

June 18, 2014



Alejandro Valle,
Esq.

Questions
on this topic?
CLICK HERE

Accommodating Employees' Religious Practices and Beliefs, *Revisited*: EEOC Issues New Guidelines Regarding Religious Garb and Grooming

By Alejandro Valle

We have [previously reported](#) on the various nuances of the federal anti-religious discrimination provision in Title VII of the Civil Rights Act of 1964.

As we have explained previously, Title VII generally obligates employers with at least 15 employees to "reasonably accommodate" their employees' "sincerely held" religious beliefs and observance (or lack thereof) unless doing so would impose an "undue hardship" on the employer. Title VII does not define what constitutes a "reasonable accommodation" nor does it define "undue hardship." An employer therefore must analyze each request for a religious accommodation on a case-by-case basis. (Title VII also prohibits retaliation against employees who exercise statutorily protected rights - such as the right to make a complaint - based upon suspected religious discrimination and prohibits discrimination or harassment based upon an employee's sincerely held religious beliefs.)

Examples of reasonable accommodations could include exempting employees from customary dress or grooming

requirements. Accordingly, the Equal Employment Opportunity Commission (EEOC), which monitors enforcement of Title VII, [issued a set of guidelines](#) this past March designed to clarify the EEOC's perspective on what Title VII requires with respect to garb or dress-related religious discrimination issues in the workplace.

At least some of the commentary from the EEOC on this issue appears to be in partial response to the Tenth Circuit U.S. Court of Appeals case, [EEOC v. Abercrombie & Fitch Stores, Inc.](#), we [reported about in October of 2013](#). The *Abercrombie* case addressed a situation in which a job applicant wore a black hijab, a type of religious headscarf, which conflicted with the company's published "Look Policy." The interviewer assumed that the hijab was worn by the applicant for religious reasons, and despite initially giving her an interview score that would have qualified her for hire, eventually reduced her score such that she was no longer eligible for hire by the company. The EEOC, which filed a lawsuit on the applicant's behalf, was awarded summary judgment. The appellate court overturned this decision, explaining that the wearing of a hijab, while typically associated with a religious practice, did not necessarily mean that it was done by the applicant for religious reasons. There had been no discussion at the interview whatsoever regarding the hijab. The court held that the interviewer's mere assumption regarding the religious nature of the item was not enough for the applicant to establish a *prima facie* case of religious discrimination.

In contrast to the Tenth Circuit's *Abercrombie* decision, the EEOC's guidance published this year explains that, in the EEOC's view, in some instances, even without a specific request for accommodation from an individual, it "will be obvious" that a particular practice in question is religious such that an accommodation is needed if there is a conflict with a work policy (Guidelines, ¶ 7). The example provided by the EEOC is that of an applicant for a rental car sales position who is an observant Sikh and who wears a chunni (religious headscarf) to her interview. The interviewer does not advise the applicant that there is a dress code prohibiting head coverings, and the applicant does not ask whether wearing the chunni will be permitted. The interviewer/hiring manager believes that the headscarf is a religious garment and refuses to hire the applicant based on the assumption that it will be worn at work. The EEOC states that this failure-to-hire violates Title VII even though the applicant did not make a request for an accommodation during her interview, due to the fact that the employer merely believed the practice was religious in nature and would need accommodation (Guidelines, Example 7).

Other notable points from the EEOC's Religious Garb and Grooming in the Workplace guidance document include the following:

- Statistically, during fiscal year 1997, there were 1,709 religious discrimination charges filed with the EEOC. In fiscal year 2013, more than double that amount was filed - 3,721.
- Some states or localities will have protections that are parallel to or broader than the federal Title VII's protections. (Guidelines, ¶ 1)
- Religious beliefs can include lesser known or established religious belief systems, such as Wicca, or non-religious belief systems, such as atheism. This latter point means that non-religious employees cannot be forced to wear, for example, a cross or other religious symbol. (Guidelines, ¶ 2)
- The EEOC explains that Title VII prohibits job segregation, defined as assigning an employee to another position (such as a non-customer service position) because of his or her religious garb. (Guidelines, ¶ 1). Customer preference, and even "[c]o-workers' disgruntlement or jealousy," are not considered sufficient undue hardship to prevent a religious accommodation. (Guidelines, ¶ 6)
- The applicable standard to determine whether an undue hardship exists in the religion context is "more than *de minimis*" cost, and the burden is on the employer to establish an undue hardship (Guidelines, ¶ 12; Guidelines, Examples 17 & 19)
- Employers should not assume that religious practices professed by their employees are not sincerely-held, even if the beliefs seem to appear irregularly or arise suddenly after a long time without such practices appearing. (Guidelines, ¶ 4; Guidelines, Examples 1 & 2)
- If other employees seek the same exception provided to an employee for religious reasons, but for non-religious reasons, such as mere personal preference, the employer may deny the non-religious request, even though it had granted the religious accommodation to another employee. (Guidelines, ¶ 6)
- The EEOC believes that in "most" instances there will not be an undue hardship, and employers will be required to make exceptions to their usual rules regarding dress and grooming practices.

Many of the examples cited by the EEOC arise from cases that did not reach final adjudication on the merits, but instead were settled prior to findings by a court. Accordingly, the guidelines tend to reflect EEOC theories and not actual case law interpreting and applying Title VII. Further, the EEOC's guidance is just that - guidance. It is not the law. Nevertheless, it is helpful to know how the EEOC interprets the law in order to help predict where and how the EEOC will direct its resources toward enforcement against covered employers.

As we have advised previously, there are no bright line rules and no easy answers. Employers are best served by managers and supervisors who, when faced with a request for a religious accommodation, or with issues raising possible religious accommodation scenarios, are trained to individually assess each request and avoid preconceived notions of what qualifies as a religious belief or practice, consider other reasonable and available accommodations if a requested accommodation would pose an undue hardship, and consult their HR professional and appropriate legal specialists when faced with a difficult or unique situation. Employers might also benefit from developing internal procedures for processing religious accommodation requests.

The 60-Second Memo® is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.



[Forward this issue](#)

Copyright 2014 Gonzalez Saggio & Harlan LLP. All rights reserved.

Arizona | California | Florida | Georgia | Illinois | Indiana | Iowa | Massachusetts
New Jersey | New York | Ohio | Tennessee | Washington, D.C. | Wisconsin

www.gshllp.com