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Employment Discrimination Report™

Race

Wearing Dreadlocks Doesn't Support Race Bias Claim

The EEOC's allegations that a black job seeker was denied work based on race because she refused to cut off her dreadlocks fall short, a federal appeals court affirmed (*EEOC v. Catastrophe Mgmt. Sols.*, 2016 BL 301245, 11th Cir., No. 14-13482, 9/15/16).

The case is notable because the court rejected the Equal Employment Opportunity Commission's argument that it stated a plausible bias claim under the modern definition of ''race,'' which according to the agency includes cultural characteristics and ''individual expression'' associated with race.

Federal law prohibits job discrimination based on the fixed traits of a worker's race, the U.S. Court of Appeals for Eleventh Circuit found Sept. 15. It relied on dictionary definitions and circuit precedent to assess the likely understanding of the term by legislators when they passed federal employment bias protections in the 1960s. Title VII of the 1964 Civil Rights Act doesn't define race and the EEOC hasn't ''seen fit to issue a regulation defining the term,'' the court noted.

The dismissal of the agency's lawsuit on behalf of Chastity Jones was proper because the EEOC didn't allege that dreadlocks ''are an immutable characteristic of black persons,'' the court said. Rather, the agency claimed dreadlocks are ''culturally associated with race,'' the court wrote.

No other court has ever accepted the EEOC's view of Title VII ''in a scenario like this one,'' and it appears ''every court to have considered the issue has rejected the argument that Title VII protects hairstyles culturally associated with race,'' the Eleventh Circuit said.

Professor D. Wendy Greene said the ruling is important because relatively neutral grooming policies like the one in this case are vulnerable to the subjective interpretations of an employer's decision makers. Such subjective interpretations can greatly affect the ability of black and other protected class workers to ''obtain and maintain employment,'' she said.

Greene teaches at the Cumberland School of Law at Samford University in Birmingham, Ala. She has written extensively on the issue of race bias and ''natural hairstyles,'' she told Bloomberg BNA Sept. 16.

EEOC Conflates Bias Theories. Catastrophe Management Solutions, the prospective employer, told Jones she was hired for a customer service position following an interview, according to the EEOC. But when Jones told a human resources manager post-interview that she wouldn't cut off her ''short dreadlocks,'' she was told she was no longer hired.

Jones wouldn't have had contact with the public as a customer service representative, but the company's grooming policy requires employees to wear ''professional/business'' hairstyles and prohibits ''excessive hairstyles or unusual colors,'' the Eleventh Circuit said.

The EEOC sued the Mobile, Ala., insurance claims processing company under the intentional bias theory of discrimination, so its argument that CMS had a race-neutral grooming practice that had a disparate impact on black job applicants couldn't be considered, the appeals court ruled.

The Eleventh Circuit said "every court to have considered the issue has rejected the argument that Title VII protects hairstyles culturally associated with race."

The EEOC's proposed amended complaint in the case also improperly conflated the disparate treatment and disparate impact theories of discrimination ''by making disparate impact arguments in support of its disparate treatment claim,'' Judge Adalberto Jose Jordan said.

The ''two theories are not interchangeable,'' he said, as a disparate treatment claim requires proof of intentional bias while a disparate impact claim does not. A disparate impact claim instead seeks to establish employer liability when a facially neutral job policy has disadvantageous consequences for a protected class of workers, Jordan explained.

The U.S. Supreme Court's ruling in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 126 FEP Cases 765 (U.S. 2015), a pregnancy discrimination case, didn't cause the sea-shift in the scope of the disparate treatment theory suggested by the EEOC, the Eleventh Circuit held.

Young doesn't ''stand for the proposition that an employer's neutral policy can engender disparate treatment liability merely because it has an unintended adverse effect on members of a protected group,'' Jordan wrote.

Issue Likely to Recur. In a statement provided to Bloomberg BNA Sept. 16, EEOC General Counsel P. David Lopez said, ''We are disappointed with the Eleventh Circuit's treatment of this case, which involved an

employer's demand that Chastity Jones cut her hair, worn in dreadlocks, because of the employer's view that dreadlocks 'tend to get messy.' We believe the court was incorrect when it held that the employer's actions could not be proven to be race discrimination.''

He said the agency is reviewing its options regarding a possible appeal or other challenge to the court's ruling.

Greene said that challenges to race-based employer grooming policies will likely recur, regardless of what the EEOC decides to do in this case. The Eleventh Circuit's decision will have a ''huge impact'' on other cases and potential litigation, both inside and outside the employment context, she said.

The issue has also arisen in the school setting, Greene said. Grooming policies touching on immutable traits other than race may also be subject to challenge by workers and others, she said.

In addition to the financial ramifications of not getting or being able to maintain a job because of their hairstyle, black workers also face other adverse consequences from policies like CMS's, Greene said. Those problems are especially tough for black women, she said.

Black women may be required to straighten their hair to get or keep a job, which can be costly—up to $500 per month in some instances—and is a drain on their time and energy, Greene said. Negative health consequences also may be triggered by the need to refrain from certain physical activities, such as exercise, to maintain a straightened hairstyle, she said. The straightening process could ultimately lead to hair loss, she said.

''Sometimes courts and employers don't recognize these issues,'' she said.

The Eleventh Circuit's decision ''provides a unique opportunity to think about notions of race and the immutability doctrine that is deeply embedded'' in judicial interpretations of race, Greene said.

Helgi C. Walker, lead counsel for CMS, told Bloomberg BNA Sept. 16, ''The opinion provides important guidance to employers because it reaffirms that they may establish and enforce race-neutral grooming policies for their workplace without running afoul of Title VII.'' She's with Gibson, Dunn & Crutcher LLP in Washington

Related Arguments Also Rejected. In rejecting the EEOC's argument that CMS interpreted its facially neutral grooming policy in a way that intentionally discriminated against Jones, the appeals court also rejected the agency's sub-argument that dreadlocks are a natural outgrowth of the hair texture of black people, which is itself an immutable trait.

It likewise was unpersuaded by the related contentions that a dreadlocks hairstyle is associated with race, which is immutable; that dreadlocks are sometimes a ''symbolic expression of racial pride''; and that targeting dreadlocks when making employment decisions ''can be a form of racial stereotyping.''

The court said the EEOC's arguments were founded in part on the historical context of the development of the term ''dreadlock.''

According to the EEOC, Jordan noted, dreadlock ''became a 'commonly used word to refer to the locks that had formed during the slaves' long trips across the ocean' '' as a result of '' 'their hair being matted with blood, feces, urine, sweat, tears, and dirt.' ''

Meaning of Race 'Complex,' Court Says. The Eleventh Circuit said the meaning of race is too well-established, on the one hand, and too nuanced on the other, to sanction the EEOC's proferred view of the term. The EEOC itself hasn't been consistent over the years in how it defines race, the court added.

''In the 1960s, as today, 'race' was a complex concept that defied a single definition,'' Jordan said, and it's more likely Congress intended race in Title VII to refer to ''common physical characteristics shared by a group of people and transmitted by their ancestors.'' Modern views of race may be different, but they don't reflect ''the country's collective zeitgeist'' at the time, he said.

Moreover, even those championing the EEOC's proposed modern definition of race ''have different views (however subtle) about how 'race' should be defined,'' he added. How are courts to choose among these competing views, and how are courts and employers ''to know what cultural practices are associated with a particular 'race'?'' Jordan asked.

In short, circuit precedent and the likely intent of Congress in passing the race bias prohibitions of Title VII mean that ''discrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not,'' Jordan said.

Judges Julie E. Carnes and Eduardo C. Robreno joined the opinion.

EEOC attorneys Paula R. Bruner in Washington and Julie Bean, Marsha L. Rucker and C. Emanuel Smith in Birmingham, Ala., represented the commission. Eugene Scalia and Thomas M. Johnson Jr. of Gibson Dunn in Washington and David J. Middlebrooks and Whitney R. Brown of Lehr Middlebrooks & Vreeland P.C. in Birmingham also represented CMS.

Joshua P. Thompson of the Pacific Legal Foundation in Sacramento, Calif., represented PCF, and William S. Consovoy of Consovoy McCarthy PLLC in Arlington, Va., represented the U.S. Chamber of Commerce. They both appeared in the case as amici supporting CMS.

Neither Thompson nor Consovoy responded Sept. 16 to Bloomberg BNA's request for comment.

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