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SPLITTING HAIRS OVER HAIRSTYLES: A FORM OF RACIAL BIAS OR ENFORCEABLE GROOMING POLICIES?

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Abstract

In the past few years, there has been a trend to pass legislation that bans employers and schools from creating and enforcing appearance policies that have a disproportionate impact on racial minorities. This paper examines the current state of the law on this issue.

INTRODUCTION

In 2016, the Eleventh Circuit Court of Appeals dismissed a lawsuit filed by the Equal Employment Opportunity Commission (EEOC) on behalf of Chastity Jones against Catastrophe Management Solutions (CMS) claiming that the company discriminated against her when it declined to hire her because she wore dreadlocks.[i]

Jones had filed an application online as a customer service representative. She came to the interview in a blue business suit and her hair in short dreadlocks.CMS's Human Resource Manager, Jeannie Wilson offered Jones the job, but stated that the company could not hire her wearing dreadlocks. When Jones asked Wilson for an explanation, the latter replied that "They tend to get messy, although I'm not saying yours are, but you know what I'm talking about."[ii]

CMS had a hairstyle policy which it interpreted as banning dreadlocks. The policy stated that an employee's "hairstyle should reflect a business or professional image." No excessive or unusual colors are acceptable."[iii]

The EEOC filed the action claiming that Jones was a victim of racial discrimination. The agency argued that race does not have a biological definition but is a social construct. Moreover "race is not defined or limited by immutable characteristics."[iv]

The EEOC also claimed that race included "cultural characteristics related to race or ethnicity, which included "grooming practices" and that "dreadlocks are nonetheless a racial characteristic as is skin color.[v]

The EEOC argued the case on the theory of disparate treatment which means intentional discrimination. A preferable approach would have been to argue disparate impact. In a disparate impact case, a facially-neutral policy applies to all employees but has a disproportionate impact on a class protected by Title VII.[vi]

Thus, CMS's policy was race neutral on its face. CMS would not hire Chastity Jones with dreadlocks but it also would not hire a white woman if she wore dreadlocks.[vii]

Employer policies like those of CMS while seemingly neutral, predominantly affect black women because they exclude their natural hairstyles based on stereotypical notions that those styles are "unprofessional, messy, political, radical or excessive."[viii]

Thus, black women who wear hairstyles that are natural to the African-American culture can be excluded from the workplace. The alternative is to conform to white hairstyles by going to extraordinary lengths like wearing wigs or straightening the hair through chemicals or heat.[ix]

That black women's hair is a cultural characteristic is evidenced by an examination of history. In Africa, hair braiding patterns were unique to each tribe. According to "Hair Story:Untangling the Roots of Black Hair in America"[x] in the early 15th century, hair was a carrier of messages in West African societies.

> *Within these cultures hair was an integral part of a complex language system. Ever since African civilizations bloomed, hairstyles have been used to indicate a person's marital status, age, religion, ethnic identity, wealth and rank within the community.*[xi]

Because hair was closely related to African identity, slave traders would shave the heads of men and women to strip them of their individuality and community ties. A female slave's job would determine how she wore her hair. Women who worked in the fields wore head rags. If the female slave worked in the house, she wore her hair like a white woman.[xii]

The CMS case was a more recent example of a federal court ruling in favor of an employer's grooming

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policy. In Rogers v. American Airlines[xiii] a federal court ruled in favor of the airline, in a case involving Renee Rogers, a flight attendant.The court found that American's policy against wearing braids or cornrows was not race biased.

The court stated that the policy did not violate Title VII because it did not have a disparate impact on black women, was not job-related, was consistent with business necessity and was not applied discriminatorily.[xiv]

The court also stated that an employer policy which barred an Afro hairstyle would have been racial discrimination because that is a product of natural hair growth. The court noted that the flight attendant did not begin wearing cornrows until it was popularized in the movie "10."[xv]

The EEOC guidelines differ with these court decisions. Issued in 2006, the agency stated that Title VII allows employers to have neutral hairstyle rules but those directives should respect racial differences.The guidelines also note that Title VII "prohibits employers from applying neutral hairstyle rules more restrictively[xvi] to hairstyles work by African Americans.

The guidelines, however, are not regulations, so the federal courts are not bound by them or by the EEOC's interpretation.[xvii]

LEGISLATIVE REMEDIES

In February 2019, the New York City Commission on Human Rights (NYCCHR) issued new guidelines stating that "the targeting of people based on their hair or hairstyle at work, school or in public spaces will now be considered racial discrimination."[xviii]

While the law applies to anyone in New York City, its primary goal is the remedying disparate treatment of African Americans to maintain their "natural hair, treated or untreated hairstyles such as locks, cornrows, twists, braids, Bantu knots, fades, Afros and or the right to keep hair, in an uncut or untrimmed state."[xix]

The guidelines provide a cause of action to persons who have been harassed, threatened, punished, demoted, or fired because of the texture or style of their hair and also allows the Commission to impose penalties of up to $250,000 on those who violate the rules. There is no limit on damage awards.[xx]'

The Commission's action occurred in the wake of its investigation of complaints from workers at a medical center and a non-profit in the Bronx. There were also complaints from workers at an Upper East Side hair salon and a restaurant in Queens.[xxi]

Under the NYCCHR guidelines, hair is deemed "inherent to one's race" and can be closely associated with "racial, ethnic or cultural identities" and is thus "protected under New York's human rights law which bans discrimination based on "race, gender, national origin, religion or other protected classes."[xxii]

In the case of the salon, Sharon Dorram Color at Sally Hershberger, agreed to settle the complaints about hair based racial bias for a $70,000 fine.In addition, the salon is required to work with a city styling school that specializes in the care and styling of black hair, to advise current stylists at the salon, and to establish an internship program for hairdressers from "underrepresented groups."[xxiii]

Also, the salon's colorist or senior stylist must complete 35 hours of community services with a racial justice group that "works to combat hair discrimination and promote black beauty.[xxiv]

The salon is a high-end operation known for haircuts that cost $1000.00 and 24K hair products packaged in gold-trim. Among its patrons are celebrities like Meg Ryan, Kate Hudson, Christie Brinkley, Renee Zellweger, Michelle Obama, and Hillary Clinton.[xxv]

After New York City created these rules, other jurisdictions followed suit including New York State, New Jersey, California, and Montgomery County, Maryland.[xxvi] Considering similar legislation are Wisconsin, Michigan, Tennessee, Illinois, Pennsylvania, Massachusetts, Maryland, Georgia, Florida, South Carolina, Virginia and Kentucky.[xxvii]

California became the first state to bar racial discrimination based on hairstyle. The law revises the definition of race to include:

> *"traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."*[xxviii] *In a society in which hair has historically been one of many determining factors of a person's race and whether they were a second class citizen, hair remains a proxy for race.*[xxix]

Like the New York City guidelines, the law dubbed CROWN Create a Respectful and Open Workplace for Natural Hair" bans both employers and schools from enforcing grooming policies that claim to be race neutral but…. have a disproportionate impact on people of color."[xxx]

New Jersey's Crown Act, signed into law in December 2019, makes it illegal to discriminate against people at work, school, or in public places "based on their hair texture, hair type and protective hairstyles like braids, locks and twists".[xxxi] Penalties include a fine of up

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to $10,000 for a first violation. The maximum penalty for a second violation within five years is $25,000 and a third violation within seven years is $50,000.[xxxii]

The law was prompted by an incident in 2018 in which a black high school wrestler was forced to cut his dreadlocks or his school would have had to forfeit the match.[xxxiii]

THE IMMUTABLE CHARACTERISTIC

"A hairstyle, even one more closely associated with a particular ethnic group is a mutable characteristic." So wrote U.S. District Court Judge Charles R. Butler, Jr in 2014.[xxxiv]

The federal courts have traditionally referred to race as an "immutable trait, that a person cannot change, such as skin color, hair texture and facial features."[xxxv]

The district court dismissed Chastity Jones' lawsuit stating that dreadlocks are not an immutable trait because one can change one's hairstyle.

The EEOC and the NAACP Legal Defense Fund (LDF) however, contend that race is "more than a person's biological traits" and that research shows that race is "also a social construct based on shared culture and identity."[xxxvi] Because dreadlocks are closely associated with African-American culture a company policy which bars them is a form of racial discrimination.[xxxvii]

The argument is that racial discrimination in the 21st century is more covert than it was in previous decades. The LDF argues that current racial bias is more subtle with seemingly facially neutral grooming policies and stereotypes as more common ways to discriminate.[xxxviii]

LDF also cites a U.S. Supreme Court ruling in Price Waterhouse v. Hopkins[xxxix], in which male supervisors criticized Hopkins' demeanor as too aggressive and that she needed to behavior more femininely in order to get a promotion. The Court held that work-based gender stereotypes are a form of intentional sex discrimination under Title VII.

Nor did Congress contemplate sexual harassment as sex discrimination when Congress passed Title VII but in Meritor Savings Bank v. Vinson,[xl] the Court ruled that it was. Congress also likely did not anticipate that men would face sexual harassment but the Supreme Court held that Title VII prohibited such behavior in Oncale v. Sundowner Offshore Services.[xli]

The Courts have traditionally given employers latitude to impose grooming policies especially in cases where safety may be an issue.[xlii] Employers however should consider why they have their policies in place and whether there is a subtle racial bias behind the bans on dreadlocks, cornrows etc.Even the military which traditionally required austere hairstyles has relented and now allows braids and locks.[xliii]

CONCLUSION

Since the federal courts have maintained that dreadlocks are not an immutable racial characteristic under Title VII, the only remedy is for states and localities to enact their own laws. Even in the absence of regulation, employers should reexamine their rules on hair grooming and ask if the policies are truly related to workplace safety, efficiency, and professional appearance or if they are merely an unspoken vestige of racial bias based on Eurocentric concepts of beauty.

Appearance policies should be explicit, non-discriminatory and uniformly applied although requirements for safety and hygienic reasons can be justified.[xliv]

Managers and supervisors should undergo training to ensure that they are sensitive to cultural difference which are more prevalent in the 21st century workplace.[xlv]

Companies should caution supervisors not to comment on hairstyles to avoid possible discrimination claims.[xlvi]

Finally, they should make employees aware that the human resource departments are open to complaints about hairstyle issues and will work to resolve them.[xlvii]

California, New Jersey, New York City and other jurisdictions are in the vanguard of expanding the definition of racial discrimination. Employers should have no double that other states and municipalities will follow their lead. Hair discrimination is undoubtedly the new frontier of civil rights.[xlviii]

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[i] EEOC v. Catastrophe Management Solutions 852 F. 3d. 1018 (11th Cir. 2016)
[ii] Id at 1021-1022.
[iii] Id at 1022.
[iv] Imani Gandy, "Black Hair Discrimination Is Real – But Is It Against the law?" Rewire News, Apr 17, 2017 https://rewrite.news/able/2017/04/17black-hair-discrimination-real-but-is-it-against-law (hereinafter "Black Hair Discrimination is Real, But Is It Against the Law?")
[v] Id.

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[vi] Id.
[vii] Id.
[viii] Id.
[ix] Id. Use of some chemicals for hair straightening can create reproductive hazards for some women.
[x] Ayana Bird and Lori L. Tharps (authors) St. Martin's Griffin 2002. A study published in the International Journal of Cancer, conducted by scientists at the National Institute of Environmental Health Sciences, implicated hair straighteners in a 30 percent increase in the risk of breast cancer among all women using the products. African-American women were much more likely than white women to use hair straighteners. Nearly 75 percent of black women reported using hair straighteners which contain several chemicals that mimic the hormone estrogen, including parabens and some chemicals banned by the European Union. Many straighteners contain formaldehyde which is a carcinogen. Roni Caryn Rabin, "Possible Breast Cancer Risk in Hair Dye," N.Y. Times, Dec 5, 2019 at A25.
[xi] Black Hair Discrimination Is Real, But Is It Against the Law? supra, note 4.
[xii] Id.
[xiii] 527 F.Supp. 229 (S.D.N.Y. 1981)
[xiv] Title VII's Application of Grooming Policies and its Effect on Black Women's Hair in the Workplace," University of Missouri Libraries. https://library.guides.missouri.edv/c.php?g=593919ep=4124519
[xv] Bo Derek, a white female actor, was cast in the movie "10" produced by Blake Edwards. In her memoir, Julie Andrews, wife of Blake Edwards who also appeared in the film, wrote that Derek asked Blake's permission to try the iconic cornrows she wears in the film. In those days it was considered an inspired choice. Today, we recognize it as cultural appropriation." HomeWork, Hachette Books 2019 at 250.
[xvi] "Black Hair Discrimination Is Real, But Is It Against the Law? Supra, note 4.
[xvii] Id.
[xviii] Stacey Stowe, "New York City to Ban Discrimination Based on Hair," N.Y. Times, Feb 18, 2019 https://wwwnytimes.com/2019/02/18/style/hair-discrimination-new-york-city.html.
[xix] Id.
[xx] Id.
[xxi] Id.
[xxii] Id.
[xxiii] Ed Shanahan, "Luxe Salon Accused of Bias To Train to Style Black Hair, N.Y. Times, Nov 14, 2019 at A25.
[xxiv] Id.
[xxv] Id.
[xxvi] Id.
[xxvii] Mariel Padilla, "Student's Case Leads New Jersey to Enact Ban On Hair Discrimination," N.Y. Times, Dec. 23, 2019 at A21 (hereinafter "Student's Case Leads New Jersey to Enact Ban on Hair Discrimination")
[xxviii] Liam Stack, "Bill Prohibits Discrimination That's Based on Natural Hair," N.Y. Times, June 29, 2019 at A16.
[xxix] Id. See also California Senate Bill 188 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?billid-201920200SB188
[xxx] Id.
[xxxi] "Student's Case To Lead New Jersey to Enact Ban on Hair Discrimination, supra note 27.
[xxxii] Id.
[xxxiii] Id.
[xxxiv] 11 F. Supp. 3d 1139, 1144 (2014)
[xxxv] Alexia Fernandez Campbell, "A Black Woman Lost a Job Offer Because She Wouldn't Cut Her Dreadlocks. Now She Wants to Go to the Supreme Court, Vox, Apr 18, 2018 https://www.vox.com/2018/4/18/17242788/chastity-jones-dreadlock-job-discrimination
[xxxvi] Id.
[xxxvii] Id.
[xxxviii] Id.
[xxxix] 490 U.S. 228 (1989)
[xl] 477 U.S. 57 (1986)
[xli] 523 U.S. 75 (1998)
[xlii] Sharlene A. McEvoy, "A Hairy Question: Discrimination Against Employees Who Violate Employers' Appearance Policies", J. of Indiv. Employment Rights, Vol 4, No 1. 67-79 1995-96 (examining federal cases on rights of male employees to wear beards or long hair contrary to grooming policies) See also Willingham v. Macon Tel Publ'& Co 507 F. 2d. 1084 (5th Cir 195) (enbanc)(man denied job because his hair was too long claimed to be victim of sexual stereotyping)
[xliii]Kamika S. Shaw "Hair and Employer Regulations: Redefining Race- Based Discrimination" On Labor, Mar 9, 2017 (https://onlabor.org/hair-and-employer-regulations-redefining-race-based-discrimination) See also (http://time.com/31047647/military-black-hairstyles/) and https://www.nytimes.com/2017/02/10/us/army-ban-on-dreadlocks-black-servicewomen.html

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[xliv] M.P. McQueen "Hairstyles and Anti-Discrimination Laws: What Employers Need to Know", Law.com, Apr 23, 2019 https://www.laws.com/corpcounsel/2019/04/23/hairstyles-and-anti-discrimination-laws-what-employers-need-to-know See also (https://www.shrm.org/resourcesandtools/legal-and-compliance-state-and-local-updates/pages/california-bill-would-expand-definition-of-race-to-include-hairstyle.aspx

[xlv] Id.

[xlvi] Id.

[xlvii] Id.

[xlviii] Id.