a limited amount of time. Sometimes all the interviewer can use as evidence of how a candidate will behave is what he sees in front of him. There are stereotypes, such as fat people are lazy, or badly groomed people are disorganized. Stereotypes should not be used as a reason to deny someone a job. But, time is money and often people will fall back on stereotypes in order to make quick and efficient hiring

³²⁾ *Id.*

³³⁾ *Id.*

decisions.

In *Texas Bus Lines*, Arazella Manuel was denied a job because the doctor who conducted her physical examination declared she was too unhealthy to perform the job, based on the fact that she was “morbidly obese.”³⁴⁾ The doctor took one look at Manuel and decided she would be unable to perform the duties the job required. He didn’t base that decision on any medical knowledge he possessed. Instead, he observed her and made a judgment call. The court stated that the defendant is not allowed under the Americans with Disabilities Act to refuse to hire someone because they have a disability, as long as that person is able to complete the job with reasonable accommodation.³⁵⁾ The court found that the defendant was not allowed to decide Manuel could not perform the job merely because she was obese.³⁶⁾ Texas Bus Lines refused to hire Manuel because of a “perception of disability based on ‘myth, fear or stereotype.’”³⁷⁾ This case illustrates a situation where stereotyping cannot be used to reject an applicant. Though this case did not deal directly with appearance, the way she appeared (her weight) was the reason that Texas Bus Lines refused to hire her.

2. Reinforcement of Group Subordination

The problem with appearance being used as a factor for employers is that it can strengthen the subordination that disadvantaged people already

34) *E.E.O.C. v. Texas Bus Lines*, 967.

35) *Id.*, 970.

36) “Texas Bus Lines’ argument that Manuel was not qualified under DOT regulations for the driving position solely on account of her weight is neither supported by the objective medical findings nor the DOT Regulations,” *Id.*, 974.

37) *Id.*, 979.

face based on gender, race, ethnicity, class, age and sexual orientation.³⁸⁾ Sometimes employers want a certain image for their company. That is legally acceptable, as long as the look is race and gender neutral. Part of the support for the passage of *Brown v. Board of Education* was a sociology study where black children were asked to identify which of two dolls was the bad one and the good one.³⁹⁾ A majority of the children said that the black doll was the bad one and the white doll was the good one. During the 1940's, black people were stigmatized and told they were not good enough to be in the company of white people. This idea was internalized and affected how they viewed themselves. Society should fight against people being made to feel inferior based on their appearance. Whenever people in a group feel that they aren't good enough or are stigmatized, they will not reach their full potential.⁴⁰⁾ Society as a whole benefits when all of its members are performing at their best.

Attractiveness often goes hand-in-hand with wealth. People in lower socioeconomic stations have difficulty keeping up with today's standard of beauty. Professor Rhode wrote, "[a]pppearance both reflects and reinforces class privilege."⁴¹⁾ Rich people have time and money to spend on improving and maintaining their appearance. They can go to spas, dermatologists and cosmetic surgeons to make sure they live up the standard. If a person doesn't fit conventional standards of beauty, she might not be able to get that higher paying job.⁴²⁾ It takes time and money to make yourself beautiful. Time is expensive. A woman struggling to make ends meet will have difficulty

38) Rhode, *The Beauty Bias*, p. 93.

39) 347 U.S. 483(1954).

40) *Id.*, 96.

41) *Id.*

42) *Id.*

finding the time to buy attractive clothes and beauty products, put on makeup, style her hair, and apply nail polish. Except for the naturally attractive person, it is very difficult for lower-income people to have the appearance that is expected of people in higher paying jobs.

Women suffer the most from this subordination. Women have been denied access to certain careers because the courts felt women lacked the suitable capacity to perform those jobs, or even that a woman's place was in the home. It is now recognized that employers cannot treat men and women who are similarly situated in different ways. Courts have held that it is illegal to deny a woman with young children a job when a man with young children is hired.⁴³⁾ The court in *Frank v. United Airlines, Inc.* held that it is gender discrimination to require different weight standards for male and female flight attendants. "A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ."⁴⁴⁾ In this case, United Airlines could provide no reason for this disparate treatment, and it was found to be sex discrimination by the court. But the courts will allow different grooming standards as long as both sexes are required to conform to "generally accepted community standards."⁴⁵⁾ Employers are allowed to require female employees to wear make up and heels, which imposes more expense and physical harm than male employees are asked to bear.

43) *Phillips v. Martin Marietta Corp.*, 400 U.S. 542(1971).

44) *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855(9th Cir., Cal. 2000).

45) *Willingham v. Macon Telephone Publishing Co.*, 507 F.2d 1084, 1092(5th Cir. 1975).

3. Restrictions on Self-Expression and Cultural Identity

Americans often pride themselves on their freedom of expression and not caring about what society thinks. The United States is made up of people from all over the world, with different cultural backgrounds and religions. Under the First Amendment, Americans are guaranteed freedom of religion and other freedoms have also been found within the penumbra of this amendment by the Supreme Court.⁴⁶⁾ But even freedom of religion is not absolutely protected. The courts have sometimes failed to force employers to accommodate people who desire to wear something or keep a certain grooming habits in order to express their religion.⁴⁷⁾ If the court won't protect some kinds of religious expressions, such as wearing a turban or a head scarf, it is not surprising that the court doesn't place considerable importance on the right to choose your hairstyle. This restricts self-expression and can destroy cultural identities.

Two cases dealing with black women who wanted to choose how to wear their hair are *Rogers v. American Airlines* and *Hollins v. Atlantic Co., Inc.* In *Rogers*, the plaintiff wanted to wear her hair in cornrows. The court placed little significance on the right to wear one's hair the way one wished. The plaintiff pointed out that this hairstyle “has been, historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society.”⁴⁸⁾ The court responded that braided hair is not a hairstyle that is unique to black women; therefore, the policy was not racially discriminatory because both black and non-black

46) U.S. Const. amend. I.

47) Rhodes, *The Beauty Bias*, p. 99(see fn. 39).

48) *Rogers v. American Airlines*, 527 F. Supp. 229, 231–232(S.D.N.Y. 1981).

women were equally bared from braiding their hair.⁴⁹⁾ The court wasn't willing to consider the cultural significance of braided hair to black women, or the fact that it is a hairstyle traditionally worn by women of color because of the texture of their hair. As long as a hairstyle is neat, perhaps it should be allowed. The court instead should ask what business purpose does it serve to prohibit a woman from braiding her hair.

The other case is *Hollins v. Atlantic Co., Inc.*, where the defendant told Hollins she could have any hairstyle she liked, as long as it wasn't eye-catching. The company's policy was that employees have "neat and well groomed hair style[s]." ⁵⁰⁾ Hollins was informed that her preferred hair style was not acceptable, even though it was neat and well groomed and that in the future, whenever she wanted to change her hairstyle, she was required to present a photo for preapproval.⁵¹⁾ Only Hollins and the other black woman who worked at the company were required to do this. The hair policy was being enforced along racial lines. And, there were at least five other white women who worked under the same supervisor, with the same hairstyle that Hollins was reprimanded for wearing.⁵²⁾ The appellate court reversed the district court's finding that Hollins could not establish a *prima facie* case on disparate treatment and that a jury could find discriminatory treatment.⁵³⁾ There is a cultural significance to hair, and people should not be discriminated against when they are trying to express their culture. The courts should not allow a dominate culture to wipe out or degrade other cultures unless the employer has a good reason for doing so.

49) *Id.*, 232.

50) *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 655(6th Cir. Ohio, 1999).

51) *Id.*, 656.

52) *Id.*, 660.

53) *Id.*, 662-663.

Appearance discrimination laws could also work towards helping those people that go against the cultural norm. There are people who want to dress against gender conventions, such as men wearing earrings or women who don't want to wear makeup. Society could be improved if employers were forced to accept people who wanted to express their different views of gender norms. Of course, employers don't want employees who are distracting or scare away customers, but maybe the only way to change society's view of the outliers is to protect their freedom of expression and eventually society will change its views and become more accepting.

IV. Unattractive Employees

Even though appearance discrimination is not illegal across most of the United States, there are cases where the discrimination is based, in a large part, on the victim's appearance. Appearance discrimination based on some characteristics is already illegal, such as discrimination based on sex, race or disability. The following cases deal with the issue of employees being discriminated against because they are not attractive enough. The courts have handled this issue in different ways.

The first case is *Yanowitz v. L'Oreal USA, Inc.*, in which the plaintiff sued for retaliation in response to her protected activity-refusal to fire an employee whom Yanowitz' supervisor deemed unattractive. Yanowitz alleged that the supervisor told her liked fair-skinned blondes and ordered Yanowitz to "[g]et me somebody hot."⁵⁴) The court considered whether Yanowitz' refusal to carry out her supervisor's instructions was protected

54) *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1038, 116 P.3d 1123, 1127(2005).

activity if the instruction was discriminatory. The court stated that Yanowitz only had to show she believed in good faith that the instruction was discriminatory for her activity to be protected by the California Fair Employment and Housing Act, which she showed because she had never had to “fire a male sales associate because he was not sufficiently attractive.”⁵⁵⁾ Her claim for retaliation was not successful, however, because she failed to disclose to anyone at the company why she was not following the supervisor’s order.

The court held that requiring difference standards of attractiveness for male and female employees would be sex discrimination, which makes sense. Of course, different courts have found in the past that the variations in standards held for men and women can be fairly wide.⁵⁶⁾ The court states that a company policy requiring the same level of attractiveness from male and female sales associates would be permissible.⁵⁷⁾ It does not seem like the court willing to create any space in the law for appearance discrimination. Appearance discrimination is not illegal, but it obviously made Yanowitz uncomfortable to simply fire someone because her supervisor did not find the sales associate personally attractive. In this case, Yanowitz relied on the disparate treatment of men and women to make her argument, but if there were a law against appearance discrimination, she would have had a stronger argument in court.

In *Heilman v. Memeo*, the plaintiff alleged she was fired because she was not good looking enough and that her replacement was more slender

55) *Id.*, 1044, 1131.

56) Court found that requiring women to wear makeup as part of the grooming required by a company was comparable to men keeping their appearance neat. *Jepersen v. Harrahs’ Operating Co.*, 444 F.3d 1104(9th Cir. 2006).

57) *Yanowitz v. L’Oreal USA, Inc.*, 1045, 1132(see fn. 6).

than her. The court said they cannot decide whether the replacement employees were more attractive. The court didn't think there was a "standard by which a jury would determine Defendants' notion of attractiveness."⁵⁸⁾ This is a common problem cited by critics of appearance discrimination law. But, it seems reasonable that a jury could make a decision on whether a replacement employee was more attractive than the plaintiff.

In another case dealing with appearance, *Brice v. Resch*, a woman was initially offered a job in Wisconsin, but that offer was later rescinded by the company's CEO. The woman alleged that the CEO did not wish to hire her because the CEO did not find her attractive.⁵⁹⁾ The court granted the defendant's motion to dismiss the claim of tortious interference with contract because Wisconsin is an at-will employment state⁶⁰⁾ and because a CEO cannot interfere with his own company, except perhaps where he has breached some actual contract. There is no contract when the employment offer is at-will. The plaintiff's second claim was for breach of contract, but a job offer in an at-will state does not create a contract. The court states, "[t]he allegation that a male CEO prefers to hire women he finds attractive cannot give rise to a breach of contract claim under these circumstances, however, because (among other reasons) a termination on that basis simply does not 'gravely violate[s] paramount requirements of public interest.'"⁶¹⁾

58) *Heilman v. Memeo*, Not Reported in F.Supp.2d, 2008 WL 2669294, *8 (D.Nev., 2008).

59) *Brice v. Resch*, Not Reported in F.Supp.2d, 2011 WL 284182(E.D.Wis.), 111 Fair Empl.Prac.Cas.(BNA) 844.

60) "At will' means a boss can fire an employee for a good reason, a bad reason, or for no reason at all." *Brice v. Resch*, *4, citing *Brockmeyer*, 113 Wis.2d at 567, 335 N.W.2d at 837.

61) *Brice v. Resch*, *3, quoting *Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 573, 335 N.W.2d 834, 840(Wis. 1983).

The court does not believe that appearance discrimination is the sort of public policy concern that must be protected. The court's argument does not really make sense when compared to the airline cases where the employers were not allowed to only hire attractive women because in that case the court obviously thought that some form of appearance discrimination did go against public policy. The court in *Brice* goes on to point out that as long as the dislike of an employee's appearance is not linked to some protected form of discrimination (e.g. sex or race), then the court will not find that public policy has been violated.⁶²⁾ It's unlikely, however, that if the court examined the hiring practices of this company, they would find any potential male employees whose job offers were rescinded because of their attractiveness.

This recent case also points out that physical attraction is not a protected class under the law in Wisconsin. Employers are free to hire and fire at will if they don't like how employees or potential employees look. The court says, "[i]t is clear from statutes (including Title VII, which Plaintiff herself cites) that legislatures know how to create protected classes of employees, and no legislature has carved out a protection based on physical attractiveness. To do so here would be an ill-advised stretch of judicial power."⁶³⁾ And maybe this is the problem. When you consider the facts of this case, that a woman had a job offer and thought she would be starting soon, only to be told that the company changed its mind because the CEO thought she was ugly; it feels wrong. Of course, the law cannot be swayed by feelings. The court must follow the law. Maybe the law is wrong, or maybe it doesn't allow for enough flexibility. If cases like this one continue to occur, it might be time for the legislatures to change the law and give people extra protection.

62) *Id.*, 4.

63) *Id.*

Maybe the law doesn't need to be changed. Instead, these cases could be brought on a sex discrimination basis. One commentator to the case suggested that the plaintiff could have alleged this under Wisconsin's Equal Rights Division through the Wisconsin Fair Employment Act, but not as a civil matter through the courts.⁶⁴⁾ Women are almost always held to higher beauty standards than men. It would be reasonable to argue that most appearance cases could be dealt with through sex or race discrimination laws, but that also leaves groups of people unprotected. It might be difficult to decide how ugly a person would have to be in order to qualify for protection under the law. Most people know what an attractive person looks like and there are people that could not find protection under current anti-discrimination laws, such as short or ugly men. It is obvious that people are discriminated against because of their appearance. Perhaps it is time for the law to be changed protect them.

V. Appearance Discrimination Laws in Action

There is no federal protection against discrimination based on appearance, but there are a few local ordinances and one state law that do make it illegal. The state of Michigan and city of San Francisco do not allow discrimination based on height and weight. Santa Cruz, California law only protects against discrimination based on involuntary physical features. Urbana (Illinois), the

64) Eric H. Rumbaugh, "Appearance-Based Discrimination Not Actionable in Wisconsin", *National Law Review* (March 8, 2011), <http://www.natlawreview.com/article/appearance-based-discrimination-not-actionable-wisconsin>(Last visited Feb. 9, 2012).

District of Columbia, Howard County (Maryland) and Madison (Wisconsin) prohibit discrimination based on general appearance.⁶⁵⁾ Any appearance-based discrimination cases have been raised under these non-federal laws. Critics of appearance discrimination laws often will state that if that protection is afforded by the federal government, the courts will be jammed with frivolous suits. So far the courts in those areas have not been burdened by excessive appearance discrimination cases.⁶⁶⁾ The cases that have been brought could have also been argued under federal discrimination laws, as well. We will take a look at how the District of Columbia applies its appearance discrimination laws in the following two cases where the companies involved disapproved of a female employee's style of dress and the male employee's ponytail.

The first case is *Atlantic Richfield Co. v. District of Columbia Commission on Human Rights*, where the victim was a black woman. Elisa Janetis' supervisor thought Janetis' shirts were too low and too tight, that Janetis was too friendly with office visitors and accused Janetis of being promiscuous.⁶⁷⁾ Janetis later quit and alleged that she had suffered discrimination based on personal appearance. The D.C. Human Rights Act prohibited discrimination on personal appearance and defines personal appearance as "the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards. It shall not relate, however, to the requirement of ... prescribed standards ... when uniformly applied to a class of employees for a reasonable business purpose..."⁶⁸⁾

65) Rhode, *The Beauty Bias*, pp. 126-134.

66) *Id.*

67) *Atlantic Richfield Co. v. District of Columbia Com'n on Human Rights*, 515 A.2d 1095, 1097(D.C., 1986).

68) *Id.*, 1099, quoting D.C. Code § 1-2502(22).

In the District of Columbia, employees have some freedom over their personal style, but employers still can maintain uniformly applied standards for the workplace. The court found that Janetis had not violated the company's standard for office attire because the company did not have a "uniformly prescribed standard of dress applied for reasonable business purpose."⁶⁹⁾ Janetis was successful in this case, but she also could have claimed that she was discriminated against on the basis of race and gender. She was being treated differently from other employees similarly situated.

Another case in Washington, D.C. showed the limits of the personal appearance discrimination law. If a company wants to enforce certain grooming habits, there must be some "written grooming policy." As we saw in *Atlantic Richfield*, the policy must be in existence if the company wants to claim that an employee violated it. In *Turcios v. U.S. Services Industries*, the court said the written policy doesn't have to be specific, and can find that "neat hair style" can mean no ponytail for male janitors.⁷⁰⁾ The court in this case was upholding traditional gender conventions that say men can't have long hair. But maybe the court should not be so deferential towards employers. A company's image is not greatly affected by their cleaning staff's appearance. This case could also have been brought under gender discrimination law. The company presumably would have allowed female employees to have long hair, thus treating their male employees different from their female employees.

What these cases show is that the courts have the capacity to deal with appearance discrimination issues. The manner in which they are dealt with is not that different from how the courts deal with federal discrimination issues. Proponents of appearance discrimination laws should consider how

69) *Id.*, 1100.

70) *Turcios v. U.S. Services Industries*, 680 A.2d 1023, 1027(D.C. 1996).

necessary they are. A lot of these cases would disappear if employers stopped pushing traditional ideas of gender of their employees. A person can perform their job just as well if they are wearing makeup or not, or if they have long hair or short. A better solution might be to apply gender discrimination laws and afford less discretion to employers. That might be a better answer than creating new laws similar to the appearance discrimination laws already in place in some states.

VI. Conclusion

Appearance shouldn't matter. In a perfect world, people are judged on their work performance, not their looks. A doctor can serve you just as competently wearing a tie or wearing a grungy t-shirt and a nose ring. A lawyer works just as well in a suit as she does in jeans. The social norms for professionals tends to be partly self-imposed and partly from the public's expectations, but that's not really the problem we are dealing with in this paper. The problem is when employers are forcing certain appearance standards on their employees. Professor Rhode wants the law to prohibit appearance discrimination and sexualized grooming requirements.⁷¹⁾ If a woman wants to wear heels and makeup, she should be allowed to choose, unless it has some demonstrative affect on job performance.

The dissent in *Atlantic Richfield Co.* pointed out that Janetis could have pleased her supervisor if she had wore loose-fitting clothes. In the judge's opinion, Janetis had problems because of her behavior, not her appearance.⁷²⁾

71) Rhode, *The Beauty Bias*, p. 89.

72) *Atlantic Richfield Co. v. District of Columbia Com'n on Human Rights*, 1104.

The judge thought Janetis should have just conformed to her employers' wishes. But shouldn't Janetis be allowed to wear what she likes, be in control of how and in what way she enhances her attractiveness? Professor Rhode also believes that people should have freedom to express themselves without being judged as "politically incorrect or professionally unacceptable."⁷³) Employers need to stop pushing their concepts of what is required, because usually those requirements are based on ideas that are not universal. Instead, those company policies have some element of racism or sexism.

Discrimination is a societal evil that should be stamped out. Some people might believe that appearance discrimination is not important enough to fight over. But making appearance discrimination illegal would encourage a more egalitarian society. Sex discrimination is very useful in fighting some forms of appearance discrimination since most discrimination faced by people is based on the fact they are not conforming to gender stereotypes. The problem with relying on sex discrimination is that it can be difficult to prove that a company is discriminating against an employee because her looks do not match the employer's preference for women. The results in cases like the Brice case and Yanowitz case might have been different if the plaintiffs could have alleged appearance discrimination. Even though it is doubtful that male employees would have been held up to the same beauty standards, it is more difficult to prove sex discrimination. The defendants in these cases made it clear that the victim's appearance was the issue, so alleging appearance discrimination would have been a much simpler argument.

There are arguments against making appearance discrimination illegal, such as the courts being clogged up or that it would be too difficult to create a workable rule. When we look at the states and cities that do have

73) Rhode, *The Beauty Bias*, p. 87.

appearance-discrimination laws, it doesn't look like frivolous lawsuits will be the problem. Also, I doubt a jury would truly have difficulty deciding if a person was being discriminated against because of appearance. Of course it would be difficult to have a bright line rule on what makes a person unattractive, but a jury could determine if someone's appearance played a central role in an employer's decision. Even if the federal government never makes it illegal to discriminate based on appearance, society can make changes. If everyone works together to destroy their personal biases and opinions on what is attractive and what we expect to see in the workforce there would be no need for appearance discrimination laws.

(투고일 2012년 4월 6일, 심사(의뢰)일 2012년 5월 10일, 게재확정일 2012년 5월 31일)

Key Words : appearance discrimination, anti-discrimination, beauty bias, gender, race, appearance, employer, employee, employment, physical features, physical characteristics

References

1. Books

Deborah L. Rhode, *The Beauty Bias*, New York: Oxford University Press, 2010.

2. Articles

Charles Feng, "Looking Good: The Psychology and Biology of Beauty",
Journal of Young Investigators Vol. 6, issue 6, December 2002.

Eric H. Rumbaugh, "Appearance-Based Discrimination Not Actionable
in Wisconsin", *National Law Review*, March 8, 2011.

Hélène Choquet/David Meyre, "Genetics of Obesity: What have we
Learned?", *Curr Genomics*, May 2011.

Stefanie K. Johnson/Kenneth E. Podratz/Robert L. Dipboye/Ellie Gibbons,
"Physical Attractiveness Biases in Ratings of Employment
Suitability: Tracking Down the 'Beauty is Beastly' Effect", *The
Journal of Social Psychology* Vol. 150, issue 3, 2010.

William R. Corbett, "The Ugly Truth About Appearance Discrimination
and the Beauty of Our Employment Discrimination Law", 14
Duke J.G.L.P. 153, 2007.

3. Case Law

Atlantic Richfield Co. v. District of Columbia Com'n on Human Rights,
515 A.2d 1095(D.C., 1986).

Brice v. Resch, Not Reported in F.Supp.2d, 2011 WL 284182(E.D.Wis.),

111 Fair Empl.Prac.Cas.(BNA) 844.

E.E.O.C. v. Texas Bus Lines, 923 F.Supp. 965(S.D.Tex., 1996).

Frank v. United Airlines, Inc., 216 F.3d 845(9th Cir. Cal., 2000).

Heilman v. Memeo, Not Reported in F.Supp.2d, 2008 WL 2669294
(D.Nev., 2008).

Hollins v. Atlantic Co., Inc., 188 F.3d 652(6th Cir. Ohio, 1999).

Jepersen v. Harrahs' Operating Co., 444 F.3d 1104(9th Cir. 2006).

Phillips v. Martin Marietta Corp., 400 U.S. 542(1971).

Rogers v. American Airlines, 527 F. Supp. 229(S.D.N.Y. 1981).

Turcios v. U.S. Services Industries, 680 A.2d 1023(D.C. 1996).

Willingham v. Macon Telephone Publishing Co., 507 F.2d 1084(5th Cir. 1975).

Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 299-303(S.W Texas, 1981).

Yanowitz v. L'Oreal USA, Inc., 36 Cal.4th 1028, 116 P.3d 1123(2005).

[국문초록]

미국에서의 외모차별과 우리가 외모차별에 대해 생각해 봐야하는 이유

Patricia Ruth McWilliam*

이 보고서는 직장에서의 외모차별에 관한 문제를 조사한다.

법학자들 사이에서 고용인들의 외모와 입는 옷에 근거한 차별로부터 고용인들을 보호하기 위한 연방법을 만들 것을 지지하는 추세가 증가하고 있다.

이 보고서는 외모차별 법과 연관된 현재 법적 구조와 어떻게 외모차별문제가 법정에서 다루어지는 검토한다.

이 보고서가 제기하고 있는 의문은 성별, 인종, 다른 반차별 법에 의한 보호와 비슷한 연방 외모차별 법이 필요한지이다.

외모차별은 현재 존재하고 있는 반차별 법을 통해 더 잘 다루어질 수 있거나, 성별, 인종, 장애인과 같은 다른 차별법의 분명한 위반이 있는 경우를 제외하고는 개인의 외모는 보호받을 수 없다.

주제어 : 외모차별, 반차별, 아름다움의 편견, 성별, 인종, 외모, 고용주, 고용인, 고용, 신체적 특징, 육체적 특징

* 건국대학교 법학전문대학원 조교수.

