



## *Weight Discrimination Protections in New York City Illustrate Need for Federal Attractiveness Discrimination Protections*

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### **Introduction**

On May 26, 2023, New York City Mayor Eric Adams signed landmark legislation prohibiting weight and height discrimination in employment, housing, and public accommodations.<sup>1</sup> As the New York City Commissioner on Human Rights explained, “most forms of appearance-based discrimination have persisted unchecked.”<sup>2</sup> And after this legislation, the victims of attractiveness discrimination will remain largely unprotected, even in New York City. This Essay starts by describing the pervasiveness of attractiveness discrimination. It then documents the widespread harm of the practice to businesses, workers, and consumers. Next, the case for an expansive interpretation of Title VII to include attractiveness discrimination protections is provided, addressing the most common objection of subjectivity of attractiveness. Finally, the Essay concludes by emphasizing the benefit of protection under a federal statute, compared to the current practice of minimal protections in narrow geographic areas such as New York City.

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<sup>1</sup> *Mayor Adams Signs Legislation to Prohibit Height or Weight Discrimination in Employment, Housing, and Public Accommodations*, NYC (May 26, 2023), <https://www.nyc.gov/office-of-the-mayor/news/364-23/mayor-adams-signs-legislation-prohibit-height-weight-discrimination-employment-housing-#/0>.

<sup>2</sup> *Id.*

## Attractiveness Discrimination Pervasiveness

Studies demonstrate that attractiveness discrimination permeates nearly every aspect of society. Teachers discriminate against unattractive students.<sup>3</sup> The unattractive are less likely to get married and if they do, less likely to marry someone wealthy.<sup>4</sup> Unattractive plaintiffs and defendants are discriminated against by juries and judges.<sup>5</sup> Unattractive attorneys earn less than their attractive peers.<sup>6</sup> The unattractive are discriminated against when applying for loans.<sup>7</sup> Voters discriminate against unattractive politicians.<sup>8</sup> Unattractive quarterbacks in the NFL are paid less than their attractive counterparts with similar stats.<sup>9</sup> Even babies discriminate against the unattractive as they prefer to look at attractive faces.<sup>10</sup>

## Widespread Harms from Attractiveness Discrimination

The nonsensical conflation of appearance with employment-related skills harms businesses, workers, and consumers. Attractiveness discrimination results in inefficiencies in the hiring and promotion process, as workers are assigned roles based on attractiveness rather than ability. This results in corporate inefficiencies, and produces inferior products and services for the consumer. By perpetuating society's obsession with looks, attractiveness discrimination in the workplace

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<sup>3</sup> Jordan Bello, *Attractiveness as Hiring Criteria: Savvy Business Practice or Racial Discrimination?*, 8 J. GENDER RACE & JUST. 483, 496 (2004).

<sup>4</sup> DEBORAH L. RHODE, *THE BEAUTY BIAS* 27 (2010).

<sup>5</sup> Anne D. Gordon, *Better Than Our Biases: Using Psychological Research to Inform Our Approach to Inclusive, Effective Feedback*, 27 CLINICAL L. REV. 195, 212 (2021).

<sup>6</sup> Jeff E. Biddle & Daniel S. Hamermesh, *Beauty, Productivity and Discrimination: Lawyers' Looks and Lucre*, 16 J. LAB. ECON. 172, 185-90 (1998).

<sup>7</sup> DANIEL S. HAMERMESH, *BEAUTY PAYS: WHY ATTRACTIVE PEOPLE ARE MORE SUCCESSFUL* 145 (2011).

<sup>8</sup> *Id.* at 75-79.

<sup>9</sup> David J. Berri, Rob Simmons, Jennifer Van Gilder & Lisle O'Neill, *What Does It Mean to Find the Face of the Franchise? Physical Attractiveness and the Evaluation of Athletic Performance*, 111 ECON. LETTERS 200 (2011).

<sup>10</sup> Anna Gosline, *Babies Prefer to Gaze Upon Beautiful Faces*, NEWSIDENTIST (Sept. 6, 2004), <https://www.newscientist.com/article/dn6355-babies-prefer-to-gaze-upon-beautiful-faces/>.

results in increased worker investment in pursuing largely unobtainable beauty standards, as opposed to pursuing education and job training. This infatuation with beauty also contributes to our current mental health crisis and is linked to sexual harassment.<sup>11</sup>

### **Using Title VII to Provide Attractiveness Discrimination Protection**

Attractiveness is not currently a recognized protected class in any federal anti-discrimination legislation.<sup>12</sup> But if the discrimination can be linked to a protected class, the victim may still receive legal protection. For example, in the 2005 case of *Yanowitz v. L’Oreal USA Inc.*, the California Supreme Court held it was unlawful sex discrimination to fire a female employee for not being “hot enough” to sell perfume, reasoning that there were no such attractiveness standards applied to males.<sup>13</sup> But why should protection from discrimination be contingent upon the coincidental inclusion of an explicitly protected classification? Providing protections through an expansive interpretation of Title VII would be far more practical.

Expanding Title VII to include attractiveness discrimination is consistent with its ever-expanding nature. Title VII only applied to associational race discrimination claims starting in the 1980s<sup>14</sup> and did not apply to associational gender discrimination claims until 2018.<sup>15</sup> Title VII’s causation requirement has been relaxed and lessened over its history.<sup>16</sup> It originally did not protect against

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<sup>11</sup> Michael Conklin, *Unlocking the Beauty from Within Title VII: Arguing for an Expansive Interpretation of Title VII to Protect Against Attractiveness Discrimination*, 31 AM. U. J. GENDER, SOC. POL’Y & L. 25, 35–36 (2023).

<sup>12</sup> James Desir, *Lookism: Pushing the Frontier of Equality by Looking Beyond the Law*, 2010 U. ILL. L. REV. 629, 634 (2010).

<sup>13</sup> *Yanowitz v. L’Oreal USA Inc.*, 116 P.3d 1123, 1134 (Cal. 2005).

<sup>14</sup> Andrew W. Powell, *Is There a Future for Sex-Based Associational Discrimination Claims Under Title VII?*, 66 LAB. L. J. 164, 165–66 (2015).

<sup>15</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 125 (2d Cir. 2018) (“[W]e now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.”).

<sup>16</sup> See, e.g., Ronald Turner, *Title VII and the Unenvisaged Case: Is Anti-LGBTQ Discrimination Unlawful Sex Discrimination?*, 95 IND. L. J. 227, 236 (2020) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343

workplace sexual harassment<sup>17</sup> nor workplace racial and national origin harassment.<sup>18</sup> Title VII was further extended to protect same-sex harassment in 1998.<sup>19</sup> And in *Price Waterhouse v. Hopkins*, the Supreme Court extended Title VII protections to the victims of gender stereotyping based on an expansive interpretation of its “because of . . . sex” language.<sup>20</sup> Most recently, the Supreme Court held in *Bostock* that Title VII protects against gender identity and sexual orientation discrimination.<sup>21</sup>

Extending Title VII to include gender identity and sexual orientation discrimination provides an illustrative precedent for extending Title VII to include attractiveness discrimination. This is because, as was the case in *Bostock*, attractiveness discrimination is inherently linked to existing protected classes. Ample evidence points to how attractiveness discrimination is linked to gender discrimination. Obesity decreases the odds of marriage twice as much for women as for men.<sup>22</sup> Nearly ninety percent of cosmetic surgery patients are female.<sup>23</sup> The obesity penalty in earnings is more pronounced for women than men.<sup>24</sup> The perception of a woman’s attractiveness decreases with age at a more rapid rate than it does for men.<sup>25</sup> Women experience significantly more stringent

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(2013) (“Beginning in 1991, Title VII plaintiffs alleging status-based (race, color, religion, sex, or national origin) discrimination can satisfy a relaxed and lessened causation standard by ‘show[ing] that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives which were causative in the employer’s decision.’”).

<sup>17</sup> Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 346 (1990) (“In all likelihood, the members of Congress would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination—especially since the term ‘sexual harassment’ did not come into currency until the late 1970s.”).

<sup>18</sup> Turner, *supra* note 16, at 239.

<sup>19</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

<sup>20</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-42, 258 (1989).

<sup>21</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

<sup>22</sup> RHODE, *supra* note 4, at 30.

<sup>23</sup> *Id.* at 97.

<sup>24</sup> HAMERMESH, *supra* note 7, at 53.

<sup>25</sup> *Id.* at 30 (measuring perceived attractiveness in people aged 22–49 compared to 50–64 and finding that men only decreased from thirty-six percent to twenty-one percent, while women decreased from forty-five percent to eighteen percent).

and difficult-to-obtain beauty standards than men.<sup>26</sup> Women incur a much greater cost in obtaining an acceptable standard of attractiveness than do men.<sup>27</sup> Furthermore, the protected classes of race and ethnicity are also implicated in attractiveness discrimination because Caucasian-based beauty standards are incompatible with non-white races.

As with every proposed legal interpretation, there exist objections to this expansive interpretation of Title VII. However, properly understood, these objections are either the result of a misunderstanding, or are outweighed by the benefits of offering protections.<sup>28</sup> For example, while beauty is subjective, this does not mean that attractiveness discrimination protections are unenforceable as some claim.<sup>29</sup> Existing protected classes such as race and ethnicity are likewise

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<sup>26</sup> Jada Jones, *The Beauty Standards Placed on Women are Unrealistically Unachievable*, METEAMEDIA (Apr. 9, 2021), <https://meteamedia.org/20179/opinions/the-beauty-standards-placed-on-women-are-unrealistically-unachievable/>.

<sup>27</sup> Jones, *supra* note 26.

<sup>28</sup> Conklin, *supra* note 11, at 46–72 (explaining the following potential objections with refutations: Subjective nature of attractiveness; Likelihood of inconsistent results; detrimental effects of adding more protected classes; Adverse selection; Attractive employees are good for business; Attractiveness as a BFOQ; Subconscious nature of attractiveness discrimination; Immutability issue; Lesser discrimination; Trivializing effect on discrimination claims; Ancillary benefits of being attractive; The attractive earn their preferential treatment; Difficulties of implementation; and Slippery slope).

<sup>29</sup> See, e.g., Julie Tappero, *Lookism Discrimination*, WEST SOUND WORKFORCE (Aug. 3, 2011), <https://www.westsoundworkforce.com/lookism-discrimination/> (“Who would define the parameters of what is good looking and what is unattractive?”); see also Robin Shea, *11 Employer FAQs (No. 7): Should the “Ugly” Be Protected from Discrimination?*, CONSTANGY, BROOKS, SMITH & PROPHETE LLP (Sept. 2, 2011), <https://www.constangy.com/employment-labor-insider/ok-i-admit-it-this> (“How do we draw the line between the less-than-ideal and the truly ugly?”); Jon Hyman, *Never Pick a Fight with an Ugly Person, They’ve Got Nothing to Lose*, OHIO EMPLOYER L. BLOG (Aug. 30, 2011), <https://www.ohioemployerlawblog.com/2011/08/never-pick-fight-with-ugly-person.html> (“Can you imagine a more subjective, unworkable standard for discrimination litigation?”); Heather R. James, *If You Are Attractive and You Know It, Please Apply: Appearance-Based Discrimination and Employers’ Discretion*, 42 VAL. UNIV. L. REV. 629, 662 (2008) (“Enforcing an appearance discrimination law is wholly impracticable because if beauty truly ‘is in the eye of the beholder,’ it will be too difficult for courts to determine when employers have such a discriminatory motive.”); James J. McDonald, Jr., *Civil Rights for the Aesthetically-Challenged*, 29 EMP. RELS. L. J. 118, 127 (“Will there be a national standard of attractiveness established by EEOC rulemaking?”); Frank J. Cavico, Stephen C. Muffler & Behaudin G. Mujtaba, *Appearance Discrimination in Employment: Legal and Ethical Implications of “Lookism” and “Lookphobia”*, 32 EQUAL, DIVERSITY & INCLUSION: AN INT’L J. 83, **Error! Bookmark not defined.** 103 (2012) (“[This] would logically necessitate a ‘sliding scale of ugliness,’ consequently placing judges in an unenviable position to apply such a standard on a case-by-case basis to determine if a plaintiff employee or job applicant falls within this newly defined, yet descriptively abstract, new type of protected class.”); HAMERMESH, *supra* note 7, at 156 (“Could we even agree on which people are sufficiently bad-looking as to merit protection under some policy designed to aid this particular group?”).

subjective.<sup>30</sup> In these cases, the plaintiff need only prove discrimination based on *perceived* membership in the protected class.<sup>31</sup> Likewise, a plaintiff would only need to show discrimination based on a *perceived* level of attractiveness; a jury consensus as to actual level of attractiveness is unnecessary.

## Conclusion

While New York City's protections against weight and height discrimination are a step in the right direction, this piecemeal, geographically limited approach leaves the vast majority of Americans unprotected. This Essay provides a valuable framework for considering Title VII as an implementation tool for offering these protections. By considering the severity of the practice, how it is inherently linked to the existing protected classes of gender and race, the clear trajectory of Title VII to offer more protections, and the recent case of *Bostock* as a roadmap for implementation, a strong, cumulative case is made. This course of action will protect victims of discrimination; help increase productivity in the U.S. economy; and likely reduce eating disorders and depression.

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<sup>30</sup> Ritchie Qitzig, *The Medicalization of Race: Scientific Legitimization of a Flawed Social Construct*, 125 ANNALS INTERNAL MED. 675, 675 (1996) (explaining race as an "arbitrary biological fiction").

<sup>31</sup> See, e.g., *Equal Emp. Opportunity Comm'n v. WC&M Enters.*, 469 F.3d 393, 397 (5th Cir. 2007) (noting that co-workers harassed plaintiff by making statements that he was Arab and a part of the Taliban, despite the fact that he was Indian).