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Religious Accommodations in the Workplace ... or When is a Scarf not a Scarf?

A pair of recent cases addressed the question of the proper standards regarding religious accommodations in the workplace. These cases came to different results based on what might be viewed as a very slight distinction.

A large clothing retailer established a grooming policy requiring its employees to act as human models by wearing clothing in the style of clothing they typically sell. Their policies prohibited employees from wearing head coverings. In separate cases, an employee and an applicant for employment claimed that their religious beliefs were violated when they were rejected because they wore head coverings. Both asserted that they were Muslim and that their religion required them to wear a scarf-like head covering called a hijab.

The employer's key defense was that deviations from its established grooming policies would hurt its success by detracting from the in-store experience of the customers and negatively affecting their brands. However, no one could present a specific example of how an employee wearing a hijab had a negative impact, and there was no tracking or correlation between deviations from their grooming policies and any negative impact on sales. Also, the employer had allowed almost 80 exceptions to the grooming policy since 2005, including allowing male employees to grow facial hair or wear a yarmulke and allowing female employees to wear visible jewelry of a religious nature, long skirts, and even hijabs. There was no evidence that any of these exceptions caused damage to sales, reputation, or the business model for these stores.

That would seem to end the matter, but as noted above there was a crucial difference in the facts of the two cases at issue that resulted in very different outcomes.

In one case, an employee had performed her job while wearing a hijab for more than four months without incident. In February 2010, a district manager was engaging in a regularly scheduled store visit and saw her in her hijab. He contacted the senior manager of human relations, who informed her that she could not continue to wear her hijab. After explaining that her religion required her to wear a hijab, the employee was terminated for violating the grooming policy. Noting the lack of evidence that allowing the employee to wear her hijab did any damage to the employer's business or sales, the court ruled for the EEOC and the employee.

In a similar case, an applicant for employment was being interviewed for a position. She wore a hijab during her interview with the assistant manager and was not hired as a result. While it would seem this should end the same way as the first case, "not so" said the court. The applicant acknowledged that she never told the assistant manager during the interview that she was Muslim or mentioned her hijab, let alone explaining that she wore it for religious reasons (as opposed to the employee in the first case, who did make it clear prior to her termination that she wore her hijab for religious reasons). For her part, the assistant manager testified that she didn't know the applicant's religion, but "assumed she was Muslim" and "figured" that she was wearing the hijab for religious reasons. However, the court found that suspicion and assumption aren't sufficient to put the employer on notice that the applicant wore a hijab due to her religion.

The court noted that employers are admonished not to inquire about the religious beliefs of employees or prospective employees and not to make assumptions about the religious beliefs of their employees or prospective employees. Thus, a statement asking if they were Muslim because of their clothing could create serious issues. In order to prevent employers from being between the rock of not being allowed to inquire as to religion and the hard place of having to accommodate something that they suspect may be religious in origin, the court placed the responsibility on the individual to explain his or her religious belief and articulate the need for an accommodation. In other words, it isn't a "knew or should have known" standard, it's a "knew beyond any doubt and/or was specifically told by the employee" standard. Thus, the applicant's failure to explain that she wore her hijab due to her religion was fatal to her case.

Accordingly, the answer to the question of when is a scarf not a scarf is when it is worn by someone because their religion requires it and the employer knows that it is being worn for religious reasons.

A Conversation with Chairman Leonard Hubert of the Ohio Civil Rights Commission

Leonard Hubert has served on the Ohio Civil Rights Commission since 2006 and as its chairman since 2011. Before joining the commission, he was the Governor's director of external affairs, overseeing the Office of Minority Affairs, Multicultural Affairs, Faith-Based Initiatives, and Veterans Affairs. He recently took some time to discuss the workings of the Ohio Civil Rights Commission with Assistant Attorney General Steve Schmidt of the Ohio Attorney General's Civil Rights Section.

Steve Schmidt: What would you like the public to understand about the commission's work?

Leonard Hubert: What I'd like the public to understand about the work of the commission is, and to some degree I say this with sadness, the commission's work is still necessary. It's still necessary when you look at the number of cases that continue to be filed with the commission. For example, just a month ago, *The Columbus Dispatch* did a Sunday article about the Zanesville water case. If you had a conversation with most citizens about that case, they would not think this was a case in this century. No one would believe that individuals would be denied access to water based on the color of their skin, but it happened. We had a case in Cincinnati a year ago in which an individual put up a sign at an apartment pool saying, "whites only." I'm from the segregated South, from Alabama. I grew up right in an area in which segregation was very prevalent, and it is mind boggling that we see those types of things today. We still see cross burnings right here in Central Ohio. The work of the commission is, unfortunately, still necessary.

Steve Schmidt: How do you strive to achieve fairness?

Leonard Hubert: What I try to make people understand is that the commission is a neutral third party. The commission's role and responsibility is to investigate the case, gather materials from both sides, and apply the evidence that the investigation produces to determine whether or not discrimination occurred. It is not the commission's role to side with either party. It is to look at the evidence and follow the evidence and let it go where it needs to go.

Steve Schmidt: What is the most important attribute of a commissioner?

Leonard Hubert: It's the ability to listen, look at the facts, apply the law, and reach a decision. Sometimes a case involves a manager or an owner being a jerk. But being a jerk is not discrimination, you're just dealing with a jerk.

Steve Schmidt: The commission prides itself on trying to stop discrimination before it happens, primarily through education and training. Are there plans to expand in those areas?

Leonard Hubert: Yes. We routinely meet with businesses and organizations to educate them about discrimination and the commission's processes. Another approach is what we call "taking our show on the road." We have held commission meetings at Ohio State, Kent State, Wright State, Cleveland State, and Rhodes State College in Lima. These provide opportunities for students and the public to see how the commission works. We intend to continue this outreach to increase the commission's visibility. We want to remedy problems before they happen, and education is the key. Our work involves everything from providing housing training to the realtors' association to maintaining ongoing partnerships with entities such as Honda, Wright State University, and PNC in conducting our annual Civil Rights Hall of Fame. This program recognizes Ohioans who have advocated for civil rights. Another educational piece is our [Martin Luther King Jr. Art, Writing and Multimedia Contest](#). We work with schools across the state to talk with students about discrimination and how to recognize and apply Dr. King's principles in their world. ([See samples of the students' work.](#))

Steve Schmidt: What emerging issues do you see the commission becoming involved in?

Leonard Hubert: Some areas include LGBT rights in employment and marriage, emotional support animals, accessibility for disabled persons, familial status in housing, "stand your ground" laws, prior convictions and credit scores/history in employment decisions, and human trafficking.

Steve Schmidt: Is the commission's process cost-effective?

Leonard Hubert: From the moment a case is filed, parties have access to the commission's mediation process. Our goal is to help the parties resolve the matter because we just want to stop discrimination. If it's there, we want to say, "OK, this is what you did wrong. Don't do it anymore, and let's move on." If you look at the time and cost of judicial proceedings, the cost savings from the commission's process is a great benefit for the citizens of Ohio.

Steve Schmidt: Which commission cases stick out in your mind?

Leonard Hubert: Every case sticks out to some degree. In addition to the water and pool sign cases that I've already mentioned, one is a case involving a nationally recognized restaurant chain that refused to serve African-American college students because of a prior incident involving an African-American. So the bias arose from the manager being upset with what had happened with the prior experience, and he made a decision not to serve the students based on race. There have been dozens of cases of that nature.

Steve Schmidt: If you wanted to give some advice to Ohio youth, what would you tell them about the future?

Leonard Hubert: Well, I think we have a bright future as a state and as a nation, but I would suggest that things are changing, and changing in the sense that we live in a global society. We are dealing with individuals from all walks of life, all nationalities, all races, all religions, who have totally different cultural perspectives. So, when you bring all of those wonderful things together, we have to be able to do what is right regardless of those differences.

For more information: Visit the [Ohio Civil Rights Commission website](#).

News to Catch You Up

Here are just a few developments in the Civil Rights Section since our last issue:

Kudos: Marilyn Tobocman, principal assistant attorney general in the Ohio Attorney General's Cleveland Office, earned [Crain's Cleveland Business and In-House Government Counsel Award](#) in November for her years of service in fighting for the rights of all Ohioans.

On the Training Front: The Civil Rights Section provided comprehensive equal employment opportunity training on issues ranging from pregnancy to age discrimination as part of the Department of Administrative Services' annual EEO Academy. Two other recent trainings: to the International Right of Way Association on the intersection of fair housing laws and property rights and to job seekers over 55 on what can and can't be asked during job interviews.

If your organization is interested in scheduling a training presentation on fair housing or employment, call us at 614-466-7900.

On the Litigation Front: The Civil Rights Section won an appellate decision in *Ohio Civ. Rights Comm. v. Myers*, 2014-Ohio-144, when we convinced the court to overturn a decision holding that neighbor on neighbor harassment is not a stand-alone cause of action under Ohio's fair housing laws.

The section also prevailed in the administrative cases of *Sims v. Westside Family Practice*, Commission Complaint 08-EMP-COL-34472, involving a medical practice that fired its medical assistant after finding out she was pregnant, and *Neer v. Feet First Inc.*, Commission Complaint 06-EMP-DAY-17651, involving a podiatrist who fired his receptionist after she complained about pregnancy discrimination. In *FHRC v. Bien*, Commission Complaint 10-HOU-CLE-40132, the section won in a case in which a landlord twice denied assistance animals when tested by a fair housing group.

For copies of any of these administrative decisions, call the Civil Rights Section at 614-466-7900.

And some news from the Ohio Civil Rights Commission:

Welcome Aboard: The commission welcomed member Lori Barreras in October. Commissioner Barreras joins former Sen. Tom Roberts, Stephanie Mercado, William Patmon III, and Chairman Leonard Hubert.

Kudos: The Ohio State University recently recognized G. Michael Payton, the commission's executive director, with its Alumni in Government Distinguished Service Award.

Involving Youth: The commission's [Martin Luther King Jr. Art, Writing and Multimedia Contest](#) drew more than 1,000 entries from students around the state. The [winners' work](#) appears on the commission's website.

Ohio Civil Rights Commission v. Myers

[Ohio Civil Rights Commission v. Myers](#), 2nd District Court of Appeals, Ohio, 2014-Ohio-144 (Jan. 17, 2014)

Issue: Is Ohio's Fair Housing Act, Ohio Revised Code (R.C.) Section 4112.02(H) limited to behavior related to housing transactions and therefore inapplicable to harassment by a neighbor?

Summary: The 2nd District Court of Appeals ruled that a neighbor may be held liable under R.C. 4112.02(H)(12) for conduct that interferes with the exercise or enjoyment of a fair housing right of a person with a disability. The court further held that an aggrieved person need not have claim for a violation of any other provision of R.C. 4112.02(H) in order to bring claim under R.C. 4112.02(H)(12). The Ohio Civil Rights Commission brought this case on behalf of Dotty Podiak, a hearing-impaired tenant whose assistance dogs are trained to alert her to door bells, alarm clocks, smoke detectors, and other common noises within a home.

The commission alleged that a neighbor, Philip Myers, harassed and intimidated Podiak and her animal assistants due to Podiak's disability. The conduct at issue included mocking Podiak's use of sign language, repeatedly whistling and hitting a stick while on his front porch that caused the dogs to alert Podiak to those noises, falsely complaining that Podiak intentionally used her animal assistants to frighten and intimidate him, and knocking over a flower pot on his property and falsely reporting to management that Podiak's animal assistants were responsible for the damage. Podiak allegedly moved out due to Myer's conduct.

Myers moved to dismiss the complaint, asserting the commission's claims must fail as a matter of law because Ohio's Fair Housing Act was limited to behavior related to housing transactions, and Myers was just a neighbor. Additionally, Myers argued that Ohio does not recognize a "hostile housing environment," and the allegations in the complaint did not rise to the level of actionable conduct. On these grounds, the Montgomery County Common Pleas Court granted Myers' motion and dismissed the complaint. The commission appealed.

Outcome: The court decided that R.C. 4112.02(H)(12)'s prohibitions regarding conduct that coerces, intimidates, threatens, or interferes with any person's exercise of any right protected by the statute applies to any person, be he a neighbor or otherwise, and covers discrimination that occurs after acquiring or taking possession of the property. The court declined to find that Myers' alleged conduct was addressed by R.C. 4112.02(H)(1) and (15), which prohibit the refusal to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, including conduct that might "otherwise deny or make unavailable" a housing opportunity. Similarly, the court declined to apply R.C. 4112.02(H)(16), which makes it unlawful to discriminate in "the terms, conditions, or privileges of the sale or rental of housing accommodations."

Legal Significance: The court recognized that Ohio's statute prohibits discriminatory conduct by neighbors by its language that limits discriminatory behaviors of "any person." As a result, a neighbor or fellow tenant may be liable for discriminatory conduct even when the conduct is unrelated to the transfer of real estate.

Dickinson et al v. Zanesville Metropolitan Housing Authority et al

[Dickinson et al v. Zanesville Metropolitan Housing Authority et al](#), U.S. District Court, Southern District of Ohio, Eastern Division, 2013 WL 5487101 (Sept. 30, 2013)

Issue: Can a female victim of domestic violence state a cause of action under the Fair Housing Act based on sex discrimination by alleging the housing authority failed to act and instead blamed her for violence caused by the father of her children.

Summary: A federal district court rejected a defendant's motion to dismiss a housing discrimination case involving a female victim of domestic violence. The court found the plaintiff pled a viable claim of sex discrimination under the Fair Housing Act (FHA) against the housing authority that operated the apartment complex by alleging that it failed to respond to her calls for help and instead blamed, reprimanded, created inaccurate records, and attempted to evict her.

Kayla Dickinson lived at Coopermill Manor, a public apartment complex operated by Zanesville Housing Authority (ZMHA). She was the victim of domestic violence brought about by the father of two of her children, Brandon Somers. Somers, who did not live at the apartment complex, frequently trespassed into plaintiff's home, physically abused her, damaged her property, threatened her, and disturbed other residents. The Zanesville Police Department was notified about several of these incidents. Eventually, Somers was arrested, convicted, and sentenced to prison.

According to plaintiff's complaint, ZMHA's security was slow to respond to her calls for help. Even though she attempted to explain the danger Somers posed to her, ZMHA blamed her for the incidents. ZMHA's staff also failed to investigate the accuracy of the complaints lodged by other tenants against Dickinson. Instead, it created electronic records of the incidents, which stated that she was culpable for the disturbances. ZMHA informed Dickinson that it would not protect her and threatened to evict her if she did not elect to leave voluntarily. Several years after she left Coopermill Manor, ZMHA sent multiple negative reference letters to other landlords, creating a roadblock for Dickinson to obtain new housing.

Outcome: Based on these allegations, the court found that Dickinson properly pled that ZMHA interfered, or allowed Somers to interfere, with her ability to live at Coopermill Manor in violation of the FHA. It found that ZMHA was aware, or should have been aware, that she was the victim of domestic violence. Since it failed to satisfy its obligations under the Violence Against Women Act, and since it blamed her for the results of the domestic violence, Dickinson's allegations could give rise to an inference that ZMHA acted with intent to discriminate based on sex.

Legal Significance: Landlords receiving federal subsidies can be held liable for sex discrimination claims under the FHA by failing to properly respond to complaints of domestic violence and by assuming the female victim is the cause of the problem.