Case 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
Case No. 1:13-cv-00476-CB-M

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE

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Dated: January 16, 2015

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

Pursuant to 11th Cir. R. 26.1-1, 28-1(b), and 29-2, *amicus curiae* the Chamber of Commerce of the United States of America states that it is not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of its stock.

The Chamber of Commerce 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. Chamber of Commerce of the United States of America, *Amicus Curiae* in Support of Defendant-Appellee
7. Connolly, J. Michael, attorney for the Chamber of Commerce of the United States of America
8. Consovoy McCarthy PLLC, attorneys for the Chamber of Commerce of the United States of America
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No. 14-13482-DD
Equal Employment Opportunity Commission v. Catastrophe Management Solutions, Inc.

11. Equal Employment Opportunity Commission, Plaintiff-Appellant

12. Fonde, Daphne Pilot, an individual owning shares in CMS

13. Gibson, Dunn & Crutcher LLP, attorneys for Defendant

14. Johnson, Jr., Thomas M., attorney for Defendant

15. Jones, Chastity, the individual whose Charge resulted in this lawsuit

16. Lee, James L., attorney for Plaintiff

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18. Lehr Middlebrooks & Vreeland, P.C., attorneys for Defendant

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20. McCarthy, Thomas R., attorney for the Chamber of Commerce of the United States of America

21. Middlebrooks, David J., attorney for Defendant

22. Milling, Jr., Bert W., United States Magistrate Judge

23. Pilot Catastrophe Services, Inc., an affiliate of Catastrophe Management Solutions.

24. Pilot, Curtis F., individual owning shares in CMS

25. Pilot, Rodney A., individual owning shares in CMS

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29. Rucker, Marsha Lynn, attorney for Plaintiff

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32. Smith, C. Emanuel, attorney for Plaintiff

33. Todd, Kate Comerford, attorney for the Chamber of Commerce of the United States of America

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STATEMENT OF THE ISSUES

Whether the district court properly dismissed the Equal Employment Opportunity Commission's ("EEOC") complaint for failure to state a plausible claim of intentional race discrimination under Title VII.

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber has a strong interest in the proper resolution of this case. Many of the Chamber's members are subject to Title VII of the Civil Rights Act of

[1] Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

1964 ("Title VII"). The EEOC's interpretation of Title VII would result in an unprecedented, unbounded, and legally unsupported theory of "intentional" discrimination that in fact requires no showing of intent to discriminate on the basis of race.

SUMMARY OF THE ARGUMENT

The EEOC's allegations do not plead any cognizable claim of discrimination under Title VII. Title VII has been interpreted to create two distinct theories of employer liability—disparate treatment and disparate impact—to comprehensively guard against discrimination based on a protected trait. In theory, the EEOC might have tried to bring a disparate treatment claim based on alleged direct or circumstantial evidence that Chastity Jones was treated differently because of her race. Or, the EEOC might have tried to bring a disparate impact claim, alleging that Catastrophe Management Service's ("CMS") interpretation of its workplace grooming policy—which bans unprofessional hairstyles—to prohibit dreadlocks is a neutral rule with a statistically significant adverse effect on African-American job applicants. But the EEOC brought neither of these claims. The Commission instead is trying to make new law by purporting to bring a disparate treatment cause of action based solely on the allegation that CMS intentionally discriminated against Ms. Jones because its grooming policy adversely affects African Americans as a group.

It is vital that the Court reject the EEOC's attempt to conflate these two categories of Title VII claims. Allowing the EEOC to mix-and-match disparate treatment and impact theories is incompatible with the statutory scheme. Disparate treatment requires proof that the employer engaged in the kind of intentional treatment on the basis of race (or one of the other four protected traits) that fits within the classic understanding of "discrimination." As a consequence, Title VII's disparate treatment cause of action affords employers limited defenses and provides for monetary sanctions, including punitive damages. Disparate impact, on the other hand, does not require any showing that the employer intentionally discriminated and instead requires statistical proof that a racial group is being unintentionally harmed as compared to others in the applicant pool. Because such a claim entails no finding of intentional discrimination, Title VII affords employers a robust "business necessity" defense and limits successful plaintiffs to equitable relief.

It is clear from the Complaint ("Compl.") and the Proposed Amended Complaint ("PAC") that the EEOC is trying to have it both ways. The EEOC does not attempt to argue that Ms. Jones was denied a position on the basis of her race as opposed to her hairstyle; that is, the EEOC does not allege that Ms. Jones would have been denied employment if she did not wear dreadlocks. Rather, the theory of the case is that CMS's neutral workplace grooming policy constitutes *per se*

intentional discrimination because it prohibits dreadlocks, which according to the Commission's vague historical, cultural, and sociological assessments, are disproportionally *associated* with African Americans. The PAC contains *no* allegations that could support a claim for disparate impact discrimination, either, despite the EEOC's attempts in its brief on appeal to use the language of disparate impact theories to support the disparate treatment claim that it actually pleaded.

The ramifications of allowing the EEOC to pull off this maneuver are significant. Accepting the EEOC's theory would hold CMS responsible for intentionally discriminating against Ms. Jones even though there is no allegation it harbored any such animus toward her. That finding would potentially expose CMS to compensatory and punitive damages, all because it was unable to anticipate the EEOC's novel theory as to why dreadlocks are a racial characteristic even though, as the agency concedes, this mutable hairstyle is worn by people of all racial backgrounds.

Treating general policies affecting mutable cultural practices as intentional and invidious racial discrimination would mean, moreover, that *no* employer could *ever* implement a grooming policy prohibiting dreadlocks for *any* reason. That is not a result Congress would have contemplated or endorsed. Congress understood that there occasionally will be nondiscriminatory workplace policies that cause unintentional harm to a protected group. But Congress also recognized that the

employer must be given the chance to demonstrate that the workplace policy—notwithstanding its disparate impact—is essential to the business and there is no alternative means of achieving that same interest. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). Neutral policies that have a disparate impact on a protected class will sometimes be justified by business necessity, and sometimes they will not. But the issue should be decided in those cases in a thoughtful, fact-specific fashion instead of under the EEOC's all-or-nothing theory of intentional discrimination.

These doctrinal problems, though troublesome enough in their own right, would not be the worst of it. Validating the EEOC's novel theory would thrust the business community and the judiciary into an evidentiary quagmire. In light of the potentially massive liability they could face, employers would need to anticipate this type of challenge and ensure that a similar claim could not be made against myriad other workplace rules. But there will be no easy way for the employer to figure out which policies impact a mutable characteristic that is sufficiently associated with race to be deemed intentionally discriminatory by the EEOC. The most any employer could do is conduct a survey of its workforce (or perhaps those employees potentially implicated by the policy), make a similar inquiry of job applicants, or commission an academic study if it has the financial resources to do so. Not only will these efforts lead to the very racial stereotyping and workplace discord Title VII was passed to end, it will not even achieve anything. No matter

how hard the employer tries, if the EEOC and a court ultimately disagree with its assessment, the business will be subject to statutory penalties for having engaged in intentional discrimination.

The ramifications are perhaps more disquieting for the factfinder—whether a judge or jury—who would need to resolve this dispute without objective criteria. The PAC tries to support the EEOC's theory of disparate treatment through references to the EEOC Compliance Manual, newspaper and law review articles, and blog posts. But *none* of these sources will be available to the factfinder. Statistics are not direct evidence of discrimination; the EEOC's views are not entitled to deference; and the various written materials are not admissible evidence. As a consequence, a factfinder looking for neutral principles is left with nothing but the EEOC's promise of expert testimony if the Court proceeds down this uncharted path. That the EEOC wants to turn Title VII into a vehicle for a trial via dueling experts over claims that "[r]ace is a social construct with no biological definition," as well as the other allegations the EEOC needs to prove in order to vindicate its attempted new theory of Title VII, is reason enough to reject its claim and affirm the district court's decision.

ARGUMENT

I. The District Court Correctly Rejected The EEOC's Attempt To Distort Title VII's Distinct Causes Of Action For Disparate Treatment And Disparate Impact.

Title VII has been interpreted to create two distinct theories of employer liability. It provides:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

On its face, Title VII's ban on discrimination "because of" a protected trait supports a cause of action for disparate treatment. *See Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (describing disparate treatment as occurring when "an employer has 'treated [a] particular person less favorably than others because of' a protected trait" (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 985-86 (1988)); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("The employer simply treats some people less favorably than others because of their

race, color, religion, sex, or national origin."). Disparate treatment is "the most easily understood" anti-discrimination rule; as applied to this setting, it prohibits an adverse employment action that *intentionally* targets a protected trait for disfavored treatment. *Id*. (citation and quotations omitted); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). "Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15 (citation omitted).

The Supreme Court has separately interpreted Section 2000e-2(a) to create disparate impact liability. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Disparate-impact liability, by contrast, arises where an employer imposes a neutral workplace policy that has an *unintentional* impact on a protected class of employees or job applicants. *See Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15; *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008). Under Title VII's disparate impact cause of action, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" are unlawful out of concern for "the consequences of [such] practices, not simply the motivation." *Griggs*, 401 U.S. at 430-32. An employer's "good intent or absence of discriminatory intent" is therefore irrelevant. *Id*. at 432.

A. Disparate Treatment And Disparate Impact Are Distinct Causes Of Action With Distinct Standards Of Proof And Distinct Judicial Remedies.

The disparate treatment and disparate impact theories of employer liability under Title VII are analytically distinct causes of action that differ in at least four key respects.

First, as its name suggests, disparate-treatment liability is premised on a finding of intentional discrimination. It requires a showing that a protected trait "actually motivate[d] the employer's decision." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (citation omitted). A "disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job related action." *Ricci*, 557 U.S. at 577 (internal quotations omitted).

"By contrast, disparate-impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Raytheon Co.*, 540 U.S. at 52. A disparate impact claim stands in stark contrast to a disparate treatment claim; whereas Title VII's disparate treatment cause of action requires proof "that the defendant had a discriminatory intent or motive," Title VII's disparate impact cause of action bans "facially neutral … practices that have significant adverse effects on protected groups … without proof that … those practices" were "adopted with a discriminatory intent." *Watson v. Fort Worth Bank*

& Trust, 487 U.S. 977, 986-87 (1988). The absence of intentional discrimination based on a protected trait "is the very premise for disparate-impact liability in the first place, not negation of it or a defense to it." *Meacham*, 554 U.S. at 96.

Second, the two claims require different types of proof. Disparate treatment can most readily be established "where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (citing *Int'l Bhd. of Teamsters*, 431 U.S. at 358 n.44). That is, by presenting "evidence which reflects 'a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.'" *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999) (quoting *Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 641 (11th Cir. 1998) (other citation and quotations omitted)). As this Court has explained, "'only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis'" of a protected trait "will constitute direct evidence of discrimination." *Id.* at 1359 (quoting *Earley v. Champion Int'l Corp.,* 907 F.2d 1077, 1081-82 (11th Cir. 1990) (other citations and quotations omitted)).

Because intentional discrimination can sometimes be difficult to prove, however, the Supreme Court has recognized a burden-shifting framework that allows a plaintiff to proceed based on a *prima facie* showing of potential disparate treatment. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To meet

her burden, "[t]he plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. The burden then shifts to the defendant "to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id*. At that juncture, the burden shifts back to the plaintiff, who must prove that the employer's neutral justification is pretext for intentional discrimination. *See id.* at 255-56.

Proving disparate impact requires a different evidentiary showing altogether. "To establish a *prima facie* case of disparate impact, a plaintiff must … establish causation by offering statistical evidence sufficient to show that the practice in question has resulted in prohibited discrimination." *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1314 (11th Cir. 1994) (citation omitted). "Disparate impact cases typically focus on statistical disparities and on the various explanations for those disparities, rather than on specific incidents. The statistical disparities must be 'sufficiently substantial that they raise … an inference of causation.'" *Id*. (quoting *Watson*, 487 U.S. at 995) (other citation omitted). Hence, although a plaintiff may likewise make use of a burden-shifting framework on a disparate impact claim, the required threshold showing is more substantial. *See, e.g.*, *Wards*

Cove Packing Co. v. Atonio, 490 U.S. 642, 650-55 (1989) (explaining that even stark racial disparities in employment may not establish a *prima facie* case of disparate impact without careful analysis of the available labor pool).

Third, disparate treatment and disparate impact claims offer different defenses to employers. Naturally, the principal defense generally available in a disparate treatment case is that the employer did not act with discriminatory intent. In contrast, an employer can rely on various defenses to avoid disparate impact liability, such as the "business necessity" defense or the lack of alternative employment practices. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i)-(ii). These defenses have been applied only in disparate impact cases. *See, e.g., Watson*, 487 U.S. at 997.

Fourth, disparate treatment and disparate impact claims provide for different judicial remedies. A finding of intentional discrimination exposes an employer to compensatory and punitive damages—remedies that are not available in a disparate impact claim. *See* 42 U.S.C. § 1981a(a) ("In an action brought by a complaining party under [Title VII] against a respondent who engaged in unlawful intentional discrimination"—*i.e.*, not an employment practice that is unlawful because of its disparate impact—"the complaining party may recover compensatory and punitive damages."); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) ("The 1991 Act limits compensatory and punitive damages awards … to cases of 'intentional

discrimination'—that is, cases that do not rely on the 'disparate impact' theory of discrimination."). Title VII permits only equitable relief in disparate-impact cases. *See id.* at 533-34.

For these reasons, the Supreme Court has admonished that "courts must be careful to distinguish between these theories." *Raytheon*, 540 U.S. at 53. "The different allocations of the burdens of proof and production in disparate treatment and disparate impact cases stem precisely from the different requirements for establishing the prima facie case." *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1152 (10th Cir. 2008). To allow a plaintiff to pursue a "disparate impact judgment where the case centers entirely around allegations and evidence of *intentional* discrimination" thus "would unwisely conflate the distinct theories of disparate impact and disparate treatment." *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1283 (11th Cir. 2000). Allowing the plaintiff to pursue a disparate treatment claim without having properly alleged the elements of such a claim based on arguments that sound in disparate impact likewise contorts the statutory scheme. *See Gullett v. Town of Normal, Ill.*, 156 F. App'x 837, 841-42 (7th Cir. 2005) ("The fact that a policy or practice may have a disparate impact on a protected class is irrelevant to a [Title VII] disparate treatment claim.").[2] In either

[2] As explained *infra* at 15-17, the Complaint also falls far short of what is necessary to allege a claim of disparate impact.

instance, then, the legal principle is the same: it remains, at all times, the plaintiff's pleading burden to allege facts substantiating the precise Title VII cause of action brought through the complaint.

B. The EEOC Is Trying To Merge These Distinct Causes Of Action By Relying On A Disparate Impact Theory To Plead A Claim For Disparate Treatment Under Title VII.

The EEOC's allegations do not set forth a claim for any cognizable form of discrimination under Title VII. The EEOC has clearly attempted to assert a claim for disparate treatment. Yet the EEOC does not allege any facts (either direct or indirect) showing Ms. Jones was denied employment because of the immutable characteristic of her race. In other words, nothing in the EEOC's complaint suggests that Ms. Jones would have been denied employment by CMS if she did not wear dreadlocks. The EEOC also does not attempt to plead a case for disparate impact. CMS Br. 14-18.

Instead, the EEOC attempts to rely on disparate impact principles to support the inadequate disparate treatment allegations in the PAC. Specifically, the EEOC seeks to plead disparate treatment by alleging that "the racial *effect* of grooming policies has allowed employers to discriminate" and by pointing to the allegedly "racial *impact* of a dreadlock ban." EEOC Br. 7-8 (emphasis added); EEOC Br. 31 (arguing "that the people *most adversely and significantly aff*ected by a dreadlocks ban, such as CMS's, are African Americans") (emphasis added); EEOC Br. 29 n.3

(expressly distinguishing the EEOC's claim "that a dreadlocks ban is race-based" from a "disparate impact case"). The EEOC needs to attempt this sleight of hand because dreadlocks are not an immutable physical trait, and thus, no claim of disparate treatment could be cognizable. CMS Br. 18-21.

There can be no question, then, that the EEOC seeks to have it both ways. The Court should not permit the Commission to proceed in this manner. As noted above, doing so would create myriad doctrinal problems. The EEOC could have—but has not—tried to bring a claim of disparate treatment based on direct evidence of intentional discrimination. It also failed to bring a claim of disparate treatment based on circumstantial evidence of intentional discrimination under the established *McDonnell Douglas* framework. That is, the EEOC has never suggested Ms. Jones's hairstyle was not the real reason CMS failed to hire her and that CMS would have declined to hire Ms. Jones because of her race, even had she not worn dreadlocks. Put simply, the EEOC is unable and unwilling to plead *any* of the allegations that support a claim of disparate treatment under Title VII.

The EEOC also has not attempted to plead a Title VII disparate-impact claim. Such a claim would require it to "demonstrate causation by offering statistical evidence sufficient to show that the challenged practice has resulted in prohibited discrimination." *Spivey v. Beverly Enterprises, Inc.,* 196 F.3d 1309, 1314 (11th Cir. 1999). Unlike in a disparate treatment case, then, the EEOC could

not state a claim solely based on the policy's effect on Ms. Jones. *See Alford v. City of Montgomery, Ala.*, 879 F. Supp. 1143, 1150 (M.D. Ala. 1995), *aff'd*, 79 F.3d 1160 (11th Cir. 1996) ("The test is not whether a racial and/or gender neutral employment practice adversely affects a single employee, but whether that practice adversely affects blacks or males at a substantially higher rate than whites or females.") (citing *Griggs,* 401 U.S. at 431)). In a disparate impact case, the statutory inquiry focuses on the effect on a "protected group." *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 n.13 (11th Cir. 1993); *Joe's Stone Crab*, 220 F.3d at 1274; *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 582 (1978) (Marshall, J., concurring in part and dissenting in part).

As a consequence, the EEOC would need to "make a comparison of the racial composition of persons in the labor pool qualified for the position at issue with those persons actually holding that position" and then "demonstrate that the allegedly discriminatory practice or test is connected to the disparate impact." *Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1520 (11th Cir. 1995) (citing *Wards Cove Packing Co,* 490 U.S. at 657). Among other things, that rigorous statistical standard would require the EEOC to allege facts showing that CMS's neutral workplace grooming policy's prohibition on unprofessional hairstyles has a sufficiently greater impact on African-American job applicants because of the dreadlocks ban than it has on other job applicants (who also might wear dreadlocks

or other hairstyles the policy prohibits) in order to state a disparate-impact claim. The EEOC has not even attempted to plead a disparate-impact claim because it likely knows that it would have no chance of succeeding.

Instead of bringing either a genuine disparate treatment or disparate impact claim, the EEOC merges these distinct causes of action by alleging that a neutral workplace grooming policy prohibiting unprofessional hairstyles is itself direct evidence of intentional discrimination against a particular employee because one such hairstyle (dreadlocks) is allegedly disproportionally "associated" with African Americans. But that is just an attempt to take a shortcut around having to plead and prove pretext or disparate impact, which the EEOC has not done. Obviously, a neutral workplace grooming policy that prohibits dreadlocks is not tantamount to a policy of refusing to hire African Americans. *See Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989) ("[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate … constitute direct evidence of discrimination."); *see, e.g.*, *Earley*, 907 F.2d at 1081 ("One example of direct evidence would be a management memorandum saying, 'Fire Earley—he is too old.'"). In fact, CMS offered Ms. Jones the position for which she had applied. CMS Br. 16. That is why no court has found that a neutral workplace policy prohibiting a mutable grooming practice arguably "associated" more closely with

one racial group than another has engaged in intentional discrimination absent evidence of pretext. CMS Br. 18-23.

There is no reason to break new ground here. If the EEOC believes it has an adequate factual basis to allege that a neutral workplace policy adversely affects African Americans as a group because of the practice's cultural prevalence in that community, it should bring a disparate impact claim in an appropriate case. But it clearly has *not* done so here.

Classifying neutral workplace grooming policies as *per se* discriminatory—as the Commission asks the Court to do here—takes an axe to an issue that Congress quite clearly wants addressed with a scalpel. This concern is not confined to employer grooming policies. CMS Br. 21. For example, there have been numerous Title VII disparate treatment cases challenging policies requiring that employees speak English in the workplace as intentionally discriminating on the basis of national origin. Those claims have been correctly rejected as the inability to speak English is not an immutable trait; while workplace policies requiring English sometimes have a disparate impact, they are not intentional national origin discrimination, prohibited in every workplace in the nation. *See Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980); *Velasquez v. Goldwater Mem'l Hosp.*, 88 F. Supp. 2d 257, 262 (S.D.N.Y. 2000) (citing *Soberal–Perez v. Heckler,* 717 F.2d 36, 41 (2d Cir. 1983)).

Were it otherwise, no employer could ever implement a rule requiring that employees speak English in the workplace. Nor could an employer even implement a rule that employees, while free to speak a foreign language generally, must be *capable* of speaking English. That would be an unfathomable construction of Title VII. Like any workplace rule, an English requirement allegedly being used as pretext for intentional national-origin discrimination may be challenged under the *McDonnell Douglas* framework. *See Gloor*, 618 F.2d at 270. Likewise, even absent a pretext claim, a job applicant could bring a disparate impact challenge to an English requirement, arguing that the requirement is unjustified based on the job in question. *See, e.g.*, *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486-90 (9th Cir. 1993). But the ability to speak English is without question a legitimate and non-discriminatory prerequisite for *some* jobs.[3]

[3] This approach not only comports with Title VII's text and purpose, but ensures that employer policies are evaluated based on the "specific factual context of [the] case," *Garcia*, 998 F.2d at 1489, instead of on generalities as to the relationship between national origin and language. Properly analyzing workplace-language rules through the prism of disparate impact also allows the employer to defend the policy as a business necessity and allows a court to uphold the policy on that basis where appropriate. *See, e.g.*, *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1171 (10th Cir. 2007) (upholding business necessity of English policy in hospital's operating room department); *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 418 (S.D.N.Y. 2005) (upholding "English language policy" for "consultants and cashiers" as "consistent with business necessity").

II. Endorsing Any Of The EEOC's Novel Theories As To Why Neutral Grooming Policies Prohibiting Dreadlocks In The Workplace Are Intentionally Discriminatory Would Be Untenable Both For Employers And Courts.

The EEOC's claim that dreadlocks are a racial characteristic is not some academic debate. Employers, including CMS here, potentially could be subject to compensatory and punitive damages if the Court finds that workplace grooming policies prohibiting dreadlocks are *per se* disparate treatment. That kind of award is understandable when an employer has exhibited racial animus. "The purpose of awarding punitive damages," in particular, "is to 'punish a wrongdoer for his outrageous conduct and to deter others from engaging in similar conduct.'" *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986) (quoting *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 460 (1975)). But to subject employers to this kind of monetary liability because they were unaware of the EEOC's novel theories as to why dreadlocks are a racial characteristic of being African American would be unfair, unwise, and would in no way further Title VII's purposes.

The prospect of crippling liability, moreover, would force employers to anticipate this type of challenge. But that is easier said than done. CMS Br. 28-29. Relying on *Rodgers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981), the EEOC argues that "dreadlocks are 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.'" EEOC Br. 25 (quoting PAC ¶ 25). But *Rodgers* was not even about "Afro" hairstyles; it was about a ban on "cornrows," which the district court held were *not* an inherently racial characteristic. 527 F. Supp. at 231. Further, the court merely suggested that a policy banning "the 'Afro/bush' style *might* offend Title VII," and even then only "because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination *on the basis of immutable characteristics*." *Id*. at 232 (emphasis added). The district court thus rejected the plaintiff's claim because the "braided hairstyle … is not the product of natural hair growth but of artifice. An all-braided hairstyle is an 'easily changed characteristic,' and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer." *Id*.

Following the EEOC's line of reasoning, CMS apparently was supposed to digest *Rodgers* and then decipher whether dreadlocks are more like the "cornrow" or "Afro" hairstyle in order to avoid liability for intentional discrimination. The business community is not equipped to make these culturally sensitive judgments. And even if it could be expected to research views held by experts on African-American culture, it would still find sharp differences of opinion over these culturally divisive issues. *See, e.g.*, Richard T. Ford, *Racial Culture: A Critique* 40

(2005) ("Even if we take it on faith that cornrows represent black nationalist pride as against the integrationist and assimilationist coiffure of chemically straightened hair, it's clear that a right to cornrows would be an intervention in a long-standing debate *among* African-Americans about empowerment strategies and norms of identity and identification."). Employers can look to statistical models and their own business judgment to assess whether a grooming policy might expose them to disparate-impact liability. The EEOC's theory would force employers to establish "a list of protected hairstyles" with nothing to guide an inquiry inherently fraught with peril. *Id*.

But this problem will not be limited to particular hairstyles or grooming policies generally. CMS Br. 25-27. More broadly, how precisely are businesses supposed to evaluate these kinds of issues going forward if the EEOC prevails? The employer might survey its employees. But should it survey only those employees implicated by the policy or should the employer consider the views of the entire workforce? What if the company's employees are divided or, even if they have a unified view, the EEOC or job applicants ultimately disagree with their opinion? The employer could instead commission a study (if it has the wherewithal to do so). But the study would no more insulate the employer from liability than would the employee survey. No matter how diligent the employer might be in attempting to determine whether a mutable practice of one kind or another has a

"physiological and cultural" connection to a racial group sufficient to qualify as a racial characteristic, it will be found to have engaged in intentional discrimination if a charge is brought and the factfinder disagrees.

The issue only becomes more complicated once litigation ensues given the inability of neutral principles to instruct the court's resolution of the dispute. The EEOC suggests that courts can defer to its views, repeatedly pointing to its compliance manual and other agency documents supporting its theory of the case. PAC ¶¶ 21-22, 25; EEOC Br. 25-28. But the EEOC is well aware that its views are not entitled to weight. CMS Br. 29-30. The EEOC Compliance Manual is not controlling upon the courts, and is entitled to deference "only to the extent that [it has] the power to persuade." *Christensen v. Harris County,* 529 U.S. 576, 587 (2000) (citations and quotations omitted); *Villescas v. Abraham,* 311 F.3d 1253, 1261 (10th Cir. 2002) (holding that EEOC Compliance Manual is "not entitled to any special deference by our court"); *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 115 (3d Cir. 2003) ("An internal agency manual is not subject to the kind of deliberateness or thoroughness that gives rise to significant deference."). That merely brings the judicial inquiry back to square one as whether the EEOC's views are "persuasive" is the very question to which the factfinder is searching for a way to answer based on objective evidence.

The EEOC also points to law reviews, newspaper articles, and blog posts to substantiate its theory. EEOC Br. 25, 33 n.5, 35. But that is a woefully insufficient offer of proof given the unprecedented expansion of Title VII the EEOC seeks. These written materials will not be available to the factfinder because they are inadmissible as evidence. *See United States v. Baker*, 432 F.3d 1189, 1211 (11th Cir. 2005); *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of Rogers*, 917 F. Supp. 1514, 1521 (N.D. Okla. 1995) ("It is clear that the contentions of a law review article are not evidence sufficient to defeat a motion for summary judgment."). And authors of anonymous blog posts are not qualified experts under the Federal Rules of Evidence. The business community should not be subject to Title VII liability far beyond what Congress envisioned based solely on the EEOC's armchair sociology, supported by nothing more than a self-serving sample of law review articles, newspaper clippings, and blog posts.

The EEOC promises to fill the gaping factual void with expert testimony. PAC at 1. But it is worth considering the factual assertions that the EEOC proposes to substantiate through its expert. The EEOC will offer expert testimony, for example, that "[r]ace is a social construct and has no biological definition"; that "the concept of race is not limited to or defined by immutable physical characteristics"; and that the "method and manner used by Black people to wear, style and groom their natural hair has always been and remains generally very

different from the method and manner used by White people to wear, style and groom their natural hair." PAC ¶¶ 21, 24. Ultimately, the EEOC will ask its expert to opine that "dreadlocks are … a racial characteristic, just as skin color is a racial characteristic." PAC ¶ 29. The prospect that Title VII liability for intentional racial discrimination would hinge on dueling testimony offered by purported experts on sociology and racial identity is untenable for the business community and should be rejected by this Court.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5,778 words, including footnotes; and

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2015, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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