NOTE

RACIAL IDENTITY PERFORMANCE
AND EMPLOYMENT DISCRIMINATION LAW

Katherine E. Leung*

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* JD. Candidate Harvard Law School 2017, A.B. Wellesley College. This paper was inspired by Kenneth Mack’s Critical Race Theory Seminar. Many thanks to Professor Mack for his feedback and support; to my talented classmates for their insightful comments and inspiration; and to Kyser Blakely for his comments and suggestions.
Although Title VII of the Civil Rights Act protects employees against discrimination on the basis of race, color, sex, national origin and religion using identical statutory language, those protections have varied dramatically as a result of courts’ statutory interpretations. Early interpretations of Title VII treated extensions of protection for one protected class as applicable to analogous discrimination against other protected classes under Title VII. However, in recent years, courts have begun to interpret Title VII protections differently across protected classes, limiting protection for race discrimination when compared with religious discrimination and sex discrimination. I argue that as a result of these divisions, where our legal system protects employees against religious identity performance discrimination and gender identity performance discrimination, similar protection is not available for racial identity performance. While gender identity performance protections have steadily expanded since the Supreme Court’s decision in Price Waterhouse, and Abercrombie ratified iron-clad protection for religious identity performance, there has been no similar protection for racial identity performance, and even in cases where subjective standards or appearance policies have a demonstrable disparate impact on employees of color, courts have refused to acknowledge the discriminatory nature of those policies and provide relief for employees of color who face discrimination under these policies.

INTRODUCTION

TITLE VII of the Civil Rights Act prohibits discrimination on the basis of race, religion, national origin, and gender.1 Despite the identical statutory language protecting these classes, the case law that developed out of Title VII litigation does not provide similar protection. While protections against religious discrimination and gender discrimination cover identity performance, protection against race discrimination doesn’t seem to extend that far.2 Given the identical statutory language protecting each of these three classes, this disparity in legal protection isn’t the result of lawmakers’ failure to treat these classes equally, nor is it the result of the absence of statutory protection. This willingness to

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regulate religious discrimination and gender discrimination to a greater extent than race discrimination stems from the cultural influences of interest convergence and implicit bias and has resulted in race discrimination going unchallenged, even by government agencies that are tasked with fighting employment discrimination. It also reflects a societal acknowledgement that conventional understandings of “professionalism” have significant implications for religious and gender discrimination, while failing to acknowledge the highly raced nature of “professionalism” in most workplaces in the United States.

For the purposes of this article I will define racial identity performance as the manner in which one outwardly performs race. This can include but is certainly not limited to the clothing choices, language patterns, hairstyles, political activism, and grooming habits. While these characteristics are also expressions of self, they are all raced concepts – particularly in the workplace. I routinely perform my own racial identity by wearing red on Lunar New Year, and attending Chinese cultural events. But as a woman with a mixed racial background, raised in a predominantly white suburban neighborhood, I also have the privilege of passing and years of practice code switching, displaying elements of the white side of my identity performance in professional settings where whiteness is the established cultural norm. Although I grew up feeling that I was never Asian enough, my whiteness has made me less vulnerable to racial identity performance discrimination. But such a contextual shift is not always seamless, nor should it be a necessary element of professional success.

I. Framing Racial Identity Performance Protection

A. Critical Framework

Devon Carbado and Mitu Gulati have long argued that race discrimination can be deeply rooted in identity performance. They use the idea of the “fifth black woman” to illustrate how such discrimination might occur where there are five black women candidates for partnership in a law firm and the four women who relax their hair, wear sweater sets, and join the same country club as the white partners are promoted while the fifth woman who wears her hair naturally, dresses in traditional African clothing on casual Friday, and is a political activist, is denied partnership. While Carbado and Gulati’s scholarship has highlighted how race discrimination is more nuanced than refusing to hire anyone from a cer-

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tain racial group, our discrimination laws and cultural conception of professionalism have largely remained the same.

This raises the question of why Carbado and Gulati’s scholarship hasn’t prompted a major shift in the way we handle race discrimination cases, while conceptions of what gender discrimination and religious discrimination look like have continued to shift. Our cultural failure to recognize intersectionality and interest convergence as forces behind our decisions about whose rights to recognize and to what extent those rights should be protected is one of the main drivers, behind our failure to treat race discrimination similarly to gender discrimination and religious discrimination. Both religious discrimination and gender discrimination can impact white men, and when white men’s interests converge with the interests of a marginalized group, protections for that group tend to increase.5

Derrick Bell describes interest convergence as a phenomenon whereby the temporary alignment of white people’s interests with those of African Americans was a significant contributing factor in the passage of major civil rights legislation.6 This same kind of interest convergence was a major factor in the expansion of gender discrimination protections, as white gay men in the United States pushed for an expansion of gender discrimination protections, the convergence of white men’s interests with women’s interests expanded how we understand gender discrimination to create sufficient momentum to move the law.7 Religious discrimination law tells a similar story – many of the cases that expand protections for religious liberty are the result of lobbying by Judeo-Christian organizations, which are largely made up by white people advocating on behalf of their own rights, both in and out of the workplace, and those organizations’ commitment to preventing an adverse precedent in cases involving employees with other religious beliefs.8 While there are no differences in the statutory language protecting race, religion, and gender, protections against race discrimination were not put in place to protect white people, and as a result protections against race discrimination do not benefit from the same kind of interest convergence that has expanded coverage for gender discrimination and religious discrimination.

Not only has the expansion of gender discrimination and religious discrimination protection left race discrimination protection behind, but

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6 Id.


it also fails to address the intersectional nature of identity performance. As a result, a variety of specific grooming or appearance policies that have a specific negative impact on women of color, and in rarer instances a specific negative impact on men of color, slip through the cracks because discrimination that occurs where race and gender intersect often leaves individuals who are members of more than one marginalized group out of the conversation and fails to address their rights. Women of color are not at the center of the conversation around expanding the definition of gender discrimination, which is centered on the needs of white gay men and white women. As a result, women of color often receive less protection than white women and white gay men under the gender discrimination provision of Title VII, although restrictions on appearance that would require relaxed hair, for example, would have the greatest disparate impact on Black women, and is thus a form of gender discrimination. Unfortunately, because these kinds of cases fall at the intersection of race discrimination and gender discrimination, they are generally treated as cases of race discrimination rather than gender discrimination, and thus do not receive the same kinds of protection as policies that are viewed as discriminating against or harassing white women. While this particular problem extends far beyond interpretations of Title VII, it points to a significant explanation for the inconsistencies in courts’ interpretations of Title VII and how those inconsistencies are problematic.

B. The Development of Modern Disparate Impact Theory

Disparate impact theory was originally designed to pick up on employment practices that disadvantaged members of a protected class and does not require that the employer exercise discriminatory intent, simply that the policy have a discriminatory impact on a protected class. However as more time passes between Title VII’s original passage and a plaintiff’s disparate impact claim, courts seem more reluctant to permit plaintiffs to argue robust disparate impact claims. In fact it was unclear following Dukes whether or not the Supreme Court was even willing to

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9 Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, in CRITICAL RACE THEORY, supra note 5, at 357-60.


11 Compare Griggs, 401 U.S. at 431 (holding that practices that operate as a means of discrimination against a protected class are prohibited), with Ricci v. DeStefano, 557 U.S. 557, 583-84 (2009) (holding that an employer cannot take remedial action to address the potential disparate impact of an examination on employees within protected class unless there is a substantial basis in the evidence to suggest that the employer may be liable for disparate impact discrimination, because such remedial action would constitute disparate treatment of those employees who performed well on the test, on the basis of their races).
consider disparate impact litigation at all.\textsuperscript{12} The Court’s holding in \textit{Dukes} that there wasn’t enough commonality among women at Wal-Mart and the harm they suffered as a result of the extreme discretion that Wal-Mart gives supervisors in determining who to promote and how to manage employees, suggests a skepticism of disparate impact theory that could place significant barriers in the paths of future plaintiffs attempting to raise the issue of racial identity performance as a basis for disparate impact liability under Title VII.\textsuperscript{13}

The specific question of whether or not disparate impact theory is still viable appears to have been resolved by \textit{Texas Department of Housing and Community Affairs} in 2015.\textsuperscript{14} However, this decision coming shortly after \textit{Dukes} leaves open the question of whether or not disparate impact theory is still available under Title VII specifically, and if it is, whether it is open to cases that don’t involve employee testing. Because the class in \textit{Dukes} was so large and challenged supervisors’ discretion rather than a specific policy, one could argue that it is limited to its facts, and unlikely to recur should a smaller class of plaintiffs with more commonality and more similar job titles, supervisors and employer policies raise a disparate impact claim under Title VII.\textsuperscript{15} However it is equally possible that \textit{Dukes} signals an impatience from the Court with employees’ disparate impact claims altogether, and that while the Court accepts disparate impact as a legitimate theory in housing cases, will not be open to similar claims in the context of Title VII.

Given the limited development of disparate impact theory even prior to \textit{Dukes}, it is plausible, even likely, that the Court will not be open to a disparate impact theory of racial identity performance discrimination under Title VII. Although Congress never limited disparate impact theory under Title VII to testing or educational requirement cases, disparate impact theory in modern employment law appears to be limited to litigation over disparate outcomes in employee test results and the discriminatory nature of standardized tests.\textsuperscript{16} And to be truly effective, any dispar-

\textsuperscript{12} Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554-55 (2011) (holding that the employees’ inability to identify a common manner in which supervisors exercised discretion was a bar to class certification because without commonality in the discretion that plaintiffs claimed as the discriminatory policy or practice, employees could not demonstrate commonality for the purposes of class certification).

\textsuperscript{13} Id.

\textsuperscript{14} Tex. Dep’t of Hous. & Cnty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2511-12 (2015) (holding that Texas was required to place low income housing in a variety of neighborhoods, not just low income, majority minority neighborhoods, because failure to do so constituted a disparate impact on the people of color who make up the majority of low income housing residents).


ate impact theory of racial identity performance would rely to some degree upon the unreasonable discretion granted to supervisors, hiring managers, and other individual agents of the employer in determining what professionalism is, and in enforcing appearance and professionalism standards in the workplace. Such a case, similar to *Dukes*, would have a widespread impact across job titles and responsibilities in a given company, because of the way that discretion is likely to play out as a direct result of implicit bias and whitewashed notions of how employees should look, act and speak on the job. While employees might be able to pursue this kind of disparate impact claim in separate smaller class action lawsuits, in an attempt to avoid the pitfalls of the class size and comparability questions the Court objected to in *Dukes*, such a strategy might make it more difficult to find named plaintiffs for each class, and would limit more privileged employees’ ability to protect employees who are afraid of the consequences of pursuing this case as named plaintiffs or as witnesses.17

II. HISTORY OF IDENTITY PERFORMANCE PROTECTIONS UNDER TITLE VII

A. The Evolution of Sex Discrimination Under Title VII

Gender discrimination has included protection against discrimination on the basis of failure to adhere to gender stereotypes or perform one’s gender according to company dictates for decades. In 1989, the Supreme Court decided *Price Waterhouse v. Hopkins*, holding that failing to promote a woman because she did not behave in a conciliatory manner, or wearing skirts and makeup, but rather behaved aggressively and had a more masculine or androgynous personal sense of style constituted discrimination on the basis of Ms. Hopkins’ failure to perform a gender stereotype.18 The Court acknowledged and rejected the clear implication in *Price Waterhouse* executives’ suggestions that Ms. Hopkins “take a course at charm school” and wear high heels and makeup if she wanted to be promoted to partner, that there was a correct way for Ms. Hopkins to perform her gender, including her choice of clothing, language and the manner in which she carried herself.19

This acknowledgement and rejection of stereotyping language as directly counter to Title VII’s purpose was one of the first indicators that there might be some form of protection for identity under Title VII. *Price Waterhouse* was quickly followed by a string of cases expanding the notion of gender discrimination and sexual harassment beyond quid-pro-quo harassment of women by men, or the use of extreme sexist, derogatory and potentially threatening language toward women, to a new

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19 Id. at 250.
definition of gender discrimination that acknowledged that employers can discriminate against employees of the same gender on the basis of gender, and that discrimination can be about more than just a dislike or unwillingness to interact with people of a specific gender, perhaps including that employee’s performance of gender.\textsuperscript{20} A more nuanced understanding of sexual harassment, and gender discrimination more broadly, leaves comparatively more room for employees to fight back against gender discrimination as it evolves and to protect their right to be treated as equitable in the workplace.

Although courts have been resistant to the idea of expanding the concept of sex discrimination under Title VII to cover gay and lesbian employees who are discriminated against on the basis of their sexual orientation, despite the combination of \textit{Price Waterhouse} and \textit{Oncale} which seem to suggest that a sex stereotyping theory of sexual orientation discrimination might be actionable under Title VII, courts were prepared to use sex stereotyping analysis to protect trans*men and trans*women\textsuperscript{21} from discrimination in the workplace long before they were prepared to extend protection for many other LGBT rights, including marriage equality.\textsuperscript{22} While there are many ways in which trans* workers are discriminated against both inside and out of the workplace, these cases indicate that judges were comfortable protecting gender identity under Title VII well before \textit{Complainant v. Foxx}, suggesting a longer history of protection for gender identity, the parallel for which cannot be found in jurisprudence on racial identity performance.

Even though the immediate line of same-sex discrimination cases following \textit{Oncale} suggests that courts were unwilling to extend protection against discrimination to employees suffering discrimination as a result of their coworkers’ perception of their homosexuality, whether real or imagined, recent cases suggest this early trend was not dispositive with respect to gender performance discrimination.\textsuperscript{23} Despite largely consistent decisions in favor of protecting gender identity under Title VII, the Sixth Circuit was particularly resistant to allowing plaintiffs’ attorneys to bootstrap sexual orientation discrimination into Title VII protections under a sex stereotyping theory, arguing that sexual orientation dis-


\textsuperscript{21} For the purposes of this article I will define the term trans*men to mean men who were assigned female at birth and identify as men, and the term trans*women to mean women who were assigned male at birth and identify as women.

\textsuperscript{22} Schroer v. Billington, 557 F. Supp. 2d 293, 303-04 (D.D.C. 2008); see also Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566, 574-75 (6th Cir. 2004); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2001); but cf., Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085-86 (7th Cir. 1984).

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crimination was based on out of work conduct rather than appearance or behavior that was readily apparent at work, making it less actionable under Title VII. While these views are representative of a broader trend, the contrast between protections for sexual orientation and gender identity is especially pronounced in the Sixth Circuit.

In July of 2015 the EEOC issued a decision that further expanded this kind of protection against gender discrimination. In Complainant v. Foxx the Commission held that an employer cannot discriminate against an employee on the basis of sexual orientation, an interpretation of Title VII that has been arguable under a combination of Price Waterhouse and Oncale, but which federal courts have been reluctant to endorse. While the Commission’s decision in Complainant v. Foxx is only binding precedent in cases brought before EEOC Administrative Law Judges, it is persuasive authority in any gender discrimination case and circuit courts have yet to depart from the line of thinking articulated in Foxx, nor has the Supreme Court spoken on this issue. Given that Foxx also follows the Supreme Court’s decision in Obergefell v. Hodges, this interpretation of Title VII may be ripe for adoption in federal courts. Even if the Commission’s decision in Foxx is not adopted by federal courts in the near future, it has significantly expanded Title VII protections for federal employees, as Foxx is binding on EEOC Administrative Law Judges and as a result will have a sizeable impact on the scope of protection against gender discrimination under Title VII regardless of how federal courts proceed on this question.

Even without Foxx, the scope of Title VII protection against gender discrimination far exceeds federal courts’ interpretations of the scope of Title VII protections against race discrimination. While the Supreme Court has repeatedly held that employers’ disparate treatment of employees based on their race is unacceptable, the Court has been hesitant to apply disparate impact theory as broadly. In fact the Supreme Court has never heard a case on the disparate impact appearance policies have on people of color, although it has heard a variety of cases addressing the disparate impact that appearance policies have on women, classifying such policies as gender discrimination, and religious groups, requiring that employers accommodate their employees’ religious dress or grooming requirements.

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24 Vickers, 453 F.3d at 764.
26 Id.
Title VII protection against religious discrimination in the workplace is in many ways rooted in identity performance. Religious dress and grooming habits vary widely based upon religious background and denomination, but are consistently an outward expression of one’s religious beliefs. Observances of specific holidays or a Sabbath are similar outward expressions of identity and belief, all of which fall within our definition of identity performance. The Supreme Court’s interpretation of Title VII has protected religious identity performance in many forms, accommodating employees’ religious holidays, prayer breaks, dress and grooming requirements. While the Supreme Court has held that the right to religious accommodation is subject to reasonable constraints, such constraints are generally limited to criminal activity and bona fide occupational qualifications (BFOQs) in religious places of employment.

As recently as 2006, a District Court in Massachusetts held that an employer’s refusal to treat an employee equally with his coworkers when he was unable to comply with the employer’s appearance policy as a result of his beliefs as a practicing Rastafarian did not violate Title VII. The Court held that the employer’s choice to relegate the mechanic to the back of the shop where he would not be seen by customers was not a violation of Title VII’s prohibition on religious discrimination, because placing the employee in the back where he would not be seen by customers was a reasonable accommodation of his inability to comply with the employer’s new appearance policy because of the employee’s religious beliefs. Where Judge Posner found a reasonable accommodation for an employee whose religious beliefs did not permit him to comply with the grooming requirements under the new appearance policy, the policy also gave a nod to ideas of professionalism and respectability, which suggest a more onerous explanation for the employer’s actions. F.L. Roberts & Co. may indeed have been more concerned with the appearance of neatness, cleanliness and approachability when they implemented their appearance policy, but such a policy inherently has a disparate impact on people of color who choose to express their racial

32 Under F.L. Roberts & Co.’s new 2002 appearance policy, “[a]ll customer-contact employees are expected to be clean-shaven with no facial hair (no beards, goatees, or moustaches). Sideburns must be neatly trimmed and no longer than the bottom of the ear. Hair should be clean, combed, and neatly trimmed or arranged. Radical departures from conventional dress or personal grooming standards are not permitted.” Id. at 10.
identity by presenting themselves in a manner that is not conventional by white standards, but conventional or normal within their own racial identity group. Despite the great degree of protection usually granted to religious beliefs and performance of religious identity, the Court’s decision that permitting an employee with dreadlocks and a beard to be seen by customers would be an undue burden on the employer is an example of how the intersection of race and religion can weaken protections for an employee’s otherwise protected right to religious identity performance in the workplace. A pattern that, prior to the Court’s decision in Abercrombie, played out in a series of lower court cases involving the intersection of religion with race to conflict with whitewashed appearance policies in the workplace.

In EEOC v. Abercrombie & Fitch Stores the Supreme Court held that it is unlawful for an employer to fail to hire an employee based upon the expectation that the employee’s religious beliefs will prevent them from adhering to the employer’s appearance policy. Although Abercrombie argued that such a holding would require employers to essentialize religion and make assumptions about an employee’s religion, the Court dismissed this argument, pointing out that the employer is already making assumptions about prospective employees’ religious beliefs and using them as a basis for refusing to hire them. This argument could likely be applied to race discrimination as well – appearance policies that require certain hairstyles or style of dress make certain assumptions about employees’ racial background or identity performance and their ability to perform some amalgamation of those racial expectations. Ultimately the Court in Abercrombie required that employers suspend their appearance policies to accommodate any religious attire and would not permit an employer to take adverse employment action against the employee because of their attire. The court was comfortable making a sweeping judgment about employers’ appearance policies where they discriminate on the basis of religion, so why hasn’t the court made this same kind of sweeping judgment about appearance policies that discriminate against certain racial groups?

33 Compare Brown, 419 F. Supp. 2d 7 (holding that an employer’s adverse action sending an employee to the back of the shop as a result of his religious grooming requirements was not a violation with Title VII), with Carter v. Bruce Oakley, Inc., 849 F. Supp. 673 (E.D. Ark. 1993) (holding that an employer’s refusal to permit a Jewish employee to return to work following an injury unless he shaved his beard, against his religious beliefs, was a refusal to accommodate an employee’s religious beliefs and violated Title VII).


36 Id.

37 Abercrombie, 135 S.Ct. at 2028.
C. Distinguishing Race from Gender and Religion Identity Performance Protections in an Intersectional World

Under EEOC guidelines, English Only policies in the workplace are per-se discriminatory in violation of Title VII. While this guideline will protect racial minorities in many cases, the guideline was pursuant to Title VII’s protection against discrimination on the basis of national origin and does intersect with protections for white immigrants in addition to immigrants who are people of color. In fact when presented with an English-Only policy, the Ninth Circuit Court of Appeals relied on the EEOC guidelines, finding the English Only policy discriminatory on the basis of national origin, but failed to address the raced aspect of language and English Only policies, although it acknowledged that certain large racial and ethnic groups would be disproportionately impacted by English Only policies. However even if the Supreme Court extended this protection on the basis that English Only policies were a form of race discrimination, it would still fall short of the kind of protection that we see in Abercrombie, and Price Waterhouse, which provided broad protection against any restrictions on religious attire or attempts to enforce gender stereotypes in the workplace. In contrast, the protection against English Only policies is limited in that it addresses the language specific aspect of identity performance, without protecting other aspects of identity performance, like dress, cosmetics, or cultural observances.

The Supreme Court has occasionally provided some protections against discrimination on the basis of racial identity performance but those protections have been limited in nature and fell under the national origin provision of Title VII. While the Supreme Court has been willing to intervene in an employer’s appearance policy despite any concerns that employer might have about so called professionalism that motivated the appearance policy in the first place, the Court is unwilling to require that employers make similar accommodations for employees’ racial identity performance. Employees might struggle to adhere to appearance or grooming policies for a variety of reasons like maintaining a neatly trimmed beard to prevent painful ingrown hairs, or different cultural norms surrounding makeup or professional dress. Even in the event

39 Id.
42 Carmen Rios, You Call it Professionalism; I Call It Oppression In A Three Piece Suit, EVERYDAY FEMINISM (Feb. 15, 2015), http://everydayfeminism.com/2015/02/professionalism-and-oppression/.
that an employee is able to adhere to an appearance policy requiring relaxed hair, neutral colored suits and “natural” makeup application, these policies reflect highly raced concepts of professionalism and exist even in workplaces without a client-facing element.

There is an argument that the added Constitutional protection of religious freedom is part of why courts more readily require employers to accommodate their employees’ religious practices. However with the exception of government employers, employers’ failure to accommodate religious practices would not be a Constitutional violation, only a Title VII violation, making it comparable to failure to accommodate racial identity performance. Furthermore, there is a similar argument to be made about race discrimination, under the Due Process Clause of the Fourteenth Amendment. In fact race, gender and religious freedom all receive some form of Constitutional protection, but perhaps religious freedom’s foundational relationship to this country’s history plays a role in our comfort regulating religious freedom even where it is not constitutionally required. This comfort may be compounded by the whitewashed history of religious freedom as essential to our democracy and the moral fabric of this country – including the cultural fiction that white people “civilized” people of color by introducing them to Christianity. These same emphases on respectability and civilization are omnipresent in American understandings of professionalism.

In an at-will employment structure, many employment decisions are made on the basis of whether or not an employee is a good fit with the office culture, subjective evaluations of the employee’s professionalism, and, in customer facing positions, the employee’s ability to connect with the employer’s clientele. We already know that employers are making decisions that have a disparate impact on candidates of color at the hiring stage when evaluating whether a potential employee should receive an interview or a call back. Before an employer interviews a candidate there’s a reasonable chance that they have not yet met the candidate in person and had the opportunity to evaluate their racial identity performance, and yet research shows that employers are already discrim-

43 U.S. CONST. amend. XIV.
44 See, e.g., Harriet Beecher Stowe, Uncle Tom’s Cabin (1852).
45 49 states have a default rule of at-will employment, Montana being the only exception. While the tort of wrongful termination as against public policy is still available in most states, courts generally hesitate to use the tort of wrongful termination as against public policy to provide more protection for employees than expressly designated under Title VII or analogous state statutes.

inventing based upon the racial identity that they associate with the candidate’s name.\textsuperscript{47} While naming is certainly a form of identity performance at the intersection of race, gender, and religion, given the protections for religious and gender identity performance, employees who perform their racial identity through naming conventions are at the greatest risk of employment discrimination as a result of their names.

Naming conventions and the decision about whether or not to give a child a name within a naming convention traditional to a racial or ethnic group, or a “white” name are markers of a family’s decision about how to perform racial identity. For example, both my first and middle name are traditionally Anglo-Saxon, but my parents retained some elements of traditional Chinese naming conventions, giving my sister and me a common middle name. While my middle name is likely unidentifiable as an expression of racial identity that a potential employer would recognize as a racial marker on a resume or job application, it is representative of my racial identity and is one of the ways in which my family performs our identity. In some ways, names are the first way in which we perform our racial identity, although we ought to credit our parents with a large portion of that particular performative act, as our names act as a racial marker long before we can walk, talk, or employ our clothing, hairstyle or body art as methods of expressing our racial identity.

Concepts of professionalism that are rooted in conventional beauty standards in this country are also inherently rooted in whiteness and place an obligation on people of color to assimilate to those standards to the best of their abilities. While these standards do not explicitly state that natural or braided hairstyles are unprofessional because they are black hairstyles, restrictions on employees’ right to wear their hair naturally, or in braids, twists or dreadlocks, are racially coded to specifically police people of color’s appearance, and more specifically women of color.\textsuperscript{48}

This highlights yet another instance in which interest convergence has created a limited degree of protection for people of color, which does not extend to addressing all of the ways in which women of color are discriminated against on the basis of both their race and their gender.

\textsuperscript{47} Id. at 10.

\textsuperscript{48} Maya Rhodan, \textit{U.S. Military Rolls Back Restrictions on Black Hairstyles}, TIME, Mar. 19, 2016, http://time.com/3107647/military-black-hairstyles/ (reporting Secretary of Defense Hagel announced plans to change U.S. Military regulations to permit traditional Black hairstyles, following significant criticism over U.S. Military regulations’ prohibition on many of these styles, including but not limited to, multiple braids, twists, and dreadlocks, and the policies’ use of terms like matted and unkempt).
The Equal Employment Opportunity Commission was created in 1965 to enforce Title VII of the Civil Rights Act, and to adjudicate employment discrimination complaints to which federal agencies are parties. Its authority is divided into three different functions—enforcement, litigation, and adjudication. All three of these branches are tasked with enforcing Title VII, the Rehabilitation Act, Americans with Disabilities Act, Age Discrimination in Employment Act and Pregnancy Discrimination Act, assisting protected classes who are facing discrimination. Under the statutory construction of Title VII the EEOC can use all three of these powers to broaden or narrow who can claim employment discrimination and how Title VII is enforced with respect to discrimination against different protected classes.

EEOC Commission decisions and guidelines provide helpful guidance for investigators when determining whether there is cause to believe discrimination has occurred in a particular case. While Commission decisions are not binding on federal courts they signal the Commissioners’ position on what constitutes actionable discrimination under Title VII. The Commissioners’ votes in prior cases can also provide insight into how they might vote on initiating litigation in future cases. This signals, to both investigators and EEOC attorneys, whether or not litigation on behalf of the United States is appropriate to enforce Title VII under those circumstances. Commission decisions are therefore a powerful factor in determining how EEOC investigators and attorneys will exercise their discretion in enforcing Title VII, and may provide a strong signal to Article III courts about what is and is not covered by Title VII.

Although EEOC commission decisions are not binding on the Article III courts that adjudicate private sector Title VII cases, they can have a significant impact on every employee’s access to Title VII protection. While EEOC commission decisions do not get Chevron deference, early Title VII jurisprudence treated Commission decisions and EEOC guidelines with a high level of respect, allowing them to carry significant ana-

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50 Id.
51 Id.
52 Id.
53 U.S. EQUAL EMP’T OPPORTUNITY COMM’N LETTER FOR THE MARCH 24, 2015 HEARING RECORD, http://www.eeoc.gov/eeoc/legislative/hearing_record_5-24-15.cfm (last visited Mar. 14, 2016) (explaining in the vast majority of cases the Commission does not have to vote to approve litigation, however in a small fraction of EEOC litigation, attorneys must file a brief with the Commission, detailing the rationale for litigating the case and the Commission votes on whether to approve or deny the litigation).
These decisions can be a signal to investigators and potential claimants about how far Title VII protection goes, and can act as persuasive authority on Article III courts, permeating every aspect of the process. As a result the Commission’s interpretations have a profound impact on the scope of Title VII protections and have the potential to exclude an entire class of plaintiffs from pursuing their claims, even if these decisions are not legally binding on those plaintiffs as individuals.

The EEOC’s enforcement division accepts complaints from individuals who believe they have been discriminated against and investigates those claims. Based on that investigation the EEOC issues right to sue letters, makes a “cause” determination that discrimination has occurred, which generally puts the case in line for possible litigation, or issues a finding that there has been no discrimination, limiting potential plaintiffs’ ability to proceed. Given that the enforcement division has the ability to essentially cut employees off from access to adjudication and any remedies that might follow, the enforcement division’s interpretation of statutory protection against race discrimination carries significant practical weight. Interpretations at this level stem from the statute itself, case law, commission decisions, and trainings put on by the agency, which draw from all of the aforementioned sources of interpretation. The decision making process, particularly when looking for cause, is largely the result of a feedback loop that is not designed to challenge existing law or parse how those laws are applied amongst comparable cases of race, gender, or religious discrimination. As a result even in an agency which purports to fight employment discrimination and push the bounds of the law, the cultural understanding of professionalism as separate from racism bleeds into the decision making process.

While the EEOC’s legal division is generally inclined to push the bounds of the law, they are restricted by the enforcement division’s finding of cause, or lack thereof, and by Rule 11 sanctions. These sanctions are doled out by the same judges who are writing the existing case law which treats race, religious and gender discrimination differently. Ultimately this means that to the extent that the existing case law and agency decisions do not support protecting employees from discrimination on the basis of their racial identity performance, the litigation department may be trapped in a feedback loop that will not permit a racial

54 See, e.g., Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 94 (1975) (holding that EEOC guidelines are entitled to “great deference” but holding that even that deference must have limits).
56 Id.
discrimination case based on facts that indicate the discrimination was against the claimant’s racial identity performance. While such a case may look factually very similar to _Price Waterhouse v. Hopkins_ or even to _Complainant v. Foxx_, the case law on race discrimination has focused more on racial slurs, failure to hire or promote any employees from a particular racial group, or even perhaps the use of racially coded language.⁵⁹

While the EEOC has not taken steps to expand Title VII’s coverage of race discrimination to include racial identity performance, a Commission decision has the capacity to open up a conversation about racial identity performance and professionalism as a racially coded term used to police people of color’s racial identity performance in the workplace. As we’ve seen in the months following _Complainant v. Foxx_, the Commission’s decisions may be followed by similar interpretations in federal courts, in addition to changing how all three branches of the EEOC deal with discrimination cases.⁶⁰ While federal courts are under no obligation to follow the Commission’s lead when it comes to interpreting Title VII or any other Commission decision, these decisions do send a signal from a group of experts in Title VII and other employment discrimination law about what they believe the law to be and although it isn’t binding, that signal can start a conversation or even a movement to change the law to better address problems of employment discrimination as they evolve.

Some might worry that a policy designed to protect racial identity performance would necessarily essentialize racial groups in the name of ensuring that individuals had the right to perform their racial identity without facing adverse employment practices. A policy that truly protected racial identity performance would not essentialize racial groups because it would embrace the idea that individuals perform their own racial identity in a variety of ways, and attempt to protect all of those performances. Unfortunately that degree of protection can likely only be realized through good cause protection for all employees, which is unlikely given American law’s traditional presumption in favor of freedom of contract, and the strict limitation that a good cause provision imposes on the employer’s bargaining power and subsequent benefits and obligations, it is unlikely that any court would impose a good cause restriction on all employment contracts in the interests of ending employment discrimination.⁶¹

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⁶⁰ See, e.g., _Isaacs v. Felder Servs. L.L.C._, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015) (holding that as a matter of first impression sexual orientation discrimination is a cognizable under Title VII).

⁶¹ Given courts’ reluctance to expand the tort of wrongful termination as against public policy, and 49 states’ commitment to at-will employment, it is unlikely that good cause protection is a viable solution for employees facing discrimination on the basis of racial identity performance. See _RESTATEMENT_
Additionally, such a restriction would really only address discrimination against employees who have already been hired. Given the extent to which professionalism is judged in the application process and studies indicating that racial discrimination whether as the result of implicit bias or explicit prejudice begins even before employers meet candidates, often based on information employers glean from applicants’ resumes or social media presence, it’s plausible if not likely that employers would continue using evaluations of applicants’ so called professionalism to filter out employees of color, thus limiting even a good cause restriction’s ability to prevent racial identity performance discrimination.62

VI. CONCLUSION

Not only does the limited scope of each of these protections for employees’ identity performance demonstrate the role that interest convergence and whiteness have on the Court’s interpretation of identical statutory language, with identical claims to Constitutional protection, but it also shows us how the compartmentalization of each of these issues has resulted in uneven protections for employees whose intersectional identities and identity performance leave them vulnerable to discrimination as a result of their marginalization within different protected classes. But that doesn’t mean that employment discrimination law hasn’t had positive effects for people of color.

While each of the cases discussed in this paper signifies the inherently problematic nature of employment discrimination law as it stands today, they also highlight the many ways in which existing employment discrimination law has helped employees from a variety of protected classes and changed the shape of the American workplace. While the application of these protections has been far from equal and deeply problematic, Title VII protections also helped people of color get and keep jobs in a post-segregation world when racism and concerns about customer preferences for white employees might otherwise have excluded them from many workplaces and perhaps entire industries.63

It’s likely that the structural racism that makes us less comfortable regulating race discrimination to the same extent that we regulate gender discrimination and religious discrimination will severely limit any attempts at protecting racial identity performance under Title VII. Entrenched racism may be so well established that even the best regulations


designed to prevent racial identity performance discrimination would still fail as a result of implicit bias. Sadly this is a problem that our society is unlikely to grapple with because the effects of interest convergence and structural oppression will make any statutory or administrative protection against racial identity performance unlikely to pass. So while an EEOC Commission decision or even an enforcement division interpretation of Title VII’s prohibition on race discrimination might be a symbolic gesture and even start a productive conversation about racial identity performance and discrimination, it is unlikely to eliminate the reality of racial identity performance discrimination.

But even in a world where we may not be able to defeat racial identity performance discrimination, starting the conversation about the inequalities in Title VII protections against discrimination on the basis of race, religion, national origin, or gender and how identity performance can be protected against discrimination has the potential to affect positive change in individuals’ lived experiences. While it is important to remain critical of unequal application of Title VII where different protected classes are involved and to work toward a more intersectional approach to employment discrimination law, we should not discount the positive impact that these laws can have on creating more diverse workplaces and combatting discrimination.