

# EMPLOYMENT LAW

## COMMENTARY

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## RELIGIOUS DISCRIMINATION AND MUSLIM EMPLOYEES

By [Caroline Stakim](#) and [Ian Johnston](#)

Religious discrimination charges are on the rise. The U.S. Equal Employment Opportunity Commission (EEOC) has seen a 223% increase from 1997 to 2012.<sup>1</sup> And over in the UK, the number of religious discrimination claims has more than doubled in just six years.

This article provides a comparison of religious discrimination law in the United States and the United Kingdom, highlighting the similarities and differences between the obligations of employers on either side of the pond. Religious discrimination laws in both countries cover a wide range of religions and religious beliefs and, in the UK, philosophical beliefs. In this article, we have focused in particular, on Muslim practices and how they may conflict with workplace practices or policies. However, the principles discussed would apply in respect of any other religion or belief in the same way.

### The United States

Employee religious practices are protected by Title VII of the Civil Rights Act of 1964.<sup>2</sup> Title VII prohibits religious discrimination and also requires reasonable accommodation of religious practices that may interfere with employment, unless that accommodation would impose an undue hardship for the employer.<sup>3</sup>

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Title VII religious accommodation claims have a two-part framework. First, a plaintiff must establish a prima facie case, which shows the existence of the conflict with the employer. If the plaintiff can establish a prima facie case, then the burden shifts to the employer to show that a requested accommodation would impose an undue hardship.<sup>4</sup>

To establish a prima facie case, a plaintiff must prove: (1) she holds a sincere religious belief that conflicts with a job requirement; (2) that she informed her employer of the conflict; and (3) that she was disciplined for failing to comply with the conflicting requirement.<sup>5</sup>

Generally, Muslim plaintiffs will have little difficulty establishing a prima facie case, because Muslim practices are well established. The 10th Circuit, however, recently held that the second element was not established where a prospective employee did not *actively inform* her employer that there was a religious conflict between wearing her hijab and a no-headgear policy.<sup>6</sup> The 10th Circuit's decision has created a split: most circuits only require the employer's awareness that the religious practice would create a job conflict.<sup>7</sup> The EEOC is currently seeking an en banc rehearing of the 10th Circuit's ruling.<sup>8</sup>

If the plaintiff makes out a prima facie case, "[t]he burden then shifts to the employer to: (1) conclusively rebut one or more elements of the ... prima facie case; (2) show that it offered a reasonable accommodation; or (3) show that it was unable reasonably to accommodate the employee's religious needs without undue hardship."<sup>9</sup>

An accommodation would cause undue hardship if it would require the employer "to bear more than a de minimis cost."<sup>10</sup> What qualifies as de minimis is a broad inquiry, which includes burdens placed on co-workers, safety issues, and other potentially non-quantifiable costs.<sup>11</sup>

## The United Kingdom

In the UK, both religion and belief are protected under the Equality Act 2010 (the "Act"). This means that employees are protected against discrimination on the grounds of religion or belief in relation to recruitment, the terms and conditions of employment offered to them, their treatment during employment and in respect of dismissal. "Religion" for these purposes is given the broad definition of any religion or lack of religion. Similarly, "belief" covers any religious or philosophical belief (or lack thereof). Religious belief goes beyond beliefs about and adherence to a religion and may vary between people of the same faith. There is no question that the Islamic religion and Islamic beliefs fall within the religions and beliefs protected under the Act.

An employee may suffer discrimination in two principal ways: either directly or indirectly. A claim of direct discrimination arises where an employer treats an employee less favorably than they would treat another person on the grounds of religion or belief. The employer cannot justify direct religious discrimination (other than by relying on one of the statutory exceptions, for example, that there is an occupational requirement for an employee to be of a particular religion or belief or that they are exercising the positive action provisions of the Act in order to address an existing inequality).

A claim of indirect discrimination, on the other hand, arises where a group of people with a shared religion or belief are disadvantaged by a particular provision, criterion or practice of the employer (a "PCP"), for example, a dress code policy. Employers will have a defense to an indirect discrimination claim where they can show that enforcing that PCP is a proportionate means of achieving a legitimate aim. This is similar to the concept of reasonable accommodation in the United States and will be the focus of our article. What amounts to a legitimate aim and whether an employer's PCP is proportionate has been the subject of much case law involving Muslim employees, and these are discussed further below.

To help employers understand their rights and obligations under the Act, the Equality and Human Rights Commission has published a Statutory Code of Practice (the "EHRC Code") and non-statutory guidance. The EHRC Code does not impose legal obligations and it is not an authoritative statement of the law. However, tribunals and courts must take relevant sections of the EHRC Code into account when deciding discrimination claims brought by employees.

## Guidance from the Courts on Muslim Practices

### (1) Eid

Eid is a religious holiday. Celebrating Eid requires that Muslims take one day off twice each year. Eid will take place on July 28 and October 4th in 2014, although this shifts to take place about 11 days earlier each year.<sup>12</sup>

In the US, employers should allow employees to take the day off, unless that would create more than a de minimis cost to the employer. One company, Tyson Foods, accommodated its Muslim workers by exchanging Labor Day for Eid, so that its Muslim workers could take Eid off instead.<sup>13</sup> Muslims who worked on Labor Day were still paid holiday pay.

In the UK, employees are entitled to at least 28 days' paid holiday per year, taken at dates agreed between the employer and the employee. Employees are not

entitled to take or demand any particular days as holiday on the basis that it is a religious holiday or festival, such as Eid. Nor are they entitled to additional time off for this reason. However, if a Muslim employee requests to use their annual holiday entitlement for the purposes of celebrating Eid, the EHRC Code suggests that the employer accommodates that request where it is reasonable for the employee to be absent during that period. Employers who do not risk claims of direct and indirect discrimination. As mentioned above, to defend the indirect discrimination claim, the employer needs to (a) have a legitimate aim; (b) be able to show that their refusal to grant the holiday is a proportionate means of achieving that aim. For example, it may be able to argue that ensuring the smooth operation of the business is a legitimate aim which would be impacted by the employee taking holiday to celebrate Eid. However, it would also need to go on to show that there was no other, more proportionate, way in which that aim could be achieved, for example, by arranging for other employees to cover the work.

## (2) Ramadan

Ramadan also shifts to be earlier each year. Observing Ramadan means refraining from eating or drinking during daylight hours. Muslims employees may need a meal break at sundown, because they may have skipped their normal meal times. Furthermore, the sunset prayer break becomes more significant, as it signifies breaking the fast. Therefore, employees may request extra time to pray and eat at sunset.

In *E.E.O.C. v. JBS USA, LLC*, employees sought to move their second-shift dinner break to sunset so that they could break their fast and pray during Ramadan.<sup>14</sup> The court held that it would be more than a de minimis cost to accommodate the break, in particular because the meat-packing plant assembly line had to be running at all times. Stopping the assembly line would incur large costs to the plant (\$18,180 per break), as well as cause issues regarding food safety and burdens to co-workers.

The EEOC recently brought a religious discrimination case against appliance manufacturer Electrolux regarding a request from the Muslim employees to take a longer break at sundown during Ramadan. Electrolux settled by agreeing to allow a sundown meal break.<sup>15</sup>

Although we are not aware of any cases in the UK regarding alleged discrimination against a Muslim employee observing Ramadan, the EHRC Code gives a specific example of what an employer should do in respect of religions that require extended periods of fasting. Unsurprisingly, employers are encouraged to support their employees through a fasting period.

However, this is to be balanced against placing unduly burdensome duties or obligations on other employees as a result, which itself could amount to less favorable treatment. In the example given, a Muslim teacher is fasting for Ramadan. After consulting other teachers, the head agrees to amend the lunchtime rota so that the Muslim teacher does not have to supervise the lunch hall during the fasting period. This example highlights a key practical point when dealing with conflicts of interests in the workplace – consulting with all employees on proposed accommodations that may be made is likely to ensure that an appropriate compromise can be reached and that neither Muslim nor non-Muslim employees feel less favourably treated.

## (3) Daily Prayers

Observant Muslims are required to complete five daily prayers. The actual timing of the prayers will shift throughout the year depending on daylight hours. The first prayer is at sunrise, the second prayer at midday, the third prayer a little before sunset, the fourth prayer at sunset, and the fifth prayer any time during the night. Muslims must be able to stand, bow, and place a prayer mat in a clean, quiet place. Some Muslims believe that the prayers may be made within a 10-minute window, for example, that the sunset prayer may happen within 10 minutes of sunset. Others believe that a 45-minute window is allowed.<sup>16</sup>

In *Farah v. A-1 Careers*,<sup>17</sup> Farah had a conflict with his workplace not providing him with a place to pray. He was praying in the building lobby, which was not owned by his employer. The building owner complained, and the employer told Farah that he had to stop praying in the lobby or he would be asked to resign. Farah sought, as an accommodation, to be allowed to pray in the hallways or in someone's office. The court held that those accommodations would cause undue hardship because the prayer mat would have obstructed most of the hallway, and because using someone's office would be disruptive to that person. These disruptions would have created burdens on the other employees, not necessarily to the employer itself. The court nonetheless held that the disruptions were substantial enough to constitute an undue hardship.

The *Farah* court also held that the employer had provided a reasonable accommodation by allowing Farah to pray off-site. Thus, in order to reasonably accommodate a prayer location, permitting the employee to leave the worksite may be a reasonable solution.

In *Abdelwahab v. Jackson State Univ.*,<sup>18</sup> a residence hall receptionist asserted that he needed to pray and



study the Koran from 2:00 a.m. to 4:00 a.m. each night, and that his employer needed to accommodate him by having someone else work the night shift. The court concluded that he did not have a bona fide belief that he needed to study during this time, in particular because he had already worked those hours for three years. The court also held that it would be an undue hardship for the University to accommodate him by moving his shift, as “requiring employers to rearrange their schedule and force employees to ‘trade shifts’ to accommodate the religious practices of an employee . . . imposes an ‘undue hardship.’”<sup>19</sup>

In the UK, similar to the approach in respect of Eid and Ramadan, requests for time off for prayer or requests for a suitable place to pray, should be accommodated where possible. The ECHR Code provides a useful analogy. If the employer normally allows other employees to take additional smoking breaks of a similar length during working hours, refusing the Muslim employee’s request could amount to direct and indirect discrimination (which would be difficult to objectively justify). Employers should consider whether it would be possible to allow the Muslim employee time for prayers on the basis that that time is made up at the start or the end of the working day. This may not be possible in all cases but is another example of the requirement on employers to try to be more flexible, where possible in order to accommodate a request made on religious grounds.

#### (4) Friday Congregational Prayer

Muslim employees may attend a congregational prayer at midday on Fridays, which can take between 30-90 minutes and may take place at a local mosque.

The case law does not directly address what a reasonable accommodation for the Friday service would be, although employees and the EEOC have brought suits related to failure to accommodate the Friday service. Two such cases have settled for \$60,000 and \$75,000.<sup>20</sup>

In the UK, on the other hand, there have been several cases regarding Friday Prayer. In *Cherfi v G4S Security Services Ltd*<sup>21</sup>, Mr. Cherfi, a Muslim security guard, was refused permission to leave work on Friday lunchtimes to attend a mosque. His employer, G4S Security Services Ltd, argued that their customer contract required there to be a certain number of security guards on site during operating hours. Mr. Cherfi, claimed that this put practicing Muslims at a disadvantage. The tribunal and, on appeal, the employment appeal tribunal, rejected his claim of indirect discrimination. The operational need of the business was a legitimate aim. And, requiring all security guards to remain on site was a proportionate means of achieving that aim. In assessing the impact

on Mr. Cherfi, it was relevant that it was not possible to provide cover for Mr. Cherfi during the lunch break that Mr. Cherfi had been offered alternative working patterns of either at the weekend instead of Friday or reducing his working hours to Monday to Thursday: and that Mr. Cherfi was permitted to use a prayer room on site.

#### (5) Pilgrimage

Observant Muslims are required to go on a pilgrimage to the city of Mecca at least once in their lifetime.

Although some employees have brought suits seeking special accommodations for them to do their pilgrimage to Mecca, employers probably do not have to accommodate them. In *Tiano v. Dillard Dept. Stores*,<sup>22</sup> the 9th Circuit held that the particular timing of a pilgrimage is likely a personal preference for a Catholic employee, not a bona fide religious belief. The typical Muslim belief that the pilgrimage may be taken at any point during one’s lifetime makes it fairly unlikely that the timing would ever be urgent enough to require employer accommodation.

Likewise in the UK, the employee is not entitled to take a particular period of time off work (paid or unpaid) for the purpose of a pilgrimage. However, as with requests to take annual leave for religious holidays, this should be accommodated where possible.

#### (6) Dietary Requirements

Observant Muslims follow halal standards in food preparation, which prohibits alcohol and pork and mandates certain other dietary requirements.

Although no cases have been brought to judgment on this issue in the US, in *E.E.O.C. v. Work Connection*<sup>23</sup>, an employment agency settled with a number of employees for, inter alia, making them sign a form acknowledging that they agreed to handle pork products before being placed at Gold’n Pump, a chicken processor. Any employee who refused to sign the form and was not placed by Work Connection was awarded \$4,878 in the settlement.

In the UK, on the other hand, there have also been a number of cases involving Islamic dietary requirements. In *Ahmed v Tesco Stores Limited* and others<sup>24</sup>, a Muslim warehouseman claimed that requiring him to handle alcohol was against his religious beliefs and amounted to indirect discrimination. The tribunal held that Tesco had a legitimate aim – to supply alcohol to customers – and that requiring Mr. Ahmed to handle alcohol was a proportionate way to achieve that aim. Significantly, Mr. Ahmed had been made aware during his recruitment interview that this would be part of his duties and this fact influenced the tribunal’s decision.

Dietary requirements also posed an issue in *Khan v Direct Line Insurance plc*<sup>25</sup>. As a sales incentive, staff at Direct Line were awarded alcoholic drinks. Mr. Khan, a Muslim employee who did not drink alcohol on the grounds of his religion claimed that this amounted to indirect discrimination. The tribunal disagreed. It held that having an incentive system in order to encourage sales was a legitimate aim. In deciding whether awarding alcohol was a proportionate way of achieving that aim, the tribunal considered it relevant that Direct Line had in practice replaced the alcohol with gift vouchers where an employee did not wish to accept it. The tribunal concluded that, in any event, any disadvantage suffered by Muslims was so trivial that it could be ignored.

Lastly, the EHRC Code suggests that employers give consideration to whether any specific dietary requirements result in food needing to be stored or cooked separately. Again, consultation on this type of issue is likely to be the best way to find a solution that accommodates all parties.

## (7) Appearance

Muslim men may wear beards or small head coverings for religious reasons. Muslim women may wear hijabs, which is a small covering that covers the hair and neck, or a fuller body covering, such as a khimar, niqab, or burqa.

In, *EEOC v. Alamo Rent-A-Car*,<sup>26</sup> Alamo argued that the only clothing that was permitted was specifically listed in its “Dress Smart Policy.” A Muslim employee sought to wear a head covering in violation of the dress policy. Alamo argued that its policy was important to establish favorable impressions with its customers. The court held that Alamo had failed to establish an undue burden, as its arguments regarding favorable impressions were too speculative. In particular, Alamo provided no evidence regarding what kind of costs it would have incurred if it accommodated the head covering.

Defendants have been more successful when safety concerns are involved. In *E.E.O.C. v. Kelly Servs., Inc.*,<sup>27</sup> plaintiffs sued Kelly Services, an employment agency, for refusing to refer a Muslim woman to a commercial printing company. The printing company operated an industrial plant with large rollers, which pull paper onto printing presses. The company has a policy against loose-fitting clothing or headgear, as it can potentially get caught in the machinery. Plaintiff Suliman wore a khimar, which is a long head and neck covering. The court held that it would be undue hardship to accommodate Suliman, because the potential safety concerns were paramount. Other courts

have similarly held that employers who run heavy machinery do not have to accommodate loose clothing or headgear.<sup>28</sup>

In the UK, the implementation or enforcement of an employer’s dress code will amount to a PCP. If the employer is to avoid indirect discrimination claims, it will therefore have to be able to objectively justify having that particular code in place where it may conflict with an employee’s religion or beliefs.

In a widely reported case, *Azmi v Kirklees Metropolitan Borough Council*<sup>29</sup>, Mrs. Azmi, a Muslim teaching assistant, was dismissed for refusing to remove her veil whilst teaching. Her veil covered all of her face, except for her eyes. The tribunal dismissed her claim of indirect discrimination and that decision was upheld on appeal. The legitimate aim here was to provide effective education. Importantly, the evidence presented showed that the children needed to be able to see Mrs. Azmi’s face in order to communicate well with her. Asking Mrs. Azmi to remove her veil whilst teaching was held to be a proportionate means of achieving that aim. Mrs. Azmi was only required to remove her veil when teaching the children. She was free to wear it at all other times.

In *Noah v Desrosiers t/a Wedge*<sup>30</sup>, Ms. Noah was refused employment because she wore a headscarf at all times, except when she was at home, on the basis of her religious beliefs. The owner of Desrosiers, a hair salon, argued that it was necessary for stylists to display and show off their haircuts when at work in order to promote the salon’s business and wearing the headscarf was not compatible with that requirement. The tribunal agreed that the salon owner had a legitimate aim. However, it did not consider that this was achieved in a proportionate way. Significantly, the tribunal considered that the requirement for stylists to show off their haircuts was not a core requirement of the job and, although the salon owner considered there to be a risk to her business if the stylists’ haircuts were not on display, she had not carried out an assessment, based on evidence, as to the degree of risk that actually existed. Ms. Noah was therefore successful in her indirect discrimination claim.

## Guidance for Employers

Generally, in the US, employers will not need to accommodate any requests that cause demonstrable disruptions, impacts to revenue, or safety concerns. Employers should accommodate requests where the financial impact is de minimis or difficult to quantify, such as in brand management. In the UK, although the test is different, the theme is similar. When faced with a request on religious grounds that conflicts

with the employer's PCP, the employer needs to consider two things: whether they have a legitimate aim and whether imposing a particular PCP is a proportionate means of achieving that aim. This may require the employer to adopt a more flexible approach. By contrast to the position in the United

States, the financial impact or cost to an employer in accommodating a request is rarely stated to be a justifiable reason in and of itself for not doing so.

To view prior issues of the ELC, click [here](#).

- 1 *Religion-Based Charges*, FY 1997 – FY 2012, <http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> [last accessed December 2, 2013].
- 2 42 U.S.C. § 2000e-2(a).
- 3 *U.S. Equal Employment Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, No. 11-CV-03162-YGR, 2013 WL 4726137, at \*8 (N.D. Cal. Sept. 3, 2013).
- 4 *Id.*
- 5 *Id.*, at fn. 14; *Shelton v. Univ. of Med. & Dentistry of New Jersey*, 223 F.3d 220, 224 (3d Cir. 2000).
- 6 *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1143 (10th Cir. 2013).
- 7 See, e.g., *Dixon v. Hallmark Cos.*, 627 F.3d 849, 855–56 (11th Cir. 2010); *Brown v. Polk Cnty.*, 61 F.3d 650, 652–53 (8th Cir. 1995); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1436–37, 1439 (9th Cir. 1993); *Hellinger v. Eckerd Corp.*, 67 F.Supp.2d 1359, 1361–63 (S.D. Fla. 1999).
- 8 Gerald Maatman and Howard Wexler, *Take Two? EEOC Moves For Reconsideration After Losing High-Profile Religious Discrimination Case Over Abercrombie's "Look Policy"* December 4, 2013. <http://www.eeoccountdown.com/2013/12/04/take-two-eeoc-moves-for-reconsideration-after-losing-high-profile-religious-discrimination-case-over-abcrombies-look-policy/> [last accessed December 10, 2013].
- 9 *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1122 (10th Cir. 2013), citing *Thomas v. Nat' Ass'n of Letter Carriers*, 225 F.3d 1149, 1156 (10th Cir. 2000).
- 10 *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 65, 97 S. Ct. 2264, 2267, 53 L. Ed. 2d 113 (1977).
- 11 *E.E.O.C. v. JBS USA, LLC*, No. 8:10-CV-318, 2013 WL 6621026 (D. Neb. Oct. 11, 2013); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 317 (4th Cir. 2008); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 147 (5th Cir. 1982).
- 12 <http://www.calendarlabs.com/calendars/religious/islamic-calendar.php> [last accessed December 10, 2013].
- 13 <http://www.foxnews.com/story/2008/08/05/tyson-plant-drops-labor-day-for-muslim-holiday/>, [last accessed December 2, 2013].
- 14 8:10-CV-318 (D. Neb. Oct. 11, 2013).
- 15 <http://www.eeoc.gov/eeoc/newsroom/release/8-6-10a.cfm> press release dated August 5, 2010 [last accessed December 2, 2013].
- 16 *E.E.O.C. v. JBS USA, LLC*, 940 F. Supp. 2d 949, 957 (D. Neb. 2013).
- 17 No. 2:12-cv-02692 2013 BL 323434, (D. Kan. Nov. 20, 2013).
- 18 No. 309-cv-41TSL-JCS, 2010 WL 384416 (S.D. Miss. Jan. 27, 2010).
- 19 *Id.* at \*3, citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977).
- 20 [http://www1.eeoc.gov/eeoc/litigation/selected/religion\\_nationalorigin.cfm?renderforprint=1](http://www1.eeoc.gov/eeoc/litigation/selected/religion_nationalorigin.cfm?renderforprint=1) [last accessed December 5, 2013].
- 21 UKEAT/0379/10.
- 22 139 F.3d 679, 680 (9th Cir. 1998)/
- 23 Civ. No. 08-5137 DSD/JJG, 2008 WL 8954713 (D. Minn. Dec. 1, 2008)/
- 24 1301492/08.
- 25 ET/1400026/05/
- 26 432 F. Supp. 2d 1006 (D. Ariz. 2006).
- 27 598 F.3d 1022, 1023 (8th Cir. 2010).
- 28 See, e.g., *E.E.O.C. v. Oak-Rite Mfg. Corp.*, No. IP 99-1962-C H/G, 2001 WL 1168156 (S.D. Ind. Aug. 27, 2001).
- 29 UKEAT/0009/07.
- 30 ET/2201867/2007

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