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Hon. Carmelyn P. Malalis
Commissioner
New York City Commission on Human Rights

Re: Hair Discrimination Rule

No. 2019 RG 086

Dear Commissioner Malalis:

Pursuant to New York City Charter § 1043 subd. c, the above-referenced rule has been reviewed and determined to be within the authority delegated by law to your agency.

Sincerely,

/s/ Steven Goulden

STEVEN GOULDEN
Senior Counsel
Division of Legal Counsel

cc: Zoey Chenitz (CCHR)
Kimberly Fayette (CCHR)
Francisco Navarro (Operations)

COMMISSION ON HUMAN RIGHTS

Notice of Adoption

NOTICE IS HEREBY GIVEN, pursuant to the authority vested in the New York City Commission on Human Rights ("Commission") by section 905(j) of the New York City Charter and in accordance with the requirements of section 1043 of the Charter, that the Commission has adopted new rules governing discrimination related to hair textures, hairstyles, including the use of headcoverings, and hair lengths, which are commonly associated with a particular race, creed, or religion.

The proposed amendments were first published in the City Record on March 13, 2020. On April 2, 2020, the public hearing planned for April 21, 2020 was postponed in response to the COVID-19 pandemic. On July 30, 2020, an amended notice was published in the City Record announcing that the hearing would be held online on October 15, 2020. The hearing was held on the web platform WebEx on October 15, 2020. Written comments were accepted until October 22, 2020.

Statement of Basis and Purpose of Rule

The New York City Commission on Human Rights (the "Commission") is amending its rules to clarify protections on the basis of race, creed, and religion.

Race includes characteristics and traits commonly or historically associated with race or ethnicity, including but not limited to hair textures, hairstyles, including the use of headcoverings, and hair length. Similarly, hair textures, hairstyles, headcoverings and hair length can be elements of individuals' religious practices. Discrimination based on hair can function as a proxy for discrimination based on race or religion and constitute a form of unlawful stereotyping.

This rule does not exclude claims for hair-based discrimination on the basis of disability, gender, age or other protected status under the New York City Human Rights Law.

These rules amend title 47 of the Rules of the City of New York to explain covered entities' obligations under the City Human Rights Law.

The Commission's authority for these rules is found in sections 905(j) and 1043 of the New York City Charter and Administrative Code section 8-107.

New material is underlined.

[Deleted material is in brackets.]

"Shall" and "must" denote mandatory requirements and may be used accordingly, unless otherwise specified or unless the context clearly indicates otherwise.

Chapter 2 of title 47 of the Official Compilation of the Rules of the City of New York is amended by adding a new section 2-08 to read as follows:

§ 2-08 Prohibition on Hair Discrimination Based on Race and Religion

(a) Disparate Treatment Based on Race with Respect to Hair Textures, Hairstyles or Hair Length: (1) A covered entity that restricts or prohibits hair texture, hairstyles, including the use of headcoverings, or hair length associated with a racial or ethnic group or that engages in unequal treatment, including harassment, on the basis of an individual's hair texture, hairstyle, including the use of a headcovering, or hair length associated with a racial or ethnic group, is engaging in race discrimination in violation of § 8-107 of the Administrative Code, unless the restriction or prohibition addresses a legitimate health or safety concern. It is not a defense that a restriction or prohibition is based on customer preference or based on a perception that a person's hair is "unprofessional," a "distraction," or inconsistent with a covered entity's image.

Speculative health or safety concerns may not be used as a pretext for racial discrimination. In assessing whether a restriction or prohibition constitutes pretext for discrimination or is based on legitimate health or safety concerns, the Commission will consider, among other factors, the nature of the articulated health or safety concern; whether the restriction or prohibition is narrowly tailored to address the concern; the availability of alternatives to the restriction or prohibition; and whether the restriction or prohibition has been applied in a discriminatory manner. Where a restriction or prohibition is premised on legitimate health or safety concerns, covered entities must consider, in good faith, alternatives including hair ties, hair nets, other headcoverings, and alternative safety equipment that can accommodate different hair textures, hairstyles, headcoverings, or hair lengths.

(2) Examples of violations include:

i. An employer's appearance and grooming policy prohibiting twists, locs, braids, cornrows, Afros, Bantu knots, or fades, which are commonly associated with Black people, or requiring employees to change their hair to conform to the company's appearance standards, including having to straighten or relax hair.

ii. A supervisor telling a Black employee that she cannot be promoted unless she straightens her natural hair.

iii. Co-workers taunting an Afro-Caribbean woman as being "unkempt" and "dirty" because she wears her hair in cornrows, and the employer failing to intervene to stop the harassment.

iv. An appearance code at a school banning students' hair that extends a certain number of inches above the scalp, thereby negatively impacting students who wear hairstyles such as Afros.

v. Requiring a Native American employee to cut his long, braided hair, which he wears as part of his Navajo identity, or risk losing his job.

vi. Denying a Black employee with locs the opportunity to work in a customer-facing role unless he changes his hairstyle or hides his locs.

vii. Refusing to hire a Black applicant with box braids because her hairstyle does not fit the image the employer is trying to project.

viii. A school policy prohibiting braids, locs, and head wraps.

ix. An athletic association prohibiting a Black student athlete with locs from participating in an athletic competition because his hair is below his shoulders, but allowing white student athletes with long hair to tie their hair up.

x. A restaurant that refuses to seat a Black customer who wears a headscarf over her Afro because it violates the restaurant's dress code.

(b) Disparate Treatment Based on Religion With Respect to Hair Textures, Hairstyles, Hair, or Length: (1) A covered entity that restricts or prohibits hair textures, hairstyles, including the use of headcoverings, or hair length associated with an individual's religious beliefs, observance, or practice or that engages in unequal treatment, including harassment, on the basis of an individual's hair texture, hairstyle, including headcoverings, or hair length associated with an individual's religious beliefs, observance, or practice is engaging in discrimination in violation of § 8-107 of the Administrative Code, unless the restriction or prohibition addresses a legitimate health or safety concern. It is not a defense that a restriction or prohibition is based on customer preference or based on a perception that a person's hair is "unprofessional," a "distraction," or inconsistent with a covered entity's image.

Speculative health or safety concerns may not be used as a pretext for religious discrimination. In assessing whether a restriction or prohibition constitutes pretext for discrimination or is based on legitimate health or safety concerns, the Commission will consider, among other factors, the nature of the articulated health or safety concern; whether the restriction or prohibition is narrowly tailored to address the concern; the availability of alternatives to the restriction or prohibition; and whether the restriction or prohibition has been applied in a discriminatory manner. Where a restriction or prohibition is premised on legitimate health or safety concerns in employment, covered entities must engage in the cooperative dialogue process and provide reasonable religious accommodations, in accordance with subdivision (c). Where a restriction or prohibition is premised on legitimate health or safety concerns in housing or public accommodations, covered entities must consider, in good faith, alternatives including hair ties, hair nets, other headcoverings, and alternative safety equipment that can accommodate different hair textures, hairstyles, headcoverings, or hair lengths.

(2) Examples of violations include:

i. An employer refusing to retain an employee who converts to or adopts a different faith and begins to wear religious headwear, such as a turban, hijab, or yarmulke, to partly cover or completely cover their hair.

ii. A landlord who refuses to rent to a tenant because her hair is styled into locs, worn as part of her Rastafarian religious beliefs.

iii. A school that rejects students who wear religious turbans, yarmulkes, or hijabs.

iv. A customer service company that orders an employee to cut, restrict, change, or conceal their hairstyle or facial hair, in violation of their religious beliefs, to remain in a public-facing position.

v. An employer who fails to take appropriate action when an employee who maintains unshorn facial or body hair in observance of their religious beliefs is repeatedly harassed by co-workers.

vi. A store that refuses to serve a customer who covers her hair with a religious headcovering such as a hijab or sheitel.

vii. A bouncer at a bar who tells a turban-wearing patron that he looks like a "terrorist" and denies him admission based on the bar's "no headwear" policy.

viii. A healthcare provider that shaves a patient's religious beard without the patient's consent or the consent of the patient's designated representative, in non-emergency cases.

ix. A public school that fails to take adequate corrective action when a student who wears a turban over his uncut hair for religious reasons is bullied by other students for his religious appearance and repeatedly told that he looks like "Osama Bin Laden" and to "get out of this country."

(c) Failure to Provide Reasonable Accommodations in Employment for Religious Hair Textures, Hairstyles, and Hair Length. (1) It is religious discrimination in violation of § 8-107(3) of the Administrative Code for an employer to fail to provide a reasonable accommodation to an applicant or employee to maintain a particular hairstyle associated with the person's sincerely-held religious beliefs, observance, or practice, when providing such an accommodation would not constitute an undue hardship. Pursuant to § 8-107(28) of the Administrative Code, an employer is required to engage in a cooperative dialogue with any applicant or employee who has requested a religious accommodation or who the employer has notice may require a religious accommodation, and to provide a written decision to the person at the conclusion of the cooperative dialogue process. As part of the cooperative dialogue process, where there are legitimate health or safety concerns, covered entities must consider, in good faith, alternatives including hair ties, hair nets, other headcoverings, and alternative safety equipment that can accommodate different hair textures, hairstyles, headcoverings, or hair length.

(2) Undue Hardship:

Employers must accommodate employees' religious beliefs unless doing so constitutes a significant difficulty or expense to the employer, which includes an assessment of the identifiable cost of the accommodation, including costs of loss of productivity. Employers may not deny a religious accommodation for a particular hairstyle because of: customer preference; concerns that these styles are a distraction or unprofessional; concerns about company image or reputation; trivial or minor losses of efficiency; or speculative health or safety concerns.

The employer is responsible for covering the cost of the accommodation if that does not impose significant difficulty or expense. If the cost of the requested accommodation constitutes a significant difficulty or expense, the employer may not deny an employee the accommodation before offering the

employee the option to share the cost, and if still an undue hardship to the employer, to cover the cost of the accommodation themselves.

(3) Examples of violations include:

i. An employer refusing to grant an exception to the company's grooming policy to a job applicant who maintains uncut hair for religious reasons, despite the absence of an undue hardship.

ii. An employer rejects a job applicant who wears a beard for religious reasons because the job requires use of a gas mask or other personal protective equipment ("P.P.E.") that does not provide adequate protection for persons wearing beards. However, the employer, without incurring undue hardship, could have provided an effective alternative for the gas mask or P.P.E.

iii. An employer or agent of an employer who, despite the absence of an undue hardship, fails to provide or to consider providing alternatives to a required hair-based drug test as a reasonable accommodation for employees who are unable to provide a live hair sample for religious reasons.

iv. An employer or agent of an employer who submits an individual's name to an employment or licensing database as a drug screening failure based on the individual's refusal to submit to hair-based drug testing for religious reasons.

v. An employer refusing to allow a Muslim employee to grow a beard during Ramadan, as an exception to a general grooming policy, despite the absence of an undue hardship.

vi. An employer conditioning permission for an employee to wear religious headwear at work on the employee adding the company logo to the religious headwear, despite the employee's religious objections and the absence of an undue hardship on the employer.