

## Title VII and African American Hair: A Clash of Cultures

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### INTRODUCTION

Vanessa Van Dyke's hair is a "distraction"—school officials said when they threatened to expel her for wearing her naturally curly afro.<sup>1</sup> At only ten years old, Van Dyke was marginalized for wearing her natural hair. She did not want to cut her hair because, like many African American women, her hair is part of her identity—"It says I'm unique . . . First of all, it's puffy and I like it that way. I know people will tease me about it because it's not straight. I don't want to fit in."<sup>2</sup> Van Dyke was suspended because her hair violated Orlando Faith Academy's policy: "hair must be a natural color and must not be a distraction."<sup>3</sup> The policy cites mohawks, shaved designs, and rat

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<sup>1</sup> *Bullied 12-Year-Old Girl Who Was Threatened with Expulsion from School for Refusing to Cut Her Natural Afro Hair Welcomed Back Without Having to Cut a Single Strand*, DAILY MAIL (Dec. 2, 2013, 10:37 AM), <http://www.dailymail.co.uk/news/article-2516925/Vanessa-Van-Dyke-12-threatened-expulsion-refusing-cut-afro-hair-welcomed-school.html#ixzz3oSn7CANr>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

tails as examples of “distractions.”<sup>4</sup> However, unlike the examples provided in the school’s policy that involve altering one’s hair, Van Dyke’s hair remained its natural texture.<sup>5</sup> Although Van Dyke was eventually allowed to return to the academy,<sup>6</sup> she was almost deprived of her elementary education simply because she chose to embrace her natural hair.

Van Dyke and many others have chosen to wear their natural hair and subsequently lost educational or other opportunities.<sup>7</sup> For example, in 2006, activist Marc Lamont Hill reported that the Baltimore Police Department proposed implementing a policy banning “extreme or fad hairstyles” including “cornrows, mohawks, dreadlocks, and twists.”<sup>8</sup> Hill claimed that this policy criminalizes African American hairstyles since the department allegedly started the policy because “the police were blending in with the criminals.”<sup>9</sup>

These hair policies are not limited to predominately white institutions; they are common in African American organizations as well. In 2001, Hampton University—a historically African American university—stopped males in their five-year Masters of Business

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<sup>4</sup> *Id.*

<sup>5</sup> *Update: African-American Girl Won't Face Expulsion Over 'Natural Hair,'* CLICK ORLANDO.COM (Nov. 27, 2013, 4:41 PM), <http://www.clickorlando.com/news/update-african-american-girl-wont-face-expulsion-over-natural-hair>.

<sup>6</sup> *Id.*

<sup>7</sup> *See* Desire Thompson, *Texas Mom Says Daughter Was Kicked off Cheerleading Squad for Refusing to Straighten Curly Hair*, NEWSONE (Nov. 9, 2015), <http://newsone.com/3245416/daughter-kicked-off-cheerleading-squad-for-curly-hair/> (a biracial student was kicked off the cheerleading team for refusing to straighten her curly hair because the chemicals would damage her hair).

<sup>8</sup> Marc Lamont Hill, *Baltimore Police Ban Natural Hairstyles*, MARC'S BLOG (Dec. 21, 2006), <http://www.marclamonthill.com/baltimore-police-ban-natural-hairstyles-1727>.

<sup>9</sup> *Id.*

Administration program from wearing dreadlocks and cornrows.<sup>10</sup> The school claimed that the hair policy was implemented to ensure that their students “[got] into the job.”<sup>11</sup> In its statement, the university implied that students who wear their natural hair are less likely to gain employment, versus students wearing more traditional hairstyles.<sup>12</sup>

As Van Dyke’s, the Baltimore Police Department’s, and Hampton’s stories exemplify potential negative impacts African Americans face when they chose to embrace natural hairstyles. Popular culture’s recent acceptance of natural African American hair makes the issues of hair politics and policies particularly relevant for consideration.<sup>13</sup> Though these policies are often facially neutral and not intended to have discriminatory effects, they can adversely affect African American employees.<sup>14</sup>

These discriminatory policies are likely the result of an unconscious bias against stereotypical African American appearances. Employers should solicit input from minorities while drafting grooming policies to decrease the likelihood of lawsuits and

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<sup>10</sup> Julee Wilson, *Hampton University’s Cornrows and Dreadlock Ban: Is It Right?*, HUFFINGTON POST (Aug. 23, 2012, 6:47 PM), [http://www.huffingtonpost.com/2012/08/23/hampton-university-cornrows-dreadlock-ban\\_n\\_1826349.html](http://www.huffingtonpost.com/2012/08/23/hampton-university-cornrows-dreadlock-ban_n_1826349.html).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See Ruth La Ferla, *The Afro as a Natural Expression of Self*, N.Y. TIMES, (Oct. 2, 2013), <http://www.nytimes.com/2013/10/03/fashion/the-afro-as-a-natural-expression-of-self.html>; see also John-John Williams IV, *Afros, Dreads, Natural Styles More Popular, Still Controversial*, BALTIMORE SUN, (Mar. 4, 2015, 5:55 PM), <http://www.baltimoresun.com/features/fashion-style/bs-lt-natural-hair-20150304-story.html>.

<sup>14</sup> See Andrew L. Rodman, *Dreaded Ultimatum: Cut Your Hair Or Get Out Of Here!*, 28 No. 8 FLA. EMP. L. LETTER 1 (2016) (urging employers to proceed with caution when drafting grooming policies that may have an adverse effect on African American employees).

improve employee satisfaction. This change would allow the employer to maintain their ability to regulate aspects of the employee's appearance without requiring their employees to change something that is culturally significant. However, since there are often few African Americans within the corporation or the firm drafting these policies, employers may have to use outside consultants or increase diversity recruiting efforts to implement this solution.

This note explores the possible motivations behind these grooming policies and their effect on African Americans in the workplace. It also explores possible legal arguments that could invalidate such policies under Title VII of the Civil Rights Act of 1964 (Title VII).<sup>15</sup>

Part I examines the history of African American natural hair and its continued significance as a racial identifier. Part I also surveys significant Title VII case law on hair discrimination and the connection between hair policies and implicit bias. Part II illuminates the disconnect between Title VII's failure to recognize hair discrimination as race discrimination and the historical significance of hair as a racial identifier. Part II then examines how facially neutral hair policies are part of a larger the shift from explicit race discrimination to policies that are informed by stereotypes and implicit bias.

Part III sets forth a proposal: that instead of focusing on the Title VII litigation, employers should collaborate with minority decision makers to redesign grooming policies that allow regulation of employee appearance using objective criteria instead of a subjective standard that leaves room for implicit bias.

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<sup>15</sup> 42 U.S.C. § 2000e-2 (Westlaw through P.L. 114-327).

## I. HISTORY

*A. Importance of Hair as a Signifier of Race*

As early as the 1940s and 1950s, Americans used straight hair and light skin as a form of “symbolic capital,”<sup>16</sup> providing better opportunities for lighter skinned African Americans. For example, during this time, some churches discriminated based on the texture of one’s hair with the comb test.<sup>17</sup> If an individual’s hair “was too nappy and it snagged in the comb,” he or she was not allowed to enter the church.<sup>18</sup> Therefore, naturally straight or chemically straightened hair was required to be part of these community organizations.<sup>19</sup>

At the same time, African Americans were inundated with images and advertisements glorifying straightened hair and encouraging them to reject naturally curly hair.<sup>20</sup> From 1948 to 1953, hair-straightening products made up ten to eleven percent of the total advertising in *Ebony* magazine.<sup>21</sup> These advertisements associated

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<sup>16</sup> Evelyn Nakano Glenn, *Yearning for Lightness: Transnational Circuits in the Marketing and Consumption of Skin Lighteners*, 22 *GENDER & SOC’Y* 281, 282 (2008).

<sup>17</sup> See Audrey Elisa Kerr, *The Paper Bag Principle: Of the Myth and the Motion of Colorism*, 118 *J. AM. FOLKLORE* 271, 285 (describing the comb test folklore at a church in Philadelphia).

<sup>18</sup> KATHY RUSSELL-COLE ET AL., *THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR IN A NEW MILLENNIUM* 60 (2013).

<sup>19</sup> *Id.*

<sup>20</sup> See Cheryl Thompson, *Black Women and Identity: What’s Hair Got to Do With It?*, *UNIV. OF MICH. FEMINIST STUD.* (Fall 2008–2009), <https://quod.lib.umich.edu/cgi/t/text/text-idx?cc=mfsfront;c=mfs;c=mfsfront;idno=ark5583.0022.105;rgn=main;view=text;xc=1;g=mfsg> (arguing “that women in large part see no option but to alter their hair because of the images we are inundated with of women whose hair is very long, silky, flowing . . .”).

<sup>21</sup> Taylor Mioko Dewberry, *Defining Black Beauty Before “Black is Beautiful”* 20–21 (May 15, 2014) (unpublished B.A.H. thesis, Stanford University) (on file with author and Stanford University American

straight hair with romance and beauty,<sup>22</sup> and images encouraged straightening hair, “reinforc[ing] a negative portrayal” of natural hair.<sup>23</sup>

While society regularly rejected African-American hair from 1940s to the 1960s,<sup>24</sup> natural hair and afros experienced a sharp rise in popularity during the “Black is Beautiful” movement of the late 1960s.<sup>25</sup> Fueled by the growing civil rights movement and popularity of Rhythm and Blues music, the “Black is Beautiful” movement rejected practices of white emulation, such as skin whitening creams and hair straightening products.<sup>26</sup> During the civil rights movement, Malcolm X criticized those who straightened their hair, stating “[w]e have been a people who hated our African characteristics.”<sup>27</sup> Other civil rights leaders believed that wearing natural hair was the “most obvious sign” that fellow African Americans supported the civil rights movement.<sup>28</sup> In response, more African Americans began wearing afros, and *Vogue* magazine even featured Charlene Dash

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Studies Department) (citing generally EBONY MAGAZINE, 1946–53) (describing a study the author compiled of the Stanford University Ebony Archives).

<sup>22</sup> See, e.g., *Snow White Advertisement*, EBONY, Apr. 1948, at 1 (referring to straightened hair as “lustrous,” “beautiful,” and promising that it would “delight your man tonight”).

<sup>23</sup> Chanel Donaldson, *Hair Alteration Practices Amongst Black Women and the Assumption of Self-Hatred*, NYU DEPT. APPLIED PSYCHOL. (Fall 2012), <http://steinhardt.nyu.edu/appsych/opus/issues/2012/fall/hairalteration>. See Imani Perry, *Buying White Beauty*, 12 CARDOZO J.L. & GENDER 579, 580–82 (2005) (discussing the popularity of women of color conforming their beauty standard to that of white women).

<sup>24</sup> BEN AROGUNDADE, BLACK BEAUTY: A HISTORY AND A CELEBRATION 50–52 (2000).

<sup>25</sup> *Id.* at 64–65, 72.

<sup>26</sup> *Id.* at 64–66.

<sup>27</sup> *Id.* at 71.

<sup>28</sup> *Id.* at 70.

wearing an afro in a two page spread.<sup>29</sup> Similarly, in June of 1966, *Ebony* released a cover of a model with an afro titled “The Natural Look: New Mode for the Negro Woman.”<sup>30</sup> Although the “Black is Beautiful” movement seemed to mark the shift towards popular acceptance of natural hair,<sup>31</sup> for many reasons some African Americans continued to straighten their hair.<sup>32</sup> Many thought that “American success” was gained through ascribing to European ideology.<sup>33</sup>

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<sup>29</sup> Charlene Dash was featured in *Vogue Magazine* in 1968. *Id.* at 73. See Claire Sulmers, *Black History Month with Fashion Bomb Daily: Charlene Dash*, FASHION BOMB DAILY (Feb. 9, 2011), <http://fashionbombdaily.com/black-history-month-with-fashion-bomb-daily-charlene-dash/> (in its May 1970 issue, *Ebony* proclaimed “[Dash] is considered one of the top black models in the nation”).

<sup>30</sup> *The Natural Look: New Mode for Negro Woman*, EBONY, June 1966, <https://books.google.com/books?id=Q18CIGb9y5QC&printsec=frontcover&dq=Ebony+June+1966&hl=en&sa=X&ved=0ahUKEwj2jI7i4OjKAhVJmh4KHctFBVYQ6AEIJAA#v=onepage&q=Ebony%20June%201966&f=false>. See *The Natural Look: New Mode for Negro Woman?*, BALTIMORE AFRO-AMERICAN, June 18, 1966, at N9 (“A new concept in beauty becoming more popular, especially among the younger set, is the wearing of hair in its natural state . . . as featured in June *Ebony* . . . .”); see also Samuel Abbott Jr., *Letters to the Editor: ‘The Natural Look,’* EBONY, Aug. 1966, at 12 (applauding *Ebony*’s “The Natural Look” article, Abbott writes “[b]ut for Negroes to judge themselves by another race’s beauty standard is like trying to make a poodle look like a collie”).

<sup>31</sup> See *supra* notes 24–26.

<sup>32</sup> Tracy Owen Patton, *Hey Girl, Am I More Than My Hair?: African American Women and Their Struggles with Beauty, Body Image, and Hair*, 18 NWSA J. 24, 29 (2006).

<sup>33</sup> *Id.* at 40–41. See also Catherine Saint Louis, *Black Hair, Still Tangled in Politics*, N.Y. TIMES (Aug. 26, 2009), [http://www.nytimes.com/2009/08/27/fashion/27SKIN.html?\\_r=0](http://www.nytimes.com/2009/08/27/fashion/27SKIN.html?_r=0) (explaining that many African American women choose to straighten their hair in order “to be more acceptable to certain relatives, as well as to the white establishment”).

The acceptance of natural African American hair in the 1960s and 1970s remained unparalleled until the “Natural Hair Movement” of the late 2000s.<sup>34</sup> Between 2008 and 2013, sales of relaxers and chemical straighteners declined twenty-six percent, while sales of styling products for naturally curly hair care like moisturizers, setting lotions, curl creams, and pomades increased.<sup>35</sup> These statistics demonstrate that it is becoming more common for African American women to wear natural styles to protect their hair from the damage that is caused by constant heat or chemical styling.<sup>36</sup> Camille Reed, a

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<sup>34</sup> See Kerisha Harris, *Natural Hair: It's More Than a Hashtag*, FUSION (Nov. 9, 2015), <http://fusion.net/story/4717/natural-hair-its-more-than-a-hashtag/> (“But as millennial women have come of age, a paradigm shift has taken place. More than ever, black and brown ladies[,] . . . who have everything from wavy to curly to kinky, have chosen to abandon the chemicals, [and] love the hair they were born with . . . .”); see also Cipriana Quann, *Ebony: Since When Isn't Natural Hair for Everyone*, URBAN BUSH BABES (Aug. 1, 2015), <http://urbanbushbabes.com/ebony-since-when-isnt-natural-hair-for-everyone/> (“Over the past five years, the natural hair revolution has become an incredible movement. We’ve come together as a community, sharing style tips and product advice as well as other interchangeable ideas and perceptions about our natural roots.”). See generally Cherise Luter, *The History of Natural Black Hair, Plus How 2014's Afro Has a Whole New Meaning*, BUSTLE (June 20, 2014), <https://www.bustle.com/articles/27404-the-history-of-natural-black-hair-plus-how-2014s-afro-has-a-whole-new-meaning>.

<sup>35</sup> *Hair Relaxer Sales Decline 26% over the Past Five Years*, MINTEL (Sept. 5, 2013), <http://www.mintel.com/press-centre/beauty-and-personal-care/hairstyle-trends-hair-relaxer-sales-decline>.

<sup>36</sup> Leah Binkovitz, *A Natural Hair Movement Takes Root*, SMITHSONIAN.COM (June 7, 2013), <http://www.smithsonianmag.com/smithsonian-institution/a-natural-hair-movement-takes-root-95923558/>. See generally Vicky Gan, *The Fight to Get Rid of Women's Hair Salons of Toxic Chemicals*, CITYLAB (Nov. 6, 2015), <http://www.citylab.com/navigator/2015/11/the-fight-to-rid-black-womens-hair-salons-of-toxic-chemicals/414430/> (discussing the harsh side effects from many of the straightening products and efforts to mitigate these



salon owner in Maryland, “[wanted] young women to understand that they can be beautiful without the wigs, without the weaves, without the extensions.”<sup>37</sup> This newly formed natural hair acceptance is further shown through mainstream media’s increased acceptance of natural beauty.<sup>38</sup>

Unlike the idea of beauty promulgated by *Ebony* magazine in the 1940s and 1950s, more African American women are finding beauty in their natural hair texture. Famous African American women like Viola Davis, Lupita N’yongo, and Tracee Ellis Ross, all of whom wear their hair naturally, reinforce this acceptance in mainstream media.<sup>39</sup>

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effects).

<sup>37</sup> Binkovitz, *supra* note 36.

<sup>38</sup> See Kadasya Roberts, *The Rise of Natural Hair in Media Advertising*, KLASZY KINKS (Mar. 23, 2015), <http://klassykinks.com/rise-natural-hair-media-advertising/> (commenting on the rise of natural hair in advertising and providing examples of these advertisements across various types of media); see also #LoveYourCurls: Dove Gives the Emoji Keyboard a Curly Hair Makeover, VIBE (Nov. 6, 2015), <http://www.vibe.com/2015/11/dove-love-your-curles-emojis-gif/> (“Dove Hair is committed to redefining traditional standards of beauty and ensuring women and girls see accurate reflections of themselves in the world around them, including, and especially, in digital and social media . . .”).

<sup>39</sup> See Rachel McRady, *Lupita Nyong’o Shows Off Longer, Curly Hair at Disney’s D23 Expo: Pics*, US WEEKLY (Aug. 16, 2015, 2:19 PM), <http://www.usmagazine.com/celebrity-beauty/news/lupita-nyongo-longer-curly-hair-disney-d23-expo-pics-2015168#ixzz3oTcJlWpq>; see Franchesca Ramsey, *Her Character Was Only Supposed to Remove Her Makeup Before Bed. Then Viola Davis Made It Real*, UPWORTHY (Nov. 6, 2014), <http://www.upworthy.com/her-character-was-only-supposed-to-remove-her-makeup-before-bed-then-viola-davis-made-it-real> (discussing how important it was for Viola Davis to take her wig off on her hit series *How to Get Away with Murder* and show her natural afro to women “of color [that] proudly rock[] [their] natural hair”); see also Nicole Marie Melton, *Tracee Ellis Ross Shares Hair Secrets, Weighs in on the Natural Hair Debate*, ESSENCE (Aug. 29, 2012), <http://www.essence.com/2012/08/29/tracee-ellis-ross-shares-hair->

*B. Case Law*

Despite the increase in sale of natural products and the growth of natural salons, society has not readily accepted African American natural hair in all sectors. Particularly in the employment context, many businesses have grooming policies banning hairstyles—such as afros, cornrows, twists, and dreadlocks—commonly worn by African Americans.<sup>40</sup> In response to these policies, some employees brought suits under Title VII of the Civil Rights Act of 1964.<sup>41</sup>

Title VII expressly prohibits discrimination on the basis of race, national origin, sex, color, and religion.<sup>42</sup> The “basic purpose of Title VII is to prohibit discrimination in employment on the basis of race

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secrets-weighs-natural-hair-debate (discussing Ellis-Ross’s hair products and her natural styles); *cf.* Lisa Jean Francois, *Afro-Brazilian Actress Taunted by Fellow Brazilians on Facebook After Revealing Her Natural Hair*, BGLH (Nov. 5, 2015), <http://AfricanAmericangirlonghair.com/2015/11/brazilian-actress-receives-racist-facebook-comments-after-revealing-hair/> (discussing an actress who revealed her natural hair on social media, embracing her natural beauty, and received vulgar comments such as “who posted the picture of this gorilla on Facebook?” and “lend me your hair I wash dishes”).

<sup>40</sup> See Ayana Byrd & Lori L. Tharps, *When Black Hair is Against the Rules*, N.Y. TIMES (Apr. 30, 2014), <http://www.nytimes.com/2014/05/01/opinion/when-African-American-hair-is-against-the-rules.html> (“The United States Army is only the latest in a long line of institutions, corporations and schools to restrict [African American hairstyles.]”); *see supra* note 10 (Hampton University banned dreadlocks in hopes that it would improve job prospects).

<sup>41</sup> See, e.g., *Eatman v. UPS*, 194 F. Supp. 2d 256, 263 (S.D.N.Y. 2002).

<sup>42</sup> “It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .” 42 U.S.C. § 2000e-2 (Westlaw through Pub. L. No. 114-327).

or color.”<sup>43</sup> Courts have limited these prohibitions “to ‘immutable characteristics,’ such as skin color, as opposed to those characteristics that, even though mutable, are associated with one’s race, national origin or color.”<sup>44</sup>

In order to establish the prima facie case of racial discrimination, the plaintiff must prove:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>45</sup>

After the employee has established the prima facie case of discrimination, the burden shifts to the employer “to articulate some legitimate, nondiscriminatory reason for the employee's rejection.”<sup>46</sup> The employee can then rebut the articulated “legitimate, nondiscriminatory reason” by proving that the employer’s reason is pretextual.<sup>47</sup>

Under Title VII, plaintiffs can also prove racial discrimination under the disparate impact theory. Under the disparate impact theory, an employer’s intent to discriminate is irrelevant if the employer maintains procedures “that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”<sup>48</sup> “To establish a prima facie case for disparate impact, the plaintiff must

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<sup>43</sup> Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 806, 806 n.6 (1994) (citing 110 Cong. Rec. 2556 (1964) (statement of Rep. Emanuel Celler)).

<sup>44</sup> D. Wendy Greene, *Title VII: What’s Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1361 (2008).

<sup>45</sup> McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

show: (1) an identifiable, facially-neutral personnel policy or practice; (2) a disparate effect on members of a protected class; and (3) a causal connection between the two.”<sup>49</sup> An employment practice that has a “substantial adverse impact against a protected group must be justified by business necessity.”<sup>50</sup> Substantial adverse impact is a higher standard and requires the employee to measure their success rate against a majority group.<sup>51</sup> However, many plaintiffs struggle to find sufficiently comparable coworkers because the comparator group may not be “similarly situated in [all] material aspects.”<sup>52</sup> After the employee proves a substantial adverse impact, the burden of proof shifts back to the employer to justify that the procedure was a business necessity.<sup>53</sup>

Some of the litigated cases show that employees often lose because they are unable to establish a prima facie case, even though

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<sup>49</sup> *Mems v. St. Paul*, 224 F.3d 735, 740 (8th Cir. 2000).

<sup>50</sup> MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORK LAW: CASES AND MATERIALS* 624 (3d ed. 2015). See *Franklin v. Local 2 of Sheet Metal Worker Int’l Ass’n*, 565 F.3d 508, 519 (8th Cir. 2009) (holding that a union referral policy did not have a disparate impact on African American workers).

<sup>51</sup> 29 CFR § 1607.4(D). See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1998) (a “plaintiff’s burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer’s work force”).

<sup>52</sup> Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *YALE L.J.* 728, 753–54 (2011) (citing *Perkins v. Brigham & Women’s Hosp.*, 78 F.3d 747, 751 (1st Cir. 1996)). See, e.g., Barbara Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 *YALE L.J.* 2009, 2025 (1995) (providing an example of a plaintiff whose prima facie case would be impeded because her workplace is small and may not have an adequate comparator).

<sup>53</sup> See *NAACP v. N. Hudson Reg’l Fire & Rescue*, 742 F. Supp. 2d 501, 523 (D.N.J. 2010) (holding that a residency requirement aiming to increase the number of firefighters living nearby had a disparate impact on African American firefighters and was not a business necessity required to perform employees’ duties).

the framework exists for African Americans to bring suit for discrimination based on grooming policies.<sup>54</sup> Some courts emphasize that certain hairstyles are not immutable characteristics of race and are not protected under Title VII, even if that hairstyle is typically associated with race.<sup>55</sup> These courts are “less inclined to believe that hairstyles, language choices, and other characteristics that distinguish ethnic groups from White culture stem from rights worth protecting.”<sup>56</sup>

As early as 1981, African Americans brought Title VII claims against facially neutral grooming policies. In *Rogers v. American Airlines Inc.*, an African American female employee claimed that American Airlines discriminated against her through its policy

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<sup>54</sup> See *Eatman v. UPS*, 194 F. Supp. 2d 256, 262–63 (S.D.N.Y. 2002) (The court expressed doubt that Eatman was fired under circumstances giving rise to an inference of racial discrimination and found that the claimant “produced no such “smoking gun” or “thick cloud of smoke” indicating that he was fired because of his race.”); see also *McManus v. MCI Commc’n Corp.*, 748 A.2d 949, 954, 959–60 (D.C. 2000) (holding that an African American woman who came to work with “dreadlocks, braids, twists, and cornrows” failed to meet the prima facie case).

<sup>55</sup> *Greene*, *supra* note 44, at 1361. Cf. *Bradley v. Pizzaco of Nebraska Inc.*, 926 F.2d 714, 715 (8th Cir. 1991) (holding that a policy prohibiting beards was discriminatory because African American males suffer from a condition known as pseudofolliculitis barbae more frequently than white males and could not shave every day without irritation). See *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at \*6 (M.D. Ga. Apr. 25, 2008) (holding that a policy that prohibits dreadlocks, cornrows, and beaded hairstyles was not discriminatory because hairstyle is not an immutable characteristic of race); see also *Thomas v. Firestone Tire & Rubber Co.*, 392 F. Supp. 373, 374–75 (N.D. Tex. 1975) (holding that a policy that dictates the line of an employee’s side burns does not violate Title VII because side burns are a mutable characteristic).

<sup>56</sup> Michelle L. Turner, Comment, *The Braided Uproar: A Defense of My Sister’s Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN’S L.J. 115, 136–37 (2001). See, e.g., *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

banning cornrow braids.<sup>57</sup> The policy applied to all races and genders.<sup>58</sup> In its decision, the court emphasized that both African Americans and white people wore cornrows.<sup>59</sup> The court ultimately held that Rogers did not have a valid Title VII claim because the policy “does not regulate on the basis of any immutable characteristic of the employees involved.”<sup>60</sup> Here, Rogers did “not allege that an all-braided hair style is worn exclusively or even predominantly by black people.”<sup>61</sup> However, the court did not foreclose the idea that a policy banning certain African American hairstyles could be a form of Title VII discrimination.<sup>62</sup> The court wrote that an “employer’s policy prohibiting the ‘Afro/bush’ style might offend Title VII . . . because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics.”<sup>63</sup>

In *Eatman v. United Postal Service*, over twenty years later, Charles Eatman brought an action against the United Parcel Service (UPS) because its grooming policy “single[d] out African[]Americans on the basis of a characteristic—locked hair—that is unique to African[]Americans.”<sup>64</sup> Pursuant to its collective bargaining agreement,<sup>65</sup> UPS maintained a grooming policy that

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<sup>57</sup> *Rogers*, 527 F. Supp. at 231.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 232.

<sup>60</sup> *Id.* at 231.

<sup>61</sup> *Id.* at 232.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Eatman v. UPS*, 194 F. Supp. 2d 256, 262 (S.D.N.Y. 2002).

<sup>65</sup> Eatman was a unionized employee and this policy was the result of a collective bargaining agreement. *Eatman*, 194 F. Supp. at 259. Under the National Labor Standards Act, collective bargaining is action “by an employer with some or all of his employees about matters in his business which concern them as employees and the recognition by him of their chosen labor union as the agency of such bargaining are proper objects of concerted action by his employees.” RESTATEMENT (FIRST) OF TORTS § 785

required male drivers to wear “businesslike” hair.<sup>66</sup> The local labor relations manager responsible for interpreting the guidelines decided whether hairstyles were “businesslike” by using his “common sense.”<sup>67</sup> Employees without “businesslike” hair were required to wear a hat while driving.<sup>68</sup> From January 1999 to 2002, seventeen African American drivers were required to wear hats in order to cover their “‘unconventional’ hairstyles, which included ‘dreadlocks,’ ‘braids,’ ‘corn rolls,’ a “‘dew rag,’” and a ‘ponytail.’”<sup>69</sup>

Eatman began working for UPS in 1989, but did not start dreading his hair until 1995.<sup>70</sup> In 1996, he was told that his locks were not “businesslike” and the company policy required all the employees with locked hair to wear a hat.<sup>71</sup> The hat was very uncomfortable for him to wear and eventually Eatman told his manager that he thought the hat policy was discriminatory.<sup>72</sup> He was reprimanded for failing to follow the hat policy.<sup>73</sup> Eatman also alleged that UPS managers harassed him about his dreadlocks: one manager told him to “‘leave the extracurricular drugs alone,’” while another manager compared his hair to “‘shit.’”<sup>74</sup> Eatman was suspended and later terminated.<sup>75</sup> The court held that violating the appearance guidelines was “‘certainly a ‘legitimate, nondiscriminatory reason’ for that adverse employment action.”<sup>76</sup> Neither the discriminatory comments nor the appearance policy was enough for Eatman to establish the prima facie case because dreadlocked hair was not a quality that was unique to

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(1939).

<sup>66</sup> *Eatman*, 194 F. Supp. at 259.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 260.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 261, 264.

<sup>75</sup> *Id.* at 261.

<sup>76</sup> *Id.* at 264.

African Americans.<sup>77</sup>

More recently, in *Equal Employment Opportunity Commission v. Catastrophe Mgmt.*, Chastity Jones brought a Title VII employment discrimination claim against her employer, Catastrophe Management (CMS).<sup>78</sup> Jones took issue with CMS's policy that prohibited employees from wearing dreadlocks.<sup>79</sup> CMS offered Jones employment with condition that Jones remove her dreadlocks.<sup>80</sup> CMS withdrew the offer when Jones refused.<sup>81</sup> The court held that the grooming policy did not violate Title VII because dreadlocks are not an immutable characteristic of race, sex, color or national origin.<sup>82</sup> The court reasoned that, "[a] hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic."<sup>83</sup>

### *C. Policies Informed by Unconscious Bias*

Unlike policies stemming from intent-based racism, like the comb test<sup>84</sup> and Jim Crow laws,<sup>85</sup> unconscious bias is a form of prejudice

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<sup>77</sup> *Id.* at 262, 268–69.

<sup>78</sup> 11 F. Supp. 3d 1139 (S.D. Ala. 2014).

<sup>79</sup> *Id.* at 1139. The company's policy read: "[a]ll 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." *Id.* at 1140.

<sup>80</sup> *Id.* at 1140.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1143.

<sup>83</sup> *Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d at 1143.

<sup>84</sup> *See supra* note 18.

<sup>85</sup> Jim Crow laws were policies established statewide by the southern states to segregate railcars, public spaces, and resources. Such policies were in effect from the late 1800s to the mid-1960s. *See* Charles E. Wayne, *The Evolution of Jim Crow Laws in Twentieth Century Virginia*, 28 *PHYLON* 416, 416–18 (1967).



without intent.<sup>86</sup> Overall, modern discrimination has shifted from racism “characterized by open bigotry and an emphasis on pre-Civil War beliefs about [African Americans]” to more “subtle” and “indirect” discriminatory acts.<sup>87</sup> Therefore, even as open bigotry began to fade, unconscious bias and stereotyping remained embedded in American society.<sup>88</sup> Stereotypes often inform an individual’s implicit bias against a group of people.<sup>89</sup> Implicit biases are “the

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<sup>86</sup> See generally Horace McCormick, *The Real Effects of Unconscious Bias in the Workplace*, UNC KENAN-FLAGLER BUS. SCH. EXEC. DEV. (2015), <https://www.kenan-flagler.unc.edu/~media/Files/documents/executive-development/unc-white-paper-the-real-effects-of-unconscious-bias-in-the-workplace-Final>.

<sup>87</sup> Arthur P. Brief et al., *Just Doing Business: Modern Racism and Obedience to Authority as Explanations for Employment Discrimination*, 81 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 72, 73–74 (2000). See also Audrey L. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. CIV. RTS.-CIV. LIBERTIES. L. REV. 481, 482 (2005) (“The nature of discrimination today is dramatically different from the pernicious, overt discrimination that existed prior to the passage of the Civil Rights Act of 1964.”).

<sup>88</sup> Lee, *supra* note 87, at 483. “A social stereotype is a mental association between a social group or category and a trait. The association may reflect a statistical reality, but it need not. If the association does reflect a statistical reality, members of the group will be more likely to display the trait than will members of other groups.” Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 947 (July, 2006). See also Marianne Bertrand & Sendill Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991–92 (2004) (illustrating that discriminating against candidates with “African-American-sounding” names is a form of racial stereotyping).

<sup>89</sup> Lee, *supra* note 87, at 483–84. See generally Isabel Wilkinson, *Television; Black Life on TV: Realism or Stereotypes?*, N.Y. TIMES (Aug. 15, 1993), <http://www.nytimes.com/1993/08/15/arts/television-African-American-life-on-tv-realism-or-stereotypes.html?pagewanted=all> (finding that many images of African Americans on television in many ways

attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.”<sup>90</sup> This form of bias is extremely problematic because “[it] can produce behavior that diverges from a person’s avowed or endorsed beliefs or principles.”<sup>91</sup> For example, Professor Nilanjana Dasgupta and her colleagues found that participants in their implicit bias study showed a preference for whites over African Americans despite expressing an indifference towards an individual’s race.<sup>92</sup>

Courts have recognized that some adverse actions taken against protected employees based on implicit bias are protected under Title VII.<sup>93</sup> In finding that implicit bias is a form of discrimination proscribed under Title VII, the First Circuit wrote, “[t]he ultimate question is whether the employee has been treated disparately ‘because of race.’ This is so regardless of whether the employer

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resemble old minstrel shows and stereotypes). *See generally* Leigh Donaldson, *When the Media Misrepresents Black Men, the Effects are Felt in the Real World*, GUARDIAN (Aug. 12, 2015, 12:15 PM), <https://www.theguardian.com/commentisfree/2015/aug/12/media-misrepresents-black-men-effects-felt-real-world> (negative portrayals of African Americans in the media can affect African American men self-esteem).

<sup>90</sup> Kirwan Inst. for the Study of Race & Ethnicity, *Understanding Implicit Bias*, KIRWAN INST. (2015), <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.

<sup>91</sup> Greenwald, *supra* note 88, at 951.

<sup>92</sup> *See* Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 318–21 (2000) (data was collected using Professor Banji’s IAT).

<sup>93</sup> *See* *Kimble v. Wis. Dep’t of Workforce Dev.*, 690 F. Supp. 2d 765, 778 (E.D. Wis. 2010) (holding that discriminating against an African American supervisor based on race and sex was a violation of Title VII even if it was the result of implicit bias); *see also* Christopher Cerullo, Note, *Everyone’s a Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127, 150–54 (Oct. 2013) (providing an overview of the federal courts’ treatment of implicit bias in Title VII cases).

consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.”<sup>94</sup> Thus, “a process infected by this subtle bias is no more permissible [under Title VII] than a decision influenced by conscious racism or sexism.”<sup>95</sup> With a greater number of non-minorities in Decision-making positions, it seems more likely that this type of implicit bias will inadvertently happen.

*D. The Lack of Minorities in Decision-making Positions*

Since white decision makers largely control the corporate world, “whites hold a disproportionate share of business ownership and decisionmaking [sic] power within corporate structures.”<sup>96</sup> In fact, in 2014, minority-owned businesses only accounted for 17.5 percent of businesses in operation, despite making up more than 38 percent of the total population.<sup>97</sup> There are even less African Americans in upper management. As of 2016, there were only five African American CEOs at Fortune 500 companies and only one African

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<sup>94</sup> *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999). See also Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 771 (“The court thus explicitly recognized that in a subjective evaluation system, there is a risk that evaluations will be based on unconscious discriminatory attitudes . . .”).

<sup>95</sup> Hart, *supra* note 94, at 771.

<sup>96</sup> Flagg, *supra* note 52, at 2036.

<sup>97</sup> Andrew Soergel, *Most of America’s Businesses Run by White Men*, U.S. NEWS & WORLD REP. (Sept. 1, 2016, 12:12 PM), <https://www.usnews.com/news/articles/2016-09-01/most-of-americas-businesses-run-by-white-men-says-census-bureau>. Cf. U.S. Census Bureau, *Census Bureau Reports the Number of Black-Owned Businesses Increased at Triple the National Rate* (Feb. 8, 2011), [https://www.census.gov/newsroom/releases/archives/business\\_ownership/cb11-24.html](https://www.census.gov/newsroom/releases/archives/business_ownership/cb11-24.html) (while African Americans make up a small percentage of the total business owners, the size of African American small business owners is growing at triple the national rate).

American woman.<sup>98</sup> As of 2012, only 13.9 percent of the African American federal employees reported having a supervisory role in the workplace, compared to 22.3 percent of white federal employees.<sup>99</sup>

The Equal Employment Opportunity Commission (EEOC) argues that the lack of minorities in decision-making roles can be directly attributable to unconscious bias.<sup>100</sup> “African Americans are not considered, groomed, or selected for high level positions because of the stereotypical view (or unconscious bias) that those positions are considered nontraditional for African Americans.”<sup>101</sup> Accordingly, many employment policy decisions are made without an African American’s input. As a result, many purportedly race-neutral policies, such as grooming policies, are made by groups of individuals to whom “racial identity is not a central life experience.”<sup>102</sup>

Many corporations acknowledge the lack of minorities in the workplace and making efforts to diversify using various initiatives,<sup>103</sup> including diversity training, networking, and mentoring programs.<sup>104</sup> Some companies have even sought assistance from diversity consultants.<sup>105</sup> For example, UPS, the company that Eatman sued

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<sup>98</sup> Ellen McGirt, *Why Race and Culture Matter in the C-Suite*, FORTUNE (Jan. 22, 2016, 6:30 AM), <http://fortune.com/black-executives-men-c-suite/>.

<sup>99</sup> EEOC, EEOC AFR. AM. WORKGROUP REP. (2012), <http://www.eeoc.gov/federal/reports/aawg.cfm>.

<sup>100</sup> *Id.* at 2.

<sup>101</sup> *Id.* at 3.

<sup>102</sup> Flagg, *supra* note 52, at 2035.

<sup>103</sup> Pam Jenoff, *The Case for Candor: Application of the Self-Critical Analysis Privilege to Corporate Diversity Initiatives*, 76 BROOK. L. REV. 569, 570 (2011).

<sup>104</sup> Frank Dobbin & Alexandra Kalev, *The Origins and Effects of Corporate Diversity Programs*, in OXFORD HANDBOOK OF DIVERSITY & WORK 253, 267–69 (Quinetta M. Roberson ed., 2013).

<sup>105</sup> As early as the 1990s companies have used diversity consultants who “specialize[] in fostering and managing diversity in the work place.” Lena

under Title VII, maintains many diversity and inclusion programs, such as Business Resource Groups<sup>106</sup> (BRGs).<sup>107</sup> Through BRGs, minority groups refine skill development and gain networking opportunities.<sup>108</sup> However, a study published by the Oxford University Press shows that diversity training and diversity performance evaluations are less effective than “innovations designed to engage managers in promoting workforce integration—[through] mentoring programs, diversity taskforces, and full-time diversity

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Williams, *Companies Capitalizing on Diversity*, N.Y. TIMES (Dec. 15, 1992), <http://www.nytimes.com/1992/12/15/business/companies-capitalizing-on-worker-diversity.html?pagewanted=all>. The use of consultants is very popular in large corporations but sometimes difficult for small business with smaller budgets. Cliff Oxford, *Fighting the Consultant Temptation*, N.Y. TIMES (May 2, 2013, 7:00 AM), [http://boss.blogs.nytimes.com/2013/05/02/fighting-the-consultant-temptation/?\\_r=0](http://boss.blogs.nytimes.com/2013/05/02/fighting-the-consultant-temptation/?_r=0). Consultants are used in largely white private schools to educate white students about minorities and white privilege as well as help the African American students adjust to the largely white environment. Kyle Spencer, *At New York Private Schools, Challenging White Privilege from the Inside*, N.Y. TIMES (Feb. 20, 2015), <http://www.nytimes.com/2015/02/22/nyregion/at-new-york-private-schools-challenging-white-privilege-from-the-inside.html>.

<sup>106</sup> See Bersin by Deloitte, DELOITTE, <http://www.berstin.com/Lexicon/Details.aspx?id=17368> (last visited Apr. 4, 2016) (““Business resource groups” (BRGs) have long been a staple of diversity and inclusion efforts within organizations. These groups have ranged from informal forums to connect colleagues from similar backgrounds to formalized and company-sponsored groups specifically focused on helping to advance business and talent strategies with a diversity focus.”).

<sup>107</sup> *Diversity & Inclusion*, UPS, <http://sustainability.ups.com/committed-to-more/diversity-and-inclusion/> (last visited Nov. 11, 2015) (in 2012, UPS expanded its diversity initiatives to cover “African American; Asian American; Hispanic/Latino; Focus on Abilities; [and] Lesbian, Gay, Bisexual, Transgender and Allies (LGBT)”)

<sup>108</sup> *Id.*

staffers . . . .”<sup>109</sup> Without more minorities in management positions, companies lack minority input in these key employment policies. Though current Title VII litigation and case law indicates that African American hairstyles and hair textures are not immutable characteristics of race,<sup>110</sup> African American history shows that hairstyle and texture are important signifiers of status and racial identity.<sup>111</sup>

## II. ANALYSIS

The protected category of race should consider employer discrimination based on natural hair and hairstyle to be related, given the rich history of discrimination tied to African American hair. Straighter hairstyles and lighter skin have historically given African Americans access to elite social clubs and spaces.<sup>112</sup> Accordingly, African Americans have embraced natural hairstyles as a way to combat these beauty norms.<sup>113</sup> It is not a coincidence that the rejections of chemically straightened hair and African American acceptance of natural hair textures coincide with major civil rights movements of the 1960s and 1970s.<sup>114</sup> Indeed, the use of African American hair during the Civil Rights Movement provides evidence of its interconnectedness to racial identity.

Furthermore, although the courts in *Rogers*, *Eatman*, and *EEOC v. Catastrophe Mgmt.* determined that hairstyle and hair were mutable characteristics of race,<sup>115</sup> under the current judicial definition of

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<sup>109</sup> Dobbin & Kalev, *supra* note 104, at 253.

<sup>110</sup> See Greene, *supra* note 44, at 1364, 1371.

<sup>111</sup> See Gail Robinson & Barbara Mullins Nelson, *Pursuing Upward Mobility: African American Professional Women Reflect on Their Journey*, 40 J. BLACK STUD. 1168, 1172–73 (2010).

<sup>112</sup> See Glenn, *supra* note 16, at 287.

<sup>113</sup> See *supra* note 34 and accompanying text.

<sup>114</sup> See AROGUNDADE, *supra* note 24, at 71–72.

<sup>115</sup> *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981); *Eatman v. UPS*, 194 F. Supp. 2d 256, 264 (S.D.N.Y. 2002); *EEOC v.*

“mutable,” hairstyle and hair texture are also immutable.<sup>116</sup> Many African Americans must use harsh chemicals and high degrees of heat to change their hair from curly and thick to straight.<sup>117</sup> Sometimes these methods can damage and irritate the scalp.<sup>118</sup> If making the “mutable” change to straighten one’s hair causes severe skin and scalp damage, it may be immutable even though there are avenues to make these changes.<sup>119</sup> Braided hairstyles and dreadlocks can be considered attempts to look professional without damaging African Americans’ hair and skin. However, courts and employers have been skeptical of this line of argument, citing many policies that also ban certain hair colors and hair cuts like mohawks.<sup>120</sup>

Even though *Rogers* was one of the earliest cases to determine that braided African American hairstyles were not immutable characteristics of race, the court did state that “an employer’s policy prohibiting the ‘Afro/bush’ hairstyle might offend Title VII.”<sup>121</sup> Thus, to some degree, courts recognize the historical significance of African American hair texture to racial identity. However, the Southern District of New York limits the wide array of hairstyles and textures worn by African Americans only to an “Afro/bush” hairstyle without including braided styles and dreadlock styles.<sup>122</sup>

The court in *Eatman* also determined that dreadlocks were not an

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Catastrophe Mgmt. Sols., 11. F. Supp. 3d 1139, 1143 (S.D. Ala. 2014). The court in *Rogers v. American Airlines* determined that hair could be an immutable characteristic if it was an “[a]fro/bush” hairstyle and not dreadlocks. *Rogers*, 527 F. Supp. at 232.

<sup>116</sup> See Turner, *supra* note 56, at 126 n.58; *infra* note 119 and accompanying text.

<sup>117</sup> See *supra* note 36 and accompanying text.

<sup>118</sup> See *supra* note 36 and accompanying text.

<sup>119</sup> Mutable characteristics are “traits that are within [the employees’] control” and immutable characteristics are “outside of the employee’s control.” Turner *supra* note 56, at 126 n.58.

<sup>120</sup> *Eatman*, 194 F. Supp. at 258–59.

<sup>121</sup> *Rogers*, 527 F. Supp. at 232.

<sup>122</sup> *Id.*

immutable characteristic of race, despite evidence that Eatman's coworkers said many offensive comments about his dreadlocks that reinforced many racial stereotypes.<sup>123</sup> Similar to the court in *Rogers*, the court in *Eatman* viewed dreadlocks as a style choice, like choosing to wear a ponytail or choosing to dye one's hair a different color.<sup>124</sup> Yet, the court did not look at dreadlocks in the full racial context and failed to consider dreadlocks' association and connotation with African American stereotypes. For example, the managers told Eatman that his hair looked like "shit" and associated his dreadlocks with the use of drugs.<sup>125</sup> Although dreadlocks are not a hairstyle solely worn by African Americans, this hairstyle may be associated with negative stereotypes of African Americans as drug dealers.<sup>126</sup> Instead of simply evaluating whether something is an immutable characteristic based on the current precedent, hairstyles should be evaluated considering social context and association with race.

While employers should have broad freedom to decide how to run their businesses, the wide latitude employers are given to define "businesslike" leaves room for decisions informed by implicit bias against African Americans. The outcomes in *Eatman* and *Catastrophe Mgmt. Sols.* hinge upon whether dreadlocks are "businesslike" within the terms of the policy.<sup>127</sup> Eatman's local labor relations manager was solely responsible for defining "businesslike" using his "common sense";<sup>128</sup> there is no evidence that he incorporated any objective standards into his analysis.<sup>129</sup> Without more objective criteria including well-defined standards such as

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<sup>123</sup> *Eatman*, 194 F. Supp. at 261.

<sup>124</sup> *Id.* at 262.

<sup>125</sup> *Id.* at 261.

<sup>126</sup> See generally *supra* note 91 and accompanying text (information on stereotypes).

<sup>127</sup> *Eatman*, 194 F. Supp. at 259; *EEOC v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1140 (S.D. Ala. 2014).

<sup>128</sup> *Eatman*, 194 F. Supp. at 259.

<sup>129</sup> *Id.*



combed, clean, or a requirement for hair length, the subjective policy allows the employer's implicit biases to negatively influence the "businesslike" standard.

Even a manager with no ill will towards African Americans could be informed by negative images of African Americans because implicit bias can "produce behavior that diverges from a person's avowed or endorsed beliefs or principles."<sup>130</sup> For example, a manager could be influenced by negative portrayal of African Americans with natural hairstyles on television<sup>131</sup> or other media influences. While there has been a significant influx of positive images of African Americans wearing natural hairstyles in the media,<sup>132</sup> there are still many negative images that can inform society's opinions.<sup>133</sup> Since white Americans hold a disproportionate share of the decision-making power within the corporate structure,<sup>134</sup> it is likely that African Americans will not determine the definition of "businesslike."

### III. PROPOSAL

Few Title VII actions against employers' facially neutral grooming policies are successful; a more effective way to remedy these disputes is to remedy the policies. In addition to low success rates, courts in Title VII litigation fail to grasp the disconnect between the importance of African American hairstyles throughout history and its mutable characteristics. However, an employer could lessen the discriminatory effect of grooming policies by including more diverse input when creating objective grooming guidelines—reducing the need for litigation altogether.<sup>135</sup>

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<sup>130</sup> See Greenwald & Krieger, *supra* note 88, at 951.

<sup>131</sup> See Wilkinson, *supra* note 89.

<sup>132</sup> See *supra* note 39 and accompanying text.

<sup>133</sup> See Donaldson, *supra* note 89.

<sup>134</sup> See Flagg, *supra* note 96, at 2036.

<sup>135</sup> See *supra* note 44 and accompanying text.

For a short-term solution, companies with potentially discriminatory grooming policies could consult diversity experts to design an effective policy that prevents discrimination based on features that are fundamental to race.<sup>136</sup> For a long-term solution, companies could increase the diversity of both lateral and new hires to ensure that a diverse group of people designs grooming policies.

By consulting diversity experts to design the policies and by hiring a more diverse group of employees, the employer will reap three main benefits. First, designing a more objective grooming policy will reduce Title VII lawsuits because the employer will have a concrete, objective standard as a defense. Second, there will be more minority perspectives solving a larger problem for the company: the lack of diversity in the workplace. Third, having a diverse group of people in the workplace will allow employees that do not engage regularly with African Americans and other minorities to have a more well-rounded view of African Americans, rather than relying on their implicit bias informed by images and stereotypes in the media.<sup>137</sup>

Companies could hire diversity consultants to help draft an employer's grooming policies to fix the current state of facially neutral policies in the same manner that they employ consultants or financial advisors when making other potentially risky business decisions.<sup>138</sup> While small businesses may have fewer resources than large corporate employers, it may be useful to put forth resources for these consultants to prevent costly litigation. Ideally, a diversity consultant would provide perspective on the reception of grooming policies by African American employees and help design objective criteria to fit the employer's need. While the ideal, more permanent situation is to increase the number of minorities in upper management, hiring a consultant could provide a quick remedy to

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<sup>136</sup> See *supra* note 105 and accompanying text.

<sup>137</sup> See *supra* notes 89–91 and accompanying text.

<sup>138</sup> See *supra* note 105 and accompanying text.

prevent litigation.<sup>139</sup>

Hiring more diverse entry-level employees, increasing diversity programs, and fostering a work environment that is conducive to promoting diverse candidates to upper management is a better long-term solution to discriminatory policies for two reasons. First, instead of hiring outside consultants, the employer will be able to build a task force of its own diverse employees to problem solve the policy and think about its impact on employees of color. As permanent employees, the diverse individuals will be constantly available to answer questions about the policies and help shape the direction of future company policies. Second, changing the face of the corporate work environment will allow the white management to engage with people of different backgrounds and races and hopefully negate some negative perceptions and implicit biases. Since African Americans are often not promoted to high level positions due to “unconscious bias”,<sup>140</sup> employers must take extra steps to remedy these issues through concrete diversity initiatives Programs already exist in major corporations and companies to increase their ethnic diversity.<sup>141</sup>

However, the goal should extend beyond getting African Americans into entry-level positions. The real solution should create a path for minority access to positions that affect the policy and decision making of the employer. With more African Americans in policy and decision-making positions shaping these policies, there will be more vetting of these grooming policies with members of the community and the addition of some objective standards. Therefore, there would be less reason for African American employees to bring suits against these subjective and arguably discriminatory policies.

The larger problem with the stagnant Title VII litigation and these

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<sup>139</sup> See Flagg, *supra* note 96, at 2036 (“[W]hites hold a disproportionate share of business ownership and decisionmaking [sic] power within corporate structures.”).

<sup>140</sup> See also EEOC AFR. AM. WORKGROUP REP., *supra* note 99, at 2–4.

<sup>141</sup> See Jenoff, *supra* note 103; see also *Diversity & Inclusion*, *supra* note 108 (UPS has many diversity initiatives).

facially neutral subjective grooming policies is that they stand in the way of the goal of workplace diversity that many companies claim to desire.<sup>142</sup> The difficulty is that many employers claim to want diverse candidates, but then ask African Americans to bring diversity while also assimilating to the white hegemonic appearance norms of the workplace. If these conflicting requests continue, it may create an environment where African American employees feel as though they cannot be true to their racially identities and subsequently fail to contribute the diversity of the opinion the employer truly desires.

#### CONCLUSION

Plaintiffs are often unable to establish successful Title VII cases against discriminatory grooming policies because the courts have found that hairstyle and sometimes hair texture are mutable characteristics.<sup>143</sup> The history portion of the note discussed importance of race as a cultural signifier by showing examples times hair was used to exclude African Americans from certain spaces. Within the African-American community, hair texture and hairstyle had major roles within civil rights movements,<sup>144</sup> acted as a barrier to entry in social organizations,<sup>145</sup> and were the subject of controversial beauty advertisements.<sup>146</sup> Yet, hair texture and styles are still not seen as immutable characteristics of race for purposes of a Title VII analysis.

Because hair texture is not an immutable characteristic of race under Title VII, company grooming standards requiring “businesslike” hair and banning dreadlocks are not legally discriminatory. Despite the stagnant Title VII progress on grooming standards, it is particularly timely to evaluate these grooming policies

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<sup>142</sup> See UPS, *supra* notes 107–108 and accompanying text.

<sup>143</sup> See *supra* note 44 and accompanying text.

<sup>144</sup> See AROGUNDADE, *supra* notes 24–28 and accompanying text.

<sup>145</sup> See *supra* notes 17–19 and accompanying text.

<sup>146</sup> See *supra* notes 21–23 and accompanying text.

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because of the current resurgence in the acceptance of natural hairstyles by African Americans.<sup>147</sup>

To reduce Title VII actions altogether, employers should focus on changing these facially neutral policies from their inception. These changes should be informed by diverse opinions and establish a concrete objective standard for company grooming. Because there are few African Americans in decision-making roles, as a short-term solution, companies should hire diversity consultants to help redesign the grooming policies. However, to completely alleviate this issue, companies should concentrate on diversity initiatives: hiring and promoting diverse candidates to roles where they make decisions like those on hair grooming policies. With a diverse group writing the policies, a company can better design a policy that is less discriminatory and fairer to diverse employees.

The long-term solution also has the added benefit of diversifying the workplace and ensuring that many white employees who normally do not have the opportunity to engage with African Americans have the opportunity to question any stereotypical views they may hold. Engaging with their diverse fellow employees may reduce white employees' reliance on negative stereotypes of African Americans and make managers less likely to fall back on implicit bias against African Americans in the workplace when interpreting the company grooming policy.

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<sup>147</sup> See *MINTEL*, *supra* note 35.

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