

MANY PATHS TO JUSTICE: THE GLASS CEILING, THE LOOKING GLASS, AND STRATEGIES FOR GETTING TO THE OTHER SIDE

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In recent years, legal scholars,¹ organizational behavior experts,²

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1. See, e.g., SUSAN ESTRICH, *SEX & POWER* 287 (2000). Estrich is a law school professor and nationally syndicated columnist. *Id.* She answers questions such as: Why do women today (who are richer, more educated and more powerful than ever before) account for a mere two percent of the nation's top executives? *Id.* at 8. Why are there only three women running Fortune 500 companies? *Id.* Why have so many women opted out of the race for power? *Id.* at 10. Why do women fail to call into action the power they already have as consumers, voters, shareholders, and agents of change? *Id.* at 23–24. Estrich's book focuses primarily on questions related to ambition. See generally *id.* Are women today ambitious enough, both individually and collectively? *Id.* at 29. Why are young women especially complacent? *Id.* at 13. Estrich concludes that women need to work collectively and use their power to lift other women. *Id.* at 29, 263. Note that Estrich assumes her reader is a relatively privileged, white, middle-class female. *Id.* at 24, 263.

Joan Williams presents an informed, insightful argument that employers design work around the concept of an ideal worker and that employer designs' are discriminatory under Title VII. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 5 (2000). Ideal workers do not make spending time with family a priority, work full-time (and often overtime), and can move if the job requires it. *Id.* Williams argues that "[m]any individual workplaces designed around masculine norms exclude a disproportionate number of women in violation of Title VII." *Id.* at 113.

2. See, e.g., MARILYN J. DAVIDSON, *THE BLACK AND ETHNIC MINORITY MANAGER: CRACKING THE CONCRETE CEILING* (1997). As noted in the author's biography, Davidson is a senior lecturer in organizational psychology at the Manchester School of Management, University of Manchester Institute of Science and Technology. The author summarizes research on black and ethnic minority women in both the United Kingdom and America. *Id.* at 15. One especially interesting feature of this book is that it explains how the experience of black and ethnic minority women managers differs from the experience of white women managers. *Id.* at 12.

Fernandez and Davis use data about human behavior to help organizations "overcome such persistent ills as racism, sexism, declining morale, lack of team effectiveness, poor stakeholder relations,

economists,³ journalists and freelance writers,⁴ psychologists,⁵ and angry

poor customer service, and loss of market share.” JOHN P. FERNANDEZ & JULES DAVIS, RACE, GENDER, AND RHETORIC: THE TRUE STATE OF RACE AND GENDER RELATIONS IN CORPORATE AMERICA 9 (1998). The authors conclude their discussion with a “holistic, strategic, human resources initiative which corporations can build into their business plans as a vital component of their global success story.” *Id.* at 11. Carol Gallagher, a doctor in organizational psychology, and Susan Golant, a writer, develop their road map for success for women executives based upon in-depth interviews with 200 women who have made it within two steps of CEO at America’s Fortune 1000 companies. CAROL GALLAGHER & SUSAN GOLANT, GOING TO THE TOP: A ROAD MAP FOR SUCCESS FROM AMERICA’S LEADING WOMEN EXECUTIVES 3–21 (2000). This book provides practical advice for women who want to forge their way to the top.

The Federal Glass Ceiling Commission was formed in 1991 to foster advancement of women and minorities into managerial positions. Federal Glass Ceiling Initiative, *Working Women Face Barriers to Advancement*, in WORKING WOMEN: OPPOSING VIEWPOINTS 64 (Bruno Leone, et al. eds., 1998). Stereotypes of women are traditionally cited as the major reasons why women have not been able to advance in business. *Id.* at 64. While some people assume that these stereotypes have disappeared, a recent survey by this federal commission revealed that stereotypes of women persist among male CEOs. *Id.* at 66. For example, the male executives reported that women are not as committed to work as men, are not willing to work for long hours, are not willing to relocate, and are too warm and nurturing for the business world. *Id.* at 68–69. *But see* Michael Lynch & Katherine Post, *Women are Not Victims of Discrimination in the Workplace*, in WORKING WOMEN: OPPOSING VIEWPOINTS 57 (Bruno Leone, et al. eds., 1998). These authors disagree with the conclusion that stereotypes of women are preventing their full integration into the workplace. *Id.* at 58. Lynch and Post assert that these stereotypes reflect the reality of women’s lives. *Id.* Women’s individual choice to divide their time between work and family is the cause of women’s under representation in the workplace and their less auspicious economic position. *Id.* at 60–61.

3. *See, e.g.*, TERESA AMOTT & JULIE MATTHAEI, RACE, GENDER & WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES (1996). Reading Amott and Matthaei’s economic history of American Indian, Chicana, European American, African American, Asian American, and Puerto Rican women is a good reminder that when one speaks of “women” and the glass ceiling, the use of the word women is complex. *Id.* at 3. For example, Amott and Matthaei explain that Puerto Rican professional and managerial women are less likely to migrate to the United States than women with lower level jobs. *See id.* at 285. In the United States, most white-collar Puerto Rican women hold clerical jobs. *Id.* Consequently, glass ceiling issues are not likely to be a primary concern to Puerto Rican women who work in the United States. Moreover, some groups of women, whose economic histories are filled with problems of disadvantage, are more likely to relate to the “sticky floor” than the glass ceiling metaphor. Catherine White Berheide, a sociology professor, describes the sticky floor metaphor as the barriers that keep some workers in low wage, dead-end jobs. Jennifer J. Laabs, *The Sticky Floor Beneath the Glass Ceiling*, 72 PERSONNEL J. 35, 35 (1993). For a more in depth analysis of the sticky floor metaphor, see Karen Nussbaum, *Removing Barriers for Working Women: The “Glass Ceiling” and the “Sticky Floor” Must be Demolished to Create a More Equitable Workplace*, CHRISTIAN SCI. MONITOR, Mar. 24, 1994, at 19; Elizabeth Levitan Spaid, *“Sticky Floor” Keeps Many Women in Low-Paying Jobs*, CHRISTIAN SCI. MONITOR, Jul. 13, 1993, at 12.

4. *See, e.g.*, ESTHER WACHS BOOK, WHY THE BEST MAN FOR THE JOB IS A WOMAN: THE UNIQUE FEMALE QUALITIES OF LEADERSHIP XII-XIII (2000). Book, a former reporter for Forbes, explains to women how to use female qualities of leadership to move up into leadership roles. Virginia O’Brien, a freelance writer, wrote a book because she was tired of negative stories about the glass ceiling and wanted to write a more positive account of what women are achieving in the American workplace. VIRGINIA O’BRIEN, SUCCESS ON OUR OWN TERMS: TALES OF EXTRAORDINARY, ORDINARY BUSINESS WOMEN 1, 3, 269 (1998). She challenges the definition of “success” that fo-

Americans with no apparent expertise in issues related to diversity⁶ have engaged in research and/or writing that offers advice about strategies to shatter the glass ceiling.⁷ The glass ceiling⁸ is a metaphor that describes hidden barriers⁹ that prevent individuals from advancing upward in their

cuses on how high women have climbed on the corporate ladder and celebrates other kinds of success, especially success as individual women define it for themselves. *Id.* at 5, 6. Anthony Stith, an African-American man and columnist for *Savoir Faire* magazine, writes primarily about the obstacles racial minorities face as they attempt to climb the corporate ladder. ANTHONY STITH, *BREAKING THE GLASS CEILING: SEXISM & RACISM IN CORPORATE AMERICA—THE MYTHS, THE REALITIES & THE SOLUTIONS* 22–23 (1998). Stith covers a wide range of topics, from institutional racism, to how corporations can change, to personal reflections.

5. See, e.g., ANTHONY J. IPSARO, *WHITE MEN, WOMEN & MINORITIES IN THE CHANGING WORKFORCE* (1997). Ipsaro, a psychologist, believes that diversity is good for our democracy, and he wants to help white men understand and answer a wide range of questions, such as: What motivates men? What does it mean to be white and male in America today? What does a man have to do to feel strong and stable, content and confident, satisfied and safe within himself, within his relationships, within society? What is the white male's future in the American workplace? *Id.* at 3. Ipsaro believes it is in men's self-interest to care about diversity in organizations, in part because giving up power opens the possibility for more meaningful connections with a wider range of people in organizations. *Id.* at 257–58. *But see generally* Annelies E. M. van Vianen & Agneta H. Fischer, *Illuminating the Glass Ceiling: The Role of Organizational Culture Preferences*, 75 *J. OCCUPATIONAL & ORG. PSYCHOL.* 315 (2002) (offering studies explaining the “glass ceiling” in terms of differing preferences for “organizational cultures” within a company and finding that women tend to avoid high pressure top management positions that would compromise their family lives).

6. See, e.g., WILLIAM A. WHITAKER, *WHITE MALE APPLICANT: AN AFFIRMATIVE ACTION EXPOSE* 13 (1996). Whitaker argues that white males are today's victims of discrimination. *Id.* For example, he suggests that the glass ceiling is a fiction. *Id.*

7. For a more complete discussion of factors influencing the glass ceiling phenomenon, see generally ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) [hereinafter *THE SECOND SHIFT*]; ROSABETH M. KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977); VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (1998); Jeffrey H. Greenhaus & Nicholas J. Beutell, *Sources of Conflict Between Work and Family Roles*, 10 *ACAD. OF MGMT. REV.* 76 (1985); Tuvia Melamed, *Career Success: An Assessment of a Gender-Specific Model*, 69 *J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL.* 217 (1995); Virginia E. Schein, *The Relationship Between Gender-Role Stereotypes and Requisite Management Characteristics*, 57 *J. APPLIED PSYCHOL.* 95–100 (1973); Virginia E. Schein et al., *Think Manager - Think Male: A Global Phenomenon*, 17 *J. ORG. BEHAV.* 33 (1996).

8. See, e.g., ANN M. MORRISON ET AL., *BREAKING THE GLASS CEILING: CAN WOMEN REACH THE TOP OF AMERICA'S LARGEST CORPORATIONS?* (1987) [hereinafter *MORRISON, ET AL., BREAKING THE GLASS CEILING*]; Ronald J. Burke & Carol A. McKeen, *Women in Management*, 7 *INT'L REV. INDUS. & ORGANIZATIONAL PSYCHOL.* 245, 247 (1992); Tuvia Melamed, *Barriers to Women's Career Success: Human Capital, Career Choices, Structural Determinants, or Simply Gender Discrimination*, 44 *APPLIED PSYCHOL.: AN INT'L REV.* 295, 295 (1995); Ann M. Morrison & Mary Ann Von Glinow, *Women and Minorities in Management*, 45 *AM. PSYCHOL.* 200, 200 (1990).

9. Often, these barriers are denied even by minorities who have successfully leaped the hurdles to their success. See Todd Gutner, *The Rose-Colored Glass Ceiling*, *BUS. WK.*, Sept. 2, 2002, at 101, for an account of women CEOs of large corporations who are reluctant to address the problem of glass ceilings. Gutner quotes Shelly Lazarus, CEO of Ogilvy and Mather, a global advertis-

organizations into high-level managerial positions.¹⁰ When someone uses the phrase “the glass ceiling,” the image that often comes to mind is that of a professional white woman who wants to climb a corporate ladder, but is unable to do so because a white man in a position of authority refuses to promote her. This white man may believe his refusal to promote the woman is justified for a number of reasons, such as his perception that the particular woman lacks leadership skills, or that the particular woman will have difficulty balancing work and family responsibilities if she is promoted. In this scenario, the white professional woman is angry because she believes the man’s rationale for holding her back is rooted in sexism. This woman wants justice. Sometimes, she sues her employer. Increasingly, however, some scholars are urging this woman to refrain from suing, and to instead pursue non-legal strategies for shattering the glass ceiling.¹¹ Some authors even claim to know “the one way” to shatter the glass ceiling, and this one way does not rely on legal action.¹²

ing agency: “The opportunity is there for women to go as far as they want to go in the business world, but women must believe they can reach the top—otherwise, they won’t want to make the necessary sacrifices.” *Id.* at 101. Gutner argues that such advice does little to alleviate the obstacles to female success in the corporate world. *Id.*

10. See SHEILA WELLINGTON & CATALYST, BE YOUR OWN MENTOR 10 (2001) (referring to the glass ceiling as it affects women); see generally ANN M. MORRISON, ET AL., BREAKING THE GLASS CEILING: CAN WOMEN REACH THE TOP OF AMERICA’S LARGEST CORPORATIONS? 13 (1987). “The glass ceiling is not simply a barrier for an individual, based on the person’s inability to handle a higher-level job. Rather, the glass ceiling applies to women as a group who are kept from advancing higher because they are women.” *Id.*

Researchers have speculated about the link between traditional stereotypes of women and upward mobility in organizations. See BETH J. HASLETT, ET AL., THE ORGANIZATIONAL WOMAN: POWER AND PARADOX 31, 32 (1992). The “characteristics associated with most professional and managerial positions, that is, positions involving decisionmaking and authority over other adults, match those of the ‘masculine’ stereotype and do not match the ‘feminine’ stereotype.” *Id.*

When women can overcome these stereotypes, then they are said to break through the glass ceiling. See CATALYST, CREATING WOMEN’S NETWORKS: A HOW-TO GUIDE FOR WOMEN AND COMPANIES 161 (1999). In 1999, women constituted 46.5% of the U.S. labor force. Women held 49% of managerial positions, 11.9% of positions as corporate officers, 5.1% of the highest titles in business organizations, and comprised 3.3% of top corporate earners. Two women held the position of Chief Executive Officer (“CEO”) of a Fortune 500 company. Almost all of the women who hold high-level positions in companies are white women. See also U.S. DEP’T OF LABOR, WOMEN’S BUREAU, WOMEN’S EARNINGS AS A PERCENT OF MEN’S EARNINGS, 1979–1999 tbl. 1 (2001), available at http://www.dol.gov/wblpublic/info_about_wb/main.htm. While women slowly climb the corporate ladder to take their place among top executives, they still earn comparably less than their male colleagues. *Id.* According to a 1999 U.S. Department of Labor bulletin, women annually earn 72.2% of what men earn, compared to 59.7% in 1979. *Id.*

11. See, e.g., Debra E. Meyerson & Joyce K. Fletcher, *A Modest Manifesto for Shattering the Glass Ceiling*, HARV. BUS. REV., Jan.-Feb. 2000, at 128 [hereinafter, *A Modest Manifesto*] (advocating an upheaval of systemic discrimination through diagnosis, action, and experimentation).

12. See *id.* (presenting an argument that the gender-based glass ceiling will be shattered in the

The stimulus for this article is concern that the problem of the glass ceiling would be so overly simplified that those desiring change would unnecessarily limit their reform options. Although some forms of discrimination call for non-legal strategies reform, we argue that other forms of discrimination call for legal remedies.

The argument unfolds in two major sections. The first delineates the myriad issues falling under the “glass ceiling” metaphor. In particular, Section I considers the general context in which glass ceiling issues arise, specific factors that hold managers back in organizations, legal and non-legal strategies for shattering the glass ceiling, and the overriding importance of the employer-employee relationship in determining which of many paths to justice might be most fruitful for an individual or group of managers. This section generates questions highlighting the complexity of the many paths to justice for potential plaintiffs.

Section II takes the questions Section I generates and applies them to a particular issue: “lookism” as a hidden barrier to advancement. Lookism is the belief that appearance is an indicator of a person’s value.¹³ It refers to society’s construction of a standard for beauty or attractiveness, and the resulting oppression that occurs through stereotypes and generalizations about those who do and do not meet society’s standards.¹⁴ Section II presents background information about women and appearance, relates lookism¹⁵ to factors that typically hold managers

new millennium only through a strategy that uses “small wins”) (citing Karl Weick, *Small Wins: Redefining the Scale of Social Problems*, AM. PSYCHOL. (1984) (providing a general idea of small wins)).

13. Erik M. Jensen, *The Heroic Nature of Tax Lawyers*, 140 U. PA. L. REV. 367, 372 n.33 (1991) (citing SMITH COLLEGE OFFICE OF STUDENT AFFAIRS, SMITH’S NEW GUIDE FOR THE PERPLEXED (1990)) (defining ‘lookism’ as “the belief that appearance is an indicator of a person’s value; the construction of a standard for beauty/attractiveness; and oppression through stereotypes and generalizations of both those who do not fit that standard and those who do”), *reprinted in* ACADEMIC QUESTIONS, Spring 1991, at 80, 81; *see also* ELAINE HATFIELD & SUSAN SPRECHER, MIRROR, MIRROR: THE IMPORTANCE OF LOOKS IN EVERYDAY LIFE 36 (Donn Byrne & Kathryn Kelley eds., 1986) (indicating the assumption that beauty signifies positive inner qualities is centuries old and has been voiced by philosophers from Sappho—“What is beautiful is good”—to Schiller—“Physical beauty is a sign of interior beauty, a spiritual and moral beauty. . .”).

14. Jensen, *supra* note 13, at 372 n.33.

15. A complicating factor in this debate is the unstated, but habitual consideration of physical appearance in the assessments that people make of one another. *See* HATFIELD & SPRECHER, *supra* note 13, at 36. The authors claim that people generally perceive the good-looking to be special, they treat them accordingly, and, as a consequence, the good-looking become special—different from others in a variety of ways. *Id.*; *see also* Ellen Berscheid & Elaine Walster, *Physical Attractiveness*, 7 ADVANCES IN EXPERIMENTAL PSYCHOL. 157, 169 (1974) (quoting many studies including a survey indicating that attractive people are assumed to be unusually sensitive, kind, interesting, strong, poised, modest, sociable, outgoing, more exciting dates, and sexually warm and responsive).

This personal appeal often translates into predictions of success on the job. *See, e.g.*, ROBERT P.

QUINN ET AL., THE DECISION TO DISCRIMINATE 18–19 (1968) (indicating that sixty percent of personnel managers surveyed say they would hire based on whether a person “[l]ooks like a manager”); Garda W. Bowman, *What Helps or Harms Promotability?*, 42 HARV. BUS. REV. 20 (1964) (rating good appearance by personnel managers above college education and characteristics such as innovation, loyalty, or sensitivity); Marshall Dermer & Darrel L. Thiel, *When Beauty May Fail*, 31 J. OF PERSONALITY & SOC PSYCHOL. 1168, 1175 (1975) (surveying women who perceived beautiful women as not only “more sociable” and “personally happy” but “successful professionally”); Karen Dion et al., *What is Beautiful is Good*, 24 J. PERSONALITY & SOC. PSYCHOL. 285, 289 (1972) (predicting happy lives and successful careers for the good-looking); Robert L. Dipboye et al., *Relative Importance of Applicant Sex, Attractiveness, and Scholastic Standing in Evaluation of Job Application Resumes*, 60 J. APPLIED PSYCHOL. 39, 42–43 (1975) (concluding that industrial management students and personnel managers who were presented with resumes and photos of applicants gave enormous advantage to the good-looking applicants) [hereinafter Dipboye et al., *Relative Importance*]; Robert L. Dipboye et al., *Sex and Physical Attractiveness of Raters and Applicants as Determinants of Resume Evaluations*, 62 J. APPLIED PSYCHOL. 288, 291 (1977) (finding that attractive and non-attractive interviewers alike recommend attractive applicants more often and for higher starting wages); Hope B. Lanier & Joan Byrne, *How High School Students View Women: The Relationship Between Perceived Attractiveness, Occupation, and Education*, 7 SEX ROLES 145 (1981) (indicating that high school students who were shown twenty slides of women from beautiful to ugly assumed that the good-looking ones were the ones in professional careers, and had taken traditionally masculine high school courses such as physics, calculus, and political science).

Perceptions of intellectual competence are also linked to attractiveness. For example, surveys of teachers reveal higher expectations for good-looking children to be brighter. Margaret M. Clifford & Elaine Walster, *Research Note: The Effects of Physical Attractiveness on Teacher Expectations*, 56 SOC. EDUC. 248, 251 (1973) (demonstrating that fifth-grade teachers rated attractive children as more intelligent and more likely to get advanced degrees, even when academic records for attractive and non-attractive children were identical); see also Gerald R. Adams & Allan S. Cohen, *An Examination of Cumulative Folder Information Used by Teachers in Making Differential Judgments of Children's Abilities*, 22 ALTA. J. OF EDUC. RES. 216, 222 (1976); Gerald R. Adams, *Racial Membership and Physical Attractiveness Effects on Preschool Teachers' Expectations*, 8 CHILD STUDY J. 29, 37 (1978); Margaret M. Clifford, *Physical Attractiveness and Academic Performance*, 5 CHILD STUDY J. 201, 201 (1975) [hereinafter Clifford, *Academic Performance*].

Other studies seem to indicate that good-looking children do indeed have better report cards. Richard B. Felson, *Physical Attractiveness, Grades, and Teachers' Attributions of Ability*, 11 REPRESENTATIVE RESEARCH IN SOC. PSYCHOL. 64, 70 (1980); Richard M. Lerner & Jacqueline Lerner, *Effects of Age, Sex, and Physical Attractiveness on Child-Peer Relations, Academic Performance, and Elementary School Adjustment*, DEV. PSYCHOL. 585, 589 (1977); John Salvia et al., *Attractiveness and School Achievement*, J. OF SCH. PSYCHOL. 60, 60 (1977). *But see* Clifford, *Academic Performance*, *supra*, at 207 (showing that objective measurements by IQ testing and standardized tests show no difference in performance between attractive and unattractive children; brains and beauty are only correlated in grades on essays or overall impressions by teachers—grades that can be influenced by personal biases of the teacher). However, attractive children most likely receive more attention from teachers, thus encouraging intellectual development. See Gerald R. Adams & Allan S. Cohen, *Children's Physical and Interpersonal Characteristics that Affect Student-Teacher Interaction*, 43 J. EXPERIMENTAL EDUC. 1, 4 (1974) (finding teachers more receptive to and supportive of attractive students); Ralph Barocas & Harvey K. Black, *Referral Rate and Physical Attractiveness in Third-Grade Children*, 39 PERCEPTUAL AND MOTOR SKILLS 731, 732–33 (1974) (observing that attractive children are more likely to be referred for special supplemental services such as speech, reading, or psychological testing services).

The bias in favor of attractive students, particularly females, continues through college. See Jerome E. Singer, *The Use of Manipulative Strategies: Machiavellianism and Attractiveness*, 27 SOCIOMETRY 128, 144 (1964) (concluding that attractive girls are easier to remember and thus get

back, considers legal and non-legal strategies for responding to lookism, then reminds the reader of the overriding importance of the employer-employee relationship in determining the best path to justice for an employee who wants to put a stop to lookism. Ultimately, the article concludes that women who experience a glass ceiling and/or a looking glass¹⁶ may pursue a variety of paths to justice. The issue of lookism raises a variety of issues, and different issues call for different responses.

I. THE MESSY REALITY OF THE GLASS CEILING

A. Putting the Issues in Context

Factors that hold workers back fall into two general categories. First, some factors that hold workers back relate to the individual worker.¹⁷ For example, a particular individual may lack the right background or experience to be eligible for promotion. However, the individual worker has control over some factors; he or she can strive to attain the experience necessary to be eligible for promotion. The second category of factors includes those that are external to the individual worker.¹⁸ The employer, who shapes and defines the ways workers ad-

the benefit of the doubt when professors make grading decisions). *But see* Clifford, *Academic Performance*, *supra*, at 208 (“[A]lthough attractiveness may be a reliable determinant of an individual’s initial impression formation, it is not necessarily a predictor of long-term academic effects.”); Thomas J. Kehle et al., *Teachers’ Expectations: Ratings of Student Performance as Biased by Student Characteristics*, 43 J. EXPERIMENTAL EDUC. 54, 59 (1974) (reporting that when teachers know more about other characteristics such as sex, race, academic standing and IQ, the importance of appearance is significantly less); Susan Solomon & Leonard Saxe, *What Is Intelligent, as well as Attractive, Is Good*, 3 PERSONALITY AND SOC. PSYCHOL. BULL. 670, 670 (1977) (indicating characteristics, such as physical attractiveness, which are easily perceivable, help to form personal impressions); *see also* Richard B. Felson & George W. Bohrnstedt, “Are the Good Beautiful or the Beautiful Good?” *The Relationship Between Children’s Perceptions of Ability and Perceptions of Physical Attractiveness*, 42 SOC. PSYCHOL. Q. 386, 390 (1979) (confirming children perceived as intelligent are considered more attractive by their peers).

Intellectual competence is also associated with attractiveness in students’ judgments of teachers. *See* Barbara L. Goebel & Valjean M. Cashen, *Age, Sex and Attractiveness as Factors in Student Ratings of Teachers: A Developmental Study*, 71 J. EDUC. PSYCHOL. 646, 646–47 (1979) (finding attractiveness of teachers significantly affected teacher ratings).

16. This article introduces the looking glass as a new metaphor that describes the situation some employees face as they attempt to achieve upward mobility in the organizations that employ them.

17. Tuvia Melamed, *Barriers to Women’s Career Success: Human Capital, Career Choices, Structural Determinants, or Simply Sex Discrimination*, APPLIED PSYCHOL.: AN INT’L REV. 295, 296 (1995).

18. *Id.*

vance, enacts formal or informal policies that may hold individual employees back. In some organizations, informal and formal policies hold back entire groups of workers.¹⁹ When writers describe the glass ceiling, they often make assumptions about the extent to which employees or employers hold the tools necessary to shatter the glass ceiling.

As this section describes the many factors that hold managers back, envision a pie with slices of different sizes each representing a factor that impedes promotion. Legal scholars, organizational behavior experts, and others who write about glass ceiling issues using this approach envision different sized slices for each factor. For example, some writers assume that choices individual workers make account for almost the entire glass ceiling phenomenon, while others assume an employer's discriminatory practices constitute the largest portion of the pie.²⁰ Additionally, writers might look at the same facts and categorize them differently. One writer might see a particular employment practice as a glass wall,²¹ while another writer might look at the same facts and interpret them as raising an issue of individual choices.

It is also important to point out that when writers think about the glass ceiling, they are likely to envision competing versions of the "stock story."²² The introduction to this Article presented the stock story of the glass ceiling defined as a white woman who believes her lack of advancement is related to the sexist attitudes of the white men in superior positions. In this scenario, the white men in positions of power are bewildered and believe their rationale for holding a particular woman back is rooted in factors that are gender neutral. This stock story is so often acted out in media portrayals of the glass ceiling that many Americans assume the glass ceiling issue is a gender issue, and nothing more.

Some writers, however, either offer competing stories or assume the stock story focuses on the particular glass ceiling issue they face. The glass ceiling story could highlight the experience of a black man whose employers hold him back because they continually underestimate his potential and assume he is bound for failure.²³ Alternatively, a gay

19. See *A Modest Manifesto*, *supra* note 11; see also *infra* note 36 and accompanying text.

20. See, e.g., Lynch & Post, *supra* note 2, at 58; Melamed, *supra* note 17, at 295-96.

21. See WELLINGTON & CATALYST, *supra* note 10, at 638. Catalyst calls women's lack of access to line jobs glass walls. *Id.* Line jobs are "revenue generating jobs that lead to the executive suite." *Id.*

22. See LANI GUINIER & SUSAN STURM, WHO'S QUALIFIED? 5 (2001). A stock story refers to a story people commonly think of when they are considering a particular policy. *Id.* For example, Lani Guinier describes the stock story people typically think of when they consider affirmative action. *Id.* at 22.

23. See generally ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS: WHY ARE MIDDLE-CLASS

man might wish the stock story focused on the glass ceiling issue that his ability to discuss his personal life at work is impaired.²⁴ When he cannot discuss his personal life, he cannot befriend those in positions of power as readily as workers whose personal lives are more socially acceptable. This lack of collegiality affects his ability to rise in the organization. Consider also the story of an African American woman who sees issues of race as far more important than issues of gender.²⁵ This woman may

BLACKS ANGRY? WHY SHOULD AMERICA CARE? 52–73 (1993). In chapter three, Cose outlines the twelve demons that black individuals spend time coping with: (1) inability to fit in; (2) exclusion from the club; (3) low expectations; (4) shattered hopes; (5) faint praise; (6) presumption of failure; (7) coping fatigue; (8) pigeonholing; (9) identity troubles; (10) self-censorship and silence; (11) mendacity; (12) guilt by association. *Id.* at 56–68. In spite of all the obstacles black middle-class Americans experience as they attempt to rise in organizations, it is unusual to hear a stock story about the glass ceiling that includes African American employees. *See also generally* DEBORAH A. WATTS, 101 WAYS TO KNOW YOU'RE "BLACK" IN CORPORATE AMERICA (1998). Watts uses a more basic, simple format to make points similar to those Cose makes in *THE RAGE OF A PRIVILEGED CLASS*. *But see generally*, DAVID A. THOMAS & JOHN J. GABARRO, BREAKING THROUGH: THE MAKING OF MINORITY EXECUTIVES IN CORPORATE AMERICA (1999) (voicing a more optimistic view of what it takes for managers of color to succeed in corporate America). Thomas and Gabarro look at fifty-four executives and managers of color at three companies and study how and why these executives "broke through" a glass ceiling. *Id.* at 6. The book includes lessons for managers (both black and white) who strive to move up the ranks in an organization.

24. *See* GERALD V. MILLER, GAY MALE'S ODYSSEY IN THE CORPORATE WORLD: FROM DISEMPOWERMENT TO EMPOWERMENT 5 (1995). Miller notes that the U.S. Department of Labor's 1991 composite of the glass ceiling and barriers that hold employees back focused on women. *Id.* He writes that "the movement to accept gays and lesbians is virtually nonexistent except for pockets such as Levis, Apple, and Microsoft." *Id.*

25. *See* BARI-ELLEN ROBERTS & JACK E. WHITE, ROBERTS VS. TEXACO: A TRUE STORY OF RACE AND CORPORATE AMERICA (1998). Roberts is one example of a woman who saw race as a much more significant issue than gender as she attempted to rise in a corporate hierarchy. The lead plaintiff in *Roberts v. Texaco*, Roberts was subjected to acts of individual discrimination; for example, upper-level executives told her she was "uppity." *Id.* at 163–64. When she was part of a team that was supposed to make suggestions about how to diversify the company, the strategies she and others suggested ignited a temper tantrum in which an executive referred to her and others as "black panthers." *Id.* at 152. Moreover, Roberts' supervisor changed her performance appraisal arbitrarily. *Id.* at 163. She was denied a promotion and the job went to a less qualified man. *Id.* at 193. These examples are a few of the many that show the individual prejudice and hostility upper-level managers demonstrated toward Roberts. However, the class action suit alleged more than individual discrimination. *Id.* at 196–97. It alleged across-the-board discrimination at Texaco, including systemic discrimination in the areas of pay and promotion. *Id.* at 196, 210–12. The suit claimed that Texaco's performance appraisal or "PMP" system was discriminatory in that managers used this system to keep rewards from African-American employees. *Id.* at 212. The lawsuit settled before trial for approximately \$176 million, which was split among a large class of plaintiffs. *Id.* at 276. The settlement called for a panel of experts to monitor the company's behavior for five years. *Id.* at 272.

In recent years, organizations that study the glass ceiling for women have recognized that the experience of women of color might be different from the experience of white women. *See, e.g.*, CATALYST, WOMEN OF COLOR IN CORPORATE MANAGEMENT: OPPORTUNITIES AND BARRIERS 3 (1999); *see also* Sheila Wellington, Advancing Women in Business: You've Come a Long Way—Maybe!, in 65 VITAL SPEECHES OF THE DAY, Aug. 1999, at 639. Catalyst's study indicated that al-

see the unfair assumptions executives make about her because of her gender, but these assumptions are far less troubling than blatantly racist comments employers make about her. The point of these examples is to add another layer of complexity to the glass ceiling picture. It is likely that several groups of employees wish the stock story of the glass ceiling showed an awareness of their particular circumstances.²⁶

As the following paragraphs describe the many barriers that hold workers back, note that these descriptions take place in the context of differing opinions about whether the primary focus should be on the individual worker, a group of workers, or the employer. Also note the different perceptions about the magnitude of each factor as a barrier and competing stock stories about the glass ceiling.

though many people believe women of color may be doubly advantaged in corporate America due to diversity goals, the reality is that women of color are “vastly under-represented in the managerial workforce. . . women of color do not perceive their advancement opportunities. . . to have been as favorable as those of white women.” *Id.*

Scholars have also pointed out white women’s reluctance to acknowledge that women of color face far more obstacles than white women. See Judith H. Katz, *White Women’s Collusion: Caught Between Oppression, Power and Privilege*, in *THE PROMISE OF DIVERSITY* 46, 47 (Elsie Y. Cross et al. eds., 1994) [hereinafter *THE PROMISE OF DIVERSITY*].

26. A Jewish man or woman may want corporate executives to know the struggles they faced before they came to be perceived as white. See generally KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* (1998) (exploring from a personal and professional perspective that Jews’ racial assignment has shifted from non-white to white, affecting the perceptions of the American Jewish Community).

A worker in a wheelchair may want corporate executives to think of the many struggles handicapped workers face as they strive to be perceived as competent. See generally *e.g.*, NANCY MAIRS, *WAIST-HIGH IN THE WORLD* (1996) (writing for able-bodied readers who are ignorant about what it is like to go through adult life disabled); *THE RAGGED EDGE: THE DISABILITY EXPERIENCE FROM THE PAGES OF THE FIRST FIFTEEN YEARS OF THE DISABILITY RAG* (Barrett Shaw ed., 1994) (highlighting the view that Americans should not use a pity approach when they interact with the disabled and that often, able-bodied workers use this approach and, as a result, are condescending).

A mixed race manager may wish glass ceiling stories explained the turmoil bi-racial employees feel in a world in which they cannot win—whites want him to assimilate, but treat him as non-white. Then, although an employee may suffer for being non-white, other people view him negatively when he tries to benefit from the protection of affirmative action. For a particularly good description of this turmoil, see KEVIN R. JOHNSON, *HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN’S SEARCH FOR IDENTITY* 159 (1999).

Finally, a manager of a particular generation, such as a veteran, may want the glass ceiling story to include an appreciation of the difficulties that arise when older workers are managed by younger ones. For an excellent exploration of clashes among workers of different generations, see RON ZEMKE ET AL., *GENERATIONS AT WORK: MANAGING THE CLASH OF VETERANS, BOOMERS, XERS, AND NEXTERS IN YOUR WORKPLACE* 36–41 (2000).

B. The Many Factors That Hold Managers Back

1. Choice

Scholars who write about glass ceiling issues generally agree that the personal choices workers make affect the likelihood they will rise to a high-level position in a company.²⁷ For example, most people would agree that employees use their time differently, and different choices about the use of time affect the likelihood of job promotion. Employees who value leisure more than spending time at work cannot expect this choice to be rewarded with promotions.²⁸ Also, individuals make different investments in human capital.²⁹ General human capital consists of investments people make to increase their productivity, such as education, on-the-job training or experience.³⁰ Assuming equal opportunity in access to an employer's programs that allow investment in human capital, an employee who seeks additional education, training, and experience would reasonably expect promotions, while one who does not make similar investments could not reasonably expect rewards.

In addition to personal choices with a clear link to productivity, other personal choices may also affect whether upper-level executives perceive a particular manager as having the potential to become an upper-level executive. For example, a book that gives guidance to women who want to shatter the "last glass ceiling," the American presidency, provides a "how to" guide that includes tips about looking good and getting a haircut.³¹ These tips are two of thirteen "how to" points.³² Another

27. RANDY ALBELDA ET AL., UNLEVEL PLAYING FIELDS: UNDERSTANDING WAGE INEQUALITY AND DISCRIMINATION 80 (1997).

28. *Id.* at 80.

29. *Id.* at 74, 80.

30. See BARBARA R. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 73 (1986). Bergmann, discussing human capital, states that

Just as working with a tool or a machine can make a worker more productive, so the possession of a particular skill or body of knowledge or valuable experience can make a worker more productive. . . . The worker who took education or training and thus acquired "human capital" was described as "investing in himself" (sic). Human capital can be acquired in school, in on-the-job training, or from the experience of working on a job.

Id. at 73.

31. ELEANOR CLIFT & TOM BRAZAITIS, MADAM PRESIDENT: SHATTERING THE LAST GLASS CEILING 16, 318–23 (2000).

32. See generally *id.* at 319–24. Looking good and establishing a persona as a leader call for: lowering voice pitch, getting teeth fixed, lightening hair, and traveling with a makeup artist and hair stylist. *Id.* at 319–20. The authors advise women to keep their hair relatively short. *Id.* at 320. "Hair should be neat and not call too much attention to it." *Id.*

author devotes a book to telling managers how to create an executive image.³³ This book covers everything from the facial expressions a person should choose to display,³⁴ to the kinds of clothing most consistent with creating an executive image.³⁵

2. Informal Barriers

Sometimes employees point out informal barriers that prevent them from attaining promotions in corporations. For example, some employees point out that employers who call meetings after standard working hours (e.g., 5 or 6 pm) create an informal barrier for employees with child care responsibilities.³⁶ The employees who complain are often women.³⁷ This policy is informal when meetings arise somewhat spontaneously, or when an employee accepts a job not knowing bosses will expect flexibility in scheduling meetings. Another informal barrier is that some employers assume women will not want to travel abroad because of work/life balance issues. This policy is informal when it is an unstated assumption that guides an executive's unwritten policy. In reality, this assumption is a myth that harms women's upward mobility,³⁸

33. See generally, VICTORIA A. SEITZ, *YOUR EXECUTIVE IMAGE, HOW TO LOOK YOUR BEST AND PROJECT SUCCESS* (2000). The book's major sections are: your body language, dress, and etiquette. The author even includes detailed sections on what underwear women and men should choose. *Id.* at 95–97.

34. *Id.* at 9–11.

35. *Id.* at 39–50.

36. See generally, *A Modest Manifesto*, *supra* note 11 at 128–29 (explaining how a European global retail company who held delayed or emergency meetings hurt female employees because they have more demands with regard to the home and children than men do). For books that explore the topic of balancing work and family as an informal barrier to advancement, see LOTTE BAILYN, *BREAKING THE MOLD* 81–88 (1993) (encouraging corporate executives to reward managers who use their time efficiently and get their job done, rather than workers who put in long hours and may be less efficient); STEWART D. FRIEDMAN & FRIEDMAN & JEFFREY H. GREENHAUS, *WORK AND FAMILY—ALLIES OR ENEMIES?* (2000) (encouraging readers to understand that greater integration of work and family is good for both workers and the companies that employ them); HARVARD BUSINESS REVIEW ON WORK AND LIFE BALANCE (2000).

37. See *THE SECOND SHIFT*, *supra* note 7, at 190–93 (1989) (explaining why women continue to perform more than their share of tasks related to taking care of the home and children, even when they work full time). For a more positive view, i.e. a view that suggests men are doing their fair share of household work, see ROSALIND C. BARNETT & CARYL RIVERS, *SHE WORKS/HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPY, HEALTHY, AND THRIVING* 130–31 (1998).

38. See Meredith J. Moore, *Same Ticket, Different Trip: Supporting Dual Career Couples on Global Assignments*, 17 *WOMEN IN MGMT. REV.* 61, 62 (2002). This article describes findings from a study conducted by the nonprofit organization Catalyst, which points out that:

stereotypes pose the most formidable barrier for women in global assignments. These misperceptions range from the belief that clients or colleagues outside the USA will not do business with women to the assumption that women face more work/life conflict than

especially if job promotion requires evidence of international experience.

3. Glass Walls

The metaphor of a glass wall³⁹ relates to the concept of occupational segregation. The metaphor refers to lateral barriers that prevent employees from seeking the kinds of jobs that lead to promotions. Occupational segregation refers to the fact that women and some minorities (e.g., African Americans) pursue or are forced into certain kinds of jobs. For example, women may choose, or employers may force them into occupations that require the ability to smooth disagreements.⁴⁰ Specifically, women are more likely than men to end up in jobs in the human resources department.⁴¹ Some employers are likely to steer African American and Hispanic employees away from visible, strategically important jobs and into supportive, less powerful positions, such as positions in communications departments.⁴² Sometimes, employers refuse to believe women and African Americans can expand their skills into other areas, such as jobs that require intense data analysis or an understanding of complex finance issues.⁴³ When employers refuse to offer a range of job opportunities to women and minority employees, these employees are likely to say they are experiencing a glass wall.

4. Stereotypes

Sometimes, employers rely on stereotypes when they decide whom to advance in a particular organization. A stereotype is a probabilistic belief people use to categorize people.⁴⁴ Stereotypes often generate erro-

men on global assignments. As a result, managers may hesitate to tap women for global assignments and women themselves may be reluctant to accept such assignments. Similarly, another powerful myth is that women in dual-career couples are unable or unwilling to accept expatriate assignments.

Id.

39. See Wellington, *supra* note 25, at 638–39 (explaining that Catalyst calls women’s lack of access to line jobs, “revenue generating jobs that lead to the executive suite,” glass walls).

40. See *A Modest Manifesto*, *supra* note 11 at 133 (referring to such positions as “invisible work”).

41. See *id.* at 135.

42. See Complaint-Class Action at 22–23, *Gutierrez v. Johnson & Johnson Co.*, No. 01-5302 (D.N.J. Nov. 15, 2001) [hereinafter *Johnson & Johnson Complaint*], available at <http://www.findjustice.com> (last visited Dec. 21, 2003).

43. *Id.* at 30.

44. See Victor Ottati & Yeuh-Ting Lee, *Accuracy: A Neglected Component of Stereotype Re-*

neous generalizations about women and people of color. Examples of common stereotypes⁴⁵ that affect managers are the view that women should be deferential rather than assertive,⁴⁶ African American workers are lazy or incompetent, and employees of certain national origins might be untrustworthy.⁴⁷ If an employer acts based upon stereotypical beliefs about a particular employee or a group of employees, many people would describe this form of action as discriminatory.

5. Discrimination

One form of discrimination is individual discrimination. This type of discrimination is what we typically think of when we say we believe someone is treating someone else less favorably due to a particular trait, such as race or gender. Individual discrimination is a result of “isolated prejudiced individuals” who make inappropriate decisions about who gets the organization’s rewards (e.g., the job, the promotion, the admission into a particular program).⁴⁸ For instance, if a particular corporate vice-president fails to promote an assertive African American woman because he sees her as “uppity,” that would be an example of individual discrimination.⁴⁹ Those who care about individual discrimination want to

search, in STEREOTYPE ACCURACY 29, 41 (Yueh-Ting Lee et al. eds., 1995).

45. See Monica Biernat, *The Shifting Standards Model: Implications of Stereotype Accuracy for Social Judgment*, in STEREOTYPE ACCURACY 87, 98–102 (Yueh-Ting Lee et al. eds., 1995) (explaining that social scientists have studied many stereotypes, including: men are more competent than women, women are more verbal than men, African Americans are more athletic than Caucasian Americans, and men are more aggressive than women).

46. See generally ANN BRANIGAR HOPKINS, *SO ORDERED: MAKING PARTNER THE HARD WAY* (1996) (providing a detailed look at a lawsuit that raised questions about sex role stereotyping); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). Hopkins suffered for her lack of femininity, which included allegations that she was too assertive or aggressive. *Id.* Hopkins won the right to partnership in the consulting division at Price Waterhouse only after filing a lawsuit that was ultimately decided by the United States Supreme Court. *Id.* at 258. The case focused on Price Waterhouse’s “mixed motives” for refusing to grant Hopkins partnership. *Id.* at 246. On the one hand, there was evidence that Hopkins was hostile and abrasive with subordinates. *Id.* at 235. On the other hand, Hopkins’ superiors criticized her because she was not feminine enough, i.e. they told her she should wear more make-up and jewelry. *Id.*

47. See generally Biernat, *supra* note 45, at 87–88 (explaining how stereotypes are specific to the category membership of the person being judged and comparing the exaggerations and realities of stereotypes); see also Clark R. McCauley, *Are Stereotypes Exaggerated? A Sampling of Racial, Gender, Academic, Occupational, and Political Stereotypes*, in STEREOTYPE ACCURACY 215 (Yueh-Ting Lee et al. eds., 1996) (providing an overview of different types of stereotyping and their possible effects).

48. Myra Marx Ferree & Julia McQuillan, *Gender-Based Pay Gaps: Methodological and Policy Issues in University Salary Studies*, 12 GENDER & SOC’Y 7, 9 (1998).

49. See ROBERTS & WHITE, *supra* note 25, at 163.

remove prejudiced individuals from decision-making roles.⁵⁰ The organization should fire or discipline the vice-president who fails to promote the female executive based upon uninformed or irrational beliefs about others. There is no need for broad remedies for discrimination if the cause of discrimination is individual prejudice.⁵¹ We blame the “bad actor,” implement an individual consequence, and move on.⁵²

A second form of discrimination is institutionalized discrimination.⁵³ This form of discrimination “is not only historical, but also pervasive and ongoing.”⁵⁴ This view assumes that no individual prejudice or hostility is necessary to show discrimination.⁵⁵ Rather, when discrimination is institutionalized, it becomes part of the shared expectations about who deserves the organization’s rewards.⁵⁶ These shared expectations are eventually built into the way things are done. “Institutional inequity is often hard to see in everyday interactions.”⁵⁷ An example of institutionalized discrimination would be an employer who uses a performance evaluation system as a barrier to advancement for a group of employees, such as African American employees.⁵⁸

50. See Feree & McQuillan, *supra* note 48, at 9.

51. *Id.* Fred L. Pincus also discusses individual prejudice, he writes:

Individual discrimination refers to the behavior of individual members of one race/ethnic/gender group that is intended to have a differential and/or harmful effect on the members of another race/ethnic/gender group. *Institutional discrimination*, on the other hand, is quite different because it refers to the policies of the dominant race/ethnic/gender institutions and the behavior of individuals who control these institutions and implement policies that are intended to have a differential and/or harmful effect on minority race/ethnic/gender groups. Finally, *structural discrimination* refers to the policies of dominant race/ethnic/gender institutions and the behavior of the individuals who implement these policies and control these institutions, which are race/ethnic/gender neutral in intent but which have a differential and/or harmful effect on minority race/ethnic/gender groups.

Fred L. Pincus, *Discrimination Comes in Many Forms: Individual, Institutional, and Structural*, 40 AM. BEHAV. SCI. 186, 186 (1986).

52. Feree & McQuillan, *supra* note 48, at 9.

53. *Id.* at 8.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. ROBERTS & WHITE, *supra* note 25, at 173. See also *Johnson & Johnson Complaint*, *supra* note 42, at 3–6 (showing how plaintiffs in the lawsuit against The Coca-Cola Corporation made similar allegations).

C. Legal Responses to Obstacles

Although several federal statutes prohibit employment discrimination, the most important statute is Title VII of the Civil Rights Act of 1964.⁵⁹ This law prohibits discrimination on the basis of race, color, national origin, religion, and gender at any stage of employment, including promotion.⁶⁰ In particular, Title VII prohibits discrimination against protected classes “with respect to compensation, terms, conditions, or privileges of employment”⁶¹ Title VII also makes it illegal for an employer “to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee”⁶² Under Title VII, plaintiffs have two tests they can assert to prove their claims—the disparate treatment and disparate impact tests.⁶³

The disparate treatment test is relevant when an employer has engaged in intentional discrimination.⁶⁴ The disparate treatment test has several steps. First, the plaintiff must prove by a preponderance of the evidence that she is a member of one of the protected classes (in this case sex), and that she was not treated as well as a similarly situated employee who is not a member of the protected class.⁶⁵ If the plaintiff succeeds in proving the first step of the test, the court presumes the employer engaged in unlawful discrimination.⁶⁶ At all times, the burden of proof remains with the plaintiff. However, once the presumption has been made, the burden of production shifts to the defendant. The defendant must articulate a legitimate, nondiscriminatory reason for the alleged discrimination.⁶⁷ If the defendant meets its burden of production, the burden shifts to the plaintiff, who must prove that the employer’s legitimate reason was a mere pretext for an illegal motive.⁶⁸ Employees often show pretext by proving that the employer applied its legitimate

59. 42 U.S.C. § 2000e to e-17 (2000).

60. *Id.* § 2000e-2(a).

61. § 2000e-2(a)(1).

62. *Id.* § 2000e-2(a)(2).

63. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (explaining the disparate treatment test); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–31 (1971) (explaining the disparate impact test).

64. *McDonnell Douglas Corp.*, 411 U.S. at 802.

65. *Id.*

66. *Texas Dep’t. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

67. *McDonnell Douglas Corp.*, 411 U.S. at 802.

68. *Id.* at 804.

employment practice unevenly.⁶⁹ Also, the plaintiff may show that the employer was motivated by discrimination.⁷⁰ Although courts are allowed to infer a discriminatory motive, the United States Supreme Court has made it clear the plaintiff must allege and prove intentional discrimination.⁷¹

The disparate impact test is relevant when the plaintiff wants to focus on an employer's facially neutral practice that has a disparate impact on a protected group and cannot be justified by a business necessity.⁷² To prove a prima facie case of disparate impact discrimination, a plaintiff must identify a specific employment practice that created the disparate impact.⁷³ Next, the plaintiff uses statistical evidence to show that "the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."⁷⁴ If the plaintiff succeeds in proving these two elements of the prima facie case, the burden of production and persuasion shifts to the defendant, who must show that the challenged practice is job related for the position in question and consistent with business necessity.⁷⁵

D. Non-legal Responses to Obstacles

1. Self-help

One non-legal response to obstacles that hold managers back is self-help. In other words, employees can take the steps necessary to maximize their potential for advancement.⁷⁶ Employees who lack job

69. *Id.*

70. *Id.* at 804–05.

71. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

72. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977).

73. *See Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989).

74. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

75. *Id.* at 997–98.

76. For an argument in favor of self-help as a remedy, see Deborah Walker, *The Women's Agenda*, 44 *THE FREEMAN* 193, 197 (April 1994). Walker writes: "Emphasize your own individual responsibility. If you want your employer to change, then take the responsibility of creating your own strategy for that change." *Id.* Several self-help books tell those who suffer the consequences of a glass ceiling that they should take matters into their own hands. *Id.* *See, e.g.*, DEBORAH J. SWISS, *THE MALE MIND AT WORK: A WOMAN'S GUIDE TO WORKING WITH MEN* 5 (2000). Swiss suggests that one primary path to the top of an organization starts with women figuring out how men think. *Id.* "By looking through the male lens on work, a woman can gain valuable truths about the male psyche so that she can rise above gender politics, compete with confidence, and succeed on her own terms." *See also* PAMELA BOUCHER GILBERD, *THE ELEVEN COMMANDMENTS OF WILDLY SUCCESSFUL WOMEN XIX* (1996). Gilberd lists her commandments in the introduction to her book:

training can sign up for the next training opportunity. Employees who need an advanced degree can enroll in an MBA program. Employees who have placed a priority on leisure time, or spending time with their families, can rearrange their priorities and spend more time at work. In other words, if an employee wants change, he or she has to make it happen. Of course, this response assumes an employer that genuinely believes in equal opportunity. Lawsuits have provided good evidence that sometimes employers are not equality-minded when it comes to providing self-help opportunities.⁷⁷ They may give some categories of employees more opportunity for self-help than others.⁷⁸ However, many employers are ignorant, rather than malicious. It is possible for some non-legal strategies to help employers understand their deficiencies. One such strategy is a “small wins” strategy.⁷⁹

2. Small Wins

Meyerson and Fletcher argue that corporations can make small changes or small wins that “chip[] away the barriers that hold women back,”⁸⁰ “snowball,”⁸¹ and eventually eradicate systemic discrimination.⁸² Generally, a “small wins” strategy “chip[s] away the barriers that hold women back without sparking the kind of sound and fury that scares people into resistance.”⁸³ The small wins strategy includes four

Commandment One: One size does not fit all—create YOUR definition of success; Commandment Two: Take responsibility for your career; Commandment Three: Change your thinking, change your life; Commandment Four: When the odds are against you, defy the odds; Commandment Five: Fantasize your future but create your game plan; Commandment Six: Get ready, get set, RISK!; Commandment Seven: When someone says, “you can’t,” say “Watch me!”; Commandment Eight: Become financially savvy; Commandment Nine: See mistakes as road signs, not road blocks; Commandment Ten: Enjoy your work and your life; and Commandment Eleven: Give back to keep the cycle of success going.

Id.

77. See *Wards Cove Packing Co.*, 490 U.S. at 647–48; *Watson*, 478 U.S. at 983; *International Brotherhood of Teamsters*, 431 U.S. at 329–30; Bickley Townsend, *Room at the Top for Women*, AM. DEMOGRAPHICS, July 1996, at 28, 32–33.

78. One example might be the employer who offers leadership development self-help opportunities, then fills positions in the program through word-of-mouth recruitment, rather than open enrollment based upon merit. When employers use word-of-mouth as a recruitment strategy, some groups of employees may be left out of the loop.

79. See *A Modest Manifesto*, *supra* note 11, at 128.

80. *Id.*

81. *Id.* at 136.

82. *Id.* (indicating “[o]ne small change begets another, and eventually these small changes add up to a whole new system.”)

83. *Id.* at 128. (“That is why we believe that the glass ceiling will be shattered in the new mil-

steps: organizations recognize they have a problem, senior managers diagnose the problem and give it a name, giving the problem a name opens the possibility of change, and then small wins snowball into systemic change.⁸⁴

According to Meyerson and Fletcher, managers have traditionally been using three strategies for solving gender inequity issues, and all three “have gone about as far as they can.”⁸⁵ These three strategies are assimilation (make women more like men), accommodation (respond to the unique needs and situations of women through special policies and benefits), and valuing difference (put women in positions where their “difference” is an advantage).⁸⁶ All of these approaches are problematic because they “deal with the *symptoms* of gender inequity rather than the sources of inequity itself.”⁸⁷

Meyerson and Fletcher believe that a better strategy for promoting change is to pursue “a persistent campaign of incremental changes that discover and destroy the deeply embedded roots of discrimination.”⁸⁸

lennium only through a strategy that uses *small wins*. . .”).

84. See generally *id.* Meyerson and Fletcher offer three main reasons to support their conclusion that the small wins strategy is the only way to shatter the glass ceiling. First, they believe this strategy is the only one that will work in contemporary corporate environments, where discrimination is now covert. *Id.* at 128. Second, they argue that strategies corporations have used in the past have outlived their usefulness. *Id.* at 130. Third, they argue that a small wins strategy is a powerful way to eliminate systemic discrimination and will ultimately reinvent organizations so they will become equitable for everyone. *Id.* at 136. Meyerson and Fletcher offer their first reason by explaining that legal action and organizations’ increased awareness, that they have much to lose if they fail to support the advancement of women, has eliminated the overt discrimination practiced in corporations from the 1960s through the 1990s. See *id.* at 127. A glass ceiling still exists because discrimination has gone underground. *Id.* at 128. Organizations end up with many “[p]roblem[s] with [n]o [n]ame.” *Id.* These problems “arise[] from a male-based culture” that is “tough, aggressive, [and] decisive.” *Id.* at 129. The authors are careful to point out that neither men nor women are to blame for pervasive gender inequity in organizations today. *Id.* Meyerson and Fletcher assert that women have been blaming themselves. *Id.* What’s to blame? “It is the organization itself.” *Id.* at 136. Organizations have pursued flawed approaches to remedying gender inequity.

85. *Id.* at 130. Unfortunately, Meyerson & Fletcher offer no proof that assimilation, accommodation and valuing difference have outlived their usefulness. Ideally, these researchers would provide evidence of which strategies corporations have pursued, how long corporations have pursued these strategies, and what outcomes corporations have experienced after sustained efforts toward assimilation, accommodation and/or valuing difference. In other words, they needed to assess these strategies before deciding they have outlived their usefulness.

86. *Id.* In describing these three approaches, Meyerson and Fletcher “use a metaphor that replaces gender with height.” *Id.* at 129.

87. *Id.* at 130.

88. *Id.* at 131. Meyerson & Fletcher explain that small wins are powerful because (1) they “give a name to practices and assumptions that are so subtle they are rarely questioned, let alone seen as the root of organizational ineffectiveness. . . . The act of naming the ‘problem with no name’ opens up the possibility of change;” (2) “small wins combine changes in behavior with changes in understanding;” (3) “small wins tie the local to the global;” (4) “small wins have a way

Men and women will want to work together to pursue a small wins strategy because both groups will benefit from a reinvented workplace. Organizations begin by recognizing that they have a problem (e.g., women are leaving the company), then men and women⁸⁹ get together to diagnose the problem⁹⁰ (e.g., they ask, “what *is* our invisible problem?”), then the group fixes the problem; hence, a “small win.”⁹¹ Meyerson and

of snowballing;” and (5) small wins “rout[] discrimination by fixing the organization, not the women who work for it.” *Id.* at 135–36. Meyerson & Fletcher assert that everyone wins when the organization itself is fixed. *Id.* at 136.

Finally, Meyerson and Fletcher explain that “[i]t’s not the ceiling that’s holding women back; it’s the whole structure of the organizations in which we work . . . [b]ut dismantling our organizations isn’t the solution. We must ferret out the hidden barriers to equity and effectiveness one by one.” *Id.* at 136. A small wins strategy “asks leaders to act as thoughtful architects and to reconstruct buildings beam by beam, room by room, rebuilding with practices that are stronger and more equitable, not just for women but for all people.” *Id.*

89. *Id.* at 132. Senior managers are responsible for “probing an organization’s practices and beliefs to uncover its deeply embedded sources of inequity.” *Id.*

90. *Id.* at 135. Perhaps the most troubling component of Meyerson & Fletcher’s argument, that a small wins strategy is the one way to shatter the glass ceiling, is their assumption that if senior level managers are able to attach a neutral label to a problem, this labeling will somehow promote change. *Id.*

Suppose we attach a neutral label to the problem that male executives have preconceived notions about women. For example, male executives might assume that women with small children will not want to travel when, in fact, women with small children might be eager to travel. We’ll call the problem here the problem of “mistaken assumptions.” Once senior level managers identify “mistaken assumptions” as the kind of invisible problem that drives women from the workplace, it is not clear what will make the managers want to achieve a small win. The question here is one of *motivation*. See generally ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 35–45 (1997). Sociologist Arlie Russell Hochschild’s work suggests that many workers prefer being at work to being at home. *Id.* If a woman has small children, the idea of heading out of town and staying in a hotel might be really appealing. *Id.*

Meyerson & Fletcher envision corporations with leaders who are eager to solve subtle problems, especially once a neutral label is attached to the problem. See *A Modest Manifesto*, *supra* note 11, at 132. Which leaders do they have in mind? The authors need to present some evidence that shows senior level managers are eager to change. In fact, the status quo is good for some people. Imagine if you were the star who is used to getting all the credit for a job well done. Once the problem of “invisible work” is identified, you have to share the credit with countless supportive co-workers who helped you achieve your goals. See *id.* at 133. How is that good for the star? Imagine if you were an employee with a spouse or partner at home who has agreed to pursue household tasks as a full-time occupation. You are free to stay at work as long as you want, giving every single project all the attention you can. In fact, over time, your ability and willingness to stay at work has become a competitive advantage. Then, your organization recognizes the problems of “unbounded time” and “overdoing work.” See *id.* at 132, 134. How is this identification good for the employee who has made spending time at work a competitive advantage? Meyerson & Fletcher fail to recognize that some, perhaps many, employees will benefit if the corporate culture does not change. The authors may be misleading the reader by stating that everyone wins when the culture changes. *Id.* at 136.

91. *Id.* at 132.

Fletcher point out that each organization is unique, and consequently will need its own “small wins.”⁹²

Meyerson and Fletcher offer several examples of problems with no name, such as the problem of “unbounded time” (in some organizations, executives call important meetings spontaneously, often early or late in the day, without regard for other executives who face time constraints such as the necessity of leaving work to pick up children from day-care);⁹³ the problem of “invisible work”⁹⁴ (women do work executives do not value, such as smoothing disagreements); the problem of “over-doing work”⁹⁵ (some organizations have created a norm of giving every work request full treatment; those who give work full treatment suspect that people who give a project less than full treatment are incompetent or uncommitted).

3. Traditional Responses: Mentoring Programs, Succession Planning, and Flexible Schedules

Catalyst is a nonprofit organization whose mission is to measure the number of women in upper-level management in the nation’s largest companies.⁹⁶ Catalyst responds largely to the stock story presented in the introduction to this article—the white woman who fails to advance in an organization in large part because of misperceptions about gender.⁹⁷

In 1995, Catalyst surveyed 325 CEOs and 461 women who work at the level of vice-president and above in Fortune 100 companies.⁹⁸ Catalyst wanted “to assess their perceptions of progress and prospects for women in corporate leadership.”⁹⁹ In addition to sending and receiving written surveys, Catalyst interviewed twenty female executives and twenty male CEOs in-depth *and* asked them questions related to the glass ceiling.¹⁰⁰

One interesting finding of Catalyst’s work was that female and male executives “don’t see eye to eye about what’s holding women back.”¹⁰¹ Male CEOs generally believe that what is holding women back

92. *Id.*

93. *Id.*

94. *Id.* at 133.

95. *Id.* at 134.

96. *See generally* Townsend, *supra* note 77, at 28.

97. *Id.* at 30.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 31.

is that they lack general management or line experience.¹⁰² Also, male CEOs believe that “women have not been in the pipeline long enough” to be eligible for advancement.¹⁰³ Female executives believe the primary factors that prevent them from moving up in the organization are “male stereotyping and preconceptions of women”¹⁰⁴ and “exclusion from ‘old boy’ networks.”¹⁰⁵ Interestingly, few women identified “commitment to family responsibilities” as a significant obstacle to advancement.¹⁰⁶ Many women who are close to shattering the “glass ceiling” have already raised children or have chosen to place their jobs ahead of their families.¹⁰⁷ Catalyst suggested three actions companies should take to develop and retain talented women: (1) launch informal or formal mentoring programs; (2) incorporate goals related to diversity into succession planning; and (3) take steps to eliminate attrition of talented women, such as creating more flexible work schedules.¹⁰⁸

Catalyst has identified mentoring programs as key to the advancement of groups that are underrepresented in high levels of management.¹⁰⁹ A mentor is “a trusted counselor or guide.”¹¹⁰ When companies implement mentoring programs, their goal is to create mentor-protégé relationships that “provide the protégé with the recognition, attention, and guidance she needs for optimum personal and professional growth.”¹¹¹ Mentors coach, protect, intervene, provide guidance, and help protégés out of politically difficult situations.¹¹² In essence, these relationships give protégés the information they need to navigate the corporate culture successfully.

Another traditional and non-legal approach to shattering the glass ceiling is corporate succession planning that explicitly encourages high-level managers to consider replacing themselves with managers who are different from them in terms of factors such as race and gender.¹¹³ For example, Catalyst has highlighted the work of Motorola, Inc. because this company has done a particularly good job in the area of succession

102. *Id.*

103. *Id.*

104. *Id.* at 32.

105. *Id.*

106. *Id.* at 33.

107. *Id.*

108. *Id.* at 36–37.

109. CATALYST, ADVANCING WOMEN IN BUSINESS—THE CATALYST GUIDE: BEST PRACTICES FROM THE CORPORATE LEADERS 62–63 (1998).

110. *Id.*

111. *Id.*

112. *Id.* at 63.

113. *See id.* at 18–19.

planning.¹¹⁴ The company has long been aware of the strength generated by thoughtful planning about the chain of command, and has for years considered what to do to replace key leaders who could suffer illness or death, or choose to retire.¹¹⁵ The company strives to identify managers to groom to step in to replace key leaders.¹¹⁶ As early as the 1980's, Motorola started making leadership development of women and minorities a priority.¹¹⁷ The company identifies a diverse pool of high potential managers, and grooms these managers for top jobs. The company has achieved success with this plan. From 1989 to 1997, the company went from having two female vice-presidents to having forty, including seven women of color.¹¹⁸

One of the most commonly cited strategies for shattering the glass ceiling calls for employers to create more flexible work schedules.¹¹⁹ Catalyst calls this category of strategies "work-life practice."¹²⁰ The overriding goal of work-life practices is to make it possible for managers with children to balance their work and family responsibilities in such a way that they can maximize their workplace productivity.¹²¹ This productivity places managers in a position that makes them prime candidates for advancement. Common work-life programs are services that help employees find good child care arrangements, on-site child care centers, family care leave, flex-time, part-time work, job sharing, telecommuting, and services that help employees relocate successfully.¹²²

4. Responses That Appeal to Employers' Self-Interest

One example of a company that has achieved success over the years in terms of diversity initiatives is IBM.¹²³ In March 2000, Catalyst awarded IBM with a corporate achievement award.¹²⁴ It is the third time in 15 years that Catalyst has given IBM this award.¹²⁵ IBM is not pursu-

114. *Id.* at 18–23.

115. *Id.* at 18.

116. *Id.*

117. *Id.*

118. *Id.* at 23.

119. *Id.* at 61.

120. *Id.* at 63.

121. *Id.*

122. *Id.* In a chapter on work-life practices, Catalyst highlights initiatives implemented by Eastman Kodak Company, Johnson & Johnson, Morrison & Foerster LLP, Dow Chemical Corporation, and The American Business Collaboration for Quality Dependent Care. *Id.* at 145–60.

123. See generally Keith H. Hammonds, *Difference is Power*, FAST CO. 258 (July 2000).

124. *Id.* at 260.

125. *Id.*

ing subtle strategies to promote diversity. Instead, IBM's vice-president of global workplace diversity, J.T. "Ted" Childs, Jr., has a much more "in-your-face" strategy for promoting diversity.¹²⁶

First, Childs lets employees know that diversity is the key to competitiveness.¹²⁷ He emphasizes the purchasing power of all kinds of groups—women, African Americans, gays and lesbians, to name a few.¹²⁸ Then, he makes a point of telling employees:

[d]iversity of thought and culture and geography and race and gender enables us to bring the best solutions to our customers. If we don't reach out and make diversity a competitive advantage, it will become a liability. If customers go inside our company, they should see people who look like them at all levels.¹²⁹

Second, after explaining why IBM should care about diversity, Childs advocates tough strategies for change.¹³⁰ For example, in 1995, Childs began a five-year campaign inside IBM to promote change.¹³¹ He assembled eight task forces to look at IBM from their particular perspective: African Americans, Asians, disabled people, gays and lesbians, Hispanics, Native Americans, white males and women.¹³² In addition to asking executives from each of the groups to lead their particular task force, IBM assigned one of the CEO's direct reports to sponsor each group.¹³³ Each group worked to find the answers to these questions: "What is necessary for your group to feel welcomed at IBM? What can we do, in partnership with your group, to maximize your group's productivity? What can we do to influence your group's buying decisions, so that IBM is seen as a solution provider?"¹³⁴ Another action Childs pursued was adding content to a letter a senior executive sent to general managers throughout the company.¹³⁵ The letter announced a company-sponsored conference about women's leadership.¹³⁶ With the senior executive's permission, Childs wrote in the letter, "I want you [general

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 262.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Hammonds, *supra* note 123, at 266.

136. *Id.*

managers] to talk to our women leaders about the barriers to their advancement. I don't care about the opinions of the men.”¹³⁷

By reaching out to groups that are underrepresented in the upper managerial ranks, and appealing to the employer's and company's self-interest, IBM is changing, albeit slowly.¹³⁸ Other companies are starting to follow IBM's lead and base their diversity strategies on appeals to the company's self-interest.

E. The Employer as Partner, The Employer as Adversary

Once managers appreciate the messy reality of the glass ceiling, a key question arises: What should a manager or group of managers do if they believe they are experiencing an issue that falls under the broad category of glass ceiling issues? Often, managers will want to know whether they should sue their employer, or whether alternatively, they should pursue a non-legal strategy for change.

First, managers should make sure they understand the particular issue or issues they face in the context of the wide range of concerns that fall under the glass ceiling metaphor: Do employees or the employer hold the tools necessary to shatter the glass ceiling in a particular organization? How does the employer, employee and/or group of employees envision the “pie” of factors that hold workers back? What stock story does the employer, employee, and/or group of employees envision when they hear the phrase “the glass ceiling”?

Second, managers must make sure they understand the specific factors that hold them back: To what extent does individual choice matter in this particular glass ceiling issue? Are informal barriers an issue? Are glass walls preventing managers from getting the experience they need? To what extent is the employer relying on stereotypes when making promotion decisions? To what extent is the employer engaging in discriminatory behavior? Is this behavior individual discrimination, institutional discrimination, or is individual discrimination layered over a fundamentally discriminatory institution?

Third, the managers should think through the possible remedies for glass ceiling issues. With the help of an attorney, the managers should ask: To what extent can legal tools respond to specific glass ceiling issues? What about non-legal remedies? To what extent would non-legal strategies, such as self-help, “small wins,” mentoring programs, succes-

137. *Id.*

138. *Id.*

sion planning, work-family policies, and appeals to the company's self-interest eliminate barriers to advancement?

All three of these categories of questions take place in a context that is of utmost importance: whether the employer and employees are engaged in a partnership to shatter the glass ceiling, or instead, whether the employer and employees are in an adversarial relationship. As a starting point, it is important to note that most employers see themselves as partners. It would be difficult to find an employer today who refrains from expressing complete support for increased diversity in high-level positions in organizations. Listening to top-level executives might make today's managers believe the glass ceiling will be smashed to bits—soon!

Unfortunately, many top-level executives express support that is enthusiastic, yet thin. Top executives might define diversity narrowly. For example, in some companies, white male leaders might envision themselves surrounded by a “diverse” group of employees most like themselves: white women. Other companies might define diversity more broadly,¹³⁹ and may use their power to reach other groups typically left out of the running for top positions, including African American men and women, gay and lesbian employees, and handicapped managers.

Even if high-level decision-makers define diversity broadly, managers who are concerned about barriers to advancement must try to assess the company's level of commitment to diversity initiatives. To what extent has the employer already embraced non-legal strategies for change, such as mentoring programs and succession planning? Does the employer follow through on promises? When pushed, can upper-level executives provide sincere, meaningful responses to challenges about their commitment to shattering the glass ceiling? Does the employer reward managers who value diversity? How does the employer define diversity? Ultimately, managers who are thinking about becoming plaintiffs must decide whether their relationship with their employer is based primarily upon a partnership philosophy, an adversarial relationship, or something in between. To figure this out, managers may have to consult an attorney and seek assistance in investigating the company's practices. Smart potential plaintiffs will engage in careful research, study, and thought before deciding how to describe their relationship with their employer.¹⁴⁰

139. Some companies define diversity so broadly the term loses its meaning.

140. Employees must realize their employer's human resources department has been defending itself from potential lawsuits for years. Employers are often repeat players, while most employees who file discrimination lawsuits will do so only once in their lives.

If the manager decides his or her relationship with the employer is a partnership, he or she may be wise to pursue non-legal strategies for seeking advancement. Although this path to justice may be slow, non-legal remedies such as a small wins approach generate less tension, are usually less expensive, and might yield positive outcomes. If a manager or group of employees discovers that the employer's commitment to diversity at the top is thin, these potential plaintiffs should consider the path to justice most likely to force executives to pass along some of their power—litigation. Although lawsuits are time consuming, expensive, and stressful to the plaintiffs brave enough to assert their rights, sometimes, for some employees, this is the only realistic path to justice. Employees who discover their employer is making a transition from an adversarial relationship to a partnering relationship might be wise to pursue non-legal strategies, then pursue litigation as a last resort.

Now that Section I has explored the messy reality of the glass ceiling, and highlighted the many possible paths to justice for potential plaintiffs, it is time to apply the questions Section I raises to a particular glass ceiling issue. Section II considers lookism and its relationship to the glass ceiling. It then outlines the many paths to justice for potential plaintiffs held back by an employer's impressions of their attractiveness.

II. MANY PATHS TO JUSTICE: ALTERNATIVE STRATEGIES FOR RESPONDING TO LOOKISM

A. Putting the Issue in Context

As the introduction pointed out, lookism is the belief that appearance is an indicator of a person's value.¹⁴¹ It refers to society's construction of a standard for beauty or attractiveness, and the resulting oppression that occurs through stereotypes and generalizations about those who do and do not meet society's standards.¹⁴² In the context of hidden barriers to advancement, lookism is important because employers may be judging the worth of particular managers based upon superficial characteristics rather than merit. Employers may be comparing good-looking managers to managers with below-average looks, and rewarding attractiveness.

141. Jensen, *supra* note 13, at 372 n. 33 (defining lookism).

142. *Id.*

When putting the issue of lookism in context, it is also important to note that the metaphor of a glass ceiling is off-track. Instead of a glass ceiling, imagine a looking glass. Women step up to the looking glass and see their own image reflected back. Like Alice stepping through her looking glass, all that women must do is step through the mirror to join the corporate world. The factor that allows some women to step through and forces others to stay behind is the actual image reflected in the mirror. Women who are more attractive can step through the looking glass and tumble into the world of business, while women who are not as attractive are left to gaze at their reflections on the other side of the mirror.

As revealing as that metaphorical jaunt may be, it has things more than a little wrong. A mirror ordinarily provides a visual copy of what it reflects. But in the case of a woman who stares into the mirror, the relevant image is not the one bouncing back to the woman, but rather what a typical man sees when he views an image such as the one ricocheting back to the woman in the mirror. The significance of this external interpreter of the image is that, unlike the woman in the looking glass illustration above, women cannot just step through the glass; they must be permitted to enter the corporate hierarchy. Power relations thereby mediate between how women look and how they will be treated in labor markets. It is possible that a variety of factors, including race and sexual orientation, also affect power relations.

Some good-looking managers have the additional advantage of good looks as granting sexual power. For example, an attractive white woman may be the most promotable employee if the men above her in a corporate hierarchy factor in sexual attraction in addition to good looks. If heterosexual white men are the decision-makers about who will and will not get promoted, and attractiveness defined in sexual terms is an unstated part of the decision-making process, some groups are at a disadvantage, even if they are relatively attractive. For example, gay men and African American women may be out of the running for upper-level positions, even if they are especially attractive.¹⁴³ It is possible that some

143. This idea comes from an especially interesting set of articles by Pamela J. Smith. See Pamela J. Smith, *Part I-Romantic Paternalism-The Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 J. GENDER RACE & JUST. 107, 135 (Fall 1999) [hereinafter Smith, *Part I*] and Pamela J. Smith, *Part II-Romantic Paternalism-The Ties that Bind: Hierarchies of Economic Oppression that Reveal Judicial Disaffinity for Black Women and Men*, 3 J. GENDER RACE & JUST. 181 (Fall 1999) [hereinafter Smith, *Part II*].

In her first article, Smith points out the ways in which stereotypes that support romantic paternalism (white men looking out for white women) can hurt white women. For instance, white men view white women as best able to serve as their wives and mothers to their children, so it is difficult for white men to view white women as leaders rather than helpers. See Smith, *Part I, supra* at 135. She

white men are willing to allow women to break out of their traditional roles as helpers into positions of equality. Some men may prefer to pass this power to white women over other groups, as they may feel an affinity to white women. In addition, white men may feel some need to protect the white women who tumble through the looking glass, especially if they perceive these women as potential mates and/or similar to their own working wives and mothers of their children.¹⁴⁴

B. Appearance as One of the Many Factors That Hold Managers Back

1. Choice

For some managers,¹⁴⁵ choices they make with regard to their appearance affect the likelihood they will rise to high-level positions within a company. “How-to” books on the glass ceiling include numerous tips about how to create an executive image.¹⁴⁶ Writers who suggest that employees’ choices hold them back would point out that employees have a great deal of control over their attractiveness, and hence their promotability. Below-average looking managers are free to choose whether to become more attractive. Employees make choices about whether to purchase high-quality clothing, take steps to reach an attractive body size and shape, undergo plastic surgery to improve facial features, fix imperfect smiles, and wear the right shoes to achieve an appealing height.

also argues that white women share race with white men, and this shared identity carries advantages. *Id.* White men may want to control white women to perpetuate their roles as helpers, but in modern times, white men may want to protect white women as the working wives of white men and working mothers of white children. *See* Smith, *Part II, supra* at 185.

Smith writes that black wives and mothers “historically were forced to work, suffering economic exploitation and economic devaluation.” Smith, *Part II, supra* at 186. White men are unlikely to protect black women, since they do not see them as candidates for the status of working wives of white men and working mothers of white children. *Id.* This devaluation continues today.

The same analysis may be extended to other groups. For example, white men at the top of a corporate hierarchy might feel strongly that they should not consider the needs and interests of gay men, who could not serve as their wives or mothers of their children.

144. *See* Smith, *Part I, supra* note 143, at 135.

145. White, female managers have the best opportunity to use their attractiveness to their advantage. *See id.*

146. *See supra* text accompanying notes 32–33.

2. Informal Barriers

Informal barriers are unstated assumptions that guide an employer's unwritten policies.¹⁴⁷ For example, suppose an employer develops a highly competitive leadership development program. The program seeks applicants with the most leadership potential. Presumably, leadership potential would be defined and measured by upper-level management. Selection criteria would include standard measures of merit, such as the manager's ability to use resources efficiently, and his or her ability to motivate subordinates. Now, suppose a review of photographs of past participants in the program suggests that decision-makers have demonstrated a preference for good-looking managers. It is possible, perhaps likely, that below-average appearance presents an unstated barrier to entry into a program that is likely to enhance a manager's future promotions.

3. Glass Walls

It is possible that a manager's appearance is linked to occupational segregation. The question here is whether upper-level managers channel employees into particular jobs based upon their perceptions of an employee's attractiveness, and whether this channeling puts some workers at a disadvantage. It is important to note the link between promotability and access to line or revenue generating jobs. Here, the issue of attractiveness may be tricky. It is likely that upper-level executives will urge relatively attractive employees to take positions that allow them to use their appearance to gain favor with those outside the company. For instance, one might imagine an attractive woman working in the public relations department, presenting a positive image of the company to outsiders. Public relations jobs are not linked to generating revenue, so managers who take this kind of position may eventually experience a glass wall. On the other hand, imagine the attractive person in a sales position, a job that is obviously linked to revenue generation. This attractive manager is setting the stage for upward mobility. Managers who are below-average in terms of appearance might face subtle bias that will prevent them from generating the kind of revenue employers associate with "high potential" employees.

147. See generally *In re Vey*, 639 A.2d 718, 720 (N.J. 1994).

4. Stereotypes

People have been reluctant to talk about the bias toward more attractive people,¹⁴⁸ which this article refers to as ‘lookism.’¹⁴⁹ Admitting this bias reveals an unpleasant side of humans. Favoring people because they are attractive implies that we are more concerned with superficial features than we are with performance variables.¹⁵⁰ Some people simply refuse to believe that lookism persists and that it might be a factor in women’s success.¹⁵¹ People are also reluctant to discuss ‘lookism’ be-

148. See HATFIELD & SPRECHER, *supra* note 13, at 34 (1986); see also Nancy A. Rudd & Sharron J. Lennon, *Social Power and Appearance Management Among Women*, in APPEARANCE AND POWER 153 (Kim K. P. Johnson & Sharron J. Lennon eds., 1999). Using the research of Hatfield and Sprecher, Rudd and Lennon surmise three reasons why beautiful people are given preferential treatment. *Id.* at 155. The first is that attractive people are simply more aesthetically appealing. *Id.* Second, people make the assumption that beautiful people have positive and socially desirable characteristics. *Id.* People then want to associate with and remain in the favor of such people. *Id.* The third reason for the beauty bias is that our own self-esteem and social status augment when we associate with very attractive people. *Id.*

Sometimes, however, writers celebrate bias in favor of attractive women. For a blatant celebration, see Patricia Sellers, *Women, Sex & Power*, FORTUNE, Aug. 5, 1996, at 42. Sellers profiles “seven remarkable women” and explains how these women have achieved tremendous success in the business world: they use their sexuality to their advantage; they do not plan their careers; they take a certain amount of flak in stride; they don’t care that they don’t blend in; and they see no reason to help other women. *Id.* at 42–57. Sellers describes all seven women in terms of their attractiveness and includes large pictures of each woman that emphasize both their beauty and their femininity. *See id.*

149. See William Safire, *Lookism: Uglier of the World, Unite!*, N.Y. TIMES MAGAZINE, Aug. 27, 2000. The author notes that lookism has joined the ranks of words like racism, sexism, and ageism. *Id.*

150. See Dion et al., *supra* note 15, at 286. Admitting our bias toward the beautiful is also disturbing because it undermines the democratic notion that those who work hard can succeed on their own merits. Social psychologists speculate that wanting to believe in this ‘just world’ phenomenon prevents people from investigating the effects of beauty. *Id.* We fear making a discovery that beauty might be tied to success. *Id.* We would rather remain ignorant to beauty’s potential effects than discover that a relatively unalterable characteristic impacts our pursuit of success. *Id.*

151. See generally DONNA BROOKS & LYNN BROOKS, SEVEN SECRETS OF SUCCESSFUL WOMEN (1997); GREGORY K. ERICSEN, WOMEN ENTREPRENEURS ONLY (1999); MORRISON ET AL., *supra* note 8; DEBORAH J. SWISS, WOMEN BREAKING THROUGH (1996). These books are targeted at women who are trying to succeed in the business world. While the books offer some useful tips for success, they do not mention the potential impact of attractiveness on occupational success. Some discussion of appearance is offered, but the books provide few specifics about how appearance can influence others. The lack of discussion of attractiveness or appearance could represent an unwillingness to believe that such factors play a significant role in achieving success. These women are spreading a message of self-empowerment, which further sustains the belief that individual efforts can lead to success.

Wendy Reid Crisp claims that women who are successful in the traditionally male business world are often warding off suspicions about how they actually reached the top. Wendy Reid Crisp, *Women + Power = Suspicion*, EXECUTIVE FEMALE, Jan.-Feb. 1997, at 80. Supposedly women are suspected of engaging in promiscuous behavior to achieve success. *Id.* The author not only causti-

cause it is difficult to determine whether people are exhibiting a bias for the beautiful. Unlike racism or sexism, where the subject of the discrimination is more easily distinguishable, determining whether a person is attractive is subjective, or so we say.

Despite our aversion to talking about the prevalence of ‘lookism,’ research indicates that attractiveness benefits both men and women in most forums.¹⁵² For purposes of this article, we will focus on how attractiveness affects women in business situations.¹⁵³ A survey of 700 managers illustrates the importance of appearance in the business forum.¹⁵⁴ The managers were asked to rank what factors help a person survive and succeed in organizations.¹⁵⁵ Based on the 662 returned surveys, personal appearance was ranked the eighth most important factor out of twenty.¹⁵⁶ The results reflect a belief among managers that attractiveness helps a person succeed in business.¹⁵⁷

Attractive women can gain an advantage from the earliest stages of employment through the later ones. For instance, when photographs are attached to resumes, research indicates that attractive women will be favored over unattractive women.¹⁵⁸ These results are consistent even

cally chides the notion that attractive women succeed because of their promiscuous behavior, but she also argues that attractiveness is a non-significant factor in reaching the top. *Id.* She writes: “Very few men are so blinded by the bimbo blizzard that they are willing to risk public humiliation by promoting someone to regional sales manager solely because she is totally cute.” *Id.* Alison Maitland summarizes a survey where women executives were asked to report what characteristics helped them to the top of the business world. Alison Maitland, *Women Hand on their Breakthrough Tactics*, FINANCIAL TIMES, Apr. 30, 1998, at 15. The women cited factors such as a “strong” attitude and maintaining a positive outlook. *Id.* Appearance was not seen as a significant factor in their success. *Id.*

152. See Dion et al., *supra* note 15, at 286–88.

153. See David L. Wiley, *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27 ST. MARY’S L.J. 193, 217 & n.86 (1995) (asserting that attractiveness affects women in many forums, including the judicial system, and noting that women are more likely than men to be the victims of appearance discrimination during criminal trials).

154. See Nick Nykodym & Jack L. Simonetti, *Personal Appearance: Is Attractiveness a Factor in Organizational Survival or Success?*, 24 J. EMP. COUNSELING 69, 74 (1987).

155. *Id.* at 74–75.

156. See *id.* at 74.

157. See Katherine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 Mich. L. Rev. 2541, 2551 (1993–1994), cited in Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 198 n.19 (2000) (“[A] good deal of control over appearance is exercised at the hiring stage . . . [particularly] with respect to appearance characteristics that the employer assumes the applicant would not be able to change . . .”).

158. See Dipboye et al., *Relative Importance*, *supra* note 15, at 42. Participants were asked to rank fake resumes for a managerial position in order of approval where photographs of the applicants were attached to each resume. *Id.* The attractiveness of the applicant was found to significantly correlate with the applicant’s ranking. *Id.*

when the attractive women are rated as less competent in terms of experience and education.¹⁵⁹ Studies have shown that managers are likely to recommend higher starting salaries for more attractive people.¹⁶⁰ Attractive women are evaluated higher than unattractive women in terms of task performance.¹⁶¹ When making decisions about promotions, attrac-

A New Zealand study confirms Dipboye, Fromkin, and Wilback's findings that attractiveness influences how one ranks a job applicant. M.Y. Quereshi & Janet P. Kay, *Physical Attractiveness, Age, and Sex as Determinants of Reactions to Resumes*, 14 SOC. BEHAV. & PERSONALITY 103, 111 (1986). For this research, the authors asked participants to rank resumes for three *different* jobs: a tax manager, a postmaster, and a vice-principal. *Id.* at 103. Attractiveness was found to be the "most pervasive and predominant" characteristic for all three job categories. *Id.* at 111. Another study confirms that attractive persons are preferred for hiring. Thomas F. Cash & Robert Kilcullen, *The Eye of the Beholder: Susceptibility to Sexism and Beautyism in the Evaluation of Managerial Applicants*, 15 J. APPLIED SOC. PSYCHOL. 591, 602 (1985). Attractiveness was more significant for women than for men. *Id.* at 601. The researchers use the neologism, "beautyism," to describe the participants' preference for the beautiful. *Id.* But see Greg W. Marshall, et al., *Preinterview Bias: The Impact of Race, Physical Attractiveness, and Sales Job Type on Preinterview Impressions of Sales Job Applicants*, 18 J. PERS. SELLING & SALES MGMT. 21, 21 (1998). The researchers in this study wondered if being shown a photo of the applicant prior to the interview would result in bias based on race or physical attractiveness. *Id.* at 23, 26. The results indicate that physical attractiveness does not affect preinterview impressions. *Id.* at 33. However, gender was not included as a variable in this study. *Id.* at 35. Therefore, attractiveness could have been more significant for males or females even if it was not significant for an average of the two.

159. See Dipboye et al., *Relative Importance*, *supra* note 15, at 42.

160. See Linda A. Jackson, *The Influence of Sex, Physical Attractiveness, Sex Role, and Occupational Sex-Linkage on Perceptions of Occupational Suitability*, 13 J. APPLIED PSYCHOL. 31, 41–42 (1983). The author hypothesized that attractiveness would not be a significant factor for a sex-neutral occupation (educational counselor). *Id.* at 33, 35. The researcher concluded that even for supposedly neutral occupations, women's attractiveness influenced their recommended starting salaries. *Id.* at 41. More attractive women were recommended higher starting salaries. *Id.* Attractiveness was also a significant factor for the female job of a dietician. *Id.* at 35, 38.

Hatfield and Sprecher report a study in which women were sent to employment counselors in New York, Los Angeles, and Chicago at two separate times, once with a very plain appearance and once made up very attractively. HATFIELD & SPRECHER, *supra* note 13, at 62. The counselors estimated higher starting salaries for the women when they were made up attractively—all other credentials were consistent. *Id.* The researchers referred to the tendency of having higher expectations for attractive women as the "Cinderella Syndrome." *Id.*

161. See David Landy & Harold Sigall, *Beauty is Talent: Task Evaluation as a Function of the Performer's Physical Attractiveness*, 29 J. PERSONALITY & SOC. PSYCHOL. 299, 303 (1974). In an experimental setting, men were asked to judge essays written by women. *Id.* at 300. Attached to the essays was either a photo of a beautiful woman, a very unattractive woman, or no photo at all. *Id.* The men were told the photo was a picture of the essayist. *Id.* The men reported that they were most impressed by the essays of the beautiful women even though the researchers had intentionally riddled the essays with grammatical mistakes and shoddy writing. *Id.* at 302. The authors concluded that "[o]n the whole these interactions suggest that physical attractiveness may have had greater impact when the quality of the work was poor than when it was good." *Id.* at 302; see also Thomas F. Cash & Claire A. Trimer, *Sexism and Beautyism in Women's Evaluations of Peer Performance*, 10 SEX ROLES 87, 96 (1984) (finding physical attractiveness enhances the quality of a performance evaluation and revealing that female attractiveness was most important when women were performing supposedly masculine tasks).

tive persons in general even tend to be favored over people with a better work record.¹⁶²

A woman's beauty can also influence her earnings over time. Economists Jeff Biddle and David Hamermesh are leading researchers in the area of attractiveness bias.¹⁶³ Biddle and Hamermesh's research indicates that attractive women earn five percent more, even when controlling for education.¹⁶⁴ Their research also revealed that women whose looks are rated "below-average" are three percent less likely to even enter the work force.¹⁶⁵ The results of the American studies were recently confirmed by the work of British economist, Barry Harper.¹⁶⁶ Harper

162. See Paula C. Morrow et al., *The Effects of Physical Attractiveness and Other Demographic Characteristics on Promotion Decisions*, 16 J. MGMT. 723, 724 (1990). In this study, the researchers wanted to discover whether attractiveness played a role in promotions for managerial positions. *Id.* Managerial jobs were the focus because they are viewed as more 'masculine' and, thus, the researchers speculated that attractiveness might not be as significant a factor. *Id.* at 726-27. The study revealed that attractiveness did have a small impact on recommendations for promotions. *Id.* at 735. Though the effects were small, the authors note that even small effects can be critical when employers are deciding between large numbers of resumes, as is often the case in today's job market. *Id.* at 735. For a study focusing on the effects of attractiveness on executives in Hong Kong, see Po-Pui Chung & Kwok Leung, *Effects of Performance Information and Physical Attractiveness on Managerial Decisions About Promotion*, 128(6) J. SOC. PSYCHOL. 791, 793 (1988). The Chung & Leung concluded that recommendations for promotions when the candidate's performance was mediocre had more to do with attractiveness than with competency. *Id.* at 796. Attractiveness was not nearly as significant when the candidate's performance was high. *Id.*

163. See Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1174 (2001) [hereinafter Hamermesh & Biddle, *Labor Market*]. "Our purpose here is to offer the first study of the economics of discrimination in the labor market against yet another group—the ugly—and its obverse, possible favoritism for the beautiful." *Id.*

164. See Hamermesh & Biddle, *Labor Market*, *supra* note 163, at 1186 (finding women in the top thirty-three percent of the attractiveness category enjoy an earnings premium of five percent). In another study by the same authors, Biddle and Hamermesh studied a sample of law school graduates with the purpose of determining whether beauty was a factor in the lawyers' earnings. Jeff E. Biddle & Daniel S. Hamermesh, *Beauty, Productivity, and Discrimination: Lawyers' Looks and Lucre*, 16 J. LAB. ECON. 172, 173 (1998). The researchers concluded that beauty was not a significant factor in the first year of the lawyers' careers. *Id.* at 184. However, after five years, the authors found that better-looking attorneys were earning higher wages than attorneys rated as less attractive. *Id.* at 195. Attorneys in the private sector also tended to be more attractive than those in the public sector. *Id.* Biddle and Hamermesh argue that "beauty is not merely correlated with but actually causes differences in earnings." *Id.* at 197. *But see* Patricia Roszell et al., *Physical Attractiveness and Income Attainment Among Canadians*, 123 J. PSYCHOL. 547, 555-56 (1989). In a sample of over 1,000 Canadian businesspersons, the researchers did not find that attractive women enjoyed an economic benefit over unattractive women. *Id.*

165. See Hamermesh & Biddle, *Labor Market*, *supra* note 163, at 1189. Hamermesh and Biddle did not find that men's attractiveness correlated with their entrance into the workforce. *Id.*

166. See Barry Harper, *Beauty, Stature, and the Labour Market: A British Cohort Study*, 62 OXFORD BULL. ECON. & STAT. 771, 771 (2000). Harper followed the American research on the effect of attractiveness on earnings. *Id.* Noting the importance of the American research, Harper decided to investigate whether a relationship between beauty and earnings existed among British employees. *Id.* Attractiveness appeared to be an occupational-specific bias. For example, in clerical

discovered that unattractive British women suffered an earnings penalty of negative 10.9 percent.¹⁶⁷ The evidence presented in these studies support the proposition that, on average, more attractive women receive higher salaries than their unattractive colleagues.

The previous research focused on the influence of general attractiveness. Other research has narrowed this field of general beauty by focusing on the effects height and weight have on employment.¹⁶⁸ Harper's study indicates that very short females are paid less than their colleagues of average height.¹⁶⁹ Shorter women are seen as less powerful and more susceptible to traditional stereotypes,¹⁷⁰ making the women appear less fit for managerial and upper-level employment positions. Stereotypically, taller women are seen as more masculine, which usually means they appear to be more demanding, decisive, and powerful.¹⁷¹ Such perceptions translate into an advantage for taller women in the workplace. Women above average height were found to enjoy higher pay even beyond those of average height.¹⁷² Blending in with the male-dominated business world might be more feasible for taller women.

occupations, unattractive women earn 14.6 % less than attractive women. *Id.* at 790. In craft occupations, obese women suffer a pay penalty of an astounding negative 30.6%. *Id.* The importance of appearance in certain occupations influences the probability of being employed. *Id.* Attractive women have a higher probability than do average or unattractive women of being employed in professional or clerical positions. *Id.* at 793. Contrary to what the researcher expected, appearance does not affect the probability of being employed in customer-oriented jobs, in fact, customer-service jobs are the only ones in which attractive women suffered an earnings penalty of negative 9.7 %. *Id.* at 794.

167. *Id.* at 785.

168. *Id.* at 798.

169. *See id.* at 785. Women in the bottom 10% of the height distribution earned 5.1% less than women in the rest of the distribution. *Id.* Women who fit in the 10-9 percentile of height distribution enjoyed a 5.1% pay premium. *Id.* Interestingly, men in this range of height suffer a negative 3.8% wage penalty. *Id.* The study found no significant results for tall women. *Id.* at 786.

170. *See HATFIELD & SPRECHER, supra* note 13, at 198. An Italian law enacted by Benito Mussolini reflected the stereotypes that short women and men are less powerful and less effective. *Id.* Mussolini created a regulation that people shorter than five foot three inches could not be employed as government employees. *Id.* Though the law is no longer in existence, a five foot one inch secretary was fired from her government position in 1981. *Id.*

171. *See id.* at 195; Gerald R. Adams, *Social Psychology of Beauty: Effects of Age, Height, and Weight on Self-Reported Personality Traits and Social Behavior*, 112 J. SOC. PSYCHOL. 287, 287 (1980). Study participants associated height with having a high internal locus on control and being likable. *Id.*

172. *See Eng Seng Loh, The Economic Effects of Physical Appearance*, 74 SOC. SCI. Q. 420, 430 (1993). Loh found that women's height plays a role in determining wages. Women receive a 4.2% increase in hourly wages for every 10 % increase beyond the average height. *Id.* *But see* Harper, *supra* note 166, at 786. The authors report that taller than average women do not enjoy higher wages. *Id.* However, the discrepancy in findings may be due to the different samples. Harper's study was conducted among females in the United Kingdom, whereas Loh's study included American participants.

Just as height has been found to influence women's wages, so too has weight.¹⁷³ Women who are significantly overweight or obese tend to incur negative ramifications in the workplace.¹⁷⁴ For example, women considered "fat" earn twenty percent less in hourly wages than women of average weight.¹⁷⁵ Harper also found pay penalties for overweight women in the UK.¹⁷⁶ These research findings support the hypothesis that unattractive women are earning less than attractive women, if we assume that being overweight is considered unattractive.

Assuming that the previously discussed research is valid and reliable, we can conclude that beauty is playing a role in determining which women succeed in business. The next logical question to ask is *why* do beautiful people enjoy an advantage in business.¹⁷⁷ One possible answer to this question is the tendency to assign positive characteristics to attractive people.¹⁷⁸ This tendency to associate what is good with what is beautiful is known as the "beauty myth."¹⁷⁹

173. Obese persons have been active in claiming weight-based discrimination. *See, e.g.*, Cook v. Rhode Island Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 21 (1st Cir. 1993); Coleman v. Georgia Power Co., 81 F. Supp. 2d 1365, 1365-66 (N.D. Ga. 2000); Murray v. John D. Archbold Mem. Hosp., Inc., 50 F. Supp. 2d 1368, 1370-71 (M.D. Ga. 1999); Ridge v. Cape Elizabeth Sch. Dep't., 77 F. Supp. 2d 149, 162 (D. Me. 1999); Morrow v. City of Jacksonville, 941 F. Supp. 816, 821-22 (E.D. Ark. 1996); Nedder v. Rivier Coll., 908 F. Supp. 66, 73 (D.N.H. 1995); Smaw v. Virginia Dep't of State Police, 862 F. Supp. 1469, 1470 (E.D. Va. 1994); Underwood v. Trans World Airlines, Inc., 710 F. Supp. 78, 80 (S.D.N.Y. 1989); Missouri Comm'n on Human Rights v. Southwestern Bell Tel. Co., 699 S.W.2d 75, 76 (Mo. Ct. App. 1985); Gimello v. Agency Rent-A-Car Sys., Inc., 594 A.2d 264, 273 (N.J. Super. Ct. App. Div. 1991); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 794 (N.D. 1987); Philadelphia Elec. Co. v. Commonwealth of Pennsylvania 448 A.2d 701, 703 (Pa. Commw. Ct. 1982); Morrison v. Pinkerton, Inc., 7 S.W.3d 851, 853 (Tex. App. 1999).

174. *See* Susan Averett & Sanders Korenman, *The Economic Reality of the Beauty Myth*, 31 J. HUM. RESOURCES 304, 316 (1996). Obese women make lower hourly wages and have a lower family income than women of normal weight. *Id.*

175. *See The Rules of Attraction*, ECONOMIST, Dec. 11, 1993, at 76 (reporting the findings of researchers Averett and Korenman who studied the effect of weight on hourly income). In addition to their findings for overweight women, the researchers also discovered that being underweight results in a wage penalty. *Id.* However, skinny women make up the difference by marrying husbands who earn an average of 45% more than the husbands of fat women do. *Id.* The trend of decreasing wages with increasing weight does not apply to men. *Id.* Slightly overweight men actually earn 26% more than men who are considered skinny. *Id.*

176. *See* Harper, *supra* note 166, at 784, 786. Weight was a significant factor for women when they were in the top 10% of the weight distribution. *Id.* When in this group, women incurred a negative 5.3% pay penalty. *Id.*

177. *See* NANCY ETCOFF, SURVIVAL OF THE PRETTIEST: THE SCIENCE OF BEAUTY 233 (1999). The creator of artificial intelligence, Marvin Minsky, is noted for saying that "the sight of beauty is a signal to the mind 'to stop evaluating, reflecting, selecting, and criticizing.'" *Id.*

178. *See* Helene Larose & Joanne Tracy, *Effects of Gender on the Physical Attractiveness Stereotype*, 127 J. PSYCHOL. 677, 678 (1993) (revealing that people rated attractive were assigned more positive character traits than unattractive people when study participants were asked to assign

The positive traits that attractive people are often assumed to possess are traits that businesspersons value. For instance, attractiveness has been shown to contribute to high self-esteem.¹⁸⁰ Studies have demonstrated that attractiveness is equated with creativity, intelligence, and general competence.¹⁸¹ Beautiful people have been shown to experience

character traits to photographs). One male recruiter offered a blunt answer for why attractive women are preferred: "If you have two women walk into your office to be recruited, and both have the same grades, the nice looking one will get hired . . . [p]robably because the nice looking one can do more things than the not nice looking one—i.e., use her sex appeal, etc. to smooth over some clients." See HATFIELD & SPRECHER, *supra* note 13, at 57. In another study, participants were shown photographs of patients before and after their cosmetic surgery. S. Michael Kalick, *Aesthetic Surgery: How it Affects the Way Patients are Perceived by Others*, 2 ANNALS PLASTIC SURGERY 128, 128 (1979). The 'after' photographs were rated as more poised, enthusiastic, and friendlier than the 'before' photos. *Id.* If we assume that after the surgery the participants looked more attractive, then this study lends support to the assertion that people assign positive characteristics to the beautiful. *Id.*

179. See Dion, et al., *supra* note 15, at 179; see also HATFIELD & SPRECHER, *supra* note 13, at 36. Hatfield and Sprecher have delineated four steps in the stereotyping process that equates beauty with goodness. The first step is when people realize that discriminating against the ugly doesn't seem fair, but they are not sure how to control it. *Id.* The next step is that privately we tend to assign desirable traits to beautiful people. *Id.* Because we assign these positive traits to people, we treat the good-looking people better. *Id.* The final step in the stereotyping process is that attractive people whom we treat better reap the rewards of the treatment, which includes thinking more highly of themselves. *Id.*

In referring to Nancy Etcoff's book, *Survival of the Prettiest*, Steve Herman boldly proclaims that a preference for attractiveness is a natural step in our evolution. Steve Herman, *Kosmetikos: Beauty by Darwin*, GLOBAL COSMETICS INDUSTRY, Nov. 1999, at 20–22. Herman indicates that beauty is highly desirable in today's world and, thus, to thrive in this world one must take strides to become attractive. *Id.* If achieving beauty is necessary for our survival, then cosmetics play a functional role in the adaptive process. *Id.* The author implies that through cosmetics we can improve humanity. *Id.*

180. See Sharon J. Lennon & Nancy A. Rudd, *Linkages Between Attitudes Toward Gender Roles, Body Satisfaction, Self-esteem, and Appearance Management Behaviors in Women*, 23 FAM. & CONSUMER SCI. RES. J. 94, 107 (1994). But see HATFIELD & SPRECHER, *supra* note 13, at 241–42. Hatfield and Sprecher note that there is a slight tendency for attractive people to have more self-confidence than the less attractive, but beauty is not the most significant contributing factor. *Id.* Several studies have found that having meaningful relationships and work that one enjoys have more of an impact on self-esteem than beauty. *Id.* at 242. However, if we consider the possibility that attractive people are more likely to be in relationships and that they receive advantages in the workplace then an undetected relationship might exist between attractiveness and self-esteem. In a study conducted by the Center for Creative Leadership, female executives reported that self-confidence was an "enabling factor" and a "means to an end" for women who wish to succeed in business. MORRISON ET AL., *BREAKING THE GLASS CEILING*, *supra* note 8, at 92.

181. See HATFIELD & SPRECHER, *supra* note 13, at 268; see also Arnie Cann, *Stereotypes About Physical and Social Characteristics Based on Social and Professional Competence Information*, 131 J. SOC. PSYCHOL. 225, 229 (1991) (reporting that when asked which persons in a group of photographs were most competent, the participants consistently indicated that taller and more attractive persons were competent); *Men's Gray Hair Has Negative Impact*, USA TODAY MAGAZINE, Apr. 1998, at 6 (finding that men's appearance can impact their perceived abilities in that men with gray hair are considered less effective and that there is a real life salary penalty for gray haired men who earn an average of \$10,000 less than men without gray hair). For another study on the effect of male physical appearance, see Thomas F. Cash, *Losing Hair, Losing Points? The Effects of Male*

less stress and are less at risk for mental illness.¹⁸² People are more likely to offer help to those who are more attractive.¹⁸³ Studies indicate that persons rated as attractive have a higher internal locus of control than unattractive persons.¹⁸⁴ Highly attractive women have a tendency to be more assertive than their less attractive female colleagues.¹⁸⁵ The business community views traits such as assertiveness, self-control, intelligence, self-esteem, and creativity favorably. When employers assume that more attractive women have such traits, the assumption translates into various rewards for the women.

The assumption that beautiful women have desirable traits may not be completely invalid.¹⁸⁶ Attractive individuals are treated differently

Pattern Baldness on Social Impression Formation, 20 J. APPLIED SOC. PSYCHOL. 154, 155 (1990). Male pattern baldness results in several negative implications for the men with the condition. *Id.* For example, balding men were rated less favorably in initial impressions. *Id.* at 159. They were rated lower in physical attractiveness and desirable interpersonal characteristics. *Id.* at 159, 160.

182. See HATFIELD & SPRECHER, *supra* note 13, at 268; see generally Ellen Berscheid, *Interpersonal Attraction*, in HANDBOOK TO SOCIAL PSYCHOLOGY, 413 (Lindzey Gardner & Elliot Aronson eds., 1985). Attractive people have more positive self-images, which contributes to better mental health.

183. See MORRISON, ET. AL., *BREAKING THE GLASS CEILING*, *supra* note 8, at 100–01 (finding that female executives reported that getting help from others is a key element to getting ahead in business).

If the research indicating that attractive people are more likely to be given help is valid, then attractive women's chances of advancing are greater than the chances of their less attractive colleagues. For example, in a study Peter L. Benson and his colleagues sought evidence that people were more inclined to help beautiful people than their less attractive counterparts. Peter L. Benson et al., *Pretty Pleases: The Effects of Physical Attractiveness, Race, and Sex on Receiving Help*, 12 J. EXPERIMENTAL SOC. PSYCHOL. 409, 413 (1989). A completed graduate school application, including a picture of the supposed applicant, was left in a stamped envelope in a telephone booth. *Id.* at 410. The researchers found that the more attractive the applicant, the more likely it was that the person who found the application would put it in the mail. *Id.* at 413. For research that supports the claim that attractive people are more likely to elicit help from others than are unattractive people see HATFIELD & SPRECHER, *supra* note 13, at 102–03. However, Hatfield and Sprecher also note that attractive people are the group least likely to be asked to help others. *Id.* For further support of this proposition, see Matthew Mulford et al., *Physical Attractiveness, Opportunity, and Success in Everyday Exchange*, 103 J. AM. SOC. 1565, 1580 (1998), finding that while more attractive people are given more help than unattractive people, the beautiful will cooperate with only certain people. For instance, the authors' research concluded that women who see themselves as attractive are less likely to cooperate with any other women. *Id.* at 1581. If a woman thinks of herself as highly attractive, then she will cooperate with other highly attractive women, but not with attractive, average, or unattractive ones. *Id.*

184. See HATFIELD & SPRECHER, *supra* note 13, at 251. Researchers speculate that beautiful people feel more in control because "attractive versus unattractive people are treated very differently: attractive people are given more opportunities to impose their will in social and achievement activities." *Id.*

185. See HATFIELD & SPRECHER, *supra* note 13, at 249–50.

186. See Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, BUSINESS WEEK, March 16, 1998, at 18. Barro argues that worker productivity should be measured by the amount a

from a very young age.¹⁸⁷ In the classroom, attractive students reap numerous benefits from the teachers.¹⁸⁸ Teachers give attractive students more attention, more information, and more opportunities to perform than they do less attractive students.¹⁸⁹ This preferential treatment by parents, teachers, and peers¹⁹⁰ helps to develop feelings of self-worth, confidence, and self-reliance.¹⁹¹ A subtle message is sent to the watchful eye when beautiful females are treated preferentially.¹⁹² The message is that attractiveness is a source of power for women.¹⁹³ The researcher R.J. Freedman refers to this type of power as hedonic, or the ability to indirectly acquire influence “by virtue of one’s appearance, charm, or political savvy.”¹⁹⁴ Freedman asserts that hedonic power is “a woman’s primary source of social power.”¹⁹⁵ Women learn that beauty can work in their favor and they aim to use it that way.¹⁹⁶ Such behaviors can

worker adds to customer satisfaction and co-worker happiness. *Id.* Using this definition of productivity, attractiveness becomes an important occupational qualification. *Id.* Barro uses the example of flight attendants to argue that customers are happier when being served by attractive women. *Id.* According to the author, the government should not attempt to regulate discrimination against the less attractive because the discrimination is based on legitimate economic interests. *Id.*

187. See Katherine A. Hildebrandt & Hiram E. Fitzgerald, *Adults’ Responses to Infants Varying in Perceived Cuteness*, 3 BEHAV. PROCESSES 159, 169 (1978) (explaining that babies judged to be cuter received more attention from adults than less attractive babies).

188. See, e.g., Barocas & Black, *supra* note 15, at 733.

189. See, e.g., Adams & Cohen, *supra* note 15, at 2.

190. See Karen K. Dion & Ellen Berscheid, *Physical Attractiveness and Peer Perception Among Children*, 37 SOCIOMETRY 1, 9–10 (Mar. 1974). Based on children’s responses during a study testing the hypothesis that children’s attractiveness affected peer perception, the researchers concluded that more attractive children are preferred as friends. *Id.*

191. Alesia T. Barrett Singer & Rhona S. Weinstein, *Differential Parental Treatment Predicts Achievement and Self-Perceptions in Two Cultural Contexts*, 14 J. FAM. PSYCHOL. 491, 492 (2000).

192. Many feminists argue that the subtle message sent by favoring beautiful women is destructive to women emotionally, physically, and mentally. See WENDY CHAPKIS, *BEAUTY SECRETS: WOMEN AND THE POLITICS OF APPEARANCE* 171 (1986); NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 49–50 (1991).

193. See HATFIELD & SPRECHER, *supra* note 13, at 251. The work of psychologist David Campbell shows that attractive women capitalize on their sense of empowerment by showing preference for more exciting and adventure-filled jobs. *Id.* at 246. Campbell calls this tendency the “James Bond Syndrome.” *Id.*

194. R.J. FREEDMAN, *BEAUTY BOUND* 73–74 (1986). Freedman contrasts hedonic power with agonic power. *Id.* Agonic power is defined as direct influence over others usually through authority, money, or strength and is not as available to women as it is to men. *Id.* at 74. Direct power is not considered attractive in women. *Id.* Hegonic power, on the other hand, is more accessible to women because it is more often associated with feminine characteristics. *Id.*

195. See Rudd & Lennon, *supra* note 148, at 156.

196. See *id.* at 167–68 (reporting that women who engaged in high appearance management were aware that it could increase their social power and concluding that “these women clearly recognized the hedonic power that can come from being beautiful to others, either naturally or through judicious appearance-management behaviors.”). Cf. Mary Tannen, *Show Me Where it Hurts!*, N.Y. TIMES, June 14, 1998, (Magazine), at 66. The author details a competition between two sisters fight-

manifest into qualities that make attractive women more successful in the business world.¹⁹⁷

5. Discrimination

While beauty can be an asset to women, it can also be a detriment to women's advancement. Some researchers as well as some female executives argue that attractive women are more likely to be subject to traditional stereotypes than unattractive women.¹⁹⁸ Businesspersons assume that attractive women will get married, or in the event that they are already married they will have children. Beautiful women can also be seen as potential targets for harassment,¹⁹⁹ an issue no employer wants to ignite. One executive pointed out that beautiful women cannot blend in as easily as average-looking women can.²⁰⁰ An inability to blend in can increase the amount of scrutiny and evaluation one receives.²⁰¹ While this evidence indicates the potential pitfalls of beauty, it is not as convincing as the evidence that attractive women are more easily breaking through the glass ceiling.

Regardless of whether women incur negative or positive ramifications because of their appearance, basing employment decisions on attractiveness has potentially deleterious effects for society.²⁰² Many

ing to see whom can endure the most pain to look the best. *Id.* The sisters try to one-up each other with painful procedures such as hair removal and waxing. *Id.* While the sisters are acting partially in jest, their behavior is representative of many women who subject themselves to painful processes in the name of beauty. *Id.* Implicitly such behavior acknowledges that women realize they are at least partially judged by their physical attractiveness. *Id.*

197. See Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2040 (1987) [hereinafter *Facial Discrimination*] (citing ROBERT D. GATEWOOD & HUBERT S. FIELD, HUMAN RESOURCE SELECTION 347 (1987)) The importance of appearance is highlighted by the fact that employers usually require in-person interviews before they will hire an individual. *Id.* A survey of employee selection processes found that "only one organization hires a candidate sight unseen." *Id.* n.31.

198. See ETCOFF, *supra* note 177, at 83. Etcoff notes that beautiful women are likely to be associated with traditional stereotypes of women. *Id.* For example, they are seen as submissive, meek, and feminine. *Id.* Attractive women are also viewed as less capable of performing high-intensity jobs. *Id.* Beauty is rewarded for jobs that involve high visibility and interpersonal interaction. *Id.*

199. See *id.* at 84 (asserting that statistics legitimize employers' fears that attractive women are more likely to be harassed); see generally William DeJong, *Rape and Physical Attractiveness: Judgments Concerning Likelihood of Victimization*, PSYCHOL. REP., Aug. 1999, at 32 (concluding that research indicates that people generally believe that physically attractive women are more likely to be raped than they are to be robbed and beaten).

200. See HATFIELD & SPRECHER, *supra* note 13, at 66.

201. See *id.*

202. See Adamitis, *supra* note 157, at 198-99. Adamitis notes two broad negative implications of allowing beauty to influence employment decisions. *Id.* The first implication is that it permits

women view the emphasis on appearance as a form of discrimination,²⁰³ primarily because “females suffer disproportionately from this evaluation device.”²⁰⁴

C. Legal Responses to Lookism

As more women entered the workforce, the issue of appearance discrimination became more prevalent. Soon women began bringing lawsuits against employers on grounds of appearance discrimination. These lawsuits generally fall into one of two broad categories. The first type includes instances of discrimination against a person’s physical characteristics, such as height²⁰⁵ and weight.²⁰⁶ The second type of appearance discrimination suits are those related to a person’s grooming habits and attire.²⁰⁷

Women seeking legal remedies for appearance discrimination have limited options for redress.²⁰⁸ A few states or municipalities have laws

employers to take into consideration an attribute that is not generally associated with job performance. *Id.* at 199. Discrimination based on looks is “arbitrary, irrational, and unfair.” *Id.* at 212. Employers who could potentially suffer from the beauty bias may not be hiring the most qualified individuals for the job. A second negative consequence of not taking action to quell appearance discrimination is that women will continue to be adversely affected by the culture’s beauty obsession. *Id.* at 199. For additional information on this topic, see CHAPKIS, *supra* note 192, at 171; WOLF, *supra* note 192, at 49–57.

203. See *Facial Discrimination*, *supra* note 197, at 2051 (indicating that appearance discrimination “represents one of the ways in which we use hazy and illegitimate criteria to separate good from bad, acceptable from unacceptable, and normal from deviant”).

204. See Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 474 (1990) (stating personal characteristics as job qualifications can appear to be gender-neutral, but this criterion may be “affected profoundly by preconceived notions of the ‘appropriate’ roles and traits of women and men”); see also ETCOFF, *supra* note 177, at 61 (stating that in cultures where men and women were asked how much they value beauty, men consistently reported that they valued looks more than do women).

205. See, e.g., *Craig v. County of Los Angeles*, 626 F.2d 659, 666–68 (9th Cir. 1980) (holding a minimum height requirement unlawful because it had a disparate impact on Mexican-Americans).

206. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329–31 (1977). Female prison guards sued their employer on grounds that the height and weight requirements for guards had a disparate impact on women. *Id.* at 324. The court held that physical attributes do not constitute legitimate employment criteria if they have a discriminatory impact on a protected class. *Id.* at 332.

207. See, e.g., *Carroll v. Talman Fed. Sav. & Loan Ass’n*, 604 F.2d 1028, 1032 (7th Cir. 1979). An employer required women to wear a uniform to work, but allowed men to wear traditional business attire. *Id.* at 1029. A female employee sued on grounds of disparate treatment. *Id.* The court decided in her favor, finding that not only did the uniform requirement result in different treatment, but it also reflected gender-based stereotypes. *Id.* at 1033–34. *But see Tardif v. Quinn*, 545 F.2d 761, 762–64 (1st Cir. 1976) (upholding a high school’s decision to terminate a teacher because of the short skirts that she wore).

208. The possibilities for winning the cases seem limited as well. See, e.g., *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1207–10 (8th Cir. 1985). The story of Christine Craft dampened the hopes

that prohibit appearance discrimination,²⁰⁹ but these are in the minority.²¹⁰ Most women must evoke federal legislation by tying their appearance to an already protected category,²¹¹ such as disability, race, color, religion, sex, national origin, or age. These are the protected categories as defined by the Americans with Disabilities Act (“ADA”),²¹² Title VII of the 1964 Civil Rights Act (“Title VII”),²¹³ and the Age Discrimination in Employment Act (“ADEA”).²¹⁴ Each piece of legislation requires different elements to prove discrimination.

Appearance discrimination presents a unique problem under the ADA. Before an individual can argue that her unattractiveness contributed to discrimination, she has to prove that she *is* considered unattractive. Unlike other disabilities protected under the ADA, ugliness is a considerably subjective determination.²¹⁵ If an individual can prove that an attribute is considered unattractive, then she must show that the attribute is also an impairment. Under the ADA, an individual’s impairment must be shown to substantially limit a major life activity before it

of women seeking redress for appearance discrimination. Craft was a television news co-anchor. *Id.* at 1208. Her employer was constantly commenting on Craft’s appearance and pushing her to wear more make-up and change her style of dress. *Id.* After a telephone survey of local viewers rated Craft low in attractiveness, she was reassigned to a reporter’s position. *Id.* at 1209. Craft alleges that her supervisor told her she was “too old, too unattractive, and not deferential enough to men.” *Id.* Craft refused to accept the reassignment and filed a lawsuit against the television station. *Id.* Craft’s main argument was that “standards for on-air personnel were stricter and more strictly enforced as to females than as to males . . .” *Id.* at 1207. Despite her claim that appearance standards are “based on stereotyped characterizations of the sexes” she lost the claim of sex discrimination after a long series of appeals. *Id.* at 1221.

209. See, e.g., Elliot-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2202 (West 1999) (prohibit appearance discrimination); D.C. CODE ANN. § 1-2512 (1981) (prohibiting lookism); see also *Atl. Richfield Co. v. D.C. Comm’n on Human Rights*, 515 A.2d 1095, 1099 (D.C. 1986) (finding in plaintiff’s discrimination claim discrimination based on personal appearance after she proved that her employer did not like her tight blouses and disheveled hair). *Id.* at 1100; Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 28 (1997) (arguing that obesity is a disability and despite the possibility that “including obesity in the definition of disability may open the door to claims of discrimination on the basis of physical appearance, this difficulty should not prevent extending the [Americans with Disabilities] Act’s protection to the obese”).

210. Michigan is noted for its appearance discrimination and fair employment laws. See, e.g., *Dept. of Civil Rights v. Edward W. Sparrow Hosp. Ass’n*, 377 N.W.2d 755, 757–58 (Mich. 1989) (holding that a law that required female technologists to wear uniforms violated Michigan’s fair employment law).

211. See *Adamitis*, *supra* note 157, at 199.

212. 42 U.S.C. § 12101 (2000).

213. 42 U.S.C. § 2000e (2000).

214. 29 U.S.C. § 621 (2000).

215. *Contra Facial Discrimination*, *supra* note 197, at 2047–48 (arguing that because studies have found a “high degree of agreement among people in their ratings of other people’s physical attractiveness” one can be objectively classified as attractive or unattractive).

can be considered a disability.²¹⁶ For example, the court ruled that missing teeth substantially limited the life activity of working.²¹⁷ Cases of missing teeth, facial disfigurement, or missing limbs, are not as common as the claims that obesity should be considered a disability.

Many people have tried to argue that obesity is a physical impairment and therefore deserving of protection under the ADA.²¹⁸ Generally, obese persons are found to not have a disability unless they suffer from a physiological disorder or are perceived as disabled.²¹⁹ The court assumes that persons who do not have a physiological disorder can control their own weight. Control is an important issue in terms of considering appearance as an impairment.²²⁰ If appearance can be controlled, then it's protection under the ADA is limited even more than it is currently.

Another avenue of redress for appearance discrimination victims is the ADEA, which protects people over forty from age discrimination.²²¹ If an older woman wishes to use the ADEA, then she must argue that older women are disproportionately impacted by attractiveness policies. This argument unites the ban on age discrimination with appearance discrimination. Cases brought under the ADEA are not usually based on appearance, but "they may implicitly involve an applicant's or employee's 'old' or 'older' appearance and the stereotypical assumptions derived from that visual perception."²²²

216. *See id.* at 2047.

217. *See, e.g.,* *Hogdon v. Mt. Mansfield Co.*, 624 A.2d 1122, 1131 (Vt. 1992). Plaintiff was a hotel maid who lacked all of her upper teeth. *Id.* Employers viewed her as unsuited to be seen by guests and thus unable to work. *Id.*

218. *See* Jane Osborne Baker, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination*, 29 U.S.C.A. L. REV. 947, 961–64 (1982) (revealing that by 1982, a number of claims regarding obesity discrimination as a violation of the Rehabilitation Act of 1973 were being brought, and arguing that, "serious obesity [should] be recognized as a 'physical or mental impairment' within the meaning of the Rehabilitation Act of 1973 . . .").

219. *Id.* at 963 (stating that successful claims under the Americans with Disabilities Act generally constituted "obese individuals who have demonstrated that the complained-of discrimination was based on a weight related medical condition, or on a perceived medical condition . . .").

220. *See Facial Discrimination, supra* note 197, at 2036 n.5 (explaining that if appearance can be controlled, then individuals who do not make an effort to beautify themselves should be responsible for any negative implications resulting from their unattractiveness). *But see* GORDON L. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 153–55 (1985) (explaining that certain aspects of a person's appearance are immutable, yet they may still be taken into consideration when judging one's beauty).

221. *See* 29 U.S.C. § 631(a); *see also* Adamitis, *supra* note 157, at 203, 207 (noting that employees have been able to argue discrimination on the basis of appearance by showing discrimination was a result of age under the ADEA).

222. Adamitis, *supra* note 157, at 207.

The final and most common avenue of redress for appearance discrimination is Title VII.²²³ Plaintiffs must prove that the employer's policy results in either disparate treatment²²⁴ or disparate impact of protected classes.²²⁵ Under Title VII, the plaintiff can invoke the "sex plus" theory.²²⁶ This theory allows the plaintiff to demonstrate that she was discriminated against because of her sex plus another characteristic, such as race, marriage, or appearance.²²⁷ In general the courts have held that attractiveness, appearance, attire, and grooming requirements are not legally permitted if they impose different standards based on gender,²²⁸ are a result of sexual stereotypes,²²⁹ or raise the risk of harassment.²³⁰ Courts

223. *Id.* at 203–04.

224. *See* Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 507 (1990) (noting that the key issue in a case alleging disparate treatment is whether the defendant "intentionally" discriminated against the plaintiff).

225. *See* Adamitis, *supra* note 157, at 204, 207 (pointing to Title VII as a source for employees to sue for appearance discrimination by showing that such discrimination was linked to characteristics of race, religion, gender or national origin).

226. *See id.* at 208 n.102.

227. *See id.* (claiming that the sex plus theory is most successful when the "plus" characteristic is immutable); *see also* Lanigan v. Bartlett 466 F. Supp. 1388, 1389–92 (1979) (using the sex-plus theory to argue that she was being discriminated against because of her sex and because of false stereotypes about women, plaintiff unsuccessfully contended that her employer's dress code prohibiting women from wearing pants violated Title VII); Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 197 (1991); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (*per curiam*); EEOC v. Sage Realty Corp., 507 F. Supp. 599, 607–08 (S.D.N.Y. 1981) (applying the sex plus doctrine).

228. *See* Adamitis, *supra* note 157, at 207; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 235, 250 (1989) (finding that Hopkin's firing was based on sex stereotyping and discriminatory attitudes when her employer urged her to "dress more femininely" and to try to look more like a woman).

229. *See, e.g.*, O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263 (S.D. Ohio 1987). Burlington Coat Factory required female employees to wear a smock while working. *Id.* at 264. The store imposed no such requirement for men. *Id.* A female employee sued under Title VII and the courts decided in her favor. *Id.* at 267. The dress requirement was found unlawful because it was the result of a sexual stereotype. *Id.* at 266.

230. Customer preference for more attractive employees does not grant the employer permission to discriminate based on appearance. *See* Gerdom v. Continental Airlines Inc., 692 F.2d 602, 608–10 (9th Cir. 1982) (holding that customer preferences cannot justify discrimination when an airline company tried to argue that attractiveness was a job requirement); *see also* Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir. 1971) (stating that "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid . . . [i]ndeed, it was, to a large extent, these very prejudices [Title VII] was meant to overcome"); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 303–04 (N.D. Tex. 1981) (rejecting defendant's contention that feminine sex appeal was necessary to perform the task of an airline attendant where an airline had a female-only flight attendant policy.) *But see* Cox v. Delta Air Lines, No. 75-2639-CIV-CA, 1976 WL 730, at *1 (S.D. Fla. Sept. 30, 1976), *aff'd*, 553 F.2d 99 (5th Cir. 1977) (finding defendant's weight requirements for flight attendants were held to be a legitimate grooming requirement rather than an attractiveness standard). *See generally* Pamela Whitesides, *Flight Attendant Weight Policies: A Title VII Wrong Without a Remedy*, 64 S. CAL. L.

have upheld attractiveness requirements when the policies were found to be gender-neutral.²³¹ When appearance discrimination can be linked to judgmental treatment of a protected class, then Title VII does afford some legal protections.

However, legal protections are beneficial only when the victims are aware that they need to be protected. Lookism is such a subtle form of discrimination that most do not actually realize it is happening. While the evidence suggests that beauty is helping some women to step through the looking glass, the women left on the other side are not likely to realize that attractiveness can be so influential. Because lookism is covert and subjective, the likelihood of quelling its impact is slight.

D. Non-legal Responses to Lookism

1. Self-Help

Of course, a person whose bosses perceive her to be unattractive can engage in self-help to look better. To some extent, employees who realize they are below-average in attractiveness can make change happen.²³² Consider, however, that some employees who engage in self-help will still be unlikely to tumble through the looking glass. Consider the African American woman who buys top-of-the-line clothing, gets braces, recreates facial features through plastic surgery, and works hard to create an attractive body size and type. It is still possible she will not tumble through the looking glass. If the white men who decide which employees tumble through have a subtle bias in favor of women who might be potential mates, it is still likely they will favor white women.²³³

2. Small Wins

It is possible that some executives do not see the inherent bias in considering appearance when deciding who tumbles through the looking

REV. 175 (1990) (discussing the difficulty flight attendants had in securing civil rights protection).

231. See Adamitis, *supra* note 157, at 208–09; see also Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1424 (1992) (indicating that action based on women's appearance in the workplace is allowed so long as both genders are at least nominally regulated).

232. This Article has already reviewed the range of self-help options, from plastic surgery to weight loss.

233. See generally Smith, *Part I*, *supra* note 143, at 177.

glass. Using the idea of “small wins,” employees who are aware of subtle bias related to appearance could engage in a strategy to encourage upper-level executives to realize and correct their hidden bias. However, this small wins strategy is tricky. The women chosen by upper-level executives as having high potential might not want to point out that superficial factors may have played a role in the decision-making process. Women chosen to tumble through the glass may believe their ability to travel to the other side of the looking glass relates solely or primarily to their merit. Groups on the other side of the glass (e.g., unattractive white women, African American women, gay men etc.) may find it difficult to engage in the political tiptoeing required by a small wins strategy. The groups that may have the strongest desire to point out “beauty bias” might look even less appealing to upper-level managers if they point out the irrationality involved in selecting “high potential” white women on the basis of their attractiveness.

3. The Link Between Lookism and Traditional Responses

Recall that traditional responses to glass ceiling issues include mentoring programs, succession planning, and flexible schedules as part of family-friendly workplaces.²³⁴ Mentoring programs work very well for employees upper-level executives have a desire to guide, protect, and reward.²³⁵ Succession planning works especially well for employees likely to be tapped as able to replace white men.²³⁶ In other words, when white men decide to pass along their power to someone else, they have to imagine that person is capable of the kind of excellence they themselves have demonstrated. Flexible schedules are a particularly attractive response to glass ceiling issues when high-level executives have a vested interest in helping certain groups achieve positions of power, along with an interest in helping them perform their familial roles effectively.

4. Lookism and Appeals to the Employers’ Self-Interest

Recall IBM’s strategy of appealing to self-interest as a response to discrimination. Customers may expect a corporation’s upper-levels to reflect the diversity in the community at large. Do employers have an interest in making sure their upper-level ranks reflect the level of beauty of

234. See generally SWISS, *supra* note 151.

235. See generally WELLINGTON & CATALYST, *supra* note 10.

236. See generally IPSARO, *supra* note 5.

the public at large? In other words, will customers want to see below-average looking employees in positions of power? The self-interest response is somewhat strained with regard to lookism, as it is quite possible that even ugly employees admire attractive leaders. They, like the public at large, might view attractiveness as somehow linked to competence and leadership potential.

E. The Employer as Partner, the Employer as Adversary

Section I indicated that it is important for individuals and groups of managers to determine whether the employer and employees are engaged in a partnership to shatter the glass ceiling, or whether instead, the employer and employees are in an adversarial relationship. With regard to lookism, Section II has envisioned a looking glass, rather than a glass ceiling. One way to consider the issue of lookism is to point out that the metaphor of a looking glass clarifies which groups of workers will tumble through the looking glass and into a possible partnership, and which are highly unlikely to tumble into opportunity no matter what they do.

Those who tumble through the looking glass can use non-legal strategies to move along a path to equality, pointing out all kinds of hidden bias (e.g., unbounded time) to partners who genuinely want to guide and counsel them. Those left on the other side of the glass have legal strategies that can be of some use.

III. CONCLUSION

The reality of the glass ceiling is messy. In fact, for some, the glass ceiling is the wrong metaphor. This article has suggested that the looking glass presents a more appropriate metaphor. Once an individual or group of managers recognizes the complicated nature of the obvious and hidden barriers to advancement in organizations, he or she must assess the extent to which legal and non-legal strategies for change hold promise. Whether an employee or group of employees is trying to shatter a glass ceiling, or tumble through a looking glass with the blessing of powerful people on the other side, they must recognize the many paths to justice, and the overriding importance of their relationship with their employer as a determinant of their strategy.