REASONABLE ACCOMMODATION AND DISPARATE IMPACT: CLEAN SHAVE POLICY DISCRIMINATION IN TODAY'S WORKPLACE

INTRODUCTION

Salik Bey, Terrel Joseph, Steven Seymour, and Clyde Phillips are Black firefighters employed by the New York City Fire Department (the "FDNY").[1] They all suffer from a skin condition called Pseudofolliculitis Barbae (PFB) which results in persistent irritation and pain following shaving.[2] PFB affects up to 85% of Black men.[3] A Clean Shave Policy[4] is a part of the FDNY's Grooming Policy.[5] The FDNY used to provide medical accommodations to firefighters with PFB, which permitted them to maintain closely cropped beards.[6] Following a review, the FDNY determined that the accommodation was prohibited by regulations of the United States Occupational Safety and Health Administration (OSHA) and revoked the

[1] *See Bey v. City of New York*, 999 F.3d 157, 161 (2d Cir. 2021).

[2] *See id.*

[3] *See id.*; Roopal V. Kundu & Stavonnie Patterson, *Dermatologic Conditions in Skin of Color: Part II. Disorders Occurring Predominantly in Skin of Color*, 87(12) AM. FAM. PHYSICIAN 859, 860 (2013).

[4] The capitalized terms used herein are for this Note's emphasis purpose only: Clean Shave Policy, Grooming Policy, Clean Shave Policy Discrimination, Grooming Policy Discrimination, and Hair Discrimination.

[5] *See Bey*, 999 F.3d at 161.

[6] *See id.*

program.[7] The firefighters were required to face a choice between becoming clean-shaven and suffer harmful medical consequences or being placed on light duty[8] and never being able to enter a fire site and save lives again.

Hair Discrimination and Grooming Policy Discrimination cases involving hair length, hair texture, or hair styles in the workplace have been prevalent since the enactment of Title VII of the Civil Rights Act of 1964 ("Title VII").[9] Discrimination with regard to male facial hair was no exception — the Equal Employment Opportunity Commission (EEOC) issued a guidance on this topic in as early as 1989.[10] Male facial hair discrimination, usually in the form of an employer Clean Shave Policy, mainly concerns a man's ability to wear a beard, often for religious reasons or medical reasons such as PFB.[11] Because PFB disproportionately affects Black men and has not been considered a disability within the meaning of the Americans with Disabilities Act (ADA) until recent years,[12] PFB-related Clean Shave Policy Discrimination

[7] *See id.* at 162.

[8] *See id.*

[9] 42 U.S.C. § 2000e et seq. (1964); *see CM-619 Grooming Standards*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/cm-619-grooming-standards (last visited Apr. 4, 2022); *see e.g.*, *Fagan v. Nat'l Cash Reg. Co.*, 481 F.2d 1115 (D.C. Cir. 1973) (male employee refused to cut his hair to an acceptable length); *Rogers v. Am. Airlines Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981) (an employer policy against women wearing braids or cornrows).

[10] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 9.

[11] *See id.*

[12] *See infra* Part I.C.i.

usually has racial implications and shares the same socio-historical and legal context with Hair Discrimination and Grooming Policy Discrimination against Black employees.

The FDNY firefighters sued their employer in New York federal court for disability and racial discrimination.[13] It is one of the most recent Clean Shave Policy Discrimination cases and probably the first to examine the interaction of reasonable accommodation for a disability under the ADA, disparate impact on a protected racial group under Title VII, and other binding federal regulations such as OSHA safety standards.[14]

This Note examines recent developments in Clean Shave Policy Discrimination litigation, especially cases where Black plaintiffs suffer from PFB, with an intersectional approach utilizing legal theories on racial discrimination, disability discrimination, and religious discrimination. Part I surveys the history of Clean Shave Policy Discrimination litigation in a broader context of Hair Discrimination and Grooming Policy Discrimination, and the methods often used to challenge discriminatory employment practices. Part II will conduct a case study on the recent Second Circuit case — *Bey v. City of New* York — to illustrate current challenges to Clean Shave Policy litigation such as the interaction of the ADA and Title VII with other binding federal regulations like OSHA rules. Part III will propose solutions for Clean Shave Policy Discrimination other than litigation under the current legal frame. This Note proposes that employers should take the lead in designing equitable Grooming Policies in the workplace such

[13] *See generally Bey v. City of New York*, 437 F. Supp. 3d 222 (E.D.N.Y 2020), *aff'd in part*, *rev'd in part on other grounds*, 999 F.3d 157 (2d Cir. 2021).

[14] *See id.*

as the Halo Code in the United Kingdom,[15] that courts should take an intersectional approach to Hair Discrimination cases going forward, and that legislative efforts such as the CROWN Act should advocate for Black men as well.

PART I. BACKGROUND

A. History of Hair Discrimination and Grooming Policy Discrimination

For a long time in history, Black people have had to risk losing job and education opportunities because of their hair.[16] In the workplace, Grooming Policy Discrimination, or Grooming Codes Discrimination, is defined as "the specific form of inequality and infringement upon one's personhood resulting from the enactment and enforcement of formal as well as informal appearance and grooming mandates, which bear no relationship to one's job qualifications and performance. However, such mandates implicate protected categories under anti-discrimination law like race, color, age, disability, sex, and/or religion."[17]

Our understanding of the relationship between race, Hair Discrimination, and Grooming Policy Discrimination has been evolving over time. In Grooming Policy Discrimination cases,

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[15] *See infra* Part III.A.

[16] *See* Dena E. Robinson & Tyra Robinson, *Between a Loc and a Hard Place: A Socio-Historical, Legal, and Intersectional Analysis of Hair Discrimination and Title VII*, 20 U. MD. L.J. RACE RELIGION, GENDER & CLASS 263, 264–65 (2020).

[17] D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in* EEOC v. Catastrophe Management Solutions, 71 U. MIA. L. REV. 987, 990 n.12 (2017).

courts often adopt the immutability doctrine, holding that federal protections only extend to adverse treatment based on an employee's immutable traits — "traits with which one is born, are fixed, difficult to change, and/or displayed by individuals who share the same racial identity."[18] In the context of Hair Discrimination, this doctrine would mean that afros are protected, but braids are not[19] — because "afros are racial but locks are cultural."[20] Plaintiffs in seminal Grooming Policy Discrimination cases like *Rogers v. Am. Airlines Inc.*[21] and *EEOC v. Catastrophe Mgmt. Sols.*[22] challenge such doctrine but have failed. Legal scholars claim that this doctrine is a legal fiction — "a rule created by judicial, legislative, and political bodies, which is not based in fact, yet is treated as such in legitimating zones of protection and inclusion."[23] These scholars further argue that the courts should take a cue from how immutability was

[18] See *id.* at 998.

[19] *See id.*

[20] *See id.* at 1015.

[21] 527 F. Supp. 229 (S.D.N.Y. 1981).

[22] 852 F.3d 1018 (11th Cir. 2016).

[23] *See Greene, supra* note 17, at 1029; *Robinson & Robinson, supra* note 16, at 284.

interpreted in sexual orientation cases[24] such as *Bostock v. Clayton County*,[25] and read race as a social and legal construct.[26] Such advocacy has also led to the creation of the CROWN Act in 2019 — "a law that prohibits race-based hair discrimination, which is the denial of employment and educational opportunities because of hair texture or protective hairstyles including braids, locs, twists or bantu knots."[27]

B. Clean Shave Policy Discrimination as a Product of Implicit Bias

Discrimination today has shifted from open bigotry to more "subtle" and "indirect" discriminatory acts[28] driven by implicit bias. Implicit bias refers to stereotypes or attitudes that operate without an individual's conscious awareness.[29]

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[24] *See Greene, supra* note 17, at 1034 ("[C]ourts permitted sexual orientation discrimination claims based upon the concept that immutability embodies characteristics that are 'central and fundamental' to one's identity; therefore, the Constitution guarantees protection against discrimination when one is 'required to abandon' such a characteristic."); *Robinson & Robinson, supra* note 16, at 287.

[25] 140 S. Ct. 1731 (2020).

[26] *See Greene, supra* note 17, at 1033; *Robinson & Robinson, supra* note 16, at 285.

[27] *See About*, THE OFF. CROWN ACT, https://www.thecrownact.com/about (last visited Apr. 4, 2022).

[28] *See* Taylor Mioko Dewberry, Note, *Title VII and African American Hair: A Clash of Cultures*, 54 WASH. U. J. L. & POL'Y 329, 345 (2017).

[29] *See* Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 429 (2007).

African Americans face a significant amount of implicit bias.[30] Similar to "an employer's hyper-regulation of a Black woman's natural hair when not shaped like an afro based upon subjective and paternalistic ideals about what management finds 'attractive,' 'acceptable,' and therefore 'permissible' in the workplace,"[31] Clean Shave Policy for Black men is also a product of implicit bias, because "white supremacy permeates ideas around what it means to appear as 'professional' or 'businesslike.'"[32]

Employers might be unaware of what PFB is and how their seemingly race-neutral Clean Shave Policy could create implicit bias against their Black employees. For example, in *Forkin v. UPS*, when an employee was trying to seek accommodations for his PFB, UPS's labor manager stated: "[N]o disrespect, but I can go to any doctor and get any bullshit note I want to . . . . I'm just calling it how I see it."[33] Whereas in reality, some Black employees might have to go through laser hair removal on their face in order to comply with their employer's Clean Shave Policy.[34]

C. Methods of Challenging Clean Shave Policy Discrimination

Black employees with PFB experiencing discriminatory employment practice can challenge their employer's Clean Shave Policy for disability discrimination under the ADA and

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[30] *See id.* at 436–37.

[31] *See Greene, supra* note 17, at 1003.

[32] *See Robinson & Robinson, supra* note 16, at 277.

[33] 2020 U.S. Dist. LEXIS 255487, at *7 (E.D.N.Y. 2020).

[34] *See Bey v. City of New York*, 437 F. Supp. 3d 222, 227 (E.D.N.Y 2020), *aff'd in part, rev'd in part on other grounds*, 999 F.3d 157 (2d Cir. 2021).

race discrimination under Title VII, under the doctrines of disparate treatment or disparate impact.

i. ADA — Disability Discrimination

Plaintiffs with PFB challenging an employer's Clean Shave Policy have brought disability discrimination claims under the ADA[35] or § 504 of the Rehabilitation Act of 1973, which prohibits disability discrimination from employers and organizations that receive financial assistance from any federal department or agency.[36]

Like other discrimination claims, ADA claims are subject to the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*.[37] The plaintiff must establish the four elements of a prima facie case:

> "(1) [The plaintiff] is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, [the plaintiff] could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations."[38]

[35] 42 U.S.C. § 12112(a).

[36] 29 U.S.C. § 794(a); *see Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1125 (11th Cir. 1993).

[37] 411 U.S. 792, 802 (1973); *see Bey v. City of New York*, 999 F.3d 157, 165 (2d Cir. 2021).

[38] *Bey*, 999 F.3d at 165.

Before the ADA Amendments Act of 2008 ("ADAAA"),[39] it was hard to prove that PFB constituted a disability because the Supreme Court had narrowly interpreted the concept.[40] After the ADAAA instructed courts to construe the "definition of 'disability' . . . in favor of broad coverage,"[41] courts grew more inclined to find PFB as a disability,[42] although some still express doubt.[43]

ii. Title VII — Sex, Race, and Religious Discrimination

According to the EEOC, challenges to Clean Shave Policy Discrimination are usually brought based on sex, race, or religion.[44]

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[39] 42 U.S.C. § 12101 et seq. (2008).

[40] *See Kennedy v. Gray*, 83 F. Supp. 3d 385, 390 (D.D.C. 2015) (citing *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184 (2002)).

[41] 42 U.S.C. § 12102(4)(A).

[42] *See Bey v. City of New York*, 437 F. Supp. 3d 222, 231 (E.D.N.Y 2020), *aff'd in part, rev'd in part on other grounds*, 999 F.3d 157 (2d Cir. 2021) ("[p]laintiffs are [d]isabled within the [m]eaning of the ADA"); *Dehonney v. G4S Secure Sols.*, 2017 U.S. Dist. LEXIS 162217, at *6 (W.D. Pa. 2017) ("it is plausible that Plaintiff's pseudofolliculitis barbae condition is a disability").

[43] *See Lewis v. Univ. of Pa.*, 779 F. App'x 920, 925 (3d Cir. 2019) ("whether PFB qualified as a disability under the ADA definition was a fact in dispute").

[44] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 9.

"[F]ederal courts have generally held that sex-differentiated grooming standards do not violate Title VII."[45]

Some Black men might not be able to shave for both medical and religious reasons and might be able to bring their claims under both theories. The overlap might be small — for example, only 2% Black Americans are Muslim.[46] But many religions prohibit shaving at different degree, such as Muslim, Judaism, Sikh, and Asatru — a traditional Norse Pagan religion.[47] Even though this Note focuses on race discrimination, the analysis informs discussions on religious discrimination as well.

As a result, Black plaintiffs challenging a Clean Shave Policy often bring a Title VII race discrimination claim under either a disparate treatment theory or a disparate impact theory.

iii. Title VII — Disparate Treatment & Disparate Impact

Title VII employment discrimination claims adopt the same *McDonnell Douglas* burden-shifting framework as the ADA claims.[48]

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[45] *Forkin v. UPS*, 2020 U.S. Dist. LEXIS 255487, at *21 (E.D.N.Y. 2020) (citations omitted).

[46] *See Black Muslims Account For a Fifth of All U.S. Muslims, and About Half Are Converts to Islam*, PEW RSCH. CTR. (Jan. 17, 2019), https://www.pewresearch.org/fact-tank/2019/01/17/black-muslims-account-for-a-fifth-of-all-u-s-muslims-and-about-half-are-converts-to-islam/.

[47] *See Bhatia v. Chevron U.S.A.*, 734 F.2d 1382, 1383 (9th Cir. 1984); *Hamilton v. City of New York*, 2021 U.S. Dist. LEXIS 185855, at *1 (E.D.N.Y. 2021); *Sughrim v. New York*, 503 F. Supp. 3d 68, 83–84 (S.D.N.Y. 2020).

[48] *See McDonnell Douglas Corp. v. Green*., 411 U.S. 792, 802 (1973).

The central issue to a disparate treatment claim is whether the employer's actions were motivated by discriminatory intent.[49] A disparate treatment challenge to a Clean Shave Policy can only prevail if the employee can prove that the employer instituted the policy in order to exclude Black male from the workplace, which is a case-by-case, fact-specific analysis.

Plaintiffs can also recover by claiming that an employment policy impacted members of a group protected by Title VII in a discriminatory pattern — a disparate impact claim.[50] But the courts' standards for these cases have been shifting. In *Griggs v. Duke Power Co.*, once the plaintiff had shown a prima facie case, the burden shifted to the defendant to justify the disputed practice — "the touchstone is business necessity."[51] However, in *Wards Cove Packing Co. v. Antonio*, the court shifted the burden of business necessity to that of a "reasoned review," significantly lowered the employer's burden.[52] Congress rejected *Wards Cove*'s "reasoned review" standard in the Civil Rights Act of 1991, which tried to codify the *Griggs* standard.[53] However, the Supreme Court has not decided a Title VII disparate impact case since then, so it is difficult to predict how the courts will apply the standard now.[54]

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[49] *See* William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. LEGIS. 529, 530 (2007).

[50] *See id.*

[51] 401 U.S. 424, 431 (1971).

[52] 490 U.S. 642, 659 (1989); *see Gordon*, *supra* note 49, at 540.

[53] *See Gordon*, *supra* note 49, at 540.

[54] *See id.* at 546.

In his 2007 article *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study* in the *Harvard Journal on Legislation* discussing a Clean Shave Policy hypothetical, William Gordon proposed that "it will be more difficult for plaintiffs to establish a prima facie case of disparate impact and easier for an employer to establish job relatedness. It also appears the Court will be more sympathetic to an employer's business necessity defense []."[55] Gordon's prediction was proven correct by the 2021 case *Bey v. City of New York* decided by the Second Circuit, which further contemplated the employer's use of other federal regulations such as OSHA safety standards as a defense to a disparate impact claim and weakened the doctrine.

PART II. ANALYSIS

A. *Bey v. City of New York*

The *Bey* court interpreted an OSHA Respiratory Protection Standard (RPS) that prohibits facial hair from "com[ing] between the sealing surface of the [respirator's] facepiece and the [wearer's] face" to ensure that the respirator achieves a proper seal.[56] Firefighters are required to wear a respirator also known as a self-contained breathing apparatus or "SCBA," the goal of which is to protect them against toxic atmospheres.[57]

[55] *See id.*

[56] *Bey v. City of New York*, 999 F.3d 157, 161 (2d Cir. 2021).

[57] *See id.*

The FDNY firefighters brought, *inter alia*, a failure to accommodate claim and a disability discrimination claim under the ADA, and disparate treatment and disparate impact claims under Title VII, against their employer.[58]

In the Eastern District of New York, the trial court granted summary judgment for the plaintiffs on their failure to accommodate and disability discrimination claims, holding that the plaintiffs are disabled within and meaning of the ADA and the accommodation sought would not violate OSHA's RPS.[59] The court granted summary judgment for the defendants on the disparate treatment claim because "Plaintiffs have not produced evidence showing that they were similarly situated to the unidentified Caucasian firefighters they allude to."[60] And the court granted summary judgment for the defendants on the disparate impact because "Plaintiffs' specific factual allegations are at bottom claims for disparate treatment only."[61]

Defendants appealed on the ADA decision in the Second Circuit.[62] The plaintiffs cross-appealed on the disparate impact claim decision, but not the disparate treatment claim.[63] A three-judge panel reversed the trial court on the ADA claims, holding that the accommodation sought by the plaintiffs was in violation of OSHA's RPS, and that "it is a defense to liability

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[58] *See Bey v. City of New York*, 437 F. Supp. 3d 222, 226 (E.D.N.Y 2020), *aff'd in part, rev'd in part on other grounds*, 999 F.3d 157 (2d Cir. 2021).

[59] *See id.* at 234–36.

[60] *See id.* at 237.

[61] *See id.* at 238.

[62] *See Bey*, 999 F.3d at 163.

[63] *See id*.

under the ADA 'that another [f]ederal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part."[64] The circuit court affirmed the district court's decision on the disparate impact claim, holding that "Title VII cannot be used to require employers to depart from binding federal regulations."[65] After the appeal, the plaintiffs petitioned a rehearing en banc but the petition was denied.[66]

B. Implications of *Bey*

With millions of workers required to wear a respirator in the workplace,[67] the *Bey* decision will have a profound impact on Black men with PFB, and other men who need to maintain facial hair for medical or religious reasons, when they seek employment opportunities.

i. The *Bey* Decision Prohibits Employers from Providing Accommodations to Employees with PFB as a Matter of Law

Bey is the first case to provide a definitive reading of the conflict between OSHA's RPS and the ADA and/or Title VII. By conclusively prohibiting employers from providing accommodations to employees with PFB under the ADA or Title VII if the employer is subject to the OSHA RPS, the *Bey* decision will have a profound negative impact on legal efforts to combat Clean Shave Policy Discrimination in the workplace.

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[64] *See id.* at 168.

[65] *See id.* at 170.

[66] *See* Order, Petition for Rehearing/Rehearing en Banc Denied, *id*.

[67] *See infra* Part II.B.i.

First, by reversing the district court, the Second Circuit's opinion in *Bey* is the first case to interpret the OSHA RPS in such a restrictive way, contrary to prior case law and actual employer practice. The court held that the regulation was "unambiguous" and that the RPS "clearly requires firefighters to be clean shaven where an SCBA seals against the face."[68] No prior case law or employer practice has indicated that to comply with the RPS, employees must be completely clean-shaven. The district court in *Bey* pointed to OSHA's own interpretive letter dated May 9, 2016: "Facial hair is allowed as long as it does not protrude under the respirator seal, or extend far enough to interfere with the device's valve function."[69] The district court noted that firefighters who received the prior accommodation — maintain closely-cropped facial hair uncut by a razor — all passed the OSHA Fit Test.[70] In *Kennedy v. Bowser*, plaintiff firefighter was able to pass the District of Columbia Fire Department's respirator Fit Test with a beard.[71] In *Fitzpatrick v. City of Atlanta*, the Eleventh Circuit held that "shadow beards" were encompassed by the prohibitions, but noted that "the OSHA . . . standards . . . do not specifically address the case of very short shadow beards," and that "public employers such as the City are not required by law to comply with OSHA standards."[72]

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[68] *Bey*, 999 F.3d at 166.

[69] *Bey v. City of New York*, 437 F. Supp. 3d 222, 235 (E.D.N.Y 2020), *aff'd in part*, *rev'd in part on other grounds*, 999 F.3d 157 (2d Cir. 2021).

[70] *See id.* at 234–35.

[71] 843 F.3d 529, 532 (D.C. Cir. 2016).

[72] 2 F.3d 1112, 1121 (11th Cir. 1993).

Moreover, in *Sughrim v. New York*, a case involving correctional officers of New York State Department of Corrections and Community Supervision (DOCCS) challenging their employer's Clean Shave Policy on religious discrimination grounds, the plaintiffs allege that the OSHA RPS only requires users be able to achieve a proper seal from the mask as determined by a Fit Test.[73] Relatedly, DOCCS and the State of New York lost a class action arbitration with the correctional officers' union in 2016, the arbitrator found that DOCCS's designated clean-shaven job posts was not required by OSHA regulations and officers with facial hair can work in clean-shaven posts if they can pass a Fit Test.[74] *Bey*'s interpretation of the OSHA RPS is the first federal appellate decision holding that the regulation requires employees to be completely clean-shaven, and it will likely be given significant weight by other courts and employers.[75]

Second, after holding that OSHA RPS requires employees to be completely clean-shaven, the Second Circuit went on to decide that "[a]n accommodation is not reasonable within the meaning of the ADA if it is specifically prohibited by a binding safety regulation promulgated by a federal agency" and that "Title VII cannot be used to required employers to depart from binding federal regulation."[76] The court held that compliance with federal safety regulations should be treated as either an undue hardship for the employer or an affirmative defense.[77]

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[73] *See Sughrim v. New York*, 503 F. Supp. 3d 68, 77 (S.D.N.Y. 2020).

[74] *See id.*

[75] *See* Appellees–Cross-Appellants' Petition for Rehearing en Banc at 11–12, *Bey v. City of New York*, 999 F.3d 157, 161 (2d Cir. 2021).

[76] *Bey*, 999 F.3d at 168, 170.

[77] *See id.* at 168.

Previously, in *Chevron U.S.A. v. Echazabal*, the United States Supreme Court held that competing policies of the ADA and OSHA remain "an open question,"[78] but reducing the chances of incurring liability due to OSHA violations was consistent with the employer's business necessity.[79] In other PFB-related Clean Shave Policy cases, even though the employers are not bound by OSHA standards, the courts have held that "such standards certainly provide a trustworthy bench mark for assessing safety-based business necessity claims,"[80] and that "protecting employees from workplace hazards is a goal that, as a matter of law, has been found to qualify as an important business goal."[81] Even though the burden on the employer has become increasingly lighter,[82] merely asserting a business necessity defense would not be sufficient, the employer would still need to "present convincing expert testimony."[83]

In *Bey*, the Second Circuit went one step further and held that if the accommodation the plaintiff was seeking under the ADA and/or Title VII conflicts with binding federal regulations, it would be undue hardship automatically and the defendant could pass the business necessity analysis without any hurdles.[84] Furthermore, for a failure to accommodate claim under the

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[78] 536 U.S. 73, 84–85 (2002).

[79] *See* Gordon, *supra* note 49, at 542.

[80] *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1121 (11th Cir. 1993).

[81] *Id.* at 1119; *see also Stewart v. City of Hous.*, 2009 U.S. Dist. LEXIS 79188, at *35 (S.D. Tex. 2009), *aff'd*, 372 Fed. Appx. 475 (5th Cir. 2010); Gordon, *supra* note 49, at 543–44.

[82] *See* Gordon, *supra* note 49, at 531.

[83] *Fitzpatrick*, 2 F.3d at 1119 n.6.

[84] *See Bey v. City of New York*, 999 F.3d 157, 168, 170 (2d Cir. 2021).

ADA, the plaintiff might not even be able to establish a prima facie case as the accommodation they seek would not be reasonable.[85]

The impact of *Bey* could be expansive. Take OSHA regulations as an example. Before, if an employer interprets the OSHA RPS less restrictively, they would be able to allow employees with PFB to keep a small beard while wearing a respirator if they can pass the Fit Test.[86] Now employers are foreclosed, as a matter of law, to give such an interpretation and provide accommodations.[87] OSHA regulations reach an extremely wide array of employers, "cover[ing] most private sector employers and their workers, in addition to some public sector employers and workers in the 50 states and certain territories and jurisdictions under federal authority."[88] In New York, public employers like the FDNY must comply with OSHA regulations under state law.[89]

A 2001 Bureau of Labor Statistics survey found that a total of 3.3 million employees, or about 3% of all private-sector employees, wear respirators on the job.[90] In about 10% of all

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[85] *See id.* at 168.

[86] *See Bey v. City of New York*, 437 F. Supp. 3d 222, 228–29 (E.D.N.Y 2020), *aff'd in part, rev'd in part on other grounds*, 999 F.3d 157 (2d Cir. 2021).

[87] *See Bey*, 999 F.3d at 166.

[88] *About OSHA*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., https://www.osha.gov/aboutosha (last visited Apr. 4, 2022).

[89] *See* N.Y. LAB. LAW § 27-a(4)(a).; *Bey*, 999 F.3d at 161.

[90] *See Use of Respirators in the Workplace*, BUREAU OF LAB. STAT. (Mar. 21, 2002), https://www.bls.gov/opub/ted/2002/mar/wk3/art04.htm; *Who Uses Respirators — And Why?*,

private industry workplaces, half of those that wear respirators are required to do so.[91] Those numbers are likely to increase significantly in the current COVID-19 pandemic. OSHA's Emergency Temporary Standard (ETS) on COVID-19 Testing and Vaccination requires employers to comply with OSHA regulations on face covering and respiratory protection.[92] The fact that the ETS is currently being contested in federal courts[93] likely means that employers would face more uncertainty, err on the side of caution, and potentially be more restrictive when implementing such regulations. Moreover, the New York Health and Essential Rights Act (NY HERO Act) mandates employers to adopt extensive new workplace health and safety protections in response to the COVID-19 pandemic and to protect employees against exposure and disease during a future airborne infectious disease outbreak.[94] If a New York employer is trying to implement a new workplace safety regulation in compliance with the OSHA ETS and the NY

INDUS. SAFETY & HYGIENE NEWS (Apr. 19, 2002), https://www.ishn.com/articles/85737-who-uses-respirators-and-why.

[91] *See id.*

[92] *See COVID-19 Vaccination and Testing; Emergency Temporary Standard*, FED. REG., https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard (last visited Apr. 4, 2022).

[93] *See* Mychael Schnell, *OSHA Suspends Enforcement of COVID-19 Vaccine Mandate for Businesses*, THE HILL (Nov. 17, 2021, 3:23 PM), https://thehill.com/policy/healthcare/582022-osha-suspends-enforcement-of-covid-19-vaccine-mandate-for-businesses.

[94] *See NYS Hero Act*, DEP'T OF LAB., https://dol.ny.gov/ny-hero-act (last visited Apr. 4, 2022).

HERO Act, they might not be able to provide accommodations to employees with PFB as a result of *Bey*.

The impact of *Bey* is also immediate. In *Hamilton v. City of New York*, a sister case decided right after *Bey*, a firefighter challenged the FDNY's Clean Shave Policy on religious discrimination grounds.[95] The court disposed of the plaintiff's Title VII failure to accommodate claim swiftly, granting summary judgment in favor of the employer.[96] The court held that in light of *Bey*, the OSHA RPS posed an undue hardship and that "[d]efendants easily satisfy their burden."[97] The court further explained that *Bey* applies to ADA accommodations "with equal (if not greater) force" than Title VII religious accommodations.[98] Similarly, in the aforementioned *Sughrim* case for religious discrimination, even though the district court has ruled that the correctional officers have plausibly alleged Title VII disparate treatment and failure to accommodate claims in a motion to dismiss decision,[99] the plaintiffs are unlikely to prevail if the

[95] *See* 2021 U.S. Dist. LEXIS 185855, at *17 (E.D.N.Y. 2021).

[96] *See id.*

[97] *Id.* at *16.

[98] *Id.* at *17 (citing *Kalsi v. N. Transit Auth.*, 62 F. Supp. 2d 745, 757 (E.D.N.Y. 1998) ("[I]n stark contrast to the ADA's reasonable accommodation requirement, which has been interpreted broadly, the obligation under Title VII is very slight.")).

[99] *See Sughrim v. New York*, 503 F. Supp. 3d 68, 96–97 (S.D.N.Y. 2020).

parties return to litigation,[100] because New York state law requires that DOCCS is subject to OSHA in the same manner as the FDNY.[101]

ii. The *Bey* Decision Will Undermine the FDNY's Diversity Recruitment Efforts

The Second Circuit's decision in *Bey* will likely hinder the FDNY's effort to recruit more Black firefighters, if the FDNY is prohibited as a matter of law to provide accommodation for a Black firefighter with PFB who wants to serve in active duty. With PFB affecting up to 85% Black men,[102] the deterring effect might be significant.

The FDNY has long faced allegations of discrimination.[103] In 2021, of the more than 11,000 firefighters in New York City — the largest in the nation — 75% of the firefighters are

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[100] The parties will be working on a new motion for class certification until August 19, 2022. *See* Scheduling Order, *Sughrim*, 503 F. Supp. 3d 68 (Dkt. 236).

[101] *See* N.Y. LAB. LAW § 27-a(4)(a). For some religions, shaving is prohibited altogether, so even the previous reading of the OSHA RPS (allowing cropped facial hair) might not suffice for the employees. *See Bhatia v. Chevron U.S.A.*, 734 F.2d 1382, 1383 (9th Cir. 1984) ("the Sikh religion proscribes the cutting or shaving of any body hair"). But meaningful analogy could still be drawn between disability and religious challenges to Clean Shave Policies, and as discussed below, some of the claims could be intersectional. *See infra* Part III.B.

[102] *See* Kundu & Patterson, *supra* note 3, at 860.

[103] *See* Astead W. Herndon & Ali Watkins, *How a Racist Scandal at the F.D.N.Y. Led to Its Biggest Suspensions Ever*, N.Y. TIMES (Oct. 5, 2021), https://www.nytimes.com/2021/10/01/nyregion/fdny-racism-scandal.html; Ginger Adams Otis, *Why So Few of New York's Bravest Are Black*, THE ATLANTIC (June 6, 2015),

white.[104] In 2018, only 9% FDNY firefighters were Black and 13% Hispanic.[105] *The Atlantic* even questioned *Why So Few of New York's Bravest Are Black* in 2015.[106] In 2011, the FDNY settled a lawsuit that determined the FDNY had discriminated against Black and other minority applicants in its post-9/11 hiring process and was put under the watch of a federal monitor to focus on diversity.[107] Since the lawsuit, the FDNY has developed several strategies to attempt to diversify firefighters including adding $10 million to support recruiting African American, Hispanic/Latino, Asian, and female candidates.[108] Even though the FDNY has made some

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https://www.theatlantic.com/politics/archive/2015/06/black-firefighters-matter/394946/; THE COUNCIL OF THE CITY OF NEW YORK, REPORT OF THE FINANCE DIVISION ON THE FISCAL 2021 PRELIMINARY PLAN AND THE FISCAL 2020 PRELIMINARY MAYOR'S MANAGEMENT REPORT FOR THE FIRE DEPARTMENT OF NEW YORK 5 (2020), https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/02/057-FDNY.pdf.

[104] *See* Herndon & Watkins, *supra* note 103.

[105] *See* Amanda Farinacci, *FDNY Reports Progress in Diversity Recruitment Efforts*, NY1 (June 28, 2018, 10:18 PM), https://www.ny1.com/nyc/all-boroughs/news/2018/06/29/fdny-reports-progress-in-diversity-recruitment-efforts-.

[106] *See* Adams Otis, *supra* note 103.

[107] *See* Herndon & Watkins, *supra* note 103; Adams Otis, *supra* note 103.

[108] *See* THE COUNCIL OF THE CITY OF NEW YORK, *supra* note 103, at 5.

progress,[109] the *Bey* decision could be a setback, and it reflects "part of a nationwide struggle for African Americans seeking to gain equal access to higher-paying civil-service jobs."[110]

PART III. PROPOSAL

In light of *Bey*, if a job requires the employee to wear a respirator, and the employer is subject to OSHA regulations, as a matter of law, the employee is required to be completely clean-shaven, and the employer is prohibited from providing any accommodation under the ADA if the employee suffers from PFB.[111] More broadly, *Bey* held that accommodations under the ADA and Title VII should give way to any binding federal regulations.[112] Because millions of employees are required to wear a respirator at work,[113] and with PFB disproportionately impacting Black men,[114] *Bey* will result in the exclusion of Black men with PFB from the workforce.

The restrictive ruling in *Bey* was probably not expected by the parties to the case. The court noted that the plaintiffs tried to point out that the FDNY's Clean Shave Policy was narrower than the OSHA RPS, which would in fact allow a short goatee.[115] However because

[109] *See* Farinacci, *supra* note 105.

[110] Adams Otis, *supra* note 103.

[111] *See Bey v. City of New York*, 999 F.3d 157, 166–68 (2d Cir. 2021).

[112] *See id.* at 168–70.

[113] *See supra* notes 90–90 and accompanying text.

[114] *See* Kundu & Patterson, *supra* note 3, at 860.

[115] *See Bey*, 999 F.3d at 169.

the plaintiffs based their claims on the OSHA RPS not the FDNY Policy, and that they only raised this argument on appeal, the court declined to consider it[116] and issued a restrictive reading on the OSHA RPS.

As a result, for Black employees with PFB trying to challenge their employer's Clean Shave Policy, litigation seems to be an ineffective method. Given the challenges of establishing an ADA or a Title VII claim,[117] the likelihood of success in litigation is low, especially with other binding federal regulations such as OSHA at play. The unpredictability of how a court would interpret certain rules or regulations could also lead to an unexpectedly restrictive decision like *Bey*, which would end up creating further setbacks to the mission of seeking equality for diverse employees.

In addition to litigation, administrative agency and legislative efforts could also help with the inequitable results of Clean Shave Policy Discrimination in the workplace, but those solutions will likely take too long and are less efficient. In *Bey*, the Second Circuit suggested that if the firefighters continue to believe that the OSHA RPS is unduly restrictive, they should direct their challenge to OSHA.[118] Like with the Civil Rights Act of 1991 and the ADAAA, Congress should clarify their intent and make sure the courts faithfully apply the laws Congress passes.[119]

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[116] *See id.* at 169–70 ("the FDNY's defensive strategy was likely influenced by the Firefighters' approach").

[117] *See supra* Part I.C.

[118] *See Bey*, 999 F.3d at 169.

[119] *See* Gordon, *supra* note 49, at 529.

This Note proposes that instead of litigation, employers should take the lead in designing equitable Clean Shave Policy and Grooming Policy in the workplace; as a driving force for social change, courts should take an intersectional approach towards Hair Discrimination cases; and with its legislative and awareness-raising victories, the CROWN Act should advocate for Black men as well.

A. Employers Should Take the Lead in Designing Better Grooming Policies in the Workplace

Ultimately it is the employers who will be enforcing these workplace policies. Speaking on to the conflict between the OSHA RPS and employees with PFB, OSHA clarified that it is up to the employer to select which type of respirator to use, "[b]ecause OSHA's standard does not necessarily require this type of respirator."[120] The City of Houston Police Department ("HPD") is an example of the employer taking the initiative to update their Grooming Policy in response to concerns about implicit bias.[121] After African-American officers with PFB sued the HPD and challenged its Grooming Policy, Chief Police Harold Hurtt created a committee to "study and address the concerns raised by uniformed officers," and to identify possible "accommodations."[122] Under recommendations of the committee, Chief Hurtt revised the HPD's Grooming Policy and officers affected by PFB are issued "escape hood respirators."[123]

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[120] *See Job Requiring Respiratory Protection*, OCCUPATIONAL SAFETY AND HEALTH ADMIN. (Apr. 16, 1996), https://www.osha.gov/laws-regs/standardinterpretations/1996-04-16.

[121] See *Stewart v. City of Houston*, 2009 U.S. Dist. LEXIS 79188, at *8–9 (S.D. Tex. 2009).

[122] *Id.*

[123] *Id.* at *9.

In general, it is recommended that employers consult diversity experts to redesign facially neutral Grooming Policies that might be potentially discriminatory, hire a more diverse group of employees, especially in decision-making positions,[124] and further educate themselves about Hair Discrimination. One example is the Halo Code in the United Kingdom.[125] The Halo Collective is an alliance working to create a future without Hair Discrimination.[126] The Collective introduces the Halo Code which provides a set of voluntary guidelines for professional establishments to adopt and educate their workforce about Black hair.[127]

B. Courts Should Take an Intersectional Approach Towards Hair Discrimination Cases

Courts should reevaluate their jurisprudence on disparate impact litigation and take an intersectional approach in order to better align with society's growing understanding of implicit racial bias. Intersectionality considers how the intersection of multiple identity categories can

[124] *See* Dewberry, *supra* note 28, at 354.

[125] *See* Stephanie Cohen, *The Truth within Our Roots: Exploring Hair Discrimination and Professional Grooming Policies in the Context of Equality Law*, 2 YORK L. REV. 107, 120 (2021); HALO COLLECTIVE, https://halocollective.co.uk/ (last visited Nov. 29, 2021).

[126] *See* HALO COLLECTIVE, *supra* note 125.

[127] *See Halo Code Workplace*, HALO COLLECTIVE, https://halocollective.co.uk/halo-code-workplace/ (last visited Nov. 29, 2021).

create unique inequities among marginalized communities.[128] The EEOC has offered guidance on how to take an intersectional approach to Title VII compliance: "Title VII prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex). . . . The law also prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another EEO statute — e.g., race and disability, or race and age."[129]

PFB-related Clean Shave Policy Discrimination, just like Hair Discrimination, is a manifestation of racism — it affects Black people psychologically, as well as their access to money, capital, and generational wealth.[130] PFB is also a disability. Courts have already recognized the distinct stereotypes Black males are subject to in intersectional discrimination cases.[131] With courts moving forward with precedent-setting intersectional discrimination

[128] *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139, 140 (1989).

[129] *Section 15 Race and Color Discrimination,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#IVC (last visited Nov. 30, 2021).

[130] *See Robinson & Robinson, supra* note 16, at 282.

[131] *See Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 770 (E.D. Wis. 2010).

cases,[132] courts should start considering Clean Shave Policy Discrimination's intersectional impact on disability and race.

C. The CROWN Act Should Also Advocate for Black Men

The aforementioned CROWN Act[133] has enjoyed great success both in the legislature and in raising awareness about Hair Discrimination. "15 states and more than 40 municipalities have enacted their versions of the CROWN Act."[134] In March 2022, the U.S. Congress passed the federal version of the CROWN Act in a 235–189 vote.[135] The bill is now heading to the Senate.[136] However, the CROWN Act movement seems to have a focus on Hair Discrimination experienced by Black women and girls, as evidenced by its research projects commissioned by

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[132] *See* Sheila Callaham, *Women Plaintiffs 'Sex-Plus-Age' Discrimination Claim Stands*, FORBES (July 26, 2020, 10:10 AM), https://www.forbes.com/sites/sheilacallaham/2020/07/26/women-plaintiffs-sex-plus-age-discrimination-claim-stands.

[133] *See supra* Part I.A.

[134] Veronica Stracqualursi & Rachel Janfaza, *What Is the CROWN Act and What Do Advocates Say It Will Do?*, CNN (Apr. 30, 2022, 6:25 PM), https://www.cnn.com/2022/04/30/politics/crown-act-hair-discrimination/index.html; *see also* THE OFF. CROWN ACT, *supra* note 27.

[135] *See* Veronica Stracqualursi, *US House Passes CROWN Act That Would Ban Race-Based Hair Discrimination*, CNN (Mar. 18, 2022, 11:28 AM), https://www.cnn.com/2022/03/18/politics/house-vote-crown-act/index.html.

[136] *See id.*

Dove — a co-founder of the CROWN Coalition,[137] its legislative framework,[138] and its media coverage.[139] The CROWN Act could also act as a platform to raise awareness and gain legislative support for Black male employees experiencing Clean Shave Policy Discrimination due to PFB.

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[137] *See The CROWN Act Resources*, THE OFF. CROWN ACT, https://www.thecrownact.com/resources (last visited May 20, 2022) (examining Hair Discrimination experienced by Black women and girls in the "2021 Dove CROWN Research Study for Girls" and "2019 Dove CROWN Research Study").

[138] *See* S.B. 188 (Cal. 2019) ("This bill would provide that the definition of race . . . also include traits historically associated with race, including, but not limited to, hair texture and protective hairstyles. . . ."); *Introduce The CROWN Act to Your State*, THE OFF. CROWN ACT, https://www.thecrownact.com/your-state (last visited May 20, 2022) (providing state legislators with legislative templates).

[139] *See* Jaclyn Diaz, *The House Passes the CROWN Act, a Bill Banning Discrimination on Race-Based Hairdos*, NPR (Mar. 18, 2022, 7:12 PM), https://www.npr.org/2022/03/18/1087661765/house-votes-crown-act-discrimination-hair-style ("For too long, Black girls have been discriminated against and criminalized for the hair that grows on our heads."); *The CROWN Act*, NAACP LEGAL DEF. FUND, https://www.naacpldf.org/crown-act/ (last visited May 20, 2022) ("Black women are 1.5x more likely to be sent home from their workplace because of their hair. Black women were also 80% more likely to change their hair from its natural state to fit into the office setting.").

CONCLUSION

With the erosion of the disparate impact doctrine, it has become increasingly arduous for Black plaintiffs with PFB to challenge the employer's Clean Shave Policy under Title VII. With *Bey*, the challenge has become even greater if other binding federal regulations are at play. With progressing understanding of Hair Discrimination and race, these Black firefighters from the FDNY deserve to receive reasonable accommodation for their PFB under the ADA. And it should be recognized that such Clean Shave Policy would have a disparate impact on Black male employees in today's workplace. Employers should take the lead in designing more equitable Grooming Policies, courts should take a more intersectional approach towards Hair Discrimination cases, and legislative efforts such as the CROWN Act should advocate for Black men as well.