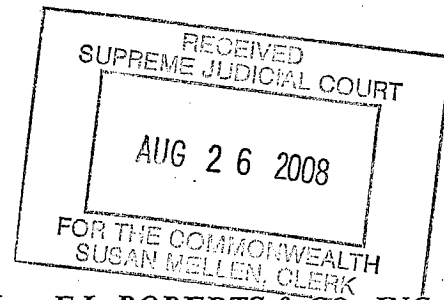


Supreme Judicial Court
John Adams Courthouse
One Pemberton Square, Suite 2500
Boston, MA 02108



Re: **BOBBY T. BROWN vs. F.L. ROBERTS & CO., INC**
SJC-10155, DAR-16778

**LETTER EXPRESSING VIEWS OF AMICUS
ANTI-DEFAMATION LEAGUE**

Dear Honorable Chief Justice and Associate Justices:

We write this letter in support of Bobby T. Brown's appeal from the Massachusetts Superior Court decision in *Brown v. F.L. Roberts & Co., Inc.*, No. 06-132, slip op. (Mass Super. Ct. Nov. 8, 2007).

Interest of Amicus Anti-Defamation League

The Anti-Defamation League ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has previously filed briefs supporting the right of employees to wear religious dress absent a compelling health and safety reason. We filed an *amicus* brief in support of *certiorari* in *Zeinab Ali v Alamo*, 8 Fed.Appx. 156, 2001 WL 218788 (4th Cir 2001) *cert denied* 534 U.S. 944. We also filed on behalf of *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), arguing that that two Muslim police officers in Newark, N.J. should be permitted to continue to wear beards on the force as they had since the 1980s. Finally, ADL filed an *amicus* brief in *Goldman v Weinberger*, 475 U.S. 503 (1986), arguing that the Air Force should not be permitted to prohibit an Orthodox Jewish psychologist from wearing a yarmulke while on duty at an Air Force hospital.

We write in this case because both the state and federal trial courts that have heard this case have come to the conclusion that it is governed by the First Circuit's decision in *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (holding that it would pose "an undue hardship to require Costco to grant an exemption because it would adversely affect the employer's public image...") applies. As articulated by a federal judge who heard this case on Brown's collateral federal claims:

One has to wonder how often an employer will be inclined to cite this expansive language to terminate or restrict from customer contact, on image grounds, an employee wearing a yarmulke, a veil, or the mark on the forehead that denotes Ash Wednesday for many Catholics. More likely, and more ominously, considerations of "public image" might persuade an employer to tolerate the religious practices of predominant groups, while arguing "undue hardship" and "image" in forbidding practices that are less widespread or well known. *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 17 (D. Mass. 2006).

Such a result is unacceptable in a religiously diverse society, returns us to a day where fear of differences controlled hiring decisions and it stands contrary to the letter and spirit of G.L. c. 151B, Section 4(1A).

Argument

We ask this Court to reverse the part of the decision in which the Superior Court looked to the First Circuit case of *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131, 125 S. Ct. 2940, 162 L. Ed. 2d 873 (2005) to hold that providing a religion-based exception to defendant F.L. Roberts & Co.'s dress code policy would be an "undue hardship" under G.L. c. 151B, Section 4(1A).

By looking to *Cloutier* as authority, and by interpreting the rule in that case as effectively granting employers *carte blanche* to allow declare religion-based exceptions to dress codes to be "undue hardships," the Superior Court undermines the essence of Chapter 151B, allowing what, by its express terms, it was meant to abolish. Although it is Massachusetts' custom to look to federal case law when interpreting Chapter 115B, this Court is not bound to do so. *College-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination*, 400 Mass. 156, 162 n. 3 (1987). And it certainly should not do so when the applicable federal case law serves to undermine 115B's purposes as *Cloutier*, and when applying that case law would have such grave consequences for religious minorities in the workplace. We ask this Court to decline to expand *Cloutier* beyond its facts—which pertain to an adherent of the so-called "Church of Body Modification"—and find that Chapter 115B protects Massachusetts' religious minorities from the whims of "customer preference."

The decision in *Cloutier* may have been appropriate for its specific facts. The plaintiff, Ms. Cloutier, was an adherent to the "Church of Body Modification." *Id.* at 128. Although she was offered several forms of accommodation, the only accommodation Ms. Cloutier would accept was to be allowed to wear facial piercings at all times while continuing to work in a customer service position. *Id.* at 130. The First Circuit held that allowing Cloutier an exemption from the dress code so she could continue to wear her piercings would be an undue burden on Costco. *Id.* at 137. It came to this conclusion by interpreting analogous cases very broadly. Particularly relevant to the present case is the fact that *Cloutier* specifically cited cases involving "policies regulating facial hair" as proof that "Courts considering Title VII religious discrimination claims have... upheld dress code policies, that, like Costco's, are designed to appeal to customer preference or to promote a professional public image." *Id.* at 136.

However, all of these cases cited by the First Circuit involved plaintiffs who worked in the food service industry, where facial hair is often prohibited for health reasons. *See Hussein v. The Waldorf-Astoria*, 134 F. Supp. 2d 591 (S.D.N.Y. 2001), *aff'd* 31 Fed. Appx. 740 (2d Cir. 2002) (unpublished); *EEOC v. Sambo's of Georgia, Inc.*, 530 F. Supp. 86 (N.D. Geo. 1982); *Woods v. Safeway Stores, Inc.*, 420 F. Supp. 35 (E.D. Va. 1976), *aff'd*, 579 F.2d 43 (4th Cir. 1978). These cases are not even particularly persuasive authority—*Woods* and *Sambo's of Georgia* are both over twenty years old, and all three are from outside the First Circuit. As further support, the

Cloutier court also cites cases having to do with police uniforms. *Cloutier*, 136, citing *Daniels v. City of Arlington*, 256 F.3d 500 (5th Cir. 2001). Cases involving facial hair regulations in the food service industry and in para-military offices, where such regulations serve important interests such as public health and safety, hardly support a *per se* rule against religion-based exceptions to dress code policies in *all* areas of employment. See, e.g., *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

Due to its very broad interpretation of the law, *Cloutier* is questionable as a statement of present federal law. Other federal courts have declined to use its rule. See *EEOC v. Red Robin Gourmet Burgers* (2005) U.S. Dist. LEXIS 36219, 16-17 (W.D. Wash. Aug. 29, 2005) (explicitly declining to use the rule set forth in *Cloutier*). Other circuits have held, contrary to *Cloutier*, that mere customer preference is not adequate justification for discrimination. See *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1214 (8th Cir. 1985) (noting that customer preferences cannot justify discriminatory practices, and citing supporting cases from the 5th and 9th Circuits). Moreover, the Equal Employment Opportunity Commission has expressly rejected the rule in *Cloutier*. The EEOC Compliance Manual states:

When an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices, *the employee may ask for an exception to the policy as a reasonable accommodation*. Religious grooming practices may relate, for example, to shaving or hair length. Religious dress may include clothes, head or face coverings, jewelry, or other items. Absent undue hardship, religious discrimination may be found where an employer fails to accommodate the employee's religious dress or grooming practices. *Some courts have concluded that it would pose an undue hardship if an employer was required to accommodate a religious dress or grooming practice that conflicts with the public image the employer wishes to convey to customers*. While there may be circumstances in which allowing a particular exception to an employer's dress and grooming policy would pose an undue hardship, *an employer's reliance on the broad rubric of "image" to deny a requested religious accommodation may in a given case be tantamount to reliance on customer religious bias (so-called "customer preference") in violation of Title VII*.

EEOC Compliance Manual, "Section 12: Religious Discrimination" (Released 7/22/2008),¹ emphasis supplied

Even the United States District Court, when examining the federal claims in this case, expressed great reluctance to apply the rule of *Cloutier*. The court reluctantly granted summary judgment to F.L. Ross, while acknowledging:

If *Cloutier's* language approving employer prerogatives regarding "public image" is read broadly, the implications for persons asserting claims for religious discrimination in the workplace may be grave. One has to wonder how often an employer will be inclined to cite this expansive language to terminate or restrict from customer contact, on image grounds, an employee wearing a yarmulke, a veil, or the mark on the forehead that denotes Ash Wednesday for many Catholics. More likely, and more ominously,

¹ <http://www.eeoc.gov/policy/docs/religion.pdf>

considerations of "public image" might persuade an employer to tolerate the religious practices of predominant groups, while arguing "undue hardship" and "image" in forbidding practices that are less widespread or well known. *Brown*, 419 F. Supp. 2d 7, 19.

Judge Ponsor has this right: the public image exception articulated by *Cloutier* is a slippery slope upon which Jews, Muslims, and Catholics (and others) will find their religious grooming needs unwelcome in Massachusetts.

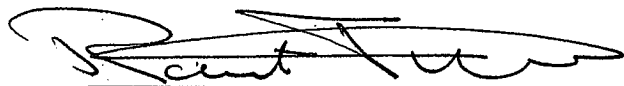
Conclusion

We urge this Court to keep in mind the slippery slope presented by *Cloutier*. This case provides employers with road maps to lawfully exclude members of minority faiths, racial or ethnic groups from the workplace. Should this Court choose to affirm the Superior Court's application of *Cloutier*, its decision will allow employers to bypass Chapter 151B and exclude Kippah-wearing Jews, cross-wearing Christians and Hajib-wearing Muslims from the workplace by using the subjective and amorphous concept of "customer preference" as justification. We urge this Court to correct the Superior Court's interpretation of the law, decline to expand *Cloutier* beyond its facts, and find that allowing Mr. Brown a religious exception to F.L. Roberts & Co.'s dress code would not have worked an undue hardship on F.L. Roberts.

DATED: BOSTON, MASSACHUSETTS
AUGUST 26, 2008

Sincerely,

ANTI-DEFAMATION LEAGUE
BY ITS ATTORNEYS



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CERTIFICATE OF SERVICE

I, undersigned counsel, do hereby certify that on August 25, 2008, I served copies of the attached letter by first class mail, postage prepaid, upon the following:

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DATED: BOSTON, MASSACHUSETTS
AUGUST 26, 2008



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