A COMPARATIVE LABOUR LAW PERSPECTIVE ON CATEGORIES OF APPEARANCE-BASED PREJUDICE IN EMPLOYMENT

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by

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Submitted in fulfilment of the requirements in respect of the master's degree qualification *Magister Legum*, LL.M, in the Department of Mercantile Law, in the Faculty of Law at the

UNIVERSITY OF THE FREE STATE

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November 2014

Declaration

I, Damian John Viviers, declare that the master's research dissertation (dissertation) that I herewith submit for the master's degree qualification *Magister Legum*, LL.M, at the University of the Free State, is my independent work and that I have not previously submitted it for a qualification at another institution of higher education.

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Acknowledgements

To my supervisor, Dr Denine Smit, thank you for your valuable guidance and insight, as well as your support, encouragement and willingness to always go above and beyond for me. My gratitude and appreciation can never be fully expressed. Thank you for being an exceptional mentor and friend.

To my family, especially my parents, thank you for your love, encouragement and always believing in me. Your prayers and support have been invaluable. Thank you for allowing me the opportunity to follow my dreams.

To my friends, particularly my inner circle, thank you for your patience, interest, support and encouragement during the completion of this dissertation – it has meant a great deal to me.

To the members of the Faculty of Law of the University of the Free State, especially the members of the departments of Mercantile Law and Private Law, thank you for taking such a keen interest in my project and for the perpetual willingness to offer words of wisdom and encouragement. I would also like to thank Professor J.L. Pretorius for his input, interest and insights regarding this dissertation.

To Ms Hesma van Tonder from the UFS Information Services, thank you for your assistance with my research. Your competence and kind nature are truly admirable.

Dankie aan my Hemelse Vader, sonder U liefde en genade sou die voltooiing van hierdie taak nie moontlik gewees het nie …

Ut omnia in gloriam Dei

…. Narcissus, incarnation of desire and beauty, refused to take another as his equal, causing despair, turmoil and injustice. As retribution for his vanity, he was seduced to gaze into a pool, where he became mesmerised by his own reflection. There his beauty consumed and destroyed him …[1]

[1] Graves 1981:80-81.

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Chapter 1

Introduction and general orientation

Though I came to realise that it would take a lot more than beauty to conquer the world, I recognised that it definitely could not hurt. Like most people, I learned early in life that physical attractiveness plays a large role in our society, and the concept stuck with me. The importance of physical appearance in our society motivated me to maintain mine and take pride in my outward appearance. I, like others, worked to better myself and my physical appearance constantly. The physical attractiveness phenomenon, as it has been called, pervades and is influential throughout a person's entire life span.[1]

1.1 Introduction and background

The legal consideration of appearance prejudice in employment has gained considerable momentum in recent years (despite having been a problem for many decades). Several foreign jurisdictions have introduced legislation to deal with this issue, and the prevalence of discrimination claims on this ground has increased significantly. South Africa, however, has not yet followed suit in enacting legislation or adopting other measures to govern this problem, in spite of the fact that more and more cases involving elements of appearance discrimination make their way to the steps of the judiciary. The rationale for considering appearance discrimination in the South African context is justified by Pieterse as follows:[2]

> It might seem pointless to argue that the unattractive are worthy of rights-based protection in a society preoccupied with the eradication of discrimination based on race, gender, sexual orientation, religion and culture. However, to ignore negative stereotyping and resulting disparate treatment of those deviating from socially ingrained standards of physical attractiveness is to turn a blind eye to the very nature of discrimination and its consequences.
>
> Appearance overlaps significantly in many respects with a number of grounds upon which our society prohibits unfair discrimination. Race, sex, age and disability all manifest to varying extents in physical appearance.

Subsequent to a comparative and evaluative study, this dissertation will aim to investigate and evaluate appearance-based prejudice in the workplace, its effect on employees, and how it could be regulated within the South African labour arena.

As will be discussed in the chapters of this dissertation, an individual's appearance is one of his or her most defining features. It serves as the primary method of distinguishing one individual from another and determining how he or she will be

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1 Vo 2002:339.

2 Pieterse 2000:121.

perceived and treated by others. People bring all of themselves to work, including their perceptions and appearance preferences. Thus, appearance is not only frequently utilised as a tool to distinguish between people in the social domain, but in the workplace as well.

The following chapters will also illustrate that appearance falls on a continuum, with the mutable (or so-called voluntary) characteristics on one end, and the immutable (or so-called involuntary) characteristics on the other. The mutable characteristics consist of factors such as dress and grooming, while the immutable characteristics consist of factors such as physical attractiveness and height. Somewhere in the middle of this continuum one finds factors such as weight, which is attributable to both mutable and immutable considerations.

The research will further indicate that employers and managerial employees tend to utilise the 'personal appearance' of employees and job applicants in their decision-making processes, policies and practices. Generally, employees and applicants with a favourable appearance are preferred to employees with a less favourable appearance, despite having similar qualifications and the fact that appearance has no bearing on the inherent requirements of the job. Reasons for such discriminatory treatment include the fact that employees represent the business of the employer, and that an employee with a favourable appearance will create the impression of the business also being favourable. These considerations will be extensively explored.

This study will be conducted by way of a comparative research methodology and will be conceptually analytical as well as evaluative and qualitative in nature. Various sources, including academic literature, legislation, case law, statistics and news articles, will be used. The comparative analysis will serve to establish the position on appearance discrimination in workplaces across the world. Sources from the International Labour Organisation, the United States of America, Australia (where relevant) and the European Union (with emphasis on the United Kingdom) will be used to accomplish this objective. These investigations and evaluations will then be used to suggest possible solutions to the problem in the South African labour context.

1.2 Academic and practical reasons for topic selection

The investigation and evaluations in this dissertation will be aimed at forming new theoretical insights and a fresh theoretical perspective on appearance-based prejudice in employment as a distinct ground for discrimination within the South African legal system. Appearance discrimination in employment is currently under-researched in South Africa, and the theoretical foundation of the concept requires clarification and investigation in order to establish its parameters and defining characteristics in the South African context.

Appearance prejudice in the workplace forms part of a new field of development in South African labour law, and incorporates several categories, including physical attractiveness, height, dress, grooming, weight and transgender appearance. The phenomenon is worthy of investigation in light of its prevalence and prominence in many other jurisdictions (especially in recent years), the cases that have already appeared before South African judicial forums, and the lack of clarity of the concept in South African labour law. The parameters of the concept will be extensively investigated in order to suggest possible solutions and attempt to establish its place in law.

The research conducted for this dissertation will have the benefit of helping to solve the practical problems surrounding appearance-based prejudice in employment. Employees who had been subjected to appearance discrimination have presented themselves as vulnerable in many foreign jurisdictions. Discrimination on the basis of appearance goes to the heart of human prejudice,[3] which is not governed by and limited to a specific country or people. It therefore follows that it is likely to be a problem in all jurisdictions. This dissertation will investigate the possible position of appearance prejudice in law as well as possible measures to govern it when it is inevitably thrust into the spotlight in South Africa. It will aim to provide more clarity regarding the definitions and parameters of appearance discrimination, and the possible categories of employees who may be vulnerable to it. Due to the magnitude of possible categories of appearance discrimination, this dissertation will only deal with specific categories thereof, namely physical attractiveness, height, dress and

[3] It also infringes upon the human dignity and right to equality of individuals who are subjected to this prejudice. See Dion *et al* 1972:289; Langlois *et al* 2000:390; Rhode 2010:6.

grooming, weight, and issues relating to transgender appearance. These specific categories have been selected, as their position is currently unclear in South African labour law, while other categories of appearance such as race, sex, age and physical disability have already been afforded extensive attention.

Employees who are exposed to appearance discrimination are rendered vulnerable to violations of their right to dignity, equality and equal opportunity, as appearance-based discrimination is not currently mentioned explicitly as part of the listed grounds of discrimination. This dissertation will thus aim to identify and analyse appearance-based discrimination as such, as well as its possible status as both a listed and unlisted ground.[4] The dissertation will further endeavour to argue that the amendment of section 6(1) of the EEA to include "any other arbitrary ground" strengthens the claim of persons alleging appearance-based discrimination in employment since unfair discrimination on the basis of appearance is, in most instances, arbitrary.

It is also necessary to study the possible effect of discrimination, harassment, bullying, victimisation and unfair treatment in the workplace as a result of appearance discrimination on employees, as well as the frequency thereof. This will illustrate the magnitude and prevalence of the problem, and will assist in determining how appearance discrimination should be governed by law.

1.3 The legal problem and objectives of the study

The legal problem in relation to appearance-based discrimination is that South African law currently has no measures in place to govern the issue. Thus, employers are not explicitly prohibited from using their appearance preferences to unfairly discriminate against and disadvantage employees. Since 'appearance' is not listed as a specific ground of unfair discrimination by either the Employment Equity Act[5] or the Constitution,[6] victims of this kind of discrimination and prejudice have very limited legal recourse.

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4 This will be done as a primary option of granting protection to the victims of appearance-based discrimination in employment.

5 55/1998.

6 1996.

This dissertation will investigate the extent to which the prohibition of appearance discrimination is accommodated under section 9(3) of the Constitution and section 6(1) of the Employment Equity Act. This will in turn indicate whether employees require protection from such discrimination, and will help determine an equitable solution and recommendations for their protection.

After thorough analysis of the legislative definitions, prevalence, parameters and enforcement action in respect of appearance-based discrimination in the foreign jurisdictions, the parameters of the phenomenon in the South African context will also be suggested in accordance with the specific needs of the South African workforce, taking into account its history and culture, while being mindful not to broaden it to the extent of allowing a flood of frivolous litigation.[7]

Therefore, to summarise, this study will aim to address the following:

- What constitutes "appearance" discrimination in employment, and to what extent vulnerable employees in this regard qualify for legal recognition and protection. The appearance discrimination categories that will be considered in this dissertation include physical attractiveness, height, dress codes and grooming standards (with an emphasis on the status of tattoos and piercings), weight-based discrimination, and issues related to transgender appearance;
- The way in which appearance-induced unfair discrimination, harassment, victimisation and bullying influence the employment conditions or employability of victims;
- The possible measures that could be implemented to govern appearance-based discrimination in the South African labour arena in order to safeguard the rights of dignity, equality and equal opportunity in the workplace;
- The prevalence of the phenomenon, and relevant legislation and case law with reference to each of the above.

1.4 A legal study

It is submitted that, while this dissertation constitutes a legal study, it is also necessary to investigate and evaluate certain social and psychological constructs,

[7] Given the variety of sources available in both South Africa and the foreign jurisdictions, a comparison between these will provide a thorough and comprehensive perspective on the matter.

which do not appear in general legal discourse, in order to provide background and clarity surrounding the legal issues. For that reason, human behaviour, prejudice and statistics will be used to illustrate the prevalence and ground-level perspective of the problems.

1.5 Structure of the dissertation

The chapters of this dissertation have been structured in such a manner that each addresses a particular category of appearance prejudice. This approach was selected because each of the independent categories has specific, unique legal considerations, and warrants independent investigation. It must however be noted that although certain categories of appearance-based prejudice are investigated in separate chapters, the primary argument that prejudice on the basis of appearance amounts to unfair discrimination and violates an employee's rights to dignity and equality applies to all the categories.

Each chapter will briefly illustrate the category of appearance prejudice it addresses, the prevalence thereof, followed by a discussion of each comparative jurisdiction in relation to that prejudice category. The chapters will generally follow the same basic structure, which may be illustrated as follows:

- Introduction and background
- Deconstruction of the concept and prevalence of the problem in employment
- The legal position on the appearance category in the various jurisdictions, which will involve the following:

    The position on the appearance category in terms of international law and the International Labour Organisation

    The position on the appearance category in the United States of America (background, legal position and legislation, case law and conclusion)

    The position on the appearance category in Australia (where relevant) (background, legal position and legislation, case law and conclusion)

The position on the appearance category in the European Union (background, legal position and legislation, case law, the legal position in the UK, UK case law and conclusion)

The position on the appearance category in South Africa (background, legal position and legislation, case law and conclusion)

- Possible measures for governing the appearance category in South Africa by law
- Conclusion

The legal position of the comparative jurisdictions will be discussed before that of South Africa in each chapter in order to provide a comprehensive, international view of the problem, its prevalence and how it is governed before it is drawn closer to home and considered in the local context. This will also allow for easy comparison.

Following this introductory chapter, chapter 2 will reflect on the appearance categories of physical attractiveness, height as well as manner of dress and grooming in employment. Chapter 3 will address the category of weight-based prejudice in the workplace, with chapter 4 devoted to the position on transgender and transsexual appearance in the workplace. Chapter 5 will discuss the role of appearance-related harassment and bullying of an employee. Finally, chapter 6 will provide the conclusions and recommendations, which will deviate from the chapter outline provided above.

1.6 Glossary of terminology and constructs

As certain concepts used in this dissertation are not encountered in everyday legal discourse, this glossary is intended to clarify the meaning of the terminology and constructs as they apply to appearance discrimination in the employment context.

Appearance discrimination: For the purposes of this dissertation, appearance discrimination encompasses all unbeneficial and unfavourable differential and discriminatory treatment against individuals with either a favourable or unfavourable appearance characteristic, which has the potential of violating their inherent human dignity or right to equality in the workplace.

Discrimination: This involves the use of irrelevant criteria to distinguish between individuals or groups, bringing about less favourable consequences for members of one group in relation to those of another.[8] The specific personal prejudice of persons will influence the group against whom they are likely to discriminate, as their prejudice determines which stereotypes they consider to be an "out group".[9]

Employment-at-will doctrine: It is important to note that when the United States of America is discussed, its employment system adheres to the employment-at-will doctrine, in terms of which it is presumed that the employment relationship is for an indefinite period and may be terminated by either party at any time.[10]

Prejudice: This may be viewed as an attitude;[11] a subjective negative view of certain persons and situations. It deals with how individuals think and feel about other individuals and groups,[12] and is based on a faulty and inflexible generalisation.[13] Stereotyping is also linked with prejudice, and is described as involving negative beliefs and thoughts about people.[14] 'Modern prejudice' is described as "any expression of prejudice that is subtle, easily justified, and hence, difficult to detect".[15]

Stigmatisation: This occurs when people rely on stereotypes to separate themselves from other groups. Stereotyped groups are isolated and vulnerable to stigmatisation and discrimination.[16] These stereotypes are brought to the fore by the repeated exposure to subjective views of others in a majority group, and media sources such as newspapers, books and television.[17]

Vulnerability: Determining the parameters of and defining employment vulnerability is a complex issue, since specific criteria have not yet been established to determine which workers (currently falling outside the scope of the protection of labour laws) are vulnerable enough to receive protection.[18] The International Labour Organisation

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8 Du Plessis and Fouche 2012:93.

9 Whitley and Kite 2010:376.

10 There has however been a move away from this doctrine over the last decade, with a growing emphasis on employees' rights. See Cornell University Law School 2014.

11 Whitley and Kite 2010:370.

12 Whitley and Kite 2010:370.

13 Brown 1995:6.

14 Blaine 2012:66.

15 Blaine 2012:78.

16 Brown 1995:83.

17 Brown 1995:83.

18 Viviers and Smit 2014:61.

has however given an indication of what constitutes employment vulnerability: "Vulnerable employment is often characterised by … difficult conditions of work that undermine workers' fundamental human rights."[19]

1.7 Appearance discrimination in employment: An international phenomenon – considerations from across the world

The levels of employer interest in aesthetic labour ("a workforce with a favourable appearance") have increased significantly across the world. This trend has seen the occasional appearance discrimination claim being brought under the relevant judicial forums.[20] This is a global concern and not limited to any specific country or culture.

Appearance discrimination in the **United States of America** has effectively become known as "lookism", which has been the subject of widespread academic research in the wake of recent cases before the United States courts.[21] One such case came about when the international cosmetics company L'Oreal instructed one of its sales managers in San Francisco to terminate the employment of a saleswoman because she was "not good-looking enough".[22] In the USA, one state and several districts have enacted legislation that prohibits discrimination on the basis of appearance.

In the **United Kingdom**, appearance-based discrimination has been termed "aesthetic labour", and has been the subject of established academic research in recent years.[23] Although appearance discrimination has been identified as a problem in the UK, the country's anti-discrimination laws do not offer explicit protection on this ground.[24] Studies carried out in the UK have illustrated that there is employer demand for employees whose appearance can be shaped to represent the company image and brand.[25]

In 2006, BBC News reported that the **Chinaese** Navy was only interested in enlisting sailors who were "good-looking and polite".[26] The reasoning behind this was that the sailors of the Navy were ambassadors of China and represented the country on the

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19 Viviers and Smit 2014:61.
20 Waring 2011: 194.
21 As will be discussed in 2.4.2.5. See Warhurst *et al* 2009:131.
22 *Yanowitz v L'Oreal USA, Inc*. 32 Cal. Rptr. 3d 436 Cal 2005; Waring 2011:194.
23 Warhurst *et al* 2009:131.
24 Warhurst *et al* 2009:133-134.
25 Waring 2011:194.
26 Warhurst *et al* 2009:131; BBC News 2006.

international stage.[27] Such a condition for employment has the effect of discriminating against certain candidates who may have all the relevant skills to perform the inherent requirements of the job, but fall short for not being "good-looking" enough.

Meanwhile, in **Japan**, a former senior executive of the international luxury fashion retailer Prada testified before court that the senior management of the brand had instructed her to terminate the employment of all employees who were "old, fat, ugly or not having the Prada look".[28]

In Singapore, **Malaysia**, an award-winning advertisement for an airline displayed a close-up picture of its female flight attendants' bottoms, accompanied by the suggestive wording "Explore the backyard of Malaysia".[29] This can be seen as a clear instance of a workforce with a favourable appearance being utilised to generate a profit, to the exclusion of those female flight attendants who do not have an "attractive behind".

Appearance discrimination has also received attention in **Australia**, where it has become known also as "aesthetic labour". Several cases have been brought before the Australian courts relating to this ground of discrimination in employment.[30] In response, one Australian state has gone so far as to enact legislation that prohibits discrimination on the basis of appearance.[31]

In the context of **South Africa**, appearance discrimination has been identified as a potential as well as an actual problem.[32] Several cases involving an element of appearance discrimination have come before the Commission for Conciliation, Mediation and Arbitration (CCMA) as well as the South African courts. This is not unexpected, since a country with such diverse people, cultures, religions, languages and a competitive job market is sensitive to discrimination on any ground. Yet, as is evident from the above, it is not a uniquely South African problem, but is seen in many industries and businesses aimed at generating a profit.

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27 Warhurst *et al* 2009:131.

28 Waring 2011:194; Herald Sun News 2010. http://archive.is/ntj0f. Accessed on 31/03/2014.

29 Waring 2011:194.

30 As will be discussed in 2.4.3.2 below. See Warhurst *et al* 2009:131,134.

31 Warhurst *et al* 2009:134.

32 Bulger 1998:1; Wolf 2013:1; FSP Business Team 2013:1.

Chapter 2

Categories of appearance discrimination

A favourable appearance has been described as:

"A greater recommendation than any letter of introduction" – Aristotle[1]

"A short[-lived] tyranny" – Socrates[2]

"The privilege of nature" – Plato[3]

2.1 Introduction and background

Appearance has been a key consideration and obsession of society for thousands of years, and is recorded in every culture, time period and country throughout history.[4] The ancient Greeks were devoted to the admiration of aesthetics (the philosophy of beauty and beautiful things)[5] and regarded beauty as a primary consideration in their society.[6] This culture spread to all people conquered by the Greeks, integrating the consideration and importance of beauty with those cultures as well.[7] Archaeological evidence confirms the paraphernalia associated with physical attractiveness in many cultures, including ancient Egypt, Cro-Magnon man burial sites and present-day burial caskets.[8]

This chapter will investigate and discuss the concept of appearance prejudice as well as its role in employment against the backdrop of unfair discrimination and equality principles in South Africa and the comparative jurisdictions. The various aspects of appearance discrimination will each be separately investigated and discussed. The legal position on appearance discrimination in the various jurisdictions will also be

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1 Hughes 2009. http://www.bettanyhughes.co.uk/the-helen-syndrome-the-curse-of-beauty. Accessed on 22/03/2014.

2 ThinkExist.com 1999-2014. http://thinkexist.com/quotation/socrates_called_beauty_a_short-lived_tyranny/162318.html. Accessed on 20/03/2014; Langlois *et al* 2000:390.

3 ThinkExist.com 1999-2014. http://thinkexist.com/quotation/socrates_called_beauty_a_short-lived_tyranny/162318.html. Accessed on 20/03/2014; Langlois *et al* 2000:390.

4 Vo 2002:341.

5 Encyclopaedia Britannica 2014. <http://global.britannica.com>. Accessed on 20/03/2014.

6 Baron 2008. http://www.aish.com/h/c/t/dt/48971961.html. Accessed on 20/03/2014.

7 Baron 2008. http://www.aish.com/h/c/t/dt/48971961.html. Accessed on 20/03/2014.

8 Patzer 1985:4.

explored. Lastly, the chapter will discuss whether appearance discrimination is being recognised in law, and whether it warrants protection.

2.2 Deconstructing appearance and appearance prejudice

2.2.1 "What is beautiful is good"[9]

The physical attractiveness or appearance of an individual has been described as the individual's most prominent, noticeable characteristic as well as the characteristic most accessible to others.[10] Research has suggested that a physical attractiveness stereotype exists, as well as bias in favour of persons with a favourable physical appearance.[11] Physically attractive persons are perceived to have more socially desirable personalities, to be more intelligent, more interesting, kinder and more able to secure prestigious jobs and live happier and more successful lives.[12]

This perception, originally suggested by Dion *et al* in the early 1970s, has become known as the "what is beautiful is good" thesis.[13] Support for this theory may be traced back as far as ancient Greek culture, who believed that there was a fundamental relationship between favourable appearance and other positive qualities, purporting that those who were beautiful were also good.[14] In today's society, beginning at birth, these "attractive" persons are viewed as more intelligent, likable and good.[15] Consequently, an individual's appearance tends to overshadow his or her other characteristics, and creates a more favourable perception of the person's other attributes.[16]

This thesis is also noticeably present in the employment realm, where persons who are more attractive are perceived to be more likely to achieve success, to be more hireable as managers, to receive a higher starting salary and achieve higher performance scores than their less attractive colleagues.[17] Thus, as a powerful form

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9 Dion *et al* 1972:289.
10 Dion *et al* 1972:285.
11 Dion *et al* 1972:289.
12 Patzer 1985:8.
13 Dion *et al* 1972:289.
14 Langlois *et al* 2000:390.
15 Rhode 2010:6.
16 Mahajan 2007:166.
17 Johnson *et al* 2010:301-302.

of non-verbal communication,[18] appearance will influence perceptions of job performance and professional competence, which will in turn influence salary and status.[19] Persons with a less favourable appearance are likely to have their curricula vitae assessed in a less favourable manner and also less likely to be appointed to the position in question.[20] This equally applies to the promotion of the employee, even in professions where appearance is irrelevant to job performance.[21]

It follows, then, that the more favourable a person's appearance, the more positively the person will be perceived and responded to, and the more successful the person's personal and professional life. Conversely, a less favourable appearance will result in less favourable treatment and less success.[22] Persons generally associate an unfavourable appearance with unfavourable characteristics, creating the stereotype that "what is ugly is deviant."[23] People are said to believe, either consciously or unconsciously, that individuals with an unappealing exterior also have unappealing interiors, or will develop such unappealing interiors over time.[24]

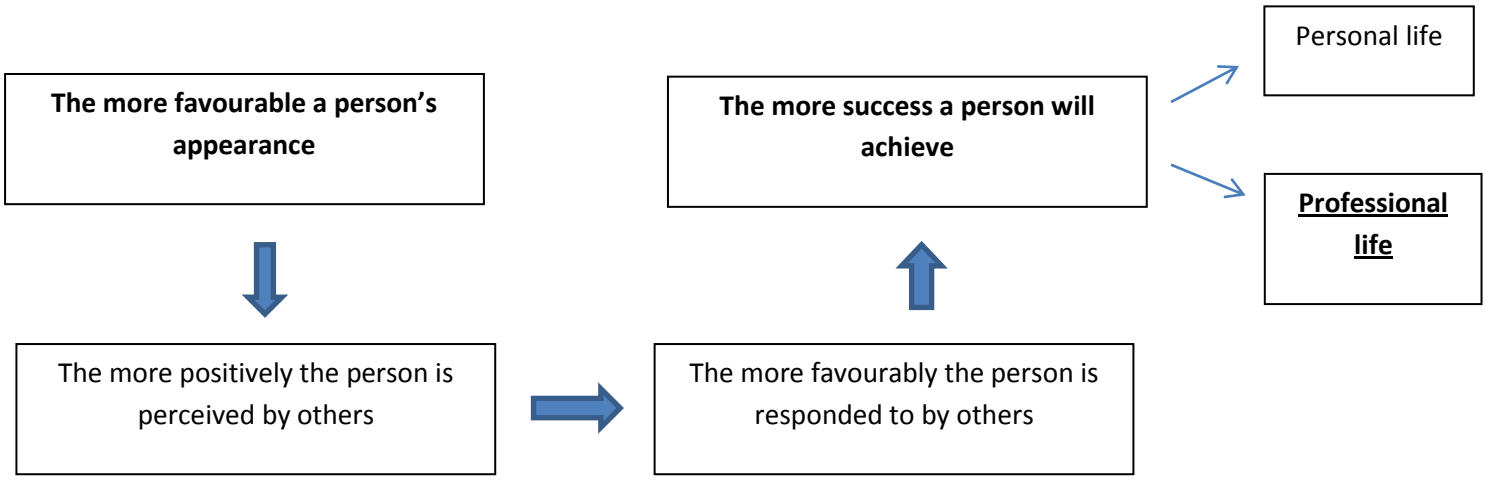

Diagram 1: Illustration of the "what is beautiful is good" principle

18 Mahajan 2007:167.
19 Rhode 2010:6.
20 Rhode 2010:6.
21 Rhode 2010:6.
22 Patzer 1985:2.
23 Patzer 1985:2; Fleener 2005:1315.
24 Harvard Law Review 1987:2038.

Professor D.L. Rhode[25] has conducted extensive research on appearance discrimination and its effects. She reports the following: In the United States of America, an exorbitant amount of money is spent on improving appearance each year. The following statistics have been recorded in this regard:[26]

- Altogether $40 billion per annum is spent on diets (even though 95% of dieters regain this weight within five years).
- Cosmetic product purchases amount to $18 billion per annum (of which only 7% actually finances the ingredients of these products).
- Almost 20% of the population lacks basic health-care services; cosmetic procedures, however, have increased by 400% over the last 10 years.
- Liposuction is the most prevalent form of surgery in the world.

Furthermore, it is significant to note that even though the global economy is struggling, the funds invested in appearance each year exceed $200 billion.[27] It may be assumed from the abovementioned statistics that society's obsession with beauty is not just a feature of the past. It is alive and well in modern society, affecting every sphere of life, not least of which the employment realm. In addition, appearance-based discrimination and stigma is responsible for many personal problems experienced by employees, such as depression and stress.[28] Thus, although people often suggest that it is preferable not to "judge a book by its cover", in reality, this is simply not the case.[29] The stereotypes and discriminatory attitudes in relation to appearance defeat the idea that different appearances merely constitute different examples of diversity, and the notion that one can be intelligent and successful irrespective of your appearance.[30]

2.2.2 A favourable appearance

A foremost problem in the area of appearance discrimination is defining and quantifying the concept of a favourable appearance. What constitutes a favourable

[25] Professor D.L. Rhode is a professor of law at Stanford University, USA, and one of the foremost authorities on appearance discrimination and its injustices. Her work will be referred to throughout this dissertation.
[26] Rhode 2010:6-7.
[27] Brown 2013:1; Rhode 2009:1034.
[28] Rhode 2010:7.
[29] Patzer 1985:12.
[30] Jones 2013:505.

appearance? This question has been the focus of many debates and studies. “Attractiveness” has been described as a social construct that varies in its definition across cultures, and changes over time.[31]

Although the general perception is that “beauty is in the eye of the beholder”, research has suggested that this is not necessarily the case, and most people generally agree on the attractiveness of certain characteristics.[32] This may be attributable to the global village of the 21st century and the views of attractiveness peddled by the media.[33] Computers, the internet and three-dimensional images play no small part in putting people with a favourable appearance on a pedestal.[34] Magazines and television programmes clearly illustrate the obsession with appearance,[35] which in turn plays a role in setting the standards that people perceive to be the norm. The frenzy surrounding appearance, as aggravated by the media, is not only an indication of society’s preoccupation with beauty, but is ultimately also the vehicle that drives appearance-based discrimination.[36] It is argued that this is so because the media keeps the obsession with a favourable appearance relevant and alive, and implies on a subconscious level that it is the norm to which one and all should adhere.

A favourable physical appearance may be attributed to many biological factors, but largely depends on the person’s waist-to-hip ratio and the symmetry of his or her face.[37] The standard attractive female appearance has been identified as a small waist-to-hip ratio, a light body weight and femininity.[38] The standard attractive male appearance has been identified as a larger waist-to-hip ratio, masculinity and a muscular build.[39]

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31 Toledano 2013:683.
32 Rhode 2010:24; James 2008:636; Langlois *et al* 2000:390-391.
33 James 2008:629; Rhode 2010:24.
34 Corbett 2011:16; Rhode 2010:52-68.
35 Cavico *et al* 2012:791; James 2008:629.
36 Brown 2013: 1.
37 Toledano 2013:686, referring to Dixson *et al* 2011:43 and Fink *et al* 2006:491.
38 Toledano 2013:87, referring to Grundl *et al* 2009:1068.
39 Toledano 2013:688, referring to Dixson *et al* 2003:29, 33.

A favourable appearance is also fuelled by presentation,[40] which is why a person's clothing and grooming methods will contribute to the overall favourableness of his or her appearance.

2.2.3 Appearance discrimination

The second and more important question that will be investigated is what constitutes appearance discrimination. Appearance discrimination has been identified as an existing and prevalent problem in employment spheres across the world. In the United States of America, the phenomenon of appearance discrimination has been termed "lookism", while in the United Kingdom and Australia, it has become known as "aesthetic labour".[41]

The term lookism originated in the 1970s and was used for the first time in print by the *Washington Post*.[42] It refers to "the experience of prejudice or discrimination on the grounds of appearance".[43] Lookism has also been associated with the general "look" of a person as well as their "style",[44] and is thus not restricted to immutable characteristics only. It also refers to the idea that individuals' appearance indicates their value, especially in the employment arena, and is measured according to society's standard of what beauty should be.[45] This, in turn, results in stereotypes and generalisations about how people measure up to this standard.[46]

The term aesthetic labour has become popular and its use more explicit amongst academics and legal experts in the United Kingdom and Australia. Aesthetic labour has been described as "the employment of workers with desired corporeal dispositions. With this labour, employers intentionally use the embodied attributes and capacities of employees as a source of competitive advantage".[47] One of the most important considerations of aesthetic labour is said to be people's corporeal dispositions that employers can commodify and exploit in an attempt to increase

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40 Toledano 2013:286.
41 Warhurst *et al* 2009:131.
42 Warhurst *et al* 2009:133.
43 Desir 2010:632, referring to the American Heritage Dictionary of the English Language 2000:1032; Brown 2013:2.
44 Tietje and Cresap 2005:33.
45 Fleener 2005:1299, referring to Browne and Giampetro-Meyer 2003:61,87.
46 Brown 2013:2.
47 Karlsson 2012:54, referring to Warhurst and Nickson 2007:107.

their profits and competitive advantage.[48] Aesthetic appearance is utilised as a powerful form of capital in the employment realm, despite being unevenly distributed amongst employees and potential employees,[49] and is seen as an increasingly significant dimension of the modern workplace.[50]

Rhode has however suggested that appearance discrimination falls on a continuum deriving from two foundations. Firstly, it derives from the immutable characteristics of a person, which are inherent to each unique individual and are difficult or impossible to alter.[51] These are features such as a person's facial structure or height. It is argued that the inflexibility of these features makes them akin to other rigid personal characteristics, such as race and gender. The second foundation for appearance discrimination is those appearance characteristics that are voluntary, optional or easily changeable, such as clothing and grooming choices.[52] In the middle of these two foundations lie certain other appearance characteristics that are attributable to both biological and behavioural factors, such as weight.[53] The appearance factors that form the basis of an appearance discrimination claim may therefore be any or a combination of these.

However, in line with the general definition of discrimination mentioned in the previous chapter, in order for discrimination to exist, it will have to be shown that a person has been subjected to differential treatment, which resulted in unfavourable consequences based upon appearance. Thus, a person must have been treated differently because of his or her less favourable appearance, which distinction must have caused some form of prejudice or unjust consequences for such person. The discrimination may be blatant, subtle or covert. In the employment setting, an employee is treated differently and/or unfavourably because of an employer's particular employment policy or practice. Brown argues that appearance discrimination is difficult to identify, since it often overlaps with other forms of injustice and discrimination.[54]

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48 Karlsson 2012:54.
49 Tietje and Cresap 2005:32.
50 Entwistle and Wissinger 2006:776, referring to Witz *et al* 2003.
51 Rhode 2010:25.
52 Rhode 2010:25.
53 Rhode 2010:25.
54 Brown 2013:2.

A study in the United States revealed just how much importance people attach to appearance in employment, and yielded the following results:[55]

- Of all the participants, 13% stated that they would contemplate having a cosmetic medical procedure in order to improve their confidence and competitiveness in the job market.
- Altogether 3% revealed that they had already undergone a cosmetic procedure in order to increase their value in the workplace.
- Some 73% believed that a favourable appearance influenced employment decisions such as hiring and promotion, as well as the recruitment of new clients.

An economic study found that "plain people" earn between 5% and 10% less than "average-looking" people, who again earn 5% less than "good-looking" people.[56] Biddle and Hamermesh indicate that reasons for the discrepancy in earnings based on appearance include discrimination by employers and customers.[57] In an article titled "The beauty advantage", the magazine *Newsweek* reported on a survey it had conducted, which found that 57% of managers said that qualified yet unattractive candidates would have a more difficult time securing a job.[58] The article also stated: "It's better to be average and good-looking than brilliant and unattractive", and "When it comes to the workplace, it's looks, not merit, that all too often rule".[59]

Brown and the *Harvard Law Review* have stated that appearance is the single most important criterion in employee selection in numerous vocations,[60] irrespective of the nature of the job or the relevance of the employee's appearance to the specific task at hand.[61] This has led Rhode to argue that if an employee who has a less favourable appearance is not hired or promoted, or receives a lower salary or a less favourable performance evaluation, this should constitute employment discrimination, as it represents unfounded discrimination based on certain

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55 Cohen 2014:2.
56 James 2008:637; Hamermesh and Biddle 1994:1174,1186.
57 Biddle and Hamermesh 1998:197.
58 Bennet 2010. http://www.newsweek.com/beauty-advantage-how-looks-affect-your-work-your-career-your-life-74313. Accessed on 22/03/2014.
59 Bennet 2010. http://www.newsweek.com/beauty-advantage-how-looks-affect-your-work-your-career-your-life-74313. Accessed on 22/03/2014.
60 Brown 2013:2.
61 Harvard Law Review Association 1987:2040.

employment policies and practices.[62] Such prejudices may also cause an employer to underestimate the abilities and talents of an employee (or potential employee) simply because of a less favourable appearance.[63]

Furthermore, appearance-based discrimination may be seen as unfair because it disadvantages people based on characteristics that are, for the most part, beyond their control. Employers will most likely not have an official policy that promotes differential treatment based on appearance (although the possibility is not excluded), and the differential treatment will probably rather be in the form of an unofficial employment practice such as a decision-making process.[64] The primary reason why employers make employment decisions based on appearance is that the employee represents or acts as the face of the business.[65] Since customers and clients will take in the favourable appearance of the employees, and such appearance will be associated with other favourable characteristics, they will also associate this with the business being favourable. It has also been suggested that employing an aesthetically pleasing workforce will have the benefit of identifying and distinguishing the employer's services, as well as offering a competitive edge.[66] It is therefore economically beneficial for employers to discriminate on the basis of appearance,[67] since appearance is a powerful form of non-verbal communication and will act as a means to promote the business's products and services.

Irrespective of the psychological or physiological reason, employers understand that employees who do not have a favourable appearance or "do not look like they can take care of themselves will not elicit confidence that they can take care of a potential customer's business".[68] Consequently, employers attempt to control appearance in the workplace,[69] which motivates them either subconsciously or consciously to discriminate based on appearance. An employer does so not because an employee may be more attractive, but because the employer has drawn

62 Rhode 2010:95.
63 Harvard Law Review Association 1987:2039.
64 Unless appearance is an inherent requirement of the position (such as modelling). See Crow & Payne 1992:869.
65 Cavico *et al* 2012:791-792; James 2008:638.
66 Waring 2011:196.
67 Cavico *et al* 2012:792; James 2008:638.
68 Fowler-Hermes 2001:32.
69 Fowler Hermes 2001:32.

conclusions about the employee's personality based on appearance, and believes that their personality will be better suited for the position in question.[70]

Employers may discriminate against employees based on appearance post-appointment by imposing grooming, dress and other appearance standards.[71] This is often also done on the premise that "favourable appearance sells".[72] Differential treatment on the basis of appearance, however, raises several red flags in terms of jurisprudential, ethical and moral issues.[73]

Therefore, although certain individuals may possess the necessary merit to perform the inherent functions of a job, if they lack a favourable enough appearance to represent the brand or the look that the business seeks to project, they may not be hired.[74] Discrimination based on appearance is more than just a moral or ethical issue[75] due to the disadvantage and unfair treatment it perpetuates, not only at grassroots level, but potentially at every rung of the employment ladder.

Abercrombie and Fitch – an example of how 'lookism' may present itself in practice

Abercrombie and Fitch (A&F) is an American-based clothing store with over 600 outlets in its chain throughout the United States,[76] and operations in Europe and Asia as well.[77] In 2003, A&F reported annual sales of $1,6 billion.[78] In the 2013 financial year, A&F recorded an operating profit of $374,2 million and a net profit of $237 million. This clothing retailer prides itself on its "looks policy", which requires its sales employees (called "brand representatives") to meet a strict appearance requirement – they must be of a "natural, classic American style",[79] and appear "cool yet seductive".[80] In effect, this "looks policy" ended up giving preference to attractive,

70 Toledano 2013:693.
71 Corbett 2007:154; Mahajan 2007:165.
72 Corbett 2007:154.
73 Waring 2011:197.
74 Fleener 2005:1303.
75 Crow and Payne 1992: 869.
76 Fleener 2005:1295, referring to Young 2003:9.
77 MarketLine 2014:3.
78 Fleener 2005:1295, referring to Young 2003:9.
79 Fleener 2005:1295, referring to Greenhouse 2003:12.
80 Zakrzewski 2005:431.

mostly white, physically fit males and females with blond hair and blue eyes.[81] Consequently, only attractive people were employed by A&F, or the less attractive employees were granted fewer working hours than their more attractive fellow workers.[82]

Like many other employers, A&F openly admits to its desire to employ an attractive staff corps.[83] Another method used by A&F to portray its brand and implement its "looks policy" is to cover the walls of their stores and the pages of their advertising material with pictures of models that fit their brand.[84] The very attractive and appealing A&F employees are thus regarded as "walking billboards" for the brand.[85]

This strict "looks policy" was the basis of a class action against A&F, namely *Gonzalez v Abercrombie and Fitch Stores Inc*.,[86] which resulted in a settlement of approximately $50 million.[87] The 14 plaintiffs in this claim alleged that A&F's "looks policy" went further than permissibly regulating employee appearance on the job,[88] and resulted in employment discrimination. This allegation was made because A&F selected the most "exemplary models" from photographs and used this as the standard of attractiveness for all its stores' employees.[89] Although the employees in this case were able to settle the case under the primary banner of racial discrimination, it has been stated that the discrimination is not restricted to racial minorities, but can disadvantage all persons who do not fit into "the narrow confines" of the employer's "looks policy".[90] It has furthermore been noted that the discrimination behind the "looks policy" is not that of racism (although it also has this effect), but rather the aesthetic values of the retailer, namely appearance discrimination (lookism).[91]

81 Brown 2013:4.
82 Zakrzewski 2005:431.
83 James 2008:654, referring to Greenhouse 2003:12.
84 James 2008:654.
85 James 2008:654.
86 *Gonzalez, et al. v Abercrombie & Fitch Stores, Inc., et al.* No. C03-2817, filed in June 2003 and settlement approved by the US district court in April 2005.
87 Fleener 2005:1295-1296.
88 Fleener 2005:1296.
89 Fleener 2005:1296.
90 Fleener 2005:1297.
91 Desir 2010:634.

In conjunction with the *Gonzalez* matter, A&F settled another two cases relating to its looks policy and appearance-based discrimination, although these cases were settled based on sex and religious discrimination respectively.[92] This case illustrates an important principle, namely that the appearance discrimination tolerated by society and the discrimination condemned by society are related.[93]

A&F also placed another advertisement outside its store in Aberdeen, Scotland, stating that it was looking for "cool and good-looking" employees.[94] The controversial advert generated a strong backlash from the community, which resulted in statements about how "ridiculous" it was that a major brand such as A&F had "no regard for employment law".[95] It was also stated that the advertisement was evidence of A&F's lack of commitment to equal opportunity and diversity in the workplace.[96]

It is argued that while the first advertisement discriminated more subtly on the basis of appearance, the second one clearly indicated the intention to prejudice "non-good looking" job applicants and promote an employment environment devoid of equality and fairness.

2.2.4 Conclusion

Beauty bias has been identified as an issue not only in employment, but something "fairly universal", appearing in a variety of different cultures across the world.[97] Discrimination based on appearance is undoubtedly one of the most intriguing and complex issues in employment discrimination law.[98] In recent years, the issue has become more prevalent, resulting in its status as the new "sizzling hot topic" in

92 Corbett 2011:23, referring to Cutler 2004:A-2.
93 Fleener 2005:1329.
94 Peacock 2010. http://www.personneltoday.com/hr/abercrombie-fitch-could-face-discrimination-claims-over-cool-and-good-looking-job-ad/. Accessed on 25/03/2014.
95 Peacock 2010. http://www.personneltoday.com/hr/abercrombie-fitch-could-face-discrimination-claims-over-cool-and-good-looking-job-ad/. Accessed on 25/03/2014.
96 Peacock 2010. http://www.personneltoday.com/hr/abercrombie-fitch-could-face-discrimination-claims-over-cool-and-good-looking-job-ad/. Accessed on 25/03/2014.
97 Shahani-Denning 2003:16.
98 Corbett 2011:2.

discrimination law globally,[99] and the suggestion that "appearance discrimination should be recognised as the new supermodel issue of employment law".[100]

2.3 Types of appearance discrimination

2.3.1 Physical attractiveness

2.3.1.1 A common manifestation of "lookism"[101]

As described earlier, appearance falls on a continuum representing characteristics that are immutable and not easily changeable on the one end and those that can be more readily altered on the other. Physical attractiveness may be classified as an immutable characteristic, as it cannot be altered without difficulty.[102] People differentiate based on appearance mostly on an unconscious level (being intuitively attracted to others whom they find physically appealing)[103] and, as such, neither the victim nor the perpetrator may be aware of the extent or consequences of the differentiation.[104] This holds true for discrimination based on physical attractiveness, as a specific form of appearance discrimination, as people notice and favour that which appeals to them. The "aesthetically challenged", on the other hand, generally do not share in the advantages allotted to the attractive.[105] It has been suggested, however, that it is unjust for attractiveness, which may justify decisions in one sphere (such as intimate relationships), to also be used as a basis for decision-making in other spheres (such as the employment realm).[106]

The question then arises as to what constitutes "unattractive". Which individuals would be considered "unattractive" enough to fall into this category?[107] Naturally, given the stigma and negative connotations of being unattractive, few people would want to claim such a status.[108] Consequently, the victims of discrimination based on physical attractiveness do not identify as a cohesive group (such as racial, ethnic or

99 Corbett 2011:2-3.
100 Corbett 2007:162.
101 Desir 2010:653.
102 Rhode 2010:25.
103 Corbett 2011:16.
104 Rhode 2010:101.
105 Corbett 2007:157, referring to Baron 2005:386.
106 Rhode 2010:94.
107 Rhode 2010:101.
108 Rhode 2010:101.

gender groups).[109] For the purposes of this dissertation, therefore, the victims of discrimination based on physiognomy will encompass all persons who may be discriminated against based on their physical (un)attractiveness.

2.3.1.2 Discrimination based on physical attractiveness

Rhode has said the following in relation to physical-attractiveness discrimination in employment: "On the whole, … less attractive individuals are less likely to be hired and promoted, and they earn lower salaries despite the absence of any differences in cognitive ability." [110]

Discrimination on the basis of physical attractiveness has been recognised as one of the most frequently practised types of employment discrimination, and generally does not fall within the ambit of labour law.[111] Discrimination on this ground is at least as prevalent (if not more so) than discrimination based on other protected traits such as sexual orientation, gender, pregnancy or race.[112]

Cavico and colleagues argue that, in the employment sphere, employers often make decisions based on physical attractiveness.[113] Employers, like the rest of society, acknowledge the fact that looks do matter, which acknowledgement is reflected in their employment decisions.[114] As mentioned earlier, employers attempt to use their employees' aesthetic capital as a marketing technique[115] – a phenomenon clearly illustrated by the case of A&F – to further their business and its success, because, according to market analysts, employees' attractiveness reflects on the brand and its image.[116] It is hard to dispute that attractiveness sells.[117]

But where does this leave the less attractive candidates and employees, who do not make the grade? It is submitted that the differential treatment of less attractive persons in employment amounts to discrimination, and is founded on the prejudice that attractive people are "superior" and should thus receive superior treatment and

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109 Rhode 2010:101.
110 Hamermesh and Biddle 1994:1174; Rhode 2010:27.
111 Corbett 2011:9.
112 Rhode 2010:102.
113 Cavico *et al* 2012:791.
114 Cavico *et al* 2012:791-792.
115 Cavico *et al* 2012:792.
116 James 2008:638.
117 Fowler-Hermes 2001:32.

superior salaries.[118] These less attractive individuals are discriminated against based on characteristics beyond their election or control, much similar to characteristics such as race and gender. Fleener summarises this position quite well:[119]

> Individuals who have qualifications for the core job duties but lack the necessary looks – a physically apparent but less clearly categorised facet of appearance – suffer similar injuries [to those suffered by people discriminated against based on race, gender, age, etc] when employers refuse to hire them because they do not fit the image the company seeks to project.

It is also important to distinguish between employees who perform various job duties, and models of a business (whose sole purpose is to promote the business and its image).[120] With the latter, appearance is an inherent requirement of the job, as models are hired with the explicit purpose of promoting the business.[121] With the former (such as sales or office staff), appearance is not likely to be an inherent requirement of the position. Yet, employers appear to prefer attractive employees for these positions too.[122] Employers prefer such employees to be attractive because they may interact with clients, and should consequently promote a positive image of the business.[123]

Another question that now presents itself is whether it would constitute unjust appearance discrimination based on attractiveness if employers give preference to the aesthetically gifted in vocations that sell physical attractiveness. Examples of such vocations may include the entertainment industry, exotic dancing and modelling.[124] Gumin has suggested that employers may indeed discriminate on the basis of attractiveness in these vocations.[125] Until recently, discrimination based on physical attractiveness was considered nothing more than a moral or ethical issue[126] – insignificant enough not to warrant legal consideration. However, awareness of this category of discrimination has amplified significantly in recent years,[127]

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118 Mahajan 2007:168.
119 Fleener 2005:1303.
120 Fleener 2005:1303.
121 For example, by appearing on promotional material of the business, such as posters and brochures, with the primary purpose of "selling" the business image. See Fleener 2005:1303.
122 Shahani-Denning 2003:14.
123 Fleener 2005:1303.
124 Gumin 2012: 1771.
125 Gumin 2012:1771.
126 Crow and Payne 1992:869.
127 Crow and Payne 1992:871.

predominantly because society appears to be possessed by a "cult of beauty",[128] resulting in societal and employment injustices.

2.3.2 Height

2.3.2.1 "Heightism"

Similar to physical attractiveness, height also falls on the appearance continuum as an immutable characteristic. A person's height cannot be easily altered, if at all. It has been stated that considering height as a form of discrimination is almost "laughable"; yet, it cannot be denied that people do place a certain premium on height, be it in a social, sexual or economic context,[129] and that it cannot simply be dismissed as a folk tale.[130] Favourable treatment based on height has been described as one of the primary, most blatant and most forgiven prejudices in society.[131]

Many studies suggest a positive correlation between height and a variety of other favourable traits and characteristics.[132] People have been said to engage in so-called "gaze behaviour", which is a rather primitive manner of establishing social hierarchies based on whether a person looks up to or down on another.[133] Those who are looked down on (shorter individuals) are ascribed less social power and assumed to have negative character traits.[134] Conversely, taller individuals who are looked up to enjoy the so-called "halo effect" and are attributed positive character traits.[135]

Discrimination on the basis of height is however nothing new, and can be noted throughout history and across cultures.[136] Ancient Egyptian wall paintings reflect status in accordance with height, illustrating that the more important a person was, the taller his or her figure would have been.[137] Anthropologists have discovered taller skeletons in more elegant tombs, while shorter skeletons have more often been

128 Crow and Payne 1992:871.
129 Rosenberg 2009:908-909.
130 Judge and Cable 2004:428.
131 Rosenberg 2009:909, referring to Galbraith 1977:22.
132 Craig Roberts 2012:783.
133 Rosenberg 2009:910, referring to Martell and Biller 1984:35.
134 Rosenberg 2009:910, referring to Martell and Biller 1984:34-35.
135 Rosenberg 2009:910-911, referring to Martell and Biller 1984:36.
136 Patzer 1985:164.
137 Patzer 1985:164.

found in common graves.[138] In the modern world, certain everyday expressions have a bearing on height-based prejudice. These include having respect for persons who "sit tall in the saddle" and "walk/stand tall", and disrespect for those whose behaviour "stoops too low" and who "belittle" others.[139]

Height-based discrimination has been termed "heightism", a phrase coined in the early 1970s.[140] The sociologist Saul Feldman, who introduced the phrase, also stated that "to be tall is to be good and to be short is to be stigmatised".[141] Judge and Cable describe height as being a "socially desirable asset", because, as research has suggested, it results in an easier life, more power and greater respect.[142] Discrimination based on height is, to some extent, comparable to discrimination based on physical attractiveness, since persons of taller heights generally receive more favourable treatment than those of a lesser height, and it would appear that society has a subtle prejudice in favour of taller people.[143] It has also been stated, however, that the human prejudice related to height is pervasive and its existence not readily acknowledged.[144] Yet, short people are indeed victims of discrimination.[145]

2.3.2.2 "Heightism" in employment

The realm of employment is by no means immune to the effects of height-based discrimination,[146] and Rosenberg has even stated that it perhaps affects employment in a similar way than discrimination based on race and gender does.[147] Height reportedly affects the employment of a person vulnerable to height discrimination, not only in the course of employment, but during the hiring and selection phase as well.[148] In this latter phase, the job candidate may very well be refused employment based on his or her height.[149] If the person is indeed employed, the discrimination

138 Patzer 1985:164.
139 Patzer 1985:164.
140 Rosenberg 2009:909, referring to Feldman 1971:64.
141 Patzer 1985:163, referring to Feldman 1971:1.
142 Judge and Cable 2004:428.
143 Patzer 1985:163-164.
144 Rosenberg 2009:913, referring to Martel and Biller 1984:38.
145 Pechman 1997:3.
146 Patzer 1985:168.
147 Rosenberg 2009:914, referring to Persico *et al* 2004:1019, 1020.
148 Patzer 1985:168.
149 Patzer 1985:168-169.

may continue. This is shown by the fact that taller individuals often hold jobs of a higher status[150] and earn a higher salary than shorter individuals, despite not necessarily deserving it.[151]

The effect of height on salary is no myth. It has been found that every additional inch (2,54 cm) in height results in a 1,8%-2,2% increase in wages, or an additional $789 per inch, annually.[152] Studies continue to find a significant relationship between height and earnings.[153] It has been suggested that being four inches (10,16 cm) taller is more significant in terms of success in the business world than any paper qualifications that an individual may have.[154] It is also argued that height influences advancement in employment, since the individual's height will affect their social and self-esteem, which in turn affects the individual's job performance, perceived job performance and, ultimately, professional success.[155] Interestingly also, the majority (58%) of CEOs of Fortune 500 companies are taller than six feet (1,8288 m).[156]

Height-based discrimination in employment exists, but given its pervasive nature, most people who are on the receiving end often do not realise the true reason for the discrimination and differential treatment.[157] It is argued that precisely this makes height-based discrimination particularly complex and dangerous in the employment field. A further concern relating to heightism is that height usually is not an inherent requirement of most jobs,[158] which fuels its injustice. Height in the employment setting is linked not only to earnings and career advancement, but also to workplace interactions and outcomes.[159] The perception has come to exist in employment that taller individuals are more capable, competent and able.[160] As with lookism, this in turn motivates employers to discriminate on the basis of height, using this social and economic perception to generate higher income and business success. Height and

150 Case and Paxson 2008:499.
151 Craig Roberts 2012:783; Patzer 1985:169,170.
152 Rosenberg 2009:914, referring to Persico *et al* 2004:1021.
153 Judge and Cable 2004:436; Rosenberg 2009:914.
154 Rosenberg 2009:915, referring to Harbison 1990:70.
155 Rosenberg 2009:914; Judge and Cable 2004:436.
156 Rosenberg 2009:914-915, referring to Gladwell 2005:86-87.
157 Rosenberg 2009:915.
158 Judge and Cable 2004:437.
159 Judge and Cable 2004:437.
160 Judge and Cable 2004:428.

the visual appearance of height are therefore linked with professional and career success.[161]

2.3.3 Grooming, dress, tattoos, piercings and appearance discrimination

2.3.3.1 The mutable characteristics

The voluntary appearance characteristics of a person, namely those that can be altered more easily, are referred to as the mutable characteristics of appearance. These include grooming, dress, tattoos and piercings. It is argued that these categories have often been dismissed without due consideration, primarily because of their voluntary and changeable nature.[162] Yet, they go to the heart of individual self-expression and identity.[163] This individual identity and self-expression is regarded as a reflection of an individual's personal beliefs, religion, culture and ethnicity; thus, it has been suggested that an "individual's manner of appearing is their manner of being".[164] Therefore, it cannot be denied that an individual's right to freedom of expression may encompass the right to express ideas via dress and appearance.[165]

2.3.3.2 Dress codes and grooming standards

The way in which people present themselves, including their hairstyles, clothing, make-up and piercings, constitutes "vitally important social capital" that people use to engage in private and public relationships.[166] Of these social engagements, the most regulated and crucial is the workplace.[167] In light of this, Corbett makes an important submission, namely that dress codes and grooming standards are merely tools used by employers to maximise and improve on the appearance of their employees.[168] Most employees practice self-expression through their appearance, which is displayed both in their private lives and at work.[169] How individuals choose to present themselves certainly affects how they are perceived by others, and how others will

161 Craig Roberts 2012:784.
162 Rhode 2010:99.
163 Rhode 2010:99.
164 Rhode 2010:99.
165 Pitt and Clayton 1997:54.
166 Jones 2013:504.
167 Jones 2013:504.
168 Corbett 2007:157.
169 Hoffman *et al* 2009:251.

behave towards them.[170] This is because people have a tendency to relate to others based on visual information such as appearance, clothing, hairstyle, ornaments and body art.[171] It is argued that many employers have a certain business image that they wish to portray, and that some employees' appearance may be out of keeping with this image.

Dress codes have been a popular and long-standing tool to promote and maintain a tidy and professional standard in employment.[172] Employers generally have much leeway in determining the dress standards of their employees as a condition of employment.[173] More often than not, employers encourage dress codes in employment environments that require an employee to interact with clients and customers, in order to promote a professional and impressive image of their business.[174] Dress codes may prescribe the colour and type of clothing that an employee is expected to wear, and often also place limitations on jewellery and ornaments that an employee may display.[175] Dress codes and grooming standards may govern other aspects as well, such as the length of an employee's hair (male and female), that women should wear skirts and high-heeled shoes, that men should be clean-shaven and that women should wear make-up.[176] These codes and policies, therefore, have the effect of curbing expressions of the self and individuality.[177]

Pitt and Clayton postulate that dress styles and grooming choices are not restricted to individual expression, but also have social significance as ways in which individuals participate in culture.[178] It is also argued that if an employer attempts to suppress an individual's grooming and style choices, the employer is in essence restricting an individual's participation in both the private and public domain.[179] Employer dress codes have however become a prime cause of litigation in recent

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170 This submission flows from the "what is beautiful is good" principle.
171 Pitt and Clayton 1997:56.
172 Cain and Cunningham 2009:20.
173 Ayers http://www.ucaoa.org/docs/Article_BodyArt.pdf. Accessed on 14/02/2014; Cain and Cunningham 2009:20.
174 Cain and Cunningham 2009:20.
175 Cain and Cunningham 2009:21.
176 Pitt and Clayton 1997:55.
177 Pitt and Clayton 1997:56.
178 Pitt and Clayton 1997:57.
179 Pitt and Clayton 1997:57.

years.[180] These claims were mostly brought under the guise of sex or religious discrimination,[181] however, as the law as it stands does not provide for protection against discriminatory employer dress codes and appearance discrimination.

2.3.3.3 Tattoos and piercings

Even though tattoos and piercings usually fall under the employer's dress codes and grooming standards, the increased litigation with regard to these features seen of late warrants a more comprehensive and separate discussion.

Given society's obsession with appearance, it is not unexpected that many individuals would use certain items to enhance or distinguish their personal appearance.[182] Distinguishing items such as tattoos and piercings have been prevalent for thousands of years. Ancient mummies have been discovered bearing body art, earrings and body piercings,[183] and even the mummified remains of an iceman from 5000 B.C. had piercings.[184] In the more recent past, tattoos and piercings have been described as being "the sole province of bikers, sailors and rock stars", as well as other marginalised groups such as carnival workers and convicted criminals, with no area of their body being "off limits", including tongues, navels and genitalia.[185] These so-called "fringe" personalities normally use tattoos and piercings to "signify their outsider status and rejection of mainstream society".[186] However, tattoos and body piercings – which are described as piercings "anywhere in the body besides the soft spot of the earlobe" – have become more prevalent in recent years[187] and certainly more acceptable in mainstream society.[188] These mutable characteristics are reportedly gaining popularity because they are used as a form of self-expression.[189]

Tattoos and piercings may be classified as mutable or alterable appearance characteristics and, therefore, do not automatically qualify for any special legal

180 Cain and Cunningham 2009:20.
181 Cain and Cunningham 2009:20-21.
182 Hoffman *et al* 2009:245.
183 Hoffman *et al* 2009:245, referring to Endo 2007.
184 Hoffman *et al* 2009:245.
185 Bible 2010:109; Hoffman *et al* 2009:245.
186 Brallier *et al* 2011:72.
187 Elzweig and Peeples 2011:14; Bible 2010:109.
188 Brallier *et al* 2011:72.
189 Brallier *et al* 2011:72.

protection.[190] It follows, then, that a policy of an employer that bans or limits the display of tattoos or body piercings in the workplace will be valid, provided that it is reasonable[191] and does not violate a constitutional right of the employee.[192] However, discrimination against a tattoo that is vulgar, obscene or hate-orientated will always be valid.[193] Even though the prevalence of tattoos and piercings appears to be increasing, many stigmas and stereotypes about tattoos and piercings still exist, including that persons with such characteristics are deviant, lack good judgement, and are dangerous, self-destructive and sexually promiscuous.[194] As many persons with tattoos and piercings will be employed, employers will therefore have to decide on how to govern such characteristics in the workplace.[195] The most frequently used employment policy has been to instruct an employee to cover the tattoo or piercing while at work (or, at least, while in public).[196]

A 2008 study on the prevalence of tattoos and piercings in the United States revealed that the highest prevalence of tattoos can be found amongst the age group 25-49, which is the age group most likely to be employed or seeking employment. [197] It is undisputed that such persons will not part with their tattoos and piercings when they go to work, at which point they may fall foul of an employer's dress code. It has been suggested that the limitations imposed by employer dress codes and grooming standards will become more difficult to enforce as tattoos and piercings become more conventional, and that more discrimination claims will inevitably arise.[198]

2.3.3.4 Discrimination on the basis of mutable characteristics

Persons who exercise their right to self-expression have often placed themselves in contravention of an employer's dress or grooming policies. They use their appearance to express themselves, which often falls short of an employer's

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190 Elzweig and Peeples 2011:14.

191 ClientAdvisory 2011. http://www.hdjn.com/pdfs/advisories/2011/ClientAdvisory-TatoosPiercingsOtherBodyArt11.3.11.pdf. Accessed on 14/02/2014.

192 Elzweig and Peeples 2011:14.

193 Ayers http://www.ucaoa.org/docs/Article_BodyArt.pdf. Accessed on 14/02/2014.

194 Brallier *et al* 2011:72.

195 Bible 2010:109.

196 Bible 2010:109.

197 Ages 25-29 (32%), ages 30-39 (25%) and ages 40-49 (12%) all have tattoos. See Elzweig and Peeples 2011:13-14, using a 2006 study from the *Journal of the American Academy of Dermatology* and the 2008 Harris Poll.

198 Elzweig and Peeples 2011:19.

standards and image, resulting in the employee or potential employee being subjected to differential and unfavourable treatment. Tattoos and piercings in particular have been described as "adornments which invite discrimination".[199] Body art has also been described as leading to prejudice, stereotyping and stigmatisation in the employment arena.[200] It is suggested that isolated instances of appearance discrimination on these grounds seem insignificant, but the cumulative effect thereof is quite the opposite.[201] Such instances of discrimination are said to violate merit principles, undermine equal opportunity, encourage stigma, erode self-esteem and restrict individual liberty.[202] Discrimination based on appearance diminishes and affects the dignity and social equality of persons in the same way as discrimination based on race, gender, culture, religion and sexual orientation.[203]

In relation to tattoos and piercings, a study found that 77% of managers believe that employees who sport visible tattoos and piercings experience more difficulty in making sales compared to employees without such tattoos and piercings.[204] In this regard, it was also found that visible tattoos and piercings are less acceptable in vocations that require employees to engage with customers and clients.[205] Another study found that 82% of employers believe that individuals with tattoos and piercings will have a more difficult time securing employment.[206]

The following information was published in 2007 by Vault Employee Tattoo and Body Piercing Survey:[207]

- A total of 85% of respondents believed that having a tattoo or body piercing would hinder an individual's chances of finding a job.
- Respondents indicated that not having a tattoo or piercing would make an individual more marketable.

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199 Washington Times 2008. http://www.washingtontimes.com/news/2008/feb/7/beware-the-art-on-your-sleeve. Accessed on 15/04/2014.

200 Submission by Professor Brian Miller, Texas State University; Washington Times 2008. http://www.washingtontimes.com/news/2008/feb/7/beware-the-art-on-your-sleeve. Accessed on 15/04/2014.

201 Rhode 2010:101.

202 Rhode 2010:101.

203 Rhode 2010:101.

204 Brallier *et al* 2011:73, referring to Ligos 2001.

205 Brallier *et al* 2011:73.

206 Hoffman *et al* 2009:247.

207 2007 Vault Employee Tattoo and Body Piercing Survey.

- The chances of an employee experiencing prejudice will be less if the body modifications are not displayed.
- An individual's identity does not carry as much weight as the stereotypes associated with tattoos and piercings.
- Two respondents indicated that their employment had been terminated due to a body piercing.[208]

It has been suggested that neither employers nor employees wish to work with persons who have tattoos and piercings, because they still associate these characteristics with the deviant and marginalised groups in society,[209] and not only believe that such characteristics may offend clients and customers,[210] but also that working with such individuals will impede their own job performance.[211] One particular employer stated that the business would not have employed a certain job applicant (who turned out to be an excellent employee) if the employer had known about the employee's body art.[212] It would therefore appear that employers wish to govern and control the mutable appearance characteristics of their employees, as these affect not only the image of the employer but also the success of the business.[213]

2.4 Appearance discrimination and its status in law

2.4.1 International law, discrimination and the position of the International Labour Organisation on appearance discrimination

Equality and non-discrimination are cornerstones of international labour law, more so in the modern society of the 21st century than ever before. This stems from the international commitment to the protection of human rights contained in various United Nations covenants[214] as well as the international interest shown therein. The conventions of the International Labour Organisation (ILO) have also expressly

208 The first employee was fired from a restaurant for having a nose ring, and the second individual's employment at Starbucks was terminated after receiving 3 warnings about a tongue ring.

209 Washington Times 2008. http://www.washingtontimes.com/news/2008/feb/7/beware-the-art-on-your-sleeve. Accessed on 15/04/2014; Hoffman *et al* 2009:247.

210 Ayers http://www.ucaoa.org/docs/Article_BodyArt.pdf. Accessed on 14/02/2014.

211 Hoffman *et al* 2009:247.

212 Hoffman *et al* 2009:247.

213 James 2008:636.

214 Bronstein 2009:124.

included non-discrimination as a fundamental right.[215] The origin of protection against discrimination lies far deeper than equality, however, as it relates to the fundamental human dignity of the individual.[216] It is argued that suffering discrimination because of some stigma or prejudice is an affront not only to the right to equality, but also to the dignity of the person at the receiving end of such discrimination.

The ILO has implemented the Discrimination (Employment and Occupation) Convention (No. 111), which is aimed specifically at the eradication of discrimination in the workplace, and advancing equal opportunity for and treatment of workers.[217] South African employment law considers Convention 111 to be of fundamental importance, and has stipulated that the South African Employment Equity Act should be interpreted in terms of this convention. Since the implementation of the convention, however, the ILO has recognised that appearance discrimination is a legitimate issue in employment, and now acknowledges that employee rights to equality and non-discrimination may need to be extended to include protection against appearance discrimination in employment.

In the ILO's General Survey on the Fundamental Conventions concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008, the following is stated:[218]

> In collective agreements, specific consideration has been given to equality and non-discrimination based on a range of grounds, including and often going beyond those set out in Convention No. 111, namely race, colour, sex, religion, political opinion, national extraction or social origin. Other grounds that have been touched upon in collective agreements include age, sexual orientation, disability, **physical characteristics** and HIV and AIDS. Provisions have also been included in collective agreements aimed at reinforcing equality at the workplace and further assisting both women and men to reconcile work and family responsibilities, including provision for flexible working arrangements and family-related leave.

This acknowledgement by the ILO ought to be seen as a positive step towards the prohibition of appearance-based discrimination in employment by the international community.

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215 ILO Declaration on Fundamental Principles and Rights at Work, 1998; Bronstein 2009:125.

216 Bronstein 2009:130.

217 Bronstein 2009:126.

218 101st session of the International Labour Conference, 2012. Own emphasis added.

2.4.2 Legal position in the United States of America

2.4.2.1 The legal principles of the USA applicable to appearance discrimination

2.4.2.1.1 Discrimination in the United States of America

[a] The Civil Rights Act of 1964

The United States Civil Rights Act has been described as the foremost "flagship" of employment discrimination law after that country's constitution,[219] and constitutes a federal law, which means that all states should adopt policy for legislation to this effect. This is because it applies to the majority of state agencies and private employers, as well as labour unions and employment agencies.[220] In addition, the act covers almost every aspect of the relationship between an employer and employee.[221]

Title VII of the act has as its general purpose the elimination of discrimination in employment.[222] It outlaws discrimination on the grounds of race, colour, religion, national origin and sex.[223] An anti-retaliation provision is also listed under Title VII in order to protect employees who seek relief (via the Equal Employment Opportunity Commission) against illegal employment practices.[224] Included in the scope of Title VII is the prohibition of discrimination in the hiring, terms and conditions of employment, dismissal or remuneration of an employee based on the prohibited grounds.[225]

[b] Legislation and discrimination in the USA

Discrimination and equality are linked, and are both concepts that are embedded in the foundation of law.[226] Legislation in the USA does not contain any precise definition of discrimination. A definition does not appear in Title VII or in any of the

219 Haggard 2001:3.
220 Haggard 2001:3.
221 Haggard 2001:3.
222 Cavico *et al* 2012:794.
223 Haggard 2001:4, 51.
224 Twomey 1998:3; Haggard 2001:4.
225 Twomey 1998:2.
226 Rutherglen 2001:14.

statutes based thereon.[227] As with the constitutional law, the statutory law of employment discrimination is left open, without a precise definition.[228]

[c] The forms of discrimination

It can be noted from the above that both Title VII and the American constitution prohibit discrimination based on certain grounds, which include race, colour, religion, national origin and sex. These grounds strongly overlap with the listed grounds of unfair discrimination contained in section 6(1) of the South African Employment Equity Act (as amended).[229] It is also important to note that discrimination in the USA may take place directly or indirectly based on a prohibited ground,[230] which is similar to the South African legal position. Discrimination claims may fall in one of two categories, namely disparate treatment and disparate impact.

[d] Disparate treatment and disparate impact

Disparate treatment involves becoming aware of and acting in accordance with some differentiation.[231] The wording "<u>because of</u> such individual's race, colour, religion, sex or national origin" used in Title VII brings an employer's decision-making process into play, with the reason for the employer's decision being more relevant than the outcome of the decision.[232] This differs from the South African position, where the discriminatory impact is the most relevant, and not the employer's intention to discriminate. In either circumstance, the unfair discrimination (for whatever reason) will have an adverse impact on the individual/group concerned. The "intention" element in discrimination, the so-called motive, is what separates intentional discrimination from disparate impact, creating two forms of employment discrimination under Title VII.[233]

Disparate impact occurs when an employer's seemingly neutral employment policies or practices, although neutrally applied, have an adverse impact on the members of a protected group, and the policy or practice cannot be linked to job performance or

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227 Rutherglen 2001:31.
228 Rutherglen 2001:31.
229 55/1998; Employment Equity Amendment Act 47/2013.
230 Haggard 2001:63, 67-71.
231 Rutherglen 2001:31.
232 Rutherglen 2001:31.
233 Twomey 1998:6; Rutherglen 2001:32.

business necessity.[234] In this instance, the relevant consideration is the impact of the discriminatory conduct, and not the intention to discriminate. A complainant alleging disparate impact need only prove that the employment policy or practice caused the impermissible effect, namely discrimination based on one of the listed grounds.[235]

[e] Employer defences against an employment discrimination claim

In the first instance, discriminatory conduct by an employer based on one of the prohibited grounds under Title VII will not be considered to be illegal if it is a BFOQ defence. A BFOQ defence is described as "a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise".[236] The Supreme Court has recognised that this defence was meant to be narrowly interpreted, but has given way to a wider interpretation in certain instances.[237] The business necessity defence allows an employer to escape liability if the discriminatory practice that serves to exclude certain groups can be shown to relate to job performance.[238] It is argued that these defences are similar to South African employer defences against an allegation of unfair discrimination, namely the defence of inherent requirements of the job and the defence of operational requirements. Secondly, an employer in the United States may use an affirmative action policy as a defence for discriminating against or excluding certain groups in its employment policies and practices.[239] This mirrors the South African defence of affirmative action, with which employers are able to escape liability for employment discrimination.

[f] Procedures, remedies and the EEOC

Employees who wish to institute a claim under Title VII will first have to lodge their grievance with the Equal Employment Opportunity Commission (EEOC) (or the relevant state agency if the jurisdiction so demands), and only once this mandatory process is exhausted, the employee may proceed to court.[240] Certain amendments

234 Twomey 1998:6.
235 Haggard 2001:59.
236 Haggard 2001:76.
237 *Dothard v Rawlinson* 433 U.S. 321, 15 FEP 10 1997; Twomey 1998:56.
238 Haggard 2001:92.
239 Haggard 2001:81.
240 Employees may approach the court at their own behest, or the EEOC may approach the court on the employee's behalf. See Haggard 2001:4.

made to the Civil Rights Act in 1991 now provide employees with a wide range of remedies for illegal employment discrimination, including compensatory damages, possible punitive damages, attorney's fees, back pay and injunctive relief demanding that the employee be hired, reinstated, promoted or transferred (with an award of retrospective seniority).[241]

The EEOC was born from Title VII of the Civil Rights Act.[242] The EEOC consists of a five-member commission responsible for making equal employment opportunity policy and approving all litigation in this regard.[243] The general counsel of the EEOC bears the duty of organising and carrying out all EEOC enforcement litigation in court.[244]

2.4.2.2 Background to "lookism" in the USA

The USA does not have a federal law that governs appearance discrimination in employment. As a result, some state and local legislatures have attempted to fill the gap in the legal system by enacting their own legislation to deal with the matter.[245] As will be discussed, only one state and six counties and cities have a law dealing with appearance-based discrimination. Other claims that allege appearance discrimination are usually linked with an already prohibited ground under Title VII of the Civil Rights Act, and are pursued as such. The enacted prohibitions on appearance discrimination in employment in the United States vary in their scope and impact.[246]

2.4.2.3 Legislation and anti-discrimination provisions in the USA

The laws implemented by the various jurisdictions to govern discrimination on the basis of appearance were enacted with the purpose of achieving social reform and innovation.[247] It is important to note that, from the outset, the enactment of legislation to extend employment protection against appearance-based discrimination has been

241 Haggard 2001:4.
242 Player 1999:38; Twomey 1998:3.
243 Twomey 1998:3.
244 Twomey 1998:3.
245 Cavico *et al* 2012:798.
246 Rhode 2010:125.
247 Brown 2013:8.

met with much resistance. The most prominent criticism has been that such protection would open the floodgates of frivolous litigation and business backlash.[248]

2.4.2.3.1 The state of Michigan

Thus far, Michigan is the only state in the USA to have included a prohibition on appearance discrimination in employment in its Civil Rights Act.[249] Legal experts regard this act as the "statutory inauguration of legal reform on appearance discrimination".[250] The prohibition, which explicitly bans discrimination based on height and weight, was enacted in 1977.[251]

The Elliot-Larsen Civil Rights Act of Michigan reads as follows in this regard:[252]

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, **height**, **weight**, or marital status.
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, **height**, **weight**, or marital status.

The United States Human Rights Commission is invested with broad remedial powers in terms of the act, which empowers it to order reinstatement to employment, attorney's fees, monetary damages and other appropriate relief, and also allows for the imposition of fines ($10 000 to $50 000).[253] A complainant may also bring a civil action on the ground of such discrimination, and may in such an instance be awarded attorney's fees as well as injunctive and monetary relief.[254]

This act applies to the entire state of Michigan and, as such, has seen the most enforcement action and complaints: In the period between 2005 and 2007, the Department of Civil Rights received 61 complaints, although none resulted in a final judgement. These complaints comprised the following: 48 involving weight-based discrimination, six involving height-based discrimination, and seven involving both

248 Rhode 2010:126.
249 Cavico *et al* 2012:798; Rhode 2010:132.
250 Brown 2013:8.
251 Rhode 2010:132; Cavico *et al* 2012:798.
252 Elliot-Larsen Civil Rights Act 453/1976: sec 37.2202. Own emphasis added.
253 Rhode 2010:132.
254 Rhode 2010:132.

height and weight.[255] In the time period between 1985 and 2007, only 18 court cases were based on a claim of height- or weight-based discrimination, which indicates the need for research and the search for awareness in the quest to ensure equality at work. [256]

2.4.2.3.2 Local ordinances

[a] Santa Cruz (California)

The most well-known and well-publicised prohibition on appearance-based discrimination is a 1992 local ordinance in Santa Cruz.[257] This ordinance defines the relevant concepts as follows:[258]

> (5) "Discriminate, discrimination or discriminatory" shall mean any act, policy or practice which, regardless of intent, has the effect of subjecting any person to differential treatment as a result of that person's race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, **height, weight or physical characteristic**. "Discrimination" includes the assertion of an otherwise valid reason for action as a subterfuge or pretext for prohibited discrimination.
>
> (10) "**Height**" shall mean the actual or assumed height of an individual.
>
> (13) "**Physical characteristic**" shall mean a bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person including individual physical mannerisms. Physical characteristic shall not relate to those situations where a bodily condition or characteristic will present a danger to the health, welfare or safety of any individual.
>
> (18) "**Weight**" shall mean the actual or assumed weight of an individual.

The prohibition against discrimination in this ordinance reads as follows:[259]

> It is the intent of the city council, in enacting this chapter, to protect and safeguard the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, **height**, **weight** or **physical characteristic**. It is important to recognize that the council's purpose in enacting this chapter is to promote the public health and welfare of all persons who live and work in Santa Cruz.

Originally, the ordinance aimed to prohibit discrimination based on various factors, including height, weight and appearance.[260] However, in the wake of protests and negative publicity, the Santa Cruz city council opted to replace "appearance" with

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255 No more recent statistics are available as of yet. See Rhode 2010:132-133.

256 Rhode 2010:133.

257 Brown 2013:9; Rhode 2010:126.

258 Santa Cruz Municipal Code: sec 9.83.020. Own emphasis added.

259 Santa Cruz Municipal Code: sec 9.83.010. Own emphasis added.

260 Zakrzewski 2005:438; Rhode 2010:126.

"physical characteristic".[261] The courts have been empowered to grant "appropriate" remedies in the circumstances, which include compensatory damages, attorney's fees and injunctive relief.[262] The amended ordinance does allow employers to discriminate on the basis of mutable (voluntary) aspects of appearance, such as clothing, grooming, tattoos and piercings (as discussed above),[263] while it aims to protect individuals against discrimination based on the uncontrollable aspects of physical appearance.[264] South Africa should, at the very least, take a leaf out of this book.

Certain factions' concern that this ordinance would result in a flood of frivolous litigation proved to be unfounded. In the first 15 years after the ordinance was passed, not a single complaint relating to height, weight or physical characteristics was recorded.[265] Since there has been no discernable backlash, this concern too appears to have been unfounded.[266]

[b] Urbana (Illinois)

In 1979, Urbana enacted a general prohibition on appearance discrimination. This ordinance provides the following prohibition on discrimination:[267]

> It is the intent of the City of Urbana in adopting this article, to secure an end, in the city, to discrimination, including, but not limited to, discrimination by reason of race, color, creed, class, national origin, religion, sex, age, marital status, physical and mental disability, **personal appearance**, sexual preference, family responsibilities, matriculation, political affiliation, prior arrest or conviction record or source of income, or any other discrimination based upon categorizing or classifying a person rather than evaluating a person's unique qualifications relevant to an opportunity in housing, employment, credit or access to public accommodations.

Personal appearance is defined as follows under the ordinance:[268]

> The outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, such as weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose.

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261 Zakrzewski 2005:8; Rhode 2010:126.
262 Brown 2013:9; Rhode 2010:126.
263 Rhode 2010:126.
264 Desir 2010:641.
265 Rhode 2010:127.
266 Rhode 2010:127.
267 City of Urbana Municipal Code: sec 12-37. Own emphasis added.
268 City of Urbana Municipal Code: sec 12-39.

As is the case under the Santa Cruz ordinance, not a single complaint has been recorded in Urbana in the 30 years since the enactment of its ordinance, thus also disproving the concern that a flood of frivolous litigation and business backlash would ensue.[269]

[c] San Francisco (California)

The city of San Francisco extended its Human Rights Law in 2000 to include a prohibition against height and weight-based discrimination.[270]

The San Francisco ordinance stipulates the following in this regard:[271]

> In this City and County the practice of discrimination on the actual or perceived grounds of race, religion, color, ancestry, age, sex, sexual orientation, gender identity, disability, **weight**, **height** or place of birth and the exploitation of prejudice related thereto adversely affects members of minority groups. Such discriminatory practices are inimical to the public welfare and good order …

San Francisco has a wider range of remedies available to victims of appearance discrimination than Urbana and Santa Cruz, including triple damages, fines, attorney's fees, legal costs and punitive damages.[272] It does however share their limited enforcement activity, and in the time period between its enactment in 2000 and 2008, San Francisco's Human Rights Commission received only two complaints relating to weight and height-based discrimination.[273]

[d] The District of Columbia

In 1982, the district of Columbia expanded its Civil Rights Law to include appearance discrimination.[274] Their local Human Rights Act, which bans discrimination on the basis of "personal appearance", was the first local act in the United States to do so.[275]

The district of Columbia places the following ban on discrimination:[276]

> It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual

269 Rhode 2010:127.
270 Rhode 2010:127.
271 City of San Francisco Administrative Code: sec 12A.1. Own emphasis added.
272 Rhode 2010:127.
273 Rhode 2010:127.
274 Brown 2013:8; Rhode 2010:125.
275 Rhode 2010:128.
276 District of Columbia Code: sec 2-1401.01. Own emphasis added.

> merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, **personal appearance**, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.

"Personal appearance" is defined as follows:[277]

> (22) "Personal appearance" means 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 cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual.

This act has also experienced little enforcement activity, even though it sports "relatively broad remedial provisions",[278] which empower the Human Rights Commission to award reasonable attorney's fees, compensatory damages, retrospective pay and reinstatement to employment.[279] The provisions also include the option of imposing fines for violations (a maximum of $10 000 for first-time offenders and up to $50 000 for repeat offenders).[280] In the first 25 years since the enactment of this prohibition, only 11 complaints were received.[281] Although the number of complaints is not extensive enough to impose a burden on businesses, some cases have been described as "bordering on the frivolous".[282] In those cases where discrimination was found, only one was based solely on appearance, while the others involved a combination of discriminatory grounds (such as gender and disability), of which appearance was but one.[283] This prohibition on discrimination

277 District of Columbia Code: sec 2-1401.02.

278 Rhode 2010:128.

279 Brown 2013:8; Rhode 2010:128.

280 Rhode 2010:128.

281 One such case was that of *McManus v MCI Communs. Corp* 748 A.2d 949, 951 D.C. 2000, in which an employee filed a discrimination claim against her employer after she had been replaced by an individual who, she alleged, "more typically reflect[ed] corporate America". The replaced employee used to wear "African-styled" clothing and wore her hair in "dreadlocks, braids and cornrows". The claim was brought on the basis of race and personal appearance in the district of Columbia. The court, however, held that the employee did not make out a sufficient case on either of these grounds, since she was replaced by an individual within her protected class, and the comments she received regarding her appearance were mostly complimentary. See Mahajan 2007:185; Rhode 2010:128.

282 Rhode 2010:129.

283 Thus, those cases could have been brought on the basis of the other grounds as well, and not only under the umbrella of appearance-based discrimination. See Rhode 2010:129.

does however provide for the exception of business necessity and reasonable business purposes.[284]

[e] Howard County (Maryland)

The Civil Rights Code of Howard County includes a prohibition on appearance discrimination.[285] It covers the outward appearance of a person, including hairstyle, manner of dress, facial hair and physical characteristics.[286] The ordinance of Howard County prohibits discrimination, and reads as follows:[287]

> The Howard County Government shall foster and encourage the growth and development of Howard County so that all persons shall have an equal opportunity to pursue their lives free of discrimination.
>
> Discrimination practices based upon: Race, Creed, Religion, Handicap, Color, Sex, National origin, Age, Occupation, Marital status, Political opinion, Sexual orientation, **Personal appearance**, Familial status, Source of income.

In Howard County, personal appearance is regarded as:[288]

> … [the] outward appearance of a person with regard to hair style, facial hair, physical characteristics or manner of dress. It does not relate to a requirement of cleanliness, uniforms or prescribed attire, when uniformly applied, for admittance to a public accommodation or to a class of employees.

Remedies for discrimination include "civil penalties of reasonable attorney's fees" as well as employment claims (maximum of $5 000) and any other claims (maximum of $1 000).[289] The county code requires the investigation of claims to take place without publicity and the information to remain confidential and, as such, the Office of Human Rights has not released copies of appearance discrimination complaints.[290] The office did however confirm that only 1% of complaints in 2010 related to personal appearance.[291] It also released general information pertaining to 16 physical appearance complaints reported between 2003 and 2007, only one of which was filed based on appearance alone, while the others were filed on a combination of grounds.[292]

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284 Cavico *et al* 2012:799.
285 Rhode 2010:130.
286 Rhode 2010:130.
287 County of Howard Code: sec 12.200. Own emphasis added.
288 County of Howard Code: sec 12.201.
289 Rhode 2010:130.
290 Rhode 2010:130.
291 Howard County Office of Human Rights and Human Rights Commission 2010:7.
292 Rhode 2010:130.

[f] Madison (Wisconsin)

Madison also has an ordinance prohibiting discrimination on the basis of physical appearance,[293] which reads as follows:[294]

> The practice of providing equal opportunities in housing, employment, public accommodations and City facilities to persons without regard to sex, race, religion, color, national origin or ancestry, citizenship status, age, handicap/disability, marital status, source of income, arrest record, conviction record, less than honorable discharge, **physical appearance**, sexual orientation, gender identity, genetic identity, political beliefs, familial status, student status, domestic partnership status, receipt of assistance, unemployment or status as a victim of domestic abuse, sexual assault, or stalking is a desirable goal of the City of Madison and a matter of legitimate concern to its government.
>
> Denial of equal opportunity in employment deprives the community of the fullest productive capacity of those of its members so discriminated against and denies to them the sufficiency of earnings necessary to maintain the standards of living consistent with their abilities and talents.

The Madison ordinance describes "physical appearance" in the following manner:[295]

> Physical appearance means the outward appearance of any person, irrespective of sex, with regard to hairstyle, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose.

Madison reportedly receives the largest number of complaints in comparison with the other cities and counties with appearance discrimination ordinances, with remedies under this ordinance including injunctive relief, compensatory damages and reasonable attorney's fees and costs.[296] Madison's Equal Opportunity Commission reported 36 complaints being filed between 2003 and 2007.[297] Only one of these claims appears to have been based solely on appearance, while the remainder were based on a combination of grounds, including appearance.[298]

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293 Rhode 2010:130.

294 Madison Code of Ordinances: sec 39.03(1). Own emphasis added.

295 Madison Code of Ordinances: sec 39.03(2)(bb).

296 Rhode 2010:130,131.

297 One such a case was *Sam's Club Inc. v Madison Equal Opportunity Commission* WI App 188, Wis. Ct. App. 2003, in which an employee alleged that the employer's facial jewellery employment policy discriminated based on appearance. The court ruled in favour of the employer and held that there was a legitimate business reason for the policy. See Schwie 2011:3; Rhode 2010:131.

298 Rhode 2010:131.

2.4.2.4 The legal position pertaining to appearance-based discrimination claims in the USA

This section will address the legal position of those states that do not have legislation specifically prohibiting appearance-based discrimination in employment.

The civil rights laws of the USA make it illegal for an employer to discriminate against any employee on the basis of his or her race, colour, religion, sex, national origin, age and disability. Since there is no federal law that prohibits appearance-based discrimination in particular, appearance discrimination *per se* is clearly not illegal.[299] Thus, aggrieved employees will have to link the appearance discrimination with one of the already protected categories mentioned above, and can only then bring an action in a court with competent jurisdiction to decide the matter.[300] In order to bring a discrimination claim, the employee will have to provide direct evidence of discrimination or produce circumstantial evidence that will satisfy the requirements of a *prima facie* discrimination claim.[301] Once the plaintiff has established such a *prima facie* claim, the employer will have to provide reasons for its actions (alleging that discrimination had not taken place) or successfully raise a defence against employment discrimination.[302]

As will be indicated by a discussion of case law later on, appearance discrimination has been most successfully linked with sex discrimination, race discrimination, religious discrimination and, sometimes, age and disability discrimination, depending on how the claim was phrased.

[a] Disparate treatment, disparate impact and employer defences

Since appearance-based discrimination is often based on subconscious biases, it would be challenging for an employee to produce evidence of direct intention to discriminate and, thus, succeed with a disparate treatment claim.[303] It may also be challenging for employees who allege appearance discrimination to succeed in proving that a certain employment policy or practice has a disparate impact on members of a protected class if not many other employees belong to the specific

299 Cavico *et al* 2012:795.
300 Corbett 2007:164; Cavico *et al* 2012:793,795,796.
301 Zakrzewski 2005:2.
302 Zakrzewski 2005:2.
303 Mahajan 2007:178.

group, or the other employee members of the protected class choose to adhere to the employer's policy, or the aggrieved employee could actually comply with the employer's policy.[304] However, if employees can discharge the onus of proof in terms of these allegations, they may succeed with their claims.

Even if an employee can discharge the onus of proof and raise a successful claim in terms of disparate treatment or disparate impact, an employer may still defeat the employee's claim by raising a successful business defence,[305] namely either a business necessity defence or a *bona fide* occupational qualification defence.[306]

2.4.2.5 Case law and "lookism" in the USA

Several cases have come before the United States courts, especially in recent years, alleging an element of appearance discrimination in employment. Many of these litigations have attracted extensive media attention, which should not only point to an element of sensation, but also awareness of the problem.[307] Some of these notorious cases will be investigated and discussed below.

[a] Physical attractiveness

One of the most interesting cases relating to appearance discrimination is that of *Lorenzana v Citigroup Inc*.[308] This case involved an employee who was regarded as physically very attractive.[309] The employee resigned from her first job as a sales representative when a hostile work environment developed after she had reported an incident of sexual harassment.[310] She then secured employment as a business banker with Citibank, after which she was informed by a co-worker that the branch was renowned for "hiring pretty girls".[311] The employee started receiving comments about her dress and appearance, including instructions from two of her male supervisors not to wear certain types of clothing (clothing that was too revealing or

304 Mahajan 2007:178.
305 Mahajan 2007:179.
306 Employers may use the business defences to escape liability despite having discriminated against an employee based on a prohibited class or characteristic.
306 Where the discrimination is necessary for the reasonable operation of the employer's business. See Mahajan 2007:179.
307 Corbett 2007:158.
308 116382/09 N.Y. Supp. Ct. 2009.
309 Corbett 2011:5.
310 Corbett 2011:6.
311 Corbett 2011:6.

provocative), as she was distracting her male colleagues.[312] The employee did not comply with these instructions.[313] After she had lodged complaints about the comments with management, the employee was placed on probation because of her unsatisfactory sales credits.[314] She again complained to two regional vice-presidents about the hostile work environment, and was transferred to another branch shortly thereafter.[315] The manager of this branch eventually terminated her employment, stating that she "did not fit the culture of the bank", also mentioning her dress issues at the first branch where she was employed.[316] The employee filed a lawsuit against the bank, alleging sex-based discrimination, sexual harassment, a hostile work environment and retaliation for lodging complaints.[317] The matter was submitted for arbitration.[318] This case received considerable media attention and catapulted the issue of appearance discrimination in employment into the limelight.

The case of *Yanowitz v L'Oreal USA, Inc.*[319] is another example of appearance discrimination in employment. In this case, a manager of the cosmetics company L'Oreal refused to obey her employer's order to terminate the employment of a saleswoman for allegedly not being "good-looking enough".[320] The employer also ordered the manager to employ "somebody hot".[321] This order was repeated on several occasions, eventually resulting in the manager leaving the employer's service, alleging that she had been retaliated against for not complying with the order, which caused her stress and forced her to resign.[322]

In *Brice v Resch*,[323] an employee claimed that her employment had been terminated because her superior "did not like her body shape".[324] This claim for wrongful termination was however dismissed.[325]

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312 *Lorenzana v Citigroup Inc*.: 6.

313 She alleged that she could not afford new clothes, and that it was part of her Latin culture for women to spend time on and make an effort with their appearance. See Corbett 2011:6.

314 *Lorenzana v Citigroup Inc*.: 11-12.

315 *Lorenzana v Citigroup Inc*.: 14-16.

316 *Lorenzana v Citigroup Inc*.: 21.

317 *Lorenzana v Citigroup Inc*.: 1; Corbett 2011:7.

318 Because she had signed a mandatory arbitration agreement. See Corbett 2011:7.

319 32 Cal. Rptr. 3d 436 Cal 2005.

320 *Yanowitz v L'Oreal USA, Inc.:* 437; McDonald *et al* 2010:3.

321 *Yanowitz v L'Oreal USA, Inc.:* 437; McDonald *et al* 2010:3.

322 *Yanowitz v L'Oreal USA, Inc.:* 458; Corbett 2007:163.

323 U.S. Dist. LEXIS 7163 E.D. Wis. Jan. 24, 2011.

324 *Brice v Resch*: II; Schwie 2011:6.

In *Hodgton v Mt. Mansfield Co. Inc.*,[326] the employment of a chambermaid was terminated when she failed to comply with the employer's instruction to wear her dentures to work.[327] The plaintiff was missing her front teeth, but preferred not to wear her dentures because they caused her pain.[328] The employer, who was aiming for a four-star rating, was concerned that members of the public might feel uncomfortable with the plaintiff's lack of front teeth.[329] The Vermont Supreme Court ruled in favour of the plaintiff and held that her lawsuit was viable on the ground that the employer's conduct fell within the bounds of discrimination based on a disability.[330]

In a similar case, *Talanda v KFC National Management Co.*,[331] a manager of Kentucky Fried Chicken alleged that his employment had been terminated for failing to obey his supervisor's order to remove from customers' view an employee who was missing her front teeth.[332] The court in this case also held that the appearance issue (the missing front teeth) was a viable claim of disability discrimination.[333]

In the case of *Wilson v Southwest Airlines*,[334] the airline argued that "sex appeal" was a *bona fide* inherent requirement of the job of flight attendant, and consequently opted to employ only attractive female flight attendants.[335] The court rejected the argument that attractiveness was a necessity in order to ensure business success, and stated that sex appeal was only an indirect aspect of the job, not the core duty, which was held to be the safe transportation of passengers.[336]

In the case of *Lewis v Heartland Inns of America*,[337] a diligent and hard-working employee was promoted to a more prestigious position at a hotel.[338] This promotion was concluded over the phone, but upon meeting the employee, the director

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325 *Brice v Resch*: III; Schwie 2011:6.
326 160 Vt. 150 624 A.2d 1122 Vt. Sup. Ct. 1992.
327 *Hodgton v Mt. Mansfield Co. Inc.:* 1124; Pechman 1997:4.
328 *Hodgton v Mt. Mansfield Co. Inc.:* 1124; Pechman 1997:4.
329 *Hodgton v Mt. Mansfield Co. Inc.:* 1124; Pechman 1997:4.
330 *Hodgton v Mt. Mansfield Co. Inc.:* 1132; Pechman 1997:4.
331 U.S. Dist. LEXIS 7634N.D. Ill. 1996.
332 *Talanda v KFC National Management Co.:* 1092; Pechman 1997:4.
333 *Talanda v KFC National Management Co.:* 1092,1098; Pechman 1997:4.
334 517F. Supp. 292. N.D. Tex. 1982.
335 *Wilson v Southwest Airlines*: 293; McDonald *et al* 2010:2.
336 *Wilson v Southwest Airlines*: 300,304;McDonald *et al* 2010:2.
337 L.L.C. 591F.3d 1033 8th Cir. 2010.
338 *Lewis v Heartland Inns of America:* 1036; Schwie 2011:7.

retracted the offer.[339] The employer's employment policies did not expressly stipulate any appearance requirements, but the director "essentially promulgated" an employment policy requiring that employees "should be pretty" and have "the Midwestern girl look".[340] The employee in this case was not deemed to be pretty enough, essentially because she elected to wear loose-fitting clothes (which also included men's wear), had short hair, and did not wear any make-up, which gave her a "tomboyish, Ellen DeGeneres kind of look".[341] Shortly thereafter, the employee's employment was terminated.[342] The employee sued the employer for sex-based discrimination, and the court held that employers may not base employment decisions on sex or "sex stereotypes".[343]

[b] Height

In the case of *Craig v County of Los Angeles*,[344] a certain police department implemented a height requirement, stating that "height was directly related to strength" and gave police officers an additional psychological advantage in conflict situations.[345] As a result of this policy, many qualified candidates who failed to meet the height requirement, mostly Mexican-Americans, were not employed, and claimed that this requirement was discriminatory on the basis of their race.[346] The court upheld this argument.[347] This serves to show that in the absence of a specific prohibition on "lookism", complainants attempt to mould their discrimination claims to fit the existing prohibited grounds.

In *Micu v City of Warren*,[348] an individual applied for a position as a fire-fighter but, being 5,6 foot tall, failed to meet the employer's height requirement of 5,8 foot.[349] The applicant consequently brought a discrimination lawsuit against the fire department. The court concluded that the department's allegations that height was a safety concern were legitimate, although this was based on "observation and

339 *Lewis v Heartland Inns of America:* 1035,1036; Schwie 2011:7.
340 *Lewis v Heartland Inns of America:* 1036,1037; Schwie 2011:7.
341 *Lewis v Heartland Inns of America:* 1036; Schwie 2011:7.
342 *Lewis v Heartland Inns of America:* 1037; Schwie 2011:7.
343 *Lewis v Heartland Inns of America:* 1047; Schwie 2011:7.
344 626 F.2d 659 9th Cir. 1980.
345 *Craig v County of Los Angeles:* 667; James 2008:649.
346 *Craig v County of Los Angeles:* 661,662; James 2008:649.
347 *Craig v County of Los Angeles:* 668; James 2008:649.
348 147 Mich. App. 573 1985.
349 *Micu v City of Warren:* 576,577; Rhode 2010:134.

experience" and not study and research.[350] The court further questioned why the department had a minimum but not a maximum height requirement and proceeded to suggest that the department consider expanding its hiring policies to create employment opportunities for persons shorter than 5,8 foot.[351] This instance could well have constituted discrimination based on height, had the employer not been able to assert a business necessity defence.

[c] Dress codes and grooming standards[352]

In a watershed case on appearance discrimination brought in the district of Columbia, *Atlantic Richfield Co. v D.C. Commission on Human Rights*,[353] an employee's employment was terminated after her supervisor had compared her provocative work attire to that of a prostitute.[354] The employer alleged that the employee had violated the standards of dress and conduct,[355] but the employer was found to be liable for discrimination and for having made the employee's working conditions intolerable, which resulted in a constructive dismissal.[356]

In *Craft v Metromedia Inc*.,[357] a co-anchor at a television station was demoted after surveys had indicated an "overwhelmingly negative" perception of the employee's appearance.[358] The employer cited this as the reason for the station's recent poor ratings and subsequently implemented an "intensive wardrobe oversight", which included a calendar depicting what clothes the employee was to wear each day.[359] The employee filed a gender-based discrimination lawsuit against the employer, but the court ultimately ruled in favour of the employer, stating that the harsh

350 *Micu v City of Warren:* 583; Rhode 2010:134.

351 *Micu v City of Warren:* 583,585; Rhode 2010:134.

352 The cases discussed reflect the most significant instances of "lookism" in the workplace, but the list is by no means exhaustive. For further reading, see *Willingham v Macon Telephone Publishing Co*. 507 F.2d 1084 5th Cir. 1975; *Rogers v American Airlines Inc*. 527 F. Supp 229 S.D.N.Y. 1981; *Tardif v Quinn* 545 F.2d 761 1976; *Stalter v City of Montgomery* 993 F.2d 232 11th Cir. 1993; *McManus v MCI Communs. Corp.* 748 A.2d 949, 951 D.C. 2000; *Lanigan v Bartlett & Co.* 466 F. Supp. 1388, 1389 W.D. Mo. 1979; *Carroll v Talman Federal Savings & Loan Association of Chicago* 604 F.2d 1028, 1029 7th Cir. 1979; *Seabrook v City of New York* 80 F.E.P. Cases BNA 1453 S.D.N.Y. 1999.

353 515 A.2d 1095, 1102-03 D.C. 1986.

354 *Atlantic Richfield Co. v D.C. Commission on Human Rights:* 1097,1100; Brown 2013:9.

355 *Atlantic Richfield Co. v D.C. Commission on Human Rights:* 1100.

356 *Atlantic Richfield Co. v D.C. Commission on Human Rights:* 1101; Brown 2013:9.

357 766 F.2d 1205 1985.

358 *Craft v Metromedia Inc*.: 1209; Brown 2013:1.

359 *Craft v Metromedia Inc*.: 1209; Brown 2013:1.

appearance standards imposed by the network were crucial to its economic success in light of the survey results.[360]

In the case of *Jespersen v Harrah's Operating Co. Inc*.,[361] a "long-time and effective" employee refused to adhere to her employer's new "Personal Best" employment policy, which required female employees to wear make-up.[362] The employee opted against wearing the make-up, as she believed that it clashed with her self-image, and she was consequently dismissed.[363] The employee sued her employer on the ground of sex-based discrimination.[364] The case was however dismissed because male and female employees were not saddled with unequal burdens, and the alleged discrimination did not relate to an immutable appearance characteristic.[365]

In *Hollins v Atlantic Co*.,[366] an employee challenged her employer's grooming policy, which stipulated certain hairstyle preferences and consequently disallowed the employee to wear her hair in a "finger wave" style.[367] The employee alleged discrimination based on her race, and the court held that she had made out a successful *prima facie* case for discrimination and disparate treatment on that basis.[368]

In *Hedum v Starbucks Corp*.,[369] an employee alleged that her employment was terminated because she had worn a Wiccan[370] pendant to work.[371] The court held that she had a valid discrimination claim on the basis of religion.[372] This case illustrates that the ornaments an individual may elect to wear to work could form the basis of discrimination against them.

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360 *Craft v Metromedia Inc*.: 1221; Brown 2013:1.

361 444 F.3d 1104, 1107 9th Cir. 2006.

362 *Jespersen v Harrah's Operating Co. Inc*.: 1106,1107; Corbett 2007:163.

363 *Jespersen v Harrah's Operating Co. Inc*.: 1108; Corbett 2007:163.

364 The court in this case also noted that quality service by employees should outweigh considerations as trivial as the wearing of make-up, and employees who elect to make such appearance choices should not suffer employment detriment as a result. See *Jespersen v Harrah's Operating Co. Inc*.: 1106,1118; Corbett 2007:163.

365 *Jespersen v Harrah's Operating Co. Inc*.: 1106.

366 188 F.3d 652, 655 6th Cir. 1999.

367 *Hollins v Atlantic Co*.: 655; Mahajan 2007:184.

368 *Hollins v Atlantic Co*.: 663; Mahajan 2007:185.

369 546 F. Supp. 2d 1017 D. Or. 2008.

370 Wicca is the religious cult of modern witchcraft.

371 *Hedum v Starbucks Corp*.: A.

372 *Hedum v Starbucks Corp*.: A1.

The matter of *EEOC v Sambo's of Ga. Inc.*[373] was about an employee who was forbidden by his religion to shave his facial hair, which went against the employer's grooming policy.[374] For this reason, the employee's application for the position of manager was turned down.[375] In this case, the court held that the grooming policy was a business necessity and adhered to the customer preference of being clean-shaven when working in a restaurant.[376] The essence of the discrimination in this case was again appearance, although it overlapped with religion. It also illustrates that an employer's business necessity can be used to successfully justify discrimination on the basis of appearance.

In *Schmitz v ING Securies, Futures and Options Inc*.,[377] a female employee was continuously criticised by her male superior for wearing clothing that was too revealing and unprofessional to work.[378] She instituted a claim against her employer, alleging a hostile work environment.[379]

In *Rivera v Trump Plaza Hotel*,[380] two male employees' services were terminated because they had worn ponytails to work, which violated the employer's grooming policy.[381]

[d] Tattoos and piercings[382]

In the case of *Riggs v City of Fort Worth*,[383] a police officer was required to cover up the numerous tattoos on his arms and legs while he was acting in an official capacity.[384] Although the department did not have a complete ban on tattoos, it believed that the employee's tattoos were extensive enough to be regarded as

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373 530 F Supp. 86,88 N.D. Ga 1981.

374 *EEOC v Sambo's of Ga. Inc.:* 88; Mahajan 2007:187.

375 *EEOC v Sambo's of Ga. Inc.:* 88; Mahajan 2007:187.

376 *EEOC v Sambo's of Ga. Inc.:* 91; Mahajan 2007:187.

377 U.S. App. LEXIS 16942 7th Cir. 1999.

378 *Schmitz v ING Securies, Futures and Options Inc*.: 984; Fowler-Hermes 2001:32.

379 *Schmitz v ING Securies, Futures and Options Inc*.: 984; Fowler-Hermes 2001:32.

380 702 A.2d 1359 N.J. Super. Ct. App. Div. 1997.

381 Fowler-Hermes 2001:33.

382 The cases discussed reflect only the most significant instances of "lookism" based on tattoos and piercings in the workplace. For further reading, please see *Sam's Club Inc. v Madison Equal Opportunity Commission* WI App 188, Wis. Ct. App. 2003; *Inturri v City of Hartford* 365 F. Supp. 2d 240 D. Conn. 2005; *Swartzentruber v Gunite Corp*. 99 F. Supp. 2d 976, 978-79 N.D. Ind. 2000; *Capaldo v Pan American Federal Credit Union* WL 9687 E.D.N.Y. 1987.

383 229 F. Supp. 2d 572 N.D. Tex. 2002.

384 *Riggs v City of Fort Worth*: 574,575; James 2008:634.

unprofessional.[385] The policeman argued that this supressed his freedom of expression, but the court sided with the police department and held that the tattoos were "unprofessional and unprotected by law".[386]

In the case of *Kleinsorge v Island Corp*.,[387] the employment of a male employee was terminated because he had worn an earring to work.[388] The employer's policy permitted only females, and not males, to wear earrings to work.[389] The complainant failed to prove that the grooming policy was unevenly applied, either between males and females, or between similarly situated males, and the case was dismissed.[390]

In *Cloutier v Costco Wholesale Corp.*,[391] an employee was required to remove her metal eyebrow piercing, or replace it with a clear stud.[392] The employee claimed to be a member of the Church of Body Modification, and therefore, the employer's request amounted to discrimination on the basis of her religion.[393] The court sided with the employer, and stated that permitting the employee to wear the piercing was beyond the bounds required by reasonable accommodation – especially since the employee was unwilling to accept anything other than exception from the policy – and would lead to a breakdown of professionalism at the employer's business, causing undue hardship.[394]

In the case of *EEOC v Red Robin Gourmet Burgers Inc.*,[395] an employee, who practised an ancient Egyptian faith, had two religious tattoos around his wrists.[396] The employee believed that covering up his tattoos would be a sin, although the employer's dress code policy required all tattoos and piercings to be concealed.[397] When the employee refused to cover up his tattoos, his employment was terminated. He approached the EEOC for assistance, alleging religious-based discrimination.[398]

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385 *Riggs v City of Fort Worth*: 575; Bible 2010:110.
386 *Riggs v City of Fort Worth*: 583,584; James 2008:634.
387 81 F.E.P. Cases BNA 1601 E.D. Pa. 2000.
388 *Kleinsorge v Island Corp*.: I; Fowler-Hermes 2001:33.
389 *Kleinsorge v Island Corp*.: I; Fowler-Hermes 2001:33.
390 *Kleinsorge v Island Corp*.: III.A.
391 390 F.3d 126 1st Cir. 2004.
392 *Cloutier v Costco Wholesale Corp.:* 128; HR Focus 2008:7.
393 *Cloutier v Costco Wholesale Corp.:* 128; HR Focus 2008:7; Bible 2010:114.
394 *Cloutier v Costco Wholesale Corp.:* 128,138; HR Focus 2008:7; Elzweig and Peeples 2011:16.
395 WL 20906 W.D. Wash. 2005.
396 *EEOC v Red Robin Gourmet Burgers Inc.*: II; Elzweig and Peeples 2011:16.
397 *EEOC v Red Robin Gourmet Burgers Inc.*: II; Elzweig and Peeples 2011:17.
398 *EEOC v Red Robin Gourmet Burgers Inc.*: II; Elzweig and Peeples 2011:17.

The EEOC filed suit on behalf of the employee, and the employer, who had lost a motion for summary judgement, settled for $150 000.[399]

In the case of *Hub Folding Box Company v Massachusetts Commission Against Discrimination*,[400] an employee was required to cover up a tattoo on her arm (or have her employment terminated), although a similarly situated male employee was not required to cover up his tattoo.[401] The employer alleged that customers found a tattoo on a woman distasteful, and that it symbolised that she was either "a prostitute, or on drugs or from a broken home".[402] The court in this case found that the complainant had been discriminated against based on her sex.[403] This case serves as a prime example of how appearance discrimination may overlap with another ground of discrimination – in this case, sex.

In *EEOC v Papin Enterprises Inc*.,[404] an employee claimed that wearing a nose ring was part of her religion and, as such, refused to cover it up while at work, which led to her dismissal.[405] The court held that the complainant had a sufficient case of religious discrimination and consequently denied the employer's motion for summary judgement.[406]

2.4.2.6 Conclusion

The need for legislative intervention such as the state and local ordinances above, as well as the many cases cited, clearly indicates that appearance discrimination is indeed a concern in the context of ground-level relations between employers and employees, and presents a growing problem that needs to be addressed more adequately. From the case law, it is evident that employees who are victims of appearance discrimination, which offends their rights to dignity and equality, do not have adequate protection in the workplace. Although such employees attempt to seek protection and relief by bringing claims under the already protected grounds of discrimination, these grounds cannot always be interpreted broadly enough to cover

399 Elzweig and Peeples 2011:17.
400 52 Mass. App. Ct. 1104 2001.
401 *Hub Folding Box Company v Massachusetts Commission Against Discrimination:* 1; Elzweig and Peeples 2011:20.
402 *Hub Folding Box Company v Massachusetts Commission Against Discrimination:* 1.
403 *Hub Folding Box Company v Massachusetts Commission Against Discrimination:* 2.
404 U.S. Dist. LEXIS 30391 M.D. Fla. 2009.
405 *EEOC v Papin Enterprises Inc*.: I.
406 *EEOC v Papin Enterprises Inc*.: IV.

the specific type of discrimination involved. Although a more definitive solution is required in most states, the United States of America has been at the forefront of developing the law in relation to appearance-based discrimination in employment.

2.4.3 Australia

2.4.3.1 Australia and appearance discrimination law

Similar to the United States of America, the Australian state of Victoria also has legislation that explicitly governs appearance-based discrimination in employment.[407] The Equal Opportunity Act of 2010 took effect in August 2011, and repealed the 1995 Equal Opportunity Act. Both acts prohibit discrimination on the basis of appearance, and seek to deter employers from treating employees less favourably because of their physical features.[408] The new act aims to strengthen the discrimination laws in Victoria and to achieve the progressive realisation of equality in order to keep pace with a changing society.[409]

Waring cites former Equal Opportunity Commissioner Sisely, who said the following when explaining the reasoning behind the implementation of the ban on appearance-based discrimination:[410]

> [There are] all too many cases involving people who have been refused employment, denied promotion, knocked back from trendy nightclubs and suffered hurt, harassment and humiliation just because they don't measure up to someone's ideal of how they should look.

The 2010 act defines "physical features" as follows:[411]

> "Physical features means a person's **height**, **weight**, **size** or **other bodily characteristics**."

Discrimination is defined as follows:[412]

> (1) Discrimination means—
>
> (a) direct or indirect discrimination on the basis of an attribute;
>
> (2) Discrimination on the basis of an attribute includes discrimination on the basis—

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407 Rhode 2010:135.
408 Warhurst *et al* 2009:134.
409 Victorian Equal Opportunity and Human Rights Commission n.d.
410 Waring 2011:199.
411 Equal Opportunity Act 2010 (Victoria): sec 4. Own emphasis added.
412 Equal Opportunity Act 2010 (Victoria): sec 7(1), 7(2).

(a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;

(b) of a characteristic that a person with that attribute generally has;

(c) of a characteristic that is generally imputed to a person with that attribute;

(d) that a person is presumed to have that attribute or to have had it at any time.

Although it is not expressly included, the act does recognise that the implementation of dress codes and appearance standards may have an adverse discriminatory impact on employees,[413] and contains many exceptions to the prohibition on appearance-based discrimination.[414] These exceptions include discrimination that is reasonably necessary for the protection of the health, safety and property of any person, or in employment requiring dramatic or artistic performance, modelling work or a similar vocation.[415]

All discrimination complaints are submitted to, and subject to conciliation by, the Victorian Equal Opportunity and Human Rights Commission (hereinafter "the Commission").[416] Complaints may also be referred to the Victoria Civil and Administrative Tribunal (hereinafter "the Tribunal"), whether the person has submitted the dispute to the Commission or not.[417] The Tribunal is vested with a variety of powers, including the power to order any person or body that has been found guilty of discrimination, to make appropriate redress for its actions, pay compensation and order prevention of any further contravention of the act.[418]

The annual reports of the Commission indicate the following statistics in relation to the inquiries and complaints received based on appearance discrimination ("physical features"):[419]

413 Consequently, the act provides certain guidelines for employers on appearance standards and dress codes in employment. See Warhurst *et al* 2009:134.

414 The exceptions in the 2010 act mirror those of the 1995 act. See Rhode 2010:135.

415 Equal Opportunity Act 2010 (Victoria): sec 26(4), 86(1).

416 Rhode 2010:135; Equal Opportunity Act 2010 (Victoria): sec 111, 113.

417 Equal Opportunity Act 2010 (Victoria): sec 122.

418 Equal Opportunity Act 2010 (Victoria): sec 125.

419 Victorian Equal Opportunity and Human Rights Commission 2013:41,43; 2007; Rhode 2010:135.

	2006/2007	2011/2012	2012/2013
Inquiries	122	225	218
Complaints	56	148	126

These statistics clearly indicate that appearance discrimination is prevalent in employment, and more people have been lodging complaints on this basis in recent years. As is also often the case in the United States of America, complainants in Australia tend to link appearance discrimination with another prohibited ground (such as race, gender or religion) in their discrimination claims.[420]

2.4.3.2 Case law and "lookism"

The Australian employment arena has seen some interesting cases in relation to appearance-based discrimination. A primary case in this regard is that of *Hopper and Others v Virgin Blue Airlines (Pty) Ltd*.[421] Virgin Blue was established as a low-cost airline under Sir Richard Branson's Virgin brand in 2000.[422] From the outset, Virgin Blue aimed at establishing a "highly identifiable brand", which was in line with the Virgin group's image and values.[423] In the process of establishing its brand, the airline opted to employ cabin crew members with "organisational aesthetic of youth, vigour and playfulness", which consequently led to the employment of attractive individuals.[424] Virgin Blue often sports its attractive employees, who have been described as having identical body shapes and an Aryan look, in its advertisements, commercials and in-flight magazine, *Voyeur.*[425]

In this case, a group of eight highly experienced female flight attendants aged between 36 and 56 applied for employment with Virgin Blue, but their applications failed.[426] These job applicants then alleged age-based discrimination against the

420 Rhode 2010:136.
421 2004 QADT 13; 2005 QADT 28; 2006 QADT 9.
422 Waring 2011:200.
423 Waring 2011:201.
424 Waring 2011:201.
425 Waring 2011:201.
426 *Hopper and Others v Virgin Blue Airlines (Pty) Ltd*.: 13; Waring 2011:201.

airline, and filed a complaint with the Tribunal.[427] Amongst the grounds relied on by the complainants in support of their claim was that the airline was more preoccupied with looks than with ability, and its requirement that applicants for employment had to perform a "song and dance" for the assessors (which younger candidates were naturally more able to do).[428] The Tribunal ultimately decided in favour of the complainants, held that they had proved aged-based discrimination, and awarded each complainant $5 000 in damages.[429] The issue of appearance-based discrimination was however not afforded much consideration.

Waring has stated that the Tribunal tends to take a relatively broad view in their consideration of "physical features", which have been interpreted to include "any physical component of the body", but excludes "facial expression, posture or clothes".[430] In the case of *Jamieson v Benalla Golf Club Inc*.,[431] however, the Tribunal held that a job applicant had been discriminated against because of his extensive tattoos.[432] The Tribunal opted for a broad interpretation of "other bodily characteristics" and held that these may include characteristics acquired after birth.[433]

2.4.3.3 Concluding remarks

Australia, particularly the state of Victoria, has contributed significantly to the area of appearance discrimination in employment. The increasing number of complaints being brought under the prohibition on appearance discrimination is proof of the problem experienced in ground-level employer-employee relations and employment practices. It is unclear whether the problem has become more prevalent in recent times, or whether more people are simply enforcing their right not to be discriminated against on this ground. What is clear, however, is that this problem is real and requires governance by law.

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427 Since the complaint was filed in Queensland, and not Victoria, the complainants could not use "physical features" as a ground of prohibited discrimination.

428 *Hopper and Others v Virgin Blue Airlines (Pty) Ltd*.: 12; Waring 2011:201,203.

429 *Hopper and Others v Virgin Blue Airlines (Pty) Ltd*.: 30.

430 Waring 2011:199-200.

431 2000 VCAT 1849.

432 *Jamieson v Benalla Golf Club Inc*.: 6,7; Waring 2011:200.

433 *Jamieson v Benalla Golf Club Inc*.: 52.

2.4.4 The European Union

2.4.4.1 The legal principles of the EU applicable to appearance discrimination

2.4.4.1.1 The European Union and anti-discrimination

The European law incorporates more than just a prohibition against unjust discrimination in the workplace. Instead, it is aimed at general non-discrimination, the pursuit of equality, fair participation and equality of opportunity.[434]

[a] Equality

The concept of equality is not stagnant, and its meaning and scope is subject to constant change and redefinition.[435] At its core, though, equality requires that people should be treated alike.[436] However, it has been argued that since every person is unique, it is rather difficult to find "like people".[437] As such, says Barnard, equality shall be achieved when there is no unjust discrimination either directly or indirectly against any person.[438] The primary focus and flagship of the European Union's (EU) policy is the achievement of equality[439] and, consequently, the eradication of unjust discrimination in all spheres of life, particularly employment. Equality has been recognised as a general principle of law in the EU.[440] The Constitutional Treaty of the EU protects and advances the principle of equality, and states that the EU must observe this principle in respect of its citizens in all of its activities.[441]

The Charter of Fundamental Rights of the Constitution also safeguards the right to equality, and states in Title II that "everyone is equal before the law".[442] Article II-81(1), which is applicable to all EU member states, contains a non-exhaustive list of grounds of discrimination, which also overlaps with article 14 of the European Convention on Human Rights, which prohibits discrimination on the listed grounds.[443] This Convention for the Protection of Human Rights and Fundamental Freedoms is

434 Ellis 2005:87.
435 Ellis 2005:4.
436 Barnard 2006:313-314.
437 Barnard 2006:314.
438 Barnard 2006:314.
439 Barnard 2006:297.
440 *Marshall v Southampton and South West Hampshire Area Health Authority* No.1 1986 ECR 723: 36; Barnard 2006:314.
441 Constitutional Treaty of the European Union 2004: art I-45; Barnard 2006:312.
442 Constitutional Treaty of the European Union 2004: art II-80; Barnard 2006:313.
443 Connolly 2006:17.

an international treaty to promote and protect human rights and fundamental freedoms in Europe. It is enforced by the Council of Europe and the European Court of Human Rights. The prohibited grounds of discrimination listed are as follows:[444]

> "Sex, race colour, ethnic or social origin, **genetic features**, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation."

Notably, the "equal before the law" stipulation and the non-exhaustive list of prohibited grounds above very closely resemble section 9 of the Constitution of the Republic of South Africa as well as section 6(1) of the Employment Equity Act.

[b] The sources of anti-discrimination law

There are several sources of anti-discrimination law in the EU. As the EU constitutes a community (a federation), which is in turn made up of member states, each member state will retain its own domestic laws, which may be considered individually. The community as a whole, however, also has its own law that applies to all its member states.[445] The member states are required to implement and enforce the directives and laws of the EU through detailed and specific legislation in their own domestic law.[446] This includes the prohibition against discrimination. The most important enforcement mechanism of EU equality law is the European Court of Justice (ECJ). The ECJ is furthermore an important forum for the development of equality and anti-discrimination law in the EU, and has the discretion and power to develop EU law, define the nature of the law, and give effect to its provisions and articulations.[447] The ECJ is not bound by the doctrine of precedent and may alter its own decisions if it believes it to be just in the given circumstances.[448]

[c] Anti-discrimination and equality provisions in the European Union

The prohibition against discrimination in the EU plays a pivotal role in the employment realm, and acts as an important tool in the protection of the fundamental

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444 Constitutional Treaty of the European Union 2004: art II-81(1); Barnard 2006:313. Own emphasis added.

445 Ellis 2005:11.

446 Bell 2004:147.

447 Ellis 2005:19,37.

448 Ellis 2005:19.

right to non-discrimination.[449] Differential treatment in the EU is considered to be discriminatory and morally reprehensible when it is used to treat some persons less favourably than others on the basis of an irrelevant ground.[450] This is equivalent to the yardstick used in South Africa and the USA. The EU has been described as the ideal "vehicle" for protecting equality and preventing discrimination, particularly because of its potential for growth and development.[451] Thus far, only a few listed grounds of prohibited discrimination exist, as mentioned above, although this list is not closed and does allow for the possibility of further grounds being identified, defined and added.

[d] Direct and indirect discrimination in the EU

In a case of direct or overt (apparent) discrimination, one group, or a member of such a group, is treated differently and less favourably than the members of another.[452] The intention to discriminate is not a prerequisite for direct discrimination. It is sufficient to prove that the differential treatment was based on one or more of the prohibited grounds.[453] Again, this is very similar to the South African position. Direct discrimination may furthermore only be justified when there is an express legislative derogation that allows for it.[454] Indirect (or disguised) discrimination, by contrast, is not measured in terms of the differential action or measure, but rather in terms of its effect.[455] Indirect discrimination will occur if a particular action or policy, which appears to be neutral, disadvantages a substantially higher proportion of the members of one group in comparison to those of another, which can be proven if it is shown that the action or measure has a disparate impact on the members of a protected group.[456] The question that presents itself in this instance is whether the disadvantage must have actually occurred or can in fact be anticipated.[457] In *O'Flynn v Adjudication Officer*,[458] the ECJ declared that a risk of adverse impact is sufficient

449 Bell 2004:29.
450 Ellis 2005:2.
451 The EU law on anti-discrimination and equality is notoriously complex, and there are a number of different instruments that enter the fold for consideration, especially in unclear and ambiguous matters. See Ellis 2005:7,20.
452 Barnard 2006:321.
453 *Worringham v Lloyds Bank* 1981 ECR 767; Barnard 2006:321.
454 Barnard 2006:322.
455 Barnard 2006:324.
456 Barnard 2006:324, 328.
457 Ellis 2005:91.
458 1996 ECR I-2617.

to constitute indirect discrimination and that, in a case of indirect discrimination, the discrimination may be objectively justified if it can be shown that the action or measure is a proportionate means of achieving a legitimate aim.[459]

2.4.4.2 The EU legal system and appearance discrimination

A study conducted in European workplaces in 2012 revealed that 37% of people believed that people's general physical appearance could be to their disadvantage, while 45% believed the same in relation to a person's look, manner of dress or presentation.[460] This view was widely expressed in Sweden (64%), Denmark (61%), Austria (60%) and France (53%).[461]

After the United States of America and Australia, the EU – of which the United Kingdom is a prominent member – presents a noteworthy jurisdiction in relation to appearance-based discrimination in employment.

Although the EU does not have any specific legislation and few cases dealing with appearance prejudice in employment,[462] the formulation of its prohibition on discrimination[463] as well as its mission to develop equality and equal opportunity is similar to that of South Africa, and has significant potential for development in the context of appearance discrimination. Article 14 of the European Convention on Human Rights and the Human Rights Act of the United Kingdom, which embodies the principles of the Convention, have made provision for a non-exhaustive list of prohibited grounds of discrimination.[464] Thus, as mentioned earlier, article 14 is open to many more grounds than the ones listed.[465] Moreover, the Convention makes provision for an "open-ended formula" to allow for changing values and a changing society.[466]

The cases that have presented themselves in the EU in relation to appearance discrimination are as interesting as they are relevant, not only because of the legal principles involved, but also because they have been interpreted similarly to those in

459 Ellis 2005:91; Barnard 2006:321.
460 Jones 2013:503, referring to the 2012 Euroborameter poll.
461 Jones 2013:503, referring to the 2012 Euroborameter poll.
462 Rhode 2010:137.
463 Being non-exhaustive, allowing for the possibility of adding more grounds in the pursuit of equality.
464 Connolly 2006:21.
465 Connolly 2006:21.
466 Connolly 2006:21.

the USA.[467] A comparison between US law and European law revealed that European laws allow individuals a greater right to privacy and self-expression.[468]

It has been reported that the countries of continental Europe, particularly Germany and France, appear to have a prominent interest in protecting the employee's right to privacy and dignity.[469] German law encompasses the right to "express oneself in appearance and dress"[470] and, as such, a German labour court found no objection to, for example, a truck driver who wanted to wear shorts in summer.[471] A French labour court, in turn, ruled in favour of an employee who wished to wear a headscarf while at work, contrary to the wishes of her employer.[472] In these jurisdictions, employers are more restricted in placing their business image above the individual images of their employees.[473]

2.4.4.3 Case law and "lookism" in the EU

In *Stevens v United Kingdom*,[474] the European Commission for Human Rights considered the possibility that an individual's right to freedom of expression may encompass the right of that individual to express his or her ideas through way of dress.

The facts were as follows:[475] The applicant's son had been asked by his school to leave and go home because he refused to wear a tie to school. The applicant had written to the school, informing them that the son's choice of clothing was a private matter and not one which the school could govern. On a different occasion, the applicant's daughter was asked to stand during school assembly, upon which her lack of school uniform and her appearance were pointed out in an unfavourable manner. It was explained to the applicant that school dress code was a matter of discipline, which had been left to the discretion of school governors to decide, but the

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467 This similarity assists in effectively comparing the foreign jurisdictions and South Africa. See Rhode 2010:137.

468 Rhode 2010:139.

469 Rhode 2010:138.

470 As part of the right of "free development of personality". See Rhode 2010:138.

471 Rhode 2010:138.

472 Rhode 2010:138.

473 Rhode 2010:139.

474 Application No 11674/85, (1986) 46 DR 245.

475 *Stevens v United Kingdom*: 1,2; Article 19 2008. http://www.article19.org/resources.php/resource/3098/en/echr:-stevens-v.-the-united-kingdom. Accessed on 09/05/2014.

applicant did not accept this. The applicant subsequently lodged a complaint, alleging that the required wearing of a school uniform violated individuals' right to express themselves through their clothing.

The European Commission for Human Rights held as follows:[476] Freedom of expression was a right that applied to all persons, including school children, and the wearing of clothing was indeed one form of such expression. However, the court said, the applicant's children were not impeded from expressing an idea or opinion through their clothing.

2.4.4.4 The significance of the United Kingdom

[a] The UK legal principles applicable to appearance discrimination

As a significant member of the EU, and because reference will be made to the UK throughout this thesis where relevant, some pertinent aspects of its discrimination law need to be considered. Although the UK does not have a constitution, it does have a Human Rights Act.[477] This act incorporates into domestic law the principles of the European Convention on Human Rights.[478] The state and its laws must comply with this act, but where a law cannot be reconciled with a right in the Convention, the courts do not have the power to nullify or amend it.[479] However, although the European Court of Human Rights is separated from European community law, the ECJ still respects the Convention and its principles, which is why these principles may filter into the UK system via community law.[480]

[b] The UK and appearance discrimination

As mentioned earlier, appearance discrimination in the UK has become known as "aesthetic labour". The theory of aesthetic labour originated from a series of job advertisements in the UK media that sought employees that were "stylish, outgoing,

476 *Stevens v United Kingdom*: 3,4; Article 19 2008. http://www.article19.org/resources.php/resource/3098/en/echr:-stevens-v.-the-united-kingdom. Accessed on 09/05/2014.
477 The Human Rights Act 1998.
478 Connolly 2006:17.
479 Connolly 2006:18.
480 Connolly 2006:18.

attractive, trendy, well-spoken and of smart appearance".[481] In 2011, the UK paper *Daily Star* reported that "ugly people lose out in the hunt for jobs because 'lookist' bosses want handsome folk", and that "this trend means prejudice against the unattractive is the new racism".[482]

In terms of the UK legal system, employees who are discriminated against because of an aspect of their appearance usually do not automatically enjoy legal protection[483] (as they do in the USA). Employees in the UK do however also have the option of linking the appearance-based discrimination with an already protected category[484] (such as race, gender or religion), as most of the complainants in the American and Australian case law demonstrated.

[c] Judicial precedents on "lookism"

In the case of *Schmidt v Austicks Bookshops*,[485] an employee instituted a sex discrimination claim because her employer did not permit female employees who engaged with the public to wear trousers, and rather insisted that they wore skirts.[486] This rule did not apply to employees who did not engage with the public.[487] The employee's employment was eventually terminated because she insisted on wearing trousers to work.[488] The Employment Appeal Tribunal ruled in favour of the employer and upheld the dress code.[489]

In *Department for Work and Pensions v Thompson*,[490] the Employment Appeal Tribunal had to determine whether an employer's rule that required male employees to wear a collar and tie to work amounted to unlawful sex discrimination.[491] The Employment Tribunal decided in favour of the employee, but this decision was set

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481 These advertisements were predominantly placed in the hospitality and retail employment sectors. See Karlsson 2012:51.

482 Wall 2011.

483 Middlemiss 2007:5.

484 Middlemiss 2007:6.

485 1978 I.C.R. 85.

486 *Schmidt v Austicks Bookshops:* 2; Pitt and Clayton 1997:59.

487 *Schmidt v Austicks Bookshops:* 2; Pitt and Clayton 1997:59.

488 *Schmidt v Austicks Bookshops:* 2; Pitt and Clayton 1997:59.

489 Swarb.co.uk 2014. http://swarb.co.uk/schmidt-v-austicks-bookshops-eat-1977/. Accessed 30/06/2014.

490 2004 IRLR 348 EAT.

491 *Department for Work and Pensions v Thompson:* 1; The Law Society Gazette 2004. http://www.lawgazette.co.uk/law/employment-law/3344.article. Accessed 09/05/2014.

aside by the Employment Appeal Tribunal.[492] The Employment Appeal Tribunal reasoned that the Employment Tribunal had erred in its approach to determining sex-based discrimination on the basis of dress and that the crux of the matter was not whether men were held to a certain standard of dress and women were not, but rather that the professional standard of dress for men is a collar and tie, while women have a wider variety of dress items to choose from and that this did not amount to unlawful sex discrimination.[493] This case serves as a prime example to indicate that appearance discrimination cannot always be appropriately addressed by "linking" it with a prohibited ground of discrimination.

The fairly recent decision by the UK Employment Tribunal in *Primmer v Mayflower Kebabs Ltd*[494] is significant with regard to employment discrimination based on appearance. In this case, an employee was subjected to derogatory comments and sexual innuendos by her manager because of her red hair.[495] These comments were communicated to her in English, but were also translated into Turkish by the manager so that other employees could understand.[496] When the employee was absent from work due to illness, the employer terminated her employment and refused to accept medical evidence of her illness. In the absence of a prohibition on appearance discrimination, the employee consequently instituted a claim of sexual harassment against the employer.[497] The Employment Tribunal decided that verbal comments about an individual's appearance were sufficient to establish a hostile or unwelcome working environment, and thus enabled the employee to succeed with her claim.[498]

In the matter of *Smith v Safeway*,[499] a male employee was dismissed for having long hair, which violated the employer's dress and grooming rules.[500] Female employees

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492 *Department for Work and Pensions v Thompson:* 32.

493 The EAT held that the true question was whether men and women were held to the same standard of smartness in their manner of dress, which they were. See *Department for Work and Pensions v Thompson:* 30.

494 2007 (unreported) Employment Tribunal.

495 Middlemiss 2007:6.

496 Middlemiss 2007:6.

497 Middlemiss suggests that it would be easier to establish a claim based on harassment than on some form of prohibited discrimination where appearance is involved, because the judicial forum will be more concerned with the effect of the behaviour on the victim. It is also suggested that this case for the first time provides a possible remedy to victims of lookism in the UK. See Middlemiss 2007:6.

498 Middlemiss 2007:7.

499 1996 I.C.R. 868.

were permitted to have long hair, but male employees were not.[501] While the Employment Appeal Tribunal ruled in favour of the employee's discrimination claim, the Court of Appeal reversed this decision.[502]

In *Boychuk v Symons*,[503] a lesbian accounts clerk, who regularly engaged with members of the public, opted to wear a badge with the words "Lesbians ignite" to work.[504] The employee refused to obey her employer's instruction not to display the badge while at work, and her employment was subsequently terminated.[505] The Employment Appeal Tribunal agreed with the employee's submission that there were certain limitations on an employer's ability to dismiss an employee because of certain aspects of their appearance.[506] The Appeal Tribunal, however, concluded that the employee was fairly terminated, as the slogan on her badge had the potential to cause offence to other employers and customers.[507]

In the case of *Burret v West Birmingham Health Authority*,[508] a female nurse instituted a claim against her employer's dress code, which required female nurses to wear a cap as part of their uniform, while this did not apply to male nurses.[509] The employee felt that the cap was demeaning and served no practical purpose, but her claim was dismissed by the Employment Appeal Tribunal.[510] The Employment Appeal Tribunal held that the employee had not suffered discrimination since a male employee who refused to wear his uniform would have been treated in a similar

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500 *Smith v Safeway:* 2; Pitt and Clayton 1997:59.

501 *Smith v Safeway:* 2; Pitt and Clayton 1997:59.

502 The Court of Appeal held that in a sex discrimination claim it had to be proven not only that males and females were treated differently, but that one sex group was treated less favourably than the other. The court held that in this case the employer's approach was even handed and that neither sex was treated less favourably. This case again illustrates the ineffectiveness of linking an appearance-based discrimination claim with a prohibited ground of discrimination. See *Smith v Safeway:* 2; Pitt and Clayton 1997:59.

503 1977 IRLR 395 EAT.

504 *Boychuk v Symons*: 1,2; Pitt and Clayton 1997:58.

505 *Boychuk v Symons*: 1; Pitt and Clayton 1997:58.

506 Pitt and Clayton 1997:58.

507 *Boychuk v Symons*: 2; ExpertHR 1977. http://www.xperthr.co.uk/law-reports/case/LM-Boychuk-v-HJ-Symons-Holdings-Ltd- 1977-IRLR-395-EAT/2210/. Accessed 09/05/2014.

508 1994 I.R.L.R. 7 EAT.

509 *Burret v West Birmingham Health Authority:* 2; Pitt and Clayton 1997:59.

510 *Burret v West Birmingham Health Authority:* 2; Pitt and Clayton 1997:59.

manner as she was, with the only difference being the fact that their uniforms differed.[511]

In *James v Bank of England*,[512] the employer's dress code stating that "staff must present a neat and business-like appearance avoiding extremes of dress" was interpreted as requiring men to wear a suit to work.[513] It was alleged that this amounted to sex discrimination, but the Employment Appeal Tribunal held that it did not.[514]

In the case of *Kingston and Richmond RHA v Kaur*,[515] an applicant had been accepted to undergo a training course to become a nurse, but the uniform required female trainees to wear a dress.[516] As the applicant's religious affiliation and social custom required her legs to be covered, she offered to wear any form of trousers under her dress, but the health authority would not concede to this and her position in the training programme was rescinded.[517] The Employment Appeal Tribunal sided with the health authority when the applicant brought an indirect race discrimination lawsuit.[518]

It follows from the case law above that the judicial forums of the UK appear to have settled on the view that an employer's interest in promoting a conventional business image and promoting customer relations is an acceptable enough reason to dictate employee appearance at work.[519]

2.4.4.5 Concluding remarks

Interesting cases and complaints have been noted before the courts and tribunals of the European Union, and the United Kingdom in particular, in relation to appearance-based discrimination in employment. Although the success rate of these cases is very low, it must again be noted that since neither the EU nor the UK expressly

511 The Appeal tribunal also held that the standard of "less favourable treatment" is a question of fact and does not depend on the subjective views of the employee. See *Burret v West Birmingham Health Authority:* 2.

512 EAT/226/94, EAT/237/94 unreported (LEXIS transcript); Pitt and Clayton 1997:62.

513 *James v Bank of England;* Pitt and Clayton 1997:62.

514 *James v Bank of England;* Pitt and Clayton 1997:62.

515 1981 I.R.L.R. 337 EAT.

516 *Kingston and Richmond RHA v Kaur:* 1-2; Pitt and Clayton 1997:64.

517 *Kingston and Richmond RHA v Kaur:* 2; Pitt and Clayton 1997:64.

518 *Kingston and Richmond RHA v Kaur:* 2; Pitt and Clayton 1997:64-65.

519 Rhode 2010:137.

outlaws appearance discrimination in the workplace, employees cannot bring a discrimination claim based on the true reason for the discrimination. Instead, as in the United States and Australia (with the exception of those states that do have specific legislation), they are forced to 'link' their appearance discrimination with an already prohibited ground of discrimination in the hope that it will be interpreted widely enough to encompass the appearance factor. Despite the low success rate thus far, however, employees in the EU and UK may yet see appropriate legal recourse being instituted, as the list of prohibited grounds of unfair discrimination contained in article 14 of the European Convention on Human Rights is not a closed list. Individuals may thus allege appearance discrimination as a particular ground and pursue it via the ECJ, which will adhere to the principles of the Convention.

2.4.5 South Africa

2.4.5.1 The South African legal principles applicable to appearance discrimination

[a] The South African position on unfair discrimination

South Africa takes a very stern stance on the prohibition of unfair discrimination, particularly in light of its discriminatory past. Consequently, the supreme law of the Republic, the Constitution,[520] enshrines the right to equality before the law.[521] Various statutes have been enacted to give effect to this right, while the courts have also further defined and developed the prohibition and protection against unfair discrimination.

[b] The Constitution of the Republic of South Africa

As the pinnacle of South African law, the Constitution protects every individual's basic human rights. This includes the right to equality, as contained in section 9:[522]

> (1) Everyone is equal before the law and has the right to equal protection and benefit from the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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520 The Constitution of the Republic of South Africa, 1996.

521 The Constitution of the Republic of South Africa, 1996: sec 9(1).

522 Own emphasis added.

> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, **including** race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9(3) clearly prohibits unfair discrimination, and provides a list of prohibited grounds. This list, however, is not exhaustive, and more grounds may be identified and added.[523] The courts are thus granted the power to recognise new grounds – the so-called unlisted grounds of unfair discrimination.[524] This affords individuals and groups who have been left unprotected, despite being vulnerable to unfair discrimination, the opportunity to bring themselves within the ambit of the definition.[525] However, in order to prevent opening the floodgates of litigation and endless possibilities, boundaries have been set to determine which types of situations could qualify as unlisted grounds of unfair discrimination.

[c] The Employment Equity Act 55 of 1998 and Employment Equity Amendment Act 47 of 2013[526]

The Employment Equity Act (EEA)[527] and the Employment Equity Amendment Act[528] were enacted to give effect to the constitutional right to equality[529] and to eradicate unfair discrimination in the South African workplace, thereby bringing about the new labour dispensation envisaged by the Constitution.[530] Employees who allege unfair discrimination must refer these disputes under the auspices of the EEA.[531] Such disputes must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the labour courts for determination in accordance with their

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523 Fredman 2002:68.

524 Fredman 2002:68.

525 Fredman 2002:70.

526 Although the Employment Equity Amendment Act will be specifically referred to in certain instances, all references to the Employment Equity Act in this dissertation also include the Employment Equity Amendment Act.

527 55/1998.

528 47/2013.

529 Grogan 2005:87.

530 Du Toit 2007:1.

531 Grogan 2005:87.

respective jurisdictions.[532] This also implies that employers may only rely on the defences available under the EEA, and any broader defences are thus excluded (such as those available to the state).[533]

In addition, the EEA serves as the foundation of the prohibition on unfair discrimination in the South African employment realm.[534] The prohibition is crystallised in section 6(1) of the act, which states the following:[535]

> **No person** may **unfairly discriminate**, **directly or indirectly**, against an **employee**, in any **employment policy or practice**, on one or more grounds, **including** race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth **or on any other arbitrary ground**.

It must be noted, however, that section 6(1) does not prohibit discrimination as such, but only unfair discrimination.[536] As is the case with the Constitution, the list of prohibited grounds is not exhaustive, and certain unlisted grounds of unfair discrimination may be alleged and proven, provided that the allegation meets the requirements.[537] Unfair discrimination may take place directly or indirectly.[538] It should further be noted that the EEA expressly includes the protection of an employee from harassment based on any of the listed grounds.[539]

[d] Unfair discrimination in the employment arena

Important to note from the outset is that the prohibition on unfair discrimination in employment essentially centres on the protection of inherent human dignity, which is also the key factor in distinguishing between the listed and unlisted grounds of unfair discrimination.[540]

Section 5 of the EEA places an obligation on employers to promote equal opportunity in the workplace by eradicating unfair discrimination, eliminating it from employment policies and practices.[541]

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532 Grogan 2005:87.
533 Du Toit 2007:2.
534 Dupper *et al* 2004:31.
535 Employment Equity Amendment Act: sec 6(1). Own emphasis added.
536 Dupper *et al* 2004:31.
537 Dupper *et al* 2004:32.
538 Du Plessis and Fouche 2012:93; Dupper *et al* 2004:32. Also refer to par 2.4.5.1[e] below.
539 Grogan 2014:107; 2009:95.
540 McGregor and Germishuys 2014:96; Dupper *et al* 2004:65.
541 EEA: sec 5; Du Toit and Potgieter 2014:15.

At the core of unfair discrimination lies differentiation.[542] Put simply, differentiation means to treat job applicants or employees differently, or to have an employment policy that differentiates between these persons.[543] Differentiation will become discrimination if a person is treated differently for an unacceptable reason.[544] The prohibited grounds listed in section 6(1) qualify as such unacceptable reasons, as does any unlisted ground that is analogous to the listed grounds.[545] Discrimination will become unfair discrimination if the employer cannot justify it.[546] The Constitution and the EEA both prohibit unfair discrimination, but neither defines the concept.[547] The ILO Convention 111, with which the EEA, according to section 3(d), must comply, does however provide a definition:[548]

> 1. For the purpose of this Convention the term "discrimination" includes —
>
> (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
>
> (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

Du Toit raises an interesting argument in suggesting that since the Convention provides a definition for discrimination, it is unnecessary to rely directly on the Constitution or the *Harksen v Lane*[549] test for unfair discrimination.[550] It is proposed that since the EEA must be interpreted in terms of Convention 111, discrimination in terms of the EEA must bear the same meaning as that provided in the Convention (described above).[551] It is also stated that this position will not be in conflict with the

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542 Dupper *et al* 2004:33.

543 Dupper *et al* 2004:33.

544 Dupper *et al* 2004:33-34.

545 Grogan 2014:107; Dupper *et al* 2004:34.

546 Dupper *et al* 2004:35.

547 Du Toit and Potgieter 2014:16. Du Plessis and Fouche (2012:93) suggest the following definition for unfair discrimination: "Discrimination is the **use of irrelevant criteria** to distinguish between individuals or groups, which has the purpose or effect of less favourable consequences for members of one group in relation to those of another." Own emphasis added.

548 ILO Convention 111/1958: art 1(1); Du Toit and Potgieter 2014:9.

549 *Harksen v Lane NO and Others* 1997 11 BLRD 1489 CC.

550 Dupper and Garbers (eds) 2010:152, Du Toit 2010.

551 Dupper and Garbers (eds) 2010:152, Du Toit 2010.

Constitution where employment discrimination is concerned.[552] This position is supported by Van Niekerk *et al*.[553]

Du Toit suggests that the definition in the Convention "covers the same ground as section 6(1) of the EEA, but in more functional terms, rooted in the specific realities of the workplace rather than the broad terms of the Constitution".[554] It is further suggested that discrimination is not separated from the grounds on which it is prohibited, but rather results in the combination of the two elements into a single concept, which leads to a two-stage inquiry (very similar to the inquiry that the labour courts derived from *Harksen v Lane*).[555]

This two-stage inquiry is described as follows:[556]

> 1. Did the conduct complained of amount to –
>   (a) A distinction, exclusion or preference
>   (b) having the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation? And if so,
> 2. was it made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin or on such other grounds as determined in accordance with art 1b [of Convention 111] (above)?

According to Du Toit, section 1(a) of the inquiry above is equivalent to the South African test to establish whether discrimination has taken place, while sections 1(b) and 2 of the test capture the aspect of unfairness.[557] Consequently, if section 6(1) of the EEA is interpreted in terms of the Convention, discrimination against an employee will in fact amount to unfairness.[558]

However, in terms of the traditional South African approach to determining unfair discrimination, which is endorsed by the South African judicial forums and supported by section 11 of the amended EEA, a three-stage inquiry will need to be considered:[559]

Stage 1: Has differentiation taken place?

Stage 2: If so, does the differentiation amount to discrimination?

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552 Dupper and Garbers (eds) 2010:152, Du Toit 2010.
553 Van Niekerk *et al* 2012:135.
554 Dupper and Garbers (eds) 2010:153, Du Toit 2010.
555 Dupper and Garbers (eds) 2010:153, Du Toit 2010.
556 Dupper and Garbers (eds) 2010:153, Du Toit 2010.
557 Dupper and Garbers (eds) 2010:153, Du Toit 2010.
558 Dupper and Garbers (eds) 2010:153, Du Toit 2010.
559 Grogan 2005:88; Pretorius 2013: 9-21; Du Toit and Potgieter 2014:91.

Stage 3: If it does, is the discrimination unfair?

If all three questions are answered in the affirmative, unfair discrimination has occurred.

The most evident display of discrimination occurs when an employer is more concerned with the irrelevant personal characteristics of employees than with their work performance and merit.[560] Therefore, employees will be the victims of unfair discrimination if they are singled out and treated prejudicially on an unacceptable ground.[561] Such an unacceptable ground is said to be arbitrary and based on some irrelevant criterion,[562] which cannot be objectively justified.[563] However, the discrimination need not be arbitrary, and may include a deliberate or rational discriminatory action.[564] Discrimination in employment may also constitute the use of any distinguishing criterion not related to the employment relationship, provided that the use of the criterion adversely affects the complainant's human dignity.[565]

In the case of *Harksen v Lane*, the Constitutional Court stated that in order for an employee to succeed with a claim of unfair discrimination based on an unlisted ground, the employee must establish the distinguishing factor and prove that it defines a group or class of persons.[566] Thereafter, the employee will also have to show that the factor is worthy of protection.[567]

An employer does not have to intend discriminating against an employee. The discriminatory impact of the policy or practice will be sufficient,[568] and is regarded as the most important consideration.[569] An impact on the dignity of the individual or group is another decisive factor in establishing unfair discrimination.[570]

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560 Tinarelli 2000:16.
561 Grogan 2014:107.
562 Grogan 2007:280.
563 Grogan 2005:90.
564 Grogan 2005:90.
565 Du Plessis and Fouche 2012:93.
566 *Harksen v Lane NO and Others*: 27.
567 *Harksen v Lane NO and Others*: 27.
568 Grogan 2009:95.
569 *Association of Professional Teachers and Another v Minister of Education and Others* 1995 16 ILJ 1048 IC: 1089-1090; Grogan 2005:91.
570 Grogan 2009:95.

An employer may raise the following three possible grounds of justification (defences) against an unfair discrimination claim:[571]

(a) The action is not discriminatory or the discriminatory action is not unfair.
(b) The action was taken in terms of affirmative action measures.[572]
(c) The discriminatory action was taken because of the inherent requirements of the job.[573]

These are the only crystallised defences on which an employer may rely to defeat a claim of unfair discrimination.

[e] Direct and indirect discrimination

Both direct and indirect discrimination are prohibited by the Employment Equity Act. Direct discrimination takes place when certain persons, because of a particular trait or characteristic falling within the listed grounds of prohibited discrimination (or not), are treated differently[574] and usually not to their advantage, typically being subjected to adverse treatment or being withheld a benefit because of their affiliation with the protected group. Indirect discrimination occurs when a seemingly neutral employment policy or practice disproportionately affects members of a particular group, and is not justifiable in the circumstances.[575]

[f] The grounds of discrimination

As mentioned earlier, the grounds of discrimination may be divided into listed grounds of discrimination, namely those specified in section 6(1) of the Employment Equity Act, and unlisted grounds, namely those that are analogous to the listed ones. In terms of the Employment Equity Amendment Act, the new 'arbitrary grounds' in section 6(1) are relevant as well. For the sake of clarity, these concepts are discussed below.

[i] The listed grounds

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571 Grogan 2005:99-111.
572 EEA: sec 6(2)(a).
573 EEA: sec 6(2)(b).
574 According to Grogan, direct discrimination may be based on the listed grounds in sec 6(1) or on "comparable attributes". See Grogan 2014:108; Dupper *et al* 2004:39.
575 Dupper *et al* 2004:39,46.

These grounds of discrimination have been listed because of the disadvantage and prejudice that these particular groups have been subjected to in the past, and because, if these groups are not protected, discrimination could be used to demean them in their inherent human dignity.[576]

[ii] The unlisted grounds

In establishing discrimination based on unlisted grounds, an important consideration comes to the fore. Section 3(d) of the EEA stipulates that the act must be interpreted in line with Convention 111 of the ILO, in terms of which discrimination is unfair if it is based on an unlisted ground that "has the effect of nullifying or impairing equal opportunity or treatment in employment or occupation of employees in an equivalent manner".[577] In terms of section 6(1) of the amended EEA, the use of the word "including" also suggests that the list is not exhaustive, and that certain unlisted analogous grounds may be alleged and proven.[578] Since this prohibition is open-ended, discrimination on an unlisted analogous ground may also be unfair, and as discrimination is unfair when it is based on an aspect of an individual's personality, and human personality is not currently contained in the grounds listed in section 6(1), this prohibition can be extended.[579] Section 6(1), it is argued, should consequently be extended to include "any ground that is integral to an employee's identity or dignity".[580] The determination of what could constitute such unlisted analogous grounds has been left to the South African courts to decide based on the specific circumstances of the cases before them.[581]

A crucial consideration in respect of the unlisted grounds of discrimination can be found in the case of *Harmse v City of Cape Town*,[582] where it was stated that "the right not to be unfairly discriminated against is a right enjoyed by all employees, whether or not they fall within any of the designated groups as identified by the Act [EEA]".[583]

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576 Grogan 2014:109-110; 2009:97.
577 Du Toit 2007:6.
578 Van Niekerk *et al* 2012:131.
579 Du Toit and Potgieter 2014:24.
580 Du Toit and Potgieter 2014:24.
581 Du Toit and Potgieter 2014:24.
582 2003 24 ILJ 1130 LC.
583 *Harmse v City of Cape Town*: 47; Grogan 2005:97.

In terms of the traditional approach, the unlisted grounds impose a more strenuous burden of proof, since neither unfairness nor discrimination will be presumed.[584] The *Harksen* test will have to be applied, and complainants will have to show that the employment policy or practice complained of has the potential to impair their fundamental human dignity, or affect them in a comparably serious manner.[585] The unlisted grounds of discrimination should be analogous to the listed grounds, and should consequently have a similar relationship and impact.[586] Complainants must therefore demonstrate a link between the alleged discrimination and the analogous ground that impairs their dignity.[587]

In the case of *Kadiaka v Amalgamated Beverage Industries*,[588] it was held that "discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless".[589] The Labour Court in *Kadiaka* also stated that in order for a ground to have standing as a potentially analogous ground of unfair discrimination, it should be "purposeless, or for a purpose of insufficient importance to outweigh the rights of the job-seeker or employee, or it must be morally offensive".[590]

The key distinction between these grounds lies in the fact that if a listed ground of discrimination is alleged, the discrimination is presumed to be unfair. However, if an unlisted ground of discrimination is alleged, the unfairness thereof will have to be proven.[591] The common denominator among these grounds is their close link to the protection of human dignity[592] and, consequently, if such a link can be shown, an unlisted ground becomes analogous to a listed ground, and worthy of protection.

[iii] The arbitrary grounds

The Employment Equity Amendment Act has included the words "or on any other arbitrary ground" in the wording of section 6(1). What exactly constitutes such an arbitrary ground is not yet clear.

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584 Dupper *et al* 2004:60.
585 *Harksen v Lane NO and Others*: 1509E-G; Pretorius 2013:14; Grogan 2009:98.
586 Grogan 2005:91; Pretorius 2013:14.
587 Van Niekerk *et al* 2012:135.
588 1999 20 ILJ 373 LC.
589 *Kadiaka v Amalgamated Beverage Industries:* 384; Dupper *et al* 2004:63.
590 *Kadiaka v Amalgamated Beverage Industries:* 384A-D; Grogan 2005:91.
591 Dupper *et al* 2004:58.
592 Dupper *et al* 2004:65.

Du Toit and Potgieter suggest that this clearly amounts to a category of "unspecified grounds", but that it is arguable whether this should be allocated the same meaning as unlisted analogous grounds, since this would render the amendment meaningless.[593] They further propose that the amendment was possibly made in order to widen the net of possible discrimination on the basis of grounds that may not necessarily be analogous to the listed grounds, but are nonetheless arbitrary "in the sense of being random, subjective, capricious or haphazard" and, consequently, infringe upon the right to equality.[594] It is also suggested that "arbitrary" introduces another dimension of unfairness, as it serves to describe all forms of listed and unlisted discrimination that violate an employee's right to dignity.[595]

Section 11 of the amended EEA stipulates the burden of proof where an allegation of unfair discrimination based on an arbitrary ground is concerned, and provides as follows:[596]

> 11(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –
>
> (a) the conduct complained of is not rational;
> (b) the conduct complained of amounts to discrimination; and
> (c) the discrimination is unfair.

It is uncertain how these elements will be interpreted in the absence of legislative or judicial guidelines, however. Although the first element, namely rationality, can possibly be tested against existing case law, and the second element, discrimination, has been afforded much consideration, it is the third element, namely unfairness, which lacks clarity in the scope of its possible interpretation.[597]

2.4.5.2 The South African legal position and appearance discrimination

The Republic of South Africa does not have a law that explicitly prohibits discrimination based on appearance. Neither section 9(3) of the Constitution nor section 6(1) of the EEA or the Employment Equity Amendment Act lists appearance discrimination or its related features and characteristics as a ground of discrimination.

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593 Du Toit and Potgieter 2014:24-25.
594 Du Toit and Potgieter 2014:25.
595 Du Toit and Potgieter 2014:25.
596 Employment Equity Amendment Act: sec 11(2).
597 Du Toit and Potgieter 2014:92.

[a] Lookism and aesthetic labour in the South African employment sphere

Although appearance discrimination is under-researched in South Africa, extensive research reveals that it does seem to be a potential problem in the realm of employment.[598]

An article that appeared in *The Mercury* discusses the ambit of the EEA and reveals that it may very well cover appearance-based discrimination issues, as the grounds of prohibited discrimination are so broad and diverse.[599] In *Business Day*, it was revealed that "lookism is still a big problem in the workplace" and that both genders may face appearance discrimination, particularly if they are seen as "too appealing".[600] This article also referred to how employees with a favourable appearance were often used in certain employment positions to improve the value of the employer's business brand, without such exploitation of appearance necessarily aiding the advancement of the employee's career in a comparable manner.[601] *FSP Business*, in turn, believes that height or weight-based discrimination by an employer may give rise to an unfair discrimination lawsuit under the EEA, even though these characteristics are not specifically listed in section 6(1).[602] It is further stated that the best way for an employer to avoid being taken to the CCMA for unfair discrimination, is to discriminate based on appearance characteristics only when it relates to an inherent requirement of the job.[603] These observations clearly indicate that immutable appearance characteristics are akin to the other, existing prohibited grounds of unfair discrimination, and are likely to receive the same protection if they are specifically alleged in an unfair discrimination claim against an employer.

Although appearance discrimination falls squarely within the ambit of the constitutional rights to dignity and equality, and can be challenged most effectively on these grounds, Hepple makes an interesting suggestion, namely that an approach to equality that focuses on human dignity[604] is not sensitive enough to certain other issues in the South African workplace, such as individual liberty and

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598 Although the *Mercury*, *Business Day* and *FSP Business* articles cited are not from legal journals, they do serve to illustrate the existence of the problem in South African workplaces.

599 Bulger 1998.

600 Wolf 2013:1.

601 Wolf 2013:1.

602 FSP Business Team 2013.

603 FSP Business Team 2013.

604 This right is firmly entrenched in sec 10 of the Constitution of South Africa.

autonomy.[605] It is further suggested that where an appearance discrimination dispute occurs, a proportionality approach[606] would be more appropriate.

In South Africa (as in Europe), it has been suggested that the appearance characteristics of dress and grooming may fall under the constitutional right to freedom of expression.[607] Dress and grooming standards in South African workplaces are affected by multiple considerations, including diversity issues such as race, ethnicity, religion and culture, which all have a significant impact on the lifestyle and world view of South African employees.[608] These and other considerations, including globalisation, a mobile transnational workforce and the growth of the small-business sector, have all affected dress standards in the South African workplaces.[609] Therefore, respecting every employee's right to operate within their dress comfort zones is vitally important in ensuring workplace equality, harmony and effectiveness.[610]

Rycroft, however, points out that as the law stands, employers are entitled to set dress codes, with which employees must comply.[611] The reasoning behind such dress codes includes the creation of brand awareness as well as the reputation and image of the employer, the maintenance of health and safety in the workplace, and the determent of inappropriate clothing.[612] The promotion of uniformity, discipline and professionalism may also play a role.[613]

McGregor interestingly and correctly suggests that "personal appearance" and "manner of dress" may very well be alleged as unlisted analogous grounds of unfair

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605 Dupper and Garbers (eds) 2010:8, Hepple 2010.

606 Which would inquire whether the employer's aim with appearance-based differentiation is a legitimate one, and whether the means are proportionate to that aim. See Dupper and Garbers (eds) 2010:8, Hepple 2010.

607 Sec 16 of the Constitution reads: "Everyone has the right to freedom of expression, which includes … freedom to receive or impart information or ideas, freedom of artistic creativity …". Also see Alston *et al* 2003:163.

608 Grant and Nodoba 2009:360.

609 Grant and Nodoba 2009:363.

610 Grant and Nodoba 2009:363, referring to Merry 2003:469.

611 Rycroft 2011:109.

612 Rycroft 2011:109.

613 Rycroft 2011:109.

discrimination in South African labour law,[614] since these issues centre on every person's right to inherent human dignity.

[b] The role of appearance in relation to equality and dignity in the South African context

The rights to dignity and equality are cemented in the Constitution of the Republic of South Africa.[615] It is argued that appearance-based discrimination in South Africa can best be challenged as an infringement upon an individual's right to dignity and equality.[616]

Vettori indicates that a contract of employment is more than just a commercial contract, and also contains aspects of dignity, identity and humanity.[617] An employer is consequently obliged to act in a reasonable and fair manner towards its employees, and respect their constitutionally protected right to dignity.[618] It is further reaffirmed that the rights to dignity and equality, as well as the prevention of harassment, are fundamental cornerstones of the South African labour arena.[619] In light of this, it is argued that by virtue of the contract of employment and the employment relationship, an employer is obliged not to unfairly discriminate against employees based on their appearance and to respect their dignity and right to equality in the workplace.

Dignity has often been described as the central value of equality in as far as it speaks to our basic humanity.[620] Therefore, while these rights are protected as individual and independent rights, they also exist in unison.[621] Fredman refers to Chaskalson in this regard, who states the following: "Inequality is established not simply through group-based differential treatment, but through differentiation which

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614 McGregor and Germishuys 2014:106.

615 The right to equality in sec 9, and the right to dignity in sec 10.

616 While reference will be made to constitutional court cases, certain case law such as *Minister of Health and another v New Clicks SA (Pty) Ltd and Others* 2006 2 SA 311 CC does indicate that when an employment dispute occurs, neither the Constitution nor any court cases directly interpreting the Constitution may be relied on at first instance. See Du Toit and Potgieter 2014:14. Here, however, it is suggested that given the willingness of the labour courts to endorse the tests for unfair discrimination, the role of inherent human dignity in labour matters, as well as the fact that the EEA flows from the Constitution, the cases cited are indeed relevant for the purposes of this study.

617 Vettori 2012:103.

618 Vettori 2012:103.

619 Vettori 2012:103.

620 Currie and De Waal 2005:273.

621 Dupper and Garbers (eds) 2010:19, Fredman 2010.

perpetuates disadvantage and leads to scarring of the sense of dignity and self-worth." [622]

Equality is one of the cornerstones of the South African Constitution and the new constitutional society, and is described as being both a "value" and a "legally enforceable right".[623] It has been suggested that the achievement of substantive equality involves a process of transformation in society, which is aimed at the eradication of disadvantage based on race, gender, class and other forms of inequality.[624] It is argued that discrimination based on appearance is one such form of inequality, which should be remedied if society is to achieve equality and transformation.

In the labour arena, the right to equality and the pursuit of fairness require a balancing act between the rights and interests of the employer and employee.[625] This differs slightly from the constitutional position, where the balance is tilted in favour of those persons who are vulnerable and marginalised,[626] although issues such as vulnerability and marginalisation of groups will always play a dominant role in assessing fairness and equality in the labour arena.

This position was highlighted in the case of *Hoffmann v SAA*,[627] where the Constitutional Court warned against allowing the employer's commercial interests to outweigh the employee's right to dignity, and reaffirmed that the Constitution afforded protection to the victims of prejudice and stereotyping in employment.[628] It is therefore argued that appearance-based discrimination in employment should be subjected to the same balancing act, and that the vulnerability of these employees and the adverse effect that such discrimination has on their rights to dignity and equality should be weighed against the commercial interests of the employer. Preference should therefore be given to the employee's rights, which would result in the prohibition of appearance discrimination in employment.

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622 Dupper and Garbers (eds) 2010:19, referring to Chaskalson 2002:140, Fredman 2010.

623 Dupper and Garbers (eds) 2010:77, Albertyn 2010.

624 Dupper and Garbers (eds) 2010:77, Albertyn 2010.

625 Dupper and Garbers (eds) 2010:79, Albertyn 2010.

626 Dupper and Garbers (eds) 2010:79, Albertyn 2010.

627 2001 SA 1 CC, 2000 11 BCLR 1211 CC: 34; Dupper and Garbers (eds) 2010:79, Albertyn 2010.

628 Dupper and Garbers (eds) 2010:79, Albertyn 2010.

If a claim alleging the infringement of the right to equality is brought before the South African judiciary, the Constitution compels the courts to approach such claims by assessing the "position of the claimants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real-life context, in order to determine its fairness or otherwise in light of the values of the Constitution".[629] These factors in the appearance context have been investigated and discussed at length earlier on. In a claim of appearance-based discrimination, the courts must thus consider the factors mentioned above, which will, given the prejudice, stigma and disadvantage associated with this category of discrimination, result in a finding that it does indeed infringe upon an employee's right to dignity and equality.

In the case of *Harksen v Lane*, the Constitutional Court stated that fairness was assessed by determining whether there has been an infringement of a complainant's fundamental human dignity or an impairment of a comparable serious nature.[630] It is suggested that judging and disadvantaging employees based on what they look like strikes at the very foundation of the individual's dignity, resulting in gross unfairness.

It is also important to consider the meaning of discrimination, as described by the Constitutional Court in the case of *Prinsloo v Van der Linde and Another*,[631] namely that discrimination "amounts to the unequal treatment of people based on attributes and characteristics attaching to them".[632] It follows, then, that individuals' physical attractiveness, height or self-expression are appearance characteristics "that attach to" the individuals and, consequently, meet the standard required to amount to discrimination if the individual is treated unequally on these grounds.

Currie and De Waal argue that human dignity is the foundation in which an individual's innate right to physical integrity as well as a number of other rights are rooted.[633] As the right to dignity can therefore have many meanings and be used in many different ways to address a diversity of issues, many aspects of this right have arisen. One such aspect is that dignity is taken to reflect characteristics such as

629 Dupper and Garbers (eds) 2010:80, Albertyn 2010.
630 Dupper and Garbers (eds) 2010:80, Albertyn 2010.
631 1997 3 SA 1012 CC, 1997 6 BCLR 759 CC: 31; Dupper and Garbers (eds) 2010:145, Du Toit 2010.
632 Dupper and Garbers (eds) 2010:145, Du Toit 2010.
633 Currie and De Waal 2005:273.

psychological self-worth and personal autonomy.[634] When employees are prohibited from expressing themselves and their ideas through their appearance, or are prejudiced because of their appearance, this offends both the employee's personal autonomy and psychological self-worth. Consequently, the employee's right to dignity is also tarnished.

Most equality claims that have been brought before the judiciary (the Constitutional Court in particular) have been claims for social recognition, which declare the social identities and values of the group concerned and request recognition, equal standing and equal protection in society.[635] It is argued that the victims of appearance-based discrimination constitute a group – albeit not necessarily cohesive or easily identifiable – who may seek social recognition and are able to allege their social identity and values. These include that the members of the group are often subjected to prejudicial and discriminatory treatment in the workplace or in the hiring process by means of an employment policy or practice of the employer, based on some characteristic or feature of their appearance.

Albertyn recognises that the courts have addressed only a small portion of the inequalities that characterise South African society.[636] It has therefore been suggested that the list of additional prohibited grounds be carefully considered and the nature and values underpinning the right to equality be further articulated and applied[637] to also afford protection to the victims of appearance-based discrimination in employment, as such inequality is not yet dealt with and may be characterised as a possible additional prohibited ground. In line with Albertyn's view, it is also proposed that such an additional ground may be developed as either an unlisted analogous ground or an arbitrary ground under the new Employment Equity Amendment Act.[638]

[c] "Metro cops hair tiff"[639] – A practical perspective on how appearance discrimination may present itself in the South African employment realm

634 Dupper and Garbers (eds) 2010:90, Albertyn 2010.
635 Dupper and Garbers (eds) 2010:94, Albertyn 2010.
636 Dupper and Garbers (eds) 2010:96, Albertyn 2010.
637 Dupper and Garbers (eds) 2010:96, Albertyn 2010.
638 As indicated under par 2.4.5.1.(f)(iii), the legislature and/or the judiciary will first need to clarify the nature and scope of the arbitrary grounds.
639 Venter 2014a.

In May 2014, two female Metro Police recruits' employment was terminated for refusing to adhere to an instruction to cut their hair as "short as that of men".[640] In December 2013, an instructor informed the recruits that their hair was too long and that they had to cut it short, which they refused to do.[641] The instructor, who had very short hair herself (which the recruits regarded as a male hairstyle), instructed the recruits to wait for her after the line-up, at which point she grabbed the recruits and forcefully cut their hair.[642] One recruit stated that in trying to defend herself, her finger was cut, while the other testified that the violent manner in which she was grabbed caused a "burning feeling in her neck".[643]

In the wake of a grievance lodged against her, the instructor was dismissed from her position.[644] Five months later, the recruits received letters informing them that their employment had also been terminated for refusing to obey the lawful instruction to cut their hair.[645] The Metro Police chief indicated that the instructor was not dismissed for having issued the instruction, but rather for the manner in which she proceeded to cut the hair of the recruits herself.[646] He contended that the instruction was indeed lawful, as recruits were expected to complete obstacle courses, where long hair could get caught and, therefore, posed a risk.[647]

These events led to an urgent application by the recruits in *IMATU and Others v City of Tshwane Metropolitan Municipality and Others*[648] to have their training agreements declared lawful and their dismissal from the programme reversed. The court decided in favour of the recruits, and ordered their reinstatement to the programme.[649] This case clearly illustrates the contention between individual expression and alleged business needs in the South African context.

2.4.5.3 Appearance discrimination cases in South Africa

640 Venter 2014b.
641 Venter 2014b.
642 Venter 2014b.
643 Venter 2014b.
644 Venter 2014b.
645 Venter 2014b.
646 Venter 2014b.
647 Venter 2014b.
648 44390/2014 2014 ZAGPPHC 412.
649 *IMATU and Others v City of Tshwane Metropolitan Municipality and Others:* 1,3.

[a] *Department of Correctional Services & Another v POPCRU & Others*[650]

In this case, the respondents, who had been employed as prison correctional officers by the Department of Correctional Services, were dismissed for having refused to comply with the Department's dress code.[651] The primary objective of the dress code was to achieve neatness and uniformity in correctional officers' appearance, with the secondary purpose of enhancing security, discipline and service delivery.[652] The officers wore their hair in "dreadlocks" and refused to cut their hair when they were ordered to do so.[653] The area commissioner was dissatisfied with the poor compliance with the Department's dress code in that employees mixed their uniforms and wore different hairstyles, and believed that this could compromise security and discipline at the prison.[654] The employees alleged that they wore their hair in "dreadlocks" because they were members of the Rastafarian religion, while others alleged that they wore their hair in "dreadlocks" for cultural reasons.[655] It was therefore contended that the instruction to cut their hair amounted to discrimination on the basis of religion and culture.[656] The dress code of the Department prescribed different appearance standards for male and female officers, and while men were explicitly prohibited from wearing dreadlocks, women were not.[657] Consequently, the respondents alleged gender discrimination as well.

The court held that the dress code did introduce differentiation in respect of employee hairstyles that was not facially neutral,[658] as it enforced mainstream male hairstyles "at the expense of minority and historically excluded hairstyles, such as hippy, punk or dreadlocks".[659] The court determined that this imposed disadvantages or placed a burden on the male correctional officers, who were consequently "prohibited from expressing themselves fully in a work environment where their practices are rejected and in which they are not completely accepted for who they

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650 2012 2 BLLR 110 LAC.
651 *Department of Correctional Services & Another v POPCRU & Others*: 113(2).
652 *Department of Correctional Services & Another v POPCRU & Others*: 124(38).
653 *Department of Correctional Services & Another v POPCRU & Others*: 113(2).
654 *Department of Correctional Services & Another v POPCRU & Others*: 113(4).
655 *Department of Correctional Services & Another v POPCRU & Others*: 114(5).
656 *Department of Correctional Services & Another v POPCRU & Others*: 114(5).
657 *Department of Correctional Services & Another v POPCRU & Others*: 114(8)-115(8).
658 *Department of Correctional Services & Another v POPCRU & Others*: 119(25).
659 *Department of Correctional Services & Another v POPCRU & Others*: 120(25).

are".[660] The court also held that reasonable accommodation of diversity in the workplace was important in determining whether a discriminatory measure achieved its purpose, and whether less restrictive or disadvantageous means could have been employed instead.[661]

In this case, the appellants did not allege that short hair (or un-dreadlocked hair) was an inherent requirement of the job, nor did they put forward any evidence to suggest that the decline of discipline and security that had allegedly been caused by dreadlocked hair was a genuine enough threat to outweigh the rights of equality and dignity.[662] The court argued that, seen against the constitutional dispensation in South Africa, it was unlikely that the purpose served by uniforms would be undermined by reasonable accommodation of diversity.[663]

The Labour Appeal Court determined that the employees had been discriminated against on the basis of religion, culture and gender, and consequently ruled in favour of the correctional officers.[664] In its finding, the court stated the following: "[Q]uite evidently, therefore, the department was aware of the requirements of the principle of reasonable accommodation, yet curiously opted for the imposition of a blanket prohibition, irrespective of the unfair impact upon the rights and dignity of the respondents and its constitutional and statutory obligation to accommodate diversity."[665]

The Department subsequently appealed to the Supreme Court of Appeal (SCA) against the Labour Appeal Court's decision.[666] According to the Department, the wearing of dreadlocks had an adverse impact on rehabilitation and discipline.[667] The SCA, however, was not convinced by this argument and held that no evidence had been produced to indicate that the employees' hairstyles impeded their ability to

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660 *Department of Correctional Services & Another v POPCRU & Others*: 120(25).

661 *Department of Correctional Services & Another v POPCRU & Others*: 126(44).

662 *Department of Correctional Services & Another v POPCRU & Others*: 126(45).

663 *Department of Correctional Services & Another v POPCRU & Others*: 128(49).

664 *Department of Correctional Services & Another v POPCRU & Others*: 121(28),129(55).

665 *Department of Correctional Services & Another v POPCRU & Others*: 129(51).

666 *Department of Correctional Services & Another v POPCRU & Others* 2013 4 SA 176 SCA.

667 In this appeal, the Department of Correctional Services attempted to illustrate that the dress code served to combat the use of illegal drugs (dagga) in prison. As Rastafarians are known cannabis users, the Department argued, prisoners could possibly persuade Rastafarian guards to smuggle dagga into the prison. See *Department of Correctional Services & Another v POPCRU & Others:* 20.

perform their jobs or rendered them vulnerable to manipulation or corruption.[668] The hairstyle required by the dress code was consequently found not an inherent requirement of the job, and no rational connection was established between the supposed purpose of the discrimination and the measure taken.[669] The court held that the Department had also failed to demonstrate that it would suffer undue hardship if it accommodated the employees. The appeal was therefore dismissed.[670]

This case illustrates another relevant principle, namely that an employer may require employees to adhere to certain standards of appearance at work, with the aim of increasing its productivity and efficiency, and that employees may challenge such policies on the basis of their rights to equality and dignity, if they feel that the policies violate their rights to dignity and equality.[671] This is so because constitutional rights have been included in the employment relationship, resulting in a constant balancing act between the employee's constitutional rights and the employer's right to engage in free economic activity.[672]

Apart from dealing with appearance discrimination in employment, what adds to the significance of this case is that it highlights the Labour Appeal Court's willingness to allow for reasonable accommodation of diversity in the workplace. It is argued that, by implication, reasonable accommodation of diversity also includes appearance.

This case also indicates that employees should be accepted for who they are at work, and permitted to express themselves accordingly. The words of the court, "expressing themselves fully in a work environment" and "accepted for who they are", carry the implication that employees' right to self-expression and freedom of expression may be extended to their appearance; that they may impart their ideas via their appearance, and that their appearance is thus directly linked to who they are as individuals. Consequently, discrimination against employees because of their appearance may constitute not only an infringement of their rights to equality and dignity, but also their right to freedom of expression.

668 *Department of Correctional Services & Another v POPCRU & Others:* 25.
669 *Department of Correctional Services & Another v POPCRU & Others:* 25.
670 *Department of Correctional Services & Another v POPCRU & Others:* 25.
671 Grant 2012:179.
672 Grant 2012:179.

The case further suggests that employees may succeed with a claim of appearance-based discrimination if they link it with another ground of prohibited discrimination under the Constitution and the EEA. It is not foreseen that the amendments contained in the Employment Equity Amendment Act will change this. This is also akin to the position taken by most complainants in the other, comparative jurisdictions.

[b] *Dlamini & Others v Green Four Security*[673]

In this case, security guards were dismissed for having refused to trim or shave their beards, as required by the company dress policy.[674] The employees alleged indirect religious discrimination, as they professed to be members of the Nazareth faith.[675] They also alleged that the company's dress policy that required employees to be clean-shaven was not in force at the commencement of their employment, and that they had beards when they started working for the employer.[676] The employer contended that employees were contractually bound to be clean-shaven because they were aware of the employment policy.[677] The Labour Court held that the rule applied at the time of their dismissal and, in fact, resulted in their dismissal, and as such, was the only important consideration.[678] The employment policy (dress code) stated the following: "… to be personally clean, neat and hygienic. The employee acknowledges that he/she is in the Security Industry for which a clean-shaven facial appearance is required at all times". [679]

The Labour Court adopted a "constitutional approach" in reaching its decision.[680] It concluded that the clean-shaven rule amounted to an inherent requirement of the job[681] and was neither arbitrary nor irrational.[682] The rule was found to be justified

673 2006 11 BLLR 1074 LC, 2006 JOL 17853 LC.
674 *Dlamini & Others v Green Four Security*: 1.
675 *Dlamini & Others v Green Four Security*: 1,7.
676 *Dlamini & Others v Green Four Security*: 2.
677 *Dlamini & Others v Green Four Security*: 7.
678 *Dlamini & Others v Green Four Security*: 5.
679 *Dlamini & Others v Green Four Security*: 54.
680 Govindjee 2007:361.
681 The court considered foreign law as well as the appearance standards of other security services, such as the SANDF and the SAPS, and found that unshaven and untrimmed beards were untidy. See Govindjee 2007:362.
682 *Dlamini & Others v Green Four Security*: 62, 67.

and the employees were found not to have been victims of discrimination.[683] The court did however note that neither party made any submissions relating to constitutional grounds (particularly sections 36 and 39), nor did they submit any international or foreign authorities for the court to consider.[684] The Labour Court found this regrettable, since the responsibility to develop constitutional jurisprudence rested as much with legal practitioners as it did with the courts.[685] It is therefore argued that the judicial forums would be receptive to an appearance-based discrimination claim, and would consider it in the spirit of developing South African labour law in the constitutional dispensation.

The following statement by the Labour Court is significant in respect of allegations of religious as well as appearance discrimination: "[I]f a requirement in a code conflicts with human rights law, the latter prevails."[686] Thus, an employment policy will not be justified if it restricts a practice (such as a religious belief) that does not impede an employee's ability to perform the duties of employment, or place the safety of the public and other employees at risk, or cause undue hardship for the employer.[687] It can be argued that appearance is one such characteristic that does not, under regular circumstances, impede employees' ability to perform the duties associated with their employment.

However, this matter also clearly illustrates that an employment policy or practice that amounts to an inherent job requirement will be justified.[688] Consequently, if an employment policy or practice restricts or governs an aspect of appearance and is an inherent requirement of the job, appearance-based discrimination against the employee will most likely be justified.

2.4.5.4 The legal position in South Africa seen against the comparative jurisdictions

As stated earlier, the EEA must be interpreted in accordance with Convention 111 of the ILO, which deals with anti-discrimination and equal opportunity in employment,

683 *Dlamini & Others v Green Four Security*: 67, 71.
684 *Dlamini & Others v Green Four Security*: 11.
685 *Dlamini & Others v Green Four Security*: 11.
686 *Dlamini & Others v Green Four Security*: 43.
687 *Dlamini & Others v Green Four Security*: 43.
688 Rycroft 2011:112.

and considers this Convention to be fundamentally important. The ILO's 2008 General Survey on the Fundamental Conventions[689] acknowledged the prevalence of appearance discrimination in employment, and stated that it was a new ground of discrimination that had (in many jurisdictions) been given consideration in addition to those listed in the Convention.

Since the EEA must adhere to Convention 111, and the ILO has noted appearance characteristics as a possible ground of discrimination that threatens equality, it can be concluded that the South African labour law should be open to the possibility of acknowledging appearance-based discrimination as a problem in employment, and should consider taking steps to govern and eradicate it.

The USA, Europe, Australia and South Africa are similar in that none of the jurisdictions currently have a national law dealing with appearance discrimination in employment. South Africa also does not have any provincial or local laws that address this issue, while the USA has but a few and Australia has only one. The legislation that regulates appearance prejudice in the USA and Australia has been invaluable in determining what the consequences of legislating against appearance discrimination in employment will be: The relatively low enforcement action experienced under these laws has proven that the floodgates of litigation will not necessarily be opened and that frivolous claims are few and far between. There has also been no discernible business backlash. There is no reason, therefore, why this should not also be the case in South Africa if labour laws were extended to include such a specific prohibition. The foreign ordinances have also acted to deter employers from discriminating on the basis of appearance, and have provided protection and legal recourse to employees who have a legitimate claim on this ground. It is suggested that legislative reform in South Africa will accomplish the same goal.

Although many of the court cases in the USA, Australia and Europe did not succeed, they are still noteworthy as evidence of the problem. The cases that did succeed are even more significant, because they illustrate that the problem is acknowledged by the legal fraternity, and that the victims of appearance discrimination are worthy of legal recognition and protection. These cases, however, were mostly brought on the

689 ILO 2012.

basis of an already prohibited ground, such as race, gender, disability or religion, and the problem of appearance prejudice was therefore given secondary consideration only. This is similar to the position in South Africa, as was illustrated by the *POPCRU* and *Dlamini* cases discussed above. This stresses the need for legal reform so that cases can be dealt with based on the true discriminatory ground (namely appearance), and not by means of a claim that has been bent and shaped to fit the bill of an existing, specifically legislated protected ground.

2.4.5.6 Concluding remarks

Appearance-based discrimination has been identified as a concern in the South African employment arena, and although no court cases have dealt directly with this issue, it is clear from the Labour Appeal Court's approach in *POPCRU*[690] that, in the new constitutional dispensation, employers must have due regard for the reasonable accommodation of diversity. Employees' rights to equality and dignity are paramount in the workplace, and employers may not impose blanket bans of discrimination that could infringe these rights. Employees bring all of themselves to work, and should be allowed to be who they are and express themselves accordingly, unless of course such expression clashes with the inherent requirements of the job to which they have been appointed or cause undue hardship for the employer, as illustrated in *Dlamini*.[691] Every employee's rights to equality and dignity, as guaranteed by the South African Constitution, make it possible for the victims of appearance-based discrimination to seek legal recognition and protection in the labour arena. It is suggested that any attempt at law reform in relation to appearance discrimination in employment should draw on the social change and innovation that radiates from the beating heart of South African law, the Constitution, and eradicate the inequality and prejudice caused by this form of discrimination.

2.5 Appearance-based discrimination in the workplace: The possibility of protection

This section will consider the legal arguments for governing appearance discrimination in employment by way of law. Appearance discrimination will be viewed from the angle of a violation of the rights to dignity and equality, while its

690 *Department of Correctional Services & Another v POPCRU & Others* 2013 4 SA 176 SCA.

691 *Dlamini & Others v Green Four Security* 2006 11 BLLR 1074 LC.

status as an unlisted analogous ground as well as an arbitrary ground of unfair discrimination will be considered in South African labour law.

2.5.1 The rationale for statutorily regulating appearance prejudice in employment

Rhode submits that appearance-based discrimination negates the values of personal dignity and social equality in a similar manner as other forms of discrimination that are now illegal, and asks: "What accounts for the difference in treatment?"[692] The reasoning behind this question is supported by Pieterse, who provides the following comparison in this regard:[693]

> Negative perceptions of unattractive people and adverse treatment they receive as a consequence often amounts to unfair discrimination. When one views a fat person as lazy, a short person as incompetent or a person with bad skin as unhygienic, one is stereotyping….

Appearance discrimination seems to be at least as prevalent as other forms of prohibited prejudice, and public opinion seems to suggest that something should be done to govern it in the employment realm. National surveys conducted in the USA produced the following results:[694]

Type of discrimination	Appearance	Race	Age	Religious or ethnic bias	Sex
Percentage	12-16%	12%	9-14%	3%	12-19%

The results above indicate that the percentage of people who were subjected to appearance-based discrimination is either equal to or greater than the percentages

692 Rhode 2010:101.
693 Pieterse 2000:124.
694 Rhode 2010:102- 103, referring to a 2008 NBC News/*Wall Street Journal* poll.

reported by workers in relation to other forms of discrimination.[695] Furthermore, 33% of people stated that persons who are subjected to categories of appearance-based discrimination in employment (such as discrimination based on attractiveness, weight or dress) should receive legal protection "similar to the protection granted to persons with disabilities".[696] In a survey conducted amongst employers, 93% stated that appearance was either critical or important to business success, while 90% stated that the "right appearance" was a critical recruitment criterion.[697]

As stated earlier, appearance falls on a continuum that encompasses both mutable (dress and grooming) and immutable (height and physical attractiveness) characteristics. It has been established that prejudice based on characteristics that individuals cannot readily alter is unfair and unjust.[698] The mutable characteristics of appearance, such as dress and grooming, are more difficult to place, although discrimination on these grounds clearly restricts the rights to self-expression and individuality. Appearance discrimination in the workplace raises the important question of how employers, the courts and the legislature will determine which aspects of appearance should receive protection,[699] and how this is to be regulated by labour laws.

As other forms of human prejudice that are assumed to be ingrained, such as bias based on race, religion and sexual orientation, have come to be governed by law, Rhode argues as follows with regard to appearance discrimination:[700]

> The point is not to equate all forms of discrimination or to deny that bias raises greater concern when it is based on innate rather than voluntary characteristics. The point is rather that even forms of prejudice assumed to be hardwired have in fact been profoundly influenced by law. There is no reason to believe that appearance discrimination would be different.

The failure to prohibit appearance discrimination in employment has the effect of legitimising the practice and "perpetuating society's discriminatory tendencies".[701] Furthermore, to tolerate appearance-based discrimination in the workplace would cause harm to those employees who have not been blessed with a "favourable

695 Rhode 2010:102.
696 Rhode 2010:103; Loy 2005:36.
697 Warhurst *et al* 2009:133.
698 Rhode 2010:109.
699 Rhode 2010:111.
700 Rhode 2010:113.
701 James 2008:657, referring to Adamitis 2000:214.

appearance",[702] and may aggravate existing adverse social and psychological pressures on employees.[703]

[a] The prevalence of appearance discrimination claims

An important question to consider is why more employees have not brought claims based on appearance discrimination. This may be due to several factors.

The stern view taken by the law in relation to many forms of discrimination in employment and the achievement of equality may deter employers from discriminating openly and directly against employees, including based on appearance. The lack of legal governance and clarity relating to appearance-based discrimination in the workplace may also make claims difficult to prove in court. It has been argued, however, that the generally low rate of success[704] is not unique to appearance discrimination claims, but is prevalent in other areas of discrimination as well.[705] A further reason may be that many victims of appearance discrimination do not file complaints or institute legal action, and of those who do, only a small percentage achieves success.[706]

However, the victories of those parties who did achieve success are significant and have contributed to the paradigm shift in perceptions about appearance-based discrimination in employment. This shift has been amplified in the jurisdictions that have prohibitions on appearance discrimination, which have also significantly contributed to addressing this problem in the workplace. In addition, the litigation and complaints involving appearance discrimination have served to raise public awareness on the issue.[707]

[b] Frivolous claims and the floodgates of litigation

As has been indicated by the jurisdictions that have laws in place regulating categories of appearance-based discrimination, the relatively low enforcement action stands as evidence that the promulgation of legislation that specifically deals with

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[702] Or the particular appearance characteristic that the employer seeks to exploit. See Waring 2011:198.

[703] Waring 2011:197,198,199.

[704] The low success rates can be seen in the judicial precedents of the various jurisdictions.

[705] Rhode 2010:140.

[706] Rhode 2010:140.

[707] Rhode 2010:140.

this phenomenon does not necessarily open the floodgates of litigation and allow absurdities to occupy and distract judicial forums. The costs involved with litigation and the onus to prove such prejudice have served to deter the complaints of many employees, disproving the flood of frivolous litigation anticipated by those opposed to such a law.[708]

[c] Appearance discrimination and the inherent requirements of a job

One of the most significant and convincing arguments in favour of statutorily regulating appearance-based discrimination in employment is that, in most instances, appearance is irrelevant to job performance.[709] People's appearance should not deter them from earning a living, especially in vocations where appearance is neither part of the job description nor significant to performance.[710]

Corbett suggests that appearance is as irrelevant to job performance as many other prohibited grounds.[711] It raises concerns when an individual is categorised based on qualities that do not speak to their merit or capacity to execute the core functions of the job for which they are appointed.[712] Employers and employment policies that assess and place individuals based on appearance are "arbitrary, irrational and unfair" and adversely affect the individual concerned.[713] Waring states the following in this regard:[714]

> Making the arbitrary judgement that a certain look equates with a more desirable form of customer service or is inconsistent with a corporate brand, immediately excludes those without this look who are capable of performing a task to a satisfactory level.
>
> … [T]his contention unduly elevates 'looks' above 'competency' and attaches highly questionable assumptions to the notion of quality customer service. Such strategies unfairly reduce opportunities for otherwise competent applicants and entrench unhelpful stereotypes.

Furthermore, employment policies and practices that judge employees on the basis of appearance seem to suggest that appearance is more significant than "academic, career or personal accomplishments".[715] Appearance is not an accomplishment, and

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708 Rhode 2010:113.

709 This has been noted and argued by several authors, including Mahajan 2007:170; Desir 2010:637-638; Corbett 2007:177; James 2008:630,657; Waring 2011:198; Zakrzewski 2005:432; Gumin 2012:1770.

710 Desir 2010:637-638.

711 Such as race or gender. See Corbett 2007:177.

712 Mahajan 2007:170.

713 Fleener 2005:1302-1303; Mahajan 2007:170.

714 Waring 2011:205.

715 Mahajan 2007:170; Zakrzewski 2005:432.

employment decisions should be based on more substantive considerations.[716] The use of appearance as a criterion for decision-making in employment only serves to perpetuate the unfair stigmatisation and negative stereotypes associated with looks suffered by many employees,[717] much like racism and gender discrimination in the past.[718]

Over and above the harm suffered by the victims of appearance discrimination in hiring and employment, it seems detrimental to organisational performance to base hiring and employment decisions on non-job-related factors such as appearance.[719] It also contributes to the establishment of a less accomplished workforce.[720]

[d] Self-expression and appearance discrimination

Appearance has often been linked with the right to self-expression, which is purported especially in relation to the mutable appearance characteristics. Individuals express their identities through certain social practices, such as how they choose to dress and groom.[721] Post suggests that a balance must be struck between the rights of the employee and the business interests of the employer, in order to achieve the most equitable outcome.[722]

[e] Appearance discrimination and other forms of prohibited bias

The victims of appearance-based discrimination, particularly in the comparative jurisdictions, have often opted to "link" this discrimination with another ground of prohibited discrimination, such as race, gender, religion or disability, either to seek redress in the absence of a law that governs appearance in employment, or to increase their chances of success.[723] It is suggested that greater legal certainty would ensue if litigation and complaints were based on a legitimate law or policy governing appearance in the workplace, as opposed to bending and shaping the already protected categories to include new and unintended characteristics and aspects.

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716 James 2008:657, referring to Zakrzewski 2005:434.
717 Fleener 2005:1302,1315.
718 Fleener 2005:1315.
719 Shahani-Denning 2003:14.
720 Zakrewski 2005:432.
721 Mahajan 2007:173; Pitt and Clayton 1997:54.
722 Post 2000:6; James 2008:634.
723 James 2008:656.

2.5.2 The effect of appearance discrimination

Appearance-based discrimination is described as having the "same harmful effect" as discrimination based on gender, national origin and race and, as such, it should also be statutorily prohibited and regulated.[724] People with unfavourable appearance characteristics share many of the burdens suffered by other minority groups,[725] and suffer comparable harm, despite the fact that appearance falls on a continuum and that victims of appearance discrimination do not form a cohesive group.[726]

Physical attractiveness and height can be altered with no more ease than features such as skin colour, gender or disability, and discrimination on these grounds radiate injustice and unfairness. Standards of dress and appearance communicate individuals' ideas, beliefs and values, which is why workplace restrictions on what employees may wear and how they should present themselves may adversely affect their right to individual freedom of expression, and foster feelings of anger, hurt and shame,[727] which in turn has a negative impact on the employee's dignity.

According to Fleener, victims of appearance-based discrimination suffer a comparably serious effect than the victims of discrimination on other, already prohibited grounds:[728]

> … [M]embers of already protected categories and victims of looks-based discrimination experience a similar type and degree of harm. The complex, cyclical nature of that harm arguably makes it an appropriate subject for legal intervention.

Also, as appearance-based discrimination in the workplace can lead to considerable disparities in wealth and opportunity within the employment realm,[729] which also tend to spill over into employees' private lives and society in general, it can indeed be seen as similar to other forms of discrimination.

2.5.3 Legal recourse for victims of appearance discrimination in South Africa

2.5.3.1 Appearance discrimination as an unlisted ground of unfair discrimination

724 Zakrzewski 2005:432.

725 Post 2000:6, where it is stated that it is as bigoted and unjust to discriminate against people on the basis of their appearance as it is to do so on the basis of their race.

726 Harvard Law Review Association 1987:2037.

727 Mahajan 2007:173.

728 Fleener 2005:1318.

729 Toledano 2013:700.

In order for employees to successfully bring a claim of appearance-based discrimination, they will have to allege an infringement of their rights to dignity and equality, as well as unfair discrimination, and assert that appearance discrimination amounts to an unlisted analogous ground of prohibited discrimination, which they will then have to prove by meeting the specified requirements.

As discussed earlier on, the EEA was enacted to give effect to the constitutional right to equality in the workplace and, as such, all employees who bring unfair discrimination claims must do so under the auspices of this act. Employers may consequently also rely on the defences to a claim of unfair discrimination contained in the act. The prohibition of unfair discrimination in employment is contained in section 6(1) of the EEA, which outlaws discrimination on the basis of listed grounds, arbitrary grounds and unlisted analogous grounds, while section 5 places an obligation on employers to eradicate unfair discrimination in the workplace and to promote equal opportunity.

In dealing with a claim of unfair appearance discrimination, it may be useful to consider Du Toit's argument discussed earlier,[730] namely that since the EEA must be interpreted in accordance with ILO Convention 111, which is not in conflict with the Constitution, the test for discrimination found in the Convention must also be used. Again, this test comprises the following:

1. Did the conduct complained of amount to –
   (a) A distinction, exclusion or preference
   (b) having the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation? And if so,
2. was it made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin or on such other grounds as determined in accordance with art 1b [of Convention 111]?

According to Du Toit, section 1(a) of the test is equivalent to the South African test for discrimination, while sections 1(b) and 2 of the test constitute the test for unfairness.[731] In a claim of appearance-based discrimination, it is argued that the test can be applied as follows:

1. (a) If an employer has treated an employee differently compared to other (similarly situated) employees by virtue of any employment policy or practice,

[730] Discussed in par 2.4.5.1(d).

[731] Dupper and Garbers (eds) 2010:153, Du Toit 2010.

either excluding or preferring them on the basis of their appearance, such conduct will amount to a distinction, exclusion or preference so envisaged.

(b) It is argued that discriminating against employees based on their appearance characteristics not only strikes at the foundation of their inherent human dignity and results in gross unfairness,[732] but also amounts to unequal treatment of people on the basis of characteristics attaching to them,[733] which restricts equal opportunity in the workplace. Discriminating against persons based on their appearance also tarnishes their psychological self-worth and personal autonomy, and perpetuates patterns of disadvantage for them in the workplace.

2. Since the various categories of appearance are not listed in the Convention, appearance-based discrimination constitutes an unlisted distinction, exclusion or preference, as described in art. 1(1)(b) of the Convention.

However, in terms of the traditional South African approach to determine unfair discrimination, which the labour courts have constructed from the test in *Harksen v Lane* and is endorsed by the South African judicial forums and supported by section 11 of the amended EEA, an inquiry into a claim of unfair discrimination will encompass three stages, namely whether differentiation has taken place; if so, whether it amounted to discrimination, and, if it did, whether the discrimination was unfair.

Thus, in a case of appearance-based discrimination, an employee will be able bring a claim under section 6(1) of the EEA (as amended), since it is argued that appearance discrimination constitutes both an unlisted analogous ground of unfair discrimination (which is preserved in the Employment Equity Amendment Act by the use of the word "including") as well as an arbitrary ground (introduced by the Employment Equity Amendment Act).

In determining whether appearance-based discrimination amounts to unfair discrimination in employment, it will have to satisfy all three stages of the test:

- *Stage 1: Differentiation*

732 *Harksen v Lane*; Dupper and Garbers (eds) 2010:80, Albertyn 2010.

733 *Prinsloo v Van der Linde*; Dupper and Garbers (eds) 2010:145, Du Toit 2010.

Differentiation occurs when an employer treats certain job applicants or employees differently from others, or uses an employment policy or practice to exclude certain groups.[734, 735]

In a case of appearance prejudice, an employer differentiates between employees or job applicants on the basis of their appearance either through the employer's conduct or an employment policy or practice. The victims are not treated the same as other, similarly situated employees or job applicants due to a certain characteristic, namely appearance.

- *Stage 2: Discrimination*

Discrimination can be established in two ways: either by linking the differentiation in treatment or effect with an already prohibited ground of discrimination (those listed in section 6(1) of the EEA), or by linking it with an unlisted ground (a ground not mentioned in section 6(1)).[736] However, in order to be considered as an unlisted ground of discrimination, the differentiation must first comply with the *Harksen* test.

According to the *Harksen* test, it will have to be shown that the "ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner" as members of a vulnerable group.[737]

Appearance-based prejudice is not specifically listed as a prohibited ground of discrimination in section 6(1) of the EEA (or in the amendment act). As such, it will have to be alleged as an unlisted ground. According to the *Harksen* test, therefore, it will have to be shown that the appearance prejudices of an employer have the potential to impair the fundamental human dignity of the victims or affect them in a comparably serious manner.

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734 Dupper *et al* 2004:33.

735 It must be noted, however, that differentiation is not synonymous with discrimination. Differentiation is a neutral term and the reason for differential treatment may not be negative. See Dupper *et al* 2004:33.

736 Dupper *et al* 2004:36.

737 McGregor and Germishuys 2014:94,95; Dupper *et al* 2004:36; Grogan 2013:97; Radebe 2013:73.

Dignity is described as affording an individual "his or her intrinsic worth and value", as well as "the state of being worthy of respect and a sense of pride in yourself".[738] It is argued that as individuals' appearance defines them, determines how they will be treated by others, and establishes their position in society, it touches on the intrinsic value of every person and attaches to their sense of self-pride. Psychological research has also revealed that discrimination on the basis of individual appearance has a significant negative impact on the individual's sense of self-worth.[739] Therefore, judging and disadvantaging employees based on what they look like strikes at the very foundation of the individual's dignity, and thus results in gross unfairness.

Consequently, it cannot be denied that appearance discrimination in the workplace impairs the fundamental human dignity of employees, and affects them in a manner similar to persons who are discriminated against because of other defining attributes or characteristics, such as their race or gender.

- *Stage 3: Unfairness*

According to the Constitutional Court in *Harksen v Lane*, if discrimination is based on one of the prohibited grounds listed in section 6(1) of the EEA, unfairness will be presumed. If the differentiation is based on an unlisted ground, however, the complainant will have to prove unfairness.[740]

The *Harksen* test dictates that unfairness is established by focusing on the impact of the discrimination on the complainant and others similarly situated.[741] In this regard, the courts will consider a number of factors, including the worth and value of the victim's attributes, exploitation suffered by them, as well as their vulnerability and past patterns of disadvantage and prejudice.[742] Since appearance-based

738 McGregor and Germishuys 2014:96. The Labour Court in *IMATU v City of Cape Town* 2005 26 ILJ 1404 LC also stated the following in relation to an infringement upon the right to dignity: "Arbitrary, irrational and unfair exclusions predicated upon anachronistic generalised assumptions impair their [persons with Type 1 diabetes] dignity and seriously affect them adversely by limiting the full enjoyment of the right, guaranteed by section 22 of the Constitution, to pursue a chosen trade, occupation or profession." See *IMATU v City of Cape Town:* 90.

739 Pieterse 2000:131, referring to Adams 1977:218, 223-234 and Webster and Driskell 1983:160.

740 *Harksen v Lane NO and Others*: 325A.

741 *President of the Republic of South Africa and Another v Hugo* 1997 6 BCLR 708 CC: 755E-F; Pretorius 2013:16.

742 *Harksen v Lane NO and Others* 1997 11 BCLR 1489 CC: 1510F; Pretorius 2013:16.

discrimination is not a listed ground of prohibited bias, unfairness will have to be proven. In terms of the *Harksen* test, therefore, the impact of the discrimination on the complainants will have to be assessed.

In *Kadiaka v Amalgamated Beverage Industries*,[743] the Labour Court held that discrimination is unfair if it is "purposeless, or for a purpose of insufficient importance to outweigh the rights of the job-seeker or the employee, or if it was morally offensive".[744]

According to Kruger, stereotyping of complainants (or prejudice suffered by them) has been used in determining the impact that the discrimination has had on them.[745] Stereotyping or prejudicing of employees based on their appearance may therefore also be used to help determine the impact of the discrimination on these individuals. In circumstances where stereotypes of appearance amount to a withholding of benefits or opportunities or results in disadvantage to the individual which is comparable to the disadvantage caused to other protected groups (such as race, sex or age) because of stereotyping, then such appearance stereotypes unfairly discriminate against the individual concerned.[746] It is argued that appearance discrimination has a severe impact on employees at the receiving end. It not only diminishes the self-worth and dignity of employees, but also implies that appearance outweighs merit, hard work and achievement.[747]

To judge individuals because of what they look like, and imply that they are less significant and worth less than persons with a more favourable appearance, perpetuates a pattern of disadvantage and prejudice in employment. Furthermore, the exploitation of employees with a favourable appearance for economic gain, and the exclusion of those with less favourable looks, results in severe employment vulnerability and inequality.

It is argued, therefore, that discrimination based on appearance characteristics is unfair.

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743 1999 20 ILJ 373 LC.

744 Grogan 2005:91.

745 Kruger 2011:493.

746 Pieterse 2000:124.

747 Mahajan 2007:170; Zakrzewski 2005:432.

2.5.3.2 Appearance discrimination and the new, amended EEA: The arbitrary grounds

In light of the new arbitrary grounds introduced by the amended section 6(1) of the EEA, and the lack of legal clarity surrounding this concept, it is particularly important to investigate these grounds against the backdrop of appearance discrimination.

The inclusion of the words "or on any other arbitrary ground" in section 6(1) of the amended EEA strengthens a possible claim by employees who allege unfair appearance-based discrimination in the workplace, even though the meaning and scope of the concept of an "arbitrary ground" is still uncertain.

The *Oxford Dictionary* defines "arbitrary" as "[b]ased on random choice or personal whim, rather than any reason or system".[748] According to Grogan, "arbitrary" can be defined as discrimination that is based on some irrelevant criterion.[749] De Villiers believes that the origin of an arbitrary ground lies in an employer's personal preferences, resulting from certain characteristics that are not of primary relevance to the employment relationship.[750]

For want of legislative or judicial guidelines to define and interpret the concept, it is argued that when an employment policy or practice discriminates against an employee on the basis of his or her appearance, and such appearance characteristic does not amount to an inherent requirement of the job, the discrimination is based on an irrelevant criterion or personal whim of the employer and is consequently arbitrary.

As discussed earlier on, "arbitrary" clearly amounts to a category of unspecified grounds, but it is not likely that this is to be interpreted in the same manner as the unlisted analogous grounds, as that would render the amendment pointless.[751] Therefore, as Du Toit and Potgieter have suggested, the inclusion of this ground in section 6(1) was possibly intended to widen the net of discrimination grounds that may not necessarily be analogous to the listed grounds, but are nonetheless arbitrary "in the sense of being random, subjective, capricious or haphazard" and

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748 Oxford University Press 2014. http://www.oxforddictionaries.com/definition/english/arbitrary. Accessed on 05/08/2014.

749 Grogan 2007:280.

750 De Villiers 2014:182.

751 Du Toit and Potgieter 2014:24-25.

consequently infringe upon the right to equality.[752] The same authors have proposed that "arbitrary" introduces another dimension of unfairness, since it serves to describe all forms of listed and unlisted discrimination that impede an employee's right to dignity.[753] Grogan notes that an employee alleging discrimination on an arbitrary ground will still have to prove that the ground is worthy of protection.[754] It is argued that when an employer uses an employee's appearance characteristics as the basis for decision-making in any employment policy or practice, and such conduct cannot be justified in terms of the EEA, the conduct is subjective, capricious, random and haphazard, infringing upon the employee's rights to equality and dignity.

In terms of section 11 of the amended EEA, the complainant bears the onus of proving on a balance of probabilities that the employer unfairly discriminated against him or her based on an arbitrary ground. Section 11(2) states the following in this regard:[755]

> 11(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –
>
> (a) the conduct complained of is not rational;
> (b) the conduct complained of amounts to discrimination; and
> (c) the discrimination is unfair.

Therefore, in terms of an unfair discrimination claim that alleges appearance discrimination as an arbitrary ground, it is foreseen that the aggrieved employee will have to prove the following:[756]

- *Stage 1: Rationality*

The employee will have to prove that the employer's differential treatment on the basis of the employee's appearance is not rational. In the absence of judicial or legislative guidelines, one can only speculate about what is meant by "rational". However, in *Harksen v Lane*, the court indicated that for differentiation to be lawful, it must be logically connected to, and an appropriate and effective means to achieve, its purpose.[757] Thus, if the labour courts' favourable view in relation to *Harksen v*

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752 Du Toit and Potgieter 2014:25.
753 Du Toit and Potgieter 2014:25.
754 Grogan 2014:107.
755 Employment Equity Amendment Act: sec 11(2).
756 Stages 1, 2 and 3 of the test reflect sections 11(2)(a), (b) and (c) respectively.
757 Pretorius 2013:11.

Lane is extended to rationality, this position may be endorsed.[758] A complainant of unfair appearance discrimination will therefore have to prove that the employer's decision to differentiate against him or her based on appearance is neither logically connected to the purpose the differentiation aims to serve, nor the most effective means to achieve it.

- *Stage 2: Discrimination*

Given the current position of the law and the extensive consideration afforded to the determination of discrimination, the traditional test for discrimination should be used, as discussed in stage 2 under paragraph 2.5.3.1 above. The argument in relation to the discriminatory status of appearance prejudice will apply in equal measure.

- *Stage 3: Unfairness*

Likewise, in light of the current position of the law in relation to the determination of unfairness, and the extensive attention it has received in court, the test in stage 3 under paragraph 2.5.3.1 should be used, and the argument pertaining to the unfairness of appearance discrimination will equally apply.

2.5.3.3 Direct and indirect appearance discrimination

Appearance discrimination against an employee may take place either directly or indirectly, and it is argued that the normal meaning of these concepts will equally apply in this instance.[759] Therefore, direct appearance discrimination occurs if employees are discriminated against because of an aspect of their appearance, and the discrimination is intentional. Indirect appearance discrimination takes place if a certain apparently neutral employment policy or practice of the employer has the effect of disproportionately disadvantaging certain employees because of an aspect of their appearance.

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758 This suggestion is however purely speculative, as only a clear interpretation of section 11(2) by the judicial forums will clarify the position in this regard.

759 Direct discrimination is when people are treated differently from others on the basis of a particular ground or trait, namely those contained in section 6(1) or grounds akin thereto; when persons are treated differentially because they belong to a particular category. See Du Plessis and Fouche 2012:90; Dupper *et al* 2004:39; Grogan 2005:92; 2013:96. Indirect discrimination is when an employer uses an apparently neutral employment policy or criterion that affects the members of a disadvantaged group disproportionately in circumstances where it is not justifiable. See Dupper *et al* 2004:39; Du Plessis and Fouche 2012:90; Grogan 2005:92; 2013:96.

2.5.3.4 Appearance discrimination and the legal position of the employer

An employer may raise three possible defences to a claim of unfair discrimination under the EEA. As outlined earlier on, these defences are that the action is not discriminatory or the discriminatory action is not unfair; that the action was taken in terms of affirmative action measures,[760] or that the discriminatory action was taken because of the inherent requirements of the job.[761]

Thus, in an appearance discrimination dispute, an employer may defeat the employee's claim if the employer can raise any of the defences mentioned above. These will be as follows:

(1) The employer may prove that the employee's appearance discrimination claim does not in fact amount to discrimination. To achieve this, as it is an analogous ground, the employer will have to prove that it does not impair the fundamental human dignity of the employee, according to the *Harksen* test. The employer may also prove that the discriminatory action is not unfair. This will be achieved if the employer can prove that the discrimination was not purposeless or was sufficiently important to outweigh the employee's right to equality, or that the impact on the employee was not severe or sufficiently disadvantageous.

(2) The employer may allege that the decision was taken in terms of affirmative action measures that were sufficient in the circumstances to render the employee's discriminatory treatment fair.

(3) Arguably the most powerful employer defence against a claim of unfair appearance discrimination probably is that the discrimination is justified because it relates to an inherent requirement of the particular job. In a claim of appearance discrimination, an employer in, for example, the entertainment or modelling industry will be apple to argue that a favourable appearance is an inherent requirement of the job. "Inherent requirement of the job" means that the possession of the particular quality must be necessary to effectively carry out the duties attached to the position.[762] As such, if the particular appearance characteristic that forms the basis of the employer's discrimination is not tied to the effective carrying out of the duties

760 EEA: sec 6(2)(a).
761 EEA: sec 6(2)(b).
762 Grogan 2005:108.

associated with the employee's position, the appearance characteristic cannot be said to be an inherent requirement of the job.

2.5.3.5 The South African common law and appearance prejudice

It is suggested that an employee or job applicant who has been discriminated against on the basis of their appearance may also have the option of instituting a common law delictual action against the employer for an infringement of their personality right to dignity. According to Neethling *et al* an individual's dignity embraces his or her subjective feelings of dignity or self-respect and an infringement of this nature therefore constitutes insulting that person.[763] As a result any insulting words or belittling contemptuous behaviour relating to a person's appearance may found this action.[764] However, in order to be considered wrongful such conduct must not only infringe the victim's subjective feelings of dignity, but also be *contra bonos mores* (violate a legal norm).[765] The employee must also prove that he or she felt insulted "in circumstances where the reasonable person would also have felt insulted" and the employer may allege a ground of justification for its conduct.[766] The general elements of a delict will all have to be proven by the victim employee or job applicant in order to succeed with this action.[767] As far as the common law remedies are concerned, the victim employee may claim satisfaction from the employer in terms of the *actio iniuriarum* for the infringement of his or her dignity.[768] If the employee also suffered financial loss as a result of the infringement to their dignity, then he or she may also recover damages in terms of the *actio legis Aquiliae*.[769]

2.6 Conclusion

Although discrimination based on appearance is nothing new, the topic has been foregrounded globally over the last few years, mainly due to "contemporary market

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763 Neethling *et al* 2010:346.

764 Neethling *et al* 2010:346.

765 Neethling *et al* 2010:346.

766 Neethling *et al* 2010:347.

767 It is trite that these elements are conduct, wrongfulness, fault, causation and damage.

768 Neethling *et al* state that the "deliberate aggression upon personal dignity is not considered a trivial matter" and as such the victim employee may recover substantial damages. However, if the insult was not serious, nominal damages may be awarded. Therefore the degree of insult relating to the individual's appearance will determine the quantum of the damages recoverable; Neethling *et al* 2005:198.

769 Neethling *et al* 2005:198. The common law position relating to the infringement of an employee's dignity will apply equally to all the appearance categories discussed in this dissertation.

forces, technology and the media".[770] The labour and employment spheres are the yardstick by which the law measures equality and fairness.[771] It then follows that equality and fairness cannot be said to exist in labour and employment forums when certain persons suffer disadvantage and discrimination based on characteristics that, in most cases, have no bearing on job performance.

Legal experts have labelled this trend of injustice and prejudice against the "unattractive" as the "new racism".[772] Also, due to the current lack of adequate protection against this prejudice, controversy surrounding appearance in employment may very well increase in the future. Employees falling within jurisdictions that do have legislation prohibiting appearance discrimination in the workplace have the advantage that their claims are dealt with on the basis of the actual discrimination concerned, namely appearance, and are not forced to bring their claims under the banner of any other protected ground. For this reason, this study will argue that the most effective way to combat appearance-based discrimination in employment is to impose specific legislative frameworks, employment policies and codes of good practice to do away with the overly broad scope in which employers are currently able to indulge. This is supported by the fact that a primary feature of anti-discrimination law in employment has always been that employees should not suffer employment disadvantages for "unchangeable aspects of their person".[773]

Employees in South Africa now also have the option to bring an unfair discrimination claim under the EEA on the basis of appearance discrimination, alleging that it amounts to an unlisted analogous ground or possibly even an arbitrary ground of unfair discrimination. As discussed in this chapter, the chances of success with such a claim are high, provided that the employer is unable to successfully raise a legitimate defence. This possibility will however remain purely speculative until a judicial forum deals with the issue, or the legislature provides clarity.

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770 Corbett 2011:8-9.

771 Desir 2010:630, referring to Barro 1998:18.

772 Wall 2011:1.

773 Fleener 2005:1316.

The bias of appearance discrimination, although underappreciated and underestimated, results in very real and harmful consequences,[774] of which the sufferers have not yet found an explicit and specific legal remedy or protection.[775] It is therefore not surprising that appearance discrimination has been signalled as the next frontier in the battle against employment discrimination.[776]

Chapter 3

[774] Desir 2010:632.
[775] Harvard Law Review Association 1987:2035.
[776] Warhurst *et al* 2009:132.

The phenomenon of weight-based discrimination

Now that prejudice against most formerly stigmatized groups has become unfashionable, if not illegal, one of the last acceptable forms of prejudice is that against obese persons.[1]

3.1 Introduction

The overweight and obese have been described as a prominent "subset of the unattractive".[2] Although weight discrimination is a significant category of appearance-based discrimination, it is considered separately in this dissertation due to its unique standing and perspective: While the other categories of appearance-based discrimination are primarily violations of an employee's right to dignity and equality, weight-based discrimination constitutes such violations as well as a potential disability. The overweight and obese suffer the same adverse stigma as others who are discriminated against based on appearance, but also face prejudices "wholly distinct from the unattractive" on top of that.[3]

This chapter will commence with a deconstruction of weight-based discrimination, and will proceed to investigate and evaluate its position in the workplace and in South African law as well as in the legal systems of the comparative jurisdictions.

3.2 Deconstructing weight-based discrimination

3.2.1 Introduction to "weightism"

In the past, being thin was associated with disease and illness, while being "plump" was considered attractive and constituted the norm.[4] In modern society, the converse applies. The prevalence of weight-based discrimination has increased over the past decade, and has gained so much momentum that it is as common as race and age discrimination in society today.[5] The social stigmatisation of and prejudice against the overweight and obese stem from societal perceptions and values on

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1 Taussig 1994:932, referring to Stunkard and Sorensen 1993.
2 Toledano 2013:702.
3 Toledano 2013:702.
4 Rudin and Pereles 2012:137.
5 Rudin and Pereles 2012:137; Bento *et al* 2012:3200, referring to Crandall 1994.

body type, and filter into all areas of life, not least of which the workplace[6] where people spend 60% of their time.[7]

An individual's weight is one of the primary evaluations of attractiveness[8] and is directly coupled with the "what is beautiful is good" stereotype.[9] Individuals who are overweight are considered to fall outside the scope of the societal norm of beauty, and are stigmatised and prejudiced in a similar manner, perhaps even more severely, than the other groups who also fall outside this norm.[10]

Weight-based prejudice and discrimination is known as "weightism".[11] Body shape and size is a clearly visible aspect of diversity that is a foremost consideration in the categorisation of people, and research on the position of the obese and overweight has increased significantly in recent years[12] and it is reported by Blaine that discrimination and prejudice against individuals because of their weight is prevalent in today's society.[13] It has furthermore been demonstrated that employers also suffer as a result of their obese employees, because they cost employers up to 50% more than there "thinner" colleagues, in terms of time off.[14] Amongst the many studies that have illustrated this prejudice, one has revealed that weight is an important factor in how individuals are perceived, and that people would prefer a spouse who is a drug abuser, embezzler or thief rather than obese.[15] Another study on the ranking of undesirable traits revealed that obesity was consistently ranked last, being perceived as even less desirable than dismemberment and facial disfigurement.[16]

For the sake of clarity, it is important to distinguish between the terms "overweight" and "obese". These terms refer to ranges of weight that are greater than what is normally considered healthy for a given height.[17] Obesity refers to a specific group of

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6 Chernov 2006:107.
7 Tugenhaft and Hofman 2014:6.
8 Glass *et al* 2010:1778.
9 Discussed in chapter 2. See Sartore and Cunningham 2007:174.
10 Sartore and Cunningham 2007:174.
11 Blaine 2012:144.
12 Blaine 2012:5,139.
13 Blaine 2012:5.
14 Tugenhaft and Hofman 2014:6.
15 Rhode 2010:27.
16 Taussig 1994:933.
17 Centres for Disease Control and Prevention 2014.

individuals with a body mass index (BMI)[18] of 30 or greater, while those with a BMI of 40+ are regarded as morbidly obese,[19] and persons with a BMI of 25 or greater are considered overweight.[20] Rudin and Pereles have noted that discrimination against the overweight becomes more severe as the individual's BMI increases.[21] The American Medical Association recognises obesity as a disease,[22] and researchers have subdivided the condition into mild obesity (20-40% over the norm), moderate obesity (41-100% over the norm) and morbid obesity (more than twice the norm).[23] Notably, while the victims of the other categories of appearance-based discrimination do not form a cohesive and easily identifiable group, it is argued that the victims of weight-based discrimination may be categorised into a specific, identifiable group because they can be classed according to the BMI scale mentioned above.

In recent years, public concern and news coverage have increasingly started to focus on "the epidemic nature of obesity" in society.[24] Millions of people are obese, yet maintain their health, while a small portion of the world's population are morbidly obese and experience life-threatening health concerns.[25] Recent research has indicated that the importance attached to appearance and appearance standards is a powerful undercurrent of anti-fat prejudice.[26] A favourable physical appearance is strongly influenced by weight, and research has found a positive correlation between the overall importance placed on appearance and the rate of anti-fat prejudice experienced in a specific setting.[27] Weight-based discrimination is therefore irrefutably a prominent category of appearance-based prejudice.

Research has also revealed that individuals who are overweight and obese experience very negative stereotypes, including negative perceptions about their character and abilities, such as the belief that they are unattractive, lazy, self-

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18 BMI may be described as a simple ratio of weight to height, namely weight in kilograms divided by the square of the individual's height in metres. See Schallenkamp *et al* 2012:256.

19 Blaine 2012:140; Centres for Disease Control and Prevention 2014 http://www.cdc.gov/obesity/adult/defining.html. Accessed on 01/06/2014; Chernov 2006:107.

20 Centres for Disease Control and Prevention 2014. http://www.cdc.gov/obesity/adult/defining.html. Accessed on 01/06/2014.

21 Rudin and Pereles 2012:138.

22 Hodges 2013.

23 Taussig 1994:929; Browne *et al* 2010:2.

24 Blaine 2012:140.

25 Blaine 2012:140.

26 O'Brien *et al* 2013:455.

27 O'Brien *et al* 2013:455-456.

indulgent, unhappy, asexual, lacking in self-esteem, uncooperative, socially inept and intellectually slow.[28] In one study that investigated obesity stereotypes, overweight persons were rated as "less active, intelligent, attractive, hardworking, popular, successful and outgoing than normal weight persons".[29] According to another study, obesity is perceived as less desirable than a substance abuse problem.[30] These beliefs and stereotypes about obesity and overweight persons indicate society's perception that weight is mutable and controllable.[31] The traditional reasoning in this regard is that weight is manageable, and that, for that reason, fat people must be doing something to cause their excessive weight, such as overeating or being lazy and not exercising.[32] In this regard, a survey revealed that two-thirds of people believed that individuals are overweight and obese because they lack self-control.[33] It is this perceived perception about weight that perpetuates unfair stereotypes.

Weight is however far less controllable and manageable than what people think.[34] The genetic influences on individuals' body size and their basic metabolic rate suggest that weight is not as controllable as was originally thought.[35] While some individuals can overeat to their heart's content without gaining weight, others cannot lose weight, irrespective of what they eat or do, and these predispositions appear to be mainly genetic.[36] Furthermore, dieting and weight loss methods are notoriously ineffective,[37] with 90% of dieters regaining the lost weight within a year.[38] An individual's weight can be attributed to interplay between various environmental, physiological, socio-economic, psychological and cultural factors, and is not merely a matter of willpower.[39] Therefore, it has been conceded that being overweight must be an aspect of natural human diversity.[40] Overweight bodies, some say, should

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28 Jones 2012:2002; Blaine 2012:141.
29 Blaine 2012:141; Browne *et al* 2010:3.
30 Blaine 2012:141.
31 Jones 2012:2002.
32 Blaine 2012:141.
33 Rhode 2010:42.
34 Taussig 1994:932.
35 Blaine 2012:142. Up to 25% of an individual's overall fat percentage cannot be attributed to the choice of an individual but is caused by genetics; Goedecke *et al* 2006:70.
36 Forhan and Sharma 2011:1; Blaine 2012:142.
37 Jones 2012:2009.
38 And 95% regaining the lost weight within five years. See Blaine 2012:142.
39 Forhan and Sharma 2011:1-2; Taussig 1994:929; Rhode 2010:42.
40 Jones 2012:2007, referring to Saguy and Riley 2005:883.

simply be seen as being different and diverse, and should be accepted and not discriminated against and stigmatised.[41]

Stigmatising and discriminating against the overweight in order to shame them into losing weight is ineffective and counterproductive, as 80% of people enrolled in dieting and weight loss programmes respond to such stigma and discrimination by eating more or withdrawing from the programme concerned.[42]

Another perception in respect of overweight and obese persons, especially in recent years, is that they are unhealthy,[43] which simply adds to "an already negative and deeply discrediting stereotype", since it implies that obesity causes illness, and that overweight persons deserve the health problems resulting from obesity for allowing themselves to become overweight.[44] Jones, however, argues that people should be permitted to live beyond the parameters regarded as "healthy" by the social order, without facing prejudice, discrimination, stigma, hatred and shame.[45]According to Blaine, both the physical-appearance and character aspects of weight stereotypes render these persons the targets of widespread discrimination, and make prejudice against individuals based on their weight a growing concern in modern society.[46]

Further mechanisms that fuel negative stereotypes against overweight persons are the television world,[47] the media, and social networking sites.[48] This stigmatisation of overweight individuals by the media, along with the "victim-blaming approach" that the media portray, perpetuates the disadvantage of these persons as a group,[49] both in society and in the employment realm. The media also encourage the misconception that weight is completely controllable, and continuously display "success" stories of persons who have lost significant quantities of weight, at least in the short term.[50] They market the perception that fat is unattractive, and continuously display advertisements that instruct the public on how to achieve beauty by losing

41 Jones 2012:2008.
42 Rhode 2010:42.
43 Blaine 2012:142.
44 Blaine 2012:142.
45 Jones 2012:2027.
46 Blaine 2012:144.
47 Heuer *et al* 2011:976; Blaine 2012:148.
48 Forhan and Sharma 2011:1.
49 Heuer *et al* 2011:977.
50 Bento *et al* 2012:3201.

weight or concealing their excess weight with clothes.[51] The $60,9 billion weight loss industry peddles the belief that weight loss can be achieved with effort and self-control.[52]

The negative stereotypes, prejudice and discrimination endured by overweight and obese individuals have an adverse impact on their psychological well-being,[53] putting them at greater risk of developing depression, anxiety, low self-esteem and other mental health issues.[54] Stigma also results in increased stress levels, which fuel other health problems.[55]

An investigation into weight-based discrimination, however, needs to take note of the position of underweight individuals as well. Although stigma and discrimination based on weight is primarily directed at overweight individuals, underweight persons are not immune to it and may also fall into this category. Rhode reports that various "thinspiration" websites have been created to support anorexics and bulimics, suggesting that these individuals are not experiencing (eating) disorders, but have instead made a lifestyle choice.[56]

3.2.2 'Weightism' in employment

As already mentioned, individuals indeed bring all of themselves to work, which is why the workplace becomes a significant outlet for social discrimination.[57] Discrimination against the overweight and obese is prevalent in the employment realm, and results in many such workers being underemployed or unemployed because of the discrimination and prejudice against them.[58] Overweight and obese individuals are subjected to as much prejudice in the workplace as they are in other areas of life.[59] Multiple surveys have revealed that 90% of obese persons have experienced humiliating comments about their weight from friends, family and co-

51 Jones 2012:2001.
52 Jones 2012:2002.
53 Blaine 2012:149; Jones 2012:2004.
54 Pomeranz and Puhl 2013:469; Rhode 2010:29; O'Brien *et al* 2013:455.
55 Rhode 2010:41.
56 Rhode 2010:54.
57 Chernov 2006:108.
58 Taussig 1994:927; O'Brien *et al* 2013:455.
59 Blaine 2012:145; Jones 2012:1996.

workers.[60] Recent studies have also shown that discrimination against overweight individuals has increased by 66% over the past decade.[61]

Since overweight persons are perceived to be undisciplined, lazy, sloppy and lacking in capability, their competence and skill are often under suspicion in the workplace.[62] As is the case with the other categories of appearance-based discrimination, weight-based discrimination is already present at the start of the hiring process, and may last throughout employment. These perceived factors cause employers to shy away from employing overweight individuals.[63]

The following three main reasons have been identified why employers would prefer not to have an overweight person in their employ:[64]

- Image: Employers strongly consider customer preference, and believe that customers and clients are more likely to be repulsed by obese employees and will consequently not support the business.[65] A further consideration is that employees represent the brand of the employer's business and, as such, an overweight employee exudes a negative image. Rhode reveals that, "particularly for upper-level positions, fat is a sure-fire career killer. If you can't control your contours, goes the logic, how can you control a budget and staff?".[66] The image consideration could also lead employers to place overweight employees in employment positions that require less contact with the public, as they are perceived as better fit for positions that require less personal interaction and present less strenuous work.[67] This in effect disadvantages such employees, as they may miss out on the possible rewards and professional and personal growth associated with more challenging employment positions.[68]

60 Rhode 2010:94.
61 Pomeranz and Puhl 2013:469.
62 Weight-based prejudice by the employer is more often linked with implicit employment practices, and is therefore more subtle and difficult to detect. See Blaine 2012:145; Rhode 2010:94.
63 Chernov 2006:108.
64 Chernov 2006:108-109.
65 Schallenkamp *et al* 2012:257.
66 Rhode 2010:94, referring to Campos 2004.
67 Sartore and Cunningham 2007:172.
68 Crowder 2010:39; Sartore and Cunningham 2007:172.

- Health-care costs and future health conditions:[69] It has been stated that although employers may be motivated to find and employ competent employees, overweight individuals pose possible health risks and, as such, may constitute a latent expense for the business, which may discourage their appointment.[70] In the United States, it was found that obese employees cost their employers up to $12,7 billion a year, while another study indicated that the costs of obesity accounted for almost 10% of Western countries' health-care costs.[71] Since overweight and obese individuals are perceived to be in ill health, employers will be reluctant to hire such persons due to the risk of increased medical-aid costs, absenteeism[72] and the potential need for costly special accommodations in the workplace. Many employers also believe that overweight employees are less productive.[73] This perception is not limited to employers, but also extends to the colleagues of the overweight employee, who believe that their heavier co-worker will cost the organisation in terms of absenteeism and health care.[74]
- Physical limitations: Employers will also be less inclined to employ overweight persons because excess weight may be restrictive in the performance of certain aspects of an employment position.

Overweight and obese employees receive considerably less remuneration than thinner employees,[75] which points to severe discrimination. Surveys and studies have revealed that overweight employees are paid up to 12% less than their thin colleagues, even when performing the same duties.[76] One study found that, in sales positions, overweight individuals started with a lower salary than non-overweight individuals, and experienced a slower wage increase throughout their employment, even as they gained more experience and expertise.[77] This negative effect of weight

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69 It was estimated in 2012 that obesity and its associated health costs resulted in losses of R15 billion and 132 million workdays lost per annum in South Africa; Tugenhaft and Hofman 2014:6.

70 Other research indicates that obesity may cost countries as much as cancer treatments, which in the United States, amounts to over $70 billion a year. See Browne *et al* 2010:8.

71 Browne *et al* 2010:8.

72 Tugenhaft and Hofman 2014:6.

73 Browne *et al* 2010:8. In South Africa over R20 billion per annum is lost due to absenteeism and lower productivity due to illness and disability caused by obesity and its associated costs; Tugenhaft and Hofman 2014:6.

74 Blaine 2012:146.

75 Jones 2012:2003; Schallenkamp *et al* 2012:256.

76 Blaine 2012:146.

77 Schallenkamp *et al* 2012:257, referring to DeBeaumont *et al* 2009.

on remuneration has been confirmed in cross-cultural studies among adults in the United States of America, the United Kingdom and Canada.[78]

Another review of workplace weightism revealed that overweight people were less likely to be promoted than thinner employees, despite having similar qualifications and experience.[79] Weight-based discrimination is however not only prevalent in promotion decisions, but also in hiring and termination.[80] One study indicates that weight alone explains 34,6% of the discrepancy in employers' hiring decisions.[81] Performance assessments also constitute a way in which employers discriminate against the overweight.[82]

In light of the fact that the population of overweight employees continues to increase, the discrimination and prejudice against such persons will continue to escalate too. Such discrimination, it is argued, will lead to more litigation, and aggrieved employees will continue to search for legal recourse and "scurry about in the dark" in the absence of legal clarity on their position (as is the case with the other categories of appearance-based discrimination).

3.3 The position of weight-based discrimination in the various jurisdictions

3.3.1 The International Labour Organisation

The ILO has taken cognisance of the fact that discrimination based on appearance is an issue in the modern workplace, and has acknowledged that an employee's right to equality and non-discrimination may be extended to include protection against appearance discrimination in the workplace.[83] The ILO has identified "physical characteristics" as a ground of equality and non-discrimination. It is argued that an individual's weight constitutes a "physical characteristic" of his or her person and, consequently, should form part of this concept.[84]

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78 Browne *et al* 2010:3.

79 Blaine 2012:146.

80 Crowder 2010:39; Jones 2012:2003.

81 Jones 2012:2004.

82 Bento *et al* 2012:3197.

83 As discussed in chapter 2.

84 This argument is supported by the jurisdictions that have enacted protection on the basis of "physical characteristics" and "personal appearance".

In the conference paper "Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work", the ILO has also noted the prevalence of discrimination on the basis of body weight in employment in several countries, including the United States of America, the European Union and Australia.[85] Overweight and obesity discrimination is a phenomenon that continues to escalate on the international employment stage, and requires proper statutory regulation.

3.3.2 'Weightism' and the USA

3.3.2.1 Introduction

In the United States of America, 66% of adults are either overweight or obese.[86] A total of 127 million adults are overweight, 60 million are obese, and nine million are severely obese.[87] The United States has no federal law that prohibits discrimination based on weight.[88] Although aggrieved employees may choose to "link" their weight-based discrimination claims with an already protected ground under Title VII (as is the case with the other categories of appearance discrimination), they have more often opted to pursue it as a disability or a perceived disability under the Americans with Disabilities Act and/or the Rehabilitation Act.

3.3.2.2 'Weightism' and the legal position in the USA

The only other way to bring a weight-based discrimination claim against an employer (other than under Title VII, the Americans with Disabilities Act or the Rehabilitation Act) is in terms of the statutes of those jurisdictions that explicitly prohibit weight discrimination.[89] These jurisdictions are predominantly the same as those discussed in chapter 2. In terms of these statutes, the employee does not have to link the weight discrimination with an already protected ground, or allege that it constitutes a disability. Employees need only prove that their weight was the basis of the discrimination.[90]

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85 ILO 2011, Report I(B).

86 Crowder 2010:39; Staman 2007:1.

87 Staman 2007:1-2.

88 Just as there is no federal law that bans discrimination based on appearance. See Staman 2007:2.

89 Jones 2012:1998.

90 Schallenkamp *et al* 2012:254.

In chapter 2, it was revealed that the following jurisdictions directly prohibit discrimination on the basis of weight. The relevant remedies, prevalence and statistics were also discussed there and are therefore not repeated:

- The state of Michigan
- Santa Cruz (California)
- Urbana (Illinois)
- San Francisco (California)
- The District of Columbia
- Howard County (Maryland)
- Madison (Wisconsin)

The following jurisdictions also have laws pertaining to weight-based discrimination, or have unsuccessfully attempted to enact such a law:[91]

[a] Binghamton (New York)

The city of Binghamton prohibits discrimination on the basis of weight and height. It provides the following in this regard:[92]

> It is the intent of the Binghamton City Council, in enacting the Binghamton Human Rights Law, to protect and safeguard the right and opportunity of all persons to be free from discrimination based on a person's actual or perceived age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, sexual orientation, gender identity or expression, **weight or height;** and to empower the courts to provide for remedies for any such discrimination. The authority for this Local Law is the exercise of the City's police power to preserve and care for the safety, health, comfort, and general welfare of its residents and visitors.

Weight and height are defined as follows:[93]

> Weight is a numerical measurement of total body weight, the ratio of a person's weight in relation to height or an individual's unique physical composition of weight through body size, shape and proportions.
>
> "Weight" encompasses, but is not limited to, an impression of a person as fat or thin regardless of the numerical measurement. An individual's body size, shape, proportions, and composition may make them appear fat or thin regardless of numerical weight. Height is a numerical measurement of total body height, an expression of a person's height in relation to

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91 Although some of the bills failed, they are still noteworthy as evidence that legislatures have taken cognisance of the weight discrimination problem in employment, and have attempted to take steps to combat it.

92 Code of the City of Binghamton, N.Y. (chapter 45 – Human Rights Law): sec 45-2; Jones 2012:2017. Own emphasis added.

93 Code of the City of Binghamton, N.Y. (chapter 45 – Human Rights Law): sec 45-3; Jones 2012:2017.

> weight, or an individual's unique physical composition of height through body size, shape and proportions.
>
> "Height" encompasses, but is not limited to an impression of a person as tall or short regardless of numerical measurement. The length of a person's limbs in proportion to the person's body may create an impression that the person is short, tall, or atypically proportioned, independent of numerical measurements of height.

[b] Massachusetts

In 2007, the state of Massachusetts considered adding weight and height to their anti-discrimination laws to make it unlawful for employers to discriminate based on these grounds.[94] This consideration did, however, not become law.

[c] Nevada

In 2009, Nevada unsuccessfully attempted to pass Assembly Bill 166, which would have outlawed discrimination on the basis of "physical characteristics", which included weight. The proposed legislation read as follows in this regard:[95]

> 6. "Physical characteristic" means any bodily condition or physical attribute of a person that is a result of birth, injury, disease or natural biological development, including, without limitation: (a) Height; (b) **Weight**; and (c) Physical mannerisms beyond the control of the person.

[d] Oregon

Also in 2009, the state of Oregon unsuccessfully attempted to enact a law prohibiting weight bias in employment.[96]

[e] Utah

A bill (HB 132) that would have added the categories of height and weight to employment anti-discrimination law failed to pass in the state of Utah in 2013.[97] Although the bill failed to become law, this is still a strong indicator of winds of change with regard to the law's position on weight-based discrimination. In this regard Cohen suggests that if a state as conservative as Utah considered such a prohibition, employers should "be aware of what's coming down the pike".[98]

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94 H.B. 1844, 185th Gen. Court Mass. 2007; Jones 2012:2017.

95 A.B. 166, 75th Leg. Nev. 2009; Jones 2012:2017. Own emphasis added.

96 Jones 2012:2017.

97 Wallace 2013:1.

98 Cohen 2013:1.

[f] Mississippi

In the state of Mississippi, the legislature proposed a law to prohibit "certain food establishments from serving any food to a person who is obese".[99] Even though this proposal was not enacted, it clearly illustrates the gravity of the situation in relation to discrimination against the overweight.[100]

[g] Michigan

Although the law relating to appearance discrimination in Michigan was discussed in chapter 2, it is significant to consider the following in the context of weight-based discrimination:

The "Heavy Hooters Girls"[101] – a practical perspective on weight-based discrimination in the workplace

The Hooters restaurant chain has never concealed the fact that they prefer to employ attractive waitresses, and their mission statement explicitly confirms this as part of their brand's identity.[102] Casandra Smith (weighing 132 pounds),[103] one of two former Hooters waitresses, instituted a weight discrimination claim against the restaurant in the state of Michigan.[104] This came after Smith was placed on "weight probation" and instructed to join a gym, despite having received good reviews and a promotion.[105] She was counselled and disciplined about how her uniform fit, and was instructed to lose weight and improve her looks in order to "fit better into the extra-small size uniform that she was required to wear".[106] After the counselling session, Smith was placed on a "30 day weight probation", which instruction the Hooters officials allegedly shared with the other employees at the restaurant.[107] The Hooters

99 Browne *et al* 2010:3, referring to House Resolution 282 H.R. 282 2008 Leg. Reg. Sess. Miss. 2008.
100 Browne *et al* 2010:3.
101 Barkacs and Barkacs 2011:105.
102 Barkacs and Barkacs 2011:106.
103 Elan 2010:78.
104 Barkacs and Barkacs 2011:109.
105 Elan 2010:78; Barkacs and Barkacs 2011:109.
106 Elan 2010:78; Barkacs and Barkacs 2011:110.
107 Barkacs and Barkacs 2011:110.

officials also informed her that they would understand if she felt that she could not lose the weight and wanted to resign.[108]

3.3.2.3 The legal position pertaining to weight-based discrimination claims in the USA

This section will address the legal position of those states that do not have legislation that specifically prohibits weight-based discrimination in employment.

[a] Title VII of the Civil Rights Act

Title VII does not expressly include weight as a ground of prohibited discrimination. However, if employees are able to show that the discrimination based on their weight is connected with another prohibited ground (such as sex, race or age), they ought to have a sufficient basis to institute a claim. Disparate treatment of (as well as disparate impact on) overweight individuals based on gender is regarded as a category of gender discrimination, and is consequently banned.[109] Such a claim will form the strongest basis for a Title VII claim concomitant with weight.

[b] The Americans with Disabilities Act (ADA)

The American Medical Association has declared obesity a disease.[110] However, the law does not grant protection to persons with diseases – only to those with disabilities.[111] The question that then arises is whether or not obesity amounts to a disability.

The courts use the guidelines of the ADA to determine the validity of weight-based discrimination claims.[112] The ADA does however not specifically recognise obesity as a disability.[113] The definition of disability used to be narrowly interpreted by the courts,[114] which caused the claims of many aggrieved employees to fall outside the definition and left them without legal recourse. The ADA was amended in 2008,

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108 The case was submitted for arbitration by virtue of the existing employment contract, and the outcome is unclear. See Roth 2010. http://blogs.findlaw.com/law_and_life/2010/08/court-allows-hooters-weight- bias-lawsuit.html. Accessed 01/09/2014; Barkacs and Barkacs 2011:110.

109 Schallenkamp *et al* 2012:252.

110 Hodges 2013:1.

111 Hodges 2013:1.

112 Staman 2007:2.

113 Hodges 2013:1.

114 Rudin and Pereles 2012:138; Hodges 2013:1.

though, which expanded the definition of disability.[115] Although the courts are now able to interpret the definition more liberally and give leeway to more claims, obesity is still not expressly included in the definition.[116]

The ADA (as amended) defines a disability and its subcategories as follows:[117]

> (1) Disability. The term "disability" means, with respect to an individual
>
> > (A) **a physical or mental impairment that substantially limits one or more major life activities**[118] **of such individual**;
> >
> > (B) a record of such an impairment; or
> >
> > (C) **being regarded as having such an impairment** (as described in paragraph (3)).
>
> (3) Regarded as having such an impairment. For purposes of paragraph (1)(C):
>
> > (A) **An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.**
> >
> > (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

In terms of subsection 1(C) and 3(A), employees may succeed with a claim of disability discrimination if they have an impairment that is not necessarily substantially restrictive, but they are treated as if it is, or if they have no impairment but are treated as if they do.[119]

As the ADA does not expressly address obesity, the EEOC undertook the task of helping employers, employees and the judiciary interpret the statute.[120] The EEOC did not expressly exclude being overweight from the definition of impairment, but declared that only severe (morbid) obesity would qualify as an impairment for the

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115 Rudin and Pereles 2012:138; Hodges 2013:1.

116 Hodges 2013:1.

117 The Americans with Disabilities Act 1990 (as amended) (P.L. 110-325): sec 1210(1)-1210(3). Own emphasis added.

118 "Major Life Activities: (A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. (B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

119 Taussig 1994:938.

120 Hodges 2013:1.

purposes of the act.[121] If an employee can prove, however, that his or her obesity is caused by an underlying disorder or condition, such as a heart or thyroid condition, it may constitute a disability.[122] In recent years, the EEOC has taken a more aggressive approach in advocating that obesity constitutes a disability, and more federal districts courts have been recognising the merit of these claims.[123]

Interestingly, the ADA does not require that a disability or impairment must stem from circumstances beyond an individual's control.[124] The act applies to conditions that are caused or aggravated by voluntary conduct, such as cancer caused by smoking.[125] Thus, even if an individual's obesity is caused by voluntary conduct, such as overeating and not exercising, this will not preclude such an individual from being protected by disability legislation.

3.3.2.4 Judicial precedents on "weightism"

Several aggrieved employees have attempted to bring weight-based discrimination claims, with varied degrees of success.[126] Most of them tried to litigate under the ADA and argued that obesity constituted a disability and a perceived disability in terms of the act.[127] However, most courts held that the obesity had to be caused by some underlying physiological condition in order to constitute impairment for the purposes of the ADA.[128] A selection of weight-based discrimination cases are discussed below.[129]

The first federal court decision to recognise weight-based discrimination as a disability was in *Cook v Rhode Island, Department of Mental Health, Retardation, and Hospitals.*[130] In this case, an applicant applied for a position as an institution

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121 Staman 2007:3; Hodges 2013:1.

122 Hodges 2013:1.

123 Hodges 2013:1.

124 Pomeranz and Puhl 2013:470.

125 Pomeranz and Puhl 2013:470.

126 Toledano 2013:703.

127 Toledano 2013:703.

128 Toledano 2013:703.

129 The cases discussed reflect only the most relevant instances of "weightism", and by no means constitutes an exhaustive list. For further reading, please see *Francis v City of Meriden* 129 F.3d 281 2nd Cir. 1997; *Cassita v Community Foods Inc*. 5. Cal. 4th 1050 1993; *Greene v Union Pacific Railroad* 548 F. Supp. 3 W.D. Wash. 1981; *Goodman v L.A. Weight Loss Centres* No. 04-CV-3471, 2005 U.S. Dist. LEXIS 1455; *Coleman v Georgia Power Co*. 81 F. Supp. 2d 1365 N.D. Ga. 2000, and *King v Hawkeye Community College* 10 AD Cases BNA 203 N.D. Iowa 2000.

130 10 F.3d 17 1st Cir. 1993.

attendant at a state-run facility for the mentally handicapped.[131] Even though the applicant had worked in such an employment position for over five years and had an immaculate performance record, she was not employed and informed that she was "too fat for the job".[132] The applicant alleged discrimination on the basis of her weight, pursued the claim in court, and eventually won the case, which caused obesity to be recognised as a disability.[133] The employee in this case was able to succeed with her claim, because even though she was morbidly obese, she was in fact capable of discharging the inherent requirements of the job. The employer, however, perceived her as being unable to do so. As such she was able to satisfy the test for a disability, namely that she was a person who actually has, or who "is regarded" as having, a "physical or mental impairment which substantially limits one or more of such persons major life activities".[134] The court made the following statement in coming to its conclusion: "In a society that all too often confuses "slim" with "beautiful" or "good," morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences".[135]

In the case of *Whittaker v. America's Car-Mart Inc*.,[136] the complainant alleged that he had been terminated from his employment position as a general manager because he was severely obese, which limited his ability to walk.[137] The complainant alleged that he was disabled and also purported that despite his obesity, he was able to perform the inherent requirements of the job in question, with or without reasonable accommodation.[138] The court held that the employee had successfully made out a case that he is disabled within the meaning of the ADA.[139]

In *State Division of Human Rights ex rel. McDermott v Xerox Corp*.,[140] a job applicant failed a pre-employment medical examination because he was obese, and

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131 *Cook v Rhode Island, Department of Mental Health, Retardation, and Hospitals:* 21; Taussig 1994:927.

132 *Cook v Rhode Island, Department of Mental Health, Retardation, and Hospitals:* 21; Taussig 1994:927.

133 It must be noted, however, that the applicant was morbidly obese and that her employer "perceived" her obesity to be a disability. See *Cook v Rhode Island, Department of Mental Health, Retardation, and Hospitals:* 28; Taussig 1994:927,928,950.

134 *Cook v Rhode Island, Department of Mental Health, Retardation, and Hospitals:* 25.

135 *Cook v Rhode Island, Department of Mental Health, Retardation, and Hospitals:* 25.

136 1:13-cv-00108-SNLJ.

137 *Whittaker v. America's Car-Mart Inc*.: B; Hodges 2013:1.

138 *Whittaker v. America's Car-Mart Inc*.: B; Hodges 2013:1.

139 *Whittaker v. America's Car-Mart Inc*.: C.

140 65 N.Y.2d 1985.

was consequently not appointed.[141] The employer failed to explain why the applicant's weight would limit the performance of her employment duties, especially since the applicant's weight had not impeded her ability to perform similar job functions in the past.[142]

In the case of *Gimello v Agency Rent-A-Car Systems*,[143] an office manager claimed that his employment had been terminated because of his weight, although the employer alleged that he had been dismissed because of performance-related issues.[144] The court acknowledged the fact that the employee had sought medical treatment for his obesity, and recognised it as a medical condition.[145] The court upheld the employee's claim, and held that his obesity constituted an actual disability as well as a perceived disability, as the employer regarded his obesity as a disability.[146]

In the matter of *EEOC v Watkins*,[147] a morbidly obese employee was dismissed after he had sustained an injury on the job, and the EEOC instituted a disability discrimination claim on the employee's behalf.[148] Although the EEOC alleged that the employer perceived the employee to be disabled, the court focused on whether or not there was a physiological cause for his morbid obesity to constitute an impairment under the ADA.[149] The EEOC could not produce such evidence and the claim failed.[150]

In *McDuffy v Interstate Distributor Co*.,[151] a truck driver was suspended without remuneration by his employer because of his weight.[152] The court found in favour of

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141 *State Division of Human Rights ex rel. McDermott v Xerox Corp*.: 215; Taussig 1994:943.

142 The court held that obesity might constitute a disability, irrespective of whether it was an immutable condition. See *State Division of Human Rights ex rel. McDermott v Xerox Corp*.: 216; Taussig 1994:943.

143 594 A.2d N.J. Super. Ct. App. Div. 1991.

144 *Gimello v Agency Rent-A-Car Systems:* 341; Taussig 1994:943.

145 *Gimello v Agency Rent-A-Car Systems:* 361; Taussig 1994:943.

146 *Gimello v Agency Rent-A-Car Systems:* 365; Taussig 1994:943.

147 463 F.3d 436 6th Cir. 2006.

148 *EEOC v Watkins*: 439; Staman 2007:6.

149 *EEOC v Watkins*: 441-443; Staman 2007:6.

150 *EEOC v Watkins*: 445; Staman 2007:6.

151 Multnomah Cty. Cir. Ct. No. 0409-09172, 2005.

152 Alexander Hamilton Institute 2008. http://www.businessmanagementdaily.com/19486/weight-discrimination-in-the-workplace-realities-and-legalities. Accessed on 20/08/2014.

the employee and awarded him $109 000 in damages as a result of the employer's assumption that his morbid obesity made him unfit to perform the duties of his job.[153]

In the case of *Frank v United Airlines Inc*.,[154] the court upheld a sex-based discrimination claim that stemmed from weight after female employees of an airline had alleged that the employer's weight-limit requirements applied less favourably to women than to men.[155] The airline failed to produce significant evidence as to how having disproportionately thinner female than male flight attendants had a bearing on the performance of the inherent requirements of the job.[156]

In *Lamoria v Health Care & Retirement Corp*.,[157] which was decided in Michigan, which has a law prohibiting discrimination based on weight, an employer made negative comments about overweight persons, and suggested that they would be dismissed.[158] The court concluded that this amounted to sufficient direct evidence to support a former employee's claim that she was dismissed on the basis of her weight.[159]

In *PS2 LLC, D/B/A Boston's Gourmet Pizza v Childers*,[160] the court ruled that an employer was liable to pay for its employee's weight reduction surgery after the employee had incurred an injury while at work.[161] Because the employee had to lose weight in order to undergo the surgery to treat his injury, the court held that the employee's weight combined with the injury sustained to form a single injury, for which the employee was entitled to receive treatment.[162]

In *Philadelphia Electric Co. v Commonwealth of Pennsylvania*,[163] an applicant was rejected for a post as a service representative after she had failed a medical

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153 Alexander Hamilton Institute 2008. http://www.businessmanagementdaily.com/19486/weight-discrimination-in-the-workplace-realities-and-legalities. Accessed on 20/08/2014.

154 9th Cir. No. 98-15638, 2000.

155 *Frank v United Airlines Inc*.: 848; Alexander Hamilton Institute 2008. http://www.businessmanagementdaily.com/19486/weight-discrimination-in-the-workplace-realities-and-legalities. Accessed on 20/08/2014.

156 *Frank v United Airlines Inc*.:855; Schallenkamp *et al* 2012:252.

157 584 N.W.2d 589 Mich. Ct. App. 1998.

158 *Lamoria v Health Care & Retirement Corp*.: 590; Jones 2012:2037.

159 *Lamoria v Health Care & Retirement Corp*.: 595; Jones 2012:2037.

160 910 N.E.2d 809 Ind. Ct. App. 2009.

161 *PS2 LLC, D/B/A Boston's Gourmet Pizza v Childers:* 813; Swanton 2009:26.

162 *PS2 LLC, D/B/A Boston's Gourmet Pizza v Childers:* 813; Swanton 2009:26.

163 448 A.2d 701 1982.

examination due to her morbid obesity.[164] The employer acknowledged that the applicant was not hired due to her weight, primarily because the employer feared the risk of increased health costs in future.[165] The court in this case ruled that morbid obesity did not amount to a disability in the absence of medical evidence proving some underlying physiological condition; however, on appeal, the decision was set aside and it was held that morbid obesity did constitute a disability.[166]

In the case of *Nedder v Rivier College*,[167] an obese professor was regarded as substantially limited in her ability to perform her employment duties because of "arcane stereotyping", and the court held that a triable issue existed on this ground.[168]

In the case of *Gerdom v Continental Airlines Inc*.,[169] a stewardess of the airline was suspended and later dismissed from her employment position because she exceeded the airline's weight limit for stewardesses.[170] Stewardesses of the airline were weighed on a monthly basis, and if found to exceed the weight limit, were put on a weight loss programme.[171] In terms of the programme, the "overweight" stewardess had to lose at least two pounds per week, failing which she faced suspension and termination of employment.[172] The airline contended that the weight programme was implemented to ensure that the customers of the airline would be serviced by "thin, attractive women, whom executives referred to as 'Continental's girls'".[173] The court found in favour of the stewardess (and other aggrieved stewardesses), because similarly situated men were not treated in the same way and the weight regulations applied to women only.[174]

In *Marks v National Communications Association Inc*.,[175] an obese employee was passed over for promotion in favour of a less experienced, "thinner and cuter"

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164 *Philadelphia Electric Co. v Commonwealth of Pennsylvania:* 702-703; Johnson and Wilson 1995:242.
165 *Philadelphia Electric Co. v Commonwealth of Pennsylvania:* 704; Johnson and Wilson 1995:242.
166 *Philadelphia Electric Co. v Commonwealth of Pennsylvania:* 705; Johnson and Wilson 1995:242.
167 944 F. Supp. 111 D.N.H. 1996.
168 *Nedder v Rivier College:* 113, 120; Pechman 1997:2.
169 692 F.2d 602 9th Cir. 1981.
170 *Gerdom v Continental Airlines Inc*.: 604; Schwie 2011:4.
171 *Gerdom v Continental Airlines Inc*.: 604; Schwie 2011:4.
172 *Gerdom v Continental Airlines Inc*.: 604; Schwie 2011:5.
173 *Gerdom v Continental Airlines Inc*.: 604.
174 *Gerdom v Continental Airlines Inc*.: 605; Schwie 2011:5.
175 72 F. Supp. 2d 322.

employee.[176] The employer also stated that if the employee were to lose weight, she would be promoted.[177] The employee refused to return to work and was consequently dismissed.[178] Soon thereafter, she instituted a gender discrimination claim against the employer.[179] The employer acknowledged that the employee was refused a promotion because of her weight, but denied that it had anything to do with her gender, and as the employee could not prove that similarly situated males were treated differently, the court sided with the employer.[180]

3.3.2.5 Concluding remarks

The investigation above indicates that the position of weight-based discrimination within the US legal system is uncertain at best. With no federal law to govern the issue, mixed judicial outcomes and the varied claims and allegations of complainants, it is clear that the United States also requires legal intervention with regard to this problem. The US jurisdictions that do have a law governing weight discrimination in employment have however proven valuable in ascertaining the results that may stem from such a law should it be enforced on a national scale. These laws have not opened the floodgates of frivolous litigation or injected absurdities into the legal system, as many critics feared. The employees in these jurisdictions have simply been afforded an opportunity to have their cases decided based on their actual claims, namely discrimination on the basis of their weight.

3.3.3 Australia

3.3.3.1 Background

Australia is ranked as one of the most overweight nations in the world, with the prevalence of obesity having doubled over the past 20 years, and over 14 million Australians currently classified as overweight or obese.[181] The levels of obesity in Australia have also been noted to be on par with those in the United States of

176 *Marks v National Communications Association Inc.*: 327; Fowler-Hermes 2001:32,36.
177 *Marks v National Communications Association Inc.*: 326; Fowler-Hermes 2001:36.
178 *Marks v National Communications Association Inc.*: 327; Fowler-Hermes 2001:36.
179 *Marks v National Communications Association Inc.*: 330; Fowler-Hermes 2001:36.
180 *Marks v National Communications Association Inc.*: 335,336; Fowler-Hermes 2001:36.
181 Monash University 2013. http://www.modi.monash.edu.au/obesity-facts-figures/obesity-in-australia/. accessed 22/06/2014.

America.[182] It follows, then, that many of these individuals will either be employed or seeking employment and, given the stigma and prejudice associated with being overweight, are likely to experience discrimination in the workplace.

3.3.3.2 Australia and weight-based discrimination

Similar to the United States, Australia does not have a national law that prohibits discrimination based on body weight. As discussed in chapter 2, the state of Victoria does however have such a prohibition. The 2010 Equal Opportunity Act prohibits discrimination on the basis of "physical features", which, according to the definition in the act, include weight. The reasoning behind the implementation of the act, its purpose as well as the relevant procedures, remedies and statistics were discussed in chapter 2 and are therefore not repeated here.

Weight-based discrimination in employment has been prevalent in Australian workplace for many years, which can be illustrated by the fact that over a decade ago, in 2000/2001, the Victorian Equal Opportunity and Human Rights Commission registered 104 complaints based on "physical features", 29 of which pertained to weight.[183] This is further supported by the fact that since 1995, the same commission has registered over 600 complaints based on "physical features".[184]

3.3.3.3 Case law and weightism in Australia

The Victorian Equal Opportunity and Human Rights Commission listed the following case study in its 2012/2013 annual report, which was resolved through conciliation:[185]

> The complainant applied for a position as a driver with a transport company. He was offered the position, but when the respondent became aware that he weighed over 130 kg, the job offer was withdrawn as the company considered he was too large to be a driver. When notified of the complaint, the respondent agreed to attend a conciliation conference. The complaint was resolved, without admission of liability, with the respondent agreeing to pay the complainant $5,000 compensation.

In the case *of Hill v Canterbury Road Lodge Pty*,[186] a complainant alleged direct discrimination on the basis of her physical features, namely her weight.[187] At the time

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182 ABC 2014. http://www.abc.net.au/news/2014-05-29/australian-obesity-rates-climbing-fastest-in-the-world/5485724. Accessed 22/06/2014.

183 Waring 2011:199.

184 Warhurst *et al* 2009:134.

185 Victorian Equal Opportunity and Human Rights Commission 2013:45.

of the complaint, the complainant weighed 120 kilograms.[188] She alleged that because of the discrimination, she had suffered loss and damage comprising loss of earnings as well as pain and suffering.[189] Members of management made remarks about her weight and stated that she was very large, and referred to the "need to get rid of her".[190] The tribunal stated that direct discrimination would have taken place if the complainant was less favourably treated than others in the same or similar circumstances on the basis of her weight.[191] The tribunal accepted evidence that the employer had on several occasions stated that the complainant was "too fat" and that they wanted to dismiss her.[192] The tribunal consequently held that the employee's weight was a substantial reason for the termination of her employment, and upheld her complaint.[193] The complainant was awarded $2 500 in damages.[194]

3.3.3.4 Concluding remarks

Similar to the United States, Australia is another valuable jurisdiction to study with regard to weight-based discrimination because of the Victorian Equal Opportunity Act. The protection offered to persons against discrimination based on their weight, the extent of the complaints registered in this regard, and the outcome of their cases prove that weight discrimination is a legitimate and prevalent problem in the workplace. It also testifies to the fact that judicial forums are willing to rule in favour of employees who have legitimate claims and have been the victims of unfair discrimination.

3.3.4 The European Union and weightism

3.3.4.1 Introduction

The European Union is said to be "fighting the battle of the bulge" of late, and this battle has found its way into the legal arena.[195] According to the World Health

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186 2004 VCAT 1365.
187 *Hill v Canterbury Road Lodge Pty:* 3(1), 4(9).
188 *Hill v Canterbury Road Lodge Pty:* 4(7).
189 *Hill v Canterbury Road Lodge Pty:* 4(8).
190 *Hill v Canterbury Road Lodge Pty:* 3(4); Waring 2011:200; Rhode 2010:136.
191 *Hill v Canterbury Road Lodge Pty:* 5(12).
192 *Hill v Canterbury Road Lodge Pty:* 10(45).
193 Waring 2011:200.
194 Rhode 2010:136.
195 Killings 2014. http://guardianlv.com/2014/06/european-union-fights-the-battle-of-the-bulge/. Accessed 24/06/2014.

Organisation, the prevalence of obesity has tripled in many European countries since the 1980s, and continues to increase at an alarming rate.[196] Based on the latest estimates in European Union countries, being overweight affects 30-70% of adults, while obesity affects 10-30%.[197] Again, as is the case in Australia, many of these individuals are bound to be employed or seeking employment, and are therefore bound to experience discrimination in the workplace, given the stigma and prejudice associated with being overweight.

3.3.4.2 The EU legal position on weight discrimination

As was revealed in chapter 2, the EU does not have a general law that governs appearance discrimination in employment. This is also the case in relation to weight-based discrimination. Weight is not expressly included in the list of prohibited grounds contained in section 14 of the European Convention on Human Rights, or in article II-81(1) of the Charter of Fundamental Rights of the Constitution. Certain other grounds may however be identified. Although there are no general laws and very few cases in the EU dealing with weight-based discrimination in employment, there is one significant case currently being heard by the ECJ, which may change the position of weight discrimination in workplaces across Europe. This case is discussed below.

3.3.4.3 Case law and weightism in the EU

In 2014, the ECJ considered a case of weight-based discrimination in employment, namely *Kaltoft v The Municipality of Billund*.[198] It was considered whether or not to classify obesity as a disability under the EU's Employment Equality Directive.[199] In this case, one Karsten Kaltoft, a Danish child-minder weighing about 160 kilograms, alleges that he was terminated from his employment after 15 years for being overweight.[200] Kaltoft's employer, the Billund local authority, contended that Kaltoft was dismissed because of the decline in the number of children, and because he

196 World Health Organisation 2014. http://www.euro.who.int/en/health-topics/noncommunicable-diseases/obesity/obesity. Accessed 22/06/2014.

197 World Health Organisation 2014. http://www.euro.who.int/en/health-topics/noncommunicable-diseases/obesity/partners. Accessed 22/06/2014.

198 2014 EUECJ C-354/13 O.

199 The directive prohibits employment discrimination on the basis of disability. *Kaltoft v The Municipality of Billund*: 3.

200 *Kaltoft v The Municipality of Billund*: 2, 10.

was unable to perform some functions of his job, such as tying children's shoelaces, and was instead enlisting the assistance of other employees for these tasks.[201] Kaltoft denied this and claimed that he was able to perform all the inherent requirements of the position.[202]

The Advocate-General of the ECJ stated that obesity may very well constitute a disability for the purposes of discrimination law, but also included that, in his opinion, only severe obesity would create the applicable limitations to qualify as a disability, namely hindering the individual's ability to participate in professional life.[203] A BMI of 40 was suggested as a threshold.[204] The Advocate-General also issued a reminder that whether obesity is self-inflicted or not was irrelevant, and that it was comparable to an injury sustained while playing a dangerous sport (which may be considered as a disability, regardless of how it was caused).[205]

The decision of the ECJ will of course be binding throughout the EU, and will compel all member states to treat obesity as a disability in employment if the complaint is upheld.[206] Employers will be forced to consider reasonable accommodation of overweight employees, and ensure that these employees are not discriminated against or harassed because of their weight.[207] Even if the ECJ rules that obesity does not constitute a disability in the employment realm, employers will still need to "think carefully" about how overweight employees are treated in the workplace, since these employees have the option of instituting other claims, such as a constructive unfair dismissal.[208]

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201 *Kaltoft v The Municipality of Billund*: 9.

202 BBC News 2014. http://www.bbc.com/news/world-europe-27809242. Accessed 23/06/2014.

203 *Kaltoft v The Municipality of Billund*: 55, 56, 58, 60.

204 *Kaltoft v The Municipality of Billund*: 56. Allen 2014. http://www.weightmans.com/blog/2014/07/obesity-can-be-a-disability-says-the-advocate-general/. Accessed 08/08/2014.

205 *Kaltoft v The Municipality of Billund*: 58.

206 BBC News 2014. http://www.bbc.com/news/world-europe-27809242. Accessed 23/06/2014; Bowcott 2014. http://www.theguardian.com/society/2014/jun/10/danish-childminder-discrimination-case-obesity-disability-eu-states. Accessed 24/06/2014.

207 Yahoo Finance UK & Ireland 2014. https://uk.finance.yahoo.com/news/should-you-be-sacked-for-being-too-fat-103655032.html. Accessed 23/06/2014; Brenlund 2014.

208 Brenlund 2014. http://www.hrzone.com/blogs/hrzone-employment-law-update/obesity-new-disability/143706. Accessed 24/06/2014.

This case has stirred up a media frenzy across EU countries, especially in the UK.[209] Business backlash has also been severe, emphasising the misconception that all overweight persons are themselves responsible for their plight, and that employers should not have to bear the burden and be disadvantaged by this.[210]

3.3.4.4 Weightism and the United Kingdom

In the United Kingdom, obesity has been described as an epidemic[211] and is on the increase, with 67% of men and 57% of women in the UK being either overweight or obese.[212] The following has been recorded in relation to obesity rates: There has been a marked increase in obesity rates over the past eight years. In 1993, 13% of men and 16% of women were obese; by 2011, this had increased to 24% for men and 26% for women.[213]

As is the case with the EU in general, the UK does not have a law that explicitly governs weight discrimination in employment. Case law in this regard is also scarce. However, the judgement of the ECJ (discussed above) may alter the UK law indirectly via community law, since UK law is bound to uphold the judgements of the ECJ.

The UK Equality Act[214] also does not expressly recognise obesity as a disability, although (as will be illustrated by the case below) this may happen in appropriate circumstances.[215] The act states the following in relation to disabilities:[216]

> 6 Disability
>
> (1) A person (P) has a disability if-
> (a) P has a physical or mental impairment, and
> (b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

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209 Killings 2014. http://guardianlv.com/2014/06/european-union-fights-the-battle-of-the-bulge/. Accessed 24/06/2014.

210 Killings 2014. http://guardianlv.com/2014/06/european-union-fights-the-battle-of-the-bulge/. Accessed 24/06/2014.

211 NHS Choices 2013. http://www.nhs.uk/news/2013/02February/Pages/Latest-obesity-stats-for-England-are-alarming-reading.aspx. Accessed 22/06/2014.

212 Boseley 2014. http://www.theguardian.com/society/2014/may/29/uk-western-europe-obesity-study. Accessed 22/06/2014.

213 NHS Choices 2013. http://www.nhs.uk/news/2013/02February/Pages/Latest-obesity-stats-for-England-are-alarming-reading.aspx. Accessed 22/06/2014.

214 Equality Act of 2010.

215 Yahoo Finance UK & Ireland 2014. https://uk.finance.yahoo.com/news/should-you-be-sacked-for-being-too-fat-103655032.html. Accessed 23/06/2014.

216 Equality Act: sec 6.

[a] Case law and weightism in the UK

In the case of *Walker v SITA Information Networking Computing Ltd*,[217] which was decided in 2013, an obese employee weighing 137 kilograms alleged that his obesity amounted to a disability and should be covered by the Disability Discrimination Act.[218] In this case, the complainant experienced an array of medical issues related to his obesity.[219] The Employment Appeal Tribunal engaged in an in-depth investigation as to whether or not obesity would constitute an impairment for the purposes of the act, and eventually concluded that it did, particularly as the complainant was substantially impaired.[220]

This case has opened the doors to the recognition of weight-based discrimination in employment in the UK, acknowledging that it may constitute a problem and should be afforded due consideration by employers. The outcome of this case will be strengthened by the ECJ case mentioned above, if the latter succeeds.

3.3.4.5 Concluding remarks

Although the EU does not have a standard approach to weight-based discrimination in employment, and the relevant cases are few and far between, the willingness to recognise obesity as a disability in the UK and, possibly, the entire EU is a positive step towards providing the victims of this discrimination some measure of legal recourse. The outcome of the ECJ case will also be an invaluable source for the South African position on weight-based discrimination, since the EU aims to achieve equality, equal opportunity and eradication of unfair discrimination in the workplace (as does South Africa).

3.3.5 The South African position on weightism

3.3.5.1 Introduction

217 EAT/0097/12.

218 Disability Discrimination Act of 1995; *Walker v SITA Information Networking Computing Ltd*: 2(6).

219 *Walker v SITA Information Networking Computing Ltd*: 1(2),1(3).

220 *Walker v SITA Information Networking Computing Ltd*: 5(14),7(21),7(22).

South Africa is known to have the highest overweight and obesity rates in sub-Saharan Africa[221] and is ranked among the top three most overweight nations in the world after the United States of America and the United Kingdom.[222] Seven out of every ten women and four out of every ten men have significantly more body weight than what is deemed healthy.[223] A recent study by the South African Medical Research Council indicates that 61% of the South African population is overweight, obese or morbidly obese.[224] It is also estimated that approximately 2,8 million South Africans die every year as a result of being overweight or obese.[225] With such shocking obesity rates, it goes without saying that overweight individuals are spread across the South African society and workplaces, and are therefore likely to also experience some weight-related form of discrimination at work.

3.3.5.2 The South African legal position on weight discrimination

South Africa does not have a law that explicitly prohibits discrimination on the basis of weight, and neither section 9(3) of the South African Constitution nor section 6(1) of the EEA lists weight as a prohibited ground of discrimination. Obesity is also not expressly recognised as a disability in South African law. Disability is included in the list of prohibited grounds of both section 9(3) of the Constitution and section 6(1) of the EEA, but there is no single, accepted definition for it.[226] What constitutes a disability depends primarily on the circumstances.[227] The Code of Good Practice: Key Aspects on the Employment of People with Disabilities, however, provides the following definition for disability:[228]

> The scope of protection for people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not the diagnosis or the impairment.
>
> People are considered as persons with disabilities who satisfy all the criteria in the definition:
>
> (i) having a **physical** or **mental impairment;**

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221 Malan 2014. http://mg.co.za/article/2014-05-29-00-sa-has-the-fattest-sub-saharan-african-nation-study. Accessed on 07/07/2014.

222 SMASA 2014. http://www.smasa.cc/4th-post/. Accessed on 07/07/2014.

223 Malan 2014. http://mg.co.za/article/2014-05-29-00-sa-has-the-fattest-sub-saharan-african-nation-study. Accessed on 07/07/2014

224 SMASA 2014. http://www.smasa.cc/4th-post/. Accessed on 07/07/2014.

225 SMASA 2014. http://www.smasa.cc/4th-post/. Accessed on 07/07/2014.

226 Pretorius *et al* 2001:7-26(1).

227 Pretorius *et al* 2001:7-26(1).

228 The Code of Good Practice: Key Aspects on the Employment of People with Disabilities 2002: item 5; Pretorius *et al* 2001:7-27. Own emphasis added.

(ii) which is **long term** or **recurring**; and
(iii) which **substantially limits their prospects of entry into, or advancement in employment.**

Section 1 of the EEA defines reasonable accommodation as follows: "Any modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate in employment."[229] Designated groups are defined as "black people, women and people with disabilities".[230] Therefore, an individual with a disability will be entitled to reasonable accommodation in the workplace. Reasonable accommodation for persons with disabilities is also supported by the Code of Good Practice mentioned above.[231]

[a] Weightism in the South African context

The opinion expressed by *FSP Business*, cited in the previous chapter, applies here as well, namely that weight-based discrimination by an employer may give rise to an unfair discrimination lawsuit under the EEA, even though this characteristic is not specifically listed in section 6(1).[232] It was further stated that the best way for an employer to avoid being taken to the CCMA for unfair discrimination is to discriminate on the basis of weight only when it relates to an inherent requirement of the job.

[b] The role of weight and obesity in relation to equality and dignity in the South African context

It is suggested that the same position of equality and dignity that applies in relation to the other appearance characteristics applies equally to weight-based discrimination, since weight is a prominent category of appearance and falls under the umbrella concept of appearance discrimination in employment.

[c] The role of weight and obesity as a disability in the South African context

229 EEA 55/98: sec 1.
230 EEA 55/98: sec 1.
231 Code of Good Practice: Key Aspects on the Employment of People with Disabilities 2002: item 6.
232 FSP Business Team 2013.

In order to consider whether obesity may constitute a disability in the South African context, one needs to evaluate what a disability is. The definition of a disability provided by the Code of Good Practice mentioned earlier is set out as follows:[233]

> **5.1.1 Impairment**
> (i) An impairment may either be physical or mental or a combination of both.
>
> (ii) **'Physical' impairment** means a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired.
>
> (iii) **'Mental' impairment** means a clinically recognized condition or unless that affects a person's thought processes, judgment or emotions.
>
> **5.1.2 Long-term or recurring**
> (i) **'Long-term'** means the impairment has lasted or is likely to persist for at least twelve months.
>
> (ii) **'Recurring impairment'** is one that is likely to happen again and to be substantially limiting (see below). It includes a constant chronic condition, even if its effects on a person fluctuate.
>
> (iii) **'Progressive conditions'** are those that are likely to develop or change or recur. People living with progressive conditions or illnesses are considered as people with disabilities once the impairment starts to be substantially limiting. Progressive recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities.
>
> **5.1.3 Substantially limiting**
> (i) An impairment is substantially limiting if, in its nature, duration or effects, it substantially limits the person's ability to perform the essential functions of the job for which they are being considered.
>
> (ii) Some impairments are so easily controlled, corrected or lessened**,** that they have no limiting effects**.** For example, a person who wears spectacles or contact lenses does not have a disability unless even with spectacles or contact lenses the person's vision is substantially impaired.
>
> (iii) An assessment to determine whether the effects of an impairment are substantially limiting**,** must consider if medical treatment or other devices would control or correct the impairment so that its adverse effects are prevented or removed.
>
> (iv) For reasons of public policy certain conditions or impairments may not be considered disabilities. These include but are not limited to
>
> (a) Sexual behaviour disorders that are against public policy;
> (b) self-imposed body adornments such as tattoos and body piercing;
> (c) compulsive gambling, tendency to steal or light fires;
> (d) disorders that affect a person's mental or physical state if they are caused by current use of illegal drugs or alcohol, unless the affected person is participating in a recognized programme of treatment;
> (e) **normal deviations in height, weight and strength**; and conventional physical and mental characteristics and common personality traits.
> (f) an assessment may be done by a suitably qualified person if there is uncertainty as to whether an impairment may be substantially limiting.

[233] Code of Good Practice: Key Aspects on the Employment of People with Disabilities 2002: item 5.

Clearly, obesity is not expressly included in the elements of the definition of disability, and complainants of such discrimination have not yet expressly alleged it is such, as will appear from the case law discussed below. Whether obesity may in fact constitute a disability in the South African context will be investigated in paragraph 3.4.

3.3.5.3 The legal position in South Africa seen against the comparative jurisdictions

It is argued here that given the connection between the EEA and Convention 111 of the ILO, as well as the ILO's recent acknowledgement that weight-based discrimination (as part of "physical characteristics") may constitute an infringement upon equality in the workplace, South African labour law should be receptive to such an acknowledgement as well.[234]

The laws of those American and Australian jurisdictions that specifically govern weight-based discrimination in the workplace are significant sources to consider, since they indicate how such laws are interpreted and enforced, and shed light on the potential consequences of such a law in South Africa. The judicial precedents of the USA, EU and Australia are all important sources to consult, as they illustrate how weight discrimination is dealt with in other jurisdictions, what parameters and criteria are used, as well as what type of remedies would be appropriate for such a claim. The case law also demonstrates how weight-based discrimination is dealt with as a disability, a sex-based discrimination claim or a weight-based discrimination claim in its own right.

3.3.5.4 Case law and weightism in South Africa

[a] *NUM & Nongalo, P v Libanon Gold Mine*[235]

In this case, a first-aid team leader at a mining company challenged the termination of his employment.[236] The employee, who did not have to go down into the mine on a regular basis, was diagnosed with diabetes and became obese.[237] He was certified as unfit to work underground, and his employment was terminated on medical

234 See discussion of Convention 111 under par 2.4.5.1[d], [f][ii] above.
235 1993 1 ICJ 8.1.38.
236 *NUM & Nongalo, P v Libanon Gold Mine:* 1.
237 *NUM & Nongalo, P v Libanon Gold Mine:* 1.

grounds.[238] The termination stemmed from the fact that he was overweight and unfit to work underground, as the employer contented that the ability to perform work underground was an inherent requirement of the employee's job.[239] The court rejected the employee's claim that the employer did not make a sufficient effort to find him alternative employment or provide him with reasonable accommodation.[240] The court held that the termination of the employee was not unfair and the application was dismissed.[241]

This case clearly illustrates that an employer may discriminate against employees based on their weight, and may even terminate their employment, provided that the employee's weight is directly linked to the inherent requirements of the position in question. It also illustrates that as South African labour law currently stands, employers are not obliged to provide reasonable accommodation to employees who are overweight or obese, since obesity is not a recognised disability.

[b] *PSA obo October v Department of Community Safety, Western Cape*[242]

In this matter, an employee applied for incapacity leave, which the employer denied.[243] The employer believed that the employee's health problems were self-induced[244] and that he had already taken an excessive amount of sick leave. In order to challenge the employer's decision, the employee alleged that the employer was in breach of the applicable collective agreement.[245] In assessing this allegation, the court held that it was important to examine the cause of the excessive periods of sick leave taken. The evidence revealed that the employee's sick leave had been exhausted because he suffered from gout, high blood pressure, mellitus, diabetes and obesity.[246] The employer attempted to assist the employee by suggesting that he attend a gym, and offered to pay for it.[247] The employee, however, did not have operative transport to accept the offer.[248] The employee revealed that his weight had

238 *NUM & Nongalo, P v Libanon Gold Mine:* 1.
239 *NUM & Nongalo, P v Libanon Gold Mine:* 1.
240 *NUM & Nongalo, P v Libanon Gold Mine:* 1.
241 *NUM & Nongalo, P v Libanon Gold Mine:* 1.
242 2010 19 PSCBC 3.5.1.
243 *PSA obo October v Department of Community Safety, Western Cape:* 6.
244 *PSA obo October v Department of Community Safety, Western Cape:* 5.
245 *PSA obo October v Department of Community Safety, Western Cape:* 2.
246 *PSA obo October v Department of Community Safety, Western Cape:* 6.
247 *PSA obo October v Department of Community Safety, Western Cape:* 7.
248 *PSA obo October v Department of Community Safety, Western Cape:* 8.

increased after he stopped playing sports, and admitted that he "partied a lot".[249] It was clear that the employee's various illnesses were directly related to his obesity; that it resulted from his own voluntary behaviour, and was not attributable to his working conditions.[250] After examining this history, the court held that the employer had attempted to assist the applicant and consequently exercised its discretion fairly, and the court thus did not interfere with this decision.[251]

This case indicates that a relevant consideration where employees' weight is concerned is whether the obesity has stemmed from the employees' working conditions or their own voluntary conduct. It further illustrates that attempts by an employer to provide the obese employee with reasonable accommodation will illustrate an element of fairness on the part of the employer should a dispute arise.

[c] *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union*[252]

In this case, an employee refused to comply with a reasonable instruction of his employer, and his employment was consequently terminated for insubordination and misconduct.[253] The employee alleged that he was unable to comply with the instruction due to health reasons, one of which was his obesity.[254] The employer arranged for the employee to be examined by medical practitioners, who found that the employee was indeed fit to perform his duties and that, given his obesity, exercise would be beneficial to him.[255] Thus, the employer did not support the allegation that the employee was unfit to comply with the instruction.[256] The arbitrator in this case held that the employee was fairly dismissed.[257]

This case shows that employees will not be entitled to reasonable accommodation because of their weight unless medical evidence proves that the employees' weight limits their ability to perform a function associated with their employment.

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249 *PSA obo October v Department of Community Safety, Western Cape:* 16.
250 *PSA obo October v Department of Community Safety, Western Cape:* 24.
251 *PSA obo October v Department of Community Safety, Western Cape:* 25.
252 1991 12 ILJ 1140 ARB.
253 *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union:* 1.
254 *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union:* 3.
255 *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union:* 3.
256 *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union:* 3.
257 *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union:* 1.

[d] *Velen and West 'n Bell Catering Equipment*[258]

In this matter, an employee who had been retrenched from his employment at a close corporation[259] contested his retrenchment, alleging that the real reason behind the termination of his employment was incapacity.[260] In evaluating the evidence, the arbitrator found that the employer had indeed dismissed the employee for incapacity and poor work performance, and not because of its operational requirements.[261] The arbitrator noted the following:[262] One of the reasons furnished by the employer for having dismissed the employee was the fact that the employee was overweight and had fallen through a ceiling at a customer's premises, as well as the fact that the employee had been accused on several occasions of being overweight, sleeping on the job and using other employees to assist him with his work. These facts clearly illustrate that the employer wanted the employee to leave its employ.[263] The arbitrator held that the employee's dismissal was substantively fair, but procedurally unfair.[264]

This case suggests that an employer will be entitled to dismiss employees for incapacity if their weight prevents them from performing certain functions of their job. It also implies that it is acceptable for an employer to accuse employees of being overweight, and to covertly link their job performance to their weight in the absence of medical evidence to support such an allegation.

[e] *IMATU v City of Cape Town*[265]

Although this case dealt primarily with an insulin-dependent diabetic seeking employment as a fireman, which was denied due to the fire department's blanket ban on the employment of insulin-dependent diabetics, the court also commented on the issue of weight in relation to such an employment position.[266] The court held that overweight firemen might be susceptible to heart attacks and other medical

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258 2005 26 ILJ 2500 BCA.
259 *Velen and West 'n Bell Catering Equipment:* 1.
260 *Velen and West 'n Bell Catering Equipment:* 1.
261 *Velen and West 'n Bell Catering Equipment:* 1.
262 *Velen and West 'n Bell Catering Equipment:* 7.
263 *Velen and West 'n Bell Catering Equipment:* 7.
264 *Velen and West 'n Bell Catering Equipment:* 8.
265 2005 26 ILJ1404 LC.
266 *IMATU v City of Cape Town:* 71,108.

complications, but that this did not justify the blanket ban on the employment of such persons, and that it offended their fundamental human dignity.[267]

3.3.6 Concluding remarks

Weight based-discrimination has been identified as a problem area in the South African workplace. Although South African labour law does not at present specifically govern weight-based discrimination in employment, it does offer possibilities in this regard. Weight discrimination could be challenged either as an infringement of the rights to dignity and equality, or may be alleged as a possible disability. The various judicial developments clearly indicate that the position regarding weight-based discrimination in employment is ambiguous, which leads to varied decisions that fail to provide any legal certainty or clarity.

3.4 Weight-based discrimination in the workplace: The possibility of protection

3.4.1 The rationale for statutorily regulating weight-based prejudice in employment

The primary consideration for regulating weight-based discrimination by law is that every person, irrespective of size and body weight, has the right to a life of dignity, respect[268] and equality. Persons of a different size and body weight should be allowed to live beyond the parameters that society and employers view as healthy or acceptable, without facing stigma, prejudice and shame.[269] In this regard, it is very similar to the rationale for statutorily regulating any of the other categories of appearance-based prejudice in employment.

Although weight-based discrimination in the workplace has lately gained momentum, it has in fact placed several employees at an unfair disadvantage over many years. Certain common concerns as discussed earlier, namely that the employment of an overweight or obese person may negatively affect the employer's image, bring about increased health-care costs and impose possible physical limitations, have persuaded employers to discriminate against the overweight, resulting in such persons either not being hired or promoted, or being relegated to employment

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267 *IMATU v City of Cape Town:* 96,98.

268 Taussig 1994:962.

269 Jones 2012:2027.

positions that require little or no face-to-face contact with customers and clients.[270] Contrary to society's perceptions, not all overweight and obese employees experience other illnesses and health concerns, and it would be unfair to require such employees to lose weight to retain their employment (or to be hired and promoted) in order to satisfy inaccurate employer stereotypes.[271] This is supported by the notion that bigger bodies are merely another form of human diversity. Given the stigma, prejudice and discrimination that overweight and obese individuals have to endure in the employment realm, it is surprising that there is little legal recourse available for such victims to combat weight-based discrimination, whereas the victims of other prominent discriminatory categories are afforded ample protection by the law.[272]

Without legislation to properly regulate this form of discrimination in employment, it will continue to hinder equal opportunities in the workplace, strengthen disparities and diminish quality of life for millions of employees who are overweight or obese.[273]

3.4.2 Legal recourse for victims of weight-based discrimination in South Africa

[a] An equality and dignity-based approach

Weight is a prominent category of appearance and, as such, weight-based discrimination may be pursued in the same manner as the other categories of appearance discrimination, namely by alleging an infringement upon the rights to equality and dignity. As a category of appearance discrimination, it is argued that weight discrimination will also comply with the test for unfair discrimination discussed in chapter 2, and will amount to an unlisted analogous ground of unfair discrimination, as well as a possible arbitrary ground. Therefore, the evaluations, discussions and arguments in respect of appearance discrimination covered in paragraph 2.5.3 above equally apply to weight-based discrimination in employment.

[b] An obesity and disability approach

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270 Chernov 2006:111.
271 Rudin and Pereles 2012:141.
272 O'Brien *et al* 2013:455.
273 Pomeranz and Puhl 2013:470.

Sufficient evidence supports the suggestion that obesity may be a disability, particularly in its more advanced stages,[274] but in order to consider whether obesity may constitute a disability in the legal sense, it needs to be tested against the definition of disability found in item 5 of the Code of Good Practice: Key Aspects on the Employment of People with Disabilities discussed earlier.

- *A physical or mental impairment*

It is argued that obesity is a physical impairment, as it amounts to a physiological condition that affects several bodily systems[275] and that may in fact partially limit a bodily function. Excessive weight may prevent an employee from engaging in strenuous physical tasks; it may impair walking and give rise to other health issues and illnesses that could limit bodily function. It is however suggested that this is possible in advanced stages of obesity only. Obesity may also be regarded as a disability if it is caused by an underlying physiological condition, which in itself may limit a bodily function.

The World Health Organisation has defined an impairment to mean "any loss or abnormality of psychological, physical, or anatomical structure or function".[276] Considering this, it is argued that excessive body weight may in fact be tantamount to a physical abnormality.

In addition, obesity may amount to a mental impairment if it is caused by a compulsive eating disorder or some other mental disorder that results in a "voluntary" form of obesity.[277]

- *Long-term or recurring*

It is suggested that obesity may satisfy the "long-term" requirement if an employee has maintained a particular level of obesity or body weight for a period of 12 months or more. Likewise, an employee may satisfy the "recurring" requirement if an

274 Taussig 1994:957.
275 Taussig 1994:957.
276 Pretorius *et al* 2001:7-30(1).
277 Taussig 1994:958.

individual is obese, loses sufficient weight,[278] but is likely to regain this weight in the near future, and the obesity is likely to be substantially limiting.

Obesity may also amount to a progressive condition, as weight fluctuates and an employee may gain more weight over time, leading to a higher body mass index. Obesity may however only be considered a progressive condition once it becomes substantially limiting.

- *Substantially limits entry into or advancement in employment*

According to the definition, an impairment will be substantially limiting if it limits an employee or job applicant's ability to perform the inherent requirements of the job in question. Thus, in order for obesity to be substantially limiting, it must inhibit the individual's ability to perform the inherent functions of the job. This will vary from one job to the next.

The definition also states that an assessment to determine whether a condition is substantially limiting must consider whether medical treatment or other devices could control or correct the impairment, in order to rectify or remove the adverse effects. This is considered possible by means of weight reduction surgery or surgery to correct the underlying physiological condition that causes the obesity. Other means that could be utilised to control or rectify obesity are weight reduction programmes involving diets and exercise.

However, it is argued that employees should not have to undergo non-essential surgical procedures to conform to employer stereotypes, especially since surgery itself may have possible adverse consequences. It has also been noted earlier in this chapter that an individual's weight is determined mainly by genetic factors, and that obesity is predominantly an involuntary disease, for which no "cure" is available.[279] In addition, weight reduction programmes and diets are notoriously ineffective. Therefore, obesity may be substantially limiting, depending on the circumstances.

The definition provides that, for reasons of public policy, certain conditions or impairments cannot constitute disabilities. These include normal deviations in weight.

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[278] Losing "sufficient weight" is a relative concept, but should be considered sufficient if the individual's BMI drops to below 30.

[279] Taussig 1994:958.

However, the definition is silent on what would constitute a "normal deviation". For this reason, it is suggested that merely being overweight will not meet the criterion for a disability. Obesity, on the other hand, can be seen as being beyond a normal deviation in weight, and can thus possibly amount to a disability.

The definition of a disability contained in the Code of Good Practice seems to reflect a medical model of disability, and not a social model.[280] Pretorius and colleagues suggest that this emphasis on a medical model has the disadvantage of not accommodating cases involving a "perceived" disability.[281] The employee may not have a physical or mental impairment, but an employer may nevertheless treat the employee as if he or she does.[282]

The American model of disability includes perceived disabilities in the definition. This has relevance here, as the stigma surrounding obesity has resulted in such severe and widespread discrimination in employment that employers and society have come to perceive the overweight and obese as being disabled and having limited abilities to perform the functions of a job.[283] In the USA, employees have the option of pursuing their disability discrimination claim as a perceived disability, which is not currently available to South African employees, even though they may suffer comparable prejudice in the workplace because of their weight.

In light of all of the above, it is argued that obesity may in fact constitute a disability in terms of South African law. Unfortunately, however, it also poses significant challenges: Obesity will only be a disability if it stems from a psychological disorder or partially limits a bodily function. It will also only be a disability if it is substantially limiting. Furthermore, only abnormal deviations in weight could meet the requirements, which exclude all other non-obese yet overweight employees. Thus, those individuals who are overweight or obese but do not meet these requirements will be left without protection, despite the fact that they may face equally severe employer prejudice based on their weight.

[c] Reasonable accommodation and weightism

280 Pretorius *et al* 2001:7-30(1).
281 Pretorius *et al* 2001:7-30(1)-7-30(2).
282 Pretorius *et al* 2001:7-30(2).
283 Taussig 1994:960.

According to the Code of Good Practice: Key Aspects on the Employment of People with Disabilities, employers should make reasonable accommodation for the needs of people with disabilities, with the aim of reducing the impact of the impairment on the individual's capacity to perform the inherent requirements of the job.[284] The most important consideration is that the person with a disability must ultimately be able to perform the inherent requirements of the employment position, with or without reasonable accommodation.[285]

In applying reasonable accommodation, it would appear that there are three primary considerations:[286]

- **Whether the employee or job applicant is suitably qualified**: This entails that the individual must possess the required qualifications, experience, prior learning and/or the ability to become able to perform the particular job (within a reasonable time).
- **Choosing the appropriate reasonable accommodation**: There are several possible methods for an employer to achieve reasonable accommodation, including adapting facilities and equipment, reorganising the work environment, restructuring jobs, adjusting leave and working hours, and providing specialised support, training and supervision in the workplace.
- **Whether the reasonable accommodation will impose a disproportionate burden on the employer**: Any such accommodation should be assessed in light of an employer's financial resources and the structure of the working environment in order to determine whether the measures are reasonable and will not impose undue hardship on the employer.

Thus, employees who successfully establish their obesity as a disability will be entitled to reasonable accommodation specifically tailored for them and their weight, provided that they have the necessary qualifications, that the reasonable accommodation does not impose a disproportionate burden on the employer, and that the employer is indeed able to make appropriate reasonable accommodation available to the employee. Authors agree that employers should in future be

284 Code of Good Practice: Key Aspects on the Employment of People with Disabilities: item 6.

285 Pretorius *et al* 2001:7-34.

286 Pretorius *et al* 2001:7-34-7-44; Code of Good Practice: Key Aspects on the Employment of People with Disabilities: item 6.

compelled to make reasonable accommodation for overweight and obese employees, and should be able to provide legitimate and non-discriminatory reasons for the employment decisions made in relation to such employees.[287]

[d] The most appropriate measure of protection against weight-based discrimination in South African workplaces

It is argued that the most appropriate legal measure to govern weight discrimination in employment is for weight to be added to the list of prohibited grounds of unfair discrimination. The argument in support of this is the same as that for the other categories of appearance-based discrimination: It will grant protection to all employees on the basis of their weight, irrespective of their particular deviation from "normal weight".

It is also argued that certain employees who meet the requirements according to the definition as discussed above will be able to successfully claim obesity as a disability and be afforded the relevant protection and reasonable accommodation. However, until such a matter is heard by South African judicial forums or addressed by the legislature, the matter will remain purely speculative and without legal certainty.

[e] The position of the employer

The employer's position in relation to weight-based discrimination is the same as the position in relation to the other categories of appearance discrimination. The employer may raise the same defences to a claim of weight discrimination, namely that the action taken was not discriminatory or that the discriminatory action was not unfair, that it was taken in terms of affirmative action measures, or that it is justified by the inherent requirements of the job in question. Therefore, the arguments and discussions with regard to these defences contained in paragraph 2.5.3 apply equally to weight-based discrimination.

If employees successfully allege that their obesity amounts to a disability, the employer will be obliged to make available reasonable accommodation. Reasonable accommodation for an obese employee could include a parking bay closer to the

[287] Rudin and Pereles 2012:140.

workplace, restructuring of an employment position to exclude extensive or strenuous physical activity, transfer to a more appropriate position (as illustrated in the *Libanon Gold Mine* case discussed earlier) and, possibly, financing a gym membership or other training and weight loss programmes (shown in the *October* case discussed earlier). The employer will however not be liable to provide reasonable accommodation to an employee if such measures will result in a disproportionate impact on the employer or if the employee lacks the necessary qualifications or is unable to discharge the inherent requirements of the job.

3.5 Conclusion

This chapter illustrated the severe discrimination and prejudice suffered by certain employees in the workplace because of their weight. Particularly the notion that these individuals are themselves responsible for their own plight, as well as the shaming of such persons, contributes to this unfair stigmatisation and prejudice. The influence of the media and weight loss industry further aggravates the incorrect perception that weight is always voluntary and controllable. However, it is unclear exactly where on the appearance continuum weight would fall, as it may be linked with both mutable and immutable characteristics.

Those employees who fall within the jurisdiction of laws that do outlaw discrimination based on weight enjoy the benefit of having their claims decided based on the actual discrimination suffered (as is the case with the other categories of appearance discrimination). The number and nature of the claims brought in the comparative jurisdictions also serves to indicate the prevalence of the problem, as well as the need for legal intervention.

In South Africa, employees who are discriminated against on the basis of their weight may not rely directly on a prohibited ground of unfair discrimination in section 6(1) of the EEA, since weight is not specifically listed there. Such aggrieved employees may however bring an unfair discrimination claim on the basis of an unlisted analogous ground or an arbitrary ground. Their obesity may also be alleged as a disability if it is severe enough to constitute an abnormal deviation in weight from what is considered the norm. However, in the absence of legislative reform and judicial precedent the position will remain unclear.

Chapter 4

Trans-appearance

People changed lots of other personal things all the time. They dyed their hair and dieted themselves to near death. They took steroids to build muscles and got breast implants and nose jobs so they'd resemble their favourite movie stars. They changed names and majors and jobs and husbands and wives. They changed religions and political parties. They moved across the country or the world -- even changed nationalities. Why was gender the one sacred thing we weren't supposed to change? Who made that rule? — Ellen Wittlinger[1]

4.1 Introduction

In the context of this study, one other category of appearance-related discrimination in the workplace warrants investigation, namely the discrimination experienced by

[1] Goodreads 2014. http://www.goodreads.com/quotes/tag/transgender (accessed on 04/08/2014).

transgender persons,[2] transsexual persons[3] and transvestites[4] in the workplace based on their looks. For the purposes of this dissertation, these groups will be referred to as the category of "trans-employees" or "trans-appearance" individuals in employment. In recent years, law and literature of various jurisdictions around the world appear to be moving towards increased protection for trans-employees in the workplace, and it has been suggested that this will continue and increase in the future.[5]

4.2 Deconstructing trans-appearance

4.2.1 Categories of trans-appearance and prejudice

Transsexuality is not a new occurrence, and has actually been present in societies throughout history.[6] Although it certainly is no longer the case today, transsexuals were historically often "afforded an exulted status" in their societies:[7] The Gallae, who were transsexuals in ancient Rome, castrated themselves upon making a decision about which gender they were, and placed their genitalia in the doorway of a worthy citizen, who would consider it as an honour and a sign of good fortune. Certain Native American cultures recognised transsexuals and afforded them a special and honoured status in their societies.

Transsexual individuals suffer severe levels of prejudice and discrimination, as well as isolation, harassment, ridicule, marginalisation and humiliation in their everyday lives, including in the employment realm.[8] This, in turn, affects the physical and psychological health of these individuals.[9]

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2 "Of, relating to, or being a person (as a transsexual or transvestite) who identifies with or expresses a gender identity that differs from the one which corresponds to the person's sex at birth." - Merriam Webster 2014. http://www.merriam-webster.com/dictionary/transgender (accessed on 31/05/2014).

3 "A person who strongly identifies with the opposite sex and may seek to live as a member of this sex especially by undergoing surgery and hormone therapy to obtain the necessary physical appearance (as by changing the external sex organs)." – Merriam Webster 2014. http://www.merriam-webster.com/dictionary/transsexual (accessed on 31/05/2014).

4 "A person and especially a male who adopts the dress and often the behaviour typical of the opposite sex especially for purposes of emotional or sexual gratification." - Merriam Webster 2014. http://www.merriam-webster.com/dictionary/transvestite (accessed on 31/05/2014).

5 Juarez and Williams 2013:3.

6 Visser and Picarra 2012:515.

7 Visser and Picarra 2012:515.

8 McGregor 2013a:201.

9 McGregor 2013a:201.

In considering "trans-appearance", it is important to note in the first instance the difference between sex and gender. The former refers to the biological element in terms of which individuals are defined as either male or female, depending on their reproductive organs.[10] The latter, on the other hand, refers to the psychological, social and cultural element that can be described as the state of being female or male.[11] In this regard, the following has been noted:[12]

> When the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice, with the consequence that *man* and *masculine* might just as easily signify a female body as a male one, and *woman* and *feminine* a male body as easily as a female one.

Gender is partly constructed based on society's perception of the physical differences between the male and female sexes, particularly dress codes, speech patterns and manner of walking.[13]

However, transvestites are not restricted to individuals who choose to wear clothing associated with the opposite gender for sexual, emotional and psychological reasons. This culture also consists of various sub-cultures, including "drag queens",[14] "she-males"[15] and "female impersonators".[16] It should also be noted that transvestites have a male gender identity; they enjoy their male genitals and bodies, and have no desire to change their sex.[17] "Transgender" is an umbrella term for "individuals whose identity and/or gender expression does not reflect the societal gender norms associated with the sex assigned at birth".[18] Transgender individuals

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10 Oxford University Press 2014. http://www.oxforddictionaries.com/definition/english/sex (accessed on 14/07/2014).

11 Oxford University Press 2014. http://www.oxforddictionaries.com/definition/english/gender (accessed on 14/07/2014).

12 Dietert and Dentice 2009:127, referring to Butler 1999:10.

13 It is said that from birth until death, various social structures govern who people are and what life roles they are supposed to perform based on whether the individual is born male or female. In terms of this societal construction, people identify, perceive and categorise individuals in society as either male or female, which in effect limits and excludes acceptance of gender identities that do not comply with this norm. Consequently, society perceives being male or female as mutually exclusive gender identities. See Visser and Picarra 2012:508; Dietert and Dentice 2009:121,122.

14 Homosexual cross dressers who wear female clothing for their own erotic and sexual pleasure (or that of their partner). They do not wish to become female and they value their "maleness". See Visser and Picarra 2012:513, referring to Weiss 2001:142.

15 Male individuals who have undergone breast augmentation, but have retained their male genitals, and are often involved in prostitution, pornography or the adult entertainment industry. See Visser and Picarra 2012:513, referring to Weiss 2001:142.

16 Men who wear female apparel to entertain an audience. These individuals may be homosexual, heterosexual or bisexual. See Visser and Picarra 2012:513, referring to Weiss 2001:142.

17 Visser and Picarra 2012:513, referring to Weiss 2001:142.

18 Dietert and Dentice 2009:122.

may self-identify and give expression to their gender in different ways, depending on the individual concerned.[19]

Expert evidence in *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*[20] indicated that it was an "immutable state" and that no individual who truly is a transsexual has ever been "persuaded, bullied, drugged, analysed, shamed, ridiculed or electrically shocked into the acceptance of his physique".[21] It was also stated that in most medical circles, the only remedy or treatment for transsexuality was to alter the individual's body to reflect his or her psychological state.[22]

The sexual identity or orientation of transgender individuals may also vary from one individual to the next, which contradicts the common misconception that a homosexual individual will automatically become heterosexual after undergoing gender reassignment.[23] Gender reassignment has been described as follows:[24]

> A medical procedure available to individuals who suffer from a medically recognised psychological condition in which they believe that their physical characteristics should be those of the opposite sex. This procedure is irreversible, and includes both surgery and hormonal treatment to achieve a match between the person's physical sex characteristics and their psychological gender profile.

Not all transgender individuals will or wish to undergo gender reassignment, however.[25] The reconstructing of the body to display the individual's gender identity may or may not be part of a specific person's transition process.[26] The decision to alter the body forms part of the particular individual's gender expression.[27] It is estimated that only about 15% of transsexual individuals actually undergo gender reassignment surgery.[28] If trans-employees do elect to align their physical bodies with their gender identities and undergo transition in the workplace, this process may include changing a male name to a female name, or vice versa; being addressed by means of the appropriate pronouns, wearing appropriate clothing, and taking the relevant hormones. If the employer and/or fellow employees handle a transition

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19 Dietert and Dentice 2009:122.

20 Unreported LC Judgement 2010, case no. JS 296/2009.

21 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 4.

22 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 4.

23 These individuals may identify as bisexual, heterosexual or homosexual. See Dietert and Dentice 2009:122.

24 Grant 2011:82, referring to Taitz 1989.

25 Dietert and Dentice 2009:122.

26 Dietert and Dentice 2009:122.

27 Dietert and Dentice 2009:122.

28 Juarez and Williams 2013:3.

poorly, this could result in a divided workforce, a low morale and even a hostile work environment.[29]

4.2.2 Trans-appearance in the workplace

Trans-employees experience prejudice, discrimination and constraint in all areas of life, especially in the workplace.[30] This discrimination and inequality may be due to the fact that many employers and employees are "transphobic", and arguably do not fully understand the position of these trans-employees.[31] It is reported that trans-individuals suffer high levels of victimisation as well as verbal abuse and sexual assault, which is why their experiences of discrimination and inequality should not be dismissed as simply being "oversensitive".[32] One study revealed that trans-employees experience three primary issues in the workplace, which most often result in discrimination against such persons. These issues are the employee's so-called "coming out" in the workplace, the lack of support received from the employer and fellow employees, and the importance of the trans-employee being acknowledged with the proper pronouns and chosen names during and after the appearance transition and change.[33]

For trans-employees, undergoing gender reassignment and transitioning in the workplace often involves altering their manner of dress and grooming in addition to their changing physical appearance.[34] It is during this transitioning process that most trans-employees experience discrimination.[35] Their transition and changing appearance render these employees particularly vulnerable to discrimination and harassment by their employers and co-workers.[36] A further area where trans-employees may experience prejudice in the workplace is restrooms and ablution facilities. Public restrooms serve as an authority of demarcation, as they force individuals to present themselves as either male or female.[37] When trans-employees

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29 Juarez and Williams 2013:2.

30 Herman and Cooper 2011:1; Make the Road New York 2010:4; Dietert and Dentice 2009:128; Burns and Krehely 2011:1.

31 McGregor 2013a:202.

32 McGregor 2013a:202-203.

33 Dietert and Dentice 2009:123.

34 Jones 2013:504.

35 Jones 2013:504.

36 Jones 2013:504.

37 Dietert and Dentice 2009:128.

enter a public restroom, they must be able to "present themselves" and "function appropriately" in order to avoid scrutiny, prejudice and discrimination.[38]

Trans-employees appear to suffer discrimination in the workplace not only based on their appearance, but also on two other primary grounds, namely discrimination based on sexual orientation, and disability discrimination. The former refers to the suffering of discrimination because these individuals are incorrectly perceived to be of a particular sexual orientation, such as gay, lesbian or bisexual.[39] As mentioned above, sexual orientation is not definitively linked with gender identity and, as such, these employees experience amplified discrimination on the basis of a stereotype, which may or may not hold true for a specific individual. Transsexual individuals have also been identified as suffering from gender dysphoria,[40] which in fact amounts to a mental impairment.[41] Therefore, it can be argued that such individuals may be "disabled" in the employment context, provided that they meet the rest of the requirements for disability. If these trans-employees can be regarded as people with disabilities, this will also open up possibilities for reasonable accommodation for such employees.

A study revealed that trans-employees experienced verbal abuse and sometimes even physical violence as well as discrimination in hiring, promotion, remuneration and employment benefits.[42] A survey revealed that 33% of trans-employees were dismissed by their employer after their transition, while 29% left their employment because of conditions relating to their transition.[43] Another study indicated that 20% of trans-employees lost their employment because they were transgender, while 39% were not employed and 17% were denied a promotion on this ground.[44] Trans-employees also experience high levels of harassment in the workplace (in addition to other discrimination), which is confirmed by the results of a survey that stated that, at

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38 Dietert and Dentice 2009:128.

39 Harris 2002:4.

40 A recognised medical condition, sufferers of which do not internally feel to be of the gender that their bodies reflect. See Whittle 2002; APA 2013:451-459.

41 Harris 2002:5.

42 Whittle 2002 http://www.gires.org.uk/assets/employment-dis-full-paper.pdf. Accessed 17/02/2014.

43 Whittle 2002.

44 Herman and Cooper 2011:1.

the time of transition, 38% of these employees experienced harassment, while 13% experienced it on a daily basis, and 25% still experienced it after a change in jobs.[45]

4.3 Trans-appearance in the various jurisdictions

4.3.1 Introduction

This section aims to investigate and evaluate the legal position and judicial precedent in the various jurisdictions in relation to appearance discrimination against trans-employees in the employment realm.

4.3.2 The International Labour Organisation and trans-appearance

In 2013, the Director-General of the ILO issued a statement on the organisation's efforts to eradicate employment discrimination against trans-employees.[46] The statement reinforces that the ILO has been and continues to be the primary vehicle to advance human rights in employment, and affirms its commitment to achieve workplaces that are free from all forms of discrimination, including discrimination based on gender identity.[47] The statement indicates that while significant progress has been made to advance the rights of trans-employees, these individuals still face discrimination and harassment in the workplace.[48]

In the same year, the ILO published a report by the governing body of the International Labour Office, which recognises that transgender rights are nothing new in the international labour arena, but have been receiving increased attention in recent years (including at various United Nations forums).[49] According to the report, trans-employees regularly experience discrimination and harassment; legislation that grants them protection is often absent, and when such legislation exists, it is often poorly applied.[50] The report further indicates that, in the workplace, women who are perceived to be more masculine and men who are perceived to be more feminine in their behaviour and appearance are often stigmatised and discriminated against

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45 Whittle 2002.

46 Ryder 2013. http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_213528/lang--en/index.htm. Accessed 22/07/2014.

47 Ryder 2013. http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_213528/lang--en/index.htm. Accessed 22/07/2014.

48 Ryder 2013. http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_213528/lang--en/index.htm. Accessed 22/07/2014.

49 ILO 2013:1.

50 ILO 2013:2.

because of their perceived sexual orientation.[51] Transgender employees also appear to experience the most severe forms of discrimination in the workplace, and are more vulnerable to bullying and harassment as well.[52]

4.3.3 The United States of America

4.3.3.1 The legal position on trans-appearance in employment

No federal law in the United States of America expressly grants protection to transgender employees in the workplace.[53] Proposed legislation to grant such federal protection on the basis of gender identity has been considered by the United States Congress on multiple occasions, but has failed to become law.[54] This lack of a federal law that grants protection to trans-employees does not necessarily leave such employees destitute, since they could bring a sex-based discrimination claim under Title VII or, in appropriate circumstances, even a sexual orientation-based or disability discrimination claim.[55]

Although there is no federal law, 17 states and at least 150 cities in the USA have included gender identity or gender expression in their employment anti-discrimination statutes.[56] Many employers have also taken progressive steps and included transgender protections in their employment policies and handbooks.[57] Therefore, Burns and Krehely suggest that the United States Congress should in fact enact a federal law that protects trans-employees from discrimination in the workplace, in order to ensure that all persons are treated fairly in employment and are judged on the basis of their skills, qualifications and quality of their work, and not their gender identity.[58]

An example of a work environment where trans-employees and their appearance are not tolerated is the military.[59] Trans-employees are barred from joining the military before gender reassignment (if this intention is known), and cannot enlist after

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51 ILO 2013:2.
52 ILO 2013:3.
53 This is similar to the position of the other categories of appearance-based discrimination. See Juarez and Williams 2013; Make the Road New York 2010:5.
54 Juarez and Williams 2013.
55 Harris 2002:2.
56 Juarez and Williams 2013.
57 Juarez and Williams 2013.
58 Burns and Krehely 2011:1.
59 Green 2010:155.

transition due to their physical and "genital abnormality".[60] They are also not considered to be psychologically or socially suited for military service due to their need for sophisticated and continued medical care.[61]

4.3.3.2 Case law and trans-appearance in the USA

In the case of *Macy v Holder, NO*.,[62] the EEOC held that complaints based on gender identity, transgender status and sex change were possible under Title VII of the Civil Rights Act, and thus applied to the employment domain as well.[63]

In *Schwenk v Hartford*,[64] the court held that discrimination against an individual because of his or her failure to act like a man or a woman was a form of sex discrimination and was outlawed under Title VII and, consequently, prohibited in the workplace.[65]

The form of gender stereotyping mentioned above has been applied in several cases to extend protection to transsexual people.[66] These include the following:[67]

- *Rosa v Park West Bank and Trust Co*.,[68] where a biologically male plaintiff was deprived of the prospect to apply for a loan because he was not dressed in masculine clothing[69]

- *Rentos v OCE-Office Systems*,[70] where the court refused to dismiss the claim of a transsexual female that she had been discriminated against based on her sex[71]

- *Doe v Brockton Sch. Comm*.,[72] where a court declined to dismiss a transsexual individual's complaint requesting an order to permit her to wear clothing typically worn by teenage girls[73]

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60 Green 2010:155.
61 Green 2010:155.
62 0120120821 2012 WL 1435995 EEOC April 2012.
63 Juarez and Williams 2013.
64 204 F.3d 1187 9th Cir. 2000.
65 *Schwenk v Hartford:* 1205; Harris 2002:2-3.
66 Harris 2002:3.
67 Harris 2002:3-4.
68 214 F.3d 213 1st Cir. 2000.
69 *Rosa v Park West Bank and Trust Co*.: 214.
70 1996 U.S. Dist. LEXIS 19060 S.D.N.Y. 1996.
71 *Rentos v OCE-Office Systems:* 27.
72 No. 2000-J-638 Mass. App. 2000.

- *Enriquez V West Jersey Health Systems*,[74] where the court held that a prohibition on sex discrimination protected transsexual employees[75]

In the case of *Doe v Belleville*,[76] the court decided as follows, which has a significant bearing on trans-appearance in the workplace: "Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles".[77] The court explained that this meant that a male individual who was harassed because he had a soft voice, a slight physique or long hair, or because he exhibited masculinity in a manner different than what his co-workers believed a male should appear and behave, was harassed because of his sex.[78]

In *Lie v Sky Publishing Corporation*,[79] the court held that a male-to-female transsexual could maintain a claim of unlawful discrimination based on sex, sexual orientation, disability and retaliation.[80]

In the case of *Tronetti v TLC Healthnet Lakeshore Hospital*,[81] the court decided that a transsexual individual could maintain an action for alleged employment discrimination based on the employer's perceptions of male and female gender roles and the employee's inability to "act like a man".[82]

In *Fishbaugh v Brevard County Sherriff's Department*,[83] it was held that a transsexual employee had a valid claim for discrimination on the basis of transsexuality rather than sex itself.[84]

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73 *Doe v Brockton Sch. Comm*.: 3.

74 2001 N.J. Super. LEXIS 283 N.J. Super. 2001.

75 *Enriquez V West Jersey Health Systems:* 380.

76 119 F.3d 563 7th Cir. 1997.

77 *Doe v Belleville:* 580; Harris 2002:4.

78 *Doe v Belleville:* 581; Harris 2002:4.

79 15 Mass. L. Rptr. 412 2002 WL 31492397 Mass. Super. Ct. 2002.

80 *Lie v Sky Publishing Corporation:* 1-8; Bolmarcich 2009. http://www.semmes.com/publications_archive/labor_employment/pdf/employment-discrimination-protection-transgender.pdf. Accessed 20/07/2014.

81 2003 WL 22757935 W.D.N.Y. 2003.

82 *Tronetti v TLC Healthnet Lakeshore Hospital*: 4; Bolmarcich 2009. http://www.semmes.com/publications_archive/labor_employment/pdf/employment-discrimination-protection-transgender.pdf. Accessed 20/07/2014.

83 FCHR Order No. 04-103 Fl. Comm. Human Rel. 2004.

84 *Fishbaugh v Brevard County Sherriff's Department;* Bolmarcich 2009. http://www.semmes.com/publications_archive/labor_employment/pdf/employment-discrimination-protection-transgender.pdf. Accessed 20/07/2014.

The aforementioned cases thus clearly distinguish the position of trans-employees as an explicit ground of discrimination in employment.

4.3.4 The European Union

4.3.4.1 The legal position on trans-appearance in employment

In 2013, the EU Council of Ministers for Foreign Affairs approved the Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons.[85] The approval of such a document has been described as an important and relevant development of human rights in the EU's new foreign policy, the goal of which is to brand the EU as a "global force for human rights".[86] Although the recognition of human rights in the EU is a complex legal and political process, forums such as the ECJ have made significant positive contributions thereto.[87] The new guidelines recognise that transgender persons have the same human rights as other individuals who should receive protection, and that no new rights are created for them.[88] Transgender persons are also identified as a vulnerable group, since they face widespread discrimination and violations of their human rights.[89] A priority area of these guidelines is the promotion of equality and non-discrimination against transgender individuals, although the specific measures to be taken in terms of the guidelines is described according to the various international jurisdictions.[90]

It is also acknowledged that while these guidelines are a positive step towards the protection of human rights for transgender individuals in the EU, it remains difficult to identify a common trend in how these issues are addressed in the different EU member states, who each has its own laws and views on the issue.[91]

4.3.4.2 Case law and trans-appearance in the EU

85 Annicchino 2013:624.
86 Annicchino 2013:624,625.
87 Although EU guidelines do not have binding force, they are political commitments and instructions on how to address situations where human rights violations may occur. Annicchino 2013:624,625.
88 Annicchino 2013:627.
89 Annicchino 2013:627.
90 Annicchino 2013:629.
91 Annicchino 2013:629.

In the case of *Kara v The United Kingdom*,[92] the European Commission of Human Rights upheld a decision of the London Education Authority, which prohibited a male transvestite from wearing dresses to work.[93] The commission sided with the education authority, but did not deny that the right to freedom of expression included individuals' right to express themselves via their manner of dress.[94]

In *Goodwin v The United Kingdom*,[95] a transsexual employee experienced severe discrimination and harassment in the workplace, which had reached such alarming proportions as co-workers holding her down, looking under her skirt (allegedly to examine her genital organs) and touching her breasts.[96] The employee was eventually dismissed from her employment due to "ill health", allegedly because she was a transsexual.[97]

4.3.4.3 The legal position of the United Kingdom and Ireland on trans-appearance

The Gender Recognition Act of 2004 currently applies in the United Kingdom. This act was promulgated in the wake of the *Goodwin* case discussed above.[98] It provides for the establishment of panels to decide whether a post-operative transsexual's altered sex should be recognised by law.[99] A pre-operative transsexual is however not necessarily denied recognition in terms of the act, unless the individual is married.[100] The position of trans-employees in the military service differs from that in the USA, since the UK military does accommodate transgendered persons.[101] Individuals who undergo gender reassignment are also allowed to remain in service.[102]

In 2013, Ireland proposed a Gender Recognition Bill, which would have the effect of establishing a statutory system for the recognition and regulation of gender

92 App. No. 36528/97 ECHR 1999.
93 *Kara v The United Kingdom*: 275; Rhode 2010:139.
94 *Kara v The United Kingdom*: 274.
95 (1996) 22 EHRR 123.
96 *Goodwin v The United Kingdom*: 2.
97 *Goodwin v The United Kingdom*: 2.
98 Visser and Picarra 2012:519.
99 Visser and Picarra 2012:519.
100 Visser and Picarra 2012:519.
101 Green 2010:155.
102 Green 2010:155.

identity.[103] The bill came about because many transgender persons' enjoyment of vital services, such as access to employment, was restricted because of their gender identity.[104] After the *Goodwin* judgement mentioned above, the Irish High Court held that the lack of procedures to address gender identity in Ireland violated its obligations under article 8 of the European Convention on Human Rights.[105] Dunne describes the Gender Recognition Bill as long overdue and a positive attempt to fill the gaps in Irish law, as well as an effort to recognise the dignity and equality of transgender individuals.[106]

4.3.5 South Africa

4.3.5.1 The legal position on trans-appearance in employment

In South Africa, both section 9(3) of the Constitution and section 6(1) of the EEA prohibit discrimination based on sex, gender and sexual orientation. Although the various 'trans'-categories are not mentioned explicitly, the members of these groups have sought and received protection on these grounds, as the judicial precedents below will indicate.

The acceptance of the transgender and transsexual occurrence has led to the accommodation of these persons in terms of the Births and Deaths Registration Act[107] and the enactment of the Alteration of Sex Description and Sex Status Act,[108] which allows persons to alter their assigned sex for all legal purposes.[109] Visser and Picarra describe the latter act as being sensitive to the notion that the protected grounds of sex, gender and sexual orientation are in fact all dimensions of human dignity.[110] The Alteration of Sex Description and Sex Status Act is relevant in the employment context, because it will affect trans-employees who wish to transition

103 Dunne 2014:1.
104 Dunne 2014:1.
105 Dunne 2014:2.
106 Dunne 2014:4.
107 51/1992.
108 49/2003.
109 This legal framework, however, only allows for persons to legally change their sex if they have undergone gender reassignment surgery and treatments. See Visser and Picarra 2012:507.
110 Visser and Picarra 2012:524.

and undergo gender reassignment. Since such employees will have a legal right to alter their sex under this act, it may affect official documents completed in a job application process, as well as those held by a current employer. Furthermore, the fact that a trans-employee's appearance will change while at work, and that such employee will legally become a member of the opposite sex, may affect employment relations with the employer and co-workers.

4.3.5.2 Case law on trans-appearance in South Africa

[a] *National Coalition for Gay and Lesbian Equality v Minister of Justice*[111]

In this case, the Constitutional Court appears to have interpreted "sexual orientation" to include transsexuals.[112] The following is stated in this regard:[113]

> The concept "sexual orientation" as used in section 9(3) of the 1996 Constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who are bi-sexual, or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex.

McGregor suggests that this position is debatable, as the concepts of gender identity and transgender identity differ from the notion of sexual orientation.[114] Nevertheless, although this debate is credible, the statement reflects the Constitutional Court's willingness to grant protection to transsexual persons.

[b] *Atkins v Datacentrix (Pty) Ltd*[115]

In this case, a prospective employee was offered an employment position after a successful job interview, which he accepted, and then proceeded to inform the employer that he intended undergoing a gender reassignment procedure from male to female.[116] The employer was "not impressed" by this disclosure, and terminated the contract of employment, as the employee had failed to divulge this during the interview process.[117] The employer argued that this omission amounted to serious misrepresentation, and viewed the employee's actions as a repudiation of the

111 1999 1 SA 6 CC.
112 McGregor 2013a:205, referring to *National Coalition for Gay and Lesbian Equality v Minister of Justice*: 21.
113 *National Coalition for Gay and Lesbian Equality v Minister of Justice*: 21.
114 McGregor 2013a:205.
115 2010 4 BLLR 351 LC.
116 *Atkins v Datacentrix (Pty) Ltd*: 1.
117 *Atkins v Datacentrix (Pty) Ltd*: 1.

contract of employment.[118] The employee instituted an unfair discrimination claim against the employer[119] and alleged that the employer had discriminated against him on the basis of his sex, gender and/or sexual orientation.[120]

The court determined that the primary reason for the employee's dismissal was that the employer was "not happy" that the employee wished to undergo gender reassignment, and dismissed him for that reason.[121] The court further held that once an employee had undergone gender reassignment, the employee continued to be an employee, and continued to enjoy the protection afforded by the Labour Relations Act, the EEA and the Constitution.[122] The court clearly stated that the employee did not consequently become any less of a human being.[123] The court wanted to "send out a message" to employers who still harboured prejudice in relation to gender reassignment, and reinforced that such conduct would not be tolerated or indulged at all.[124] It also stated that the employer was completely insensitive to the situation and circumstances of the employee, and that discrimination on this and other grounds was "painful and … an attack on a person's dignity as a human being".[125] The court consequently ruled that the employee's dismissal was automatically unfair and that the employer had discriminated against the employee on the basis of sex and gender.[126] It also ordered the employer to take steps to prevent such discrimination from recurring and to apologise to the employee in writing.[127]

The court in this case clearly illustrated that an individual's appearance as well as the alteration thereof did not make such an employee any less a human being or lowered or removed his or her status as an employee. The alteration of an employee's physical appearance from male to female (or vice versa) cannot be a legitimate reason for terminating the employment of such a person. The case also

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118 *Atkins v Datacentrix (Pty) Ltd*: 1.

119 *Atkins v Datacentrix (Pty) Ltd*: 1.

120 *Atkins v Datacentrix (Pty) Ltd*: 5.

121 *Atkins v Datacentrix (Pty) Ltd*: 18.

122 *Atkins v Datacentrix (Pty) Ltd*: 19.

123 *Atkins v Datacentrix (Pty) Ltd*: 19.

124 *Atkins v Datacentrix (Pty) Ltd*: 20.

125 It was further held that times had changed, that employees no longer had to live in closets, and that people's personal views on transgender and transsexual individuals had to remain their own personal views and not become a reason to discriminate against such persons or terminate their employment. See *Atkins v Datacentrix (Pty) Ltd*: 20.

126 *Atkins v Datacentrix (Pty) Ltd*: 24.

127 *Atkins v Datacentrix (Pty) Ltd*: 24.

illustrates that employers should have regard for the personal circumstances of employees, and that discrimination based on the alteration of employees' appearance (namely gender reassignment) results in a painful attack on their inherent human dignity.

[c] *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*[128]

This case involved an employee who was born a biological male, but wished to transition to female.[129] The intention to undergo gender reassignment was not kept from the employer, who indicated no problem with it.[130] Although the transition was under way and the employee's testicles had already been removed, the employer requested the employee to wear male clothes when consulting with clients, which the employee agreed to do.[131] The employee then started acquiring more feminine features: She developed breasts and her nails and hair grew longer.[132] The employee also legally changed her name and provided her employer with a letter from her psychiatrist stating that she had to wear female clothing.[133] During the transition process, the employee experienced clashes with co-workers, which centred on issues relating to her gender and gender reassignment process.[134] The employee was later dismissed, as the employer declared her position redundant.[135] The employee brought an unfair discrimination claim against the employer on the basis of gender and/or sex and/or sexual orientation.[136]

The court held that, in South Africa's constitutional democracy, it was "appalling" that the employer had attempted to reach an agreement with the employee to wear male clothes when consulting with clients.[137] It stated that the employer's justification that the engineering profession was largely male-dominated and that, for this reason, the employee would not have been treated favourably if she had consulted with them in female clothes, was "reminiscent of the dark ages", and that it was shocking that

128 Unreported LC Judgement 2010, case no. JS 296/2009.
129 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 3.
130 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 5.
131 At this point, although the employee still had a penis, she was for all intents and purposes a woman. See *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*:5.
132 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 6.
133 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 10.
134 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 6,7.
135 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 10.
136 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 19.
137 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 35.

such beliefs still existed.[138] The court further held that the employee was employed in a profession where a sex change operation would not affect her capability and competence as an employee, and that she remained an employee despite her sex change.[139] The employee excelled in the workplace and was regarded as "the best".[140]

The court reinforced that unfair discrimination in the workplace should not be tolerated; that it was ugly and evil, and should be rooted out from the employment realm.[141] It held that this case clearly illustrated what discriminated people had to endure in the workplace on a daily basis, and that despite the numerous anti-discrimination laws in existence, discrimination in employment still seemed to thrive.[142] The court concluded that the true reason for the employee's dismissal was that she was a transsexual who was undergoing gender reassignment and that, if it were not for that, the employee would not have been dismissed.[143] It consequently ruled that the employee's dismissal was automatically unfair and that she had been unfairly discriminated against on the basis of her sex and gender.[144] The court argued that by not finding in favour of the employee, it would have sent a message that South African judicial forums would not come to the aid of employees in such discriminatory circumstances.[145]

Over and above the alteration of the employee's physical appearance in the workplace, this case clearly illustrates the issues surrounding grooming and manner of dress. The court's view that, in South Africa's constitutional democracy, it was "appalling" that the employer attempted to reach an agreement to regulate the employee's dressing standards (especially since male clothing no longer reflected her gender identity) indicates that employers should be wary of attempting to regulate employees' dressing practices if such regulation clashes with a constitutionally and statutorily protected right of the employee (such as gender, sex, sexual orientation, dignity and equality). The court also indicated that the belief that

138 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 35.
139 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 35.
140 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 45.
141 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 44.
142 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 45.
143 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 36.
144 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 37,51.
145 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*: 44.

certain appearance standards, such as manner of dress, rigidly reflected sex and gender stereotypes was not acceptable under a constitutional democracy.

The court held that the employee excelled at her job, and that there was therefore no reason why her change of appearance (the gender reassignment) would affect her competence as an employee. It can thus be assumed that employees' appearance or gender need not affect their ability to perform their job or diminish their competence as employees. In most positions, applicants' appearance is arguably an irrelevant criterion in an employer's decision-making process.

Another important consideration presented by this case is the Labour Court's statement that unfair discrimination in employment is an evil that should be eradicated, and that despite the numerous anti-discrimination laws in existence, unfair discrimination seems to be alive and well in modern workplaces. This statement is particularly true for appearance-based discrimination in employment, being one of the forms of unfair discrimination that continues to occur in workplaces across South Africa, despite the provisions in anti-discrimination laws and the Constitution.

Finally, the Labour Court has confirmed in this case that unfair discrimination will not be tolerated, and that the court will come to the aid of those who fall prey to it.[146] According to Venter, the lesson demonstrated by this case is that employers should encourage employees to tolerate each other's differences and not treat other employees differently simply because they have different characteristics, and that employers bear the responsibility to prevent unfair discrimination in the workplace.[147]

Grant also believes that the cases mentioned above represent a warning to employers to prevent unfair discrimination in the workplace.[148] It is also suggested that these cases call on employers to seriously consider the manner in which employees are treated at work, and to separate their own personal views, prejudices and stereotypes from their employment decisions, policies and practices.[149]

146 Venter 2010:54.
147 Venter 2010:54.
148 Grant 2011:87.
149 Grant 2011:87.

McGregor highlights the fact that these cases indicate that many workplaces still have discriminatory policies and practices in place, despite the fact that employers have had many years to eradicate such practices.[150] Employers' obligation to take active steps to eradicate unfair discrimination and work towards the attainment of equality and diversity in employment is also reaffirmed.[151] Again, this position is significant in relation to appearance-based discrimination in the workplace, as many employers indeed may still be engaging in discriminatory conduct on this ground, even though the constitutional democracy and the anti-discrimination era have been in existence for over two decades.

McGregor further suggests that employers may not fully understand the position of trans-employees or how to deal with transsexuality, and perhaps do not yet comprehend the need to distinguish these characteristics from the employee's ability to perform his or her job.[152] This suggestion underlines the fact that employers should engage in differential and discriminatory treatment only if such treatment is related to the inherent requirements of the position in question, and not merely on the basis of transgender employees' appearance.

4.3.5.3 The legal position in South Africa seen against the comparative jurisdictions

The trend in the USA, the EU, South Africa and the ILO indicates a shift towards recognising the plight of trans-employees and the appearance issues they face in the workplace. These jurisdictions have all made positive progress in extending recognition and protection to this vulnerable group, especially over the last decade.

4.4 Trans-appearance and unfair discrimination in the workplace: The possibility of protection

4.4.1 Introduction

As the previous section indicated, the Labour Court's decisions in *Atkins* and *Ehlers* have effectively granted protection to trans-individuals against employment discrimination on the basis of their sex and gender. It is argued that while such

150 McGregor 2013a:210.
151 McGregor 2013a:210.
152 McGregor 2013a:210.

discrimination primarily infringes upon these employees' rights not be discriminated against on the basis of their sex and gender (in terms of section 9(3) of the Constitution and section 6(1) of the EEA), discrimination against them during and after the transition process amounts to appearance discrimination as well, as they are unfairly discriminated against based on their (altered) physical features and their (altered) manner of grooming and dress.

4.4.2 The rationale for granting trans-employees protection against appearance discrimination in employment

The primary rationale for protecting trans-employees from discrimination based on their appearance is that they are frequently subjected to various forms of unfair treatment in the workplace, such as alienation, marginalisation, stigma, harassment, ridicule, labelling, stereotyping, humiliation, discrimination and prejudice.[153] One study revealed that 90% of trans-employees experienced discrimination and harassment in the workplace,[154] while the case law in the previous section clearly indicated the severe levels of appearance-based discrimination suffered by trans-employees at the hands of their employers and co-workers.

Employers' continuous failure to curb such discriminatory practices in the workplace, despite being legally obligated to do so, is shocking[155] and a factor that perpetuates patterns of disadvantage for these employees. Employers should embrace their employees' diversity and keep prejudices relating to employees' appearance (both during and after transition) to themselves.[156] Unless employers take positive action to meet their statutory obligations in this regard, the appearance of trans-employees will continue to label these individuals as "undesirable", "outsiders" and "freaks", similar to the manner in which persons from different racial groups were viewed in the past.[157]

A clear reason why trans-employees may face such severe degrees of discrimination in the workplace is that their employers and co-workers may not understand their position or circumstances, as McGregor has suggested. Therefore, one motivation

153 McGregor 2013a:201.
154 Burns and Krehely 2011:1.
155 Whittle 2002. http://www.gires.org.uk/assets/employment-dis-full-paper.pdf. Accessed 17/02/2014.
156 McGregor 2013a:211.
157 Whittle 2002. http://www.gires.org.uk/assets/employment-dis-full-paper.pdf. Accessed 17/02/2014.

for the statutory protection of such employees is that a legal prohibition on discriminating against them during and after the transition process on the basis of their appearance will force employers to think carefully about these employees' circumstances, as well as educate other employees on the transition process and why and how the appearance of the individual will change.

The transition process should therefore be an interactive one, helping all relevant parties to understand the circumstances involved.[158] This could also assist in dealing with any potential awkwardness, harassment and discrimination against trans-employees,[159] as well as possible awkwardness, harassment and discrimination relating to the use of restrooms and ablution facilities in the workplace.

A further rationale for statutorily protecting trans-employees from discrimination on the basis of their appearance (as was the case with the other categories of appearance) is that their physical characteristics and manner of dress are completely unrelated to their ability to perform the inherent requirements of a job.[160] This position was clearly supported by the Labour Court in *Atkins* and *Ehlers*. Burns and Krehely argue that far too many trans-employees go to work every day with a fear of being dismissed from their jobs due to factors that have no bearing on their job performance.[161]

Discrimination against trans-employees has been directly linked with job instability, unemployment, poverty rates and a wage gap between workers.[162] Research has also illustrated time and time again that this form of discrimination diminishes productivity in the workplace, job satisfaction, and the physiological and psychological health of employees.[163] From a practical perspective, the *Ehlers* case clearly demonstrates how a hostile work environment can ensue from a trans-employee's changing appearance in the workplace. The prevalence of trans-individuals in the workplace cannot be denied, and consequently, improved employment relations between employers, co-workers and trans-employees will

158 Juarez and Williams 2013.
159 Whittle. http://www.gires.org.uk/assets/employment-dis-full-paper.pdf. Accessed 17/02/2014.
160 Burns and Krehely 2011:2.
161 Burns and Krehely 2011:4.
162 Burns and Krehely 2011:3.
163 Burns and Krehely 2011:3.

ensure a better quality of life for these vulnerable persons, both before and after the transition process.[164]

4.4.3 The legal way forward: Proposals to embrace the dignity and equality of trans-employees

It is important to note that trans-employees who are unfairly discriminated against in the workplace do have legal recourse under the protected grounds of sex and gender, as illustrated in *Ehlers* and *Atkins*.

However, these employees also suffer unfair discrimination on the basis of their appearance, as such discrimination violates their rights to equality and dignity. The court in *Atkins* clearly indicated that discrimination against the appearance of a trans-employee (before and after transition) amounted to an assault on the individual's dignity as a human being.[165] As appearance discrimination against trans-employees constitutes a category of appearance discrimination, it is argued that it will also comply with the test for unfair discrimination discussed in chapter 2, and will amount to an unlisted analogous ground of unfair discrimination. The evaluations, discussions and arguments discussed in paragraph 2.5.3 above will therefore apply in equal measure to appearance discrimination against trans-employees in the workplace.

4.5 Conclusion

The legislative reform that has taken place in the various jurisdictions to legally recognise the gender reassignment and altered sex and appearance of trans-individuals clearly indicates that such persons are in need of legal recognition and protection. The laws promulgated in the jurisdictions extend this protection and recognition to this group, legitimising their plight. The case law from the various jurisdictions has clearly indicated that trans-employees are extremely vulnerable to appearance-based discrimination in the workplace, particularly during the transition process as well as thereafter, when their physical appearance, manner of grooming and dress have changed.

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164 McGregor 2013b:687.

165 *Atkins v Datacentrix (Pty) Ltd*: 20.

The indications by the South African Labour Court in *Atkins* and *Ehlers* – namely that unfair discrimination in the employment realm should not be tolerated; that employees do not lose their status as employees or statutory protection because their appearance has changed, and that the alteration of their physical appearance and manner of dress is not a legitimate ground for employers to discriminate against employees – can be seen as positive steps in the battle against appearance discrimination in the employment realm.

The outright discrimination against trans-employees because of their appearance strengthens the argument that certain employees suffer appearance-based discrimination and disadvantage in the workplace. The prejudice suffered by trans-employees in the workplace because of their physical features and manner of dress infringes upon their rights to dignity and equality in the same manner as it infringes upon the rights of the other victims of appearance prejudice in employment.

It is submitted, therefore, that a prohibition on appearance discrimination in employment will also allow trans-employees to bring an unfair discrimination claim on this ground when their employers treat them in an unjustifiable manner.

Chapter 5

Appearance-based bullying and harassment

There is nothing I can do about my height or appearance and I wish people would just see me for the man, and lawyer, I am. It really hurts and it's getting hard to show that it doesn't bother me anymore …[1]

5.1 Introduction

In order to provide a complete overview of appearance-based discrimination in employment, it is important to briefly consider harassment and bullying (which may also be regarded as a form of harassment) of employees on the basis of their appearance. As harassment itself constitutes a form of unfair discrimination in terms of section 6(3) of the EEA, it tallies with the prejudice element of this dissertation.

5.2 Deconstructing bullying and harassment in the workplace

5.2.1 Harassment in the workplace

The EEA includes harassment as a form of unfair discrimination in employment, but fails to define it.[2] It is therefore relevant to consider other sources in search of a definition. The *Oxford Dictionary* defines harassment as "aggressive pressure or intimidation",[3] while the British Advisory, Conciliation and Arbitration Service defines it as "unwanted conduct affecting the dignity of men and women in the workplace … related to sex, race, disability, religion, sexual orientation, nationality and **any other personal characteristic** … and may be persistent or an isolated incident".[4] Grogan suggests that harassment is most frequently used in modern times to describe conduct that is persecuting or constantly molesting, "self-evidently with a bad motive".[5] The South African Prevention of Harassment Act also provides a definition

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1 Bekiaris 2014:63.
2 EEA: sec 6(3).
3 Oxford University Press 2014. http://www.oxforddictionaries.com/definition/english/harassment (accessed on 06/08/2014).
4 Tehrani 2012:197-198. Own emphasis added.
5 Grogan 2005:129.

for harassment, namely conduct of an electronic or personal nature that causes harm to or infringes upon the rights of another.[6]

The second definition cited above is of particular significance in the appearance discrimination context, since it refers to "personal characteristic[s]", which can be interpreted to include appearance characteristics. In this regard, Tehrani states that harassment relates to a person's dignity as well as "unwanted behaviour", and that bullying and harassment are linked, as both concepts amount to "unwanted" conduct.[7] Grogan argues that harassment is primarily used in situations involving "unwanted sexual advances", but that harassment as contained in the EEA is not restricted to harassment of a sexual nature.[8] Primarily in the context of employer liability, Le Roux also indicates that although harassment in the workplace is focused on sexual harassment, the concerns surrounding this employment issue are equally valid in respect of other forms of discrimination and harassment as well.[9]

5.2.2 Workplace bullying

[a] Defining workplace bullying

In the first instance, an important observation is that bullying does not relate to a "clash of personalities", nor is it a common misunderstanding or miscommunication.[10] It involves interplay between various deliberate, menacing and hurtful behaviours, as well as the harassment of the victim.[11] It is difficult to define workplace bullying, which is probably also why no single definition exists,[12] and therefore, identifying and defining workplace bullying has proven to be more effective by evaluating the elements, symptoms and consequences thereof. Oade suggests the following definition for workplace bullying by capturing its key elements:[13]

- A personalised, often sustained attack on one colleague by another colleague using behaviours which are emotionally and psychologically punishing.

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6 17/2011: sec 1.

7 Tehrani 2012:198.

8 Grogan 2005:129.

9 Le Roux *et al* 2010:1; Le Roux 2006:412.

10 Visagie *et al* 2012:63, referring to Von Bergen *et al* 2006:15.

11 Visagie *et al* 2012:63, referring to Von Bergen *et al* 2006:15.

12 Pietersen 2007:59; Visagie *et al* 2012:63. This is also clearly illustrated by the multiple definitions captured and discussed by Smit 2014:30-32.

13 Oade 2009:2.

- Introducing a dynamic into a workplace relationship which involves a purposed attempt by one colleague to injure another colleague's self-esteem, self-confidence and reputation or to undermine their competence to carry out their work duties effectively.
- The degree to which the person using bullying behaviour chooses to handle their relationship with a colleague in a way that involves removing power from that colleague and placing it with themselves.

Generally speaking, bullying behaviours can occur in two broad categories, namely direct and indirect bullying.[14] The former takes place on an interpersonal and "face-to-face" level, while the latter occurs on a more subtle level and aims to harm people emotionally.[15] Indirect bullying is characterised by behaviour such as gossiping, spreading rumours, social exclusion, purposefully sitting as far away from victims as possible, and neglecting the working conditions of victims.[16]

In more specific terms, bullying behaviour may manifest itself in various ways,[17] including verbal tactics,[18] non-verbal tactics,[19] practical tactics[20] and performance-related tactics.[21] Victims are constantly teased, badgered and insulted, and feel that they have little recourse to retaliate.[22] Einarsen and colleagues also suggest that bullying may present itself in verbal and physical forms, and include other subtle behaviours such as excluding the victim from social intercourse or isolating the victim from his or her peer group.[23]

In the 21st century, workplace bullying and harassment are certainly not limited to their traditional forms and occurrences. The influence of the media and the internet as well as the increasing use of social media forums has added an entire new dimension to this phenomenon in employment,[24] which has been termed cyberbullying.[25] Cyberbullying is particularly relevant in the appearance context,

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14 Cunniff and Mostert 2012:3.

15 Cunniff and Mostert 2012:3.

16 Cunniff and Mostert 2012:3.

17 Oade 2009:4-6; Einarsen *et al* 2011:87-89.

18 Including name calling, discussing employees with others, abusive comments and remarks, as well as public shaming.

19 Including laughing, rolling of the eyes, staring and adopting a threatening posture.

20 Including transmitting insulting and degrading messages electronically, for example via text message, e-mail or fax. Behaviour could also entail meddling with a victim's property or workspace.

21 Including unwarranted criticism, burdening the victim with an unreasonable workload, implying that the victim may suffer organisational detriment such as demotion or termination, purposely withholding information, and selecting onerous or petty work rules to apply to the victim.

22 Einarsen *et al* 2011:76.

23 Einarsen *et al* 2011:76.

24 Smit 2014:56.

25 "The use of modern technology to send derogatory or otherwise threatening messages directly to the victim or indirectly to others; to forward personal and confidential communication or images of the

because individuals in a workplace may exchange text messages and e-mails containing derogatory and abusive comments relating to an appearance characteristic of a victim employee, may transmit pictures of/in relation to the physical appearance or manner of dress of a victim employee, or post derogatory remarks about the appearance of a victim employee on social networking forums.

[b] The consequences of workplace bullying

It seems obvious that different people will be affected differently by workplace bullying, and it does not appear to elicit a typical reaction from victims.[26] There are however certain consequences of workplace bullying that appear to be shared by its victims. These include psychological consequences (anxiety, feelings of being isolated and alone, a lowered confidence and self-esteem, anger, mood swings, a lack of energy or motivation, and feeling depressed) and physiological consequences (nausea, headaches or migraines, palpitations, skin conditions, backache, sweating or shaking, loss of appetite and reduced immune system efficiency).[27]

Other consequences experienced by victims of workplace bullying include increased stress levels, increased absenteeism, disruption of sleep patterns and substance abuse problems.[28] The levels of stress experienced by victims also vary, with some experiencing only minor stress, while other victims develop depression or post-traumatic stress disorder.[29] Depression resulting from bullying may be viewed as a particularly significant concern, since it is one of the most costly health problems in the world, and places severe economic burdens on organisations.[30] Such increased costs stem from the fact that depression increases absenteeism and premature mortality as well as employees' work engagement levels, productivity, burnout levels[31] and stress-related illnesses.[32]

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victim for others to see, and to publicly post degrading messages." See Smit 2014:58, referring to Privitera and Campbell 2009:396.

26 Oade 2009:149.

27 Oade 2009:151-154.

28 Einarsen *et al* 2011:109-110.

29 Einarsen *et al* 2011:108.

30 Welthagen and Els 2012:1, referring to McIntyre and O'Donovan 2004.

31 Burnout refers to "a negative work-related well-being state", and employees who suffer from it experience exhaustion, cynicism and feelings of ineffectiveness. See Welthagen and Els 2012:2.

5.2.3 The relationship between bullying, harassment and appearance

The anti-bullying charity Ditch the Label's annual survey for 2013 indicated that 60,2% of people experienced bullying because of an aspect of their appearance.[33] In light of the above definitions and discussion on bullying and harassment, it is significant to consider Tehrani's suggestion mentioned earlier, namely that harassment affects a person's dignity and amounts to "unwanted behaviour".[34] It is further proposed that bullying and harassment are linked, as both concepts amount to "unwanted" conduct.[35] Workplace bullying has also been directly referred to as a form of harassment.[36] Furthermore, according to Namie and Namie, bullying is a form of "status-blind harassment", cutting across the boundaries of status group membership.[37] Therefore, a victim may also enjoy potential legal protection if he or she is a member of a status-protected group.[38] This is significant to consider, since (as will be discussed later) section 6(3) of the EEA prohibits harassment only if it is based on one or a combination of the protected grounds listed in section 6(1). Consequently, the lines of legal clarity become blurred if individuals of, for example, the same race or the same gender bully each other in the workplace on the ground of, amongst other things, appearance. Namie and Namie also report that bullying is four times more prevalent than other forms of illegal and discriminatory harassment.[39]

It is argued that if bullying or harassment takes place on the basis of the appearance characteristics of employees, such conduct may impair their fundamental human dignity and amount to a form of unfair discrimination.

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32 Including loss of attentiveness, loss of concentration and low energy levels, which all have a negative impact on organisations, including factors such as increased health-care costs, reduced productivity and turnover, legal problems and increased substance abuse problems. See Welthagen and Els 2012:2,5.

33 Ditch the Label Anti-Bullying Charity 2014. http://www.ditchthelabel.org/appearance-bullying-support-teens/. Accessed on 07/08/2014.

34 Tehrani 2012:198.

35 Tehrani 2012:198.

36 Van den Broeck *et al* 2011:2, referring to Brodsky 1976.

37 Namie and Namie 2009:299.

38 Namie and Namie 2009:299.

39 Namie and Namie 2009:299.

5.2.4 Workplace bullying and harassment in the context of appearance

Workplace bullying has been noted as a significant problem in the employment realm, and identified as not being restricted to a specific occupation or profession.[40] A prime demonstration of appearance-related bullying in the workplace is a survey of 4 000 workers, who indicated that they believed it acceptable to tease people with red hair, or so-called "gingers".[41] This study also revealed that most workers thought it acceptable to tease their co-workers about their baldness, accents and sense of dress and style.[42] Most employees stated that they had been insulted, teased or ridiculed in relation to their accent, for being too short or overweight, or for having large breasts.[43]

Jones refers to Dempsey,[44] who stated that employees whose manner of dress was unconventional or whose looks diverged from the norm were perceived as fair game for ridicule by society.[45] The following statement recorded in Jones's research is of particular significance to bullying in the workplace: "However, there is a fine line between gentle teasing and malicious bullying. What makes one person laugh may very well make another cry and how people react to it very much depends on whether they're having a bad hair day."[46]

Werner provides an interesting suggestion, namely that employer-imposed appearance standards in the workplace may lead to sexual harassment and a hostile work environment.[47] Such appearance standards will typically manifest in a dress code requiring employees to wear certain "uniforms", which may include costumes, swimwear or provocative clothing.[48]

Workplace bullying generally flows from power relations and, as such, operates vertically (with supervisors bullying subordinates) more often than horizontally (with

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40 Viljoen 2013:65.
41 Jones 2007:1.
42 Jones 2007:1.
43 Jones 2007:1.
44 Karen Dempsey was the editor of *Press Association News Ltd*. in May 2007, when Jones's article was published. See Jones 2007:1.
45 Jones 2007:1-2.
46 Jones 2007:2; Dempsey 2007:12.
47 Werner 1993:146.
48 Werner 1993:157-159.

peer-on-peer bullying).[49] Bullying and harassment tend to be detrimental to an organisation in various ways. These negative and dysfunctional outcomes affect not only the organisation, but also the individuals within it.[50] Businesses are negatively affected by bullying, as it obstructs group communication and creates a hostile work environment that is characterised by mistrust, suspicion, anger and apprehension.[51] Workplaces where bullying behaviour is rife have consequently been described as "an organisational culture and climate filled with emotional toxicity".[52] The destructive nature of bullying behaviour also causes high levels of anxiety in the organisation,[53] as well as higher rates of absenteeism, loss of productivity and increased costs relating to intervention programmes.[54] In addition, unethical conduct such as bullying has been shown to increase stress within an organisation.[55]

Different authors have come up with creative terms for bullies, ranging from "snakes in suits" to "hyenas at work",[56] which, it is argued, accurately capture their abusive, demeaning and unnecessary behaviour that amounts to unwelcome and unwanted conduct from the victim's perspective. Therefore, bullying not only causes emotional damage to victims, but also results in increased costs for the organisations concerned.[57]

"Of baldness, bullying and harassment" – a practical perspective on how appearance-based bullying and harassment may present itself in practice

In 2008, a teacher at Denny High School in Stirlingshire, UK, instituted a compensation claim after allegedly having been bullied by learners at the school.[58] The 61-year-old James Campbell claimed that he was teased, bullied and harassed on account of his "bald head", and was allegedly subjected to derogatory comments and called "baldy".[59] The teacher also claimed that the bullying and harassment had caused him to lose the confidence to teach and to constantly live in fear of being

49 Smit 2014:239.
50 Boddy 2011:45, referring to Harvey *et al* 2007.
51 Cunniff and Mostert 2012:1-2
52 Cilliers 2012:2, referring to Fox and Spector 2005.
53 Cilliers 2012:2, referring to Stapley 1996; 2006.
54 Smit 2014:77, referring to Branch *et al* 2013:14.
55 Boddy 2011:45, referring to Giacalone and Promislo 2010.
56 Cilliers 2012:6, referring to Babiak and Hare 2006, Marais and Herman 1997.
57 Boddy 2011:61.
58 Davidson 2008a.
59 Davidson 2008a.

subjected to further teasing and torment.[60] However, as the employee instituted a disability discrimination claim, it was dismissed because the Commissioner held that being bald was comparable to having a large nose or ears, and did not amount to a disability.[61]

In light of the UK Employment Tribunal's recent judgement in the matter of *Primmer v Mayflower Kebabs Ltd*,[62] the employee in the case mentioned above would have had a valid claim for harassment if he could prove that the comments about his appearance were sufficient to give rise to a hostile work environment. However, since the teacher was not bullied by his co-workers or employer, this is but speculation.

5.3 A comparative overview of bullying, harassment and appearance

5.3.1 The International Labour Organisation

An ILO report in 2006 revealed that violence at work, which includes mobbing and bullying, was increasing on a global scale, and had already reached epidemic proportions in certain jurisdictions.[63] The report also revealed that bullying and harassment (along with its allied behaviours) could be just as damaging as actual physical violence.[64] In 2003, the ILO described workplace violence as being both physical and psychological in nature, and stated that it included offensive behaviour that manifests through various "vindictive, cruel, malicious or humiliating" manoeuvres to undermine an individual or individuals in the workplace.[65]

5.3.2 The United States of America

Recent studies report that, in the USA, up to four million employees are likely to encounter some form of harassment in employment each year.[66] Bullying and workplace harassment in the USA do not seem to be adequately addressed. Smit refers to Yamada in this regard, who states that the victims of workplace bullying in the USA are without adequate relief, since claims for mistreatment based on a

60 Davidson 2008b.
61 Davidson 2008a.
62 2007 (unreported) Employment Tribunal (discussed in chapter 2 and revisited later in this report).
63 ILO 2006.
64 ILO 2006.
65 Smit 2014:230.
66 Viljoen 2013:65.

protected class status are an inadequate remedy.[67] Employers are also not encouraged to curb bullying and harassment in the workplace, which, together with the minimal fear of being held liable, allows injustices to continue.[68]

A significant case to revisit in relation to appearance-based harassment in the workplace is that of *Lorenzana v Citigroup Inc,*[69] which involved a physically attractive employee who had left her employment as a result of sexual harassment and a hostile work environment. The employee received comments about her dress and appearance, including instructions from two of her male supervisors not to wear certain types of clothing (nothing too revealing or provocative), as she was distracting her male colleagues. The employee did not comply with this instruction, and lodged complaints about the sexual harassment and hostile work environment. She was eventually transferred to another branch of the bank, and her employment was terminated shortly thereafter. The employee filed suit against the employer alleging sex-based discrimination, sexual harassment, a hostile work environment and retaliation for lodging complaints.

In *Buck v American Family Insurance Co*.,[70] an employee alleged that he was subjected to repeated humiliating and embarrassing comments about his weight and back problems from his manager, and that he was forced to endure other insults and swearing about decisions he had made in the workplace.[71] The employee also experienced threats of physical and actual violence at the hands of the manager, and claimed that he lived in fear of the manager's bullying.[72] A complaint lodged by this employee gave rise to an investigation into the manager's conduct, during which other employees corroborated the complainant's allegations.[73] The other employees of the business also stated that there was a hostile work environment under the manager's supervision, and that the complainant was not the only one who was subjected to derogatory appearance-related comments from the manager.[74]

5.3.3 The European Union

67 Smit 2014:94.
68 Smit 2014:95.
69 Discussed in chapter 2.
70 2014 WL 272343 E.D.Mo.
71 *Buck v American Family Insurance Co:* 4.
72 *Buck v American Family Insurance Co:* 4.
73 *Buck v American Family Insurance Co:* 5.
74 *Buck v American Family Insurance Co:* 5.

In 2000, a study conducted across EU member states revealed that bullying and harassment were commonplace in these jurisdictions.[75] The EU has significant influence in combating workplace bullying and discrimination, and has gone so far as to endorse the development of anti-bullying legislation, which resulted in the 2007 Framework Agreement on Harassment and Violence at Work.[76] The EU has also obliges European companies to implement zero-tolerance policies to govern and prevent bullying, harassment and workplace violence.

5.3.3.1 The United Kingdom

The UK is a forerunner in the global battle against workplace bullying and harassment, and has enacted legislation to help deal with this issue.[77] The Protection from Harassment Act of 1997 is applicable in this regard and is described as having a broad range of application, extending to cover issues of harassment in the workplace.[78]

In the consideration of appearance-related bullying and harassment in the UK, it is relevant to revisit *Primmer v Mayflower Kebabs Ltd*,[79] which dealt with an employee who was subjected to derogatory comments and sexual innuendos by her manager because of her red hair. The UK Employment Tribunal held that verbal comments about an individual's appearance were sufficient to establish a hostile or unwelcome working environment and, as such, enabled the employee to succeed with her claim of sexual harassment. This case is significant because it illustrates that gender-neutral harassment based on appearance characteristics may give rise to a valid unlawful harassment claim.[80] It also serves as a clear illustration that bullying and harassment relating to an employee's appearance may be sufficient to succeed with an harassment complaint, and that derogatory comments, teasing and abusive behaviour on the basis of an employee's appearance characteristics are no trivial matter in the realm of employment law.

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75 International Labour Organisation 2006.
76 Smit 2014:178.
77 Smit 2014:173.
78 Smit 2014:185.
79 2007 (unreported) Employment Tribunal.
80 Walker 2007:21.

The case of *Majrowski v Guy's & St Thomas's NHS Trust*[81] also clearly shows that comments about an individual's appearance may constitute workplace harassment.[82] Since, as Walker suggests, the Harassment Act of 1997 requires of an employee only to prove that the harassment is a course of conduct that causes him or her alarm or distress, without the need to prove a qualifying condition, such as race or disability, comments about an employee's appearance could (quite easily) constitute harassment.[83]

Walker notes that rude or humiliating remarks, which are notably also bullying behaviours, relating to an employee's appearance could result in a constructive dismissal claim, provided that such comments are serious enough to severely damage or destroy the employment relationship.[84]

5.3.4 South Africa

South Africa is by no means immune to the phenomenon of workplace bullying and harassment, and a study in this regard revealed that roughly 77,8% of South Africans had experienced some form of workplace bullying.[85] South Africa does not have any legislation dealing with workplace bullying, and lacks clarity and legal certainty as to the status of bullying in law.[86] Smit notes that the Commission for Conciliation, Mediation and Arbitration names bullying as a form of harassment, but does not define it.[87] According to Viljoen, workplace harassment is ultimately a violation of fundamental human rights, which causes victims to suffer physical, psychological and professional harm.[88] The concept of a hostile work environment is strongly linked with bullying and harassment, and Le Roux describes such a workplace as one "that is offensive and/or abusive".[89]

Van Niekerk *et al* indicate that while harassment is not defined by the EEA, it may generally be taken to mean that persons are treated in a manner that in effect

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81 2006 UKHL 34.
82 *Majrowski v Guy's & St Thomas's NHS Trust*: 2; Walker 2007:21.
83 Walker 2007:21.
84 Walker 2007:21.
85 Cunniff and Mostert 2012, referring to a study conducted by the Work Dignity Institute in 2000.
86 Le Roux *et al* 2010:51; Rycroft 2009:1434; Smit 2014:229.
87 Smit 2014:237.
88 Viljoen 2013:66.
89 Le Roux 2006:418.

violates their inherent human dignity or creates a degrading environment.[90] It is also argued that harassment in the workplace constitutes discrimination, because it imposes "arbitrary barriers" to employees' full and equal enjoyment of their rights in the employment environment, while also violating their right to dignity.[91] Le Roux indicates that the structure of the EEA does however not allow a victim employee to proceed against a perpetrator co-employee in terms of that act, and the victim will thus have to rely on the Promotion of Equality and Prevention of Unfair Discrimination Act or the law of delict and the common law.[92]

In terms of workplace harassment in the South African context, section 6(3) of the EEA states the following: "Harassment of an employee is a form of unfair discrimination and is prohibited on one, or a combination of grounds of unfair discrimination listed in subsection (1)." Also of significance in relation to bullying and harassment in the workplace is section 60 of the EEA, which provides as follows:[93]

1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

Le Roux believes that section 60 is primarily aimed at encouraging employers to eliminate discrimination in employment.[94] The section's application to harassment in the workplace is as follows: If an employee contravenes section 6(3) by harassing another employee, the incident is reported to the employer (subsection 1). Should the employer fail to take the necessary steps to eliminate this conduct (subsection

90 Van Niekerk *et al* 2012:127.

91 Van Niekerk *et al* 2012:127.

92 The common law and the law of delict may be used to institute an action against both the co-employee and the employer (in terms of vicarious liability). See Le Roux 2006:419-420.

93 EEA: sec 60. Own emphasis added.

94 Le Roux 2006:413.

2), the employer will be vicariously liable for the harassment committed by the employee (subsection 3).

Rycroft[95] and Smit[96] interestingly and correctly point out that in the absence of legal clarity surrounding bullying in employment, an argument arises as to whether it amounts to a form of harassment and unfair discrimination, or rather a dignity violation. In the first instance, it must be noted that the CCMA has identified bullying as a form of harassment (as mentioned above). In the second instance, the principle of fair dealings between employers and employees encompasses that they must treat each other with dignity and refrain from bullying behaviour.[97] It can therefore be assumed that if employers or employees engage in bullying in the workplace, this would violate the principle of fair dealings.

The view that bullying violates an employee's dignity is supported by the case of *Maharaj v CP de Leeuw (Pty) Ltd*,[98] in which the court confirmed that bullying should rather be observed as a dignity violation than as a form of unfair discrimination or harassment.[99]

5.3.4.1 Case law and appearance-related bullying and harassment in employment

In the matter of *Murray v Minister of Defence*,[100] the court held that the employee had been marginalised, which constituted a form of bullying, and that this had violated the principle of fair dealings between employer and employee.[101] Viljoen notes that employers are also vulnerable to delictual claims by employees in cases where bullying and harassment "have not reasonably been addressed".[102] Therefore, it may be assumed that employees who are bullied or harassed on the basis of their

95 Rycroft 2009:1433.

96 Smit 2014:269.

97 Smit 2014:269, referring to Le Roux *et al* 2010:53.

98 2005 26 ILJ 1088 LC 1104.

99 *Maharaj v CP de Leeuw (Pty) Ltd*: 74; Smit 2014:271.

100 2008 29 ILJ 1369 SCA.

101 In light of this case, Viljoen argues that preventative and reactive measures implemented by an employer should not be restricted to instances of harassment and sexual harassment, but should be extended to other instances of abuse, bullying and other types of inexcusable employee behaviour as well. See *Murray v Minister of Defence:* 51,59,65,66; Viljoen 2013:66; Smit 2014:269.

102 Viljoen 2013:66.

appearance could have a valid claim against their employer for violating the principle of fair dealings.

In *Media 24 and Another v Grobler*,[103] the Supreme Court of Appeal held that employers were by law duty-bound to establish and maintain a safe working environment for their employees, and to take reasonable care to ensure the safety of employees.[104] This duty is not limited to protection from physical harm, but includes psychological harm as well.[105] In this case, the court held the employer vicariously liable for illegal acts (sexual harassment) committed by a manager.[106]

This case is relevant in the context of appearance-related bullying and harassment, as it suggests that an employer may be held vicariously liable for acts of harassment and bullying committed by one of its employees if it failed to protect the victim from psychological harm and to establish and maintain a safe working environment. Acts of appearance-related bullying are often psychologically harmful, as they diminish the individual's sense of self-worth and dignity.

The case of *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others*[107] demonstrates that an employee may succeed with an alternative claim for constitutional damages against an employer if no appropriate statutory or common-law remedy exists.[108] In this case, the Labour Court upheld such an employee claim when it was alleged that the employer had failed or neglected to provide a safe working environment, failed to sufficiently investigate an allegation of harassment, and neglected to provide assistance to the employee in the form of counselling.[109] The court held that the employer was required to take all reasonable measures to eliminate or diminish the possibility of a recurrence of the incident.[110] The community's legal convictions reasonably oblige the employer to investigate the

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103 2005 7 BLLR 649 SCA.

104 *Media 24 and Another v Grobler*: 41; Viljoen 2013:67.

105 *Media 24 and Another v Grobler*: 65; Viljoen 2013:67.

106 *Media 24 and Another v Grobler*: 41; Viljoen 2013:67.

107 2007 28 ILJ 897 LC.

108 *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others*: 93; Viljoen 2013:67; Le Roux and Rycroft 2012:46.

109 *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others*: 78-80; Viljoen 2013:67; Le Roux and Rycroft 2012:46.

110 *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others*: 79; Viljoen 2013:67.

claim, establish the identity of the alleged perpetrator, and take immediate steps to prevent the employee from suffering any further psychological trauma.[111]

Thus, if an employer fails to meet the standards set in the aforementioned case, and the employee cannot obtain adequate relief from statutory or common-law remedies, an employee may institute a claim for constitutional damages, alleging a violation of his or her constitutional right to fair labour practices.[112] This, then, provides employees who suffer appearance-related bullying and harassment in the workplace with an alternative avenue to hold an employer liable for a violation of their right to fair labour practices. This will be considered in more detail below.

The case of *Gaga v Anglo Platinum Ltd & others*[113] involved an allegation of sexual harassment that related to appearance characteristics. In this case, the alleged perpetrator of the harassment would occasionally pass remarks about the complainant's appearance and clothing, and on one occasion requested that the complainant unbutton her top coat and turn so that he could admire her.[114]

Therefore, the implication is clear that if a victim's appearance characteristics are the primary reason for, or inseparable from, the sexual harassment, harassment based on appearance characteristics may *ipso facto* also be covered by section 6(3) of the EEA.

In the South African labour law context, the various categories of harassment may serve as the basis for bullying or harassment in the workplace. This is supported by the case of *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*,[115] which included an element of bullying and harassment at work based on an employee's changing physical appearance in the course of gender reassignment. Here, an employee received derogatory text messages relating to her appearance from a co-worker and about her transitioning from male to female.[116] On a separate occasion, the employee was the subject of a degrading and humiliating comment made by a co-employee to a client of the business, calling her an "it".[117] The employee also alleged that she had

111 *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others*: 79; Viljoen 2013:67.
112 Constitution of the Republic of South Africa: sec 23(1); Viljoen 2013:67.
113 2012 33 ILJ 329 LAC.
114 *Gaga v Anglo Platinum Ltd & others:* 13.
115 As discussed in chapter 4.
116 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd:* 6.
117 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd:* 7.

been ostracised in the business, and excluded from social interaction by her colleagues (although her fellow employees denied this).[118] The court held that there were two distinct camps in the workplace, with the complainant on one side and the rest of the employees on the other, and that this conflict and hostile work environment were not properly managed by the employer.[119] However, since a claim was not instituted for workplace harassment or bullying, the court did not make an explicit finding in this regard.

5.4 Appearance-related bullying and harassment in South Africa – future considerations and possible protection

Although bullying has been identified as a form of harassment, it is argued that viewing it as a dignity violation is preferable, especially in relation to appearance characteristics. This is supported by the fact that the prohibition of harassment in section 6(3) of the EEA is limited to the listed grounds, of which the various appearance categories do not specifically form part. A violation of the employee's right to dignity on the ground of appearance-related bullying may thus be more tangible.

However, considering the Employment Equity Amendment Act's introduction of arbitrary grounds in section 6(1), the question arises whether, if the unfair discrimination based on the various categories of appearance were to be considered arbitrary in terms of the act, harassment (and, consequently, bullying) on these grounds could amount to unfair discrimination in terms of section 6(3). For want of clarity surrounding what exactly constitutes an arbitrary ground, and in the absence of legislative and judicial guidelines to establish its meaning and parameters, this consideration remains speculative at best.

An individual's inherent human dignity is violated if his or her psychological self-worth or personal autonomy is scarred through abusive and degrading comments, public humiliation, intimidation and other bullying behaviour. This obviously and especially holds true in a context where employees are abused, humiliated or degraded by supervisors and co-workers in the workplace because of their appearance. An employee may also bring a valid alternative claim for constitutional

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118 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd:* 6.

119 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd:* 34.

damages against an employer if there are no statutory or common-law remedies available, and if the employer violated the employee's right to fair labour practices.[120]

Therefore, those employees who are bullied or harassed in the workplace because of an aspect of their appearance will have the option of instituting a valid claim, for example as sexual harassment (if the appearance characteristics contributed to such harassment of the victim), a dignity violation, a delictual claim, or an alternative claim for constitutional damages for the infringement of the right to fair labour practices. Smit is however correct in saying that legislation or a Code of Good Practice is required to appropriately govern and curb these phenomena in future.[121]

5.5 Concluding remarks

Although appearance-based bullying and harassment in the workplace offer enough material to justify an independent study, it is significant to note the role of such bullying and harassment in the broader context of this thesis as well, in order to provide a comprehensive view of the employment circumstances of employees who suffer discrimination based on their appearance.

As appearance grounds are not explicitly listed in section 6(1) of the EEA, the appearance categories are not specifically included in the scope of harassment, and bullying is not governed by law. However, this chapter has shown that the various appearance categories may very well be the basis of bullying and harassment suffered by employees and, as such, constitute grounds for alleging a dignity violation. Legislative reform is however required to appropriately govern this issue in the employment realm, and to provide legal certainty.

120 Such a violation may stem from the employer's failure to investigate and appropriately deal with a claim of harassment, as well as the employer's failure to prevent the victim employee from suffering any further psychological trauma.

121 Smit 2014:380.

Chapter 6

Conclusion and recommendations

6.1 Introduction

In considering which measures would be most appropriate to govern appearance discrimination in employment, it is suggested that a so-called gold, silver and bronze-medal approach be adopted. In terms of this approach, the primary option for regulating this employment problem is legislative reform, followed by guidelines for the judiciary to deal with such cases until such time as it is recognised as a prohibited ground of unfair discrimination, with a possible Code of Good Practice and workplace policy as tertiary options.

6.2 The gold-medal approach: Possible recommendations and solutions to regulate the various categories of appearance discrimination by law

It is argued that the primary option for statutorily governing appearance-based discrimination in employment would be legislative reform. Amending existing legislation would be the most effective long-term solution to regulate this problem in the workplace.

As unfair discrimination on the basis of appearance characteristics is primarily a violation of an employee's rights to dignity and equality, the EEA may be the most appropriate vehicle to govern this issue, particularly also since it aims to give effect to the constitutional right to equality and to eradicate unfair discrimination in South African workplaces.

[a] Legislative reform option 1

It is suggested that section 6(1) of the EEA be amended to read as follows:

> No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth and **personal appearance** or on any other arbitrary ground.

This will confirm personal appearance as a prohibited ground of unfair discrimination, putting it firmly within the ambit of the EEA, and will provide more legal certainty as to the applicability of various other provisions, such as the employer defences and the prohibition of workplace harassment.

In order to avoid ambiguity and confusion, as well as to limit possible frivolous litigation, it is suggested that the prohibited ground of personal appearance be defined as follows in section 1 of the EEA:[1]

> The outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, such as weight, height, facial features, manner or style of dress, hairstyle, facial hair as well as appearance changes due to gender reassignment. It shall however not relate to the requirement of cleanliness, uniforms or prescribed attire reasonably required by the inherent requirements of the job.

It is further suggested that the concepts of weight and height also be defined in section 1 of the EEA, and indeed as follows:[2]

> Weight is a numerical measurement of total body weight, the ratio of a person's weight in relation to height, or an individual's unique physical composition of weight through body size, shape and proportions. It encompasses, but is not limited to, an impression of a person as fat or thin, regardless of the numerical measurement. An individual's body size, shape, proportions and composition may make them appear fat or thin, regardless of numerical weight.
>
> Height is a numerical measurement of total body height, an expression of a person's height in relation to weight, or an individual's unique physical composition of height through body size, shape and proportions. It encompasses, but is not limited to, an impression of a person as tall or short, regardless of numerical measurement. The length of a person's limbs in proportion to the person's body may create an impression that the person is short, tall or atypically proportioned, independent of numerical measurements of height.

The definition of personal appearance above is suggested, as it extends protection to all the primary categories of appearance that cause employees to suffer unfair discrimination in the workplace. Physical attractiveness and height are covered, as well as manner of dress and grooming, which would obviate the need for a lengthy debate about infringement upon the right to freedom of expression. Since weight-based discrimination is covered, it would be unnecessary for employees to allege disability, which has in any event not succeeded in bringing about any substantial clarity thus far. Transgender appearance is also covered in instances where an

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1 This definition has been adapted and constructed from the definitions of this concept in the comparative jurisdictions (as discussed in chapter 2). The definitions of personal appearance used in Urbana, the district of Columbia, Howard County and Madison in the USA, as well as considerations from the Australian state of Victoria, have been used.

2 These definitions have been borrowed from the comparative jurisdiction of Binghamton, New York, USA (as discussed in chapter 3).

individual's physical appearance is undergoing change due to gender reassignment, consequently eliminating the need to allege and prove that the appearance-based discrimination amounts to a violation based on sex or gender.

[b] Legislative reform option 2

As alternative to the above, it is suggested that a slightly more restrictive version be considered.

In this regard, it is suggested that section 6(1) of the EEA be amended to read as follows:

> No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth and **physical characteristics** or on any other arbitrary ground.

Again, in order to avoid ambiguity and confusion, as well as to limit possible frivolous litigation, it is suggested that the prohibited ground of physical characteristics be defined as follows in section 1 of the EEA:[3]

> The physical features of any person (which is from birth, accident or disease, or from any natural physical development, or any other event beyond the control of that person, including individual physical mannerisms), irrespective of sex, with regard to bodily condition or characteristics, such as weight, height, facial features, and appearance changes due to gender reassignment. It shall however not relate to the requirement of cleanliness, uniforms or prescribed attire reasonably required by the inherent requirements of the job.

This definition is limited to the immutable appearance characteristics, and excludes voluntary considerations such as manner of style, dress and grooming. It has been included because immutable characteristics such as physical attractiveness and height attach to the individual and are included in the same spectrum as race and sex, which cannot be easily altered and are interlinked with the individual's inherent human dignity. However, employees who allege unfair discrimination based on mutable characteristics will still have the option of pursuing such a claim on the basis of a violation of inherent human dignity, equality and freedom of expression.

[3] This definition has been adapted and constructed from the definitions of this concept in the comparative jurisdictions (as discussed in chapter 2). The definitions of personal appearance used in Urbana, the district of Columbia, Howard County and Madison as well as the definition of physical characteristic in Santa Cruz (all in the USA) have been used.

It is submitted, however, that the first option is preferred, since this will extend protection to all employees who experience unfair discrimination and injustice on the basis of their appearance characteristics.

[c] Legislative reform option 3

With reference to the discussion of weight-based discrimination, and particular discrimination based on obesity, in chapter 3, a final suggestion in respect of legislative reform is for the ambit of disability listed under section 6(1) of the EEA and the Code of Good Practice: Key Aspects on the Employment of People with Disabilities be extended to include obesity.

6.3 The silver-medal approach: Proposed guidelines for judicial forums, the Department of Labour, employers and employees to deal with cases of appearance-based discrimination in employment

It is proposed that a set of guidelines, definitions and tests relating to the status of appearance discrimination in South African labour law will be a significant resource for the judiciary to deal with such matters if and when disputes arise. It is further suggested that these factors will aid the South African Department of Labour, employers and employees in understanding the nature and scope of appearance discrimination in the workplace. These guidelines could help establish legal clarity and certainty regarding appearance-based discrimination in employment.

As a practical contribution, a draft set of guidelines is proposed in annexure A.

6.4 The bronze-medal approach: A possible Code of Good Practice for the South African labour arena

It is suggested that a Code of Good Practice will constitute an invaluable source of guidance and interpretation for employers, employees, the judiciary and the Department of Labour in the case of a complaint of appearance-based discrimination.

A proposed Code of Good Practice that addresses appearance discrimination in the workplace has been drafted and included in annexure B.

6.5 The bronze-medal approach: A possible workplace policy dealing with appearance discrimination in employment

Employers should be encouraged to adopt workplace policies that prohibit discrimination, bullying and harassment on the basis of appearance characteristics in the workplace. It is argued that such policies will play a significant role in curbing such discriminatory practices in employment.

This proposal stems from the fact that although most employment decisions are made by employers, decision-making may also fall to higher-level employees of the business, such as managers and supervisors – especially in larger organisations – who may or may not share the employer's view on employee appearance, particularly if no guidelines have been set. Therefore, a workplace policy will clarify the position pertaining to appearance-related bias within an organisation, and help ensure that managerial employees who have the authority to make organisational decisions, such as those relating to appointment, promotion, demotion and dismissal, make such decisions without prejudicing employees and job applicants on the basis of their appearance.

A policy prohibiting appearance-related discrimination, bullying and harassment will also have the benefit of discouraging employees from prejudicing and disadvantaging each other (either vertically or horizontally) because of an aspect of their appearance.

A suggested workplace policy on the prohibition of appearance discrimination, bullying and harassment in the workplace has been drafted and included in annexure C.

6.6 Conclusion

In the absence of specific legislation to govern appearance-based prejudice, including unfair discrimination, bullying and harassment of an employee because of an aspect of their appearance, as well as the increase in the prevalence of appearance discrimination and claims based on it, the recommendations above should serve as adequate means to regulate the situation and provide protection to these victims, until such time as the legislative reform options are adopted and implemented.

In the past, the legislature and the judiciary recognised that the most effective way of defeating prejudice in employment is to eliminate the possibility of employers indulging in it,[4] and therefore, it is suggested that the current lacuna in South African labour law in respect of appearance-based discrimination may be effectively addressed by the recommendations provided by this comparative study. These recommendations, if properly implemented, should safeguard and promote the rights to dignity, equality and equal opportunity of every employee in the workplace, irrespective of appearance.

The stigma associated with appearance-based prejudice, and the heavy evidentiary burden placed on victims, may prevent them from coming forth. However, this is no different from the victims of other forms of discrimination,[5] and a proper law regulating such matters will make enforcement action more accessible, consistent and certain. Although the difficulties of such a law have been acknowledged, this should not prevent a proper regulatory response to curb unjust behaviour.[6] Although the law can never fully eliminate all forms of discrimination in the workplace, it can certainly do more to address severe abuse.[7] Legal reform is the most effective way to address this, govern prejudice in workplace culture, and contribute to a more tolerant and effective employment realm.

Stereotypes regarding different facets of attractiveness are deeply ingrained and differentiation on personal appearance is accepted as a social given. Unfair discrimination on this ground should not be. The law has a role to play in ensuring fair and equal treatment for all and in preserving the human dignity of everyone who is side-lined merely because of an objectively irrelevant personal characteristic or attribute.[8]

4 Rhode 2010:107.
5 Rhode 2010:114.
6 Waring 2011:198.
7 Rhode 2010:116.
8 Pieterse 2000:137.

Annexure A

DRAFT

Guidelines for South African judicial forums, the Department of Labour, employers and employees on the status of appearance-based discrimination in the workplace[1]

1. Introduction

In the absence of legal clarity surrounding the phenomenon of appearance-based prejudice in the workplace, the following definitions, tests and suggestions aim to serve as a guideline for the Commission for Conciliation, Mediation and Arbitration (CCMA), the South African labour courts, the Department of Labour, employers and employees as well as their respective representatives to interpret and apply the concept.

2. Definitions

2.1 Personal appearance

The outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, such as weight, height, facial features, manner or style of dress, hair style, facial hair, and appearance changes due to gender reassignment. It shall however not relate to the requirement of cleanliness, uniforms or prescribed attire reasonably required by the inherent requirements of the job.

2.2 Physical characteristics

The physical features of any person (which is from birth, accident or disease, or from any natural physical development, or any other event beyond the control of that person, including individual physical mannerisms), irrespective of sex, with regard to bodily condition or characteristics, such as weight, height, facial features, and appearance changes due to gender reassignment. It shall however not relate to the requirement of cleanliness, uniforms or prescribed attire reasonably required by the inherent requirements of the job.

[1] These guidelines have been constructed from arguments and concepts used throughout this dissertation, and have also drawn on similar resources available in the comparative jurisdictions.

2.3 Height

Height is a numerical measurement of total body height, an expression of a person's height in relation to weight, or an individual's unique physical composition of height through body size, shape and proportions. It encompasses, but is not limited to, an impression of a person as tall or short, regardless of numerical measurement. The length of a person's limbs in proportion to the person's body may create an impression that the person is short, tall or atypically proportioned, independent of numerical measurements of height.

2.4 Weight

Weight is a numerical measurement of total body weight, the ratio of a person's weight in relation to height, or an individual's unique physical composition of weight through body size, shape and proportions. It encompasses, but is not limited to, an impression of a person as fat or thin, regardless of the numerical measurement. An individual's body size, shape, proportions and composition may make them appear fat or thin, regardless of numerical weight.

2.5 Manner of dress

Manner of dress includes clothing, shoes, jewellery and ornaments.

2.6 Grooming

Grooming includes hair length, colour and style as well as facial hair.

2.7 Appearance discrimination

This concept includes discrimination on the basis of personal appearance and physical characteristics (as defined above), as well as bullying and harassment based on the personal appearance or physical characteristics of an individual.

2.8 Dress code

Any policy of an employer that governs and regulates the manner of dress and/or grooming of an employee while such employee is at work and in the process of executing of their employment duties.

3. Examples of appearance prejudice, discrimination, bullying and harassment in employment

3.1 Employment policies and practices

Section 6(1) of the Employment Equity Act (EEA) prohibits unfair discrimination either directly or indirectly against any employee, in any employment policy or practice. Therefore, the primary forum where appearance discrimination could present itself is an employer's employment policy or practice.

3.2 Bullying and harassment

The following behaviours are, amongst others, examples of bullying and harassment on the basis of appearance:

- Name-calling (on the ground of an appearance characteristic)
- Discussing the appearance of employees with others (in an insulting or degrading manner)
- Abusive comments and remarks about the appearance of the victim
- Public shaming of victims because of their appearance
- Laughing at others because of their appearance
- Rolling of the eyes and/or staring because of the appearance of the victim
- Electronically transmitting insulting and degrading messages about the appearance of another (e.g. by text message, e-mail, social media or fax)
- Unwarranted criticism relating to the victim's appearance
- Implying that victims will suffer organisational detriment (such as demotion or dismissal) because of their appearance
- Selecting onerous or petty rules and tasks for victims because of their appearance
- Posting, transmitting, sending and sharing compromising pictures of the victim's appearance
- Purposefully excluding or ostracising victims because of their appearance

4. Test to determine appearance discrimination

Appearance discrimination is not specifically listed as a prohibited ground of discrimination in section 6(1) of the EEA and, as such, it must be alleged and proven as an unlisted analogous ground of unfair discrimination. In the context of appearance-based discrimination (in all its various forms) the test should be applied as follows:

4.1 Has differentiation based on an appearance characteristic taken place?

Differentiation has taken place if an employer uses an employment policy or practice to distinguish between employees, treat them differently or exclude certain (individual or groups of) employees based on an aspect of their appearance. Such employees are thus treated differently from similarly situated employees because of their appearance.

4.2 Does the differentiation constitute discrimination?

Complainants will have to prove that the employer's appearance prejudices have the potential to impair their fundamental human dignity.

Every individual's right to dignity is a multi-faceted right, which includes characteristics such as psychological self-worth and personal autonomy. When employees are prohibited from expressing themselves and their ideas through their appearance or are prejudiced because of their appearance, this violates both the employee's personal autonomy and psychological self-worth.

Furthermore, judging and disadvantaging an employee based on what they look like strike at the very foundation of the individual's intrinsic worth and value, and results in gross unfairness. Discrimination on the basis of appearance also fosters feelings of shame and hurt, and affects an individual's dignity.

It follows that appearance discrimination impairs the fundamental human dignity of employees, and affects them in a manner similar to persons who are discriminated against because of other defining attributes or characteristics, such as race or gender.

4.3 Is the discrimination unfair?

According to the test proposed in *Harksen v Lane NO and Others* 1997 11 BLRD 1489 CC, unfairness is established by investigating the impact of the discrimination on the complainant and others similarly situated. The courts will consider certain factors in determining unfairness, including the worth and value of the victim's attributes, exploitation suffered by them, as well as their vulnerability and past patterns of disadvantage and prejudice.

Since appearance-based discrimination is not a listed ground of prohibited bias, the unfairness will have to be proven. Prejudging and disadvantaging employees on the basis of their appearance has a severe impact. It diminishes not only the self-worth and dignity of employees, but also implies that appearance outweighs merit, hard work and achievement.

Judging individuals based on what they look like, and implying that an individual is less significant and less of a person than someone with a more favourable appearance, perpetuates a pattern of disadvantage and prejudice in employment. Furthermore, exploiting employees with a favourable appearance for economic gain, while excluding those with a less favourable appearance, results in severe employment vulnerability and inequality. Therefore, discrimination on the basis of appearance characteristics is unfair.

4.4 Does appearance discrimination constitute an arbitrary ground in terms of section 6(1) of the EEA?

The South African judicial forums are encouraged to examine whether appearance-based discrimination could amount to an arbitrary ground, since section 6(1) of the amended Employment Equity Act specifically lists arbitrary grounds as prohibited grounds of unfair discrimination, even though the meaning and scope of this concept is still unclear.

In the absence of legislative or judicial guidelines to define and interpret the concept, an employment policy or practice that discriminates against an employee on the basis of his or her appearance (without such appearance characteristic amounting to an inherent requirement of the job) may be viewed as discrimination that is based on an irrelevant criterion or personal whim of the employer, and is consequently arbitrary.

Therefore, depending on the interpretation of the judiciary, appearance discrimination may constitute an arbitrary ground of prohibited unfair discrimination.

5. Status of appearance-related bullying and harassment

Appearance-based bullying and harassment are not expressly recognised as forms of harassment or a legitimate dignity violation in terms of South African labour law.

Employees who are bullied or harassed because of an aspect of their appearance will therefore have to institute an action for delictual damages against the employer, or an action for constitutional damages based on a violation of section 23(1) of the Constitution (if the employer failed to maintain a safe working environment and violated the employee's right to fair labour practices), or an action against the employer for vicarious liability in terms of section 60 of the EEA.[2]

The South African judicial forums and the legislature are however encouraged to extend the South African labour law to prohibit bullying and harassment on the basis of an employee's mutable and immutable appearance characteristics.

6. Conclusion

The guidelines, tests, definitions and suggestions above have the potential to guide the decision-making process of the judiciary should a dispute in respect of appearance-related discrimination make its way to the CCMA or labour courts. They may also serve as guidelines and suggestions for the Department of Labour to recognise and address the issue, as well as aid in obtaining legal clarity for employers and employees on the status of appearance discrimination in employment.

The content of these guidelines is ultimately aimed at establishing a position of fairness and legal certainty for all employees in the South African labour arena who are vulnerable to unfair discrimination as well as violations of their rights to dignity and equality on the basis of their mutable and immutable appearance characteristics.

[2] These claims will of course only be possible if the employee is able to comply with the relevant requirements in each case.

Annexure B

DRAFT

Code of Good Practice on the Handling of Appearance-Related Prejudice in the Workplace[1]

1. Introduction, definitions and objectives of the Code

1.1 The objective of this Code is to eradicate discrimination on the basis of personal appearance in employment.

1.2 This Code provides procedures to adequately deal with issues relating to appearance-based discrimination in the workplace.

1.3 This Code aims to encourage the implementation of workplace policies, codes and procedures that will create work environments that are free from discrimination based on the appearance of individuals in the workplace. It furthermore aims to promote work settings in which employers and employees respect the rights to privacy, equality, dignity and equal opportunity of all persons in the employment environment.

1.4 In this Code, certain concepts have been defined as follows (unless the context indicates otherwise):

Appearance discrimination	This concept includes discrimination on the basis of personal appearance and physical characteristics (as defined below), as well as bullying and harassment based on the personal appearance or physical characteristics of an individual.
Dress codes	Any policy of an employer that governs and regulates the manner of dress and/or grooming of an employee while such employee is at work or in the process of executing of their employment duties.
Height[2]	The actual or assumed height of an individual.

[1] This draft Code has been adapted from the Code of Good Practice on HIV and AIDS and the World of Work, the Amended Code of Good Practice on the Handling of Sexual Harassment in the Workplace and the Code of Good Practice: Key Aspects on the Employment of People with Disabilities.

Personal appearance	The outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, such as weight, height, facial features, manner or style of dress, hairstyle, facial hair, and appearance changes due to gender reassignment. It shall however not relate to the requirement of cleanliness, uniforms or prescribed attire reasonably required by the inherent requirements of the job.
Physical characteristics	The physical features of any person (which is from birth, accident or disease, or from any natural physical development, or any other event beyond the control of that person, including individual physical mannerisms), irrespective of sex, with regard to bodily condition or characteristics, such as weight, height, facial features, and appearance changes due to gender reassignment. It shall however not relate to the requirement of cleanliness, uniforms or prescribed attire reasonably required by the inherent requirements of the job.
Suitably qualified outsider	A person falling outside the scope of employment of the employer, but may include an independent contractor, such as an attorney.
Weight[3]	The actual or assumed weight of an individual.

1.5 This Code is intentionally general and deals with multiple forms of appearance-related discrimination because every situation is different and may or may not encompass all or a combination of appearance-related elements. As such, this Code deals with discrimination either on the basis of a single appearance characteristic or a combination of characteristics.

2. Application of the Code

2.1 This Code applies to the workplace and as such it is a guide for the following persons:

2.1.1 Employers

2.1.2 Employees and those in an employment relationship

2.1.3 Job applicants

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[2] This definition has been borrowed from the District of Santa Cruz, USA, as discussed in chapter 2.

[3] This definition has been borrowed from the District of Santa Cruz, USA, as discussed in chapter 2.

2.1.4 Managers

2.1.5 Supervisors

2.1.6 Clients and customers

2.1.7 Contractors and sub-contractors of the business

2.2 In instances where “employee” is used in this Code, it will be deemed to include job applicants as well.

2.3 Employers are not invested with authority in terms of this Code to take disciplinary action against non-employees.

3. Personal appearance as a form of unfair discrimination

Appearance discrimination against an employee on the basis of any employment policy or practice, as well as bullying or harassment of employees on the basis of their appearance, amounts to unfair discrimination and a violation of such person’s dignity and equality.

4. Factors to establish appearance-based discrimination

Appearance discrimination occurs if an employee is subjected to unfair discriminatory treatment (by virtue of any employment policy or practice) on any of the following grounds:

4.1 Physical attractiveness

4.2 Height

4.3 Weight

4.4 Manner of style, dress or grooming

4.5 Alteration of physical appearance

4.6 Bullying and/or harassment on the basis of an appearance characteristic

5. Guiding principles

Employers should aim to create a working environment in which the dignity of all employees is respected and in which complaints based on appearance discrimination are afforded due consideration and are not ignored.

The following guidelines should be implemented in this regard:

5.1 Employers and employees should refrain from engaging in practices that unfairly discriminate against employees on the basis of their appearance.

5.2 Employers and employees should work together to create and maintain a working environment in which discrimination, bullying and harassment on the basis of an individual's appearance is not tolerated.

5.3 Employers should take appropriate action in terms of this Code in cases where complaints on the basis of appearance discrimination arise.

6. Appearance discrimination policies

6.1 Employers are encouraged to adopt employment policies in terms of this Code to set clear guidelines for the eradication of unfair appearance discrimination in their organisations.

6.2 Such employment policies should be clearly and effectively communicated to all employees of the organisation concerned.

6.3 Appearance-related discrimination policies should contain at least the following statements:

6.3.1 Appearance discrimination is a form of unfair discrimination and amounts to a dignity and equality violation, which infringes the rights of the complainant and acts as a barrier to equity in the workplace.

6.3.2 Appearance discrimination, bullying and harassment will not be tolerated or condoned.

6.3.3 Complainants in appearance discrimination matters have the right to follow the procedures contained in the employment policy, and appropriate action must be taken by the employer to investigate and remedy the matter.

6.3.4 Victimising or retaliating against an employee who, in good faith, lodges a complaint in terms of the employment policy will be met with disciplinary action.

6.4 The employment policy should clearly stipulate the relevant procedures to be followed by a complainant of appearance-based discrimination, as well as those to be followed by the employer.

7. Procedures

Employers should develop and implement clear procedures to deal with cases of appearance discrimination, bullying and harassment in the workplace. These procedures should enable the resolution of complaints in a sensitive, efficient and effective manner.

7.1 Reporting appearance discrimination, bullying and harassment

7.1.1 In cases of appearance discrimination, such discrimination must be brought to the attention of the employer as soon as is reasonably possible.

7.1.2 Incidents of appearance discrimination in the workplace may be brought to the attention of the employer by the complainant, or any other employee who is aware of or witnessed the discrimination.

7.2 Obligations of the employer

When an incident of appearance discrimination has been brought to the attention of the employer, the employer should do the following:

7.2.1 Consult with all the relevant parties

7.2.2 Take all reasonable and necessary steps to address the complaint (in accordance with this Code and the employer's policy)

7.2.3 Take all reasonable and necessary steps to eradicate the discrimination

7.3 The steps to be taken by the employer when a complaint is lodged should include, but will not be limited to, the following:

7.3.1 Advising the complainant of the formal and informal procedures available in terms of this Code

7.3.2 In appropriate circumstances, offering the complainant advice, counselling and assistance in terms of 7.4 below, or appointing a suitable outsider to do so

7.3.3 Following the procedures required by this Code in a manner that is procedurally and substantively fair

7.4 Advice and assistance

7.4.1 A complainant alleging appearance discrimination is entitled to receive advice and assistance in terms of this Code, either from the employer or a suitably qualified outsider, depending on existing internal policies.

7.4.2 As far as is reasonably feasible, an employer should designate an employee outside the line of management or a suitably qualified outsider to offer advice and assistance to complainants of appearance discrimination.

7.5 Informal procedures

7.5.1 The complainant of appearance discrimination and another appropriate person may approach the perpetrator employee or the employer and inform such person that the conduct, practice or policy in question is discriminatory based on appearance, and that it violates the victim's rights to dignity and equality.

7.5.2 A suitably qualified outsider or a co-employee may approach the perpetrator employee or employer and inform such person that certain conduct, practices or policies are

discriminatory on the basis of appearance, and have the potential to violate employees' rights to dignity and equality.

7.6 Formal procedures

7.6.1 A complainant is entitled to follow a formal procedure with or without first having followed an informal procedure. This should be done in line with a company's internal policies and procedures (if such policies and procedures exist).

7.6.2 In circumstances where a formal procedure was not followed, an employer is still obliged to investigate the possibility and prevalence of appearance discrimination in the workplace in order to protect others therefrom.

7.6.3 An employer's policy to prevent appearance discrimination should contain the following information in respect of a formal procedure:

7.6.3.1 The individual with whom the complainant should lodge a grievance

7.6.3.2 The internal grievance procedures to be followed

7.6.3.3 Appropriate timeframes that will allow a swift resolution of the grievance

7.6.3.4 That should the matter not be satisfactorily resolved by the relevant formal measures, the complainant has the option of referring the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA)

7.6.3.5 That it will constitute a disciplinary offence to victimise or retaliate against any employee who, in good faith, lodges a complaint of appearance discrimination.

8. Confidentiality

8.1 Employers and employees should endeavour to investigate and deal with allegations of appearance discrimination in a manner that ensures that the identities of the parties and nature of the complaint be kept confidential.

8.2 Employers are obliged to furnish the relevant parties with information that is reasonably necessary to enable their preparation for any proceedings in terms of this Code.

9. Information and education

9.1 The Department of Labour should, where feasible, attempt to make sure that this Code is accessible and available in all the official languages.

9.2 Employers and employer's organisations should endeavour to include the topic of appearance discrimination in their education, orientation and training programmes.

9.3 Trade unions should also endeavour to include the problem of appearance discrimination in their education and training programmes for employees.

9.4 CCMA commissioners should receive specialised training to adequately address issues of appearance discrimination, bullying and harassment in the workplace.

Annexure C

DRAFT

Workplace policy dealing with appearance-based discrimination, bullying and harassment in employment[1]

(Name of organisation/legal entity) recognises that all employees should work in an environment that is free from discrimination, bullying and harassment on the basis of mutable and immutable appearance characteristics.

Appearance discrimination is defined as inclusive of discrimination on the basis of personal appearance and physical characteristics, as well as bullying and harassment based on the personal appearance or physical characteristics of an individual.

Appearance-based bullying and harassment is defined as unwanted, unreasonable and unacceptable conduct (including verbal, non-verbal, practical and unfair performance-related behaviour) that affects the dignity of employees in the workplace and that is based on an aspect of their appearance, which may be persistent conduct or an isolated event, or occur via electronic means.

Appearance-related discrimination, bullying and harassment can occur vertically and/or horizontally within an organisation, and consequently, employers or employees may be responsible.

Examples of conduct that may amount to unfair discrimination, bullying or harassment on the basis of appearance include, but are not limited to, the following:

Employment practices:

- Promotion, demotion or appointment of an individual based on an aspect of their appearance that does not relate to the inherent requirements of the job in question

[1] This code has been adapted from the "Draft policy to prevent and deal with workplace bullying constructed by Smit 2014:382-384.

- Differences in remuneration of employees performing substantially the same work or employed in a substantially similar employment positions, with the only difference between the employees being their personal appearance or physical characteristics
- Differences in working conditions and/or employment benefits that are attributable solely to the personal appearance or physical characteristics of employees

Behaviours:

- Name-calling (on the basis of an appearance characteristic)
- Laughing and/or staring at employees because of their appearance
- Transmitting insulting and degrading messages about the appearance of an employee
- Public shaming of employees because of their appearance
- Discussing the appearance of an employee with others
- Abusive comments and remarks about the appearance of an employee
- Public shaming of employees because of their appearance
- Unwarranted criticism of an employee's appearance
- Implying or stating that employees may suffer organisational detriment (such as demotion or dismissal) because of their appearance
- Selecting onerous or petty rules and work tasks for employees because of an aspect of their appearance
- Sending or posting compromising pictures related to an employee's appearance
- Purposefully excluding or ostracising employees because of their appearance

If the employer makes organisational decisions based on the personal appearance or physical characteristics of an employee (such as appointment, promotion, demotion or allocation of employment benefits), and such decisions were in accordance with section 6(2) of the Employment Equity Act 55 of 1998 (based on the inherent requirements of the job or in accordance with affirmative action measures), the employer has not committed an unjustifiable act of unfair discrimination, and will not be held liable.

If the employer took all reasonable and necessary steps to prevent appearance-related bullying and harassment in the workplace, as well as all reasonable and necessary steps to deal with a complaint of bullying or harassment, and to eradicate such conduct, the employer will not be held liable for any such conduct.

Isolated and single occurrences of appearance-based discrimination, bullying and harassment as well as patterns of repetitive behaviour are equally unacceptable, and will not be tolerated.

(Name of organisation/legal entity) and all of its employees have an obligation to prevent and eradicate appearance-related discrimination, bullying and harassment in employment, and to promote the rights to dignity, equality and equal opportunity of all persons in the workplace.

(Name of organisation/legal entity) has procedures in place to deal with appearance-related discrimination, bullying and harassment in the workplace. All complaints will be afforded due consideration, and will be dealt with in a swift and impartial manner, while maintaining confidentiality.

(Name of organisation/legal entity) encourages all its employees to help curb and manage appearance-based discrimination, bullying and harassment in the workplace, and to report any incidents of the abovementioned via the normal disciplinary and grievance procedures.

(Name of organisation/legal entity) will ensure that no employee who lodges a complaint or grievance, or any other person who may be involved, is victimised or subjected to retaliation.

Confidentiality will be respected and maintained by all persons involved in a complaint of appearance-related discrimination, bullying or harassment.

The relevant person to contact or approach regarding an allegation of appearance-based discrimination, bullying or harassment in the workplace is [insert name].

<u>Consequences of breaches</u>

Individuals in the workplace who fail to adhere to this policy may be sanctioned with disciplinary action, including warnings, final written warnings, transfer, counselling or dismissal, depending on the circumstances.

Attendance of workshops and training regarding discrimination, bullying and harassment in the workplace will be compulsory if ordered.

Mediation is recommended in appropriate circumstances, and all internal disciplinary and grievance procedures must be exhausted before a dispute is referred to the Commission for Conciliation, Mediation and Arbitration.

This employment policy does not diminish or supersede any other legal recourse that is available to victims of appearance-related discrimination, bullying and harassment in the workplace.

_____ _____

Signed Dated

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List of abbreviations

CCMA	Commission for Conciliation, Mediation and Arbitration
ECJ	European Court of Justice
EEA	Employment Equity Act
EEOC	Equal Employment Opportunity Commission
EU	European Union
ILO	International Labour Organisation
UK	United Kingdom
USA	United States of America

Summary

Appearance discrimination entails discrimination against persons because of an aspect of their appearance, such as their physical attractiveness, height, weight, manner of dress and grooming styles. It also extends to individuals who elect to alter their appearance by undergoing gender reassignment.

Appearance-based discrimination is a prevalent concern in workplaces across the globe, with jurisdictions such as the United States of America, Australia, the United Kingdom, Europe, Malaysia, Japan, China and South Africa showing signs of this problem. Employers' subconscious appearance preferences seem to filter into their employment decisions, policies and practices, causing employees who do not meet certain appearance standards to suffer discrimination in employment. Employees may also be subjected to bullying, harassment and hostile work environments because of their appearance characteristics.

Research indicates that individuals who are physically more attractive as well as taller enjoy preference in the employment realm, while less attractive and shorter individuals are discriminated against and often suffer employment detriment, even when these characteristics are unrelated to the inherent requirements of the job.

Employers' discretion to impose dress codes and grooming standards (when such criteria are unrelated to the inherent nature of the employment position) in effect curb employees' right to freedom of expression via their appearance, as well as their individuality and personal autonomy.

Particular considerations in the context of appearance-based discrimination include weight-based discrimination, discrimination against so-called "trans-employees", as well as appearance-related bullying and harassment of employees.

Individuals whose body weight deviates from the norm experience significant discrimination in the workplace. Overweight and obese individuals suffer particularly severe employment detriment, as they are assumed to be in ill health, to be lazy and lacking work ethic. Employees who choose to alter their appearance through the process of gender reassignment are equally severely discriminated against in the

employment setting. As is the position with the other categories of appearance discrimination, these individuals have little legal recourse that explicitly addresses the nature of the unfair discrimination to which they are subjected. Bullying and harassment of employees because of an aspect of their appearance is another significant concern in employment, with the same limited legal protection currently available to victims. As bullying is not governed or prohibited by law, and the appearance categories fall outside the ambit of the listed grounds of prohibited discrimination, such conduct does not officially amount to harassment either.

The global attitude towards appearance discrimination is however beginning to change, and the International Labour Organisation has recognised this problem. Various states in the United States of America and in Australia have started enacting legislation to govern this issue and outlaw appearance discrimination in the employment arena. The judiciaries of these jurisdictions, as well as those in the European Union and South Africa, are also hearing more and more cases in this regard. South Africa still lags behind the rest of the world in dealing with this concern, even though many employees in the country do suffer unfair discrimination, bullying and harassment on the basis of their appearance.

Discriminating against employees based on their appearance, without such discrimination being legally justifiable, amounts to unfair discrimination, and violates victims' rights to equality and dignity. It also acts as a barrier to equity in the workplace. Harassment and bullying of individuals because of an aspect of their appearance is equally unacceptable, amounting to a dignity violation.

Keywords: appearance discrimination, weight discrimination, height discrimination, dress, grooming, transgender appearance, transsexual appearance, workplace harassment, workplace bullying, lookism, heightism, weightism, unfair discrimination, dignity, equality, disability.

Opsomming

Voorkomsdiskriminasie behels diskriminasie teen persone as gevolg van ’n aspek van hul voorkoms, onder meer fisiese aantreklikheid, lengte, gewig, klerestyl of persoonlike versorging. Dit geld ook vir individue wat kies om hul voorkoms deur geslagswysiging te verander.

Voorkomsdiskriminasie is ’n algemene probleem in werkplekke oor die hele wêreld, met jurisdiksies soos die Verenigde State van Amerika, Australië, die Verenigde Koninkryk, Europa, Maleisië, Japan, China en Suid-Afrika wat tekens daarvan toon. Werkgewers se voorkomsvoorkeure sypel deur na hul indiensnemingsbesluite, beleide en praktyke, en stel werknemers wat nie aan sekere voorkomsstandaarde voldoen nie, aan diskriminasie bloot. Werknemers word ook dikwels blootgestel aan bullebakkery en teistering op grond van hul voorkoms.

Navorsing dui daarop dat individue wat fisies aantrekliker en langer is, voorkeur in die werkplek geniet, terwyl minder aantreklike en korter individue diskriminasie en benadeling in die werksomgewing ervaar, selfs wanneer hierdie eienskappe nie met die kernvereistes van hul werk verband hou nie.

Werkgewers se diskresie om dragkodes en versorgingstandaarde neer te lê (waar sulke kriteria nie met die kernvereistes van die werk verband hou nie), beperk inderwaarheid werknemers se reg op vryheid van uitdrukking via hul voorkoms, en lê hul individualiteit en persoonlike outonomie aan bande.

Bepaalde oorwegings in verband met voorkomsgegronde diskriminasie sluit in gewigsdiskriminasie, diskriminasie teen sogenaamde “transwerknemers”, sowel as voorkomsverwante bullebakkery en teistering van werknemers.

Individue wie se liggaamsgewig van die norm afwyk, ervaar beduidende diskriminasie in die werkplek. Oorgewig en vetsugtige individue ondervind veral erge benadeling in die werkplek omdat daar aangeneem word dat hulle siek is, lui is en oor swak werksetiek beskik. Werknemers wat kies om hul voorkoms deur die proses van geslagswysiging te verander, ervaar ewe erge diskriminasie in die

werksomgewing. Soos met die ander kategorieë van voorkomsdiskriminasie, het hierdie individue weinig remedies tot hul beskikking wat die onbillike diskriminasie spesifiek hanteer. Afknouery en teistering van werknemers as gevolg van ’n aspek van hul voorkoms is nóg ’n beduidende bron van kommer in die werksomgewing, met ewe min wetlike beskerming tot slagoffers se beskikking. Aangesien bullebakkery en teistering nie volgens wet gereguleer of verbied word nie, en die voorkomskategorieë buite die bestek van die gelyste gronde van verbode diskriminasie val, is sulke optrede ook nie (wetlik beskou) teistering nie.

Die wêreldwye houding teenoor voorkomsdiskriminasie is egter besig om te verander, en die Internasionale Arbeidsorganisasie het reeds die probleem erken. Verskeie state in die Verenigde State van Amerika en in Australië het begin om wetgewing uit te vaardig om hierdie probleem in die werksomgewing te reguleer en te verbied. Die howe van dié jurisdiksies, sowel as dié in die Europese Unie en Suid-Afrika, hoor ook al hoe meer geskille op hierdie gebied aan. Suid-Afrika is egter steeds agter die res van die wêreld in die hantering van hierdie kwessie, al gaan heelwat werknemers in die land gebuk onder onbillike diskriminasie, teistering en bullebakkery op grond van hul voorkoms.

Diskriminasie teen werknemers op grond van hul voorkoms, sonder dat dit wetlik geregverdig kan word, kom neer op onbillike diskriminasie, en skend die slagoffers se reg op gelykheid en waardigheid. Sulke diskriminasie dien ook as ’n hindernis vir gelykheid in die werkplek. Teistering en afknouery van individue as gevolg van ’n aspek van hul voorkoms is ewe onaanvaarbaar, en kom op ’n skending van menswaardigheid neer.

Trefwoorde: voorkomsdiskriminasie, gewigsdiskriminasie, lengtediskriminasie, kleredrag, persoonlike versorging, transseksuele voorkoms, teistering in die werkplek, bullebakkery in die werkplek, onbillike diskriminasie, waardigheid, gelykheid, gestremdheid.