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Segregating Workplaces by Religion

Many employers use dress codes to keep visibly religious employees out of sight. Now, the Supreme Court has a chance to end the practice.

By Dawinder Sidhu

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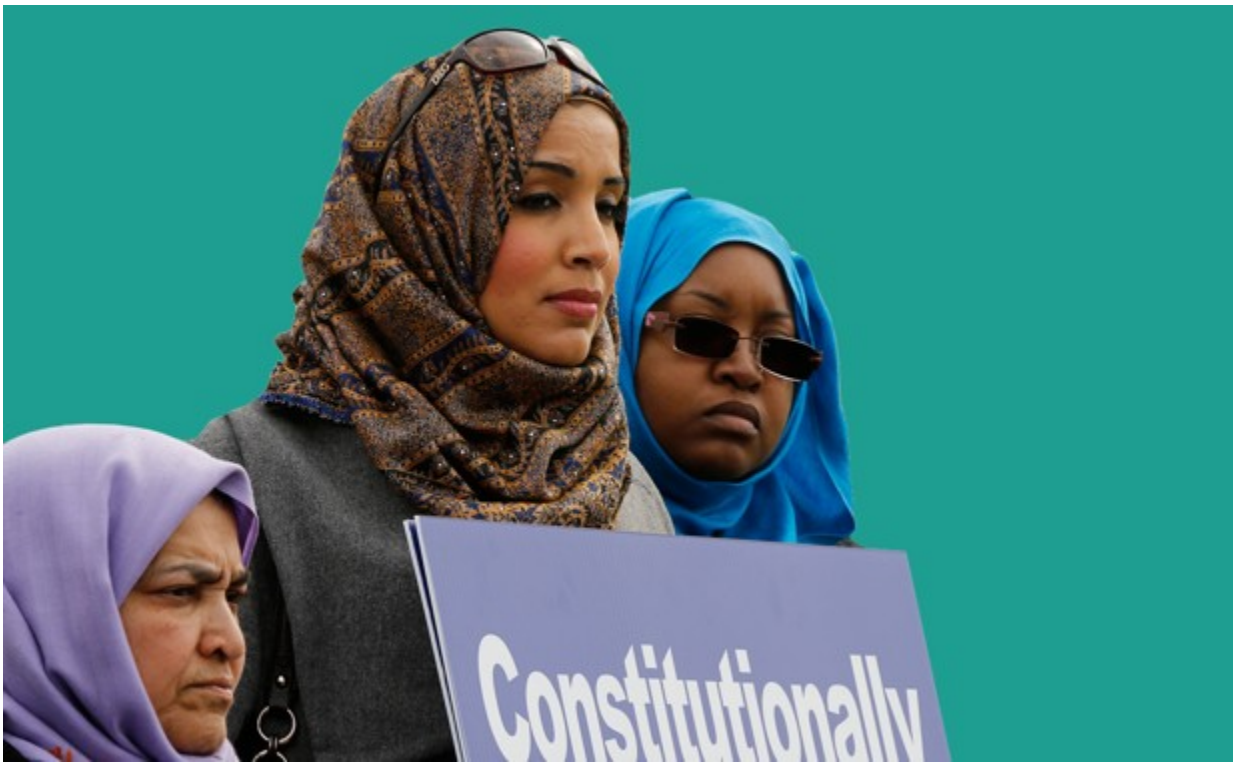

Jim Bourg/Reuters/The Atlantic

In an episode of the hidden-camera series, What Would You Do?, a Jewish man with a yarmulke, a Muslim woman with a headscarf, and a Sikh man with a turban were interviewing for a job at a restaurant. The applicants and the restaurant manager—all actors—spoke loud enough for the dining public—all real people—to hear. The manager made clear to the applicants, and to those within earshot, that the applicants would not be hired because their religious attire violated the restaurant's dress code. The manager told the turbaned Sikh, for example, that he couldn't be hired "looking the way you look."

Some patrons were incredulous. An African-American woman wondered if the manager could "say it to me about my color or my religious beliefs. It's the same thing, right?" Another patron admonished the manager, "I'm just not sure you're aware of how illegal it is," adding, "you're lucky there are no other lawyers around."

As it turns out, the law appears to be on the restaurant's side. In lawsuits filed under Title VII of the Civil Rights Act of 1964, the federal statute prohibiting employment discrimination, courts have permitted employers to avoid hiring visibly religious applicants who do not conform to the employers' dress code or "look."

This may change. Last week, the Supreme Court heard oral arguments in a case seemingly taken right out of the What Would You Do scenario. The Justices' real-life version features Samantha Elauf, who applied for a "model," or floor, position with Abercrombie Kids. Elauf, a Muslim, wears a headscarf for religious reasons. But Abercrombie's dress code emphasizes a "preppy," "classic East Coast collegiate style of clothing," that does not permit any headgear, including headscarves.

In the event of such a conflict, Title VII requires employers to "reasonably accommodate" an applicant's religious practice, unless the employer can prove that such accommodation would present an "undue hardship." The specific question before the Justices is whether Abercrombie had the duty to accommodate Elauf when it assumed—but wasn't told by Elauf—that her headscarf was religious in nature.

Based on the oral argument, the Justices seem poised to say yes. This would be the right result: Abercrombie perceived Elauf's headscarf to have religious significance and then acted on this perception by downgrading—on the basis of the headscarf alone—Elauf's interview score such that she would not be recommended for a position.

Make no mistake: This case is not only about discrimination, but also about employers' attempts to use dress codes as a mechanism to regulate, and minimize, the presence of the visibly religious in our public spaces. The Justices should not miss the opportunity to reject such appearance-based social engineering. Here are four things they could say about dress codes and the outwardly religious.

First, the Court should repudiate Abercrombie's claim that it did not discriminate because Elauf was subject to a "neutral" dress code that applies to all applicants who would be in public view. Abercrombie's counsel said the company would have

refused to hire any applicant who did not comply with the dress code, whether they had on a “headscarf,” “baseball cap,” “helmet,” or any other headgear.

But Title VII specifically requires employers to accommodate an individual who cannot, for a religious reason, comply with a generally applicable policy, unless doing so would present an undue hardship. Accordingly, as Chief Justice John G. Roberts said, the question under Title VII is not whether are you “treating everybody the same,” because Title VII imposes on employers “an obligation to accommodate people with particular religious practice or beliefs.”

Similarly, Justice Ruth Bader Ginsburg noted pointedly that Title VII requires employers to “treat people who have religious practice[s] differently.” Employers would have to accommodate a yarmulke, but not a baseball cap, she added. Thus, Abercrombie cannot avoid the charge of employment discrimination by saying it applies its dress code to everyone.

"I would refuse to serve a drunken man or a colored man or anyone I felt would damage my business."

Second, it does not matter that Abercrombie’s dress code is not the product of any hostility towards Muslims or religious applicants generally, or that the dress code instead may be responsive to customer preferences. Similar arguments were made in the civil rights era, particularly as to African-Americans. In one prominent example, the proprietor of a barbeque restaurant in Birmingham, Alabama refused to serve African-Americans inside because doing so would repel white customers. Emphasizing that the decision was about the bottom line and not bias, the proprietor said, “I would refuse to serve a drunken man or a profane man or a colored man or anyone I felt would damage my business.”

The courts back then made clear that purely customer-driven decision making makes no qualitative difference in the civil rights context: The restaurant still acted on those preferences in a tangible way, by denying dine-in service to those who did not correspond to the preferences. It therefore opened itself up to civil rights laws. And so it is here: Abercrombie cannot immunize its dress code from judicial scrutiny by simply referencing external preferences and disclaiming internal animus.

Third, a dress code, unrestrained by Title VII, would permit employers to reinforce popular or majoritarian beliefs as to which appearances are preferred and which are not favored in public view. Those beliefs, once translated into hiring decisions, can reserve positions for those who conform to expectations. At the same time, those who look different for religious reasons are excluded from the workforce. As Justice Elena Kagan suggested, employers could “cut these people out” from positions and by extension from the workforce altogether.

Fourth, the Court should foreclose employers’ use of dress codes to keep visibly religious employees out of sight. Rather than modifying their dress code or upsetting customer preferences, some employers have accommodated employees with

religious attire by giving them positions out of public view. For example, a major airline with a dress code accommodated a turbaned Sikh ticketing agent by confining him to sales calls. The Court should make clear that such "out of sight" maneuvers cannot constitute a reasonable accommodation under Title VII.

At bottom, the Supreme Court can help eliminate the mismatch between our moral sentiments about the application of dress codes—as reflected in the What Would You Do episode—and current legal tolerance of those appearance-based policies. The Justices can take the visibly religious out of the shadows and invalidate employers' attempts to define the proper place of Jews, Sikhs, Muslims, and others, in our society. They can end the use of dress codes as an instrument of workplace segregation.

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