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More Hair-Raising Decisions, and How Professor Wendy Greene Combs Through Their Flaws

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D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 **J. Gender Race & Just.** 405 (2011), available at [SSRN](#).

If you are looking for an interesting and timely employment discrimination article to read, please consider *Black Women Can't Have Blonde Hair . . . in the Workplace*, by Professor Wendy Greene of Cumberland, Samford University, School of Law. In that article, Professor Greene builds upon the work that she began in her article *Title VII: What's Hair (and Other Race Based Characteristics) Got to Do With It*¹ where she argued that characteristics that are commonly associated with a particular racial or ethnic group should fall under Title VII's current protected categories of race, color, and national origin. Professor Greene also builds upon a seminal work in Critical Race Theory, *A Hair Piece: Perspectives on the Intersection of Race and Gender*², which was written by Professor Paulette Caldwell of New York University School of Law more than twenty years ago.

In *A Hair Piece*, Professor Caldwell used the case *Rogers v. American Airlines* to expose the ways in which employer grooming codes can be used to discriminate against black women at the intersection of race and gender. In *Rogers*, a black female employee of American Airlines filed a lawsuit under Title VII, arguing that her employer discriminated against "her as a woman, and more specifically, a black woman" through a grooming policy that prohibited employees who had customer contact from wearing all-braided hairstyles. In dismissing Rogers's claims based on American Airlines's appearance grooming regulations, the district court provided two basic reasons for its decision (without actually ever addressing the plaintiff's intersectional discrimination claim): (1) that the challenged appearance code did "not regulate on the basis of any immutable characteristic" and (2) that the challenged policy applied equally to both races and sexes. Professor Caldwell astutely argued that the flaw in *Rogers* was that it rested upon the premise that racism and sexism existed and operated separately and independently from each other.

The year 2011—the year in which Professor Greene published her *Black Women Can't Have Blonde Hair . . . in the Workplace* article—marked the twentieth anniversary of the publication of Professor Caldwell's seminal *Hair Piece* article. It also marked the thirtieth anniversary of the *Rogers v. American Airlines* decision. The upcoming anniversary of both Professor Caldwell's article and the *Rogers* decision inspired me to revisit the question of race and gender discrimination based upon hair restrictions in employer grooming codes.³

Professor Greene, too, was moved to write about this form of discrimination against black women that has not changed either in its practice by employers or its recognition by the courts for twenty years. When I asked Professor Greene about her motivations for writing *Black Women Can't Have Blonde Hair . . . in the Workplace*, she wrote the following to me:

Reading the blonde hair cases struck a personal chord with me as my mother at the time was wearing a short dyed blonde hair style, and my aunt was born with blondish-red hair; for as long as I can remember, my aunt's hair has always been some shade of blonde. The personal/legal issue that arose in reading these cases for me is: per the immutability doctrine that courts have advanced uncritically, why should my mother not be protected against an employer's decision that her hair is "extreme" because she is a Black woman wearing blonde hair yet my aunt theoretically could be protected against such a prohibition, because her blonde hair was "natural"? Shouldn't both women be protected under the law? In both cases, the prohibition stems from this notion that only white women can don blonde hair, as blonde hair is presumed natural only for white women. Accordingly,

a prohibition against blonde hair enforced against a Black woman is not simply about her hair color but has everything to do with her race, color, and gender—her socially constructed status as a Black woman. Thus, the viability of Black women’s challenges against employers’ hair regulations under our discrimination laws should not hinge upon this legal fiction of immutability.

Interestingly, at the time I was writing this article, my mother was making a community-wide presentation in my hometown. After her presentation, an Egyptian woman initiated a conversation with my mother, commending her on her presentation. During the conversation, however, she also expressed to my mother (who was wearing blonde hair at the time) that as an African woman she found it “offensive” when Black American women wore blonde hair. My mother engaged her further on her beliefs and mentioned that her thoughts were quite timely, as her daughter was currently writing an article on this very issue of race/gender discrimination with respect to the discrimination Black women encountered when they wore blonde hair in the workplace. This conversation reminded me very much of the *Bryant* case and forced me to ponder hypothetically: what if my mother worked for this Egyptian woman who held very similar beliefs as the supervisor in the *Bryant* case? What if other Black women worked with/for her and she imposed her ideas about hair colors Black women *should* wear and thereby excluded Black women from employment opportunities, harassed Black women, and/or denied privileges of employment in the process? Do our courts and our antidiscrimination laws protect Black women, like my mother, from such discrimination?

As Professor Greene spells out so nicely in her article, the answer to her questions, even twenty years after *Rogers*, is a resounding no.

In her article, Professor Greene not only examines cases since *Rogers* that involve black women who wear natural hairstyles like braids, twists, and locks, but also introduces a new subset of “hair stories” involving black women who are barred from wearing blonde hair in the workplace, such as *Burchette v. Abercrombie & Fitch Stores*, *Santee v. Windsor Court Hotel*, and *Bryant v. BEGIN Manage Program*. Through her overview of “hair cases,” Professor Greene illustrates that courts, by essentially upholding employers’ regulations on braids, locks, and twists, have severely constrained “Black women’s freedom, choice, and dignity” and have “constructed and reified a very narrow space in which Black women can express their natural or chosen style or color without reprobation, stigmatization, or exclusion.”

In so doing, Professor Greene demonstrates how courts have limited grooming-code-based, employment discrimination claims brought by black women in one major way: by adopting an “immutability doctrine” in race discrimination cases, in which Title VII remedies discrimination only when based solely upon an immutable characteristic such as skin color. Professor Greene highlights that, when adverse employment decisions are made due to the confluence of “immutable” and mutable characteristics, such as hair, courts repeatedly find plaintiffs’ challenges to these employment decisions to be outside of the purview of anti-discrimination law and “immaterial” to equal employment opportunity.

In the end, Professor Greene argues that a few key factors, such as an intersectional analysis; race and gender-based privilege; race and gender-based stigmatization; an acknowledgment that mutable characteristics are racialized; an understanding of differential treatment within race and gender groups; and lastly an understanding that hair regulations can impact a Black woman’s equal employment opportunities in tangible ways, are missing from courts’ analyses of black women’s claims of discrimination based on hair regulations. She concludes by calling for renewed attention to the intersectional, race, color, and gender-based discriminatory harms that black women experience due to the enactment and enforcement of formal and informal hair regulations in the workplace.

1. 79 **U. Colo. L. Rev.** 1356 (2008),

2. 1991 **Duke L.J.** 365

3. Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 **Geo. L.J.** 1079, 1103 (2010).

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