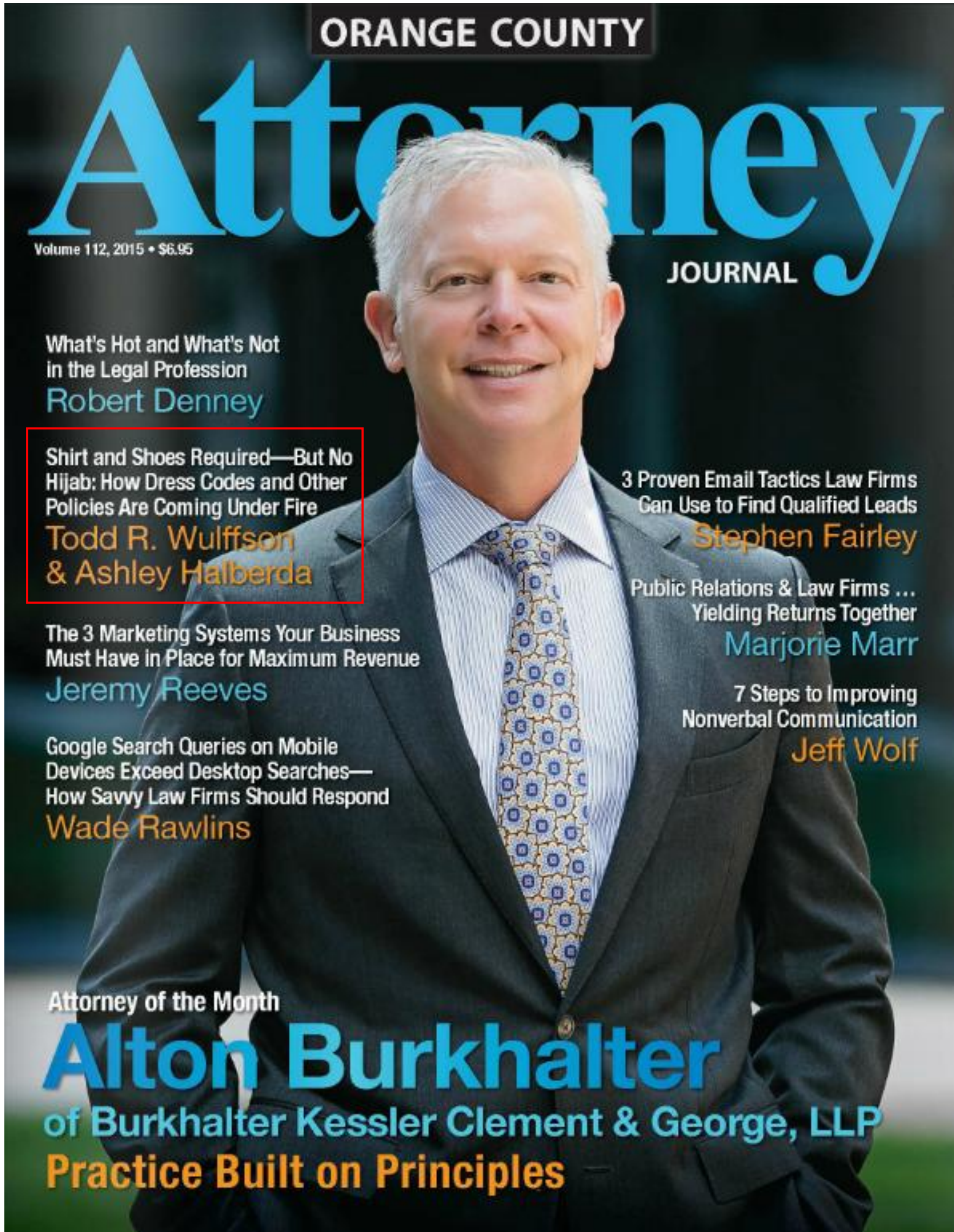
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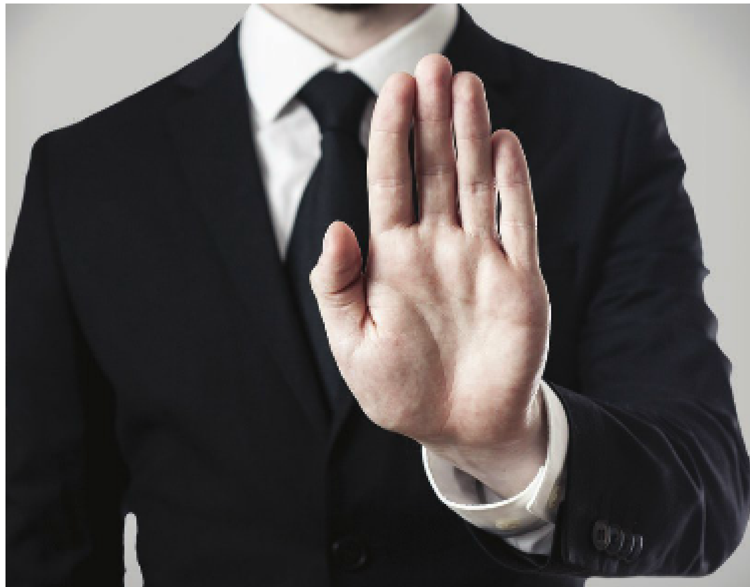

# Shirt and Shoes Required—But No Hijab

## How Dress Codes and Other Policies Are Coming Under Fire as Discriminatory of Religious Garb

**By Todd R. Wulffson and Ashley Halberda**

Early in 2012, the Equal Employment Opportunity Commission (EEOC), the federal entity tasked with enforcing federal anti-discrimination laws, issued its Strategic Enforcement Plan (SEP) for 2012-16. As stated on the EEOC's website, "the purpose of the SEP is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace." In practice, however, the EEOC has recently focused on a few high-visibility areas where media attention has been high. One of those areas has been religious discrimination under Title VII of the Civil Rights Act of 1964. What has been most unusual, however, is that, for the first time ever, the majority of cases do not involve denial of employment on the overt assertion of an applicant's religion—and most do not involve Christianity. The most recent and most visible wave of enforcement actions has been with respect to facial hair and clothing worn at work by adherents to religions that are relatively unknown by employers. Examples include the Muslim head scarf (hijab), the Sikh turban and kirpan (symbolic miniature sword) and adherence to shaving or hair length observances, such as Sikh uncut hair and beard, Muslim facial hair, Rastafarian dreadlocks, and Jewish peyes (sidelocks). Otherwise neutral company policies regarding employee appearance have recently been attacked as discriminatory. The United States Supreme Court has recently added significant fuel to the EEOC's anti-religious discrimination enforcement fire.

Nationwide retailers—and particularly those with established corporate identities—have been hardest hit by the new SEP, but small employers ultimately will be the most injured. For example in 2013, the EEOC filed two religious discrimination cases against Abercrombie & Fitch involving the use of head scarves in the workplace. Similar to many other companies, Abercrombie had in place a "Look Policy" which governed employees' clothing worn at work, and prohibited caps as being too informal for the company's desired image. The head scarf was treated as a cap under this policy. The first case involved Abercrombie's failure to hire a job applicant who wore a head scarf during his interview, while the other concerned the termination of an employee who refused to remove his head scarf at work. Both settled out of court, but the trend was apparent.

Abercrombie's "Look Policy" had also been challenged earlier by the EEOC on behalf of a 17-year-old young Muslim woman who was denied employment when she wore her hijab during her interview. Abercrombie justified its denial of employment because the hijab clashed with the company's dress code, which called for a "classic East Coast collegiate style." Although the applicant never indicated her head scarf was due to her religious practice, and she did not request a religious accommodation to excuse her from compliance with the applicable dress code, the EEOC *inferred* a religious-based motive for Abercrombie's decision not to hire the Muslim applicant. Abercrombie fought the case because everyone agreed that it had no knowledge of the alleged need for a religious accommodation.

This case was heard by the United States Supreme Court in February 2015. On June 1, 2015, the Court found that an employer may not make a job applicant's religious practice, **confirmed or otherwise**, a factor in employment decisions. Significantly, the Court found that employer knowledge of the need for a special accommodation was irrelevant, meaning that the applicant need not have asked for it. Based on the specific holding of the Court, an otherwise-neutral policy regarding grooming and attire must give way to the need for an after-the-fact asserted accommodation, regardless of an employer's knowledge of any need for a religious accommodation.

The implications of this case are broad (just look at the dozens of groups who filed "friend of the court" briefs who are not even

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remotely religious-based). It arguably charges an employer with knowing all of the possible religious implications of headgear, jewelry, clothing, hair and makeup—and likely eviscerates many dress code and grooming standards modeled on local standards. Also, if anyone thinks that cultural and ethnic items, including tattoos, piercings and extremely interesting earrings and hairstyles, are not now going to be argued as needing similar accommodations, he or she has not been reading the advance sheets from the local court house.

Some may argue that such an evolution is beneficial for society as a whole—but it will likely be financially devastating for small businesses who cannot afford to be blind-sided by costly litigation. Based on this Supreme Court case, any dress code that is worded, and applies, neutrally, can still be the basis of a religious discrimination claim (or cultural or ethnic discrimination) if a person is denied employment while wearing an item of unknown religious significance. The most likely real benefactors of this potential slippery slope in the short term are the lawyers for both sides.

What should employers do to protect themselves from such "stealth" liability? How is an employer to know that an interesting hat, facial piercing, tattoo or mustache is for religious or some other protected purpose, and is not just a fashion statement? The most practical approach for employers is to include the dress code in the job description—and include any bans on facial piercings, visible tattoos or unnaturally colorful hair. (This should be provided to applicants who respond to the ad—not placed in the ad itself.) Just like it is appropriate to ask applicants if they are going to be able to perform the essential functions of the job with or without an accommodation, a prudent employer who has a specific dress code and/or grooming policy should ask the applicant if it poses a problem. An employee then can explain any religious/cultural objections or accommodations needed; and the employer can determine whether it is a legitimate issue that needs to be accommodated (yes, this will involve lawyers too).

This is a good way to avoid a potential trap discussed by the Supreme Court—namely, that the employer need not know of the need for an accommodation to be held liable. If the employer specifically asks for this information and the applicant refuses to provide it, that can go a long way toward negating the legitimacy of the applicant's purported religious needs. Once armed with the applicant's response, the employer can determine whether a legitimate, safety or bona fide occupational qualification is involved. After all, if the applicant is otherwise qualified, but needs a legitimate accommodation, the employer should do its best to hire him or her. Hopefully, just having the dialog will help to educate both parties enough to avoid litigation—but if the employer chooses to risk litigation exposure, at least it will be able to see the risk coming.

Perhaps the most important lesson from the Abercrombie case and the recent wave of EEOC action is that an employer cannot simply rely on its policies or dogmatically adhere to the fact that "this is the way we have always done things." Employers must be proactive and adaptable—to a changing economy as well as an evolving legal landscape. ■

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