SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1815 (Weber)
Version: May 23, 2024
Hearing Date: June 4, 2024
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Discrimination: race: hairstyles

DIGEST

This bill clarifies that "race," as a category protected against discrimination under the Unruh Civil Rights Act (Unruh Act), the Fair Employment and Housing Act (FEHA), and the Education Code, includes traits associated with race, such as hair texture and protective hairstyles, as defined.

EXECUTIVE SUMMARY

In 2019, California passed the Creating a Respectful and Open World for Natural Hair Act, known as the CROWN Act. (SB 188 (Mitchell, Ch. 58, Stats. 2019).) The CROWN Act clarified that discrimination on the basis of race prohibited by the FEHA and in public education includes discrimination on the basis of traits historically associated with race, such as protective hairstyles like braids, locs, and twists. By passing the CROWN Act, California became the first state to expressly prohibit discrimination on the basis of traits associated with race; since then, over 20 other states have passed similar laws.

This bill, which comes from a recommendation from the California Task Force to Study and Develop Reparation Proposals for African Americans, is intended to clarify the scope of California's antidiscrimination laws with respect to traits associated with race in two ways. First, this bill adds to the Unruh Act a provision expressly including, within the meaning of race, traits associated with race, including, but not limited to, hair texture and protective hairstyles, as defined. Second, this bill removes the word "historically" from the references to traits associated with race that are already in FEHA and the Education Code, to avoid confusion over the scope of the protected traits. These provisions are intended to expand protections against discrimination on the basis of traits associated with race, particularly in sporting organizations, and to provide clarity

regarding the scope of the traits associated with race that are protected under the state's laws.

This bill is sponsored by the Western Center on Law and Poverty and is supported by the Alliance for Reparations, Reconciliation, and Truth, the Black Equity Collective, the California Black Power Network, the California Teachers Association, Catalyst California, the Greater Sacramento Urban League, Live Free California, and three members of the Task Force. This Committee has not received timely opposition to this bill.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the Unruh Civil Rights Act, which provides that all persons in California are free and equal, and regardless of a person's actual or perceived sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status, everyone is entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments. (Civ. Code, § 51.)

2) Provides that it is the policy of this State to afford all persons in public schools equal rights and opportunities in the educational institutions of this state, regardless of their actual or perceived disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, immigration status, or association with a person or group with one or more of these actual or perceived characteristics. (Ed. Code, §§ 200, 210.2.)

3) Establishes the FEHA, which prohibits discrimination in housing and employment on the basis of a person's actual or perceived race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, subject to specified exceptions. (Gov. Code, §§ 12920 et seq.)

4) Provides that "race," for purposes of 2) and 3), is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles; and "protective hairstyles" includes, but are not limited to, hairstyles such as braids, locs, and twists. (Ed. Code, § 212.1(b), (c); Gov. Code, § 12926(w), (x).)

This bill:

1) Provides that "race," under the Unruh Civil Rights Act, is inclusive of traits associated with race, including, but not limited to, hair texture and protective

hairstyles, and that "protective hairstyles" includes, but is not limited to, hairstyles such as braids, locs, and twists.

2) Removes the word "historically" from the inclusion of traits "historically associated with race" in the meaning of race under the civil rights protections under the Education Code and in FEHA.

3) Makes nonsubstantive technical and conforming changes.

4) Provides that the changes in 1)-3) are declaratory of existing law.

COMMENTS

1. Author's comment

According to the author:

> AB 1815 would expand the CROWN Act to include an amateur sports organizations or youth sports organizations. Discrimination does not take place only in schools and the work place but also on the sports field. The original CROWN Act protected students and employees however many children compete in non-school affiliated athletics such as club sports and adults participate in sports and are not paid to do so. This bill would protect both of these populations from discrimination.

2. Background on racial discrimination based on traits associated with race, particularly hair

The social construction of race is inextricable from the social construction of what, within predominant white supremacist power structures, is considered "good" and "bad" hair. As the concept of race was developed and enslavers looked for reasons to other Africans and persons of African descent—in order to justify the kidnapping, enslaving, raping, and murdering they were perpetrating—European and, later, American enslavers latched onto hair texture and curl as a signifier of worth.[1] Under this framework, "straight hair, which hangs down as it grows longer" is treated as the "normative ideal"; the further from that ideal that a person's hair is, the further they are from the ideal.[2] And because the idealized hair type coincides most frequently with persons of European, and particularly Northern European, descent, while Black people

[1] Greaves, *How Black People Came To Believe 4C Was A "Bad Hair" Texture*, Bustle (Mar. 4, 2019), https://www.bustle.com/style/how-black-people-came-to-believe-4c-was-a-bad-hair-texture-16265631. All links in this analysis are current as of May 30, 2024.

[2] Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII* (2010) 98 Geo. L.J. 1079, 1093.

generally have more tightly coiled hair, this qualitative approach to hair served both to reify and to reinforce the concepts of race and of white supremacy.[3]

There is a long history of de jure and de facto preference for hairstyles that are generally most easily achieved by white people, and discrimination on the basis of hairstyles that are generally most easily achieved, and which may be worn for protective reasons,[4] by Black people.[5] Simply put, hairstyles associated with, and more frequently worn by, Black people have been treated as "unprofessional," with little examination of how the construction of what is "professional" or not is a function of white supremacy.[6] This type of hair-based discrimination frequently arises at the intersection of race and gender; women of Black descent are often faced with the choice of straightening their hair—which is often an expensive, dangerous, painful, and time-consuming process[7]—or facing the "stigmatization of their natural hair, which often engenders harassment, unfavorable performance evaluations, as well as loss or denial of employment."[8]

The most (in)famous case on point might be *Rogers v. American Airlines*, in which a federal district court ruled that American Airlines' "grooming policy," which prohibited employees in certain positions from wearing all-braided hairstyles, did not constitute prohibited gender or racial discrimination under federal law.[9] The court based its ruling on its conclusion that, even if braided hairstyles were "socioculturally associated with a particular nationality," an employer would be entitled to discriminate on the basis of such hairstyles because they are "not the product of natural hair growth but of artifice."[10] The court's rationale:

> [E]xpose[d] the court's incomplete understanding of the full implications of tightly coiled and kinky hair for [B]lack women in the United States. First, the court revealed its unspoken preference for white hairstyles

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[3] *Id.* at pp. 1094-1095; *see also* Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South* (1998) 108 Y.L.J. 109, 130-140; California Task Force to Study and Develop Reparation Proposals for African Americans, Final Report (Jun. 29, 2023), p. 435, *available at* https://oag.ca.gov/system/files/media/full-ca-reparations.pdf (Final Report).
[4] "Protective hairstyles" include braids, locs, and twists, and are often worn to preserve hair from damage. (*See* Sen. Com. on Judiciary, Analysis of Sen. Bill No. 188 (2019-2020 Reg. Sess.), as amended March 13, 2019, pp. 3-4.)
[5] Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender* (1991) 1991 Duke L.J. 365, 366-367.
[6] Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions* (2017) U. Miami L. Rev. 987, 1001-1002.
[7] Onwuachi-Willig, *supra*, at p. 1112.
[8] Greene, *supra*, at p. 991.
[9] *Rogers v. American Airlines* (S.D.N.Y. 1981) 527 F.Supp. 229, 231.
[10] *Id.* at p. 232. The *Rogers* court opted to treat Rogers's race- and sex-based arguments as separate and distinct, even though Rogers pleaded discrimination on the basis of her status as a Black woman (*Rogers*, *supra*, 527 F.Supp. at p. 231), thereby failing to appreciate how the restrictions imposed by American Airlines served as "a proxy for race" that could be altered only with "money, time, effort, and damage to the psyche" (Onwuachi-Willig, *supra*, at p. 1104.).

> through its very contention that the use of a ponytail of straight, artificial hair was an appropriate alternative to the all-braided hairstyle that it called "artifice." Second, the court exposed its assumption of white traits in Rogers's hair through its suggestion that a [B]lack woman could easily pull her hair back into a bun. Packed into that proposal is an assumption of white hair as the norm.[11]

Twenty-five years after the *Rogers* decision, the Eleventh Circuit held that an employer did not violate federal antidiscrimination laws when it rescinded a job offer to a Black woman because she refused to cut off her dreadlocks.[12]

3. <u>The passage of the CROWN Act</u>

In 2019, California enacted the CROWN Act, authored by Senator Holly Mitchell.[13] The CROWN Act prohibited discrimination in education, employment, and housing on the basis of traits historically associated with race, including hair textures and hairstyles.[14] The CROWN Act recognized that "[w]orkplace dress code and grooming policies that protect natural hair, including afros, braids, twists, and locks have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group," and that "hair discrimination targeting hairstyles associated with race is racial discrimination."[15]

California was the first state in the nation to pass legislation protecting traits associated with race; since then, 23 other states have passed similar laws.[16]

4. <u>This bill adds the CROWN Act's express protections to the Unruh Act and clarifies the scope of the prohibition on discrimination based on traits associated with race</u>

This bill comes from a recommendation from the Task Force, arising from hostility toward traditionally Black hairstyles in sports.[17] Although California's CROWN Act already expressly applies to in-school sports, the Task Force identified discrimination against Black athletes' hairstyles in other sporting organizations as an ongoing source of inequality.[18] This bill is, therefore, intended to clarify the scope of the prohibition on traits associated with race in two ways.

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[11] Onwuachi-Willig, *supra*, at p. 1093 (footnotes omitted).
[12] *EEOC v. Catastrophe Management Solutions* (11th Cir. 2016) 852 F.3d 1018, 1021-1022, *rehg. en banc. den.* (11th Cir. 2017) 876 F.3d 1273.
[13] SB 188 (Mitchell, Ch. 58, Stats. 2019).
[14] *Ibid.*
[15] *Id.*, § 1(d), (f).
[16] *See* Payne-Peterson, Report: The CROWN Act: Report, Economic Policy Institute (Jul. 26, 2023), https://www.epi.org/publication/crown-act/.
[17] Final Report, *supra*, at pp. 734-736.
[18] *Id.* at pp. 341-342, 734-735.

First, this bill expressly provides that the Unruh Act's prohibition on discrimination by business establishments and in public accommodations on the basis of race includes discrimination on the basis of traits associated with race, including protective hairstyles. This is intended as an express statement of existing law: the Unruh Act's list of characteristics—including "color, race, religion, ancestry, and national origin—serve[] as illustrative, rather than restrictive, indicia of the type of conduct condemned,"[19] meaning discrimination on the basis of traits associated with race are presumably already covered under the Unruh Act. Nevertheless, this change will make the prohibition explicit, thereby making clear that businesses, including private sporting organizations, cannot discriminate on the basis of traits associated with race.

Second, this bill clarifies the FEHA and Education Code's prohibition on discrimination by removing the word "historically" from the definition of race as "inclusive of traits historically associated with race." The use of the word "historically" may inadvertently introduce ambiguity about the scope of what traits are included; if, for example, a trait is culturally associated with race but does not have a long historical tradition of such an association, it may cause confusion over whether the trait is protected. And while the language of these statutes makes clear that race is broader than traits historically associated with race—race is "inclusive," but not limited to, these traits—leaving the word "historically" in statute could give rise to confusion. Accordingly, this bill removes the word "historically" to clarify the scope of existing law.

5. Arguments in support

According to the California Teachers Association:

> AB 1815 builds on existing law within the Unruh Civil Rights Act which already provides a robust framework against discrimination based on race, including traits historically associated with race such as hair texture and protective hairstyles. Extending these protections into the realm of amateur sports is a necessary and progressive step that aligns with broader societal commitments to equity and inclusivity. AB 1815 affirms our collective commitment to an inclusive society where every individual, regardless of race or how they choose to express their cultural identity through their appearance, has equal opportunity to participate in and benefit from all public institutions such as schools. This bill allows us to move closer to eliminating discrimination and bias in all forms, paving the way for a more inclusive, respectful, and equitable community.

SUPPORT

Western Center on Law and Poverty (sponsor)
Alliance for Reparations, Reconciliation, and Truth

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[19] *In re Cox* (1970) 3 Cal.3d 205, 212.

Black Equity Collective
California Black Power Network
California Teachers Association
Catalyst California
Don Tamaki, Task Force Member
Dr. Cheryl Grills, Task Force Member
Greater Sacramento Urban League
Lisa Holder, Task Force Member
Live Free California

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: SB 1137 (Smallwood-Cuevas, 2024) clarifies that the Unruh Act, the Education Code, and FEHA prohibit discrimination on the basis of intersecting protected bases.

Prior Legislation: SB 188 (Mitchell, Ch. 58, Stats. 2019) enacted the CROWN Act. SB 188 is discussed in greater detail in Part 2 of this analysis.

PRIOR VOTES:

Assembly Floor (Ayes 71, Noes 0)
Assembly Appropriations Committee (Ayes 14, Noes 0)
Assembly Judiciary Committee (Ayes 11, Noes 1)

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