Reasonable Accommodation and Disparate Impact: Clean Shave Policy Discrimination in Today's Workplace

Yucheng (Renee) Jiang[1]

1: FORDHAM UNIVERSITY, NEW YORK, NY, USA.

Keywords: Grooming Policy Discrimination, Hair Discrimination, Clean Shave Policy, Racial Discrimination, Disability Discrimination

Abstract: This article examines *Bey v. City of New York* — a recent Second Circuit case where four Black firefights suffering from Pseudofolliculitis Barbae (a skin condition causing irritation when shaving which mostly affects Black men) challenged the New York City Fire Department's Clean Shave Policy — with an intersectional approach utilizing legal theories of racial, disability, and religious discrimination.

Introduction

Salik Bey, Terrel Joseph, Steven Seymour, and Clyde Phillips are Black firefighters employed by the New York City Fire Department (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, which requires "all full-duty firefighters to be clean shaven in the neck, chin, and cheek area," is a part of the FDNY's grooming policy.[4] From 2015 to 2018, the FDNY provided medical accommodations to firefighters with PFB, permitting them to maintain closely cropped beards.[5] Following a review in May 2018, the FDNY determined that the accommodation was prohibited by regulations of the United States Occupational Safety and Health Administration (OSHA) and revoked the program.[6] The firefighters were required to choose between becoming clean-shaven and suffering harmful medical consequences or being placed on light duty[7] and never being able to enter a fire site again.

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).[8] Discrimination with regard to male facial hair is no exception — the Equal Employment Opportunity Commission (EEOC) issued guidance on this topic as early as 1989.[9] Religious or medical reasons such as PFB may restrict how a man maintains his facial hair.[10] A clean shave policy discrimination claim may arise when an employer disparately enforces such policy against male employees' protected traits.[11] PFB-related clean shave policy discrimination implicates both race and disability, 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]

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 in a racial discrimination claim under Title VII, and federal safety regulations under OSHA.[14]

This Paper examines recent developments in clean shave policy discrimination litigation — especially cases where Black plaintiffs suffer from PFB — with an intersectional approach,[15] utilizing legal theories of racial discrimination, disability discrimination, and

Yucheng (Renee) Jiang, J.D., *graduated from Fordham University School of Law in New York City in 2022.*

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)
DOI: 10.1017/jme.2023.55

religious discrimination. Part I surveys the history of clean shave policy discrimination litigation in the broader context of grooming policy discrimination, and the legal claims often used to challenge discriminatory employment practices. Part II conducts a case study on the recent Second Circuit case *Bey v. City of New York* to illustrate current challenges to clean shave policy discrimination litigation such as the interaction of the ADA and Title VII with federal safety regulations like OSHA rules. Part III provides policy recommendations in light of the *Bey* decision. This Paper proposes that employers should design more equitable grooming policies in the workplace,[16] that courts should adopt a revised evidentiary framework and an intersectional approach towards grooming policy discrimination cases,[17] and policymakers such as drafters of the CROWN Act should reevaluate their approach and also advocate more for Black men.[18]

This Paper proposes that employers should design more equitable grooming policies in the workplace, that courts should adopt a revised evidentiary framework and an intersectional approach towards grooming policy discrimination cases, and policymakers such as drafters of the CROWN Act should reevaluate their approach and also advocate more for Black men.

I. Background

A. History of Grooming Policy Discrimination and Hair Discrimination

Grooming is a major life activity.[19] Federal regulations implementing the ADA included "caring for oneself" as one of the non-exhaustive "major life activities."[20]

Black people often risk losing employment and educational opportunities because of their hair[21] and suffer from grooming policy discrimination and hair discrimination. Because "[t]here is a widespread and fundamentally racist belief that Black hairstyles are not suited for formal settings, and may be unhygienic, messy, disruptive, or unkempt."[22]

In the workplace, grooming policy discrimination, or grooming codes discrimination, is defined by Professor Wendy Greene 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."[23] According to Professor Greene, such mandates implicate protected categories under anti-discrimination laws including race, color, age, disability, sex, and/or religion.[24]

An example of grooming policy as racial discrimination includes when Black employees with tightly curled hair textures are pressured to straighten or relax their hair or prohibited from wearing certain hairstyles by their employers to conform to white and European standards of beauty, and they suffer physical, emotional, and financial harm as a result.[25]

Our society has been making gradual progress in understanding the relationship between grooming policy discrimination and race. In seminal cases like *Rogers v. American Airlines Inc.*[26] and *EEOC v. Catastrophe Management Solutions*[27] concerning grooming policy discrimination against Black women's hairstyles, courts have held that afros are protected traits, but braids are not[28] — because "afros are racial but locks are cultural"[29] — under the so-called "immutability doctrine."[30] Professor Greene argues that 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."[31] Other legal scholars further argue that the courts should take a cue from the interpretation of "immutability" in sexual orientation cases[32] such as *Bostock v. Clayton County*,[33] to read race as a social and legal construct.[34]

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."[35] The CROWN Act provides a framework legislation whose various state versions have been signed into law in 19 states, and its federal version has passed the U.S. House of Representatives and currently sits with the U.S. Senate.[36]

B. Clean Shave Policy Discrimination and PFB

Similar to "an employer's hyper-regulation of a Black woman's natural hair ... based upon subjective and paternalistic ideals about what management finds

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)

'attractive,' 'acceptable,' and therefore 'permissible' in the workplace,"[37] clean shave policy discrimination against Black men also represents a gendered notion of what is presentable and professional.

PFB is primarily caused by the curved shaped of the hair follicle and tightly curled hair structure but can be associated with an additional genetic predisposition (KRT75) predominately affecting Black men.[38] It is medically recommended that individuals with PFB should avoid shaving down to the skin.[39]

Many employers enforce a clean shave policy disregarding Black male employees' inability to shave. Some employers might even be unaware of what PFB is. 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."[40] However, in reality, some Black employees might have to go through laser hair removal on their face to comply with an employer's clean shave policy.[41]

PFB has also been described as "the most significant skin condition" amongst U.S. Army servicemen.[42] Black servicemen with PFB suffer from the stigma of being perceived as lazy and unprofessional, and negative impacts on career advancement and personal life.[43]

In the workplace, there are several notable PFB-related cases since the 1990s, including *Fitzpatrick v. City of Atlanta* (granting summary judgment for employers),[44] *Bradley v. Pizzaco of Nebraska, Inc.* (upholding disparate impact on Black employees),[45] and *Stewart v. City of Houston*.[46]

C. Methods of Challenging Clean Shave Policy Discrimination

Black male employees with PFB who are banned from wearing facial hair have often challenged an employer's clean shave policy for disability discrimination under the ADA and race discrimination under Title VII, under the doctrines of disparate treatment or disparate impact.

1. ADA — Disability Discrimination

Plaintiffs with PFB challenging an employer's clean shave policy can bring disability discrimination claims under the ADA for an employer with 15 or more employees.[47]

Like other types of discrimination claims, failure to accommodate claims under the ADA are subject to the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*.[48] 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.[49]

If a plaintiff suggests reasonable accommodations, the burden of proof shifts to the employer to demonstrate that such accommodations would present undue hardships and would therefore be unreasonable.[50] An "undue hardship" is "an action requiring significant difficulty or expense."[51]

Once the plaintiff establishes a prima facie case, the employer can defend the claim by "articulat[ing] some legitimate, nondiscriminatory reason for" not accommodating.[52] If a defendant produces admissible evidence showing legitimate business reasons, "the burden shifts back to the plaintiff to demonstrate by competent evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[53]

Before the ADA Amendments Act of 2008 (ADAAA),[54] it was hard to prove that PFB constituted a disability because the Supreme Court had narrowly interpreted the concept.[55] After the ADAAA instructed courts to construe the "definition of 'disability'... in favor of broad coverage,"[56] courts grew more inclined to find PFB as a disability,[57] although some still express doubt.[58]

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

There are five protected classes under Title VII: race, color, religion, sex, and national origin.[59] According to the EEOC, clean shave policy discrimination claims are usually brought based on sex, race, or religion.[60] To challenge an employer's clean shave policy as sex discrimination, "federal courts have generally held that sex-differentiated grooming standards do not violate Title VII."[61]

Some Black men might not be able to shave for both PFB-related and religious reasons and might be able to bring their claims as both race and religious discrimination. The overlap might be small — for example, only 2% of Black Americans are Muslim.[62] But many religions prohibit shaving at different degrees, such as Islam, Judaism, Sikhi, and Asatru — a traditional Norse Pagan religion.[63] Even though this Paper focuses on race and disability discrimination, the analysis informs discussions on religious discrimination as well.

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)

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.[64]

3. Title VII — Disparate Treatment & Disparate Impact

Private Title VII actions, regardless of whether based on race, color, religion, sex, and/or national origin discrimination, fall into either of two types of cases: disparate treatment or disparate impact.[65]

The central issue in a disparate treatment claim is whether the employer's actions were motivated by discriminatory intent.[66] A disparate treatment challenge to a clean shave policy based on race can only prevail if the employee can prove that the employer instituted the policy to exclude Black males from the workplace, which requires a case-by-case, fact-specific analysis.

Plaintiffs can also recover by claiming that an employment policy impacted members of a protected classification by Title VII in a discriminatory pattern — a disparate impact claim.[67] Title VII disparate impact claims adopt the *McDonnell Douglas* burden-shifting framework.[68] For example, in the 1971 case *Griggs v. Duke Power Co.*, once the plaintiff established a prima facie case, the burden shifted to the defendant to justify the disputed practice — "[t]he touchstone is business necessity."[69] However, courts' standards for these cases are evolving. In *Wards Cove Packing Co. v. Antonio*, the court shifted the burden of business necessity to that of "reasoned review," significantly lowering the employer's burden.[70] Congress rejected *Wards Cove*'s "reasoned review" standard in the Civil Rights Act of 1991, which tried to codify the *Griggs* standard.[71] Because the Supreme Court has not decided a Title VII disparate impact case since then, it is difficult to predict how the Court will apply the standard.[72]

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 []."[73] Gordon's prediction was proven correct by the 2021 case *Bey v. City of New York* decided by the Second Circuit, which further contemplated employers' use of other federal regulations such as OSHA safety standards as a defense to a disparate impact claim and lowered a plaintiff's chance to prevail under such theory.

II. Clean Shave Policy in Today's Workplace — A Case Study

A. Bey v. City of New York

In *Bey,* the 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.[74] Firefighters are required to wear a respirator also known as a self-contained breathing apparatus (SCBA) to protect them against toxic atmospheres.[75]

The four plaintiffs were granted accommodation not to be clean-shaven in 2015.[76] The accommodation was fully applicable for two and a half years and here were no reports that it increased the risks to firefighters or civilians.[77] In 2018, after a review of the Department's safety standards initiated by then-FDNY Acting Chief of Safety Joseph Jardin, the medical accommodation was revoked.[78] The 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.[79]

In the Eastern District of New York, the trial court granted summary judgment for plaintiffs on their failure to accommodate and disability discrimination claims, holding that plaintiffs were disabled within the meaning of the ADA and the accommodation sought would not violate OSHA's RPS.[80] The court granted summary judgment for defendants on the disparate treatment claim because "[p]laintiffs have not produced evidence showing that they were similarly situated to the unidentified Caucasian firefighters they allude to."[81] The court also granted summary judgment for defendants on the disparate impact claim because "[p]laintiffs' specific factual allegations are at bottom claims for disparate treatment only."[82]

Defendants appealed the ADA decision to the Second Circuit.[83] Plaintiffs cross-appealed the disparate impact claim decision, but not the disparate treatment claim.[84] A three-judge panel reversed the trial court's decision 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 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.'"[85] 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."[86] After the appeal, plaintiffs petitioned for a rehearing en banc, which was denied.[87]

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)

B. Implications of Bey

With millions of workers required to wear a respirator in the workplace,[88] 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.

1. Holdings of *Bey*

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.

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."[89] 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: "[f]acial 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."[90] The district court noted that firefighters who received the prior accommodation — to maintain closely-cropped facial hair uncut by a razor — all passed the OSHA Fit Test.[91] In *Kennedy v. Bowser*, plaintiff firefighter was able to pass the District of Columbia Fire Department's respirator Fit Test with a beard.[92] 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."[93]

Moreover, in *Sughrim v. New York*, where correctional officers of New York State Department of Corrections and Community Supervision (DOCCS) challenged their employer's Clean Shave Policy on religious discrimination grounds, the plaintiffs alleged that the OSHA RPS only requires users be able to achieve a proper seal from the mask as determined by a Fit Test.[94] Relatedly, DOCCS and the State of New York lost a class action arbitration with the correctional officers' union in 2016.[95] The arbitrator found that DOCCS's designated clean-shaven job posts were not required by OSHA regulations, and that officers with facial hair can work in clean-shaven posts if they can pass a Fit Test.[96] *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.[97]

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 require employers to depart from binding federal regulations."[98] The court held that compliance with federal safety regulations should be treated as either an undue hardship for the employer or an affirmative defense.[99]

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,"[100] but reducing the chances of incurring liability due to OSHA violations was consistent with the employer's business necessity.[101] In other PFB-related clean shave policy cases, even though 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,"[102] 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."[103] Even though the burden on employers has increasingly become lighter,[104] merely asserting a business necessity defense would not be sufficient — the employer would still need to "present convincing expert testimony."[105]

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 automatically be considered an undue hardship and the defendant could pass the business necessity analysis without any hurdles.[106] Furthermore, for a failure to accommodate claim under the ADA, the plaintiff might not even be able to establish a prima facie case as the accommodation they seek would not be reasonable.[107]

2. The *Bey* Decision Allows Employers to not Provide Accommodations to Employees with PFB

The impact of *Bey* could be expansive. Take OSHA regulations as an example. Before *Bey*, if an employer

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)

adheres to a less restrictive interpretation of the OSHA RPS, they could allow employees with PFB to keep a small beard while wearing a respirator if they can pass the Fit Test.[108] According to the Second Circuit, OSHA's regulation permits employers to prohibit male facial hair altogether,[109] which other federal appellate courts have not ruled as such. 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."[110] New York state law requires that all public employers — like the FDNY — must comply with OSHA regulations.[111]

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.[112] In about 10% of all private industry workplaces, half of those that wear respirators are required to do so.[113] Although no similar surveys have been conducted recently, those numbers are likely to increase significantly in the current COVID-19 pandemic.[114] 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.[115] The fact that the ETS is currently being contested in federal courts likely means that employers would face more uncertainty, err on the side of caution, and potentially be more restrictive when implementing such regulations.[116] Moreover, the New York Health and Essential Rights Act (NY HERO Act) requires 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.[117] If a New York employer is trying to implement a new workplace safety regulation in compliance with the OSHA ETS and the NY HERO Act, they can easily defeat a failure to accommodate claim brought by 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 three months after *Bey*, a firefighter challenged the FDNY's Clean Shave Policy on religious discrimination grounds.[118] The court disposed of the plaintiff's Title VII failure to accommodate claim swiftly, granting summary judgment in favor of the employer.[119] The court held that in light of *Bey*, the OSHA RPS posed an undue hardship and that "[d]efendants easily satisfy their burden."[120] The court further explained that *Bey* applies to ADA accommodations "with equal (if not greater) force" than Title VII religious accommodations.[121] Similarly, in *Sughrim*, the aforementioned religious discrimination case, the district court ruled that the correctional officers plausibly alleged Title VII disparate treatment and failure to accommodate claims in a motion to dismiss decision.[122] However, the plaintiffs are unlikely to prevail if the parties return to litigation,[123] because New York state law renders DOCCS subject to OSHA in the same manner as the FDNY.[124]

Generally, the Bey decision will likely hinder employer's diversity, equity, and inclusion efforts nationally. Bey put employers in a bind where they will likely face the choice between violating OSHA rules or undermining the goals of the ADA and Title VII. Because if employers want to adhere to the ADA or Title VII and provide reasonable accommodations, they cannot essentially make that kind of accommodation if they are subject to OSHA rules.

3. The *Bey* Decision Will Likely Hinder Employers' Diversity, Equity, and Inclusion Efforts

Specifically, *Bey* will likely negatively impact the FDNY's effort to recruit more Black firefighters if the FDNY is allowed to not provide accommodation for a Black firefighter with PFB who wants to serve in active duty. With PFB affecting up to 85% Black men,[125] the deterring effect might be significant.

The FDNY has long faced allegations of discrimination.[126] In 2021, out of more than 11,000 FDNY firefighters in New York City — the largest fire department in the nation — 75% of the firefighters are white.[127] In 2018, only 9% of FDNY firefighters were Black and 13% Hispanic.[128] *The Atlantic* even questioned "Why So Few of New York's Bravest Are Black" in 2015.[129] 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

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)

focus on diversity.[130] 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.[131] Even though the FDNY has made some progress,[132] 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."[133]

Generally, the *Bey* decision will likely hinder employer's diversity, equity, and inclusion efforts nationally. *Bey* put employers in a bind where they will likely face the choice between violating OSHA rules or undermining the goals of the ADA and Title VII. Because if employers want to adhere to the ADA or Title VII and provide reasonable accommodations, they cannot essentially make that kind of accommodation if they are subject to OSHA rules.

III. Policy Recommendations In Light Of *Bey*

In light of *Bey*, if a job requires an employee to wear a respirator and the employer is subject to OSHA regulations, the employee is required to be completely clean-shaven and the employer is unlikely to be able to provide any accommodation under the ADA if the employee suffers from PFB.[134] More broadly, the holding in *Bey* provides that accommodations under the ADA and Title VII should give way to any binding federal regulations.[135] Because millions of employees are required to wear a respirator at work,[136] and with PFB disproportionately impacting Black men,[137] *Bey* may result in the exclusion of Black men with PFB from the workforce or impact how they can effectively perform their jobs.

The parties to the case probably did not expect the restrictive ruling in *Bey*.[138] The Second Circuit noted that the plaintiffs tried to establish that the FDNY's clean shave policy was narrower than the OSHA RPS, which would in fact allow a short goatee.[139] However because the plaintiffs based their claims on the OSHA RPS rather than the FDNY policy and only raised this argument on appeal, the court declined to consider it,[140] instead issuing a restrictive reading on the OSHA RPS.

As a result, for Black employees with PFB hoping to challenge an employer's clean shave policy, litigation seems to be ineffective. Given the challenges of establishing an ADA or a Title VII claim,[141] 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 employees.

Administrative agency and legislative efforts could also help with the inequitable results of clean shave policy discrimination in the workplace. But such solutions would likely move more slowly and may be less efficient than employer initiatives and litigation. 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.[142] On the legislative front, Congress could clarify their intent and try to ensure the courts faithfully apply the antidiscrimination laws Congress passes, as they did with the Civil Rights Act of 1991[143] and the ADAAA.[144]

This Paper proposes that employers should design more equitable clean shave policy and grooming policy in the workplace; as a driving force for social change, courts should take a deeper dive into pretext and take an intersectional approach towards grooming policy cases; and policy makers such as legislators of the CROWN Acts should reevaluate their approach in light of *Bey* and also advocate more for Black men.

A. Employers Should Design Better Grooming Policies in the Workplace

Ultimately it is employers who will be enforcing these workplace policies. Addressing 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."[145] The City of Houston Police Department (HPD) is an example of an employer taking the initiative to update its Grooming Policy in response to concerns about implicit bias.[146] After African American officers with PFB sued the HPD and challenged its Grooming Policy, Chief of Police Harold Hurtt created a committee to "study and address the concerns raised by uniformed officers," and to identify possible "accommodations."[147] Under recommendations of the committee, Chief Hurtt revised the HPD's Grooming Policy to issue "escape hood respirators" to officers affected by PFB.[148]

In general, it is recommended that employers consult diversity experts to redesign facially neutral Grooming Policies that might actually be discriminatory, hire a more diverse group of employees — especially in decision-making positions[149] — and further educate themselves about Hair Discrimination.[150] One example is the Halo Code in the United Kingdom.[151] The Halo Collective is an alliance working to create a future without Hair Discrimination.[152] The Collective

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)

introduced the Halo Code which provides a set of voluntary guidelines for professional establishments to adopt and educate their workforce about Black hair.[153]

Employers should be mindful of the bind created by *Bey* and design better grooming policies in the workplace to advance the goals of the ADA and Title VII without violating federal safety regulations.

B. Courts Should Not Overlook Pretext and Should Take an Intersectional Approach Towards Clean Shave Policy Discrimination Cases

Courts should not overlook pretext and need to revisit evidentiary framework in discrimination cases.

The trial court in *Bey* granted summary judgment for defendants on the disparate treatment claim because "[p]laintiffs have not produced evidence showing that they were similarly situated to the unidentified Caucasian firefighters they allude to."[154] Courts usually grant deference to employers' undue hardship or business necessity defenses. With *Bey*, the Second Circuit has made it easier for employers to use federal safety regulations such as OSHA rules as affirmative defense as well. Professor Greene's article *Title VII: What's Hair (and Other Race-Based haracteristics) Got to Do with It?*[155] provides great insight as to how courts should revisit the evidentiary framework in discrimination cases and not to overlook pretext. For example, the fact that the FDNY firefighters were able to perform their jobs successfully for years without being cleanshaven, and that FDNY revoked the accommodation without further explanation, are strong indicators of pretext, and *Bey* should probably not be disposed in a summary judgment motion.

Bey, along with *Hamilton* and *Sughrim*, also presents an intersectional issue of disability, race, and religion. Intersectionality considers how the intersection of multiple identity categories can create unique inequities among marginalized communities.[156] 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.[157]

PFB-related Clean Shave Policy Discrimination, just like Hair Discrimination, is a manifestation of racism: it affects Black people psychologically, and limits their access to money, capital, and generational wealth.[158] PFB is also a disability.[159] Courts have already recognized the distinct stereotypes to which Black males are subject in intersectional discrimination cases.[160] As courts move forward with precedent-setting intersectional discrimination cases,[161] they should start considering Clean Shave Policy Discrimination's intersectional impact on disability and race. Professor Greene's discussion on cases involving Muslim women's hijabs and Black women's hairstyles are also informative in this context.[162]

C. Policymakers Should Reevaluate Their Approach in light of Bey

The aforementioned CROWN Act[163] has enjoyed great success, both in the legislature and in raising awareness about hair discrimination. Twenty states and more than 40 municipalities have enacted their versions of the CROWN Act.[164] In March 2022, the U.S. Congress passed the federal version of the CROWN Act in a 235–189 vote.[165] The bill did not pass the U.S. Senate and will heed to be reintroduced during the 2023 legislation session.[166]

Similar to clean shave policy discrimination cases, health and safety is a defense often raised by employers in grooming policy discrimination cases in general. After *Bey*, policy makers such as legislators of different versions of CROWN Act should probably reevaluate their approach. For example, Nebraska's version of CROWN Act lays out the framework for employers with health and safety concerns while regulating "characteristics associated with race" such as Black hairstyles.[167] Policy makers should be mindful of courts issuing restrictive interpretations of laws or rules outside the legislative framework, like the Second Circuit did in *Bey*.

In addition, the CROWN Act movement seems to have a focus on grooming policy discrimination experienced by Black women and girls, as evidenced by its research projects commissioned by Dove — a cofounder of the CROWN Coalition,[168] its legislative framework,[169] and its media coverage.[170] 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.

Conclusion

With the erosion of the disparate impact doctrine, it has become increasingly arduous for Black plaintiffs with PFB to challenge an employer's Clean Shave Policy under Title VII. Since the *Bey* decision, the challenge has become even greater when other binding federal

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)

regulations are at play. As collective understanding of grooming policy discrimination and race progresses, Black FDNY firefighters suffering from PFB deserve reasonable accommodation under the ADA. Additionally, it should be recognized that such clean shave policies 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 adopt a revised evidentiary framework and a more intersectional approach towards hair discrimination cases, and legislative efforts such as the CROWN Act should include Black men in their advocacy.

Note

This article was selected as honorable mention of the American Society of Law, Medicine & Ethics 2nd Annual Graduate Student Writing Competition in Health Law and Anti-Racism. An earlier version was published in *Fordham Urban Law Journal* 50 (2022). The author has no conflicts to disclose.

References

1. *See Bey v. City of New York*, 999 F.3d 157, 161 (2d Cir. 2021).
2. *See id.*
3. *See id.*; R. V. Kundu and S. Patterson, "Dermatologic Conditions in Skin of Color: Part II. Disorders Occurring Predominantly in Skin of Color," *American Family Physician* 87 (2013).
4. *Bey*, 999 F.3d at 161.
5. *See id.* at 161–62.
6. *See id.* at 162.
7. *See id.*
8. 42 U.S.C. §§ 2000e–2000e-17. (1964); *see* CM-619 Grooming Standards, U.S. Equal Emp. Opportunity Commissionn, *available at* <https://www.eeoc.gov/laws/guidance/cm-619-grooming-standards> (last visited Sept. 28, 2022); *see, e.g.*, *Fagan v. Nat'l Cash Reg. Co.*, 481 F.2d 1115, 1125–26 (D.C. Cir. 1973) (holding that requiring a male employee to cut his hair to an acceptable length was not sex discrimination); *Rogers v. Am. Airlines Inc.*, 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981) (upholding an employer policy against women wearing braids or cornrows).
9. *See CM-619 Grooming Standards*, *supra* note 8.
10. *See id.*
11. *See id.*
12. *See infra* Part I.C.i.
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.*
15. *See infra* Part III.B.
16. *See infra* Part III.A.
17. *See infra* Part III.B.
18. *See infra* Part III.C.
19. *See Bey v. City of New York*, 437 F. Supp. 3d 222, 232 (E.D.N.Y 2020), *aff'd in part*, *rev'd in part on other grounds*, 999 F.3d 157 (2d Cir. 2021).
20. *See id*; 29 C.F.R. § 1630.2(i); *see also Sutton v. United Air Lines*, 527 U.S. 471, 480 (1999) (holding that caring for oneself is a major life activity).
21. *See* D. E. Robinson and T. Robinson, "Between a Loc and a Hard Place: A Socio-Historical, Legal, and Intersectional Analysis of Hair Discrimination and Title VII," *University of Maryland Law Journal of Race, Religion, Gender* 20, no. 2 (2020).
22. *Legal Enforcement Guidance on Race Discrimination on the Basis of Hair*, N.Y.C. Commission on Human Rights. (Feb. 2019), *available at* <https://www.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf> (last visited March 6, 2023).
23. 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*," *University of Miami Law Review* 71 (2017).
24. *See id.*
25. *See Legal Enforcement Guidance on Race Discrimination on the Basis of Hair*, *supra* note 22.
26. 527 F. Supp. 229, 232–33 (S.D.N.Y. 1981) (holding that prohibiting female Black employees to wear braids or cornrows was not racial discrimination).
27. 852 F.3d 1018, 1021 (11th Cir. 2016) (holding that asking plaintiff, a Black woman, to cut her dreadlocks was not racial discrimination).
28. *See* Greene, *supra* note 23, at 998.
29. *Id.* at 1015.
30. *Id.* At 998 (federal protections only extend to adverse treatment based on an employee's "traits with which one is born, are fixed, difficult to change, and/or displayed by individuals who share the same racial identity").
31. *Id.* at 1029.
32. *See* Robinson and Robinson, *supra* note 21, at 287.
33. 140 S. Ct. 1731, 1746 (2020).
34. *See* Robinson and Robinson, *supra* note 21, at 285.
35. See "About," Official Campaign of The CROWN Act, *available at* <https://www.thecrownact.com/about> (last visited Sept. 26, 2022).
36. *See id.*
37. *See* Greene, *supra* note 23, at 1003.
38. M.T. Tshudy and S. Cho, "Pseudofolliculitis Barbae in the U.S. Military, a Review," *Military Medicine* 186 (2021).
39. *Bey v. City of New York*, 999 F.3d 157, 161 (2d Cir. 2021).
40. 2020 U.S. Dist. LEXIS 255487, at *7 (E.D.N.Y. Nov. 10, 2020) (denying defendant's motion to dismiss the employee's disability discrimination claim).
41. *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).
42. Tshudy and Cho, *supra* note 38, at e56.
43. Letter to the Editor, *Pseudofolliculitis Barbae in the Military and the Need for Social Awareness*, *Military Medicine* (2021).
44. 2 F.3d 1112 (11th Cir 1993).
45. 7 F.3d 795 (8th Cir. 1993).
46. 2009 U.S. Dist. LEXIS 79188 (S.D. Tex. Aug. 7, 2009).
47. 42 U.S.C. §§ 12111(5)(A), 12112(a). Plaintiffs can also bring claims under § 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. 29 U.S.C. § 794(a); see also *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1125 (11th Cir. 1993).
48. *See* 411 U.S. 792, 802 (1973); *Bey v. City of New York*, 999 F.3d 157, 165 (2d Cir. 2021); *see also* S. F. Sperino, *The Law of Employment Discrimination* (West Academic Publishing 2019) ("Many lower courts assume that a disparate impact case under the ADA works similarly to a Title VII disparate impact case.").
49. *Bey*, 999 F.3d at 165.
50. *McMillan v. City of N.Y.*, 711 F.3d 120, 128 (2d Cir. 2013).
51. 42 U.S.C. § 12111(10)(A).
52. *Rambacher v. Bemus Point Cent. Sch. Dist.*, 307 F. App'x 541, 543 (2d Cir. 2009).
53. *Id.*
54. 42 U.S.C. § 12101 et seq. (2008).
55. *See Kennedy v. Gray*, 83 F. Supp. 3d 385, 390 (D.D.C. 2015) (citing *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195–98 (2002)).
56. 42 U.S.C. § 12102(4)(A).
57. *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

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)

157 (2d Cir. 2021) ("Plaintiffs 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. Sept. 28, 2017) ("[I]t is plausible that Plaintiff's pseudofolliculitis barbae condition is a disability.").
58. *See, e.g.*, *Lewis v. Univ. of Pa.*, 779 F. App'x 920, 926 (3d Cir. 2019) (holding that whether PFB qualified as a disability under the ADA definition was a fact in dispute that should be decided by a jury).
59. *See* 42 U.S.C. § 2000e–2(a)(2).
60. *See generally CM-619 Grooming Standards*, *supra* note 8.
61. *See, e.g.*, *Forkin v. UPS*, 2020 U.S. Dist. LEXIS 255487, at *21 (E.D.N.Y. Nov. 10, 2020) (citations omitted) (holding that UPS's clean shave policy that affects only men did not discriminate on the basis of sex).
62. *See Black Muslims Account for a Fifth of All U.S. Muslims, and About Half Are Converts to Islam*, Pew Research Center, Jan. 17, 2019, *available at* <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/> (last visited March 6, 2023).
63. *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. Sept. 28, 2021); *Sughrim v. New York*, 503 F. Supp. 3d 68, 83 (S.D.N.Y. 2020).
64. *See Bey v. City of New York*, 999 F.3d 157, 162 (2d Cir. 2021); *Green v. Safeway Stores*, 1998 U.S. Dist. LEXIS 19910, at *3 (N.D. Cal. Dec. 14, 1998).
65. *See* W. Gordon, "The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study," *Harvard Journal of Legislation* 44 (2007).
66. *See id.* at 530.
67. *See id.*
68. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); Sperino, *supra* note 48.
69. 401 U.S. 424, 431 (1971).
70. 490 U.S. 642, 659 (1989); *see* Gordon, *supra* note 65.
71. *See* Gordon, *supra* note 65, at 540–41.
72. *See id*
73. *See id.*
74. 29 C.F.R. § 1910.134 (2022); *Bey v. City of New York*, 999 F.3d 157, 161 (2d Cir. 2021).
75. *See Bey*, 999 F.3d at 161.
76. *See Bey v. City of New York*, 437 F. Supp. 3d 222, 229 (E.D.N.Y 2020), *aff'd in part*, *rev'd in part on other grounds*, 999 F.3d 157 (2d Cir. 2021).
77. *See id.*
78. *See id.*
79. *See id.* at 226.
80. *See id.* at 234–36.
81. *See id.* at 237.
82. *See id.* at 238.
83. *See Bey*, 999 F.3d at 162–63.
84. *See id.* at 162.
85. *Id.* at 167–68.
86. *Id.* at 170.
87. *See* Order Denying Petition for Rehearing, *id.* (No. 20-456).
88. *See Respiratory Protection*, Occupational Safety & Health Admin., *available at* <https://www.osha.gov/respiratory-protection> (last visited Aug. 7, 2022).
89. *Bey*, 999 F.3d at 166.
90. *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).
91. *See Bey*, 437 F. Supp. 3d at 228–29 ("A Fit Test is a standard test designed by OSHA to ensure[] that the face piece of the SCBA gets the proper seal…").
92. 843 F.3d 529, 532 (D.C. Cir. 2016).
93. 2 F.3d 1112, 1121 (11th Cir. 1993).
94. *See Sughrim v. New York*, 503 F. Supp. 3d 68, 77 (S.D.N.Y. 2020).
95. *See id.*
96. *See id.*
97. *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) (No. 20-456).
98. *Bey*, 999 F.3d at 168, 170.
99. *See id.* at 168.
100. 536 U.S. 73, 84–85 (2002).
101. *See* Gordon, *supra* note 65, at 542.
102. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1121 (11th Cir. 1993).
103. *Id.* at 1119; *see also Stewart v. City of Houston*, 2009 U.S. Dist. LEXIS 79188, at *8–9, 34–35 (S.D. Tex. Aug. 7, 2009), *aff'd*, 372 Fed. App'x 475 (5th Cir. 2010); Gordon, *supra* note 65, at 543–44.
104. *See* Gordon, *supra* note 65, at 531.
105. *Fitzpatrick*, 2 F.3d at 1119 n.6.
106. *See Bey v. City of New York*, 999 F.3d 157, 168, 170 (2d Cir. 2021).
107. *See id.* at 168.
108. *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).
109. *See Bey*, 999 F.3d at 166.
110. *About OSHA*, Occupational Safety & Health Admin., *available at* <https://www.osha.gov/aboutosha> (last visited Apr. 4, 2022).
111. *See* N.Y. Lab. Law § 27-a(4)(a) (Consol. 2022); *Bey*, 999 F.3d at 161.
112. *See Use of Respirators in the Workplace*, U.S. Bureau Lab. Stats. (Mar. 21, 2002), *available at* <https://www.bls.gov/opub/ted/2002/mar/wk3/art04.htm> (last visited March 10, 2023); "Who Uses Respirators — and Why?" *Indus. Safety & Hygiene News*, Apr. 19, 2002, *available at* <https://www.ishn.com/articles/85737-who-uses-respirators-and-why> (last visited March 10, 2023).
113. *See id.*
114. *See Respiratory Protection*, *supra* note 88. Although the government's labor statistics might need some time to catch up, additional COVID-19 guidance issued by OSHA indicates significantly increased importance of respiratory protection in the workplace. *See id.*
115. *See COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021).
116. *See* M. Schnell, "OSHA Suspends Enforcement of COVID-19 Vaccine Mandate for Businesses," *Hill*, Nov. 17, 2021, *available at* <https://thehill.com/policy/healthcare/582022-osha-suspends-enforcement-of-covid-19-vaccine-mandate-for-businesses> (last visited March 10, 2023).
117. *See NYS Hero Act*, N.Y. Dep't Lab., *available at* <https://dol.ny.gov/ny-hero-act> (last visited Apr. 4, 2022).
118. *See* 2021 U.S. Dist. LEXIS 185855, at *1–2 (E.D.N.Y. Sept. 28, 2021).
119. *See id.* at *3.
120. *Id.* at *16.
121. *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.")).
122. *See Sughrim v. New York*, 503 F. Supp. 3d 68, 96–97 (S.D.N.Y. 2020).
123. The matter is stayed until April 14, 2023. *See* Scheduling Order, *Sughrim*, 503 F. Supp. 3d 68 (Dkt. 311).
124. *See* N.Y. Lab. Law § 27-a(4)(a) (Consol. 2022). 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) ("[T]he Sikh religion proscribes the cutting or shaving of any body hair."). But a 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.

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)

125. *See* Kundu and Patterson, *supra* note 3, at 860.
126. *See* A. W. Herndon and A.Watkins, "How a Racist Scandal at the F.D.N.Y. Led to Its Biggest Suspensions Ever," *New York Times*, Oct. 5, 2021, *available at* <https://www.nytimes.com/2021/10/01/nyregion/fdny-racism-scandal.html> (last visited March 10, 2023); G. Adams Otis, "Why So Few of New York's Bravest Are Black," *Atlantic*, June 6, 2015, *available at* <https://www.theatlantic.com/politics/archive/2015/06/black-firefighters-matter/394946/> (last visited March 10, 2023); *The Council of the City of N.Y., Rep. of the Fin. Div. on the Fiscal 2021 Preliminary Plan and the Fiscal 2020 Preliminary Mayor's Mgmt. Rep. for the Fire Dep't of N.Y. 5* (2020), *available at* <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/02/057-FDNY.pdf> (last visited March 2023).
127. *See* Herndon and Watkins, *supra* note 126.
128. *See* A. Farinacci, "FDNY Reports Progress in Diversity Recruitment Efforts," *Spectrum News NY1*, June 28, 2018, *available at* <https://www.ny1.com/nyc/all-boroughs/news/2018/06/29/fdny-reports-progress-in-diversity-recruitment-efforts-> (last visited March 10, 2023).
129. *See* Adams Otis, *supra* note 126.
130. *See* Herndon and Watkins, *supra* note 126; Adams Otis, *supra* note 126.
131. *See The Council of the City of New York*, *supra* note 126, at 5.
132. *See* Farinacci, *supra* note 128.
133. Adams Otis, *supra* note 126.
134. *See Bey v. City of New York*, 999 F.3d 157, 166, 170 (2d Cir. 2021).
135. *See id.* at 168–70.
136. *See supra* notes 112–114 and accompanying text.
137. *See* Kundu and Patterson, *supra* note 3, at 860.
138. The Second Circuit did not have to issue an interpretation on the OSHA RPS to decide this case, but it chose to, unlike the district court. *See Bey*, 999 F.3d at 166.
139. *See id.* at 169.
140. *See id.* at 169–70 ("[T]he FDNY's defensive strategy was likely influenced by the Firefighters' approach.").
141. *See supra* Part I.C.
142. *See Bey*, 999 F.3d at 169 ("[T]he Firefighters retain the ability to present their evidence to OSHA if they continue to believe that the respiratory-protection standard is unduly restrictive; but it is OSHA to which such a challenge should be directed, not the FDNY, and not the courts.").
143. *See* Gordon, *supra* note 65, at 529.
144. *ADA Amendments Act of 2008 Frequently Asked Questions*, U.S. Dep't Lab., *available at* <https://www.dol.gov/agencies/ofccp/faqs/americans-with-disabilities-act-amendments#Q1> (last updated Jan. 1, 2009).
145. *See Job Requiring Respiratory Protection*, Occupational Safety & Health Admin. (Apr. 16, 1996), *available at* <https://www.osha.gov/laws-regs/standardinterpretations/1996-04-16> (last visited March 10, 2023).
146. *See Stewart v. City of Houston*, 2009 U.S. Dist. LEXIS 79188, at *8–9 (S.D. Tex. Aug. 7, 2009).
147. *Id.*
148. *Id.* at *9.
149. *See* T. M. Dewberry, Note, "Title VII and African American Hair: A Clash of Cultures," *Washington University Journal of Law & Policy* 54 (2017).
150. *See* S. Cohen, "The Truth within Our Roots: Exploring Hair Discrimination and Professional Grooming Policies in the Context of Equality Law," *York Law Review* 2 (2021).
151. *See id.*; Halo Collective, *available at* <https://halocollective.co.uk/> (last visited Sept. 25, 2022).
152. *Id.*
153. *See Hair Discrimination in Workplace*, Halo Collective, *available at* <https://halocollective.co.uk/halo-code-workplace/> (last visited Nov. 29, 2021).
154. *Bey v. City of New York*, 437 F. Supp. 3d 222, 237 (E.D.N.Y 2020), *aff'd in part*, *rev'd in part on other grounds*, 999 F.3d 157 (2d Cir. 2021).
155. D. Wendy Greene, "Title VII: What's Hair (and Other Race-Based Characteristics) Got to
Do with It?" *University of Colorado Law Review* 92 (2021).
156 *See* K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* 1989, no. 1 (1989): 139-167.
157. U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2006-1, Section 15 Race and Color Discrimination (2006), *available at* <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#IVC> (last visited Sept. 25, 2022).
158. Robinson and Robinson, *supra* note 21, at 282 ("Hair discrimination, and race discrimination generally of course, affects a person's access to money, capital, and generational wealth.").
159. *See supra* Part I.C.i.; *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).
160. See *Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 770 (E.D. Wis. 2010).
161. *See* S. Callaham, "Women Plaintiffs 'Sex-Plus-Age' Discrimination Claim Stands," *Forbes*, July 26, 2020, *available at* <https://www.forbes.com/sites/sheilacallaham/2020/07/26/women-plaintiffs-sex-plus-age-discrimination-claim-stands> (last visited March 13, 2023).
162. D. Wendy Greene, "A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair," 8 *Florida International University Law Review* 8, no. 2 (2013).
163. *See supra* Part I.A.
164. *See* Off. CROWN Act, *supra* note 35.
165. *See* V. Stracqualursi, "US House Passes CROWN Act That Would Ban Race-Based Hair Discrimination," *CNN*, March 18, 2022, *available at* <https://www.cnn.com/2022/03/18/politics/house-vote-crown-act/index.html> (last visited March 13, 2023).
166. *See* Off. CROWN Act, *supra* note 35.
167. Legislative Bill 451, *available at* <https://nebraskalegislature.gov/FloorDocs/107/PDF/Slip/LB451.pdf> (last visited March 13, 2023).
168. *See The CROWN Act Resources*, Off. CROWN Act, *available at* <https://www.thecrownact.com/research-studies> (last visited April 18, 2023) (examining Hair Discrimination experienced by Black women and girls in "2021 Dove CROWN Research Study for Girls" and "2019 Dove CROWN Research Study").
169. *See* S.B. 188, 2019 S., Reg. Sess. (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*, Off. CROWN Act, *available at* <https://www.thecrownact.com/email-your-federal-legislator> (last visited April 18, 2023) (providing state legislators with legislative templates).
170. *See* J. Diaz, "The House Passes the CROWN Act, a Bill Banning Discrimination on Race-Based Hairdos," *NPR*, March 18, 2022, *available at* <https://www.npr.org/2022/03/18/1087661765/house-votes-crown-act-discrimination-hair-style> (last visited March 13, 2023) (quoting the floor statement of Rep. Ayanna Pressley: "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, *available at* <https://www.naacpldf.org/crown-act/> (last visited Sept. 25, 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.").

The Journal of Law, Medicine & Ethics, 51 (2023): 185-195. © 2023 The Author(s)