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

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

Yucheng (Renee) Jiang^{*+}

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⁺ J.D., 2022, Fordham University School of Law. Many thanks to my Note advisor Professor Kimani Paul-Emile; editors of Volume 49 & 50 of the *Fordham Urban Law Journal*; and all my colleagues and friends. I want to thank my father for his support and encouragement. I dedicate this Note to my mother Ren Jie.

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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,⁴ 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.⁵ From 2015 to 2018, the FDNY provided medical accommodations to firefighters with PFB, permitting them to maintain closely cropped beards.⁶ 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.⁷ The firefighters were required to choose between becoming clean-shaven and suffering harmful medical consequences or being placed on light duty⁸ and never being able to enter a fire site again.

Hair Discrimination and Grooming Policy Discrimination cases involving hair length, hair texture, or hair styles in the workplace have been prevalent

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 AM. FAM. PHYSICIAN 859, 860 (2013).

4. The following 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. *Bey*, 999 F.3d at 161.

6. *See id.* at 161–62.

7. *See id.* at 162.

8. *See id.*

since the enactment of Title VII of the Civil Rights Act of 1964 (Title VII).⁹ Discrimination with regard to male facial hair is no exception — the Equal Employment Opportunity Commission (EEOC) issued guidance on this topic as early as 1989.¹⁰ Male facial Hair Discrimination, usually in the form of an employer’s Clean Shave Policy, mainly concerns a man’s ability to wear a beard, often for religious 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 has racial implications and shares the same socio-historical and legal context as the larger issue of 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 between 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,¹⁵ utilizing legal theories of racial discrimination, disability discrimination, and religious discrimination. Part I surveys the history of Clean Shave Policy Discrimination litigation in the broader context of Hair Discrimination and Grooming Policy Discrimination, and the methods 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 litigation such as the interaction of the ADA and Title VII with other binding federal regulations like OSHA rules. Part III proposes

9. See 42 U.S.C. §§ 2000e–2000e-17 (1964); *CM-619 Grooming Standards*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/cm-619-grooming-standards> [<https://perma.cc/JK2D-YTLD>] (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).

10. See *CM-619 Grooming Standards*, *supra* note 9.

11. See *id.*

12. See *infra* Section I.C.1.

13. See *generally* *Bey v. City of New York*, 437 F. Supp. 3d 222 (E.D.N.Y. 2020) [hereinafter *Bey I*]; *Bey v. City of New York*, F.3d 157 (2d Cir. 2021) [hereinafter *Bey II*].

14. See *id.*

15. See *infra* Section III.B.

solutions for Clean Shave Policy Discrimination other than litigation under the current legal framework. This Note proposes that employers should take the lead in designing equitable Grooming Policies in the workplace,¹⁶ that courts should take an intersectional approach to Hair Discrimination cases,¹⁷ and that legislative efforts such as the CROWN Act should be expanded to cover Black men who suffer from Clean Shave Policy Discrimination.¹⁸

I. BACKGROUND

A. History of Hair Discrimination and Grooming Policy Discrimination

Black people often risk losing employment and educational opportunities because of their hair.¹⁹ 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.”²⁰ Such mandates implicate protected categories under anti-discrimination laws including race, color, age, disability, sex, and/or religion.²¹

Societal understanding of the relationship between race, Hair Discrimination, and Grooming Policy Discrimination has evolved over time. In Grooming Policy Discrimination cases, 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.”²² In the context of Hair Discrimination, courts have interpreted this doctrine to mean that afros are protected, but braids are not²³ — because “afros are racial but locks are cultural.”²⁴ Plaintiffs in seminal Grooming Policy Discrimination cases like

16. *See infra* Section III.A.

17. *See infra* Section III.B.

18. *See infra* Section III.C.

19. *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).

20. 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).

21. *See id.*

22. *Id.* at 998.

23. *See id.*

24. *Id.* at 1015.

*Rogers v. American Airlines Inc.*²⁵ and *EEOC v. Catastrophe Management Solutions*²⁶ have challenged this doctrine but failed. Many 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.”²⁷ These scholars further argue that the courts should take a cue from the interpretation of “immutability” in sexual orientation cases²⁸ such as *Bostock v. Clayton County*,²⁹ to read race as a social and legal construct.³⁰ Doing so could ensure equal protection of “cultural” aspects of race like braids and dreadlocks. Such advocacy has also led to the drafting 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.”³¹ The CROWN Act provides a framework legislation that has been signed into law in 19 states and its federal version currently sits with the U.S. Senate.³²

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

Discrimination today has shifted from open bigotry to more “subtle” and “indirect” discriminatory acts³³ driven by implicit bias. Implicit bias refers to stereotypes or attitudes that operate without an individual’s conscious awareness.³⁴

African Americans face a significant amount of implicit bias.³⁵ With regard to Hair Discrimination, “an employer’s hyper-regulation of a Black woman’s natural hair . . . based upon subjective and paternalistic ideals

25. 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).

26. 852 F.3d 1018, 1021 (11th Cir. 2016) (holding that asking plaintiff, a Black woman, to cut her dreadlocks was not racial discrimination).

27. Greene, *supra* note 20, at 1029; *see also* Robinson & Robinson, *supra* note 19, at 284.

28. *See* Greene, *supra* note 20, 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 19, at 287.

29. 140 S. Ct. 1731, 1746 (2020).

30. *See* Greene, *supra* note 20, at 1023; Robinson & Robinson, *supra* note 19, at 285.

31. *See* About, OFF. CROWN ACT, <https://www.thecrownact.com/about> [<https://perma.cc/WCY7-7MJS>] (last visited Sept. 26, 2022).

32. *See id.*

33. *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).

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

35. *See id.* at 436–37.

about what management finds ‘attractive,’ ‘acceptable,’ and therefore ‘permissible’ in the workplace” is one example of implicit bias.³⁶ Clean Shave Policies for Black men are another example because “white supremacy permeates ideas around what it means to appear as ‘professional’ or ‘businesslike.’”³⁷

Employers might be unaware of what PFB is, and how seemingly race-neutral Clean Shave Policies 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.”³⁸ 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.³⁹

C. Methods of Challenging Clean Shave Policy Discrimination

Black employees with PFB experiencing discriminatory employment practice can challenge 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 have brought disability discrimination claims under the ADA⁴⁰ 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.⁴¹

Like other types of discrimination claims, ADA claims are subject to the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*.⁴² The plaintiff must establish the four elements of a prima facie case:

36. See Greene, *supra* note 20, at 1003.

37. See Robinson & Robinson, *supra* note 19, at 277.

38. 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).

39. See *Bey I*, 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).

40. 42 U.S.C. § 12112(a) (2008).

41. 29 U.S.C. § 794(a) (2016); see also *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1125 (11th Cir. 1993).

42. See 411 U.S. 792, 802 (1973); *Bey II*, 999 F.3d 157, 165 (2d Cir. 2021); see also SANDRA F. SPERINO, *THE LAW OF EMPLOYMENT DISCRIMINATION* 144 (2019) (“Many lower courts assume that a disparate impact case under the ADA works similarly to a Title VII disparate impact 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.⁴³

Before the ADA Amendments Act of 2008 (ADAAA),⁴⁴ it was hard to prove that PFB constituted a disability because the Supreme Court had narrowly interpreted the concept.⁴⁵ After the ADAAA instructed courts to construe the “definition of ‘disability’ . . . in favor of broad coverage,”⁴⁶ courts grew more inclined to find PFB as a disability,⁴⁷ although some still express doubt.⁴⁸

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

There are five protected classes under Title VII: race, color, religion, sex, and national origin.⁴⁹ According to the EEOC, Clean Shave Policy Discrimination claims are usually brought based on sex, race, or religion.⁵⁰ 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.”⁵¹

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.⁵² But many religions prohibit shaving

43. *Bey II*, 999 F.3d at 165.

44. 42 U.S.C. § 12101–03 (2008).

45. *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)).

46. 42 U.S.C. § 12102(4)(A).

47. *See Bey I*, 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) (“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.”).

48. *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).

49. *See* 42 U.S.C. § 2000e-2(a)(2).

50. *See generally CM-619 Grooming Standards*, *supra* note 9.

51. *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).

52. *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/> [<https://perma.cc/WP84-PS3Y>].

at different degrees, such as Islam, Judaism, Sikhi, and Asatru — a traditional Norse Pagan religion.⁵³ 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.⁵⁴

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.⁵⁵

The central issue in a disparate treatment claim is whether the employer's actions were motivated by discriminatory intent.⁵⁶ A disparate treatment challenge to a Clean Shave Policy 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 group protected by Title VII in a discriminatory pattern — a disparate impact claim.⁵⁷ Title VII disparate impact claims adopt the same *McDonnell Douglas* burden-shifting framework as used in claims under the ADA.⁵⁸ 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.”⁵⁹ 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.⁶⁰ Congress rejected *Wards Cove's* “reasoned review” standard in the Civil Rights Act of 1991, which tried to

53. See *Bhatia v. Chevron U.S.A.*, 734 F.2d 1382, 1383 (9th Cir. 1984); *Hamilton v. City of New York*, 563 F. Supp. 3d 42, 48 (E.D.N.Y. 2021); *Sughrim v. New York*, 503 F. Supp. 3d 68, 83 (S.D.N.Y. 2020).

54. See *Bey II*, 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).

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

56. See *id.* at 530.

57. See *id.*

58. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); SPERINO, *supra* note 42, at 144.

59. 401 U.S. 424, 431 (1971).

60. 490 U.S. 642, 659 (1989); see Gordon, *supra* note 55, at 540.

codify the *Griggs* standard.⁶¹ Because the Supreme Court has not decided a Title VII disparate impact case since then, it is difficult to predict how courts will apply the standard.⁶²

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 than it has been in years past.”⁶³ 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.⁶⁴ Firefighters are required to wear a respirator also known as a self-contained breathing apparatus (SCBA) to protect them against toxic atmospheres.⁶⁵ 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.⁶⁶

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.⁶⁷ 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

61. See Gordon, *supra* note 55, at 540–41.

62. See *id.* at 546.

63. See *id.*

64. 29 C.F.R. § 1910.134 (2022); *Bey II*, 999 F.3d 157, 161 (2d Cir. 2021).

65. See *Bey II*, 999 F.3d at 161.

66. See *Bey I*, 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).

67. See *id.* at 234–36.

firefighters they allude to.”⁶⁸ 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.”⁶⁹

Defendants appealed the ADA decision to the Second Circuit.⁷⁰ Plaintiffs cross-appealed the disparate impact claim decision, but not the disparate treatment claim.⁷¹ 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.’”⁷² 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.”⁷³ After the appeal, plaintiffs petitioned for a rehearing en banc, which was denied.⁷⁴

B. Implications of *Bey*

With millions of workers required to wear a respirator in the workplace,⁷⁵ 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. *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.

68. *See id.* at 237.

69. *See id.* at 238.

70. *See Bey II*, 999 F.3d at 162–63.

71. *See id.* at 162.

72. *Id.* at 167–68.

73. *Id.* at 170.

74. *See* Order Denying Petition for Rehearing, *Bey II*, 999 F.3d 157 (2d Cir. 2021) (No. 20-456).

75. *See Respiratory Protection*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/respiratory-protection> [https://perma.cc/3WJ6-STMH] (last visited Aug. 7, 2022).

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.”⁷⁶ 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.”⁷⁷ 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.⁷⁸ In *Kennedy v. Bowser*, plaintiff firefighter was able to pass the District of Columbia Fire Department’s respirator Fit Test with a beard.⁷⁹ 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.”⁸⁰

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.⁸¹ Relatedly, DOCCS and the State of New York lost a class action arbitration with the correctional officers’ union in 2016.⁸² 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.⁸³ *Bey*’s interpretation of the OSHA RPS is the first federal appellate decision holding that the regulation

76. *Bey II*, 999 F.3d at 166.

77. *Bey I*, 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).

78. *See Bey I*, 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”).

79. 843 F.3d 529, 532 (D.C. Cir. 2016).

80. 2 F.3d 1112, 1121 (11th Cir. 1993).

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

82. *See id.*

83. *See id.*

requires employees to be completely clean-shaven, and it will likely be given significant weight by other courts and employers.⁸⁴

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.”⁸⁵ The court held that compliance with federal safety regulations should be treated as either an undue hardship for the employer or an affirmative defense.⁸⁶

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,”⁸⁷ but reducing the chances of incurring liability due to OSHA violations was consistent with the employer’s business necessity.⁸⁸ 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,”⁸⁹ 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.”⁹⁰ Even though the burden on employers has increasingly become lighter,⁹¹ merely asserting a business necessity defense would not be sufficient — the employer would still need to “present convincing expert testimony.”⁹²

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.⁹³ Furthermore, for a failure to accommodate claim under the ADA, the plaintiff might not even be able to

84. See Appellees–Cross-Appellants’ Petition for Rehearing en Banc at 11–12, *Bey II*, 999 F.3d 157, 161 (2d Cir. 2021) (No. 20-456).

85. *Bey II*, 999 F.3d at 168, 170.

86. See *id.* at 168.

87. 536 U.S. 73, 84–85 (2002).

88. See Gordon, *supra* note 55, at 542.

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

90. *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 F. App’x 475 (5th Cir. 2010); Gordon, *supra* note 55, at 543–44.

91. See Gordon, *supra* note 55, at 531.

92. *Fitzpatrick*, 2 F.3d at 1119 n.6.

93. See *Bey II*, 999 F.3d 157, 168, 170 (2d Cir. 2021).

establish a prima facie case as the accommodation they seek would not be reasonable.⁹⁴

The impact of *Bey* could be expansive. Take OSHA regulations as an example. Before *Bey*, if an employer interprets the OSHA RPS less restrictively, they could allow employees with PFB to keep a small beard while wearing a respirator if they can pass the Fit Test.⁹⁵ Now employers are precluded, as a matter of law, from giving such an interpretation and providing accommodations.⁹⁶ 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.”⁹⁷ In New York, all public employers — like the FDNY — must comply with OSHA regulations under state law.⁹⁸

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.⁹⁹ In about 10% of all private industry workplaces, half of those that wear respirators are required to do so.¹⁰⁰ Although no similar surveys have been conducted recently, those numbers are likely to increase significantly in the current COVID-19 pandemic.¹⁰¹ 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.¹⁰² 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.¹⁰³ Moreover, the New York Health and Essential Rights Act

94. *See id.* at 168.

95. *See Bey I*, 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).

96. *See Bey II*, 999 F.3d at 166.

97. *About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/aboutosha> [<https://perma.cc/Y2WC-P5FK>] (last visited Apr. 4, 2022).

98. *See* N.Y. LAB. LAW § 27-a(4)(a) (Consol. 2022); *Bey II*, 999 F.3d at 161.

99. *See Use of Respirators in the Workplace*, U.S. BUREAU LAB. STATS. (Mar. 21, 2002), <https://www.bls.gov/opub/ted/2002/mar/wk3/art04.htm> [<https://perma.cc/Z7NH-38U8>]; *Who Uses Respirators — and Why?*, INDUS. SAFETY & HYGIENE NEWS (Apr. 19, 2002), <https://www.ishn.com/articles/85737-who-uses-respirators-and-why> [<https://perma.cc/5235-DU8A>].

100. *See id.*

101. *See Respiratory Protection*, *supra* note 75. 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.*

102. *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 FED. REG. 61402 (Nov. 5, 2021).

103. *See* Mychael Schnell, *OSHA Suspends Enforcement of COVID-19 Vaccine Mandate for Businesses*, HILL (Nov. 17, 2021, 3:23 PM), <https://thehill.com/policy/healthcare/582022->

(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.¹⁰⁴ 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 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 three months after *Bey*, a firefighter challenged the FDNY's Clean Shave Policy on religious discrimination grounds.¹⁰⁵ The court disposed of the plaintiff's Title VII failure to accommodate claim swiftly, granting summary judgment in favor of the employer.¹⁰⁶ The court held that in light of *Bey*, the OSHA RPS posed an undue hardship and that "[d]efendants easily satisfy their burden."¹⁰⁷ The court further explained that *Bey* applies to ADA accommodations "with equal (if not greater) force" than Title VII religious accommodations.¹⁰⁸ 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.¹⁰⁹ However, the plaintiffs are unlikely to prevail if the parties return to litigation,¹¹⁰ because New York state law renders DOCCS subject to OSHA in the same manner as the FDNY.¹¹¹

osha-suspends-enforcement-of-covid-19-vaccine-mandate-for-businesses
[<https://perma.cc/5D9T-XH4V>].

104. See *NYS Hero Act*, N.Y. DEP'T LAB., <https://dol.ny.gov/ny-hero-act> [https://perma.cc/3ENN-JXH2] (last visited Apr. 4, 2022).

105. See 563 F. Supp. 3d 42, 48–49 (E.D.N.Y. 2021).

106. See *id.* at *3.

107. *Id.* at *16.

108. *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.”)).

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

110. 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).

111. 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 — which allowed for 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* Section III.B.

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

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,¹¹² the deterring effect might be significant.

The FDNY has long faced allegations of discrimination.¹¹³ 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.¹¹⁴ In 2018, only 9% of FDNY firefighters were Black and 13% Hispanic.¹¹⁵ *The Atlantic* even questioned *Why So Few of "New York's Bravest" Are Black* in 2015.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ Even though the FDNY has made some progress,¹¹⁹ 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."¹²⁰

112. See Kundu & Patterson, *supra* note 3.

113. 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> [<https://perma.cc/SJ5L-SA8H>]; Ginger Adams Otis, *Why So Few of New York's Bravest Are Black*, ATLANTIC (June 6, 2015), <https://www.theatlantic.com/politics/archive/2015/06/black-firefighters-matter/394946/> [<https://perma.cc/4M7F-YF72>]; THE COUNCIL OF THE CITY OF N.Y., REPORT OF THE FINANCIAL 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> [<https://perma.cc/J2TZ-KB84>].

114. See Herndon & Watkins, *supra* note 113.

115. See Amanda Farinacci, *FDNY Reports Progress in Diversity Recruitment Efforts*, SPECTRUM NEWS 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-> [<https://perma.cc/5TF3-8Q6A>].

116. See Adams Otis, *supra* note 113.

117. See Herndon & Watkins, *supra* note 113; Adams Otis, *supra* note 113.

118. See THE COUNCIL OF THE CITY OF N.Y., *supra* note 113.

119. See Farinacci, *supra* note 115.

120. Adams Otis, *supra* note 113.

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, 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.¹²¹ More broadly, the holding in *Bey* provides that accommodations under the ADA and Title VII should give way to any binding federal regulations.¹²² Because millions of employees are required to wear a respirator at work,¹²³ and with PFB disproportionately impacting Black men,¹²⁴ *Bey* will result in the exclusion of Black men with PFB from the workforce.

The parties to the case probably did not expect the restrictive ruling in *Bey*.¹²⁵ 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.¹²⁶ 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,¹²⁷ 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,¹²⁸ 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.

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

121. *See Bey II*, 999 F.3d 157, 166, 170 (2d Cir. 2021).

122. *See id.* at 168–70.

123. *See supra* notes 99–101 and accompanying text.

124. *See Kundu & Patterson, supra* note 3.

125. 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 II*, 999 F.3d at 166.

126. *See id.* at 169.

127. *See id.* at 169–70 (“[T]he FDNY’s defensive strategy was likely influenced by the Firefighters’ approach.”).

128. *See supra* Section I.C.

restrictive, they should direct their challenge to OSHA.¹²⁹ On the legislative front, Congress could clarify their intent and ensure the courts faithfully apply the antidiscrimination laws Congress passes, as they did with the Civil Rights Act of 1991¹³⁰ and the ADAAA.¹³¹

This Note proposes that 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 as an exemplary legislative and awareness-raising effort against Hair Discrimination, 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 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.”¹³² 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.¹³³ 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.”¹³⁴ Under recommendations of the committee, Chief Hurtt revised the HPD’s Grooming Policy to issue “escape hood respirators” to officers affected by PFB.¹³⁵

In general, it is recommended that employers consult diversity experts to redesign facially neutral Grooming Policies that might actually be

129. *See Bey II*, 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.”).

130. *See* Gordon, *supra* note 55, at 529.

131. *ADA Amendments Act of 2008 Frequently Asked Questions*, U.S. DEP’T LAB. (Jan. 1, 2009), <https://www.dol.gov/agencies/ofccp/faqs/americans-with-disabilities-act-amendments#Q1> [<https://perma.cc/FFM6-ZNYZ>].

132. *See Job Requiring Respiratory Protection*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Apr. 16, 1996), <https://www.osha.gov/laws-regs/standardinterpretations/1996-04-16> [<https://perma.cc/62UU-GUJ7>].

133. *See Stewart v. City of Houston*, 2009 U.S. Dist. LEXIS 79188, at *8–9 (S.D. Tex. Aug. 7, 2009).

134. *Id.*

135. *Id.* at *9.

discriminatory, hire a more diverse group of employees — especially in decision-making positions¹³⁶ — and further educate themselves about Hair Discrimination.¹³⁷ One example is the Halo Code in the United Kingdom.¹³⁸ The Halo Collective is an alliance working to create a future without Hair Discrimination.¹³⁹ The Collective introduced the Halo Code which provides a set of voluntary guidelines for professional establishments to adopt and educate their workforce about Black hair.¹⁴⁰

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 to better align with society's growing understanding of implicit racial bias. Intersectionality considers how the intersection of multiple identity categories can create unique inequities among marginalized communities.¹⁴¹ 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.¹⁴²

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

136. See Dewberry, *supra* note 33, at 354.

137. 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).

138. See *id.*; HALO COLLECTIVE, <https://halocollective.co.uk/> [https://perma.cc/QMR2-KQ9V] (last visited Sept. 25, 2022).

139. See HALO COLLECTIVE, *supra* note 138.

140. See *Hair Discrimination in Workplace*, HALO COLLECTIVE, <https://halocollective.co.uk/halo-code-workplace/> [https://perma.cc/298G-A5VC] (last visited Nov. 29, 2021).

141. See Kimberle 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, 148 (1989).

142. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2006-1, SECTION 15 RACE AND COLOR DISCRIMINATION IV(C) (2006), <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#IVC> [https://perma.cc/PXA6-QHD4].

wealth.¹⁴³ PFB is also a disability.¹⁴⁴ Courts have already recognized the distinct stereotypes to which Black males are subject in intersectional discrimination cases.¹⁴⁵ As courts move forward with precedent-setting intersectional discrimination cases,¹⁴⁶ they 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 Act¹⁴⁷ has enjoyed great success, both in the legislature and in raising awareness about Hair Discrimination. 19 states and more than 40 municipalities have enacted their versions of the CROWN Act.¹⁴⁸ In March 2022, the U.S. Congress passed the federal version of the CROWN Act in a 235–189 vote.¹⁴⁹ The bill is now heading to the Senate.¹⁵⁰ 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 Dove, a co-founder of the CROWN Coalition,¹⁵¹ its legislative framework,¹⁵² and its media coverage.¹⁵³ The

143. Robinson & Robinson, *supra* note 19, at 282 (“Hair discrimination, and race discrimination generally of course, affects a person’s access to money, capital, and generational wealth.”).

144. *See supra* Section I.C.1; *Bey I*, 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).

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

146. *See* Sheila Callahan, *Women Plaintiffs ‘Sex-Plus-Age’ Discrimination Claim Stands*, FORBES (July 26, 2020, 10:10 AM), <https://www.forbes.com/sites/sheilacallahan/2020/07/26/women-plaintiffs-sex-plus-age-discrimination-claim-stands> [<https://perma.cc/XCX3-8YTD>].

147. *See supra* Section I.A.

148. *See About, supra* note 31.

149. *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> [<https://perma.cc/3DEL-PPLR>].

150. *See id.*

151. *See The CROWN Act Resources*, OFF. CROWN ACT, <https://www.thecrownact.com/resources> [<https://perma.cc/9C82-8WG4>] (last visited Sept. 25, 2022) (examining Hair Discrimination experienced by Black women and girls in “2021 Dove CROWN Research Study for Girls” and “2019 Dove CROWN Research Study”).

152. *See* S.B. 188, 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, <https://www.thecrownact.com/your-state> [<https://perma.cc/45KD-4AEW>] (last visited Sept. 25, 2022) (providing state legislators with legislative templates).

153. *See* Jaelyn 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> [<https://perma.cc/72TS-GC53>] (quoting the floor statement of Rep. Ayanna Pressley:

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 regulations are at play. As collective understanding of Hair 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 take a more intersectional approach towards Hair Discrimination cases, and legislative efforts such as the CROWN Act should include Black men in their advocacy.

“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/> [<https://perma.cc/9VFF-DWD9>] (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.”).