

NO. 88062-0

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES KUMAR, RANVEER SINGH, ASEGEDEW GEFE, AND
ABBAS KOSYMOV,

Petitioners.

v.

GATE GOURMET, INC.,

Respondent.

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STATE OF WASHINGTON

**BRIEF OF AMICUS CURIAE STATE OF
WASHINGTON HUMAN RIGHTS COMMISSION**

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I. INTRODUCTION

The Washington State Human Rights Commission has long recognized religious accommodation as a theory for relief under the Washington Law Against Discrimination (WLAD). From the Commission's perspective, this legal theory was not in question until the recent appellate court decision in *Short v. Battleground School District*, 169 Wn. App. 188, 279 P.3d 902 (2012). The *Short* court held WLAD does not provide a claim for failure to accommodate religious beliefs. It reached that decision based in part on its mistaken belief that the Commission had not recognized such a claim under WLAD. *Short*, 169 Wn. App. at 203. The trial court in this case expressly relied on *Short* when it dismissed the plaintiffs' case below.

The Commission is concerned that the *Short* court relied on an incomplete understanding of the Commission's position. The Commission files this brief to alert the Court to its position and to apprise the Court of the Commission's guidance and actions relating to accommodation of religious beliefs. The Commission contends that the *Short* case was wrongly decided and should be overturned, and that the trial court erred when it dismissed this case.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Commission is the administrative agency charged with the enforcement of WLAD, RCW 49.60. The Commission has an interest in this case because the Legislature created the Commission under WLAD and gave it “powers with respect to elimination and prevention of discrimination.” RCW 49.60.010. As such, the Commission is familiar with WLAD and has interpreted and applied the statute to complaints alleging failure to accommodate religious beliefs. The Commission wishes to apprise the Court of its interpretation of WLAD, information that was not presented to the Court of Appeals in the *Short* case.

This Court’s decision will guide the Commission and state courts faced with future cases involving religious accommodation. This Court has recognized the requirement that WLAD be broadly construed. *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996). Historically, the Commission has also relied on the legislative mandate that WLAD “be construed liberally for the accomplishment of the purposes thereof.” RCW 49.60.020. Despite this rule of liberal construction, Gate Gourmet asks this Court to narrowly construe WLAD’s protections relating to religion and to do so based on *Short’s* incomplete understanding of the Commission’s position on this issue.

The Commission carries out its mandate to liberally construe WLAD by processing complaints and issuing guidance recognizing a religious accommodation theory. Restricting this theory to only those protected by federal law would create a gap in protection from discrimination for those employees not covered by federal law.¹ Such a holding would interfere with the Commission's statutory responsibility to eliminate and prevent religious discrimination. For these reasons, the Commission submits this amicus brief supporting reversal of the trial court's dismissal of this action and the overruling of the *Short* decision.

III. ISSUE

The Commission addresses only one issue raised on appeal:

Does a cause of action exist under the Washington Law Against Discrimination, RCW 49.60, for failure of an employer to reasonably accommodate its employees' religious beliefs and practices?

IV. STATEMENT OF THE CASE

James Kumar, Ranveer Singh, Asegedew Gefe, and Abbas Kosymov (collectively, Kumar) brought an action against their employer,

¹ The *Short* decision created a gap in coverage for religious accommodation claims. See Appellant's Br. at 14. Specifically, employers with 8 or more employees are subject to the provisions of WLAD. See RCW 49.60.040(11). In contrast, Title VII of the Civil Rights Act of 1964 covers employers with 15 employees or more. See 42 U.S.C. § 2000e(b) (2012). Those employees who work for employers that fall between these jurisdictional levels would have no protection from this form of religious discrimination.

Gate Gourmet, Inc., alleging, among other claims, that Gate Gourmet failed to accommodate their sincerely held religious beliefs by not providing meals that complied with those beliefs, or by failing to inform the employees when serving them meals that contained foods that conflicted with those beliefs. Appellant's Br. at 10-11.

Gate Gourmet moved to dismiss the complaint under Civil Rule 12(b)(6), asserting that Kumar failed to state a claim on which relief can be granted. The King County Superior Court granted Gate Gourmet's motion, based on the *Short* decision cited above. Appellant's Br. at 6-7. The *Short* court held that WLAD does not provide a claim for failure to accommodate religious beliefs. *Short*, 169 Wn. App. at 203. Although it recognized that such a theory exists under federal law, the *Short* court reasoned that the Washington Supreme Court, the legislature, and the Commission had not specifically recognized the failure to accommodate theory under WLAD. *Short*, 169 Wn. App. at 201-02. Accordingly, the *Short* court declined to recognize such a claim and held that the plaintiff's religious accommodation claims were properly dismissed by the trial court. *Id.* at 197.

The *Short* court was mistaken in asserting that the Commission had not interpreted WLAD to include a claim for failure to accommodate religious beliefs or practices. In fact, as discussed more fully below, the

Commission had recognized for many years a claim for failure to reasonably accommodate religious beliefs, had published guidance to that effect and, until June 2012 when the *Short* opinion was filed, processed complaints based on such a theory.

V. ARGUMENT

The *Short* decision is in error and should be overturned as it failed to recognize that the religious accommodation theory is implied in WLAD. The *Short* decision relied in part on its mistaken belief that the Commission had not recognized a failure to accommodate theory, when in fact the Commission had published guidance and processed complaints based on that theory. The Commission's recognition of a failure to accommodate religious beliefs theory is supported by the language of RCW 49.60. The Court should reverse *Short* and recognize that WLAD includes an implied theory of proving discrimination based on creed on a failure to accommodate theory.

A. **Contrary To The *Short* Decision, The Commission Has Recognized And Employed The Religious Accommodation Theory**

The *Short* court was mistaken in its belief that the Commission has not spoken on the existence of a religious accommodation theory. In fact, the Commission created guidance on religious accommodation years before the *Short* decision. The Commission also processed complaints

based on such a theory, only ceasing to do so when it was caught off-guard by the court's ruling in *Short* in the summer of 2012.

The Commission created and placed on its website documents demonstrating its support of a religious accommodation theory. This Court has previously looked to such Commission documents to provide direction on the interpretation of state discrimination law. *Roe v. Teletech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 759 n. 10, 257 P.3d 586 (2011) (noting Commission guidance related to medical marijuana use).

In 2008, the Commission published a *Guide to Religion and Washington State Nondiscrimination Laws*.² This document includes a section, at page 2, titled, *Reasonable Accommodation* that begins:

In order to receive a reasonable accommodation from an employer, the employee must hold a religious belief and put the employer on notice that the religious belief conflicts with a workplace rule. Once that occurs, the employer and employee must enter into an interactive process to find a reasonable accommodation. The employer does not need to choose the employee's preferred accommodation, only one that works.^{3]}

² Laura Lindstrand, *Wash. State Human Rights Comm'n, Guide to Religion and Washington State Nondiscrimination Laws* (March 2008), available at <http://www.hum.wa.gov/Publications/Guides.html> (last visited Sept. 20, 2013). A copy is included as Attachment A to this brief.

³ Attach. A at 2.

An employer need not make accommodation if a work rule is safety based or if the rule is a legal requirement. Attach. A, at 2. The section further discusses types and examples of reasonable accommodations and undue hardships. Attach. A, at 2.

The Commission followed with its *Guide to Dress Codes and Washington State Nondiscrimination Laws* in 2009.⁴ This publication addresses employer policies on dress and grooming and how those policies may discriminate in violation of WLAD. In particular, the Guide provides “[i]n order to avoid religious discrimination, an employer may need to exempt the employee from the dress code or grooming standard as a reasonable accommodation.”⁵ The Guide further references religious accommodation, including discussions of headwear policies that may discriminate against persons of Sikh, Muslim, or Jewish faiths and policies regarding beards that may discriminate against Sikh, Orthodox Judaism, Rastafarian, and some Hindu faiths.⁶ The document ends with an entreaty to employees who believe they have suffered discrimination because of a

⁴ Laura Lindstrand, Wash. State Human Rights Comm'n, *Guide to Dress Codes and Washington State Nondiscrimination Laws* (Feb. 2009), available at <http://www.hum.wa.gov/Publications/Guides.html> (last visited Sept. 19, 2013). A copy is included as Attachment B to this brief.

⁵ Attach. B at 3.

⁶ Attach. B at 3-4.

dress code, and to employers who have questions about imposing dress codes, to contact the Commission.⁷

The Commission has also applied the religious theory in investigating complaints filed with the agency. Such practice is demonstrated by the matter of Faira Abu against her employer, Best Western Airport Executel in Seatac, Washington. Ms. Abu filed a complaint with the Commission against the hotel asserting she had been fired for wearing a head scarf to work. The Commission issued a Reasonable Cause Finding on May 9, 2007, providing that “employers must reasonably accommodate employees’ sincerely held religious beliefs or practices unless doing so would impose an undue hardship on the employer or create an insurmountable safety problem.”⁸ Ms. Abu subsequently sued in federal court alleging violations of WLAD and Title VII. Complaint and Demand for Jury Trial, *Abu v. Pramco Sea-Tac Inc.*, No. C-08-1167 (W.D. Wash. Aug. 5, 2007).⁹

⁷ Attach. B at 6.

⁸ A copy of the Reasonable Cause Determination is included as Exhibit B to Attachment C to this brief. The Commission respectfully requests that this Court take judicial notice of the Commission’s use of the religious accommodation theory pursuant to ER 201(b)(2). This Rule allows courts to take judicial notice of adjudicative facts that are “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.”

⁹ A copy of the Complaint is included as Attachment C to this brief. The case settled. Order of Dismissal (Apr. 15, 2009). A copy of the Order of Dismissal is included as Attachment D to this brief.

The above discussion demonstrates that, rather than being “silent” on the existence of a religious accommodation obligation, as stated in *Short*, the Commission has adopted this interpretation of WLAD through its publicly available guidance and the processing of complaints. As the agency charged with administering WLAD, the Commission respectfully requests that the Court grant deference to its interpretation. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726, 733 (2000); *see also Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998).

B. The Commission’s Interpretation Is Supported By The Law, Which Creates An Implied Cause Of Action For Religious Accommodation

Gate Gourmet urges this Court to reject the cause of action for a failure to accommodate legal theory of religious discrimination under WLAD. Its arguments are based, in part, on the contention that such a theory cannot exist without the Legislature or the Commission affirmatively mentioning religious accommodation. *See Resp’ts’ Br.* at 9. However, as discussed below, this Court has previously determined that WLAD provides theories of recovery—such as accommodation, disparate treatment, and disparate impact—in the absence of express statutory or regulatory language setting forth those theories. The Court should

similarly find an implied cause of action here with respect to the accommodation of religious beliefs.

1. The Obligation For An Employer To Accommodate Religious Beliefs Is Implied In The Statute

The *Short* Court recognized that federal courts have long recognized a variety of theories for establishing religious discrimination “including disparate impact, hostile work environment and failure to accommodate.” *Short*, 169 Wn.2d at 198. The Court further states that there is sparse case law analyzing the theories for religious discrimination under WLAD. *Id.* While Washington Courts have not yet had the opportunity to address various liability theories in the religious context, they have recognized such theories for other types of discrimination, all of which arise from the same section of the law that prohibits religious discrimination. *See* RCW 49.60.030. This Court now has the opportunity to ensure those subject to religious discrimination are afforded the same protection the Court has provided for other types of discrimination.

In enacting WLAD, the legislature declared: “The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.” RCW 49.60.020. This liberal construction supports implying a cause of action for failure to accommodate from RCW 49.60.030(1), which provides in part:

(1) The right to be free from discrimination because of race, *creed*,^[10] color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a *civil right*. This right shall include, but not be limited to:

(a) *The right to obtain and hold employment without discrimination[.]*

(Emphasis added.)

WLAD's strong policy against employment discrimination is again stated in RCW 49.60.180, which provides in part that it is an unfair practice for any employer:

(3) *To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability*

(Emphasis added.) The statutes thus provide that employers cannot discriminate based on certain protected classes, including creed.

RCW 49.60 does not expressly state that causes of action exist for any specific legal theory of discrimination, including the disparate

¹⁰ The *Short* court noted the term "creed" in WLAD has been interpreted to mean "a system of religious beliefs." *Short*, 169 Wn. App. at 201 n.18 (citing *Riste v. Eastern Wash. Bible Camp, Inc.*, 25 Wn. App. 299, 302, 605 P.2d 1294 (1980)).

treatment or disparate impact claims frequently brought under WLAD. Nonetheless, this Court has recognized such causes of action are clearly implied in RCW 49.60. *See Fahn v. Cowlitz Cnty.*, 93 Wn.2d 368, 375-76, 610 P.2d 857, 621 P.2d 1293 (1980) (noting our legislature's mandate of liberal construction for RCW 49.60); *see also E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 909, 726 P.2d 439 (1986) (discussing claims of disparate impact and disparate treatment based on race); *Hume v. American Disposal Co.*, 124 Wn.2d 656, 668, 880 P.2d 988 (1994) (stating age discrimination claims can be brought under disparate impact and disparate treatment theories).

In these cases, the Court affirmed disparate impact and disparate treatment as valid theories of recovery, despite the absence of any express mention of the theories in WLAD. Gate Gourmet acknowledges in this case that those causes of action exist under Washington law. Resp't's Br. at 23, 25. In the disability discrimination context, this Court has also recognized a failure to accommodate claim despite the lack of statutory language specifically authorizing such a claim. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 387, 583 P.2d 621 (1978).

In *Holland*, this Court faced the question of whether employers were required to make reasonable accommodation for employees with

disabilities as an “issue of first impression” in 1978. There, the Court recognized that such a responsibility was implied in the statute:

RCW 49.60 contains a strong statement of legislative policy. *See* RCW 49.60.010 and .030. When, in 1973, the legislature chose to make this policy applicable to discrimination against the handicapped, we believe it is clear it mandated positive steps be taken. An interpretation to the contrary would not work to eliminate discrimination. It would instead maintain the Status quo wherein work environments and job functions are constructed in such a way that handicaps are often intensified because some employees are not physically identical to the “ideal employee”.

Holland, 90 Wn.2d at 388-89.¹¹ Likewise, this Court has recognized other implied theories of discrimination, such as a hostile work environment claim under WLAD’s disability discrimination prohibition. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2003).

The Court’s recognition of implied theories of proving discrimination is consistent with the principle that the Court should interpret a statute “in the manner that best fulfills the legislative purpose and intent.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996). In *Marquis*, the court stated that WLAD requires a liberal construction in order to accomplish the goals of the law. *Id.* As noted by *Marquis*, this Court has determined that the purpose of WLAD is “to deter

¹¹ Having made this determination, the Court also noted the existence of a Commission rule regarding the duty to accommodate. WAC 162-22-080. That rule was repealed in 1999. Wash. State Reg. 99-15-025.

and eradicate discrimination in Washington[.]” *Id.* at 109. Additionally, the liberal construction mandate requires the Court to avoid any construction of the statute that would narrow the coverage of the law. *Marquis*, 130 Wn.2d at 108. Gate Gourmet’s request that this Court reject a religious accommodation theory contradicts this Court’s previous admonitions that nothing in WLAD “be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights.” RCW 49.60.020; *see Marquis* 130 Wn.2d at 108.

2. Courts Have Not Required An Administrative Rule Prior To Recognizing Legal Theories Of Discrimination Under Either State Or Federal Law

Contrary to Gate Gourmet’s assertion, the existence of a requirement to accommodate religion under WLAD is not dependent on formal administrative action by the Commission. For example, the only mention of disparate impact in the Commission’s regulations is in the context of potentially discriminatory pre-employment inquiries¹² and sex discrimination related to pregnancy.¹³ Nonetheless, as noted in the

¹² Inquiries into convictions must be justified by business necessity because “[s]tatistical studies on convictions and imprisonment have shown a disparate impact of some racial and ethnic minority groups.” WAC 162-12-140(3)(d).

¹³ “There may be circumstances when the application of the employer’s general leave policy to pregnancy or childbirth will not afford equal opportunity for women and men. One circumstance would be where the employer allows no leave for any sickness or other disability by any employee, or so little leave time that a pregnant woman must

previous section, this Court has recognized a disparate impact theory for establishing discrimination in other areas such as race, *E-Z Loader Boat Trailers, Inc.*, 106 Wn.2d at 909, and age, *Hume*, 124 Wn.2d at 668.

Just as with these types of discrimination, the Commission has not doubted that the statute includes a religious accommodation requirement, and thus did not deem a rule on the subject necessary. While an administrative agency may provide guidance on issues of statutory interpretation, it is ultimately for the courts to determine the purpose and meaning of statutes. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106, 103 S. Ct. 730, 74 L. Ed. 2d 954 (1983) (reviewing Human Rights Commission interpretation of WLAD). To now state that a legal theory may not exist absent its inclusion in an administrative rule would turn years of jurisprudence on its head.

3. An Express Statutory Requirement To Accommodate Disabilities Does Not Prevent The Court From Implying A Theory Of Religious Accommodation

Gate Gourmet also argues that the mention of the word “accommodation” in WLAD’s disability discrimination provisions and related Commission rules bolsters its argument that an accommodation

terminate employment. Because such a leave policy has a disparate impact on women, it is an unfair practice, unless the policy is justified by business necessity.” WAC 162-30-020(3)(b).

theory cannot exist with respect to religious discrimination absent such expression. Resp't's Br. at 9; *see also* RCW 49.60.040(7)(d).

When the legislature added disability discrimination to WLAD in 1973, it did not mention accommodation.¹⁴ In 1978, however, as discussed above, this Court ruled that disability accommodation was implied in WLAD. *Holland*, 90 Wn.2d at 388-89. The legislature did not act to address this issue until 2007 when it adopted the current definition of "disability."¹⁵ Even at that point the focus was not on accommodation

¹⁴ Laws of 1973, 1st Ex. Sess., ch. 214. The law originally used the term "handicapped." This word was replaced with "disabled" in 1993. Laws of 1993, ch. 510.

¹⁵ That statute defines Disability as:

The presence of a sensory, mental, or physical impairment that:

- (i) Is medically cognizable or diagnosable; or
- (ii) Exists as a record or history; or
- (iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

....

(d) Only for the purposes of qualifying for reasonable *accommodation* in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an *accommodation* would aggravate the impairment to the extent that it

itself, but rather to address issues raised in a Washington Supreme Court decision¹⁶ regarding the proper definition of the term “disability.” Final Bill Report on Substitute S.B. 5340, 60th Leg., 2007 Regular Sess. (2007).¹⁷ Similarly, mention of accommodation in the Commission’s regulations is contained in the definition of “able worker with a disability.” WAC 162-22-020(3).¹⁸

Thus, there is no indication that the legislature’s inclusion of “accommodation” in statutory provisions regarding disability discrimination meant to single out disability discrimination for accommodation. Rather, the legislative history suggests that when amending the statutory definition of disability for a different purpose (in response to a court decision), the legislature incorporated already existing law regarding accommodation into its definition. The express mention of accommodation in the definitional sections of WLAD and the Commission’s rules does not undermine the existence of a religious accommodation theory of liability, contrary to Gate Gourmet’s assertion.

would create a substantially limiting effect. RCW 49.60.040(7) (Emphasis added.)

¹⁶ *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006).

¹⁷ A Copy of Final Bill Report on Substitute S.B. 5340, 60th Leg., 2007 Regular Sess. (2007) is included as Attachment E to this brief.

¹⁸ The Commission’s rules also include a definition of “reasonable accommodation.” WAC 162-22-065.

VI. CONCLUSION

The Commission respectfully requests that this Court determine that a cause of action exists under WLAD for failure to accommodate religious beliefs. The trial court dismissal should be reversed, the *Short* decision overturned, and the case remanded for further proceedings consistent with its decision.

RESPECTFULLY SUBMITTED this 23rd day of September 2013.

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ATTACHMENT A

WASHINGTON STATE HUMAN RIGHTS COMMISSION

GUIDE TO RELIGION and WASHINGTON STATE NONDISCRIMINATION LAWS



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Religion and Non-Discrimination

RCW 49.60 and Title VII of the Civil Rights Act of 1964 prohibit discrimination in employment based on religion or creed.

Religion or Creed

A religion or creed is defined broadly and includes observance, practice, and belief. A creed or religious belief includes those sincere and meaningful beliefs that occupy in the life of that individual a place parallel to that of God in a traditional religion. The beliefs can include sincerely held moral and ethical beliefs as to what is right and wrong, and beliefs that address ultimate ideas, or questions about life, purpose, and death. For example Wiccan is a belief that is religious in nature because the belief relates to “ultimate” issues and a moral concern about improving the quality of life for others. However, membership in the Ku Klux Klan is not a religion and is instead considered an ideology.

- A person does not have to be part of an organization or church to have a creed or religion.
- Someone from a particular religion may adhere to different practices and beliefs than someone else in the same religion.
- Someone who was not religious at one point, may become religious.
- Employers may request some type of information to ensure that the employee is sincere, such as further information from the employee or a letter from a religious leader; however, it is often difficult, from a legal standpoint, to challenge a person’s sincerity.

Reasonable Accommodation

In order to receive a reasonable accommodation from an employer, the employee must hold a religious belief and put the employer on notice that the religious belief conflicts with a workplace rule. Once that occurs, the employer and employee must enter into an interactive process to find a reasonable accommodation. The employer does not need to choose the employee’s preferred accommodation, only one that works.

There are **two general types of reasonable accommodation**:

1. **An exemption from a work rule** or grooming standard.
 - Examples: An exemption from wearing a uniform or an exemption from a “no-beards” policy for a person who wears religious headwear, clothing, or icons, or has a beard for religious reasons.
 - An employer does not have to make an exemption from the work rule if the rule is safety based or if the rule is a legal requirement. Examples of such rules could be a requirement that employees must wear hard hats at a construction site, or a prohibition of loose-fitting clothing that could get

caught in machinery in a machine shop. These safety issues must be legitimate, and not hypothetical.

- Company image and customer preferences are never valid reasons to deny an exemption from a work rule. Company image, however, should be distinguished from the essential nature of the business. As an example, a company that markets hair care products would require its models to show their hair. A person whose religion requires that their hair be covered could not be a model for the hair care products.

2. **Work schedule change** to accommodate attendance at worship or services or to eliminate a safety issue.

- The employer can alter the person's schedule, transfer the person to a different position, or change the person's shift in order to accommodate a religious belief and practice.

An employer does not have to reasonably accommodate a religious belief if there is an **undue hardship**.

- An employer can claim that changing a work schedule would result in an undue hardship if there is an actual cost to making the change, if there is an actual negative impact on other employees, or if the change would create a violation of a collective bargaining agreement.
- The employer's burden of showing an undue hardship in religious accommodation situations is less than that of showing an undue hardship in disability accommodation situations. In religious accommodation, the employer can generally show undue hardship if the cost or impact is more than *de minimis*.

An example of an undue hardship might be found in a production setting with timelines or quotas for finishing an order. An employer may not have to accommodate an orthodox Muslim employee who must stop work to pray five times a day, if the time spent in prayer has an impact on production.

Employers should be aware that after the 9/11 terrorist attacks, government enforcement agencies are committed to preventing backlash against Muslims, Arabs, Sikhs, and others who may be thought to be associated with terrorists. In light of this, employers should consider relaxing their uniform and grooming standards, unless there are legitimate safety issues. Certainly, employers should avoid implementing rules that are more restrictive on religious practices because of terrorism fears.

Example: Prior to 9/11/2001, Muslim female employees were allowed by their employer to leave their shirts untucked, as it was a violation of their religious beliefs to tuck their shirts in as it would reveal their female shape. After the 9/11 terrorist attacks, the company revoked this accommodation. The company argued that it was a safety issue.

A U.S. District Court determined that safety was not the primary factor behind the new policy, and struck down the enforcement of the policy.

Sometimes, a workplace situation may present conflicting interests. For example, a Muslim dentist may claim that he cannot be in the same room as a dog due to his religious beliefs. One of his patients is disabled, and must have a service animal with her during the dental visit. The dental clinic, as a place of public accommodation, must allow the service animal to enter. The clinic must also explore the religious accommodation issues, and determine how the dentist might be accommodated in the situation.

Discrimination

An employer cannot subject employees or applicants to different treatment due to their religious beliefs. Examples of different treatment include, but are not limited to, refusing to hire an applicant, refusing to promote an employee, giving an employee the hardest jobs or worst shifts, holding an employee to different rules or different performance standards, or withholding benefits from an employee.

Harassing a person because of that person's religion or creed is prohibited conduct. This type of harassment should be covered in an employer's harassment and non-discrimination policies, and should be subject to an internal complaint and investigation procedure. An employer has the duty to take prompt and remedial action if an employee complains of religious discrimination. The employer is obligated to conduct an objective and prompt investigation, with appropriate remediation or discipline if discrimination is found. However, the employer is not obligated to impose the discipline that the complaining employee wants.

Likewise, an employer or manager who holds religious beliefs cannot treat an employee differently or poorly because that employee does not share their religious beliefs, and cannot make any employment decision based on the fact that the employee does not share their religious beliefs. The same principle applies to the treatment of employees who are not religious. For example, a company owned by Mormons cannot only hire or promote Mormons; the company must provide equal opportunity to people who are of other religions and to people who do not practice a religion.

Employee Behavior

Employees can express their religion at work by wearing personal ornaments, placing modest decorations in their workstations, or by having a Bible study during an unpaid lunch period. Employers can place restrictions on decorations at employee workstations if the workstation is in public or customer view, particularly if the employee works for a government agency. Religious ornamentation at a government agency may run afoul of the First Amendment's Establishment Clause. Employers should prohibit religious group study during work hours. Employers may prohibit private religious study during non-break work hours, as long as the rule is equally applied to similar non-religious behavior (i.e. to studying textbooks and to reading novels or magazines).

A manager or supervisor who decides to hold a religious study for co-workers during an unpaid lunch or outside of work hours must exercise extreme caution. Attendance must be and appear to be completely voluntary - it must never appear that employees are forced or pressured to attend. Attendance at the religious study must never be a prerequisite for any workplace perks or employment decisions. The manager or supervisor must use care to treat all employees the same in all aspects of employment, and to show no favoritism, even social favoritism, to employees who attend the religious study. Employers should be aware of the risk of this type of religious study; if an employee who chooses not to attend the study is then faced with an adverse employment action, there is the potential that the employee will make a claim of religious discrimination.

An employee cannot be rude or disruptive in the exercise of his or her religion, and the employer can prohibit such behavior as long as the same conduct rules are applied to everyone equally in non-religious situations.

In addition, an employee exercising his or her religion should not act adversely toward certain kinds of people, or refuse to cooperate in employer programs. For example, when an employer began displaying "diversity posters" which were inclusive of homosexuals, an employee responded by posting Biblical scriptures large enough to be visible to other employees. When the employee posted a passage condemning homosexuality, the employee's supervisors determined that it could be offensive and that it violated the employer's policy prohibiting harassment. The employee was fired for insubordination when he refused to remove the scriptures. The court held that it would create an undue hardship for the employer to accommodate the employee by allowing him to post messages intended harass his co-workers, or to exclude homosexuals from its diversity program. The court upheld the employee's termination, stating that the employee was not fired for his religious beliefs, but for insubordination and violation of the workplace harassment policy.

If you need additional information, have additional questions, or wish to have training for your organization, please contact the WSHRC at 360-753-6770 or 800-233-3247 (TTY 800-300-7525). Additional information on this and other civil rights issues can be found on our website at www.hum.wa.gov. This document does not constitute legal advice; if you have a particular situation about which you need legal advice, you should contact your attorney.

Following is information, including several scenarios, pertaining particularly to Muslims, Arabs, South Asians, and Sikhs. This information is courtesy of the U.S. Equal Employment Opportunity Commission.

QUESTIONS AND ANSWERS ABOUT EMPLOYER RESPONSIBILITIES CONCERNING THE EMPLOYMENT OF MUSLIMS, ARABS, SOUTH ASIANS, AND SIKHS

Since the attacks of September 11, 2001, the Equal Employment Opportunity Commission (EEOC) and state and local fair employment practices agencies have recorded a significant increase in the number of charges alleging discrimination based on religion and/or national origin. Many of the charges have been filed by individuals who are or are perceived to be Muslim, Arab, South Asian, or Sikh. These charges most commonly allege harassment and discharge.

While employers have an ongoing responsibility to address workplace discrimination, reaction to the events of September 11, 2001 may demand increased efforts to prevent discrimination. This fact sheet answers questions about what steps an employer can take to meet these responsibilities. The Commission has also prepared a companion fact sheet that answers questions about employee rights. For additional information, visit the EEOC's website at <http://www.eeoc.gov>.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination based on religion, ethnicity, country of origin, race and color. Such discrimination is prohibited in any aspect of employment, including recruitment, hiring, promotion, benefits, training, job duties, and termination. Workplace harassment is also prohibited by Title VII. In addition, an employer must provide a reasonable accommodation for religious practices unless doing so would result in undue hardship. The law prohibits retaliation against an individual because s/he has engaged in protected activity, which includes filing a charge, testifying, assisting, or participating in any manner in an investigation, or opposing a discriminatory practice. Employers with 15 or more employees are required to comply with Title VII. Title VII also prohibits discrimination by most unions and employment agencies.

HIRING AND OTHER EMPLOYMENT DECISIONS

Narinder, a South Asian man who wears a Sikh turban, applies for a position as a cashier at XYZ Discount Goods. XYZ fears Narinder's religious attire will make customers uncomfortable. What should XYZ do?

XYZ should not deny Narinder the job due to notions of customer preferences about religious attire. That would be unlawful. It would be the same as refusing to hire Narinder because he is a Sikh.

XYZ Discount Goods should also consider proactive measures for preventing discrimination in hiring and other employment decisions. XYZ could remind its managers and employees that discrimination based on religion or national origin is not tolerated by the company in any aspect of employment, including hiring. XYZ could also adopt objective standards for selecting new employees. It is important to hire people based on their qualifications rather than on perceptions about their religion, race or national origin.

HARASSMENT

Muhammad, who is Arab American, works for XYZ Motors, a large used car business. Muhammad meets with his manager and complains that Bill, one of his coworkers, regularly calls him names like "camel jockey," "the local terrorist," and "the ayatollah," and has intentionally embarrassed him in front of customers by claiming that he is incompetent. How should the supervisor respond?

Managers and supervisors who learn about objectionable workplace conduct based on religion or national origin are responsible for taking steps to correct the conduct by anyone under their control. Muhammad's manager should relay Muhammad's complaint to the appropriate manager if he does not supervise Bill. If XYZ Motors then determines that Bill has harassed Muhammad, it should take disciplinary action against Bill that is significant enough to ensure that the harassment does not continue.

Workplace harassment and its costs are often preventable. Clear and effective policies prohibiting ethnic and religious slurs, and related offensive conduct, are needed. Confidential complaint mechanisms for promptly reporting harassment are critical, and these policies should be written to encourage victims and witnesses to come forward. When harassment is reported, the focus should be on action to end the harassment and correct its effects on the complaining employee.

RELIGIOUS ACCOMMODATION

Three of the 10 Muslim employees in XYZ's 30-person template design division approach their supervisor and ask that they be allowed to use a conference room in an adjacent building for prayer. Until making the request, those employees prayed at their work stations. What should XYZ do?

XYZ should work closely with the employees to find an appropriate accommodation that meets their religious needs without causing an undue hardship for XYZ. Whether a reasonable accommodation would impose undue hardship and therefore not be required depends on the particulars of the business and the requested accommodation.

When the room is needed for business purposes, XYZ can deny its use for personal religious purposes. However, allowing the employees to use the conference room for prayers likely would not impose an undue hardship on XYZ in many other circumstances.

Similarly, prayer often can be performed during breaks, so that providing sufficient time during work hours for prayer would not result in an undue hardship. If going to another building for prayer takes longer than the allotted break periods, the employees still can be accommodated if the nature of the template design division's work makes flexible scheduling feasible. XYZ can require employees to make up any work time missed for religious observance.

In evaluating undue hardship, XYZ should consider only whether it can accommodate the three employees who made the request. If XYZ can accommodate three employees, it should do so. Because individual religious practices vary among members of the same religion, XYZ should not deny the requested accommodation based on speculation that the other Muslim employees may seek the same accommodation. If other employees subsequently request the same accommodation and granting it to all of the requesters would cause undue hardship, XYZ can make an appropriate adjustment at that time. For example, if accommodating five employees would not cause an undue hardship but accommodating six would impose such hardship, the sixth request could be denied.

Like employees of other religions, Muslim employees may need accommodations such as time off for religious holidays or exceptions to dress and grooming codes.

TEMPORARY ASSIGNMENTS

Susan is an experienced clerical worker who wears a hijab (head scarf) in conformance with her Muslim beliefs. XYZ Temps places Susan in a long-term assignment with one of its clients. The client contacts XYZ and requests that it notify Susan that she must remove her hijab while working at the front desk, or that XYZ assign another person to Susan's position. According to the client, Susan's religious attire violates its dress code and presents the "wrong image." Should XYZ comply with its client's request?

XYZ Temps may not comply with this client request without violating Title VII. The client would also violate Title VII if it made Susan remove her hijab or changed her duties to keep her out of public view. Therefore, XYZ should strongly advise against this course of action. Notions about customer preference real or perceived do not establish undue hardship, so the client should make an exception to its dress code to let Susan wear her hijab during front desk duty as a religious accommodation. If the client does not withdraw the request, XYZ should place Susan in another assignment at the same rate of pay and decline to assign another worker to the client.

BACKGROUND INVESTIGATIONS

Anwar, who was born in Egypt, applies for a position as a security guard with XYZ Corp., which contracts to provide security services at government office buildings. Can XYZ require Muhammad to undergo a background investigation before he is hired?

XYZ may require Anwar to undergo the same pre-employment security checks that apply to other applicants for the same position. As with its other employment practices, XYZ may not perform background investigations or other screening procedures in a discriminatory manner.

In addition, XYZ may require a security clearance pursuant to a federal statute or Executive Order. Security clearance determinations for positions subject to national security requirements under a federal statute or an Executive Order are not subject to review under the equal employment opportunity statutes.

WHERE TO GO FOR GUIDANCE

The EEOC is available to provide you with useful information on how to address workplace problems relating to discrimination based on religion, national origin, race or color. We conduct various types of training, and we can help you find a format that is right for you.

Small businesses are faced with unique challenges in promoting effective workplace policies that prevent discrimination. Our Small Business Liaisons are located in each of our District, Local and Area offices to assist you in compliance with EEO laws.

You should feel free to contact EEOC with questions about effective workplace policies that can help prevent discrimination. We are also available to answer more specialized questions. Please call 1-800-669-4000 (TTY 1-800-669-6820), or send inquiries to:

Equal Employment Opportunity Commission
Office of Legal Counsel
1801 L Street, NW, Suite 6000
Washington, D.C. 20507

ATTACHMENT B

WASHINGTON STATE HUMAN RIGHTS COMMISSION

GUIDE TO DRESS CODES

AND WASHINGTON STATE NONDISCRIMINATION LAWS



OLYMPIA HEADQUARTERS OFFICE

711 S. Capitol Way, Suite 402

PO Box 42490

Olympia, WA 98504-2490

TEL: 360-753-6770 - FAX: 360-586-2282

Toll Free: 1-800-233-3247

TTY: 1-800-300-7525

Se Habla Español

www.hum.wa.gov

Introduction

Generally, an employer has the right to expect that certain guidelines involving dress and grooming be met in the workplace, and can set forth policies regarding these issues. However, when an employer seeks to impose a dress code, uniform requirement, or grooming standard onto employees, there is a potential for the employer to engage in unlawful discrimination. There are two main areas of potential discrimination. One is in the area of religious discrimination, as some religions dictate that a person must wear religious garb, headwear, or objects. The other is in the area of sex, when an employer imposes different standards on male and female employees. Other areas of potential discrimination include race discrimination, national origin, disability discrimination, and sexual orientation/gender identity discrimination. These areas of potential discrimination will be discussed below.

Dress Codes

Dress codes and grooming standards are often utilized to impose employee uniformity or to project a certain company image or professionalism. Dress codes can clarify for employees what type of dress is acceptable and what is not acceptable. Sometimes dress codes are necessary due to the health and safety concerns of a particular job or worksite. Dress codes might include rules regarding facial hair, hair length, clothing, accessories, jewelry, visible undergarments, facial and body piercings, and tattoos.

Dress codes should always be in writing, can include examples of dos and don'ts, should be clear and specific, and must be distributed to all affected employees. Dress codes should always be enforced fairly and consistently. An employer should never let dress code violations go unchecked, and then suddenly begin enforcing the code without notice. An employer should never enforce the dress code against some employees, but allow other employees to violate the dress code. This type of random or inconsistent enforcement is likely to lead to discrimination complaints.

Discrimination Law

RCW 49.60 prohibits discrimination in employment based on a person's protected class. Protected classes in Washington State include; race/color, creed (religion), national origin, sex (including pregnancy and maternity), marital status, age over 40, disability, use of a guide dog or service animal by a person with a disability, HIV/AIDS or hepatitis C status, sexual orientation/gender identity, and honorably discharged veteran and military status. The Washington State Human Rights Commission enforces RCW 49.60, and investigates discrimination complaints.

Discrimination on the Basis of Creed or Religion

What is a Creed or Religion

RCW 49.60 and Title VII of the Civil Rights Act of 1964 prohibit discrimination in employment based on religion or creed. A religion or creed is defined broadly and includes observance, practice, and belief. A creed or religious belief includes those sincere and meaningful beliefs that occupy in the life of that individual a place parallel to that of God in a traditional religion. The beliefs can include sincerely held moral and ethical beliefs as to what is right and wrong, and beliefs that address ultimate ideas, or questions about life, purpose, and death.

- A person does not have to be part of an organization or church to have a creed or religion.
- Someone from a particular religion may adhere to different practices and beliefs than someone else in the same religion.
- Someone who was not religious at one point may become religious.
- Employers may request some type of information to ensure that the employee is sincere, such as further information from the employee or a letter from a religious leader; however, it is often difficult, from a legal standpoint, to challenge a person's sincerity.

Dress Code Conflicts

Sometimes a sincerely held religious belief will conflict with employer dress codes regarding, clothing, head covers, jewelry, beards, and hair length. In order to avoid religious discrimination, an employer may need to exempt the employee from the dress code or grooming standard as a reasonable accommodation. In order to receive a reasonable accommodation from an employer, the employee must have a sincerely held religious belief and put the employer on notice that the religious belief conflicts with a workplace rule. Once that occurs, the employer and employee must enter into an interactive process to find a reasonable accommodation, unless an accommodation would create an undue hardship for the employer. An undue hardship means anything more than a minimal cost.

Examples:

A Sikh who wears a turban, a Muslim who wears a hijab (head scarf), or a Jewish man who wears a yarmulke requests a reasonable accommodation exempting him or her from a policy prohibiting headwear. In most cases, an employer would need to grant that reasonable accommodation.

An exemption from wearing a uniform is granted for a person who wears scarves, headwear, clothing, or icons because of his or her religious beliefs.

An employer with a no beard policy may encounter conflicts with persons whose religions require beards, such as Sikhs, Orthodox Jews, Rastafarians, and some

Hindus. In most cases, an employer would need to grant an exception to the no beard policy.

Safety Issues and Legal Requirements

An employer does not have to make an exemption from the work rule if the rule is safety based or if the rule is a legal requirement. Examples of such rules could be a requirement that employees must wear hard hats at a construction site, or a prohibition of loose-fitting clothing or dangling jewelry that could get caught in machinery in a machine shop. A person can be prohibited from having a beard if their job requires that they wear a mask that creates a seal around their nose and mouth. These safety issues must be legitimate, and not hypothetical. An example of a legal requirement would be a health code regulation that prohibits food-handlers from having beards over a certain length. An employer would not be required to allow anyone with a beard over that length to work in a food handler position.

Job Necessity

An employer also does not have to make an exemption from the work rule if the rule is due to a job necessity. Examples of job necessities would be wearing a fairy tale character costume at a theme park, wearing a uniform while on patrol with a security company, or wearing a dance costume while dancing in a ballet. A company that markets hair care products would require its models to show their hair. A person whose religion requires that their hair be covered could not be a model for the hair care products.

However, job necessity must be distinguished from company image and customer preferences. Company image and customer preferences are never valid reasons to deny an exemption from a work rule. The fact that a receptionist's hijab makes customers uncomfortable is not a valid reason to move her to a more secluded job.

Post 9/11

Employers should be aware that after the 9/11 terrorist attacks, government enforcement agencies are committed to preventing backlash against Muslims, Arabs, Sikhs, and others who may be thought to be associated with terrorists. In light of this, employers should consider relaxing their uniform and grooming standards, unless there are legitimate safety issues. Certainly, employers should avoid implementing rules that are more restrictive on religious practices because of terrorism fears.

Example:

Prior to 9/11/2001, Muslim female employees were allowed by their employer to leave their shirts untucked, as it was a violation of their religious beliefs to tuck their shirts in as it would reveal their female shape. After the 9/11 terrorist attacks, the company revoked this accommodation. The company argued that it was a safety issue. A U.S. District Court determined that safety was not the

primary factor behind the new policy, and struck down the enforcement of the policy.

Discrimination Based on Sex

Courts have found that dress codes can be different for men and women, but cannot be less favorable to one gender. As long as the dress code is consistent with social norms and customs, does not differ significantly for men and women, and does not place a greater burden on one sex, then a dress code will usually be found not to be discriminatory.

Example of a rule involving a social norm:

A rule requiring men to wear their hair above their collar is not discriminatory, even if there is not a similar rule for women.

Examples of rules involving equal burdens on men and women:

A dress code requiring men to wear a shirt with a collar and a tie is not discriminatory, as long as women are also required to dress with a similar measure of formality or professionalism.

In *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir. 2004), the Court determined that a dress code that required women to wear make-up and nail polish and style their hair was not discriminatory. Males were required to have short hair and trimmed fingernails. The Court did not believe that there was evidence to show that the use of make-up cost more or took more time than the grooming standard that the employer imposed on male employees. The court found that females were not burdened any more than males by the grooming standard.

Examples of rules involving differing standards on men and women:

A dress code prohibiting women from wearing t-shirts, but allowing men to wear t-shirts, would be discriminatory.

A dress code requiring men to wear a suit and tie and women to wear a uniform would be discriminatory.

A dress code requiring women to wear skirts as opposed to pants would most likely be found to be discriminatory.

A dress code requiring women to dress in a more revealing or more provocative manner than men would be discriminatory.

Other issues

Dress codes may also potentially give rise to other types of prohibited discrimination.

National Origin Discrimination

An employer cannot adopt a dress code policy that prohibits certain types of ethnic dress, such as Indian saris or traditional African attire.

Race Discrimination

Some African American men have a skin condition called Pseudo-folliculitis barbae, in which shaving badly irritates the skin and causes facial sores. Some men with the condition wear beards in order to avoid shaving. Thus, a no-beards policy may disparately impact African Americans.

Disability

Those employers who adhere to an appearance standard (i.e. they want their employees to conform to an ideal of attractiveness) must beware of discriminating against persons who have certain disabilities that affect their appearance, such as cleft lip, Craniosynostosis (misshapen skull), and port wine stain. Refusing to hire persons with such disabilities could potentially violate the Washington Law Against Discrimination as well as the Americans With Disabilities Act. Employers who impose dress codes must also be aware of the potential need to make a reasonable accommodation for a person with a disability who is unable to meet the dress code criteria due to the disability.

Sexual Orientation/Gender Identity Discrimination

If a person is transitioning from male to female, or from female to male, employers should allow that person to dress in a manner that is consistent with the gender with which that person identifies. For example, a person transitioning from male to female, and who identifies as female, should be allowed to wear skirts and long hair. That person should then otherwise comply with the dress code.

Conclusion

If you are an employee who believes that you have been discriminated against in employment because of a dress code due to your protected class, or if you are an employer with questions about imposing a dress code, please contact the WSHRC at 360-753-6770 or 800-233-3247 (TTY 800-300-7525). Additional information on this and other civil rights issues can be found on our website at www.hum.wa.gov. This document does not constitute legal advice; if you have a particular situation about which you need legal advice, you should contact your attorney.

ATTACHMENT C

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AUG 05 2008 RE.

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY



08-CV-01167-CMP

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

FAIZA ABU,

Plaintiff,

vs.

PIRAMCO SEA-TAC INC., d/b/a BEST
WESTERN AIRPORT EXECUTEL,

Defendant.

NO. **C08-1167** RSL

COMPLAINT

JURY DEMANDED

SEA 195/2 Summons Issued

I. INTRODUCTION

1.1 This action challenges religious discrimination in employment. Plaintiff FAIZA ABU alleges Defendant failed to accommodate her sincerely held religious beliefs and then terminated her employment because of her religion and her refusal to comply with a discriminatory work policy in violation of federal and state laws against discrimination. Defendant admits that it terminated Ms. ABU because she refused to remove her religious head covering.

II. JURISDICTION AND VENUE

2.1 This action arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Washington Law Against Discrimination, R.C.W. §49.60 et seq.

1 4.6 In mid-August 2006, true to her word, Ms. ABU began wearing a
2 headscarf to work each day. From that point forward, Ms. ABU wore the headscarf
3 to work every day of her employment. Her scarf was black. It did not cover her
4 neck or face.

5 4.7 Manager Shawn Walters initially made no comment about Ms.
6 ABU's headscarf. At the time, BEST WESTERN's dress code required that
7 employees present a "businesslike appearance" in order to "favorably impress our
8 guests." The dress code did not mandate a particular uniform but advised employees
9 to "practice common sense rules of neatness, good taste, and comfort." The dress
10 code did not expressly prohibit the wearing of head coverings.

11 4.8 The month-long Muslim holiday of Ramadan began on September 23,
12 2006. Ms. ABU continued to wear her headscarf each day during Ramadan.

13 4.9 The following month, in October 2006, Defendant BEST WESTERN
14 received new uniforms for its employees, including Ms. ABU.

15 4.10 Manager Walters asked that Ms. ABU not wear her headscarf with the
16 new uniform. Mr. Walters explained that the purpose of the uniform was to give a
17 uniform and professional appearance for employees. He claimed that Ms. ABU's
18 headscarf was not part of the uniform and could not be worn.

19 4.11 Ms. ABU questioned the employer's policy. She explained that she
20 wore the head covering for religious reasons and that she would not be forced to
21 remove a religious article of clothing.

22 4.12 Mr. Walters threatened Ms. ABU with discipline or discharge if she
23 did not fulfill the job requirements by removing her head covering. He stated that
24

1 when people walked into the hotel and saw her headscarf it made a “bad impression
2 on the hotel,” or words to that effect.

3 4.13 Ms. Abu protested still. She offered to begin wearing a headscarf
4 matching the color of the uniform. Mr. Walter’s rejected her suggestion, claiming
5 that “wearing the head scarf and the uniform at the same time does not look good to
6 the company.” Demonstrating her opposition to what she viewed as the company’s
7 discriminatory policy, Ms. ABU continued to wear her headscarf at work.
8

9 4.14 On November 4, 2006, Defendant BEST WESTERN terminated
10 Plaintiff ABU’s employment through the actions of Manager Walters. Defendant
11 acknowledged Ms. ABU’s “strong religious conviction.” Yet it terminated her
12 employment nonetheless because of her refusal to conform to the dress code by
13 removing her head covering. Defendant asserted that “the garment is not part of the
14 uniform and is not professional in appearance.”
15

16 4.15 Defendant BEST WESTERN provided Ms. ABU with a written
17 notice of employment termination identifying her refusal to remove her headscarf as
18 the reason for termination. A true and correct copy of the notice of termination is
19 attached to this Complaint as **Exhibit A**.

20 4.16 On December 18, 2006, Ms. ABU filed a charge of discrimination
21 with the Washington Human Rights Commission. After investigation, the agency
22 issued a finding of Reasonable Cause on May 9, 2007. It concluded that a
23 preponderance of the evidence supported a finding that BEST WESTERN denied
24 Ms. ABU religious accommodation and terminated her for her religious beliefs when
25 she refused to remove her head covering.
26
27

1 or with reckless indifference to Ms. ABU's federally protected rights under Title VII,
2 entitling Ms. ABU to an award of punitive damages.

3 5.6 BEST WESTERN's actions caused Ms. ABU both economic and
4 non-economic damages, including, but not limited to, lost past and future wages and
5 benefits, lost future earning capacity, and mental and emotional harm including
6 emotional and mental distress, anxiety, anguish, humiliation, a reduction in her
7 ability to enjoy life, and pain and suffering.
8

9 **VII. SECOND CAUSE OF ACTION**
10 **FAILURE TO ACCOMMODATE AND DISCRIMINATION IN VIOLATION**
11 **OF R.C.W. §49.60**

12 6.1. Plaintiff realleges and incorporates by this reference each and every
13 allegation contained in paragraphs 1.1 through 5.6 as though fully set forth herein.

14 6.2 The Washington Law Against Discrimination prohibits as an unlawful
15 employment practice the discharging of an employee because of the employee's
16 religion or creed. R.C.W. §§49.60.030; 49.60.180. The Washington Law Against
17 Discrimination requires employers to reasonably accommodate an employee's
18 religious observance, practice, or beliefs unless it can establish that to do so would
19 cause an undue hardship on the employer's business. R.C.W. §49.60.180. The
20 Washington Law Against Discrimination also prohibits retaliation for an employee's
21 good faith opposition to discriminatory employment actions. R.C.W. §49.60.210.
22

23 6.3 The failure to accommodate, discriminatory, and retaliatory actions
24 described above render BEST WESTERN liable both for discriminatory and
25 retaliatory employment actions.
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I. Such other further and different relief as the Court deems just and proper.

J. Ms. ABU reserves her right to amend her claims in the nature and extent of her damages to conform to the facts that may be demonstrated either prior to or during the time of trial.

DATED this 4th day of August, 2008.

FRANK FREED SUBIT & THOMAS LLP

By: 

Sean Phelan, WSBA #27866
Beth Barrett Bloom, WSBA #31702
Attorneys for Plaintiff FAIZA ABU

4 Nov 2006

Faiza Abu is no longer employed with the Best western Airport Executel, as of 4 November, 2006. She has expressed strong religious conviction that will not allow her to remove a garment that is not part of her uniform. The purpose behind wearing a uniform is to give a uniformed, professional appearance for employees. The garment is not part of the uniform and is not professional in appearance.

Faiza has stated that it is not her preference to leave, but also refuses to fully conform to the uniform, and the professional appearance it is designed to accomplish.

Shawn Walters

EXHIBIT

A

INVESTIGATIVE FINDING OF THE WASHINGTON STATE HUMAN RIGHTS COMMISSION

CASE NAME: Faiza Abu v. Best Western Airport Executel
CASE NUMBER(s): WSHRC: 17EC-0484-06-7 EEOC:38G-2007-00230 Date Filed: 12/18/2007
FINDING: REASONABLE CAUSE

ALLEGATION(s): Complainant alleged that Respondent terminated her because of her religious beliefs when she refused to remove her hijab (head scarf).

JURISDICTION: Respondent is an "employer" as defined by RCW 49.60.040(3). Timeliness and all other jurisdictional requirements have been met. Pursuant to RCW 49.60.180(3) it is unfair practice for any employer to discriminate against any person in compensation or in other terms and conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability.

LEGAL THEORY: Failure to Accommodate/Creed

ELEMENTS OF PROOF:

1. Complainant is a member of protected class which requires an accommodation;
2. Respondent was made aware of Complainant's need for accommodation;
3. Respondent refused or failed to engage in an interactive process with Complainant, and/or refused or failed to provide the needed accommodation;
4. Complainant was subjected to adverse employment action by Respondent; and
5. There is a causal link between Complainant's protected class and the adverse action.

FINDINGS OF FACT:

1. Complainant is Muslim, a religion.
2. Respondent is a national hotel chain.
3. In August 2006, Respondent, specifically Shawn Walters, front desk manager, hired Complainant as a front desk person for its SeaTac, Washington location.
4. Complainant did not wear her hijab, an Islamic headscarf, during her interview with Mr. Walters, nor did she wear it during the first few weeks to a month during the start of her employment.
5. Complainant agreed that she did not wear the hijab during the interview, but informed Respondent that she was Muslim and would wear the hijab as part of her dress.
6. During Ramadan as well as weeks before Ramadan, Complainant wore the hijab.
7. Respondent, specifically its Director of Operations, Scott Brown, stated that the hijab was "tolerated," because Respondent was in the process of getting new, more professional uniforms, and because many employees were out of uniform compliance.

EXHIBIT B

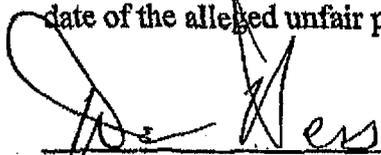
8. In October 2006, when Respondent's new uniforms arrived, Respondent asked that Complainant not wear the hijab.
9. Complainant stated that Respondent, specifically Mr. Walters, demanded she not wear her hijab.
10. Respondent added the purpose of the uniform was to give a uniformed, professional appearance for employees. The hijab was not part of the uniform and could not be worn.
11. Complainant refused and restated that she was wearing a head covering for religious reasons.
12. On November 4, 2006, Respondent, specifically Complainant's supervisor, Mr. Walters, terminated Complainant for refusing to remove her hijab as "her head scarf did not comply with our uniform."
13. On April 19, 2007, in an investigative interview, Mr. Brown reiterated Respondent's response. Mr. Brown stated that Complainant's hijab was not part of the professional uniform and would not be allowed.

CONCLUSION AND RECOMMENDATION: REASONABLE CAUSE FINDING

The preponderance of the evidence supports a finding that Respondent denied Complainant religious accommodation and terminated her because of her religious beliefs when she refused to remove her hijab (head scarf). Complainant established that she is Muslim and wears a hijab during Ramadan as well as other times. Many Muslim women wear the hijab as an article of their faith. Though Respondent argued that the "no headgear policy" was non-discriminatory, employers must reasonably accommodate employees' sincerely held religious beliefs or practices unless doing so would impose an undue hardship on the employer or create an insurmountable safety problem. Respondent did not identify any undue hardship or safety problem imposed by Complainant's wearing of her hijab. Therefore, the basis of Complainant's allegation, that Respondent denied Complainant religious accommodation and terminated her because of her religious beliefs when she refused to remove her hijab, can be proven by a preponderance of evidence. Pursuant to WAC 162-08-098 it is recommended that a finding of Reasonable Cause be entered in reference to Complainant's claim of discrimination in a place of public accommodation.

EXPLANATION OF FINDING:

A **REASONABLE CAUSE FINDING** means that there is sufficient evidence to show that an unfair practice has occurred as defined by RCW 49.60, Washington State Law Against Discrimination. This Commission action does not preclude the Complainant from filing a civil action in a court of competent jurisdiction [RCW 49.60.030(2)]. It should be noted that private civil actions must be filed in court within limited periods from the date of the alleged unfair practice.



Dana C. Hess
Equal Opportunity Compliance Investigator

5/9/07
Date



Jennifer Greenlee
Operations Manager

5-9-07
Date

ATTACHMENT D

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FAIZA ABU,

Plaintiff,

vs.

PIRAMCO SEA-TAC, INC.,

Defendant.

NO. C08-1167RSL

ORDER OF DISMISSAL

It having been reported to the Court on Tuesday, April 14, 2009 that the above cause has been settled, and no final order having yet been presented, NOW, THEREFORE,

IT IS ORDERED that this cause be and the same is hereby DISMISSED. This dismissal shall be without prejudice to the right of any party upon good cause shown within sixty (60) days hereof to reopen this cause if the reported settlement is not consummated.

The Clerk of the Court is instructed to send copies of this Order to all counsel of record.

DATED this 15th day of April, 2009.


Robert S. Lasnik
United States District Judge

ATTACHMENT E

FINAL BILL REPORT

SSB 5340

C 317 L 07

Synopsis as Enacted

Brief Description: Defining disability in the Washington law against discrimination.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser).

Senate Committee on Judiciary

House Committee on Judiciary

Background: Washington's antidiscrimination law prohibits discrimination based on the presence of any sensory, mental, or physical disability. The "presence of any sensory, mental, or physical disability" is not defined by statute, but is defined in an administrative regulation to include a sensory, mental, or physical condition that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it actually exists. The regulation regards a condition as a "sensory, mental, or physical disability" if it is an abnormality and is a reason why the affected person suffered discrimination.

In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), a majority of the Washington Supreme Court rejected this definition, and adopted the definition of "disability" as set forth in the federal Americans with Disabilities Act. The federal definition provides that a "disability" is a physical or mental impairment that substantially limits one or more major life activities, where a record of such impairment exists, or where the affected individual is regarded as having such impairment.

Summary: The Legislature finds that the *McClarty* decision failed to recognize that Washington's antidiscrimination law provides protections independent of federal law.

"Disability" is defined as a sensory, mental, or physical impairment that is medically cognizable or diagnosable, or exists as a record or history, or is perceived to exist, whether or not it actually exists. The "disability" exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether it limits the ability to work or engage in any other activity encompassed within Washington's anti-discrimination law. "Impairment" includes a physiological disorder, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and mental, developmental, traumatic, and psychological disorders.

For purposes of qualifying for reasonable accommodation in employment, the employee's impairment must be known by the employer, or be shown through an interactive process to exist in fact. The impairment must either have: (1) a substantially limiting effect upon the individual's ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) the reasonable likelihood that engaging in job functions without accommodation would aggravate the impairment to the

extent that it would create a substantially limiting effect. If the proposed basis for accommodation is the reasonable likelihood that without the accommodation the impairment would be aggravated, the employee must have notified the employer of the impairment. Also, medical documentation must establish this basis. A limitation is not substantial if it has only a trivial effect.

This act is retroactive, and applies to causes of action occurring before issuance of the *McClarty* decision on July 6, 2006, and to causes of action occurring on or after the effective date of this act.

Votes on Final Passage:

Senate	42	6	
House	66	32	(House amended)
Senate			(Senate refused to concur)
House	62	35	(House amended)
Senate	46	2	(Senate concurred)

Effective: July 22, 2007