

MY HAIR IS NOT LIKE YOURS: WORKPLACE HAIR GROOMING POLICIES FOR AFRICAN AMERICAN WOMEN AS RACIAL STEREOTYPING IN VIOLATION OF TITLE VII

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ABSTRACT

This article argues that workplace discrimination based on hair grooming policies disproportionately impacts African American women. The article seeks to establish that natural hair is an immutable characteristic, as is all hair, made mutable by social policies that impose an “acceptable” standard of beauty that was never meant to include or reflect black women. Often placed under workplace or other institutional grooming policies, the article posits that these policies are no more than a continuation of race-based policies that reflect unlawful stereotyping under Title VII and should be eliminated. Lastly, the article proposes a set of questions that test the imposition of such policies and urge the protection from employment discrimination of women who wear their hair in its natural state.

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INTRODUCTION

“Hair is a big deal.”¹

While it may seem like a trivial issue, hair is anything but. This is especially the case when it comes to African American women. It is estimated that the African American hair market is approaching \$500 billion a year.² That is half a trillion dollars—more than double Greece’s gross domestic product.³ Although this message apparently has not quite reached the corporate sector wholesale yet,⁴ African American women have increasingly moved to wearing their natural hair rather than using heat, chemicals, weave, or wigs to make it appear straight and thus more “mainstream” or “acceptable” in the workplace.⁵ In November 2015, the topic made CNN News when Maria Borges, an Angolan model, wore her short, natural hair in the Victoria’s Secret fashion show to be aired on television in December 2015,⁶ understandably prompting the query: “When will black women’s hair stop making history?”⁷

Workplace grooming policies generally require that hair be groomed in a manner that is professional,⁸ businesslike,⁹ conservative,¹⁰ not “too excessive,”¹¹ “eyecatching or different,”¹² or that employees cover hairstyles that are “unconventional,”¹³ and so on. These subjective terms have been interpreted by employers to ban from the workplace African American women’s natural

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¹ Michelle L. Turner, *The Braided Uproar: A Defense of My Sister’s Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN’S L.J. 115, 116 (2001).

² Antonia Opiah, *The Changing Business of Black Hair, a Potentially \$500b Industry*, HUFFINGTON POST (Jan. 24, 2014), http://www.huffingtonpost.com/antonia-opiah/the-changing-business-of-_b_4650819.html.

³ *Id.*

⁴ India Hill, *Viewpoint: How Is Natural, African-American Hair Viewed in the Workplace?*, USATODAY: COLLEGE (July 1, 2013), <http://college.usatoday.com/2013/07/01/viewpoint-how-is-natural-african-american-hair-viewed-in-the-workplace/>.

⁵ *Id.*; Antonia Opiah, *The Changing Business of Black Hair*, UN-RULY.COM (Jan. 23, 2014), <http://un-ruly.com/the-changing-business-of-black-hair/>.

⁶ Lisa Respers France, *Model Makes Hair History at Victoria Secret’s Runway Show*, CNN (Nov. 18, 2015), <http://www.cnn.com/2015/11/12/living/maria-borges-victorias-secret-natural-hair-feat/index.html>; Antonia Opiah, *When Will Natural Hair Stop Making History?*, UN-RULY.COM (Dec. 9, 2015), <http://un-ruly.com/when-will-natural-hair-stop-making-history/>.

⁷ Opiah, *When Will Natural Hair Stop Making History?*, *supra* note 6.

⁸ EEOC v. Catastrophe Mgmt. Sol., No. 14-13482, 2016 WL 4916851 (11th Cir. Sept. 15, 2016).

⁹ *Id.*

¹⁰ Ali v. Mount Sinai Hosp., No. 92 CIV. 6129 (JGK) (NG), 1996 WL 325585 (S.D.N.Y. June 12, 1996).

¹¹ *Catastrophe Mgmt. Sol.*, 2016 WL 491685.

¹² Hollins v. Atlantic Co., 188 F.3d 653 (6th Cir. 1999).

¹³ Eatman v. United Parcel Serv., 194 F. Supp. 2d 256 (S.D.N.Y. 2002).

hairstyles¹⁴—i.e., women wearing their hair consistent with its unaltered texture. However, these grooming policies excluding black women’s neatly groomed natural hairstyles are based on stereotypes rooted in race and gender, and operate to illegally exclude them from the workplace. Such policies can mean that African American women are not being hired, or are being fired, simply for neatly wearing their hair in its natural state.¹⁵ Under exclusionary, stereotype-based grooming policies, African American women are forced into a style that is accomplished only by changing the natural qualities of their hair or wearing false hair.¹⁶ The stereotype-based grooming policies violate Title VII of the Civil Rights Act of 1964,¹⁷ the nation’s foremost civil rights law, which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, or religion. These discriminatory policies prohibiting such hairstyles are generally based on seemingly neutral policies but are actually reflections of race and gender stereotyping that have a disparate impact on black women. As we will discuss, the legal reasoning underlying the Title VII stereotyping cases that led to interpreting gender to include discrimination on the basis of gender stereotyping is also applicable to race discrimination, including racial stereotyping involving the natural hairstyles of African American women.

In just the past few years, African American hair has been addressed in negative ways in public settings frequently enough that it is time to give the issue serious attention. First, in 2012, meteorologist Rhonda Lee wore her natural hair in a neat haircut as she broadcasted the weather on television.¹⁸ A white viewer said in a Facebook post that Ms. Lee should wear a wig or grow more hair, as her natural hair did not look good.¹⁹ Lee posted a respectful response explaining, among other things, that this was her natural hair as an African American and that she was proud of it.²⁰ Lee was terminated.²¹ Second, in June 2013, an Ohio

¹⁴ Natural hairstyles refer to African American women neatly styling their natural hair in ways consistent with the hair’s natural texture.

¹⁵ See Hill, *supra* note 4.

¹⁶ *Id.*

¹⁷ 42 U.S.C. § 2000e-2(a) (2012) states, in pertinent part: “(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

¹⁸ Whitney, *Rhonda Lee Fired for Responding to Comments About Her Natural Hair*, SPORTY AFROS (Dec. 11, 2015), <http://sportyafros.com/hair/rhonda-lee-fired-her-responding-to-comments-about-her-natural-hair/>.

¹⁹ *Id.* The viewer’s Facebook comment stated, “the black lady that does the news is a very nice lady. [T]he only thing [] she needs to wear [is] a wig or grow some more hair. [I]’m not sure if she is a cancer patient. [B]ut still it[’]s not something myself that [I] think looks good on [TV]. [W]hat about letting someone a male have waist long hair do the news” *Id.*

²⁰ *Id.* Rhonda Lee’s response stated: “Hello Emmitt—I am the ‘black lady’ to which you are referring. I’m sorry you don’t like my ethnic hair. And no I don’t have cancer I am very proud of my African-American ancestry which includes my hair. For your edification: traditionally our hair

charter elementary school attempted to issue a rule banning afro puffs²² and twists²³—both popular, natural styles for little black girls.²⁴ After national attention, the school quickly apologized and said that it intended the provision for boys.²⁵ Third, in 2014, the U.S. Army banned the wearing of certain natural hairstyles very common among African American women,²⁶ only to modify its regulations shortly thereafter²⁷ following a vocal outcry and a White House petition against the regulations.²⁸ One African American female soldier said, “I either get a wig or be NJPed [non-judicially punished], all because of the way my hair grows naturally.”²⁹

This article will analyze cases involving negative grooming policy outcomes for black women wearing their natural hair in the workplace, provide context for

doesn't grow downward. It grows upward. Many Black women use strong straightening agents in order to achieve a more European grade of hair and that is their choice. However in my case I don't find it necessary. I'm very proud of who I am and the standard of beauty I display. Women come in all shapes, sizes, nationalities, and levels of beauty. Showing little girls that being comfortable in the skin and HAIR God gave me is my contribution to society. Little girls (and boys for that matter) need to see that what you look like isn't a reason to not achieve their goals. Conforming to one standard isn't what being American is about and I hope you can embrace that. Thank you for your comment and have a great weekend and thanks for watching.” *Id.*

²¹ *Id.*; Julee Wilson, *Rhonda Lee Fired: TV Station Responds to Meteorologist's Claim She Was Fired for Facebook Comments About Her Natural Hair*, HUFFINGTON POST (Dec. 11, 2012), http://www.huffingtonpost.com/2012/12/11/rhonda-lee-fired-natural-hair-comments_n_2279950.html; Danielle Young, *I Am Not My Hair: Black Women Have to Apologize for Being Natural or Face Unemployment*, HELLO BEAUTIFUL, <http://hellobeautiful.com/2012/12/14/i-am-not-my-hair-black-women-have-to-apologize-for-being-natural-or-face-unemployment/> (last visited Sept. 26, 2015).

²² Afro puffs are “very curly, usually afro (kinky) textured hair that is pulled into two or more ponytails. The hair, instead of hanging down like straighter and less thick textures, will ‘puff’ out into a spherical shape.” *Afro Puffs*, DEFINITHING, <http://definithing.com/afro-puffs/> (last visited Apr. 29, 2016).

²³ Rebecca Klein, *Ohio School Apologizes After Attempting to Ban ‘Afro-Puffs’ and Twisted Braids*, HUFFINGTON POST (June 25, 2013), http://www.huffingtonpost.com/2013/06/25/ohio-school-afro-puff-horizon-science-academy_n_3498954.html.

²⁴ *Id.*

²⁵ *Id.*

²⁶ On March 18, 2014, the U.S. Army issued new hair guidelines which, among other things, regulated the wearing of braids, cornrows, and twists for female soldiers. U.S. DEP’T OF THE ARMY, ARMY REGULATION 670-1, UNIFORMS AND INSIGNIA: WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (2015), http://armypubs.army.mil/epubs/pdf/r670_1.pdf [hereinafter U.S. ARMY PERSONAL APPEARANCE POLICY]. Dreadlocks have been banned in the Army since 2005 but the new policy more specifically defined the accepted hairstyles and gave measurements that must be adhered to. *E.g.*, *id.* §§ 1-8.

²⁷ On August 13, 2014, the U.S. Army Personal Appearance Policy was modified to reflect these concerns. *Id.*; Maya Rhodan, *U.S. Military Rolls Back Restrictions on Black Hairstyles*, TIME: POLITICS (Aug. 13, 2014), <http://time.com/3107647/military-black-hairstyles/>.

²⁸ There was an immediate outcry on social media, with black female soldiers saying the new grooming regulations are racially biased. Michelle Tan, *Black Female Troops Say Grooming Rule ‘Racially Biased’*, USA TODAY (Apr. 1, 2014, 10:24 AM), <http://www.usatoday.com/story/news/nation/2014/04/01/soldiers-complain-army-hairstyle-rule-racially-biased/7149757/>; Tom Roeder, *Petition: Regs Discriminate Against Black Women*, GAZETTE (Apr. 2, 2014), <http://gazette.com/petition-army-appearance-regs-discriminate-against-black-women/article/1532608>; Douglas Ernst, *Female Army Soldier Petitions White House on ‘Racially Biased’ Grooming Regulations*, WASH. TIMES (Apr. 2, 2014), <http://www.washingtontimes.com/news/2014/apr/2/female-army-soldier-petitions-white-house-racially/>.

²⁹ *Id.*

black women' decisions to wear their hair this way, and suggest a policy approach that will both allow the employer to maintain the professional workplace it seeks, yet address the needs of African American women.³⁰ Part I of the article examines Title VII and how the Equal Employment Opportunity Commission ("EEOC"), the agency charged with enforcing Title VII of the Civil Rights Act of 1964, addresses issues of race and grooming policies in its Compliance Manual. Part II provides a brief history of the stereotypes that form the basis for how African American hair is generally viewed, as reflected in the workplace grooming policies. Part III discusses the case law involving workplace grooming policies and African American hair. Part IV sets forth the argument for extending Title VII to workplace grooming policies on the basis that stereotyping of African American natural hair constitutes race discrimination. Part V describes a policy proposal, which includes questions that employers should ask as a foundation for creating an inclusive grooming policy.

I. TITLE VII AND THE EEOC GUIDELINES ON GROOMING POLICIES AND HAIR TEXTURE

Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin."³¹ There are two theories of recovery under Title VII: disparate treatment³² and disparate impact.³³

Disparate treatment addresses discrimination that is intentional.³⁴ For instance, a policy permitting only women to be hired as flight attendants,³⁵ or a policy of prohibiting blacks to be poker dealers because whites did not want to touch cards dealt to them by black dealers, are examples of such intent.³⁶

Disparate impact is used to challenge workplace policies that are neutral on their face but have a disparate or disproportionate impact on a group protected by the law such that it adversely affects that group at a higher rate than other similarly situated individuals for reasons unrelated to ability to perform the job.³⁷ For instance, policies that required a high school diploma and passing score on two standardized tests unrelated to job requirements that had the impact of screening

³⁰ For discussion of the unique intersectionality of race and gender, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Darren Lenard Hutchinson, *Identity Crisis: 'Intersectionality,' 'Multidimensionality,' and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001).

³¹ 42 U.S.C. § 2000e-2(a) (2012).

³² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

³³ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

³⁴ See, e.g., *McDonnell Douglas Corp.*, 411 U.S. 792.

³⁵ *Wilson v. SW. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

³⁶ *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987 (5th Cir. 2005).

³⁷ *Griggs*, 401 U.S. 424.

out black employees at a higher rate than whites,³⁸ having a minimum height and weight requirement for prison guards that screened out female applicants at a higher rate without showing such requirements to be necessary for the job;³⁹ or imposing a policy that all male delivery drivers be clean-shaven, which screened out blacks at a significantly increased rate because of the much higher occurrence of *pseudofolliculitis barbae* in the black male population, are examples of how a seemingly neutral policy can disproportionately impact a protected class.⁴⁰

The EEOC enforces federal laws prohibiting workplace discrimination⁴¹ and issues a Compliance Manual as guidance for employers to monitor and measure employment opportunity requirements and employment policies.⁴² On its website, the EEOC has published the following guidance on race, race stereotyping, and immutable characteristics: “Discrimination on the basis of an immutable characteristic associated with race, such as skin color, hair texture, or certain facial features violates Title VII, even though not all members of the race share the same characteristic.”⁴³

Section 15-V(B) of the Compliance Manual, in regard to “Race and Color Discrimination,” states the following about disparate impact:

A finding of discrimination in the form of disparate impact does not depend on the existence of an unlawful motive. Disparate impact analysis is aimed at removing barriers to [Equal Employment Opportunity] that are not necessarily intended or designed to discriminate—“practices that are fair in form, but discriminatory in operation” in that they operate as “built-in headwinds for [a protected class] and are unrelated to measuring job capability.”⁴⁴

Title VII exempts certain policies or practices from disparate impact challenges—most notably, seniority systems. However, the disparate impact approach applies to all types of employment criteria, whether objective or subjective,⁴⁵ including as here relevant: recruitment practices; hiring or promotion

³⁸ *Id.*

³⁹ *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

⁴⁰ *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795 (8th Cir. 1993).

⁴¹ The Commission was created by the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2012)). The employment section of this Act is Title VII. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

⁴² See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, COMPLIANCE MANUAL (2000), <http://www.eeoc.gov/laws/guidance/compliance.cfm> [hereinafter EEOC COMPLIANCE MANUAL]. While the EEOC’s Compliance Manual is not law, it is entitled to deference. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984) (“considerable weight should be accorded to . . . the principle of deference to administrative interpretation”); *Singh v. Green Thumb Landscaping, Inc.*, 390 F. Supp. 2d 1129 (M.D. Fla. 2005); *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (“Courts should respect an agency’s contemporaneous construction of its founding statute.”).

⁴³ *Facts About Race/Color Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/publications/fs-race.cfm> (last visited Sept. 26, 2015).

⁴⁴ EEOC COMPLIANCE MANUAL, *supra* note 42, § 15-V(B).

⁴⁵ See *Watson v. Fort Worth Bank*, 487 U.S. 997 (1988).

criteria; layoff or termination criteria; and appearance or grooming standards.⁴⁶

Further, Title VII's prohibition of race discrimination includes: "[e]mployment discrimination based on a person's physical characteristics associated with race, such as a person's . . . hair"⁴⁷

In further defining how appearance standards may violate Title VII's prohibition of race discrimination, the EEOC's Compliance Manual states that:

Appearance standards generally must be neutral, adopted for nondiscriminatory reasons, consistently applied to persons of all racial and ethnic groups, and, if the standard has a disparate impact, it must be job-related and consistent with business necessity. The following are examples of areas in which appearance standards may implicate Title VII's prohibition against race discrimination Hair: Employers can impose neutral hairstyle rules—e.g., that hair be neat, clean, and well-groomed—as long as the rules respect racial differences in hair textures and are applied evenhandedly. For example, Title VII prohibits employers from preventing African American women from wearing their hair in a natural, unpermed “afro” style that complies with the neutral hairstyle rule. Title VII also prohibits employers from applying neutral hairstyle rules more restrictively to hairstyles worn by African Americans.⁴⁸

In following these guidelines, therefore, grooming policies that list unacceptable hairstyles based on stereotypes about natural African American hair violate the EEOC's guidelines requiring an employer to “respect racial differences in hair textures.”⁴⁹ Further, such exclusionary policies force black women unnecessarily to conform to hair grooming policies that do not take into consideration the natural texture of black women's hair, thus forcing them to use expensive and dangerous heat, chemicals, weave, or other unnatural means to comply with an employer's grooming policy. Consequently, rejection of a black employee's neatly groomed natural hair is essentially a rejection of that employee's racial characteristics—natural hair—and, therefore, is illegal. Hence, based on the EEOC's stated position, a black claimant denied a job because her natural hair is styled in dreadlocks, cornrows, or braids—even if they are neat, clean, and well-groomed—would have a viable claim of race discrimination in violation of Title VII.

II. ORIGINS OF THE NATURAL HAIR STEREOTYPE

The U.S. House of Representatives in 2008⁵⁰ and the Senate in 2009⁵¹ issued apologies for the U.S.'s history of slavery in which members of Congress

⁴⁶ EEOC COMPLIANCE MANUAL, *supra* note 42, §§ 15-V(A)-(B).

⁴⁷ *Id.* § 15-II.

⁴⁸ *Id.* § 15-VII(B)(5).

⁴⁹ *Id.*

⁵⁰ H.R. 194, 110th Cong. (2008).

⁵¹ S. Con. Res. 26, 111th Cong. (2009).

acknowledged the lingering consequences felt today from the vestiges and aftermath of slavery. In its formal apology to African American citizens, the concurrent Senate Resolution proclaimed, "African Americans were brutalized, humiliated, and dehumanized . . . and stripped of their heritage; that the visceral racism was enmeshed in the social fabric of the United States, and that African Americans continue to suffer from the consequences of slavery long after [it] was formally abandoned."⁵² The lingering consequences are at the heart of the issues regarding workplace grooming policies as they apply to black women wearing natural hair. As the following brief history of the origin of black hair stereotypes will demonstrate, Americans have a long and deep history with black hair that leads directly to the stereotypes that operate today.

Historically in Africa, Africans' took pride in their hair being clean, neat, and well-groomed.⁵³ Hair was groomed in elaborate braiding or cutting patterns that were often adopted by tribes as their own unique style and by which they were known to other tribes.⁵⁴ Early archeological excavations have found elaborately carved combs and other hair ornaments used to adorn hair.⁵⁵

When Africans were captured by slave traders, they were simply taken from wherever they were found, with whatever they had on, and with no opportunity to gather belongings or notify family.⁵⁶ They were taken to ports and put into holds of ships, packed spoon fashion, often in spaces only about eighteen inches high, and left to make the three-month or so trip across the Atlantic chained together, living in the dark.⁵⁷ One of the traders' first acts of control was to commodify their cargo. They cut off the hair of those they captured as a show of power.⁵⁸ Hair identified tribes. Removing it decreased a slave's ability to remain attached to a community, thus weakening the subjugated person.

In order to maintain the subordination of the enslaved, it was important to

⁵² *Id.*

⁵³ SAIS SHARPE, GET YOUR LENGTH: HELPING WOMEN WITH NATURAL HAIR RETAIN LENGTH 2-3 (2013); AYANA D. BYRD & LORI L. THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA (2002); *Black Hair History: Discovering Our Roots Timeline*, THIRSTY ROOTS, <http://www.thirstyroots.com/black-hair-history/discovering-our-roots-do-i-hate-my-hair> (last visited Apr. 24, 2016).

⁵⁴ See BYRD & THARPS, *supra* note 53.

⁵⁵ See, e.g., *Ain't Nothing Wrong With Nappy Hair!*, LOCKSANDLINKS, <http://www.locksandlinks.com/article/nothing-wrong-with-nappy-hair> 38 (last visited Apr. 24, 2016). See also *Origins of the Afro Comb: 6000 Years of Culture, Politics and Identity*, UNIV. OF CAMBRIDGE, <http://www.cam.ac.uk/research/news/origins-of-the-afro-comb-6000-years-of-culture-politics-and-identity> (last visited Apr. 24, 2016); *A Brief History of Afro-Textured Hair*, BLACK GIRL WITH LONG HAIR (Oct. 5, 2011), <http://blackgirllonghair.com/2011/10/a-brief-history-of-afro-textured-hair/>.

⁵⁶ See, e.g., MARCUS REDIKER, *THE SLAVE SHIP: A HUMAN STORY* 106 (2007); HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE 1440-1870*, at 106, 407, 412-16 (1999).

⁵⁷ *Id.*; EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* 40 (2014).

⁵⁸ SAIS SHARPE, GET YOUR LENGTH: HELPING WOMEN WITH NATURAL HAIR RETAIN LENGTH 2-3, 10 (2013).

remind them constantly of their subservient position.⁵⁹ Some jurisdictions passed laws requiring that black women cover their hair.⁶⁰ This outward show of status was apparent even down to the “Negro cloth”⁶¹ slaves were required to wear to constantly remind them of their position in society as slaves.⁶² In 1822, a South Carolina grand jury addressing the question of whether the enslaved should be permitted to wear ordinary cotton cloth, determined that “Negroes should be permitted to dress only in coarse stuffs. Every distinction should be created between whites and the Negroes, calculated to make the latter feel the superiority of the former.”⁶³

Distinctions were also drawn about the physical differences between whites

⁵⁹ See, e.g., KENNETH M. STAMP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 141 (1956) (“The power of the master must be absolute, to render the submission of the slave perfect. ‘It is a pity,’ a North Carolina planter wrote sadly, ‘that agreeable to the nature of things, slavery and tyranny must go together and that there is no such thing as having an obedient and useful slave, without the painful exercise of undue and tyrannical authority.’ The legislatures and course of the antebellum south recognized this fact and they regulated the relationship of the master and slave accordingly ‘The power of the master must be absolute to render the submission of the slave perfect,’ a southern judge once affirmed.” (internal citations omitted)); *id.* at 66 (“A South Carolinian limned a perfect relationship between a slave and his master, ‘that the slave should know that his master is to govern absolutely, and he is to obey implicitly. That he is never for a moment to exercise either his will or judgment in opposition to a positive order.’ The second step was to implant in the bondsmen themselves a consciousness of personal inferiority. They had to know and keep their places, ‘to feel the difference between master and slave,’ to understand that bondage was their natural state. They had to feel that African ancestry tainted them, that their color was a badge of degradation.” (internal citations omitted)); WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* 23 (1999) (“Slaveholders used that [the threat of being sold away] to govern their slaves. As slaveholder, Thomas Maskell proudly put it to a man who had sold him some family slaves, ‘I govern them the same way your late brother did, without the whip by stating to them that I should sell them if they do not conduct themselves as I wish.’”).

⁶⁰ See, e.g., *Slave Women and the Head Wrap*, PBS.ORG, <http://www.pbs.org/wnet/slavery/experience/gender/feature6.html> (last visited Sept. 26, 2015); Helen Bradley Griebel, *The African American Woman’s Headwrap: Unwinding the Symbols*, CORNELL UNIV., <http://char.txa.cornell.edu/griebel.htm> (last visited Sept. 26, 2015).

⁶¹ Negro cloth is “a strong coarse cloth formerly used in making clothes for black slaves.” *Negro Cloth*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/negro%20cloth> (last visited Jan. 26, 2016).

⁶² *Textile Firm Linked to ‘Negro Cloth’ for Slaves*, USATODAY.COM (Feb. 21, 2002, 12:14 AM), <http://usatoday30.usatoday.com/money/general/2002/02/21/slave-westpoint-stevens.htm>. For other ways in which slaves, and later freemen, were made to feel their low position in society see, e.g., DAVID K. FREMON, *THE JIM CROW LAWS AND RACISM IN AMERICAN HISTORY* 13-41 (2000); DONALD L. GRANT, *THE WAY IT WAS IN THE SOUTH: THE BLACK EXPERIENCE IN GEORGIA* 30, 52 (1993); VIRGINIA FOSTER DURR, *OUTSIDE THE MAGIC CIRCLE: THE AUTOBIOGRAPHY OF VIRGINIA FOSTER DURR* 17, 19, 59 (1985); SARA BROOKS, *YOU MAY PLOW HERE: THE NARRATIVE OF SARA BROOKS* 91 (Thordis Simonsen ed., 1986); WILLIAM H. CHAFE, *REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH* 57, 59-70 (2001); JAMES MELLON, *BULLWHIP DAYS: THE SLAVES REMEMBER: AN ORAL HISTORY* (James Mellon ed., 1988); SOLOMON NORTHRUP, *TWELVE YEARS A SLAVE* 18-25 (1968); DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* 7-28 (6th ed. 2008); PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICANS* 23-52 (2002); HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 5-8 (1987); TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS* 1954-63, at 67 (1988); MARTIN TIERNEY, *MARTIN LUTHER KING: STRIDE TOWARD FREEDOM* 28-29 (1989); C. STEPHEN BADGLEY, *AMERICAN SLAVERY AS IT WAS IN 1839: TESTIMONY OF A THOUSAND WITNESSES* 143 (2013).

⁶³ *Textile Firm Linked to ‘Negro Cloth’ for Slaves*, USATODAY.COM (Feb. 21, 2002, 12:14 AM), <http://usatoday30.usatoday.com/money/general/2002/02/21/slave-westpoint-stevens.htm>.

and Africans, with the dark skin, broad noses, large lips, and kinky hair of Africans being denigrated and the features of whites being exalted.⁶⁴ As one planter wrote, it was necessary

to implant in the bondsmen themselves a consciousness of personal inferiority. They had to know and keep their places, to “feel the difference between master and slave,” to understand that bondage was their natural state. They had to feel that African ancestry tainted them, that their color was a badge of degradation.⁶⁵

The dehumanization and degradation suffered by slaves survived the abolition of slavery and continued through Jim Crow segregation. The “visceral racism” sewn into the “social fabric of the United States”⁶⁶ continued. The stereotypical images of blacks as big-lipped, bulging-eyed, grinning, nappy-haired caricatures were firmly planted in the national conscious by marketing products across the country containing such images.⁶⁷ These images appeared on a variety of products from seed packages to golf clubs.⁶⁸

In an effort to distance themselves from the nappy-haired caricatures they had become in the public’s eye and to attempt to make themselves more acceptable, black women began to treat their natural hair with products designed to straighten and lengthen it.⁶⁹ Hot combs and chemical straighteners became popular items used to accomplish this.⁷⁰ Through these processes, black women were able to remove the natural kinks and curls and change their natural hairstyles so as to better

⁶⁴ BAPTIST, *supra* note 57, at 240; David Pilgrim, *Nigger and Caricature*, JIM CROW MUSEUM (2001), <http://www.ferris.edu/jimcrow/caricature/>.

⁶⁵ STAMP, *supra* note 59, at 66.

⁶⁶ S. Con. Res. 26, 111th Cong., at pmb1. (2009).

⁶⁷ See, e.g., *Jim Crow Museum of Racist Memorabilia*, FERRIS STATE UNIV. (2012), <http://www.ferris.edu/jimcrow/caricature/>.

⁶⁸ *Id.* These caricatures continue to exist. There is currently a movement to get rid of Aunt Jemima. First brought to life in 1885 as a rag-headed symbol of the southern plantation mammy, her symbol still reminds people of the vestiges of slavery. Chauncey Alcorn, *Beyond the Confederate Flag: Five More Racially Insensitive Things that Need to Go Away*, N.Y. DAILY NEWS (June 24, 2015, 8:11 PM), <http://www.nydailynews.com/news/national/racially-insensitive-article-1.2270225>.

⁶⁹ Chanel Donaldson, *Hair Alteration Practices Amongst Black Women and the Assumption of Self-Hatred*, NYU STEINHARDT (2016), <http://steinhardt.nyu.edu/appsycho/opus/issues/2012/fall/hairalteration>. In her article, Chanel Donaldson posits that changing the texture of hair for black women was an attempt to fit into a model of white beauty and not to attain beauty on their own terms. *Id.* She states: “[H]air alteration is effective in transforming the Black woman into something that is simply adequate or sufficient rather than beautiful.” *Id.* (internal citations omitted).

⁷⁰ For example, in 1957, Johnson Products introduced Ultra Sheen, a lye-based chemical relaxer for women, which revolutionized the black hair care industry. JULIE A. WILLETT, *THE AMERICAN BEAUTY INDUSTRY ENCYCLOPEDIA* 167-68 (Julie A. Willett ed., 2010). It continued to evolve its products so that in 1970, Johnson Products introduced Gentle Treatment, the first non-lye relaxer on the market. *Id.* This product, and many copycats, remain on the market. *Id.* Much earlier, Madame C.J. Walker, who incorporated her hair care company in 1910, introduced the wide tooth hot comb to her customers. Henry Louis Gates, Jr., *Madam Walker, the First Black American Woman to Be a Self-Made Millionaire*, PBS.ORG (2013), <http://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/100-amazing-facts/madam-walker-the-first-black-american-woman-to-be-a-self-made-millionaire/>. This product, previously invented by a Frenchman in a small-tooth version, became a staple in black households after Madame C.J. Walker began producing it. *Id.*

emulate the smooth and soft-curved styles worn by white women.⁷¹ Acceptable styles such as the page boy, bob, ponytail, and other styles worn by white women when hair is straight or long, or both, was finally achievable by black women.⁷²

Although Jim Crow segregation ended with passage of the Civil Rights Act in 1964,⁷³ more subtle forms of race discrimination based on the same animus and stereotypes appeared in the workplace. Such race discrimination is reflected in the statement of the hotel manager, who told a black female employee in 1987 when she wore a natural braided hairstyle to work: “I can’t understand why you would want to wear your hair like that anyway. What would our guests think if we allowed you all to wear your hair like that?”⁷⁴ Or, the hospital manager who told a black woman in 1996 when she came to work in a neatly-cut, natural haircut reflective of the times that she looked like she “belong[ed] in a zoo.”⁷⁵

It is against this backdrop of the more subtle, though lingering, forms of racial discrimination⁷⁶ that in 2006 the EEOC included in its Compliance Manual guidelines for an employer to use when including hair in its grooming policy.⁷⁷ Grooming policies that prohibit black women from wearing natural, unpermed hairstyles can be the basis of racial discrimination because of the disparate impact they have on black women. This is true because “discrimination on the basis of an immutable characteristic associated with race . . . such as hair texture,”⁷⁸ even though “not all members of the race share the same characteristic,”⁷⁹

⁷¹ H&MUA Team, *Hair and Makeup Artist Handbook: Women’s 1950s Hairstyles: An Overview*, HAIRANDMAKEUPARTIST.COM (July 23, 2013), (<http://hair-and-makeup-artist.com/womens-1950s-hairstyles/>) (depicting white and black women from the 1950s wearing the same hairstyles).

⁷² *Id.*

⁷³ See, e.g., MARGO JEFFERSON, *NEGROLAND: A MEMOIR* 53-54 (2015); KATHY RUSSELL ET AL., *THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS* 1-2 (1992); MARITA GOLDEN, *DON’T PLAY IN THE SUN: ONE WOMAN’S JOURNEY THROUGH THE COLOR COMPLEX* 124-28 (2004); BLISS BROYARD, *ONE DROP: MY FATHER’S HIDDEN LIFE—A STORY OF RACE AND FAMILY SECRETS* 17, 67, 75 (2007).

⁷⁴ E.R. Shipp, *Braided Hair Style at Issue in Protests Over Dress Codes*, N.Y. TIMES (Sept. 23, 1987), <http://www.nytimes.com/1987/09/23/garden/braided-hair-style-at-issue-in-protests-over-dress-codes.html>.

⁷⁵ *Ali v. Mount Sinai Hosp.*, No. 92 CIV. 6129 (JGK) (NG), 1996 WL 325585, at *7 (S.D.N.Y. June 12, 1996). A “fade” haircut, popular several years ago and now reappearing on the scene, is one in which an afro is longer on the top and shorter on the sides. See *id.* at *2.

⁷⁶ In its overview and explanations of race discrimination in the new compliance manual provisions, the EEOC stated: “Today, the national policy of nondiscrimination is firmly rooted in the law. In addition, it generally is agreed that equal opportunity has increased dramatically in America, including in employment Yet significant work remains to be done The purpose of this Manual Section is to provide guidance on Title VII’s prohibition against workplace discrimination based on race or color. It discusses coverage issues, . . . [and] various employer practices The Manual Section includes numerous examples, as well as guidance reflecting the Commission’s strong interest in proactive prevention and ‘best practices.’ . . . Title VII’s prohibition of race discrimination generally encompasses: . . . Culture: Employment discrimination because of cultural characteristics related to race or ethnicity. Title VII prohibits employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person’s . . . grooming practices.” EEOC COMPLIANCE MANUAL, *supra* note 42, §§ 15-1 to -II (internal citations omitted).

⁷⁷ *Id.* § 15-V(B).

⁷⁸ *Facts About Race/Color Discrimination*, *supra* note 43.

⁷⁹ *Id.*

violates Title VII.

III. TITLE VII'S RACE-BASED EMPLOYMENT DISCRIMINATION CASES

Workplace grooming restrictions, which exclude the wearing of hairstyles of African Americans with their hair worn in its natural state, have been challenged numerous times on the basis of race discrimination under Title VII.⁸⁰ While hair is not enumerated specifically within Title VII's protected classes, the Sixth Circuit has held that workplace grooming policies restricting certain hairstyles are discriminatory under Title VII if they are applied only to black employees.⁸¹ Other courts have also recognized that employers cannot use grooming standards as a pretext to refuse to hire black applicants.⁸² Thus, courts do recognize that hair can serve as a basis for employment discrimination forbidden by Title VII when a grooming policy is used unlawfully against a protected class.

However, Title VII race-based challenges to an employer's grooming policy generally have not been successful. Courts have regularly upheld an employer's grooming policy if it is neutral⁸³ and reasonable.⁸⁴ Policies have been upheld where they differentiate on the basis of sex, for example, forbidding long hair on men but not on women.⁸⁵ These policies were not a violation of Title VII because they are based on sex discrimination,⁸⁶ not race discrimination. Policies that

⁸⁰ See, e.g., *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256 (S.D.N.Y. 2002); *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 661-62 (6th Cir. 1999); *EEOC v. Catastrophe Mgmt. Sol.*, No. 14-13482, 2016 WL 4916851 (11th Cir. Sept. 15, 2016); *Ali v. Mount Sinai Hosp.*, No. 92 CIV. 6129 (JGK) (NG), 1996 WL 325585 (S.D.N.Y. June 12, 1996); *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795 (8th Cir. 1993); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385 (11th Cir. 1998); *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349 (4th Cir. 1976); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981); *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306 (M.D. Ga. Apr. 25, 2008); *Gadson v. Ala. Dept. of Corr.*, No. 2:13-CV-105-VEH, 2013 WL 3879903 (N.D. Ala. July 26, 2013). Other bases besides race have been used as well, most notably Title VII religious challenges by Rastafarians who allege that their religion prohibits them from cutting their dreadlocked hair and beards. See, e.g., *Xodus v. Wackenhut Corp.*, 619 F.3d 683 (7th Cir. 2010); *Booth v. Maryland*, 337 Fed. Appx. 301 (4th Cir. 2009). Excluded from this article are cases that challenge policies directed toward prison populations as the considerations there are outside the scope of this article although they are Title VII race-based claims. See, e.g., *Jackson v. Dist. of Columbia*, 254 F.3d 262 (D.C. Cir. 2001).

⁸¹ *Hollins v. Atlantic Co.*, 188 F.3d 652, 661-62 (6th Cir. 1999). The Sixth Circuit remanded the case after testimony of the plaintiff's supervisors supported the contention that the plaintiff's hairstyle met the employer's grooming standards but violated an unwritten policy of being "eyecatching," although at least five white female employees wore the same hairstyle without reprimand. *Id.* at 661.

⁸² *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460 (N.D. Cal. 1978) (citing *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1125 (D.C. Cir. 1973)).

⁸³ See, e.g., *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385 (11th Cir. 1998).

⁸⁴ See, e.g., *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976) ("A grooming policy will be sustained unless the decision to enact the regulation or the regulation itself is so irrational that it may be branded arbitrary."); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 609 (S.D.N.Y. 1981) ("At least seven circuits have ruled that Title VII does not prohibit an employer from making reasonable employment decisions based on factors such as grooming and dress.").

⁸⁵ *Willingham*, 507 F.2d 1084.

⁸⁶ *Id.*

include more specific references to hairstyle, prohibiting dreadlocks,⁸⁷ braids, or cornrows,⁸⁸ are not the same as prohibiting long or short hair. The EEOC prohibits discrimination on the basis of “an immutable characteristic associated with race, such as . . . hair texture.”⁸⁹ For example, a grooming policy that prohibited all dreadlocks longer than shoulder length, whether worn by a male or female employee, would not violate Title VII. However, prohibiting all dreadlocks would be a violation because hair texture is “an immutable characteristic associated with race,” even though only some blacks wear dreadlocks.⁹⁰ Thus, the court’s statement in *Eatman v. United Parcel Service*, that “it is beyond cavil that Title VII does not prohibit discrimination on the basis of locked hair”⁹¹ is inconsistent with the EEOC Compliance Manual.

Recently, the Eleventh Circuit, in *EEOC v. Catastrophe Management Solutions*,⁹² held that an employer did not violate Title VII when it rescinded a job offer to an applicant who refused to cut off her dreadlocks. Despite the EEOC’s arguments to the contrary⁹³ and consistent with its precedent,⁹⁴ the Court determined that dreadlocks were not an immutable characteristic protected by law.⁹⁵

While not prohibiting dreadlocks *per se*, the Catastrophe Management Solution’s grooming policy stated: “All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines . . . [.] hairstyles should reflect a business/professional image. No excessive hairstyles or unusual

⁸⁷ *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256 (S.D.N.Y. 2002).

⁸⁸ *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

⁸⁹ EEOC COMPLIANCE MANUAL, *supra* note 42.

⁹⁰ *Id.*

⁹¹ *Eatman*, 194 F. Supp. 2d at 262.

⁹² *EEOC v. Catastrophe Mgmt. Sol.*, No. 14-13482, 2016 WL 4916851 (11th Cir. Sept. 15, 2016).

⁹³ *Id.* at *2. The EEOC posited four arguments. First, the EEOC stated that race “is a social construct and has no biological definition.” *Id.* Second, the EEOC asserted that “the concept of race is not limited to or defined by immutable characteristics.” *Id.* Third, according to the EEOC Compliance Manual, the “concept of race encompasses cultural characteristics related to race or ethnicity,” including “grooming practices.” *Id.* Fourth, although some non-black persons “have a hair texture that would allow the hair to lock, dreadlocks are nonetheless a racial characteristic, just as skin color is a racial characteristic.” *Id.* The Court had two bases for rejecting these proposals from the EEOC. First, the Court found that these assertions would establish a theory of disparate impact, and the EEOC conceded that it was proceeding only under a theory of disparate treatment. *Id.* at *4. Thus, the Court refused to address further the EEOC’s arguments that “CMS’ race-neutral grooming policy had . . . a disproportionate effect on other black job applicants.” *Id.* (footnote omitted). Second, the Court rejected the EEOC’s reliance on its 2006 Compliance Manual because less than a decade ago, in an administrative hearing, the EEOC conceded that “a grooming policy that prohibited dreadlocks and similar hairstyles lies ‘outside the scope of federal employment discrimination statutes,’ even when the prohibited hairstyles are associated with a particular race.” *Id.* at *10, citing *Thomas v. Chertoff*, No. 0120083515, 2008 WL 4773208, at *1 (E.E.O.C. Oct. 24, 2008). Absent a compelling justification for switching from its earlier position, which the EEOC did not offer, the Court refused to give deference or weight to the EEOC Compliance Manual. *Id.* at *10.

⁹⁴ *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084 (5th Cir. 1975); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

⁹⁵ *Catastrophe Mgmt. Sol.*, 2016 WL 4916851, at *13.

colors are acceptable.”⁹⁶ Implicit in the decision to rescind the offer of employment is the belief that the plaintiff did not appear “professional” or “businesslike” and that her hairstyle, in particular, did not reflect a professional image, as required by the grooming policy, or was excessive or unusual as prohibited by it. The Human Resources Manager explicitly told the applicant that she would not be hired because the dreadlocks “tend to get messy, although I’m not saying yours are, but you know what I’m talking about.”⁹⁷ Restricting the applicant’s hairstyle because of what the employer viewed as an attribute of all dreadlocks (they get messy) is exactly what the EEOC has declared to be an impermissible action based on stereotypes of a protected class.⁹⁸ The EEOC regulations require workplace hairstyle policies to be neutral (clean, neat and well-groomed), while still respecting racial differences in hair textures.⁹⁹

Earlier cases cited in *Catastrophe* echoed the same sentiments implied by that employer. In *Willingham v. Macon Telegraph Publishing Company*,¹⁰⁰ the male plaintiff was refused employment because his hair was too long. The employer’s grooming code required “employees (male and female) who came into contact with the public to be neatly dressed and groomed in accordance with the standards customarily accepted in the business community.”¹⁰¹ Interpreting the plaintiff’s long hair to be in violation of the grooming policy, the employer denied him the job.¹⁰² The employer explained that an International Pop Festival had been held near Macon and the festival had attracted “bearded and long-haired youth and scantily dressed young women.”¹⁰³ The court noted that the employer believed that “the business community of Macon was particularly sour on youthful, long-haired males” when the plaintiff applied.¹⁰⁴ The court rejected the sex discrimination argument, holding that the discrimination was based on grooming standards, not sex.¹⁰⁵ The court then analyzed the complaint on “a more subtle form of discrimination” characterized as “sex plus.”¹⁰⁶ Recognizing the grooming requirement here to be based on a sex stereotype (most men have short hair), the employer’s statement that the business community was sour on “long-haired youthful males” should have been sufficient to allow the court to find

⁹⁶ *Id.* at *2.

⁹⁷ *Id.*

⁹⁸ EEOC COMPLIANCE MANUAL, *supra* note 42, § 15-VII(B)(5).

⁹⁹ *Id.*

¹⁰⁰ *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084 (5th Cir. 1975) (challenging employer’s grooming policy allowing women to have long hair but prohibiting men from having long hair under Title VII’s sex discrimination statute). *See also* *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (finding no disparate impact where employees could readily observe the company’s no-Spanish during work hours policy and non-observance was a matter of individual preference).

¹⁰¹ *Id.* at 1087.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1088.

¹⁰⁶ *Id.* at 1089 (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)).

discrimination based on the sex plus factor. Instead, it rejected the plaintiff's sex plus argument by finding that grooming codes are more "related to the employer's choice of how to run his business than to equality of employment opportunity."¹⁰⁷ The *Willingham* Court concluded by finding that if the employee accepts the job he accepts the grooming code.¹⁰⁸

Courts outside of the Eleventh Circuit have held similarly. In *Rogers v. American Airlines*,¹⁰⁹ the plaintiff was an airport operations manager for American Airlines. Her duties included extensive contact with passengers, including greeting passengers, issuing boarding passes, and checking luggage.¹¹⁰ American Airlines adopted a grooming policy to "help American project a conservative and business-like image,"¹¹¹ and prohibited employees in certain employment categories from wearing an all-braided hairstyle, such as cornrows worn by the plaintiff. She claimed that the policy discriminated against her based on both sex and race.¹¹²

The *Rogers* Court held that Title VII did not support either claim.¹¹³ Citing *Willingham's* holding that Title VII did not support a claim of sex discrimination for grooming policies that imposed different standards for men and women, the court held that the claim would be equally applicable to the plaintiff's race discrimination claim.¹¹⁴ Rejecting her argument that she was protected because her hairstyle was "reflective of cultural, historical essence of the black woman in American society,"¹¹⁵ the court at the same time admitted that prohibiting the "Afro/bush style might offend Title VII,¹¹⁶ . . . because "banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics."¹¹⁷ Still, the *Rogers* Court held that braids are an "easily changed characteristic" not subject to Title VII protection,¹¹⁸ completely ignoring its own admonition.¹¹⁹

The contention made in this article that workplace grooming policies restricting certain natural hairstyles worn by black women who prefer natural hair have a discriminatory impact on them in violation of Title VII, mirrors the EEOC's guidelines.¹²⁰ Reliance on cases such as *Rogers*, which pre-date the 2006 EEOC Compliance Manual guidelines, is to perpetuate use of stereotypes about hair

¹⁰⁷ *Willingham*, 507 F.2d at 1091.

¹⁰⁸ *Id.*

¹⁰⁹ *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

¹¹⁰ *Id.* at 231.

¹¹¹ *Id.* at 233.

¹¹² *Id.* at 231.

¹¹³ *Id.* at 232.

¹¹⁴ *Id.* at 231.

¹¹⁵ *Id.* at 232.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (internal citations omitted).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ EEOC COMPLIANCE MANUAL, *supra* note 42.

texture in disregard of those guidelines. To restrict the only acceptable natural hairstyle to the “afro” example given by the EEOC is to ignore the remainder of the regulation that prohibits employers from applying hairstyle rules more restrictively to hairstyles worn by African Americans. By refusing to allow a black woman to wear her hair in a particular style typically worn by women with natural hair, the employer is implying that no woman who wears dreadlocks, braids, or cornrows could *possibly* fit within the category of neat, clean, and well-groomed.¹²¹ Regarding these hairstyles as “unprofessional,”¹²² non-business like,”¹²³ or “excessive”¹²⁴ without regard to whether the style is “neat, clean, or well-groomed”¹²⁵ may operate to keep black women out of the workplace in disproportionate numbers. Use of such stereotypes qualify as an unnecessary, artificial, and arbitrary barrier to employment equality¹²⁶ and should be held to be discriminatory and in violation of Title VII. The more realistic and inclusive hair texture policies that include factors stated in the EEOC Compliance Manual, which require that hair be clean, neat and well-groomed, are neutral without being exclusive of African American natural hair texture considerations and should be encouraged.

IV. RACIAL STEREOTYPING AS A VIOLATION OF TITLE VII

Title VII’s prohibition of workplace discrimination also prohibits discrimination based on subjecting the employee to stereotypes about a group to which the employee belongs and thereby making decisions based on those stereotypes that operate to disadvantage the employee.¹²⁷

Stereotyping came to be recognized as an important part of Title VII in 1989 when the U.S. Supreme Court issued its landmark decision in *Price Waterhouse v. Hopkins*.¹²⁸ Ann Hopkins had worked at Price Waterhouse for five years and was a senior manager when she failed to make partner.¹²⁹ After failing again the next year, she filed a suit with the EEOC¹³⁰ alleging sex discrimination in violation of

¹²¹ *Id.*

¹²² EEOC v. Catastrophe Mgmt. Sol., No. 14-13482, 2016 WL 4916851, at *2 (11th Cir. Sept. 15, 2016).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ EEOC COMPLIANCE MANUAL, *supra* note 42.

¹²⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹²⁷ *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); EEOC COMPLIANCE MANUAL, *supra* note 42. Title VII of the Civil Rights Act of 1964 protects individuals against employment discrimination on the basis of race and color as well as national origin, sex, or religion. “It is unlawful to discriminate against any employee or applicant for employment because of race or color in regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups.” *Facts About Race/Color Discrimination*, *supra* note 43.

¹²⁸ *Price Waterhouse*, 490 U.S. at 228.

¹²⁹ *Id.* at 233.

¹³⁰ *Id.* At the time Hopkins was considered for partnership, the firm had 662 partners, seven of

Title VII.¹³¹ The record demonstrated that Price Waterhouse's partners had an "uncurbed"¹³² history of making gender-related comments about female partner candidates and this had likely been the case with Hopkins.¹³³ According to expert testimony, such comments likely stemmed from gender stereotyping.¹³⁴

The lower courts held in Hopkins' favor.¹³⁵ When the case was appealed to the Supreme Court,¹³⁶ the Court concluded that the negative comments made about Hopkins that had resulted in her not becoming a partner were primarily related to sex stereotypes held by the partners.¹³⁷ In evaluating the decision-making process that used the sex stereotyping comments for at least some part of the decision about Hopkins' candidacy and holding such considerations to be impermissible, the Court stated:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they

whom were female. *Id.* at 234.

¹³¹ *Id.* at 233-34. During her tenure, Hopkins had managed the District of Columbia office, was well regarded by her clients, and had played a central role in landing a \$25 million contract with the State Department—something none of the other 77 partnership candidates—all male—had done. *Id.*

¹³² *Id.* at 236 ("In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, '[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers'; in this environment, '[t]o be identified as a 'women's lib[b]er' was regarded as [a] negative comment.' In fact, the judge found that in previous years '[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers'—yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations.'" (internal citations omitted)).

¹³³ *Id.* at 234-35. While there were many complimentary comments about Hopkins' performance by partners in their written evaluations of Hopkins used in determining her partnership candidacy, there were also several negative comments, primarily about her interpersonal skills, including that Hopkins was sometimes "overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id.*

¹³⁴ *Id.* at 235 ("There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.' Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only 'because it's a lady using foul language.' Another supporter explained that Hopkins 'ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.' But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace*: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" (internal citations omitted)).

¹³⁵ Hopkins v. Price Waterhouse, 618 F. Supp. 1109 (D.D.C. 1985).

¹³⁶ Price Waterhouse, 490 U.S. 228.

¹³⁷ *Id.* at 251.

behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.¹³⁸

Despite the fact that Congress has yet to provide protection for workplace discrimination based on sexual orientation or gender identity, the *Price Waterhouse* reasoning was extended to sex stereotyping of LGBT employees. In *Nichols v. Azteca*,¹³⁹ the court found that an effeminate male employee had endured an “unrelenting barrage” of verbal abuse.¹⁴⁰ The *Nichols* Court found that the behavior in the workplace was based on the stereotype that a man should be virile rather than effeminate and stated, “we conclude that this verbal abuse was closely linked to gender.”¹⁴¹ In *Heller v. Columbia Edgewater Country Club*,¹⁴² the court held that an employee who was harassed by her supervisor because she was a lesbian could withstand the employer’s motion for summary judgment because the supervisor’s harassment was based on the gender stereotypes that the employer held.¹⁴³

The *Price Waterhouse*’s stereotype analysis was later used to extend Title VII’s sex discrimination coverage to transgender people. After a series of court decisions holding that Title VII addressed gender stereotyping in the context of transgender individuals and therefore violated Title VII,¹⁴⁴ the EEOC determined in *Macy v. Holder*¹⁴⁵ that gender stereotyping is a basis for gender identity discrimination as a type of sex discrimination in violation of Title VII. In *Macy*, the EEOC concluded that it was a violation of Title VII for an employer to refuse to hire a highly qualified candidate simply because the applicant was transitioning from male to female.¹⁴⁶ The EEOC now accepts claims of discrimination for both sexual orientation and gender identity as it relates to sex stereotypes.¹⁴⁷ Once

¹³⁸ *Id.* (internal citations omitted).

¹³⁹ *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864 (9th Cir. 2002).

¹⁴⁰ *Id.* This “unrelenting barrage” included constantly referring to the male employee with the feminine pronouns “her” or “she”, name-calling, including “faggot”, and vulgarities, as well as being mocked for “walking and carrying his serving tray like a woman.” *Id.* at 870.

¹⁴¹ *Id.* The decision in this case specifically abrogated the holding of *DeSantis v. Pac. Tel. & Tel. Co.*, No. C76 1083 SW., 1976 U.S. Dist. LEXIS 13342 (N.D. Cal. Sept. 7, 1976). *DeSantis* predated *Price Waterhouse* by thirteen years. See *Price Waterhouse*, 490 U.S. 228.

¹⁴² *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002).

¹⁴³ *Id.*; but see *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005). In *Dawson*, the court agreed that gender stereotyping was a violation of Title VII, but because the considerations were so close to discrimination on the basis of sexual orientation not covered by Title VII, the court did not want to “bootstrap protections for sexual orientation into Title VII.” *Id.* at 218.

¹⁴⁴ See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

¹⁴⁵ *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

¹⁴⁶ *Id.* at *11.

¹⁴⁷ See *Sex-Based Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/types/sex.cfm> (last visited Sept. 26, 2015) (“Discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex in violation of Title VII.”). See also *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://>

Price Waterhouse determined that gender stereotyping constituted a violation of Title VII, the way was paved for the argument that treating an employee differently because he or she acted differently than an employer's stereotyped view of a person of that gender violated Title VII, even if the employee was a transgender person.¹⁴⁸

As here relevant for analyzing grooming policies as a type of race discrimination when African American hair texture is not taken into consideration, the EEOC determined in *Macy v. Holder*¹⁴⁹ that the *Price Waterhouse* decision made clear that "the term 'gender' encompasses not just a person's biological sex, but also the cultural and social aspects associated with masculinity and femininity."¹⁵⁰ The Supreme Court had specifically addressed the issue of "failing to act and appear according to expectations defined by gender," which results in gender stereotyping.¹⁵¹ The EEOC noted that it was important that Title VII be interpreted as prohibiting more than simply discrimination on the basis of biological sex, just as the Court had done in *Price Waterhouse* and in later cases.¹⁵² In the Court's view, to not do so would mean that the only basis for sex discrimination claims under Title VII would be when an employer preferred a male over a female, or vice versa. The EEOC believed the law to be much broader than that, reading it to encompass the cultural aspects associated with masculinity and femininity.¹⁵³

Recognizing that Congress was unlikely to have been considering discrimination against transgender persons when it enacted Title VII, the EEOC cited *Oncale v. Sundowner Offshore Services* to support its reasoning:

[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.¹⁵⁴

Further, in its *Macy v. Holder* decision, the EEOC made clear that these

www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Sept. 26, 2015) ("The Commission's Strategic Enforcement Plan (SEP), adopted by a bipartisan vote in December of 2012, lists 'coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply' as an enforcement priority for FY2013-2016. This enforcement priority is consistent with positions the Commission has taken in recent years regarding the intersection of LGBT-related discrimination and Title VII's prohibition on sex discrimination.").

¹⁴⁸ *Macy*, 2012 WL 1435995, at *11.

¹⁴⁹ *Macy*, 2012 WL 1435995.

¹⁵⁰ *Id.* at *6.

¹⁵¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

¹⁵² *Macy*, 2012 WL 1435995, at *5 (citing *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)).

¹⁵³ *Macy*, 2012 WL 1435995, at *6.

¹⁵⁴ *Id.* at *10 (citing *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79-80 (1998); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983)).

different “formulations” of gender discrimination, such as gender stereotyping, do not constitute different claims of discrimination. “Rather, they are simply different ways of describing sex discrimination.”¹⁵⁵ So it is with race discrimination and stereotyping based on hair texture in grooming policies.

Extending *Oncale*, the EEOC held that Macy would be able to demonstrate a violation of Title VII. The violation could be proven either by showing that the employer chose someone else for the job after learning of Macy’s transition because the supervisor believed men should only present as men in men’s clothing, or that the supervisor was willing to hire Macy when he thought he was a male but not when he learned Macy would now be a female.¹⁵⁶

As the Supreme Court reasoned in *Oncale*, a statutory prohibition against sex discrimination can be extended to cover “comparable evils” of stereotyping based on sex.¹⁵⁷ The Court in *Price Waterhouse*, *Oncale*, and *Macy* extended sex discrimination where the employer’s perceptions about the employee’s behavior (too aggressive for a female,¹⁵⁸ too effeminate for a male,¹⁵⁹ a man should dress as a man¹⁶⁰) formed the discrimination. Similarly, the statutory prohibition on race discrimination should be extended to include the comparable evil of stereotyping based on race. As with gender, discrimination on the basis of race would include stereotypes based on immutable characteristics such as hair texture that disproportionately impact African American women. The EEOC, as the agency charged with enforcing Title VII and other workplace discrimination laws, has also taken this view and its view should be given deference by the courts hearing these cases.¹⁶¹

Because the *Catastrophe* case was based on disparate treatment requiring intent to discriminate, the Eleventh Circuit refused to consider the EEOC’s arguments about the impact these policies have on women with hairstyles other than the Afro.¹⁶² In a disparate impact case, the EEOC’s position should be adopted if Title VII is to be enforced so that it does what the law and Supreme Court decisions intended in striking at the entire spectrum of impermissible stereotypes excluding employees from the workplace.

V. POLICY PROPOSALS TO ELIMINATE DISCRIMINATORY GROOMING POLICIES

Rather than take a one-size-fits-all approach to creating workplace grooming policies that are inclusive and do not exclude the full range of qualified employees,

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Oncale*, 523 U.S. 75, 78-79.

¹⁵⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-235 (1990).

¹⁵⁹ *Nicolas v. Azteca Rest. Enter., Inc.*, 256 F.3d 864 (9th Cir. 2002).

¹⁶⁰ *Glenn v. Brumby*, 663 F. 3d 1312, 1321 (11th Cir. 2011).

¹⁶¹ *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984).

¹⁶² *EEOC v. Catastrophe Mgmt. Sol.*, No. 14-13482, 2016 WL 4916851, at *4 (11th Cir. Sept. 15, 2016).

workplace policy makers should consider hair grooming policies that are more inclusive to meet workplace needs and realities. Employers should analyze these factors before establishing policies that have a disparate impact, which could potentially lead to litigation. The factors take into consideration the legal arguments likely to confront an employer sued for a discriminatory hair grooming policy. The queries are designed to be prophylactic and avoid litigation, as well as to better position an employer sued for racial discrimination for using a hair grooming policy.

The queries are as follows:

1. What is the purpose of the employer's hair grooming policy?
2. Does the employer acknowledge the full range of natural hair textures before establishing the grooming policy?
3. For what type of industry or position is the employer establishing the grooming policy?
4. Are there health, safety, or hygiene issues associated with imposing the grooming policy?
5. Does the employer know the impact of the policy on the full spectrum of protected employee groups?
6. Will there be a disparate impact on such groups by imposing the grooming policy?
7. Are there alternatives to the grooming policy that may avoid potential discrimination?
8. Are exceptions to the policy permitted? If so, on what basis?
9. How does the employer plan to handle those employees who voice opposition to the grooming policy on the basis of protected criteria?
10. Is there a legitimate nondiscriminatory business justification for the grooming policy?

The goal in applying this analysis to an employer's grooming policy is to provide the employer with the maximum control over his or her workplace while minimizing disparate impact in exercising such control. The necessity for the questions will vary depending on what the grooming policy requires and what it is regulating. The questions can be modified as necessary to fit the specific situation. If an employer addresses each of these questions, there is much less likelihood that the employer would create a policy that results in disparate impact on a protected class. The employer would also be better protected when unavoidable litigation arises.

How would answering these questions help to implement workplace grooming policies? Assume the employer wants to institute a policy that excludes dreadlocks, braids, or cornrows worn by African American women. In answering the first question as to why the policy is needed, presumably the answer would be to create a professional-looking workplace in order to project a certain image. In

order to answer this question, the employer must first determine what he or she believes looks “professional” and what does not, and why. If an employer only associates dreadlocks with people with radical ideas or politics, or thinks of the hairstyle as the opposite of straight, “normal,” Caucasian hair, then this is a matter of personal preference rather than safety. An employer may also only have one idea of what dreadlocked hair is. That is not the case. For example, dreadlocks can be long or short; worn close to the head or worn full length; be styled, tied up; have shells, beads, or other items woven into it; or be worn in many other styles.¹⁶³ If the only consideration were whether the hairstyle is neat, clean, and well-groomed, there would be no need to exclude all persons wearing dreadlocks. Only those whose dreadlocks were not neat, or clean, or that contained extraneous decorative items would be excluded. If the employer’s perception of “professional-looking” hair is based on media or societal depictions of Caucasian groups rather than something more reflective of the inclusion of other non-Caucasians with varying hair textures, the policy will likely be broader, more inclusive, and less likely to violate Title VII.

The second consideration is whether the policymaker knows the full range of hair textures before establishing the policy. If it is possible that applicants will have hair unlike that of the policy maker, it may be beneficial to consult with others to see if more or different information would create more inclusive, less vulnerable policies. For instance, if an employer is in a homogeneous workplace where everyone’s hair is virtually the same as the employer’s, the employer may have little reason to know the impact an existing grooming policy would have on a potential employee who is from a different race or who wears his or her hair differently from existing employees. Gathering information for creating an inclusive policy may prove invaluable.

The type of industry in which the policy is being applied can be important where the policy needs to be industry-specific. For the third question, for instance, establishing policies for a manufacturing establishment using machinery or a restaurant serving food will require different rules or considerations for safety purposes, or because of government-imposed hygiene regulations. In an office setting, this may not be an issue. Assuming there are no safety issues, the question becomes whether excluding certain hairstyles can meet the EEOC’s business necessity exception. Courts are sensitive to the issue of business image.¹⁶⁴ Simply catering to a customer or client base cannot be the justification for an employer to exclude all employees with a certain type of hair texture or hairstyles without meeting the more stringent test of business necessity.¹⁶⁵

¹⁶³ See *Dreadlocks Pictures and Images*, GETTY IMAGES (2016), <http://www.gettyimages.com/photos/dreadlocks?excludenudity=true&mediatype=photography&phrase=dreadlocks&sort=mostpopular> for examples of the variety of ways in which dreadlocks appear.

¹⁶⁴ See *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084 (4th Cir. 1975).

¹⁶⁵ See, e.g., *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987 (5th Cir. 2005).

Question four regarding the impact of the policy on health, safety, or hygiene is very much related to the industry query. If a policy prohibiting wearing dreadlocks is established because of the safety or hygiene considerations, then such a policy would be much more defensible. However, allowing a person with long-hair, for instance, to put the hair in a ponytail in order to comply with the safety requirements but excluding an African American with long dreadlocks to do the same would not. It would also not be defensible to prohibit wearing of all dreadlocks if some employees did not have long dreadlocks that presented a safety issue or if the safety issue of the longer dreadlocks could be addressed by an accommodation such as a hat, scarf, or hair tie.

Questions five and six involve the impact of the policy on protected groups. Disparate impact is an unlawful employment practice¹⁶⁶ that does not require intent or an unlawful motive.¹⁶⁷ For policies that appear neutral, the employer must assure that protected classes are not adversely impacted.¹⁶⁸ Seeking the input of employees before instituting a policy can be fruitful in identifying potential unexpected adverse impact on protected groups. This does not mean the employer must create a policy with which all employees agree, but discovering objections beforehand might identify those so impacted and allow for areas of compromise, which can lead to avoiding litigation.

Question seven seeks to balance the employer's wishes with the legitimate considerations of protected employees by providing the employer with alternatives that have less adverse impact. In a policy prohibiting dreadlocks, for example, if the prohibition is based on safety, then the employer can choose a policy that only addresses safety issues, rather than instituting a full dreadlocks ban. As with the third query, the ban can be limited to only those employees whose dreadlock length interferes with legitimate machinery safety issues. Banning all dreadlocks, even short ones or those that can be pulled back and present no safety hazard, are more defensible and less likely to appear to be racially motivated.¹⁶⁹ It is important that the alternative be realistic and respectful. For instance, instructing a black employee wearing natural hair to "wear a hairpiece" or instructing her to wear a larger wig when she says wigs give her headaches will appear to be racially biased.¹⁷⁰

Question eight considers whether there are exceptions to the policy and if so, on what basis they are permitted. Exceptions may be granted for a variety of

¹⁶⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹⁶⁷ EEOC COMPLIANCE MANUAL, *supra* note 42.

¹⁶⁸ *See, e.g., Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795 (8th Cir. 1993) (finding that no beard policy adversely impacted males with skin disease affecting primarily black males); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (finding that height requirements for prison guards adversely impacted women).

¹⁶⁹ *See Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256 (S.D.N.Y. 2002). The policy allowed for dreadlocks to be covered, rather than prohibit them. *Id.*

¹⁷⁰ *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

reasons but should be done on a consistent basis and extended to all groups of employees evenhandedly.¹⁷¹ For instance, if white employees with long hair are permitted to pull it back so that the hair does not present a safety hazard, black employees with dreadlocks should be allowed to do the same thing.

Questions nine and ten address the employer's response to the inevitability of having employees who do not wish to comply with the employer's policy, or are reluctant to do so. Assuming the hairstyle in question meets the EEOC's requirement of being neat, clean, and well-groomed, the employer should have a plan for how to address such unwillingness or reluctance to comply with the employer's hair grooming policy. If an employer has a policy prohibiting certain hairstyles, the employer should re-evaluate the policy to determine whether there is a business necessity for it. If the employer determines there is no business necessity that may be an opportunity for the employer to withdraw or modify the policy. If the employer decides that the policy is necessary, the employer might have to defend the policy using the business necessity defense. Absent a safety or hygiene requirement, employers who prohibit hairstyles generally should avoid using such language as "business-like" or unprofessional. When they adversely impact groups protected by Title VII, these characterizations appear to reflect stereotypes that should not be used as a basis for denying an otherwise qualified employee a job.

CONCLUSION

A credibility gap can exist between wanting to be inclusive on the one hand, and knowing exactly how to operationalize that concept, on the other. One of the ways employers have failed in operationalizing diversity that would avoid unnecessary liability for workplace discrimination is by imposing unrealistic and demeaning policies on black women's natural hair via restrictive and non-inclusive hair grooming policies. These restrictive policies, while appearing neutral on their face, have illegal disparate impact of excluding African American women with natural hair from the workplace.

The refusal to take into consideration the inherent differences in hair texture based on race in workplace hair grooming policies is a serious flaw that must be corrected. Failure to do so is to allow racial stereotypes to continue adversely impact African American female employees for reasons having nothing to do with their ability as an employee.

When it comes to African American women's hair, we must be willing to use

¹⁷¹ *Hollins v. Atlantic Co.*, 188 F.3d 652, 661 (6th Cir. 1999). The employer's policy manual required all employees to be neat and well-groomed. *Id.* at 659. Even though the employer admitted the plaintiff's hair met the grooming policy, the employee was told she could not wear certain styles that were "eye-catching" or "called attention" to her—despite the fact that white women in the workplace wore exactly the same hairstyle as the plaintiff and they were not prohibited from doing so. *Id.* at 655-56.

our common sense and knowledge of our country's deep history of bias to understand that our ideas about hair that is "inappropriate," "unprofessional," "extreme," "unusual," "distracting," "eye catching,"¹⁷² and not "business-like," are value judgments rooted in racial stereotypes. Workplace grooming policies should be expanded to embrace more inclusive realities of hair textures and what is and is not appropriate in workplace grooming standards for non-whites, particularly African Americans. Not only will this make unlawfully excluded employees feel more included and less as if they are acceptable only when they conform to an inherently exclusionary standard, but it will greatly decrease workplace litigation regarding this issue. It will also curtail the use of irrelevant racial stereotypes to determine whether an otherwise qualified applicant is hired, clearly a Title VII violation.

No one here advocates for employees wearing truly unorthodox hairstyles, such as those that can be found in images on the Internet, including multi-colored Mohawks, hair that is styled to look like a pineapple or checkerboard, a hand grabbing the head, or a bear climbing a tree to raid a bird nest complete with birds.¹⁷³ Even beads woven into braided hairstyles, which we deem more of a cultural attribution than an immutable characteristic of hair texture,¹⁷⁴ may not be acceptable in certain work environments. We advocate here only for inclusion of hairstyles worn by African American women that meet the EEOC criteria of neat, clean, and well-groomed, but that do not force African American women to change their natural hair texture in order to comply with an employer's idea of what is appropriate in the workplace. The interest here is in broadening the idea of what is acceptable to truly reflect the diversity of the hair textures of those in the workplace, rather than imposing standards that exclude African American women's natural hair texture.

It is important that an employer or business owner be able to have workplace grooming policies that are, to the extent they are legal, consistent with the workplace necessity. However, the texture of African American women's hair should not be permitted to be used as a justification for grooming policies banning them from the workplace. The policies that exclude black women's neat, clean, and well-groomed, natural hairstyles are based on racial stereotypes that continue to denigrate natural hair even though hair texture is recognized by the EEOC as an "immutable characteristic associated with race."¹⁷⁵

The outlined query approach should assist employers in fashioning non-discriminatory grooming policies because "it requires an employer to restructure

¹⁷² *Id.*

¹⁷³ See, e.g., Google Search: "Crazy Haircuts for Men, GOOGLE.COM, <https://www.google.com/search?q=crazy+haircuts+for+men&espv=2&tbn=isch&tbo=u&source=univ&sa=X&ei=g9GLU57hM67hsATd0lLoBg&ved=0CCgQsAQ&biw=1353&bih=783>.

¹⁷⁴ See, e.g., *Carswell v. Peachford Hosp.*, No. C80-222A, 1981 WL 224, at *1 (N.D. Ga. May 26, 1981).

¹⁷⁵ EEOC COMPLIANCE MANUAL, *supra* note 42.

the workplace in ways that mitigate the effects of pre-existing white dominance”¹⁷⁶ that they may not have been aware of,¹⁷⁷ rather than through the contentious avenue of litigation. In the long run, this is a more effective approach to providing more meaningful space for all at the table of society, which is not only a laudable goal, but the legal one imposed by law.

¹⁷⁶ Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2037 (1995).

¹⁷⁷ *Id.*