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Between an Abercrombie Rock and a Hard(ison) Place: Muslim Head Coverings, Corporate Dress Policies, and the Unresolved Tensions Between Workplace Religious Accommodation and Undue Hardship

Richard D. Crane

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Title VII mandates that employers accommodate sincerely held religious beliefs and practices so long as they do not impose an undue hardship on the employer.[1] One of the most pervasive sources of legal complaints with respect to the failure of employers to accommodate religious practices involves religious dress or garments, especially the hijab or other head coverings for Muslim women. Even though Muslims account for just two percent of the population, they make up one-quarter of all discrimination claims filed with the Equal Opportunity Employment Commission (EEOC).[2] These religious requirements have often clashed with workplace expectations regarding dress, including corporate "look policies," in American business culture, from restaurants to corporate offices to department stores and other positions involving customer service. There have also been conflicts between Muslim women and government law enforcement agencies and correctional institutions. These conflicts provide an important vantage point from which to evaluate Title VII religious accommodation jurisprudence, as well as the public policy values at stake in these legal controversies. In this essay, the primary argument is that the line of cases most notably associated with the EEOC's suits against Abercrombie & Fitch, are most in accordance with the vision of Title VII's requirement for reasonable accommodation of religious practices when, as Justice Thurgood

[1]42 U.S.C.A. § 2000e(j) (West).

[2]Prerna Soni, *Title VII Religious Discrimination and Contemporary Socio-Religious Issues in A Post-9/11 America: The Scope and Shortcomings of Religious Discrimination Protection Under Title VII*, 163 U. PA. J. BUS. L. 599, 629 (2014).

Marshall framed the issue, the employee is faced with the cruel choice between their religion and their job.[3]

Even though Title VII mandates that employers accommodate religious needs so long as they do not impose an undue hardship on the employer, neither "reasonable accommodation" nor "undue hardship" are defined in the statute. Two seminal cases have shaped the legal landscape with respect to accommodation of religious needs and practices in the workplace. *Ansonia Bd. of Educ. v. Philbrook*[4] and *Trans World Airlines, Inc., v. Hardison*[5] and have set the terms for navigating the tension between an employer's requirement to accommodate employee religious practices and determining what constitutes undue hardship for employers. Both of these cases were very deferential toward employers, with *Hardison* setting a low bar for what constitutes "undue hardship" and *Ansonia* setting limits on what an employer must do to offer a reasonable accommodation. Because of these two cases, Professor Keith Blair argues, courts view the issues through the lens of the employer, not the employee.[6]

One of the ironies of post-*Hardison* and post-*Ansonia* jurisprudence is that the courts have indeed been very deferential toward employers with respect to religious accommodation requests for time off of work for religious worship and other observances, typically finding "undue hardship" on employers if employers are more than mildly inconvenienced. However, courts, particularly but far from exclusively in the ninth circuit, have tended to issue legal

[3] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 87 (1997) (Marshall, J., dissenting).

[4] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

[5] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 87 (1997)

[6] Keith S. Blair, *Better Disabled Than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK L. REV. 515, 518 (2010).

decisions more favorable toward religious accommodations of Muslim women seeking to wear the hijab in the workplace. The courts have been less accommodating toward employers when the issue is a company's "look policy" or dress code, so long as the conflict with the dress code does not pertain to issues of workplace safety.

Rulings in several cases involving Abercrombie and Fitch's "look policy" illustrate this divergence in how courts handle religious accommodations that disrupt workplace productivity, efficiency, or involve higher labor costs and religious accommodations that require an exception to a company's dress and appearance expectations. In a case that reached the Supreme Court, *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*[7] one finds an extraordinarily strong affirmation of the employer's requirement to accommodate religious practices. Writing for the majority, Justice Scalia asserts that Title VII does not demand that employer policies be merely neutral with respect to religious practices. It does not merely proscribe religious discrimination. He writes:

> Rather, it gives [religious practices] favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual ... because of such individual's" "religious observance and practice." An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious ... practice," it is no response that the subsequent "fail[ure] ... to hire" was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.[8]

Dallan Flake, a lawyer and Professor of Sociology, identifies the reason for this apparent contradiction. Courts usually find undue hardship where profitability or productivity is at stake,

[7] E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015).

[8] *Id.*

but they are typically more skeptical of undue hardship claims based on corporate image concerns alone.[9]

The second half of the paper will take up policy implications at stake in cases involving religious accommodations in relation to corporate dress or "look policies." Dallan Flake advocates for greater judicial deference to corporations and other businesses when there is a conflict between the religious needs of employees and corporate image concerns. He contends that the image an organization projects to its customers and the public are critical to an organization's success. Flake argues courts should recognize that accommodations that result in a business enterprise's loss of control over its image imposes more than a de minimis cost.[10]

However, if Flake's proposal were to prevail in the courts, the outcome would be the eradication of any meaningful requirement for employers to accommodate religious practices of employees unless the employer chooses to do so. Title VII's protections for religious practices would be entirely thwarted. Flake identifies a valid concern with respect to the value of a business enterprise's public reputation and image. However, the deeper moral and public policy question is whether our society should place a higher premium on the protection of corporate image or protection of the bona fide religious convictions and practices of American citizens in their work lives. These two values are not and should not be construed as a purely antithetical relationship or a zero-sum game. Nevertheless, this paper will argue that a higher premium should be placed upon the protection of the employee's ability to be faithful to his or her

[9]Dallan S. Flake, *Image is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 724 (2015).

[10] Flake, *supra* note 8 at 720-21, 745-48.

indispensable religious practices unless there are stronger countervailing considerations, such as workplace safety or a disproportionate cost to employers. The animating vision for this policy preference, the "moral coordinate" that will govern the argument in this essay, is best articulated by Justice Thurgood Marshall. In his Dissent in in *Trans World Airlines, Inc. v. Hardison*, Justice Marshall captured the spirit and vison of 42 U.S.C. § 2000e(j), which requires employers to provide reasonable accommodation of religious needs:

> a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.[11]

This essay will proceed, first, by summarizing the state of the law with respect to Title VII and the issue of workplace religious accommodations. Second, the challenges of determining what constitutes a reasonable accommodation for an employee's religious practices and what constitutes an undue hardship for an employer will be explored. This section will offer an analysis of the ways in which *Hardison* and *Ansonia Bd. of Educ.* have tilted the judicial playing field in the direction of employers. The third section will offer an analysis of cases involving conflict between Muslim women, the hijab or khimar or other head coverings, and corporate, business or governmental dress policies.. Fourth, the jurisprudential reasoning in cases involving Muslim women and head coverings will be situated and analyzed in relationship to other conflicts between dress requirements and requests for religious accommodations. In the penultimate section of the paper, a critique of Dallan Flake's call for greater judicial deference to the interests of business organizations in protecting their corporate brand and image will be set forth. The "public policy" argument that will be presented is that American society should place

[11] *Hardison*, 432 U.S., at 87 (1997) (Marshall, J., dissenting).

a higher value or premium upon authentic religious needs and requirements of employees rather than subordinating the religious requirements of employees to corporate interests. This public policy proposal is based upon the power asymmetry that typically exists between employers and employees. However, this does not mean that business enterprises should be required to accommodate every employee's preferences with respect to religious expressions.

Title VII

Title VII of the Civil Rights Act of 1964 bans employment discrimination based upon race, national origin, sex, and religion.[12] Employment discrimination pertains to hiring, promotion, discharge, compensation, or other terms, conditions, or privileged of employment. This also means that an employer cannot limit, segregate or classify applicants or employees

[12]The text of 42 U.S.C.A. § 2000e-2(a)(1)-(2)(West):

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII's protections apply to employers with fifteen or more employees employment agencies, and labor unions. 42 U.S.C.A. § 2000e-2(c)(West).

based on religion, race, national origin or sex in any way that would deprive any individual of employment opportunities or adversely affect his status as an employee.[13]

Religion is defined by the statute as including "all aspects of religious observance and practice, as well as belief"[14] A person's religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion."[15] A belief is "religious" for Title VII purposes if it is "religious" in the person's "own scheme of things," i.e., it is a "sincere and meaningful" belief that "occupies a place in the life of its possessor parallel to that filled by God.[16] While the requirement to accommodate religious practices in the workplace is governed by Title VII, the First Amendment implicitly governs Title VII jurisprudence in the sense that the courts should be religiously neutral and should not attempt to make "theological" judgments about the truth or reasonableness of a person's sincerely held religious beliefs. According to the court in *U.S. v. Ballard*, "the First Amendment precludes such a course…….'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'"[17]

Religious practices might include attending worship services, prayer, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing, or

[13]42 U.S.C.A. § 2000e-2(a)(1)-(2)(West).

[14]42 U.S.CA.. § 2000e(j)(West).

[15]*Welsh v. United States*, 398 U.S. 333, 339 (1970) (interpreting what is now the Military Selective Service Act, 50 U.S.C.A. § 3806(j)(West).

[16] *United States v. Seeger*, 380 U.S. 163, 166 (1965), EEOC, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION, (2021), *available at* https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftn2.

[17] United States v. Ballard, 322 U.S. 78, 86 (1944)(quoting Watson v. Jones, 80 U.S. 679, 725 (1871)).

refraining from certain activities. Determining whether or not a practice is religious is a situational, case-by-case matter that turns upon the motivations of the employee. The issue is whether the employee's participation in the activity is pursuant to a religious belief. For example, one person may observe dietary restrictions for religious reasons, while another person does so strictly for reasons of good health or athletic training.[18]

The Supreme Court has asserted that there are only two causes of action under Title VII: (1) disparate treatment, which is intentional discrimination, and; (2) disparate impact. A cause of action based upon a failure by an employer to accommodate a religious practice is one form of disparate treatment. Like harassment in the workplace, denial of religious accommodation is disparate treatment in the terms and conditions of employment.[19]

> The EEOC states that the law requires an employer or other covered entity to:
>
> reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause more than a minimal burden on the operations of the employer's business. This means an employer may be required to make reasonable adjustments to the work environment that will allow an employee to practice his or her religion.[20]
>
> The EEOC's guidance is based upon Title VII:
>
> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to

[18]EEOC, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION. *See Davis v. Fort Bend Cnty*., 765 F.3d 480, 485, 486-87 (5th Cir. 2014) (holding that whether a practice is religious turns not on the nature of the activity itself, but rather whether the plaintiff "sincerely believed it to be religious in her own scheme of things,"

[19]*Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2031-32; EEOC, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION.

[20]EEOC, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION.

an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[21]

When religious practices conflict with an employee's work schedules, accommodations may include flexible scheduling, voluntary shift swaps or substitutions, or a lateral transfer and change of job assignments.[22] Religious accommodations also apply to matters such as dress or grooming practices. Examples include head coverings, such as a Jewish yarmulke or a hijab worn by a Muslim woman, or facial hair or hairstyles required by a person's religious commitments, such as Rastafarian dreadlocks.[23]

According to a regulation promulgated by the EEOC, interpreting § 701(j) of Title VII of the Civil Rights Act of 1964, when an employee or job applicant needs an accommodation for religious reasons, the employee or applicant should notify the employer. If the employer needs more information, the employer and employee should engage in an interactive process to discuss the request. The employer must grant an accommodation if it does not pose an undue hardship.[24]

The legal standard for a failure to accommodate complaint requires a plaintiff first to establish a prima facie case for a failure to accommodate. This requires that an employee: (1) "has a bona fide religious belief that conflicts with an employment requirement"; (2) "informed the employer of this belief"; and (3) "was disciplined for failure to comply with the conflicting employment requirement." Then the burden shifts to the employer to rebut one or more elements

[21]42 U.S.C.A. § 2000e(j)(West).

[22]29 C.F.R § 1605.2(d)(1)(i)-(iii).

[23]EEOC, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION.

[24]29 C.F.R § 1605.2(c)(1); EEOC, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION.

of the prima facie case, either to show that a reasonable accommodation was in fact provided, or that it was unable to offer a reasonable accommodation that would not pose an undue hardship.[25]

Not every proposed alternative is reasonable if it disadvantages the employee with respect to employment opportunities or the terms, conditions, or privileges of employment, such as compensation. When there is more than one means of accommodation which would not cause undue hardship, the EEOC maintains that the employer or labor organization should offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.[26]

Undue Hardship: *Trans World Airlines, Inc. v. Hardison*

"Undue hardship" under Title VII is not defined in the statute. In its deliberations, the court in *Hardison* noted that the Equal Opportunity Employment Commission, in its 1967 guidelines, did not specify with precision when a hardship to an employer becomes "undue." Instead, the EEOC left further definition of its guidelines to judicial review of "each case on an

[25] *Ansonia Bd. of Educ*., 479 U.S. at 62; 42 U.S.C.A. § 2000e(j)(West).

[26] 29 C.F.R § 1605.2(c)(1)(i)-(ii). This approach is taken when the EEOC is acting as an adjudicatory body. However, as will be pointed out in the next section, the EEOC's more employee-friendly approach when hearing cases in its administrative law courts is in tension with the more employer-friendly standard set forth in *Ansonia Board of Education*.

individual basis in an effort to seek an equitable application of its guidelines to the variety of situations which arise due to the varied religious practices of the American people."[27]

Trans World Airlines, Inc. v. Hardison set a very low bar for employers whose defense is that a particular religious accommodation would constitute an "undue hardship." Hardison, the original plaintiff, was employee of Transworld Airlines (TWA) and subject to the seniority system contained in the collective bargaining agreement between TWA and the International Association of Machinists and Aerospace workers. As a member of the Worldwide Church of God, he believed he could not work on the Sabbath, which runs from sundown on Friday until sundown on Saturday. TWA was willing to permit the union to seek a change of work assignments for Hardison. However, he had insufficient seniority to succeed in his bid for a shift in which he had Saturday off. The union was unwilling to violate the seniority system of the collective bargaining agreement. Hardison's alternative proposal, to work only four days a week, was rejected by TWA because Hardison's job was essential and could not remain unfilled on weekends. To fill his position with someone else would have required TWA to pay premium overtime wages. When no accommodation could be agreed upon, Hardison refused to report for work on Saturdays and was discharged on grounds of insubordination.[28]

The court noted that the EEOC provided an example of "undue hardship that was similar to the facts in the case under consideration. The EEOC stated that "undue hardship" may exist

[27] *Hardison,*, 432 U.S. at 84.

[28] *Id.* at 67-69.

where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer,"[29]

The most decisive outcome of *Hardison* was the court's establishment of a very minimal legal standard for employers claiming "undue hardship" when it described undue hardship as more than a *de minimis* cost.[30] More than a minimal decrease in workplace efficiency, for example, could exempt an employer from making an accommodation of a religious practice on the ground that such an accommodation is an undue hardship.[31]

At one extreme, as noted by the court in *Hardison,* was a federal district court ruling that an employer who fired an employee for refusing to work on the employee's Sabbath had not committed an unfair labor practice, in spite of the fact that the employer "made no effort whatsoever to accommodate the employee's religious needs.[32] The court noted that it is clear from the language of § 701(j) of the Civil Rights Act, as amended in 1972,[33] and the inclusion of the text of the opinion of *Riley v. Bendix* in the congressional record, that Congress intended to change the outcome of situations, such as that in *Riley v. Bendix,* by requiring some form of accommodation. The statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear. However, the

[29]*Hardison,* 432 U.S. at 72; 29 CFR § 1605.1 (1968).

[30]*Hardison,* 432 U.S. at 84.

[31]This standard is lower than the statutory definition of "undue hardship" under the Americans with Disabilities Act (ADA), which is "significant difficulty or expense. 42 U.S.C.A. § 12111(10)(A)(West).

[32]*Hardison,* 432 U.S. at 75 (citing Riley v. Bendix Corp., 330 F.Supp. 583 (MD Fla.1971).

[33] 42 U.S.C.A. 2000-e(j)(West).

problem identified by the *Hardison* court was that the reach of that obligation had never been spelled out by Congress or by EEOC guidelines.[34]

The Court of Appeals had held that TWA did not make reasonable efforts to accommodate Hardison's religious needs because TWA rejected three alternatives. The Court of Appeals regarded each alternative as reasonable. *Hardison*, and later, *Ansonia Board of Education*, undermined the employee-friendly ruling of the court of appeals. The Supreme Court determined that the each of these alternatives, regarded by the eight circuit court of appeals, imposed an undue hardship on the employer. The first proposed alternatives was permitting Hardison to work a four-day week, utilizing in his place a supervisor or another worker on duty elsewhere on his Sabbath. This could have been accomplished without violating the seniority system. However, Supreme Court ruled that this would have caused other shop functions to suffer. The second alternative is that TWA could have filled Hardison's Saturday shift from other available personnel competent to do the job. The Supreme Court, however, deemed this to impose an undue hardship because it would have involved premium overtime pay. Third, TWA could have arranged a "swap between Hardison and another employee either for another shift or for the Sabbath days." The Supreme Court did not offer a reason, but nonetheless treated the third alternative as an undue hardship on the employer.[35]

Instead, the Supreme Court determined that TWA made reasonable efforts to accommodate as required by Title VII. It held several meetings with Mr. Hardison and endeavored to find a solution. TWA authorized the union steward to search for someone who

[34]*Hardison*, 432 U.S. at 75 (commenting in footnote 9).

[35]*Id*. at 76–77; Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 39-41 (8th Cir. 1975).

would swap shifts, which apparently was normal procedure." TWA attempted to find Hardison another job, even if it did not succeed. The union was unwilling to agree to a variance within the seniority system over the objections of persons with more seniority than Hardison. Therefore, TWA could not have unilaterally arranged a swap without breaching the collective bargaining agreement. If TWA and the union had violated the seniority system to accommodate Mr. Hardison, it would have involved a preference for Mr. Hardison that deprived more senior employees of their contractual rights to shift and job preferences. Therefore, the court concluded that TWA did all that could be reasonably expected within the confines of the seniority system.[36]

The rule established by the *Hardison* court described "undue hardship" as "more than a *de minimis* cost."[37] The creation of this standard has had a significant impact on jurisprudence pertaining to religious accommodations in the workplace. In his dissent, Justice Marshall protested that *Hardison* effectively gutted Title VII's protection of the employer's obligation to accommodate employee religious practices:

> Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices……..An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a

[36]*Hardison*, 432 U.S. at 77-79, 81. The court identified a firm statutory basis for its ruling that a request for religious accommodations does not take precedence over a seniority system. Section 703(h) of Title VII provides that: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment *82 pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2(h)(West).

[37]*Hardison*, 432 U.S. at 85-86.

> matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972.[38]

Justice Scalia's contention, thirty-eight years later, that Title VII gives religious practices favored treatment,[39] rather than treating them with mere neutrality, seems to be at odds with the *Hardison* decision. Rather than giving religious practices favored treatment, *Hardison* accentuated the danger of unequal treatment of employees not receiving religious accommodations. Overriding the seniority system to give religious practices favored treatment means allocating the privilege of having Saturdays off according to religious beliefs.[40]

Ansonia Board of Education **and "Reasonable Accommodation"**

The court in *Ansonia Board of Education* also wrestled with the difficulty of determining whether any particular proposed accommodation is reasonable.[41] This case featured a school teacher who was a member of the Worldwide Church of God, whose religious beliefs prohibited him from engaging in secular employment on holy days, six of which occurred during the school

[38] *Id*. at 85-86 (Marshall, J., dissenting).

[39] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 775.

[40] *Hardison*, 432 U.S. at 84-85

[41] *Ansonia Bd. of Educ*., 479 U.S. at 66.

year. The school board permitted only three days of leave for religious observance and would not allow him to use paid leave for personal days to be used for religious observance.[42]

According to the EEOC's 1986 guidelines: "when there is more than one means of accommodation which would not cause undue hardship, the employer ... ..must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities."[43] The Supreme Court emphatically rejected the Appeals Court's interpretation of 29 CFR § 1605.2(c)(2)(ii) (1986) to require the employer to accept any alternative favored by the employee short of undue hardship.[44] In this case, the school board did not accept Philbrook's proposed accommodation of taking personal days to fulfill religious obligations. Rather, the school board's proposal was to permit Philbrook to take three days of unpaid leave to meet his religious obligation. The court held that the school board's proposed accommodation was reasonable. It may not have been ideal to Philbrook. An alternative less favored by an employee that does not disadvantage the individual's *employment opportunities* was deemed to be, nonetheless, a reasonable accommodation. The Supreme Court determined that the offer of unpaid leave to attend religious services as the employer's proffered accommodation had no adverse bearing upon the employee's employment opportunities or job status.[45]

How did *Ansonia* intensify the court's wide deference to employers? The most significant outcome of this case is that the court placed the power to choose the religious accommodation,

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[42] *Id.* at 62.

[43] 29 CFR § 1605.2(c)(2)(ii) (1986); *Ansonia Bd. of Educ.*, 479 U.S. at 69.

[44] *Ansonia Bd. of Educ.*, 479 U.S. at 69

[45] *Id.* at 70-71.

so long as it is "reasonable," entirely into the hands of the employer. What is new in *Ansonia* is that once a reasonable accommodation has been offered, the employer has met his or her burden under Title VII. The employer does not have the further obligation of accommodating the employee if the employee rejects the accommodation the employer offered. An employer is not required to continue the interactive process in order to come up with an alternative accommodation that is both satisfactory to the employer and more preferred by the employee than the employer's first proposal.[46]

The rationale for this holding was the "concern" that the EEOC's 1986 guidelines give employees an incentive to hold out for the most beneficial accommodation, despite the fact that an employer has already offered a reasonable resolution of the conflict.[47] Here, the court was extremely solicitous to protect the interests of employers at the expense of employees.

The court in *Ansonia* called attention to the legislative history and evidence for the legislative intentions behind § 701(j) of the Civil Rights Act as amended in 1972. The court acknowledged that Senator Jennings Randolph, the sponsor of the amendment of § 701(j), had communicated the spirit of the amendment as one in which employer and employee engage in an interactive process characterized by bilateral cooperation designed to arrive at the most favorable solution for both employer and employee.[48] However, as Prerna Soni points out, the holding in *Ansonia* undermines any genuine bilateral and interactive process. The employer has no obligation to accept any accommodation that the employer prefers and has no obligation to take

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[46] *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 65-66; Soni, *supra.* Note 2, at 602-3.

[47] *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 69.

[48] *Id*.

into consideration the employee's preferences. An employer has no obligation to achieve a compromise with an employee who desires an alternative accommodation that would not cause much greater hardship to the employer but would be significantly more beneficial to an employee.[49]

Because of these two cases, courts view the issues through the lens of the employer, not the employee, and are deferential to employers. Keith Blair argues that this gets things wrong because the religious-discrimination provision of Title VII was designed to protect employees.[50]

Post-*Hardison* Deference to Employers When the Accommodation Sought is a Modification of the Employee's Work Schedule for the Sake of Religious Observance

After *Hardison* and *Ansonia Board of Education*, courts have been deferential toward employers with respect to requests for time off of work for religious worship and other observances, typically finding "undue hardship." *U.S. E.E.O.C. v. Bridgestone/Firestone, Inc.*, offers a paradigmatic example of post-*Hardison* deference to employers when the religious accommodation request involves modifications to an employee's work schedule. This issue often presents itself due to religious convictions about the impermissibility of working a specific day of the week. In this case, after Firestone implemented a new production schedule in 1996 that

[49]Soni, *supra*. note 2, at 610-11.

[50] Blair, *supra* note 5, at 518-19.

required all tire-builders to work on some Sundays, Frazier sought schedule accommodations because working on Sunday violated his religious convictions.[51]

Efforts to accommodate Frazier through shift swapping did not succeed because other employees did not like to give up their Sundays. Frazier refused to work most of the Sundays he was scheduled. Seventy-five percent of the time, his absence was covered by workers receiving overtime pay. When overtime help was unavailable, much of the work that would have been done by Frazier, whose job was to lubricate the machinery, was left undone, having an adverse impact on the maintenance of the machinery, which in turn reduced overall production.[52]

Firestone offered Frazier a warehouse position that did not require work on Sundays. However, warehouse jobs paid substantially less than tire builder positions.[53] While the court wrestled with the question of whether the offer of a transfer to a lower paying position constituted a reasonable accommodation, noting that there was no clear answer from prior circuit court decisions, the court did not reach this question. Instead, in a decision highly deferential to the employer, the judgment was made that every other proposed accommodation would have imposed an undue hardship. Here, the court made explicit the reasoning that has governed findings of undue hardship. Accommodations of an employee's Sabbath religious observance requirements that either disturb the job preferences of other employees, require the employer to pay premium wages, constitutes undue hardship [54] The court relied on *Hardison* in its judgment

[51] U.S. E.E.O.C. v. Bridgestone/Firestone, Inc., 95 F. Supp. 2d 913, 916-917 (C.D. Ill. 2000).

[52] *Id.* at 918.

[53] *Id.* at 916-917.

[54] *Id.* at 923-24.

that an employer endures an undue hardship when it suffers a loss of production because one of its workers is absent due to a religious conflict.[55] Therefore, the EEOC's argument that Firestone could merely have done without Frazier and Waddell on Sundays was emphatically rejected by the court, which asserted that "[a]ny cost in efficiency or wage expenditures that is more than de minimis constitutes undue hardship."[56]

Ironically, however, as will be seen, this approach to determinations of undue hardship has resulted in favorable outcomes for Muslim women seeking workplace accommodations for wearing the hijab or other head coverings

Cases Involving the Hijab, the Khimar, or other religious head coverings

Muslim women who wear the hijab or other head coverings do so for a variety of religious reasons. Some wear it based upon the belief that God has instructed them to do so. Some wear it to express their identity with Islam. Others wear the hijab in the interests of modesty. Though reasons for wearing the hijab vary, the common denominator seems to be the

[55] *Id*. at 925 (referencing *Hardison*, 432 U.S. at 84–86).

[56] *Id*. at 925. One finds court rulings entirely consistent with the reasoning of *Hardison* and *U.S.E.E.O.C. v Bridgestone/Firestone. See EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 319 (4th Cir. 2008) (holding that an employer acted reasonably when refusing to grant an eleven-day unpaid leave of absence for a religious holiday); *See also Eversley v. MBank Dall.*, 843 F.2d 172, 176 (5th Cir. 1988) (finding it unreasonable for an employer to force employees to permanently switch shifts in order to accommodate another employee's Sabbath observation); *See also DePriest v. Dep't of Human Servs.*, No. 86-5920, 1987 WL 44454, at *3 (6th Cir. Oct. 1, 1987) (unpublished table decision) (stating that payment of overtime to one employee so another could take time off for religious observance would have imposed an undue hardship on employer).

conviction that hijab is a religious obligation and therefore, workplace policies prohibiting the wearing of hijab would require Muslim women to violate their religious beliefs."[57]

Many Title VII employment discrimination cases brought by Muslim women have involved conflicts between the employer's "look policy" and the wearing of the hijab. In these cases, the federal courts at every level have typically been less deferential to the concerns of corporations and other business enterprises than is the case with requests for religious accommodations when profitability, labor costs, or productivity is at stake.

A series of cases involving Abercrombie and Fitch has been foundational for religious accommodation jurisprudence with respect to corporate "look policies" or other dress codes. Abercrombie and Fitch imposes a "look policy" that governs how employees dress. The Abercrombie brand embodies an East Coast collegiate style described as "casual" and "preppy." The company's marketing strategy is to create an "in-store-experience" for customers that matches Abercrombie's vision for each of its brands and inspires customers to adopt the Abercrombie style and purchase clothing from the store. Sales associates are required to dress in ways that reinforce the aspirational lifestyles represented by the brands. The Look Policy prohibits wearing "caps," deemed to be too informal for Abercrombie's image, but this prohibition was understood to include all forms of headwear. Also forbidden was piercings, fingernail paint and heavy makeup, facial hair, and clothing displaying non-Abercrombie logos.[58]

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[57]Patricia Harrison, *Hiding Under the Veil of "Dress Policy": Muslim Women, the Hijab, and Employment Discrimination in the United States* ," 17 GEO. J. GENDER & L. 831, 836-37 (2016).

[58] *U.S. E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, No. 5:10-CV-03911-EJD, 2013 WL 1435290, at *2 (N.D. Cal. Apr. 9, 2013).

In the district court case, within the ninth circuit, referred to informally as *Abercrombie IV*, a Muslim teenager, Ms. Banafa, applied for a part-time Impact Associate position in Milpitas, California in 2008. She wore an Islamic head scarf to her interview. During the interview, Ms. Banafa was asked if she was a Muslim and whether she could remove her hijab. She received a passing score on Abercrombie's prospective employee rating system. She did not, however, receive a job offer and the EEOC took up the case, alleging that Abercrombie refused to hire her in violation of Title VII.[59]

Abercrombie asserted two types of undue hardship. First, it was argued that allowing an exception to its Look Policy would undermine its careful branding efforts, resulting in customer confusion, because of the critical role that the Look Policy plays in supporting its brand image. Second, Abercrombie argued that exceptions to the Look Policy would hurt store performance.[60]

However, the court rejected these arguments. Instead, the court set forth a legal standard that has governed most of the cases involving requests for religious accommodation and Muslim head coverings, including the hijab. The court asserted that hypothetical or merely conceivable hardships are insufficient to support a claim of undue hardship. The court relied upon the requirement, set forth in *Tooley v. Martin Marietta*, that an undue hardship defense must prove not merely the fact of hardship, but also its magnitude, and whether it surpasses at least a *de minimus* level.[61] Proof of hardship, the court insisted, rests upon actual imposition on or disruption of the employer's business. Because none of Abercrombie's executives could isolate

[59]*Id*. at *1, 10.

[60]*Id*. at *13–14.

[61]*Id*. at *14-15 (citing *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981).

or offer any empirical data that confirmed the degree to which Look Policy compliance affects store performance or brand image, the court granted the E.E.O.C.'s motion for summary judgment on this claim, finding that Abercrombie's proffered evidence afforded little basis upon which a reasonable jury could conclude that Abercrombie would have been unduly burdened in permitting Ms. Banafa to wear a hijab at work.[62]

"Abercrombie III" is a companion case to Abercrombie IV. In this case, the plaintiff, Umme-Hani Kahn, was also a Muslim woman who believed that her faith required her to wear a hijab while in public. Like Ms. Banafa, she wore a headscarf when she was interviewed for her position. However, unlike Ms. Banafa, she was hired. When she accepted the position, she acknowledged the Look Policy and agreed to abide by it. She began work in October 2009 as an Impact Association, whose job was to process shipments and place merchandise on the shop floor. Most of her duties were performed in the stockroom, but she would be in the public eye in the store one to four times per shift. Other than her headscarf, her dress was compatible with the company's "Look Policy," and she worked for four months without incident because her supervisors permitted her to wear her headscarf so long as it matched company colors. She was never informed that her headscarf was a violation of the Look Policy until a District Manager visited the Hillsdale, California store where she worked. She was told that her headscarf violated company policy and was asked her if she could take it off. Khan told the Senior Human

[62] *Id.*

Resources manager that she could not take the headscarf off because it was part of her religion. She was later terminated.[63]

In its legal analysis, the Court noted that the record contained no evidence that Abercrombie initiated good faith efforts to accommodate Ms. Khan's religious requirement. The only option she was given was "to comply with The Look Policy" or, put another way, to "wear the hijab on her own personal time" but not in the store.[64]

As in *Abercrombie IV*, the court rejected Abercrombie's claims of undue hardship. Abercrombie's evidence was the testimony of numerous employees who claimed, based on "personal experience," that compliance with the Look Policy is the key to Abercrombie's success or that deviations from the policy detract from the in-store experience and negatively affect the brand. Abercromie argued that its Look Policy is at the heart of its business model and that any deviation threatens the company's success.[65]

The court found that Abercromie's "evidence" was only the unsubstantiated opinion testimony of its own employees, without any credible evidence. For example, Khan worked at Abercrombie for four months before her termination. Abercrombie offered no evidence showing a decline in its sales, customer complaints, confusion, or brand damage linked to Khan's wearing of a hijab at work. Therefore, the court held, Abercrombie's evidence did not even raise a triable issue of hardship, much less undue hardship. Therefore, the court granted the EEOC's summary

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[63]U.S. Equal Emp. Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 966 F. Supp. 2d 949, 954–55 (N.D. Cal. 2013)

[64]*Id.* at 961.

[65] *Id.* at 962-63.

judgment motion, asserting that a reasonable jury could not conclude that Abercrombie would be unduly burdened by allowing Ms. Khan to continue wearing her hijab.[66]

One finds an almost identical argument from Abercrombie & Fitch regarding "undue hardship" and the same reasoning by the court in the case popularly described as Abercrombie II. Samantha Elauf was a practicing Muslim who, consistent with her understanding of her religion's requirements, wore a headscarf. She applied for a position in an Abercrombie store and was given an interview rating that qualified her to be hired. However, the store's assistant manager was concerned that her headscarf would conflict with the store's look policy and, after consulting with management personnel, decided not to offer her a position.[67]

In their motion for summary judgment, Abercrombie made the same arguments regarding undue hardship caused by deviations from the look policy that were later set forth in Abercrombie III and IV. The district court for the Northern District of Oklahoma rejected these arguments and ruled that this religious accommodation would not pose more than a *de minimus* burden. The court stated that a claim of undue hardship cannot be supported by merely conceivable or hypothetical hardship. The court noted that Abercrombie & Fitch stores had granted, on numerous occasions, exceptions to the Look Policy and had recently granted eight or nine headscarf exceptions. Several Abercrombie executives testified as to their belief that granting Ms. Elauf an exception to the Look Policy would negatively impact the brand, sales and compliance. However, no studies or specific examples were cited to verify or validate this

[66] *Id.* at 963-65.

[67] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1277 (N.D. Okla. 2011), *rev'd and remanded*, 731 F.3d 1106 (10th Cir. 2013), *rev'd and remanded*, 575 U.S. 768 (2015).

opinion. Abercrombie relied upon an expert witness who testified about the importance of the in-store experience to Abercrombie's marketing strategy and opined that granting even one exception to the Look Policy would negatively impact the brand. Yet, the expert made no effort to collect or analyze data to corroborate this opinion. In particular, since Abercrombie had already granted a few exceptions for head-scarfs, it would have been possible to analyze the impact of these exceptions. Absent any such study, the court rejected as merely speculative the opinions expressed by Abercrombie executives and the expert witness. Determining that there was no genuine issue of material fact in dispute, the court denied Abercrombie's motion for summary judgment and granted the E.E.O.C.'s motion for summary judgment.[68]

This case made its way to the Supreme Court. In its argument to the court, Abercrombie focused on the fact that the manager who interviewed Ms. Elauf did not ascertain whether she was in fact a Muslim, whether her headscarf was a requirement of her faith, or whether she would have requested a religious accommodation. The question presented was whether Abercrombie was guilty of disparate treatment for failing to hire an applicant because of the individual's religion when Abercrombie suspected, but did not have "actual knowledge," that is, did not know for certain, whether the individual would request a religious accommodation. The court held that 42 § 2000e-2(a)(1) does not impose a knowledge requirement. Instead, the intentional discrimination provision prohibits motives for actions such as refusing to hire a certain person regardless of the state of the actor's knowledge. In this case, if the motive for not hiring Ms. Elauf was to avoid granting a religious accommodation, this is disparate treatment[69]

[68] *Id.* at 1287.

[69] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 770-73 (2015).

Justice Scalia, writing for the majority, offered one of the most emphatic affirmations of the requirement of religious accommodation in the workplace. He asserted that disparate treatment is not limited to employer policies that explicitly treat religious practices less favorably than secular practices. Rather, Title VII demands more than neutrality toward religious practices. Instead, it gives them religious practices favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual ... because of such individual's" "religious observance and practice." He concludes:

> An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious ... practice," it is no response that the subsequent "fail[ure] ... to hire" was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.[70]

Many cases never reached the trial stage. After the plaintiff survived summary judgment, the cases were settled out of court. One example is *E.E.O.C. v. 704 HTL Operating, LLC*. The E.E.O.C. brought an action against a hotel chain in a case involving Safia Abdullah, an Iraqi-born refugee and practicing Muslim. Abdullah believed the wearing of the hijab to be required by the Quran, which she understood to dictate that women should "guard their modesty….and draw their scarf around them to avoid displaying their beauty." In her personal life, she made no exceptions. She wore her hijab whenever she was in public and whenever her family had male guests outside her immediate family.[71]

She interviewed for a housekeeping position at the MCM Elegante Hotel of Albuquerque. When she was interviewed, she wore her hijab. No one with whom she interviewed or to whom

[70] *Id*. at 775.

[71] E.E.O.C. v. 704 HTL Operating, LLC, 979 F. Supp. 2d 1220, 1222 (D.N.M. 2013).

she was introduced asked about or expressed an opinion regarding her hijab. But when she reported to duty for what would have been her first day of work, she was told by her supervisor that she had to remove her hijab and could not work if she did not do so. Ms. Abdullah spoke with the Human Resources Manager, Ms. Slough, she had met on the day of her job interview. Upon her arrival, Ms. Slough asked her to remove her hijab. Ms. Abdullah refused, stating that the headscarf was required by her religion. Ms. Slough informed her that the corporate office would not allow her to work with her head cover on because there are customers from different religions who would not want a worker to show that he or she is Muslim. Ms. Abdullah claimed that she offered to compromise and only wear the inner portion of her hijab, which was a cap on her head that kept the scarf portion of the hijab in place, but that this offer was not acceptable.[72]

Among the four causes of action asserted by the plaintiff under Title VII, one was failure to accommodate religious beliefs and practices.[73] The defendants sought summary judgment on all of the plaintiff's claims, including the failure to accommodate claim. The court noted that it was undisputed that Ms. Slough indicated that Ms. Abdullah could not work at the hotel if she wore the hijab and offered as the reason for this corporate policy the corporation's belief that non-Muslim hotel guests would dislike her display of her Muslim faith. The court was not persuaded by the hotel's argument that permitting employees to wear a headscarf would be an undue because it would violate the hotel's safety policy was not accepted by the court. The defendant's did not produce a safety policy with this guideline or rule. Therefore, the court

[72]*Id*. at 1222-23.

[73]*Id*. at 1222-23. Failure to accommodate was asserted under 42 U.S.C. §§ 2000e(j) and 2000e-2(a).

denied the defendant's summary judgment motion on all four of the plaintiff's claims, including failure to accommodate.[74]

After their summary judgment motion was denied, the hotel and the E.E.O.C. settled this claim for $100,000 of monetary relief for Ms. Abdullah, as well as an injunction prohibiting future discriminatory practices, the institution of policies and procedures to address religious discrimination and retaliation, training for employees, managers, and human resources officials of MCM on religious discrimination, and the posting of a notice advising employees of their rights under Title VII.[75]

In another district court case within the ninth circuit, *EEOC v. Alamo-Rent-a-Car*, the plaintiff's request to wear a head covering during the Muslim holiday of Ramadan was denied by her employer. The company had a "Dress Smart Policy" which promoted a favorable first impression with customers. The local manager interpreted the policy to forbid the wearing of any kind of hat, cap or head covering. The company informed Ms. Nur, the plaintiff, that she could wear the head covering when working in the back office, but required her to remove it when working at the rental counter in view of customers. She repeatedly wore the head covering at the rental counter and was fired for violating company rules. The EEOC filed suit on her behalf and prevailed at the summary judgment stage, holding that Alamo failed to prove undue hardship as a matter of law.[76]

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[74] *Id*. at 1225-1229, 1234-35.

[75] EEOC, *MCM Elegante Hotel Settles Religious Discrimination Suit with EEOC*, Press Release, (11-18-2013), https://www.eeoc.gov/newsroom/mcm-elegante-hotel-settles-religious-discrimination-suit-eeoc.

[76] E.E.O.C. v. Alamo Rent-A-Car LLC, 432 F. Supp. 2d 1006, 1008-09 (D. Ariz. 2006).

The court rejected Alamo's assertion that its offer to allow Ms. Nur to wear the head covering when working in the back office was a reasonable accommodation. The reasonable accommodation requirement requires, at minimum, the company enter into an interactive process of negotiating with the employee in at least an effort to find a solution. What the court offered was not a genuine accommodation. By requiring Ms. Nur to serve clients and requiring her to remove her head covering when doing so, she was being required her to remove her head covering during Ramadan. This rendered impossible her compliance with the requirements of her faith. Thus, it was not a reasonable accommodation.[77]

Once again, a court insisted that a claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships, but instead, must be supported by proof of actual imposition on co-workers or disruption of the work routine. Alamo asserted that permitting Ms. Nur to wear a head covering at the rental counter would have resulted in an undue hardship, claiming that any deviation from Alamo's carefully cultivated image constitutes a burden. In addition, the company claimed that permitting this deviation from company policy by allowing Ms. Nur to wear a head covering might open the floodgates for other employees to violate the company's uniform policy. However, one of the company's executives conceded that this was the only burden he could "see." The court granted summary judgment to the plaintiff because Alamo provided no factual basis for the company's claims about the costs of any deviation from

[77] *Id.* at 1013.

the uniform policy.[78] Ms. Nur was awarded $21,640 in back pay, $16,000 in compensatory damages, and $250,000 in punitive damages.[79]

A lawsuit with results similar to those featuring Muslim women seeking a religious accommodation was *EEOC v. Red Robin Gourmet Burgers*. An employee who worked as a server was terminated after refusing to cover up his tattoos, in violation of company policy requiring that "[b]ody piercings and tattoos must not be visible." The employee, Mr. Rangel, practiced Kemeticism, a religion with roots in ancient Egypt devoted to service to Ra, the Egyptian sun god. The tattoos encircled his wrists and were expressions of his religious devotion. Mr. Rangel believed that intentionally covering his tattoos is a sin.[80]

The court's rejected Red Robin's argument for undue hardship that consisted of a company profile and customer study suggesting that Red Robin seeks to present a family-oriented and kid-friendly image. But, the court maintained, Red Robin presented no evidence that visible tattoos are inconsistent with these goals generally, or that its customers specifically shared this perception. Rangel worked for six months before being asked to cover his tattoos. There was no evidence in the record of customer complaints. The court found Red Robin's claims to be based upon hypothetical hardships based on unproven assumptions. The court also rejected, as a "hypothetical hardship," Red Robin's slippery slope argument that the company

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[78] *Id*. at 1015-16.

[79] *EEOC, Alamo Car Rental Fired Young Muslim Woman After 9/11 Attacks for Wearing Head Scarf During Ramadan, Agency Charged*, Press Release (June 4, 2007), https://www.eeoc.gov/newsroom/phoenix-jury-awards-287640-fired-muslim-woman-eeoc-religious-discrimination-lawsuit.

[80] E.E.O.C. v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *1 (W.D. Wash. Aug. 29, 2005)

would be bombarded with employee requests and would be forced "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."[81] After the denial of summary judgment, Red Robin settled the case for $150,000 and a promise to make substantial policy and procedural changes to insure that management understands its obligations to accommodate religious beliefs.[82]

Unfavorable Outcomes for Muslim Women

The EEOC lost a case it filed, pursuit to Title VII of the Civil Rights Act of 1964, on behalf of a class of Muslim women who alleged that GEO, a private company responsible for the operations of a prison in Delaware County, Pennsylvania, had refused to accommodate the Muslim women by providing an exception to the prison's dress policy that precluded them from wearing religiously required head coverings. GEO filed a motion for summary judgment, claiming that a deviation from its policy would cause undue hardship by compromising its interests in security and safety. GEO's motion was granted.[83]

What was decisive for the court was GEO's argument that its no headgear policy, which prohibited employees from wearing hats, caps, scarves, hooded jackets or sweatshirts, was a

[81] *Id*. at *4-5.

[82] EEOC, *Burger Chain to Pay $150,000 to Resolve Religious Discrimination Suit*, Press Release, (September 16, 2005), https://www.eeoc.gov/newsroom/burger-chain-pay-150000-resolve-eeoc-religious-discrimination-suit-0.

[83] *Equal Opportunity Employment Commission v. The GEO Group, Inc.*, 616 F.3d 265, 267-274 (3d Cir. 2010).

safety measure. The court gave significant weight to Warden Hohm's testimony about his previous experience as the lead investigator for the company at a correctional facility in California. One of the problems he encountered was the smuggling of contraband, including narcotics and small weapons, such as knives, by employees, who sold such items to prisoners. Caps and other headwear were used to bring such items into the prison facility without detection. Particularly persuasive was his testimony that a khimar could be taken from a woman wearing it and used to choke or restrain them. A khimar grabbed from behind by the sides of it could immediately be used to choke the wearer.[84]

However, no such incidences had actually occurred. But the court departed from the standard used to assess claims of undue hardship in the line of cases represented by the EEOC's actions against Abercrombie and Fitch, *E.E.O.C. v. 704 HTL Operating, LLC*., and *E.E.O.C. v. Alamo Rent-a-Car*. In these cases, the courts required a showing that undue hardship had actually occurred. But the court in *GEO* prioritized safety concerns and therefore, reasonably foreseeable risk took precedence over requiring the company to show that absence of this particular dress policy had actually resulted in undue hardship for the company. The rationale was that in a prison setting, the safety of employees and inmates is a top priority. Therefore, GEO should not be prevented from anticipating and countering, through appropriate policies, plausible foreseeable risks that might be posed by the plaintiffs' preferred accommodation.[85]

A similar rationale prevailed in *EEOC v. Kelly Servs., Inc.* If a religious accommodation would compromise a company's safety concerns, the court will likely consider the

[84] *Id*.

[85] *Id*.

accommodation to constitute an undue hardship. After being placed by Kelly Services, a temporary employment agency, with a commercial printing company, Asthma Suliman, a female Muslim employee, was denied the assignment after she refused to remove her khimar. She brought suit against Kelly Services, but the Eight Circuit upheld Kelly's motion for summary judgment. The court found, first, the Kelly had provided a reasonable accommodation by offering Ms. Suliman her choice of seven different job placements, all of which could be performed while wearing the khimar. And the court rejected the EEOC's claim that the safety policy of Kelly's client was a pretext for discriminating against employees requiring religious accommodation. Rather, the court determined that Nahan's policy was not only facially neutral, but legitimate since the policy was a safety policy.[86]

A different rationale was offered in *Webb v. City of Philadelphia*, a case in which a Muslim woman brought suit because she had been denied a religious accommodation to wear a headscarf while in uniform and on duty. The court held that this request would constitute an undue hardship because of the need of the police department, as a governmental entity, to protect the perception of its impartiality by citizens of all races and religions and its neutrality in the service of all citizens, free from any expression of personal religion or religious bias. The court relied upon *Daniels v. City of Arlington*, in which a religious accommodation for a police officer who refused to remove a cross pin from his uniform, in non-compliance with official department policy, was denied for the same reason.[87]

[86] E.E.O.C. v. Kelly Servs., Inc., 598 F.3d 1022, 1023-24, 1031-32 (8th Cir. 2010).

[87] Webb v. City of Philadelphia, 562 F.3d 256, 258-62 (3d Cir. 2009)(citing as persuasive authority *Daniels v. City of Arlington,* 246 F.3d 500, 506 (5th Cir.2001)).

Religious Garb, Accommodations, and Corporate Dress Policy: Another Line of Judicial Reasoning

In *EEOC v. Sambo's of Georgia, Inc.*, a 1981district court case, the restaurant chain did not hire the plaintiff, Mr. Tucker, for a restaurant management position because he could not comply with the company's grooming and appearance standards for facial hair, which prohibited beards and only permitted neatly trimmed mustaches. Mr. Tucker was forbidden by his religion, the Sikh faith, from shaving his facial hair. The court found in favor of Sambo's, the defendants, because a religious accommodation would have posed an undue hardship because a bearded manager would not comport with the public image that the restaurant chain had built up over the years. The court accepted, as a showing of undue hardship, Sambo's argument that its grooming standards were based on management's perception and years of experience in the restaurant business that a significant segment of the public prefers restaurants with clean-shaven waiters and managers. The court accepted the testimony of upper level management of the company that the public associated bearded restaurant managers with unsanitary conditions. The court was also persuaded by the fact that the requirement of clean-shavenness is a conventional norm in family restaurants and widely considered to be essential to attracting and maintaining customers. This district court rejected the EEOC's long-held position that refusal to accommodate religious practices on the basis of customer preference is a matter of disparate treatment. The court argued that the EEOC's stance on this matter does not have the force of law. Instead, the court held that even if this had been a case of religious discrimination instead of a neutral grooming policy

applied to all job applicants and employees, clean-shavenness is a bona fide occupational qualification of a restaurant manager that appeals to the family trade.[88]

Twenty years later, in the Southern District of New York, the court in *Hussein v. Waldorf Astoria* rejected the complaint of a Muslim banquet waiter who brought suit against the Waldorf-Astoria hotel and restaurant for refusing to let him work with a beard. While this case was complicated by the fact that the plaintiff did not notify his employer of his request for a religious accommodation, but simply showed up to work with a beard, the court relied upon the persuasive authority of *Sambo's* to treat clean-shavenness as a bona fide occupational qualification in certain businesses so long as the employer's grooming requirement is not discriminatorily directed against a religion. And unlike the line of cases favorable to Muslim women wearing the hijab, the court did not require any showing, featuring concrete evidence of actual adverse economic impact, but rather, accepted the defendant's assertion that granting the accommodation would cause undue hardship because it would jeopardize the restaurant's reputation and might undermine efforts to maintain standards and discipline among banquet waiters.[89]

If the Abercrombie & Fitch cases are representative of the line of case law more favorable to religious accommodations for religious garb when there is a conflict with corporate dress policy, *Cloutier v. Costco Wholesale Corp*. represents the line of cases more deferential to corporate image concerns. Ms. Cloutier alleged that her employer, Costco Wholesale Corporation ("Costco") failed to offer a reasonable accommodation with respect to the

[88]E.E.O.C. v. Sambo's of Georgia, Inc., 530 F. Supp. 86, 88-89, 91 (N.D. Ga. 1981); Flake, *supra* note 8 at 725.

[89]Hussein v. The Waldorf-Astoria, 134 F. Supp. 2d 591, 598-599 (S.D.N.Y. 2001), *aff'd sub nom*. Hussein v. Waldorf Astoria Hotel, 31 F. App'x 740 (2d Cir. 2002).

company's "no facial jewelry" provision of its dress code. She was a member of the "Church of Body Modification" and that she considered herself responsible to be a good model of the church's teachings, which precluded her from removing or covering her facial jewelry. The court held that Costco had no duty to accommodate her request because it would constitute undue hardship. Cloutier argued, in continuity with the logic of the courts in the *Alamo Rent-a-Car, Red Robin*, and the Abercrombie & Fitch cases, that Costco received no complaints about her facial piercings, that the piercings did not affect her job performance, and therefore, that the hardships posited by Costco were merely hypothetical. However, the court did not require a showing by Costco of any actual hardship. Rather, the court considered Costco's own business determination that facial piercings detract from the "neat, clean and professional image it aims to cultivate." The loss of control over its public image is sufficient to constitute an undue hardship.[90]

Finally, the court in *Brown v. F.L. Roberts & Co.*,, addressed a case in which the plaintiff, a Rastafarian whose adherence to his religious beliefs required him not to shave or cut his hair. Mr. Brown worked for a Jiffy Lube in Massachusetts. Prior to the implementation of a clean-shaven appearance policy, he had worked as a lube technician, servicing vehicles in both the upper bay, where he was visible to customers, and the lower bay, where he was not. On occasion, he was responsible for greeting arriving customers and discussing products and services with them. After the implementation of the policy, he was confined to working in the lower bay, out of sight of customers. While the court wrestled with whether Mr. Brown had suffered an adverse employment action, since his pay had not been reduced and in fact, he had received a regular pay raise after being consigned to the lower bay. Mr. Brown argued that an appropriate religious

[90]Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 128-29, 134-38 (1st Cir. 2004); Flake, *supra* note 8 at 729-30.

accommodation would exempt him from the company's dress policy and permit him to work in the upper bay where he would likely have customer contact. However, the district court within the first circuit considered itself bound by the precedent established by *Cloutier,* which "made it clear that granting an outright exemption from a neutral dress code 'would be an undue hardship because it would adversely affect the employer's public image.'"[91] Nonetheless, as will be pointed out in the next section, Judge Ponsor was extremely uncomfortable with this precedent to which he was bound. His articulated concerns will be addressed in the next sections of this essay.

Dallan Flake's Proposal: Protect Corporate Image Assets and Apply a Rigorous De Minimus Standard

Dallan Flake, a law school professor with a master's degree in Sociology, sets forth a strong argument for Title VII jurisprudence that is highly deferential to economic value of a corporation or business enterprise's intangible but real image and reputation assets. Therefore, he is critical of the line of cases, including the adverse judgments against Abercrombie and Fitch, *E.E.O.C. v. 704 HTL Operating, LLC*., and *E.E.O.C. v. Alamo Rent-a-Car,* in which the court prioritized the religious needs of Muslim women wearing head-coverings over the image concerns of corporations and other business enterprises.

Since Flake's public policy stance is at odds with the argument set forth in this essay, it is important to engage his argument and to address what are indeed valid concerns about the economic value of a corporation's image and reputation. Flake contends that the image a business organization projects to its customers, shareholders, the media, and the general public is

[91]Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7, 9-11, 13, 15 (D. Mass. 2006).

critical to its success and therefore, is one of its most valuable assets. For this reason, he insists, courts should more closely scrutinize religious accommodation claims that interfere with a company's ability to control its image.[92]

Flake asserts that in a hypercompetitive business environment in which companies must stand out from the competition, a positive and well-defined image can mean the difference between success and failure. Positive image and reputation influence customer perceptions of service quality and customer loyalty.[93] It is the appearance and conduct of frontline employees who often form "the face of the company," projecting either a positive or negative image of the company to the consuming public. The importance of frontline employees to corporate image is the rationale behind companies requiring employees to follow strict dress standards. Controlling how employees look and act serves a "variety of organizational objectives" such as projecting a positive and consistent company image, fostering adherence to company norms, and conveying different levels of status and prestige.[94] As examples, Flake appeals to one study finding that consumers tend to form a negative image of a store with obese salespersons and another which found that older consumers perceive tattooed white collar workers as less intelligent and more dishonest than non-tattooed workers.[95]

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[92] Flake, *supra* note 8 at 702, 720.

[93] Flake, *supra* note 8 at 721 (citing Roderick J. Brodie et al., Investigating the Service Brand: A Customer Value Perspective, 62 J. BUS. RES. 345, 347-49 (2009).

[94] Flake, *supra* note 8 at 721-22 (citing Carrie Leigh Haise & Margaret Rucker, The Flight Attendant Uniform: Effects of Selected Variables on Flight Attendant Image, Uniform Preference and Employee Satisfaction, 31 SOC. BEHAV. & PERSONALITY 565, 566 (2003).

[95] Flake, *supra* note 8 at 722 (referencing Michael L. Klassen et al., Perceived Effect of a Salesperson's Stigmatized Appearance on Store Image: An Experimental Study of Students' Perceptions, 6 INT'L REV. RETAIL, DISTRIBUTION & CONSUMER RES. 216, 222 (1996) and Dwane H. Dean, Consumer

Flake takes his analysis even further when he celebrates the corporate aspiration to form employees who "live the brand," not only be dressing and behaving in a manner consistent with the corporate brand, but aligning their personal image with the corporate brand. Such employees become "brand ambassadors who communicate the values associated with the corporate brand through their customer interactions. [96] Flake speaks of corporations moving beyond merely requiring employees to comply with dress and conduct standards and instead *expecting* their employees to "live the brand," to become part of the brand itself. Indeed, this language of "internal branding," living the brand, and dress policy as oriented toward transforming employees' sense of self[97] sounds suspiciously like the corporate analog to religious formation and catechesis. The brand, and the lifestyle associated with the brand, represents itself as a comprehensive system of meaning and the goal is to form employees whose identity, subjectivity, and lifestyle are conformed to a corporate brand and image.

Therefore, Flake argues that courts should apply what he considers to be the "true de minimus standard." Flake considers the line of cases from *Sambo's* to *Cloutier* to be the proper application of the standard and argues that when there is any inconsistency between the accommodation and the corporate image, the result is the corporation's "loss of control" over its image and this alone should be deemed to constitute an undue hardship, regardless of whether

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Perceptions of Visible Tattoos on Service Personnel, 20 MANAGING SERVICE QUALITY 294, 303 (2010)).

[96] Flake, *supra* note 8 at 723 (referencing Celia V. Harquail, "Employees as Animate Artifacts: Employee Branding by "Wearing the Brand" in ARTIFACTS AND ORGANIZATIONS: BEYOND MERE SYMBOLISM 161-67 (Anat Rafaeli & Michael G. Pratt eds., 2006).

[97] Flake, *supra* note 8 at 723-24 (citing Harquail, "Employees as Animate Artifacts"; Nancy J. Sirianni et al., Branded Service Encounters: Strategically Aligning Employee Behavior with the Brand Positioning, 77 J. MARKETING 108, 108-09 (2013); and Anat Rafaeli, When Clerks Meet Customers: A Test of Variables Related to Emotional Expressions on the Job, 74 J. APPLIED PSYCHOL. 385, 389 (1989).

the accommodation has or will cause economic loss, customer complaints or any other adverse consequence besides loss of control. If the requested accommodation conflicts with the business enterprise's dress policy and corporate image interests, Flake argues, that is in itself sufficient to constitute undue hardship.[98]

A Matter of Values, Priorities and Public Policy

This essay will conclude with a few brief reflections which must be, of necessity, cursory.

It is extraordinarily difficult to strike a sensible balance between a business enterprise's valid concerns to protect its image and to regulate the ways in which its employees represent the company and the bona fide religious convictions and essential practices of religious adherents. As indicated earlier, the spirit behind § 701(j) of the Civil Rights Act as amended in 1972, is one in which employer and employee engage in an interactive process characterized by bilateral cooperation designed to arrive at the most favorable solution for both employer and employee. However, Dallen Flake's argument, in effect, eradicates any real vestige of the requirement for workplace accommodations of religious practices when in conflict with an employer's image. He argues that corporate image is a precious asset that a corporation need not show any tangible harm, but only a meaningful threat to their corporate image. In effect, this means that employers may provide a religious accommodation when the employer decides to provide a religious

[98] Flake, *supra* note 8 at 745-47.

accommodation. Since an employer would not, on Flake's proposal, be required to demonstrate evidence of any actual harm to the corporation or other form of business enterprise, it is the employer, not the court, who effectively decides, in a unilateral fashion, what constitutes an undue hardship.

Ultimately, the issue is one of public policy and societal values. Does American society value the protection of the essential religious convictions and practices of individuals more than the protection of corporate or other business prerogatives? Ideally, this is not an either/or choice, but one that is resolved on a case-by-case basis in a bilateral spirit of good will in search of solutions that seek to balance both interests. In this final segment of the paper, I will treat Justice Marshall's statement, in his dissent in *Hardison*, as moral norm or public policy value that is worth protecting:

> a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.[99]

Dallan Flake seeks to resolve the tension by advocating almost complete deference to business and especially corporate prerogatives. This argument would make sense of economic realities in the "real world" conformed to the ideals of the Economics 101 textbook. There, every agent within the economic system, whether individual employees or the business enterprises that are employers, has complete freedom to enter and exit contracts. An employee or prospective employee who does not like the terms of an employment contract is free to find employment elsewhere. However, though it is beyond the parameters of this brief essay to make the argument, there are good reasons to acknowledge the reality of the asymmetry of power between most

[99] *Hardison*, 432 U.S. at 85-86 (Marshall, J., dissenting).

employees and employers. Elizabeth Anderson's argument in *Private Government* is an example of this line of argumentation. Anderson argues that employers have the power to minutely regulate workers' speech, clothing, and manners that that this power often extends to workers' off-duty lives. Due to "at-will employment," workers can be fired for their political speech, recreational activities, diet, and almost anything else employers care to govern.[100]

Judge Ponsor, in *Brown v. F.L. Roberts & Co.*, considered himself to be bound by the precedent established by *Cloutier*, which treated outright exemptions from a neutral dress code to an undue hardship because it would adversely affect the employer's public image.' However, his remarks, expressing his explicit and extreme discomfort with this outcome, even if they are dicta from a mere district court decision, are extraordinarily weighty for public policy considerations. Judge Ponsor stated that if *Cloutier's* language treating, as an undue hardship whatever any employer may claim to be an undue hardship with respect to its "public image" is read too broadly, the implications are, in effect, frightening. First of all, he shares Justice Marshall's concern, stating that "An excessive protection of an employer's "image" predilection……places persons whose work habits and commitment to their employers may be exemplary in the position of having to choose between a job and a deeply held religious practice."[101] But Judge Ponsor also expresses another concern:

> One has to wonder how often an employer will be inclined to cite this expansive language to terminate or restrict from customer contact, on image grounds, an employee wearing a yarmulke, a veil, or the mark on the forehead that denotes Ash Wednesday for many Catholics. More likely, and more ominously, considerations of "public image" might persuade an employer to tolerate the religious practices of predominant groups,

[100] ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 37-41, 52-53 (2019).

[101] *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d at 18-19.

while arguing "undue hardship" and "image" in forbidding practices that are less widespread or well known.[102]

Judge Ponsor adds that when the balance tips too strongly in favor of an employer's preferences, and sometimes an employer's prejudices, there is the risk that the outcome will be "an unfortunately (and unrealistically) homogeneous view of our richly varied nation."[103]

Judge Ponsor's fears are not unrealistic. An insidious shadow was lurking behind Red Robin's argument that it would have been an undue hardship to offer a religious accommodation that would have permitted an exception to its dress policy for an adherent of Kemeticism to work as a server with a small visible tattoo encircling his wrist. Red Robin's argued that its corporate image was "family-oriented and kid-friendly."[104] One of the company's executives, however, said the quiet part of the company's particular understanding of "family-oriented" out loud. At an investment meeting, Chief Financial Officer James McCloskey stated that the company has "Christian" values and that Red Robin seeks out "that all-American kid" from the suburbs for its server positions, not those with "that urban kind of experience."[105]

The serious danger of too much deference to corporate image concerns, as advocated by Dallan Flake, is not only the undermining of Title VII's protections for religious needs, but also an undermining of Title VII's other protections as well, including those concerned with matters of race and national origin. Under the cloak of corporate image interests, James McClosky

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[102] *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d at 17.

[103] *Id*. at 18-19.

[104] E.E.O.C. v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *1 (W.D. Wash. Aug. 29, 2005).

[105] EEOC, *Burger Chain to Pay $150,000 to Resolve Religious Discrimination Suit*.

articulated precisely the danger feared by Judge Ponsor: that corporate image might be white and affluent (suburban and *not* urban).

Conclusion

I would argue that the line of cases that include *Red Robin*, *Alamo Rent-a-Car*, and the Abercrombie cases, among others, get something fundamentally right with respect to public policy and moral concerns. Muslim women who believe that wearing the hijab or other head coverings are essential for their faithfulness to Islam should not be forced to choose between faithfulness and employment. To adopt a greater deference to corporate or other business enterprise concerns for image runs the risk of imposing a corporate vision of normality that locks large segments of our population out of broad segments of the job market. This concern may be somewhat diminished by the apparent embrace by many corporations of the value of diversity. How deep this commitment runs is the subject for another essay. But nonetheless, corporate image concerns may embrace diversity with respect to race, ethnicity and sexuality while simultaneously upholding as an "image asset" an image that is biased against persons who are older or do not fit a mainstream perception of attractiveness.

Certainly, corporate image concerns are not always as problematic as that expressed by Red Robin's James McCloskey. What is needed is the recovery of a mode of judicial reasoning that seeks to balance both sets of concerns. Contrary to Dallan Flake, I would argue that the balance should be tipped slightly in favor of employees claiming the need for a religious accommodation when the belief or practice is indispensable to the adherent's faithfulness to his or her convictions.