THE HIJAB AND THE KUFI: EMPLOYER RIGHTS TO CONVEY THEIR BUSINESS IMAGE VERSUS EMPLOYEE RIGHTS TO RELIGIOUS EXPRESSION

ROBERT K. ROBINSON*
GERALYN MCCLURE FRANKLIN**
R.H. HAMILTON***

I. INTRODUCTION

In August of 2010, the Storyteller's Café in Disney's Grand Californian Hotel & Spa repeatedly sent a hostess home without pay. Her offense was her refusal to remove her *hijab*, a head scarf worn by some Muslim women. Eventually Disney maintaining that her *hijab* was not appropriate for the image of the themed restaurant in which she worked. When the Storyteller's Café dress policy was challenged on religious grounds, Disney stated that it had offered the employee several reasonable accommodations, all of which she refused. The employee charged that her employer's actions amounted to blatant religious discrimination and that she refused all the attempts at accommodation because they were "unacceptable" to her religious practices and rights as a citizen.

This article investigates the issue of religious accommodation in the workplace arising from disputes over employee appearance policies imposed on those workers whose primary duties require them to interact with customers as a condition of employment. Though federal courts have recognized the importance employee appearance plays in advancing a desired organizational image, they have also acknowledged that employers have an obligation to make reasonable accommodation for an employee's sincerely held religious beliefs, provided such accommodations do not create an undue hardship on the employer. This article also examines the clash between employer's dress codes and an employee's right to religious observance at work. In examining federal obligations to make religious accommodations, the criteria used in determining whether making a requested accommodation

* Ph.D., SPHR, Michael S. Starnes Professor, School of Business Administration, The University of Mississippi.
** Ph.D., Professor and Associate Dean, Nelson Rusche College of Business, Stephen F. Austin Sate University.
*** Ph.D., Clinical Professor, Michael S. Starnes School of Business Administration, The University of Mississippi.

imposes an undue hardship on the employer is also reviewed. Finally, the likelihood of more such challenges resulting from advocacy groups willing to support litigation initiated by aggrieved employees will be addressed.

II. BACKGROUND ON ISLAMIC DRESS REQUIREMENTS

Islamic dress requirements are often a function of the specific Islamic sect or tradition to which an individual belongs. There are varying requirements for both men and women depending upon the sect's interpretation of *shari'ah. Shari'ah* is loosely interpreted by westerners to be Islamic law, though Islamic law also includes the *Qu'ran*. *Shari'ah* deals with prescribing appropriate religious rituals, religious doctrine, and business transactions, punishments for offenders, morals, and manners.[1]

Many Americans are under the assumption that the word *hijab* refers only to the headscarf worn by Muslim women. Actually, *hijab* has two meanings. First, it is a general term denoting all religiously proper clothing which covers a woman's body. Both the *Qur'an* [2] and *shari'ah* require that once a female reaches puberty, she must, for modesty's sake, keep her body covered from neck to ankle.[3] What is an acceptable body covering and how much of the body must be covered may differ among the different Islamic traditions. Second, the term also refers to a particular head covering for women's dress, usually a scarf worn over the head with an open face. But, there are several types of head covers for Muslim women in addition to the *hijab*. The *shayla*, for example, is similar to the *hijab* but is bigger in size and reaches below the wearer's bust level. Another head covering worn by some Muslim women is the *niqab,* a veil which, unlike the *hijab* and the *shayla*, covers the face. A *khimar* is also used as a name for the garment with which women cover their heads and usually flows below the woman's hips.

Religious head coverings are not just prescribed for women. The *taqiyyah* (also called the *kufi* in the United States and Europe) is the original skull cap worn by Muslim men as a sign of humility and respect.[4] In the Middle East, the *kufi* is worn beneath the *shemagh* (the long scarf seen frequently in Saudi Arabia) or under a wrapped scarf, the *turban*.[5] In India, Bangledesh and Indonesia (the most populous Muslim nation in the world)

---

[1] WALTER M. WEIS, ISLAM 41-43 (2000).
[2] *Al-Ahzab* 33:59; *An- Nur* 24:31.
[3] WEIS, *supra* note 1, at 47-48.
[4] WEIS, *supra* note 1, at 42.
[5] EMMA TARLO, VISIBLY MUSLIM: FASHION, POLITICS, FAITH 4-8 (2010).

the men wear a cap called the *khadi* or *peci*.[6] All serve the same purpose, to identify the wearer as a Muslim.

For employers, female dress requirements are the more problematic because, in order to preserve female modesty, female attire is necessarily loose and flowing. This permits the garment to conceal the female body form from view. This may result in safety concerns which will be discussed later.

III. FACTS OF THE CASE

The complaining party, Imane Boudlal, is a front-desk hostess in the Storyteller's Café in Disney's Grand Californian Hotel & Spa. On August 18, 2010, Boudlal filed a discrimination complaint with the United States Equal Employment Opportunity Commission (EEOC), charging that her employer, Disney, repeatedly sent her home without pay before suspending her without pay for refusing to remove her *hijab*, a traditional Islamic head covering for women, at work.

Boudlal, who is from Morocco and recently became a citizen of the United States, had worked for Disney for two years at the time of the complaint. She first approached her employer in June of 2010 requesting to wear the *hijab* on the job during the Muslim holy month of Ramadan which began on August 14. At the time, she was told that her request would have to be approved by the corporate office, and when she followed up later, she learned that the request was still under consideration.[7]

UNITE HERE Local 11, the union representing Boudlal, insists the white *hijab* would have matched the uniform she is required to wear. However, the company refused to allow Boudlal to wear the *hijab* in her regular position and offered her a hat option in place of her *hijab*[8] or a backroom position instead.[9] A written statement issued by the union reported that Boudlal was told that the *hijab* did not comply with the "Disney look".[10] Boudlal stated, "I don't understand why I cannot wear my white scarf (*hijab*)

---

[6] EMMA TARLO, CLOTHING MATTERS: DRESS AND IDENTITY IN INDIA 113-14 (1996).

[7] Raja Abdulrahim, *Disney Restaurant Hostess Sues for Permission to Wear Hijab*, L.A. TIMES, Aug.19, 2010, http://articles.latimes.com/2010/aug/19/local/la-me-0819-disney-hijab-20100819.

[8] *Id.*

[9] Mark Gruenberg, *Muslim Worker Asks Federal Probe of Disney Discrimination*, PEOPLE'S WORLD, Aug. 30, 2010, http://peoplesworld.org/muslim-worker-asks-federal-probe-of-disney-discrimination.

[10] Judy Greenwald, *Muslims Turn More Often to EEOC to Resolve Workplace Discrimination,* WORKFORCE MGMT. ONLINE, Oct. 2010, http://www.workforce.com/section/legal/feature/muslims-turn-more-often-eeoc-resolve-workplace/index.html.

that already matches my restaurant uniform, and be left to do my job." "My scarf doesn't do anything to harm Disney or the guests," she continued.[11]

Suzi Brown, a Disney spokeswoman, contends that Disney officials have never denied Boudlal the opportunity to work and are working diligently to accommodate her request.[12] However, Disney officials have indicated that her *hijab* clashes with the restaurant's early-1900s theme.[13] Brown stated, "It has to do with the costume, every role at Disneyland Resort has a specific costume," and she reported that a number of employees wear religious clothing and work behind the scenes.[14]

Under Disney policy, "cast members" (employees who work in costume before the customers), including Boudlal, agree to comply with the appearance guidelines for their roles. According to Michael Griffin, a Disney spokesman, "[w]hen cast members request exceptions to our policies for religious reasons, we strive to accommodate," and he reported that Disney has made accommodations for more than 200 requests since 2007.[15]

IV. PRECEDENT ON DRESS CODES

Employers often assert their right to require employees, who come into contact with customers and the general public, to adhere to certain grooming, hygiene and appearance expectations. This is typically done through a clearly delineated dress code or appearance policy. Employers are aware of the importance of employee appearance to the image of their respective businesses and organizations.[16] Many employers believe that it is their prerogative to require their employees to meet minimum grooming standards, especially those employees who project the organization's image to its customers. Marketing theory has long contended that favorable customer impressions affect business outcomes.[17] Those impressions could be particularly shaped by interactions with employees who deal directly with the public (especially "potential" customers). Therefore, it is reasonable to conclude that requiring employees to conform to accepted societal expectations of dress and behavior serves the legitimate business purposes of promoting an orderly workplace and making customers comfortable.

---

[11] *Id.*
[12] Abdularhim, *supra* note 7.
[13] Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. TIMES, Sept. 23, 2010, http://www.nytimes.com/2010/09/24/business/24muslim.html.
[14] Abdulrahim, *supra* note 7.
[15] Greenhouse, *supra* note 13.
[16] Patricia Sheehan, *Dressed to Impress*, 59 LODGING HOSPITALITY 48, 50 (2003).
[17] Thomas Adcock, *Casualties of Casual Dress Code*, N.Y. L. J. ONLINE, 2002, http://www.law.com; Stephanie Cline, *Office Attire Swinging Back to Professional from Casual*. COLORADO SPRINGS BUS. J., March 11, 2005; Sheehan, *supra* note 16.

Some federal courts have found these concerns legitimate. The District of Columbia Circuit noted in *Fagan v. National Cash Register Company*:

> Perhaps no facet of business is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance.[18]

But, what if employees object to dress code regulations? Recently, employer dress codes have been challenged as contrary to employees' civil rights under Title VII of the Civil Rights Act of 1964.

A. *Title VII and Dress Codes*

When a challenge under Title VII of the Civil Rights Act of 1964 is made, it is always important to have an understanding of what the law actually prohibits. Title VII deals with employment relationships. Specifically, it makes it unlawful for a covered employer to discriminate against any individual on the basis of that individual's race, color, religion, sex, or national origin.[19] What Title VII prohibits is not necessarily undesirable treatment, or bad treatment, but rather it prohibits differential treatment.[20] If, in terms of religious discrimination, all religious beliefs are treated equally, there is no Title VII violation. Generally, only when one individual in the workplace is treated differently than the other because of his or her faith does an actionable Title VII violation occur. This form of discrimination is referred to as disparate treatment or intentional discrimination.

Dress and appearance standards are usually challenged on the standpoint that they result in disparate treatment either on the basis of religion or sex. Until recently, if a dress code was alleged to create sex discrimination, it was invariably because the policy placed an undue burden on one sex over the other. That is, the complaining party could demonstrate that the policy placed a *significantly different* burden on one of the sexes. For example, female employees are required to wear a uniform, but male employees are not. But religious discrimination charges related to appearance policies are on the rise, and that is the topic which is germane to this article.

---

[18] 481 F.2d 1115, 1124-25 (D.C. Cir. 1973).
[19] 42 U.S.C. § 2000e-2 (2009).
[20] ROBERT K. ROBINSON ET. AL, THE REGULATORY ENVIRONMENT OF HUMAN RESOURCE MANAGEMENT 54 (2011).

B. *Potential Legal Challenges as Religious Accommodation*

Unlike the other protected classes under Title VII, the statute places additional requirement on employers regarding religion. Accordingly:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[21]

A number of federal cases have reiterated this obligation of employers to make exceptions to or modifications in their appearance rules to accommodate employees on religious grounds.[22] In many instances, employees ask their employers to permit them to dress in a particular manner in order to conform to their religious beliefs. For example, a Muslim female may request to wear a *hijab* as part of her religious practice,[23] or an American Indian may request exception to a hair length policy as a result of his religious practice.[24] To initiate an action against a policy that restricts the employee's religious observance, the complaining party must first establish a *prima facie* case.

In order to initiate a religious accommodation challenge, the burden is on the employee to first establish that he or she has a sincere religious belief that conflicts with the employer's appearance policy.[25] The complaining party must then prove that he or she informed the employer of this belief.[26] Finally, the employee must then demonstrate that he or she was subjected to an adverse employment action (usually in the form of disciplinary action or termination) for failure to comply with the conflicting employment requirement.[27] If the employee establishes his or her *prima facie case*, the burden then shifts to the employer who must show that the accommodation would create an undue hardship. [28]

---

[21] 42 U.S.C. § 2000e(j) (2010).
[22] Booth v. Maryland, 327 F.3d 377, 382-383 (4th Cir. 2003); Brown v. Johnson, 116 Fed. Appx. 342, 343 (3d Cir. 2004); Cloutier v. Costco Wholesale Corp., 390 F.3d 126; (1st Cir. 2004).
[23] Holmes v. Marion Cnty. Office of Family and Children, 349 F.3d 914 (7th Cir. 2003).
[24] Hussein v. Waldorf Astoria Hotel, 31 Fed. Appx. 740 (2d Cir. 2002); Vargas v. Sears & Roebuck Co., 1998 U.S. Dist. LEXIS 21148 (E.D. Mich. 1998).
[25] Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985), *aff'd* on other grounds, 479 U.S. 60 (1986).
[26] Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984).
[27] *Id.*
[28] 42 U.S.C. § 2000e(j).

C. *Obligation for Religious Accommodation*

Religious accommodation, unlike the reasonable accommodation required under the Americans with Disabilities Act, does not require employers to bear more *de minimus* costs.[29] Religious accommodation is not accomplished by merely eliminating the conflict between the dress code and an employee's religious practice. This accommodation is only reasonable "provided eliminating the conflict would not impose an undue hardship."[30] What is problematic for employers is that the determination of what is or is not a reasonable religious accommodation is handled on a case-by-case basis.[31] This, of course means that often the only means for resolving the reasonableness of an accommodation is through litigation.

Federal courts have concluded that an undue hardship is established where there are identifiable costs incurred (considered in relation to the size and operating costs of the employer).[32] An accommodation requiring a business employing 17 employees to hire an additional part-time employee to cover missed work due to another employee's religious observance would, most likely, be considered to impose an undue hardship. The same requirement for a business employing 250 employees might not. Possible reasons for rejecting the requested accommodation include that it diminishes efficiency in other jobs,[33] infringes on other employees' job rights under company policies or collective bargaining agreements,[34] impairs workplace safety, or places co-workers at a greater risk.[35] Whether the proposed accommodation conflicts with another law will also be considered.[36] As an example, a Sikh machinist's beard (part of his religious observance) precluded his wearing a respirator in a job which required exposure to toxic gas, thus endangering his safety and health.[37] In another instance, an employee who claimed that her body piercings were religiously significant was merely told that she had to cover them with flesh colored band aids when working at her cash register. "The temporary covering of plaintiff's facial piercings during work hours impinges on plaintiff's religious scruples no more than the wearing of a blouse which covers the plaintiff's tattoos."[38]

---

[29] TWA v. Hardison, 432 U.S. 63, 84 (1977); Endres v. Ind. State Police, 334 F.d 618, 623 (7th Cir. 2003).
[30] EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569 (7th Cir. 1997)
[31] Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987).
[32] 29 C.F.R. § 1605.2(e)(1).
[33] *Protos v. Volkswagen of Am., Inc.,* 797 F.2d 129, 134-35 (3d Cir. 1986); Webb v. City of Philadelphia, 562 F.3d 256 (3d Cir, 2009).
[34] Virts v. Consol. Freightways Corp. of Del., 285 F.3d 508 (6th Cir. 2002)
[35] *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999)
[36] Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826 (9th Cir. 1999)
[37] Bhatia v. Chevron USA, Inc. 734 F.2d 1382 (9th Cir. 1984).
[38] Cloutier v. Costco Wholesale Corp. 390 F.3d 126 (1st Cir. 2005).

It should be noted that a claim of undue hardship cannot result from theoretical fears of loss in efficiency or additional costs, but must be grounded in the evidence of identifiable losses. Germane to this discussion, an employer erroneously believed that if it allowed an employee to wear a head covering at work during Ramadan, the employer could no longer enforce its uniform policy with respect to other employees. Here the employer failed to demonstrate an actual undue hardship; it merely showed that its employment decision was based on the fear that allowing the accommodation would open "the floodgates to others violating the uniform policy."[39]

D. *The Accommodation does not have to be Acceptable to an Employee*

The issue of whether or not the employer's proposed accommodation is reasonable does not hinge on the employee's acceptance or approval. The complaining party cannot reject an accommodation as unreasonable merely on the grounds that it was not one which the employee desired.[40]

Neither can it be rejected because the employer did not provide the employee a choice of alternatives. There is nothing in section 701 of Title VII that requires the employer to offer the employee several accommodations from which he or she may select the one which they find most acceptable.[41] Correspondingly, the employer is not under any compulsion to accept the employee's recommended accommodation, nor is the employer required to demonstrate that the employee's rejected preferred accommodation would create an undue burden.[42] When the employer has reasonably accommodated the employee's religious needs, the statutory obligation has been met.[43]

It must be remembered that in the absence of establishing an undue hardship, the employer is likely to be found in violation of Title VII for not accommodating the employee's religious grooming or appearance practices.[44]

V. IMPLICATIONS FOR EMPLOYERS

Employers are aware of the importance that employee appearance has on the image of their particular businesses, but there is an increasing likelihood of having appearance policies and dress codes challenged as

[39] EEOC v. Alamo Rent-A-Car, LLC, 432 F. Supp.2d 1006 (D. Ariz. 2006)
[40] Lee v. ABF Freight Sys., Inc., 22 F.3d 1019 (10th Cir. 1994).
[41] Wilshin v. Allstate Ins. Co., 212 F, Supp,2d 1369, 1373 (M.D. Ga. 2002).
[42] Ansonia Bd. of Ed. v. Phillbrook, 479 U.S. 60, 68 (1986).
[43] *Id.*
[44] EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 312-13 (4th Cir. 2008).

religious discrimination. There is a balancing act which must be performed at this point.

If such policies are to be continued, the employer must be prepared to demonstrate that the appearance expectations should first be justified as serving some legitimate business purpose. These reasons must be articulated and communicated to the employees. In those cases where appearance of an applicant affects a hiring decision, it may even become necessary to empirically validate the selection criterion (appearance) with consumer and market research.[45]

Second, the appearance standard should not impose greater requirements on religious clothing and appearance than on the other individuals in other classes. Are African Americans exempted from the policy that male employees are to be clean-shaven and permitted to wear beards if they have pseudo *folliculitis barbae* (a medical reason), while Muslims are denied the same privilege for religious reasons?[46]

Once implemented, is the policy consistently enforced? Selective or haphazard enforcement invariably leads to complaints, especially if enforcement affects one group more than the other. A policy should be flexible enough to make reasonable accommodations for an employee's *bona fide* religious beliefs. It is recommended that employees seeking an exemption from the policy on religious grounds do so in writing. And if denied, a legitimate business reason should be offered for denying the request and evidence should be retained that the employee understands the reason for the policy (i.e., promoting a safe working environment, maintaining a positive public image, complying with health standards, etc.). Again, consistent enforcement indicates that the proffered reason for denying the request for accommodation is legitimate and not a pretext to hide a discriminatory animus against a particular religious group.[47]

Because of the risk of potential litigation, if an appearance policy is not a component in the performance of the job, perhaps it should be avoided. To illustrate, there is hardly need for an employee appearance standard in an interstate trucking company beyond basic safety considerations. On the other hand, it can be argued that in instances where corporate image is a concern, such as a package delivery company, an employer has the right to expect employees on his or her payroll to project that image. Therefore, appearance and grooming standards should be justified and this justification communicated

---

[45] *Is Hiring on the Basis of Appearance Illegal?*, 581 FAIR EMPLOYMENT PRACTICES GUIDELINES 4, OCT. 2003, *available at* http://www.bryongaskin.net/education/MBA%20TRACK/CURRENT/MBA671/TERM%20PAPER/TIL-6-1-04/Is%20hiring%20on%20the%20Basis%20of%20Appearance%20Illegal.pdf.

[46] Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

[47] United Parcel Svc., *supra* note 44, at 139.

to all affected employees, especially for employers making customer contact. Since appearance expectations may be as important to portraying the company to outside constituencies as polite and professional behavior, employees should be informed that appearance is to be treated as any other performance dimension for evaluation purposes.

When such policies are developed, it is important to ensure that neither sex is held to a higher standard than the other. One sex cannot be given the freedom to wear "business casual" in work settings while the other is required to wear "business formal." When grooming policies are formulated, the policy should be able to pass the scrutiny of the unequal burden test.

There will be increased pressure for Congress and/or regulatory agencies to raise the undue burden standard to more than *de minimus* costs. In 2010, the Workplace Religious Freedom Act of 2010[48] was proposed in the Senate to prohibit widespread patterns of discrimination by private sector employers in unreasonably denying religious accommodations in employment, specifically in the areas of garb, grooming, and scheduling based on religion.[49]This bill was to specifically provide a comprehensive Federal prohibition of employment discrimination on the basis of religion, including the denial of accommodations, *specifically in the areas of garb, grooming*, *and scheduling*.[50] Such a move would indeed raise the bar for undue hardship determinations.

Finally, employers may expect increased litigation as advocacy groups such as the Council on American-Islamic Relations (CAIR), America's largest Muslim civil liberties organization use the courts to advance their political cause on what they perceive as critical issues in their community. One manifestation of this type of legal advocacy may explain why Muslims, who make up only 0.8 percent of the population, accounted for 21 percent of the religious discrimination charges filed with the EEOC in 2010.[51] CAIR provides advocacy and legal services to assist those individuals who have been discriminated against because of their Islamic faith.[52]

---

[48] S. 4046, 111th Cong. (2010).
[49] *Id.*
[50] *Id.* at § 3(2).
[51] Robert J. Grossman, *Online Sidebar: Muslim Lawsuits Loom Large in the Religion Category*, 55 HR MAG., Mar. 1, 2011, *available at* http://www.shrm.org/Publications/hrmagazine/EditorialContent/2011/0311/Pages/sidebar_grossman2.aspx.
[52]Council on American-Islamic Relations. *CAIR: Who We Are,* CAIR.COM, http://www.cair.com/CivilRights/CAIRWhoWeAre.aspx#WhatWeDo (last visited Feb. 28, 2011).