

With this ring

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What do you do when one of your employees dresses inappropriately? This can take the form of clothes that are too revealing or maybe body art such as tattoos or piercings that you believe do not convey the professional image you want portrayed in your community. Well, I suppose that the appropriate action would be to explain your feelings to the employee and ask him or her to not dress in the manner you find objectionable, or to remove the piercings while at work, or to cover the tats to whatever extent they can be. But, suppose your employee states that she is a member of the Church of Body Modification (CBM) and that dressing or adorning herself the way she does is an expression of her religious freedom and that she can no more restrict or inhibit what she wears than can members of more established religions who dress as their creed believes is appropriate to their religious tenets and teachings. If you insist that it is my way or the highway, would you be guilty of infringing on your employee's First Amendment rights to freely practice her religion? Interesting, huh? Well, this is what *Cloutier v Costco Wholesale Corp*, 390 F.3d 126 (1st Cir, Mass, 12/01/04), is all about.

Costco had a "no facial jewelry" provision in its employee dress code. When the plaintiff was hired as a front-end assistant, she received a copy of the employee handbook that noted certain dress-code provisions. At that time, she had multiple earrings and 4 tattoos but no facial piercings. Some time later, she was transferred to the deli department. Soon after that, Costco revised its dress code to the extent that food handlers were not allowed to wear any jewelry. She said that this rule interfered with her religious and spiritual beliefs and requested a transfer back to the front end where jewelry was allowed. Her request was granted; during the next 2 years, her work was satisfactory, and she was promoted to cashier. During this time, she also became more involved in body modification and received several facial piercings and cuttings. About 3 years later, Costco

prohibited all facial jewelry except earrings. Well, the plaintiff continued to wear her eyebrow ring and did not seek any accommodation; several months later, Costco sought to enforce its policies. The plaintiff demurred, citing infringement of religious freedom.

As an aside, the CBM was established in 1999. About 1000 members practice such "body art" as piercing, tattooing, branding, cutting, and body manipulation. The goal of CBM's teachings is to allow its members to "grow as individuals through body modification and its teachings, to promote growth in mind, body and spirit, and to be confident role models in learning, teaching, and displaying body modification." CBM's Web site is the primary mode for reaching its disciples and did not teach that the body modifications had to be visible at all times, nor was there any prohibition from covering the modifications temporarily (eg, at work). The plaintiff, however, interpreted the phrase "being a confident role model" to mean that body modifications, such as her facial piercings, had to be proudly displayed, although she did not extend this interpretation to the uniform she wore that covered the tattoos on her arms. She was again told to remove the piercings, again refused, and ultimately filed a religious discrimination complaint with the Equal Employment Opportunity Commission (EEOC), in the hope of enforcing Section 2000e-5 of Title VII, 42 U.S.C.

The next time she showed up for work, she met with the store manager regarding her appearance and the complaint she had filed. The plaintiff opined that from her perspective, a reasonable accommodation would be to place a plastic flesh-colored adhesive strip over the eyebrow piercing while at work. The request was denied. Another employee who had the same piercings was allowed to use clear plastic "retainers" so that the holes would not close. The court decision was silent as to whether the plaintiff was offered the same accommodation.

Regardless, at a mediation session, Costco offered to allow the plaintiff to either use the clear retainers or cover the eyebrow ring with an adhesive strip. However, the horse was now out of the barn, and the plaintiff refused the offer, stating that it violated her religious beliefs. From her perspective, it was now all or nothing. Costco drew its line in the sand, stating that it could not allow employees to wear facial jewelry of this type

because it would “interfere with its ability to maintain a professional appearance and would thereby create an undue hardship for its business.” The EEOC ultimately determined that Costco had violated the plaintiff’s religious freedom and also that allowing the plaintiff to express herself as desired would not result in an undue hardship. Bolstered by the ruling, the plaintiff filed a lawsuit in federal district court alleging a Title VII violation of her civil rights and a second claim for religious discrimination under Massachusetts state law.

The court dismissed the civil rights violation but allowed the state claim for religious discrimination to go forward. Regarding the federal Title VII claim, violating her civil rights, to hold water, the plaintiff must prove that (1) there existed a conflict between a bona-fide religious practice and an employment requirement; (2) the plaintiff brought this conflict to the attention of her employer; and (3) the religious practice in question was the basis for the employee’s termination. The court had issues as to the following: (1) whether the CBM was a bona-fide religion; (2) but even if it is, its practices do not require full-time exhibition of the body modifications in question; and (3) it is merely the plaintiff’s personal interpretation of these teachings that the body modifications in question had to be publicly displayed at all times. However, the court did not base its decision on this dictum (nonbinding opinion). The court ultimately ruled in Costco’s favor, finding that Costco did offer a reasonable accommodation in the form of allowing the clear plastic retainer to be worn or the metal ring to be covered by the flesh-colored adhesive strip—the accommodation originally sought by the plaintiff that she later refused to accept. The bottom line was that “accommodation” cuts both ways. An employer must reasonably accommodate an employee’s religious beliefs; concurrently, an employee must cooperate with the employer’s good-faith efforts to provide a reasonable (although not necessarily the preferred) accommodation to the employee.

As to the claim of religious discrimination filed under Massachusetts state law, it was noted that employers cannot impose any condition of employment that would “require an employee to violate, or forego the practice of, his creed or religion as required by that creed or religion.” Creed or religion is defined as “any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization.” The burden of proof falls to the employee, who must establish that the activity in question is a practice of his creed or religion. Under this examination, “[i]nquiry as to whether an employee’s belief is sincere is constitutionally appropriate.” Once the plaintiff meets

this requirement, the burden of proof shifts to the defendant to prove that it offered the employee a reasonable accommodation, defined as one that “shall not cause undue hardship in the conduct of the employer’s business.” Again, the court found for Costco.

The plaintiff appealed. In a tersely worded decision, the appellate court also found for Costco, stating that (1) granting the plaintiff a blanket exemption from the dress code provisions would impose an undue hardship on Costco; and (2) in this type of situation, an employer has no obligation to offer an unreasonable or blanket accommodation before taking an adverse employment action. The court dismissed the second issue in 1 sentence, noting that “An employer who has made no efforts to accommodate the religious beliefs of an employee or applicant before taking action against him may only prevail if it shows that no accommodation could have been made without undue hardship.” This led to an extensive analysis of what would constitute an undue hardship. An undue hardship can be defined as something that “would impose more than a de minimis cost on the employer. This calculus applies both to economic costs, such as lost business or having to hire additional employees to accommodate a Sabbath observer, and to non-economic costs, such as compromising the integrity of a seniority system.”

The plaintiff argued that since Costco never received complaints about her facial piercings, the modifications in question did not affect her job performance. Therefore, any hardship that Costco claimed was merely hypothetical and therefore not sufficient to excuse it from accommodating her religious practices. On the other hand, Costco argued that it

has a legitimate interest in presenting a workforce to its customers that is, at least in Costco’s eyes, reasonably professional in appearance. Costco’s dress code, included in [its employee] handbook, furthers this interest. It explains that “Appearance and perception play a key role in member service. Our goal is to be dressed in professional attire that is appropriate to our business at all times. All Costco employees must practice good grooming and personal hygiene to convey a neat, clean and professional image.”

The court noted that this is true of any employee who interacts with the public. Even if no complaints are ever filed, the court stated that the plaintiff’s facial jewelry has some effect on Costco’s public image, and this effect can negatively detract from its professional demeanor. The court noted the following.

Perhaps no facet of business life is more important than a company’s place in public estimation. Good grooming regulations reflect a company’s policy in our highly competitive business environment.

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