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In recent years, the EEOC and plaintiffs' attorneys have filed numerous lawsuits on behalf of Muslim women claiming discrimination against their employers for failing to accommodate their requests to wear a *hijab,* or headscarf, at work. Three recent decisions provide some insight on the attitude of juries and judges towards these types of claims.

Accommodating a Muslim Woman's Right to Wear a Headscarf at Work: Recent Court Decisions

By Dudley Rochelle Carter, Gina M. Cook, and Sana S. Ayubi

In recent years, following the events of September 11, 2001, the EEOC and private attorneys have filed lawsuits on behalf of Muslim women who claim they were discriminated against by their employers for wearing a *hijab*, or headscarf, to work. Three recent decisions provide insight on the attitude of juries and judges towards these claims.

- A Phoenix, Arizona jury awarded a Muslim woman more than $287,000 in back pay and compensatory and punitive damages after her former employer, Alamo Rent-A-Car, refused to allow her to wear a headscarf while at work.
- In contrast to this decision, on August 1, 2007, an Atlanta, Georgia jury found in favor of a Muslim woman's employer after it refused her request to wear a full headpiece leaving only a slit for her eyes, and advised her that the company was also willing to consider what other reasonable accommodations could be made to the dress code policy.
- A federal district judge ruled that the City of Philadelphia had demonstrated as a matter of law that it would suffer undue hardship if required to accommodate a police officer wearing a khimar (a form of *hijab* extending to the waist) on duty.

This article summarizes the facts leading up to these and other lawsuits, as well as the reasoning behind the decisions. It also offers recommendations to employers to ensure compliance with federal religious antidiscrimination laws.

An Employer's Duty to Accommodate an Employee's Religious Practices

Under Title VII, employers are not permitted to discharge an employee because of religion. *Religion* includes a sincerely held belief as well as all aspects of observance and practice of that belief. Further, an employer is required to accommodate the religious requirements of employees, unless a reasonable accommodation of a belief, observance or practice would cause undue hardship on the employer's business or on other employees.

The ABC's of *Hijab*: Employer's Awareness Brings Clarity

Amongst American Muslims there are numerous interpretations surrounding the practice of *hijab*. In general, the wearing of *hijab* is a visible expression of faith, piety, or modesty. Muslim girls or women who believe that wearing a *hijab* is an important part of religious identity may wear it upon coming of age, or wait until they are older, married, or have attained a certain level of religious piety. Many Muslims believe it is mandatory in Islam for women to cover their hair; for them it is forbidden to remove the *hijab*. They will feel threatened or violated if someone asks them to do so. On the other hand, many Muslim women in the U.S. do not feel that the *hijab* is required and choose not to wear it. These variations in practice exist with much internal debate over whether the Quran (the holy book of Islam) explicitly commands women to cover their hair at all times, merely recommends that they do, or contains only a circumstantial command pertaining to certain women during certain times and places.

EEOC v. Alamo Rent-A-Car, LLC[1]

In 1998, Bilan Nur, a Muslim woman and Somali refugee, immigrated to the United States. Alamo hired Ms. Nur as a rental agent at one of its rental agencies in Phoenix, Arizona in November 1999. As a rental agent, Ms. Nur was primarily responsible for renting cars to customers, accepting payment, and interacting with customers and potential customers in person and via telephone.

While Ms. Nur was employed by Alamo, the company had in effect a "Dress Smart Policy" that applied to its employees. This policy was aimed at ensuring Alamo employees presented an appropriate, pleasing and professional manner of dress and grooming to customers. In support of this goal, the dress code policy expressly prohibited employees from wearing certain articles or types of clothing and accessories. For example, the dress code policy forbid the wearing of more than one earring, open toed shoes, and half-grown beards.

The Alamo "Dress Smart Policy" did not specifically prohibit the wearing of head coverings. However, the policy contained a broad clause that forbade the wearing of any "garment or item of outer clothing not specifically mentioned in this policy." Ms. Nur claimed that in November 1999 and November 2000, her employer permitted her to wear a *hijab*, or headscarf, during the holy month of Ramadan.

The situation changed after the September 11, 2001 terrorist attacks. In November 2001, Ms. Nur requested an accommodation to wear a heard scarf during Ramadan. Ms. Nur was told that she could wear a head covering in the back of the office but not at the front counter where she could be interacting with customers.

During the month of Ramadan, Ms. Nur came to work two days in a row wearing a *hijab* and refused to remove it while at the front counter. On both occasions, Ms. Nur was counseled for violating the company's dress code policy and was sent home from work. When Ms. Nur returned to work after being sent home a second time, she again refused to remove her headscarf. Ms. Nur was suspended for three days and warned that she might be terminated from her employment.

Indeed, Ms. Nur's employment was terminated on December 6, 2001, for violating the company's dress code policy. Ms. Nur was also listed as ineligible for re-hire on her termination form.

Ms. Nur then brought her case to the EEOC and claimed that she had been discriminated against on the basis of her religion. The EEOC agreed, and sued Alamo-Rent-A-Car on her behalf. In May 2006, U.S. District Judge Roslyn Silver granted summary judgment in favor of the EEOC regarding liability on the religious discrimination claim. In June 2007, a federal jury then determined damages.

The Legal Standard for Proving Religious Discrimination

In this case, the EEOC was required to present the following factors in order to prove a *prima facie* case of discrimination:

1. that Ms. Nur had a *bona fide* religious belief that conflicted with one of her employment duties;
2. Ms. Nur informed Alamo of her belief and the conflict; and
3. Alamo threatened her or subjected her to discriminatory treatment (including discharge) because of her inability to perform the job requirements.

Alamo was then given a chance to counteract Ms. Nur's evidence if it could show one of the following:

1. Alamo initiated in good faith an effort to reasonably accommodate Ms. Nur's religious practice of wearing a headscarf during Ramadan; or
2. Alamo could not reasonably accommodate Ms. Nur's religious practice because it would place an undue hardship on its business.

Application of the Legal Standard to Ms. Nur's Case

In support of her case, Ms. Nur claimed that she was a devout Muslim and that, as a female follower of the religion, she was required to cover her head during the religious holiday month of Ramadan. Alamo disputed her religious beliefs by claiming Ms. Nur did not consistently keep her head covered during Ramadan. Alamo cited incidents in November 2000 where Alamo management had asked Ms. Nur to remove her head covering and she complied without any religious objection.

The court, however, believed that Ms. Nur's strong commitment to wearing the head scarf in November 2001, in spite of the verbalized threats to her job security, was enough evidence to demonstrate Ms. Nur's bona fide religious beliefs. Further, the legal standard dictates that the time of examination of the sincerity of an employee's religious belief is at the time the conflict with the employer arose – here, November 2001 and not any earlier time. Consequently, the court believed Ms. Nur succeeded in proving a *prima facie* case of religious discrimination.

Because Ms. Nur was successful in proving her *prima facie* case, Alamo was given the chance to prove its side of the story. The company argued that it made an attempt to reasonably accommodate Ms. Nur's request to wear a headscarf. ***However, the company failed to demonstrate what steps it took to attempt to accommodate her, or any proof that it entered into the bilateral communication necessary with Ms. Nur to come to a reasonable accommodation.*** The only accommodation that was offered to Ms. Nur (removing her headscarf at the front counter) required Ms. Nur to go against her religious belief by removing her headscarf. Therefore, the accommodation Alamo offered was not reasonable because it failed to accommodate Ms. Nur's religious conflict.

Alamo also failed to show that providing Ms. Nur with a reasonable accommodation would have caused an undue hardship to its business. Alamo suggested Ms. Nur's head scarf would have caused a deviation from the image the company wished to promote to customers;

[1] *EEOC v. Alamo Rent-A-Car LLC*, No. CIV 02-01908-PHX-ROS (D. Ariz. June 2007).

however, Alamo provided no evidence to show what economic impact this "deviation from image" would cost the company. Speculation was not a justifiable basis on which to deny Ms. Nur a reasonable accommodation.

Effect of the Jury's Award

In June 2007, in a three-day trial a Phoenix jury awarded Ms. Nur $287,640: $21,640 in back wages, $16,000 in compensatory damages and $250,000 in punitive damages. The EEOC claims this jury verdict sends a message to employers that no employee should have to sacrifice their religious beliefs for a job, and that even after September 11th, "Americans still believe in justice for all people."

It is important to note that this case is the first among numerous post-September 11 "Muslim Backlash" cases involving religious discrimination at the workplace to be decided by a jury. In the years following 2001, the EEOC saw an increase in the total number of cases filed based on religion or national origin discrimination. EEOC figures report that the number of religion-based charges rose from 2,127 in fiscal year 2001 to 2,541 in fiscal year 2006.

The EEOC continues to reach out to victims of post-September 11 backlash with a website devoted to frequently asked questions and answers about the workplace rights of Muslims, Arabs, South Asians and Sikhs under U.S. antidiscrimination laws.

Recent Cases Where Employers Were Not Held Liable

Employers should also pay particular attention to the following recent *hijab* cases: *EEOC v. Regency Health Associates*,[2] and *Webb v. City of Philadelphia*.[3] These decisions favor employers and illustrate how employers' behavior and the facts and circumstances of each case can change the outcome.

EEOC v. Regency Health Associates

In 2004, Hani Mohamed was hired by Regency Health Associates ("Regency"), a pediatric clinic, as a medical assistant. Prior to her hire, Ms. Mohamed regularly brought her children to the clinic but had never worn a *hijab*. At the time Ms. Mohamed started working, she acknowledged receipt of the strict dress code policy that did not address wearing headscarves. It was only after she started working at Regency that she started wearing a *hijab* to work. When her employer asked about her wearing a headscarf, Ms. Mohamed explained that she was required by her Islamic faith to wear the *hijab*. She also indicated that one day she wanted to wear a full headpiece, with only her eyes showing.

Regency explained to Ms. Mohamed that given the nature of the pediatric practice and reasonable desire of child patients and parents to see the face of the medical staff providers, they would be unable to approve wearing of the full headpiece. Furthermore, they notified Ms. Mohamed that they would consider what reasonable accommodations could be made to the dress code policy with respect to wearing a headscarf based on her religious beliefs. Prior to Regency's reasonable accommodation decision, Ms. Mohamed resigned her position.

In 2005, Ms. Mohamed filed a lawsuit against Regency alleging that Regency told her if she continued wearing the *hijab* she would no longer have a job with the company, and subsequently was discharged for adhering to her religious beliefs. Regency argued that Ms. Mohammed did not have a "bona fide religious belief" that required accommodation based on prior behavior and dressing patterns and that Ms. Mohamed did not give defendant sufficient time to consider her accommodation request before she resigned from her position nor provide enough information about her request for reasonable accommodation.

On August 1, 2007, the jury found in favor of the employer because they felt that the EEOC failed to prove by a preponderance of the evidence that, after informing defendant of her need for religious accommodation, Hani Mohamed was discharged because of her *bona fide* religious belief that she must wear a headscarf or *hijab* at work.

Webb v. City of Philadelphia

In 2003, Kimberlie Webb, a practicing Muslim and police officer since 1995, requested permission from her employer, the Philadelphia Police Department, to wear a *khimar* (form of *hijab* extending to the waist) along with her uniform. The police department denied her request as a violation of the police department's uniform regulation – Philadelphia Department Directive 78. Directive 78 specifically bars police officers in uniform from wearing religious dress or symbols under all circumstances and makes no medical or secular exceptions.

Ms. Webb then filed a complaint for religious discrimination with the EEOC. After she filed her complaint, Ms. Webb appeared to work wearing a *khimar* on three separate occasions and was sent home each time. As a result, the Commissioner, who himself was a Muslim, suspended her for 13 days. Ms. Webb then amended her charge in 2004, in which she added an allegation of retaliation. After receiving her right-to-sue letter, Ms. Webb filed her complaint in October 2005 against the City of Philadelphia.

The City admitted it did not offer the plaintiff a reasonable accommodation, arguing that it would suffer an undue hardship if it were required to accommodate her. In June 2007, U.S. District Judge Harvey Bartle III agreed with the City and decided against Ms. Webb. Judge Bartle ruled that the "City of Philadelphia has established compelling non-discriminatory reasons for Directive 78 and has demonstrated as a matter of law that it would suffer an undue hardship if required to accommodate the wearing of a *khimar* by the plaintiff while on duty as a police officer," and granted summary judgment to the City on the plaintiff's religious discrimination and retaliation claims. The court discussed that the Directive's standards were designed to maintain "religious neutrality" and promoted "the need for uniformity, but also enhance[d] cohesiveness, cooperation, and the esprit de corps of the police force."

Practical Considerations for Employers: Engaging in the Interactive Religious Accommodation Process

When faced with a request for a religious accommodation, such as wearing a *hijab* or any type of religious dress, an employer should engage the requesting employee in an open and

[2] *EEOC v. Regency Health Associates*, No.1:05-CV-2519-CAP-CCH (N.D. Ga. Aug. 2, 2007).
[3] *Webb v. City of Philadelphia*, 2007 U.S. Dist. LEXIS 46872 (E.D. Pa., June 27, 2007).

respectful dialogue about the need for religious accommodation and encourage the employee to be specific about what accommodation is requested. The employer does not have to become an expert on the employee's religion; indeed, to delve too deeply into all the aspects of the employee's religion may be intrusive. What the employer needs to know is simply how the employee's belief or practice can be accommodated, if it can be accommodated. To gain this knowledge, the employer must be able to understand how the job requirements affect religious requirements. This requires an open dialogue with the employee and cooperation to come to an understanding of: (1) the employee's religious needs; and (2) whether or not the employer can accommodate those needs without creating undue hardship to the business or the other employees. If, after exploring these issues, the employer concludes it cannot provide the particular accommodation that is requested, then both parties should explore alternatives. If no workable alternative surfaces, then the employer is free to deny the accommodation based on the conclusion that it would result in undue hardship.

Although the legal standard of "undue hardship" for religious accomodation is not as high as that for accommodations under the ADA, giving the employer ample room for denial in many cases, in practice many employers go above and beyond the standard to accommodate employees. However, if the same accommodation is subsequently sought by more and more employees, it may become increasingly difficult to furnish, so employers should take that into account if they choose to go beyond the legal standard of undue hardship. Employers should also be aware that an employee's religious needs or requirements may change over time, in which case, the employer may have to reengage in an open and active dialogue with the employee and reevaluate the employee's religious accommodation request.

An employer should document what steps it takes to attempt to accommodate an employee, or any proof that it has entered into dialogue with the employee to come to a reasonable accommodation. Forms are helpful at several stages: for employees to put in writing the requested accommodation(s), to acknowledge that they received a response to their request, and to document accommodation(s) considered, offered or provided.

Employers should remember that the requesting employee is entitled to a reasonable accommodation – not necessarily the desired accommodation, but one that will allow the employee to comply with religious beliefs within the confines of job requirements. Above all, if an employer is unable to make a reasonable accommodation, the company must be able to show that providing the employee with a reasonable accommodation would have caused an undue hardship to the employer's business or to coworkers. For example, an employer is not required to accommodate an employee's religious clothing, if it can demonstrate a significant workplace safety risk. Likewise, an employer may not be required to provide a reasonable accommodation if the accommodation would shift work disproportionately onto other employees, potentially causing an actual imposition on coworkers or disruption of the work routine. Finally, as the jury verdict for Ms. Nur indicates, speculation about customer disapproval alone is not a justifiable basis upon which to deny an employee a reasonable accommodation.

For additional policies, forms, tips, aids for managers and human resources professionals, see Chapter 6 of Littler's THE NATIONAL EMPLOYER® available at http://www.littler.com/compliancetools/index.cfm?event=detail&childViewID=219&section=Complaince%20Tools&subject=The%2520Employer%26reg%3B.

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