

RUTGERS JOURNAL OF LAW & RELIGION

-NEW DEVELOPMENTS-

***RELIGIOUS DISCRIMINATION OR LEGITIMATE UNIFORM POLICY?
A CRITIQUE AND ANALYSIS OF THE THIRD CIRCUIT'S DECISION TO UPHOLD A PRIVATE PRISON'S
BAN ON EMPLOYEES WEARING KHIMARS:
EEOC v. THE GEO GROUP, INC.¹***

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¹ EEOC v. The Geo Group, Inc., 616 F.3d 265 (3d Cir. 2010).

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964³ prohibits, among other things, discrimination on account of religion in the work place.⁴ However, Title VII's safeguards for religious freedom are not absolute. Title VII balances an individual's right to practice his or her religion with an employer's interests in running business operations.⁵ Thus, an employer can escape liability for religious discrimination under Title VII by demonstrating that accommodating the religious beliefs of an employee would pose an undue hardship on his or her business.⁶ Unfortunately, more than four decades after Title VII's enactment into law, the protections it affords are still needed to prohibit discrimination in the workplace on account of religion.

Recent years have seen a record number of Muslim workers complaining of employment discrimination in the United States.⁷ For instance, from September 30th, 2008 through September 2009, Muslim workers filed a record 803 employment discrimination claims.⁸ For the year ending on September 30th, 2010, Islamic groups say they have received a surge in complaints and suggest that 2010's figure will set another record.⁹ Beyond disparate treatment

³ In enacting The Civil Rights Act of 1964, "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).

⁴ 42 U.S.C. § 2000e-2(a)(1) (2010). The term "religion" includes aspects of religious observance, practice, as well as belief. *See* 42 U.S.C. § 2000e(j).

⁵ To establish a prima facie case of religious discrimination under Title VII, the employee must show: (1) she holds a sincere religious belief that conflicts with a job requirement; (2) she informed her employer of the conflict; and (3) she was disciplined for failing to comply with the conflicting requirement. *Webb v. City of Philadelphia*, 562 F.3d 256, 259 (3d Cir. 2009).

⁶ Once a plaintiff's prima facie case is established, the burden shifts to the employer to show that it either (a) made a good-faith effort to reasonably accommodate the religious belief, or (b) such an accommodation would pose an undue hardship upon the employer and its business. *Id.*; *see also* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (stating an accommodation constitutes an undue hardship if it would impose more than a de minimis cost on the employer).

⁷ In fact, these complaints exceed the amount of discrimination claims filed in the year following the September 11th attacks. Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. TIMES, September 23, 2010, <http://www.nytimes.com/2010/09/24/business/24muslim.html>.

⁸ *Id.* The discrimination claims filed from 2008 through 2009 were up 20 percent from the previous year and 60 percent from 2005. Furthermore, the rising number of Muslims complaining of employment discrimination come as polls have shown that many Americans feel a growing wariness towards Muslims following 9/11 and after years of fighting in Iraq and Afghanistan. *Id.*

⁹ *Id.* This rise of discrimination complaints affecting Muslim workers began even before increasing tensions arose regarding the planned Islamic center in Lower Manhattan. *Id.*

and hostile work environment claims, disputes have arisen over when employers have done enough to accommodate Muslim employees as required by Title VII.

In August 2010, the Third Circuit in *EEOC v. The Geo Group, Inc.*,¹⁰ decided it would be an undue hardship for The Geo Group Inc. (“GEO”)¹¹ to allow its practicing Muslim employees to wear a khimar¹² as an exception to its non-headgear policy.¹³ Relying on its previous holding in *Webb v. City of Philadelphia*,¹⁴ the Third Circuit found that the religious accommodation of allowing Muslim employees to wear religious headdress was subordinate to GEO’s safety and security interests in running a private prison.¹⁵ Taken as a whole, the court in *The Geo Group* decided that the proposed safety interests in the private prison context outweighed Title VII’s protections against religious bias and discrimination.

This article will outline the Third Circuit’s opinion in *The Geo Group*. Also, the article will discuss how the progression of the law in the Third Circuit from *Webb* to *The Geo Group* may grant employers too much leeway in avoiding their obligations under Title VII to accommodate the religious beliefs of Muslim employees. Finally, this article will make a prediction on the outcome of a similar and recently filed complaint against a private security firm that refused to permit its Muslim employees to wear their khimar when on duty as a security guard.¹⁶

II. STATEMENT OF THE CASE & PROCEDURAL HISTORY

A. GEO’s Uniform Policy prohibits hats, head scarves, hoods, and religious headdress

GEO is a private corporation that runs federal and state correctional facilities in the United States.¹⁷ The three plaintiffs were employed by GEO at the George W. Hill Correctional

¹⁰ *The Geo Group*, 616 F.3d at 275-77.

¹¹ GEO is a private company contracted to run a prison for Delaware County, Pennsylvania. *Id.* at 267.

¹² The khimar is an, “Islamic religious head scarf, designed to cover the hair, forehead, sides of the neck, shoulders, and chest.” *Id.* at 267-68. While there are many different styles of khimar, the particularity of the khimars were not at issue in the case. Thus the court adopted the definition from the complaint. *Id.* at 268 n.1.

¹³ *Id.* at 275-77.

¹⁴ *Webb*, 562 F.3d at 259.

¹⁵ *Id.* at 275.

¹⁶ Compl. at 1, *EEOC v. Imperial Sec., Inc.*, No. 2:10-cv-04733-CDJ (E.D. Pa. Sept. 16, 2010).

¹⁷ *Id.* at 2.

Facility in Delaware County, Pennsylvania (“Hill Facility”).¹⁸ During the relevant period, Raymond Nardolillo (“Nardolillo”) was the warden at the Hill Facility.¹⁹ In *The Geo Group*, the majority and dissent conflict over their respective views of the Hill Facility’s Uniform Policy prohibition against the wearing of hats, caps or religious attire and how and when this policy was implemented.

From the majority’s point of view, in April 2005, the Hill Facility instituted a new policy that prohibited hats or caps in the prison unless issued with the uniform.²⁰ Then, on October 24, 2005, the deputy warden issued a memorandum reinforcing the April 2005 policy and interpreting the Uniform Policy to prohibit the wearing of a khimar.²¹ In particular, the October 2005 memorandum stated that “all hats, caps or *religious attire* will not be permitted to be worn with your uniform or by non-uniformed employees unless specifically authorized by the Warden.”²² Following the October 2005 memorandum, GEO enforced a “zero tolerance headgear policy” for safety and security at the Hill Facility.²³

Contrary to the majority’s findings, the dissent points out that prior to April 2005, the Hill Facility’s Uniform Policy *allowed* “scarves and hooded jackets or sweatshirts” to be worn past the front desk.²⁴ It was not until April 2005 that GEO changed its Uniform Policy to prohibit scarves and hooded jackets or sweatshirts from being worn past the front desk.²⁵ Moreover, in 2004, when the plaintiffs began wearing their khimars to work on a daily basis, the original Uniform Policy *did not address head coverings or religious attire*.²⁶ It was not until October

¹⁸ *Id.* at 1-2. The Hill Facility holds pretrial detainees and people serving a county sentence of two years less one day or a state sentence of five years less one day.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 3. The new policy also stated that “scarves and hooded jackets or sweatshirts will not be permitted past the Front Security Desk.” *Id.*

²¹ *Id.* at 3-4.

²² *The Geo Group*, 616 F.3d at 268.

²³ Compl. at 5. GEO’s safety and security concerns were: (1) khimars, like hats, could be used to smuggle contraband into and around the facility; (2) khimars can be used to conceal the identity of the wearer, which creates problems of misidentification; and (3) khimars could be used by a prisoner as a strangulation weapon. Despite no reports supporting any of these concerns at the Hill Facility, the majority found that GEO’s zero tolerance policy outweighed the plaintiff’s preferred accommodation. *The Geo Group*, 616 F.3d at 274.

²⁴ But they had to be taken off at the “mousetrap,” a security area *beyond* the front desk. *The Geo Group*, 616 F.3d at 280 (Tashima, J., dissenting) (emphasis added).

²⁵ *Id.* The previous dress code had been in effect since February 19, 2004. Other than altering the location where scarves, hooded jackets, and sweatshirts needed to be removed, both the 2004 and 2005 uniform policies contained the same exact language concerning headgear. *Id.* at 280-81.

²⁶ *Id.* (emphasis added).

2005, when Nardolillo issued the memorandum, that the plaintiffs were specifically prohibited from wearing religious headdress not issued with the uniform.²⁷

B. Plaintiffs seeking an exception GEO's Uniform Policy as a religious accommodation

1. Carmen Sharpe-Allen: Nurse Practitioner in the medical department

Sharpe-Allen was hired as a medication nurse at the Hill Facility in 2004.²⁸ Her initial job at the facility was to go from cell block to cell block to dispense medication, while accompanied by a prison officer.²⁹ Sharpe-Allen wore her full hijab³⁰ and a khimar when she interviewed and when she was hired for her position as a medication nurse at GEO's facility.³¹ She informed the interviewer she was not willing to compromise wearing her khimar at work but the interviewer told her that "he didn't see it being a problem."³² At the time she was interviewed and hired, GEO's dress code on record was that scarves were not allowed past a certain security point within the prison.³³ However, it appears that the "no scarves policy" was not enforced because wearing a khimar did not prevent Sharpe-Allen from being hired as a nurse.³⁴

Then, in 2005 Sharpe-Allen became the chronic infectious disease nurse.³⁵ As a result she worked almost exclusively in the infirmary and thus was no longer required to go from cell block to cell block.³⁶ In the infirmary, she worked with the doctor to help inmates who had infectious

²⁷ *Id.* at 281. The unchanged language of the Uniform Policy prohibited "scarves and hooded jackets or sweatshirts" from being worn past a specified security location. Yet, it also provided that "no hats or caps will be permitted to be worn in the facility unless issued with a uniform." *Id.*

²⁸ *Id.* at 268 (majority opinion).

²⁹ *Id.*

³⁰ Wearing of hijab, religious dress such as a khimar, is a visible expression of faith, piety, or modesty. Among American Muslims there are numerous interpretations surrounding the practice of wearing hijab. For example, some female Muslims believe the hijab is an important part of religious identity and thus may wear it upon reaching a certain age, once they are married, or even when they believe they have attained a certain level of religious piety. On the other hand, many Muslims believe it is *mandatory* in Islam for women to cover their hair. For a female who believes wearing hijab is mandatory, someone requesting the removal of the hijab will make her feel threatened or violated. These variations in beliefs and practices exist due to internal debate over whether the Quran (the holy book of Islam) explicitly commands women to cover their hair at all times, merely recommends that they do, or only commands the wearing of hijab at certain times or during certain occasions. Rochelle Carter, *Rochelle Carter on Religious Discrimination and Religious Accommodations*, 2008 Emerging Issues 1595 (2007).

³¹ *The Geo Group*, 616 F.3d at 278-79 (Tashima, J., dissenting).

³² *Id.* at 268 (majority opinion).

³³ *Id.* at 278 (Tashima, J., dissenting).

³⁴ *Id.* at 279.

³⁵ *Id.*

³⁶ *Id.*

diseases.³⁷ Sharpe-Allen continued to wear her khimar both as a medication nurse moving throughout the prison cells and as a chronic infectious disease nurse in the infirmary.³⁸

However, in July 2005, Sharpe-Allen was returning from medical leave and informed by human resources that wearing her khimar to work would be an issue.³⁹ As a result, Sharpe-Allen contacted Nardolillo who told her that if she refused to either work without the khimar or resign, the prison would fire her.⁴⁰ Despite enjoying her job, Sharpe-Allen informed Nardolillo that she could not compromise her religious convictions by discontinuing her custom of wearing the khimar.⁴¹ In December 2005, GEO fired Sharpe-Allen because she had “effectively abandoned” her job by refusing to comply with the order to return to work without wearing her khimar.⁴²

2. Marquita King: Intake specialist

King was hired in July 2000 as an intake specialist; a position involving mainly processing paperwork for new prisoners coming into the Hill Facility.⁴³ During her interview, King wore her khimar and she continued to wear a khimar for the first five years of her employment.⁴⁴

For a majority of this time, King did paperwork in an office setting.⁴⁵ She interacted with inmates only when correctional officers brought them to her desk so she could ask them questions.⁴⁶ Moreover, King was not required to wear a uniform and thus was not subject to the Uniform Policy that allowed only headgear issued with one’s uniform.⁴⁷

After Nardolillo issued the October 2005 memorandum, co-workers informed King that Muslim women were no longer allowed to wear their khimars at work.⁴⁸ She reached out to the

³⁷ *The Geo Group*, 616 F.3d at 268 (majority opinion).

³⁸ *Id.* at 279 (Tashima, J., dissenting).

³⁹ *Id.* a 268-69 (majority opinion).

⁴⁰ *Id.* at 269

⁴¹ *Id.*

⁴² *Id.*

⁴³ *The Geo Group*, 616 F.3d at 269. Unlike the correctional officers, her position did not afford her a key to the prison.

⁴⁴ *Id.* At the interview, King wore her khimar and a veil. She was asked if she could remove her veil at work and King agreed. There was never any discussion about King’s khimar during the interview. *Id.*

⁴⁵ *Id.* at 279 (Tashima, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Id.* The applicable dress code for her position required professional attire at all times. During work, King would wear her khimar with either a long dress that is part of Muslim religious attire or slacks with long shirts. *Id.*

⁴⁸ *Id.* at 269 (majority opinion).

warden, who told her she would be fired if she wore the khimar to work.⁴⁹ Due to the mounting stress caused by her dilemma between maintaining her job and adhering to her religious convictions, King took a leave of absence for the next four to six weeks before returning to work without her khimar.⁵⁰

3. Rashemma Moss: Correctional officer

Moss began working as a correctional officer at the Hill Facility in March 2002.⁵¹ Due to her position as a correctional officer, Moss is the only plaintiff in this suit who had to wear a correctional uniform, had keys to the Hill Facility, and regularly worked in the secured areas of the prison with inmates.⁵² In July 2005 Moss became a full-fledged practicing Muslim.⁵³ In accordance with her faith, Moss began to wear a triangle shaped piece of fabric tied around her head and underneath her uniform issued hat.⁵⁴ She testified that at the time she began to wear the fabric underneath her hat, “it was common practice [among prison employees] to wear things on [their] head[s]” such as a hat, scarf, or headband.⁵⁵

It appears from the record that Moss’s conversion to Islam led to Nardolillo’s October 2005 memorandum changing the enforcement of the Uniform Policy and dress code.⁵⁶ For example on October 24, 2005, Moss wrote a letter to Nardolillo informing the warden of her conversion to Islam.⁵⁷ She also asked what she needed to do to be able to conform to both the dress requirements of her religion and the Uniform Policy at the facility.⁵⁸ Hours after receiving the letter, Nardolillo called Moss into her office and told her that he denied her request to wear her khimar and was stopping everyone in the facility from wearing hats or any type of head

⁴⁹ *The Geo Group*, 616 F.3d at 269.

⁵⁰ *Id.*

⁵¹ *Id.* at 280 (Tashima, J., dissenting).

⁵² *Id.*

⁵³ *Id.* at 270 (majority opinion).

⁵⁴ *Id.* at 279-80 (Tashima, J., dissenting). Moss took other measures to adopt her obligations of her faith with her duties at work. Instead of wearing an undergarment, Moss exchanged her correctional uniform for a larger size to better conceal her figure. *Id.*

⁵⁵ *The Geo Group*, 616 F.3d at 280.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* Before writing the letter to Nardolillo, Moss asked her union representative whether there was any policy preventing her from wearing a head covering due to her faith. The representative told her there was not. Thus in August 2005, she wrote the letters to her supervisors to confirm the representative’s statement. After receiving no response, she decided to write to the warden in October 2005. *Id.*

covering.⁵⁹ Then, Nardolillo presented her with the October 24, 2005 memorandum that added to the Uniform Policy the following provision: “all hats, caps or *religious attire* will not be permitted to be worn with your uniform or by non-uniformed employees”⁶⁰

Next, Moss offered to show GEO and the wardens that the Koran required her to cover her hair but they refused her offer.⁶¹ One of the wardens told Moss, “she might be starting a fad or fashion statement because now others are wearing” the khimar.⁶² When Moss requested a religious exception, Nardolillo told her that, “no religion will be honored in the jail.”⁶³ As Moss was leaving the meeting, Nardolillo asked her if wearing the khimar was truly important to her.⁶⁴ Moss asserted that her religion was important to her, and when she asked Nardolillo if it was important to him he replied that, “he didn’t really think it made that big of a difference.”⁶⁵

C. Procedural History

The EEOC filed a class-action complaint pursuant to Title VII of the Civil Rights Act of 1964 on behalf of Sharpe-Allen, King, and Moss; the Muslim employees affected by GEO’s Uniform Policy. The complaint alleged that GEO violated Title VII because it failed to accommodate any of the class members by providing them an exception to GEO’s dress policy, which prohibited them from wearing a khimar⁶⁶ pursuant to their religious faith and practice.⁶⁷ In response, GEO moved for summary judgment, arguing in part that an exception to its Uniform Policy would cause an undue hardship by compromising security and safety within the Hill Facility.⁶⁸

On May 18, 2009, the District Court for the Eastern District of Pennsylvania granted GEO’s motion for summary judgment, relying on the Third Circuit’s decision in *Webb*.⁶⁹

⁵⁹ *Id.* at 281-82.

⁶⁰ *Id.* at 282 (emphasis added).

⁶¹ *The Geo Group*, 616 F.3d at 282.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Compl. at 3, *EEOC v. The Geo Group, Inc.*, No. 07-cv-04043-JF (E.D. Pa. Sept. 27, 2007).

⁶⁷ *The Geo Group*, 616 F.3d at 267.

⁶⁸ *Id.*

⁶⁹ *EEOC v. The Geo Group, Inc.*, No. 07-cv-04043-JF (E.D. Pa. Sept. 27, 2007). As this article’s Analysis Section will discuss in more detail, the Third Circuit in *Webb* found that the City of Philadelphia’s police department could discharge a Muslim female officer for wearing a khimar and failing to adhere to the department’s uniform policy. In

Likewise on appeal, the Third Circuit affirmed the district court and relied in part on analogizing GEO's safety and uniformity concerns with the Third Circuit's rationale in *Webb* for permitting a police department to refuse to grant religious accommodations to its uniform policy.⁷⁰

In the analysis section, this article will provide a brief overview of *Webb* and the Third Circuit's holding that the safety and uniformity concerns of a police department outweigh the religious interests of its officers. Then, it will analyze whether the Third Circuit properly expanded *Webb*'s deference to a police department to GEO's failure to provide a religious accommodation for an administrative assistant, nurse, and corrections officer in a private prison. Finally, based on the progression of the law from *Webb* to *The Geo Group*, this article will make a prediction on the potential outcome of the EEOC's recently filed complaint against Imperial Security, a private security firm that refused to permit its female Muslim employees to wear their khimar while on duty.⁷¹

III. ANALYSIS: IS WEBB'S DEFERENCE TO THE UNIFORMITY AND SAFETY CONCERNS BEHIND A POLICE DEPARTMENT'S UNIFORM POLICY ANALOGOUS TO GEO'S REFUSAL TO PROVIDE AN EXCEPTION TO ITS UNIFORM POLICY?

A. Overview of the facts and the Third Circuit's holding in *Webb*

Kimberlie Webb, the plaintiff, is a practicing Muslim and began working as a Philadelphia police officer in 1995.⁷² In 2003, Webb requested permission to wear her khimar with her uniform while on duty.⁷³ However, her request was denied pursuant to the Philadelphia Police Department's uniform policy.⁷⁴ On February 28, 2003, Webb filed a complaint of religious discrimination under Title VII with the EEOC and the Pennsylvania Human Relations Commission. Then, on August 12, 2003 while the matter was still under investigation with the

The Geo Group, the district court framed the issue as, "whether a company which operates prison facilities pursuant to a contract with the appropriate government entity can similarly [to *Webb*] enforce a no-head-coverings policy against its employees within the prison." As a result, the court found the same rationale permitting the police department from enforcing a no head coverings policy should also apply to the private prison context in *The Geo Group*. *Id.*

⁷⁰ *The Geo Group*, 616 F.3d at 273.

⁷¹ Compl. at 4.

⁷² *Webb*, 562 F.3d at 258.

⁷³ *Id.* Webb's headscarf would not cover her face or her neck. It would cover her head and the back of her neck.

⁷⁴ *Id.* Philadelphia Police Department Directive 78 is an authoritative memorandum that prescribes the approved Philadelphia police uniforms and equipment. If Directive 78 does not list an item, then the item is prohibited based on the department's strict uniform directive.

EEOC, Webb showed up for her shift wearing her khimar, refused to remove it, was sent home, and was informed that her conduct could lead to disciplinary action.⁷⁵ From this point on, Webb no longer wore her khimar to work.⁷⁶ Finally, on October 5, 2005, Webb brought suit against the City of Philadelphia, asserting three claims under Title VII: religious discrimination, retaliation/hostile work environment, and sex discrimination.⁷⁷ For purposes of this article, the discussion and analysis will focus primarily on Webb's religious discrimination claim and the city of Philadelphia's undue hardship defense.

On April 7, 2009 the Third Circuit affirmed the district court's granting of summary judgment for the city of Philadelphia and held that accommodating a police officer's request to wear a khimar with her uniform would impose an undue burden upon the city's police department.⁷⁸ The city argued that allowing an officer to wear religious garb with her uniform would damage such essential values of a proper functioning police department as impartiality, religious neutrality, uniformity, and the subordination of personal preference.⁷⁹ Focusing on the police department's paramilitary functions, the Third Circuit found that the Philadelphia Police Department's uniformity interests support a "disciplined rank and file for efficient conduct of its affairs." With respect to safety, the court asserted that uniform requirements are crucial to the safety, public recognition, morale, esprit de corps,⁸⁰ and public confidence in the police.⁸¹ Therefore, due to the police department's uniformity and safety interests, the court held that any religious accommodation to the department's uniformity interests would impose more than the negligible or "de minimis" cost of an undue burden.⁸²

Overall, *Webb* gives more weight to the Philadelphia Police Department's paramilitary interests of uniformity and safety than the religious interests of an officer on duty. In support of its decision, the court cited to the Supreme Court and other circuits that have found that a

⁷⁵ *Id.* Subsequently, Webb was suspended for thirteen days pursuant to disciplinary charges of insubordination.

⁷⁶ *Id.*

⁷⁷ She also brought one cause of action under the Pennsylvania Religious Freedom Protection Act. On appeal, Webb focused on the adverse judgment on the religious discrimination and sex discrimination claims. *Id.* at 259.

⁷⁸ *Webb*, 562 F.3d at 264.

⁷⁹ *Id.* at 261. In support of the police department's value on the appearance of religious neutrality as vital in dealing with the public and the department's ranks, Police Commission Johnson stated, "in sum, in my professional judgment and experience, it is critically important to promote the image of a disciplined, identifiable, and impartial police force by maintaining the Philadelphia Police Department uniform as a symbol of neutral government authority, free from express of personal religion, bent, or bias." *Id.*

⁸⁰ The morale of a group.

⁸¹ *Webb*, 562 F.3d at 262.

⁸² *Id.* at 262.

paramilitary law enforcement unit, such as the police, have the same interests as the military in regulating its employees' uniforms.⁸³

Next, this article will examine the Third Circuit's holding in *The Geo Group* and its expansion of the safety and uniformity interests from the police department in *Webb* to the private prison context.

B. *Webb's* influence on the holding and rationale in *The Geo Group*

1. The majority's reliance on *Webb* in support of GEO's uniformity interests

Citing *Webb*, the majority in *The Geo Group* accepted GEO's argument that its prohibition of religious headgear is in-line with the prison's interests in requiring uniformity of appearance among prison employees to promote discipline and an esprit de corps.⁸⁴ However, *Webb* held that allowing an officer to wear a khimar while on duty would be an undue hardship because it would damage a police department's promotion of essential values such as "impartiality, religious neutrality, uniformity, and the subordination of personal preference."⁸⁵ As the dissent points out, GEO's uniformity interest was based on GEO's concern with its employees looking sloppy wearing whatever they wanted on their heads.⁸⁶ Yet, in *Webb*, the police department uniform policy was *directly related to* the safety of officers based on the public's ability to identify officers as genuine based on their uniform. Although GEO failed to expressly tie the uniformity interests to the safety concerns as in *Webb*, the majority still gave deference to GEO's interest in the appearance of a disciplined prison staff.⁸⁷

As a private prison, GEO's uniformity interest for its entire staff does not appear strongly related to *Webb's* emphasis on having police officers appear uniform and easily identifiable to the public. Unlike a police department that protects and polices *the public*, a private prison is a structured setting where inmates, guards, employees, and visitors are accounted for at all

⁸³ *Id.* at 262 (citing *Kelley v. Johnson*, 425 U.S. 238, 242 (1975); *Thomas v. Whalen*, 51 F.3d 1285, 1291 (6th Cir. 1995)).

⁸⁴ *The Geo Group*, 616 F.3d at 273. *See also Webb*, 562 F.3d at 262 ("uniform requirements are crucial to the safety of officers (so that the public will be able to identify officers as genuine, based on their uniform appearance), morale and esprit de corps, and public confidence in the police.") (citing *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999)).

⁸⁵ *The Geo Group*, 616 F.3d at 290 (Tashima, J., dissenting) (citing *Webb*, 562 F.3d at 261)).

⁸⁶ *Id.*

⁸⁷ *Id.* at 274 n.4 (majority opinion).

times.⁸⁸ With regard to Sharpe-Allen and King, GEO's ban on the khimar is neither necessary nor analogous with *Webb's* emphasis on uniformity because they both are readily identifiable as GEO employees based on their respective work in the infirmary as a nurse and an office setting as an intake specialist. In fact, the record shows GEO had no issues in hiring Sharpe-Allen and King or retaining them while they regularly wore their khimars to work prior to the October 2005 memorandum. Moreover, while Moss is the only class member that is a correctional officer, her khimar could be worn in conjunction with her issued uniform or taken off when needed so as not to prevent her identification as a correctional officer.⁸⁹

2. The majority's reliance on *Webb* in support of GEO's safety interests

Next, the majority relied on *Webb* and held that GEO's safety interests outweighed the religious interests of the class members seeking to wear their khimars as an exception to GEO's Uniform Policy.⁹⁰ While admitting that khimars present only a small threat, the majority still decided that the presence of a potential safety concern is something GEO is entitled to prevent.⁹¹ Absent any corroborating reports, the majority accepted GEO's assertions that a khimar can: (1) like hats, be used to smuggle contraband into and around the Hill Facility; (2) be used to conceal the identity of the wearer which creates problems of misidentification; and (3) be used against a prison employee in an attack.⁹² In giving deference to GEO's arguments regarding the potential dangers khimars pose, the majority cited *Bell v. Wolfish*.⁹³ In *Wolfish*, the Supreme Court noted

⁸⁸ Katya Lezin, *Life at Lorton: An Examination of Prisoners' Rights at the District of Columbia Correctional Facilities*, 5 B.U. PUB INT. L.J. 165, 177 (1996).

⁸⁹ *The Geo Group*, 616 F.3d at 284 (Tashima, J., dissenting). GEO also argued that it would incur an undue burden with respect to prison resources in accommodating the class members by allowing them to wear their khimars. The court accepted GEO's argument that forcing female Muslim employees to remove their khimars at security checkpoints for identification purposes would require "some additional time and resources of prison officials." *Id.* at 274 (majority opinion). However, the majority does not expressly state that such additional costs would pose an undue hardship for GEO. See *Hardison*, 432 U.S. at 84.

⁹⁰ *Id.* at 275 (majority opinion). In support of its holding, the majority applied *Webb's* rationale that an officer's sincere religious beliefs are subordinate to the police department's safety rationale behind its uniform policy. *Webb*, 562 F.3d at 262 (citing *Fraternal Order of Police*, 170 F.3d at 366).

⁹¹ *Id.* at 274.

⁹² *Id.*

⁹³ *Bell v. Wolfish*, 441 U.S. 520, 540 (1979). Distinct from the Title VII issue in *The Geo Group*, the Court addressed a Fourth Amendment challenge to a prison's regulations in confining pre-trial detainees. *Id.* at 523-24.

in dicta that prisons are “unique places fraught with serious security dangers” and thus federal courts should only make a limited inquiry into prison management.⁹⁴

In response, the dissent argued that GEO’s safety concerns are moot because, as the EEOC’s expert report revealed, “not one of the 359 [total] serious contraband reports [at the Hill Facility] involved secreting contraband in a cap, hat or khimar, and only two involved a staff member.”⁹⁵ In fact, kitchen workers still continue to wear hats as part of the uniform and ever since the October Memorandum changing the headgear policy, “the amount of contraband found by staff did not increase.”⁹⁶ Also, the dissent again relied on the EEOC’s expert report to argue that a khimar poses the same threat as any piece of clothing for the potential to be used as a strangulation device.⁹⁷ According to the EEOC’s expert report:

[A]ll of the other jurisdictions [the EEOC’s expert] surveyed “permit staff to wear uniform caps and or hats within their facilities,” *including jurisdictions in eight states, the District of Columbia, and the Federal Bureau of Prisons*. In particular, “[b]oth New York City and the District of Columbia correctional systems permit correctional officers and other female employees to wear the khimar within the secure perimeter of their facilities without adverse consequences.”⁹⁸

In its rejoinder to the dissent’s arguments, the majority asserted that immense weight must be given to the testimony of GEO’s wardens as to the potential dangers the khimar poses with respect to introducing contraband, concealment of identity, and strangulation. For instance, the majority focused on the wardens’ testimony that the issue of contraband was the “subject of discussion ‘probably close to 100’ times.”⁹⁹ As a result, the majority stated that GEO should not be faulted for making a policy change that strengthened security.¹⁰⁰ Furthermore, the majority contended that employees removing and/or switching khimars at check points would be “facially implausible and time consuming” and thus gave weight to GEO’s claim that this proposed accommodation of removing khimars would pose an undue hardship.¹⁰¹ Finally, the majority

⁹⁴ *The Geo Group*, 616 F.3d at 275.

⁹⁵ *Id.* at 284 (Tashima, J., dissenting). The two staff related incidents involved a correctional officer bringing food and cigarettes in his jacket pocket and the other involved a kitchen worker with cigarettes and latex gloves in his sock.

⁹⁶ *Id.* at 284.

⁹⁷ *Id.*

⁹⁸ *Id.* at 284-85 (emphasis added).

⁹⁹ *Id.* at 275-76 (majority opinion).

¹⁰⁰ *The Geo Group*, 616 F.3d at 275-76.

¹⁰¹ *Id.*

accepted GEO's assertion that the mere possibility a khimar may be used to strangle an employee justifies a blanket policy prohibiting all non-uniform headgear.¹⁰²

This article concedes that GEO has strong interests in the safe and efficient operation of its private prison. However, GEO presented absolutely no evidence that being a prison guard requires the same level of uniformity and "esprit de corps" of a paramilitary organization such as the Philadelphia Police Department in *Webb*.¹⁰³ Even though Sharpe-Allen and King were not uniformed employees that regularly work in secure areas of the prison, the majority failed to discuss how granting them an exception to the Uniform Policy would be an undue hardship to GEO's safety interests. Furthermore, with respect to Moss, GEO could have worked with her to find an accommodation allowing her to wear a khimar in a safe and secure manner similar to the way the Federal Bureau of Prisons and other jurisdictions allow employees to wear khimars in their prisons.¹⁰⁴

Hypothetical safety interests should not be a justification available to employers who discriminatorily ban the religious garb of their employees.¹⁰⁵ In the end, it is both possible and preferable for plaintiffs like the class members and employers like GEO to work together to balance their respective safety, uniformity, and religious practice interests.

IV. *EEOC v. IMPERIAL SEC., INC.: WILL WEBB AND THE GEO GROUP'S RATIONALE FOR THE BAN ON RELIGIOUS GARB APPLY TO A PRIVATE SECURITY COMPANY?*

A. Overview of the Complaint

¹⁰² *Id.* at 272.

¹⁰³ *Id.* at 290 (Tashima, J., dissenting). An employer violates Title VII for failing to provide a religion accommodation "unless the employer demonstrates that it is unable to accommodate" the employee's beliefs without imposing an undue hardship on the conduct of its business. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) (emphasis added).

¹⁰⁴ *The Geo Group*, 616 F.3d at 284.

¹⁰⁵ Courts are skeptical of an employer claiming hypothetical hardships where an accommodation has never been put into place. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (citing *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975)); see also *EEOC v. Red Robin Gourmet Burgers, Inc.*, No. C04-1291JLR, 2005 U.S. Dist. LEXIS 36219, at *9 (W.D. Wash. 2005) (stating undue hardship must be viewed within the factual context of each case and be supported by proof of actual imposition on coworkers or disruption of work routine). Although an employer may be able to prove undue hardship without undertaking possible accommodations, the employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490 (10th Cir. 1989) (citing *Draper*, 527 F.2d at 520).

Despite an unfavorable ruling in *The Geo Group*, the EEOC has recently filed a class action complaint alleging that Imperial Security, Inc.¹⁰⁶ has denied religious accommodations to Julie L. Halloway-Russell (“Halloway”) and a similar class of female Muslim employees by refusing to permit them to wear their khimar.¹⁰⁷

On November 25, 2009, Halloway was interviewed and hired for the position of a part-time security officer.¹⁰⁸ As an employee for Imperial Security, Halloway had to comply with its uniform policy establishing what each employee should wear while on duty.¹⁰⁹ The top of the uniform policy reads in capital letters: “ADDITIONS TO THE UNIFORM ARE NOT PERMITTED FOR ANY REASON INCLUDING RELIGION.”¹¹⁰

Halloway’s first assignment was at the Philadelphia Convention Center, on December 26, 2009.¹¹¹ She reported to work wearing her uniform and a khimar with its loose ends tucked underneath the collar of her shirt.¹¹² At the end of her shift, her supervisor informed her she could not wear her khimar while on duty.¹¹³ When she questioned Imperial Security’s policy, she was told to remove the khimar but instead left for the day.¹¹⁴ The following day, Halloway contacted Imperial Security about her next assignment and the uniform policy.¹¹⁵ Imperial Security informed her that the uniform policy prohibited her from wearing the khimar, but it offered her a company approved baseball hat as an alternative.¹¹⁶ Halloway declined because the baseball hat would fail to comply with her religious convictions mandating the khimar.¹¹⁷

¹⁰⁶ Imperial Security provides security services for various customers in Philadelphia and New Jersey. For example, they provide security services for large shows and events at the Philadelphia Convention Center. Compl. at 1.

¹⁰⁷ *Id.* The EEOC further alleges that as a result of the discriminatory practices of Imperial Security, the class of Muslim employees has suffered severe emotional distress damages and back pay losses.

¹⁰⁸ *Id.* at 3. Similar to the class members in *The Geo Group*, Halloway wore a full hijab covering her from head to toe, revealing only her hands and face during her interview.

¹⁰⁹ *Id.* The written policy stated: “A standard uniform consists of a white shirt, tie, black pants, a black belt, black socks, and black shoes (all must be black). No jeans or tight pants. UNLESS SPECIFICALLY PLACED AT A SITE WITH SPECIAL INSTRUCTIONS.” *Id.* Depending on the assignment, the employee may be required to wear a blazer, windbreaker, bomber jacket, or golf shirt bearing the company logo. *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 4.

¹¹² Compl. at 4. The khimar only covered her hair, ears, and neck.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* Because Halloway never received further contact from Imperial Security regarding future work, she assumed she was effectively terminated on December 27, 2009, the day she refused to wear the baseball hat instead of her khimar.

Several months later, on May 26, 2010, Imperial Security offered Halloway an opportunity to return to work for an assignment at the construction site for the Children's Hospital of Philadelphia.¹¹⁸ Imperial Security offered to "relax" its uniform policy and allow Halloway to wear her khimar at this particular site because there would be "*virtually no exposure to the general public at this construction site.*"¹¹⁹ Halloway declined this offer and filed a charge with the EEOC alleging violations of Title VII by Imperial Security.¹²⁰

B. Prediction of the outcome of the case in light of *Webb* and *The Geo Group*

Despite the *Webb* and *The Geo Group* holdings permitting uniform policies to ban religious headgear, a court will likely distinguish the uniformity and safety interests of the police or a prison from the interests of the private security firm in *Imperial Security*. A court is unlikely find that the uniformity interests of a security firm that assigns its employees to construction sites or shows are comparable to the uniformity interests of a paramilitary entity as in *Webb*.

With respect to *Webb's* or *The Geo Group's* discussion of uniformity interests, these concerns do not have the same gravity regarding Halloway. Halloway was a private security officer who wore her khimar in a way that only covered her hair, ears, and neck. In reality, Imperial Security requires its employees to purchase individual uniforms, unlike a police department or private prison that issues standard uniforms.¹²¹ Thus, there is no financial hardship to Imperial Security in allowing its employees to wear their own khimars with their self-provided uniforms. Even more distinguishable from *Webb* and *The Geo Group*, Imperial Security's offer to Halloway to work at a non-public site may be used as evidence that Imperial Security maintains a discriminatory Uniform Policy aimed at concealing from the public the fact that it employs Muslim security guards. In fact, neither employer in *Webb* nor *The Geo Group* stated

¹¹⁸ Compl. at 4.

¹¹⁹ *Id.* (emphasis added).

¹²⁰ *Id.* at 2-4. The complaint also alleges that since at least the fall of 2007, Imperial Security has prevented a class of Muslim employees assigned to work at various locations from wearing religious head coverings. The complaint also alleges that Muslim employees have been denied an accommodation to the uniform policy and have been effectively chilled from seeking religious accommodations due to adverse treatment or the threat of adverse treatment from Imperial Security. The alleged adverse treatment includes forcing its employees to compromise their religious beliefs by removing their khimars while on duty or risk termination. *Id.* at 5. This matter is currently pending before the District Court for the Eastern District of Pennsylvania.

¹²¹ Interview with Natasha Abel, Trial Attorney, EEOC District Office in Philadelphia (October 1, 2010).

that it was willing to relax its uniform policy and allow its employees to wear a khimar as long as the employee would not be visible to the public.

Moreover, the safety interests discussed in *The Geo Group*, including the possible risks in a private prison of a khimar concealing contraband, leading to misidentification, or being used as a strangulation weapon, are not akin to a private security guard that works various events. Additionally, as a private security guard, Halloway is not expected to respond with the same exigency or force as a police or correctional officer. Even a police officer “moon-lighting” as a private security guard, may not act under an officer’s “color of authority” when working for a private security firm.¹²² As a result, a security guard in Halloway’s position would most likely call the police in the event of a serious emergency.¹²³

Imperial Security’s ban on religious headdress will likely be held impermissible under Title VII because it is distinct from the uniformity and safety interests discussed in *Webb* and *The Geo Group*.

V. CONCLUSION

In upholding GEO’s ban on the khimar, the majority in *The Geo Group* analogized some of the uniformity and safety interests of a paramilitary organization, the police department in *Webb*, to the uniformed and non-uniformed employees of GEO’s private prison. Yet, in its opinion, the Third Circuit takes great pains to note that *Webb* does not establish a per se rule about religious head coverings or safety “that would govern in all religious discrimination cases, all ‘paramilitary organization’ cases, or even all police department cases.”¹²⁴ Due to the Third Circuit’s admission that *Webb* does not establish a per se rule that allows employers to prohibit religious head coverings, it appears that the majority in *The Geo Group* may have inaccurately and presumptuously applied *Webb* in its acceptance of GEO’s ban on the khimar.

Yet, even with *Webb* and *The Geo Group* upholding employers’ bans on religious headdress, it is unlikely that Imperial Security will successfully demonstrate to a court that it has the same safety and uniformity concerns as a paramilitary entity or private prison. Despite

¹²² Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 190 (2005). Whether a police officer or not, a private security guard must act within the scope of the employment agreement and work to further the interests of his or her part-time employer. *Id.* at 190-91.

¹²³ Interview with Natasha Abel, Trial Attorney, EEOC District Office in Philadelphia (October 1, 2010).

¹²⁴ *The Geo Group*, 616 F.3d at 273. The court also explicitly stated that this was a “close case.” *Id.* at 274.

the anti-discriminatory purposes of Title VII, holdings like *Webb* and *The Geo Group* will likely discourage employees from seeking a reasonable religious accommodation. In addition, under these holdings employers have even less of a reason to provide an accommodation.¹²⁵ Thus, similar to *Imperial Security*, more employers may be encouraged to issue uniform policies that ban religious headdress and rely on the uniformity and safety interests stated in *The Geo Group*.

Therefore, this article proposes that an employer should engage in good-faith communication with employees seeking an exception to the uniform policy for religious reasons. As a fair alternative to a per se ban on religious headdress, employers should discuss their respective safety and uniformity concerns with their employees to reach an accommodation that would balance the employer's interests with an employee's sincere religious convictions.

¹²⁵ In *The Geo Group*, the majority noted that the employer's interest in banning khimars for safety and uniformity outweighed the employee's sincere religious beliefs. *Id.* at 274-75.