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Diversity and Inclusion Trainings as a Public Relations Imperative: Addressing the Faragher - Ellerth Test via Interest-Convergence and Targeted Universalism

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DIVERSITY AND INCLUSION TRAININGS AS A PUBLIC RELATIONS IMPERATIVE: ADDRESSING THE FARAGHER-ELLERTH TEST VIA INTEREST-CONVERGENCE AND TARGETED UNIVERSALISM

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I. INTRODUCTION

Awareness of racial injustice in the United States is at its epoch following a decade of activists calling for the end of systemic racism.[1] The death of Trayvon Martin in 2011, followed by the suffocation of Eric Garner and shooting of Michael Brown, began the #BlackLivesMatter Movement.[2] Similar to the Civil Rights Movement in the 1960s, #BlackLivesMatter has challenged the pervasive nature of systemic racism, particularly anti-Blackness, across economic, political, legal, and social spheres.[3] Some examples of this movement include: (1) normalizing the filming of police officers on duty to hold them accountable to the public; (2) shifting public opinion on officer-involved shootings of Black people; (3) galvanizing newly elected officials and political actors; and (4) ushering in new forms of accountability in all workspaces, such as implicit anti-bias trainings and more funding towards Diversity, Equity, and Inclusion ("D.E.I.") initiatives.[4]

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1. *See generally* Seth Henderson, *10 Movements and Moments to Help You Confront Systemic Racism in America*, ASPEN INST. (July 2, 2020), https://www.aspeninstitute.org/blog-posts/10-movements-moments-confront-systemic-racism-america/ (articulating the array of movements against racial injustice across a variety of racial and ethnic minority groups).

2. Aldon Morris, *From Civil Rights to Black Lives Matter*, SCI. AM. (Feb. 3, 2021), https://www.scientificamerican.com/article/from-civil-rights-to-black-lives-matter1/ (identifying Alicia Garza, Patrisse Cullors and Ayọ Tometi as the inventors of the hashtag #BlackLivesMatter).

3. *Id.* (offering an analysis of the parallels between the Civil Rights Movement and #BlackLivesMatter from a sociological perspective by Dr. Aldon Morris, the Leon Forrest Professor of Sociology and African American Studies at Northwestern University).

4. *See* Rashawn Ray, *Black Lives Matter at 10 Years: 8 Ways the Movement has been Highly Effective*, BROOKINGS INST. (Oct. 12, 2022), https://www.brookings.edu/articles/black-lives-matter-at-10-years-what-impact-has-it-had-on-policing/ (noting

Countercurrent to this growing awareness, the Trump Administration released a memorandum in September 2020 that criticized diversity training as being anti-American propaganda efforts.[5] Conservative think tanks assert the notion that D.E.I. efforts perpetuate assumptions that "America is systemically racist; white America harbors unconscious racism; and equal rights, meritocracy, and the law itself reinforce a regime of white supremacy."[6] They argue D.E.I. initiatives and trainers "wrongfully advance the narrative" of "omnipresent discrimination" and "dismiss America's foundational promises."[7] The Goldwater and Manhattan Institutes have put forth proposals, forming the foundation for suggested legislation that would prevent "colleges and universities from adopting as institutional policy concepts of 'unconscious or implicit bias, cultural appropriation, allyship, structural racism, and disparate impact.'"[8]

Florida Governor Ron DeSantis leads the rallying cry to halt mandated D.E.I. training and to ban Critical Race Theory with "Florida's Individual Freedom Act," also known as the "Stop W.O.K.E. Act." This Act requires that the Florida Department of Education must review "school district professional development systems for compliance" when "subjecting individuals" as a condition of employment, membership, certification, etc., to "specified concepts."[9] These "specified" concepts, according to this Act and anti-D.E.I. enthusiasts, encompass teaching or training individuals that

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specific instances in which #BlackLivesMatter has impacted policing); *see also* Megan Armstrong et al., *Corporate Commitments to Racial Justice: An Update*, MCKINSEY INST. FOR BLACK ECON. MOBILITY (Feb. 21, 2023), https://www.mckinsey.com/bem/our-insights/corporate-commitments-to-racial-justice-an-update (noting companies, "have committed about $340 billion to fighting racial injustice," since May 2020).

5. *E.g.*, Press Release, Off. of Budget & Mgmt., Training in the Federal Government (Sept. 4, 2020) (claiming that racial discrimination trainings run counter to "core American values").

6. Katharine Gorka & Mike Gonzalez, *The Radicalization of Race: Philanthropy and DEI*, HERITAGE FOUND. (Dec. 21, 2022), https://www.heritage.org/progressivism/report/the-radicalization-race-philanthropy-and-dei (highlighting the main takeaways from The Radicalization of Race: Philanthropy and DEI, published by The Heritage Institute, a well-known conservative think tank).

7. Jonathan Butcher, *Diversity Training Boondoggle – Expensive and Counterproductive*, GOLDWATER INST. (Apr. 27, 2022), https://www.goldwaterinstitute.org/diversity-training-boondoggle-expensive-and-counterproductive/.

8. Glenn C. Altschuler and David Wippman, *The Right's Demonization of Campus Diversity, Equity and Inclusion Programs Must End*, THE HILL (Apr. 30, 2023, 8:30 AM), https://thehill.com/opinion/education/3979620-the-rights-demonization-of-campus-diversity-equity-and-inclusion-programs-must-end/.

9. H.B. 7, 2022 Leg. (Fla. 2022).

"[m]embers of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin;" "[a]n individual's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin;" "[a]n individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race, color, sex, or national origin," and several other factors.[10]

Many conservative politicians have followed Governor DeSantis's rallying cry, from their perspective, to protect freedom of speech and traditional American values from the specter of D.E.I. Initiatives and Critical Race Theory by developing their own Individual Freedom Acts that similarly restrict Diversity Trainings by employers.[11] These laws oppose the policies of the United States towards diversity programs developed to combat racial injustice.[12]

After *Brown v. Board of Education*, the United States actively employed desegregation legislation to counter the Communist Party's portrayal of disparate treatment towards marginalized individuals. This move aimed to prevent the rising popularity of Communist ideology within marginalized communities in the United States and abroad.[13] For example, writings by W.E.B. DuBois revealed that many Black American intellectuals held positive perceptions of the Soviet Union and the potential promises of complete racial equity through communism.[14] Periodicals utilizing incidents of racial violence in the United States "as proof that American democracy was false and that the American people possessed a racist mentality. . ." demonstrate the Soviet Union's understanding of this.[15]

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10. *E.g., id.* (enumerating three of the eight prohibited unlawful employment practices under H.B. 7).

11. *See Florida's Individual Freedom Act*, FLA. NONPROFIT ALL., https://flnonprofits.org/page/IndividualFreedomAct (last visited Oct. 22, 2023).

12. *See generally* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 136, 137 (Richard Delgado & Jean Stefancic ed., 3d ed. 2013) (displaying how the United States utilized desegregation to show that it could be a global, moral force).

13. *E.g.*, *id.* (stating that the *Brown v. Board* opinion had favorable reactions from across the globe and gave the State Department a way to counter the Soviet Propaganda).

14. *See generally* BILL MULLEN, W.E.B. DU BOIS: REVOLUTIONARY CROSS THE COLOR LINE (2016) (discussing Du Bois' declaration, "If what I have seen with my eyes is Bolshevism, I am a Bolshevik," following his first visit to the Soviet Union in 1926).

15. Kenneth W. Heger, *Race Relations in the United States and American Cultural and Informational Programs in Ghana, 1957-1966*, PROLOGUE MAGAZINE (Winter 1999), https://www.archives.gov/publications/prologue/1999/winter/us-and-ghana-195

Similarly, the entertainment industry and global companies had comparable reckonings with the #MeToo and #BlackLivesMatter Movements, which compelled both public and private actors to reevaluate their approaches to instances of sexual misconduct and racial harassment.[16] Despite the considerable success of these contemporary movements for equal rights, policies and laws impacting women of color, non-Black people of color, and people of non-Christian religions have failed to evolve as quickly.

This Article argues that courts must adopt a nuanced and culturally sensitive approach when addressing discrimination claims related to culturally and racially significant hairstyles. Specifically, it suggests incorporating immutable characteristics of racial and religious expression as a foundational standard in evaluating such cases. This approach aims to ensure equitable consideration in the adjudication of Title VII sexual harassment claims and Title VII racial discrimination claims.[17]

II. BACKGROUND

A. The Importance of Title VII in Workplace Discrimination and Harassment

Title VII of the Civil Rights Act of 1964 states an employer is liable for discriminatory behavior, including harassment, based on race, color, religion, national origin, and sex.[18] Under the Equal Employment Opportunity Commission ("E.E.O.C."), race discrimination is "treating someone unfavorably because he/she is of a certain race" or has "characteristics associated with race like hair texture, skin color, or certain facial features."[19] Colorism is discrimination within a racial group and

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16. *E.g.*, Colleen Walsh, *Me Too Founder Discusses Where We Go From Here*, HARV. GAZETTE (Feb. 21, 2020), https://news.harvard.edu/gazette/story/2020/02/me-too-founder-tarana-burke-discusses-where-we-go-from-here/ (showing the impact of the #MeToo movement and what remains to be done).

17. *Compare* with Dudziak, *supra* note 12, at 136-37 (clarifying the public relations value of addressing racial discrimination), *with* john a. powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U.L. REV. 785, 785-86 (2009) (defining the term "racialization"), *and* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 530 (1980) (explaining the principle of interest convergence and the history behind the phrase).

18. *See,* 42 U.S.C. § 2000e-2 (defining classes of people that the government protects under anti-discrimination and anti-harassment laws and policies).

19. *See Race/Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N,

comprises discrimination based on a person's skin tone.[20] Discrimination based on religion includes an employer forbidding an employee from taking a holiday for religious observance or wearing religious garb.[21] Complainants often tie national origin discrimination claims to xenophobia and racism.[22] Sexism, the most commonly litigated form of discrimination, generally is the disparate treatment of women in the workplace compared to their male counterparts.[23] Implementing procedures that empower employees to voice discrimination claims and allow employers to present their defenses typically ensures a fair hearing for the aggrieved party. Even in cases where the verdict does not favor the aggrieved party, there exists the potential for societal and cultural perspectives on what courts deem as discriminatory behavior to evolve and overturn.[24]

To establish workplace discrimination, complainants must establish a prima facie case of racial discrimination.[25] The framework created by *McDonnell Douglas Corp. v. Green* holds that a worker can demonstrate a prima facie case of discrimination by articulating: (1) they belong to a racial minority; (2) they applied and were qualified for a job for which the employer was seeking applicants; (3) despite their qualifications, they were rejected; and (4) after their rejection, the position remained open and the employer continued to seek applicants from the pool of persons with

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https://www.eeoc.gov/racecolor-discrimination (last visited Oct. 21, 2023) (clarifying policies regarding race/color discrimination that employers must abide by).

20. *E.g.*, *Facts About Race/Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (issued Jan. 15, 1997), https://www.eeoc.gov/laws/guidance/facts-about-racecolor-discrimination (defining color discrimination/colorism); *contra* Cooper v. Jackson-Madison Cnty. Gen. Hosp. Dist., 742 F. Supp. 2d 941, 950-51 (W.D. Tenn. 2010) (determining that race and color could be conflated in this proceeding but confirming that colorism generally refers to the disparate treatment of darker-skinned Black Americans in comparison to lighter-skinned Black Americans).

21. *See infra* Subsection III.B.2 (referencing case law about discrimination against observers of Judaism and Islam).

22. *See National Origin Discrimination,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/national-origin-discrimination (last visited Oct. 23, 2023) (defining what consists of national origin discrimination claims).

23. *See infra* Subsection III.B.1 (offering examples of the disparate treatment Black and East Asian women face in the workplace).

24. *See* Korematsu v. United States, 323 U.S. 214, 234-35 (1944) (Murphy, J., dissenting) (showing that Korematsu's imprisonment, and the imprisonment of United States-born people of Japanese ancestry, was race-based and therefore, discriminatory).

25. *E.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (articulating that the complainant bears the initial burden of asserting a Title VII case of prima facie racial discrimination).

complainant's qualifications.[26] The burden then shifts to the employer to articulate a legitimate, nondiscriminatory business reason for the complainant's rejection.[27] *Albemarle Paper Co. v. Moody* refined Title VII by reasserting employers' liability for workplace discrimination and making it their duty to rid their workplaces of discriminatory practices and norms proactively.[28]

The *Faragher-Ellerth* Test from the nexus of the holdings of *Faragher v. City of Boca Raton* and *Burlington Industries Inc. v. Ellerth* enabled the Supreme Court to articulate an affirmative defense against employer liability for harassment against current employees by requiring the employer (1) show that it "exercised reasonable care to prevent and correct" harassing behavior, and (2) the employee then failed to take advantage of preventative or corrective opportunities.[29] The impetus of both these cases was sexual harassment: Ellerth experienced sexual harassment by her supervisors at Burlington Industries, and Faragher, among several women lifeguards, faced "uninvited and offensive touching" from her supervisors.[30] This test has breathed life into litigation during the #MeToo Movement.[31] It has also demonstrated, in its first prong, the need for employers to exercise "reasonable care." This "reasonable care" in recent years has taken the form

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26. *E.g.*, *id.*

27. *E.g.*, *id.*

28. *E.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (defining the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination).

29. *See generally* JoAnna Suriani, *"Reasonable Care to Prevent and Correct": Examining the Role of Training in Workplace Harassment Law*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 811-12 (2018) (describing how the Faragher-Ellerth test gives employers a proactive opportunity to address Title VII discrimination and harassment claims by educating employees about them); Burlington v. Ellerth, 524 U.S. 742, 742 (1998) (holding "Under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the super- visor's actions, but the employer may interpose an affirmative defense. "); Faragher v. Boca Raton, 524 U.S. 775 (1998) (concluding, "An employer is vicariously liable for actionable discrimination caused by a supervisor but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim.").

30. *Ellerth,* 524 U.S. at 742 (illuminating plaintiff's cause of action); *Faragher,* 524 U.S. at 775 (discussing her vicarious liability claims against the city of Boca Raton as they employed her supervisors).

31. *See generally* Elizabeth C. Potter, *When Women's Silence Is Reasonable: Reforming the Faragher/Ellerth Defense in the #MeToo Era*, 85 Brook. L. Rev. (2020).

of sexual harassment trainings.

Before the #MeToo Movement, most sexual harassment training existed to protect employers from lawsuits instead of educating employees on how to identify and report sexual harassment.[32] In reaction to the #MeToo Movement, many states mandated employers with a certain number of employees to have sexual harassment trainings, including lessons on what sexual harassment is and how to report it.[33] The precise requirements of these sexual harassment trainings vary from state to state.[34] Although there have been similar levels of reports of sexual harassment and racial harassment across the United States for over a decade, the public has failed to put the same sociopolitical pressure on demanding training for harassment based on race, color, religion, and national origin.[35] Therefore, it is crucial to understand the role of interest convergence in facilitating the triumph of the #MeToo Movement and to explore how this accomplishment, in conjunction with targeted universalism, can be utilized in the application of these frameworks to emphasize the implementation of training programs by employers within the context of the *Faragher-Ellerth* test.[36]

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32. *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace.

33. *Compare Sexual Harassment Prevention Training for Employees*, CAL. C.R. DEP'T (Nov. 2022), https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/11/Sexual-Harassment-Prevention-Training-For-Employees-FAQ_ENG.pdf (clarifying the requirements for employers regarding sexual harassment training in the state of California), *with Stop Sexual Harassment Act Factsheet*, NYC COMM'N ON HUM. RTS., https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Factsheet-English.pdf (last visited Oct. 23, 2023) (describing how to file and how to access more information).

34. *See generally Sexual harassment training requirements vary by state*, RIPPLING, https://www.rippling.com/harassment-training (last visited Feb. 5, 2024).

35. *See Enforcement and Litigation Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 (last visited Feb. 1, 2024) (using the toggle features to demonstrate how reports of racial and sexual harassment have parallel levels over the course of a decade); *see also Is Equality and Diversity Training Mandatory?,* HSE DOCS, https://www.hsedocs.com/blog/is-equality-and-diversity-training-manda/ (last visited Oct. 23, 2023) (showing there is no statutory mandate for diversity and inclusion training).

36. *Compare* Bell, *supra* note 17, at 523 (establishing the contours of interest convergence theory), *with* powell, *supra* note 17, at 801-02 (discussing potential obstacles to targeted universalism, including the refusal to acknowledge implicit bias), *and* Suriani *supra* note 29, at 824 (forming the basis of the "reasonable care" affirmative defense in formulating a sexual harassment training).

B. The #MeToo Movement and Interest Convergence

Tarana Burke founded the #MeToo Movement in the late 2000s to center on survivors of sexual harassment and abuse.[37] Alyssa Milano propelled this movement into the mainstream when she tied it specifically to women coming forward to discuss their sexual abuse by Harvey Weinstein in October 2017.[38] Her ability to connect this tenuous subject to concrete examples led to a global outpouring of survivors' testimonies of sexual harassment and assault, raising awareness of their issues and calling for policymakers and organizations to make institutional reforms regarding how societies handle these instances.[39] The #MeToo Movement was successful in the United States in mandating sexual harassment trainings for both public and private employers in many jurisdictions.[40]

The cultural shift from an environment characterized by explicit misogyny to the incorporation of mandatory sexual harassment training in the employee onboarding processes reflects a convergence of interests. This transformation involves moving away from tolerating a workplace steeped in outdated gender role perspectives to recognizing the detrimental impact of sexual harassment on collaborative work environments and the potential limitation it poses to attracting a diverse talent pool for employers.[41]

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37. *E.g.*, Walsh, *supra* note 16 (discussing how the #MeToo movement and media have not focused on the trauma people of color have suffered from enough).

38. *E.g.*, *id.* (showing the impact and popularity of #MeToo in relation to the Harvey Weinstein allegations).

39. *E.g.*, Meighan Stone & Rachel Vogelstein, *Celebrating #MeToo's Global Impact*, FOREIGN POL'Y (Mar. 7, 2019), https://foreignpolicy.com/2019/03/07/metoo globalimpactinternationalwomens-day/ (expressing how #MeToo created a fundamental shift in how society handles gender-based discrimination, harassment, and abuse).

40. *Compare* Walsh, *supra* note 16 (demonstrating MeToo's long-term project for societal transformation by launching the #MeTooVoter project), *with* Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, AM. BAR ASS'N (May 8, 2020), https://www.americanbar.org/groups/litigation /publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/ (articulating how mandatory sexual harassment trainings, softening "severe and pervasive" standards for determining harassment, and eliminating non-disclosure agreements are some of the legislative victories of the #MeToo Movement).

41. *See* Suriani, *supra* note 29, at 832 (confirming how some states now mandate sexual harassment training in response to cultural upheavals); *see also* Sady Doyle, *Mad Men's Very Modern Sexism Problem*, THE ATLANTIC (Aug. 2, 2010), https://www.theatlantic.com/entertainment/archive/2010/08/mad-mens-very-modern-sexism-problem/60788/ (alluding to how accepted standards of conduct by cisgender men towards cisgender women in the workplace during the era Mad Men is set in would

A concrete example of this interest convergence is demonstrated in the acclaimed television series, *Mad Men*. While the series is riddled with traditional forms of misogyny that women-centered legislation sought to rid the American workplace, it serves as an example of the interest convergence between white men and women in a 1960s advertising agency.[42] In the series, Peggy Olson, an ingénue secretary, wins the favor and protection of the alpha male of the office, Donald Draper.[43] She ultimately becomes one of the top copyrighters at the firm because Draper realizes her perspective as a woman is a unique asset; she understands how to market products to women, who are becoming the primary buyers for the family home.[44] If Draper failed to see how Olson could benefit the advertising firm, the firm stood to both lose several accounts and fail to gain several others.[45] There were converging interests of women wanting to achieve a more significant share of the workplace and more senior men needing fresher ideas. This fictional retelling of a very real phenomenon can be applied present day. This demonstrates how the white-majority could stand to benefit from both on-boarding more diverse talent and understanding unique challenges of discrimination they may face under Title VII's protected categories.

C. What Comprises a Sexual Harassment or a Diversity and Inclusion Training?

Many states require public and private employers with a requisite number of employees to hold sexual harassment trainings yearly.[46] California and New York have some of the more detailed and in-depth programs online for

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be wholly unacceptable in the twenty-first century).

42. *See generally Mad Men* (AMC television broadcast).

43. *See Mad Men: Smoke Gets in Your Eyes* (AMC television broadcast Jul. 19, 2007) (laying the foundation for the grueling gender dynamics that Peggy Olson and other women in the advertising agency face based on their male colleague's perception of them in the early 1960s).

44. *See Mad Men: The Wheel* (AMC television broadcast Oct. 18, 2007) (showing how Peggy Olson proved herself as an asset by developing a clever marketing jingle for a lipstick campaign).

45. *See Mad Men: The Other Woman* (AMC television broadcast May 27, 2012) (detailing how Peggy Olson's finding of a job at a competing advertising agency showed both her literal and metaphorical worth as an employee).

46. *E.g.*, Iris Hentze & Rebecca Tyus, *Sexual Harassment in the Workplace,* NAT'L CONF. OF STATE LEGIS. (last updated Aug. 12, 2021), https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx (listing California, Connecticut, and Delaware, among others, as states requiring sexual harassment training every one to two years).

free, alongside printable information to display in common areas, like kitchenettes in the office, hallways, and restrooms.[47] The trainings on these websites are approximately an hour long in several languages, detail instances of covert and overt sexual harassment, and teach how to prevent harassment in the workplace.[48] Unfortunately, there are no similar mandates for trainings concerning discrimination and harassment based on race, color, national origin, or religion at a federal or state level.[49]

The lack of trainings for these forms of discrimination and harassment is surprising, given the uptick in diversity and inclusion initiatives to hire people from varying backgrounds.[50] One explanation for why diversity and inclusion trainings have failed to achieve the same esteem as sexual harassment trainings is that the racial and religious majority, white Christians, have failed to understand how the nuances of discrimination and harassment based on race, color, national origin, and religion can benefit them.[51] Tarana Burke, founder of the #MeToo Movement, noted another nuance in her interview with the *Harvard Gazette.* The #MeToo Movement has ignored the struggles of people of color, specifically Black women, in discussions of sexual abuse.[52]

Alyssa Milano is often cited as the founder of the #MeToo Movement after

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47. *Compare Sexual Harassment Prevention Training for Employees*, *supra* note 33 (clarifying requirements for employees regarding sexual harassment training in the state of California), *with Stop Sexual Harassment Act Factsheet*, *supra* note 33.

48. *See Sexual Harassment Prevention Training for Employees*, *supra* note 33 (describing, for example, California's sexual harassment training requirements).

49. *Compare Sexual Harassment Prevention Training for Employees*, *supra* note 33 (demonstrating the extent to which sex-based discrimination law has incorporated training requirements), *with* Hentze & Tyus, *supra* note 46 (showing that training is relevant to anti-discrimination laws pertaining to race, national origin, and other protected classes with respect to avoiding discriminatory practices and ensuring equal access to training generally, not necessarily mandating anti-discrimination training).

50. *See* April Glaser, *Current and Ex-Employees Allege Google Drastically Rolled Back Diversity and Inclusion Programs*, NBC NEWS (May 13, 2020), https://www.nbcnews.com/news/us-news/current-ex-employees-allege-google-drastically-rolled-back-diversity-inclusion-n1206181 (exemplifying the failure of companies in supporting an inclusive working environment despite recent corporate interest in diversity and inclusion training).

51. *See* Bell, *supra* note 17, at 532-33 (referencing how desegregation efforts succeeded because white parents realized how their children could benefit academically from an integrated education).

52. *See* Walsh, *supra* note 16 (describing Burke's belief that the media's failure to represent how sexual violence effects people of color and other marginalized groups is what both contributes to and perpetuates it).

she popularized it on Twitter, and Burke was sidelined from the movement.[53] Although the Movement demonstrated a convergence of interests within a predominantly white, patriarchal society to shield white cisgender women from the effects of misogyny, it has consistently fallen short in addressing the concerns of women of color. This failure is especially apparent in the insufficient acknowledgement and treatment of the intersection of race and sexual harassment within sexual harassment training programs.[54]

Although this assertion is upsetting, it is possible to wield the cultural shift caused by the #MeToo and racial justice movements and incorporate it into the *Faragher-Ellerth* requirement to argue that an employer's ability to exercise "reasonable care to prevent and correct" requires diversity and inclusion trainings.[55] Derrick Bell's and john a. powell's theories on interest-convergence and targeted universalism best demonstrate how to create a buy-in for these programs.[56]

III. APPLYING INTEREST CONVERGENCE AND TARGETED UNIVERSALISM TO COURT'S UNDERSTANDING OF MUTABLE CHARACTERISTICS OF RACE

A. The Fundamentals of Interest-Convergence and Targeted Universalism

Interest-convergence and targeted universalism demonstrate the necessity of white Americans to comprehend the importance of managing societal issues for their benefit.[57] These theoretical concepts also aid marginalized

53. *See* Gurvinder Gill & Imran Rahman-Jones, *Me Too founder Tarana Burke: Movement is not over*, BBC (July 9, 2020), https://www.bbc.com/news/newsbeat-53269751.

54. *Compare* Walsh, *supra* note 16 (providing Burke's statements that the #MeToo Movement should be center the most marginalized groups in addressing sexual violence), *with* Jew v. Univ. of Iowa, 749 F. Supp. 946, 949-50 (S.D. Iowa 1990) (illustrating how racial stereotypes about a given can influence sexual harassment perpetrated against that group).

55. *See generally* Suriani, *supra* note 29, at 803, 824 (describing how the Faragher-Ellerth test requires employers to prevent and promptly address harassment).

56. *See* Bell, *supra* note 17, at 523 (emphasizing the importance of making a goal desirable for the majority under interest-convergence theory), *with* powell, *supra* note 17, at 801 (implicating the necessity of understanding the metamorphosis of the concept of racism).

57. *Compare* Bell, *supra* note 17, at 523 (stating how the interests of Black people would only gain wide support if they were able to tie it to the interests of white people), *with* powell, *supra* note 17, at 789-90 (showing how Americans remain part of a racist structure even after the civil rights movement and the election of Barack Obama).

groups' conceptions of how another marginalized group's advancement may serve their goals.[58]

Derrick A. Bell Jr. enumerated that one reason for the desegregation movement's success was that white parents began to recognize the value of integrated schooling for their children.[59] Seeing children of color as a tool to advance their white children's knowledge became a primary focus of desegregation and remains a fundamental rationale in allowing more students of color into predominately-white institutions.[60] Mary L. Dudziak used this framework to address how the United States used the interest convergence of desegregation to counter Communist narratives in the Global South, which was leaning towards Communism given the perceived hypocrisy of American democracy towards people of color, specifically Black Americans in the Jim Crow South.[61] News agencies from the Global South expressed that "the United States has within its borders, one of the most oppressed and persecuted minorities in the world today."[62] Moreover, if the United States wanted to "lead the world, it must have a kind of moral superiority in addition to military superiority."[63] Accordingly, it became the imperative of the United States's Department of State to ensure the country ameliorated more egregious, better-known forms of discrimination and anti-Black violence in the Jim Crow South to secure domestic and international American interests.[64]

In his article *Post-Racialism or Targeted Universalism?*, powell addresses

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58. *See* Bell, *supra* note 17, at 523 (articulating a facet of the interest-convergence theory).

59. *E.g.*, *id.* at 533 (showing how white parents were persuaded that diversity of experience, learning alongside students of color, was part of a valuable educational experience).

60. *See id.* at 528, 532-33 (explaining how interest-convergence theory suggests balancing the interests of white and Black parents and schoolchildren when implementing desegregation efforts).

61. *See* Dudziak, *supra* note 12, at 137-38 (discussing how the United States transformed perceptions of desegregation as an unwieldly power shift to a matter of national security interests).

62. *E.g.*, *id.* at 138 (referencing news articles from the Global South condemning the United States' failure to end discrimination, harassment, and abuse of Black Americans in the South).

63. *E.g.*, *id.* (citing a newspaper article that articulated a basis for why the United States viewed desegregation as a foreign policy imperative).

64. *See id.* at 137-38, 140, 142, 144 (describing how the U.S. government's interests in maintaining their global credibility and controlling Communism contributed to the furtherance of desegregation efforts).

implicit biases that are "practices, cultural norms, and institutional arrangements that are both reflective of and simultaneously help to create and maintain racialized outcomes in society."[65] Part of these practices and institutional arrangements include calling someone racist as a form of character assassination.[66] Implicit biases also demonstrate how a large segment of American society remains unaware of the impact of cultural and systemic racism at the subconscious level, and how discrimination can occur without "blatant prejudice."[67] An example of discrimination without "blatant prejudice" as alluded to by powell, are microaggressions.[68] Microaggressions are thinly veiled instances of racism, sexism, homophobia, and other forms of discrimination.[69] Terminology such as "you people" or "those people" are oftentimes used in place of racist, sexist, or homophobic epithets and their users rationalize these generalizations based on socialized stereotypes about marginalized groups.[70] Title VII of the Civil Rights Act of 1964 ("Title VII"), prevents both public and private employers with at least 15 employees from discriminating against employment based on race, color, religion, sex, and national origin.[71]

While Title VII primarily does not protect against these enumerated instances of microaggression, it is essential to include microaggressions as part of any decision involving Title VII racial discrimination.[72] These subtle forms of discrimination are becoming more popular as society rejects the use

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65. *E.g.*, powell, *supra* note 17, at 785-86 (defining systemic racism).

66. *See id.* (showing how some Americans fail to understand that racism is a system of socialization that needs to be unlearned).

67. *E.g.*, *id.* at 802 (alluding as to why most Americans may perceive themselves as not racist).

68. *See id.* at 801-02 (describing implicit bias are forms of racial discrimination that do not involve overt prejudice).

69. *See* Stephanie Sarkis, *Let's Talk about Racial Microaggressions in the Workplace*, FORBES (June 15, 2020), https://www.forbes.com/sites/stephaniesarkis/2020/06/15/lets-talk-about-racial-microaggressions-in-the-workplace/?sh=665ca46e5d28 (providing additional examples of workplace microaggressions, such as referring to a Black coworker as "articulate").

70. *See id.* (providing additional examples of workplace microaggressions, such as referring to a Black coworker as "articulate").

71. 42 U.S.C. § 2000e (1964).

72. *See* Carol Warner, *Microaggressions and Toxic Workplaces: 3 Court Rulings Provide Key Lessons for HR,* HRMORNING, (June 14, 2023), https://www.hrmorning.com/news/microaggressions-toxic-workplaces/ (providing examples of Title VII jurisprudence supporting the applicability of anti-discrimination law to microaggressions).

of epithets and overt manifestations of discrimination, especially against hairstyles and other mutable characteristics. [73]

B. Creating a Holistic Understanding of Mutable Characteristics of Racial Presentation

Delineating these confluent matters through Title VII's categorizations of race, color, religion, national origin, and sex best articulate how applying interest-convergence and targeted universalism help courts holistically comprehend "reasonable care."[74] Each facet of Title VII's classifications poses its unique challenges.[75] Plaintiffs who raise Title VII discrimination claims often vocalize their grievances on multiple fronts.[76] While there is case law that shows hairstyle discrimination exists, plaintiffs can utilize case law rooted explicitly in the intersection of gender presentation, harassment, and race and the racialization of religion and discrimination against religious garb to granularly detail the contours of hairstyle discrimination for the courts.[77]

1. Intersections Women of Color Face with Workplace Sexual Harassment

While the #MeToo Movement advocated for mandating sexual harassment training for various organizations, many of these trainings fail to acknowledge the intersecting harassment that women of color may face by employers, colleagues, and other parties in the workplace.[78] Particularities,

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73. *See id.* (clarifying that discrimination largely happens at the subtle level).

74. *Compare* Bell, *supra* note 17, at 522-23 (describing how the success of civil rights era desegregation efforts depended on whether the interests of both white and Black people were met), *with* powell, *supra* note 17, at 802-03 (defines targeted universal strategy as one that considered the needs of marginalized and non-marginalized groups while emphasizing attention on the needs of the marginalized group), *and* Suriani, *supra* note 29, at 813 (noting that the *Faragher-Ellerth* test considered the perspectives and actions of employers and employees when assessing Title VI claims).

75. *Id.*

76. *See e.g.*, Jew v. Univ. of Iowa, 749 F. Supp. 946, 949-50 (S.D. Iowa 1990) (noting that plaintiff alleged both racial discrimination and sexual harassment in her Title VII claim).

77. *See* Muhammad v. N.Y.C. Transit Auth., 52 F. Supp. 3d 468, 485 (E.D.N.Y. 2014) (exemplifying hair discrimination case law involving the intersection of race, gender, and religion).

78. *See* Sumi Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 669, 673-675 (Richard Delgado & Jean Stefancic ed., 3d ed. 2013) (discussing, for

such as ethnic or racially-based sexual fetishization, that women of color face are tied to histories of colonization and imperialism.[79] If an employer were able to implement a D.E.I. and/or sexual harassment training that addresses the nuanced, intersecting oppressions women of color face or educate their employees on such issues, it would bolster its showing of "reasonable care" under *Faragher-Ellerth* test because it would show that the employer attempted to educate their employees about the racialized sexual objectification of women of color.[80]

Racialized sexual stereotypes of women of color place them at a greater risk of being victimized by men and white women.[81] In *DeGraffenreid v. General Motors Assembly Division*, the Eighth Circuit refused to acknowledge a woman's claims for discrimination based on her sex and race. The plaintiffs sought a determination that "last hired-first fired" discriminated against them as Black women and perpetuated discriminatory practices.[82] The court expressed concerns that this recognition would provide Black women with a "super-remedy," a combination of statutory remedies that would "give them relief beyond what the drafters intended" to raise Title VII claims.[83] In 1976, the court found that the plaintiffs were attempting to create a novel sub-category, "a combination of racial and sex discrimination."[84] While the Eastern District of Missouri held that the

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example, how two East Asian women's professional accomplishments were attributed to their sexuality).

79. *E.g.*, Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2019, 2023-24, 2029 (2017) (explaining, for example, the history of the angry Black woman stereotype).

80. *Compare* Cho, *supra* note 78, at 670-72 (describing how historical stereotypes of East Asian woman as unassertive and hypersexual often define the nature of the racial discrimination or sexual harassment they face), *with* Suriani*, supra* note 29, at 807, 813 (describing how the Faragher-Ellerth test encourages workplaces to educate employees about harmful racial and gender stereotypes, accounting for intersectionality issues and effectively preventing discrimination in the first place).

81. *See generally* Yvette N. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PA. J.L. & SOC. CHANGE 1, 2-3 (2019) (referencing two divergent landmark cases that discussed the ability of Black women to raise discrimination claims based on sex and race).

82. *E.g.*, *id.* (showing how the plaintiffs were raising claims based on their identities as women and as members of the Black community).

83. DeGraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976).

84. *Id.* (showing the foundations of the intersections of race and sex discrimination claims).

plaintiffs made a successful claim of race discrimination, it concluded that they failed to plausibly demonstrate sex discrimination.[85] The Eighth Circuit, in reviewing this case on appeal, concurred with this decision.[86]

Contrarily, in *Jeffries v. Harris County Community Association*, the Fifth Circuit in 1980 found that Black women are entitled to protection based on their race and sex because of their unique experiences.[87] Here, the appellant alleged Harris County Community Action Association ("HCAA"), her former employer, discriminated against her based on her race and sex by not promoting her, terminating her employment, and retaliating against her for filing an EEOC charge.[88] The court affirmed the District Court's holding, stating there was not a sufficient legal basis to affirm these allegations.[89] However, the Fifth Circuit acknowledged that Black females are a "distinct protected subgroup" and that "proof of pretext is the only way to identify and remedy discrimination directed toward black females."[90] The shifting perceptions, within a four-year timeframe, of Black women's intersectional oppression between *DeGraffenreid v. General Motors Assembly Division* and *Jeffries v. Harris County Community Association* demonstrates how judges' conceptions of remedies have evolved in tandem with societal understandings of discrimination. Additionally, this evolution from considering claims by Black women on their intersectional oppression as a gateway to an unconscionable "super remedy" to recognizing the unique needs of people with these identities underscores the importance of courts adopting a nuanced and culturally sensitive approach when addressing discrimination.

Adopting a culturally mindful approach involves evaluating how people from differing marginalized groups have experienced oppression and how these experiences manifest in discrimination claims. While society targets and discriminates against Black women for being angry and aggressive,

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85. *Id.* at 145.

86. *E.g.*, DeGraffenreid v. General Motors Assembly Div., 558 F.2d 480, 485-86 (8th Cir. 1977) (holding that Title VII claims could not pass, but sustained violations of Section 1981).

87. *E.g.*, *id.* (showing a converse ruling to the previous case).

88. *E.g.*, Jeffries v. Harris Cnty. Comm. Action Assoc., 615 F.2d 1025, 1028 (5th Cir. 1980) (noting the allegations of violations of Section 703(a) of Title VII and Section 704(a) of Title VII).

89. *Id.* at 1030-33 (noting the difference between the holding and a relatively progressive finding of the Fifth Circuit).

90. *Id.* at 1034 (showing how the intersection of Black women's oppression based on their race and gender should be recognized by courts).

American society frequently disregards discrimination against and sexual harassment towards East Asian and Pacific Islander women because society perceives these women as passive, docile, and submissive—they are perceived as not having the willingness to fight back against implicit and explicit forms of discrimination.[91] The normalized, exoticized fantasy of the oppression of East Asian women has also been romanticized through dramas about the sexual exploitation of these women by the American military, as shown in *Madama Butterfly* and *Miss Saigon*.[92] These prejudiced media representations make East Asian and Pacific Islander women prime targets for racialized sexual harassment.[93] In *Jew v. University of Iowa* and *University of Pennsylvania v. E.E.O.C.*, the female East Asian plaintiffs established that the defendants discriminated against them based on sex because their supervisors failed to advance them as the women refused to engage in sexual relationships with them.[94]

In *Jew v. University of Iowa*, the plaintiff, a medical doctor, secured a post-graduate associate position at the age of 24 in 1973.[95] She attained tenure in 1979 and was promoted to Associate Professor.[96] However, as a single woman, she faced accusations by her colleagues of having a sexual affair

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91. *Compare* Jones & Norwood, *supra* note 79, at 2056-57 (discussing the implications of the "Angry Black Woman" stereotype), *with* Cho, *supra* note 78, at 671-72 (articulating how society's perception of East Asian women as submissive makes them targets of racialized sexual harassment).

92. *Compare The Madama Butterfly Effect*, YALE DAILY NEWS (Oct. 19, 2012), https://yaledailynews.com/blog/2012/10/19/the-madama-butterfly-effect/ (critiquing the character Madame Butterfly for having contributed to negative racial and gender stereotypes of East Asian women), *with* Timothy Yu, *What is Wrong with Miss Saigon?*, UNIV. WIS.-MADISON: ASIAN AMER. STUD. (Mar. 27, 2019), https://asianamerican.wisc.edu/2019/03/27/whats-wrong-with-miss-saigon/ (describing the opera Miss Saigon as reinforcing harmful racial and gender stereotypes of East Asian women).

93. *E.g.*, Cho, *supra* note 78, at 674-75 (referencing the statement by Rosalie Tung's plaintiff in Univ. of Pa. v. EEOC, 493 U.S. 182, 185 (1990) about how she believed these stereotypes impacted how her superiors handled her claims for discrimination based on sex, race, and national origin).

94. *Compare* Jew v. Univ. of Iowa, 749 F. Supp. 946, 949-50 (S.D. Iowa 1990) (showing that her male superior called her "slut," "bitch," and "whore," which counts as gendered forms of sexual discrimination and harassment), *with Univ. of Pa*., 493 U.S. at 185 (asserting a claim of sexual harassment and retaliation based on plaintiff's refusal to engage in a sexual relationship with her superior).

95. *Jew*, 749 F. Supp. at 947 (detailing the list of Dr. Jew's academic and professional accomplishments).

96. *Id.*

with another colleague as a means of advancing her career.[97] Sexually suggestive cartoons of her were posted on the doors and walls of laboratories several times between 1973 and 1980.[98] Faculty members also initiated sexually denigrating speech towards her, calling her a "slut," "bitch," and "whore."[99] Her colleagues also called her a "chink."[100] The court held in her favor, concluding she proved her hostile work environment and denial of promotion claims.[101] Although Jew was unable to raise discrimination claims based on race and national origin, she mentioned her Chinese heritage because it was relevant to her supervisor calling her the racial epithet, "chink."[102] Jew's acknowledgment of her Chinese heritage and its connection to her hostile environment claim illuminates another facet of how one's race may influence other factors of discrimination, such as xenophobia.

The Supreme Court case, *University of Pennsylvania v. Equal Employment Opportunity Commission*, serves as another example of the intersecting oppression East Asian women face in the academic sphere. Here, the University denied Professor Rosalie Tung a tenure position following her alleged survival of sexual harassment from the Department Chair.[103] The University's official justification for denying her the position, was their lack of interest in "China-related" research.[104] Tung claimed this was a pretext for expressing their reluctance to have a "Chinese-American, Oriental woman in their school."[105] The Supreme Court held that the EEOC's subpoena of the University did not infringe upon any of its First Amendment Rights.[106] The Court further reasoned that any infringement on the University's rights was permissible, "because of the substantial relation between the Commission's request and the overriding and compelling state

97. *Id*. (noting that Dr. Jew was a close friend of her colleague and his wife).

98. *Id.*

99. *Id.* at 949 (showing a pattern of hostile behavior her colleagues displayed towards her over a course of years).

100. *Id.* (highlighting testimony in which her colleague was questioned whether he had called her the Sinophobic racial epithet).

101. *Id.* at 961.

102. *Id*. at 947, 950 (noting that plaintiff did not assert a national origin discrimination claim, but counsel presented her Chinese background because it was relevant to some evidence).

103. Univ. of Pa. v. EEOC, 493 U.S. 182, 185 (1990).

104. *Id.* at 185.

105. *Id.*

106. *Id.* at 202.

interest in eradicating invidious discrimination."[107]

Despite federal courts' understanding of the intersectional and insidious discrimination against Dr. Jew and Professor Tung because of their Chinese heritage and gender in 1990, many sexual harassment metrics continue to ignore the intersecting oppressions that women of color face based on their sex and racial or ethnic background.[108] They also disregard unique maltreatment faced by different women of color based on their groups' historical interactions shaped by systemic racism, colonization, and imperialism.[109]

2. The Racialization of Non-Christian Religions

Discrimination claims filed by religious minorities in the United States often relate to disparate treatment, which is defined as, "members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants."[110] An employer's refusal to permit paid or unpaid time off for religious observance or to wear garb that signifies their observance are examples of disparate treatment.[111] The best documented

107. *Id.*

108. *Compare* Suriani, *supra* note 29, at 835-36 (offering suggestions on improving the effectiveness of anti-discrimination training, notably not acknowledging the intersection of sexual and racial harassment), *with* Barbara Tomlinson, *Colonizing Intersectionality: Replicating Racial Hierarchy in Feminist Academic* Arguments, 19 J. FOR THE STUDY OF RACE, NATION, AND CULTURE 254, 255 (2013) (showing how intersectional issues have failed to be accounted for in other areas, such as feminist advocacy and research), *and* Kimberlè Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139, 141-48 (1989) (offering a number of court cases in which Black women's claims of intersecting discrimination were denied by the court).

109. *Compare* Suriani, *supra* note 29, at 807, 818-19 (establishing a foundation to create a more holistic sexual harassment training), *with* Cho, *supra* note 78, at 670-71 (providing, for example, how historic racial and gender stereotypes of East Asian women influence their harassment in the workplace) *and* Pappoe, *supra* note 81, at 2-3 (furthering the case that courts must re-evaluate how Title VII fails to protect Black women).

110. 29 C.F.R § 1607.11 (1978).

111. *Compare* Goldschmidt v. N.Y. State Affordable Hous. Corp., 380 F. Supp. 2d 303, 310 (S.D.N.Y. 2005) (failing to raise a claim of religious discrimination based on employer's articulation of undue hardship), *with* Muhammad v. N.Y.C. Transit Auth., 52 F. Supp. 3d 468, 485 (E.D.N.Y. 2014) (clarifying a disparate impact claim requires a comparison between those affected and those unaffected by a facially neutral policy).

instances relate to observers of Judaism and Islam being disfavored based on their religion parallel to how racial minorities are discriminated against.[112] This documented harassment includes Antisemitic and Islamophobic epithets against members of these groups and an employer forbidding wearing religious head coverings, like hijabs.[113]

Raising a claim based on religious discrimination parallels raising a claim of racial discrimination.[114] As previously noted under Title VII, workers submitting claims of religious discrimination must show that they: (1) hold a sincere religious belief that conflicts with an employment requirement; (2) have informed the employer about the conflicts; and (3) were discharged or disciplined for failing to comply with the conflicting employment requirement.[115] Employers can then defend themselves by proving they cannot provide reasonable accommodation for an employee's religious needs due to undue hardship.[116]

An example of religious discrimination is an employer's refusal to address religious-related slurs in the workplace directed at an employee by his colleagues.[117] In *E.E.O.C. v. Sunbelt Rentals*, the plaintiff was a Black American who converted to Islam, and his co-workers called him "Taliban," "towelhead," and "fake ass Muslim want-to-be turbine-wearing ass."[118] The plaintiff overcame a lower court's granting of summary judgment for the

112. *Compare* Shpargel v. Stage & Co., 914 F. Supp. 1468, 1476 (E.D. Mich. 1996) (establishing that a Jewish employee's firing for not attending work on Yom Kippur was religious discrimination), *with* EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 311 (4th Cir. 2008) (showing how the use of religious-based epithets parallel the use of racial slurs).

113. *See* EEOC v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298, 1309 (D. Colo. 2015) (finding that wearing a skirt would violate the uniform requirement, but not hijab).

114. *See generally* D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333, 333-67 (2013) (comparing the disparate treatment that hijabs face in the workplace to that faced by Black women who wear their natural hair or in traditional hairstyles) [hereinafter Greene, *What Not to Wear*].

115. *E.g.*, Shpargel v. Stage & Co., 914 F. Supp. 1468, 1475 (E.D. Mich. 1996) (citing Smith v. Pyro Mining Co., F.2d 1081, 1085 (7th Cir. 1987)).

116. *See id.* at 1476 (showing that defendant employer attempted to raise an undue hardship claim).

117. *E.g.*, EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 311 (4th Cir. 2008) (discussing instances when the Black American plaintiff was called racial epithets generally used against people from South Asia, West Asia, and North Africa).

118. *See id.* at 311 (referencing specific Islamophobic slurs the Black American plaintiff's co-workers called him).

defendant because the defendant failed to take prompt corrective action after being notified of the harassment.[119]

Accommodating employees who refuse to work particular days of the week due to their religious beliefs is included in an employer's responsibility to accommodate.[120] In *Shpargel v. Stage & Co.*, the complainant successfully asserted that working on Yom Kippur violated his religious beliefs by showing that he attended Yom Kippur services in the past and was a regular observer of the holiday.[121] In *Goldschmidt v. New York State Affordable Housing Corp.*, the court held that because the plaintiff did not allege the defendants denied his requests to change his schedule or take leave for religious observance, a pilgrimage, he could not raise a claim of discrimination.[122] Further, the court recognized that the defendant's articulation of an "undue hardship" of replacing the plaintiff while he was on extended leave for a pilgrimage overcame his claim of religious discrimination.[123]

An employer must enforce regulations regarding workplace attire uniformly; otherwise, a difference in enforcement may support a claim for discrimination based on religious garb.[124] In *E.E.O.C. v. Jetstream Ground Services, Inc.*, the court concluded that the Muslim complainant could wear a headscarf.[125] However, she could not wear a long, flowing skirt to work because of Jetstream's requirement that its workers wear pants due to safety regulations.[126] Comparatively, in *Muhammad v. New York City Transit*

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119. *See id.* at 319 (concluding that Sunbelt held liability in refusing to address the harassing behavior).

120. *See Shpargel*, 914 F. Supp. at 1475 (referencing the test asserted in Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987)).

121. *See id.* at 1481 (concluding that the employer-company was liable for discrimination).

122. *See* Goldschmidt v. N.Y. State Affordable Hous. Corp., 380 F. Supp. 2d 303, 311 (S.D.N.Y. 2005) (concluding that the plaintiff's desire for an extended pilgrimage created an undue hardship for his employer).

123. *See id.* at 315 (offering an example of how the plaintiff's request for time off to go on pilgrimage was overcome by the employer's articulation of an undue hardship).

124. *Compare* EEOC v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298, 1306 (D. Colo. 2015) (showing the uniformity in upholding workplace attire requirements), *with* Muhammad v. N.Y.C. Transit Auth., 52 F. Supp. 3d 468, 485 (E.D.N.Y. 2014) (denying a worker's ability to wear hijab to work did not align with bus driver uniform requirements and was, therefore, discriminatory).

125. *E.g.*, *Jetstream*, 134 F. Supp. 3d.

126. *Id.* at 1309 (asserting that workers were required to wear pants as part of their uniform for safety purposes, not discriminatory reasons).

Authority, the court held that Muhammed adduced enough evidence to prove that the Transit Authority discriminated against her based on her wearing hijab because it enforced the policy unevenly and laxly.[127]

IV. DON'T TOUCH MY HAIR: CONVERGING INTERESTS OF MUTABLE RACE CHARACTERISTIC DISCRIMINATION

Regulation of appearance, especially hair, can be tied to racial subjugation.[128] Two racial groups, Black and Indigenous people, have hair fashions that serve protective purposes and have cultural and spiritual significance.[129] Additionally, some religiously-observant people from the Sikh, Muslim, and Jewish faiths have endured similar discrimination based on facial hair and garb.[130] The most prolific documented hair discrimination in American case law is anti-Black discrimination. Discrimination against hairstyles in workplaces is most often articulated through anti-Black rhetoric.[131] Frequently, non-Black employers and supervisors remark that Black hairstyles are "messy," "unkempt," "dirty," and "unprofessional,"

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127. *See Muhammad*, 52 F. Supp. 3d at 485 (utilizing Department of Justice data to confirm that the Transit Authority's headwear policy was unevenly applied).

128. *See generally* 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. MIAMI L. REV. 987, 1036 (2017) [hereinafter D. Wendy Greene] (concluding the Eleventh Circuit's dismissal of hair discrimination was premature because grooming codes involve discrimination based on race).

129. *Compare* Chance v. Tex. Dep't of Crim. Just., 730 F.3d 404, 419 (5th Cir. 2013) (concluding plaintiff's keeping of his relative's hair lock could align with a religious practice under the Religious Land Use and Institutionalized Person Act), *with* Russel Contreras, *States Face Pressure to Ban Race-Based Hairstyle Prejudice*, AP NEWS (Sept. 15, 2020), https://apnews.com/article/us-news-ap-top-news-wa-state-wire-ca-state-wire-new-mexico-7d614665ca6e2920c2970206d9194115 (addressing the intersections of hair discrimination faced by Black and Indigenous people).

130. *E.g.*, CBS New York Team, *NYS Police Under Pressure to Prevent Discrimination of Clothing and Facial Hair because of Religious Beliefs*, CBS NEWS (July 23, 2023), https://www.cbsnews.com/newyork/news/nys-police-under-pressure-to-prevent-discrimination-of-clothing-and-facial-hair-because-of-religious-beliefs/; Groff v. DeJoy, No. 22-174 (U.S. June 29, 2023); Dan Weikel, *Sikh Truck Drivers Reach Accord in Religious Discrimination Case Involving a Major Shipping Company,* L.A. TIMES (Nov. 15, 2016), https://www.latimes.com/local/lanow/la-me-ln-sikh-truckers-20161115-story.html; Kiran Preet Dhillon, *Covering Turbans and Beards: Title VII's Role in Legitimizing Religious Discrimination Against Sikhs*, 21 S. CAL. INTERDISC. L.J. 215, 217 (2011).

131. *See* D. Wendy Greene, *supra* note 128, at 990-91.

during the onboarding process and employment.[132]

Historically, Title VII has not included discrimination based on hairstyle, unless it is an afro, because it considers hairstyles a mutable characteristic, something about one's appearance that someone can alter, and not fundamental to a person's identity.[133] However, an understanding of how tests have developed to articulate discrimination against cisgender women based on the intersection of their race and gender, and for those seeking religious accommodations to wear specific garments, can inform courts of how discrimination based on hairstyle is a form of intersecting oppression.[134]

A. C.R.O.W.N. Act: a Legislative Path Towards Ending Hair Discrimination

One path for those seeking to create a more inclusive employment space is through legislating hair discrimination. One example is the C.R.O.W.N. Act (Creating a Respectful and Open World for Natural Hair Act), which seeks to address this granulation of prejudice by prohibiting race discrimination based on natural hair or hairstyles of Black people.[135]

Support for the C.R.O.W.N. Act has gained traction across the United States. At the federal level, the 2022 version of the Act was passed by the United States' House of Representatives on September 21, 2020.[136] The Act explicitly "prohibits discrimination based on a person's hair texture or hairstyle if that style or texture is commonly associated with a particular race or national origin."[137] Unfortunately, the Senate failed to pass the Act and thus, it has not become federal law.[138] At the state-level, the C.R.O.W.N.

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132. *See id*.

133. *Compare id.* at 1015 (emphasizing how courts consider afros a facet of race, but courts do not afford dreadlocks this same recognition), *with* Jenkins v. Blue Cross Mut. Hosp. Ins., 522 F.2d 1235, 1239 (7th Cir. 1975) (detailing plaintiff's discrimination allegation based on her afro and how Blue Cross considered it unprofessional), *and* EEOC v. Catastrophe Mgmt. Sols., 876 F.3d 1273, 1273 (11th Cir. 2017) (discussing plaintiff's allegation of hairstyle discrimination because of her dreadlocks and how it differed from an afro).

134. *Infra* Subsection III.B.1; *infra* Subsection III.B.2.

135. *See* Discrimination: hairstyles, S.B. 188, 2019-20 Assemb. Reg. Sess. (Cal. 2019) (stating "protective hairstyles" include braids, locks, and twists, and are protected under statutory discrimination laws).

136. Creating a Respectful and Open World for Natural Hair Act of 2022, H.R. 2116, 117th Cong. (2022).

137. *Id.*

138. CROWN Act of 2021, S. 888, 117th Cong. (2021).

Act is law in 24 states.[139] The 24 states include more traditionally progressive jurisdictions such as New York,[140] and even typically conservative states, like Texas.[141] The establishment of the C.R.O.W.N. Act in several states has enabled plaintiffs to sue based on violations of the law.[142]

B. Utilizing the C.R.O.W.N. Act in Courts

Historically, to prove that coded language of hairstyles and natural hair is a microaggression based on race; courts have concluded that a complainant must prove that a particular racial group exclusively wears a hairstyle.[143] This has been difficult because Black people have historically worn certain styles, like dreadlocks, as a protective hairstyle.[144] Variations of the C.R.O.W.N. Act in different states have enabled another mechanism by which people of the African diaspora in particular can protect themselves from such discrimination.[145]

In September 2023, a Black high school student filed a civil lawsuit in Texas against the state's governor and attorney general for their failure to enforce Texas' C.R.O.W.N. Act.[146] The Act went into effect on September 1, one day after the student was given an in-school suspension for his dreadlocks, which violated the school dress code.[147] A spokesman for the

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139. Jasmine Payne-Patterson, *The CROWN Act: A Jewel for Combating Racial Discrimination in the Workplace and Classroom*, ECON. POL'Y INST. (July 26, 2023), https://www.epi.org/publication/crown-act/#:~:text=The%20CROWN%20Act%20is%20law,Texas%2C%20Virginia%2C%20and%20Washington.

140. *See Understanding the CROWN Act*, N.Y.S. EDUC. DEP'T, https://www.nysed.gov/sites/default/files/programs/student-support-services/understanding-crown-act.pdf (last visited Oct. 23, 2023).

141. *See* Alejandro Serrano, *Abbott Signs into Law CROWN Act Banning Race-Based Hair Discrimination*, TEX. TRIB. (May 29, 2023, 1:00 PM), https://www.texastribune.org/2023/05/29/texas-crown-act-law/.

142. *See* Gwen Aviles, *A Black Job Applicant's Lawsuit is the First to Allege Hair Discrimination Under the CROWN Act,* INSIDER (Dec. 7, 2021, 9:37 PM), https://www.insider.com/first-crown-act-suit-filed-after-job-applicant-told-to-cut-dreadlocks-2021-12.

143. *See* D. Wendy Greene, *supra* note 128, at 998 (citing Rogers v. Am. Airlines, Inc. 527 F. Supp. 229, 232 (S.D.N.Y. 1981)).

144. *Id.* at 1017.

145. *See* Payne-Patterson, *supra* note 138.

146. *See* Amanda Holpuch, *Black High School Student Suspended Over His Hair Length Sues Texas Leaders*, N.Y. TIMES (Sept. 24, 2023), https://www.nytimes.com/2023/09/24/us/darryl-george-texas-lawsuit-crown-act.html.

147. *Id.*

school district previously said the dress code was "not in conflict with the C.R.O.W.N. Act because the code permits protective hairstyles if the hair would not go beyond the permitted length when let down."[148] However, as noted in a November 2023 report by the Brookings Institution, state-level versions of the Act, like in Texas, still enable discriminatory targeting of Black hairstyles because it permits bans on male hair longer than two-inches.[149]

C. Limitations of the C.R.O.W.N. Act: Applying Precedent of Intersecting Oppressions and Expression of Protected Class to Hair Discrimination

Although there is an emerging interest in hair discrimination, many states have not enacted their own C.R.O.W.N. Act. Further, the C.R.O.W.N. Act is tailored explicitly towards protecting Black hairstyles.[150] The enactment of the C.R.O.W.N. Act at both the state and federal levels may not fully address hairstyle discrimination beyond Black communities. However, it has the potential to influence legal decisions concerning the consideration of race in such cases.[151] This is particularly problematic when hairstyle discrimination involves religious practices and observances.[152]

Communities indigenous to the United States have demonstrated the importance of rooting their hairstyle discrimination at the nexus of racial and religious discrimination.[153] In the employment context, 33% of Native

148. *Id.* (referencing New York Times's interview earlier that month with the school district); Venessa Simpson, *What's Going on Hair? Untangling Societal Misconceptions that Stop Braids, Twists, and Dreads from Receiving Deserved Title VII Protection*, 47 SW. L. REV. 265 (2017) (discussing the importance of protective hairstyles for Black hair to prevent breakage, and the sociopolitical implications of Black hairstyles).

149. *E.g.*, Jennifer Wyatt Bourgeois and Howard Henderson, *The CROWN Act hasn't ended hair discrimination in Texas*, BROOKINGS INST. (Nov. 28, 2023) https://www.brookings.edu/articles/the-crown-act-hasnt-ended-hair-discrimination-in-texas/#:~:text=Additionally%2C%20some%20state%2Dlevel%20versions,and%20dreadlocks%20on%20male%20students (providing additional studies on anti-Black hair discrimination).

150. *See* Payne-Patterson, *supra* note 138.

151. *See id.* (explaining how the C.R.O.W.N. Act impacts Black people in particular).

152. *See id.* (noting the C.R.O.W.N. Act addresses the importance of religious hairstyles generally but does not address the importance of hairstyles in particular religious practices); S.B. 188, 2019-20 Assemb. Reg. Sess. (Cal. 2019).

153. *See Letter Sent to Classical Charter Schools of America Regarding Discrimination Against Native American Boys' Hair*, ACLU (Mar. 20, 2023), https://www.aclu.org/documents/letter-sent-classical-charter-schools-america-regarding-discrimination-against-native-american-boys.

Americans have noted they have faced discrimination in being paid and promoted equally, and 31% in applying for jobs.[154] One of the numerous forms of discrimination people from Native communities face is hair discrimination.[155] In an interview with National Public Radio, Howie Echo-Hawk of the Pawnee Nation of Oklahoma, stated that his manager told him to get a "respectable" haircut.[156] Echo-Hawk's hair at that time was styled in a Mohawk, a traditional style of his tribe.[157] Instead of arguing, he cut his hair.[158]

Both the Equal Employment Opportunity Commission and the U.S. Military have deemed hairstyles associated with Native American religious and cultural practices as not falling under "undue hardship" in particular circumstances.[159] The E.E.O.C.'s training manual, *Religious Garb and Grooming in the Workplace*, outlines that employers under its jurisdiction may restrict an employee's religious dress or grooming practice based on workplace safety, security, or health concerns, "only if the practice actually poses an undue hardship on the operation of the business."[160] To illustrate this point, the Commission used an example of a Native American man being told he had to keep his hair "short and neat" in order to work as a server at a restaurant, and that he would have to cut his hair if the restaurant were to offer him the job.[161] Since the man could have been accommodated by

154. *Discrimination in America: Experiences and Views of Native Americans*, NPR (Nov. 2017), https://legacy.npr.org/documents/2017/nov/NPR-discrimination-native-americans-final.pdf (surveying 342 Native American U.S. adults from Jan. 26-April 9, 2017).

155. *See generally id.* at 11.

156. Graham Lee Brewer, *As Native Americans Face Job Discrimination, A Tribe Works to Employ Its Own*, NPR (Nov. 18, 2017), https://www.npr.org/2017/11/18/564807229/as-native-americans-face-job-discrimination-a-tribe-works-to-employ-its-own#:~:text=First%2C%20a%20bar%20manager%20told,Echo%2DHawk%20cut%20his%20hair.

157. *Id.*

158. *Id.*

159. *See infra* (offering specific instances in which traditional Native American hairstyles would not interfere with a person's employment or ability to perform their job).

160. *Fact Sheet on Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, U.S. EQUAL EMP. OPPORTUNITIES COMM'N (Mar. 6, 2014), https://www.eeoc.gov/laws/guidance/fact-sheet-religious-garb-and-grooming-workplace-rights-and-responsibilities.

161. EEOC COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION 22 (2008) (showing an example of discriminatory hiring and recruiting practices).

simply clipping his hair back, instead of cutting it, the E.E.O.C. in this example would consider this a violation of Title VII.[162] The United States' Air Force in 2022 granted Connor Crawn one of its first religious waivers so that he could grow longer hair in accordance with his cultural traditions of Mohawk nation and his Kanien'kehà:ka faith.[163]

There has also been an uptick in addressing the intersection of hair and racial discrimination for Native communities in the educational context. One example is the American Civil Liberties Union ("A.C.L.U.") sending a letter on behalf of a cisgender male first grader of the Waccamaw Siouan Tribe of North Carolina who was forced to cut his hair.[164] This letter claimed that Classical Charter School of America's requirement that "boys (and only boys) wear their hair short" violated the first grader's rights under the "North Carolina Constitution, the U.S. Constitution, Title IX of the Education Amendments of 1972, and Title VI of the Civil Rights Act of 1964."[165] Sending letters on behalf of parties seeking recompense for alleged discrimination is an excellent way to educate the public and the offending party of discriminatory practices that are culturally insensitive, and potentially violative of the U.S. Constitution. It also gives the offending party an opportunity to remediate an issue before the aggrieved party turns to a more forceful option like civil litigation.

Two examples in which Native families turned to the courts recently occurred in the Court of Appeals of New Mexico and the District Court of Nebraska. In *Johnson v. Board of Education for Albuquerque Public Schools*, the Plaintiff illustrated how the intersection of hair discrimination and the treatment of Native hair, correlates with other forms of anti-Native racism.[166] During a Halloween-themed activity in a high school English class, the English teacher (one of the defendants) approached a Native student in her classroom with box cutters.[167] She asked the student, who was wearing her long hair in traditional braids, if she liked her braids.[168] The student replied affirmatively.[169] Her teacher then put the box cutters down,

162. *Id.*

163. *Id.*

164. *Id.* at 1.

165. *Id.*

166. Johnson v. Bd. of Educ., 2023-NMCA-069, 535 P.3d 687, 688 (N.M. Ct. App. 2023).

167. *Id.*

168. *Id.*

169. *Id*.

picked up a pair of scissors, and cut "approximately three inches" of the student's hair and sprinkled it on the student's desk in front of her.[170] The teacher then proceeded to comment on Plaintiff's costume.[171] Their teacher asked her, "what are you supposed to be? A bloody Indian?"[172] In May 2023, the Court of Appeals of New Mexico found that public accommodations law applied to the school as a public institution.[173] The issue of whether the New Mexican Human Rights Act applies remains unresolved.[174]

Similarly, in Nebraska, a Lakota family sued their school district for discriminating against their children, and other Lakota and Native children broadly, by cutting the students' hair and storing it at the school without parental consent and in violation of their culture, traditions, and beliefs.[175] The teacher cut the students' hair in response to a lice outbreak in the school, violating both written protocol and unwritten practices for managing Native American students' hair. These guidelines were established in coordination with the tribal authorities.[176] In fact, tribal elders and authorities presented the spiritual importance of hair care and treatment in the Lakota culture to the school system.[177] Plaintiffs brought several claims against Defendants, including violations of: (1) the Free Exercise Clause of the First Amendment,[178] (2) the Due Process Clause of the First and Fourteenth Amendments,[179] and (3) Title VI Racial Discrimination,[180] as well as a claim for battery.[181] The widespread publicity of the case led to increased public interest around the passing of LB630 in Nebraska. This bill would require all "Nebraska schools to adopt a written dress code and grooming policy that would not discriminate against anyone's hair or dress based on race, religion, sex, disability or national origin" — an idea modeled after another bill to

170. *Id.*

171. *Id.*

172. *Id*.

173. *Id.* at 690.

174. *Id.* at 688.

175. Complaint at 1, Johnson v. Cody-Kilgore Unified Sch. Dist., No. 4:21-CV-03103 (D. Neb. May 17, 2021).

176. *Id.* at 5-6.

177. *Id.*

178. *Id.* at 11-12.

179. *Id.* at 12.

180. *Id.* at 13 (alleging that their hair was cut because of their race).

181. *Id.* at 13-14 (referencing how one defendant cut the children's hair on several occasions without permission).

protect workers against discrimination for wearing natural hairstyles.[182]

These cases are tangible examples of how educators and other public school staff, as state employees, must comply with legal standards that address racial, religious, and cultural injustices. Further, as work discrimination bills have influenced policy changes in educational settings, the advances made by Native students in challenging hair discrimination will impact the employment space. A noteworthy example is the proactive presentation of Lakota elders and authorities to their local Nebraska school system about the importance of hair in their culture. This presentation mimics the purpose of D.E.I. training: to have an outside group respect the values and traditions of a historically marginalized group. Presentations like this, if given in the employment setting, could serve as an affirmative defense for an employer against a Title VII violation.[183]

V. CONCLUSION

Marginalized employees have long been compelled to challenge systemic discrimination and address why the oppression they experience in the workplace deserves constitutional protection. The landmark decisions in *Ellerth v. Burlington Industries* and *Faragher v. City of Boca Raton* laid the foundation for individuals seeking redress for sexual harassment. This legal framework, paired with the #MeToo Movement, has expanded the protections afforded to sexual harassment and assault survivors. It has also compelled employers to take proactive measures, like instituting sexual harassment trainings, to establish operational norms.

In environments historically marred by pervasive misogyny, a similar reckoning is required for employers. Institutional arrangements, cultural practices, and norms have inadvertently reinforced systemic racism by failing to address discrimination and harassment based on race, color, religion, and national origin. While legislation from the Civil Rights Movement has helped advance the cause of people of color in the workplace, manifestations of prejudice through racial slurs and derogatory language are

182. Legis. B. 298, 108th Leg., 1st Reg. Sess. (Neb. 2023); Chris Bowling, *Native Moms Who Sued School After Hair Cutting Support Bill Seeking to Protect Students' Religious, Cultural Freedom*, LINCOLN J. STAR (Feb. 26, 2023), https://journalstar.com/news/local/education/native-moms-who-sued-school-after-hair-cutting-support-bill-seeking-to-protect-students-religious/article_25a491c2-b49d-11ed-956f-737197ab5f6f.html.

183. *See* Greene, *What Not to Wear*, *supra* note 114, at 333-34 (2013) (showing the nuance of what is associated with physical characteristics of race and why hair is an essential component).

becoming less common.[184] Instead, microaggressions based on stereotypes and systemic racism are becoming the primary basis of discrimination claims.[185] As noted, an increasingly pervasive form of micro-aggressive racism is hair discrimination. To meet the shifting needs of systemically marginalized employees under an evolving conception of "reasonable care" as established by Faragher-Ellerth, employers must prioritize the integration of D.E.I. training that comprehensively addresses, at a minimum, all aspects of Title VII discrimination and harassment.

Meeting the minimum standards of addressing systemic racism will help employers meet current societal expectations of "reasonable care" to prevent racism in the workplace. However, to strategically address potential shortfalls that the public may perceive with current categories recognized by Title VII, and that the Faragher-Ellerth "reasonable care" standard may evolve to include, it is a public relations imperative that employer-sponsored D.E.I. trainings should include "mutable characteristics" of racial, ethnic, or religious expression that are not currently covered by Title VII. These forms of expression include hairstyles worn by Black, Native American, Sikh, Muslim, Jewish, and other marginalized communities.

184. *But see* Hughes v. Brennan, No. 3:16-cv-345, 2017 WL 11539726, at *2 (D.N.D. Apr. 21, 2017) (showing a supervisor's use of a racial epithet alone is enough to advance a claim for discrimination based on race).

185. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 223, 237 (Richard Delgado & Jean Stefancic ed., 3d ed. 2013) (showing instances of how people of color are subjected to microaggressions in the workplace and are forced to "codeswitch" to a white, professional environment).