The Freedom to Believe and the Freedom to Practice: Title VII, Muslim Women, and *Hijab*

Kristina Benson[*]

Abstract

Although Title VII of the Civil Rights Act nominally affirmed employees' right to wear hijab in the workplace, the courts have taken an increasingly narrow view of the term "religion" and failed to uphold the right to wear hijab in both private and public sector settings on several occasions. This is because Title VII and its attendant protections are grounded in a framework that presumes Christianity as normative, and religiously mandated accoutrements as communicative in function. The manner in which harassment or discriminatory behavior takes place, however, often occurs outside of existing frameworks for employee protection, leaving employees with little opportunity for recourse. This paper will use a mix of critical race theory and gender studies scholarship to provide an overview and analysis of recent decisions regarding protections for wearing hijab in the workplace. It will also discuss how protections on religious freedoms protect the status quo rather than the rights of religio-cultural minorities.

***Key Words**: Women, Hijab, Title VII, Religious Accommodations, Belief, Symbol, Religio-cultural, Discrimination, Neutrality, Microaggressions*

Introduction

Muslim Americans constitute a particularly vulnerable group susceptible to harassment due to their membership in a stigmatized group. In the years following September 11, 2001, Muslim Americans have reported increased levels of prejudice, discrimination, and social exclusion.[1] Recent studies also indicate that exposure to harassment or negative attitudes correlates with the extent to which an individual is visibly identifiable as a Muslim.[2] However, being "identifiable" as a Muslim often equates

* Kristina Benson is a doctoral candidate in Islamic Studies at the University of California, Los Angeles. This paper benefited tremendously from the support and instruction of Professors Sondra Hale, Khaled Abou El Fadl, Asli Bâli, and Priscilla Ocen. All errors are my own.

1. Sonia Jackson & Linda Ghumman, *The Downside of Religious Attire: The Muslim Headscarf and Expectations of Obtaining Employment,* 31 J. of Organizational Behav. 4, 6 (2010).
2. Eden B. King & Afra S. Ahmad, *An Experimental Field Study Of Interpersonal Discrimination Toward Muslim Job Applicants,* 63 J. of Personnel Psychol. 881, 884 (2010).

to being a female Muslim donning the *hijab*,[3] making discrimination against Muslims a highly gendered phenomenon disproportionately affecting Muslim women.[4]

Harassment targeting Muslims occurs in a variety of settings, including the workplace: between September, 2001 and September, 2002 alone, the Equal Employment Opportunity Commission (EEOC) reported a near threefold increase in complaints of religious discrimination filed by Muslims, most of which involved women covering their heads with a *hijab*.[5] This number has since risen further, with 2,340 charges of religious discrimination filed with that agency in 2005, up from 1,939 in 2000.[6] Much of this increase can be attributed to a rise in Islamophobia after the events of September 11:

> Since the attacks of September 11, 2001, the Equal Employment Opportunity Commission (EEOC) and state and local fair employment practices agencies have documented a significant increase in the number of charges alleging workplace 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.[7]

However, in considering the appropriate legal response to workplace discrimination targeting Muslim women, it is important to note that the American Muslim community is in many ways in a category of its own, presenting serious challenges to existing legal civil rights frameworks. There are anywhere between 3 and 8 million

3. I use the word "hijab" in this comment to denote a head-covering or a headscarf. Although the word "hijab" today colloquially refers to a certain type of head-covering worn by self-identified Muslim women, it comes from the Arabic word *hajaba*, meaning "to prevent from seeing," and has often been used in Islamic texts to refer to a physical barrier or screen. In the Qurʾān, the word is used to refer to a curtain that served as a barrier between the wives of the Prophet Muhammad and other Muslim men. Qur'ānic discussions of women's dress, however, do not use the word "hijab," referring instead to a type of head-covering called a *khimar* (pl. *khumur*), which was worn by women and even some men in 7th century Arabia. Elsewhere, the Qurʾān refers to a type of robe called a *jilbāb* (pl. *jalabib*). While the Qurʾān makes no mention of women covering the face, the Hadīth—a collection of the Prophet's various practices and sayings over the course of his lifetime—contain references to Muhammad's wives uncovering their faces during pilgrimage, which suggests they did cover their faces at other times. Some *ahadīth* also suggest that upon reaching puberty, women are to cover all of their bodies except their hands, faces, and feet when in front of men other than their husbands and close members of the family. In Islamic scholarship, *hijab* also refers to broader notions of morality, modesty, and privacy, all of which are mandated for men as well as for women. Many contemporary Muslim women view *hijab* as a non-negotiable religious obligation, while others believe that the broader directive of modesty, which is highly fluid and contextually dependent, is emphasized by Islamic law, and that a physical head covering is not obligatory. See generally Kecia Ali & Oliver Learman, Islam: The Key Concepts (2008) (providing a more detailed discussion on hijab and its relationship to other key principles of Islam).

4. *Id.* at 882.

5. Kathleen Moore, The Unfamiliar Abode: Islamic Law in the United States and Britain 197 (2010).

6. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Provides Answers About Workplace Rights of Muslims, Arabs, South Asians and Sikhs (May 15, 2002), *available at* http://www.eeoc.gov/press/5-15-02.html.

7. *Id.* Prior to September 11, 2001, the EEOC was already tracking the number of charges filed nationwide alleging discrimination on the basis of several specific religions, including the Muslim faith. Between September 11, 2001, and May 7, 2002, the EEOC received 497 charges on the basis of Muslim religion. During the comparable period one year earlier, 193 such charges were received.

self-identified Muslims in the United States, a vast majority of whom are of African American, Arab, or South Asian descent, with the remainder primarily made up of Hispanic Americans, African immigrants, and Americans of European descent.[8] Although the Civil Rights Act offers protection against discrimination on the basis of race, color, national origin, or ancestry, the diversity of the American Muslim community means that under current civil rights legal frameworks, they are not a "race," do not have a shared "national origin," are not necessarily "people of color," and cannot accurately be described as having a common "ancestry." Muslims therefore must seek recourse for discrimination under Title VII's protections against religious discrimination, rather than race or other protected categories.

The problem, however, is that religion-based protections under Title VII are relatively weak compared to protections from race-based discrimination. This is largely because courts have regarded skin color and national origin as immutable characteristics, while religious belief has been framed as mutable and largely a product of individual choice. Although employers may not refuse to hire applicants based on those applicants' religious beliefs, employers are only required to offer "reasonable accommodation"[9] to an employee's religiously mandated preferences. Such accommodations are only legally required so long as the employer does not suffer an "undue hardship" by providing the accommodation, but the interpretation of what is and what is not an "undue hardship" has been so narrowly interpreted as to effectively result in *de minimis* accommodation of employees' religious beliefs. Put differently, because of a gap in Title VII law pertaining to religious-based discrimination, employees may not explicitly refuse to hire Muslim women due to their faith, however, employers have free rein to refuse to hire women who *look* Muslim, or to only hire them for certain positions.

Small businesses employing less than fifteen people, moreover, are not required to make accommodations for religious beliefs, reasonable or otherwise, even though they are still held to Title VII's prohibitions on race-based discrimination. As a result, millions of Americans are not afforded basic protections for their religious beliefs.

The reasons for the narrowing of Title VII's religious protections are threefold. First, the courts have consistently regarded certain employment dress codes — which often forbid headscarves and other religious headgear — as "neutral," even though they adversely and disproportionately affect religio-cultural minorities such as Orthodox Jews, Sikhs, and Muslims, while having little to no effect on the way the vast majority of Christians in the United States practice or express their faith. Originally, courts allowed plaintiffs to prevail on a Title VII discrimination claim through evidence of disparate impact; in recent decades, however, disparate impact has generally been deemed to be insufficient for relief. The standard has thus moved to one where the employee must show "discriminatory intent."[10] Such claims, however, are extraordinarily difficult to prove, and the burden for doing so falls on the employee.

8. Karen Leonard, *American Muslim Politics: Discourses and Practices*, 3 Ethnicities 147, 149 (2003).
9. The court's interpretation of "reasonable," it should be noted, has varied widely, as will be discussed in later sections. *See infra* p. 7.
10. *See generally* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of*

Second, the courts have upheld the constitutionality of these "neutral" dress codes in part due to the explicit framing of *hijab*, like other forms of religious garb, as a *symbol* of belief rather than an *aspect* of belief. In effect, the courts see *hijab* as a mere symbol of religious belief rather than an integral part of religious practice, as it is regarded by self-identified Muslim women who cover their heads. As a result, in addition to inaccurately interpreting the religious significance of *hijab,* the framing of *hijab* as symbolic not only robs it of Title VII protection, but does so by subordinating the interpretive authority of women wearing *hijab* to that of the ostensibly "neutral" viewer. This results in a "neutral" viewer who is better equipped than a Muslim woman to determine the significance of *hijab*, rendering her an *object* of a "neutral" gaze that purports to hold interpretive authority. Ultimately, such an ostensibly authoritative interpretive position vests power in a viewer who usurps female agency by decoding a woman's appearance without her input. The "neutral viewer" standard thus contributes to an intersection of racism and sexism that is particularly invidious to the female-bodied members of minority religio-cultural groups, and in particular, Muslim women.

A third gap in protections results from the fact that while Title VII and its attendant protections address harassment perpetrated by the employer, it is silent on the issue of the employer's obligation to respond to harassment inflicted by third-party affiliates of the employer, including clients, customers, or patients. Such harassment impacts work performance and psychological well-being, regardless of the fact that it is not stemming from the employer or other employees. Currently, employers are not compelled to intervene when a worker is being harassed by a non-employee with whom the employer or organization has a financial or other economic relationship (such as a vendor, client, patron, or patient), and there exist no clear guidelines as to the employer's responsibilities when an employee's work performance suffers from harassment perpetrated by non-employees.

As this paper argues, this application and interpretation of Title VII has resulted in the obverse of the intended effect of the Civil Rights Act: rather than expanding the rights available to religio-cultural minorities, Title VII has effectively codified and reinforced Christian normativity in the face of a rapidly changing demographic landscape. Such a codification of Christian norms within civil rights protections in the law has had a disproportionate effect on Muslim women, many of whom consider religious headwear an integral and religiously mandated aspect of their faith. As one Muslim woman explained to me, "*hijab* is not a symbol of belief. It *is* the belief, and that is why I practice *hijab*."

These issues do not arise in isolation, but are part of a braided logic that casts Christianity as normative, and effectively gives private sector actors, state apparatuses, and employers free rein to promote an image consistent with Christian majoritarian norms and values at the expense of civil rights protections for minorities. In

the Disparate Impact Theory of Discrimination, 22 Hofstra Lab. & Emp. L.J. 431 (2002) (discussing the disparate impact standard in Title VII jurisprudence). *See also* Cheryl Harris, *Critical Race Theory: An Introduction*, 49 UCLA L. Rev. 1215 (2002) (providing an overview of disparate impact theory and its relationship to civil rights legislation).

regarding "religious neutrality" as a legitimate purpose, the court enables discrimination against religio-cultural minorities while preserving, rather than challenging, the status quo in an increasingly diversifying nation.

We will first consider the background and history of the Civil Rights Act and its initial protections for safeguarding faith in the workplace. The paper will then discuss Title VII in application, the erosion of its initial protections for religio-cultural minorities, and the effects of these erosions on Muslim women.

Title VII of the Civil Rights Act: Protections for Religious Belief and Expression

Title VII of the 1964 Civil Rights Act seeks to protect workers from discrimination on the basis of race, color, religion, sex, and national origin.[11] However, while the original version of this landmark legislation protected workers from discrimination due to their membership in a given faith group, it did not directly address whether or not an employer was required to accommodate employees' religious practices or beliefs. As a result, while employers could not legally hang a sign in the window stating "no Jews need apply," they could achieve the same outcome by simply mandating that all employees work between sundown on Friday and sundown on Saturday.[12] Such a requirement would either result in a workplace free of religio-cultural diversity or, alternatively, one populated with "model minorities" who were able or willing to conform to the dominant religio-cultural norms.

The Equal Employment Opportunity Commission (EEOC), created in 1965, addressed this issue by requiring that employers provide accommodation to an employee's "sincerely held religious beliefs," unless doing so would cause a "serious inconvenience to the conduct of business."[13] The term "serious inconvenience" was used no less than three times in the section wherein employer obligations were delineated, indicating that it was a crucial aspect of employee protection. Nonetheless, the EEOC revised and weakened these protections in 1967, requiring only that employers provide accommodations unless "undue hardship" (rather than a "serious inconvenience") would result.[14] Additionally, in that same year, the EEOC introduced the requirement that employers make "reasonable accommodations" for employees.[15]

In 1972, Congress amended Title VII's protections for religion to include the "reasonable accommodation" standard set forth by the 1967 EEOC guidelines, and broadened the definition of religion to include all aspects of religious observance and practice as well as mere membership in a given sect or religion.[16] As a result of these changes, Title VII protects religious belief in the workplace in three ways.

11. 42 U.S.C. § 2000e-2(a) (2011).
12. Richard T. Foltin & James D. Standish, *Reconciling Faith and Livelihood: Religion in the Workplace and Title VII*, Human Rights Magazine, June 2004, at 19.
13. *Id.*
14. *Id.*
15. Thomas D. Brierton, *"Reasonable Accommodation" Under Title VII: Is it Reasonable to the Religious Employee?*, 42 Cath. Law. 165, 166 (2002).
16. *Id.*

First and foremost, Title VII protects against discrimination. Within this framework, Title VII envisions situations in which potential employees may not be hired or existing employees may be refused promotions due to their religious beliefs or membership in a certain faith community. To sufficiently plead an allegation of discrimination under Title VII, an employee or applicant must show that she is a member of a protected group, that she applied for a position for which the employer was considering candidates, and that she was rejected for the position while the employer continued to seek out similarly qualified applicants who were not members of the same protected group. The employer must then articulate a nondiscriminatory reason behind the rejection, after which the complainant may attempt to prove that such contentions are merely pretextual.[17]

Second, Title VII mandates that an employer "reasonably accommodate" an employee's sincerely held religious beliefs.[18] In the event that an employee wishes to seek remedy for insufficient accommodations, she must demonstrate that she has a sincerely held religious belief in conflict with her employer's policy or rule, that she informed the employer of this belief, and that she suffered an adverse employment action for failing to follow the policy or rule in question.[19] The employee, however, bears the burden of demonstrating that her belief meets the definition of "religion" under Section 701(j) of Title VII, which states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[20]

Once a court finds that the employee has established a *prima facie* case of a failure to provide reasonable accommodation, the employer must either show that a reasonable accommodation was made, or that reasonable accommodation would have resulted in an undue hardship to the employer and was therefore not extended as permitted by Title VII.[21] The courts have also narrowed the scope of these protections by determining, *inter alia*, that reasonable accommodations incur a "minimally low burden" to the employer, and need not compromise the appearance of neutrality or uniformity nor interfere with a company's ability to retain control of its corporate image. Any hardship asserted must be "real" rather than "speculative," and may not be merely conceivable or hypothetical.[22] Nevertheless, federal courts have ruled that an employer's wish to maintain harmony in the workplace is not a sufficient basis for muting differences, religious or otherwise. As the Ninth Circuit stated in *Burns v. Southern Pacific Transportation Co.*, "[u]ndue hardship requires more than proof of

17. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
18. 42 U.S.C. § 2000e(j) (2011).
19. *Id.* § 2000e-2(a)(2).
20. *Id.* § 2000e(j).
21. *See* St. Mary's Honor Center, 509 U.S. at 506-07.
22. Sami Hasan, *Veiling Religion in the Force: the Validity of 'Religion-Neutral Appearance' as an Employer Interest,* 9 UCLA J. of Islamic and Near E. L. 87, 95 (2009).

some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief."[23]

The third type of employee protection arises from harassment leading to a "hostile work environment."[24] As the perception of what constitutes a "hostile work environment" is subjective, the employee must demonstrate not only that the harassment is "severe," but that a "reasonable person" subjected to the same level of harassment would find the work environment "hostile."[25] Generally, courts have not found that the occasional offensive comment or epithet is enough to constitute a hostile work environment; rather, the totality of the circumstances must include evidence of "severe and pervasive conduct" that is enough to interfere with the employee's work performance or create an intimidating work environment.[26] Furthermore, the law does not compel an employer to intervene when an employee faces harassment from clients, patrons, or patients, meaning that some employees must endure an intimidating or hostile work environment rife with severe and pervasive offensive conduct with no legal recourse at their disposal.

The increasingly narrow interpretation of Title VII protections, acting in combination with the pervasive influence of Christian norms on what constitutes a "neutral" interpretation of reasonable accommodations within the Title VII context, has resulted in inconsistent protections for women wearing *hijab*, both in the public and private sectors. The following section will discuss key cases pertaining to the establishment of "neutral" dress as reinforcing the prevailing status quo before moving on to an exploration of the courts' framing of *hijab* as a symbol of belief rather than a facet of it, and how such a framing contributes to a reduced scope of protections for religio-cultural minorities in general and Muslim women in particular.

Hijab and "Neutral" Dress Codes: State Neutrality and the Subordination of Religio-Cultural Minorities' Religious Beliefs

Courts have generally upheld employers' restrictions on appearance because grooming and dress are considered expressions of choice. However, such a framing of religious accoutrements is problematic for religio-cultural minorities. It equates a woman's "choice" to wear a decorative necklace or large earrings, for example, with a Muslim woman's "choice" to wear an item of clothing that she sincerely believes to be mandated by religious law. In relying on a "neutral" standard for assessing the suitability of religious wear, the courts have thus sanctioned and codified a system wherein "neutrality" merely reinforces customer and coworker prejudices and stereotypes.

Cooper v. Eugene is an illustrative case. Although *Cooper* involved the headwear of a Sikh woman, the reasoning behind the Oregon Supreme Court's decision

23. 589 F.2d 403, 407 (9th Cir. 1978).
24. Moore, *supra* note 5, at 139.
25. *Id.*
26. *Id.*

remains instructive.[27] Furthermore, as the case has been frequently cited in later federal court decisions relating to Muslim women and *hijab*, it merits discussion. In *Cooper*, a public school teacher named Janet Cooper converted to Sikhism and expressed a desire to wear religiously mandated headgear and all-white clothing to work.[28] The school district, however, determined that allowing her to do so would violate an Oregon state statute prohibiting any teacher from wearing "religious dress" while "engaged in his [sic] duties as a teacher."[29] Cooper nonetheless insisted on showing up to work dressed in white and wearing a turban, refusing warnings issued by her employer to abandon what she believed to be religiously mandated attire or face suspension.[30] She was eventually dismissed from her position as a public school teacher and her teaching certificate was revoked.[31]

Cooper filed suit, alleging that her Constitutional rights had been violated.[32] The court, however, disagreed with her, siding with the school district's contention that allowing a teacher to wear a turban would give the impression that the school approved of the religious beliefs of the teacher.[33] The court noted elsewhere, however, that a Star of David or other "common decorations" did not constitute impermissible dress.[34] As a result, the legible manifestation of belief was equated with the school district's endorsement of such belief. At the same time, the lack of any such manifestation was not equated with the school district's endorsement of *disbelief*, nor of an endorsement of the prevailing status quo.

In *United States v. Board of Education for the School District of Philadelphia,* the Third District Court of Appeals cited *Cooper* in ruling that the state had a compelling interest in prohibiting teachers from donning religious dress and accoutrements in order to prevent the appearance of favoring a particular religion.[35] In that case, a substitute teacher named Alma Delores Reardon embraced an interpretation of Islam that enjoins women to cover every part of their bodies but their faces and hands when in public or when in the company of male non-relatives.[36] Between 1982 and 1984, Reardon continued teaching while covering all but her face and hands.[37] Near the end of the school year in 1984, however, she was consistently refused teaching assignments after refusing requests by the school district to change her manner of dress.[38]

27. Cooper v. Eugene School District Number 4J, 301 Or. 358 (1986), *appeal dismissed*, 480 U.S. 942 (1987).
28. *Id.* at 360.
29. Or. Rev. Stat. § 342.650 (repealed 2011).
30. 301 Or. at 360.
31. *Id.*
32. *Id.*
33. *Id.* at 380-81.
34. *Id.* at 380. *See also* Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 Hastings Race & Poverty L. J. 441, 472 (2008).
35. 911 F.2d 882, 889-90 (3d Cir. 1990).
36. *Id.* at 885.
37. *Id.*
38. *Id.*

The school district cited an 1895 statute, the "Pennsylvania Garb Law," which prohibits any public school teacher from wearing, while at school, "any dress, mark, emblem, or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect, or denomination."[39]

Reardon subsequently filed a complaint with the EEOC, which eventually sued the Pennsylvania school board on her behalf.[40] The Third District Court of Appeals, however, ruled in favor of the school district. Noting that *Cooper v. Eugene* offered "substantial guidance" for the case at hand, the court agreed that requiring teachers to restrict their clothing to "nonreligious dress" was a compelling state interest necessary to avoid the appearance of favoring a given religion or sect.[41] The court thus agreed with the school district that it would have been impermissible to let Reardon teach classes in her religiously mandated attire. Once again, the legible manifestation of religious belief was equated with the *endorsement* of belief, whereas the lack of such manifestation was not equated with the endorsement of a *lack* of belief or with the prevailing Christian-conformant status quo. Furthermore, Muslim (or Sikh) women teachers were regarded as acceptable employees so long as they were able to mute any differences between their preferred attire and that of their employer's.

In *Webb v. Philadelphia*, Kimberlie Webb, a police officer employed by the Philadelphia Police Department, asked her supervisor if she could have permission to wear *hijab* while on duty.[42] This request was refused because *hijab* was not listed in Directive 78, an authoritative Philadelphia Police Department memorandum which enumerated all allowable uniform accoutrements and equipment for on-duty police officers.[43] Webb eventually filed a lawsuit with the city, arguing that the failure to accommodate her request violated both protections for sex-based discrimination and mandates for religious accommodation.[44] The court, however, decided in favor of the city. Although the Third Circuit agreed that Muslim men employed by the Philadelphia Police Department were permitted to grow facial hair, it was noted that this exception occurred due to the emergence of a "secular" policy that allowed men with certain medical conditions to grow beards, thus making necessary the creation of a "religious exemption policy" parallel to its "secular one."[45] The court therefore sided with the Fraternal Brotherhood of Police in its conclusion that failure to allow *hijab* was not indicative of sex-based discrimination.

The court also found in favor of the city in ruling on Webb's religious discrimination charge, concluding that *hijab* would undermine the appearance of impartiality or neutrality, and declined for procedural reasons to address the "scarf policy," a secular and narrow exception that allows for neck scarves.[46]

39. *Id.*
40. *Id.*
41. *Id.* at 889.
42. 562 F.3d 256, 260 (3d Cir. 2009).
43. *Id.* at 258.
44. *Id.* at 258-59.
45. *Id.* at 260.
46. *Id.* at n. 5.

There are several points worth noting about the abovementioned cases. First, in *Webb,* the medical exemption for beards provides interesting insights into the court's reasoning: this medical exemption, which is "secular," paved the way for a "religious" exemption for Muslim men. However, the "religious" exemption would not have been an acceptable means for paving the way to a "secular" exemption. Second, as the "neutral" viewer would not know that the beard stemmed from the existence of a medical exemption, the presence of a bearded man—Muslim or otherwise—was not perceived as compromising the perceived "neutrality" and uniformity. Third, assuming this is the case, it is difficult to understand why it is acceptable to compromise the department's perceived neutrality due to a medical exemption but not a religious exemption, particularly since the viewer would not be expected to know the reason behind the exemption. This compels a consideration of whose perception of "neutrality" counts. Finally, the Oregon Supreme Court's conclusion in *Cooper* that "common decorations" such as crosses or Stars of David were not impermissible accoutrements, as well as the scarf exemption for Philadelphia police officers in *Webb*, belies a confusion between that which is "neutral" and that which is "normative."

The next section will discuss the framing of *hijab* as "symbolic" or "indicative" of religion and how this framing is rhetorically proximate to the designation of Muslim-appearing individuals as "non-neutral."

Hijab as Mere Symbol: "Such Garb is Not Religion Within the Meaning of Title VII"

In order to understand courts' positions on symbols of religious faith, and this rhetorical proximity to the compelling interest of "religious neutrality," it is worth noting that Title VII purports to protect "all *aspects of religious observance and practice* … as well as belief."[47] However, both federal and state courts have consistently found that religious belief *itself* enjoys First Amendment protection, but *wearing* or *carrying* "symbols" associated with such beliefs does not.[48]

In contemporary Title VII jurisprudence, *hijab* is most often treated solely as an *expression* or *symbol* of religious belief rather than an *aspect* of religious observance or practice. This has resulted in *hijab* and other similar such religiously mandated garb and accoutrements as being likened to wearing a cross, for example, rather than to the practice of abstaining from alcohol or pork. However, whereas wearing a cross is an optional expression of religious faith for a vast majority of Christians, *hijab* is interpreted by many Islamic scholars and, perhaps more significantly for purposes of this paper, many Muslim women, as fulfilling the Qurʾān's mandate for modesty. One does not *express*, *communicate,* or *symbolize* a devotion to Islam by eating *halal* food; similarly within the context of Islamic jurisprudence, the purpose of *hijab* is not to *express*, *communicate,* or *symbolize* a devotion to Islam, but to

47. 42 U.S.C. § 2000e(j) (2011) (emphasis added).

48. Alison Dundes Renteln, *Visual Religious Symbols and the Law*, 47 Am. Behav. Scientist 1573, 1576 (2004).

follow the example of the wives of the Prophet and adhere to scholars' interpretation of Qurʾānic mandates surrounding modesty.

As the court considers *hijab* to be communicative in nature, it can support the contention that *hijab* is conveying a message on behalf of the employee as well as the employer. This framing is part of the logic that allows an employer to ask the employee to remove her *hijab*, or work in a position where she has no contact with the public, and equate *hijab* with *undermining* a message of "neutrality."

The rhetorical proximity between *hijab* as symbol to *hijab*-wearer as *messenger* can be seen in *Cooper v. Eugene*, and again in later decisions that cite *Cooper*. The Oregon Supreme Court first concluded that the Sikh turban was self-evidently non-neutral before deciding that "religious dress [is to be construed as] clothing that is associated with, and symbolic of, religion."[49] Ultimately, the court determined that a dress code forbidding religious garb is facially valid if religious clothing or decoration would "contravene the wearer's role and function...."[50] This contravention, therefore, occurs through *conveying a given message*, meaning, in effect, that the court linked the visible adherence to a given belief with proselytizing on behalf of that belief, except in cases where the belief is Christianity or Reform Judaism.

Furthermore, in *Cooper v. Eugene*, as well as in subsequent cases considering the same issue, the Oregon court determined the "neutrality" of a religious item or piece of apparel not by deferring to the judgment of the complainant, nor to members of his or her religio-cultural community, but rather to the judgment of the "viewer." This viewer, though theoretically "neutral," is implicitly accustomed to a social context wherein it is not religiously mandated to carry any items or objects, or wear certain kinds of clothing, outside of the context of worship. The "neutral viewer" therefore automatically construes the presence of a religious object or item of clothing as a *symbol* that by its very nature is communicative in function and poses the risk of representing, and thus advocating for, "non-neutrality." In this manner, the *kirpan*, yarmulka, turban, or *hijab* are all inappropriately likened to a cross or a Star of David and rendered as *symbols* of belief that are left unprotected, rather than *facets* of belief that deserve protection.

This logic was explicitly applied in *Board of Education for the School District of Philadelphia*, wherein the court explicitly cast the *hijab*—and the rest of Almas Dolores Reardon's attire—as a *symbol* of belief rather than a *facet* of belief, as evidenced by the court's opening commentary:

> The import of the statute is clear: if public schools cannot accommodate the wearing of religious garb without undue burden, then *the wearing of such garb is not "religion" within the meaning of Title VII.* Thus, the district court correctly concluded that a determination of the undue hardship question was required.[51]

In other words, the wearer's contention that *hijab* is a facet of belief is overridden by the "neutral" viewer's interpretation of it. As this "neutral" viewer is accustomed

49. 301 Or. at 379; *see also* Abdo, *supra* note 34, at 507.
50. 301 Or. at 372.
51. *Bd. of Educ. for the Sch. Dist. of Phila.*, 911 F.2d. at 886 (emphasis added).

to Christian religio-cultural norms and equipped with no other authority other than a familiarity with these prevailing social norms, he decrees that it is a *symbol* of belief rather than a facet of religious practice.

Crucially, however, comparing *hijab* to a cross or Star of David pendant misrepresents and misunderstands the function of *hijab* within the context of the wearer's own religion. The intention of *hijab* is not to convey the wearer's membership in the Muslim faith, but rather to conform with her interpretation of the Qurʾanic mandate of modesty. Interpreting *hijab* as essentially communicative in function thus plays into a larger and familiar social framework wherein women are relegated to the role of *object*, whose interpretive authority is inferior to that of a "neutral" viewer who is charged with decoding the meaning of what they are wearing. The Muslim woman therefore never exists for herself, but merely as the object of a viewer's interpretive gaze or as a vehicle for the larger "message" communicated by *hijab*.

In *E.E.O.C. v. Reads, Inc.,* for example, Cynthia Moore filed a Title VII suit after she was refused employment at two Catholic elementary schools.[52] In January 1986, Moore, a self-identified Muslim, interviewed with Remedial Educational and Diagnostic Services, Inc. (READS), a private corporation which provided auxiliary services to nonpublic school students under a contract with the Philadelphia School District, for a position as a third grade counselor.[53] Moore wore a green pantsuit with a floral blouse and a green V-neck sweater to the interview, and covered her hair with a two-toned green scarf.[54] Upon confirming with Moore that she identified as Muslim, her interviewer, Joseph Lavoritano, met with his superior, and the two men determined that allowing Moore to wear her headscarf would violate statutorily and contractually-mandated prohibitions on "religious garb."[55] Although Moore suggested alternatives that included a turban, a crochet cap, and differently tied scarves, Lavoritano found these unacceptable, and advised Moore that any form of headwear, if worn for religious purposes and on a daily basis, would not be permitted.[56] Moore then filed suit with the aid of the EEOC.[57]

In its memorandum and order, the court agreed that READS was obligated to the same Pennsylvania Garb Statute which was at issue in *Board of Education for the School District of Philadelphia*, but disagreed with READS's contention that Moore's headscarf fell into the category of impermissible dress. First, the court pointed out that the purpose of the statute was to prohibit items that "indicated," or *communicated*, a person's membership in a given faith group, and then divided "religious garb" into three categories:

> [T]he Court recognizes that "religious garb" may include many different forms of attire. First, there is attire which is facially religious and worn for religious reasons. As an example, certain clerical garb falls into this category, and constitutes

52. E.E.O.C. v. Reads, Inc., 759 F. Supp. 1150, 1152-53 (E.D. Pa. 1991).
53. *Id.* at 1153.
54. *Id.*
55. *Id.*
56. *Id.* at 1153-54.
57. *Id.* at 1154.

> "religious garb." Secondly, there is attire worn for religious reasons which is perceived as religious. In the *U.S.A.* case, the Third Circuit stated in dicta that attire which may not clearly identify a teacher as an adherent of a particular religion is nevertheless "religious garb" if it is apt to be perceived as religious by "many" school children …. Finally, there is attire which is worn for religious reasons, but which is not recognized as such until its significance is explained by the wearer. Examples of such garb could include the dark suit worn by an Amish man, or the wig worn by a married woman who is an Orthodox Jew. The Court holds that attire falling into this final category is not "religious garb" because it does not indicate the wearer's religious affiliation.[58]

Ultimately, the court not only classified *hijab* as communicative in function, but also interpreted the Pennsylvania Garb Statute so that Muslim women can only wear *hijab* so long as they do not *appear* to be Muslim while doing so. Rather than expanding the rights of religio-cultural minorities, then, the court thus enjoined Muslim women to conform to the status quo by rendering themselves invisible in the public school system. Such an interpretation of Title VII enables a form of coercive assimilation wherein employees must mute their differences in such a way as to make them illegible to the "neutral" viewer. Rendering Muslim women invisible in this manner, furthermore, supports and enables the perpetuation of Orientalist stereotypes that Muslim women are "oppressed" simply by rendering them virtually absent from public spaces and positions of authority.

It is finally worth noting that, while the district court for the Eastern District of Pennsylvania held in *EEOC v. READS* that the *hijab* is communicative and symbolic in nature and not an aspect of religious belief, a district court for the Western District in the same state concluded in 2003 that prohibiting crosses or Stars of David in the classroom was unconstitutional because, in addition to violating the Free Exercise Clause of the First Amendment, there is no "compelling state interest" sufficient to require their removal.[59] In Pennsylvania, therefore, some groups are permitted to wear accoutrements of their faith, while members of other faith groups are only permitted to conform to their scriptural teachings if they hide their religious affiliation from the "neutral" viewer.

Sending Muslim Women to "the Back": "Reasonable Accommodation" for Muslim Women

In spite of Title VII's stated interest in protecting religious belief as well as practice, the courts have consistently found that an employee does not have the absolute right to express her religious beliefs when she is at work. Employers' accommodations are therefore not required to suit the preference of the employee but rather merely to satisfy the Title VII mandate for "reasonable accommodations."

Although fears of adverse customer reactions cannot justify the demotion or separation of an employee, and although Title VII forbids employers from

58. *Id.* at 1158.
59. Nichol v. ARIN Intermediate Unit 28, 268 F. Supp. 2d 536 (W.D. Pa. 2003).

"segregating" employees or refusing to hire them on the basis of their religion, the courts have held that "reasonable accommodations" might include transferring an employee or moving her to a back room where customers will not be in contact with her. Courts have also upheld "reasonable accommodations" that amount to demotion, pay reduction, and increased commute time for the employee, and agreed with employers that an employee's failure to adhere to uniform requirements often constitutes an "undue burden."

In *Wiley v. Pless Security Inc.*, for example, a security guard was prohibited from wearing *hijab* to work due to concerns that her "turban disturbed the people" at the site.[60] The employer offered to demote and transfer her in order to accommodate her religiously mandated dress; the plaintiff then filed suit.[61] The opinion, however, does not reveal how the employer knew that the "turban disturbed the people" at the site, nor how many "people" were "disturbed." The court ultimately ruled in favor of the employer, concluding that because the plaintiff had resigned, she could not prove an "adverse employment action."[62] This was the case even though continuing to wear religiously mandated clothing to work would only be possible within the context of a demotion.

Additionally, although adverse customer reactions cannot, in theory, be linked to an "undue burden" on the part of employers, the district court in *Wiley* ruled in the employer's favor because it was "hesitant to impute discriminatory animus to statements made in the course of attempts to accommodate an employee's religious practice."[63] These accommodations, of course, consisted of her demotion or transfer.[64]

Similarly, the Fourth Circuit found in favor of Alamo Rent-A-Car when a supervisor refused to allow plaintiff Zeinab Ali to wear *hijab* to work and threatened to transfer her if she did so.[65] Hired in August of 1996, Ali wore her headscarf along with her uniform until a new manager was appointed in December of that year.[66] Ali was told that she had to either stop wearing the headscarf to work or be transferred to a back room position wherein she would have infrequent contact with customers.[67] Ali refused to remove her *hijab* and was subsequently transferred to a back room position.[68] Ali claimed that Alamo's refusal to allow her to wear a headscarf was in violation of 42 U.S.C. § 2000e-2(a), which forbids an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."[69] The court determined that Ali, as the

60. Wiley v. Pless Security, Inc., No. 1:05-CV-332-TWT, 2006 WL 1982886, at *1 (N.D. Ga. July 12, 2006).
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. Ali v. Alamo Rent-A-Car, Inc., 8 F. App'x 156, 156 (4th Cir. 2001).
66. *Id.* at 157.
67. *Id.*
68. *Id.*
69. *Id.*

plaintiff, bore the burden of showing adverse employment action. Finding that she did not meet that burden, the court ruled in favor of Alamo Rent-A-Car, holding that "Title VII only prohibits employer practices where the employer discriminates on the basis of religion *and* the employee suffers an adverse employment action."[70]

In *E.E.O.C. vs. Kelly Services Inc.*, an applicant to a temp agency was denied a referral for temporary employment at Nahan Printing because the company, which worked with heavy, rotating industrial equipment, banned loose clothing or headgear for safety reasons.[71] The agency, Kelly Services Inc., declined to refer the plaintiff, Suliman, to Nahan because it felt her *hijab* would violate their "no headgear" policy.[72] The Kelly staffing supervisor did not consider contacting Nahan to find out whether Nahan could accommodate Suliman, "nor did she discuss with Suliman the possibility of Suliman tying back the khimar [headscarf]."[73] In other words, while the supervisor was aware that certain jobs at Nahan did not require an employee to work on or near machinery—thus making the no-headgear policy moot—she did not inquire as to whether such positions were available or whether other employees could be moved to different positions to accommodate Suliman.[74] Finally, the Kelly supervisor did not consult with anyone else before concluding that Suliman was not a "candidate for employment at Nahan Printing."[75]

Even so, the court found that a referring agency—in this case, Kelly Services—was not required to demonstrate that the accommodation of religious gear would put an "undue hardship" on the employers to which it referred applicants.[76] Moreover, the court determined that Kelly was found to have a "legitimate, non-discriminatory reason for not referring Suliman to Nahan," because Nahan's "facially neutral, safety-driven dress policy … was well-established."[77] The court held as such even though the referring agency did not check to see if another position was available, or ask if the applicant could tie her headscarf back. Finally, the court further declined to acknowledge the fact that the purportedly "facially neutral, safety-driven dress policy" disproportionately impacts Muslim women.[78]

In allowing employers to effectively seclude or erase the existence of Muslim women, whose religious identity can be particularly salient, the courts have sanctioned corporate America's efforts to homogenize its workforce in pursuit of white, Christian norms. Female-bodied religio-cultural minorities are put in their proper "place"—out of sight and out of mind, in the back room, and away from plain sight and from the view of customers (if, of course, they are permitted to wear their headscarf to work at all or hired in the first place). Furthermore, the relegation of Muslim

70. *Id.* at 159.
71. E.E.O.C. v. Kelly Services, Inc., 598 F.3d 1022, 1025 (8th Cir. 2010).
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1029.
77. *Id.* at 1031.
78. *Id.*

women to the "back" reinforces Orientalist stereotypes, as Muslim women are consequently regarded as "oppressed" through their erasure from public spaces and positions of authority.

Harassment and Employee Protections

An additional gap in protections results from evidence indicating that wearing *hijab* can expose women to subtle or even overt forms of harassment and discrimination that are difficult to prove in court and therefore do not lend themselves to the framework for protection provided by Title VII.[79] That is, as many of the most pervasive forms of harassment fall outside of statutory protections, they are ultimately never litigated and victims are consequently rendered invisible.

Generally, employer and employee reactions to *hijab* take the form of "microagression," which manifest as "smaller, everyday incidents of racism committed either consciously or subconsciously."[80] Microaggression can be explained by the existence of laws purporting to penalize employers for workplace discrimination, motivating employers to engage in acts of harassment that fall outside the scope of the law, such as eye-rolling, the "silent treatment," or tone of voice.[81] Alternatively, individuals may engage in microaggression as a way to express prejudice against a certain group based on particular stereotypes, a phenomenon explained by the "justification-suppression model."[82] The justification-suppression model, developed by Christian Crandall and Amy Eshleman,[83] posits that individuals maintain a positive self-image by justifying their prejudices. Under this model, a person who is prejudiced against Arabs but does not identify as racist resolves the cognitive dissonance presented by this conflict through searching for "Arab" characteristics that she doesn't like.[84] These negative characteristics then justify her dislike and poor treatment of them, and free herself from the burden of confronting her own racism.[85] This person can therefore assure herself that she is not "racist," but rather that she just does not like Arabs because they possess whatever set of shared, negative characteristics she has (selectively) observed: "I'm not racist, but all Arabs are religious fanatics."

Microaggressive acts often fall outside the scope of Title VII protections. This is because when an employee is harassed by fellow workers or by management, protections are only triggered if such harassment is severe enough to create a work environment that is pervasively hostile, and appears as such to an ostensibly "neutral" and fictional "reasonable person." This "reasonable person," however, is implicitly not a member of the employee's own religio-cultural group. Microaggressive acts

79. Abdo, *supra* note 34, at 444.
80. Abdo, *supra* note 34, at 442.
81. *Id.*
82. King & Ahmad, *supra* note 2, at 884-85.
83. Christian S. Crandall & Amy Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, 129 Psychol. Bull. 414 (2003).
84. *Id.* at 423.
85. *Id.* at 426-30.

such as occasional snide comments, eye-rolling, or heavy sighing, for example, are not constitutive of a "hostile work environment," unless they are part of a wider range of conduct sufficient to constitute a hostile work environment.

An additional gap in protections occurs because the law is silent in addressing circumstances wherein patients, clients, or patrons are guilty of harassing employees. Such instances are not addressed by workplace protections, and the employee has no recourse for them. These reactions can, however, in and of themselves create an environment that leads to worsened work performance and the hindering of professional development.

For example, in one survey of Arab nurses, eighty-five percent of whom were Muslim, there was no evidence that anyone was denied a promotion, threatened, or fired due to their membership in a stigmatized group.[86] However, survey respondents noted an appreciable increase in harassment after September 11, 2001.[87] One in seven respondents reported that patients or their families had "refused [the respondents'] care,"[88] half of respondents reported being treated with "suspicion,"[89] and over a third of respondents reported that their "work performance suffered after the events of 9/11."[90]

The survey did not clarify who was treating the employees with "suspicion": colleagues, supervisors, patients, or all of the above. However, absent evidence that there was pervasive harassment from colleagues, Title VII protections would most likely fall short. As aforementioned, Title VII only provides protections from harassment from employers or coworkers. Additionally, if patients refuse care, and/or treat nurses with "suspicion" due to their membership in a stigmatized group, Title VII does not compel the employer to intervene, as there is no clause stating that employers must take steps to protect employees from harassment by clients, patients, or patrons.[91] Second, in the event that exposure to patient, patron, or client prejudice and/or harassment leads to decreased work performance or consistently negative performance reviews, employers are effectively relieved of any burden to prove that the reasons given for a Muslim employee's termination or demotion are merely pretextual in nature.

There is a dearth of research on the ways in which *hijab* affects professional advancement. Additionally, the fact that Title VII does not address harassing conduct from third-party affiliates of employers or businesses, such as clients, customers, patrons, or patients, has meant that the instances of such harassment, as well as its effects, have been rendered invisible. Nonetheless, it can be reasonably inferred that the results of the Arab nurse study do not constitute an anomaly. Given the increased rates in which Muslims in the U.S. have reported increased levels of prejudice

86. Anahid Kulwicki et al., *The Effects of September 11 on Arab American Nurses in Metropolitan Detroit*, 19 J. of Transcult. Nurs. 134, 137 (2008).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 138.
91. Margaret C. Jasper, Employment Discrimination Law Under Title VII (2nd ed. 2008).

following September 11, 2001, it is possible to theorize that Muslims in all professions have had to cope with subtle forms of workplace harassment. Stereotype-threat literature suggests that membership in a stigmatized group can not only result in poorer performance, but also lower expectations, particularly when stigmatized individuals are aware that their behavior and performance is seen as reflective of all other group members' potential behavior and performance.[92]

Effects of stereotype threat are additionally exacerbated when members of the stigmatized group are significantly outnumbered by non-members, as their social identity as a stigmatized individual becomes readily appreciable and more salient. In other words, the only woman in an advanced math class may feel that any evidence of her discomfort with the material will be taken as evidence that *all* women are bad at math; similarly, the only employee wearing *hijab* knows that any shortcomings in her performance in the workplace gives others the opportunity to discredit her as well as *all* Muslim women.[93]

Concluding Notes and Observations

In passing the landmark Civil Rights Act of 1964, it was Congress's clear intention to ensure equal opportunities for members of all racial, ethnic, and religious groups by prohibiting policies and practices, overt or otherwise, which disadvantaged historically underrepresented groups in institutions of power.[94] In doing so, Congress clearly recognized that so-called "neutral" practices could cause insurmountable impediments to religious, cultural, and racial minorities, even in cases wherein such policies were enacted absent any animus or ill-intent.

"Disparate impact" was an early theory that emerged to address seemingly neutral policies or statutes that disproportionately and adversely impacted members of protected groups.[95] Presently, however, although courts may admit statistical information regarding the impact of a policy on a given group, such information, absent a showing of discriminatory intent, is neither dispositive nor conclusive.[96] Therefore, although Title VII may have eradicated explicitly expressed –isms and –phobias, unequal treatment of minorities persists, as demonstrated by the sheer number of EEOC complaints alone.

The courts' interpretations of workplace protections, unfortunately, have thus more often acted to codify the existing status quo and preserve Christian or "secular"

92. King & Ahmad, *supra* note 2.

93. *See* Steven J. Spencer & Claude M. Steele, *Stereotype Threat and Women's Math Performance*, 35 J. Experimental Soc. Psych. 4 (1999) (discussing the phenomenon of stereotype threat as it relates to women and math performance and the negative stereotype that women have weaker math ability than men); *see also* Claude M. Steele, Whistling Vivaldi: How Stereotypes Affect Us and What We Can Do (2010).

94. Mark R. Bandsuch, *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 Colum. Hum. Rts. L. Rev. 287, 288 (2009).

95. *See* Griggs v. Duke Power Company, 401 U.S. 424 (1971).

96. Mark R. Bandsuch, *Ten Troubles With Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 Cap. U. L. Rev. 965, 966 (2009).

conceptions of normativity than to expand the scope of opportunities available to religio-cultural minorities. As being Muslim often translates to "being a woman in *hijab*," such interpretations often act to the specific detriment of Muslim women, who suffer disproportionate levels of workplace harassment and discrimination.[97] In supporting "reasonable accommodations" wherein employers demote Muslim women, send them to the "back room," or demand that they don attire that allows them to pass as non-Muslim and minimizes the salience of their religious identity, the courts have essentially privatized the enforcement of majoritarian beliefs, sanctioning the broader goals of assimilation and cultural homogenization under coercive terms that favor the employer and its interests over that of the employee's. Women are often the site of competing visions of cultural, religious, and nationalist norms, and mandates on so-called "religion-neutral" dress—particularly those that require women to uncover parts of their bodies that they themselves deem inappropriate for public exposure—strongly resemble Orientalist and Colonialist projects to "civilize" peoples of the global south.[98]

Finally, this narrow interpretation of Title VII enables the enforcement of stereotypes regarding the proper role, or "place," for women members of religio-cultural minorities: in the "back" and out of sight. Given that Muslim women are stereotyped as "oppressed," sending them to the "back" is particularly problematic in terms of challenging such widely held Orientalist assumptions about gender relations in Islam; so, too, is the practice of subjecting them to the gaze of a "neutral" viewer who is equipped with the power to decree their conformity, or lack thereof, to prevailing social norms.

The result of the narrowing of Title VII and its attendant protections is, therefore, the silencing of Muslim women and the muting of their differences.

97. EEOC Press Release, *supra* note 6.

98. *See generally* Sondra Hale, *'The New Muslim Woman': Sudan's National Islamic Front and the Invention of Identity*, 86 The Muslim World 176 (1996) (discussing the notion of woman as the site of ongoing battles over identity, religion, politics, nationalism, and culture).