

# Religious Expression: The Devil Is in the Details

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By Steve Taylor

When an employee violates a company dress code in favor of religious expression, the HR professional should tread carefully, experts say, because the appropriate outcome can be impacted by the specific situation. Such cases are “fact-intensive,” according to attorney Clifford Anderson of Hellmuth & Johnson in Eden Prairie, Minn.

Consider these facts:

- In 2001, Alamo Rent-a-Car lost a lawsuit brought by an employee who had been terminated after refusing to remove her Muslim headscarf, or hijab, during the holy month of Ramadan. The court decided that Alamo had committed discrimination based on religion.
- In 2007, the Costco retail chain won a lawsuit brought by a cashier who was fired after she refused to remove her facial piercings. She claimed that her eyebrow rings were part of her religion. The court ruled that the retailer had a legitimate interest in presenting a professional image to its customers.
- In February, 2010, Abercrombie & Fitch dismissed an employee of one of its Hollister clothing stores in California for refusing to remove her hijab. She has filed a religious discrimination complaint with the U.S. Equal Employment Opportunity Commission (EEOC).

Although the second decision might appear to counteract the first decision, it’s important to focus on the details of each case:

The EEOC, which brought the Alamo case, said the company’s dress code did not mention headscarves and that managers had allowed the same employee to wear her hijab during Ramadan in 1999 and 2000. Following the attacks of Sept. 11, 2001, change might have been understandable, but the court said Alamo should have allowed the scarf or offered a reasonable compromise.

Costco, on the other hand, had a specific appearance code and had proposed a compromise—reinstatement to the job if the cashier covered the piercing with a band-aid or replaced it with a clear retainer—which she refused, claiming that the little-known Church of Body Modification requires display of such jewelry.

Abercrombie & Fitch has a specific appearance code and its employee rejected a compromise—reassignment to a job that would keep her out of sight of customers. It was then that she was fired.

## **A&F: Been There Before**

Abercrombie & Fitch says its sales employees are on-the-job models for its merchandise and are part of the company brand. “We want you to see our clothing, what we’re selling, and the great-looking person that is wearing the clothing,” said Deon Riley, SPHR, vice president of human resources. Because a Muslim headscarf often is worn over the shoulders and even lower on the body, it covers the shirts and tank tops the company wants customers to admire. Explained Riley, “With the hijab, you’re probably missing the brand.”

San Francisco-based attorney Jahan Sagafi calls that reasoning “unfortunate, because it seems to be consistent with the unlawful interpretation of ‘look’ policy that we’ve been challenging over the years.” Sagafi, of the firm Lieff Cabraser Heimann & Bernstein, is one of those administering a \$40 million consent decree that Abercrombie & Fitch accepted in 2004, settling complaints by minority and female job applicants who claimed that the “look” policy discriminated against them.

The A&F look is “an incorrectly—and potentially unlawfully—narrow definition of an American look,” Sagafi said.

Abercrombie did not admit discrimination in the settlement but agreed to expand the diversity of its sales applicant pool. However, in 2008 A&F was hit with another lawsuit brought by an Oklahoma woman who said she was not hired because she wore her hijab to a job interview.

### **What’s HR to Do?**

Anderson said that HR professionals can draw several lessons from this tangle of details:

- An appearance policy should apply to everyone and should treat “similarly-situated people in the same fashion.”
- “Is the policy related to business objectives?” Anderson asked. A good policy will strike a balance between legitimate needs and a reasonable accommodation of religious beliefs.
- If the accommodation involves keeping the employee out of sight, Anderson advised, companies should work out believable reasons why this is necessary. “Your touchstone is always tying back to a legitimate business purpose for what you’re doing, and frankly, to the credibility of that business purpose.”
- Having no policy is not advised, according to Anderson, because the company might face hostile work environment claims if workers harass co-workers over their religious attire.

HR consultant Harriet Cohen of Training Solutions in Agoura, Calif., took a hard line about accommodations. She said that if the appearance policy is specific and applied consistently, “It doesn't matter if it's about religion or anything else. There is an expectation of appearance established that must be upheld by all employees in a given establishment.”

Linda Konstan of Sensible Human Resources Consulting in Denver acknowledged that religious attire in the workplace can be distressing to customers and co-workers. “However, unless it impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work or conflicts with another law or regulation, common sense and legal guidelines say we should allow religious expression among employees to the same extent that we allow other types of personal expressions.

“Instead of assuming disruption may occur, let's train managers to gauge the actual disruption posed by religious expression,” Konstan added.

### **A Different Mind-Set**

The two Abercrombie hijab cases could bring economic pressure to bear on the company. Zahra Billoo of the Council on American-Islamic Relations said, “People of color and people of conscience [should consider that] the store won't hire people who look the way you look, and act accordingly.”

Joyce Dubensky, CEO of the Tanenbaum Center for Interreligious Understanding in New York, said the American Muslim community has \$170 billion per year in buying power. “It's in the interests of businesses to recognize this community,” she said, adding, “There are different ways to look at brands. It's not only what a logo looks like, but also: What is your reputation like?”

She suggested flexible thinking by HR managers when their company policies encounter religious questions. “Trying to have an accommodation mind-set that includes people ... will in the long run benefit everyone.”

*Steve Taylor is a freelance writer based in Arlington, Va.*

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1800 Duke Street  
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Phone US Only: (800) 283-SHRM  
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