

Supreme Court bans *niqab*



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In a recent decision, the Supreme Court ruled that wearing an Islamic face veil that leaves only the eyes visible (*niqab*) need not be tolerated by an employer because, although religious dress is protected under anti-discrimination legislation, it is one of the basic rules of interpersonal communication that facial expressions be visible. **(1)** Further, although an employer's prohibition on religious dress amounts to direct religious discrimination, this ban can be justified as an occupational requirement.

Facts

The plaintiff converted to Islam in 2005. She was employed by the defendant, a public notary, from January 2009 to July 2014 as a secretary. The employment relationship was terminated by the defendant because the plaintiff refused to comply with instructions banning her from wearing a *niqab* at work. The defendant argued that wearing the *niqab* did not constitute religious practice or belief and that, as a public notary, he held a public post that required employees to wear decent clothing. The defendant further argued that the face veil hindered identification – a required part of a notary's public functions.

The plaintiff sought compensation (a lump sum of €7,000) not only for being dismissed because of her religion, but also for being assigned menial tasks due to her religious clothing.

At the start of her employment relationship, the plaintiff had not worn religious clothing. However, in February 2010 she requested that she be allowed to wear a *hijab* (an Islamic headscarf) and an *abaya* (an Islamic overgarment). The defendant first refused on grounds of neutrality requirements, but finally consented after the plaintiff started crying during another discussion of the issue. The defendant also provided accommodation for her prayers because he realised how sincerely the plaintiff held her religious beliefs.

From October 2011 to March 2013, the plaintiff was on maternity leave. When she returned, still wearing only the *hijab* and *abaya*, the defendant restricted the plaintiff's contact with clients and increasingly excluded her from acting as a witness to wills – a task that notary employees usually enjoy performing.

Shortly after she returned from maternity leave, the plaintiff became ill and was on sick leave for several months. The plaintiff recovered and decided that she would now wear a *niqab*, because her religion had given her hope and solace during her illness and aided her recovery. When she mentioned this to the defendant in December 2013, before she returned to the office, he made it clear that wearing a *niqab* was incompatible with her duties. The defendant confirmed this position in March 2014 and threatened to terminate the employment agreement if the plaintiff insisted on wearing her *niqab*. He also rejected her compromise to remove the veil during client contact. The constant removal of the face veil would have been impractical because the plaintiff wanted to sit in an area visible to clients, and assigning the plaintiff a separate room would have rendered smooth communication with her co-workers impossible.

Around the same time, between March and April 2014, the defendant wrote two emails to the plaintiff, somewhat deprecatingly mentioning her "constant experiment with ethnic clothing" and noting that he would not tolerate "hooding" in his office for the sake of his clients and employees. The defendant agreed to continue to allow the plaintiff to wear her *hijab* and *abaya*, but not the *niqab*.

Decisions

The district court dismissed all the claims. The appeal court reversed this decision and ruled that although the plaintiff's dismissal was not discriminatory, she was directly discriminated on the grounds of religion when:

- she was assigned lesser tasks on her return from maternity leave; and
- the defendant disparagingly joked about her religious dress which, according to the appeal court, also constituted indirect discrimination on the grounds of gender.

In essence, the Supreme Court confirmed the appeal court's decision, but denied any discrimination based on gender and solely rested its opinion on religious discrimination.

The Supreme Court opined that although Section 17 of the Equal Treatment Act prohibits religious discrimination in the workplace, Section 20 provides for an exception if the discrimination is justified as an occupational requirement. Discussing this statutory exemption, which is in line with European legislation on the issue, the Supreme Court reasoned that an instruction prohibiting an employee from wearing a face veil could pursue a legitimate aim – namely, to avoid disrupting any contractual duties. Prohibiting the face veil was the only means to achieve this end and was thus adequate and reasonable.

In its decision, the Supreme Court mirrored the reasoning set out in the landmark European Court of Human Rights decision, **(2)** wherein the court allowed a general ban on face veils to stand for interaction purposes within the society as a whole and to avoid impairing human relations, considering the need for tolerance and openness in a democratic society.

Although Austria has no general ban on wearing face veils in public, the court found that it is an uncontested and fundamental rule of interpersonal communication that the face be unveiled. According to the Supreme Court, this is also true for other European countries, such as Germany. Since the *niqab*, in comparison to the *hijab*, covers a woman's face so that only her eyes are visible, it impairs communication and interaction not only in public spaces, but also in the workplace, where an employee has contact with customers, co-workers and her employer. In the case at hand, unimpaired communication and interaction was an essential and significant precondition for the plaintiff to perform her assigned tasks, which required her to communicate openly not only with the notary's clients, but also with her co-workers and

the defendant. Therefore, her compromise to remove the face veil during client contact would address only one part of this communication requirement. Therefore, the defendant's ban on face veils had a legitimate aim that was consistent with the exemption under Section 20 of the Equal Treatment Act.

However, the court ruled that the defendant's disparaging comments on religious garb and his less favourable treatment of the plaintiff because of her religious tenet and dress constituted religious discrimination. Consequently, the Supreme Court denied the plaintiff's discrimination claim in connection with her dismissal, but ruled that the defendant's emails in connection with assigning her job tasks that avoided client contact because of her headscarf and religious garment constituted religious discrimination. The court awarded the plaintiff €1,200 in compensation.

Comment

The court's decision is clear cut as regards Islamic face veils. It is unlikely that the decision would have been different in another employment scenario. The rationale given by the court (ie, that an unveiled face is a basis for communication in the workplace and is therefore a precondition for contract performance) leaves little room for interpretation in this respect.

However, a question still remains as to whether employers may also ban *hijabs* or *abayas* under certain circumstances, or at least where a 'neutral' dress code is in place, banning any religious symbols or dress.

Two cases concerning restrictions on wearing religious symbols in the workplace are pending before the European Court of Justice (ECJ).⁽³⁾ Thus far, in their two opinions, the advocate generals have voiced different concerns and conflicting positions on the issue.

The decisions are both due later in 2016 and it is hoped that the ECJ will provide clear and general guidance on the topic of religious apparel in the workplace.

For further information on this topic please contact Jakob Widner at Graf & Pitkowitz Rechtsanwälte GmbH by telephone (+431 401 17 0) or email (widner@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at.

Endnotes

(1) OGH 25 May 2016, 9 ObA 117/15v.

(2) Bsw 43835/11, *SAS v France*.

(3) Case C-157/15-*Achbita* and Case C-188/15-*Bougnaoui*. Both cases relate to Islamic headscarves.

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