SENATE RULES COMMITTEE SB 188
Office of Senate Floor Analyses
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THIRD READING

Bill No: SB 188
Author: Mitchell (D), et al.
Amended: 4/2/19
Vote: 21

SENATE JUDICIARY COMMITTEE: 7-0, 3/26/19
AYES: Jackson, Allen, Caballero, Monning, Stern, Umberg, Wieckowski
NO VOTE RECORDED: Borgeas

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

SUBJECT: Discrimination: hairstyles

SOURCE: CROWN Coalition

DIGEST: This bill specifies that race, a category protected against workplace discrimination under California's Fair Employment and Housing Act (FEHA), includes traits historically associated with race, such as hair texture and protective hairstyles like braids, locks, and twists.

ANALYSIS: Existing federal law makes it an unlawful employment practice for an employer to discriminate against any individual with respect to that individual's compensation, terms, conditions, or privileges of employment, because of such individual's race. (42 U.S.C. 2000e-2(a)(1).)

Existing state law:

1) Makes it an unlawful employment practice for an employer, because of race, to refuse to hire or employ the person or to refuse to select a person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment, unless based upon a bona fide occupational

qualification, or, except where based upon applicable security regulations established by the United States or the State of California. (Gov. Code § 12940(a).)

2) Prohibits discrimination on the basis of race or ethnicity in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid. (Ed. Code § 220.)

3) Provides that "race or ethnicity" includes ancestry, color, ethnic group identification, and ethnic background. (Ed. Code § 212.1.)

This bill:

1) Makes a series of findings and declarations that:

   a) discrimination against "blackness" and its associated physical traits is pervasive in society and permeates the societal understanding of professionalism;
   b) this racist, Eurocentric outlook manifests itself in workplace dress codes, grooming policies, and expectations that disparately impact Black workers;
   c) the federal courts have failed to provide adequate protection against such discrimination under federal civil rights laws;
   d) hair discrimination targeting hairstyles associated with race is racial discrimination; and
   e) continuing to enforce Eurocentric images of professionalism through purportedly race-neutral grooming polices that disparately impact Black individuals runs contrary to constitutional values of equity and opportunity for all.

2) Clarifies that, for the purposes of determining both unlawful practices under the FEHA and what constitutes discrimination prohibited by the Education Code, the term "race" includes traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.

3) Specifies that the phrase "protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists.

Comments

1) *Comparison to Federal Law*

Title VII of the 1964 Civil Rights Act prohibits workplace discrimination "because of" an individual's "race, color, religion, sex, or national origin." (42 U.S.C. 2000e-2.) Using this basic statute, African-American women have from time to time sought to challenge workplace rules or specific actions that treated them differently on account of their hair.

In assessing whether or not these restrictions constitute impermissible workplace race discrimination, the federal courts have generally applied what is referred to as the "immutability doctrine." The basic concept is that legal protections against racial discrimination cover only those aspects of racial identity that are inherent or immutable, meaning that the individual in question has no control over or ability to change them.

Two key cases demonstrate the courts' application of this doctrine to allegations of race discrimination in the context of workplace hair policies.

In 1981, Renee Rodgers challenged an American Airlines' grooming policy that banned employees from wearing braided hairstyles. (*Rogers v. Am. Airlines, Inc*. (S.D.N.Y. 1981) 527 F. Supp. 229.) Ms. Rogers sought to wear her hair in cornrows: rows of braids laced closely along the scalp. She argued that American Airlines' policy discriminated against her on grounds of race and gender. The court disagreed. Relying on the immutability doctrine, the court ruled that, because Ms. Rogers had the ability to choose whether or not to braid her hair in cornrows, they were not a protected component of her race. The right for a Black employee to wear an afro might be covered the civil rights laws, the court suggested, but:

> an all-braided hairstyle is a different matter. It is not the product of natural hair growth but of artifice. 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. (Id. at 232. Internal quotations omitted.)

More recently, in 2011, the federal Equal Employment Opportunity Commission (EEOC) took a run at achieving a different outcome. (*EEOC v. Catastrophe Mgmt. Sols.* (11th Cir. 2016) 852 F.3d 1018. Hereafter "Catastrophe.") In that case, Chastity Jones, a black woman, had obtained an

offer to work for Catastrophe Management Solutions (CMS). Ms. Jones had her hair done in locks, however, and when she confirmed this for the human resources manager, Jeannie Wilson, Wilson informed Jones that CMS could not hire Jones "with the dreadlocks." When asked why, Wilson replied "they tend to get messy, though I'm not saying yours are, but you know what I'm talking about."

At the time, CMS had the following grooming policy:

> 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]air style should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.] (*Catastrophe*, *supra*, 852 F.3d 1018, 1023.)

Ms. Jones refused to remove her locks and CMS rescinded its offer of employment. Jones filed a complaint with the EEOC for race discrimination and the case eventually made its way up to the U.S. Court of Appeals for the Eleventh Circuit.

After reviewing dictionary definitions from around the time that Congress enacted Title VII, the *Catastrophe* court convinced itself that "race" meant immutable characteristics that are "a matter of birth, and not culture." (*Catastrophe*, supra, 852 F.3d 1018, 1027.) Then, relying in part on the holding in the *Rogers* case discussed above, the *Catastrophe* court decided 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." (Id. at 1030.) Applying this distinction to the facts before it, the *Catastrophe* court concluded that Ms. Jones had not been discriminated against because, the court claimed, locks are not an immutable characteristic of race. (*Ibid*.)

Thus, according to the main cases to address the issue, federal law regarding race discrimination allows employers to restrict their employees from wearing pretty much any hairstyle the employer chooses, including hairstyles that are natural and protective of Black hair, with the lone possible exception of the afro.

These cases can be criticized on several grounds. First, the courts' factual application of the immutability doctrine can be questioned. The *Rogers* and *Catastrophe* courts distinguished afros from braids, twists, and locs. As critics

have pointed out, however, this seems to assume, incorrectly, that an afro is the only endpoint for natural outgrowth of Black hair. As the findings and declarations to SB 188 state, in addition to afros, "Black hair can also be naturally presented in braids, twists, and locs." Thus, the courts might easily and logically have concluded that braids, twists, and locs represent immutable aspects of race every bit as much as an afro.

Second, the courts' rulings in *Rogers* and *Catastrophe* gloss over the disparate impact that discrimination against natural and protective hairstyles has on Black people generally, and on Black women in particular. The *Rogers* court, for example, described the workplace hair policy at issue in the case as "a matter of relatively low importance in terms of the constitutional interests protected by the Fourteenth Amendment and Title VII," and as having "at most a negligible effect on employment opportunity." (*Rogers, supra*, 527 F.Supp. 229, 231.)

While there may be more pernicious forms of discrimination than that based on hair, in treating the matter as of so little consequence, the courts do not seem to have given serious consideration to the time, resources, and energy that Black women, in particular, frequently must devote to their hair, the more so when natural and protective hairstyles are not an option. According to a 2017 comparison done by the Perception Institute, Black women report spending more time and money on their hair than their White counterparts. Black women also reported experiencing far higher levels of anxiety about their hair, including double the social pressure to straighten it.

Nor do the *Rogers* and *Catastrophe* courts seem to have taken into account the health hazards associated with hairstyles that can only be achieved through the use of strong chemicals or high heat. Relaxers are not only linked with hair damage, they have been linked to skin and eye irritation, respiratory disorders, obesity, cancer, and reproductive health challenges. On top of these direct health effects, Black women who straighten their hair commonly report avoiding physical activity and exercise more often in order to preserve the investment of time and money they have put into getting their hair straight. Regarding these effects and in support of this bill, California Civil Liberties Advocacy concludes: "[t]here is a word for requiring people to subject themselves to the use of toxic chemicals and invest time and money to make their hair appear 'less black," it's called racism." (Emphasis in the original.)

Finally, the very application of the immutability doctrine in this context can be criticized for missing the more fundamental point. However a hairstyle is achieved – naturally or by "artifice" – and whether it is mutable or not, if the

hairstyle is intimately tied up with racial identity, then prohibiting the hairstyle in the workplace deprives employees of central and fundamental aspects of their racial identity. An arguably more enlightened and evolving branch of civil rights law recognizes that it is this issue, not whether the characteristic is immutable, that should determine the scope of civil rights protection.

2) *Practical Application of the Bill*

This bill would prevent employers from instituting grooming policies that ban, limit, or otherwise restrict natural hair or hairstyles that have historical associations with race, such as afros, locks, twists, and braids. While these hairstyles have their strongest historical associations with Black people, employers would have to apply their policies uniformly, regardless of race, or risk liability for discriminatory application of the policies. Thus, under SB 188 employers could not ban non-Black workers from wearing braids, twists, or dreadlocks any more than they could Black workers.

This does not at all mean that, if SB 188 were enacted, employers would lose the ability to make and enforce grooming policies. So long as those rules are imposed for valid, non-discriminatory reasons, have no disparate impact, and are uniformly applied, such rules are legal now and would remain so under this bill. In this sense, SB 188 does not represent an enormous change from existing law.

Thus, for instance, if an employer requires all employees to secure their hair for bona fide safety or hygienic reasons, such rule does not, on its face, violate FEHA now and would not under SB 188. Similarly, a race-neutral rule requiring employees to keep their hair neat and clean is also valid, on its face, today, and would remain so under SB 188. What would change under SB 188 is that an employer could not have an explicit policy against wearing dreadlocks, twists, braids, or other protective hairstyles. Nor could an employer achieve the same practical result by having a facially valid policy requiring "professional" hair, or "clean and tidy" hair, but applying that policy to mean, categorically, that nobody can wear afros, locks, twists, braids, or other protective hairstyles to work. An employer could fire an employee with braids, locks, or twists for having inappropriately unclean hair, but the employer would have to have evidence that the employee's hair was, in fact, unclean. It would not suffice for the employer to say that the employee's hair was unclean just because the employee wore braids, locks, or twists.

Because these hairstyles do not correlate in any way with a workers' ability to perform a task, SB 188 arguably represents little to no burden at all on

employers beyond reviewing their policies and procedures to ensure compliance. For workers, however – Black female workers especially— SB 188 represents respect, greater autonomy to wear their hair in the manner best suited to their needs, and the removal of a significant impediment to equity in the workplace.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

SUPPORT: (Verified 4/10/19)

CROWN Coalition (including: Dove Brand, part of Unilever; Color of Change; National Urban League; and Western Center on Law & Poverty) (source)
American Civil Liberties Union
American Federation of State, County and Municipal Employees, AFL-CIO
Anti-Defamation League
Black American Political Association of California
Black Women for Wellness Action Project
Black Women Organized for Political Action
California Black Chamber of Commerce
California Civil Liberties Advocacy
California Employment Lawyers Association
California Teachers Association
Courage Campaign
Delta Sigma Theta Sorority, Inc.
Equal Rights Advocates
Greater Sacramento Urban League
Greenlining Institute
National Association of Social Workers – California Chapter
National Council of Negro Women
National Organization of Black Elected Legislative Women
National Women's Law Center
Public Health Advocates
The Links, Inc.
The Women's Foundation of California
United States Black Chambers, Inc.

OPPOSITION: (Verified 4/10/19)

None received

ARGUMENTS IN SUPPORT: According to the author:

> On December 19, 2018, a predominantly White crowd in a Buena, New Jersey high school gymnasium watched as a White referee demanded a Black 16-year-old varsity wrestler cut his dreadlocks ("locks") or forfeit the match. […] Mr. Johnson lost something much more valuable that night than his win could replace; he was denied the freedom to compete while wearing one of several protective hairstyles essential to his hair's health and growth.
>
> Unfortunately, Mr. Johnson's dilemma extends far beyond the high school gymnasium. Black hair is more fragile and susceptible to breakage than the White population, and hair damage and loss is exacerbated by the consistent use of harmful styling practices like chemical relaxers and heat straightening. Thus, braids, locs, and twists (collectively "Protective Hairstyles") are necessary for healthy Black hair maintenance. As many Black employees will attest, the struggle to maintain what much of society has deemed a "professional image" while protecting the health and growth of their hair remains a defining aspect of their work experience. More often than not, Black employees choose to conform to the "professional image" at the expense of healthy hair.
>
> In an effort to advance the acceptance of Protective Hairstyles within corporate culture, [SB 188] will make it illegal for employers to enforce purportedly race neutral grooming policies that disproportionately impact persons of color – and Black women in particular.

As sponsor of the bill, the CROWN Coalition writes:

> Despite great strides made by citizens, legislators, and courts to reverse and resolve the long-lasting damaging effects of racism, hair remains a source of racial discrimination with serious economic and health consequences, especially for Black people. This sort of discrimination is fostered by purportedly "race neutral" grooming and dress code policies in the workplace that promote a Eurocentric image of professional hair. An image of professionalism that holds European features as the norm disparately affects individuals who do not naturally fall into that model. Black women, adhering to such grooming policies, often feel compelled to employ styling practices to alter the natural characteristics of their hair, including time-consuming heat straightening and chemical permanent relaxers and other things which can lead to hair damage

and hair loss. Moreover, for many Black women, braids, locks, and twists, also known as “protective hairstyles,” are essential for healthy hair maintenance.

Prepared by: Timothy Griffiths / JUD. / (916) 651-4113
4/11/19 8:41:04

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