?: 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]

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,

> 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

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]

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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,

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-

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 essen] t Bem

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 BiologyArguments 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 regulats

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 Rogersthe 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]

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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 abandonio# Aexer

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.
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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 pretext,

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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

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]

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]

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

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.

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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

> ³:KHQ D EODFN ZRPDQ JRHV WR DSSO\ I get that IRU D M 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