

*Employment Discrimination—Religion***Hijabs, Burqas, Khimars and Beards: Avoiding Religious Discrimination Suits**

**A** spate of recent cases suggests that employers are grappling with the issue of religious discrimination toward Muslims in the workplace. Generally, an employee's religion is not an issue employers need to know about, and one expert says that this is usually true when the employee practices a religion that is traditional and common in the United States.

The answer may become more complex, however, when the employee is a Muslim. This is because many Muslim women wear special clothing and many Muslim men wear beards as part of their religious observances. As the cases show, these practices can sometimes conflict with an employer's safety and grooming standards.

When a Muslim's sincerely held religious beliefs come up against an employer's standards, the question for the employer becomes whether it must accommodate those beliefs. Several employment law experts in BNA interviews and e-mails offered suggestions on how employers facing similar issues can avoid liability for religious discrimination.

**Safety Policy Trumps Religion.** In *EEOC v. Kelly Services Inc.*, 598 F.3d 1022, 78 U.S.L.W. 1607 (8th Cir. 2010), the Eighth Circuit ruled that temporary staffing firm Kelly Services Inc. did not discriminate against a Muslim woman in violation of Title VII of the 1964 Civil Rights Act when it decided not to refer her to a client because she wears a khimar. The garment is worn by Muslim woman for religious reasons and it covers their hair, forehead, sides of the head, neck, shoulder, chest, and sometimes extends down to the waist. Kelly did not make the referral because its client operates a printing plant with large machines and has a strict policy that prohibits employees from wearing headwear and loose-fitting clothes while working.

In *Haqq v. Pennsylvania Department of Public Works*, 2010 WL 1253452, 78 U.S.L.W. 1694 (E.D. Pa. 2010), the U.S. District Court for the Eastern District of Pennsylvania said that a Muslim woman who wears a veil that covers her whole body except for her hands and face may proceed with her claim that she did not pass her probationary period to become a state welfare caseworker because of religious animus.

In a third case, *EEOC v. White Lodging Services Corp.*, 2010 WL 1416676, 78 U.S.L.W. 1694 (W.D. Ky. 2010), the U.S. District Court for the Western District of

- General Reasonable Accommodations:**
- allowing voluntary schedule and shift swapping—providing paid or unpaid leave;
  - allowing extended or scheduled break periods;
  - allowing staggered work hours;
  - providing rotating shifts;
  - facilitating lateral transfers or voluntary demotions;
  - modifying dress codes or grooming standards;
  - contributing union dues to a substituted charity;
  - allowing religious expression at work; and
  - modifying hiring procedures.
- attorney Meg C. Alli

Kentucky held that the Equal Employment Opportunity Commission may pursue a religious discrimination suit under Title VII against a hotel management firm that allegedly denied housekeeper jobs to four Muslim female applicants because they would not remove their hijabs, which are also head scarves worn for religious reasons.

In *Wallace v. Philadelphia*, 2010 WL 1730850 (E.D. Pa. 2010), the Eastern District of Pennsylvania ruled that a Muslim police officer cannot proceed with his Title VII religious discrimination suit against the Philadelphia Police Department contesting the department's decision that he had to keep his beard trimmed instead of allowing it to grow to the natural fullness he claimed was required by his religion.

The Third Circuit had ruled in *FOP Newark Lodge No. 12 v. Newark, N.J.*, 170 F.3d 359 (3d Cir. 1999), that Muslim police officers have a right to wear beards for religious reasons, and Wallace argued that under this precedent he had an unlimited right to wear his beard. The district court disagreed, saying that the police department made a reasonable effort to accommodate Wallace's religious beliefs. The one-quarter inch grooming requirement "preserved the Department's emphasis on presenting a united front while respecting the religious needs of its employees," the court said. It added that what was at stake was the department's ability to appear impartial to citizens of all races and religions whom it is charged to serve and protect.

**Accommodating Religions.** The common factor in these cases is that they are accommodation cases. Generally, to make a prima facie case of failure to accommodate religious discrimination, the plaintiff employee must show that he holds a sincere religious belief that conflicts with a job requirement, that his employer knew about the conflict, and that an adverse action was taken because he did not comply with the conflicting requirement. Once the employee has made out his prima facie case, the burden shifts to the employer to show that it made a good faith effort to accommodate the religious belief, or that an accommodation would result in an undue hardship upon its business. To be considered an undue hardship, the burden on the employer must be more than de minimis.

Meg C. Alli, shareholder, Ogletree Deakins, Bloomfield Hills, Mich., who is an employment law attorney, explained to BNA May 21 that Title VII “protects against religious discrimination at work in two main ways. One, an employer cannot deny an employment opportunity because of either the employee’s or the employer’s religious beliefs or practices unless, of course, the employer is a religious corporation or entity.” Stated differently, she said that “an employer cannot prefer or reward one employee over another because the employee’s religious beliefs and practices are consistent with the employer’s.”

Alli said that the second form of religious discrimination in the workplace “is where an employer refuses to reasonably accommodate an employee’s religious belief or practice that is in conflict with a work rule or policy.” She said that “[e]mployees who are discharged or disciplined for violating a job requirement that is at odds with a genuine religious belief or practice often challenge the employer for not reasonably modifying the rule or policy by, at least, creating an exception for the

employee. Employees who are forced to choose between working and adhering to a religious practice are likely to sue if the conflict could have been reasonably eliminated.”

According to Alli, accommodation claims “are more complex because the employer is expected to do more—the employer is expected to change workplace practices (such as a work schedule) to alleviate the religious conflict unless doing so would impose an undue hardship on the employer’s business operations.”

Alli also said that “[r]equested accommodations generally fall into three categories: (1) modifying work schedules or leave policies to accommodate religious observances; (2) relieving or exempting employees from work rules, policies or procedures that conflict with religious practices, and (3) allowing employees to transfer to positions that reduce the potential for conflict with a religious observance.” As an example, she noted that “employees who wear religious clothing to work (for example, a khimar) may ask for an exception to the dress code to allow them to continue to wear religious accessories.” She added that “employees who need to take time off work to observe Sabbath practices may ask for a shift or schedule change.”

If an employer’s “policy cannot be justified by anything specific other than ‘that’s the way we do it for everyone’—refusing to create an exception for the Muslim employee would be legally problematic,” Alli said. She added, however, that “if the dress code is necessary for safety reasons—for example, to avoid head wear or loose clothing becoming tangled in machinery—the employer is usually not required to make exceptions. In those situations, the requested job modification is not reasonable and imposes an ‘undue hardship’ on the employer’s business. What is reasonable or an undue hardship is fact-specific and highly individualized.”

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#### Ground Rules for Religious Accommodations

- An employer must be notified that a religious belief or practice conflicts with a job requirement.

- An employer does not have to provide the accommodation requested by the employee if another reasonable alternative exists.

- An employer cannot rely on speculation, stereotypes or assumptions in deciding whether an accommodation is reasonable or imposes an undue hardship.

- Employers that meet and discuss possible accommodations directly with the employee are more likely to act reasonably.

- Employees have a duty to cooperate in the accommodation process.

—attorney Meg C. Alli

**Uptick in Cases Noted.** Eddie Isler, partner, Isler Dare Ray Radcliffe & Connolly PC, Tysons Corner–Vienna, Va., who represents employers, told BNA May 20 that he has noticed a significant uptick in cases involving Muslims since the terrorist attacks in this country on Sept. 11, 2001. He is not sure, however, if the increase in these cases is because the mood of the country has changed, if Muslims have become more sensitive, or a combination of the two.

Alli said that there has “been a steady rise in religious discrimination claims since [Sept. 11], but it would be a stretch to assume that most concern Muslims. While the EEOC reports that charges of religious discrimination filed with the agency have increased each year over the past decade, religion claims still represent only 3.6 [percent] of all charges filed.”

Alli also noted that “[e]mployers often experience an increase in internal complaints of discrimination by Muslim employees following media coverage of a terrorist incident.” She added that “[t]hese complaints run the gamut of challenging overt conduct such as threats, slurs and name-calling, to more subtle behaviors at work based on stereotypic assumptions about Muslim employees.”

While many of the religious discrimination cases today seem to involve Muslims, not all of them do.

Paul W. Mollica, partner, Meites, Mulder, Mollica & Glink, Chicago, who represents employees, told BNA May 20 that in most instances, “but especially in the public safety/peace officer context, uniform and dress code requirements are upheld because all alternatives to allowing an exception generally pose an undue burden on the employer.” He added that these cases are “conspicuous when applied to Muslims/Sikhs, but there have been cases involving Jews as well.” In particular, he cited *Goldman v. Weinberger*, 475 U.S. 503 (1986).

**Avoiding Liability.** Harris D. Butler III, partner, Butler, Williams & Skilling PC, Richmond, Va., another attorney who represents employees, told BNA May 21 that employers get into trouble when they start thinking about asking questions concerning an employee’s religion that they would not ask another employee whose religious preferences are more common. He added that whenever an employer singles out an employee for selective treatment it needs to be able to justify its actions.

Mollica is exclusively an employees’ attorney. He said, however, that managers can avoid exposing employers to liability for religious discrimination by “instead of just insisting on rules for rules’ sake—[they] ought to take a common-sense glance over their shoulder about how a decision would look to a fair-minded outsider.” For example, he said that “[a]llowing Muslims to wear gloves at grocery stores to handle pork and alcohol . . . seems utterly reasonable.”

Isler said that when an employer comes to him seeking advice, he usually asks about the involved employee’s age, and whether he or she is in a protected class, but questions about religion are not high on his list. In fact, he said that most employers usually don’t even know what religion the employee practices. He also suggested that religious discrimination may, in some cases, be acting as a substitute for national origin discrimination.

Looking at what policies an employer should adopt to avoid religious discrimination issues, Isler said that the employer’s basic policy should mention religion and contain a broad statement that the employer “respects the religious beliefs of all.” In reality, however, he said that the focus of most workplace policies today tends to be on sexual harassment/discrimination. The policies should, however, say that they apply to sex and all other protected classes, he said.

Isler separated the policy analysis into two issues, one for harassment and one for discrimination. Whether religion or otherwise, both issues should be addressed in the policy, he said.

**Proper Training Required.** According to Alli, many problems “stem from untrained supervisors who reject out-of-hand an employee’s request for a religious accommodation at work on the mistaken assumption that creating ‘special’ exceptions for religion is improper.” She added that “[s]upervisors need to be trained to forward those requests to the right person in the organization at, at a minimum, not to summarily dismiss the request.”

Alli said that “[l]awyers need to know the employer’s business and how it works. Guidelines must be tailored to that specific workplace and business. And, guidelines must be clear and easily understood by an average worker.” She added that “[i]t is best to identify a specific person or company department, typically human resources, to submit requests for religious accommodation or to make a complaint of religious discrimination.” She also said that employers should “[c]reate a process that ensures that the complaint or request will be channeled to the right person and let employees know that a process exists. In deciding what is ‘reasonable’ it is usually best to consult with the front-line supervisor because he or she may have the best solution to resolve a religious conflict.”

“Affirmatively changing or modifying workplace rules in order to reasonably accommodate non-traditional religious beliefs or practices continues to pose problems for employers,” Alli said. “For example, employers may be asked to relax dress codes or grooming standards to allow facial or body piercings, tattoos or other symbols that are religiously grounded. In the end, the requested job accommodation must be reasonable, not the underlying religious belief or practice.”

According to Alli, “[e]mployers sometimes back into religious discrimination by passing judgment on the

content of the religious belief when considering what is a reasonable job modification.” She cautioned that the “underlying belief or practice must be ‘sincerely held’ but it does not have to be mainstream or a tenet of an organized religion.”

An employer “must accommodate the religious belief or practice if it can reasonably do so,” Alli said. She explained, however, that “[i]f the accommodation would create more than minimal cost, such as requiring the employer to incur overtime expenses or disrupting production, or if modifying existing practices would violate the seniority rights of other employees or the terms of a collective bargaining agreement, the request may be denied as an undue hardship.” She added that “[w]hether a religious accommodation at work is reasonable or an undue hardship is a balancing test that looks at the specific workplace.”

**Sabbath Cases Still an Issue.** Even though cases dealing with Muslim dress and customs seem to currently be at the forefront in the workplace, Alli noted that “Sabbath cases are still an issue, but not as much. For instance, finding employees who are willing to take an-

other employee’s shift to allow Sabbath time off is not hard to do in a tough economy.” She added that it becomes “more difficult in situations where everyone is working mandatory overtime. Overall, employers have a better understanding of their obligations and have established procedures that allow employees to ‘swap’ shifts to accommodate religious holidays. And, many collective bargaining agreements specifically address ways employers can make religious accommodations.”

Isler thinks that there are fewer Sabbath cases today, however, because either fewer people are celebrating the Sabbath or they do not celebrate it in traditional ways.

Looking at cases involving employees seeking to take off from work on their Sabbath, Mollica said that “alternative shifts for Sabbath observance is a common area of conflict.” In this area, however, “[e]mployees tend to do better in litigation.” He explained that “employers (except in collectively bargained workplaces with strict seniority rules) tend to be able to make exceptions for employees and shift them around.”

BY BERNARD J. PAZANOWSKI

#### **Suggested Best Practices**

- Develop and implement a written policy prohibiting workplace discrimination based upon religion. Tell employees that the company will make reasonable efforts to accommodate the employee’s religious practices.

- Dress code and grooming policies, including any safety-imposed limitations, should be clear and unambiguous. They should be in writing and distributed to employees. Employees should be required to acknowledge in writing that they received and agree to comply with company policies.

- Develop an internal process for responding to requests for religious accommodations. Make sure the person leading the response effort is well-trained relative to religious accommodations and has a full scope of knowledge regarding the company’s business operations.

- Make decisions about the reasonableness of an accommodation based on the facts rather than

assumptions or speculation. Do your homework. For example, do not automatically assume that the requested accommodation will violate the terms of a collective bargaining agreement. Even if a violation is likely, do other alternatives exist that would be consistent with the collective bargaining agreement?

- Engage the employee to the fullest extent possible in the accommodation process by seeking the employee’s input on possible accommodations. Make sure the process is confidential and do not disclose the employee’s underlying religious beliefs at work beyond a strict “need to know” basis.

- Avoid the appearance that the decision to accommodate or not accommodate was based on the employer’s assessment of the validity or reasonableness of the underlying religious beliefs or practices. The accommodation, not the underlying religious belief or practice, must be reasonable.

- Train managers and supervisors how to recognize and respond to requests for religious accommodations. Generally, managers and supervisors should be advised to forward all requests for accommodation to Human Resources or any other centralized office.

- Document the reasons for the decisions to accommodate or not accommodate the employee’s religious beliefs. Explain why an accommodation would impose an undue hardship. Be specific.

- Before granting or denying an accommodation for religious practices, public employers (for example, state or local governments that employ police officers, firefighters, teachers, etc.) should consult with counsel to determine if any additional limits on what they can and cannot do exist under federal or state constitutions. The Free Exercise, Free Speech or Establishment Clauses place additional limits on public employers.

—attorney Meg C. Alli