

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
ALAMO RENT-A-CAR LLC; ANC Rental Corporation, Defendants.

No. 02-01908-PHX-ROS.

United States District Court, D. Arizona.

May 26, 2006.

1008 *1007 *1008 C. Emanuel Smith, Mary Joleen O'Neill, P. David Lopez, Equal Employment Opportunity Commission, Phoenix, AZ, for Plaintiff.

Lonnie James Williams, Quarles & Brady Streich Lang LLP, Stephanie J. Quincy, Sherman & Howard LLC, Phoenix, AZ, for Defendants.

ORDER

SILVER, District Judge.

On March 28, 2005, this Court issued a Short Order granting Plaintiff Equal Employment Opportunity Commission's ("EEOC") Motion for Partial Summary Judgment (Doc. # 49), with an opinion to follow. This is that opinion.^[1]

I. JURISDICTION

This Court has subject matter jurisdiction of the action pursuant to 28 U.S.C. § 1331 (federal question), § 1343 (civil rights action), and § 1345 (United States as a plaintiff).

II. BACKGROUND

A. Factual Background

Bilan Nur is a Muslim woman who immigrated to the United States from Somalia in 1998. [Doc. # 50 (Plaintiff's Statement of Undisputed Facts ("PSOF")) ¶¶, 6]. Alamo hired Ms. Nur as a rental agent in November 1999 for a rental agency location on East Washington Street in Phoenix, Arizona. [*Id.* ¶ 2]. In this position, Ms. Nur rented cars to customers, accepted payment, and answered the telephone; her duties required interaction with clients. [*Id.* ¶ 4]. Until the events which led to her termination, Ms. Nur's job performance was "fine." [*Id.* 115]. While Ms. Nur was employed by Alamo, the company had in effect a "Dress Smart Policy" which promoted a favorable first impression with customers, and expressly prohibited employees from wearing certain clothing and accessories, for example, the wearing of more than one earring, open toe shoes, and half-grown beards. [*Id.* ¶¶ 9, 13]. Plaintiff states that the Policy did not expressly prohibit the wearing of head coverings; Alamo counters that the Policy prohibits the wearing of any "garment or item of outer clothing not specifically mentioned in the policy" [PSOF ¶ 10; Doc. # 56, Defendant's Controverting Statement of Facts ("DCSOF") ¶ 10].

The Muslim holiday of Ramadan began on November 16, 2001. [*Id.* ¶ 17; DCSOF ¶ 17]. At some point in November 2001, Plaintiff spoke to Alamo's "City Manager" Victor Bellavia and requested permission to wear a head covering at work during the Ramadan holiday.^[2] Mr. Bellavia contacted Alamo's Human Resource Manager
1009 for the Western Region, Heather Phillips, about Ms. Nur's request for an accommodation *1009 to wear a head covering during Ramadan. Ms. Phillips instructed Bellavia that Plaintiff would be allowed to wear a head covering at work in the back of the office, but that she would need to remove the head covering while at the rental counter. [PSOF ¶ 22]. Alamo did not excuse Ms. Nur from working at the rental counter during Ramadan. [*Id.* ¶ 28].

On December 1, 2001, an Alamo manager, Herman Schilling wrote Ms. Nur a "Counseling [sic] Review," which stated: "You had previously been told by the City Manager that you are not allowed to wear a hat or head covering in your position at work. When I arrived at work this morning you were wearing a veil over your hair and I told you to clock-out and discuss with the City Manager on Sunday." [PSOF, Ex. B (Believe Dep.), Ex. 2]. The next day, December 2, 2001, Ms. Nur received another Counseling Review, pursuant to which she was suspended and advised: " You had been previously informed by the city manager that you are not allowed to wear a hat or head covering in your position at work. You were wearing a veil over your hair this morning. You were sent home yesterday for the same violation and will be sent home again today. You need to discuss this issue with the city manager tomorrow." [*Id.*, Ex. 3]. The next day (December 3, 2001), Ms. Nur again received a counseling review. In this review, Mr. Bellavia and LaShunda Brown advised Ms. Nur: "Bilan you have been verbally warned on several different occassion [sic] regarding [sic] your work uniform. You were also sent home on 12/01-12/02 for failing to comply with company policy. You are been [sic] suspended pending investigation. You are to return on 12/6/01, 8:30 am, To meet with the City Manager." [*Id.*, Ex. 4].

Also on December 3, 2001, Mr. Bellavia wrote a memorandum to the file summarizing the disciplinary actions taken against Ms. Nur:

Bilan Nur approached me on Tuesday November 20, 2001 asking me if she was allowed to wear a scarf/head covering during her religious holiday Rhamadan. I informed her that I would run it by Human Resources and let her know if she was allowed to do this. Last year in December of 2000 Sal Vargas [Assistant City Manager] informed her she could not do this and made her take it off. Heather Phillips from Human Resources informed me that she was not allowed to have her head covered do [sic] to the fact its [sic] not part of the uniform policy. I informed this to Bilan and she was not happy with the answer. When the Holiday started she insisted on having her head covered. I informed Heather of the situation and she informed me to warn her that she could not wear it and if she continue [sic] to come to working [sic] wearing it Alamo would then start counseling her immediately. On Saturday December 1, 2001 she came to work not meeting the companies [sic] uniform policy, we counseled her on it and sent her home. On Sunday December 2, 2001 Bilan did not follow the company policy on her uniform and we counseled her again and sent her home. On Monday December 3, 2001 Bilan did not follow company policy with regards to Alamo uniform policy, we counseled her and suspended her three-day [sic] which may result in her termination of employment with Alamo Rent a Car.

[PSOF, Ex. B (Bellavia Dep.), Ex. 1]. Alamo terminated Ms. Nur's employment on December 6, 2001 for violation of company rules. [PSOF, Ex. I (Vargas Dep.), Ex. 5]. The termination form indicates that Ms. Nur was not eligible for re-hire. [*Id.*].

1010 *1010 B. Procedural history

EEOC filed its Complaint on September 27, 2002. [Doc. # 1]. On November 19, 2002, the matter was stayed after Alamo filed for Chapter 11 bankruptcy. [Doc. # 6]. The automatic stay was lifted by Order filed on April 14, 2003. [Doc. # 11]. EEOC filed the Motion for Partial Summary Judgment (Doc. # 49) on April 30, 2004 in which it requests judgment regarding liability on its religious discrimination claim. EEOC asserts the claim pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, on behalf of Bilan Nur, a former employee of Defendants ("Alamo"). Alamo filed its Response on June 18, 2004 (Doc. # 55), followed by EEOC's Reply, filed on July 20, 2004 (Doc. # 59).

III. LEGAL STANDARD ON SUMARY JUDGMENT

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Jesinger v. Nev. Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); see *Jesinger*, 24 F.3d at 1130. In addition, the dispute must be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

Furthermore, the party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); see *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir.1995). There is no issue for trial unless there is sufficient evidence favoring the non-moving party; if the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50, 106 S.Ct. 2505. However, because "[c]redibility determinations, the weighing of evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, . . . [t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor" at the summary judgment stage. *Id.* at 255, 106 S.Ct. 2505 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)); see *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995).

IV. DISCUSSION

A. Framework

1011 Title VII prohibits as an unlawful employment practice the discharging of an employee because of the employee's religion. 42 U.S.C. § 2000e-2(a)(1). "Religion" is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). The Ninth Circuit employs a two-step framework to analyze claims of religious discrimination under Title VII. *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 681 (9th Cir.1998). Initially, a plaintiff must establish a prima facie case by demonstrating "(1) she had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) she informed her employer of the belief and conflict; and (3) the employer threatened her or subjected her to discriminatory treatment, including discharge, because of her inability to fulfill the job requirements." *Id.* (citing *Heller v. EBB Auto. Co.*, 8 F.3d 1433, 1438 (9th Cir.1993)). If the plaintiff establishes her prima facie case, the burden shifts to the employer to show one of two things: (1) "that it initiated good faith efforts to accommodate reasonably the employee's religious practices"; or (2) "that it could not reasonably accommodate the employee without undue hardship." *Id.* If negotiations between employee and employer "do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so." *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir.1996) (citing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988)).

B. Plaintiffs prima facie case

Alamo contends that EEOC has failed to prove a prima facie case of religious discrimination, arguing that Ms. Nur's religious beliefs did not conflict with her job requirements because her "personal practice did not require that she wear a [head covering] at all times during Ramadan." [Doc. # 55 (Def.'s Resp.), p. 4]. Alamo points to evidence that during Ramadan in 2000 (the year prior to the Ramadan at issue), Alamo's management asked Ms. Nur to remove her head covering and she complied, and did not assert a religious need to object to the request. [*Id.*, p. 5]. Alamo concludes that this evidence supports a question of fact regarding "whether Ms. Nur's religious beliefs are what she is stating in this lawsuit." [*Id.*]. Similarly, Alamo states that because Ramadan in 2001 began on Friday, November 16 and they say Plaintiff did not request an accommodation permitting her to wear a head covering until Tuesday, November 20, 2001, this could suggest that Ms. Nur's religious beliefs did not actually dictate that she wear a head covering at work under all circumstances. Alamo further states that Plaintiff went to the press with her story immediately after her termination and gave conflicting statements at deposition regarding whether she contacted the press or the press contacted her, arguing this casts doubt on whether Ms. Nur's statement of her religious beliefs is credible. [*Id.*, p. 6].

"[I]t is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity⁹⁹ as opposed, of course to the verity¹⁰⁰ of someone's religious beliefs in . . . the Title VII context." *Philbrook v. Ansonia Bd. of Educ.*,

757 F.2d 476, 481 (2d Cir.1985). Viewed in the light most favorable to Alamo, however, the evidence does not support the existence, of a material factual issue regarding the sincerity of Ms. Nur's religious belief at the time of her termination. During Ramadan 2001, Ms. Nur continued to wear a head covering despite warnings from her supervisors that she would be subjected to progressive disciplinary action, and then was terminated because Alamo concluded she had repeatedly violated its official dress policy. Ms. Nur's actions strongly "demonstrate that [s]he attached the utmost religious significance" to her belief that her religion required her to cover her head during Ramadan. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir.1993).

1012 Assistant City Manager Sal Vargas testified that he required Plaintiff to remove *1012 her head covering during Ramadan in 2000, which he stated she did do without raising any objection, religious or otherwise. Alamo contends that this fact raises a question about whether Ms. Nur's belief was sincere in 2001. An analysis of the sincerity of Ms. Nur's belief should "be measured by the employee's words and conduct at the time the conflict arose between the belief and the employment requirement." *EEOC v. IBP, Inc.*, 824 F.Supp. 147, 151 (C.D.Ill.1993). In the Complaint, the EEOC alleges that Alamo discriminated against Ms. Nur with regard to her assertion of her religious belief in November and December 2001, not in 2000. [Doc. # 1 ¶¶ 7, 15, 18]. Although there is a dispute of fact regarding whether Ms. Nur was permitted to wear a head covering during Ramadan in 1999 and 2000,^[3] that dispute is not relevant to the sincerity of Ms. Nur's belief in the Fall of 2001, when Ms. Nur's assertions of religious belief led to her termination. Alamo further contends that because in 2001 Ramadan began on November 16, and because Alamo asserts that Ms. Nur did not raise the head covering issue with Mr. Bellavia until November 20, this is evidence that might lead a fact finder to infer that Ms. Nur did not wear a head covering at work during the first few days of Ramadan 2001, i.e., between November 16 and November 20. [Doc. # 55, p. 5]. Similarly, Alamo suggests that because Ms. Nur was not first disciplined until December 1, 2001, 15 days into the Ramadan holiday, a reasonable fact finder might infer that Plaintiff had acted consistently with the accommodation Alamo offered prior to December 1, thus eroding Plaintiffs claim that Ms. Nur's religious belief was sincere. [DCSOF ¶ 30].

These inferences are not reasonable in the factual context before the Court. Plaintiff testified that when Ramadan began, she started to wear a scarf at work. [PSOF, Ex. A (Nur.Dep.), p. 33]. There is nothing in the record demonstrating that Plaintiff did not wear a head covering at work during Ramadan 2001. The record includes deposition testimony of both Victor Bellavia and LaShunda Brown, who supervised Ms. Nur. Neither Bellavia nor Brown testified that Ms. Nur did not wear a head covering during Ramadan in 2001. In fact, Victor Bellavia's December 3, 2001 memorandum to the file states that "[w]hen the Holiday started [Ms. Nur] insisted on having her head covered." [Doc. # 50 (PSOF), Ex. B, Ex. 1]. LaShunda Brown testified that Ms. Nur advised her that she wanted to wear a head covering "during Ramadan until after Ramadan was over." [DCSOF, p. 15]. The sort of speculation in which Alamo invites the fact finder to indulge does not create a factual dispute for purposes of summary judgment. *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir.1996). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Alamo has not presented specific material facts in the record to reasonably support the inference that Ms. Nur did not wear a head covering during Ramadan 2001, or the further inference that her asserted religious belief was not sincere.

C. Alamo's burden

1013 Because Plaintiff has proven a prima facie case of discrimination, the burden *1013 shifts to Alamo to show one of two things: (1) that it initiated good faith efforts to reasonably accommodate Ms. Nur's religious practices; or (2) that it could not reasonably accommodate her without undue hardship. *Tiano*, 139 F.3d at 681.

1. Reasonable accommodation

Alamo argues that it made a good faith effort to accommodate Ms. Nur, and that Ms. Nur accepted the accommodation. [Doc. # 55, p. 7]. Alamo states, without citing authority, that "[w]hen an employer makes a good faith effort to accommodate which an employee accepts, the employer has met its obligation under Title VII." [*Id.*]. Alamo further argues that "[i]f a jury decides that Ms. Nur agreed that the accommodation was reasonable by agreeing to abide by it, Alamo's duty to accommodate would be fulfilled." [*Id.*, p. 8].

Alamo's assertion that it made efforts to reasonably accommodate Plaintiff lack merit. Alamo must demonstrate that it made "some initial step to reasonably accommodate the religious belief" of Ms. Nur (or show that no reasonable accommodation was possible without undue burden). Heller, 8 F.3d at 1440 (internal citation omitted). This obligation requires, at a minimum, that the employer "negotiate with the employee in an effort reasonably to accommodate the employer's religious belief." *Id.* (internal citation omitted). The accommodation Alamo offered Ms. Nur was that "she would be allowed to wear [a head covering] when she was in the back office . . . but when she went to the rental counter to rent cars in the front of the office, she would have to remove it." [Doc. # 50 (PSOF), Ex. B (Bellavia Dep.) p. 25, 11. 10-14]. It is undisputed that the accommodation Alamo offered Ms. Nur required her to remove her head covering during Ramadan when she served clients but still required her to serve clients, making it impossible for Ms. Nur to avoid removing her head covering at work. [Doc. # 50 (PSOF), Ex. B (Bellavia Dep.), pp. 25-28; Ex. C (Phillips Dep.), pp. 45-49]. Accordingly, Alamo's proposal would have failed to accommodate Ms. Nur's religious conflict, and was not a reasonable accommodation. Thus, Alamo failed to uphold its burden to attempt to accommodate Ms. Nur's beliefs, and was left with the alternative burden to show that permitting Ms. Nur to wear a head covering during Ramadan while dealing with clients would impose an undue hardship. See Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 401 (9th Cir.1978) ("The burden was on the [employer], not [the plaintiff] to undertake initial steps toward accommodation.").

Alamo seeks to avoid summary judgment by arguing there is a genuine issue of fact whether Ms. Nur accepted Alamo's proposed accommodation. This argument is based on Mr. Bellavia's testimony, as follows:

Q. And did you inform Bilan of this accommodation?

A. Yes.

Q. What did Bilan say?

A. I believe she agreed to it.

Q. Okay. Why do you believe that?

A. Because then later on she told LaShunda that she wasn't going to remove it when she went to the counter.

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Q. You said you believe Bilan agreed to that. What's the basis for that statement?

A. That we had a conversation, and I gave her the option that was given to me. I got back to her. We had a conversation that she wanted to wear it. I said I would go to HR. HR came back with the reasonable *1014 accommodation, and I discussed it with her.

1014

Q. Okay. And you said she agreed to it. I'm asking for the basis.

A. I believe she didn't object and say at that conversation that she would say, "Well, this is not good enough" or "I'm not going to do this." She didn't say that.

Q. Did she ever say, "I agree"?

A. She didn't come out and say, you know, those words verbatim.

Q. Okay. Did she say anything comparable to "I agree"?

A. To be honest with you, I couldn't recall the total conversation.

Q. You're not sure whether she verbally agreed to it; correct?

A. No. All I can say is I know she didn't say that she wasn't going to do it.

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Q. You testified you communicated that accommodation to Bilan; correct?

A. Yes.

Q. What happened next?

A. I believe she then told LaShunda that she wasn't going to remove her head covering when she went to the rental counter.

Q. When did she so that in proximity to your conversation with Heather [Phillips]?

A. I honestly don't recall.

Q. How did you find out she told LaShunda this?

A. LaShunda told me.

.....

Q. When LaShunda told you that, what did you do?

A. I informed Heather that Bilan didn't want to agree. Bilan didn't want to remove her head covering or she informed LaShunda she didn't want to remove her head covering when she went to the rental counter.

Q. What did Heather say?

.....

A. If she didn't remove her head covering when she went to the counter, to start progressive discipline.

[Doc. # 50, Ex. B (Bellavia Dep.), p. 29, ll. 5-13, 16-25; p. 30, ll. 1-15; p. 33, ll. 17-25; p. 34, ll. 1-3, 7-12, 18-20].

The evidence does not support Alamo's position that Ms. Nur accepted the proposed accommodation. The most that a reasonable fact finder could infer from Mr. Bellavia's testimony was that Ms. Nur did not immediately respond to Alamo's proposed accommodation. In fact, Bellavia's testimony states that when Ms. Nur did respond to the proposed accommodation, she rejected it by telling LaShunda Brown that she would refuse to remove her head scarf when she was required to go to the customer counter. Alamo has not raised a material factual issue regarding its burden to show either that it made a good faith effort to accommodate Ms. Nur's religious beliefs or that Ms. Nur accepted the accommodation Alamo offered^[4]

2. Undue hardship

1015 An employer need not make an effort to accommodate an employee's religious beliefs if "it can show that any accommodation would impose undue hardship." *Heller*, 8 F.3d at 1440. "Undue hardship" is created when an accommodation "results in more than a *de minimis* *1015 cost to the employer." *Id.* (citing *Ansonia Bd. of Edna v. Philbrook*, 479 U.S. 60, 67, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986); *TWA, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977)). "A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of actual imposition on co-workers or disruption of the work routine." *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir.1981) (quoting *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406-07 (9th Cir.1978)).

Alamo suggests that permitting Ms. Nur to wear a head covering at the rental counter would result in an undue hardship, concluding simply that "any deviation from [Alamo's] carefully cultivated image is a definite burden." [Doc. # 55, p. 11]. Without supplying any indication of the cost it would have incurred by permitting Ms. Nur to wear a head covering at the rental counter, Alamo simply assumes the question of cost and argues that "the actual issue to be decided [by the jury] is the magnitude of the burden." [*Id.*]. The record provides no material factual basis for Alamo's conclusions about the cost of "any deviation" from the uniform policy.

Alamo fails to support its assertion of undue burden with anything other than speculation, which is not a basis to establish a genuine issue of material fact. Victor Bellavia testified that it would not have cost Alamo any money to allow Ms. Nur to wear a head scarf while serving customers. [PSOF Ex. B (Bellavia Dep.), p. 63. ll. 20-25]. Mr. Bellavia did state that allowing Ms. Nur to wear a head covering might have affected the efficiency of Alamo's operations by opening the door for other employees to violate the company uniform policy. [*Id.*, p. 64, ll. 4-23]. Bellavia stated that "[t]he only burden I see is other people wanting to break the uniform policy." [*Id.*, p. 67, ll. 1-2]. However, Mr. Bellavia did not believe that allowing Ms. Nur to wear a head covering at the rental counter would affect the impression she would make on customers, or would it negatively impact customer expectations concerning the level of service or quality of the product they would receive, or otherwise create any type of negative expectations with customers. [*Id.*, p. 67, ll. 1-8, 23-25; p. 68, ll. 1-14]. At Bellavia's deposition, EEOC counsel read Alamo's answer to Interrogatory No. 6, which caused the following colloquy:

Q: If you'll look at the first paragraph, the last sentence of the answer, it says, "Deviations from the uniform policy could tarnish Alamo's image and result in undue hardship on the company." Did I read that correctly?

A: That's what it says.

Q: Okay. Now, you're the city manager, obviously; right?

A: Yes.

Q: Okay. As city manager, can you tell me how a deviation from the uniform policy to allow Ms. Nur to wear her head covering with customers during Ramadan will tarnish Alamo's image?

A: No.

Q: Can you tell me how it would result in any type of undue hardship to the company?

A: No.

[*Id.*, p. 69, ll.15-25; p. 70, ll.1-6].

Heather Phillips testified at deposition in relevant part, as follows:

Q: Would it be fair to state that it would not have cost the company any money if you permitted Ms. Nur to wear a scarf at the counter?

1016 *1016 A: I don't know. I don't know if it would. It possibly could.

Q: Did you believe at the time that Ms. Nur was told that she could not wear a scarf at the counter that it would cost the company money?

A: Potentially.

Q: Why is that?

A: Once again, if we allow one person to deviate from the company policy, then we would need to allow everybody to deviate from the policy.

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Q: Now, is it your testimony, then, that permitting Ms. Nur an accommodation might have cost the company money?

A: Yes.

Q: But you're not certain that it would have cost any money?

A: Correct.

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Q: Do you believe that it would cost any money up front to permit Ms. Nur to wear a scarf as an accommodation?

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A: Up front, no.

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Q: So you did not believe there would be any out-of-pocket expenses at that time to permit Ms. Nur to wear a scarf at the counter?

A: Up front, no.

Q: Okay. But your concern was that it may affect the image with the customers and cost the company money?

A: Correct.

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Q: Other than the customer image, were there any other hardships that you believed would occur if you permitted Ms. Nur to wear the scarf at the counter?

A: No.

Q: Would it be fair to state, then, that your concern with respect to Ms. Nur wearing the scarf was that all the other employees would then also want to deviate from the customer policy, the dress policy?

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A: That was yes.

Q: And your concern wasn't with respect to Ms. Nur, per se, but it was with respect to opening the flood gate; correct?

A: That's correct.

[PSOF Ex. C (Phillips Dep.), p. 64, 1. 25; p. 65, ll. 1-12; p. 66, 1. 25; p. 67, ll. 1-8, 12-14, 18-25; p. 68, ll 1, 3; p. 69, ll. 8-15, 17-22].

The Ninth Circuit has echoed the Sixth Circuit's "skepticism" about "'hypothetical hardships' based on assumptions about accommodations which have never been put into practice." *Anderson*, 589 F.2d at 402 (quoting *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 343 (6th Cir.1978) and *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir.1975)). Although Mr. Bellavia and Ms. Phillips concluded that accommodating Ms. Nur's request to wear a head covering at the rental counter might have imposed a cost on Alamo because it would have opened the floodgates to others violating the uniform policy, Alamo has not supplied any basis for concluding that those opinions were anything other than pure speculation. Additionally, Bellavia's and Phillips's conclusion was based on a faulty understanding of Title VII's protections against discrimination based on religious beliefs, that is, that accommodating Ms. Nur's religious beliefs would have required Alamo to forego enforcement of the uniform policy against any employee ("[o]nce again, if we allow one person to deviate from the company policy, then we would need to allow everybody to deviate from the policy."). Under this faulty reasoning, virtually no accommodation could overcome the undue hardship test. Cf. *Anderson*, 589 F.2d at 402 ("If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.") (quoting *Franks v. Bowman*, 424 U.S. 747, 775, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976)). Because

"[u]ndue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts[.]" Anderson, 589 F.2d at 402, and the factual dispute Alamo asserts is grounded only in assumptions and opinion based on a hypothetical scenario, Alamo has not raised a material factual issue concerning undue burden.

V. CONCLUSION

Alamo has not presented genuine issues of material fact concerning either EEOC's prima facie case of religious discrimination or Alamo's burden to show that it offered to reasonably accommodate Ms. Nur's religious beliefs or that it could not accommodate those beliefs without undue hardship. Summary judgment has been granted in favor of EEOC on the question of liability.

Accordingly,

IT IS ORDERED that Plaintiff Equal Employment Opportunity Commission's Motion For Partial Summary Judgment (Doc. # 49) is GRANTED.

[1] The Court did not schedule oral argument on Plaintiff's Motion because the parties submitted memoranda thoroughly discussing the law and evidence in support of their positions, and oral argument would not have aided the Court's decision. See Mahon v. Credit Bur. of Placer County, Inc., 171 F.3d 1197, 1200 (9th Cir.1999), modified, No. 97-017298, 1999 U.S.App. LEXIS 8016; Partridge v. Reich, 141 F.3d 920, 926 (9th Cir.1998).

[2] Ms. Nur testified she approached Mr. Bellavia two weeks prior to the beginning of Ramadan to request she be allowed to wear a head scarf at work during the holiday. [Doc. # 50, Ex. A (Nur Dep.), p. 26, l. 21 to p. 28, l. 7]. Mr. Bellavia testified that Ms. Nur approached him with the request on November 20, 2001, after the Ramadan holiday had begun. [Id., Ex. B (Bellavia Dep.), Ex. 1].

[3] Plaintiff contends that Alamo allowed her to cover her head during Ramadan in both 1999 and 2000. [PSOF, Ex. F 6]. Alamo counters that Plaintiff was asked to remove her head covering during Ramadan in 2000, and that she did so without comment. [DCSOF 116 (Resp.)].

[4] The evidence established that there were no reasonable exceptions to Alamo's dress policy; in fact, there were no exceptions. See Alamo's Answer To Interrogatory No. 6 discussed at 13-15 herein.

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