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.

REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PLAINTIFF-APPELLANT

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INTRODUCTION

In its opening brief, the Equal Employment Opportunity Commission ("EEOC" or "Commission") argued that the district court committed reversible error when it dismissed the Commission's original complaint of race discrimination in violation of Title VII and when it refused to permit the filing of an amended complaint based on its belief that the adverse action resulting from the employer's dreadlocks ban is not conduct based on race. Specifically, the Commission asserted that dismissal was not warranted because, consistent with Rule 8 of the Federal Rules of Civil Procedure, the initial complaint set forth a short, plain statement of facts that indicated Catastrophe Management Solutions, Incorporated's ("CMS") refusal to hire a qualified Black applicant because she refused to cut off her dreadlocks constituted race-based discrimination. The Commission also argued that the allegations in the complaint were sufficient to create a prima facie case and to show pretext, although neither is required at the complaint stage.

With respect to the amended complaint, the Commission argued the district court should not have denied the EEOC leave to amend because the amended complaint offered factual enhancements not presented in the original complaint. Additionally, the amended complaint provided several viable analytical approaches to establish the discrimination was because of race including that (1) dreadlocks are a natural outgrowth of the immutable trait of Black hair texture, (2) dreadlocks are directly associated with the immutable trait of race, (3) and targeting dreadlocks as a basis for employment can be a form of racial stereotyping.

Finally, the Commission contended that this Court had jurisdiction over the appeal because the dismissal of the original complaint without prejudice was not a final order. Alternatively, the EEOC argued that the motion for leave to amend qualified under Rule 59 to toll the time for filing an appeal. In short, the Commission asserted that it presented complaints that stated a plausible claim of intentional race discrimination and timely appealed from the district court's unfavorable judgment and subsequent orders.

In response, CMS argues that its "application of a neutral grooming policy to prohibit [the] wearing of dreadlocks" by definition cannot constitute intentional race discrimination. CMS Br. at 12. It further asserts that, although an argument could be made that its neutral policy disproportionately excludes Black applicants, such an argument is waived because the EEOC never alleged a disparate impact claim. *Id.* at 13. Finally, CMS argues that the Commission's "novel" position that Title VII protects hairstyles that are a product of natural outgrowth, closely associated with racial culture, or a symbol of racial pride is not supported by law, promotes racial stereotyping, and imposes a hardship on employers who would have to speculate about race and culture to avoid liability. *Id.* at 13-14.[1]

[1] In its statement of jurisdiction, CMS re-asserts that this Court lacks jurisdiction over this appeal. CMS Br. at 3-4. The Commission rests on its jurisdictional brief to address any arguments raised by CMS in its appellee brief.

For the reasons discussed below (and in its main and jurisdictional briefs), the Commission urges this Court to reverse the district court's judgment and subsequent orders.

ARGUMENT

1. The EEOC's Complaints Satisfied Rule 8.

CMS and its amici Pacific Legal Foundation ("PLF") and the Chamber of Commerce of the United States ("Chamber" or "COC") do not attempt to challenge the factual sufficiency of the EEOC's initial or amended complaints under Rule 8. Instead, they focus their attentions on attacking the Commission's interpretations of race to obtain an affirmance. The Supreme Court, however, has recently reaffirmed the proper standard for evaluating complaints, and its analysis supports the Commission's contention that the complaints' allegations should have been considered plausible.

Citing Rule 8(a)(2) of the Federal Rules of Civil Procedure, the Supreme Court stated to avoid dismissal of a complaint, the "[f]ederal pleading rules call for 'a short and plain statement of the claim showing

that the pleader is entitled to relief[.]'" *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 346 (2014) (per curiam). To illustrate, the *Johnson* Court observed that police officers for the city of Shelby alleged that they were fired, not for deficient performance, but because they revealed the criminal activities of one of the alderman, and thus their Fourteenth Amendment's due process rights were violated. 135 S.Ct. at 346. The trial court granted summary judgment, and the Fifth Circuit affirmed on the ground that their complaint did not allege a violation of 42 U.S.C. § 1983. *Id.*

The Supreme Court, however, decided that the allegations in this complaint were sufficient under Rule 8. Specifically, the Court instructed that "[a] plaintiff . . . must plead facts sufficient to show that her claim has substantive plausibility." *Johnson*, 135 S.Ct. at 347. It continued that, "Petitioners' complaint was not deficient in that regard [because] Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim."

Id.

The *Johnson* analysis supports the Commission's view that the EEOC's original complaint satisfied Rule 8.[2] EEOC Br. at 14-18. The EEOC's complaint 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 qualified applicant, declined to cut her dreadlocks. EEOC Br. at 15-16. Further, in asserting that CMS's ban on dreadlocks "constitutes an employment practice that discriminates on the basis of race (black)," and that the effect of the practice deprived Jones "of equal employment opportunities" that adversely affected her status as an employee because of her race, *id.* at 16, the complaint "stated simply, concisely, and directly events" that showed the EEOC is entitled to relief from CMS. *Johnson*, 135 S.Ct. at 347. In short, the *Johnson* Court instructs that the EEOC's allegations were sufficient to "stave off"

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[2] The "fact that [the Commission's case] presses a statutory claim, whereas the *Johnson* plaintiffs raised a constitutional claim, does not appear to us to affect its applicability." *Brown v. Sessoms*, 2014 WL 7234806, at *4 (D.C. Cir. Dec. 19, 2014) (section 1981 case).

dismissal. *Id.* Hence, the district court's requirement of "more"from the complaint beyond the "who, what, when, and where variety" is reversible error. *Watts v. Ford Motor Co.*, 519 F. App'x 584, 587 (11th Cir. 2013). *See also Johnson,* 135 S. Ct. at 347 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (a "heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)")).

Alternatively, if the Commission's original complaint was somehow deficient, the *Johnson* ruling supports the Commission's contention that the EEOC should have been permitted to amend its complaint. EEOC Br. at 18-22. Specifically, the *Johnson* Court observed that the city sought dismissal of the petitioners' complaint because it did not "expressly invoke" 42 U.S.C. § 1983, in its constitutional claim. 135 S. Ct. at 347. The Court resolved that such articulation was not required since the petitioners' claim against the city had "substantive plausibility." *Id.* However, the Court advised that "[f]or clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,'" the claimant should be accorded an opportunity to amend its complaint. *Id.*

A similar opportunity to amend should have been granted here. While the Commission maintains that its original complaint alleged enough facts to create a plausible claim of race discrimination, *see* EEOC Br. at 17-18, if the district court was unclear about the EEOC's claim, under *Johnson,* it should have permitted the Commission to amend the complaint to "ward off" any perception that its race discrimination claim is deficient. *Johnson,* 135 S. Ct. at 347. This is especially true since the district court denied the EEOC's motion for leave to amend its complaint as futile based on its view that dreadlocks are simply a hairstyle not entitled to Title VII protection. T.4-D.27 at 1-2. *Johnson*, however, counsels that Rule 8(a) does not "countenance dismissal of a complaint for imperfect statement of a legal theory supporting the claim asserted." *Johnson,* 135 S. Ct. at 346. Accordingly, the EEOC's proposed amended complaint, which offered factual enhancements and case law clarifying that the ban of natural hair texture or hairstyles, such as the Afro, associated with a particular racial group may constitute race discrimination in violation of Title VII, *see* T.8-D.21-1 at 8-10, should have been permitted.

2. The EEOC's Complaints Allege Intentional Discrimination

For various reasons addressed below, CMS and the amici argue that the EEOC's complaints fail to establish intentional discrimination. In so doing, they improperly attempt to impose a heightened pleading standard on the Commission. *See Swierkiewicz*, 534 U.S. at 512 (a "heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)").

To start, CMS and its amici assert that the EEOC has not alleged an intentional discrimination claim because the complaints contained numerous deficiencies. Specifically, CMS and its amici contend that the complaints failed to state a plausible claim because they contained no allegation that the grooming policy was applied differently based on race or that a non-Black employee was permitted to wear an excessive hairstyle, CMS Br. at 15; no allegation of racial animus by the human resources manager or CMS, *id.* at 16; COC Br. at 4; no allegation that Catastrophe's decision to prohibit dreadlocks was in part motivated by race, PLF Br. at 2;

no allegation that the grooming policy was a pretext, CMS Br. at 16 n.2; no allegation that the victim wore dreadlocks because of racial pride, id. at 24; no allegation that Ms. Jones would have been denied employment if she did not wear dreadlocks, COC Br. at 3; and no allegation that Catastrophe's prohibition on dreadlocks is indirect evidence of racial discrimination. PLF Br. at 3. This crabbed approach to the intentional discrimination paradigm is inconsistent with established legal principles and, moreover, "attempt to burden the plaintiff with establishing a reasonable likelihood of success on the merits under the guise of the 'plausibly stating a claim' requirement." *United States ex rel. Barker v Columbus Reg'l Healthcare Sys.*, 977 F. Supp.2d 1341 (M.D. Ga. 2013).

Under Title VII, intentional discrimination can be proven by direct evidence or circumstantial evidence. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir.2000). Although circumstantial evidence commonly involves comparative evidence showing different treatment of similarly situated individuals, *Turner v. Florida Prepaid College Bd.*, 522 F. App'x 829, 832 (11th Cir. 2013), a claim can be supported by "a convincing mosaic of

circumstantial evidence that would allow a jury to infer discrimination." *Williams v. Cleaver-Brooks, Inc.*, 529 F. App'x 979, 980 (11th Cir. 2013) (per curiam). At bottom, if "something links the [employer's] actions to the employee's race," this connection is sufficient to "permit a jury to infer intentional discrimination based on race." *Turner*, 522 F. App'x. at 833.

CMS and the amici argue that the EEOC has not established a plausible claim because the complaints did not make certain allegations. First, they note that the complaints did not allege that a non-Black person was permitted to wear dreadlocks or that the grooming policy was disparately enforced. Under settled law, comparative evidence is a component of the prima facie case, which "is an evidentiary standard, not a pleading requirement." *Swierkiewicz*, 534 U.S. at 510. Hence, because it would "be difficult to define the precise formulation of the required prima facie case in a particular case before discovery has unearthed relevant facts and evidence," *id.* at 507, a plaintiff "is not required to include allegations [in the complaint] – such as the existence of a similarly situated comparator – that would establish a prima facie case of discrimination under the

'indirect' method of proof." *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 827 (7th Cir. 2014). *Cf. McCone v. Pitney Bowes, Inc.*, 582 F. App'x. 798, 801 n.4 (11th Cir. 2014) (noting that "*Twombly* . . . had no impact on *Swierkiewicz's* statement that a plaintiff is not required to plead a prima facie case of discrimination in order to survive dismissal.") Therefore, although the EEOC's complaints do not allege that non-Black candidates with dreadlocks or an "excessive" hairstyle were hired by CMS or that CMS disparately enforced its dreadlocks ban, such assertions are not required to meet the pleading sufficiency standard.

Similarly, the EEOC is not required to allege in its complaints that the policy was a pretext or indirect evidence of race discrimination, or that Ms. Jones wore her dreadlocks because of racial pride or would not have been hired if she had not worn dreadlocks. At the pleading stage, detailed factual allegations, legal theories and legal conclusions, such as allegations of pretext or racial pride, are not required. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007). The EEOC need only allege facts that if proven true would support a claim for relief. Yet, the Commission went beyond

these minimal pleading requirements. The EEOC's proposed amended complaint in fact alleged that CMS's "business image" rationale was a pretext since Ms. Jones' dreadlocks were not messy. This factual assertion, taken as true as it must be on a motion to dismiss, certainly makes plausible the Commission's claim that CMS discriminated against Ms. Jones.

To survive a motion to dismiss, the EEOC also did not need to assert that CMS or the human resources officer who informed Ms. Jones about the dreadlocks ban harbored racial animus. As this Court has instructed, "ill will, enmity, or hostility are not prerequisites of intentional discrimination." *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 n.7 (11th Cir. 1999). *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987) (holding that liability for intentional discrimination under § 1981 requires only that decisions be premised on race, not that decisions be motivated by invidious hostility or animus).[3]

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[3] Although *Ferrill* and *Goodman* are § 1981 cases, they apply with equal force to this Title VII case because "[t]he test for intentional discrimination

Finally, contrary to the assertions of CMS and the Chamber, the EEOC did not mix and match the elements of disparate treatment and disparate impact to make out its intentional discrimination claim. Here, CMS asserts that the EEOC's contention that the district court failed "to acknowledge the critical disadvantage at which the dreadlock ban places Black applicants generally" does not support a disparate treatment framework because that "criticism sounds in disparate impact" and the EEOC did not bring a disparate impact case. CMS Br. at 17; *see also* PLF Br. at 3 ("EEOC is not alleging that Catastrophe's policy prohibiting dreadlocks has a disparate impact on black employees"); COC Br. at 14 ("EEOC also does not attempt to plead a case for disparate impact"). The Chamber adds that the Commission attempts to create a new standard for intentional discrimination by alleging disparate impact elements such as that CMS's neutral grooming policy adversely affects African Americans as

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in suits under § 1981 is the same as the formulation used in Title VII discriminatory treatment cases." *Ferrill*, 168 F.3d at 472.

a group because dreadlocks are disproportionally associated with African Americans. COC Br. at 2-4.

First, CMS and the amici are incorrect in arguing that a theory of liability, such as disparate impact, is waived unless alleged in the complaint. To survive a motion to dismiss under Rule 12(b)(6), "the complaint does not need to state all possible legal theories." *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014) (internal citation omitted). In fact, dismissal is not warranted even if the complaint asserts an incorrect theory. *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 848-49 (8th Cir. 2014) (internal citation omitted) ("a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory"); *Haddock v. Bd. of Dental Exam'rs of Cal.*, 777 F.2d 462, 464 (9th Cir. 1985) ("a complaint should not be dismissed if it states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory"). All Rule 8 requires is that the complaint set forth

"'sufficient factual allegations to state a claim showing that he is entitled to relief' under some [tenable] legal theory." *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 589 (1st Cir. 1989).

In any case, the assertion that a policy which critically disadvantages or affects members of one group over another cannot support an intentional discrimination claim is erroneous. Indeed, the "critical disadvantage" phrase is often used in cases involving workplace harassment, a form of intentional discrimination under Title VII. *See, e.g., Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998) (observing in a same-sex harassment case, "the critical issue is whether members of one sex are exposed to a disadvantageous terms or conditions of employment to which members of other sex are not exposed"); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (articulating same standard in sexual harassment case).

Further, this Court's predecessor considered whether a "neutral" grooming policy disadvantaged one protected group over another in a disparate treatment action. Indeed, in *Willingham v. Macon Telegraph*

Publishing Company, 507 F.2d 1084 (5th Cir. 1975), a male employee alleged that he was denied employment because of his hair length. The Fifth Circuit observed on rehearing that regulating hair length by sex is not discriminatory because it "'do[es] not represent any attempt by the employer to prevent the employment of a particular sex, and . . . do[es] not pose distinct employment *disadvantages* for one sex.'" *Id.* at 1091-92 (quoting *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973)). Put differently, the Fifth Circuit recognized that if a grooming policy does pose a distinct disadvantage for one protected group, Title VII is violated. Hence, EEOC's contention that, given the prevalence of dreadlocks among workers of African descent, CMS's dreadlock ban exposes Black people to a distinctly disadvantageous condition of employment that non-Blacks may not experience can be a form of disparate, unfair, and unequal treatment based on race and thus support a plausible claim under Title VII.

3. CMS and the Amici's Criticisms of EEOC's Race Analysis are Without Merit

On the matter of race, CMS and its amici argue that the

Commission's complaints were properly rejected because the "novelty" or "expansiveness" of the Commission's analyses connecting dreadlocks to race are, *inter alia*, based on the EEOC's view that "a mutable characteristic, hairstyle, is the same as race, an immutable characteristic" and an improper mix of disparate treatment and impact elements. CMS Br. at 19-20; COC Br. at 2-3, 5-6; PLF Br. at 4-5. They also assert that if the Commission's race analysis prevails, employers will find enforcement of their grooming policies difficult. Moreover, both PLF and the Chamber argue that the EEOC's interpretation of race should be rejected because the Commission attempts "to expand the reach of Title VII beyond its statutory text," PLF Br. at 4-5, as it did in *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014), and *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013). PLF Br. at 4-5; COC Br. at 6. These arguments are meritless.

In Title VII, Congress defined "discrimination" broadly, and chose "neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is

the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow." *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). *Id.*[4] As a consequence, "Title VII's prohibition against 'disparate treatment because of race' extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999).

Under Title VII, race discrimination encompasses more than just a flagrant refusal to hire because of one's actual skin color. Thus, CMS's argument that race discrimination cannot be proven because CMS initially offered Ms. Jones a job is unavailing in that it ultimately rejected her because of her dreadlocks. As the enforcement agency charged with interpreting Title VII, the EEOC has consistently and reasonably interpreted Title VII to proscribe racial discrimination based on hair texture

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[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.

and hair styles associated with Black people. *See, e.g.,* EEOC Dec. No. 71-2444, 1971 WL 3898, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971) (holding that employer's grooming policy was discriminatory because it "measured ['Negroes'] . . . against a standard that assumes non-Negro hair characteristics" and makes the suppression of "the wearing of an Afro-American hair style by a Negro [which] has been so appropriated as a cultural symbol by members of the Negro race . . . an automatic badge of racial prejudice"); EEOC Compliance Manual at 15-46 to 15-47 (footnotes omitted) ("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."). This long-standing interpretation is consistent with "Congressional intention to define discrimination in the broadest possible terms," and with Title VII's remedial purpose "to eliminate the inconvenience, unfairness, and humiliation of [race] discrimination." *Rogers*, 454 F.2d at 238.

Moreover, like the EEOC, some federal courts have interpreted Title VII's prohibition of race discrimination to encompass hair, hair texture, and

hairstyles. *See, e.g.*, *Smith v. Delta Air Lines, Inc*., 486 F.2d 512, 514 (5th Cir. 1973) (recognizing that "hair . . . tends to be a general attribute of the race"); *Hollins v. Atlantic Co.,* 188 F.3d 652, 661 (6th Cir. 1999) (noting that an unwritten policy that hairstyles not be "eyecatching" was discriminatory where it only applied to a Black female employee); *Rogers v. Am. Airlines, Inc*., 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (observing 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"); *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at *5 (M.D. Ga. Apr. 25, 2008) (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"). Accordingly, the Commission's interpretations do not stand alone but have been embraced by courts.

Although the EEOC's Compliance Manual, administrative decisions,

and other secondary authority on which the Commission relies as support for its interpretation of race are not "controlling," these sources nevertheless represent "a body of experience and informed judgment to which courts and litigants may properly resort for guidance[.]" *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Hence, even if the Commission's interpretation is not entitled to deference as the Chamber asserts, COC Br. at 6, the EEOC's long-standing view of "race" under Title VII is "an administrative interpretation of the Act by the enforcing agency," *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), that is entitled to respect, if not considerable weight. *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (holding that the EEOC's "policy statements, embodied in its compliance manual and internal directives, . . . are entitled to a 'measure of respect' under the less deferential *Skidmore* standard"). To proceed otherwise would "'constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII[.]'" *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279-80 (1976) (quoting

EEOC Decision No. 74-31, 7 FEP Cases 1326, 1328, CCH EEOC Decisions ¶ 6404, p. 4084 (1973)).

Next, CMS argues that the EEOC's "concession" that CMS's written grooming policy is race-neutral supports affirmance because "an employer's adoption and application of a race-neutral policy cannot constitute discrimination based on an individual's race." CMS Br. at 12 &15. CMS misstates the Commission's position. While the EEOC considers CMS's written grooming policy requiring "[a]ll personnel . . . to be dressed and groomed in a manner that projects a professional and businesslike image" to be race-neutral, T.8-D.21-1, Proposed Amended Complaint ("PAC") at 10, the Commission made clear that CMS's "decision to interpret its race-neutral written grooming policy to ban the wearing of dreadlocks constitutes an employment practice that discriminates on the basis of race." *Id.* *See also* T.9, D.1, Complaint at 3.

In fact, the EEOC explained that when a facially neutral policy is applied "to hairstyles associated with Black hair texture," it subjects African Americans "to standards that are based on racial characteristics."

T.8-D.21-1, PAC at 10-11. Further, the Commission observed that employers who consider the natural hairstyles of African Americans to be "unprofessional," "extreme," "unnatural," "not conservative," and "not neat" are engaging in racial stereotyping. *Id.* at 11. Thus, CMS's refusal to employ a qualified Black candidate either because of her natural hairstyle or based on the stereotyped assumption that dreadlocks "get messy" is itself a judgment based in race and thus supports finding that the complaint met the plausibility standard. *Thomas*, 183 F.3d at 58 (stating that a subjective judgment resulting in discrimination against a Black plaintiff is unlawful "regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias").

Moreover, although employers certainly have the prerogative to require their employees to maintain a professional or business image, CMS Br. at 27; PLF Br. at 2-3; COC Br. at 2, this purported justification for imposing CMS's dreadlocks ban on Ms. Jones is defeated by CMS's own admission that Ms. Jones' dreadlocks were not "messy" and the lack of any

argument by CMS that it had a basis for concluding that her dreadlocks would become so. T.8- D.21-1 at 5; EEOC Br. at 33-34 & 38-39. Thus, CMS's dreadlock ban, which was grounded on mere speculation and stereotype and operated to impede Ms. Jones' opportunity for employment, plainly falls within Title VII's purview and creates a plausible claim. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality) ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"); *Carroll v. Talman Federal Sav. & Loan Ass'n of Chicago,* 604 F.2d 1028, 1033 (7th Cir. 1979) (*"'*assumptions steeped in stereotypes * * * are inconsistent with the purposes of the Act'") (internal citation omitted).

CMS also asserts that the Commission's complaints lacked plausibility because cases have decided a grooming policy that distinguishes employees based on hair length, hair style, and other hair qualities is not discriminatory or race-based. *See* CMS Br. at 18-23; T4-D.27, Order Denying Leave to Amend at 1-2; T.6-D.19, Dismissal Order at 5-10. The existence of unfavorable case law, such as *Pitts,* 2008 WL 1899306 at *6,

and *Eatman v. UPS*, 194 F. Supp. 2d 256, 262 (S.D.N.Y. 2002), especially when the decisions are non-binding, does not render a claim implausible. If that were the case, innumberable cases would be left at the courtroom door simply because a similar case had been decided unfavorably. Indeed, even the so-called precedential cases that CMS cites, such as *Willingham*, 507 F.2d 1084, and *Harper v. Blockbuster Entertainment Corporation*, 139 F.3d 1385 (11th Cir. 1998), which involved men with long hair, and *Smith v. Delta Air Lines, Inc.*, 486 F.2d 512 (5th Cir. 1973), which involved a Black man with long sideburns, are distinguishable and do not support the conclusion that the EEOC's allegations are implausible.

In *Willingham* and *Harper*, this Court and its predecessor Fifth Circuit upheld an employer's grooming code that required different hair lengths for males and females. Unlike in this case, the plaintiffs in those cases did not argue that the length of the hair on their heads or faces was a natural outgrowth of their hair texture, a trait CMS admits is immutable, or linked to any immutable trait such as gender. *See* D.23, CMS Opp. to Amend at 9 n.5. Nor did the plaintiffs argue that their hair length was a symbol in any

way related to a protected trait. In fact, beyond the general reference to hair, neither *Willingham* nor *Harper* addresses any of the issues raised by the EEOC's complaints. Hence, those decisions do not "squarely foreclose[] the [EEOC's] discrimination claim." *Harper*, 139 F.3d at 1387.[5]

Similarly, although the Fifth Circuit in *Smith* decided that a grooming policy requiring sideburns to be trimmed did not violate Title VII, that Court acknowledged, comparable to the Commission's position on Black hair, that "the requirement . . . that sideburns will not be bushy or that the

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[5] For similar reasons, CMS's reliance on the EEOC's decision in *Thomas v. Chertoff*, Appeal No. 0120083515, 2008 WL 4773208, at *1 (E.E.O.C. Oct. 24, 2008) to suggest that the EEOC's position in the complaint is inconsistent is misplaced. CMS Br. at 30-31. In *Thomas*, an African American male employee who wore his hair in long braids was informed that his hairstyle did not adhere to the agency's uniform guidelines on hair lengths for men. 2008 WL 4773208, at *1. After being threatened with a reprimand if he did not cut his hair, the complainant cut his hair but filed a complaint asserting that men who wear ethnic hairstyles such as braids and dreadlocks should be allowed to use accessories to keep their hair above the collar, like the women were permitted to do, rather than being required to cut their hair. *Id.* The EEOC ruled that the employee had no claim because he did not suffer an adverse action and hair length is not an immutable trait. Hence, like *Willingham* and *Harper*, the *Thomas* case does not address the issues of natural hair texture or other racial characteristics presented here and thus is not only not dispositive, but not relevant.

hair shall be well trimmed may impose some additional burden on persons of the negro race, because of the hair, that [the district court believed] under the evidence tends to be a general attribute of the race." 486 F.2d at 514. The Court concluded, however, that "where there is no great difficulty in complying with the rule and which can be complied with by all (sic)," the rule is not discriminatory even if it requires a Black person to trim more often to be compliant. *Id.* The *Smith* ruling has no application to the instant case. Here, CMS directed Ms. Jones to "cut off" and not trim her dreadlocks. Hence, the shearing of her hair poses a great difficulty and burden for Ms. Jones to be compliant with CMS's dreadlocks ban. Thus, *Smith* also does not foreclose the Commission's claim of intentional race discrimination.

Next, CMS insists that if Jones is able to "choose" to wear her hair in dreadlocks, that decision somehow subverts the Commission's contention that dreadlocks are a natural outgrowth of Black hair and thus not entitled to Title VII protection. CMS Br. at 27. Specifically, CMS states: "By suggesting that 'Jones chose to wear dreadlocks as a reflection of her pride

in her race,' . . . , the EEOC makes clear that Jones's dreadlocks were not simply the 'natural outgrowth' of her race. They were, in the EEOC's words, a 'grooming preference' that Jones chose.'" *Id.* at 26. CMS's argument is disturbingly vacuous.

The EEOC alleged that Ms. Jones's dreadlocks are the product or natural outgrowth of her Black hair texture. Taken as true, the Commission has established a link to race that brings CMS's interpretation and application of its grooming policy within the purview of Title VII. *American Airlines,* 527 F. Supp. at 233 ("banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics"). That Ms. Jones also may wear dreadlocks because of pride in her natural hair or race is simply an independent, alternative or additional basis for challenging CMS's dreadlock ban as discriminatory since the suppression of her personal expression could be deemed "an automatic badge of racial prejudice." EEOC Dec. No. 71-2444, 1971 WL 3898, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971). Thus, CMS's argument reflects, at best, a continuing misperception

of the core construct underlying the Commission's claim and, at worst, a persistence of the very stereotype-based thinking this lawsuit seeks to rectify.

CMS further asserts that "appearing for work as 'comes naturally' is not a statutory right" because "[d]readlocks may be 'the natural result of letting one's hair grow *wild*,'" CMS Br. at 27 (emphasis added and internal citation omitted), akin to "the trademark shaggy hair, bushy beard, and full mustache of *Duck Dynasty's* Phil Robertson." *Id.* This argument is specious. As previously stated, Title VII does protect natural hairstyles. EEOC Br. at 22-27. Further, Ms. Jones's dreadlocks in fact were not messy, ungroomed, or "wild." Hence, CMS's unfounded, stereotypical view of dreadlocks bolsters the EEOC's position that the dreadlock ban is an "artificial, arbitrary, and unnecessary barrier[] to employment" that must be eliminated. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973).[6]

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[6] CMS's pernicious descriptions and alleged consequences of permitting dreadlocks in its workplace, such as having to extend Title VII protection to

Similarly, CMS's argument that the EEOC's "novel theories" about race and culture and its "expansive" definition of race create an unworkable grooming standard is untenable. CMS Br. at 23-33. CMS argues that, to avoid liability under the EEOC's theories of race, employers would have to inquire as to whether a person was wearing dreadlocks because of racial pride, *id.* at 24-26, or "engage in armchair racial and biological speculation about whether a particular hairstyle is 'natural'." *Id.* at 28-29. CMS also argues that "the EEOC's 'predominance' test would lead to absurd results that are squarely at odds with Title VII" because "[t]he result would be that employees of one race (here, Blacks) would

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"Klan insignia worn by a White supremacist," CMS Br. at 25, border on being offensive and insulting. The Commission doubts CMS believes, as its argument suggests, that the hateful insignia of the Klu Klux Klan (KKK) is somehow inextricably linked to the Caucasian race. In any case, the KKK is considered "[t]he world's oldest, most persistent terrorist organization" whose "members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States." *Virginia v. Black*, 538 U.S. 343, 388-89 (2003) (Thomas, J., dissenting) (quoting M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia vii (1991)). Title VII, in contrast, seeks to advance equal opportunity for all races. Hence, the notion that Title VII's protection of dreadlocks would require the protection of Klan insignia in the workplace is absurd.

enjoy substantive privileges that are denied to employees of other races." CMS Br. at 33. CMS's concerns are without merit.

To be clear, if the Commission proves that CMS's dreadlocks ban violates Title VII, the ban will be prohibited and its implementation will cease. Any qualified applicant wearing dreadlocks that are neatly groomed or "not messy," as was the case with Ms. Jones, would not be denied employment simply because he or she wears dreadlocks. Such even-handed application of the grooming standard will "drive employers to focus on qualifications rather than on race," *Price Waterhouse*, 490 U.S. at 243, and promote Title VII's goal of equal employment opportunity. *Connecticut v. Teal*, 457 U.S. 440, 448 (1982). Hence, implementation of the grooming policy would not be "difficult" since CMS would not need to make any inquiries of the applicant wearing dreadlocks or treat non-Black applicants with dreadlocks differently from Black applicants with them.

Lastly, the amici's argument -- that EEOC's interpretation of race attempts "to expand the reach of Title VII beyond its statutory text," PLF Br. at 4-5, as evidenced by the decisions in *EEOC v. Kaplan Higher Educ.*

Corp., 748 F.3d 749 (6th Cir. 2014), and *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013) -- overreaches. *See* PLF Br. at 4-5; COC Br. at 6. *Kaplan* and *Freeman* are disparate impact cases that alleged criminal background and credit check policies discriminated on the basis of race. In ruling against the Commission in these cases, the courts did not find the EEOC's claim that the use of credit or criminal background checks had a disparate impact on African Americans to be implausible. Rather, the courts decided at summary judgment that the Commission's statistical evidence of impact was unreliable because the expert's scientific technique had not been tested. Hence, nothing in those cases has any bearing on the issues raised here.

CONCLUSION

The Commission urges this Court to reverse the district court's judgment and remand for further proceedings including the filing of the EEOC's 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 6,204 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 January 30, 2015, 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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