WHAT IS "RACE" UNDER TITLE VII'S PROHIBITION AGAINST RACIAL DISCRIMINATION?

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By: James C. Cunningham, Jr.

James Cunningham 300 x 400

Is race one's inherited biological and anthropological characteristics? Or, is race one's cultural traits and social construct? Or, is race merely an idea? To decide whether Title VII's prohibition against racial discrimination is violated by refusing employment to a candidate who wears dreadlocks, the Eleventh Circuit had to decide what constitutes race. In *EEOC v. Catastrophe Management Solutions,* 2016 WL 7210059, *9 (11th Cir. December 13, 2016), the Court said that race is defined by "immutable characteristics but not ... cultural practices." Determining that dreadlocks are not an immutable racial characteristic, a three-judge panel of the Eleventh Circuit concluded that refusing to hire a job applicant who wears dreadlocks does not violate Title VII's prohibition against racial discrimination.

Chastity Jones, a black lady, applied for employment with Catastrophe Management Solutions ("CMS"). CMS provides customer service support to other businesses through its telephone call center. Customer service support is performed in a large telephone call center room and does not bring CMS employees into visual contact with CMS's client or their customers. Candidates for employment with CMS are required to have basic computer knowledge and professional phone skills. CMS's employees must comply with its grooming policy that states:

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

Id. at *2.

Ms. Jones successfully navigated CMS's written job application and the personal interview. On the same day as her personal interview, Ms. Jones was offered employment. A precondition to commencing work was completing a lab test that had already been scheduled for Ms. Jones and other successful job applicants. Because of a scheduling conflict, Ms. Jones and CMS's human resources manager agreed that Ms. Jones would return on a different day for her lab test. As Ms. Jones was about to depart, the human resources manager inquired of her whether her hair was in dreadlocks; Ms. Jones responded affirmatively. The human resources manager then informed Ms. Jones that she could not be hired if she wore dreadlocks, explaining "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about." *Id*. at *2. Ms. Jones refused to cut off her dreadlocks and CMS then rescinded its job offer.

On these facts, the Equal Employment Opportunity Commission ("EEOC") sued CMS on behalf of Ms. Jones, alleging that CMS's conduct violated 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-2(m) of Title VII of the Civil Rights Act of 1964. Section 2000e-2(a)(1) makes it unlawful for an employer "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 ... ." Under Section 2000e-2(m), "an

unlawful employment practice is established when the complaining party demonstrates that race ... was a motivating factor for any employment practice, even though other factors also motivated the practice." CMS moved to dismiss the complaint arguing that the EEOC could not plausibly allege that CMS intentionally discriminated against Ms. Jones. The district court dismissed the complaint on the basis that Title VII prohibits discrimination based on immutable characteristics such as race but does not reach mutable characteristics "more associated with a particular ethnic group." *Id*. at *3 (quoting *EEOC v. Catastrophe Mgmt. Solutions,* 11 F.Supp.3d 1139, 1143 (S.D. Ala. 2014)). The district court also refused the EEOC's request to amend its complaint because, under the facts, amending would be legally futile. Having suffered the dismissal of its complaint and been denied leave to amend, the EEOC appealed to the Eleventh Circuit.

The Circuit Court began its analysis by noting that the EEOC was proceeding on a disparate treatment claim under 42 U.S.C. § 2000e-2(a)(1) as opposed to a disparate impact claim under 42 U.S.C. § 2000e-2(k)(1). This fact is important because disparate treatment and disparate impact are different theories of liability and are not interchangeable. A disparate treatment claim requires proof "that an employer intentionally discriminated against [an individual] on the basis of a protected characteristic." *Id.* at *4. In other words, a disparate treatment claim requires proof that a "protected trait actually motivated the employer's decision." *Id*. at *6. A disparate impact claim, on the other hand, requires proof that "an employment practice ... has an actual, though not necessarily deliberate, adverse impact on protected groups" and does not require discriminatory intent. *Id.* at *4.

The EEOC contended that its pleadings stated a claim under Title VII because race "is a social construct and has no biological definition," *id*. at *2, and is not "limited to or defined by immutable physical characteristics," *Id*. The EEOC described dreadlocks as being "formed in a black person's hair naturally, without any manipulations, or by manual manipulations of hair into larger coils." *Id*. The EEOC also contended that "although some non-black persons 'have a hair texture that would allow the hair to lock, dreadlocks are nonetheless a racial characteristic, just as skin color is a racial characteristic.'" *Id*. The EEOC then argued that CMS's employment decision was disparate treatment proscribed by Title VII because:

> dreadlocks are a natural outgrowth of the immutable trait of black hair texture; that the dreadlocks hairstyle is directly associated with the immutable trait of race; that dreadlocks can be a symbolic expression of racial pride; and that targeting dreadlocks as a basis for employment can be a form of racial stereotyping.

Id. at *4. In short, the EEOC was attempting to convince the Court that race should not be defined solely as the inherited biological and anthropological characteristics of a group but that race includes individual expressions tied to race.

Title VII nor the EEOC's regulations define race. Therefore, the Court employed a rule of statutory construction requiring it to look to the "ordinary, contemporary, common meaning," *id*. at *6, of the word as understood in the 1960s when 42 U.S.C. § 2000e-2(a)(1) was enacted. A 1961 dictionary defined race as "anthropological and ethnological in force" usually characterized by things such as skin color or skull shape. *Id* . Another 1960s era dictionary described race as a "subdivision of a species" displaying "a number of hereditary attributes that have become associated with one another through considerable degree of in-breeding among the ancestors." *Id*. The Court acknowledged, though, that more current definitions reject race as an "absolute biological truth," *id.* at *7, and that "some scientists have concluded that 'racial classifications are for the most part sociopolitical, rather than biological, in nature.'" *Id*. In fact, the Court acknowledged one writer's argument that "race is essentially only a very powerful idea and not at all a biological fact." *Id*.

Distilling the 1960s era definitions of race, the Court said that race "referred to common physical characteristics shared by a group of people and transmitted by their ancestors over time." *Id*. According to the Court, "[t]here is little support for the position of the EEOC that the 1964 Congress meant for Title VII to protect 'individual expression ... tied to a protected race.'" *Id*. Relying on this definition and its own case precedent, the Court concluded that "Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices." *Id*. at *9.

The Court observed that the EEOC's proposed amended complaint did not "allege that dreadlocks themselves are an immutable characteristic of black persons, and in fact [the EEOC alleges] that black persons choose to wear dreadlocks because that hairstyle is historically, physiologically, and culturally associated with their race." *Id*. The Court went on to say that even if dreadlocks are a natural result of the texture of black hair, they are not an immutable characteristic of race. *Id*. The Court then affirmed the dismissal of the EEOC's complaint and the denial of its request for leave to amend the complaint.

On December 23, 2016, the EEOC filed a motion requesting that the case be reheard by all judges on the Eleventh Circuit. As of this writing, the motion is still pending.

For more information on this topic, please contact the author, James C. Cunningham, Jr. on the firm's Dispute Resolution Team.

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