WHAT'S GOING ON HAIR?: UNTANGLING SOCIETAL MISCONCEPTIONS THAT STOP BRAIDS, TWISTS, AND DREADS FROM RECEIVING DESERVED TITLE VII PROTECTION

INTRODUCTION

Black hair is different from of all other races in its basic shape and composition.[1] These unique biological components make black hair much more fragile and prone to breakage than other hair types.[2] Fortunately, developments in research and scientific studies about black hair have helped many black women[3] combat years of misinformation about how to care for their hair[4] and develop healthy hair-care strategies. As a result, many black women have been able to grow strong and vibrant hair despite their hair's fragile characteristics.[5] Essential to healthy black hair care is the utilization of protective styles, as these styles safeguard the delicate strands of black hair.[6] By using these styles, many black women have overcome the challenges inherent to their natural kinky, curly hair and are growing their

1. AUDREY DAVIS-SIVASOTHY, THE SCIENCE OF BLACK HAIR: A COMPREHENSIVE GUIDE TO TEXTURED HAIR 23 (2011).

2. *Id.* There is a small percentage of the black population with hair texture and structure that are different than the majority of the black population. An overwhelming majority of black women, however, have tightly coiled hair. *See* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1131 (2010). In this Note, when "black hair" or "black women's hair" is referred to it is referring to the hair texture and structure that belongs to the clear majority of the black population. Likewise, although there are white women who have "curly" hair; it is important to note that the hair texture, structure, and most importantly, biological composition for nearly all, if not all, of these women differ greatly from those of black women. DAVIS-SIVASOTHY, *supra* note 1, at 23.

3. This Note occasionally focuses on black women as they are more affected by these policies, but it is important to address that this Note is focusing on race discrimination, not sex discrimination. Everything stated this Note is equally applicable to black men.

4. DAVIS-SIVASOTHY, *supra* note 1, at 23.

5. *Id.*

6. This Note assumes that the protective hairstyles are properly installed. Hair loss can also occur if these styles are improperly installed. *Id.*

hair to previously unfathomed lengths.[7] For many black women, this has been a beautiful and an encouraging sight to behold[8] – that is, until they get fired.

Social stigmas attached to certain hairstyles have led to employment bans against the primary, if not only, viable protective styles in a black woman's arsenal – braids, twists, and dreadlocks.[9] These styles (known collectively as "protective styles"[10]) are vital to black women[11] because the unique composition of black hair makes it more susceptible to hair breakage from what many would consider normal day-to-day manipulation, tension, and handling of one's hair.[12] Without them, when long black hair is worn down, the ends of the delicate hair strands repeatedly brush against the shoulders creating dryness[13] and fraying[14] which prevents the hair from growing past the shoulders and may even cause it to retreat.[15] In addition, if black hair is worn up and off the shoulders to protect the ends, such repetitive styling, for instance, by frequently brushing the hair around the parameter of the head to set a ponytail style, increases friction in the hair, and the constant manipulation also causes hair breakage.[16] As a result, in addition to the fact that a black woman can be fired, or not even hired, simply for wearing these protective styles,[17] when employers ban the styles, they ban the primary way a black woman can safely wear her long natural hair down on a continual basis. Consequently, women who wish to keep their long natural hair healthy must forgo wearing their natural hair in the workplace and must wear a wig or weave instead.[18]

7. LULU PIERRE, A PARENT'S GUIDE TO NATURAL HAIR CARE FOR GIRLS loc. 205 (2015) (ebook).

8. *Id.*

9. BEN AROGUNDADE, BLACK BEAUTY: A HISTORY OF AFRICAN AMERICAN HAIR & BEAUTY THROUGH THE AGES loc. 1959-62 (2011) (ebook).

10. DAVIS-SIVASOTHY, *supra* note 1, at 23.

11. This Note also applies to men. They have the same hair characteristics. This Note focuses on women however because they are the most affected by these policies as they tend to wear their hair longer more frequently than men. Merrill Fabry, *Now You Know: How Did Long Hair Become a Thing for Women*, TIME (June 16, 2016), http://time.com/4348252/history-long-hair/.

12. DAVIS-SIVASOTHY, *supra* note 1, at 40.

13. *Id*. at 44.

14. *Id*.

15. *Id*.

16. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 Duke L.J. 365, 390 (1991); PIERRE, *supra* note 7, at loc. 787.

17. Dawn Bennett-Alexander & Linda Harrison, *My Hair Is Not Like Yours: Workplace Hair Grooming Policies for African American Women as Racial Stereotyping in Violation of Title VII*, 22 CARDOZO J.L. & GENDER 437, 439 (2016).

18. Caldwell, *supra* note 16, at 390.

Considering the natural and immutable composition of black hair, cases challenging employment bans on braids, twists, and dreadlocks should be successful because these bans have a disparate impact against black employees as a result of their racial characteristics.[19] Instead, however, society's fundamental misunderstanding of black hair has caused many courts to perpetuate these discriminatory employment policies.[20] In cases reviewing these bans, courts have continuously demonstrated a severe lack of understanding of how black hair is different from all other races and have ignored the consequential relationship between a black woman's styling options and her subsequent and severe hair loss.[21] Because of this lack of understanding, courts have completely ignored relevant health concerns that are solely imposed on black people by these policies and held that bans against protective styles do not qualify as racially discriminatory employment policies under Title VII of the Civil Rights Act of 1964 ("Title VII").[22] The federal district court case *Rogers v. American Airlines*[23] is the seminal case on this issue, and other courts frequently cite to it while perfunctorily dismissing similar claims of racial discrimination. In *Rogers*, the court acknowledged that employment grooming policies banning natural hairstyles "would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics"[24] but then severely contradicted itself and exposed its unfamiliarity with the realities of black hair when it reasoned that braids were "not the product of natural hair growth."[25]

This Note argues that, because of a grossly inadequate understanding of the biological qualities of black hair, *Rogers v. American Airlines*, and all other cases following its rationale, were erroneously decided. If courts fully appreciated the biological realities of black hair it would be apparent to them that braids, twists, and dreadlocks are "the product of natural hair growth" since utilizing these styles is the primary, if not only, way black people can maintain long natural hair in a healthy manner. Since bans on these hairstyles have a disparate, and discriminatory, impact on black people because of the immutable characteristics of their race they should be protected by Title VII.

Part I of this Note will provide an overview of Title VII's antidiscrimination statute, discuss how bans against protective styles

19. *See* Bennet-Alexander & Harrison, *supra* note 17, at 443.
20. *See id.* at 451-52.
21. Onwuachi-Willig, *supra* note 2, at 1116-18.
22. *Id.* at 1119.
23. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981).
24. *Id*. at 232.
25. *Id.*

discriminate against race, and discuss recent cases dealing with bans on protective styles as well as their rationale when upholding these discriminatory employment policies. Part II will discuss how understanding the biology of black hair would not only prevent lawyers from making unsuccessful cultural arguments when challenging these employment policies but how it would also prevent courts from ignoring important realities when considering employment practices that ban protective styles. Part III will discuss how a black woman could successfully bring a prima facie discrimination claim challenging such employment policies by arguing these policies discriminate against the physical and immutable characteristics of black hair. Finally, Part IV will discuss the public policy concerns of preserving such discriminatory employment policies and how these policies perpetuate harmful societal norms and implicit racial biases within our society.

I. BANS AGAINST BRAIDS, TWISTS, AND DREADS DISCRIMINATE AGAINST RACE

Title VII prohibits discrimination based on "race, color, religion, sex, or national origin."[26] There are two main claims a plaintiff can use to assert an employment discrimination action – disparate treatment and disparate impact.[27] Before delving into the elements and procedures of alleging a prima facie case under either of the claims, this part will explain why employment grooming policies can constitute racial discrimination under Title VII, and explore the rationale courts have given to evade giving protection to protective styles in recent cases.

A. Grooming Policies Can Discriminate Against Race

When we talk about the concept of race, most people believe that they know it when they see it but arrive at nothing short of confusion when pressed to define it.

- Evelyn Brooks Higginbotham[28]

26. 42 U.S.C.A. § 2000e-2(a) (West, Westlaw through Pub. L. No. 115-61). For background information on Title VII analysis, see Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483 (2011).

27. Bennet-Alexander & Harrison, *supra* note 17, at 441.

28. Pilar N. Ossorio, *About Face: Forensic Genetic Testing for Race and Visible Traits*, 34 J.L. MED. & ETHICS 277, 279 (2006) (quoting Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, 17 SIGNS 251, 253 (1992)).

To successfully allege racial discrimination under Title VII employees must establish that the discrimination they faced was "because of"[29] their race, an enumerated and impermissible characteristic under Title VII. Since race discrimination in employment policies often takes a more implicit and nuanced form today,[4] courts have accommodated for it by interpreting the term "race" to include the immutable characteristics of a particular race or "'a status into which the class members are locked by the accident of birth.'"[30] In other words, Title VII protects against employment policies discriminating against physical traits and attributes associated with a particular race as well as policies that explicitly ostracize a particular race.[31]

The reason for this expanded definition of race discrimination is found in the United States' extensive history of defining race by immutable characteristics such as hair texture and particular facial features in addition to skin color.[32] As evidenced in the 1806 case *Hudgins v. Wrights*,[33] these characteristics are often what people, as well as courts, use to separate humans into different racial categories. In *Hudgins*, a slavery case, the Supreme Court of Virginia looked at the defendants' different physical characteristics and, *inter alia*, relied on physical examinations of the women's hair to determine whether they were Indian American and free, or black and enslaved. Ultimately, the court determined each woman's race by stating "nature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, . . . a flat nose and woolly head of hair."[34] When some academics discuss this time period in American history they contend that hair served as the one true signifier of race in early racial trials.[35] For example, in *Untangling The Roots Of Black Hair In America*, Ayana Byrd and Lori Tharps wrote:

> Curiously, the hair was considered the most telling feature of Negro status, more than the color of the skin. Even though some slaves . . . had skin as light as many Whites, the rule of thumb was that if the hair showed just a little bit of kinkiness, a person would be unable to pass as White. Essentially, the hair acted as the true test of blackness, which is why some

29. *See* Univ. of Texas Sw. Med. Ctr. v. Nassar 133 S.Ct. 2517, 2525-26 (2013).

30. Stevenson v. Superior Court, 941 P.2d 1157, 1187 (1997) (quoting Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 540 (1971)).

31. For a discussion on how discrimination based on racial physical traits equates to impermissible race discrimination under Title VII, see Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006).

32. *See* AYANA BYRD & LORI THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA 17-18 (2001).

33. Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134, 139 (1806).

34. *Id.*

35. BYRD & THARPS, *supra* note 32.

> slaves opted to shave their heads to try to get rid of the genetic evidence of their ancestry when attempting to escape to freedom.[36]

Today, race continues to be defined by immutable characteristics such as one's hair texture and composition.[37] In fact, the Equal Employment Opportunity Commission ("EEOC"), the government agency charged with enforcing Title VII, explicitly views discrimination against a particular hair texture as racial discrimination. In the EEOC's Compliance Manual, which is issued as guidance for employers to monitor and measure employment opportunity requirements and employment policies,[38] it published the following guidance on race and immutable characteristics of race: "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."[39] Further, in defining how grooming policies may violate Title VII's prohibition of race discrimination, the EEOC's Compliance Manual states:

> 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 . . . .
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> . . . .
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> . . . . 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.[40]

These guidelines illustrate settled case law that facially neutral policies, even if developed for nondiscriminatory reasons, can still violate Title VII if

36. *Id.*

37. *See Facts About Race/Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/fs-race.cfm (last visited Oct. 29, 2017).

38. Office of Legal Counsel Title VII/ADEA/EPA Division, *EEOC Compl. Manual Section 15: Race & Color Discrimination* § 15-II, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 19, 2006), https://www.eeoc.gov/policy/docs/race-color.pdf [hereinafter *EEOC Compl. Manual*].

39. *Facts About Race/Color Discrimination*, *supra* note 37.

40. *EEOC Compl. Manual*, *supra* note 38, § 15-VII(B)(5) (citations omitted).

they have a disparate impact on a particular race.[41] In fact, courts have also found that employment grooming policies that impose unique health concerns on a particular race violate Title VII. In *EEOC v. Trailways, Inc*.,[42] the federal district court was faced with this type of an employment policy which categorically banned facial hair in the form of beards. The court reasoned that, although the bans against beards applied equally to every race, the biological susceptibility to pseudofolliculitis barbae (PFB) from shaving one's beard, had a discriminatory impact on black men because of the immutable physical characteristic of their black hair.[43] PFB is a painful skin disorder resulting from ingrown hairs that is scientifically proven to predominately effect black men because of the unique texture and structure of black hair as it grows out of the skin.[44] Acknowledging that hair, just like skin color, is just one proxy for race, the court held that such a "no beard" employment policy raises an actionable racial discrimination claim since the policy had a disparate impact on the black population.[45] Considering the biological realities of black hair and the necessity of protective styles to maintain healthy black hair, it seems easy from this point to conclude that policies that ban protective styles violate Title VII as they too do not "respect racial differences in hair textures."[46] Unfortunately, however, courts have not come to this conclusion and have found employment policies that categorically ban protective styles permissible.[47]

B. Common Court Rationales Against Protecting Braids, Twists, and Dreads

Unlike bans on beards, and since the *Rogers v. American Airlines* decision, courts have continued to uphold employers' bans on protective hairstyles for the black population without any analysis of how the biological and immutable characteristics unique to black hair are impacted by these policies.[48] In *Rogers*, Renee Rogers, a black female employee of American Airlines filed a discrimination lawsuit under Title VII, arguing that the airline discriminated against her "as a woman, and more specifically a black

41. *See* Bradley v. Pizzaco of Neb., Inc., 939 F.2d 610, 612 (8th Cir. 1991) (citing Griggs v. Duke Power Co., 401 U.S. 432 (1971)).

42. EEOC v. Trailways, Inc., 530 F. Supp. 54 (D. Colo. 1981).

43. *Id.* at 59.

44. *Pseudofolliculitis Barbae*, AMERICAN OSTEOPATHIC COLLEGE OF DERMATOLOGY, http://www.aocd.org/?page=pseudofolliculitisb (last visited Oct. 28, 2017).

45. *EEOC v. Trailways, Inc*., 530 F. Supp. at 59.

46. *EEOC Compl. Manual*, *supra* note 38, § 15-VII(B)(5) n.154.

47. *Id.*

48. Caldwell, *supra* note 16, at 390; PIERRE, *supra* note 7, at loc. 804.

woman" through a grooming policy that prohibited employees in certain roles from wearing all-braided hairstyles.[49] When the court examined Rogers' case as a race discrimination claim, it dismissed the claim.[50] The court first erroneously reasoned that the policy applied equally to members of all races.[51] Then, although conceding that a policy prohibiting natural black styles, such as an afro, might offend Title VII, the court stated that Rogers' lawsuit was different because an all-braided hairstyle "is not the product of natural hair growth but of artifice,"[52] and that an all-braided hairstyle is an "easily changed characteristic."[53] In addition, the court noted that Rogers had the option to "pull her hair into a bun and wrap a hairpiece [also known as a weave ponytail] around the bun during working hours."[54] Since *Rogers*, black women have brought numerous challenges to grooming policies that prohibit protective hairstyles, arguing that these policies constitute race discrimination under Title VII. Since the *Rogers* decision, however, courts have continued to uphold employment bans against protective hairstyles and have applied *Rogers* perfunctorily and without any analysis about how the biological composition of black hair should influence the law in this area.[55]

In the 2008 district court case *Pitts v. Wild Adventures, Inc*., the court rejected Patricia Pitts' discrimination claim based on her employer's policy prohibiting braids, twists, and dreadlocks.[56] Before the policy was issued Pitts' supervisor told Pitts that she disapproved of her braided hairstyle and she should get her hair done in a "pretty style."[57] Pitts attempted to comply with her supervisor's request by switching to a different protective style in the form of twists, but her supervisor nonetheless disapproved of her hairstyle stating that it had "the look of dreadlocks."[58] At this point Pitts refused to have her hair restyled and argued that the company did not have a written policy regarding acceptable hairstyles.[59] In response, Pitts' supervisor issued

49. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (referring to the airline's prohibition on braided hairstyles); *see also* PIERRE, *supra* note 7, at loc. 804; Caldwell, *supra* note 16, at 575 (noting that "American [Airlines'] grooming rules [were] for customer-contact ground personnel").

50. *Rogers*, 527 F. Supp. at 234. The court also dismissed the sex discrimination claim. *Id.* at 231.

51. *Id.* at 232.

52. *Id.*

53. *Id*.

54. *Id.* at 233.

55. *See* Caldwell, *supra* note 16; PIERRE, *supra* note 7, at loc. 804; Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306, at *5 (M.D. Ga. Apr. 25, 2008).

56. *Pitts*, 2008 WL 1899306, at *5.

57. *Id*. at *1.

58. *Id*.

59. *Id*.

a memo banning the protective styles and fired her.[60] In rejecting Pitts' discrimination claim, the court simply cited *Rogers* and reasoned that, in and of itself, wearing "[d]readlocks and cornrows are not immutable characteristics" of race and are easily changed characteristics.[61] The court further rejected Pitts' argument that these styles are predominately tied to black culture and reasoned that "[t]he fact that the hairstyle might be predominantly worn by a particular protected group is not sufficient to bring the grooming policy within the scope of" the law.[62]

In the 2016 case *EEOC v. Catastrophe Management Solutions*,[63] the Eleventh Circuit affirmed the dismissal of a race discrimination case filed by the EEOC on behalf of Chastity Jones, a black woman with dreadlocks. While not prohibiting dreadlocks explicitly, Catastrophe Management Solution ("CMS") rescinded Jones' offer based on their grooming policy stating: "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 colors are acceptable."[64] Apparently, CMS interpreted that policy to mean dreadlocks categorically and the human resources manager even told Jones that her alleged violation of the policy had nothing to do with the look of her dreads personally. Instead, the manager simply felt that dreads "tend to get messy."[65] When Jones refused to cut her dreadlocks, the manager rescinded Jones' job offer and the EEOC soon filed a lawsuit against them that was subsequently dismissed by the trial court.[66] On appeal, one of the EEOC's many arguments opposing the trial court's dismissal was that the EEOC should have had the opportunity to present expert testimony to show that dreadlocks "are a reasonable and natural method of managing the physiological construct of Black hair, and that dreadlocks are an immutable characteristic, unlike hair length or other hairstyles."[67] While relying on *Rogers* the trial court rejected the need to present this evidence holding: "A hairstyle is not inevitable and immutable just because it is a reasonable result of hair texture, which is an immutable characteristic. No amount of expert testimony can change the fact that dreadlocks is [sic] a

60. *Id*. at *1-3.
61. *Id*. at *6.
62. *Id*.
63. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016).
64. *Id.* at 1022.
65. *Id.* at 1021.
66. *Id.*
67. EEOC v. Catastrophe Mgmt. Sols., 11 F. Supp. 3d 1139, 1144 (S.D. Ala. 2014).

hairstyle."[68] Unfortunately, the appellate court chose not to address this finding, which highlights a very important distinction between bringing a disparate treatment claim and bringing a disparate impact claim, discussed in Part III of this Note. Since the requested expert testimony would constitute evidence supporting the racial impact CMS's employment policy had on black people, the evidence was only relevant for a disparate impact claim, and not a disparate treatment claim. Because the EEOC only brought a disparate treatment claim, these arguments were not considered.

II. BIOLOGICAL ARGUMENTS ARE STRONGER THAN CULTURAL ARGUMENTS

By regurgitating the strained logic of *Rogers* and quickly foreclosing the idea that bans on braids, twists, and dreadlocks violate Title VII without understanding the biology of black hair, courts and lawyers alike, are blind to the argument that, just like "no-beard" policies, there is a well-documented necessity to wear protective styles to prevent hair loss and maintain healthy black hair. Although one could easily argue the simplistic view that braids, in and of themselves, are not immutable characteristics of race, by delving deeper into these cases, it is clear that the true immutable characteristic at issue is the unique texture and structure of black hair, which makes black hair susceptible to chronic breakage.[69] This part explores how the typical cultural arguments challenging such employment policies are deficient, and suggests an approach to successfully bringing a challenge against policies that ban braids, twists, and dreads.

A. The Problem with Culturally Based Arguments

"I wore my hair in its natural state. But not because I was trying to feed into my rebel cause or start a revolution. . . I was just being practical and normal. Nothing incredible or credible."

- Ezinne Ukoha[70]

In past grooming code cases, plaintiffs have prevailingly chosen to base their race discrimination claims on the cultural connections between protective styles and race instead of the biological reasons that make these

68. *Id.*

69. DAVIS-SIVASOTHY, *supra* note 1, at 23.

70. *Natural Hair Isn't Lovely and Amazing, it's Simply Normal*, HUFFINGTON POST: THE BLOG, (May 3, 2016 11:15 AM) http://www.huffingtonpost.com/ezinne-ukoha/natural-hair-isnt-lovely-_b_9760334.html.

styles necessary.[71] For example, the plaintiff in *Rogers* predicated her claim in part on her understanding of braided hairstyles as "part of the cultural and historical essence of Black American women."[72] Although cultural arguments are quite appealing and race truly is a complex concept that likely defies a single definition, these are unavailing arguments and ignore the fact that braids, twists, and dreads are essential to achieve healthy black hair.

There are three main problems in relying on culture-based arguments for black plaintiffs in grooming discrimination cases. First, culture-based positions present the problem of defining cultural boundaries. In his book *Racial Culture: A Critique*, Professor Richard Ford contends that antidiscrimination law "should limit the formal acknowledgement of race to its most formal and culturally empty definition."[73] Per Ford, centering legal protections around culturally or racially correlated characteristics presents the practical problem of determining where to draw cultural boundaries.[74] Secondly, Ford argues, cultural arguments highlight the dangers of essentialism. For instance, Ford questions how braids can be considered culturally black if, say, a significant segment of black women reject them as part of their culture.[75] Finally, it is important to recognize that cultural arguments simply argue that the policy is discriminatory because the culture is tied to the race – not that the policy is discriminatory because of an immutable characteristic that is tied to the race. Courts have time after time rejected cultural arguments of this nature because this argument is that bans against protective hairstyles are discriminatory not because of the immutable characteristics of the plaintiff's race, but because they violate the plaintiff's particular cultural choices.[76]

In addition to presenting challenges of defining boundaries and escaping essentialism, the *Rogers*-type culture-based arguments also fail to allow the courts to fully unpack the underlying misunderstanding of black hair at hand. The argument ignores the glaring assumption made by the *Rogers* court when

71. *See, e.g.*, Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981); EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1022 (11th Cir. 2016).

72. *Rogers*, 527 F. Supp. at 232.

73. RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 13 (Princeton Univ. Press, 2005); *see also* Keith Aoki & Kevin Johnson, *An Assessment of Latcrit Theory Ten Years After*, 83 IND. L.J. 1151, 1190 (2008).

74. *See* FORD, *supra* note 73, at 13.

75. *Id*.

76. *See also* Thomas M. Hruz, *The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQ. L. REV. 779, 821 (2002) (explaining that Title VII was designed to prohibit discrimination on bases beyond the employee's control).

it predicated its decision on the determination that braids are not "natural"[77] and does not expose the court's blatant ignorance when it figured an "afro/bush" style might offend Title VII because it is a "natural" hairstyle but did not consider the different styling options the natural Afro would need to stay healthy after it grew past a certain length. It also ignores the ignorance displayed by many courts who agree with the rationale of "no-beard" cases, that is, grooming policies may be discriminatory if the black population has more difficulty complying with the "neutral" policy due to the nature of their race, but yet come to the conclusion that a ban against protective styles is a grooming policy that applies equally to members of all races. Using biological arguments, however, would expose these ghastly assumptions made about black hair and the courts' incomplete understanding of the necessity of these styles to maintain healthy black hair.

B. Why Biology Arguments Are Better

To begin, the assertion that bans against protective styles are not racially discriminatory because they have nothing to do with the immutable characteristics of race and are "easily changeable" gives this issue short shrift. The utility of protective styles is essential to growing and maintaining healthy black hair because of the uniquely fragile nature of black hair. The major cause of hair damage for the black population is caused by the physical damage of what many people would call "normal" manipulation, tension, and handling of their hair.[78] Black hair strands have flattened, cross-sectional profiles, and each strand has a natural tendency to curl and coil around its neighbors making regular handling and styling manipulation detrimental to black hair over time.[79] The "Shoulder-Length Plateau," which is a widespread length plateau in black hair care is caused by the fragility of this hair type and protective hair styling is the ultimate key to hair preservation and to fight against it receding.[80] Without it, when black hair grows past this point, the already delicate and older hair ends repeatedly brush the shoulders in the open air, creating an overall tendency towards dryness.[81] The medical name for this type of hair breakage is acquired trichorrhexis nodosa ("TN").[82] Without comprehensive protective styling, the ends of the hair fray as they

77. *Rogers*, 527 F. Supp at 232.

78. DAVIS-SIVASOTHY, *supra* note 1, at 57.

79. *Id*.

80. *Id*.

81. *Id*.

82. Ana Maria Pinheiro, *Acquired Trichorrhexis Nodosa in a Girl: The Use of Trichoscopy for Diagnosis*, 4 (1) J. OF DERMATOLOGY AND CLINICAL RESEARCH 1064-65 (2016).

rub and slide back and forth across clothing.[83] Although the hair will continue to grow from the scalp, if this continues over the course of several months or years, the hair will continue to break at this point and may even retreat.[84]

In *Rogers* the court made the assertion that Rogers could have easily switched to a weave ponytail.[85] Although it is certainly true that Rogers could have put her hair up in this manner, this argument reveals that the court does not appreciate the fact that, because of the immutable characteristics of black hair, the constant manipulation and tension of black hair continuously worn up would also cause rampant hair breakage of the outer perimeter of a black person's hair.[86] This is why even though black hair can be worn up and off the shoulders to protect it from the "Shoulder-Length Plateau", such repetitive styling, increases friction, and frequent manipulation of the outer perimeter of the hair also causes breakage.[87]

[88]

Traction alopecia ("TA") is an extremely common condition experienced by black women "resulting from years of use of hairpieces and hairstyles that exert prolonged and repeated traction upon the hairs" around the perimeter of the hairline.[89] In the course of the disease, a phenomenon similar to a "follicular abandonment" occurs and the terminal hair (the hair that is thick, strong, and pigmented found in abundance on the scalp, in the pubic region,

83. *See* DAVIS-SIVASOTHY, *supra* note 1, at 57.

84. *Id.*

85. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

86. Caldwell, *supra* note 16, at 390; PIERRE, *supra* note 7, at loc. 791-92.

87. DAVIS-SIVASOTHY, *supra* note 1, at 57.

88. Aline Tanus et al., *Black Women's Hair: The Main Scalp Dermatoses and Aesthetic Practices in Women of African Ethnicity*, AN. BRAS. DERMATOL., July-Aug. 2015, at 465, http://www.scielo.br/pdf/abd/v90n4/0365-0596-abd-90-04-0450.pdf.

89. *Id.*

and under the arms) disappear from the follicles, and only the vellus hairs remain (commonly known as "peach fuzz").[90]

Protective styling is a black woman's antidote to the "Shoulder-Length Plateau" and TA, and braids, twists, and dreadlocks are the main protective styles a black woman can use to protect and grow her hair.[91] These styles reduce day-to-day combing and styling manipulation with brushes, combs, curling irons, and the use of blow dryers and flatirons that lead to breakage.[92] They also increase moisture, stop the hair from tangling, and reduce the need to apply physical manipulation while combing and detangling.[93] Black hair professionals suggest that protective styles should be worn 90% of the time, but at the bare minimum they should be incorporated at least times a few times each week to maintain a healthy hair regimen.[94] Because these styles are necessary to obtain and maintain healthy natural black hair, a black employee with long, natural hair that is faced with such an employment ban would likely suffer severe hair damage.

III. HOW TO SUCCESSFULLY BRING A DISCRIMINATION CLAIM WITH BIOLOGY

A. Avoid Bringing a Claim of Disparate Treatment Unless You Can Prove Intent

In a disparate treatment claim the plaintiff must establish *intentional* discrimination by the employer.[95] Typically, these cases are based on indirect, circumstantial evidence as opposed to direct evidence.[96] In a

90. *Id.*

91. "Some naturals vow that they have retained length without protective styling; we are happy for them and they are quite fortunate, but when it comes to afro-textured hair the truth is we are not all created equal." Marsha Buchanan, *10 Reasons You Are at a Hair Length Plateau*, BLACK HAIR INFORMATION (Sept. 8, 2013), https://blackhairinformation.com/growth/hair-problems/10-reasons-hair-length-plateau/2/.

92. DAVIS-SIVASOTHY, *supra* note 1, at 57.

93. *Id.*

94. *Id.* at 56-58.

95. *See* Rudin v. Lincoln Land Cmty. Coll, 420 F.3d 712, 719 (7th Cir. 2005).

96. "'Direct evidence is evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption.'" *Id.* at 720 (quoting Eiland v. Trinity Hosp., 150 F.3d 747, 751 (7th Cir. 1998)). "Direct evidence 'can be interpreted as an acknowledgement of discriminatory intent by the defendant or its agents.' [It] is a 'distinct' type of evidence that uniquely reveals 'intent to discriminate [, which] is a mental state.'" *Id.* (quoting Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994)) (internal citations omitted). A classic example of direct evidence of unlawful intentional race discrimination under Title VII is an employer's express statement that it terminated an employee because he is Black. *See, e.g.*, *id.* In this day and age employers know better than to do this.

disparate treatment case where circumstantial evidence,[97] as opposed to direct evidence, is offered, the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[98] and *Texas Department of Community Affairs v. Burdine* applies.[99] The first step is for the plaintiff to establish a prima facie case of race discrimination.[100] In response to the plaintiff's prima facie case, the employer must articulate a "legitimate, nondiscriminatory reason" for its adverse employment action.[101] If the employer successfully does so, the plaintiff must then produce evidence showing that the employer's asserted reason is pretextual, or in other words, the asserted reason is false, or that intentional discrimination was the real reason for the adverse employment action.[102] The plaintiff can prove pretext "'either directly, by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence.'"[103]

The elements of the plaintiff's prima facie case vary depending on the factual circumstances and the type of claim asserted.[104] In grooming cases, the plaintiff must establish a prima facie case of discrimination by proving the following four factors: (1) that the plaintiff belonged to a minority group; (2) that the plaintiff was qualified for the position or was adequately performing the plaintiff's duties in that position; (3) that the plaintiff suffered an adverse employment action; and (4) that the plaintiff was treated less favorably than others outside of his or her group, or that there are circumstances that give rise to an inference of discrimination.[105] Ultimately, the plaintiff's prima facie case must essentially establish a presumption that the adverse employment action occurred because of his or her race.[106] As

97. "Circumstantial evidence of discrimination . . . allows the trier of fact 'to infer intentional discrimination by the decisionmaker.'" *Id.* (quoting Rogers v. City of Chicago, 320 F.3d 748, 753 (7th Cir. 2003)).

98. 411 U.S. 792 (1973).

99. 450 U.S. 248 (1981).

100. *See McDonnell Douglas Corp.*, 411 U.S. at 802.

101. *Id.*

102. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . [and] a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.") (emphasis added).

103. Jackson v. State of Alabama State Tenure Comm'n, 405 F.3d 1276, 1289 (11th Cir. 2005) (quoting *Burdine*, 450 U.S. at 256).

104. *See McDonnell Douglas Corp.*, 411 U.S. at 792-93; Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1223 n.1 (11th Cir. 1993).

105. Onwuachi-Willig, *supra* note 2, at 1110-11.

106. *See Burdine*, 450 U.S. at 254.

previously discussed and as will be examined further in this Note, in race discrimination cases involving protective styles, courts have continuously held that the plaintiff was unable to establish a prima facie case of unlawful discrimination and dismissed the cases. Courts have justified their decisions on the basis that hairstyles are not "immutable characteristics" of race and thus, the typically "minimal"[107] burden of establishing a prima facie case is indeed "onerous"[108] in such cases.

By arguing the biological qualities of hair texture, which is within the scope of Title VII as it is considered an immutable racial characteristic of race, if a black woman is qualified, or is meeting job expectations and was subject to an adverse employment action, she should be able to show that she was treated less favorably because of her race by arguing the biological composition of her hair texture. Notably however, it is important the plaintiff does not attempt to argue that the protective styles themselves are an immutable characteristic because, as shown in *EEOC v. Catastrophe Management Solutions*, the court will swiftly reject that idea because hairstyles can change and thus, by definition, mutable.[109] In addition, it would be wise for the complaint to carefully and thoroughly explain why such a biology argument contradicts the common reasoning used by the courts that the grooming policies apply equally to members of all races that is used when they dismiss these cases as outside the scope of Title VII.[110] By arguing biology, the plaintiff could establish that bans on protective styles simply do not have the same substantive effect for all races considering the unique health concerns such as TN and TA that a black employee would face.[111] In fact, in *Trailways'* "no-beard" case the court noted how important and impactful it was that the plaintiff was able to use expert testimony to establish that PFB was a physical characteristic peculiar to black men.[112] Similar to the rationale used for these "no-beard" cases, although protective hairstyles are mutable, research has shown that the average black hair grows

107. D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1364 (2008); Bryant v. Begin Manage Program, 281 F. Supp. 2d 561, 569 (E.D.N.Y. 2003) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993)).

108. Greene, *supra* note 107.

109. *See supra* text accompanying notes 49-52; *see also* Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 469 (N.D. Cal. 1978) (Title VII is not implicated when an employment decision is based on "easily changed physical characteristics").

110. *See, e.g.*, Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

111. *See* Caldwell, *supra* note 16, at 390.

112. *See* EEOC v. Trailways, Inc., 530 F. Supp. 54, 57 (D. Colo. 1981) ("Judge Aldisert added that in Greyhound, the EEOC failed to prove a greater impact on blacks than on whites, but here the Commission cured that deficiency in proof.").

in such a manner that requires unique care as it is prone to certain conditions and diseases.[113] Numerous studies have found that the unique biological composition of black hair coupled with "regular" styling and handling manipulation is detrimental to black hair over time.[114] Simply stated, wearing black hair down and loose, regularly, encourages hair breakage that is unique to the black race[115] and protective styles are quite literally necessary to have healthy black hair.[116] By retaining an expert witness and using this information a plaintiff should be able to halt a court from (or at least have it explain itself before doing so) setting the plaintiff's hair styling options "against a standard that assumes non-Negro hair characteristics"[117] and force it to recognize that a ban on braids, twists, and dreads do not apply equally to members of all races. As shown by the "no-beard" cases, when difficulty to conform with an employment policy is caused by the immutable characteristics of one's race it is an actionable employment discrimination suit. Since PBF is caused by shaving the immutable physical characteristics of tightly coiled black hair,[118] the same standard should apply with similar diseases caused by immutable characteristics of black hair when a woman with long hair attempts to comply with an employment policy banning protective styles.

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its action.[119] This is where, even if the plaintiff is able to establish a prima facie case, the plaintiff will likely meet still another hurdle. A disparate treatment claim is an *intentional* discrimination claim.[120] Therefore, if, for example, the plaintiff's employer explained its actions simply by stating that it did not know that such styles were the primary ways for black women to safely wear their hair long in its natural texture, this explanation would disprove any intent to discriminate. Accordingly, a plaintiff should only use a disparate treatment claim if the

113. Black women, in particular, must be sensitive to the fact that black hair, on average, grows in a manner that requires unique care. DAVIS-SIVASOTHY, *supra* note 1, at 23.

114. *Id.*

115. *See id.*

116. *Id.*

117. *See, e.g.*, EEOC Decision No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18, 1 (1971) (holding that employer's grooming policy was discriminatory because it "measured ['Negroes'] . . . against a standard that assumes non-Negro hair characteristics.").

118. "Pseudofolliculitis barbae is an inflammatory condition typically involving the face and neck in persons with tightly curled hair." Roopal V. Kundu & Stavonnie Patterson, *Dermatologic Conditions in Skin of Color: Part II. Disorders Occurring Predominantly in Skin of Color*, AMERICAN FAMILY PHYSICIAN (June 15, 2013), http://www.aafp.org/afp/2013/0615/p859.pdf.

119. *See, e.g.*, Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712, 724 (7th Cir. 2005).

120. *Id.* at 719.

plaintiff has either direct or circumstantial evidence that the employer imposed the grooming policy to intentionally discriminate against the black population.[121] Sufficient circumstantial evidence here can be that the black woman explained to her employer that her hairstyle was one of only a few ways that she could wear her hair long and in its natural state.[122] As long the differences in the textures and structures of black and nonblack hair were understood by the employer, it would be improper to allow such bans simply because the employer did not take the time to fully think through the implications of those differences ahead of time.[123] After that point, an employer can justify its policy only by showing that there are bona fide occupational qualifications (BFOQ).[124] A BFOQ is a qualification that is reasonably necessary to the normal operation or essence of an employer's business.[125] There is no BFOQ defense for race however[126] so even if the employer argued that the purpose of the policy was to create a "conservative and business-like image,"[127] a consideration recognized as a bona fide business purpose for sex discrimination, it would not qualify for race discrimination.[128]

B. The Biology Argument is Better Suited for Disparate Impact Claims

The Supreme Court interpreted the Civil Rights Act of 1964 in *Griggs v. Duke Power Co.*, to proscribe not only overt discrimination but also practices that are fair in form but discriminatory in operation.[129] As a result Title VII also prohibits employment practices, regardless of the employer's intent when enacting the policy, if they have a disproportionately adverse impact on minorities in cases known as "disparate impact" claims.[130] The Supreme Court in *Griggs* explained, and later reinforced in *Connecticut v. Teal*,[131] the notion that good intent or absence of discriminatory intent does not redeem employment procedures or mechanisms that operate as arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate based on prohibited traits that are unrelated to

121. *Id.*
122. Caldwell, *supra* note 16, at 390.
123. *Id.* at 365, 370, 390.
124. *Id.* at 388 n.73.
125. *Id.*
126. *Id.*
127. *Id.* at 381.
128. *Id.*
129. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
130. Ricci v. DeStefano, 557 U.S. 557, 577-78 (2009).
131. 457 U.S. 440, 445 (1982).

measuring job capability.[132] Thus, employment practices that in operation exclude individuals "because of" prohibited traits[133] that are not job related or do not serve a business necessity are prohibited.[134] In 1991, Congress codified disparate impact discrimination as it was established in *Griggs*.[135]

Under the disparate impact framework, a plaintiff must first establish a prima facie case by showing that an employer used an "employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[136] Once a plaintiff establishes a "sufficiently substantial" disparity, the burden then shifts to the defendant to rebut the plaintiff's statistics or to show that the challenged practice is "job related" and consistent with "business necessity."[137] If the employer succeeds, the plaintiff then must show that other employment policy options would serve the employer's interest without creating the undesirable discriminatory effect.[138] Because a disparate impact claim does not require the plaintiff to prove that his or her employer *intentionally* discriminated against the plaintiff, if the plaintiff is able to illustrate to the court that bans against protective hairstyles are in fact within the scope of Title VII as they do not apply to each race equally,[139] it would be easy for the plaintiff to then use those same studies that establish a prima facie case for a disparate impact claim.

A plaintiff generally establishes a prima facie case of disparate impact caused by employment policy by offering "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion."[140] The plaintiff thus must establish an inference of causation between the employment practice and the racial disparate impact.[141] Disparate impact claims under Title VII do not require a showing of racial disparity in the actual numbers of the employer's work force[142] and there is no requirement that disparate impact claims must include evidence that actual job applicants were turned down for employment because of the challenged

132. *Griggs*, 401 U.S. at 429-31.

133. *Id.* at 429-30.

134. *Id.*

135. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C.A. § 2000e-2(a)) (West, Westlaw through Pub. L. No. 115-61).

136. Ricci v. DeStefano, 557 U.S. 557, 578 (2009).

137. *Id.*

138. *Id.*

139. *Id.*

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

141. *See id.* at 995; *see also* Caldwell, *supra* note 16, at 378.

142. Connecticut v. Teal, 457 U.S. 440, 450-51(1982); Bradley v. Pizzaco of Nebraska, Inc., 939 F.2d 610, 613 (8th Cir. 1991).

discriminatory policy.[143] In addition, a prima facie case can be made on general population figures when the data "conspicuously demonstrates [the] job requirement's grossly discriminatory impact,"[144] and, "when the disparity under attack has its roots in a medical condition peculiar to a protected racial group, the disqualifying racial condition and its prevalence may be established by expert medical testimony."[145] In a case challenging a policy based on prevalent racial medical conditions, the plaintiff is entitled to establish a prima facie case of disparate impact by relying on the experts testimony and dermatologists who may equate research study results to the black population as a whole.[146] This is true because the disqualifying racial condition would affect the black population without regard to geographical, cultural, educational, or socioeconomic considerations.[147] If the employer believes the studies' results were skewed, or disagrees with the dermatologists' views that the results of the studies mirror the black population as a whole, it is "free to adduce countervailing evidence of [its] own."[148]

In a disparate impact case where an employer's grooming policy prohibits employees from wearing braids, twists, or dreadlocks, the plaintiff should argue that the facially neutral employment policy discriminates against the black population when applied. The plaintiff should show that conditions like TA and TN almost exclusively affect the black population based on available styling options and the nonblack population rarely suffers from those conditions that may affect a black person who is unable to wear those styles. By using expert medical testimony and studies, the plaintiff will demonstrate that the employment policy effectively excludes the black population from the company's work force at a substantially higher rate than the nonblack population. In so doing, the plaintiff would be able to prove a prima facie case and demonstrate that the facially neutral grooming policy operates as a "built-in headwind"[149] for the minority group. After that point if the plaintiff is able to prove that the hairstyle bans are unrelated to measuring job capability, the plaintiff should be successful in their disparate

143. *See* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977); *Bradley*, 939 F.2d at 613.

144. *Dothard*, 433 U.S. at 331; *see also Bradley*, 939 F.2d at 613.

145. *Bradley*, 939 F.2d at 612.

146. *See Dothard*, 433 U.S. at 331 (reliance on general population data is not misplaced when there is no reason to believe the disqualifying racial characteristic of the sampled group differs markedly from the group's counterpart in the national population); *Bradley*, 939 F.2d at 613.

147. *See Bradley*, 939 F.2d at 613.

148. *Id.*

149. *Id.*

impact claim because the policy "falls more harshly" on a sizable segment of the black population, but does not similarly affect the nonblack population.[150]

IV. SOCIETAL IMPLICATION: BLACK HAIR IS UNNATURAL AND UNPROFESSIONAL

"When a black woman goes to apply for a job and she doesn't get that job because her hair is natural you need to take a step back and say something serious is going on here."

– Ruth Smith[151]

Why is it that, although protective styles are necessary to maintain healthy and long black hair, employers feel the need to ban them? Without these styles, black women[152] are left with two options; one, she can chemically alter her racial characteristics to acquire straighter hair which, for many, leads to severely damaged hair,[153] or two, she can hide her natural hair with a wig or weave.[154] Each of these options unjustifiably require black women with long hair to either change their racial characteristics or hide them. This Part explores the fact that, in addition to research proving that braids, twists, and dreadlocks are needed for healthy black hair and the *Rogers* court erred when it stated that the styles were not "a product of natural hair growth,"[155] packed into the physically damaging ban against protective styles is also the psychologically damaging mentality that nonblack hair characteristics are more desirable and implicit demands for black women to abandon their true hair texture.

150. *Id.*

151. Cheryl Thompson, *Black Women and Identity: What's Hair Got to Do With It?*, 22 MICH. FEMINIST STUDIES 78, 83 (2008-2009), http://hdl.handle.net/2027/spo.ark5583.0022.105.

152. *See supra* note 3.

153. PIERRE, *supra* note 7, at loc. 791-92.

154. And for a man it would appear he simply has no recourse.

155. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

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Some scholars feel discrimination against natural Black hair is not a conspiracy, but rather the result of a subliminal set of pre-conditioned "taste-responses" which date back to slavery, and which are controlled by prevailing western beauty ideals.[157] Many theorize that light skin, straight hair, and fine features were the standards of beauty that were in turn pushed onto slaves as desirable, and slaves with straighter, less afro-textured hair, and lighter skin were sold for higher prices at auction.[158] As a result, society has internalized the idea that the straighter the hair, the better, and the more textured, the worse.[159] Many scholars believe that this mentality has run so deep that it is the reason why some people, corporations, and other entities enact policies that inherently discourage black hair for entry into their social circles, jobs, and schools.[160] This inherent basis against black hair is also revealed in *Rogers* as the court amazingly concludes it would be more "natural" for Rogers to wear a weave ponytail then her natural hair in a braided style.[161]

It goes without saying, this aggressive behavior ostracizing the appearance of black hair has led to a great many of black people to harbor

156. Rihanna (@rihanna), TWITTER (May 11, 2011, 7:51 AM), https://twitter.com/rihanna/status/68327348780531714. This twitter exchange between musical artist, Rihanna, and a fan illustrates how abnormal and undesirable black hair's kinky texture is viewed to some people and how it is irrespective of socioeconomic status.

157. AROGUNDADE, *supra* note 9, at loc. 1959-62.

158. *Id.*

159. As we have seen, even courts held this mentality as they used textured hair to be a determining factor to conclude slave status. *See* Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134, 139 (1806).

160. Caldwell, *supra* note 16, at 390.

161. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

feelings of inferiority in relation to their hair.[162] In fact, in 2008[163]and 2009[164] the U.S. House of Representatives and the Senate issued apologies for the U.S.'s history of slavery in which members of Congress acknowledged the lingering consequences still felt today from the vestiges and aftermath of slavery. In its formal apology to African American citizens, the concurrent Senate Resolution proclaimed:

> [African Americans] forced into slavery were brutalized, humiliated, and dehumanized . . . and stripped of their names and heritage. . .; the visceral racism against people of African descent . . . became enmeshed in the social fabric of the United States, . . . African-Americans continue to suffer from the consequences of slavery and Jim Crow laws – long after both systems were formally abolished.[165]

When employers enforce policies that prevent black women from properly maintaining healthy natural black hair, black women are told to either face hair loss or cover their natural black hair with a wig or hairpiece. Understandably the latter solution – covering one's natural black hair with artificial hair – is frequently utilized in such a situation and the fact that it is effectively required to stay employed connotes a demeaning subordination against black racial characteristics that persists even in the face of America's most cherished and enduring symbols of inclusivity – Title VII.[166]

Regarding these hairstyles as "unprofessional,"[167] "non-business like,"[168] or "excessive"[169] without regard to whether the style is "neat, clean, or well-groomed"[170] operates to keep black women out of the workplace in disproportionate numbers and the biases against these styles qualify as an unnecessary, artificial, and arbitrary barrier to employment equality in direct violation of Title VII.[171] Although it is important that an employer is able to have workplace grooming policies that are, to the extent they are legal, consistent with the workplace necessity, challenges against these styles should not be summarily dismissed as outside the scope of Title VII and employers should be required to justify why the policy is job-related and fulfills a business necessity. As a result, the policies that exclude black

162. PIERRE, *supra* note 7, at loc. 315-18.

163. H.R. Res. 194, 110th Cong. (2008).

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

165. *Id.*

166. *See id*.

167. EEOC v. Catastrophe Mgmt. Sol., 837 F.3d 1156, 1159 (11th Cir. 2016) *opinion withdrawn and superseded*, 852 F.3d 1018 (11th Cir. 2016).

168. *See id.*

169. *See id.*

170. *EEOC Compl. Manual*, *supra* note 38.

171. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

women's neat, clean, and well-groomed, natural hairstyles are based on racial stereotypes that continue to denigrate natural black hair even though hair texture is recognized by the EEOC as an "immutable characteristic associated with race," and they should be invalidated as impermissible discrimination under Title VII.[172] It is important that courts try to unlearn the hair grading system that seems so entrenched in our culture. By preserving these policies, there will always be an identity crisis within the black population and stigma associated against black features because our society would continue to perpetuate the view that a black person should first alter or abandon their black features in order to be successful in their careers.[173] The courts must resolve to keep hair extensions and hairpieces in their proper places – as fun, quick hair-styling enhancements – and prevent black employees from being singled out and required to hide their healthy black hair with weaves to remain employed.

CONCLUSION

"Hair seems to be such a little thing. Yet it is the little things, the small everyday realities of life, that reveal the deepest meanings and values of a culture, give legal theory its grounding, and test its legitimacy."

– Paulette M. Caldwell[174]

Courts have accepted bans against protective styles as nondiscriminatory,[175] by measuring the black population "against a standard that assumes non-Negro hair characteristics."[176] For this reason, courts that have reviewed these employment policies have failed to recognize bans against protective hairstyles, such as braids, dreadlocks, and twists, do not apply equally to each race and do not respect racial differences in hair texture.[177] Instead, the current case law on this issue has been unfairly based upon an assumption that black hair's structure and texture is similar to that of all races, when in fact, it is very different. As a result, courts have allowed employers to place impermissible requirements on black employees to

172. *EEOC Compl. Manual*, *supra* note 38.

173. AROGUNDADE, *supra* note 9, at loc. 2554-55.

174. Caldwell, *supra* note 16, at 390.

175. EEOC Decision No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971); *see also* Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168 (7th Cir. 1976).

176. EEOC Decision No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971).

177. *See id*.

change or hide the physical structure and texture of their hair.[178] Such requirements are no more acceptable than requirements to change nose width or skin color. The courts' deafening silence regarding the immutable characteristics of black hair and the subsequent hair loss likely to occur without the ability to wear protective styles is a very unfortunate error in court opinions that deal with these issues. The law cannot continue to ignore the biological nature of black hair and the issue of employment bans against natural black hairstyles are primed and ready for re-evaluation. It is time for the law to rid itself from this lingering slavery-stemmed bias against the features of black hair and recognize that black employees entitled to join their coworkers in the privilege of wearing and maintaining natural healthy hair.

Venessa Simpson∗

178. Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 409–10 (2006) ("[I]t is inappropriate and potentially stigmatic to give society's predominantly white managers, supervisors, and customers unfettered discretion to define socially desirable behavior, grooming, and appearance standards.").

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