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Sidebar: UK: Second Challenge to Employment Tribunal Fees

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IS SHE REALLY ALLOWED TO WEAR THAT? RELIGIOUS ACCOMMODATION IN THE WORKPLACE

By Timothy F. Ryan

Title VII of the Civil Rights Act of 1964[1] prohibits discrimination based on religion and puts an affirmative obligation on an employer to accommodate employees' religious practices. Issues involving religion arise in many employment contexts, including decisions about hiring, discipline, promotions, and discharge. Often decisions about these issues are informed by the obligation to consider whether special attention needs to be paid to an employee's religious belief.

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What Is "Religion"?

Title VII broadly defines "religion" to include "all aspects of religious observance and practice, as well as belief."[2] The Supreme Court offers the guidance that a religious belief is "a given belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for an exemption". *United States v. Seeger*, 380 U.S. 163, 165 (1965). The EEOC defines "religious practices" as "moral or ethical beliefs as to what is right and wrong, which are sincerely held with the strength of traditional religious views" and also notes that "although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns ultimate ideas about life, purpose and death" 29 C.F.R. §1605.1.

Religious belief also includes "antipathy to religion," thereby extending the protections of Title VII to atheists. *Reed v. Great Lakes Co., Inc.*, 330 F3d 931, 934 (7th Cir. 2003).

What Is Required of an Employer?

An employee must identify a religious belief or practice before an employer has a duty to accommodate the belief or practice on religious grounds. Once a religious practice or belief is identified, Title VII requires that an employer reasonably accommodate religious practices and observances. But the law does not require an employer to accommodate an employee whose sincerely held religious belief, practices, or observances conflict with a work requirement when providing such an accommodation would create an "undue hardship." Undue hardship under Title VII is defined as something "more than *de minimis*" cost or burden.[3]

With these principles in mind, we consider below the obligations of an employer when confronted by an employee's request to wear certain religious dress or follow certain grooming practices that relate to the employee's religious beliefs.

Reasonable Accommodation of Religious Dress and Grooming

Recently, there have been many reported cases of employees who challenge their employers' refusal to accommodate their wearing of religious dress (such as a hijab, the religious headgear of Muslim women) or tolerate certain grooming practices (such as wearing beards or other facial hair by Sikhs and Muslim men). These cases only occasionally are decided by the sincerity of the religious belief involved. Instead, many cases turn whether or not an employer is excused from the obligation to provide accommodation because to do so would result in an "undue hardship."[4]

Under Title VII, undue hardship exists if a religious accommodation would cause the employer to suffer cost that is "more than *de minimis*".[5] The burden of an undue hardship can be measured in terms of money, production value, or impact on other employees. And while the burden required to establish undue hardship may be low, the standards for establishing that such a burden actually exists are much higher. Courts routinely reject claims of undue hardship where an employer's basis for the claim is merely speculation.

For example, in *EEOC v. Abercrombie & Fitch Stores*, 966 F. Supp. 2d 949, 962 (N.D. Cal. 2013), an applicant for employment, a Muslim who wore a hijab, interviewed for a sales position. In her interview, she told the recruiter that she was a Muslim and that the hijab was "required." She was not hired.

Before the District Court, Abercrombie & Fitch (A&F) argued that it had a "Look Policy" which mandated that all salespersons wear company-brand clothes and not wear head coverage. According to A&F, allowing the applicant to wear a hijab while working was a violation of its "Look Policy," and would cause customer confusion, destroy its branding efforts, and ultimately damage sales.

The court viewed the testimony of the A&F executives and managers who reached this conclusion as nothing more than speculation. Because A&F was not able to produce "studies demonstrating a correlation between failure to comply with the Look Policy and either customer confusion or decreased sales" or any "store reports that linked poor sales performance with lack of adherence to the Look Policy," the court determined that there was simply no evidence to support the claimed harm of allowing an employee to wear a hijab. The court concluded that "merely conceivable hardships cannot support a claim of undue hardship."[6]

A&F also lost on this same issue in another district court before this case. Responding to testimony from A&F executives, the district court rejected the testimony as speculative and noted

> [A&F] must provide more than generalized subjective beliefs or assumptions that deviations from the Look Policy negatively affect the sales or brand. The evidence presented does not raise a triable issue that a hardship, much less an undue hardship, would have resulted from allowing [the employee] to wear her hijab…" 213 U.S. Dist. LEXIS 125628, at *40-41.[7]

Some companies have been able to introduce the necessary evidence to show actual hardship. In *Cloutier*

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v. Costco Wholesale Corp., an employee wanted to wear facial piercings because she was a member of the Church of Body Modification. Costco presented evidence that such piercings would influence Costco's public image to an extent that requiring Costco to allow the piercings would create an undue hardship.[8]

The difference between the *Abercrombie & Fitch* and *Costco* cases seems to be that Costco was able to provide evidence that the effect the accommodation sought would have on Costco's public image would be negative, where the court determined that Abercrombie & Fitch only speculated that that would be a negative response to its applicant wearing a hijab.

Similarly, in *EEOC v. Red Robin Burgers, Inc.*,[9] the employee, a member of the Kemetic religion, was terminated for visibly wearing religious tattoos on his wrist for religious reasons. Red Robin had a policy which required that all tattoos and body piercings must be covered so as to not be visible. Red Robin argued that if it accommodated the employee's request for an exception for religious reasons, this would impose an undue burden on the company, because then it would be required to allow "whatever tattoos, facial piercings or other displays of religious information an employee might claim, no matter how outlandish, simply because an employee claimed a religious exemption." *Id*. at *19. The court rejected this argument as unsupported by any facts and held that "the mere possibility that there would be an unfillable number of additional requests for similar accommodations by others cannot constitute undue hardship." *Id*. The court noted that in determining whether an undue hardship exists, the court will look at the facts of each case and will not presume that a policy exemption allowed in one case would require Red Robin to accommodate requests for religious accommodations in other cases. *Id*. at 19.

While speculation that certain accommodations of religious beliefs may cause an undue burden on an employer is not permitted, there are legitimate circumstances that do give rise to exceptions from the duty to accommodate. For example, when accommodating a religious belief could result in a violation of law, the accommodation will be viewed as an undue burden. In *Tagore*,[10] a member of the Sikh religion requested to wear a ceremonial sword, a kirpan, to his job at the Internal Revenue Service. The kirpan is banned from federal buildings because it is considered a "dangerous weapon" that federal law bars from federal buildings. The court reasoned that if the IRS were to accommodate its employee's religious beliefs by allowing him to carry the sword in its offices, this would place the revenue agency in the position of violating federal law. To do so would constitute an undue hardship because "an employer need not accommodate an employee's religious practice by violating the laws."[11]

Likewise, an employer who can establish that accommodating a religious belief of an employee will have an adverse impact on other employees will be permitted to deny the accommodation. In *Bhatia v. Chevron USA, Inc*., 734 F2d 1382 (9th Cir. 1984), an employee who was of the Sikh faith requested an exception from a policy requiring him to wear a respirator while exposed to toxic gases. As a Sikh, Bhatia was forbidden by his religion from cutting or shaving any of his body hair. Therefore, a tight-fitting respirator would not properly seal and adequately

Calculating Holiday Pay By Caroline Stakim

The right to paid annual leave has been a key benefit of European Union workers for many years. However, what exactly should be paid during a period of leave has recently been the subject of much debate.

The widely accepted practice of paying basic salary only with respect to holidays may need to be reconsidered. Earlier this year, the European Court of Justice (ECJ) held that commissions that form an intrinsic part of a worker's remuneration must be taken into account when calculating holiday pay (*see Employment Law Commentary*, May 2014). The reasoning was that if they were not included, workers would be discouraged from taking holiday due to the resulting financial detriment and this would go against the Directive's purpose of protecting their health and safety.

But that's not the end of the story. In the UK this month, the Employment Appeal Tribunal (EAT) has given further guidance. It ruled that payments for overtime that the employer was obliged to offer and that the employee was obliged to work should also be included.

For employers who regularly pay out commissions, bonuses, and overtime payments, these decisions represent a significant change. But before panic ensues, the EAT's decision went someway to limit the potential impact in the UK.

First, it ruled that overtime payments need only be taken into account with respect to the four weeks' paid holiday that is granted under the Working Time Directive (Directive), and not with respect to the additional 1.6 weeks' paid holiday granted under the UK's Working Time Regulations

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1998. Although it remains unclear how past holidays should be categorized, it would seem most sensible for Directive leave to be deemed to be taken first.

Second, the EAT held that workers can claim past underpayments of holiday pay only as an unlawful deduction from wages. This type of claim must generally be brought within three months of the "deduction" being paid or the last in a series of deductions being paid. In practice, this means that if a period of more than three months has passed since the last period of "Directive" holiday, the claim will be out of time. This is likely to seriously limit the potential value of claims that had been anticipated.

So what should employers do now? Employers could review holiday pay policies and practices to comply with the decisions. However, with leave to appeal to the Court of Appeal being granted, it seems like this is not yet a settled matter. Another option would be to wait for the Court of Appeal's decision for more certainty. For now, only one thing seems clear—calculating holiday pay is no simple task.

Case reported: Bear Scotland Ltd v Fulton and another UKEATS/0047/13, Hertel (UK) Ltd v Woods and others UKEAT/0160/14, and Amec Group Ltd v Law and others UKEAT/0161/14

protect him from harm. Among other reasons for its determination, the Ninth Circuit held that if the employee were excused from wearing a gasmask so that he could honor his religious beliefs, the result would be that his co-workers would be "required to assume his share of potentially hazardous work." *Id*. 734 F2d at 1384. The Ninth Circuit said that an employer can establish undue hardship by not only showing that an accommodation would have a cost that is more than *de minimis* but also by showing that the accommodation has an impact on co-workers. The court concluded "Title VII does not require [the employer] to go so far" as to shift risk or burden to plaintiff's co-workers. *Id*.

Other cases have also concluded that safety concerns are legitimate reasons for denying religious accommodation.[12]

Conclusion

As noted, employers must accommodate employees' religious beliefs, unless such accommodations place an undue hardship on the employer. And the law is clear that undue hardship is more than just a *de minimis* burden. These cases are decided on a case-by-case basis and it is difficult to describe bright lines to identify burdens that are undue and those that are not. However, the courts handling these issues frequently rule against employers, not because they do not present an argument of undue burden, but rather because they fail to provide facts to support their conclusion.

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To view prior issues of the ELC, click here.

1 42 U.S.C. §2000e et seq.
2 42 U.S.C. §2000e(j).
3 *Balint v. Carson City*, 180 F3d 1047, 1055 (9th Cir. 1999).
4 An employer's burden to establish "undue hardship" is a substantially lower standard for employers to satisfy than the "undue hardship" defense under the Americans with Disabilities Act (ADA), which is defined instead as "significant difficulty or expense." 42 U.S.C. §12111(10)(A).
5 See, e.g., *Tagore v. United States of America*, 5 F3d 324, 330 (5th Cir. 2013) ("Title VII does not require religious accommodations that impose more than 'de minimis' cost on employers".
6 *Id.* at 962.
7 The Tenth Circuit reversed the district court's grant of summary judgment to the EEOC in this case, but not on the issue of whether non-speculative evidence had been produced by A&F. *EEOC v Abercrombie & Fitch Stores*, 731 F3d 1106 (10th Cir.2013). Instead, the Circuit held that the EEOC had failed to show that the applicant had ever informed A&F that she adheres to a particular practice for religious reasons (wearing a hijab) and that she needed an accommodation for that practice. The decision of the Circuit is now before the Supreme Court.
8 390 F3d at 126 (1st Cir. 2004).
9 2005 U.S. Dist. LEXIS 36219, at *19 (WD Wash. August 29, 2005).
10 735 F3d 324 (5th Cir. 2013).
11 *Id.*
12 See *EEOC v. The GEO Group*, 616 F3d 265 (3rd Cir. 2010) (religious garb could compromise safety because it could be used to smuggle contraband or conceal identities).