No. 14-13482-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

CATASTROPHE MANAGEMENT SOLUTIONS, INC.,

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District Of Alabama

BRIEF OF DEFENDANT-APPELLEE CATASTROPHE MANAGEMENT SOLUTIONS, INC.

Helgi C. Walker
Eugene Scalia
Thomas M. Johnson, Jr.
Lindsay S. See
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

David J. Middlebrooks
Whitney R. Brown
LEHR MIDDLEBROOKS & VREELAND, P.C.
P.O. Box 11945
Birmingham, AL 35202
(205) 326-3002

Counsel for Defendant-Appellee Catastrophe Management Solutions, Inc.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Appellee Catastrophe Management Solutions, Inc. ("CMS"), states that it has no corporate parent, and that there are no publicly held corporations that own 10 percent or more of its stock.

CMS further states that, to the best of its knowledge, the following persons and entities have an interest in the outcome of this case:

1. Bean, Julie, attorney for Plaintiff
2. Brown, Whitney R., attorney for Defendant
3. Bruner, Paula R., attorney for Plaintiff
4. Butler, Jr., Hon. Charles R., United States District Court Judge
5. Catastrophe Management Solutions, Inc., Defendant-Appellee
6. Davis, Lorraine C., attorney for Plaintiff
7. Equal Employment Opportunity Commission, Plaintiff-Appellant
8. Fonde, Daphne Pilot, an individual owning shares in CMS
9. Gibson, Dunn & Crutcher LLP, attorneys for Defendant
10. Johnson, Jr., Thomas M., attorney for Defendant
11. Jones, Chastity, the individual whose Charge resulted in this lawsuit
12. Lee, James L., attorney for Plaintiff
13. Lehr Middlebrooks & Vreeland, P.C., attorneys for Defendant

14. Lopez, P. David, attorney for Plaintiff
15. Middlebrooks, David J., attorney for Defendant
16. Milling, Jr., Bert W., United States Magistrate Judge
17. Pilot Catastrophe Services, Inc., an affiliate of Catastrophe Management Solutions. It is not publicly held and no publicly-held corporation owns 10% or more of its stock.
18. Pilot, Curtis F., individual owning shares in CMS
19. Pilot, Rodney A., individual owning shares in CMS
20. Pilot, Jr., W. Davis, individual owning shares in CMS
21. Reams, Gwendolyn Young, attorney for Plaintiff
22. Rucker, Marsha Lynn, attorney for Plaintiff
23. Scalia, Eugene, attorney for Defendant
24. See, Lindsay S., attorney for Defendant
25. Smith, C. Emanuel, attorney for Plaintiff
26. Walker, Helgi C., attorney for Defendant
27. Wheeler, Carolyn L., attorney for Plaintiff

No. 14-13482-DD
Equal Employment Opportunity Commission v.
Catastrophe Management Solutions, Inc.

DATE: January 9, 2015

Respectfully submitted,

/s/ Thomas M. Johnson, Jr.

David J. Middlebrooks
Whitney R. Brown
LEHR MIDDLEBROOKS & VREELAND, P.C.
P.O. Box 11945
Birmingham, AL 35202
(205) 326-3002

Helgi C. Walker
Eugene Scalia
Thomas M. Johnson, Jr.
Lindsay S. See
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee Catastrophe Management Services, Inc. ("CMS") respectfully submits that oral argument is unnecessary to resolve the issues presented by this appeal. This case involves a straightforward application of well-established principles under Title VII, which the district court correctly concluded required that the complaint be dismissed with prejudice. The novel theory advanced by the Equal Employment Opportunity Commission ("EEOC")—that Title VII's prohibition against discrimination on the basis of race prohibits employers from applying a race-neutral grooming policy to ban particular hairstyles—has no basis in the text of the statute or relevant case law. However, if the Court determines that oral argument would aid its decision in this matter, CMS would welcome the opportunity to further present its case.

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INTRODUCTION

In this appeal, the Equal Employment Opportunity Commission ("EEOC") takes the unprecedented position that an employer who conditions an applicant's job offer on compliance with a neutral grooming policy may be liable for intentional race discrimination under Title VII. On this theory, the EEOC has sued Catastrophe Management Services, Inc. ("CMS"), which offered Black applicant Chastity Jones a position, but required that she remove her dreadlocks to comply with CMS's grooming policy before starting work (which Jones refused to do). The EEOC makes ***no*** allegation that CMS harbored racial animus toward Jones, ***no*** allegation that CMS ever permitted a White applicant to work with dreadlocks, and ***no*** allegation that CMS otherwise applied its grooming policy in a discriminatory manner. Rather, the EEOC's position is that applying a neutral grooming policy to prohibit dreadlocks in the workplace—what the agency erroneously refers to as "targeting" dreadlocks—is *per se* race discrimination under Title VII.

That is not the law. Rather, the EEOC's position is "squarely foreclose[d]" by this circuit's "long-standing binding precedent" upholding neutral grooming policies from Title VII challenge, *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387, 1389 (11th Cir. 1998), because such policies are "related more closely to the employer's choice of how to run his business than to equality of employment opportunity," *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir.

1975). The EEOC's position also conflicts with a recent administrative decision in which the EEOC held that a grooming policy interpreted to prohibit dreadlocks and similar hairstyles lies "outside the scope of federal employment discrimination statutes," even when the prohibition targets "hairstyles generally associated with a particular race." *Thomas v. Chertoff*, Appeal No. 0120083515, 2008 WL 4773208, at *1 (E.E.O.C. Oct. 24, 2008). The EEOC offers no reasoned explanation for its sudden departure from that position, nor could it.

By requiring employers to make exceptions to neutral grooming policies for hairstyles "associated with" a particular race, the EEOC's proposed approach would effectively transform Title VII's prohibition on race discrimination into an accommodation mandate, even though there is no textual warrant in Title VII for requiring accommodations of race—unlike, for example, Title VII's provision for religious accommodation. *See* 42 U.S.C. § 2000e(j). The EEOC's theory would also produce a host of practical difficulties and unintended, perverse effects. Under the EEOC's approach, employers, judges, and juries would be required to engage in unbounded racial and anthropological theorizing, speculating about what hairstyles, clothing, or other practices are "associated with" different races, national origins, and cultures; whether a given employee is of that race, nation, or culture; and whether the employee is, by her hairstyle or some other practice, engaging in a display of racial or cultural pride, as to which she—but not her co-workers

of different races—is uniquely entitled. The result would be the very sort of stereotyping and discrimination that Title VII was enacted to end.

This Court should reject the EEOC's novel, atextual theories, and should affirm the district court's dismissal of the complaint.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction, pursuant to 28 U.S.C. § 1331, over the EEOC's complaint alleging discrimination under Title VII of the Civil Rights Act of 1962, as amended, 42 U.S.C. § 2000e-5. However, this Court has no jurisdiction because the EEOC did not timely appeal.

On March 27, 2014, the district court dismissed the EEOC's complaint and entered a separate judgment dismissing the action without prejudice. T6-Doc.19, at 10; T1-Dkt. Report 3. Federal Rule of Appellate Procedure ("FRAP") 4 required the EEOC to notice any appeal of the judgment within sixty days, unless the EEOC timely filed one of the types of motion specified in Rule 4. The EEOC neither filed a notice of appeal within the sixty-day period, nor filed one of the motions specified in Rule 4, such as a motion to alter or amend the judgment under Federal Rule of Civil Procedure ("FRCP") 59 or 60. Instead, on April 17, the EEOC filed a motion for leave under FRCP 15(a) to amend the complaint, adding new factual allegations and rehashing arguments and conclusory allegations that the district court had already rejected in its dismissal order. That was procedurally

improper, as Rule 15 "has no application after judgment is entered." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) (emphasis omitted). Moreover, the EEOC's motion did not seek the same relief afforded by Rules 59 and 60, *i.e.*, to alter or set aside a judgment, and hence the district court "could hardly . . . [have] abused its discretion in denying [the EEOC] leave to amend [its] complaint post-judgment." *Id.* at 1345.

The district court denied the EEOC's motion for leave to amend as futile on June 2, 2014, T4-Doc.27, at 2, and the EEOC moved for entry of a final order on June 11, T1-Dkt. Report 3. The court denied this motion because final judgment had previously been entered on March 27 and the EEOC had not sought relief from the judgment of dismissal. T3-Doc.29, at 1.

The EEOC finally noticed its appeal on August 1, 2014. T2-Doc.30. This was untimely, because it was more than sixty days after the district court's March 27 dismissal of the complaint and entry of separate judgment dismissing the action, and because the EEOC had not filed any of the motions specified in Rule 4.

CMS has more fully explained why this Court lacks jurisdiction over this appeal in its September 23, 2014, response to the Jurisdictional Question previously posed by the Court, and respectfully refers the Court to that brief for further discussion of these issues. *See* Jurisdictional Statement of Defendant-Appellee Catastrophe Management Solutions, Inc. (Sept. 23, 2014).

STATEMENT OF THE ISSUES

1. Does this Court lack jurisdiction over this appeal because the EEOC did not timely appeal within 60 days after the district court entered final judgment, nor file any of the motions identified in Federal Rule of Appellate Procedure 4 that would toll the time to appeal?

2. Did the district court properly dismiss the EEOC's original complaint, and deny leave to amend, because the EEOC did not plausibly allege that CMS had engaged in intentional race discrimination by offering an African-American applicant a job, but requiring her to remove her dreadlocks before starting work, in accordance with what the EEOC describes as CMS's race-neutral grooming policy?

STATEMENT OF THE CASE

This case involves the district court's dismissal of a complaint alleging race discrimination under Title VII, and the court's denial of a motion to amend the complaint to add more factual allegations in support of the same flawed legal theory that the court already had rejected.

I. Course of Proceedings and Disposition

On September 30, 2013, the EEOC filed a complaint against Catastrophe Management Solutions, Inc. ("CMS"), alleging that CMS had discriminated against an applicant under Title VII by offering her a job, yet requiring her, pursuant to CMS's neutral grooming policy, not to wear her hair styled in dreadlocks at

work. CMS moved to dismiss the EEOC's complaint on the basis that hairstyles are not protected under Title VII, and on March 27, 2014, the district court granted CMS's motion, dismissing the EEOC's complaint. T6-Doc.19, at 10. The same day, the district court entered "Final Judgment" in CMS's favor. T5-Doc.20.

On April 17, 2014, the EEOC filed a motion to amend its dismissed complaint. T7-Doc.21. On June 2, the district court denied the motion on the basis that the proposed amendment would be futile because it relied upon the same legal theory the district court had previously rejected. T4-Doc.27, at 2.

On June 11, 2014, the EEOC moved the district court to enter final judgment on a separate document dismissing the action with prejudice. T1-Dkt. Report 3. The district court denied the motion on June 16, noting that it had already entered final judgment by separate document when it dismissed the initial complaint. T3-Doc.29, at 1; *see also* T5-Doc.20. The district court also noted that a post-judgment motion for leave to amend a complaint cannot be granted unless judgment is vacated under Rule 59(e) or relief from judgment has been awarded under Rule 60(b). T3-Doc.29, at 2. "Because Plaintiff did not seek relief under either of these rules," the court reasoned, "the motion for leave to amend should have been denied for that reason alone." T3-Doc.29, at 2.

On August 1, 2014, the EEOC filed its notice of appeal. T2-Doc.30. On September 9, this Court *sua sponte* ordered the parties to brief the question of this

Court's jurisdiction. The Court noted probable jurisdiction on November 20, 2014.

II. Statement of the Facts

CMS has what the EEOC has conceded is a "race-neutral written grooming policy," T8-Doc.21-1 ¶ 30, which provides in relevant part:

> All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines . . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable . . . .

T9-Doc.1 ¶ 8 (internal quotation marks omitted).

According to the allegations in the EEOC's original and proposed amended complaints, complainant Chastity Jones, a Black woman, completed an online application for a job as a Customer Service Representative with CMS on May 3, 2010. T8-Doc.21-1 ¶ 9. Jones was selected for an in-person interview several days later. T8-Doc.21-1 ¶ 11. Jones wore dreadlocks at the time of her interview. T8-Doc.21-1 ¶ 12. After a one-on-one interview with a trainer, CMS's Human Resources Manager, Jeannie Wilson, brought Jones with a group of applicants into a separate room, where she informed them that they had been hired. T8-Doc.21-1 ¶¶ 13-14. Wilson distributed paperwork to the group of successful applicants and instructed them that they would have to satisfy various conditions before beginning employment, including completing lab tests and post-offer paperwork. T8-Doc.21-1 ¶ 14.

Jones met with Wilson privately afterward to discuss a scheduling conflict with the required lab tests. T8-Doc.21-1 ¶ 15. During this discussion, Wilson allegedly asked Jones "whether her hair was in 'dreadlocks,'" and Jones answered that it was. T8-Doc.21-1 ¶ 16. Wilson then allegedly explained that Jones's job offer was conditioned on Jones changing her hairstyle, because dreadlocks "tend to get messy." T8-Doc.21-1 ¶ 16 (internal quotation marks omitted). Wilson allegedly told Jones that CMS had previously applied the same condition to a male applicant. T8-Doc.21-1 ¶ 16. When Jones declined to remove her dreadlocks, Wilson asked her to return the employment paperwork. T8-Doc.21-1 ¶ 16.

The EEOC's original complaint alleged that CMS's interpretation of its race-neutral grooming policy to prohibit Jones from wearing dreadlocks "constitutes an employment practice that discriminates on the basis of race, black," and that these "unlawful employment practices" "were done with malice or reckless indifference to [Jones's] federally protected rights." T9-Doc.1 ¶¶ 11, 13-14. The EEOC sought injunctive relief, as well as back pay and punitive damages. T9-Doc.1, at 3-4.

CMS moved to dismiss the EEOC's complaint, and the district court granted the motion on March 27, 2014. T6-Doc.19, at 10. The district court concluded that the complaint did not support a plausible claim of intentional, race-based discrimination because "[i]t has long been settled that employers' grooming policies

are outside the purview of Title VII." T6-Doc.19, at 5. "A hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic" that is not protected by Title VII. T6-Doc.19, at 8.

The district court rejected the EEOC's argument that prior courts' "construct of race is far too narrow," and should in fact "encompass both physical and cultural characteristics, even when those cultural characteristics are not unique to a particular group." T6-Doc.19, at 8. "[C]ulture and race are two distinct concepts" in the law, the court explained, and the EEOC's proposed rule "could lead to absurd results," such as disparate treatment if an employer were forced to permit a Black employee to wear dreadlocks, but not a White employee in the same position. T6-Doc.19, at 8.

The district court also concluded that the EEOC's suggestion that employer grooming policies generally invite discriminatory conduct did nothing to state a claim "that *this* employer" violated Title VII. T6-Doc.19, at 9. Finally, the district court reasoned that expert testimony would not salvage the EEOC's claims because such testimony could not establish that Blacks are "the *exclusive* wearers of dreadlocks," and because the proposed testimony could at most show only that dreadlocks are "a reasonable and natural method of managing" Black hair, not that the hairstyle is an "inevitable and immutable" trait. T6-Doc.19, at 9-10 (internal quotation marks omitted).

The EEOC moved for "leave to amend [its] complaint" on April 17, 2014, T7-Doc.21, at 1, and filed a proposed First Amended Complaint, T8-Doc.21-1. The proposed amendment included additional facts regarding Jones's conditional job offer and her decision not to accept the position because of CMS's grooming policy. T8-Doc.21-1 ¶¶ 9-16. It did not, however, advance a new theory of relief, but instead doubled down on the Commission's claim that Title VII requires employers to permit Black employees to wear dreadlocks.

The EEOC alleged that dreadlocks are "suitable for Black hair texture" because they are "formed in a Black person's hair naturally, without any manipulation, or by the manual manipulation of hair into larger coils of hair." T8-Doc.21-1 ¶ 19. The EEOC asserted—with no citation—that the term "dreadlock" had its origins "during the slave trade in the early history of the United States," when "some slave traders referred to the slaves' hair as 'dreadful,'" because of "the locks that had formed during the slaves' long trips across the ocean" that "became matted with blood, feces, urine, sweat, tears, and dirt." T8-Doc.21-1 ¶ 20.[1]

In response to the district court's conclusion that Title VII's prohibition against race discrimination extends only to immutable characteristics like skin color, the EEOC alleged that "[r]ace is a social construct and has no biological defini-

[1] The EEOC's language bears substantial resemblance to language in a blog post that likewise contains no attribution. *See* http://racismschool.tumblr.com/post/40062198140/story-time-dreadlocks-and-cultural-appropriation.

tion." T8-Doc.21-1 ¶ 21. The EEOC also conceded that "some non-Blacks have a hair texture that would allow the hair to lock." T8-Doc.21-1 ¶ 29.

The district court denied the EEOC's motion for leave to amend because amendment would be futile. T4-Doc.27. The proposed amended complaint, the court reasoned, "offers nothing new," but rather "sets out in detail the factual and legal assertions" from the original complaint. T4-Doc.27, at 2.

III. Statement of the Standard or Scope of Review

This Court reviews *de novo* a district court's order granting a motion to dismiss. *Ironworkers Local Union 68 v. AstraZeneca Pharm., LP*, 634 F.3d 1352, 1359 (11th Cir. 2011).

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570, 127 S. Ct. 1955, 1974 (2007)); *see also AFL-CIO v. City of Miami*, 637 F.3d 1178, 1186 (11th Cir. 2011). Factual allegations in a complaint must be "enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965, and must go beyond permitting an inference of "the mere possibility of misconduct." *Iqbal*, 556 U.S. at 678-79, 129 S. Ct. at 1950. Rather, a complaint must sufficiently allege "all the material elements necessary to sustain

a recovery *under some viable legal theory*." *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001) (emphasis added) (internal quotation marks omitted).

Although denial of leave to amend a complaint is generally reviewed for abuse of discretion, "when the district court denies the plaintiff leave to amend due to futility, we review the denial *de novo* because it is concluding that as a matter of law an amended complaint would necessarily fail." *Fla. Evergreen Foliage v. E.I. DePont De Nemours & Co.*, 470 F.3d 1036, 1040 (11th Cir. 2006) (per curiam) (quoting *Freeman v. First Union Nat'l*, 329 F.3d 1231, 1234 (11th Cir. 2003) (per curiam)) (internal quotation mark omitted).

SUMMARY OF ARGUMENT

The district court properly dismissed the EEOC's complaint, and denied leave to amend, because the allegations in both the original and the amended complaint failed to state a plausible claim under Title VII.

I. The EEOC's theory of this case is that CMS's application of a neutral grooming policy to prohibit a successful job applicant from wearing dreadlocks to work constitutes intentional race discrimination under Title VII. But by definition, an employer's adoption and application of a race-neutral policy cannot constitute discrimination "*because of* [an] individual's race." 42 U.S.C. § 2000e-2 (emphasis added); *see also Raytheon Co. v. Hernandez*, 540 U.S. 44, 55, 124 S. Ct. 513, 520

(2003). The EEOC has made no plausible allegations that CMS acted out of racial animus in applying its policy or that it applied the policy differently to different racial groups. To the contrary, CMS offered the complainant a job, and only later informed her of its workplace grooming policy, which she then refused to observe. Under this Court's controlling precedent, evenhanded application of a facially neutral grooming policy is not disparate treatment. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998). While the EEOC attempts to recast CMS's policy as one that "target[s] dreadlocks," EEOC Br. 12, it elsewhere concedes that is not how the policy is written, T8-Doc.21-1 ¶ 30. And any argument that CMS's policy is unlawful merely because it disproportionately affects Black applicants fails because the EEOC never alleged a disparate impact claim.

II. Because the EEOC cannot prevail under a conventional Title VII analysis, the agency resorts to novel theories that are flawed in principle and unworkable in practice, and would lead to some of the very harms that Title VII was enacted to prevent. Specifically, the EEOC claims that Title VII should protect the right of a Black employee to wear dreadlocks because the hairstyle is the "natural outgrowth" of Black hair, is "associated with" the Black race and culture, or allegedly is worn by some Black people as a symbol of racial pride. These theories conflict with the case law, with one another, and with a recent administrative decision by the EEOC. They also would embark employers on a course of speculation

about race and culture that would be governed by no clear, administrable standard and that would require the sort of stereotyping that Title VII means to end. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51, 109 S. Ct. 1775, 1791 (1989) (plurality opinion). This Court, like the courts before it, should reject the claim the Commission presents here.

ARGUMENT

I. Neither The Original Complaint Nor The Amended Complaint States A Plausible Claim Of Intentional Race Discrimination.

A. The EEOC Cannot State A Claim for Disparate-Treatment Discrimination Based On Application Of A Race-Neutral Employment Practice.

Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. This provision accordingly restricts employers' business decisions only where they discriminate on one of five enumerated grounds—religion, race, national origin, color, and sex.

The EEOC has brought a disparate treatment case, one of two recognized methods of proving discrimination under Title VII. *See Ricci v. DeStafano*, 557 U.S. 557, 577, 129 S. Ct. 2658, 2672 (2009) ("disparate treatment" claims allege "intentional discrimination," while "disparate impact" claims challenge "practices that are not intended to discriminate but in fact have a disproportionately adverse

effect on minorities" (internal quotation marks omitted)). Specifically, the EEOC alleges that CMS's application of its grooming policy "has worked to deprive Chastity C. Jones of equal employment opportunities and to otherwise adversely affect her status as an employee because of her race (Black)," and that "[t]he unlawful employment practices complained of above were intentional." T8-Doc.21-1 ¶¶ 31-32; *see also* EEOC Br. 3 (complaint states a "claim of intentional race discrimination"), 12, 14, 15.

The EEOC's claim stumbles at the starting gate, however, because it alleges no disparate treatment because of race. The Commission concedes that CMS's grooming policy is "race-neutral," T8-Doc.21-1 ¶ 30, and it is well established that "apply[ing] a neutral, generally applicable" policy "can, in no way, be said to have been motivated by" a protected classification so as to constitute illegal disparate treatment. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 55, 124 S. Ct. 513, 520 (2003). Likewise, there is no allegation that CMS applied its grooming policy differently based on applicants' race by, for example, permitting White employees to wear dreadlocks. Nor does the complaint allege that CMS allowed a White employee to sport some other hairstyle that is "excessive" or that otherwise fails to "reflect a business/professional image."[2]

[2] For this reason, the EEOC errs in relying on cases holding that grooming policies can violate Title VII when applied against members of only one race. *See Hollins v. Atl. Co.*, 188 F.3d 652, 660-61 (6th Cir. 1999) (cited at EEOC Br. 19)

More fundamentally, by alleging that CMS *offered Jones a job*, the complaint makes entirely clear that Jones's race was no obstacle to her being hired by CMS. T8-Doc.21-1 ¶ 14. (Moreover, racial animus by Human Resources Manager Wilson is not alleged.) Jones's decision to walk away from the job because she declined to change her hairstyle does not establish discrimination by CMS "because of" race.

The EEOC thus has not brought an intentional discrimination claim at all; instead, it seeks to force CMS to accommodate a hairstyle that allegedly is "associated with" a race. But Title VII does not impose a duty to make "race-based" accommodations. Its anti-discrimination mandate concerns "disparities in the treatment of workers" only; "it does not confer substantive privileges." *Garcia v. Spun Steak Co*., 998 F.2d 1480, 1487 (9th Cir. 1993).

In this regard, Title VII's treatment of religion is telling, and is dispositive of the Commission's attempt to impose an accommodation requirement for race. The Act defines religion broadly to include "all aspects of religious observance *and*

(race discrimination claim survived summary judgment in light of evidence that Black employee was disciplined under unwritten policy against "eye catching" hairstyles, whereas five White women were permitted to wear the same style). Similarly, it is irrelevant that employers "cannot legally use grooming regulations as a pretext for refusal to hire Black applicants," EEOC Br. 19 (quoting *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 470 (N.D. Cal. 1978)) (internal quotation mark omitted), because the EEOC nowhere alleges that CMS used its grooming policy as a pretext for race discrimination.

practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice." 42 U.S.C. § 2000e(j) (emphasis added). None of the other Title VII protected characteristics—including race—require accommodation of employees' voluntary practices. This religious accommodation requirement "reinforce[es] the conclusion that Congress acted deliberately when it omitted" any accommodation requirement from the prohibition on race discrimination in the same section of the statute. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013); *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256, 111 S. Ct. 1227, 1234 (1991) (Congress's failure to amend similar provision of Title VII when amending other discrimination statute weighs against conclusion that Congress intended amendment to apply to Title VII as well).

The EEOC ultimately acknowledges that its case does not fit the disparate treatment framework, faulting the district court, for example, for "fail[ing] to acknowledge the critical disadvantage at which the dreadlock ban places Black applicants" generally. EEOC Br. 18. That criticism sounds in disparate impact—but the Commission did not bring a disparate impact case. It asserts "intentional" discrimination, *supra* at pp. 14-15, and the complaints nowhere allege that CMS's facially neutral grooming policy disproportionately disqualified Black applicants; indeed, Jones is the only Black applicant mentioned. Nor do the complaints allege

that CMS's policy was not job-related, as also required for a disparate impact claim. *Welborn v. Reynolds Metals Co.*, 810 F.2d 1026, 1028 n.2 (11th Cir. 1987) (per curiam). Thus, a disparate impact claim is not presented, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555, 127 S. Ct. 1955, 1964-65 (2007), and any argument suggesting that CMS's policy may "fall more harshly on one group than another," has no relevance. *Raytheon*, 540 U.S. at 52, 124 S. Ct. at 519; *see also Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712-13 (2d Cir. 1998) (dismissing disparate impact claim appropriate where complaint did "not adequately allege a causal connection between any facially neutral policy . . . and the resultant proportion of minority employees," and when statistics in the complaint "shed no light on whether there is a disparity between the number of minorities in the higher positions at Coach and in the retail industry's higher positions").[3]

For these elementary reasons, the EEOC's case fails. Applying a "race neutral policy" is not race discrimination, absent evidence that the policy was applied in an inconsistent, discriminatory manner. There are no such allegations here.

B. Courts Have Uniformly Upheld Employers' Neutral Grooming Policies Against Challenges Under Title VII.

Applying the principles set forth above, courts have routinely concluded that

[3] The Court should accordingly disregard the EEOC's attempts to smuggle disparate impact case law into this disparate treatment case. *See*, *e.g.*, EEOC Br. 29 n.3 (citing *Carswell v. Peachford Hosp.*, 1981 WL 224, at *2 (N.D. Ga. May 26, 1981)).

neutral grooming polices do not violate Title VII, but instead embody an employer's legitimate, non-discriminatory judgment about how to run a business.

These prior decisions include binding precedents of this Court, which has upheld neutral grooming policies because distinguishing among employees based on grounds "such as grooming codes or length of hair" "is related more closely to the employer's choice of how to run his business than to equality of employment opportunity," and thus does not constitute illegal discrimination. *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975);[4] *see also*, *e.g.*, *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998) (affirming dismissal of disparate treatment claim because "long-standing binding precedent" makes clear that a grooming policy setting different hair-length standards for male and female employees "was not discriminatory"); *Smith v. Delta Air Lines, Inc.*, 486 F.2d 512, 514 (5th Cir. 1973) ("trial court had ample evidence before it to determine, as it did, that the grooming requirements [dictating facial hair] were not invalid and that they were not racially motivated"). This Court should affirm on this basis alone.

The EEOC seeks to escape this precedent by arguing that CMS's grooming policy is different because it discriminates on the basis of a racial characteristic.

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), this Court adopted as precedential Fifth Circuit decisions made before October 1, 1981.

To reach this strained conclusion, the EEOC argues that race "is a social construct and has no biological definition," and urges this Court to find that Title VII's reference to "race" includes not only unchangeable characteristics such as skin color, but also "a manner of wearing . . . hair that is physiologically and culturally associated with people of African descent." T8-Doc.21-1, ¶¶ 21, 28. But there is no basis in Title VII or the cases interpreting it for such an expansive definition of "race."

To the contrary, every court to consider whether it is intentional race discrimination for an employer to restrict specific hairstyles—even hairstyles commonly associated with one race—has squarely held that it is not.[5] Even a grooming policy that "*explicitly discriminated* against locked hair"—in other words, a specific "no dreadlocks" policy, which CMS does not have—would not violate Title VII because "it is beyond cavil that Title VII does not prohibit discrimination on the

[5] *See*, *e.g.*, *Cooper v. Am. Airlines, Inc.*, 1998 WL 276235, at *1 (4th Cir. May 26, 1998) (affirming dismissal based on a grooming policy requiring that braided hairstyles be secured to the head or at the nape of the neck); *McBride v. Lawstaf, Inc.*, 1996 WL 755779, at *2 (N.D. Ga. Sept. 19, 1996) (adopting magistrate's dismissal recommendation because plaintiff could not reasonably have believed that employer's policy against braided hair was racially discriminatory); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232-33 (S.D.N.Y. 1981) (holding that braided hairstyles are an "artifice" that are "easily changed," and employer's prohibition of cornrow hair style did not violate Title VII (internal quotation marks omitted)); *Wofford*, 78 F.R.D. at 469 ("Where easily changed physical characteristics are made the basis for an individual's racial identity, it is simply not the law that an asserted racial or cultural identity cannot legally be the basis for denial of employment.") (internal quotation marks omitted).

basis of locked hair." *Eatman v. UPS*, 194 F. Supp. 2d 256, 262 (S.D.N.Y. 2002) (emphasis added); *see also Booth v. Maryland*, 327 F.3d 377, 383 (4th Cir. 2003) (affirming summary judgment for employer in Section 1981 race case where employee wore dreadlocks in violation of employer's neutral grooming policy, despite allegations—absent here—that White employees were permitted to wear hair of similar length).

Courts have rejected attempts to correlate race and cultural or lifestyle choices in other contexts under Title VII as well. For example, Title VII permits employers to limit the languages spoken in the workplace, even though an employee's native language is closely bound up with her national origin and she may have a strong cultural connection with her native tongue. *See Garcia v. Gloor*, 618 F.2d 264, 268-69 (5th Cir. 1980); *see also Spun Steak Co*., 998 F.2d at 1487.

Even the EEOC's own case law illustrates that hairstyles are not protected under Title VII. The EEOC cites *Pitts v. Wild Adventures, Inc.*, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008) to show that "a grooming policy can be challenged under Title VII if 'it . . . discriminate[s] on the basis of immutable characteristics," EEOC Br. 18-19, but the Commission ignores the very next sentence in the court's analysis: "Dreadlocks . . . are not immutable characteristics, and an employer policy prohibiting these hairstyles does not implicate a fundamental right." *Pitts*, 2008 WL 1899306, at *6. The court granted summary judgment to

the defendant. *Id.*

Likewise, cases suggesting that hairstyle or other choices relating to personal appearance may implicate constitutional due process or the First Amendment, *see* EEOC Br. 19-20, have no bearing on the obligations of a private employer under Title VII. *See Willis v. Univ. Health Servs., Inc.*, 993 F.2d 837, 840 (11th Cir. 1993) (constitutional restrictions inapplicable absent state action).

The EEOC cites no case holding that hairstyle is a protected trait under Title VII, and for good reason: No such cases exist. And the EEOC ultimately concedes, as it must, that there is no inescapable connection between dreadlocks and race. Although the EEOC argues that dreadlocks are "suitable to" Black hair texture and are purportedly "associated" with Black individuals, T8-Doc.21-1 ¶¶ 28, 30, it still acknowledges that wearing dreadlocks reflects a *choice* about how an individual manages or styles hair. *See*, *e.g.*, T8-Doc.21-1 ¶¶ 19 ("[d]readlocks is a manner of wearing hair" and the coils can be "styled in different manners, and maintained in different lengths"), 24 ("[t]he method and manner used by Black people to wear, style and groom their natural hair" differs from White individuals' styling practices), 26 ("dreadlocks are a method of hair styling suitable for the texture of black hair"). And, of course, the EEOC concedes on the face of the complaint that not all people who wear dreadlocks are Black. T8-Doc.21-1 ¶ 29.

For all these reasons, the district court correctly dismissed the EEOC's com-

plaint and denied its motion to amend because the EEOC is seeking accommodations for lifestyle choices regarding how to style one's hair, rather than discrimination based on an immutable characteristic unavoidably tied to a protected class.

II. The EEOC's Novel And Expansive Theories Of Race Discrimination Are Flawed In Principle, Would Prove Unworkable In Practice, And Would Exacerbate The Problems Title VII Was Intended To Redress.

Unable to make a case of disparate-treatment discrimination under Title VII's text or settled case law, the EEOC advances four novel theories of race discrimination: (1) Dreadlocks are protected under Title VII as a "natural outgrowth" of Black hair texture; (2) dreadlocks are directly "associated with" the Black race; (3) "targeting" dreadlocks is a form of racial stereotyping; and (4) dreadlocks can be a symbolic expression of racial pride.

The district court properly concluded that none of these theories, "[a]lone or collectively," EEOC Br. 22, can transform CMS's application of a neutral grooming policy into intentional discrimination. Indeed, as shown below, these obviously flawed theories collapse in self-contradiction: A "grooming preference . . . appropriated as a cultural symbol by members of a particular race," *id.* at 36, is not, then, merely the "natural outgrowth" of race, *id.* at 12. And it is the EEOC, not defendant, that champions "stereotyping," by urging that companies base employment decisions on whether a practice is "associated with" a particular race.

A. Title VII Does Not Require Adapting Neutral Policies to Accommodate Expressions of Racial Pride.

The Court may quickly dispense with the EEOC's argument that Ms. Jones's dreadlocks were a protected "symbol of racial pride." EEOC Br. 35-39 (capitalization altered). Neither complaint alleges that this is the reason Jones wore dreadlocks. Nor does either complaint allege that CMS was on *notice* that this was the reason for the dreadlocks. Compare the EEOC's guidance regarding religious accommodation under Title VII, which explains that an employer can terminate an employee wearing a beard in violation of a facially neutral grooming policy if the employee *did not tell* the employer that the beard was worn for religious reasons. U.S. Equal Emp't Opportunity Comm'n, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, at Q7, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm. Employees' supposed right to accommodations of displays of racial pride—which is nowhere mentioned in Title VII—cannot be greater than the right to religious accommodation, which is explicitly set forth in the Act. Indeed, holding CMS liable without notice under such a vague and amorphous standard would violate a "basic principle of due process," under which a law's prohibitions must be "clearly defined" to avoid the "dangers of arbitrary and discriminatory applications." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972).

In truth, Title VII does not protect expression or conduct related to racial

identity, and does not require employers to accommodate such voluntary expression. "It is axiomatic that an employee must often sacrifice individual self-expression during working hours. Just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII which requires an employer to allow employees to express their cultural identity." *Spun Steak Co.*, 998 F.2d at 1487; *see also id.* ("Title VII . . . does not protect the ability of workers to express their cultural heritage at the workplace").

Any other rule would sow confusion and, quite possibly, racial acrimony in the workplace. Would an employer be required, for instance, to relax restrictions on tattoos for an applicant who came to a job interview with a henna design on her arm on the basis that it might reflect the applicant's pride in her South Asian heritage? Would an Irish employee have a right to wear bright-green sequined shamrocks on St. Patrick's Day, his employer's neutral uniform requirement notwithstanding? And would Title VII protect invidious expressions of misplaced racial "pride" in the workplace, such as a Klan insignia worn by a White supremacist? An employer trying to parse these issues would be tempted to ask applicants to self-identify their race, national origin, or other protected characteristics—a line of questioning that the EEOC's regulatory guidance expressly prohibits. *See* U.S. Equal Emp't Opportunity Comm'n, *Pre-Employment Inquires and Race*, http://www.eeoc.gov/laws/practices/inquiries_race.cfm ("employers should not re-

quest information that discloses or tends to disclose an applicant's race unless it has a legitimate business need for such information").[6]

The EEOC's "symbol of racial pride" argument is meritless, but does serve one purpose: By suggesting that "Jones chose to wear dreadlocks as a reflection of her pride in her race," and that dreadlocks can be a "grooming preference," "wor[n] . . . as an appropriate expression" of one's heritage," EEOC Br. 37, 36 (internal quotation marks omitted), the EEOC makes clear that Jones's dreadlocks were not simply the "natural outgrowth" of her race. They were, in the EEOC's words, a "grooming preference" that Jones "chose." *Id*. at 36-37.

B. There Is No Title VII Right To Wear Hair In Its "Natural Outgrowth."

The EEOC argues that dreadlocks should be mandatorily exempted from employer policies concerning hairstyle because dreadlocks can be the natural outgrowth of the texture of Black hair. EEOC Br. 22-24; *see also* T8-Doc.21-1 ¶ 19

[6] Most of the support the EEOC musters for its racial pride theory, EEOC Br. 35-37, is drawn from areas of the law unrelated to Title VII race discrimination. *See*, *e.g.*, *Braxton v. Bd. of Pub. Instruction of Duval Cnty.*, 303 F. Supp. 958 (M.D. Fla. 1969) (Fourteenth Amendment, not Title VII, prohibited government employer from restricting teacher from wearing goatee). And the EEOC paints the holdings of the few Title VII cases it cites more broadly than the cases themselves allow. *See Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 749, 101 S. Ct. 1437, 1449 (1981) (Title VII enshrines "fundamental right" to be free from race discrimination as defined in the statute, not "fundamental right . . . not to be denied employment based on a factor that is inextricably linked to race," EEOC Br. 36); *Willingham*, 507 F.2d at 1091 (distinguishing permissible grooming restrictions from distinctions based on "fundamental rights" inherent in sex).

(dreadlocks are "suitable for Black hair texture" because they are "formed in a Black person's hair naturally, without any manipulation, or by the manual manipulation of hair into larger coils of hair").

This argument fails, as an initial matter, because it is contradicted elsewhere in the Commission's brief, as just shown. Dreadlocks are not simply the "natural outgrowth" of being Black—Jones had dreadlocks because she "chose" to "wear" her hair that way, EEOC Br. 12, 37, whether as an expression of racial pride or for some other reason.

In any event, Title VII does not confer a right to wear one's hair however it may naturally grow. Dreadlocks may be "the natural result of letting one's hair grow wild," *Reed v. Faulkner*, 842 F.2d 960, 962 (7th Cir. 1988), but so are the trademark shaggy hair, bushy beard, and full mustache of *Duck Dynasty*'s Phil Robertson. The fact that some White people's hair grows "straight," T8-Doc.21-1 ¶ 22, no more entitles them to show up to work with hair flowing to their knees than it entitles Ms. Jones to sport dreadlocks. And the EEOC has not and cannot allege that CMS hires White applicants coiffed like Mr. Robertson without requiring them, also, to adopt a less "excessive" and more "professional and business-like" hairstyle, T8-Doc.21-1 ¶ 17 (internal quotation marks omitted).

In short, appearing for work as "comes naturally" is not a statutory right, and if employers were required to accommodate how people look when they "'do not

cut their hair,'" EEOC Br. 22 (citation omitted), scores of employers would be hard pressed to justify the grooming policies that routinely have been upheld by this Court and others. *See*, *e.g.*, *Harper*, 139 F.3d at 1389; *Willingham*, 507 F.2d at 1091; *Smith*, 486 F.2d at 514. The EEOC cites two cases to suggest that prohibiting the Afro hairstyle "may constitute race discrimination in violation of Title VII" because it is the result of natural Black hair growth. EEOC Br. 23 (citing *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981); *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164 (7th Cir. 1976)). But even assuming that a neutral grooming policy could be interpreted to restrict an Afro, the only court to consider this issue (*Rogers*) held that braided hairstyles are different—because those styles are not the direct result of the "immutable characteristic[]" of Black hair texture. 527 F. Supp. at 232. And *Jenkins* is inapposite because the employer's reference to an employee's Afro hairstyle when denying him a promotion "was merely the method by which the plaintiff's supervisor allegedly *expressed* the employer's racial discrimination." 538 F.2d at 168 (emphasis added). *Jenkins*, in other words, was about an employer that denied a job because of race, not an employer that *offered a job* to a Black applicant and merely sought adherence to a facially neutral grooming policy.

Apart from its total lack of legal support, the EEOC's "natural outgrowth" theory would require employers to engage in armchair racial and biological specu-

lation about whether a particular hairstyle is "natural" or instead is the product of the applicant's own voluntary decision-making. This is wrong, and the EEOC's own statements illustrate the practical difficulties: The EEOC takes it as a "given" that dreadlocks are protected on the same basis as Afros because they "are an outgrowth of natural hair texture." EEOC Br. 24. But in its amended complaint, the EEOC states that dreadlocks *do not always* form naturally, but sometimes are shaped "by the manual manipulation of hair into larger coils of hair." T8.Doc.21-1 ¶ 19.

C. Title VII Does Not Protect The Right To Wear A Hairstyle "Associated With" A Particular Racial Or Ethnic Group.

Next, the EEOC argues that even if dreadlocks are not protected as the natural outgrowth of hair texture, it is enough that dreadlocks are "directly associated" with Black individuals. EEOC Br. 25 (capitalization altered). This "associational" gloss on Title VII's definition of "race" also has no basis in law.

Unable to find support in the case law, the EEOC turns to its Compliance Manual and two of its own internal decisions. These authorities are not entitled to *Chevron* deference, and cannot unilaterally expand the scope of Title VII. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662-63 (2000); *Arabian Am. Oil Co.*, 499 U.S. at 257, 111 S. Ct. at 1235. But even if these authorities were relevant, they do not support a rule that Title VII protects lifestyle decisions that are perceived to be associated with a particular race. The

EEOC's Compliance Manual addresses employees' decisions to wear their hair in a natural Afro style only, not dreadlocks or other styles that may be associated with a particular race. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 15.VII.B.5 (cited at EEOC Br. 25-26), *available at* http://www.eeoc.gov/policy/docs/race-color.html#N_154_. And the EEOC's effort to cherry-pick statements from two cases decided decades earlier ignores the agency's most recent pronouncement—which decisively rejected the approach the EEOC now advances.[7]

In that 2008 decision, the EEOC adopted reasoning almost identical to the district court's by affirming dismissal of a race discrimination claim where a Transportation Security Association ("TSA") grooming policy was interpreted to prohibit men from wearing "ethnic hair styles such as braids, twists, plaits, cornrows and dread locks." *Thomas v. Chertoff*, Appeal No. 0120083515, 2008 WL 4773208, at *1 (E.E.O.C. Oct. 24, 2008). The EEOC recognized that "courts have

[7] Even these earlier decisions do not support the EEOC's position. One of them merely states that grooming policies must account for hair texture. *See* EEOC Dec. 71-2444, 1971 WL 3898, at *1, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971) (applying a standard that hair "should not extend in line of sight beyond the ears" ignores "racially different physiological and cultural characteristics . . . because [Black individuals] have a texture of hair different from Caucasians"). And the other states that grooming standards prohibiting styles "substantially more prevalent" among Black individuals might have a "disproportionate impact" upon Black employees; it does not find that applying a facially neutral grooming policy is intentional race discrimination, and the EEOC has not alleged disparate impact here. *See* EEOC Dec. No. 72-979, 1972 WL 3999, at *1, 4 Fair Empl. Prac. Cas. (BNA) 840 (1972).

held that grooming policies are typically outside the scope of federal employment discrimination statutes because they do not discriminate on the basis of immutable characteristics"—and that this rule applies even "to prohibitions against 'ethnic' hairstyles *generally associated with a particular race*." *Id.* (emphasis added). The TSA continues to enforce a version of its policy that is functionally identical to the CMS policy at issue here. *See* TRANSP. SEC. ASS'N OFFICE OF HUMAN CAPITAL, TSA MD 1100.73-2 HANDBOOK: TSO Dress and Appearance Responsibilities § E(4)(a), *available at* http://www.afge.org/?documentID=3130 (hairstyles are "judged by a reasonable person standard" and must "present a neat, clean, professional appearance," and "[h]air shall be kept clean and the style shall not present a ragged, unkempt or extreme appearance").

Ignoring this federal policy and its own past precedent, the EEOC urges the Court to defer to its new, contrary "interpretation" of Title VII—even though an agency is obligated to provide a reasoned justification for a change in position, *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 57, 103 S. Ct. 2856, 2874 (1983), which the EEOC did not do, and agency positions advanced for the first time in litigation are due no deference, *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213, 109 S. Ct. 468, 474 (1988).

Even if there were support for the EEOC's claim that cultural or lifestyle decisions "associated with" race are protected under Title VII, the allegations in the

EEOC's original and proposed amended complaint would still fall short.

The EEOC has admitted, as it must, that Black individuals are not the sole wearers of dreadlocks, and that people of other races have hair textures that permit locking hairstyles. *See* T8-Doc.21-1 ¶ 29 ("some non-Blacks have a hair texture that would allow the hair to lock"); *see also Eatman*, 194 F. Supp. 2d at 262 ("According to Eatman's own expert, African-Americans are not the only persons who lock their hair . . . ."). Further, the EEOC has not alleged that the predominant hairstyle among Blacks is dreadlocks, or even that a predominant number of the people who wear dreadlocks are Black. Assuredly, if pressed, the EEOC would have to concede that only a small number of Black people (or people of any race) wear their hair in dreadlocks, and thus there is no necessary correlation between dreadlocks and race.

The EEOC's own case law makes clear that dreadlocks are, "like any other hairstyle, a matter of choice and style," and says that dreadlocks are "commonly associated with African-American, Rastafarian, and Jamaican *culture*." *Millin v. McClier Corp.*, 2005 WL 351100, at *5 (S.D.N.Y. Feb. 14, 2005) (emphasis added) (cited at EEOC Br. 29). A hairstyle associated with a particular "culture," religion, and place can scarcely be said to be "predominantly" linked to race. Similarly, the EEOC relies on a district court case that *rejected* the argument that prohibiting an "easily changed" hairstyle—in that case, an all-braided style—was imper-

missible under Title VII, "even if [the hairstyle is] socioculturally associated with a particular race or nationality." *Rogers*, 527 F. Supp. at 232 (internal quotation marks omitted).

Finally, the EEOC's "predominance" test would lead to absurd results that are squarely at odds with Title VII. Once a hairstyle was deemed "predominantly associated" with a particular race, only members of *that race* would henceforth be protected from "discrimination" for that hairstyle. The result would be that employees of one race (here, Blacks) would enjoy substantive privileges that are denied to employees of other races. Title VII would thus be interpreted to mandate the very disparate treatment and race-based dispensation of employment benefits that it was enacted to prevent.[8]

D. The EEOC's Position, Not Defendant's, Would Further Racial Stereotyping.

The EEOC argues that a comment Jeannie Wilson, CMS's Human Resources Manager, allegedly made to applicant Chastity Jones is sufficient to establish race discrimination. EEOC Br. 31-34. The EEOC alleges that Wilson told Jones that dreadlocks "tend to get messy," and that this statement was "race-based" because it evinced "stereotyped notions of how Black people should and should

[8] Admittedly, the EEOC casts some doubt on that conclusion by its assertion that race is merely a "social construct," with no "biological definition." T8-Doc.21-1 ¶ 21. Although the meaning of this statement is not pellucid, it suggests that a White person may actually be statutorily entitled to wear dreadlocks—if, and only if, she identifies as Black.

not wear their hair and is premised on a normative standard and preference for White hair." T8-Doc.21-1 ¶¶ 16, 30 (internal quotation marks omitted).

In truth the statement reflects a "notion" about dreadlocks, not race. That "notion" is consistent with the policy of a company that does not permit Blacks or Whites to wear dreadlocks or any number of other "excessive" hairstyles that may become "messy." Indeed, the view the EEOC attributes to Wilson is consistent with the EEOC's own portrayal of dreadlocks as a hairstyle in which hair is left uncut and ungroomed (EEOC Br. 22, 32); it is hardly a race-based judgment to believe that ungroomed hair in its "natural" state (*id.* at 33) can "get messy." The EEOC's reference to Wilson's alleged statement therefore adds nothing to its case because it continues to reflect the Commission's mistaken insistence that views about hairstyle are indistinguishable from views about race. There is nothing in the EEOC's original or proposed amended complaint to support a plausible inference that Wilson's comment was motivated by race, rather than hairstyle. On the contrary, the EEOC alleges that Wilson offered Jones a position in person, when Wilson could readily discern Jones's race, but then explained later that same day that the offer was conditioned on compliance with the same grooming standards CMS applied to every other applicant, regardless of race. T8-Doc.21-1 ¶¶ 11-16. And even assuming that the EEOC were alleging pretext in this case, which it is not, there can be no plausible inference of pretext when the same decision-maker

acts favorably toward an applicant or employee so close in time to the alleged discrimination. *See Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1442-43 (11th Cir. 1998) (collecting cases).

Courts have consistently declined to divine evidence of discriminatory animus from comments about dreadlocks or other hairstyles that may be associated with a particular race absent "objective evidence that the speaker perceived the plaintiff's locked hair as related to his race." *Eatman,* 194 F. Supp. 2d at 265; *see also EEOC v. United Va. Bank/Seaboard Nat'l*, 615 F.2d 147, 155 (4th Cir. 1980) ("we cannot see that comments concerning unusual hair styles indicate racial discrimination"); *Hines v. Hillside Children's Ctr.*, 73 F. Supp. 2d 308, 317 (W.D.N.Y. 1999) (alleged statement that wearing hair "in dreadlocks did not set a proper example for the children cannot reasonably be interpreted as evidence of racial animus . . . [because] there is no evidence that [speaker] perceived [plaintiff's] dreadlocks as related to his race"). Without any allegation linking Wilson's alleged comment to her view of Jones's race, the single comment does not raise the possibility of intentional race-based discrimination above a speculative level. *Eatman,* 194 F. Supp. 2d at 265; *see also Twombly*, 550 U.S. at 555, 127 S. Ct. at

1965-66.[9]

Ultimately, it is the approach the EEOC advocates, not CMS's facially neutral policy, that would promote racial stereotyping, by requiring employers, judges, and juries to speculate about whether various habits, proclivities, or manners of dressing or grooming are related to race. Yet, the very precedents on which the Commission rely hold that employer decisions should not be based on preconceptions about the standards of dress and grooming associated with a Title VII-protected status. *See* EEOC Br. 20-21 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51, 109 S. Ct. 1775, 1971 (1989) (plurality opinion) (gender stereotyping); *Jepersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc) (same)).

* * *

CMS offered the complainant a job and merely required that she adhere to what the EEOC calls a "race-neutral" grooming policy. That is not intentional race discrimination, no facts are alleged regarding any disparate impact, and Title VII

[9] At minimum, the district court was correct to conclude that dismissal was appropriate because the facts alleged easily—indeed, properly—support the inference that Wilson was expressing an opinion about a particular hairstyle, rather than a particular race. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (discrimination complaint insufficient where it "pleads facts that are 'merely consistent with' a defendant's liability (citation omitted)); *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (dismissal proper where "alternative inferences . . . could be drawn from the facts," and where nondiscriminatory explanation was "at least equally compelling" as plaintiff's proposed inference).

does not require accommodating race-related "practices" as it does religious practices. The novel theories offered by the EEOC would only promote confusion in the workplace—and quite likely would increase the speculation and stereotyping about race, gender, and national origin that Title VII aims to end.

CONCLUSION

For all the foregoing reasons, this Court should affirm the decision of the district court.

DATE: January 9, 2015

Respectfully submitted,

/s/ Thomas M. Johnson, Jr.

David J. Middlebrooks
Whitney R. Brown
LEHR MIDDLEBROOKS & VREELAND, P.C.
P.O. Box 11945
Birmingham, AL 35202
(205) 326-3002

Helgi C. Walker
Eugene Scalia
Thomas M. Johnson, Jr.
Lindsay S. See
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

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Respectfully submitted,

/s/ Thomas M. Johnson, Jr.

Thomas M. Johnson, Jr.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2015, I filed the foregoing Brief of Defendant-Appellee Catastrophe Management Solutions, Inc., with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit, by using the CM/ECF electronic system.

I certify that I served counsel for Plaintiff-Appellant Equal Employment Opportunity Commission, by using the CM/ECF electronic system, and by sending a copy to Plaintiff's counsel at the following addresses:

Paula R. Bruner
Equal Employment Opportunity Commission
Office of General Counsel-Appellate Services
131 M Street, N.E., 5th Floor
Washington, DC 20057

Julie Bean
Marsha Lynn Rucker
C. Emanuel Smith
Equal Employment Opportunity Commission
1130 22nd Street, Suite 2000
Birmingham, AL 35205

DATE: January 9, 2015

Respectfully submitted,

/s/ Thomas M. Johnson, Jr.