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### ATTENTION BLACK APPLICANTS: Be Cautious of "Unequal" Opportunity Employers and How Racially Motivated Stereotypes and Grooming Policies Can Impede Your Employment Outlook

Travis M. Sumter  
*Florida Coastal School of Law*

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## **ATTENTION BLACK APPLICANTS!**

BE CAUTIOUS OF “**UNEQUAL**” OPPORTUNITY EMPLOYERS AND HOW RACIALLY  
MOTIVATED STEREOTYPES AND GROOMING POLICIES CAN IMPEDE YOUR  
EMPLOYMENT OUTLOOK

**By: Travis Sumter**

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## I. INTRODUCTION

*“In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. . . .” —*

*Harry A. Blackmun, former U.S. Supreme Court Justice.*<sup>1</sup>

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Employment discrimination is more prevalent today than ever. During a time when America has elected its first black President, one would at least think that black job applicants would have employment opportunities equal to those of their white counterparts. Unfortunately, the notion of employment equality has consistently been proven to be unfounded in today’s society. The blatant acts of discrimination that black citizens became so accustomed to hundreds of years ago have taken on a more facially neutral form. There are no longer signs hanging outside of businesses stating, “We Don’t Hire Blacks” or “White Applicants Only.” Since the passage of Title VII of the Civil Rights Act of 1964<sup>2</sup>, employers now know that such manifest acts of discrimination would no longer be tolerated under the law.

In today’s society, employers are increasingly using discriminatory practices such as stereotypes and grooming policies to deny black applicants employment and advancement opportunities equivalent to those of white applicants. Many employers frequently associate being black with words such as “incompetent” and “unworthy.”<sup>3</sup> Consequently, even though the

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<sup>1</sup>Regents of University of California v. Bakke, 438 U.S. 265, 407 (1978).

<sup>2</sup> 42 U.S.C. § 2000e-2 (2008).

<sup>3</sup> D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 NEB. L. REV. 552, 564 (2008).

number of college educated black candidates has continually increased since 1985,<sup>4</sup> they do not tend to fare as well in job placement when compared to white candidates. This phenomenon can be attributed to the discriminatory tactics used by many employers in today's labor market. Despite years of efforts by the government to address discrimination in employment, this problem remains pervasive.<sup>5</sup>

Discriminatory employment practices utilized by many employers will likely not cease until the legal system realizes that its approach to combating these practices is out of touch with the facial neutrality of these employed methods. Title VII has failed to safeguard African Americans from the sword of racial employment practices mainly because the Act has primarily been applied by federal courts in a manner that does not comport with the realities of modern racism.<sup>6</sup> Although, various federal courts once acknowledged that race was a fluid and socially constructed concept, many currently view race as totally a physical concept.<sup>7</sup> This view leaves the door wide open for employers to discriminate through usage of stereotyping and grooming policies.<sup>8</sup>

Part II of this article begins with a hypothetical involving a black male by the name of Treyvon Smith who is about to graduate from business school. The article follows his plight as Treyvon struggles with the reality that his race may be the single factor that is hindering his job search, even though he has sent numerous resumes to employers exhibiting qualifications superior to many of his peers who have advanced in their employment searches.

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<sup>4</sup> African Americans Continue to Make Solid Gains in Bachelor and Master Degree Awards: But Professional and Doctoral Degrees Show Declines, *The Journal of Blacks in Higher Education*, July 1, 2008 (Anonymous) (since 1985 the number of blacks earning bachelor's degrees have increased by 148 percent).

<sup>5</sup> See *infra* Part V.

<sup>6</sup> Angela Onwuachi-Willig, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1284 (2005).

<sup>7</sup> *Id.* at 1313.

<sup>8</sup> *Id.*

Part III of the article introduces Title VII of the Civil Rights Act of 1964 and thoroughly examines the two frameworks which are recognized by most courts in the United States. Case law demonstrates the manner in which the Supreme Court uses Title VII frameworks to render judicial opinions.

Part IV leads into a discussion about the term “race,” and further explores how it has been defined and applied historically. It examines various studies and opinions of scholars who have sought to determine whether race is primarily a biological concept or a product of society. Additionally, this section reveals that the inability of society and the judiciary to decide on a concrete definition of the term “race” has led to a lack of protection being afforded to black citizens who have filed discrimination claims.

Part V takes an in-depth look into discriminatory employment practices used in today’s labor market once resumes have been submitted for advertised positions, and also once applicants have been successful in obtaining an offer of employment. Studies by Marianne Bertrand and Sendhil Mullainathan,<sup>9</sup> and Margery Austin Turner, Michael Fox and Raymond J. Struyk,<sup>10</sup> are analyzed to demonstrate that simply being “black” can decrease one’s employment opportunities. Further, these studies reveal that black applicants who have excellent qualifications still do not fare as well as their white counterparts. Most importantly, the studies seriously raise inquiries regarding the effectiveness of Title VII as a cure for racially discriminatory employment practices.

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<sup>9</sup> Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat’l Bureau of Econ. Research, Paper No. 9873, 2002), available at <http://www.nber.org/papers/w9873>.

<sup>10</sup> MARGERY A. TURNER et al., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED; RACIAL DISCRIMINATION IN HIRING, 2 (Urban Institute Report, 91-9) (1991).

Part VI argues that current case law fails to acknowledge that employer decision-making based upon stereotypes is a form of disparate treatment based on race. A review of case law will demonstrate that requirements such as grooming policies are regularly used by employers to discriminate against black employees. Further, additional case law will reveal the unwillingness of courts to acknowledge these types of policies as proxies for race discrimination.

Part VII charts a course for reform of current anti-discrimination approaches. It examines various suggested changes to current anti-discrimination law and advocates an approach that will make the EEO process more efficient and effective. It argues that the Equal Employment Opportunity Commission (“EEOC”) should refocus its efforts away from individual complaints of discrimination so that it may aggressively target the employment practices of employers in today’s labor market.

## **II. HYPOTHETICAL**

Treyvon Smith is a young black man who is completing his final semester of business school at Midlands University. The university is situated in an affluent suburb of the city of Midlands. Treyvon is one of only a few black students who were fortunate to gain admissions to Midlands University through a minority grant program. Midlands University is predominately traditional in its racial composition. Treyvon looks and acts quite differently than his black counterparts at Midlands University. He wears his hair in nicely groomed dreadlocks. Also, Treyvon is very proud of his black heritage and frequently speaks to his classmates regarding his cultural background. Treyvon lives in an area south of downtown Midlands which is predominately populated by low-income black families.

Although, Treyvon is quite distinguishable from most students at Midland University, he has generally been accepted by a vast number of his peers. Until recently, Treyvon has never had a reason to question his pride and status as a black man. The time of year has approached when students who will graduate are to begin submitting their resumes to various employers throughout the city of Midlands. Treyvon is thankful that he had an opportunity to complete two internships during his time at Midlands University. He is confident that these experiences will place him ahead of many students who have not had an opportunity to take advantage of such experiences.

Currently, more than five weeks have passed since Treyvon has sent numerous resumes to prospective employers. Since that time, he has only completed a phone screening with a single employer. Many of the students at Midlands University have received call-backs and others have gone on their first and second interviews with prospective employers. After investigation, Treyvon discovers that many of the employers that have responded to several of his peers' employment inquiries are the same employers to whom he also sent resumes. He is perplexed by the lack of interest that employers are showing his resume, which implicitly showcases the practical experiences that he has acquired. Since Treyvon regularly converses with many of his peers who have received call-backs, he personally knows that they do not have qualifications that are superior to his. These turn of events has Treyvon wondering, *"Is there something about me that is impeding my employment prospects? Could it be because I am a product of the 'ghetto?' Or is it simply because I am black?"* Unfortunately, for Treyvon, Title VII statutory framework currently used in determining whether discriminatory tactics are at use by employers will likely not provide any clarity as it pertains to his dilemma.

### III. TITLE VII STATUTORY FRAMEWORK

Title VII of the Civil Rights Act of 1964 prohibits employers from: (1) not hiring or discharging individuals, or otherwise differentiating among individuals with respect to compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin; or (2) to categorize employees or applicants for employment in a manner which would hinder or tend to hinder them from job opportunities or otherwise adversely affect their status as employees, because of race, color, religion, sex, or national origin.<sup>11</sup>

During the time that Title VII was originally enacted, racial discrimination was open and categorical.<sup>12</sup> Black people were frequently excluded from jobs or situated into positions with low pay and little prestige simply because of their race.<sup>13</sup> This article reveals that race discrimination in employment is as vibrant today as it was in the mid 1900s. Although, the Supreme Court has had several opportunities to address modern practices of discrimination in employment, it has repeatedly failed to do so.

The EEOC is the government organization that has been charged with regulating charges of discrimination arising under Title VII.<sup>14</sup> “Race remains the most frequently cited basis in discrimination charges, as it has since the Commission’s inception.”<sup>15</sup> The EEOC states that “[r]ace discrimination involves treating someone (an applicant or employee) unfavorably because he/she is of a certain race or because of personal characteristics associated with race

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<sup>11</sup> 42 U.S.C. § 2000e-2 (2008).

<sup>12</sup> Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006).

<sup>13</sup> *Id.*

<sup>14</sup> *Occidental Life Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355, 355 (1977) (the Equal Employment Opportunity Act of 1972 gives the Equal Employment Opportunity Commission authority to sue in federal courts when it finds reasonable cause to believe that there has been employment discrimination based on race, color, religion, sex, or national origin).

<sup>15</sup> Naomi C. Earp, *Forty-Three and Counting: EEOC’s Challenges and Successes and Emerging Trends in the Employment Arena*, 25 HOFSTRA LAB. & EMP. L.J. 133, 141 (2007).

(such as hair texture, skin color, or certain facial features).”<sup>16</sup> This definition is defined quite loosely covering a broad range of attributes that are frequently associated with a person’s race.<sup>17</sup> Conversely, Title VII fails to explicitly define race in terms that can guide the Supreme Court in ruling on cases involving race discrimination.<sup>18</sup> Courts have tended to use judicial definitions from Fourteenth Amendment Equal Protection jurisprudence to supplement this void.<sup>19</sup> Take for instance, “the Supreme Court’s suggest[ion] [in Fourteenth Amendment analysis] that one of the reasons that races and ethnic groups are offered antidiscrimination protection is because they possess visible, identifiable characteristics that function as irrational bases for stigma;” as a result, many courts that interpret Title VII have viewed it as intending to primarily address employment discrimination that is prompted by race/ethnicity-associated morphology.<sup>20</sup> This results in a lack of precedent favorable for plaintiffs to use in establishing a prima facie claim of race discrimination under Title VII.

Unfortunately, Title VII’s disparate treatment and impact frameworks tend to support a claim that is more closely aligned with the Supreme Court’s suggestion in Fourteenth Amendment analysis. A close examination of the burdens which must be met within each framework demonstrates the barriers preventing recognition of discrimination which may be prompted by aspects that are not race/ethnicity-associated morphology.

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<sup>16</sup> Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 52, 68 (2008).

<sup>17</sup> See Onwuachi-Willig, *supra* note 6, at 1313.

<sup>18</sup> Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U.L. REV. 1134, 1200.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

a) Disparate Treatment

In order for a plaintiff to prevail in a race discrimination in hiring case, he or she may use direct evidence tending to show discriminatory intent or apply the *McDonnell-Douglas* burden shifting standard to prove discrimination with indirect evidence.<sup>21</sup> A plaintiff can establish this initial burden by showing (1) he or she is a part of a racial minority/protected class; (2) he or she submitted an application as a qualified candidate for the position at issue; (3) regardless of his or her qualifications, he or she was rejected; and (4) after his or her rejection, the position stayed open and applications were still sought from other individuals.<sup>22</sup>

If a plaintiff can meet all three prongs, courts typically draw an inference of discrimination.<sup>23</sup> The employer then has the burden of producing a legitimate non-discriminatory reason for rejecting the applicant.<sup>24</sup> A plaintiff then has the opportunity to prove that the reason given by the employer is not worthy of credence because the employer's decision was based on racial discrimination.<sup>25</sup> Additionally, employers can employ a bona fide occupational defense ("BFOQ") to substantiate its discriminatory actions towards applicants on the basis of religion, sex, or national origin.<sup>26</sup> It has been argued that the BFOQ defense allows employers to justify discrimination against applicants or employees based on sex, religion, or national origin.<sup>27</sup> To establish this defense an employer simply has to demonstrate that an applicant's religion, sex or national origin would significantly impede his/her performance of a

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<sup>21</sup> *Id.* at 1290-91.

<sup>22</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>23</sup> Onwuachi-Willig, *supra* note 6, at 1291.

<sup>24</sup> *McDonnell Douglas Corp.*, 411 U.S. at 802.

<sup>25</sup> Lacy, *supra* note 3, at 583.

<sup>26</sup> Ritu Mahajan, *The Naked Truth: Appearance Discrimination, Employment, And The Law*, 14 ASIAN AM. L. J. 165, 179 (2007).

<sup>27</sup> Jordan D. Bello, *Attractiveness as Hiring Criteria: Savvy Business Practice of Racial Discrimination?*, 8 J. GENDER RACE & JUST. 483, 498 (2004).

specific position.<sup>28</sup> The employer must prove that an applicant has to possess a protected characteristic needed to adequately perform the functions of the position, and hiring someone to the contrary would alter the nature of the business.<sup>29</sup> Therefore, a plaintiff who cannot establish an employer's intentional discrimination may be more resourceful in determining whether he may prove a prima facie case under disparate impact analysis.

b) Disparate Impact

Courts use disparate impact analysis to examine employment practices that have an adverse impact on members of a protected group, although intent is not required.<sup>30</sup> Disparate impact analysis requires a plaintiff to prove that an employer utilizes a specific employment practice that results in a disparate impact on a protected group.<sup>31</sup>

Plaintiffs have encountered difficulty in establishing that a specific employment practice has a disparate impact on a certain group, because there are times when there are not many employees that are members of the relevant group, or those who do qualify choose to conform to a particular employment practice.<sup>32</sup> Because of the subjective nature of many employment decisions, employees typically have a difficult time demonstrating that a particular employment practice actually caused the disparate effect.<sup>33</sup> In the seminal case that established disparate impact analysis, *Griggs v. Duke Power Co.*,<sup>34</sup> the Supreme Court held that if a plaintiff is able to

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<sup>28</sup> Mahajan, *supra* note 26, at 179.

<sup>29</sup> *Id.* at 179-80.

<sup>30</sup> *Id.* at 178.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L. J. 2009, 2027 (1995).

<sup>34</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

prove a prima facie case, the employer then must demonstrate that the particular employment practice is justifiable because it serves a business necessity and relates to job performance.<sup>35</sup>

Disparate impact theory is not an adequate standard for claims based on discriminatory proxies because discrimination is usually not premised on an employer's subjective mandates, which could be job relatedness and/or business necessity. Rather, discrimination results from the application of particular standards by employers.<sup>36</sup> Historically, courts have been given wide discretion in evaluating whether a proffered business concern overshadows the adverse effects of policies based on discriminatory proxies.<sup>37</sup> This prompts the question of whether race even matters when courts have the discretion to disregard the adverse effects of policies on racial groups that have been "pre-designated" protected status?

#### IV. WHAT IS RACE? DOES RACE MATTER?

*"Race may be America's single most confounding problem, but the confounding problem of race is that few people seem to know what race is."*<sup>38</sup>

##### a) Origins of Race

Professor Cornel West once said, "[t]o engage in a serious discussion of race in America, we must begin not with the problems of black people but with the flaws of American society –

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<sup>35</sup> *Id.* at 431.

<sup>36</sup> Mahajan, *supra* note 26, at 180.

<sup>37</sup> Flagg, *supra* note 33, at 2021-22 (The nature of the proffered business concern burden is ambiguous. In *Griggs*, the Court stated that an employer simply needs to demonstrate that an employment practice has "a demonstrable relationship to successful performance of the jobs for which it is used." Such an unclear formulation does not firmly establish the kinds of purposes that suffice as a business necessity justification, the form of evidence needed to show a relationship between the purpose and the employment practice, the necessary force of that connection, along with the significance of the employer's stated purpose, and relationship between business necessity and job relatedness. These issues have not been clarified by the Supreme Court. Unfortunately, "[i]n the 1991 Civil Rights Act, Congress relied on [Supreme Court decisions that were rendered prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)] to define the concepts of 'consistent with business necessity' and 'job-related' and thus preserved the ambiguity inherent in those opinions").

<sup>38</sup> Ian. F. Lopez, *The Societal Construction of Race: Some observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-CL. L. REV. 1, 5-6 (1994).

flaws rooted in historic inequalities and longstanding cultural stereotypes.”<sup>39</sup> America has an extensive history of distinguishing among persons based on race.<sup>40</sup> An individual’s racial identity has long been important in determining personal status and legal rights.<sup>41</sup> Professor Paul Finkelman recently stated that, “[t]he word ‘race’ defies precise definition in American Law. No physical attribute or collection of physical attributes adequately defines ‘race.’”<sup>42</sup> However, the concept of race is at the pinnacle of contemporary discussions involving employment, healthcare, politics, and practically every aspect of what shapes our society today. Courts and legislatures have long struggled to define the line between “black” and “white” primarily to “separate the privileged from those with limited or no privileges.”<sup>43</sup>

Virginia was the first state in the union to attempt to provide a statutory definition of race.<sup>44</sup> However, the 1662 statute was only designed to determine the legal position of children that belonged to Negro women but were fathered by Englishmen.<sup>45</sup> The language of the 1662 statute declared that the status of a child would be determined by the status of the mother.<sup>46</sup> Subsequently, Virginia and Arkansas created statutes that looked to physical appearance in defining Negroes as possessing “a visible and distinct admixture of African blood.”<sup>47</sup>

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<sup>39</sup> CORNEL WEST, RACE MATTERS 3 (Beacons Press 2001) (1993).

<sup>40</sup> Luther Wright, Jr., *Who’s Black, Who’s White, and Who Cares: Reconceptualizing the United States Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 517 (1995).

<sup>41</sup> Sharon Hoffman, *Is There a Place for “Race” as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1101(2004).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Wright, Jr., *supra* note 40, at 522.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 523 (this was a departure from the English rule that determined a child’s status from the paternal line).

<sup>47</sup> *Id.* at 523-24 (other states that decided to define race adopted one-fourth, one-sixteenth, and one-thirty-second rules which determined that individuals who possessed these fractional quantities of black ancestry were legally black. By 1910, the majority of states applied the “one-drop rule”, which determined that anyone with a drop of African or black blood was legally black).

Consequently, these laws spurred litigation in which courts had to begin dealing with questions of racial definition.<sup>48</sup> An example of the inability of the courts to precisely define race is evident in *Hudgins v. Wright*,<sup>49</sup> wherein two judges disagreed as to the evidentiary importance of physical appearance in determining whether the plaintiff was Black or Native American.<sup>50</sup> It was stated by Judge Tucker that “even if one’s color is in doubt because of ‘racial’ mingling, ‘a flat nose and wooly [sic] hair,’ which disappear ‘the last of all,’ can serve as reliable indicators of an individual’s status as ‘African.’”<sup>51</sup> Judge Roane disagreed that such a determination could always be made from only inspection of certain characteristics.<sup>52</sup>

Even in today’s society, race has not yet been defined substantively.<sup>53</sup> Society’s inability to define race is one of the most compelling issues in this nation.<sup>54</sup> There are currently federal statutes created to combat racial discrimination in areas of employment, voting, housing, enforcement of contracts, and education.<sup>55</sup> Numerous other policies and vital activities in the United States are attached to race.<sup>56</sup> “Yet amid all of the evidence that racial classification is of great significance in American Society, the law has provided no consistent definition of race and no logical way to distinguish members of different races from one another.”<sup>57</sup> Therefore, race matters conceivably now more than ever.

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<sup>48</sup>Hoffman, *supra* note 41, at 1130.

<sup>49</sup> 11 Va. (1 Hen.) 134, 143 (1806) (the plaintiff was granted freedom by persuading the court that she was Indian and not black. She asserted that her mother, a slave, was Indian. Her “red complexion” and “straight hair,” were evidence that she could not possibly be black).

<sup>50</sup> Hoffman, *supra* note 41, at 1130.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Wright, Jr., *supra* note 40, at 518.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 519.

b) Is Race Biological? OR Is Race a Societal Creature?

Courts confronted with Title VII issues have historically defined race as a biological concept, and discrimination as a response to certain biologically predetermined traits.<sup>58</sup> Federal courts' understanding of the *McDonnell-Douglas* burden-shifting framework and laws designed to address discrimination in the workplace have repeatedly been criticized by various scholars.<sup>59</sup> "Scholars have generally analyzed antidiscrimination law in employment as disregarding and failing to account for the social realities of racism."<sup>60</sup> For example, Romona L. Paetzold and Rafael Gely have argued that Title VII, as interpreted, does not offer a framework capable of dealing with the issues that nontraditional employees face within the internal labor market.<sup>61</sup>

Professors Devon Carbado and Mitu Gulati have studied the ways in which antidiscrimination law does not account for the way in which racial and gender stereotyping disadvantage racial minorities.<sup>62</sup> Their research has discovered that this failure of antidiscrimination does not recognize "that race is not purely a physical concept,<sup>63</sup> but also a societal construct."<sup>64</sup> Consequently, employees who file race discrimination claims are adversely affected.<sup>65</sup>

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<sup>58</sup> Rich, *supra* note 18, at 1134.

<sup>59</sup> Onwuachi-Willig, *supra* note 6, at 1292.

<sup>60</sup> *Id.* at 1293.

<sup>61</sup> Romona L. Paetzold, *Through The Looking Glass: Can Title VII Help Women and Minorities Shatter The Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1520 (1995).

<sup>62</sup> Devon W. Carbado, *Working Identity*, 85 CORNELL L. REV. 1259, 1279-1308 (2000) (providing details of how women and people of color tend to change their identities to combat discrimination and use of stereotypes within the work environment).

<sup>63</sup> Onwuachi-Willig, *supra* note 6, at 1292 (classification based on persons with certain skin color or other physical features that symbolizes membership in a particular racial group).

<sup>64</sup> *Id.* at 1293.

<sup>65</sup> *Id.*

In *Perkins v. Lake County Dept. of Utilities*,<sup>66</sup> an employer who was accused of racial discrimination under Title VII, challenged whether the plaintiff was Native American.<sup>67</sup> The U.S. District Court for the Northern District of Ohio was confronted with the issue of the extent to which provable genetic/hereditary classification controls on the proposition of membership in a protected class within the meaning of Title VII.<sup>68</sup> Once the Court analyzed the historical problem associated with defining race, it determined that an employer's "reasonable belief" that a person is a member of a particular protected class governed the issue in the case.<sup>69</sup> Lake County Dept. of Utilities hired an expert to trace the plaintiff's ancestry, which led to the conclusion that the plaintiff was less than one-sixteenth Native American.<sup>70</sup> In spite of this evidence, "the [C]ourt held that the plaintiff's appearance, self-identification, and the employer's initial belief and concession that the plaintiff had some Native American ancestry was enough to prove membership within a protected class under Title VII."<sup>71</sup>

The Court believed that it was consistent with the intent of Title VII to hold that appearance and perception are paramount when racial discrimination is involved.<sup>72</sup> It was determined by the court that although the biological question of race is relevant, it is not conclusive, and therefore it would consider both biological and societal factors in determining racial classifications.<sup>73</sup> The court's rationale underlying its decision is mostly inconsistent with the holdings of many courts, which state that an employer will only be liable under Title VII if an employee is sanctioned for displaying involuntary biological, visible, or blatant

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<sup>66</sup> *Perkins v. Lake County Dept. of Utilities*, 860 F. Supp. 1262 (N.D. Ohio 1994).

<sup>67</sup> *Id.* at 1263.

<sup>68</sup> *Id.*

<sup>69</sup> Wright, Jr., *supra* note 40, at 553-54.

<sup>70</sup> *Perkins*, 860 F. Supp. at 1266-70.

<sup>71</sup> Wright, Jr., *supra* note 40, at 554.

<sup>72</sup> *Perkins*, 860 F. Supp. at 1277.

<sup>73</sup> Wright, Jr., *supra* note 40, at 554.

distinctiveness associated with a disfavored racial group.<sup>74</sup> Therefore, the question of whether race should be regarded as biological or socially constructed is likely to remain an issue for courts analyzing future racial discrimination claims brought under Title VII. More importantly, this issue is likely to allow discrimination in the workplace to evolve and transform into stereotypical practices in which Title VII will not provide a remedy.

## **V. NOW THAT TREYVON HAS SUBMITTED HIS RESUME**

### a) There is More to Treyvon Than Just His Name

Several years after the Civil Rights Era, although employers are conscious that outward racial prejudices are not a legally adequate basis for rendering employment decisions, employers can and do use proxies<sup>75</sup> for race, both consciously and unconsciously, in excluding certain people from employment.<sup>76</sup> This form of trait discrimination has increasingly become the focus of Title VII litigation today.<sup>77</sup>

Three months have now passed and Treyvon is still awaiting responses from employers. Although he has not yet received any in-person interviews, he has completed four phone-interviews. He believes that the phone-interviews went extremely well; nevertheless none have resulted in an in-person interview. As Treyvon ponders on possible factors that could be adversely affecting his employment search, he hesitantly dismisses the idea that his race could be an issue since he did not indicate it on his applications. However, how correct is Treyvon in making this assumption?

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<sup>74</sup> See *Rogers v. Am. Airlines, Inc.* 527 F. Supp. 299, 232 (S.D.N.Y. 1981).

<sup>75</sup> Discrimination based on traits associated with a particular group.

<sup>76</sup> Onwuachi-Willig, *supra* note 6, at 1297-98.

<sup>77</sup> Yuracko, *supra* note 12, at 366.

Studies have increasingly demonstrated that characteristics associated with race have “gain[ed] meaning as a defining feature of a racial group and, as a result, have created a basis on which employers and others may discriminate against an individual due to race-based [stereotypes] or prejudices toward such characteristics.”<sup>78</sup> Historically there have been several stereotypes associated with “whiteness” and “blackness.”<sup>79</sup> Adjectives such as “innocence, worthiness, competence, collegial, articulate, intelligent, and non-threatening have all been associated with ‘whiteness.’”<sup>80</sup> Alternatively, stereotypes such as “athletic, incompetent, guilty, unworthy, occupational instability, primitive morality, threatening, and dangerous,” have traditionally been associated with “blackness.”<sup>81</sup> Just as society “often link[s] color with undesirable personal qualities . . .,” it frequently also links a person’s voice or name with color and race, and various other negative stereotypes.<sup>82</sup> These characteristics at many times “carry enough ethnic meaning to . . . burden [a person’s] daily existence with stereotypes imposed by others.”<sup>83</sup>

Scholars Marianne Bertrand and Sendhil Mullainathan conducted a study entitled, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*.<sup>84</sup> This study exposed employment practices used by various employers that significantly limited one’s ability to receive an interview for simply having an African American<sup>85</sup> sounding name.<sup>86</sup>

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<sup>78</sup> Onwuachi-Willig, *supra* note 6, at 1296.

<sup>79</sup> Lacy, *supra* note 3, at 564.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Onwuachi-Willig, *supra* note 6, at 1296-97.

<sup>83</sup> *Id.* at 1297.

<sup>84</sup> Bertrand, *supra* note 9, at 1.

<sup>85</sup> Throughout the discussion of the Bertrand study, “African American” and “Black” will be used interchangeably.

<sup>86</sup> Onwuachi-Willig, *supra* note 6, at 1283-84.

Bertrand and Mullainathan's field experiment consisted of answering help-wanted advertisements in *The Boston Globe* and *The Chicago Tribune* by sending resumes.<sup>87</sup> Since resumes rarely state race, they randomly assigned African American sounding names to some resumes and white sounding names to others.<sup>88</sup> The employers were left with no other means to determine the race of a particular applicant but by name.<sup>89</sup> The results of the experiment demonstrated that white sounding names received fifty percent (50%) more callbacks for interviews than African American sounding names.<sup>90</sup> Further, the study demonstrated that federal contractors and employers who assert "Equal Opportunity Employer" status in their advertisements also discriminate to the degree that other employers do.<sup>91</sup>

The results of Bertrand and Mullainathan's study reveals that Title VII has not been successful in combating current practices of discrimination. This is mostly contributed to the failure of the judiciary to acknowledge the shift away from facial acts of discrimination to acts that are generally more subtle.<sup>92</sup> Treyvon is a primary example of someone who could probably benefit from a change of perspective by the judiciary in regards to discriminatory stereotypes and proxies for race. It is likely that Treyvon may be victim of racial discriminatory employment tactics similar to those used by employers in Bertrand and Mullainathan's study. Many would agree that the name "Treyvon" is prone to be viewed as a "black name" within today's society, and absent any other disqualifying factors, may just what is hindering Treyvon's job search.

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<sup>87</sup> Bertrand, *supra* note 9, at 1.

<sup>88</sup> *Id.* (Lakisha Washington and Jamal Jones are examples of names that are frequently considered "black sounding names").

<sup>89</sup> Onwuachi-Willig, *supra* note 6, at 1298.

<sup>90</sup> *Id.* at 1284.

<sup>91</sup> Bertrand, *supra* note 9, at 1.

<sup>92</sup> Onwuachi-Willig, *supra* note 6, at 1284.

b) Treyvon's Qualifications or The Perceived Meaning of His Appearance?

***“Even if one does not accept today that a black candidate with the same credentials as a white candidate should be given a preference because of race, fair minds must agree that race should not be allowed to remain a perennial hurdle either.”<sup>93</sup>***

Does improving credentials of black applicants positively affect discrimination in employment? Although it would appear that improved credentials would make black applicants more marketable within the labor market, several studies have demonstrated otherwise. Particularly, Urban Institute's 1990 employment discrimination study, *Opportunities Denied, Opportunities Diminished; Racial Discrimination in Hiring*,<sup>94</sup> and Jomills H. Braddock II and James M. McPartland's, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*,<sup>95</sup> both reveal that race in many instances outweighs credentials that are held by black applicants. Additionally, this phenomenon is evident from Treyvon's plight as a well-qualified black man seemingly unable to compete in the labor market among similarly qualified non-black job seekers.

Turner's study assembled 10 pairs of young black and white men in the Washington D.C. and Chicago metropolitan areas, and matched them on all aspects that could impact hiring decisions.<sup>96</sup> The hiring audit demonstrated that black job seekers were met with widespread acts of discrimination throughout the hiring process.<sup>97</sup> In fifteen percent (15%) of the audits, the

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<sup>93</sup> Lateef Mtima, *African-American Economic Empowerment Strategies for the New Millennium – Revisiting the Washington-Du Bois Dialectic*, 42 HOW. L.J. 391, 420 (1999).

<sup>94</sup> Turner, *supra* note 10, at 1.

<sup>95</sup> Jomills H. Braddock II & James M. McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. Soc. Issues 5 (1987).

<sup>96</sup> Turner, *supra* note 10, at 1.

<sup>97</sup> *Id.* at 2.

white young men received employment offers whereas their “equally qualified” black counterparts did not.<sup>98</sup>

Braddock’s study found that,

for lower-level jobs, white workers were disproportionately represented in jobs stressing the following characteristics: (1) skills: advanced reading, basic or advanced arithmetic; (2) intellectual traits: quick learner, good judgment; and (3) attitudinal traits: being a good team member, and fostering good client relations. With respect to these skills and intellectual traits, the authors determined that individual differences in educational attainment and academic test score performance could not account for overrepresentation of white applicants.<sup>99</sup>

This trend can be directly attributed to employer preference for white candidates rather than “equally qualified” black candidates.<sup>100</sup>

It has also been suggested “that some white interviewers are predisposed to believing that [black applicants], no matter what their qualifications, [cannot] be as qualified as white candidates.”<sup>101</sup> Similarly, Bertrand and Mullainathan found in their study that there was a small and statistically insignificant impact for black applicants to have higher quality resumes.<sup>102</sup> “This lower reward for [black applicants] suggests that, [*in the current state of the labor market*], [black applicants] do not have strong individual incentives to build a stronger resume.”<sup>103</sup>

This phenomenon unfortunately will impact Treyvon’s search for employment. Although he has worked extremely hard to ensure that he is as qualified as his peers, employers in today’s market would likely give more consideration to Treyvon’s appearance as a black person rather than his superior credentials. So what must Treyvon do to convince employers that he is as qualified as white applicants vying for similar positions? Regrettably, there is probably nothing

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<sup>98</sup> *Id.*

<sup>99</sup> Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL’Y REV. 219, 237-38 (1995).

<sup>100</sup> *Id.* at 238.

<sup>101</sup> Mtima, *supra* note 93, at 407.

<sup>102</sup> Bertrand, *supra* note 9, at 3.

<sup>103</sup> *Id.*

that he can do since skin color seems to be the most valued credential in today's labor market. Perhaps, yet more alarming, is the fact that even once Treyvon manages to land a job, he is likely to be confronted with discriminatory policies which will seek to compel him to conceal his identity as a black man.

## VI. WHEW! NOW THAT TREYVON HAS THE JOB: TITLE VII CASES

### a) “Facially Neutral” Grooming Policies and Trait/Proxy Discrimination

Individuals convey their identities through social practices, including the decisions they make about dress and appearance practices.<sup>104</sup> Treyvon has always expressed his pride for his identity through the wearing of his nicely-kept dreadlocks, and plans to continue this practice as he began working at the large accounting firm that recently extended to him an offer of employment. It has widely been recognized that Title VII does not protect individuals/employees who have been discriminated against based on “voluntary” or “performed” features of racial or ethnic identity.<sup>105</sup> This form of discrimination is frequently referred to as “discrimination by proxy.”<sup>106</sup> Title VII’s legislative history demonstrates that Congress “has never indicated that race or national origin should be defined under the statute in a manner that categorically bars all claims concerning voluntary aspects of racial or ethnic identity.”<sup>107</sup> These voluntary or performed features include “any behavior or voluntary displayed attribute which, by accident or design, communicates racial or ethnic identity or status.”<sup>108</sup>

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<sup>104</sup> Karl E. Klare, *For Mary Joe Frug: A Symposium on Feminist Critical Legal Studies and Postmodernism: Part Two: The Politics of Gender Identity: Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1409 (1992).

<sup>105</sup> Rich, *supra* note 18, at 1137.

<sup>106</sup> *Id.* at 1194.

<sup>107</sup> *Id.* at 1138.

<sup>108</sup> *Id.* at 1139 (it includes hairstyles and other aesthetic choices, as well as dialect, language choice, and accent).

Employers today often control the appearance of their employees by implementing grooming and dressing policies.<sup>109</sup> Some suggest that employers use these policies as tools to appeal to customers, and to maintain societal norms and cultural conformity of the company.<sup>110</sup> Employers also frequently use grooming and dressing policies “to build on commonly learned associations” that signify certain characteristics that a company may seek to use in order to align itself with specific values.<sup>111</sup> It is further suggested that dressing and grooming policies facilitate essential business related functions such as public image of the company, safety, increased productivity, and increased employee morale.<sup>112</sup>

While employing dressing and grooming policies to ensure certain essential business related functions may sometimes be necessary, there are many problems associated with these policies. Grooming and dressing policies are important since they encompass an employer’s intentional or unintentional discrimination.<sup>113</sup> These policies are problematic because they require “the judging of employees based on qualities unrelated to job performance” and further “reflect[s] certain prejudices [by] adversely affect[ing] the individuals against whom they are enforced.”<sup>114</sup> “Such policies are ‘arbitrary, irrational, and unfair,’ as they harm society by affirming certain appearance-related stereotypes and biases.”<sup>115</sup> Even more troubling is the fact that it is not illegal for employers to use this type of criteria.<sup>116</sup>

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<sup>109</sup> Mahajan, *supra* note 26, at 165 (also known as “appearance codes”).

<sup>110</sup> *Id.* at 169.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Michelle L. Turner, *The Braided Uproar: A Defense of my Sister’s Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN’S L.J. 115, 119 (2001).

<sup>114</sup> Mahajan, *supra* note 26, at 170.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

In her article, *Work Culture and Discrimination*, Professor Tristin Green, discusses the tendency for grooming and dressing policies to favor dominant group standards.<sup>117</sup> As white males are prone to be the dominant group to be in charge of implementing and enforcing these policies, it is likely that the work culture created will disadvantage people of color.<sup>118</sup> “Nor would it be surprising that employer appearance standards generally devalue racial, cultural, and religious diversity, often requiring conformity to white, heterosexual notions of beauty and appearance.”<sup>119</sup> Examples of the effects that these policies have on individuals are evident in cases such as *Rogers v. American Airlines, Inc.*,<sup>120</sup> *Carswell v. Peachford Hospital*,<sup>121</sup> and *Smith v. Delta Airlines, Inc.*<sup>122</sup>

Renee Rogers, a black female employed by American Airlines, sued the airline for unlawful discrimination under Title VII based on the company’s grooming policy.<sup>123</sup> She sought \$10,000.00 in damages, as well as injunctive and declaratory relief against enforcement of the grooming policy.<sup>124</sup> The policy prohibited women from wearing all-braided hairstyles.<sup>125</sup> Rogers was terminated for wearing a braided “corn-row” hairstyle.<sup>126</sup> She argued that the braided hairstyle carried significance to black women who expressed their cultural and historical essence through wearing it.<sup>127</sup>

The District Court rejected Roger’s claim for the following reasons: “(1) the grooming policy equally applied to all genders and races, (2) the policy only regulated something that

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 171.

<sup>119</sup> *Id.*

<sup>120</sup> *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (1981).

<sup>121</sup> *Carswell v. Peachford Hosp.*, No. C80-222A, 1981 WL 224 (N.D.Ga. May 26, 1981).

<sup>122</sup> *Smith v. Delta Airlines, Inc.*, 486 F.2d 512 (1973).

<sup>123</sup> *Rogers*, 527 F. Supp. at 229.

<sup>124</sup> *Id.* at 231.

<sup>125</sup> Rich, *supra* note 18, at 1204.

<sup>126</sup> *Rogers*, 527 F. Supp. at 231.

<sup>127</sup> *Id.* at 231-32.

could easily be changed, namely Rogers' hair and[,] (3) that the wearing of the hairstyle did not concern a matter of high importance with respect to constitutional issues."<sup>128</sup> The District Court reasoned that Rogers' braided hairstyle was not protected under Title VII because it was not an immutable characteristic,<sup>129</sup> and further implied that Rogers' braided hairstyle was not really associated with African American culture.<sup>130</sup>

A similar grooming policy was challenged by Emma Carswell when she was terminated for refusing to abide by the policy.<sup>131</sup> She brought an unlawful racial discrimination claim against her employer, Peachford Hospital.<sup>132</sup> This unwritten policy required employees working in the detoxification unit to dress conservatively.<sup>133</sup> There were no complaints about Carswell's job performance, and the only issues that the hospital had were pertaining to her chosen hairstyle.<sup>134</sup> Carswell wore her hair in corn-rows with two or more colored beads on the ends.<sup>135</sup> She was asked to remove the beads from her hair or wear some type of head cover, but refused and was subsequently put on suspension.<sup>136</sup> Carswell was later terminated.<sup>137</sup>

Carswell argued that the grooming policy caused a disproportionate impact on black people who frequently wore this hairstyle.<sup>138</sup> The United States District Court held that Carswell was fired solely because of her failure to abide by her employer's grooming policy.<sup>139</sup> Further, the court held that Carswell's wearing of beads was not an immutable characteristic such as race

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<sup>128</sup> Turner, *supra* note 113, at 124.

<sup>129</sup> Rogers, 527 F. Supp. at 231.

<sup>130</sup> Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 890-91 (2002).

<sup>131</sup> Carswell, 1981 WL 224, at \*1.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*2.

<sup>139</sup> *Id.*

or national origin.<sup>140</sup> Therefore, the court found that there was no racial discrimination present.<sup>141</sup>

Another grooming policy, yet different, was challenged by Leon Smith who had worked as an agent to Delta Airlines for nine months.<sup>142</sup> He was terminated for failing to follow a company grooming policy pertaining to facial hair.<sup>143</sup> Leon brought a Title VII action alleging racial discrimination.<sup>144</sup> Delta's grooming policy stated that,

[s]ideburns shall be no longer than even with the lower portion of the soft lobe of the ear, and shall be light to moderate in thickness, such that there is no appreciable change in facial outline therefrom. No 'porkchops' will be allowed." "Mustaches" Mustaches are acceptable if kept short and neatly trimmed; however, 'handlebar' or 'Fu Manchu' styles are not acceptable.<sup>145</sup>

Leon argued that black men had more difficulty complying with the grooming policy due to the nature of hair growth.<sup>146</sup> The trial court held that the grooming policy was not invalid and thus not racially motivated.<sup>147</sup> The court reasoned that the rule applied evenly to men of all races and should not be struck down as a result.<sup>148</sup> In this instance, "the [c]ourt [believed] that a black person c[ould] have a closely trimmed sideburn, or if the company requires it, c[ould] have closely trimmed hair. It may require more trimming more often to do that[, but the court did] not see then that the rule itself [was] being discriminatory."<sup>149</sup> The United States Court of Appeals also held that the grooming policy was not discriminatory.<sup>150</sup> This trend tending to demonstrate the reluctance of courts in recognizing the impact of grooming policies on black employees may

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at \*3.

<sup>142</sup> *Smith*, 486 F.2d at 513.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 512.

<sup>145</sup> *Id.* at 514.

<sup>146</sup> *Id.* at 513-14.

<sup>147</sup> *Id.* at 514.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 512.

likely become an issue for Treyvon at his new job or at some time throughout his professional career.

b) The Courts Just Don't Get It!

*Rogers*, *Carswell*, and *Smith* are all primary examples of the unwillingness of courts to protect individuals who have fallen victim to racial discrimination based on grooming policies and various proxies for race. In each instance, the employer instituted a grooming policy which disproportionately affected a black employee. Each court held that there was no discrimination present because the grooming policies were applied equally and did not affect an immutable characteristic held by the black employee. “In essence courts treat being a member of a protected group differently from behavior associated with that group and are less likely to protect individuals from discrimination based on mutable appearance choices because individuals are capable of avoiding discrimination by changing those traits.”<sup>151</sup> Courts will only prohibit employers from imposing trait requirements that are not relevant to the job when immutability and a disparate impact occur simultaneously.<sup>152</sup>

In the Title VII context, the immutability construct operates in a way that limits claims within protected classes by essentially separating specific parts of protected class identity from statutory protection.<sup>153</sup> An example of this proposition is evident from the *Rogers* Court noting that Renee Rogers’ braids had to be set apart from a form of involuntary and immutable race-associated trait, like the Afro.<sup>154</sup> Courts have failed to realize that the most devastating effect of

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<sup>151</sup> Mahajan, *supra* note 26, at 180-81.

<sup>152</sup> Yuracko, *supra* note 12, at 374.

<sup>153</sup> Rich, *supra* note 18, at 1220.

<sup>154</sup> *Id.* at 1225.

this immutability requirement is the unclear distinction between mutability/immutability and the need for black individuals to assimilate.

Courts tend to give the mutability/immutability distinction much more deference than it deserves.<sup>155</sup> Professor Kimberly A. Yuracko carefully notes that not many traits, including skin color and sex are actually immutable.<sup>156</sup> She further states that “[t]rait mutability/immutability seems most often to be a matter of degree of difficulty rather than of absolute possibility.<sup>157</sup> It may be more difficult for a man with [pseudofolliculitis barbae]<sup>158</sup> to shave than it is for a woman with cornrows to adopt a different hairstyle, but neither is impossible.”<sup>159</sup> Therefore, this distinction makes it quite clear that the courts are providing an injustice rather than justice to those individuals who have raised racial discrimination claims resulting from grooming policies and other proxies for race.

Lastly, courts frequently fail to protect individuals from demands to assimilate to societal norms if those demands pertain to mutable characteristics.<sup>160</sup> Further, many courts fail to require employers to justify legally valid reasons for requiring assimilation within the workplace.<sup>161</sup> Growing scholarly debate has suggested that laws prohibiting discrimination should protect individuals from being required as an employment condition, to relinquish essential traits and attributes of their protected group.<sup>162</sup> For example, Devon Carbado and Mitu Gulati argue that requiring black but not white people to do identity work to fit in at their place of employment is

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<sup>155</sup> Yuracko, *supra* note 12, at 376.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 375 (PFB is a skin disease that typically makes shaving quite painful).

<sup>159</sup> Yuracko, *supra* note 12, at 376.

<sup>160</sup> Mahajan, *supra* note 26, at 180.

<sup>161</sup> *Id.* at 181.

<sup>162</sup> Yuracko, *supra* note 12, at 366.

discriminatory and violates Title VII.<sup>163</sup> This form of decision-making by white employers is burdensome because it makes black employees abandon essential facets of their “blackness” or group identity in order to prosper in their employment.<sup>164</sup> Nevertheless, courts continue to overlook the fact that assimilation allows workplace inequities to thrive.

## VII. RECOMMENDATION

Recognizing that the courts have continually allowed employers to discriminate against applicants and employees through the use of proxies for race and grooming/appearance policies, now is the time for reform that will compel the judicial system to change its current view of modern discrimination claims. Scholars have long grappled with many ideas pertaining to the way in which current anti-discrimination statutes can be revisited in attempt to eradicate employer use of racial proxies in hiring and grooming/appearance policies, along with the need for black individuals to lose their sense of “blackness” in order to remain competitive within today’s workforce.

Attorneys Rosalio Castro and Lucia Corral have argued that Title VII interpretation must be expanded to better achieve its intended purpose.<sup>165</sup> They have suggested that Congress modify the language of Title VII by “includ[ing] the phrase ‘*or any combination thereof*’ to the text of the statute to make the law inclusive.”<sup>166</sup> Other scholars have advocated for creating a new legal right under current disparate treatment and impact theories that would essentially create an avenue that would allow individuals to preserve their cultural identities within the

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<sup>163</sup> Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 720-721 (2001).

<sup>164</sup> Yuracko, *supra* note 12, at 382.

<sup>165</sup> Turner, *supra* note 113, at 156.

<sup>166</sup> *Id.*

workplace.<sup>167</sup> A disparate treatment approach such as this would permit a black man, such as Trayvon, or black woman with dreadlocks to file a claim of discrimination for being subjected to adverse treatment related to stereotypes and grooming policies triggered by race.<sup>168</sup> Additionally, Barbara Flagg has introduced two highly examined frameworks from which she believes would address workplace discrimination based on what she considers “white subjective decision-making.”<sup>169</sup> She argues that the Foreseeable Impact and Alternatives Model would effectively reach the objective of Title VII.<sup>170</sup>

The Foreseeable Impact Model is similar to current disparate impact analysis, but it modifies certain aspects of the analytical framework.<sup>171</sup> This approach would avoid present disparate impact issues related to proving actual disparate effects because “foreseeable” disparate effects would be emphasized.<sup>172</sup> To demonstrate a foreseeable disparate effect, one only needs to show the criterion used by an employer is associated more frequently among whites instead of other racial groups.<sup>173</sup> There also would need to be a showing that whites view the criterion positively.<sup>174</sup> Flagg argues that this approach focuses closely on the characteristics that are being dispersed unevenly rather than on a particular individual.<sup>175</sup>

The Alternatives Model focuses directly to “capture the structural nature of discrimination” by departing from existing disparate impact analysis.<sup>176</sup> When analyzing a

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<sup>167</sup> Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 664-66 (2005). See e.g., Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (disparate treatment); Robert J. Gonzalez, *Note, Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN L. REV. 2195 (2003) (disparate impact).

<sup>168</sup> *Id.*

<sup>169</sup> Mahajan, *supra* note 26, at 197.

<sup>170</sup> *Id.*

<sup>171</sup> Flagg, *supra* note 33, at 2039.

<sup>172</sup> *Id.* at 2041.

<sup>173</sup> Mahajan, *supra* note 26, at 197.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 198.

<sup>176</sup> Flagg, *supra* note 33, at 2044.

nonwhite individual's claim, racial workplace structure would be examined first.<sup>177</sup> If the place of employment is found to be structured with whites occupying the majority of authoritative positions, a presumption is raised that white-specific criteria was the determining factor in a specific employment decision.<sup>178</sup> The employer would then be charged with demonstrating the specific criterion that was used when making the employment decision, along with its objectives.<sup>179</sup> The plaintiff would then be charged with showing that there is an alternative method that could have been utilized to achieve the exact objective without addressing business necessity.<sup>180</sup>

Although the Foreseeable Impact and Alternatives Model seem to have many positive aspects, I am not an avid proponent of either approach. There are several flaws within the two frameworks which will likely render the frameworks unworkable. While Foreseeable Impact seeks to create a balance between regulation and employer autonomy, it unfairly “posits differences between whites as a group and nonwhites as a group.”<sup>181</sup> The Alternatives Model addresses direct structural problems by providing a response, but nevertheless totally fails to preserve a level of autonomy for private employers.<sup>182</sup> Therefore, these flaws make both approaches fall outside of the original intent of Title VII when enacted.

The approach that I support is a cross between Professor Maurice E. R. Munroe's proposal for EEOC reform<sup>183</sup> and Professor Kristin K. Green's administrative alternative.<sup>184</sup> Munroe's approach would call for Congress to create a new framework from which unlawful

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Mahajan, *supra* note 26, at 198.

<sup>180</sup> *Id.*

<sup>181</sup> Flagg, *supra* note 33, at 2043.

<sup>182</sup> Mahajan, *supra* note 26, at 199.

<sup>183</sup> Munroe, *supra* note 99, at 275.

<sup>184</sup> Green, *supra* note 167, at 681.

discriminatory practices can be effectively addressed.<sup>185</sup> The EEOC's principal objective would be to eliminate discrimination, but no longer with a focus on individual charges.<sup>186</sup> The focus of investigations would be to determine whether employers are utilizing discriminatory employment practices.<sup>187</sup> The EEOC would use current statistical information that it already receives from employers through statutorily required reports to focus on employers who have an inexplicably low number of black individuals employed and/or in management positions.<sup>188</sup>

Green's administrative alternative requires employers to file an annual report with the EEOC detailing all structural efforts taken to ensure that discriminatory employment practices are not being used by employers.<sup>189</sup> The failure of an employer to take measures to rid discrimination in the workplace may be equated with "intent to discriminate in a systematic disparate treatment case."<sup>190</sup> Once employers demonstrate through the reporting requirement that they have introduced context-specific anti-discrimination measures, the EEOC may then compile the information to use in highlighting best practices to other employers who could use them as models when designing their own plans.<sup>191</sup>

A combination of Munroe's and Green's recommendations as mentioned above would essentially create an approach which would force employers to ensure that they are implementing and utilizing hiring and workplace policies that are not discriminatory among black individuals. Along with this combined approach, I would also suggest that the annual report from employers demonstrate that they are not solely utilizing subjective criterion when making hiring decisions. Holistically, this approach would not only protect black employees

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<sup>185</sup> Munroe, *supra* note 99, at 275.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Green, *supra* note 167, at 681.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 682.

from being compelled to assimilate, but also prevent applicants such as Treyvon, from being denied employment opportunities equal to that of their white counterparts through employer support of diversity initiatives.

Furthermore, the EEOC would still be required to provide employers with notice prior to commencement of an investigation.<sup>192</sup> The most important aspect of this approach to taxpayers would likely pertain to the amount of funds that will be saved as a result of the EEOC abandoning the current requirement of handling all individual complaints.<sup>193</sup> Additionally, individuals will still have the right to hire their own attorneys to privately sue employers for discrimination under Title VII.<sup>194</sup> Rather than revisiting Title VII as suggested by other scholars, application of this administrative-based approach would likely prove to be more efficient and effective than the current controversial processes available to combat employment discrimination.

## VIII. CONCLUSION

Society cannot afford to continue to disregard the harmful effects that stereotypes and proxies for race have on black applicants and employees in today's labor market. It is time for effective and efficient reform that will address the illegal behavior that is increasingly being utilized by employers as a basis for employment decisions. Well qualified black individuals such as Treyvon will suffer profusely if action is not immediately taken. The EEOC has stood at the forefront of combating discriminatory work practices, and should continue its efforts, yet in a more proficient manner. By developing a comprehensive plan such as the combined approach

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<sup>192</sup> Munroe, *supra* note 99, at 276.

<sup>193</sup> *Id.* at 277.

<sup>194</sup> *Id.*

that I suggested above, we will be taking the first step towards acknowledging the employment rights of all people regardless of their race.

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