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**'HAIR' TODAY, GONE TOMORROW: HOW IMMUTABLE
TRAITS MAY BECOME THE NEW FACE OF
DISCRIMINATION AS INTERPRETED IN *EQUAL
EMPLOYMENT OPPORTUNITY COMM'N V. CATASTROPHE
MGMT. SOLS.***

CORTNEY BRYSON*

INTRODUCTION

A melting pot of cultures, a mélange of ethnicities, a smorgasbord of races, nationalities, and styles. Welcome to the twenty-first century of the United States of America, a place where citizens are afforded constitutional protections as to forgo judgment or discrimination based on unique traits that make Americans American, or so we were prompted to believe.¹

In order for relief to be granted to an individual who has suffered from discrimination based on their outward appearance, they must file a complaint against the employer with the Equal Employment Opportunity Commission ("EEOC").² However, regarding grooming policies, the courts have not ruled it illegal for an employer to refuse to hire persons based on "immutable" traits, such as hairstyles that are not found to be natural.³ This is chiefly because banning a natural hairstyle, such as the Afro or bush, would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics.⁴ Courts have vaguely defined an immutable characteristic as one that is uneasily changed, such as race and national origin.⁵ This imprecise definition, along with various decisions by courts

* Cortney Bryson, J.D./MBA, Class of 2017. This article is dedicated to those who were told they couldn't; yet they did. To those who decided to stand up when faced with adversity, while others chose to sit. To those people fighting the "good fight," knowing that the world is betting against them. Thank you for the sacrifices that you have made, and that you continue to make.

"That's why I let my dreads grow, I'll never fit your crown."—Wale

1. U.S. CONST. amend. XIV, §1.

2. *Filing a Charge of Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/charge.cfm> (last visited Jan. 5, 2017).

3. *Look Policies: Can Employers Discriminate based on Their Physical Attractiveness?*, UNIVERSITY OF CINCINNATI LAW REVIEW, https://uclawreview.org/2016/03/02/look-policies-can-employers-discriminate-based-on-their-physical-attractiveness/#_ftn8 (last visited Apr. 9, 2017).

4. *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (1981).

5. *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

supporting this rationale, fails to include *all* natural hairstyles.⁶ In particular, the term “immutable” has not been interpreted to include those hairstyles that are “uneasily changed.”⁷ By definition, natural hair includes hair whose texture has not been altered by chemical straighteners, including relaxers and texturizers.⁸ However, dreadlocks, a hairstyle in which sections of hair are “permanently locked together and cannot be unlocked without cutting,”⁹ are not considered an “immutable trait” despite the difficulties associated with changing this hairstyle.¹⁰

This note will explore the impact and implications of the Eleventh Circuit Court of Appeals’ decision not to afford Title VII protection to the dreadlock hairstyle. Next, this note will discuss the Court’s decision in *Catastrophe* as well as the case law from which the decision was derived. Lastly, this note will explore some of the possible effects this decision may bring in future cases that address this issue.

THE CASE

In 2010, Catastrophe Management Solutions (“CMS”), a claims processing company located in Mobile, Alabama, announced that it was seeking candidates to work as customer service representatives.¹¹ These customer service representatives would not be required to interact with the public; their main job responsibility was to handle incoming calls.¹²

Ms. Jones, an African American, applied for this position in May of 2010 and was selected for an interview.¹³ Ms. Jones arrived to the interview dressed in business attire wearing her hair in short dreadlocks.¹⁴ After the interview was complete, Ms. Jones and a group of others were brought into another room where CMS’ human resources manager, Ms. Wilson, informed them that they had been hired.¹⁵ The group members were then told that they would be required to complete lab tests and other paperwork prior

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

7. *Id.* at 451.

8. Del Sandeen, *What Is Natural Hair?*, ABOUT.COM, <http://blackhair.about.com/od/glossary/g/natural.htm> (last visited Jan. 6, 2017).

9. *State v. Harris*, No. 15-0855, 2016 WL 4801444, * at 1 n.1 (Iowa Ct. App. Sept. 14, 2016).

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

11. *Equal Employment Opportunity Comm’n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021 (11th Cir. Dec. 13, 2016).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

to beginning their employment.¹⁶ At that point in time, there were no comments made regarding Ms. Jones' hair.¹⁷

Prior to Ms. Jones leaving, Ms. Wilson asked if she had her hair in dreadlocks.¹⁸ Ms. Jones answered in the affirmative; Ms. Wilson replied that CMS could not hire her "with the dreadlocks."¹⁹ When Ms. Jones inquired as to what the problem was, Ms. Wilson responded, "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about."²⁰

Ms. Jones told Ms. Wilson that she would not cut her dreadlocks, and Ms. Jones was informed that CMS could not hire her.²¹ Ms. Jones was then asked to return the paperwork that she had been given before she left the facility, to which she obliged.²²

At the time, CMS had a race-neutral grooming policy which read as follows: "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines . . . [h]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]"²³

In response to the argument that CMS' policy was discriminatory because it prohibited dreadlocks, which is a hairstyle, the district court held that a hairstyle, even if closely associated with a particular ethnic group, is a mutable characteristic.²⁴ The court found that the complaint failed to state a plausible claim for relief.²⁵ The court further concluded that a hairstyle is not inevitable and immutable just because it is a reasonable result of hair texture, which is an immutable characteristic.²⁶ As interpreted by the district court, Title VII did not intend for protection to extend to discrimination

16. *Id.*

17. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1022.

22. *Id.*

23. *Id.*

24. *E.E.O.C. v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1143 (S.D. Ala. 2014), *aff'd sub nom.* Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols., 837 F.3d 1156 (11th Cir. 2016), *opinion withdrawn and superseded*, No. 14-13482, 2016 WL 7210059 (11th Cir. Dec. 13, 2016), and *aff'd sub nom.* Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols., No. 14-13482, 2016 WL 7210059 (11th Cir. Dec. 13, 2016).

25. *Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d at 1143.

26. *Id.* at 1144.

based on traits, even if the trait had sociocultural racial significance.²⁷ The EEOC appealed the decision of the district court.²⁸

In a revised opinion rendered by the United States Court of Appeals, Eleventh Circuit, the decision of the district court was affirmed.²⁹ In affirming the district court's decision, the Court of Appeals concluded that the EEOC conflated the distinct Title VII theories of disparate treatment and disparate impact.³⁰ The Court of Appeals further concluded that the EEOC's proposed amendment to its complaint did not assert that dreadlocks are an immutable characteristic of black persons.³¹ The Court further decided to shy away from following the EEOC's Compliance Manual due to a conflict in position taken by the agency in an earlier administrative appeal.³² Lastly, the Court held that no court had accepted the EEOC's view of Title VII in a scenario such as the one at hand, and the allegations in the proposed amended complaint failed to set out a plausible claim that CMS intentionally discriminated against Ms. Jones on the basis of race.³³

BACKGROUND

In addressing whether hairstyles—namely cornrows and dreadlocks—are considered immutable traits, thereby garnering protection against discrimination under Title VII, a number of courts have answered this in the negative.³⁴ For example, in *Rogers v. American Airlines, Inc.*, an employee challenged an employer's grooming policy prohibiting the wearing of an "all-braided hairstyle," claiming that it discriminated on the basis of race and sex.³⁵ Rogers argued that the "cornrow" hairstyle had cultural and historical significance to black women.³⁶ This argument was rejected by the court and the decision was made to dismiss Roger's complaint, holding that "an all-braided hairstyle . . . is an 'easily changed characteristic,' and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer."³⁷

27. *Id.*

28. *Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 837 F.3d 1156, 1158 (11th Cir. 2016).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See generally* *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981); *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 258 (S.D.N.Y. 2002).

35. *Rogers*, 527 F. Supp. at 229.

36. *Id.* at 231.

37. *Id.* at 232.

Similarly, in *Eatman v. United Parcel Serv*, UPS implemented a grooming policy requiring company drivers to wear hats to cover “unconventional” hairstyles.³⁸ Eatman was an employee who wore his hair in dreadlocks and was subsequently terminated for refusing to wear a hat.³⁹ Eatman filed a claim under Title VII asserting racial discrimination based on UPS’ policy.⁴⁰ Eatman argued that the company’s policy was discriminatory because it singled out African Americans based on their locked hair, a characteristic that is unique to African Americans.⁴¹ The court held that “locked hair” is not unique to African Americans and that Title VII does not prohibit discrimination on the basis of locked hair.⁴² Therefore, even if UPS’ policy explicitly discriminated against locked hair, it would not violate Title VII on its face.⁴³

Other courts have decided in a similar manner to those previously mentioned—concluding that a hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic.⁴⁴ In cases such as *Pitt v. Wild Adventures, Inc.*, *William v. Macon Tel. Publ’g Co.*, and *McBride v. Lawstaf, Inc.*, the overarching response of each court centers around the idea that a non-natural hairstyle, such as cornrows or dreadlocks, does not present an impermissible basis that would disallow employers from prohibiting these styles in their grooming policies.⁴⁵

ANALYSIS

The common denominator in the aforementioned court decisions that oppose the protection of hairstyles—such as dreadlocks—is the idea of naturality, or being of a natural quality.⁴⁶ Black’s Law Dictionary defines “natural” as being brought about by nature as opposed to artificial means.⁴⁷ Dreadlocks are formed through the process of leaving the hair uncombed

38. *Eatman*, 194 F. Supp. 2d at 259.

39. *Id.* at 260.

40. *Id.* at 262.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Timmons v. AGC Flat Glass N. Am., Inc.*, No. 14-2272-EFM, 2015 U.S. Dist. LEXIS 146240, at *20 (D. Kan. Oct. 28, 2015).

45. *Pitts v. Wild Adventures, Inc.*, No. CIV.A.7:06-CV-62-HL, 2008 WL 1899306, at *8 (M.D. Ga. Apr. 25, 2008); *See generally Willingham*, 507 F.2d 1084 (5th Cir. 1975) (an employer’s grooming policy is permissible as long as it does not discriminate on the basis of an immutable characteristic or certain fundamental rights); *See also McBride v. Lawstaf, Inc.*, No. CIV. A.1:96-CV-0196C, 1996 WL 755779, at *2 (N.D. Ga. Sept. 19, 1996) (“As a matter of law, an employer’s grooming policy prohibiting a braided hairstyle is not ‘an unlawful employment practice’ as defined by [Title VII].”).

46. *See Pitts*, 2008 WL 1899306, at *8; *Willingham*, 507 F.2d at 1084; *McBride*, 1996 WL 755779, at *2.

47. *Natural*, BLACK’S LAW DICTIONARY (9th ed. 2010).

and uncut, which is then allowed to knot and mat into distinctive locks.⁴⁸ By virtue of definition, dreadlocks are a natural derivation of hair that has not been subjected to artificial influence in order to obtain its distinct texture or characteristics.⁴⁹ Additionally, the courts have found that banning Afros or a bush style would be a violation of Title VII due, in part, to this hairstyle being the result of the natural growth pattern of African American hair.⁵⁰ Prior to the acceptance of the Afro, many African Americans who adopted this hairstyle “were criticized by others, who said they looked messy and ill-groomed.”⁵¹ While whites with naturally curly or kinky hair could wear Afros, some African Americans with straight hair used chemicals to obtain the “kinky” look.⁵² How would the courts go about applying their definition of “natural” in this instance? Even if the courts applied the ‘easily changed characteristic’ standard established in *Rogers*, the Afro would not be considered an immutable characteristic.⁵³ This brings up the question as to when did the Afro become so widely accepted, or more importantly, what brought about the acceptance? *Rogers*, a leading case in the discussion of employment discrimination based on hairstyles associated with a particular race, was decided in 1981.⁵⁴ By the 1970s, the Afro was no longer regarded as unusual or as a political statement but rather a hairstyle choice among many others.⁵⁵ It would seem that the courts only deemed it illegal for an employer to discriminate on the basis of the Afro hairstyle *after* it became acceptable by mainstream society. *Rogers* is an exemplar of employment discrimination cases that involve black women’s physical image, negative stereotypes of black womanhood, and the intersection of race and gender.⁵⁶ Furthermore, “The assumptions underlying *Rogers* also appear in other areas, including those in which facile confluences of biology and culture combine with the intersection of race and gender to condition reproductive and lifestyle choices arguably more fundamental than those of hairstyle.”⁵⁷

In the book *Covering: The Hidden Assault on Our Civil Rights*, author and law professor Kenji Yoshino introduced the concept of “covering,” a

48. *Dread History: The African Diaspora, Ethiopianism, and Rastafari*, SMITHSONIAN INST., <http://www.smithsonianeducation.org/migrations/rasta/rasessay.html> (last visited Jan. 21, 2017).

49. *Rogers*, 527 F. Supp. at 232; See also Black’s Law Dictionary 885 (9th ed. 2010).

50. *Rogers*, 527 F. Supp. at 233.

51. VICTORIA SHERROW, *ENCYCLOPEDIA OF HAIR: A CULTURAL HISTORY* 23 (Greenwood Press, 2006).

52. See *id.* at 23.

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

54. *Id.* at 229.

55. SHERROW, *supra* note 51, at 22-23.

56. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 372 (1991).

57. *Id.* at 372.

term he defines as toning down a disfavored identity to fit into the mainstream.⁵⁸ Yoshino goes further to suggest that taking a closer look at the idea of covering will uncover the fact that this is the way many groups are being held back today.⁵⁹ Yoshino points out that covering is the most widespread form of assimilation required of people.⁶⁰ However, he notes, “contemporary civil rights law generally only protects traits that individuals cannot change, like skin color, chromosomes, or innate sexual orientations.”⁶¹ “This means that the current law will not protect [citizens] against” those traits that the courts consider “mutable,” because the value of assimilation outweighs that of being culturally different.⁶² When referring to characteristics that are beyond one’s control, or an immutable trait, the court in *Griego v. Oliver* noted, “this requirement cannot mean that the individual must be completely unable to change the characteristic.”⁶³ It seems that the previously mentioned courts have failed to take into account the idea that all hairstyles are not easily changed.

While the EEOC has acknowledged that employers can impose neutral hairstyle rules, it has also acknowledged that Title VII prohibits employers from applying neutral hairstyle rules more restrictively to hairstyles worn by African Americans.⁶⁴ Although dreadlocks are not exclusive to the African American race, the hairstyle is one that has been widely associated with the African American race and culture.⁶⁵ Will acceptance of dreadlocks on a mainstream level require the same cultural appropriation as the Afro before the courts will consider it immutable for purposes of discouraging discrimination? In 2016, at New York Fashion Week, designer Marc Jacobs draped his models in multi-colored dreadlocks, a majority of the models being white women.⁶⁶ After receiving backlash for what many considered culture appropriation, Marc Jacobs issued the statement “all who cry ‘cultural appropriation’ or whatever nonsense about any race of skin color

58. Kenji Yoshino, *Excerpt from Covering*, WRITTENVOICES.COM, available at http://www.writtenvoices.com/excerpt_display.php?isbn13=9780375508202 (last visited Jan. 22, 2017).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Griego v. Oliver*, 316 P.3d 865, 884 (2013). See *Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009) (“The constitutional relevance of the immutability factor is not reserved to those instances in which the trait . . . is absolutely impossible to change.”).

64. *EEOC Compliance Manual*, U.S. Equal Emp’t Opportunity Comm’n, 15-48 https://www.eeoc.gov/policy/docs/race-color.html#N_154_ (last visited Jan. 22, 2017).

65. Jeffery Bradley, *Are Dreadlocks Black Culture or a Unique Hairstyle for Everyone?* DREADLOCKS.ORG, <http://www.dreadlocks.org/are-dreadlocks-black-culture-or-a-unique-hairstyle-for-everyone/> (Last visited May 16, 2017).

66. Deborah Douglas, *Denial of Right to Wear Locs Means Denial of Blacks Freedom*, EBONY.COM, <http://www.ebony.com/news-views/dreadlocks-court-analysis#axzz4WXpUVbAv> (last visited Jan. 22, 2017).

wearing their hair in a particular style or manner—funny how you don't criticize women of color for straightening their hair."⁶⁷ It appears that Marc Jacobs' comment supports the idea of how women of color have been forced to assimilate and adapt in an attempt to mimic or fit in with white societal "norms." Women of color were criticized for years for their natural hair texture, and were subconsciously forced to straighten their hair as a method of acceptance by white society; however, this change in hair by black women did not resonate well with the dominant culture.⁶⁸ According to Caldwell, "black women were disparaged because of their artificially straightened hair."⁶⁹ Moreover, "[t]he aesthetic standards of the white society, no matter how well-emulated, established a boundary between black and white."⁷⁰

"The problem with the law in general is they aren't willing to move beyond what's already been legally justified."⁷¹ In the case concerning Ms. Jones, and other cases that follow along the same premise, it can be viewed as the courts giving the employer the power to dictate a personal choice in an employee's life. It is as if the courts have taken the right to decide how to grow and wear one's hair and unknowingly created an ultimatum involving a person's livelihood. More specifically, the judicial holdings of the court provide the employee with two options: (1) cut their hair and comply with the standards set by their employer; or (2) choose another company to work for. In a perfect world where the job market is oversaturated with vacancies, an employee would have no problem leaving to find employment elsewhere. However, the actual job market is the complete opposite.⁷² The implications of *Catastrophe Mgmt.* should implore a level of fear in people of color. It is arguable that this holding affords another method of discrimination that blacks will be subjected to at a disproportionate rate. How will this affect those persons who have had their dreadlocks for years? Would they be required, at their employer's request, to cut off their hair in order to maintain their job? Because the courts have stayed the course by making reference to the acceptance of natural hair in their holdings, would this af-

67. Rose Walano, *Marc Jacobs Issues Formal Apology*, USMAGAZINE.COM, <http://www.usmagazine.com/stylish/news/marc-jacobs-apologizes-for-dreadlocks-comments-w440863> (last visited Jan. 22, 2017).

68. Caldwell, *supra* note 56, at 391-92.

69. *Id.* at 392.

70. *Id.*

71. Douglas, *supra* note 66 (quoting Dr. Minkah Makalani, associate professor of African and African Diaspora Studies at the University of Texas at Austin).

72. Martha C. White, *Unemployment Is Down, But Good Jobs Are Scarce*, NBC NEWS, <http://www.nbcnews.com/business/economy/unemployment-down-good-jobs-are-scarce-n242861> (Last visited May 17, 2017).

fect those women of color who use chemical products to alter their hair into a straightened form, thereby rendering their hair unnatural?

CONCLUSION

By attempting to define natural hair in one swooping decision, as opposed to making the determination on a case-by-case basis, the court has failed the people it is designed to protect. It is arguable that dreadlocks are a form of natural hair and should be treated as an “immutable trait,” per the definition referenced in previous court decisions.⁷³ Whether dreadlocks can be cut to fit into an employer’s business framework is not what is at issue. Should an employee *have* to give up a part of their cultural identity, by cutting their dreadlocks, in an attempt to assimilate or reap acceptance from their counterparts in the workforce? This should produce the same answer across the board, no. To classify dreadlocks as anything other than immutable is comparable to erasing previous court decisions prohibiting employers from discriminating against those employees with Afros. The only way this cycle of workplace discrimination can end is if the courts recognize, adapt, and expand its inclusion of those proven traits or characteristics that have provided employers with grounds for discrimination against minorities in the past. Simply stated, it starts with, ‘*hair*.’

73. See *Macon Tel. Pub. Co.*, 507 F.2d at 1091.