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THE ELEVENTH CIRCUIT DREADLOCKS BAN AND THE IMPLICATIONS OF RACE DISCRIMINATION IN THE WORKPLACE

*Jacqueline Frank**

INTRODUCTION

A woman by the name of Chastity Jones was on the lookout for a job in 2010, when she sent in an application for a customer service position with Catastrophe Management Solutions (CMS).¹ Upon receiving her application, the company selected Chastity for an in-person interview.² In preparation for this interview, she dressed up in a blue business suit and tied her hair up in short dreadlocks.³ After the interview, Chastity learned that she was hired for the position, and not a word was mentioned about her hair.⁴ After a quick meeting with the new hires, Chastity spoke with the human resources manager who, at the end of the conversation, informed Chastity that if she kept the dreadlocks, they could not hire her.⁵ At her refusal to get rid of the dreadlocks, CMS asked Chastity to return the paperwork given to her just a few moments prior, and they rescinded the job offer.⁶

Chastity had the dreadlocks when she arrived for her initial interview, and they were apparent to all those who saw her.⁷ She was clearly fit for the position, for she was hired on the spot.⁸ Even after her hiring, not a word was mentioned as to her hairstyle.⁹ It was not until she was about to leave, when she was alone with the manager, that this issue was brought up.¹⁰ The job description for her position included sitting at a computer and talking on the telephone.¹¹ Why then would her personal hairstyle cause such an issue as to lead to a reversal in this employment opportunity? Chastity must have wondered the same thing, for she proceeded to file a claim for race discrimination through the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, as her

* J.D. Candidate, 2018, Barry University School of Law; B.S. Psychology, The Florida State University, 2014. Thank you to Professor Daniel O’Gorman for spiking my interest in this topic and inspiring me to write this Note, and for always being there to answer my questions when I need guidance, and to Professor Helia Hull for providing me with excellent legal research and writing skills—I would not be where I am without your assistance.

1. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Catastrophe*, 852 F.3d at 1022.
7. *See id.* at 1021 (all of the applicants were brought into a room together when their hiring was announced, and it is apparent that upon seeing Chastity, her hair was style was noticeable).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* (stating the service representatives “do not have contact with the public” as they are in a “large call room”).

dreadlocks were an expression of her race.¹² Dreadlocks, generally, are “suitable for black hair texture. . . . [and] are formed in a black person’s hair naturally.”¹³ However, the Eleventh Circuit Court of Appeals found that although race is a complex concept, with no strict definition, it encompasses only “immutable characteristics” and not “cultural practices.”¹⁴ Therefore, Chastity was left with no job and no recovery, stuck in the struggle between keeping true to her identity and conforming to society’s views of what her identity should be.¹⁵

Title VII was created as part of the Civil Rights Act of 1964, an act created under Lyndon B. Johnson’s presidency during a time in which discrimination, based on a variety of characteristics, was thriving in our nation.¹⁶ The Act broadly prohibited discrimination for both private and public actors in areas such as education, government, and public accommodations.¹⁷ Title VII was a section of the Act created, in expansion of the Equal Pay Act of 1963, to reduce discrimination in the employment context.¹⁸ Title VII applies to private employers, employment agencies, and labor unions.¹⁹ It prohibits workplace discrimination on the basis of race, color, religion, sex, or national origin.²⁰ Further, this section of the Act established the EEOC.²¹ The EEOC is made up of five commissioners who create policies, hear cases, and bring suits on behalf of employees to help further the goals of Title VII.²² For purposes of this Note, the focus will be placed on the race category of Title VII, as compared to the protected categories of sex and national origin.

There are two types of claims that can be brought under Title VII, which are referred to as disparate treatment and disparate impact.²³ Disparate treatment claims are brought when there is intentional discrimination against someone who falls into a protected category under Title VII.²⁴ In contrast, disparate impact claims involve employment practices that are facially neutral in their treatment of different groups, but in fact fall more harshly on one group than another and cannot be justified by business necessity.²⁵ Although cases can be brought under both types of claims,²⁶ this Note will focus on cases brought under disparate treatment.

12. *Catastrophe*, 852 F.3d at 1020; 42 U.S.C. § 2000e-2 (2012).

13. *Catastrophe*, 852 F.3d at 1020.

14. *Id.* at 1030. *See also* Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084 (5th Cir. 1975) (holding a male who had a long hair style who was denied a position in the work place had no claim for sex discrimination because the long hair was not immutable, and further, applied to both males and females).

15. *See Catastrophe*, 852 F.3d at 1022.

16. *The Law*, EEOC.GOV, <https://www.eeoc.gov/eeoc/history/35th/thelaw/> (last visited Jan. 3, 2017).

17. *Id.*

18. *Id.*

19. *Id.*

20. 42 U.S.C. § 2000e-2 (2012).

21. *The Law*, *supra* note 16.

22. *Id.*

23. SUSAN GROVER ET AL., EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK 51 (Michael Hunter Schwartz ed., 2d ed. 2014).

24. *Id.* at 51-52.

25. *Id.* at 151.

26. *Id.* at 51, 151.

This Note will focus on how the decision in *Catastrophe*²⁷ will impact both the Eleventh Circuit and the Supreme Court of the United States. It will analyze the progression of the race category under Title VII and how the growth and social progression of our country as a whole will impact future claims brought under this category, as well as how the claims should be properly analyzed. Part I will dissect how the protected categories of sex and national origin started out and how these categories have since expanded, covering many more individuals than they were originally intended to cover. Part II will cover the lack of expansion of the protected category of race, as opposed to the two previous categories of sex and national origin. It will weigh the benefits of expansion and the considerations of race being viewed as a social construct in modern society against the risks of expanding race coverage too broadly. Lastly, Part III will argue and propose a solution to the matter that should be used for consideration in relevant cases heard by the Supreme Court of the United States. The proposed solution recognizes the risk of frivolous suits that can result from the expansion of the category of race; however, fear of frivolity should not impede recognition of the importance of diversity. There is importance to the notion that people should be treated equally in the workplace regardless of their race and employers should not be able to create loopholes that will omit a certain racial group from employment. Thus, when a case concerning race discrimination under Title VII is heard before a court on a defendant's motion for summary judgment, the court should look at the impact that immutable characteristics and cultural practices, such as having dreadlocks, will actually have on the work environment to the extent that they actually impact the ability to do the job. Furthermore, considerations of personal circumstances present for both the employee and employer should be taken. If it is established that the characteristics, whether immutable or mutable, are part of someone's racial background and expression, and they do not cause any disruption in the workplace, the motion for summary judgment on behalf of the employer should be denied and plaintiff should succeed in establishing a prima facie case for race discrimination.

I. EXPANSION OF THE DEFINITIONS OF SEX AND NATIONAL ORIGIN UNDER TITLE VII

A. Sex

When Title VII came into existence, the protected category of sex was seemingly clear-cut: sex discrimination was discrimination against females or males specifically because of this protected trait.²⁸ A distinct example of this class of discrimination arose in a case where females were required to pay more for their pension funds than males at their workplace, because of statistics showing that

^{27.} See generally *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021, 1030 (11th Cir. 2016). This case is likely to cause an uproar in the circuit courts by limiting recovery to race employment discrimination claims based purely on immutable characteristics, leading the Supreme Court to eventually address the proper standard head-on in upcoming sessions.

^{28.} *GROVER ET AL.*, *supra* note 23, at 18.

females live longer than males.²⁹ Because females had to pay more for their pensions, they took home much less pay than their male co-workers.³⁰ The females sued under Title VII and the Supreme Court held that, although on average females live longer than males, this is not necessarily the case for every female; Title VII sex discrimination claims are based on individuals, not classes, and requiring females to pay more than males for their pensions was considered discrimination, for no other factor was taken into consideration other than sex.³¹ It was apparent at this point that anything outside the category of strict female versus male discrimination did not fall under Title VII.³² This was evident in the 1974 case of *Barnes v. Train*,³³ which was later overruled by *Barnes v. Costle*.³⁴ In *Train*, the court stated that a plaintiff refusing romantic gestures from an employer, and then later being retaliated against for such refusal, did not fall under the confines of sex discrimination under Title VII and there could be no recovery for the plaintiff.³⁵

In 1986, the concept of a broad view of sex discrimination began to emerge with the case of *Meritor Savings Bank v. Vinson*.³⁶ In *Meritor*, a woman who worked at a bank ended up engaging in a sexual relationship with her boss after his persistent requests to take her out to dinner.³⁷ She seemingly welcomed the conduct at first in fear of losing her job, but later began to refuse it—claiming that the actions of her boss became so serious that, at one point, he forcibly raped her.³⁸ The Supreme Court quoted the Code of Federal Regulations which states that a claim for sexual harassment includes “such conduct that has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”³⁹ Because the conduct of the woman’s boss led to a hostile working environment, such conduct became actionable under Title VII.⁴⁰ Further, in *Harris v. Forklift Systems*, the Supreme Court held that a hostile or abusive working environment could be determined by looking at the totality of the circumstances surrounding the conduct and factors such as frequency, severity, “whether it [was] physically threatening or humiliating,” whether it was just a mere utterance, and “whether it unreasonably interfere[d] with an employee’s work performance.”⁴¹

29. *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 704–05 (1978).

30. *Id.* at 704.

31. *Id.* at 707–11, 716.

32. *See generally id.* at 715–16.

33. *Barnes v. Train*, No. 1828-73, 1974 WL 10628 (D.D.C. Aug. 9, 1974).

34. *Barnes v. Costle*, 561 F.2d 983, 992–93, 995 (D.C. Cir. 1977) (holding that being fired for refusal to engage in a sexual affair with one’s supervisor of a different sex is discriminatory in nature and falls under Title VII sex discrimination).

35. *Train*, No. 1828-73, 1974 WL 10628, at *1.

36. *See generally Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

37. *Id.* at 60.

38. *Id.* She stated that “she had intercourse with him some 40 or 50 times,” and that he would “follow[] her into the women’s restroom . . . [and] expose[] himself to her” and “fondle[] her in front of other employees” in addition to the forcible rape. *Id.*

39. *Id.* at 65; 29 C.F.R. § 1604.11(a)(3) (2017).

40. *Meritor Sav. Bank*, 477 U.S. at 73.

41. *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993). *Harris* involved a female worker who was constantly insulted at her job because of her gender and was often made the target of sexual innuendos. *Id.* at 19. The Court held that the conduct must be severe or pervasive enough to create an objective hostile environment. *Id.* at 21.

Several years later, in 1989, the landmark case of *Price Waterhouse v. Hopkins* continued the expansion of sex discrimination by including cases that involved “sex stereotyping.”⁴² The Supreme Court held that sex discrimination exists where someone is treated differently because they do not fall under the stereotype of how a male or a female should act in society.⁴³ The woman in this case did not receive a promotion because she seemed aggressive or harsh, and because of comments made by other employees who stated that she needed to act more femininely.⁴⁴ Although she was not discriminated against because she was a woman, she was discriminated against because she did not, in the eyes of other employees, act like a woman should. That was enough to constitute sex discrimination under Title VII.⁴⁵ In *Oncale v. Sundowner Offshore Services, Inc.*, a man a claim based on harassment by fellow male co-workers who made crude jokes towards him and even threatened to rape him.⁴⁶ The Fifth Circuit held that because this harassment was directed at a male, by males, this was not sex discrimination.⁴⁷ However, the Supreme Court reversed and held that same-sex sexual harassment is also covered under Title VII.⁴⁸ It does not matter who the threats or actions derive from, as long as they were directed at someone with the intent to sexually harass that person.⁴⁹

One of the most recent broad expansions of “because of sex” in Title VII was established in *Macy v. Holder*, where the Equal Employment Opportunity Commission held that if an individual is being discriminated against because they are transgender, the discrimination qualifies as “because of sex” and falls under the statute.⁵⁰ Before, cases like this were shut down because courts felt that these cases involved gender identity and sexual orientation, not sex itself.⁵¹ Although *Macy* broadened this greatly,⁵² and the EEOC has accepted this view, circuit courts are still split on the issue, and the Supreme Court has yet to rule definitively on whether the statute should encompass transgender individuals.⁵³ This is also the situation with cases involving sexual orientation. For example, in 2015, the EEOC held that sexual

42. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

43. *Id.* at 250–51.

44. *Id.* at 235.

45. *Id.* at 258.

46. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 77 (1998) (explaining further that plaintiff worked for a crew containing eight men, and, on top of the threat of rape, he was forced to perform sex-related acts and was also physically sexually assaulted by these men).

47. *Id.*

48. *Id.* at 82.

49. *Id.* The Court continued by stating “[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive. *Id.*”

50. *Macy*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012).

51. *See, e.g., Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) (holding that there is an objective distinction between sex and sexuality, separating the categories completely and restricting coverage under the statute).

52. *See Macy*, 2012 WL 1435995.

53. *Compare Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (holding that suspension due to an employee undergoing transition violates Title VII), *with Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006) (holding that although perhaps plaintiff could make a claim for sex discrimination based on stereotyping received due to female characteristics, her choice to express them due to identity is not a viable claim under Title VII).

orientation discrimination can fall under sex discrimination as well, if the sexual orientation is the reason the adverse employment action against the employee took place.⁵⁴ Again, the Supreme Court has yet to rule on this definitively, and many circuit and district courts are still split as to whether sexual orientation discrimination should fall under Title VII⁵⁵—but it is a decision likely to be made in the affirmative in the future.⁵⁶

These are just a few of the examples of how broadly the definition of sex has expanded from at first only including whether one was discriminated against based on their biological characteristics, to now also including sexual harassment for both males and females, sex-stereotyping, and discrimination based on gender identity and sexual orientation.

B. National Origin

Many courts have struggled to define what the phrase “national origin” in Title VII entails.⁵⁷ It was once defined as where a person was born or where their ancestors came from, without encompassing lawful citizenship.⁵⁸ This definition has since been expanded in the Code of Federal Regulations, outlining national origin as “including, but not limited to, the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”⁵⁹ Further, within the definition, it is stated that national origin is interpreted “broadly.”⁶⁰ In other words, instead of merely encompassing the location of one’s birth or the birth of those who came before him or her, national origin encompasses a variety of aspects including characteristics, which opens the door to a variety of different applicable claims one could bring under the statute. Even if an individual was not born in a certain country, he or she will still have standing to bring suit if he or she has characteristics similar to others who were born in the particular country and if the individual is being discriminated against because of the characteristics that he or she possesses.⁶¹ It is also important to take note of the language used in the regulation, which states that national origin is “not limited to” the definition given,⁶² leaving room for other future expansions of the meaning of national origin.

54. Baldwin, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (July 15, 2015).

55. See *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 266–70 (D. Conn. 2016) (discussing the difficulties of the Second Circuit and Seventh Circuit in deciding the issue).

56. See *id.* at 267 (stating that the plain language of Title VII—that sexual orientation cannot be separated from sex—and the Supreme Court’s paradigm of sex discrimination should allow for sexual orientation claims to be brought).

57. Compare *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1195 (9th Cir. 2003) (holding that consideration of linguistic characteristics, such as an accent, is impermissible under Title VII if such characteristics do not interfere with job performance), with *Abbasi v. SmithKline Beecham Corp.*, No. CIV.A 08-277, 2010 WL 1246316, at *8 (E.D. Pa. Mar. 25, 2010) (holding that linguistic characteristics, such as accent, *can* have a legitimate, non-discriminatory role in an employer’s considerations).

58. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 87–88 (1973).

59. 29 C.F.R. § 1606.1 (2017).

60. *Id.*

61. See *id.*

62. *Id.*

Examples of some of the characteristics of one's national origin that have been recognized usually involve language or speech.⁶³ In one case, a Lebanese employee, Nada Raad, filed a claim of employment discrimination for national origin when her employer refused to hire her as a permanent teacher during three consecutive hiring cycles.⁶⁴ The employer claimed that Raad had made a bomb threat and suspended her employment.⁶⁵ Raad claimed that the report of the bomb threat was fraudulent and based upon her ethnic background.⁶⁶ Further, upon analyzing one of Raad's interviews, it was seen that comments were made about her accent being a potential weakness, although there was no evidence that her accent had ever affected her prior job performance as a substitute and temporary teacher.⁶⁷ The EEOC found that considering linguistic characteristics, such as an accent, is unlawful discrimination under Title VII.⁶⁸ Only if the accent interfered with one's job performance could it be seen as a reasonable basis for letting an employee go.⁶⁹ There was reasonable evidence that Raad's accent did not impair her work performance, and therefore, the court found that a finder of fact could conclude that using Raad's accent to refrain from permanently hiring her was merely pretext.⁷⁰

In contrast, in *Abbasi v. SmithKline Beecham Corp.*, a female filed suit after her employer repeatedly complained about her work ethic and complained that she did not speak English clearly enough.⁷¹ Although the court acknowledged that language restrictions can be discriminatory in nature, "these were not comments, such as complaining about an employee speaking with an accent, which in context might provide an inference of discrimination."⁷² Although there are exceptions to every rule, such as *Abbasi* provides, generally courts are more receptive to allowing plaintiffs to establish their prima facie cases for national origin discrimination by showing a wide variety of comments or actions taken against an employee based on linguistics and other personal characteristics.⁷³ Taking these cases and the definition of national origin into consideration, it is clear that courts are willing to broaden what it is that national origin entails, providing a wide range of protection for those who have been discriminated against because of it.

63. See, e.g., *Maldonado v. City of Altus*, 433 F.3d 1294, 1307 (10th Cir. 2006) (holding that an English-only policy required by employers could be too restrictive and could create a hostile environment for Hispanic employees).

64. Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1188 (9th Cir. 2003).

65. *Id.*

66. *Id.*

67. *Id.* at 1189. In contrast, her classroom performance was actually praised and she was seen as having "excellent rapport with her students." *Id.*

68. *Id.* at 1195 (stating that her accent was used as pretext in this case).

69. *Radd*, 323 F.3d at 1195.

70. *Id.*

71. *Abbasi v. SmithKline Beecham Corp.*, No. CIV.A 08-277, 2010 WL 1246316, at *4-7 (E.D. Pa. Mar. 25, 2010).

72. *Id.* at *22-23.

73. See generally *EEOC v. Synchro-Start Prod.*, 29 F. Supp. 2d 911 (N.D. Ill. 1999) (holding that an English-only policy is enough for plaintiff to prove a prima facie case, and that is up to the defendant to give a legitimate business justification for it).

II. LACK OF EXPANSION OF THE PROTECTED CATEGORY OF RACE AND THE PUSH TOWARDS IT BEING VIEWED AS A SOCIAL CONSTRUCT UNDER TITLE VII

A. Lack of Expansion

As made apparent in Part I, several protected categories under Title VII have greatly expanded and provided relief for a larger variety of plaintiffs since the Act's enactment in 1964.⁷⁴ However, when turning to the category of race under the Act, the same expansion has not been apparent.⁷⁵ One may try to understand the difference between color and race under Title VII. The Act itself does not define color, but the EEOC explains "color" to mean "pigmentation, complexion, or skin shade or tone."⁷⁶ When someone discriminates based on the lightness or darkness of skin, this would be considered color discrimination.⁷⁷ Although this can overlap with race discrimination, it is not precisely the same thing.⁷⁸ The EEOC uses personal characteristics such as hair, skin color, or facial features to define race; however, the problem is that there is no strict definition for race, and none is given in Title VII either.⁷⁹ Merriam-Webster defines race as, "A class or kind of people unified by shared interests, habits, or characteristics," but also uses the definition, "A category of humankind that shares certain distinctive physical traits."⁸⁰ In law, the two definitions do not overlap, so which is to be followed? Should race be defined by only what is physical, or by certain characteristics, traits, or customs that people of a certain group participate in? If sex and national origin have been so extensively expanded, should race not have that same benefit?

*Rogers v. American Airlines*⁸¹ is a prime example of a case that set the precedent restricting the expansion of the race category. In *American Airlines*, the plaintiff was an American Airlines employee for about eleven years.⁸² The company denied her the right to wear her hair in cornrows, stating that it violated company policy, and she sued claiming racial discrimination under Title VII.⁸³ She contended that the hairstyle was reflective of the cultural and historical background of a black woman in society.⁸⁴ However, the policy applied to all employees and since she could not prove that only black people wear cornrows, the court found that the hairstyle was easy to change and dismissed the claim.⁸⁵ This was only the beginning of many race cases to follow. In 1996, fifteen years after the ruling in *American Airlines*, the same

74. *Maldonado v. City of Altus*, 433 F.3d 1294, 1303 (10th Cir. 2006); *Macy*, Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

75. *See generally* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1020-21 (11th Cir. 2016).

76. Equal Employment Opportunity Comm'n, EEOC Compliance Manual, EEOC Order 915.003, § 15 at 15-III (Apr. 19, 2006).

77. *Id.*

78. *Id.*

79. *Id.*

80. Merriam-Webster, *Definition of race*, MERRIAM-WEBSTER DICTIONARY (2017), <https://www.merriam-webster.com/dictionary/race>.

81. *See generally* *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

82. *Id.* at 231.

83. *Id.*

84. *Id.* at 232.

85. *Id.* at 232, 234.

conclusion was reached in a case where a black female challenged her temporary company's policy that people who wore all-braided hairstyles would not be referred for jobs; the woman was subsequently fired for her hair style.⁸⁶ The court found again that the policy prohibiting the braided hairstyle was not an unlawful employment practice and could not violate Title VII.⁸⁷

Fast-forward to 2016—where it is believed that, culturally and racially, people from the United States have grown to accept people from many different backgrounds. While this may be the case, the coverage for race discrimination has not budged. Although blatant race discrimination cases are recognized,⁸⁸ plaintiffs still find no relief in race employment discrimination cases when cultural characteristics and habits lead to adverse employment actions. It is apparent from the case of Chastity Jones, the woman who experienced workplace discrimination due to her dreadlocks shortly after being hired, that the Eleventh Circuit relied on outdated precedents to reiterate that because her hairstyle was mutable, it was not part of her race and she had no discrimination claim.⁸⁹ Although any person from any race can technically wear dreadlocks, dreadlocks are part of the black culture, and as Chastity states, a way that her hair forms naturally.⁹⁰ This sets a dangerous precedent for those willing to discriminate. It shows that although courts have been lenient in allowing expansion for other categories of discrimination, race claims will be hard to get to the jury absent the words, “I am firing you because of your race.” The problem on a small scale with these hairstyle cases, however, is that based on the mutable characteristic of hair texture, black females, along with males, often find that putting their hair in dreadlocks or cornrows is the easiest way to style it, as Chastity stated.⁹¹ Not only that, but this is something that has culturally been a part of the black race for generations.⁹² To separate the hairstyle from the race is incredibly limiting and goes far to limit other expressions of race. This not only causes disparate impact, but can definitely be found to influence disparate treatment cases.⁹³ An employer can get away with firing someone for wearing dreadlocks, even if the employee is qualified and the style is neatly kept, by using this as a pretext for the employer's underlying discrimination. Florida, part of the Eleventh Circuit, is an incredibly multicultural state.⁹⁴ To discriminate against a specific race in this state would have unrecoverable impacts on any business engaging in such activities. However, the case of Chastity Jones now gives businesses a loophole to discriminate

86. McBride v. Lawstaf, Inc., No. 1:96-cv-0196-cc, 1996 WL 755779, at *1, 3 (N.D. Ga. Sept. 19, 1996).

87. *Id.* at *3.

88. Hope A. Lang, *My Boss Called Me “the N-Word” – Blatant Racial Discrimination in the Workplace* (July 22, 2016), https://hopealanglaw.com/lawyer/2016/07/22/Discrimination/My-Boss-Called-Me-“the-N-Word”-Blatant-Racial-Discrimination-in-the-Workplace_bl25882.htm.

89. *See generally* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1032 (11th Cir. 2016).

90. *Id.* at 1022.

91. *Id.*

92. Emanuella Grinberg, *Dear white people with dreadlocks: some things to consider*, CNN (2016), <http://www.cnn.com/2016/03/31/living/white-dreadlocks-cultural-appropriation-feat/> (stating that the term dreadlock originated from Rastafarian culture where individuals considered their locks a sign of African identity).

93. *Id.*

94. Jeff Johnson, *Multicultural Engagement Florida Fact Sheet*, AARP (2011), <http://assets.aarp.org/rgcenter/general/Multicultural-Engagement-Florida-Fact-Sheet-AARP.pdf>.

if they are not blatantly obvious, by disallowing some mutable characteristic strongly correlated with the race they wish to discriminate against. By merely disallowing some hairstyle or mutable trait popular amongst a race, an employer has greater leverage to rid that race from the workplace without consequence, due to the federal courts' consistent refusal to expand the race category under Title VII.

B. Race as a Social Construct

The fight to broaden the interpretation of the word "race" comes from the movement and ideology that race is merely a social construct, and should be treated as such.⁹⁵ What does this mean? This belief stems from the concept that race is developed as a mix of one's cultural expressions and representation, not genetics.⁹⁶ Over 100 years ago, W.E.B. Du Bois argued that scientists at the time were using biology to explain the differences between races, when in fact, these distinctions were not based on individual genes, but on the background and culture a person grows up in.⁹⁷ A scientific article concluded that racial categories are "weak proxies for genetic diversity and need to be phased out."⁹⁸ Genomes from individuals across the globe, including people in Europe and Africa, show not a single genetic difference,⁹⁹ explicitly demonstrating that race is purely based on the environment a person is raised in.

Further proof of this occurs when people born of a certain race begin experiencing dissociation from that part of themselves due to that person's relationships and interactions with those of a different race.¹⁰⁰ In the case of *Rhineland v. Rhineland*, a woman of mixed-race by the name of Alice Jones, married a white man, Leonard Rhineland.¹⁰¹ Leonard claimed that Alice misrepresented her racial background to him because he believed she was fully white.¹⁰² Although Alice succeeded at trial,¹⁰³ it is integral to note the importance in the concept that a person can be of one race, and yet act and appear as if he or she is part of another. By surrounding himself or herself with those of a different race, a person can appear to be white, black, Asian, etc., even if his or her ancestors were not of that race. Author Angela Onwuachi-Willig analyzes this case a step further, showing how in multicultural families, it is often a struggle for one partner to be confident in his or her identity, because being around the other partner of a different race leaves that individual out of touch with his or her past experiences, world views, and who he or she believes him or herself to be because of this immersion¹⁰⁴

95. Megan Gannon, *Race is a Social Construct, Scientists Argue*, SCIENTIFIC AMERICAN (2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue/>.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY 256 (2013).

101. *Rhineland v. Rhineland*, 219 N.Y.S. 548, 548 (App. Div.), *aff'd*, 157 N.E. 838 (1927).

102. *Id.*

103. *Id.* at 550.

104. See ONWUACHI-WILLIG, *supra* note 100.

Race is based on these experiences. Because of race, one might be faced with different experiences when confronted by a police officer¹⁰⁵ or be treated differently in school or at the supermarket.¹⁰⁶ Even a light-skinned black male could have different experiences than a dark-skinned black male.¹⁰⁷ Diminishing these experiences is detrimental to society; it is incredibly important to understand and accept the parts of other cultures that may seem foreign to some, in order to avoid discrimination and allow leniency where it is not harming others and where it is due. In the sex and national origin cases mentioned above, this leniency proved to help many individuals find the recovery they deserved.¹⁰⁸ Transgender individuals,¹⁰⁹ and those with thick accents,¹¹⁰ were able to find relief because their protected characteristic was expanded upon. Why should race not be the same? Without this relief, and by holding out from viewing race as a social construct, there will be such a large pretext for those who intend to discriminate based on race. As previously stated, employers will be able to find some mutable feature, such as hairstyle or clothing, that is very common among a particular race, discriminate based on the feature, and get away with it by simply stating that the employer's action was for work policy reasons unrelated to race. This is not to say that there would be no recovery based on a disparate impact theory, for a potential plaintiff may be able to recover by showing that the policy unintentionally impacts his or her racial class.¹¹¹ However, a plaintiff should be able to recover on disparate treatment, because many of these policies are discriminatory in nature, and for a disparate impact claim, the plaintiff would only be entitled to equitable relief and attorney's fees.

The examples above support the idea that race is truly influenced by our environment and is social in nature. Therefore, when viewed in light of Title VII, race should be viewed with wider eyes while considering characteristics outside those that are immutable in nature.

105. See generally *Commonwealth v. Warren*, 58 N.E.3d 333 (Mass. 2016) (ruling that the police stop of a black man showed no means of reasonable suspicion and the black man had every right to run from the cops for they had no reason to arrest him).

106. See WorldTrustTV, *Cracking the Codes: Joy DeGruy "A Trip to the Grocery Store"*, YOUTUBE (Sept. 20, 2011), <https://www.youtube.com/watch?v=Wf9QBnPK6Yg> (In this video, DeGruy explains the treatment she and her sister-in-law faced while at the grocery store. The cashier, while helping her sister-in-law, engaged in friendly conversation. When DeGruy went to check out, the cashier became silent and requested two forms of identification to ensure DeGruy's check was her own. The cashier had not requested identification from DeGruy's sister-in-law, who was half-white and light-skinned, though she paid with a check as well.).

107. See Phillip Williams, *Shades of Black*, COLUMNS: ONLINE NEWSPAPER FOR THE UNIVERSITY OF GEORGIA COMMUNITY (Oct. 2, 2006), <http://columns.uga.edu/news/article/shades-of-black/> (discussing a study performed by Matthew Harrison, a psychologist who found that light-skinned black males with lower education are still preferred on average much more than dark-skinned black males with greater levels of education).

108. See *Meritor Sav. Bank*, 477 U.S. 57, 78 (1986); *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1191 (9th Cir. 2003).

109. See *Macy*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1, 9 (Apr. 20, 2012).

110. See generally *Abbasi v. SmithKline Beecham Corp.*, No. CIV.A 08-277, 2010 WL 1246316 (E.D. Pa. Mar. 25, 2010).

111. See generally *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016).

C. Danger of Pushing the Boundary Too Far

Although in theory it seems as if no harm will result, many dissenters worry that expanding the definition of race under Title VII will not only open the door to many frivolous claims of discrimination lacking in merit,¹¹² but that it will also create problems for the courts in determining what the bright line definition of race should be and what should be protected or not.¹¹³ In *Catastrophe*, the argument was that people of different races may wear dreadlocks, or show similar expressions, so this hairstyle cannot be a determinative factor of race; for then anyone could make a claim that a characteristic falls under his or her race, and then the employer will be found liable for discrimination even if that intention was not present.¹¹⁴ However, this argument fails because it does not examine the characteristic properly. Dreadlocks are historically part of black culture—this is undisputed.¹¹⁵ This is not to say that people of other cultures are prohibited from sporting such a hairstyle, but the interpretation and background which attaches is not the same as it is for black individuals.

The hairstyle itself—dreadlocks—should not fall under Title VII protection. That is agreed upon by representatives of either side. What needs protection is the cultural connection and background that attaches the hairstyle to a person's race. This should be the case not only for dreadlocks, but also for other currently unprotected characteristics of racial background. The fear that the boundary will be pushed too far is a genuine concern, but this can be avoided if the claimants demonstrate the merit of their case by showing that there is a cultural connection and background, and that they are not just claiming protection of race because of a policy they do not like and wish to avoid following.

III. SUPREME COURT PROPOSAL ON THIS ISSUE

The ruling in *Catastrophe*¹¹⁶ has caused quite a stir in the Civil Rights community in the Eleventh Circuit and beyond.¹¹⁷ In an area with immense diversity, such as Florida, which accounts for a substantial part of the Eleventh Circuit, this ruling further solidifies inequalities that so many have tried speaking out against¹¹⁸ and unfortunately has influence on other circuits as well. Seeing as this issue is being

112. *Id.* at 1034.

113. *Id.* at 1026.

114. *Id.*

115. *Id.* at 1022 (stating that dreadlocks originated during the slave trade in the United States, when traders would refer to the slaves' hair as "dreadful." This term caught on to describe hair conditions of these slaves as they traveled across the ocean).

116. *Catastrophe*, 852 F.3d at 1035.

117. Judicial Watch, *Dreadlock Ban is not Discrimination; Court Rejects Govt. Claim of "Racial Distinctions in the Natural Texture of Black and Non-Black Hair,"* THE JUDICIAL WATCH BLOG (Sept. 28, 2016), <http://www.judicialwatch.org/blog/2016/09/dreadlock-ban-isnt-discrimination-court-rejects-govt-claim-racial-distinctions-natural-texture-black-non-black-hair/> (explaining that the EEOC tweeted that the ruling in the *Catastrophe* case is similar to not allowing a Muslim female to wear a hijab, and quoting a statement from a black male who classified his dreadlocks as part of his heritage and a statement of his pride).

118. *Catastrophe*, 852 F.3d at 1022.

brought up across the circuit courts of our nation, it is likely that, at some point soon, the Supreme Court will have to find a resolution and unify what the construction of race should entail under Title VII, whether that be expansion or a sharp cut-off at immutable characteristics alone, and who all it will cover.

I propose that race should not be strictly viewed as a biological term based on physical characteristics or immutable traits alone. I believe that race should include those mutable characteristics that are produced genuinely as an expression of one's racial background. These cases should be handled on an individual basis. In *Catastrophe*, it was clear that the no-dreadlocks rule was intended to deter distractions in the workplace.¹¹⁹ Chastity was to be working on the computer and taking phone calls.¹²⁰ She explained that not only was her hair an expression of who she was as a black female, but also a way to keep her hair tamed, for its texture naturally formed into dreadlocks and she wanted to prevent it from getting too wild.¹²¹ With this case and similar cases,¹²² there is no need for an employer to have the right to fire an employee on this basis. This is very clearly an aspect of racial discrimination. Discrimination based on immutable characteristics does create a strong case for someone making a race claim, however, this does not mean that mutable characteristics should be downplayed; they are equally as important in determining a presence of race discrimination.

The most proper way to handle cases involving mutable characteristics is to retract from outright granting a defendant's motion of summary judgment based on the failure, in the court's current eyes, of a plaintiff to establish a prima facie case.¹²³ To establish a prima facie case for an employment discrimination case under Title VII, a plaintiff must show that: (1) he or she is part of a protected category; (2) he or she is qualified for the position at hand; (3) he or she suffered an adverse employment action; and (4) someone outside of the protected category was offered the position, or something a bit further—such as insensitive comments made—in order to make a showing that they have standing.¹²⁴ An employer must rebut by showing a legitimate, non-discriminatory reason for the employment action taken.¹²⁵ The plaintiff can then respond by showing that the legitimate, non-discriminatory reason is actually just pretext for the true discrimination.¹²⁶ If plaintiffs bringing racial discrimination claims were at least able prove their prima facie case, defendants would be able to state their “legitimate reason” (presumably a policy restricting the individual from expressing their mutable characteristic), and the plaintiffs would be able to state that this reason was pretext. Courts need to be more open in deciphering whether or not there is a chance that in the particular case pretext exists. If there is an employment policy that exists that, in and of itself, prohibits a certain mutable characteristic, and if someone is suing based on this policy due to race discrimination, two factors need to be examined. First, it must be determined if the workplace will be negatively

119. *Id.*

120. *Id.* at 1021.

121. *Id.* at 1024.

122. *See generally* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981).

123. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

124. *Id.*

125. *Id.*

126. *Id.* at 803.

impacted, or if another individual will not be able to complete his or her work duties without distractions if the policy does not exist. Second, there must be evidence that the characteristic does indeed have roots and history in the racial background being addressed. If these factors are considered and met, the prima facie case and pretext would be properly shown and the case could proceed to trial for further determinations. These cases need to be taken to trial in order to determine if the characteristic was truly a racial expression and whether it was being used as pretext for race discrimination in the workplace. This is not to say that plaintiffs will always have a good claim—there will be instances in which it is obvious that the characteristic an employee seeks to protect does not fall under a racial classification. For example, if a plaintiff claims that a policy requiring employees to wear shoes all the time goes against her race, because her race opposes wearing shoes, such a claim would likely lack legitimacy, for there are no races that prohibit wearing shoes in a workplace. However, the factors presented in this proposed test would weed out illegitimate claims like the one described. Race discrimination claims are up to a jury to decide, and I believe this proposal is the best way for those discriminated against to find justice and the remedies they deserve in our federal judicial system.

IV. CONCLUSION

The Civil Rights Act of 1964 outlaws discrimination on the basis of race, color, sex, national origin, and religion.¹²⁷ Title VII of this Act brings this rule into the employment context by securing jobs for anyone who falls under these categories, so they are not rejected from the work environment based on who they are or what race they identify as.¹²⁸ While protection in employment contexts has been expansive for those bringing sex and national origin claims, it is evident from the 2016 Eleventh Circuit case of Chastity Jones that race has not been afforded the same protection.¹²⁹ Although views about the concept of race have progressed since 1964, with growing consensus that race is merely a social construct influenced by our environment, the Act has not budged from protecting only those with immutable characteristics of race. It is important that the Supreme Court resolve this issue and create a broader standard for all those impacted by the strict definition of race in Title VII, because all people affected, like Chastity Jones, deserve recovery for the injustice taken against them.

127. Civil Rights Act, 42 U.S.C. §§ 1981–2000 (1964).

128. 42 U.S.C. § 2000e-2 (2012).

129. *See generally* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016).