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LIBRARIES & LEGAL RESEARCH

Uneasy lies the head: Tracking a loophole in racial discrimination law

BY KATE E. BRITT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.¹ Historically, courts have ruled in favor of workplace grooming policies that prohibit most natural Black hairstyles as not unlawfully discriminatory within the scope of Title VII. This article discusses hair discrimination in workplaces and how federal, state, and local legislators are attempting to close this loophole.

Workplace grooming policies outline acceptable hygiene, hairstyle, and other appearance characteristics for employees. Employers can refuse employment, mete out discipline, and even terminate employees who do not abide by these policies. To stay within the bounds of employment discrimination law, these policies should be facially neutral; they must not refer to race, religion, or other protected classes. In practice, these policies expect all employees to assimilate to the dominant hair culture and hairstyles of white individuals.²

People of all races, genders, and creeds can be subject to hair discrimination, though Black people — and Black women in particular — are the most frequent victims of discriminatory policies and decisions. In 2019, the American personal care brand Dove conducted the CROWN Research Study comparing the workplace experiences of Black women and non-Black (mostly white) women.³ The results showed that Black women are more likely than their non-Black counterparts to receive formal grooming policies, be subject to discipline, and be perceived as unprofessional. These findings are reinforced by court opinions like one from 2016 that held that in order to conform to an employer's dress code, Black women are expected to straighten their hair, wear a weave or a wig, or style their hair into an afro — which the judge arbitrarily decided was more "natural" than dreadlocks or braids.⁴ As author Crystal Powell points out in "Bias, Employment, and Black Women's Hair,"

dreadlocks are "a type of hairstyle that naturally comes because of the nature of Black hair" while "hair must be teased in a way that gives it an afro style. Black women do not naturally grow afros."⁵

Hair discrimination often extends beyond the workplace. In 2018, a Black student athlete had 90 seconds to choose between forfeiting a wrestling match and allowing the white referee to cut off his dreadlocks, a story that sparked outrage and a civil rights investigation.⁶ Just as in workplaces, schools often enforce dress codes that hold white hairstyles as the standard.⁷

Protections for hairstyles may derive from their status as a religious practice. In a 2015 case regarding a Muslim-American woman who was refused employment because she wore a head scarf, the U.S. Supreme Court ruled that "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."⁸ In 2017, Army Secretary Eric Fanning authorized brigade commanders to grant requests to wear a hijab or beard, or a turban or patka with unshorn hair if the request is "based on a sincerely held religious belief."⁹

These are important decisions that connect physical appearance and hairstyle with religion — a protected Title VII class. While there is little argument that hijabs, turbans, and the unshorn hair and

AT A GLANCE

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beards of Sikh persons are legitimate religious practices, courts historically have not recognized the legitimacy of many hairstyles as characteristics of race. Hair discrimination against Black people has been permitted when courts failed to connect physical appearance and hairstyles with the protected classes of race or gender.

To justify denying protection against employment discrimination for Black people, courts have added an immutability standard to Title VII categories of protection. Since individuals can change their hairstyles, hairstyles have been considered mutable and thus ineligible for Title VII protection.¹⁰ This standard is legally inconsistent for at least two major reasons. First, a person can choose to change their religion and, to some extent, sexual orientation and gender marker under the law, but those characteristics are nonetheless protected under Title VII.¹¹ Second, to quote a California anti-hair discrimination bill, “the history of our nation is riddled with laws and societal norms that equated ‘blackness,’ and the associated physical traits, for example, dark skin, kinky and curly hair to a badge of inferiority, sometimes subject to separate and unequal treatment.”¹² Failure to recognize the connection between hair type and race at this point in our nation’s history is at best ignorant and at worst deceitful, bordering on gaslighting.

THE CROWN ACT

Since judicial interpretation is perceived to neglect the physical traits associated with race, activists are now working to enact legislation that harmonizes the legal and popular definitions of race. On the heels of its aforementioned study, Dove in 2019 partnered with the National Urban League, Color of Change, and the Western Center on Law and Poverty to form the CROWN Coalition, which champions the CROWN Act. The CROWN Act, which stands for “Create a Respectful and Open World for Natural Hair,” prohibits race-based hair discrimination “because of hair texture or protective hairstyles including braids, locs, twists or bantu knots.”¹³ The CROWN Act would provide legal protections should an employer fire or refuse to hire a person based on the style or texture of their hair. The CROWN Coalition is pushing for anti-hair discrimination legislation on the federal, state, and local levels.

As of November 2021, CROWN Act bills have been introduced in both houses of Congress. Two New Jersey lawmakers — Rep. Bonnie Watson Coleman and Sen. Cory Booker — introduced House Bill 2116 and Senate Bill 888, respectively. The status of both bills can be tracked at [Congress.gov](https://www.congress.gov).¹⁴

To encourage state legislatures to pass anti-hair discrimination legislation, the CROWN Coalition provides a template for legislative language on its website.¹⁵ The first CROWN Act bill passed in California in 2019; as of November 2021, 13 states have passed legislation prohibiting discrimination based on hair texture, including five during their 2021 sessions. The NAACP Legal Defense and Educational Fund tracks the progress of anti-hair discrimination legislation at <https://www.naacpldf.org/crown-act/>.

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In February 2021, Rep. Sarah Anthony introduced House Bill No. 4275 in the Michigan Legislature. 2021 HB 4275 aims to amend the 1976 Elliott-Larsen Civil Rights Act to include CROWN Act language in the definition of “race.” As of November 2021, no official action has been taken on 2021 HB 4275 and no parallel bill has been introduced in the Senate.

While the state legislature has yet to pass anti-hair discrimination legislation, there is movement among local jurisdictions. A handful of local governments have incorporated the CROWN Act into their relevant anti-discrimination policies in employment statutes, providing a new level of protection to government employees.

In March 2021, the Ingham County Board of Commissioners became the first county in Michigan to ban hair discrimination against public employees.¹⁶ The Flint City Council passed a similar resolution the following month modifying the city’s Title VI Non-Discrimination Plan,¹⁷ and it considered a second resolution in October 2021 opposing workplace discrimination based on beards and other facial hair, but that resolution does not appear to have passed.¹⁸ Also in April 2021, the Genesee County Board of Commissioners updated the Genesee County EEOC Plan and Policy to include “natural hair, sexual orientation, gender identity, [and] gender expression” in the list of protected statuses.¹⁹

June 2021 saw the Ann Arbor City Council amend the city code to include CROWN Act language in its definition of “race.”²⁰ Kent County was reportedly considering adopting the CROWN Act in April 2021; as of November 2021, it was not among the Michigan jurisdictions where hair discrimination in employment explicitly violates the law.²¹

FURTHER READING

Hair discrimination may be a major blind spot for those of us who have never had to experience it, and self-education will help us move beyond racist stereotypes and false assumptions. Some works by Black women on the topic of Black hair include Byrd & Tharps, “Hair Story: Untangling the Roots of Black Hair in America” (New York: St. Martin’s Griffin, 2002), Dabiri, “Twisted: The Tangled History of Black Hair Culture” (New York, HarperColling, 2020), and Davis-Sivasothy, “The Science of Black Hair: A Comprehensive Guide to Textured Hair Care” (Stafford: Saja Publishing Co, 2011).



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ENDNOTES

1 42 USC 2000a – 42 USC 2000ff.

2 Powell, *Bias, Employment Discrimination, and Black Women’s Hair: Another Way Forward*, 2018 BYU L Rev 933, 934 (2019), available at <<https://digitalcommons.>

law.byu.edu/cgi/viewcontent.cgi?article=3177&context=lawreview> [https://perma.cc/U6ZB-KLN6]. All websites cited in this article were accessed December 7, 2021.

3 *The CROWN Research Study, The JOY Collective* (2019) <https://static1.squarespace.com/static/5edc69fd622c36173f56651f/t/5edeaa2fe5d-def345e087361/1591650865168/D> [https://perma.cc/ZWV9-MHLR].

4 *EEOC v Catastrophe Management Solutions*, 852 F 3d 1018, 1032 (CA 11, 2016).

5 *Bias, Employment Discrimination*, *BYU L Rev* at 959.

6 Gold & Mays, *Civil Rights Investigation Opened After Black Wrestler Had to Cut His Dreadlocks*, *New York Times* (December 21, 2018) <https://www.nytimes.com/2018/12/21/nyregion/andrew-johnson-wrestler-dreadlocks.html> [https://perma.cc/F2CG-K4DQ].

7 Mbilishaka, et al., *Don't Get It Twisted: Untangling the Psychology of Hair Discrimination Within Black Communities*, 90 *Am J Orthopsychiatry* 590 (2020).

8 *EEOC v Abercrombie & Fitch Stores, Inc.*, 575 US 768, 773; 135 S Ct 2028; 192 L Ed 2d 35 (2015).

9 Army Directive 2017-03 (Policy for Brigade-Level Approval of Certain Requests for Religious Accommodation), Secretary of the Army, US Dep't of Defense (January 3, 2017), p 2, available at <https://api.army.mil/e2/c/downloads/463407.pdf> [https://perma.cc/BC2D-W9RA].

10 Robinson & Robinson, *Between a Loc and a Hard Place: A Socio-Historical, Legal, and Intersectional Analysis of Hair Discrimination and Title VII*, 20 *U Md L J Race, Religion, Gender & Class* 263 (2020), available at <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1351&context=rrgc> [https://perma.cc/TW3U-7NQA] and, e.g., *Rogers v American Airlines, Inc.*, 527 F Supp 229, 232 (SD NY, 1981), holding "[a]n all-braided hairstyle is an 'easily changed characteristic'" and therefore not protected by Title VII.

11 *Bostock v Clayton County*, ___ US ___; 140 S Ct 1731; 207 L Ed 218 (2020).

12 California SB 188 § 1(a) (2019).

13 The CROWN Act, Dove/CROWN Coalition <www.thecrownact.com> [https://perma.cc/F7KU-C32C].

14 CROWN Act of 2021, HR 2116, 117th Cong (2021) and CROWN Act of 2021, S 888, 117th Cong (2021).

15 *Introduce The CROWN Act to Your State*, Dove/CROWN Coalition <https://www.thecrownact.com/your-state> [https://perma.cc/577X-7LZE].

16 Resolution No 21-137: Resolution Prohibiting Hairstyle Based Racial Discrimination, Ingham Cty Bd of Commissioners (Adopted March 23, 2021) <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fbc.ingham.org%2FPortals%2FBC%2F2021%2520Resolutions%2F21-137.doc&wd-Origin=BROWSELINK> [https://perma.cc/7AAK-HT9A] and Nurse, *Ingham County bans hair discrimination against employees, a first in Michigan*, *Lansing State Journal* (March 23, 2021) <https://www.lansingstatejournal.com/story/news/local/2021/03/23/ingham-county-first-county-michigan-ban-hair-discrimination-crown-act-race/6966002002/> [https://perma.cc/FNSH-GNGK].

17 Resolution No 21019: Resolution Prohibiting Hairstyle Based Racial Discrimination, Flint City Council (Adopted April 26, 2021) and Diaz, *Here's what happened at the April 26 Flint City Council meeting*, *Flint Beat* (April 28, 2021) <https://flintbeat.com/heres-what-happened-at-the-april-26-flint-city-council-meeting/> [https://perma.cc/3A9G-7NF5].

18 Meeting Agenda - Final, City of Flint City Council

(October 11, 2021) <https://www.cityofflint.com/wp-content/uploads/Agenda-Packet-City-Council-Electronic-Public-Meeting-10-11-21.pdf> [https://perma.cc/JZ74-KASG].

19 Agenda Packet, Genesee County Board of Commissioners (April 28, 2021) <http://geneseecountymi.com/Citizens/Calendar.aspx>

20 Ordinance 21-18: An Ordinance to Amend Chapter 112 (Non-Discrimination), Section 9:151, Title IX of the Code of the City of Ann Arbor to Add Definition of

Race to Include Prohibition Against Race-Based Hair Discrimination, City of Ann Arbor (Enacted June 21, 2021) <http://a2gov.legistar.com/LegislationDetail.aspx?ID=4963357&GUID=B2C21305-4363-4287-B2A0-657CB7546E63> [https://perma.cc/3FRV-T7ED].

21 Kransz, *Kent County considering ban on hair discrimination*, *Mlive.com* (April 9, 2021) <https://www.mlive.com/news/grand-rapids/2021/04/kent-county-considering-ban-on-hair-discrimination.html> [https://perma.cc/BG3T-33ZY].