



CITY COUNCILMEMBER
RIGEL ROBINSON
 DISTRICT 7

CONSENT CALENDAR
 October 15, 2019

To: Honorable Mayor and Members of the City Council

From: Councilmembers Rigel Robinson, Cheryl Davila, Ben Bartlett, and Sophie Hahn

Subject: Ban Racial, Ethnic, Cultural, and Religious Discrimination on the Basis of Hairstyle or Headwear

RECOMMENDATION

Adopt a new Section of the Berkeley Municipal Code: Chapter 13.23 DISCRIMINATION ON THE BASIS OF HAIRSTYLE OR HEADWEAR IN EMPLOYMENT, HOUSING, AND PUBLIC ACCOMMODATIONS, prohibiting grooming or appearance policies which target natural or traditional hair, hairstyles, or headwear, and refer to the City Manager to consider the operational requirements of enforcement of the ordinance, including what effective and appropriate enforcement would entail or what amendments to the Chapter would be necessary to perform such enforcement.

POLICY COMMITTEE RECOMMENDATION

On September 9, 2019, the Health, Life Enrichment, Equity & Community Committee adopted the following action: M/S/C (Bartlett/Kesarwani) to send the item to Council with a Qualified Positive Recommendation as author needs to develop language with City Attorney's Office for enforcement and a provision to recover attorney's fees. Vote: All Ayes.

BACKGROUND

In February 2019, the New York City Commission on Human Rights (NYCCHR) issued new Legal Enforcement Guidance on Race Discrimination on the Basis of Hair, under the New York City Human Rights Law (NYCHRL). In New York, the NYCCHR found the contemporary manifestation of racial bias to include discrimination based on characteristics and cultural practices associated with being African American, including prohibitions on natural hair. In the 2019 Enforcement Guide, NYCCHR states current anti-discrimination law should be interpreted to give people of color "the right to maintain natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state."

On July 3rd, Governor Newsom signed into law the CROWN Act, authored by State Senator Holly Mitchell. The California response to New York's regulations, the CROWN Act similarly clarifies in state law that discrimination on the basis of hairstyle that has an adverse impact on racial minorities is a form of unlawful racial discrimination.

The City of Berkeley should follow in the footsteps of both these reforms, and take similar but more expansive and comprehensive action to expressly prohibit discriminatory hair styling and headwear appearance requirements in the areas of employment, housing, school, and other areas of daily living.

This falls under the range of human rights issues which The Berkeley Municipal Code (BMC) identifies as its mission to solve. As stated in BMC Section 1.22.010, “the City of Berkeley shall promote: (1) Higher standards of living, full employment, and conditions of economic and social progress and development; (2) Solutions of local economic, social, health and related problems; and regional cultural and educational cooperation; and (3) Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”

To achieve these goals, the Council should adopt a new ordinance, BMC Chapter 13.23, (Attachment 1). Chapter 13.23 would prohibit racial, ethnic, cultural, or religious discrimination on the basis of hair, hair styling, or headwear, and enumerate the rights of all persons to maintain natural, untreated, and traditional hairstyles and headwear in all sectors of employment, housing, and public accommodations. Chapter 13.23 is modeled after other sections of the code under Title 13 (PUBLIC PEACE, MORALS AND WELFARE), including Chapters 13.20, 13.27, 13.28, 13.30, and 13.101.

This item also refers consideration of appropriate enforcement measures to the City Manager. The ordinance as written will establish the prohibition on discriminatory practices and grant private right of action to remedy violations, but does not set up a system for the City to receive complaints and administratively address violations. Such an enforcement system is important to ensure that all Berkeley residents are able to access justice, as private legal action is outside of financial feasibility for many. Staff should consider what form and scope of enforcement is appropriate for the ordinance, the resources necessary to conduct such enforcement, and what, if any, changes need to be made to the ordinance to facilitate such enforcement. One specific form of enforcement that should be considered is the mandatory posting of a notification of rights in workplaces.

ALTERNATIVE ACTIONS CONSIDERED

An alternative considered was to issue local legislative interpretation guidelines regarding both the illegality of disparate impact grooming or appearance policies under the Fair Employment and Housing Act, and the illegality of refusing public services on the basis of mutable characteristics under California Civil Code Section 51. It was found that adopting new code language to codify these findings would be more enforceable and legally defensible, as City staff have greater leeway in interpreting local statute than state or federal law.

FINANCIAL IMPLICATIONS

Staff time to craft exemptions pursuant to Section 13.23.050. Enforcement costs would be dependent on the volume of complaints received by the City, and the level and type of enforcement that the City Manager finds is feasible and necessary.

ENVIRONMENTAL SUSTAINABILITY

None.

CONTACT PERSON

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Mars Svec-Burdick, Intern to Councilmember Rigel Robinson

Attachments:

- 1: Ordinance
- 2: NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair
<https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf>
- 3: Unruh Civil Rights Act, California Civil Code Section 51
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV§ionNum=51
- 4: Fair Employment and Housing Act
https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=GOV&division=3.&title=2.&part=2.8.&chapter=&article
- 5: CROWN ACT
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB188

ORDINANCE NO. -N.S.

ADOPT BERKELEY MUNICIPAL CODE CHAPTER 13.23 TO PROHIBIT
DISCRIMINATION ON THE BASIS OF HAIRSTYLE OR HEADWEAR IN
EMPLOYMENT, HOUSING, AND PUBLIC ACCOMMODATIONS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Chapter 13.23 is added to read as follows:

Chapter 13.23
DISCRIMINATION ON THE BASIS OF HAIRSTYLE OR HEADWEAR IN
EMPLOYMENT, HOUSING, AND PUBLIC ACCOMMODATIONS

13.23.010 Purpose

It is the policy of the City to eliminate all forms of racial, ethnic, cultural, and religious discrimination within the City. It is the intent of the City Council to ban grooming and appearance policies which have the effective result of discrimination on the basis of racial, ethnic, cultural, or religious identity, both for policies impacting City employees and for private employers.

13.23.020 Findings

The City Council of the City of Berkeley finds and determines as follows:

A) Discrimination against racial, ethnic, cultural, and religious minorities in employment, housing, and public accommodations exists within the City. The council further finds that the existence of such discrimination poses a substantial threat to the economic and social welfare of the community.

B) Racial, ethnic, cultural, and religious based discriminatory grooming or appearance policies exist in places of employment, housing, and public accommodations within the City. These policies exacerbate inequality in the workplace and housing market.

C) The overall effect of grooming or appearance policies which target the natural or traditional hair styles and headwear of racial, ethnic, cultural, and religious minority groups is to require a disproportionate outlay of monetary and time resources from members of these groups in order to participate in daily living, and to restrict these groups from fully and freely participating in public life.

D) Discrimination through grooming and appearance policies falls most heavily on low income communities, but cuts across all racial, ethnic, cultural, religious, and economic groups.

13.23.030 Definitions

As used in this chapter, the following words and phrases shall have the meanings ascribed to them in this subsection:

A) "Grooming or appearance policies" or "appearance policies" means any code of dress, grooming, or appearance, written or unwritten, under which an individual is in any way penalized for noncompliance.

B) "Natural hair" means all natural patterns of hair growth across all racial and ethnic groups, including but not limited to treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state. This shall include all hair grown on the head and face.

C) "Place of public accommodation" or "public accommodations" means providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available. This unambiguously includes schools, due to the historical proliferation of racially discriminatory grooming and appearance policies in educational settings.

D) "Traditional hair" means styles of maintaining hair of cultural or religious significance to any racial, ethnic, cultural, or religious group, including keeping hair uncut or completely shaven. This shall include all hair grown on the head and face.

E) "Traditional headwear" means clothing that is worn on the head that is culturally or religiously significant to any racial, ethnic, cultural, or religious group.

13.23.040 Unlawful activities

It is unlawful for any employer, business owner, property owner, provider of public accommodation, or any agent or employee thereof to discriminate in the conditions or enforcement of a grooming or appearance policy. Such prohibited discrimination includes but is not limited to the following:

A) Publish, verbally state, or otherwise communicate an explicitly or implicitly mandatory appearance policy which includes any condition prohibiting natural or traditional hair or headwear, either textually or in practice;

B) Require, in order to access employment opportunities, housing accommodations, public accommodations, or the negotiation or carrying out thereof, individual adherence to a grooming or appearance policy which explicitly or implicitly bans any natural or traditional hair style or headwear.

C) Refuse to enter into negotiations regarding hiring, employment, compensation, lease or rental of property, or otherwise withhold from any person any provision of public accommodations because of their natural or traditional hair style or headwear;

D) Represent to any person because of their natural or traditional hair style or headwear that employment opportunities, housing accommodations, or public

accommodations are not available when such opportunities or accommodations are in fact available;

E) Include a clause or provision in any legal document or agreement that the employee, tenant, or recipient of public accommodations shall adhere to a grooming or appearance policy which compromises their ability to maintain a natural or traditional hair style or headwear;

F) Penalize an employee, tenant, or recipient of public accommodations for violating an appearance policy which unlawfully bans natural or traditional hair or headwear, in any manner including financial penalties, termination, withholding of wage increases, or denial of services, housing or access.

G) Enforce grooming or appearance policies inconsistently between similarly situated employees, tenants, or recipients of public accommodations or groups of employees, tenants, or recipients of public accommodations, to the effect of enacting unequal and discriminatory grooming standards.

13.23.050 Exemptions – Health and Safety

A. The City Manager shall draft and maintain a list of exemptions from the requirements of this ordinance based upon operational requirements related to health and safety. The exemptions shall be of job categories and work environments, not for organizations as a whole.

B. Exemptions shall only be made with respect to section 13.23.040 A, B, C, and E.

C. No exemption shall be made with respect to the provision of housing, including short term housing.

D. The criteria for exemption shall be limited to only the advancement of health and safety, and exemptions shall be eliminated when the health and safety basis for the exemption no longer exists.

13.23.060 Enforcement

A) Any aggrieved person may enforce the provisions of this chapter by means of a civil action.

B) Any person who commits, or proposes to commit, an action in violation of this chapter may be enjoined therefrom by any court of competent jurisdiction.

C) Action for injunction under this subsection may be brought by any aggrieved person, by the City Attorney, by the district attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class.

13.23.070 Liability for costs and damages

Any person who violates the provisions of this chapter shall be liable to each person injured by such violation for reasonable attorney's fees and costs as determined by the court, plus damages equaling three times the amount of actual damages or a minimum of five hundred dollars.

13.23.080 Criminal penalties

Any person who is found by a court of competent jurisdiction to be guilty of a willful violation of the provisions of this chapter shall be guilty of a misdemeanor as set forth in Chapter 1.20 of this code.

13.23.090 Limitation on action

Actions under this chapter must be filed within 3 years of the alleged discriminatory acts.

13.23.100 Effective date

The effective date of this ordinance shall be January 1st, 2020 or when the City Manager has released the list of exemptions pursuant to Section 13.23.050, whichever is later.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

