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Discrimination Based on Hair and Hairstyles: Protected or Knot?

August 19, 2019

Cornrows or locs may not fit your corporate image, but be careful: state and local legislation prohibiting workplace grooming and appearance policies that adversely impact employees of color have begun popping up around the country. And the new laws have some teeth: employers who discriminate based on hair texture or style could face penalties of up to $250,000 under one and unlimited damages under another.

New York City was the first to prohibit workplace policies that ban hairstyles associated with Black communities. The New York City Commission on Human Rights, the agency that enforces New York City's Human Rights Law, issued guidelines in February 2019 stating that employers can impose work-appropriate appearance requirements but cannot have grooming policies that prohibit locs, cornrows, Bantu knots, and other such hairstyles. The guidelines state: "Employers may not ban, limit, or otherwise restrict natural hair or hairstyles associated with [B]lack communities to promote a certain corporate image, because of customer preference or under the guise of speculative health or safety concerns," according to the guidelines. "An employee's hair texture or hairstyle generally has no bearing on their ability to perform the essential functions of a job." The New York City Commission can issue a penalty of up to $250,000 and there is no cap on damages.

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Next came California, the first to enact statewide legislation. California's law is popularly known as the CROWN Act, which stands for "Creating a Respectful and Open World for Natural Hair." The Act expands the definition of "race" to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." The remedies for violation can include backpay, reinstatement, front pay; injunctive relief, attorney's fees and costs, compensatory damages, and punitive damages (if an employer is found to have acted with malice or reckless indifference).

Just last month, New York State joined the trend, amending its Dignity Act to expand the definition of race to include natural hair and hairstyles. The Act protects "natural hair, treated or untreated hairstyles," which includes, but is not limited to, locs, cornrows, braids, afros, and "the right to keep hair in an uncut or untrimmed state."

Similarly, New Jersey has also introduced legislation (Senate Bill 3945) which would expand the New Jersey Law Against Discrimination to include "traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles," such as like braids, locs and twists.

What Does This Mean For Employers?

The Equal Employment Opportunity Commission has taken the position that "race" is not limited to the color of one's skin and includes other physical and cultural characteristics associated race. Therefore, according to the EEOC, a particular hairstyle, or the texture of an employee's hair, has no correlation to any bona fide occupational qualification.

However, some courts have rejected the EEOC's position. For example, in *U.S. Equal Employment Opportunity Commission v. Catastrophe Management Solutions*, the United States Court of Appeals for the Eleventh Circuit, which serves Alabama, Florida, and Georgia, held that Title VII, the

federal anti-discrimination law, does not prohibit discrimination on the basis of hairstyle, such as locs, which the court considers a "mutable characteristic." The court distinguished discrimination based on race from discrimination based on hairstyles, stating that hairstyles only have a cultural link to race or blackness, rather than being an immutable trait of one's race. Last year, the United States Supreme Court declined to review the decision.

Likewise, in E*wing v. United Parcel Service Inc.*, a federal district court last year in Kansas found that an employee who was terminated for wearing bright colored hair was not terminated from employment on the basis of race but rather for violating the employer's personal-appearance guidelines. The court found that the employer had consistently applied and enforced its guidelines, which mandated that "hairstyles and hair color should be worn in a businesslike manner," prohibited hair colors such pink, purple, crimson, and burgundy.

These cases show that employers still may implement dress code and grooming policies, but should take steps to ensure that the policies and their enforcement do not disproportionately impact persons of color, particularly in New York, California, and New Jersey.

Best Practice Tips

Employers in states like New York, California, New Jersey should immediately review their grooming policies to provide protection for natural hair and hairstyles historically associated with the Black community. Employers in other states should also review their grooming policies and to ensure the policies are race-neutral and uniformly enforced. Along those same lines, employers should always be mindful of other physical characteristics that can be associated with an employee's race, and develop and enforce policies accordingly. Employers also should ensure that they uniformly apply any rules that

require employees to secure their hair for bona fide security, safety, and hygienic reasons.

Employers should ensure that their anti-discrimination training for managers and supervisors covers discrimination based on traits that are historically associated with race.

If you have any questions about these new laws and their impact on your company, contact your Akerman Labor and Employment attorney.
