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VIEWPOINTS

Should stereotypes (and hairstyles) be enshrined in law

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Guest Columnist

Delaware Senate Bill 192 was introduced in January. It appears to be similar to a bill that became law recently in New Jersey called the "CROWN Act" – standing for "Create a Respectful and Open Workplace for Natural Hair Act."

This bill proposes to amend Delaware's Discrimination in Employment Act, which has long prohibited race discrimination. But it includes a new definition of "race" – "traits historically associated with race, including hair texture and a protective hairstyle." "Protective hairstyle" would be defined to include "braids, locks, and twists."

Some may feel that this bill appears reasonable on its face, perhaps reasoning that race discrimination is repugnant and anything prohibiting repugnance must be reasonable. While race discrimination is repugnant, a closer examination of the bill reveals problems.

Of all of the issues raised in the proposed definitions, the least problematic might be the idea of prohibiting discrimination based on "hair texture." Indeed, one might succeed on a race claim, even without this amendment, based on evidence that an employer was motivated not to hire someone because of their hair texture, where such is pretext for race. I have never heard of anyone doing that, and it seems absurd to do so. Regardless, it might be reasonable to question whether this is a real issue that needs to be solved by adding to the law.

I leave for others having more knowledge of the history of hairstyles the task of describing when in history various hairstyles formally and officially, for purposes of laws like this bill, became associated with one or more race. It might be true that, at some point in history, there was some collection of people who began to believe that certain hairstyles correlated with specific race(s). But it is not clear which hairstyles qualify for which race(s) – and thus are off limits for consideration in making employment decisions for such race(s). Reasonable minds inevitably will disagree, leaving the matter difficult to deal with in the business world, and one for the courts to resolve, which is not ideal for employers.

Many might feel that something is fundamentally wrong with not hiring someone because they have braids, locks, or twists – perhaps raising legitimate questions about race-based motives. And many may feel that it is foolish to not hire a talented person because they have braids, locks, or twists. But should businesses be stripped of their judgment about which hairstyle its employees may not have – especially when the rule is equally applied to everyone, no matter their race?

In theory, the law – through a legal theory called "adverse impact" – is already built to deal with the situation where neutral rules are applied in a way that disproportionately impact those of one race. Thus, again, it might be reasonable to question whether this is a real issue that needs to be solved by adding to the law. Moreover, many might argue that we are going down the wrong path by defining "race" to include hairstyles.

Questions abound. Would an employer act lawfully in refusing to hire a person of race X because that person has locks (i.e., because locks are not historically associated with race X), but act unlawfully in refusing to hire a person of race Y because that person has locks (i.e., because locks are historically associated with race Y)? Who decides which hairstyles are "historically associated" with which race(s)?

Perhaps the largest concern with this bill pertains to the Pandora's Box of defining race, outside the hair context, to include any and all "traits historically associated with race." How far back in history must a "trait" go to qualify? Are we counting only the "old" stereotypes, or the "new" stereotypes too?

One can imagine many awkward conversations ahead, as well-meaning people begin to spar about which traits are those "historically associated with race." Some may become offended to learn that a trait is perceived by others as being historically associated with race - perhaps those sharing their perceptions will even be accused of being racist for holding such perceptions despite merely seeking to identify what is off limits in making employment-related decisions. Others who state disagreement about some trait being "historically associated with race" may be accused of being ignorant and perhaps racist or at least race-insensitive (e.g., for demonstrating a lack of awareness that something allegedly is a "trait historically associated with race").

Many have fought against stereotypes for years, zealously arguing that people should be given the benefit of being individuals, rather than prejudged based on group membership – thus rejecting the validity of stereotypes. Doesn't this bill call for the enshrining of some body of stereotypes as actually being "traits historically associated with race" while other stereotypes are rejected . . . at least until some later date when they cross some unspecified threshold of "historical association"?

Having consulted with hundreds of clients on both the employee and employer sides, I have never heard of race-based hair discrimination until now. Regardless, I feel the bill misses the mark in a major and damaging way through its vagueness and broadness.

Attorneys representing employees can be expected to advocate zealously for people who believe that their rights are violated under a law even if the law is perceived to be of uncertain applicability. Attorneys representing employers can be expected to do their best to advise employers regarding how to comply with new laws, and to encourage them to do so. An unclear law can make life difficult for everyone – leaving it to expensive litigation to approach clarity.

Because this bill is not yet law, there is an opportunity for lawmakers to consider that the bill is too vague and perhaps not even needed or prudent. In any event, those responsible for the fate of Delaware Senate Bill 192 should NOT pass the burden of fleshing out the meaning of the law onto someone else. They should take great care to say what they mean and make that meaning clear for those of us who seek to apply and follow the law. ■

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