

Member's Quarterly

Summer 2016 Edition

Feature

The Duty to Accommodate Religious Attire in the Workplace

It's not just about the dress code

Religious attire has been a topic of recent controversy and debate. Religious attire and grooming observances tend to come into conflict with workplace requirements in one of two areas: dress codes and safety policies.

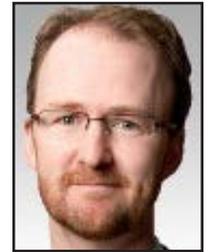
Dress Codes

The case law demonstrates that while employers are entitled to expect employees to wear religious attire that is consistent with employer dress codes, employers must be cautious and sensitive in challenging employees as to their religious attire. If there is a genuine conflict between what the employee must wear as a religious observance and the employer's dress code, then further accommodation will be necessary.

In *Saadi v Audmax*, the employer argued that its "business attire" dress code amounted to a *bona fide* occupational requirement because it was in the business of assisting new immigrants in finding employment and its own employees therefore had to lead by example. The policy required "business attire" and listed things that were appropriate, as well as things that were forbidden (such as jeans and running shoes). Based on this policy, the employer took issue with a parts of an employee's attire which it thought were unprofessional. This included her choice of clothing, which the employer described as a "tight short skirt and leggings", and her chosen style of head covering, which the employer described as a "cap."

The employee, an observant Muslim woman, stated that she adhered to the principle of modest dress and wore a hijab to cover her hair. She filed a complaint with the Ontario Human Rights Commission. The human rights adjudicator found the employer had discriminated against the complainant by attempting to dictate what style of hijab and other religiously-conforming attire it would accommodate in the workplace, without relying on any apparent basis other than a manager's personal preference. However, the Ontario Superior Court set aside a number of the adjudicator's findings of discrimination as being unreasonable and flawed. The Court stressed that while the employer's dress code was to some extent subjective and a reflection of personal taste, that did not make it discriminatory.

The Court went on to explain that the adjudicator should have asked himself whether the dress code, or the employer's enforcement or interpretation of it, conflicted with what the complainant was required to wear as part of her religion. Further, the Court found that the adjudicator missed the key logical step of considering whether it was possible for the complainant to comply with the dress code without compromising her religious requirements. In considering these questions, the Court noted that the evidence revealed no contradiction between dressing modestly and dressing in a professional business manner and revealed nothing about the complainant's religion that would require her to wear the particular form of clothing and hijab to which her employer objected. Ultimately, the Court concluded that her religious rights were not affected so long as it was possible for her to wear a religiously acceptable form of hijab that was fully consistent with the dress code.



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Health and Safety Policies

As with dress codes, health and safety standards must not be used to treat individuals adversely based on their religious practices unless accommodations cannot be made without incurring undue hardship.

An early example is *Bhinder v CN*, which involved the conflict between safety and religious interests when a Sikh employee refused to wear a hard hat because it would require him to remove his turban. The Supreme Court of Canada found the hard hat requirement was a *bona fide* occupational requirement that did not violate the *Canadian Human Rights Act*. However, the Supreme Court later questioned whether it had correctly decided *Bhinder* because there was no evidence that Mr. Bhinder's failure to wear a hard hat posed any threat to the safety of his co-workers or the public. It only increased the risk to himself.

In more recent years, adjudicators have also assessed safety risks and distinguished between risks impacting the employee alone and impacting other employees or the public.

The seriousness of an employer's safety concerns must be balanced against any countervailing employee interests.

In order to establish that permitting an exception to a particular safety standard would impose undue hardship, employers must prove that the rule addresses a real safety risk of some significance and there is no other reasonable means of managing the risk.

Best Practices

Employers should actively explore possibilities to accommodate religious attire in the workplace. In doing so, it is prudent for employers to assess:

1. the nature and importance of the workplace rule in question;
2. the sincerity of the employee's belief in the religious practice in question, the nature of the conflict, and possible solutions;
3. the consequences of allowing exceptions to the workplace rule and possible alternatives;
4. the seriousness of the risk posed to the employee, his or her coworkers, and the public, as well as the effectiveness of any alternatives;
5. possible moves into other positions where adherence to the same workplace standard is not necessary.

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