No. 14-13482

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff/Appellant,

v.

CATASTROPHE MANAGEMENT SOLUTIONS,

Defendant/Appellee.

On Appeal from the United States District Court
for the Southern District of Alabama
No. 1:13-cv-00476-CB-M
Hon. Charles R. Butler, Jr.

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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Pursuant to Fed. R. App. P. 26.1, the Equal Employment Opportunity Commission, as a government agency, is not required to file a corporate disclosure statement.

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STATEMENT REGARDING ORAL ARGUMENT

This case alleges the employer violated Title VII when it refused to hire a qualified Black applicant because she wore dreadlocks, a natural outgrowth of Black hair texture. The appeal challenges the district court's determination that this allegation fails to state a plausible claim of intentional race discrimination necessary to survive dismissal. Resolution of this issue will impact the Equal Employment Opportunity Commission's ("EEOC" or "Commission") statutory mandate to ferret out unlawful discrimination in the workplace and to remove impediments to equal employment opportunity. The EEOC believes that oral argument will assist the Court in its consideration of this appeal.

STATEMENT OF JURISDICTION

The EEOC filed this race discrimination lawsuit pursuant to section 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5, alleging that Catastrophe Management Solutions ("CMS") violated Title VII when it withdrew its job offer from charging party Chastity Jones, a qualified Black applicant, because she refused to cut off her dreadlocks.

T9-D.1.[1] The district court's jurisdiction was based on 28 U.S.C. § 1331. On March 27, 2014, the district court dismissed the EEOC's complaint for failure to state a plausible claim of intentional race discrimination. T6-D.19. The court also issued a judgment indicating the dismissal was without prejudice. T5-D.20. On April 17, 2014, the EEOC filed a motion to amend the complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure. T7-D.21; Fed. R. Civ. P. 15(a)(2). On June 2, 2014, the district court denied the EEOC's motion. T4-D.27. The EEOC moved for entry of final judgment, D.28, and the district court denied this motion. T3-D.29. Within sixty days of the denial of the amended complaint, the EEOC filed a timely appeal on August 1, 2014. T2-D.30. Jurisdiction in this Court is based upon 28 U.S.C. § 1291.

[1] "T" refers to the Appendix tab number at which the cited document can be found. "D" refers to the district court docket entry number.

STATEMENT OF THE ISSUE

Whether the district court improperly dismissed the EEOC's original complaint and denied the EEOC's motion to file an amended complaint for failure to state a plausible claim of intentional race discrimination.

STATEMENT OF THE CASE

1. Course of Proceedings

The EEOC filed a complaint alleging that CMS discriminated against Chastity Jones based on race in violation of Title VII. T9-D.1. The district court dismissed the complaint without prejudice. T6-D.19, Dismissal Order; T5-D.20, Judgment. The EEOC moved to amend the complaint, and the district court denied the EEOC's motion to amend. T4-D.27. The EEOC filed a timely notice of appeal. T2-D.30; Fed. R. App. 4(a).

2. Statement of the Facts

Catastrophe Management Solutions is a for-profit claims support service providing customer service support to insurance companies that cover losses due to natural disasters. On May 3, 2010, Chastity Jones ("Jones"), a Black female, completed an online employment application for

the position of Customer Service Representative with CMS. The position announcement stated that CMS was seeking candidates with basic computer knowledge and professional phone skills to work in a fast-paced claims processing environment. CMS expressed a preference for prior in-bound call center experience. Jones met the minimum requirements of the job. The job did not require face-to-face public contact as the duties involved handling telephone calls in a large room alongside other Customer Service Representatives. T8-D.21-1, Proposed Amended Complaint ("PAC") at 3-4.

On or about May 12, 2010, Jones was among over 30 applicants with whom Defendant conducted in-person interviews for the Customer Service position. At the time of her interview, Jones had short dreadlocks and was dressed in a blue business suit and dark pumps. When Jones arrived for the interview, she was greeted by CMS's Human Resources Manager, Jeannie Wilson ("Wilson"). Jones had a one-on-one interview with a "trainer" who reviewed and demonstrated the requirements and tasks of the job. Other trainers and employees were in the area, and Jones was

visible to all of them. No one commented to Jones about her hair. T8-D.21-1, PAC at 4.

After her interview, Jones and other selected applicants were informed by Wilson that they were hired. Wilson told the applicants that they would have to return to complete scheduled lab tests and other post offer forms, and that if anyone had a scheduling conflict, they could meet privately with her to discuss rescheduling. Jones had a conflicting medical appointment and met with Wilson to reschedule the date for her blood work. T8-D.21-1, PAC at 4-5.

Before Jones left, Wilson suddenly asked her whether her hair was in "dreadlocks." Jones answered that it was. Wilson then told Jones that CMS would not hire her with the dreadlocks because "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about." Wilson then mentioned a male applicant who was requested to cut off his dreadlocks in order to obtain a job with CMS. Jones told Wilson that she would not cut off her hair. Wilson said she understood, but asked Jones to return her paperwork. Jones did and left the facility. T8-D.21-1, PAC at 5-

6. CMS's grooming policy states:

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

T6-Dec. 19, Dismissal Order at 2. CMS interprets this policy as prohibiting dreadlocks.

3. District Court Decisions

The EEOC filed a Title VII action, alleging that CMS engaged in intentional discrimination based on race when it withdrew Jones' job offer because she would not cut her dreadlocks. CMS moved to dismiss the EEOC's complaint, primarily arguing that dreadlocks is a mutable hairstyle not protected by Title VII and thus the complaint's factual allegations would not support a plausible claim of race discrimination. D.7, CMS Motion to Dismiss at 1.

The district court granted CMS's motion to dismiss. Specifically, the court opined that an employer's grooming policy is "outside the purview

of Title VII" and noted that "many courts" have determined that policies restricting hairstyles are nondiscriminatory. T6-D.19, Dismissal Order at 6-7. Based on those court decisions, the district court decided that the Commission's complaint failed to state a plausible claim for relief because "[a] hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic." *Id.* at 8.

The district court also rejected the EEOC's argument that race also can be defined by physical and cultural characteristics, even when those cultural characteristics are not exclusive to a particular group. T6-D.19, Dismissal Order at 8. The court opined that "to define race by non-unique cultural characteristics could lead to absurd results" and "culture and race are two distinct concepts." *Id*. The court further rejected the EEOC's view that Title VII protection should not be based on "the immutable versus mutable distinction" and it gave no consideration to the argument that failure to assess the racial effect of grooming policies has allowed employers to discriminate, reasoning that nothing in the EEOC's complaint supports a claim that "this employer applied the grooming policy in a

discriminatory manner." *Id.* at 9 (emphasis in original).

Finally, the court rejected the EEOC's contention that it should be permitted to present expert testimony that Black people are the primary wearers of dreadlocks to establish the racial impact of a dreadlock ban. The court ruled that "[s]ince Blacks are not the [exclusive] wearers of dreadlocks," that testimony would not support the claim that CMS's dreadlocks ban discriminates against Black people. T6-D.19, Dismissal Order at 9. The court also stated that expert testimony that dreadlocks are a natural method of managing Black hair would be unhelpful because "a hairstyle is not inevitable and immutable just because it is a reasonable result of hair texture[.]" *Id.* The court reiterated that "dreadlocks is a hairstyle" and "Title VII does not protect against discrimination based on traits, even a trait that has socio-cultural racial significance." *Id.* at 9-10. The court then entered judgment dismissing the case without prejudice. T5-D.20.

On April 17, 2014, twenty-one days after the judgment was entered, the EEOC sought leave to file an amended complaint pursuant to Federal

Rule T7-D.21. The district court denied the Commission's motion to amend on the ground that amendment would be futile. T4-D.27, Denial Order at 1. The court reiterated its view that "'Title VII prohibits discrimination on the basis of immutable characteristics, such as race, sex, color, or national origin' but does not afford protection based on a hairstyle, such as dreadlocks." *Id.* at 2. It concluded that the proposed amended complaint "merely sets out in detail the factual and legal assertions upon which it relied in its opposition to the motion to dismiss[, and therefore] . . . [a]mending the complaint . . . would not change the outcome." *Id.*

Thereafter, the Commission requested entry of a final judgment. D.28. The district court denied the Commission's motion, stating that it entered "Final Judgment" on March 27, 2014, and that a post-judgment motion for leave to amend the complaint cannot be granted unless the judgment is vacated pursuant to a Rule 59(e) or Rule 60(b) motion. T3-D.29, Order Denying Motion for Final Judgment at 1-2. The court observed that since the EEOC "did not seek relief under either of these rules, the

motion for leave to amend should have been denied for that reason alone." *Id.* at 2. It added that, even if the motion for leave to amend were considered a Rule 59(e) or Rule 60(b) motion, the result would be the same; the proposed amended complaint failed to state a claim, and thus a motion to vacate or for relief from judgment was properly denied. *Id.*

STANDARD OF REVIEW

On appeal, the district court's grant of a motion to dismiss under 12(b)(6) for failure to state a claim is reviewed de novo. *Freeman v. Key Largo Volunteer Fire and Rescue Dep't, Inc.*, 494 F. App'x 940, 942 (11th Cir. 2012). A district court's denial of leave to amend a complaint is generally reviewed for abuse of discretion. *Pearson v. SE Property Holdings, LLC*, 534 F. App'x 885, 887-88 (11th Cir. 2013). However, "'when the district court denies the plaintiff leave to amend due to futility, [the Eleventh Circuit] review[s] the denial de novo because it is concluding that as a matter of law an amended complaint would necessarily fail.'" *Wedemeyer v. Pneudraulics, Inc.*, 510 F. App'x 875, 876-77 (11th Cir. 2013) (internal citation omitted). *See also Cooksey v. Waters*, 435 F. App'x 881, 884 (11th Cir. 2011)

("[w]e review the denial of a motion to amend a complaint for abuse of discretion, but we review de novo the underlying legal conclusion that a particular amendment to the complaint would have been futile"). "A proposed amendment is futile if the 'complaint as amended would still be properly dismissed.'" *Coventry First, LLC v. McCarty*, 605 F.3d 865, 870 (11th Cir. 2010) (internal citation omitted).

SUMMARY OF ARGUMENT

The only reason the district court gave for dismissing the Commission's original complaint and refusing to permit the filing of an amended complaint is that the adverse action resulting from the employer's dreadlocks ban is not conduct based on race. In so doing, the district court committed reversible error.

Consistent with Rule 8 of the Federal Rules of Civil Procedure, the initial complaint set forth a short, plain statement of facts that indicated CMS's refusal to hire a qualified Black applicant because she refused to cut off her dreadlocks constituted race-based discrimination. Fed. R. Civ. P. 8(a)(1). Although such level of proof is not required to satisfy the

applicable pleading standard, these factual allegations also were sufficient to present a prima facie case of race discrimination. Accordingly, the district court should have accepted these factual allegations as true, as required at the complaint stage, and concluded that the complaint supported a plausible claim of intentional race-based discrimination.

Similarly, the amended complaint offered factual enhancements that stated a plausible claim of intentional race discrimination under several viable analytical approaches. Specifically, the amended complaint made clear that denying employment on the basis of dreadlocks constitutes race-based discrimination because (1) dreadlocks are a natural outgrowth of the immutable trait of Black hair texture, (2) the dreadlocks "hairstyle" is directly associated with the immutable trait of race, (3) targeting dreadlocks as a basis for employment can be a form of racial stereotyping, and (4) dreadlocks can be a symbolic expression of racial pride. In addition, the amended complaint provided supporting facts from which the district court should have concluded that the amended complaint essentially "contained either direct or inferential allegations respecting all

the material elements necessary to sustain a recovery under some viable legal theory." *Roe v. Aware Woman Center for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001) (emphasis added) (internal citation and quotation marks omitted). As such, the amended complaint exceeded the legal standards required to avoid dismissal and the amendment certainly was not futile.

Finally, the absence of a separate motion under Federal Rule of Civil Procedure 59(e), Fed. R. Civ. P. 59(e), in conjunction with the EEOC's Rule 15 motion to amend, does not provide an alternate basis for affirmance because the filing of a Rule 59 motion was neither procedurally appropriate nor necessary. The district court's dismissal of the Commission's complaint without prejudice was not a final order since the district court did not terminate the case or indicate that an amendment of the complaint was not possible. Instead, the Commission had the option to amend its complaint, as the EEOC attempted to do in this case. In the absence of a final judgment, a motion under Rule 59 was not warranted.

Even if the dismissal constituted a final order, this Court should treat the Commission's motion to amend as a Rule 59(e) motion since it was filed

within 28 days of the judgment and by necessary implication sought to have the judgment altered. This Court therefore should reverse the judgment of the district court and remand the case for entry of the amended complaint.

ARGUMENT

THE DISTRICT COURT IMPROPERLY DISMISSED THE EEOC'S ORIGINAL AND AMENDED COMPLAINTS BECAUSE THEY STATED A PLAUSIBLE CLAIM OF INTENTIONAL RACE DISCRIMINATION UNDER TITLE VII.

"To survive a motion to dismiss, 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 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663 (citing *Twombly*, 550 U.S. at 556). Additionally, in "[d]etermining whether a complaint states a plausible claim for relief[,] . . . the reviewing court [is] to draw on its judicial

experience and common sense." *Id.* at 679. Although "detailed factual allegations" are not required, *Twombly*, 550 U.S. at 555, factual allegations that only permit the court to infer "the mere possibility of misconduct" are insufficient. *Iqbal*, 556 U.S. at 679. The "allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Consequently, "[t]hreadbare recitals of the elements of a cause of action," "mere conclusory statements," and "'naked assertion[s]' devoid of 'further factual enhancement'" do not suffice. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). However, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted).

Here, the district court decided the Commission's original complaint failed to state a plausible claim of intentional race discrimination because, in its view, the central issue, the employer's prohibition of dreadlocks, did not state a claim based on race. In its initial complaint, the EEOC provided a "short and plain statement" indicating that CMS engaged in race

discrimination when it withdrew its offer of employment because Chastity Jones, a Black applicant, declined to cut her dreadlocks. T9-D.1, Complaint at 3. Although the complaint did not explicitly assert that Jones was qualified for the job, the district court could have invoked its "judicial experience and common sense" to conclude that she was qualified, since CMS had extended the job offer to Jones.

EEOC also alleged that CMS's application of its grooming policy to prohibit dreadlocks "constitutes an employment practice that discriminates on the basis of race (black)," making clear the immutable trait at issue and the grounds upon which the claim rested. T9-D.1, Complaint at 3. Lastly, the Commission noted that the "[t]he effect of the practice[] complained of . . . has been to deprive [Jones] of equal employment opportunities and to otherwise adversely affect her status as an employee because of her race [black.]," *id*., which identified the injury and basis for relief.

On the whole, these factual allegations provided more than "[t]hreadbare recitals of the elements of a cause of action," *Iqbal*, 556 U.S. at 678, and, when taken as true, raised Jones' loss of employment and thus

her right to relief "above the speculative level." *Twombly*, 550 U.S. at 555. Specifically, the Commission's original complaint offered "nonconclusory descriptions of specific, discrete facts of the who, what, when, and where variety," which this Court has deemed is "all that Rule 8 requires" and an error if "the district court . . . require[s] more."*Watts v. Ford Motor Co.*, 519 F. App'x 584, 587 (11th Cir. 2013) (internal citations and quotation marks omitted).

Moreover, the Commission's complaint offered enough facts to support a prima facie case, even though such level of proof is not required. *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002) (negating any need to plead a prima facie case in an employment discrimination suit at the complaint stage). This is significant because "the elements of the prima facie case 'provide an outline of what is necessary to render a plaintiff's . . . claims for relief plausible.'" *Kassman v. KPMG LLP*, 925 F. Supp.2d 453, 461 (S.D.N.Y. 2013) (italics in original and internal citation omitted). A prima facie case also assists the court in determining whether there was sufficient factual matter in the complaint to give fair notice of EEOC's claim and the grounds

on which it rested. *Id.* Thus, the EEOC's initial complaint surpassed the standards articulated in *Twombly* and *Iqbal*. Consequently, the district court committed reversible error when it reduced the Commission's allegations to a focus only on a hairstyle and failed to acknowledge the critical disadvantage at which the dreadlock ban places Black applicants. Accordingly, this Court should reverse the district court's dismissal of the original complaint.

Assuming arguendo the Commission's original complaint was not sufficient, the court still erred when it denied the EEOC's motion to amend because the proposed amended complaint certainly was not futile. The amended complaint actually offered new information that was not presented in the initial complaint. Specifically, the amended complaint stated new facts and legal information establishing the nexus between dreadlocks and race that, accepted as true, would support a plausible claim of race-based discrimination.

Federal law recognizes that a grooming policy can be challenged under Title VII if "it . . . discriminate[s] on the basis of immutable

characteristics or certain fundamental rights." *Pitts v. Wild Adventures, Inc.*, 2008 WL 1899306, at *5 (M.D. Ga. Apr. 25, 2008) (citing *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975)). For example, in *Hollins v. Atlantic Co.*, 188 F.3d 652, 661 (6th Cir.1999), a district court decided that an unwritten policy that hairstyles not be "eyecatching" was discriminatory where it only applied to a Black female employee. In *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460 (N.D. Cal. 1978), a district court ruled that "[a] company cannot legally use grooming regulations as a pretext for refusal to hire Black applicants." *Id.* at 470.

Further, at least one district court in the Eleventh Circuit has recognized that the selection of one's hairstyle may be a fundamental right. *See Griffin v. Tatum*, 300 F. Supp. 60, 62 (M.D. Ala.1969) ("There can be little doubt that the Constitution protects the freedoms to determine one's own hair style and otherwise to govern one's personal appearance."), *aff'd in part and rev'd in part on other grounds*, 425 F.2d 201 (5th Cir. 1970). *See also Richards v. Thurston*, 304 F. Supp. 449, 455 (D. Mass. 1969) ("[t]he right claimed by plaintiff might be described as one of the aspects of personal

liberty, that is, liberty of appearance, including the right to wear one's hair as he pleases or, alternatively, as one of the aspects of freedom of expression"), *aff'd*, 424 F.2d 1281 (1st Cir. 1970); *Breen v. Kahl*, 296 F.Supp. 702, 706 (W.D. Wis. 1969) ("the freedom of an adult male or female to present himself or herself physically to the world in the manner of his or her choice is a highly protected freedom[;] . . . to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human 'being'").

In the Title VII context, if the individual expression is tied to a protected trait, such as race, discrimination based on such expression is a violation of the law. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (plurality) (finding Title VII violation where employer demanded that employee's appearance and deportment match sex stereotype associated with her gender); *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc) ("If a grooming standard imposed

on either sex amounts to impermissible stereotyping, something this record does not establish, a plaintiff of either sex may challenge that requirement under [Title VII].") . *Accord* EEOC Dec. No. 71-779, 1970 WL 3550, 3 Fair Empl. Prac. Cas. (BNA) 172 (1970) (holding that private hospital's policy of requiring its nurses to wear white caps instead of white scarves was not so necessary to the operation of its business as to justify the effect that this policy had upon the employment opportunities of an "Old Catholic" nurse and others of similar religious conviction, particularly where nurse had worn her scarf to her employment interview and had worn it under her scrub cap while working in the hospital nursery; thus forcing the nurse to choose between her scarf and her job constituted discrimination against her because of her religion).

In this case, the EEOC's amended complaint explained in detail how and why the Commission's allegations stated a plausible claim that CMS's dreadlocks ban discriminated based on race. Specifically, the factual allegations in the proposed amended complaint indicate that the grooming policy discriminates on the basis of immutable racial characteristics, or at a

minimum, a characteristic directly associated with Black people. The amended complaint also indicated that the reason for refusing to hire Jones reflects racial stereotyping and hostility towards her exercise of her right to a race-related expression. Alone or collectively, the factual allegations in the amended complaint were sufficient to support the granting of the EEOC's motion to amend the complaint.

Dreadlocks is a Hair Texture and Therefore An Immutable Trait Protected by Title VII

As EEOC's motion for leave to amend the complaint asserted, "dreadlocks are an immutable characteristic, unlike hair length and other hairstyles[.]" T7-D.21, Motion to Amend at 1. The proposed amended complaint also clarified that "[d]readlocks is a manner of wearing hair that is . . .suitable for Black hair texture" because they "are formed in a Black person's hair naturally, without any manipulation." T8-D.21-1, PAC at 6¶19. *See also Lewis v. Sternes*, 712 F.3d 1083, 1084 (7th Cir. 2013) ("he wore his hair in dreadlocks, which form naturally in some people who do not cut their hair"). In that CMS conceded "hair texture" is "an undisputedly

racial characteristic," D.23, CMS Opp. to Amend at 9 n.5, and the district court noted that hair texture is an "immutable characteristic," the court should have accepted as true that dreadlocks is a direct derivative of Black hair texture and thus an immutable trait entitled to Title VII protection even if it considered the allegation dubious. *Twombly*, 550 U.S. at 556 ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely").

This conclusion is supported by case law observing that the Afro, another "natural" hairstyle, is "a product of natural hair growth" for Black people, and thus prohibition of such hairstyle may constitute race discrimination in violation of Title VII. For example, in *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981), the court observed that "an employer's policy prohibiting the "Afro/bush" style might offend Title VII and section 1981[; b]ut if so, this chiefly would be because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics." *Id.* at 232. *See*

also Pitts, 2008 WL 1899306, at *5 (describing *Rogers* as noting that "a grooming policy prohibiting an 'Afro/bush style' might constitute employment discrimination because such a policy would prohibit a natural hairstyle that is tied to an immutable characteristic").

Similarly, in *Jenkins v. Blue Cross Mut. Hosp., Inc.*, 538 F.2d 164 (7th Cir. 1975), the Seventh Circuit en banc court decided that, where plaintiff filed an EEOC charge alleging that her supervisor told her he would not promote her because she could not represent Blue Cross wearing an Afro, plaintiff's "reference to the Afro hairstyle was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination." *Id.* at 168. The court thus held that "the EEOC charge was sufficient to support the racial discrimination allegations of the complaint." *Id.* Given that dreadlocks are an outgrowth of natural hair texture, these cases support the conclusion that a ban on dreadlocks, like a prohibition of the Afro, is in itself sufficient to support a claim that such an employment practice discriminates on the basis of race and thus, is enough to state a plausible claim under Title VII.

B. The Dreadlocks Hairstyle is Directly Associated with Black People

The Commission's proposed amended complaint made clear that, even if viewed as a mutable hairstyle, dreadlocks is a racial characteristic implicating the protections of Title VII just as "the wearing of an Afro hair style by a Black person is both a physiological and cultural characteristic of the Black race." T8-D.21-1, Proposed Amended Complaint (PAC) at 8¶25. *See* Angela Onuwauchi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 Geo. L.J. 1079, 1100 (2010) ("the hair was considered the most telling feature of Negro status, more than the color of the skin"); *id.* at 1100 n.112 ("[h]air type rapidly became the real symbolic badge of slavery, . . . disguised . . . by the linguistic device of using the term, 'black,' which nominally threw the emphasis to color").

The EEOC Compliance Manual states that "Title VII prohibits employers from preventing African American women from wearing their hair in a natural, unpermed 'afro' style that complies with [a] neutral hairstyle rule." EEOC Compliance Manual at 15-46 to 15-47 (footnotes

omitted). In one of the earliest formal Commission decisions, the EEOC concluded that race discrimination encompassed an employer's prohibition of Afro hairstyles. *See* EEOC Dec. No. 71-2444, 1971 WL 3898, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971). In that case, a Black male employee with an Afro hairstyle was fired for failing to comply with a grooming standard that provided that "hair is not to be kept bushy and should not extend in line of sight beyond the ears." The Commission explained that, under the employer's policy, "Negroes are measured … against a standard that assumes non-Negro hair characteristics" and that "the wearing of an Afro-American hair style by a Negro has been so appropriated as a cultural symbol by members of the Negro race as to make its suppression either an automatic badge of racial prejudice or a necessary abridgement of its First Amendment rights." *Id*. *See also* EEOC Dec. No. 72-979, 1972 WL 3999, 4 Fair Empl. Prac. Cas. (BNA) 840 (1972) (deciding employer's appearance standards concerning hair style discriminated against "Negroes" because of their race where prohibition of "bushy" hair styles (commonly referred to as Afros) were substantially more prevalent among "Negroes" of both

genders than among Caucasians). In short, the EEOC has long recognized that race includes not only hair texture, but also a hairstyle that is physically or culturally linked to Black hair texture.

In light of the EEOC's policy guidance and administrative opinions, which were issued pursuant to the agency's enforcement role, the district court should have accepted as true, at least at the complaint stage, the Commission's interpretation of what constitutes race-based conduct and its view that hair can be a racial characteristic. Moreover, the court should have accepted as true,the Commission's factual allegation that "Blacks are [the] primary wearers of dreadlocks" and reasonably inferred a racial nexus sufficient to support the Commission's claim that a prohibition on dreadlocks discriminates against Black people. Even the Army, Navy and Air Force, which are known for strict uniform standards governing military appearance, have revised their recent bans on dreadlocks, cornrows, and braids after receiving numerous complaints indicating that the service-level grooming policies were racially biased against Black women who choose to wear their hair in natural hairstyles rather than to use heat or chemicals to

straighten the hair or wigs to cover it. *See Hagel changes hair policy after controversy*, Army Times (Aug. 12, 2014), http://www.armytimes.com/article/20140812/NEWS07/308120068.

Instead, the district court decided the EEOC's race discrimination claim was not plausible because its complaint did not allege that Black people are the *exclusive* wearers of dreadlocks. T6-D.19, Dismissal Order at 9. The law does not require such a showing. Indeed, in *Rogers*, a federal court observed that an employer's policy banning an all-braided hairstyle could have violated Title VII if the plaintiff had "allege[d] that an all-braided hair style is worn exclusively or even *predominantly* by black people." 527 F. Supp. at 232 (emphasis added).[2] Under *Rogers* and other pertinent case law, the Commission's allegation that dreadlocks is "a style commonly worn by people of African descent," T8-D.21-1, PAC at 3¶8, that originated during the slave trade, *id.* at 6¶20, and is "culturally associated with Black people" and "people of African descent," taken as true, suffices

[2] The dictionary defines "predominant" as "most common, numerous, or noticeable." THE AMERICAN HERITAGE DESK DICTIONARY 745 (1981).

to state a race-based claim. *Id.* at 9 ¶¶26 & 28. *See also Millin v. McClier Corp.*, 2005 WL 351100, at *5 (S.D.N.Y. Feb.14, 2005) ("a reasonable factfinder could construe comments [by a decision-maker] regarding [plaintiff's] dreadlocks as related to his race, religion, and/or national origin [since ...] dreadlocks are commonly associated with African-American, Rastafarian, and Jamaican culture"); D. Wendy Greene, *Title VII: What's Hair (And Other Race-Based Characteristics) Got To Do With It?*, 79 U. Colo. L. Rev. 1355, 1385 (2008) ("[h]istorically and contemporarily, dreadlocks … have been associated with 'Blackness'").[3]

The fact that "some non-Blacks have a hair texture that would allow the hair to lock," also does not preclude dreadlocks from being a racial characteristic associated with Black people any more than dark skin could

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[3] Even in a disparate impact case banning a nursing assistant's beaded braids because they were "distracting," a federal court in this Circuit only required a showing that "other black people were discharged or denied employment because of the refusal to remove beads from their hair, or even that black people are *more likely* to wear beads in their hair than white people." *Carswell v. Peachford Hosp.*, 1981 WL 224, at *2 (N.D. Ga. May 26, 1981) (emphasis added). In that the number of persons impacted by a discriminatory practice or policy is critical, and proof of disproportionate impact in that case did not require exclusivity, certainly proof of exclusivity should not be required to establish that a dreadlocks ban is race-based.

be considered racially neutral simply because some people who identify as Caucasian have a dark complexion. T8-D.21-1, PAC at 10¶29. In passing Title VII, Congress recognized that "[r]acial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather [with] the ability to provide decently for one's family in a job or profession for which he qualifies and chooses." *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970).[4] Hence, Congress made clear that the United States would not tolerate racial discrimination in any form, and that it is the "duty of the courts to make sure the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics." *Id.* To this end, Congress announced its "intention to define discrimination in the broadest possible term," *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1972), to effectuate its purpose. A requirement that the EEOC

[4] The Eleventh Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

demonstrate exclusivity in order to sustain a plausible claim of race discrimination would seriously undermine this intent by ignoring that the people most adversely and significantly affected by a dreadlocks ban, such as CMS's, are African Americans.

C. The Dreadlocks Ban is a Barrier to Employment Based on Racial Stereotyping

The district court failed to consider whether the proposed amended complaint stated a plausible claim of race discrimination based on racial stereotyping. Intentional discrimination includes acts or decisions based on racial stereotypes or bias. *Kelly v. Bank Midwest, N.A.*, 177 F.Supp.2d 1190, 1206 (D. Kan. 2001). *See, e.g., Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 474 (11th Cir.1999) (holding that a defendant who acted without racial animus but consciously and intentionally made job assignments based on racial stereotypes was liable for intentional). In this case, CMS indicated that it prohibited dreadlocks because "they tend to get messy." D.21-1, PAC at 5¶16. The EEOC asserted that "[t]his view is based on stereotyped notions of how Black people should and should not wear their hair and is

premised on a normative standard and preference for White hair [texture and hairstyles] and is therefore race-based." T8-D.21-1, PAC at 11¶30. This was not a "naked assertion" or "mere conclusory statement[.]" *Iqbal*, 556 U.S. at 678. The proposed amended complaint provided enhanced facts illuminating the negative stereotypes and animus that Black people who choose to wear their hair in natural styles sometimes face in the workplace, supporting a reasonable inference that the dreadlocks ban may have had a discriminatory purpose. T8-D.21-1, PAC at 9¶¶27 & 30. *See also Ham v. South Carolina,* 409 U.S. 524, 529-30 (1973) (Douglas, J. concurring in part and dissenting in part) ("[t]he prejudices invoked by the mere sight of 'non-conventional' hair growth are deeply felt"). Further, the amended complaint noted that, although the HR official acknowledged that Chastity Jones' dreadlocks were not "messy," she still withdrew the job offer even though the literal requirements of CMS's grooming policy had not been violated. T8-D.21-1, PAC at 5¶16.

Accepting these allegations as true, as the district court was required to do, the facts support a plausible claim that the no-dreadlocks practice is

discriminatory because it represents a racial stereotype regarding natural Black hair ("it tends to get messy") that serves as an "irrational impediment[] to job opportunities and enjoyment which have plagued [Black people] in the past" and even more so in the present given the hairstyle's increasing popularity.[5] *See Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971) (acknowledging in sex discrimination case concerning no-marriage policy that applied only to female stewardesses that "Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past."). *See also Carroll v. Talman Federal Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028, 1033 (7th Cir. 1979) ("'assumptions steeped in cultural stereotypes * * * are inconsistent with the purposes of the Act'") (internal citation omitted).

The allegations also support an inference that the grooming policy may be a pretext for refusing employment to certain Black applicants. *See*

[5] The popularity of dreadlocks is demonstrated by the fact that "today dreadlocks . . . are . . . nearly as common as Afros were 30 years ago." David France, *The Dreadlock Deadlock*, NEWSWEEK 54 (Sep. 10, 2001).

Wofford, 78 F.R.D. at 470 (grooming policy cannot be pretext for refusal to hire Black applicants). In that CMS had no basis for believing that Jones would permit her hair to get "messy," these allegations, taken as true, raise a suspicion of mendacity that CMS's purported "business image" was not the real reason for her dismissal, especially where there was no "obvious alternative explanation" that suggested lawful conduct. *Cf. American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) ("courts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer") (quoting *Iqbal* and *Twombly*).

In sum, contrary to the district court's ruling that nothing new was offered, the amended complaint "contains inferential allegations from which [a court] can identify each of the material elements necessary to sustain a recovery under some viable legal theory." T6-D.19, Dismissal Order at 4 (internal citations omitted) (emphasis in the original). As such, the Commission's claim was sufficiently pled and should be reinstated.

D. Dreadlocks can be a Symbol of Racial Pride

As the Commission asserted below, T8-D.21-1, PAC at 9¶2, dreadlocks are a badge of Black pride today just as the Afro in the 1970's was viewed as a "badge of Black pride and unity." EEOC Compl. Man. §619.5: Race or National Origin Related Appearance. *See McNeil v. Greyhound Lines, Inc.*, 2013 U.S. Dist. LEXIS 158757, *2 (E.D. Pa. Nov. 6, 2013) ("Plaintiff Wayne McNeil is an African American male who wears his hair in dreadlocks in support of his race, culture, and heritage."); *Robinson v. District of Columbia,* No. 97-787 (D.D.C. Sept. 30, 2000) (upholding jury award of $47,074 to police officer who alleged he was subjected to retaliation and race discrimination after he refused to cut his dreadlocks because of his religious and African American cultural beliefs). *See also* Frances M. Ward, *Get Out of My Hair!: The Treatment of African American Hair Censorship in America's Press and Judiciary from 1969 to 2001* (UNC-Chapel Hill 2002) ("African Americans donning natural hairstyles in today's culture are often displaying cultural pride for their African Roots").

The district court should have recognized dreadlocks as sufficiently

connected to racial pride that "[their] suppression [was] . . . an automatic badge of racial prejudice[.]" *Ramsey v. Hopkins*, 320 F. Supp. 477, 480-81 (N.D. Ala. 1970) (suggesting that grooming preferences may be appropriated as a cultural symbol by members of a particular race so as to make their suppression "an automatic badge of racial prejudice"); *cf. Braxton v. Board of Pub. Instruction*, 303 F. Supp. 958, 959-60 (M.D. Fla. 1969) (deciding that Black public school teacher who wore a goatee as "'an appropriate expression of his heritage, culture and racial pride as a black man'" was entitled to First and Fourteenth Amendment protection). In failing to do so, the district court disregards the fundamental right Jones had guaranteed by Title VII, which was not to be denied employment based on a factor that is inextricably linked to race. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 749 (1981) (recognizing Title VII's "aim[] at guaranteeing a workplace free from discrimination, racial and otherwise" to be a "fundamental right"); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) ("Title VII forbids the imposition of burdensome terms and conditions of employment as well as those that produce an atmosphere

of racial and ethnic oppression").

The Supreme Court observed in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-430. If Jones chose to wear dreadlocks as a reflection of her pride in her race and natural hair texture, she is entitled to invoke Title VII to protect her fundamental right not to be subject to a racially hostile hair policy. *Cf. Willingham*, 507 F.2d at 1091-92 (holding that distinctions between men and women on the basis of fundamental rights such as the right to bear children constitute discrimination on the basis of sex under Title VII). The district court therefore should have permitted CMS's dreadlock ban to be scrutinized to determine whether it is an "artificial, arbitrary, and unnecessary barrier[] to employment" that "operate[s] invidiously to discriminate on the basis of racial or other impermissible classification" in violation of Title VII. *Griggs*, 401 U.S. at 431.

On the whole, grooming policies that impact equality of employment opportunity are within the purview of Title VII. Keeping in mind today's "nuances and subtleties of discriminatory practices," *Rogers*, 454 F.2d at 238, the EEOC's initial and amended complaints contained sufficient facts to support a finding that dreadlocks is a racial trait that when prohibited by an employer deprives qualified Black applicants, such as Chastity Jones, from equal employment opportunities in violation of Title VII. Given these facts, the district court erred in dismissing the Commission's complaint because it "fail[ed] to appreciate the distinction between determining whether a claim for relief is 'plausibly stated,' the inquiry required by *Twombly/Iqbal*, and divining whether actual proof of that claim is 'improbable,' a feat impossible for a mere mortal, even a federal judge," especially prior to discovery. *U.S. ex rel Barker v Columbus Regional Healthcare Sys.*, 977 F. Supp. 2d 1341, 1346 (M.D. Ga. 2013). Moreover, in failing to accept the factual allegations indicating that Jones had not violated CMS's grooming policy, the court disregarded that this case was not about hair length or a "messy" style but rather the legality of an

employer's decision not to hire or to bar the employment of a qualified Black candidate because her hairstyle did not meet the employer's racially stereotypical perception of an appropriate professional or business image.

E. The Filing of a Separate Rule 59(e) motion is not Required

Lastly, as a separate matter from the merits of the complaints, the district court erred when it stated that it could have denied the motion to amend because the EEOC failed to seek vacatur of the judgment by filing a Rule 59(e) or Rule 60(b) motion. T3-D.29 at 1. To begin with, the Commission did not file a formal Rule 59 or Rule 60 motion along with its Rule 15 motion to amend because the district court's judgment was not final. This Court has held that "the dismissal [of a complaint] itself does not automatically terminate the action unless the court holds either that no amendment is possible or that the dismissal of the complaint also constitutes a dismissal of the action." *Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1554 (11th Cir. 1984). In fact, this Court stated that the plaintiff has the option to file a motion to amend the complaint or to file an appeal. *Id.* ("a plaintiff has the choice

either of pursuing a permissive right to amend a complaint after dismissal or of treating the order as final and filing for appeal"). Since the district court in this case did not indicate that it terminated the case or that an amendment was not possible, the Commission properly filed a motion to amend and the district court properly considered it. *See* T4-D.27.

Even if this Court were to decide that the March 27 judgment was final, the district court still properly reviewed the merits of the EEOC's motion to amend. As the district court below correctly observed, the Commission's post-judgment motion could be treated as a Rule 59(e) motion to alter or amend the judgment. T3-D.29 at 2 n.1.

This Court has held that when a court issues a final judgment dismissing the complaint, the complaining party may seek to amend a complaint postjudgment under Rule 59(e) or Rule 60(b)(6), *Pearson v. SE Property Holdings, LLC*, 534 F. App'x 885, 888 (11th Cir. 2013), especially if the order dismissed the complaint without prejudice. *Nawab v. Unifund CCR Partners*, 2013 WL 6823109, at *3 (11th Cir. Dec. 27, 2013); *Thompson v. Dep't of Navy, Headquarters, U.S. Marine Corps.*, 491 F. App'x 46, 47 n.1 (11th

Cir. 2012). Moreover, any motion may qualify under Rule 59 if it is timely filed and "request[s] relief which may be granted"under Rule 59. Accordingly, the touchstone for determining whether a motion should be treated as having been filed under Rule 59 is not the label it bears but rather the relief it seeks and the timeframe in which it is filed. In *Livernois v. Medical Disposables, Inc.*, 837 F.2d 1018 (11th Cir. 1988), this Court stated that, regardless of how a post-trial motion is labeled, it "will conduct an independent determination of what type of motion was before the district court." *Id.* at 1020. And in that case, this Court decided that the Rule 60 motion for reconsideration qualified under Rule 59(e) even though it was not labelled a motion to amend the judgment. *Id.* [6]

So even if the party in its motion mentions a rule but neglects to refer specifically to Rule 59 or Rule 60, federal courts, including this Court, have

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[6] At the time of *Livernois*, a Rule 60(b) motion for reconsideration did not toll the time for filing an appeal. 837 F.2d at 1020. In 2009, Federal Rule 4(a)(4)(A)(vi) of appellate procedures was amended to extend the time for filing an appeal to Rule 60 motions so long as they were filed within 28 days of the judgment. *See Fed. Civ. Jud. Proc. and Rules:* Rules of Appellate Procedure-Rule 4, 2009 Amendments Subdivision (a)(4)(A)(vi) at 536 (2014 rev. ed.).

treated the filed motion as one under Rule 59 or Rule 60 if it is filed within 28 days of the judgment and seeks the appropriate relief. *See, e.g., Cormier v. Green*, 141 F. App'x 808, 815 (11th Cir. 2005) ("We treat a motion that is filed within ten business days of the entry of judgment and that asks for reconsideration of matters encompassed in the judgment as a motion under Rule 59(e)."). [7] *See also Finch v. City of Vernon*, 845 F.2d 256, 258 (11th Cir. 1988) ("the style of a motion is not controlling").

Under these well-established principles adopted by this Court, the Commission's motion to amend should be treated as a Rule 59 motion. The EEOC's motion to amend the complaint constituted a Rule 59(e) motion because it implicitly sought vacatur or alteration of the district court's judgment dismissing the initial complaint and attempted to correct "manifest errors of law or fact." *Caraway v. Secretary, U.S. Dep't of Transp.*, 550 F. App'x 704, 711 (11th Cir. 2013) (internal citation and quotation marks

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[7] When the *Comier* decision was rendered in 2005, Rule 59 of the Federal Rules of Appellate Procedure required that post-judgment motions be filed within ten days of the judgment to be considered timely for tolling purposes. By a 2009 rule amendment, the ten-day period was expanded to 28 days. *See Fed. Civ. Jud. Proc. and Rules:* Rules of Civil Procedure-Rule 59, 2009 Amendments at 261 (2014 rev. ed.).

omitted). Indeed, had the district court granted the Commission's motion to amend, it would necessarily have had to review and revise the substance of the judgment in order to permit the amendment. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 n.1 (5th Cir. 1981) ("[w]here judgment has been entered on the pleadings, a holding that the trial court should have permitted amendment necessarily implies that judgment on the pleadings was inappropriate and that therefore the motion to vacate should have been granted").

In addition, the Commission's motion to amend met the timeliness requirement of Rule 59 because it was filed well within the 28-day period following entry of the March 27 judgment. To be exact, the EEOC's motion to amend was filed 21 days after the March 27 judgment. As the EEOC's motion was timely under Rule 59(e), it should be treated as a Rule 59(e) motion. *Finch*, 845 F.2d at 258 (explaining that if a postjudgment motion is filed within the period provided for in Rule 59(e) "and calls into question the correctness of that judgment it should be treated as a motion under Rule 59(e)" (internal quotation marks omitted)).

Lastly, treating the Commission's motion to amend as a Rule 59(e) motion would simply conform the proceedings to what the district court did below. Although the district court stated, albeit erroneously, that it could have denied the motion to amend because the Commission did not file a Rule 59 motion, it in fact did not do so. Rather, the court considered the motion on its merits and denied it on the legal ground of futility. Thus, whether the Commission failed to file a Rule 59 motion, assuming arguendo it was required, is of no moment. To rule otherwise would be improper, would elevate form over substance, and would undermine Rule 15's purpose to permit at least one amendment of a complaint even when it is postjudgment. *Czeremcha* , 724 F.2d at 1554-55 (permitting postjudgment amendment of complaint "is consistent with Rule 15's liberal mandate that leave to amend be 'freely given when justice so requires'"); *Dussouy*, 660 F.2d at 598 ("The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading."). In sum, the Commission was not required to file a formal or separate Rule 59

or Rule 60 motion because the judgment was not final; the Commission's motion to amend satisfied the standards of Rule 59; and, the EEOC's Rule 15 motion was treated as a Rule 59 motion by the district court.

CONCLUSION

For the reasons stated above, the Commission urges this Court to reverse the district court's judgment and permit the EEOC to file its amended complaint.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,462 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I, Paula R. Bruner, hereby certify that on September 22, 2014, I electronically filed the foregoing brief with the Court via the appellate CM/ECF system. I also certify that the following counsel of record, who have consented to electronic service, will be served the foregoing brief via the appellate CM/ECF system and provided hard copies by regular mail:

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