

Balancing employee religious rights and the need for protective equipment

By [Laura Macfarlane](#) and [Frances Barker](#)

11 Jun 2020

The coronavirus pandemic has brought to the fore the rights of an employer to insist on the wearing of personal protective equipment (PPE) despite religious objections. For Covid-19 protection, such equipment may include masks, gloves, goggles, face shields, and other forms of protective gear. Ordinarily, the failure to adhere to an employers' reasonable PPE requirements could lead to disciplinary action being taken against employees. However, there may be instances where employees are unable or unwilling to wear the prescribed PPE, as doing so would go against their religious beliefs. How far must employers go in order to accommodate these beliefs?



© Aaron Amat – [123RF.com](#)

A common situation where this problem may arise is in the context of health professionals (or other employees) being required to wear N95 respirator masks when performing their duties. N95 respirator masks are much tighter than ordinary N95 surgical masks and cloth masks and as a result filter 95% of particles in the air, thereby reducing employees' exposure risk to the coronavirus. In order to work effectively, N95 respirator masks require an adequate seal against the wearer's face. When an employee has facial hair (a beard, moustache, sideburns or even stubble), it can compromise the N95 mask's effectiveness (I Sandaradura, et al 'A close shave? Performance of P2/N95 respirators in healthcare workers with facial hair: results of the BEARDS [Benchmarking Adequate Respiratory Defences] study' [2020] 104 Journal of Hospital Infection 4 529), often rendering it useless.

No facial hair

Many employers in the healthcare space have introduced 'no facial hair policies' in order to ensure that their employees who are at the front lines of the Covid-19 pandemic are adequately protected when wearing their N95 respirator masks and to ensure the safety of those accessing health services. Would these and similar policies pass constitutional muster considering that in certain sects of Islam, Sikhism and Judaism, beards and facial hair are a significant component of the observance of faith?

Under section 15 of the South African Bill of Rights, everybody has the right to freedom of conscience, religion, thought, belief and opinion. Section 9(3) of the Constitution prohibits discrimination on the grounds of religion. Such rights may only be limited by a law of general application and, to the extent that this limitation is reasonable and justifiable in an open and democratic society.

On the other hand, the employers have an obligation, as far as reasonably practicable, to provide a safe working environment for their employees as well as those affected by their activities under the Occupational Health and Safety Act, 1993.

An important principle to consider when balancing the employer's and employee's rights is that of "reasonable accommodation". This principle dealt was discussed by the Constitutional Court in the 2007 decision in *MEC for Education, Kwazulu-Natal and others v Pillay*, in which a Durban school refused to allow a pupil to wear a nose stud – even though doing so formed part of her religious practices as a Hindu. In this case, the court states:

“ The concept of reasonable accommodation is not new to our law – this Court has repeatedly expressed the need for reasonable accommodation when considering matters of religion. ”

The court held that one must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy their rights equally.

Religion or job

In the 2018 decision in *TDF Network Africa (Pty) Ltd v Faris*, the Labour Appeal Court reiterated that employers must “exert considerable effort in seeking reasonable accommodation” and that “the employer bears the burden of proving that it is impossible to accommodate the individual employee without imposing undue hardship or insurmountable operational difficulty.” The court stressed that employment practices that force employees to choose between their religious practices and losing their employment infringes on their dignity.

These cases imply that employers should seek out alternative measures for employees where possible – such as permitting health care workers with beards to continue to serve safely by wearing a full-face respirator called a PAPR.

Employers should ensure that the PPE prescribed in their health and safety policies is necessary and rationally connected to the objective of protecting employees. In the 2013 decision in *Department of Correctional Services v POPCRU*, the Supreme Court of Appeal considered whether the dismissal of five employees, for violating departmental dress code prohibiting male correctional officers from wearing their hair in dreadlocks, was discriminatory and automatically unfair on grounds of religion, culture and gender. The court found that there was no obvious rational connection between the ban on dreadlock hairstyles and the achievement of greater probity and discipline by correctional officers and security services at the prison. Accordingly, the department's policy relating to appropriate hairstyles was discriminatory and unlawful.

Reasonable connection

In most cases there is a clear and obvious link between employees properly wearing PPE and, for instance, curbing the spread of Covid-19. An employee refusing to wear PPE can put the health of clients, other employees and those employees' families at risk. There is a reasonable connection between the measure and its purpose.

Each employer will however need to determine whether their industry requires the use of more intrusive forms of PPE (such as N95 respirator masks) given the impact upon the religious rights of its employees. This is, at least in part, a medical question. What is good for a hospital will clearly not usually be the same for employers in financial services.

It is likely that only in exceptional cases, where alternative forms of PPE are not available, or would impose undue hardship, or where an employer has no other reasonable means of accommodating the employee it may deny an employee's request for a religious exception to wearing the prescribed PPE.

ABOUT THE AUTHOR

Laura Macfarlane, Associate and Frances Barker, Candidate Attorney at Norton Rose Fulbright.

For more, visit: <https://www.bizcommunity.com>