



Working while Muslim: Religious discrimination in the workplace

Has “Islamophobia” caused a 10 percent rise in employment-discrimination claims?

BY ANAYAT DURRANI

Politics and religion are taboo subjects at the water cooler. But some employers (and employees) still haven't gotten the memo on that. In an increasingly diverse workplace, discussion about political views, religion or global events can rapidly progress to potential conflict. Federal, state and local employment laws prohibit discriminatory treatment at the workplace, yet cases continue to mount, particularly for American Muslim employees.

A San Francisco jury awarded \$465,000 in January 2012 to a 27-year-old Muslim security guard who said his co-workers and supervisors called him a terrorist and an al-Qaida member. The jury added \$400,000 in punitive damages to their award of \$65,000 for lost wages and emotional distress.

Discrimination common



Bryant

“Discrimination against American Muslims is still very common. Many Muslims have contacted me about discrimination issues in the recent past,” said Shelley G. Bryant, an employment discrimination attorney in Fresno.

“Of course, the degree of discrimination varies.”

Shelley said that overt discrimination of any kind is less prevalent than subtle discriminatory actions. Muslim clients have contacted him regarding offensive

The New York Times reported that although Muslims account for only two percent of America's workforce, they filed nearly 25 percent of religious-discrimination claims in 2009.

comments about praying in the workplace, their traditional dress and grooming issues. “Typically, they have suffered some type of adverse action that is unsupported by the facts and the decision-makers are the ones making offensive comments,” said Bryant.

Bryant filed suit on behalf of a Muslim manager of a national insurance company after he was terminated following the 9/11 attack on the World Trade Center. Bryant said his client chose not to celebrate and toast the war in Iraq at a company meeting. He also chose not to smoke and go for drinks with other managers during company meetings. Bryant said his client prayed at work and his boss would often pry into his religious beliefs. His boss also introduced his replacement as a “good Christian,” causing another Muslim employee to quit as a result. Bryant said they showed that their client's performance was better than many who were not terminated. “The company moved to have the suit dismissed for lack of merit, but the court found the case worthy of a jury trial. The case settled on the eve of trial and my client has since opened his own insurance agency,” said Bryant.

EEOC steps in

Complaints of workplace discrimination against individuals perceived to be Muslim or Arab soared after the September 11 attacks. Following 9/11, the Equal Employment Opportunity Commission (EEOC) created a category of employment discrimination against people who are or perceived to be Arab, Muslim, Middle Eastern, South Asian or Sikh.

“According to the anti-discrimination statutes we sue under – FEHA and the



Vlasak

like – disparate treatment because of a perceived national origin or religion is grounds for liability,” said Ryan J. Vlasak, of San Francisco's Bracamontes & Vlasak. “We've had cases where an employee has suffered adverse treatment because a supervisor thought she was Muslim when she was not. That doesn't matter. The adverse action is still illegal and the supervisor/ employer is liable.”

Religious discrimination concerns adverse treatment of an applicant or employee because of their religious beliefs. Legal protection of religious beliefs extends beyond traditional, organized religions like Buddhism, Hinduism, and Judaism, to include those who hold sincere religious, ethical or moral beliefs, according to the EEOC. Religious discrimination also can include treating a person differently because they are married to or in some way associated with a person of a certain religion or because of



their link to a religious organization or group.

Vlasak said people frequently make wrong assumptions about someone's religion based on their nationality, or even perceived nationality. He said in regard to Muslim discrimination, "an employer might think a person of apparent Arab descent is Muslim – and she may or may not be – but regardless, adverse action based on the perceived Muslim status is actionable." Likewise, he cited the example of employers or fellow employees that mistakenly assume that because someone may be Muslim, they belong to a certain sect or political affiliation. "Same analysis: whether right or wrong, adverse employment action based on that perception is actionable," said Vlasak.

In a lawsuit filed by the San Francisco District Office, the EEOC announced in March 2006 the \$360,000 settlement of a lawsuit against an Oregon City auto dealership. The suit concerned two former car salesmen, one subjected to a hostile work environment due to his Iranian nationality and Islamic faith, which caused him to quit. The suit alleged that the Iranian salesman endured daily racial slurs by a new management team who called him "terrorist" and "camel jockey" and remarked he attended al-Qaida training camps. The salesman was also physically harassed and purposely tripped by a co-worker, causing a broken nose and knee injury.

Justine Lesser, Senior Attorney-Advisor for the Office of Communications & Legislative Affairs at the EEOC in Washington, D.C., said during the past fiscal year, "the EEOC received a record high number of charges of discrimination in total – almost 100,000 – a slight increase over fiscal year 2010 and a more substantial increase over previous years."

Lesser said the number of charges alleging discrimination based on religion "climbed steadily, from 2,127 in fiscal year 2001 to 4,151." And she noted that "the number of charges alleging discrimination by Muslims on the basis of their religion has also risen, from 330 in fiscal

year 2001 to 880 in the past fiscal year 2011."

In another case, Bryant assisted Muslim inmates at Solano State Prison in getting an injunction in federal court to stop the California Department of Corrections and Rehabilitation (CDCR) from disciplining the inmates when they left work or school to attend their Friday congregational prayer service. "Basically, the CDCR refused to let them leave work without penalty to attend the religious service that was very similar to Sunday church for Christians," explained Bryant.

Bryant said the trial court judge was fair in deciding the matter and gave the State a chance to explain why the Muslim inmates were penalized when the same rules didn't apply to members of other religions. "Of course, there was no good explanation so the judge issued the injunction. The judge gave the State an opportunity to come back every 90 days to prove that the injunction was causing problems," said Bryant. "The State never presented any evidence and took the case to the 9th Circuit Court of Appeals where the injunction was upheld."

Lack of religious accommodation

Most cases involve co-workers taunting Muslim employees with names like "terrorist" or "Osama" and employers not allowing Muslims to wear headscarves or take prayer breaks. The cases typically have to do with hiring and discharge, harassment, and lack of religious accommodation.

"Claims of workplace religious discrimination against Muslim women who wear the traditional headscarf continue to increase throughout the United States, including California," said Gary R. Basham of Basham Law Group in Walnut Creek. "For example, last year, the EEOC filed a religious-discrimination lawsuit against Abercrombie & Fitch in Federal Court in the



Basham

Northern District of California, claiming the retailer violated the civil rights of a Muslim woman, Hani Khan, when it allegedly fired her for refusing to remove her headscarf, or hijab."

Khan, a 19-year-old San Mateo Muslim woman who allegedly lost her job at Hollister Co. for refusing to take off her hijab at work, filed suit in the U.S. District Court for the Northern District of California against the clothing store's parent company, Abercrombie & Fitch. Khan was employed there for four months and was at first told her headscarf was acceptable as long as she wore company colors. But after a district manager and corporate human resources manager asked that she no longer wear it, Khan refused and was suspended, then terminated. Khan said when she was told to remove her scarf after being hired with it on she felt "demoralized." She said growing up in the United States where "the Bill of Rights guarantees freedom of religion," she felt "let down."

The EEOC filed suit after first trying to reach a pre-litigation settlement through its conciliation process. The EEOC seeks back pay, compensatory damages and punitive damages and injunctive relief to prevent future discrimination. Two non-profit organizations, the Legal Aid Society/Employment Law Center (LAS-ELC) and the Council on American-Islamic Relations (CAIR), also intervened in the case to represent Khan.

Zahra Billoo, Executive Director of CAIR-SFBA, said when they first received Khan's complaint, "It was the explicitness of Abercrombie & Fitch's discriminatory demands which concerned us," which Billoo called "both egregious and illegal." LAS-ELC staff attorney Araceli Martinez Olguin said the company "cannot hide behind a 'Look Policy' to justify violating Ms. Khan's civil rights" and called their failure to allow her to wear her headscarf "unlawful" and "un-American." CAIR-SFBA and LAS-ELC said they frequently get complaints and questions from American Muslims regarding their right to religious accommodation in the workplace.



The lawsuit is the second Bay Area suit the EEOC's San Francisco office has filed against Abercrombie & Fitch over its refusal to accommodate workers who wear a hijab. The previous year the EEOC filed a case concerning Abercrombie's refusal to hire an applicant because of her headscarf at the Abercrombie kids' store in Milpitas. The company's "all-American look" policy was at the center of previous EEOC litigation, with an outcome in 2005 in a six-year consent decree and \$40 million paid to a class of African Americans, Asian Americans, Latinos and women who were excluded from hire or promotions in their workforce, according to an EEOC statement.

"Title VII of the Civil Rights Act of 1964 and the California Fair Employment and Housing Act prohibit employers from discriminating against employees on the basis of religion," said Basham, who has handled many religious discrimination cases. "Under both California and federal law, an employer must offer a reasonable accommodation to resolve a conflict between an employee's sincerely held religious belief and a condition of employment, unless such an accommodation would create an undue hardship for the employer's business."

Employers with 15 or more employees must comply with Title VII, which also covers most unions and employment agencies. Federal law requires employers to accommodate headscarves, prayer breaks and other religious practices based on sincere religious beliefs unless doing so would impose an undue hardship on the employer.

"Applicable EEOC Guidelines state that when an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices – such as shaving, hair length, religious clothing, jewelry, and head or face coverings – the employee may ask for an exception to the policy as a reasonable accommodation," said Basham. "Absent undue hardship, religious discrimination may be found where an employer fails to

accommodate the employee's religious dress or grooming practices."

Title VII of the Civil Rights Act of 1964 also prohibits retaliation against persons who complain of discrimination or participate in an EEOC investigation. The EEOC filed suit against Go Daddy in 2004, alleging it terminated a Muslim employee from Morocco on the basis of his religion and national origin and in retaliation for his discrimination complaints. After overhearing the plaintiff speaking French to a customer on the phone, a supervisor asked him about his religion and national origin. The plaintiff was uncomfortable with the line of questioning and complained to human resources. The lawsuit also alleged that Go Daddy failed to promote the man based on his religion, national origin and his complaints.

In 2009, the U.S. Court of Appeals for the Ninth Circuit upheld a jury verdict in the amount of \$241,708 for the plaintiff. Appellate court judges voted two-to-one to uphold the verdict, but limited damages granted by the trial court. The appeals court awarded \$241,708 for compensatory and punitive damages. The trial court award was \$390,000. EEOC Regional Attorney Mary Jo O'Neill of the EEOC's Phoenix District Office said in a statement they were "pleased that the Ninth Circuit has affirmed the jury's finding of retaliation."

Discrimination claims

The New York Times reported that though Muslims account for only two percent of America's workforce, they filed nearly 25 percent of religious-discrimination claims in 2009. Bryant said cases dealing with employment discrimination "are just plain tough." He added that statistically, the cases that have the best chance of prevailing at trial are sexual harassment cases. "Discrimination cases by African Americans have the lowest chance of prevailing at trial. Cases filed by Muslims fall somewhere in the middle," he said.

Basham said most employment lawsuits settle before trial and that "religious-

discrimination cases are no exception." Basham, who has handled a number of these types of cases over the last few years, said "settlement terms are usually monetary, with the offending policy sometimes modified to better effect religious accommodations for American Muslims."

In 1997, religious-discrimination complaints were at 1,709, and by 2010, they had risen to 3,790, according to the EEOC. In 2010, settlements reached nearly \$10 million, the EEOC said. The increase in the past decade is in large part due to discriminatory acts against Muslims, Arabs, South Asians and Sikhs. Most of the charges typically allege harassment and discharge.

"Unfortunately, these cases are not often quickly settled or easily won, unless there are readily available and reliable witnesses or documents evidencing the defendant's discriminatory intent," said Vlasak. "In wrongful-termination cases, for example, the plaintiff has to prove that the defendant-employer acted with discriminatory intent in firing her, and not because of poor performance or a simple layoff. This can be a difficult burden to meet, and usually requires fairly extensive written discovery and depositions before a reasonable settlement can be achieved."

In 2010, the EEOC sued the Swift meatpacking company for discriminating against 160 Somali and Muslim Americans at its headquarters in Greeley, Colo., and another one of its facilities in Grand Island, Neb., alleging that supervisors and co-workers tossed blood, meat, and bones at Muslim workers and hurled profanity and racial slurs at them. "The issue of national origin and religious discrimination in the workplace has become more significant as more immigrants with different ethnic and religious backgrounds join our workforce," said EEOC General Counsel P. David Lopez, in a statement.

A Muslim security guard filed a federal lawsuit in July 2011 against Sacramento-based American Patriot Security after being allegedly fired because of his beard. The man contacted CAIR and the



APRIL 2012

EEOC, which then determined that he had the right to sue under Title VII of the Civil Rights Act. The man wears a beard as part of his Islamic faith, and six months after he was hired, a supervisor allegedly told him that he would have to shave his beard to comply with company policy. The man did not shave his beard and continued to work for the company until he was allegedly wrongfully terminated from his employment. The lawsuit seeks compensation for 65 hours for time he worked and wasn't paid, in addition to emotional and general damages.

"Muslim discrimination in the workplace can be common and take many forms, but it is usually the result of an employer's or co-worker's ignorance or confusion about basic precepts of and/or

distinctions between race, nationality, religion, or political affiliation," said Vlasak. "I like to think that if people had accurate beliefs about these concepts, this discrimination would not occur."

Legal cases of religious discrimination are indeed on the rise and have more than doubled since 2001. The post-9/11 backlash in the workplace saw a large volume of discrimination claims filed by American Muslims that has only gotten larger over a decade later. That period has marked a 150 percent jump in workplace-discrimination claims by Muslims through 2011. The increase in claims, as one Salon.com commentator stated, "could reflect a rise in Islamophobia in the workplace or an increased willingness on the part of Muslims to report

discrimination – or both." Perhaps both, but the high number of claims filed by American Muslims certainly sends a strong message that politics and religion really don't belong in the workplace.



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