

UNDERSTANDING HAIR DISCRIMINATION

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OVERVIEW OF TOPICS FOR TODAY

- Understanding hair discrimination
- State laws on hair discrimination
- Federal law on hair discrimination
- Dress & grooming policies
- Hypotheticals
- Q&A



WHAT IS HAIR DISCRIMINATION?

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“I feel like she
smells like
patchouli oil or
maybe weed.”

- *2015 Oscar Red Carpet
Commentator*



WHAT WAS WRONG WITH THIS STATEMENT?



- Comment implicates the stereotype that people with locs or dreadlocks: (i) do drugs; (ii) are associated with marijuana; and/or (iii) are smelly, dirty, unkempt
- But it was “Fashion Police” commentator? Comment implies that dreadlocks do not belong at the Oscars, or in other spaces.
- Zendaya was trying to showcase locs in a positive light to mainstream audiences, the offensive comment undercut that attempt

BLACK NATURAL HAIR IS PROFESSIONAL



Vincent Brown
Professor,
Harvard University



Rep. Ayanna Pressley
Congresswoman



Bozoma Saint John
Chief Marketing Officer
William Morris Endeavor

IMPLICIT BIAS

- Implicit bias—the ways that negative societal perceptions inform our everyday actions, often without us even realizing it



UNDERSTANDING THE HISTORY OF HAIR DISCRIMINATION

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DEFINITIONS

- Black natural hairstyles – locs, braids, twists, etc.

- These are “Protective hairstyles” and provide:
 - Protection from the elements
 - Maintain moisture

DEFINITIONS



Braids



Twists



Locs / Dreadlocks

DEFINITIONS



Bantu Knots



Box Braids



Cornrows

STIGMA AGAINST BLACK NATURAL HAIR IS NOT NEW

- Post-emancipation, black people began using chemicals—known as “relaxers”—to soften their hair in order to be accepted into a newly integrated society
- Madame C.J. Walker, the first black female millionaire, made her fortune selling products meant to straighten black hair as a way to help



IS THIS REALLY *STILL* A PROBLEM?

- Yes, new evidence shows there's still bias against black natural hair
- A February 2017 study by the Perception Institute, found that black women feel more anxiety about their hair and are twice as likely in comparison to white women to feel pressure to straighten it in their workplace
- And the study found that many people “show implicit bias against black women’s textured hair”

Source: ‘The “Good Hair” Study: Explicit and Implicit Attitudes Toward Black Women’s Hair’ <https://perception.org/goodhair/>

NATURAL HAIR HAS BECOME INCREASINGLY POPULAR

- The Boston Globe reported that sales of hair relaxer dropped from \$206 million in 2008 to \$152 million in 2013
- Today, numerous non-black-owned hair-products companies have lines for naturally curly hair

CALIFORNIA: THE CROWN ACT

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CALIFORNIA: THE CROWN ACT

On July 3, 2019, Governor Newsom signed into law Senate Bill 188, also known as the CROWN Act (Create a Respectful and Open Workplace for Natural Hair). SB 188, which is effective January 1, 2020, seeks to protect employees and students from discrimination based on natural hair and hairstyles associated with race. With the signing of SB 188, California becomes the first state to ban discrimination based on one's natural hair.

Effective January 1, 2020

CALIFORNIA: THE CROWN ACT

- The Legislature finds and declares all of the following: [...]
 - (b)[...] Professionalism was, and still is, closely linked to European features and mannerisms, which entails that those who do not naturally fall into Eurocentric norms must alter their appearances, sometimes drastically and permanently, in order to be deemed professional [...]
 - (d) Workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group [...]

CALIFORNIA: THE CROWN ACT

- California Government Code section 12926:
 - (w) “Race” is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles
 - (x) “Protective hairstyles” includes, but is not limited to, such hairstyles as braids, locks, and twists
 - *Education Code amended as well

CALIFORNIA: THE CROWN ACT

- The remedies for violation can include backpay, reinstatement, front pay; injunctive relief, attorney's fees and costs, compensatory damages, and punitive damages (if an employer is found to have acted with malice or reckless indifference)

CALIFORNIA: THE CROWN ACT

- Will grooming policies be unlawful on January 1st 2020?
 - In a July 3, 2019, press release, Governor Newsom clarified that employers may still implement and maintain dress and grooming policies, so long as they are “valid and non-discriminatory” and do not have a “disparate impact”

CALIFORNIA: THE CROWN ACT

- What about safety concerns?
 - Employers may continue to enforce policies that require employees to secure their hair for health, safety, or hygienic reasons, but should ensure those policies are consistently applied to all employees

CALIFORNIA: THE CROWN ACT

- Business necessity defense:
 - To constitute a BND, an employment practice with disproportionately adverse impact must be shown to be necessary to safe and efficient job performance



CALIFORNIA: THE CROWN ACT

- What about BFOQ?
 - The Fair Employment and Housing Act provides that a discriminatory employment practice is not unlawful if it is based upon a “bona fide occupational qualification,” (hereafter BFOQ) (Gov. Code § 12940)

CALIFORNIA: THE CROWN ACT

- What about BFOQ?
 - Employer must demonstrate that the occupational qualification is “reasonably necessary to the normal operation of [the] particular business”
 - Employer must show that the categorical exclusion based on protected class characteristic is justified, i.e., that “all or substantially all” of the persons with the subject class characteristic fail to satisfy the occupational qualification

OTHER STATE & LOCAL JURISDICTIONS

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NEW YORK CITY (FEB. 2019)

- “Employers may not ban, limit, or otherwise restrict natural hair or hairstyles associated with [B]lack communities to promote a certain corporate image, because of customer preference or under the guise of speculative health or safety concerns,” according to the guidelines. “An employee’s hair texture or hairstyle generally has no bearing on their ability to perform the essential functions of a job.”
- Up to \$250,000 per violation

NEW YORK CITY LAW – ENFORCED

- The New York Times reported that the Sally Hershberger salon on the Upper East Side agreed to a settlement with New York City's Human Rights Commission that included a \$70,000 fine. The salon was part of an investigation by the city commission following accusations of hair-based racial bias from former employees.

SALLY HERSHBERGER
PROFESSIONAL HAIR CARE



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NEW YORK STATE (JUL. 2019)

- New York State joined the trend, amending its Dignity Act to expand the definition of race to include natural hair and hairstyles
- Similar to the NYC Law and CROWN Act
- Took effect immediately

NEW JERSEY (PENDING):

- New Jersey has also introduced legislation (Senate Bill 3945) which would expand the New Jersey Law Against Discrimination to outlaw discrimination on the basis of an individual's hairstyle in the workplace, housing, and schools
- Similar to California's CROWN Act

OTHER JURISDICTIONS

- Several states and localities have ***proposed*** similar hairstyle discrimination laws, including Michigan, Wisconsin, Illinois, and Kentucky – as well as Cincinnati, OH, and Montgomery County, MD
- Given the growing trend, it is likely other states and local jurisdictions will propose similar restrictions

IS HAIR DISCRIMINATION UNLAWFUL UNDER TITLE VII?

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MS. CHASTITY JONES



An employer's refusal to hire Ms. Jones because she wears locs does not violate Title VII. See *EEOC v. Catastrophe Management Solutions*, 852 F.3d 1018 (11th Cir. 2016).

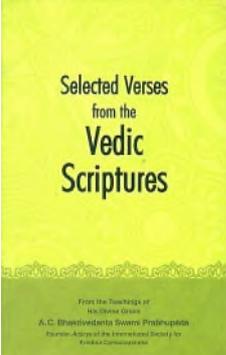
FACTS OF THE CASE

- Applied for Customer Service Representative
- No in-person contact with customers
- No mention of Ms. Jones' hair during her interview
- Ms. Jones hired on-the-spot. HR Manager asked if Ms. Jones' hair was in dreadlocks.
- HR Manager said company would not hire someone with dreadlocks because they "tend to get messy"
- Ms. Jones refused to change her hair, the job offer was rescinded

FACTS OF THE CASE

- CMS written policy
 - “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. ... [H]airstyle should reflect a business/ professional image. No excessive hairstyles or unusual colors are acceptable[.]”.

COURT'S FINDINGS



COURT'S FINDINGS

- “Title VII prohibits discrimination on the basis of **immutable** characteristics, such as race, sex, color, or national origin. A hairstyle, even one more closely associated with a particular ethnic group, is a **mutable** characteristic.”

COURT'S FINDINGS

- Immutability = “beyond the victim’s power to alter”
- Locs/dreadlocks are not exclusive to black individuals
- Banning dreadlocks under a race-neutral grooming policy does not constitute intentional race-based discrimination

COURT'S FINDINGS

- Motion to Dismiss – Ms. Jones' complaint dismissed based on pleadings alone. No evidence of how CMS ever applied its hair policy to anyone who is not black.
- District court dismissed. 11th Circuit affirmed.
- SCOTUS denied cert.

BFOQ UNDER TITLE VII

- Title VII: No BFOQ for race
- The Equal Employment Opportunity Commission has taken the position that “race” is not limited to the color of one’s skin and includes other physical and cultural characteristics associated with race. Thus, according to the EEOC, a particular hairstyle, or the texture of an employee’s hair, has no correlation to any bona fide occupational qualification.

WHAT ABOUT AFROS UNDER TITLE VII?

- *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F. 2d 164 (7th Cir. 1976)
- Courts recognize race discrimination claims based on afros: “Ms. Jenkins alleged that, after years of manipulating her hair into different styles, she suffered racial discrimination only when she allowed her hair to revert to its natural style – an afro”

WHAT MAKES A HAIRSTYLE EXTREME?

- *Ewing v. United Parcel Service Inc.*, (No. 2:2016cv02641), a federal district court last year in Kansas found that an employee who was terminated for wearing bright colored hair was not terminated from employment on the basis of race but rather for violating the employer's personal-appearance guidelines

WHAT MAKES A HAIRSTYLE EXTREME?



QUESTIONS ABOUT MS. JONES' CASE

- Should black natural hairstyles be considered immutable characteristics?
- How is a “no dreadlock” policy different from a “no bun” or “no ponytail” policy?
- Would Ms. Jones have won her case if she alleged her dreadlocks were naturally occurring?
- Does wearing natural black hairstyles have a negative effect on employment opportunities? Isn't that what Title VII is meant to prevent?

DRESS & GROOMING POLICIES

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CALIFORNIA, ET AL., REVISIT YOUR POLICIES:

- While employees can be required to have neatly groomed hair, differences in hair texture must be respected and natural hairstyles such as afros, locs, etc., can't be deemed unacceptable

TITLE VII - BEST PRACTICES

- Employers may establish and enforce race-neutral grooming policies for their workplace without running afoul of Title VII
- Employers should take steps to ensure that the policies and their enforcement do not disproportionately impact persons of color

DISNEY

According to a 2015 lawsuit, Disney's official dress policy states that the Disney Look "is a classic look that is clean, natural, polished and professional, and avoids 'cutting edge' trends or extreme styles." Female cast members' "hair should be neatly combed and arranged in a classic, easy-to-maintain style. Extreme styles are not permitted."



SAMPLE GROOMING POLICY

- Hair should be kept neat and professional looking. Hair color reasonably “natural” in appearance.
- Facial hair should be shaved except that employees may wear neatly-maintained beards or moustaches
- Fingernails should be well-manicured and of moderate length
- Employees are expect to bathe, use deodorant, and maintain general good hygiene

CONSIDER

- To the extent people have any dress codes or policies on grooming or professionalism, consider if there are ways in which these standards and codes can affect protected classes more?
- More lenient grooming standards can result in better retention and recruitment efforts

RESPECTFUL WORKPLACE IS KEY



Dalai Lama inspects the dreadlocks of Collingwood Australian rules footballer Harry O'Brien in 2011

REMEMBER – POLICIES TARGETING NATURAL HAIRSTYLES WILL SPARK DEBATE



Clinton turned away from his first day of school



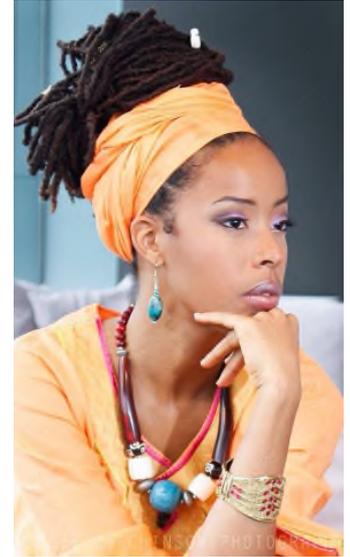
Wrestler forced to cut hair

HYPOTHETICALS

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CALIFORNIA

Liz is black. Liz wears her hair in locs and also sometimes likes to wear her hair up with her orange scarf, depending on her outfit. Her employer's grooming policy states that employees shall maintain professional appearance and are not allowed to wear any "head gear" including hats, headbands, etc. Any issues?



CALIFORNIA

Luke is white. Luke likes to wear his hair in locs. His employer's grooming policy states that employees shall maintain professional appearance and are not allowed to wear any "dreadlocks." Any issues?



CALIFORNIA

Sean is black. Sean likes to wear his hair in a mohawk. His employer's grooming policy states that employees shall maintain professional appearance and are not allowed to wear any "mohawks." Any issues?



Q&A

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THANK YOU



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Licensed in California and Illinois

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