No. 04-1475

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KIMBERLY CLOUTIER,

Plaintiff-Appellant,

v.

COSTCO WHOLESALE CORP.,

Defendant-Appellee.

On Appeal From The United States District Court
for the Western District of Massachusetts

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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July 29, 2004

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Respectfully submitted:

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The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief *amici curiae* contingent on the granting of the accompanying Motion for Leave. The brief urges this Court to uphold the decision below and thus supports the position of Defendant-Appellee, Costco Wholesale Corp.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 330 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size

and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*., as well as other equal employment laws and regulations. As employers, and as potential respondents to charges of religious discrimination under Title VII, EEAC's and the Chamber's members have a direct and ongoing interest in the issues presented in this appeal. The district court below ruled correctly that Title VII does not require an employer to waive its dress code as a religious accommodation when another accommodation is available that reasonably balances the employee's religious beliefs and practices with the employer's legitimate business interests.

Because of its interest in the religious accommodation requirements of Title VII, EEAC has filed numerous briefs *amicus curiae* in the United States Supreme Court and in the United States Courts of Appeals in cases interpreting those provisions, including *Ansonia Board of Education v.*

Philbrook, 479 U.S. 60 (1986); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) and *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Costco Wholesale hired Kimberly Cloutier to work as a cashier in its West Springfield, Massachusetts store in July of 1997. *Cloutier v. Costco Wholesale*, 311 F. Supp.2d 190, 192 (D. Mass. 2004). At the time of her hire, Cloutier had eleven ear piercings and four tattoos on her upper arms. *Id*. In the Spring of 2001, Cloutier joined the Church of Body Modification (CBM). *Id.* at 193. Members of the CBM apparently believe that the practice of body modification and manipulation — through techniques like piercing, tattooing, branding, and flesh hook suspension — "strengthens the bond between mind, body and soul." *Id*. Around that same time, in March

of 2001, Costco revised its dress code to prohibit employees from wearing of any form of visible jewelry on the face or tongue. *Id*. The rationale behind the new policy was to ensure that Costco employees project a professional image to Costco customers and to the public. *Id.* Specifically, the new policy states that "[a]ppearance and perception play a key role in member service," and that Costco's goal is for employees "to be dressed in professional attire that is appropriate to [Costco's] business at all times." *Id*. Cloutier received a copy of the policy that same month, but did not request any religious accommodation. *Id.* Nor did she remove her facial jewelry. *Id*.

One day, when Cloutier and a co-worker, Jennifer Theriaque, reported to work wearing eyebrow rings, Costco management advised the two women that they would have to remove their facial jewelry in accordance with the new policy if they wanted to continue working for the company. *Id.* Theriaque informed Costco that both she and Cloutier were members of the CBM. *Id*. The next day, both women returned to work still wearing their facial jewelry. Costco told them a second time that they were in violation of company policy, and asked them to comply or leave work. *Id.* at 194. Both Cloutier and Theriaque informed Costco that the wearing of facial jewelry was a practice required by their religion and went home. *Id*.

The next day, Cloutier filed a charge with the Equal Employment Opportunity Commission (EEOC). *Id.* One day later, Cloutier returned to work still wearing her facial jewelry. *Id* Costco management again asked Cloutier to remove the jewelry or leave. *Id*. Cloutier refused, but offered instead to wear a band-aid over her jewelry. *Id*. At that time, Costco denied her request, but shortly thereafter granted Theriaque's request that she be allowed to wear a retainer – a clear plastic spacer that would prevent her piercing from healing and closing. *Id.*

Although Cloutier knew Costco had resolved the religious conflict with Theriaque by allowing her to wear a retainer, Cloutier nevertheless chose not to report to work. *Id*. Nor did she request the same accommodation. *Id.* Several weeks later, Cloutier received a letter terminating her employment for unexcused absences resulting from her violation of Costco's dress code. *Id*.

Approximately three weeks after her termination, Costco presented Cloutier with a written, unconditional offer to return to work. *Id*. at 194-195. Costco's offer proposed two reasonable accommodations to resolve the conflict between Cloutier's religious beliefs and Costco's dress code; Cloutier could return to work if she either wore a band-aid over her facial jewelry or a clear plastic retainer in place of the jewelry. *Id*. at 195.

Cloutier never responded to Costco's offer, and instead filed the instant lawsuit. *Id*.

Cloutier brought her suit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., and under Chapter 151B, § 4(1A) of the Massachusetts General Laws, claiming that she had been discharged because of her religion. *Id*. at 191. In her lawsuit, Cloutier argues for the first time that both of Costco's suggested accommodations would have violated her personal religious convictions and that it is her sincere belief that the tenets of the CBM require her to display her facial jewelry at all times, so that a complete waiver of Costco's dress code was the only option acceptable to her. *Id.* at 195.

The district court granted Costco's motion for summary judgment, holding that the accommodation offered by Costco was reasonable as a matter of law and that Cloutier's rejection of this accommodation barred liability under Title VII. *Id*. at 191.

This appeal followed.

STATEMENT OF THE ISSUE

Whether the district court, in granting summary judgment in favor of Costco Wholesale Corporation on Cloutier's religious accommodation

claim, correctly ruled that Title VII does not require an employer to waive its dress code as a religious accommodation when another accommodation is available that reasonable balances the employee's religious observance with the employer's legitimate business interests.

SUMMARY OF ARGUMENT

Title VII requires an employer to reasonably accommodate an employee's religious beliefs or demonstrate its inability to make such accommodations without undue hardship. 42 U.S.C. § 2000e(j). Where, as here, an employer reasonably accommodates an employee's religious beliefs, the employer has fulfilled its responsibility and the Title VII inquiry ends. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986). In satisfying this legal obligation, an employer is not required to show that accommodations proposed by the employee would have caused an undue hardship. *Id*. Nor is the employer required to grant the employee the accommodation of her choice. *Id*.

In the instant case, Costco offered Cloutier two reasonable accommodations that would have resolved any conflict between Cloutier's religious beliefs and Costco's dress code. Cloutier ignored both offers, refused to cooperate with Costco's good faith efforts to accommodate her,

and now argues for the first time in this lawsuit that no accommodation short of her exemption from Costco's dress code would have resolved her religious conflict.

Yet Cloutier's stubborn insistence that Costco simply abandon its dress code is not required by Title VII. Many employers like Costco have established personal appearance standards for legitimate and non-discriminatory reasons, including for the purpose of promoting and protecting the employer's public image. Courts have long-recognized the importance of personal appearance policies to the business community and whenever possible have carefully guarded an employer's right to create and enforce them. The district court correctly ruled, therefore, that Costco has a legitimate business interest in presenting a workforce to its customers that is reasonably professional in appearance. The district court also correctly ruled that Title VII does not require an employer to waive its dress code as a religious accommodation when, as is the case here, another accommodation is available that reasonably balances the employee's religious observance with the employer's legitimate business interests.

A contrary rule would blur Title VII's focused mandate to end discrimination based on religion by expanding the scope of an employer's duty to accommodate religious beliefs to include the accommodation of an

employee's personal preferences. Title VII was enacted in part to stop the perpetuation of discrimination based on religion in the employment setting. It was not meant to prohibit employers from instituting legitimate workplace policies necessary for the successful operation of an employer's business.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT COSTCO'S OFFERS OF ACCOMMODATION WERE MANIFESTLY REASONABLE AS A MATTER OF LAW

A. Costco's Reasonable Accommodation Offers Resolved Any Conflict Between Cloutier's Religious Beliefs And Costco's Dress Code

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., prohibits employers from discriminating against employees on the basis of religion, 42 U.S.C. § 2000e-2(a), unless an employer demonstrates that it cannot "reasonably accommodate" an employee's religious observances or practices without "undue hardship" to the employer's business. 42 U.S.C. § 2000e(j). The United States Supreme Court has held that any religious accommodation imposing more than a *de minimis* cost on the employer constitutes an "undue hardship." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)(footnote omitted).

Moreover, "*any* reasonable accommodation by the employer is sufficient to meet its accommodation obligation." *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 68 (1986)(emphasis added). The employer is not required to grant an employee the accommodation of his or her choice. *Id*. Nor must the employer first show that the employee's proposed alternative accommodations would cause an undue hardship. *Id*.

While the *amici* are willing to assume for present purposes that Cloutier's religious beliefs are genuine and sincerely held, the district court properly concluded that Costco's offers of accommodation would have resolved any conflict between Cloutier's religious beliefs and Costco's dress code.

Costco proposed *two* possible reasonable accommodations to Cloutier that would have resolved any conflict between Costco's dress code and Cloutier's religious beliefs. First, Costco offered to let Cloutier cover her facial piercing with a band-aid while she was at work. As the district court held, "[t]he temporary covering of plaintiff's facial piercings during working hours impinges on plaintiff's religious scruples no more than the wearing of a blouse, which covers plaintiff's tattoos." *Cloutier*, 311 F. Supp.2d at 199. While she may take a contrary position now, it is clear Cloutier felt the same

way at the time, as evidenced by the fact that she specifically asked Costco to grant her this same accommodation.

Moreover, courts in other cases have also held that allowing an employee to temporarily cover a "religious" symbol during work hours constitutes a reasonable accommodation under Title VII. For example, in *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1342 (8th Cir. 1995), the Court of Appeals for the Eighth Circuit held that the employer's proposed accommodation of allowing an employee to wear a graphic anti-abortion button under her clothing while at work was a reasonable accommodation of her sincerely held religious beliefs. Likewise, a federal district court in Indiana held that an employer reasonably accommodated an employee and member of the Klu Klux Klan by allowing him to wear a long-sleeved shirt over his arm tattoo, which depicted a hooded figure standing in front of a burning cross. *Swartzentruber v. Gunite Corp.*, 99 F. Supp.2d 976 (N.D. Ind. 2000).

Second, Costco also proposed an alternative reasonable accommodation that would have permitted Cloutier to continue working without having to conceal her piercing. Costco offered to allow Cloutier to wear a retainer — a clear plastic spacer that prevents a piercing from healing or closing. This accommodation would have allowed Cloutier to openly

display her facial piercings *at all* times, which Cloutier now claims her faith demands. Moreover, the appropriateness of this accommodation is further underscored by the fact that Cloutier's co-worker, also a member of the CBM, specifically asked for and accepted the retainer solution as a reasonable accommodation of her religious beliefs.

For all of these reasons, the district court correctly ruled that Costco's offer of accommodation resolved any religious conflict.[1]

B. Cloutier Failed To Live Up To Her Affirmative Duty To Cooperate With Costco's Good Faith Efforts To Reasonably Accommodate Her

The Supreme Court recognized in *Ansonia* that the process of identifying a Title VII religious accommodation requires "'bilateral cooperation'" between the employer and the employee. 479 U.S. at 69 (quoting *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982)). Thus, although an employer may be required to reasonably

[1] Cloutier claims that Costco's reasonable accommodation offers came too late, thereby precluding Costco from making the argument that it attempted to accommodate her religious conflict. This argument is simply a red herring. Cloutier's current position, that *nothing* short of her exemption from Costco's policy would have resolved her religious conflict, negates her argument that Costco had to extend its offer of accommodation earlier in order for it to be valid. By Cloutier's own admission, Costco's reasonable accommodation efforts were futile from the beginning. Thus, the only question remaining is whether the accommodations offered were "reasonable" under the law. The evidence clearly shows that they were.

accommodate an employee's religious beliefs or practices under Title VII, the employee has an equally important duty to cooperate with the employer's efforts to accommodate her. *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589, 593 (11th Cir. 1994)("[W]e likewise recognize an employee's duty to make a good faith attempt to accommodate his religious needs through means offered by the employer"); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982)("Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer. A reasonable accommodation need not be on the employee's terms only")(footnote omitted).

Moreover, the courts have long recognized that an employee's failure to cooperate can be fatal to her claim. As the Eighth Circuit has held:

> An employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer. Where an employee refuses to attempt to accommodate his own beliefs or to cooperate with his employer's attempt to reach a reasonable accommodation, he may render an accommodation impossible. In such a case, the employee himself is responsible for any failure of accommodation and his employer should not be held liable for such failure.

Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977).

In this case, Cloutier failed to live up to her duty to cooperate with Costco's efforts to reasonably accommodate her. Cloutier flatly refused Costco's accommodation offers, without explanation or discussion, by simply ignoring them. While Cloutier *now* argues that none of the accommodations offered her would have resolved the conflict between Costco's dress code and her beliefs, and that only her exemption from the dress code would have been appropriate, at no time did Cloutier bother to inform Costco of this fact.

In essence, Cloutier seems to take the position that Costco should have been clairvoyant and simply known, without being told, that the conflict had not been resolved. This position is hardly reasonable, however, especially in light of the facts. Given that Cloutier's co-worker had already accepted one of the proposed accommodations as an appropriate solution to the religious conflict, and given that Cloutier herself had earlier proposed the other, Costco would have had *no reason* to believe that the accommodations offered would *not* be appropriate. Cloutier's insistence that Costco should have known otherwise underscores her unwillingness to be reasonable.

In any event, Title VII does not require clairvoyance on the part of an employer when fashioning a reasonable accommodation. *Redmond v. GAF Corp*., 574 F.2d 897, 902 (7th Cir. 1978)("[T]he employee has the duty to

inform his employer of his religious needs so that the employer has notice of the conflict"). Cloutier's failure to live up to her duty to cooperate with Costco during the reasonable accommodation process further defeats her Title VII claim.

C. After Reasonably Accommodating Cloutier's Religious Beliefs, Costco Is Not Required To Consider Accommodations Proposed By Cloutier, Even If Such Accommodations Would Not Cause Undue Hardship

Cloutier argues that Costco failed to offer any evidence that the company would have suffered an undue hardship if it had exempted her from its dress code, as she claims Costco should have done. (Brief of Appellant, at 44). Here again, though, Cloutier's argument misses the mark.

Title VII requires an employer to either reasonably accommodate an employee's religious beliefs or practices or demonstrate its inability to make such accommodations without undue hardship. Where, as here, an employer is found to have reasonably accommodated an employee's religious practices, the Title VII inquiry *ends* because the employer has fulfilled its duty to reasonably accommodate. *Ansonia*, 479 U.S. at 68. Nor does an employer have to show that the employee's proposed alternative accommodations would have caused an undue hardship. *Id*. As

the Supreme Court held in *Ansonia*, "any reasonable accommodation" the employer offers will satisfy the employer's Title VII obligation. *Id*.

Recognizing the important public policy considerations at stake in reaching this conclusion, the Supreme Court explained that to hold to otherwise would give the employee "every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict." *Id*. at 69. Thus, the Court held, whether an accommodation poses an undue hardship to the employer's business is a question that only arises if the employer claims it is unable to offer *any* reasonable accommodation without undue hardship. *Id*.

In the instant case, Costco offered Cloutier *two* reasonable accommodations that would have resolved the conflict between her religious beliefs and Costco's legitimate business interest in enforcing its dress code. Cloutier rejected both accommodations out of hand and refused to engage in any good faith discussion with Costco concerning its efforts to accommodate her. In light of these facts, Cloutier should not now be permitted to "hold out" for what, in her view, would be "the most beneficial accommodation" – her outright exemption from Costco's dress code. *Id.* To allow Cloutier to control – and abuse – the reasonable accommodation process in this way would turn the Supreme Court's holding in *Ansonia* on its head and

impermissibly expand the scope of Title VII to require the accommodation of what amounts to Cloutier's personal preference, rather than her actual religious beliefs or practices.

II. THE DISTRICT COURT RULED CORRECTLY THAT TITLE VII DOES NOT REQUIRE AN EMPLOYER TO WAIVE ITS DRESS CODE AS A RELIGIOUS ACCOMMODATION WHEN ANOTHER ACCOMMODATION IS AVAILABLE THAT REASONABLY BALANCES THE EMPLOYEE'S RELIGIOUS BELIEFS WITH THE EMPLOYER'S LEGITIMATE BUSINESS INTERESTS

A. Employers Establish Personal Appearance Standards For Legitimate And Nondiscriminatory Reasons – A Practice Long Upheld By Federal Courts

The vast majority of large employers have, like Costco, adopted policies that establish minimum standards for the personal appearance of employees in the workplace. These policies can cover a variety issues from dress style to hair length to the wearing of jewelry. Personal appearance policies serve any number of legitimate business interests, including an employer's need to comply with health and safety standards, to promote productive work environments, and to project a positive, professional image to customers and the public.

For example, some personal appearance policies require employees to wear certain clothing, such as long pants, in jobs where other forms of clothing might pose a serious risk of danger to the employee or others. Also,

state and federal regulations sometimes require an employer to regulate certain aspects of an employee's appearance, such as hair length or the wearing of jewelry, to protect the health of customers and the public at large. Employers also often require employees who have regular contact with customers and clients to follow company dress and grooming standards to ensure the employee projects a professional image when representing the company and its interests.

Even in the face of Title VII challenges, courts have long recognized the importance of personal appearance policies to the business community and whenever possible have carefully guarded an employer's right to create and enforce them. *See e.g.*, *Tavora v. New York Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996)(rejecting claim that employer's "hair length policy" discriminated against male employees); *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382 (9th Cir. 1984)(employer's "no facial hair policy" did not violate Title VII in light of safety concerns); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977)(employer did not violate Title VII by requiring male clerks to wear ties).

The rationale behind the policy involved in this case, to project a certain public image to clients and customers, is a typical one. *Wislocki-Goin v. Mears*, 831 F.2d 1374 (7th Cir. 1987)(discharge of female juvenile

detention teacher for wearing excessive make-up and unkempt hair did not violate Title VII where policy adopted out of concern for public confidence in professionalism of government employees); *Eatman v. United Parcel Serv.*, 194 F. Supp.2d 256 (S.D.N.Y. 2002)(upholding policy requiring drivers with "unconventional" hairstyles to wear hats); *Lanigan v. Bartlett and Co. Grain*, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979)(holding that "[t]he decision to project a certain image as one aspect of company policy is the employer's prerogative"); *Woods v. Safeway Stores, Inc.*, 420 F. Supp. 35 (E.D. Va. 1976)("no beard" policy served legitimate business interest of maintaining appearance of cleanliness necessary to attract and retain customers), *aff'd per curiam*, 579 F.2d 43 (4th Cir. 1978); *Capaldo v. Pan American Fed. Credit Union*, 43 Empl. Prac. Dec. (CCH) 37,016, 1987 WL 9687, at *2 (E.D.N.Y. Mar. 30, 1987)(upholding policy designed to project "conservative banking image").

Projecting a positive, professional image is of vital importance to most employers, particularly in today's highly competitive business environments. As the Court of Appeals for the District of Columbia aptly observed:

> Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its

relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance.

Fagan v. National Cash Register Co., 481 F.2d 1115, 1124-25 (D.C. Cir. 1973). It is for these important reasons that employers often use personal appearance policies as one tool to protect and promote a company's image and also why courts so often defer to an employer's business judgment in this regard.

Therefore, even in the face of a Title VII challenge based on religion, the enforcement of a personal appearance policy by an employer "is not discriminatory 'as long as the employer's [policy] is not directed at a religion.'" *Cloutier*, 311 F. Supp.2d at 200 (quoting *Hussein v. Waldorf-Astoria*, 134 F. Supp.2d 591, 599 (S.D.N.Y. 2001)). When an employee's religious belief or practice conflicts with such a policy, the law will still strike a balance between the employee's religious needs and the legitimate business interest of the employer to protect and preserve its public image.

Thus, in *EEOC v. Sambo's of Georgia, Inc.*, an employer that refused to hire a job applicant who would not shave his beard because of his Sikh religion did not violate Title VII. 530 F. Supp. 86, 90 (N.D. Ga. 1981] Upholding the employer's grooming policy, which prohibited the wearing of beards and long mustaches, the court recognized that relaxing the employer's grooming standards to accommodate the plaintiff would

adversely affect the restaurant's "clean cut" image and hurt the employer's business. *Id*. at 89. Likewise, in *Daniels v. City of Arlington*, the Court of Appeals for the Fifth Circuit upheld a police department's "no pins" policy, which prohibited police officers from wearing buttons, badges, medals or other symbols on their uniforms. 246 F.3d 500, 501 (5th Cir. 2001). The department had discharged the plaintiff after he refused to remove a small, gold cross pin from his uniform. Ruling in favor of the department, the Fifth Circuit reasoned that "[a] police department cannot be forced to let individual officers add religious symbols to their official uniforms." *Id.* at 506.

In keeping with well-settled Title VII case law, the district court appropriately held that Costco "has a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance." *Cloutier*, 311 F. Supp.2d at 200. The district court also appropriately held that the law does not require an employer like Costco to simply waive its dress code as a religious accommodation, particularly when another accommodation is available that reasonably balances the employee's religious beliefs with the employer's legitimate business interests, as is the case here.

B. Title VII's Prohibition Against Religious Discrimination Stops Short Of Requiring An Employer To Accommodate An Employee's Personal Preferences For Dress Style And Appearance

By rejecting Cloutier's religious accommodation claim, the district court declined to expand the scope of Title VII to require an employer to accommodate an employee's personal preferences regardless of the impact on the employer's legitimate business interests. This Court should do the same.

In the instant case, Costco offered Cloutier two reasonable accommodations that would have resolved any conflict between her religious beliefs and Costco's dress code. Cloutier ignored both offers, refused to cooperate with Costco's good faith efforts to accommodate her, and now argues for the first time in this lawsuit that no accommodation short of her exemption from Costco's dress code would have resolved her religious conflict.

Cloutier has dug in her heels, so to speak, and stubbornly refuses to settle for any accommodation short of her exemption from Costco's dress code. In essence, Cloutier asks this Court to hold that Costco violated Title VII by refusing to accommodate her in precisely the manner that she *prefers*

to be accommodated, without any reference whatever to Costco's legitimate business interests.

Yet, this is not the law. Cloutier's position flouts Supreme Court precedent that requires an employee to cooperate with an employer's efforts to identify reasonable accommodations and grants employers *absolute* discretion to choose from among all possible accommodations. Cloutier asks this Court to allow her to do what the Supreme Court in *Ansonia* specifically rejected – to "hold out" for what she views as the "most beneficial accommodation," despite the fact that Costco has already offered her a reasonable resolution to the conflict.

If allowed to prevail, Cloutier's position would blur Title VII's focused mandate to end discrimination based on religion by impermissibly expanding the scope of Title VII to require Costco to accommodate what amounts to Cloutier's personal preference for one accommodation over another, rather than simply accommodate her religious beliefs or practices. To do so would give unmanageably broad protection to workers and tie the hands of every employer that desires to protect legitimate business interests, including guarding against safety hazards, protecting public health, ensuring product and service quality, and preserving its public image, through the use of fair and neutral workplace appearance policies.

Title VII was enacted in part to stop the perpetuation of discrimination based on religion in the employment setting. It was not meant to prohibit employers, however, from instituting personal appearance policies for legitimate business purposes. This Court should decline Cloutier's invitation to ignore long-standing Title VII policy that not only recognizes the importance of workplace appearance standards, but also carefully guards an employer's right to create and enforce such standards.

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully urges the Court to affirm the district court's order.

Respectfully submitted,

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Dated: July 29, 2004

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This is to certify that two true and correct copies of the Brief *Amici Curiae* of the Equal Employment Advisory Council and the Chamber of Commerce of the United States in Support of Defendant-Appellee and in Support of Affirmance were served by Federal Express Priority Overnight, on the following counsel of record:

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ADDENDUM

United States District Court, E.D. New York.

Robert CAPALDO, Plaintiff,
v.
PAN AMERICAN FEDERAL CREDIT UNION, Defendant.

No. 86 CV 1944.

March 30, 1987.

MEMORANDUM AND ORDER

PLATT, District Judge.

***1** This is an action for sex discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. Plaintiff Robert Capaldo alleges, and defendant concedes, that plaintiff was terminated from his employment as loan counselor for defendant Pan American Federal Credit Union ("PAFCU") for refusing to remove a piece of jewelry from his ear. Plaintiff argues that prohibiting male employees from wearing an earring, while allowing such jewelry on women, constitutes impermissible sex discrimination. Defendant, conversely, asserts that an employer is lawfully permitted to make sex-based distinctions in grooming standards as a matter of law. Defendant moves for summary judgment and plaintiff cross-moves for the same relief. Upon viewing the facts in the light most favorable to plaintiff, we find that defendant is entitled to the requested relief.

The Undisputed Facts

Plaintiff was employed as a loan counselor by PAFCU. In that position he took loan applications and conducted loan interviews. Plaintiff's position required personal meetings and discussions with employees of PAFCU, Pan American World Airways, and affiliates of each.

PAFCU is a private credit union whose benefits are available to employees of PAFCU, Pan American and the affiliates of each. PAFCU provides below-market cost services, including below-market rate interest loans.

On June 21, 1985, plaintiff was telephoned by the President of PAFCU, Mr. Nicholas Lacetera. Mr. Lacetera informed plaintiff that he had "a problem with [plaintiff's] earring" and that the credit union members and the Board of Directors were displeased. He further informed plaintiff that he did not present an appropriate professional image and threatened plaintiff with termination if the earring was not removed.

On June 24, 1985, plaintiff met personally with Mr. Lacetera. Mr. Lacetera informed plaintiff that he was violating the Pan American World Airways Dress Code. Plaintiff was unaware of any such formal dress code and asserts that no applicable code exists.

Plaintiff asked to be permitted to wear the earring for approximately five weeks, the time needed to permanently form the hole in his ear. Plaintiff stated that after five weeks he would remove the earring and never wear it to work again. Plaintiff's request was rejected and plaintiff was terminated.

Female employees of PAFCU are permitted to wear earrings.

Discussion

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's ... sex....

Plaintiff contends that the simple fact that he was terminated for wearing an earring, while women in similar positions were allowed to do so, constitutes a violation of the above-quoted subsection. Plaintiff further relies on his asserted lack of "public" contact, the lack of an applicable written dress code, and an asserted nonuniformity of enforcement of any such code to rebut the existing case law holding such sex-based distinctions permissible. Finally, plaintiff claims that wearing an earring in his left ear constituted symbolic speech and that PAFCU's action violated his First Amendment rights.

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***2** The rule of law governing sex-based grooming standards was aptly summarized by the Eighth Circuit in *Knott v. Missouri Pac. Ry. Co.,* 527 F.2d 1249, 1252 (8th Cir.1975), which held that "minor differences in personal appearance regulations that reflect customary modes of grooming do not constitute sex discrimination within the meaning of § 2000e-2." The rationale for this conclusion is that if such policies are not designed as a pretext to exclude either sex from employment, slight differences in grooming standards have "only a negligible effect on employment opportunities." *Id.*

In a series of cases similar to *Knott,* other Circuits addressing this question have arrived at a similar result. *See, e.g., Bellissimo v. Westinghouse Electric Corp.,* 764 F.2d 175 (3d Cir.1985), *cert. denied,* 106 S.Ct. 1244 (1986) (dress codes permissible although specific requirements for males and females may differ); *Barker v. Taft Broadcasting Co.,* 549 F.2d 400 (6th Cir.1977) (a different hair grooming standard for men than for women does not give rise to a Title VII claim); *Fountain v. Safeway Stores, Inc.,* 555 F.2d 753, 755 (9th Cir.1977) ("regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not discrimination within the meaning of Title VII"); *Earwood v. Continental Southeastern Lines, Inc.,* 539 F.2d 1349 (4th Cir.1976) (sex-differentiated grooming regulation not used as pretext to exclude either sex from employment is not within Title VII's purview); *Fagan v. National Cash Register Co.,* 481 F.2d 1115 (D.C.Cir.1973) (distinction between sexes vis-a-vis grooming standards does not constitute Title VII violation).

The Second Circuit has adopted the position of other Circuits as to the permissibility of such minor sex-based distinctions in dress and grooming codes. *See Longo v. Carlisle Decoppet & Co.,* 537 F.2d 685 (2d Cir.1976). In *Longo,* a male plaintiff claimed that he was discriminatorily fired due to his hair length. In reversing the District Court decision in plaintiff's favor, the Second Circuit ruled that requiring short hair on men but not on women did not violate Title VII. The Court, accordingly, dismissed the complaint for failure to state a claim.

We find the facts here presented to be analogous to the above-cited cases. As such, plaintiff's claim is outside Title VII's purview. In any event, an employer is permitted to exercise legitimate concern for the business image created by the appearance of its employees. *Bellissimo,* 764 F.2d at 181; *Fagan,* 481 F.2d at 1124-25. PAFCU has an interest in the image it presents whether or not its services are competitive. *Brown v. D.C. Transit System, Inc.,* 523 F.2d 725, 729 (D.C.Cir.), *cert. denied,* 423 U.S. 862 (1975) ("Even a public utility with monopoly or quasi-monopoly status has an interest in consumer acceptance of its services"). Plaintiff, as a loan counselor, had significant personal meetings with defendant's credit union members. Whether these contacts be characterized as "private" or "public", these members had the choice of accepting or declining the use of defendant's services. Therefore, the imposition of grooming standards designed to project, in the employer's view, a conservative banking image may not be said to be outside of the employer's discretion.

***3** We do not believe that a different rule of law applies simply because a given dress code is not in writing. As long as the employee is warned of an applicable grooming standard and granted an opportunity to comply with it, termination from employment for refusal to comply is not, alone, impermissible. Here, plaintiff was warned that his "attire" was unacceptable and that a failure to conform his "dress" would result in termination. Plaintiff's affidavit at ¶ 5. Compliance with this warning would have been a relatively simple matter.

Finally, although plaintiff contends that PAFCU's dress code was not uniformly applied, he alleges only that such code was unevenly applied as to one other *male* employee. Plaintiff does not contend that women are free from all grooming standards. Nor does he contend that as between male and female employees the applicable grooming standards are unevenly enforced. Therefore, this is not a case in which an employer impermissibly imposed special appearance rules on one sex but not on the other, *see Gerdom v. Continental Airlines, Inc.,* 692 F.2d 602 (9th Cir.1982), *cert. dismissed,* 460 U.S. 1074 (1983), and thus no inference of sex discrimination arises.

Plaintiff's claim that wearing an earring constituted symbolic speech appears to have been asserted by him as an afterthought. Plaintiff cites only a Section 1983 action against the government in support of his claim that PAFCU violated his First Amendment rights. *See Kelley v. Johnson,* 425 U.S. 238 (1976) (upholding a police department grooming regulation). At oral argument plaintiff indicated that he was not relying on this premise. Therefore, we do not find it necessary to decide this issue although we seriously

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question and doubt that defendant's action would be constrained by the First Amendment. *Cf.* *Brown,* 523 F.2d at 727, citing *Public Utilities Comm'n v. Pollak,* 343 U.S. 451 (1952).

Accordingly, defendant's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

SO ORDERED.

1987 WL 9687 (E.D.N.Y.), 43 Empl. Prac. Dec. P 37,016

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