

Uniforms, Dress Codes and an Employee's Religious Observance

By Debbie Kaminer

Turbans, headscarves and beards have been at the center of lawsuits filed by workers whose employers were not accommodating the employees' religious grooming needs. One such suit, recently settled after approximately a decade of litigation, involved the right of employees to wear religious headgear. Another, just making its way through the courts, involves an employee who claims he was fired because of the length of his beard.

Two Recent New York Cases Involving Religious Grooming

The New York City Transit Authority, which is run by New York State's Metropolitan Transit Authority (MTA), was involved in lawsuits brought by Sikh and Muslim transit workers who wanted to wear their religious head coverings while working.¹ A number of these suits were filed over the past decade, including one by the United States Justice Department, claiming that the MTA was discriminating against Muslim and Sikh employees by requiring that they either remove their head coverings or attach the MTA logo to their head coverings. Under the MTA's new policy, religious headgear will be permitted, so long as it is blue (the color of the MTA logo). Employees will not be required to attach the MTA logo to the headgear. Under the terms of the settlement, the MTA also agreed to pay \$184,500 to eight employees who had been denied religious accommodation.

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In the newer case, a Hasidic Jewish New York Police Department (NYPD) recruit, Fishel Litzman, claims that he was illegally fired after refusing, for religious reasons, to cut his beard.² While the Police Academy accommodates religious recruits by permitting them to have beards no longer than one millimeter in length, Mr. Litzman's religious beliefs forbid him from ever cutting or trimming his beard, which is naturally short. Mr. Litzman was highly regarded by his peers and was in the top 1% of his classes. He was told that he would only need to cut his beard once, and that after he graduated from the academy, he would be permitted to allow it to grow. According to the complaint filed by his attorney on June 15, 2012, "[s]ince the NYPD permits police officers to grow beards after they graduate from the Police Academy, there is no legitimate purpose in directing him to trim his beard to a length that does not exceed one millimeter while he is in the Police Academy."³

Overview of Religious Accommodation Under § 701(j) of Title VII

Title VII of the 1964 Civil Rights Act, as originally passed, treated religion the same as the other protected categories and prohibited discrimination based on religious belief or status, but it did not mandate religious accommodation. In 1972, Congress amended Title VII to include an affirmative obligation of accommodation. Under § 701(j), "[t]he 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 . . . an employee or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."⁴

It should be noted at the outset that the New York State Executive Law⁵ and the New York City Administrative Code⁶ also prohibit religious discrimination and mandate religious accommodation in the workplace. These laws both require a higher level of accommodation than § 701(j), since they define undue hardship as "an accommodation requiring significant expense or difficulty."⁷ The City adopted this definition of "undue hardship" from the New York State Executive Law in 2011 when it passed the Workplace Religious Freedom Act. This article, however, will focus on the requirements of religious accommodation under federal law, § 701(j).

The U.S. Supreme Court has twice interpreted § 701(j) and both times has narrowly defined an employer's obligation.⁸ In *Trans World Airline v. Hardison*, the Court defined "undue hardship" as any cost greater than de minimis.⁹ Relying on *Hardison*, the lower courts have required minimal accommodation of religious employees and routinely hold that employers are not required to incur any economic or efficiency costs in accommodating an employee's religion. This does not mean, however, that an employer can simply refuse to accommodate a religious employee or rely on a hypothetical, as opposed

to an actual, hardship. Rather, the employer must be able to show that it either offered a reasonable accommodation or that no such accommodation was possible without undue hardship.¹⁰ The Supreme Court has also held that while employers must reasonably accommodate religious employees, they do not need to provide employees with their preferred accommodation.¹¹ The most common types of cases under § 701(j) involve employees requesting either time off from work to observe religious holy days or accommodation of their religious dress and grooming needs.

A number of recent cases address at what point accommodation of an employee's religious grooming needs would cause an undue hardship to the employer. In these cases, employers rely primarily on one of two types of undue hardship: the accommodation could raise health or safety concerns or the accommodation could negatively impact the employer's image. Courts have routinely held that employers do not need to accommodate religious grooming requirements that would actually cause a health or safety hazard or that would harm the employer's image.

Health, Safety and the Appearance of Neutrality

As noted, courts routinely hold that employers do not need to accommodate religious employees if to do so would compromise health or public safety,¹² determining that such risks constitute more than a "de minimis" cost. This issue is most likely to arise with employers who are in the business of dealing with public safety, such as police departments and prisons. Courts have similarly upheld dress codes based on the importance of the appearance of neutrality and the need to "promote an environment of discipline and *esprit de corps*."¹³

In 2010, the Third Circuit held that the Geo Group Inc. (Geo), a private company which had a contract to run the George W. Hill Correctional Facility in Pennsylvania (the Hill Facility), was not required to permit female Muslim employees to wear khimars, Muslim headscarves that cover the hair, forehead, sides of the neck, shoulders and chin.¹⁴ In an attempt to improve the security and performance of the prison, the Hill Facility had instituted a dress policy that prohibited all individuals who entered the facility from wearing hats, caps, scarves, or hooded jackets. Three Muslim employees requested an exception to the policy, claiming that the Islamic religion required that they wear the khimar.

The Third Circuit held that such an exception could lead to safety concerns and therefore would create an "undue hardship." The court agreed with Geo that head coverings could be used to smuggle contraband into the prison and to conceal the identity of the wearer. Loose head coverings, such as the khimars, could also be used against prison employees or other inmates in an attack. "Even assuming khimars present only a small threat of the asserted dangers, they do present a threat which is something that Geo is entitled to attempt to prevent."¹⁵

The Geo court, relying on a Ninth Circuit decision, concluded that it had an obligation “to comply with the Supreme Court’s direction that we not substitute our judgment for that of corrections facility officials.”¹⁶

The Third Circuit also recently held that the Philadelphia Police Department was not required to accommodate a female Muslim officer who wore a traditional Muslim headscarf (a khimar or hijab) to work.¹⁷ The headscarf, in this case, would have covered her head and the back of her neck but would not have covered her face; however, the Philadelphia Police Department had

safety rules which included a no-facial-jewelry policy. Permitting the employee to wear the nose ring would therefore be an undue hardship because it would impact health and food safety.

In denying summary judgment to Papin, the court emphasized that Papin had offered to accommodate the employee by permitting her to wear the nose ring so long as she left the restaurant when the compliance auditor was doing an inspection. The court explained that Papin “did not care whether [the employee] wore the nose ring or not; [it] only cared whether DAI found a store out of

The employee, a cashier, was a member of the Church of Body Modification and claimed that her religious beliefs required her to wear and display facial piercings at all times.

a strict uniform policy which did not permit officers to wear religious symbols. The court held that accommodating the plaintiff would cause an undue hardship because the department had a crucial interest in its “uniform as a symbol of neutral government authority, free from the expressions of personal religion, bent or bias.”¹⁸

Similarly, the Fifth Circuit held that the Arlington, Texas, police department was not required to accommodate a policeman who, for religious reasons, wore a small, gold cross pin on his uniform. The department had a policy that forbade officers from wearing buttons, badges, medals and other similar items and symbols. The court concluded that forcing a police department to permit officers to add religious symbols to their uniform would be an undue hardship.¹⁹

Employers who are not in the business of dealing with public safety, and who claim that accommodating a religious employee would cause an undue hardship based on health or safety risks, tend to be less successful in such cases.

The Tenth Circuit held that an employer had violated § 701(j) when it refused to hire as a truck driver a man who, as a member of a Native-American church, occasionally used peyote for religious reasons. The employer, said the court, could have reasonably accommodated the employee by requiring that he take a day off whenever he used the peyote.²⁰

In a recent case involving a food service employee, a federal district court in Florida denied summary judgment for employers who had fired an employee for wearing a nose ring.²¹ The employee claimed that her religious beliefs required her to wear the nose ring. The case involved two defendants, the Papin entities (Papin), which owns two Subway shops under a franchise agreement with the second defendant, the Doctor’s Associates Inc. (DAI), the owner of the trade name “Subway.” Both Papin and DAI claimed that they followed strict food-

compliance for allowing an employee to wear a nose ring while working.”²²

The court also denied summary judgment to DAI on the issue of undue hardship. While the court found that DAI did seriously enforce its no-facial-jewelry policy, it also noted that DAI seemed willing to make an exception for the employee if she could prove the sincerity of her religious beliefs. Furthermore, DAI permitted employees to wear watches and wedding rings, both of which are contrary to the food safety guidelines on which DAI relied.

Similarly, and prior to the settlement discussed above, a federal district court had denied summary judgment to the New York Transit Authority in the case involving its refusal to permit employees to wear turbans and khimars unless the MTA logo was attached.²³ The court determined that “this is not a case in which the uniform requirement at issue is obviously justifiable based on safety concerns or other legitimate business concerns.”²⁴

The current case involving the Hasidic Jewish NYPD recruit may be another where the employer cannot successfully rely on safety concerns. While this case does involve an employer in the business of public safety, the NYPD told the recruit that he would only have to trim his beard once and that after he becomes a police officer he would no longer be required to do so. Thus, as Litzman’s lawyer noted, it may be difficult for the police department to argue that it is an undue hardship for a recruit to grow a beard, when it permits officers to have beards.

Impact on the Employer’s Image

Employers have also claimed that accommodating a religious employee’s grooming needs would cause an undue hardship because these would negatively impact the employer’s image. This is most likely to be an issue in cases where the religious employee has regular contact with members of the public, such as in retail sales.²⁵ Employers are not uniformly successful in these cases, however.

In 2011, a federal district court in Oklahoma held that the retail clothing store Abercrombie & Fitch Stores, Inc. (Abercrombie) had violated § 701(j) when it refused to hire a Muslim teenager because she insisted on wearing a headscarf for religious reasons. Abercrombie has a “Look Policy” which requires employees to wear clothing consistent to that sold in their stores.²⁶ This policy specifically prohibits employees from wearing “caps” but does not mention other head coverings.

Executives at Abercrombie testified that permitting an exception would cause an “undue hardship” because it would negatively impact both the brand and sales. They explained that the Look Policy led to a better “in-store experience” and more repeat customers and emphasized that the company used no television advertising and minimal print advertising and that its “brand identity” was primarily communicated through the in-store experience.

The federal district court granted summary judgment in favor of the EEOC. Abercrombie did not cite examples or conduct any studies illustrating that granting an exception to the Look Policy would harm the brand and thus constitute an undue hardship; Abercrombie’s reasoning was therefore too speculative. The court also relied on the fact that Abercrombie had already granted numerous exceptions to the Look Policy over the last decade and in eight or nine of these instances had specifically permitted other employees to wear headscarves.

However, a federal district court in Massachusetts granted summary judgment to Costco Wholesale Corporation (Costco), holding that it was not required to accommodate a religious employee’s grooming needs.²⁷ The employee, a cashier, was a member of the Church of Body Modification and claimed that her religious beliefs required her to wear and display facial piercings at all times, which violated Costco’s dress code. While the court did not explicitly question the sincerity of the plaintiff’s religious beliefs, it did express skepticism and indicated that the desire to wear facial piercings at all times was a “personal preference”²⁸ as opposed to a religious belief. Even if the plaintiff had a sincerely held religious belief, the employer had offered a reasonable accommodation by permitting the employee to cover her facial piercings with a bandaid or wear a retainer. Any additional accommodation would have caused undue hardship since “Costco ha[d] a legitimate interest in presenting a workforce to its customers that is, at least in Costco’s eyes, reasonably professional in appearance.”²⁹

A federal district court in Washington denied summary judgment for an employer who had fired a server in its restaurant, based on the employee’s refusal to cover small tattoos on his wrist.³⁰ The employee practiced Kemetecism, a religion that started in ancient Egypt, and he believed that intentionally covering his tattoos was a sin. The employer relied heavily on *Cloutier v. Costco*, arguing that permitting the employee to work with his

tattoos uncovered would negatively impact its image as a family-friendly restaurant, and would therefore constitute an undue hardship.

In denying summary judgment the court distinguished *Cloutier*, explaining that the tattoos were small and most customers would not even notice them. Furthermore, there was no evidence of any customer complaints about the tattoos during the six months the employee had worked as a server with his tattoos uncovered, and the employer presented no evidence that the tattoos would harm the employer’s image as a family-friendly restaurant. Eventually, the employer settled the lawsuit with the EEOC, agreeing to pay \$150,000 and make changes to its policies to ensure that management understood its religious accommodation obligations.³¹

Cloutier was also distinguished in two of the cases previously discussed. The Florida federal district court, in the case involving the Subway employee who claimed she wore a nose ring for religious reasons,³² held employers could not successfully claim that they needed to enforce their no-facial-jewelry policy to protect their public image and at the same time offer other exceptions to the policy. The New York federal district court that denied summary judgment to the New York City Transit Authority, determined that the NYCTA would not suffer an undue hardship if employees were permitted to wear turbans and khimars without the MTA logo attached.³³

It may be similarly difficult for the NYPD to successfully claim that its image would be harmed if it were forced to accommodate the Hasidic police recruit and permit him to wear his beard untrimmed. Police officers, who can wear their beards untrimmed, have more contact with the public than recruits do. Therefore, it seems that the department’s public and professional image would not be harmed if the recruit was granted an exception to the trimmed beard policy.

Conclusion

Employers clearly have an obligation under § 701(j) to reasonably accommodate an employee’s religious dress and grooming needs unless such accommodation would cause undue hardship. Courts are most likely to find undue hardship when the employer is in the business of dealing with public safety and can claim that the requested accommodation would cause safety risks. Courts have also determined that religious grooming accommodations that harm an employer’s image can constitute an undue hardship – particularly in cases where the employee deals with the public; however, an employer’s success is not a foregone conclusion. Employers should therefore carefully determine the impact of a religious accommodation before denying an employee’s request for accommodation. ■

1. Matt Flegenheimer, *M.T.A. Agrees to Allow Its Workers to Wear Religious Headgear*, N.Y. Times, May 30, 2012; Ted Mann, *MTA Settles Bias Suit*, Wall St. J., May 31, 2012 at A21.

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2. Julia Greenberg, Hasidic NYPD Recruit Says He Was Fired Over Beard Length, CNN, June 10, 2012, <http://religion.blogs.cnn.com/2012/6/10/hasid>.
 3. *Fishel Litzman v. City of N.Y., N.Y. City Police Dep't & Raymond Kelley, as Comm.*, No. 12 Civ. 4682 (S.D.N.Y. June 14, 2012) (compl.).
 4. 42 U.S.C. § 2000e(j).
 5. Exec. Law § 296(10).
 6. N.Y.C. Admin. Code §§ 8-102, 8-107.
 7. Exec. Law § 296(10)(d); N.Y.C. Admin. Code § 8-107(3)(b).
 8. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *TWA v. Hardison*, 432 U.S. 63 (1977).
 9. *Hardison*, 432 U.S. at 84.
 10. Courts rely on a two-part procedure when analyzing § 701(j) claims. First, a plaintiff must establish a prima facie case of religious discrimination. Once a plaintiff has done so, "the burden shifts to the employer to produce evidence showing that it cannot reasonably accommodate the worker without incurring undue hardship."
 11. *Ansonia Bd. of Educ.*, 479 U.S. 60.
 12. *See, e.g., EEOC v. The Geo Grp.*, 616 F.3d 265 (3d Cir. 2010); *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995); Debbie Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 2 (2000).
 13. *The Geo Grp.*, 616 F.3d at 273.
 14. *Id.*
 15. *Id.* at 274.
 16. *Id.* at 277 (citing *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 968 (9th Cir. 2010)).
 17. *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009).
 18. *Id.* at 261.
 19. *Daniels v. City of Arlington, Tx.*, 246 F.3d 500 (5th Cir. 2001).
 20. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989).
 21. *EEOC v. Papin Enter., Inc. & Doctor's Assocs., Inc.*, 2009 WL 961108 (M.D. Fla.) (2009).
 22. *Id.* at *6.
 23. *United States v. N.Y. City Transit Auth.*, 2010 WL 3855191 (E.D.N.Y. 2010).
 24. *Id.* at *21.
 25. *See, e.g., EEOC v. Abercrombie & Fitch Stores Inc.*, 798 F. Supp. 2d 1272 (N.D. Okl. 2011); *Cloutier v. Costco*, 311 F. Supp. 2d 190 (D. Mass. 2004).
 26. *Abercrombie & Fitch Stores Inc.*, 798 F. Supp. 2d 1272.
 27. *Cloutier*, 311 F. Supp. 2d 190.
 28. *Id.* at 199.
 29. *Id.* at 200.
 30. *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 WL 2090677 (W.D. Wash. 2005).
 31. Press Release, U.S. Equal Employment Opportunity Commission, "Burger Chain to Pay \$150,000 to Resolve EEOC Religious Discrimination Suit" (Sept. 16, 2005) at <http://www.eeoc.gov/eeoc/newsroom/release/9-16-05.cfm>.
 32. *EEOC v. Papin Enter., Inc. & Doctor's Assocs., Inc.*, 2009 WL 961108 *6 (M.D. Fla.) (2009).
 33. *United States v. N.Y. City Transit Auth.*, 2010 WL 3855191 (E.D.N.Y. 2010).

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