HARMLESS HAIR: LEGISLATION LIMITING IDENTITY

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Abstract

Currently anti-discrimination laws prohibit discrimination based on race, but these laws fail to properly encompass hair discrimination that is tied to race and religion, and effects women of color greatly. Although discrimination against race is prohibited, Title VII of the Civil Rights Act[1] does not properly define what is considered to be discrimination against race, leaving ample opportunities for educational institutions and workplaces to discriminate based on hair, particularly natural hair. The U.S Equal Employment Opportunity Commission (EEOC) is an agency that is "responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, or

[1] *Title VII of the Civil Rights Act*, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964#:~:text=%20Title%20VII%20of%20the%20Civil%20Rights%20Act,It%20shall%20be%20an%20unlawful%20employment...%20More%20, (last visited April 3, 2022).

sex."[2] It does not protect against properties of a person's appearance that can be changed, leaving room for the legal discrimination of black natural hair in the workplace. Natural Hair and hairstyles need to be recognized as a part of someone's identity and cultural characteristics that relate to their race, in order to prevent institutions from discriminating against it. Aspects of individual identities that are correlated to their race or religion should be extensions of the law affording the initial anti-discrimination protections, thus protecting those attributes under federal laws. If the court continues to view these parts of individuals as mutable, people will not be provided equal protection under the law, as the Civil Rights Act claims to provide.

Natural Hairstyles has an incredible cultural significance. Since the beginning of slavery, this cultural phenomenon of hair was stripped from Black people to disconnect them from their roots, thereby eliminating their sense of identity. As natural hair did not fit into the Eurocentric ideals of their captors black women were subjected to additional insults to their personhood, "When the slave trade started in the 15th century, Africans were captured, were forced to slavery and had their hair shaved. Shaving African hair was seen as a way to humiliate them since they valued their hair

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[2] *Overview,* U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/overview#:~:text=The%20U.S.%20Equal%20Employment%20Opportunity,national%20origin%2C%20age%20(40%20or, (last visited Feb 17, 2022).

tremendously."[3] As enslaved women dealt with the inhumane conditions of slavery, their hair no longer became a priority and a sense of pride as it was before their capture, erasing centuries of their cultural identity, and further dehumanizing them. This began the stigmatization of black natural hair in the western world.

Due to the harsh conditions of enslavement, black women did not have the chance to properly take care of their hair and it was seen as unruly and unkempt by their slave masters in its natural state, black women began to use headwraps to protect their hair and scalps as well as keep it hidden, and it eventually became a sign of lower status. "While the cloth protected their hair from lice and perspiration as they worked under the blazing sun, it was also used to designate their inferior status."[4]Anything associated with black hair would therefore become inferior, marking centuries to come of policing black hair, therefore stripping black people of the culture that once was marked by their hair and played a significant role in their appearance.

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[3] Rebecca Joachim, *Natural Hair - The History Before The Movement* , kika curls.com, (2017), https://www.kikacurls.com/blogs/kikas-blog/natural-hair-the-history-before-the-movement, (last visited Feb 17, 2022).
[4] Khanya Mtshali, *The radical history of the headwrap*, Timeline, (2018), https://timeline.com/headwraps-were-born-out-of-slavery-before-being-reclaimed-207e2c65703b, (last visited Feb 17, 2022).

About halfway through the 18th Century, Louisiana went from a French colony to a Spanish one.[5] This change in the government of the colony, greatly impacted the lives of slaves in Louisiana, eventually leading to the situation where Spanish laws were used and this made significant changes in the lives of the people. " In particular, Spanish slave law recognized *coartación*, the right of self-purchase, and although most enslaved people had no chance of capitalizing on this privilege, a significant number did."[6] This sudden difference created a new social class, thereby obstructing the social order of previously enslaved people, allowing them to buy back their freedom and build wealth. This also enabled them to now have the ability to adorn their hair in any manner they would like, as well as not being restricted to covering their hair, which was completely contrary to their previous obligation when they were enslaved. The rise in social status of these previously enslaved people lead to the popularity of hair jewels, and other adornments that began to signify freedom. According to Essence magazine, "accents that made them stand out from white women…During this period, it is believed that white men found themselves increasingly attracted to the exotic looks of women of color, which enraged

[5] *Important Dates in History*, Louisiana.gov, https://www.louisiana.gov/about-louisiana/important-dates-in-history/, (last visited Feb 17, 2022).
[6] John Rodrigue, *Slavery in Spanish Colonial Louisiana 64 Parishes* (2014), https://64parishes.org/entry/slavery-in-spanish-colonial-louisiana, (last visited Apr 4, 2022).

white women."[7] As natural hair was typically covered up, this drastic change brought attention to the natural black hair and placed natural hair in a spotlight it was never in before. Due to fears concerning the attention that natural hair was getting, the Tignon Laws were created by Governor Esteban Rodriguez Miro of Louisiana. The Tignon Laws stated that ". . . women of color must cover their hair with a knotted headdress and refrain from adorning it with jewels when out in public."[8] This was the first official law that created policing black women's hair, and the impact of this law was widespread even though the law was eventually repealed.

Court Cases involving Hair Discrimination

Throughout the history of the United States, discrimination has not only been seen in regard to how people can wear their hair, but there have been laws restricting people from covering their hair as well, and this lends to religious and ethnic discrimination. The First Amendment of the U.S. Constitution was included in order to protect the freedom of religion, -"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or

[7] Samantha Callender*, The Tignon Laws Set The Precedent For The Appropriation and Misconception Around Black Hair, Essence,* Essence, (2020), https://www.essence.com/hair/tignon-laws-cultural-appropriation-black-natural-hair/, (last visited Feb 17, 2022).
[8] Id.

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[9] Although the first amendment protects against overall religious discrimination, there have been court cases where a person's religious headwear has been the subject of discrimination, on the grounds that the head covering doesn't abide by a certain institution's guidelines.

In the case of the *EEOC v. 704 HTL Operating, LLC*, Safia Abdullah a practicing Muslim woman, claimed that she was fired from her housekeeping jobs for failure to remove her hijab, a traditional headscarf worn by Muslim women. She claims that this action was in violation of Title VII of the Civil Rights Act which states, "The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. "[10] The EEOC, attempts to define and specify what religious discrimination is by saying, "The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective

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[9] *The 1st Amendment of the U.S. Constitution*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/amendment/amendment-i, (last visited Mar 23, 2022).
[10] *Executive Order 11246 (2021)*, Office of Federal Contract Compliance Programs, (1965), https://www.dol.gov/agencies/ofccp/executive-order-11246/as-amended#:~:text=The%20contractor%20will%2C%20in%20all,gender%20identity%2C%20or%20national%20origin, (last visited Mar 24, 2022).

employee's religious observance or practice without undue hardship on the conduct of the employer's business."[11] This extends the protection of freedom of religion by including the concept that practicing religion is not the only way in which individuals exercise their religion, that religious observance can be defined as wearing clothing or accessories in such a way that it is connected to their faith and it should be protected. Abdullah uses this to argue that the company requiring her to remove the Hijab, was in violation of this Act. Abdullah interviewed and was hired to work at 704-ABQ which is one of the hotels of the MCM Elegante Hotels Franchise located in New Mexico. Abdullah asserts that during her interview she wore her hijab, and it is a agreed upon by both parties that nothing was said about her hijab, "Young conducted the interview alone, and neither she, nor anyone else at 704–ABQ to whom Abdullah was introduced on the day of her interview, asked her about or otherwise expressed an opinion regarding her hijab at the time."[12] The company was aware of Abdullah's faith, and at this time it had not caused an issue. The issue began to arise when on March 15, 2010, Abdullah arrived at work. The following events are disputed between the defendant and the

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[11] *Section 12: Religious Discrimination* , U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination, (last visited Mar 24, 2022).

[12] *Equal Employment Opportunity Commission, Plaintiff, v. 704 HTL OPERATING, LLC, and Investment Corporation of America d/b/a MCM Elegante Hotel, Defendants*. (2013), https://casetext.com/case/equal-empt-opportunity-commn-v-704-htl-operating-2, (last visited Mar 23, 2022).

plaintiff. Abdullah claimed that Young, her housekeeping supervisor told her to remove her hijab, and informed her that unless she removed her hijab, she would not be able to work.[13]

Abdullah states that she was “wearing her hijab tucked into a turtleneck sweater when she reported for work and was further secured by both the inner bona and straight pins.”[14] The fact that Abdullah’s hijab was secured, is the grounds she used to argue that her hijab was in line with the hotels policies. The acceptable methods in which hair can be worn according to 704-ABQ is that “as long as it is contained and not worn loose.”[15], Abdullah uses this fact to argue that since her hair was tied away in a bona, covered by a hijab it is within the confines of the hotel’s policies. It is stated in the policies of 704-ABQ, that housekeepers can wear bandanas or caps to secure their hair. Despite this policy, Slough, Abdullah’s manager, asked her to remove the hijab for a more acceptable look, not citing any type of safety concerns with Abdullah’s hijab.

The court ruled against Abdullah, stating that 704-ABQ was within their right, to ask Abdullah to remove her hijab, despite its religious significance. All of Abdullah’s motions were denied. She sued on four grounds, and they are as follows:

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[13] Id.
[14] Id.
[15] Id.

> Title VII for (1) *failure to accommodate religious beliefs and practices* (42 U.S.C. §§ 2000e(j) and 2000e–2(a)); (2) *failure to hire and/or discharge* (42 U.S.C. § 2000e–2(a)); (3) *retaliatory failure to hire and/or discharge* (42 U.S.C. § 2000e–3(a)); and, in the alternative, (4) *constructive discharge* (42 U.S.C. § 2000e–2(a)). Under Title VII, it is "an unlawful employment practice for an employer ... to discharge any individual, or otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's ... religion."[16]

On the motion of failure to accommodate religious beliefs the court denied it, citing that the Plaintiff failed to provide proper evidence that establishes a Prima Facie Case. A Prima Facie Case is defined as follows by the Legal Information Institute at Cornell Law School, "A prima facie case is the establishment of a legally required rebuttable presumption. A prima facie case is a cause of action or defense that is sufficiently established by a party's evidence to justify a verdict in his or her favor, provided such evidence is not rebutted by the other party."[17] This means that the burden is on the Plaintiff, in this case ,Abdullah, to provide sufficient and

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[16] Id.

[17] *Prima facie*, Legal Information Institute (2022), https://www.law.cornell.edu/wex/prima_facie#:~:text=A%20prima%20facie%20case%20is,rebutted%20by%20the%20other%20party. (last visited Mar 24, 2022).

sound evidence that 704-ABQ failed to accommodate religious beliefs and practices. A prima facie case must also be built on evidence that is not rebutted by the other party. Abdullah's evidence for this motion is largely dependent on evidence that is disputed between the parties. Much of Abdullah's evidence concerned her interactions with Slough, her manager, and those conversations were not recorded, nor were there notes concerning the interactions included in her file. Thereby, the defendants argue that since Abdullah cannot establish a proper prima facie case, the burden does not fall on them to dispute her claim. They claim that she cannot support her prima facie case because "the quoted testimony reflects *Abdullah's* "subjective, self-serving" memory of the events at issue."[18]

The rest of the motions presented by Abdullah were denied by the court for similar reasons, citing that Abdullah's personal testimony on the events that occurred could be misconstrued and subjective. The court recognized that prima facie cases are hard to build when in reference to discrimination, due to the typical lack of tangible evidence for the case. Highlighting the need to reassess anti-discrimination laws, this case also exposes the lack of proper legislation surrounding the ability of the injured party to make anti-discrimination claims based upon the protected areas identified by the Civil Rights Act. And because the Act did not deal with the issue of addressing the weak position a plaintiff would be in when trying to get justice from their

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[18] Id.

employer who has all the power and the resources to create evidence or to destroy it, there continues to be problems with employer discrimination. Employers have had the ability to discriminate against people based upon their identities, because the part of the identity that is subject to discrimination isn't usually acknowledged publicly, but it is inherent as part of a person's ethnicity, race, or religion.

Similar cases have occurred dealing with employers requesting employees to change their hair. Chastity Jones, a black woman living in Alabama, "was offered a job as a customer service representative at a call center in Mobile in 2010."[19] According to an article written by Vox, during this interview, Jones wore business attire, in line with company policy. But at this interview, Jones styled her hair naturally, wearing her locs. Jones later sued the company, because, "An HR manager later told Jones that dreadlocks violated the company's grooming policy because they "tend to get messy." She told Jones she couldn't wear her hair that way at work, and when Jones refused to cut her locs, the job offer was rescinded."[20] Jones filed a racial discrimination lawsuit against the company on the grounds that her job offer was rescinded due to the racist stereotype that locs are messy and unkempt. The court denied her motions,

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[19] Alexia Fernandez Campbell, *A black woman lost a job offer because she wouldn't cut her dreadlocks. Now she wants to go to the Supreme Court*, Vox (2018), https://www.vox.com/2018/4/18/17242788/chastity-jones-dreadlock-job-discrimination, (last visited Mar 24, 2022).
[20] Id.

citing that "racial discrimination must show bias based on traits that a person cannot change."[21]

The EEOC currently only recognizes racial discrimination when something about someone's identity that cannot be changed is the object of the lawsuit. This law is not only outdated, but fails to address the issue that hairstyles are an extension of race and ethnicity, and that many natural hairstyles such as locs, have deep cultural ties, making it inseparable from race and ethnicity. According to the EEOC, "Discrimination on the basis of an immutable characteristic associated with race, such as skin color, hair texture, or certain facial features violates Title VII."[22] Currently, this immutable clause allows employers to continue to discriminate on race, based on the grounds that individuals can change certain aspects of their identity, therefore it is not considered discrimination. As discrimination evolves to become more subtle, the EEOC needs to change its policies and work on redefining what characteristics are considered to be mutable. Hair stereotypes such as the one imposed on Jones, are racial stereotypes, as they directly correlate to race. The EEOC currently prohibits, ". . .discrimination on the basis of an immutable characteristic associated with race, such as skin color, hair texture."[23] Limiting protection to characteristics that

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[21] Id.

[22] *Facts About Race/Color Discrimination*, U.S. Equal Employment Opportunity Commission, Eeoc.gov, https://www.eeoc.gov/fact-sheet/facts-about-racecolor-discrimination, (last visited Mar 24, 2022).

[23] Id.

are not directly race related, but are associated with it, still leaves room for discrimination. Including hair texture as an immutable characteristic associated with race doesn't go far enough to prevent natural hairstyles being subjected to discrimination in the workplace, as typically black hairstyles such as box braids, locs and cornrows, are seen as mutable characteristics that individuals can change, ignoring the deep cultural and historical meaning that these hairstyles have to individuals.

The CROWN Act, a law first signed in California, attempts to address this lack of legislation regarding natural hair. The CROWN Act, "which stands for "Creating a Respectful and Open World for Natural Hair," is a law that prohibits race-based hair discrimination, which is the denial of employment and educational opportunities because of hair texture or protective hairstyles including braids, locs, twists or bantu knots."[24] This act addresses the gaps in existing legislation surrounding the protection of natural hair and has been passed as a law in 14 states. This law has provided protection for black people and has recognized hair as a means of discrimination against someone's race. Although this law has offered immense protection, it needs to go further to protect in all states, since some states have not filed any legislation surrounding the protection of natural hair. The CROWN Act should be a national law, thus

[24] *The Official CROWN Act*, https://www.thecrownact.com/about , (last visited Mar 24, 2022).

stopping legal loopholes of companies discriminating against people for their natural hair.

Conclusion

Since the Civil Rights Act was signed into law in 1964, employers and other institutions have still been able to discriminate against people for what should be considered extensions of their identities that are protected by the Civil Rights Act. As the Civil Rights Act aimed to protect people from being discriminated against, included protections based on race and religion, it is not yet recognized by our legal systems that certain aspects of appearance and expression are extensions of an individual race and religion, and thereby should be covered under law. Practicing religion is not only limited to practices such as attending church, mosque, temple etc., but to the outward part of appearances that qualify as part of religious practice, such as wearing religious clothing articles, such as Hijabs. Aspects of race are not only limited to the color of someone's skin, but also the physical features that are attached to the race or ethnicity of a person, such as hair. These attributes should be protected under civil rights laws, and should not be seen as mutable characteristics, because they are a part of someone's identity. Locs and Afros are exclusive to those with coily hair textures, which is a feature of someone's race, and a deep part of cultural identity. Individuals should not be precluded from being able to choose to identify with their race, culture or religion, even in the workplace. As our understanding of identify

and discrimination evolves, the law should adjust also to recognize that discrimination on the basis of expressions affiliated with race, religion, sex, ethnicity, etc. must be precluded from happening, because it has the same effect as any other type of discrimination. Extensions of one's cultural, racial, and religious identities should never be considered parts of oneself that can be removed, as they are outward expressions of a rich history, and that diversity identities are a part of who someone is.