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U.S. SUPREME COURT ADDRESSES RELIGIOUS ACCOMMODATION IN THE WORKPLACE

Employees and job applicants are protected from discrimination and harassment because of religion by both Title VII of the Civil Rights Act of 1964 and by the Equal Employment Opportunity Commission ("EEOC"). Religious discrimination in the workplace involves treating an applicant or employee unfavorably "because of" his or her religion. The term "religion" includes not only religious beliefs, but also any aspects of religious observance and practice. An employer may be liable for discriminating against an employee's religious observances and practices unless the employer is able to show that it cannot reasonably accommodate the employee's religious practices without undue hardship.

EEOC v. Abercrombie & Fitch Stores, Inc.

On June 1, 2015, the U.S. Supreme Court issued its opinion in *EEOC v. Abercrombie & Fitch Stores, Inc.*, a case in which the EEOC filed a lawsuit against Abercrombie on behalf of Samantha Elauf, a practicing Muslim who, consistent with her religious beliefs, wears a headscarf. The EEOC alleged that Abercrombie violated Title VII when the company failed to hire Ms. Elauf. The primary issue there was whether an employer can be liable under Title VII for failing to accommodate a religious practice even if the employer does not have actual knowledge of the need for an accommodation.

The following facts were relevant to the Supreme Court's discussion and decision. Ms. Elauf applied for a position in an Abercrombie store and was interviewed by the assistant manager. After the interview, Ms. Elauf was given a rating that would have qualified her to be hired by Abercrombie, but the assistant manager was concerned that the headscarf would violate Abercrombie's "Look Policy," i.e. a neutral dress code. Although neither the headscarf nor the Look Policy was mentioned during the interview, the assistant manager later expressed her belief that Ms. Elauf wore the headscarf because of her religious faith. The assistant manager was ultimately instructed not to hire Ms. Elauf because the headscarf would violate the Look Policy.

To support Ms. Elauf's Title VII claim, the EEOC was required to show that Abercrombie: (1) "fail[ed] … to hire" Ms. Elauf (2) "because of" (3) her religious beliefs or practices. The primary issue addressed by the Supreme Court was whether the "because of" standard requires an employer to have "actual knowledge" of the applicant's need for an accommodation. Finding that an "actual knowledge" requirement is inconsistent with the statutory language, the Supreme Court concluded that "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." Title VII "prohibits certain *motives*, regardless of the state of the actor's knowledge," and an employer "who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be need."

The Supreme Court did not elaborate on what level of awareness an employer must have of the need for an accommodation before it can be liable under Title VII, although the Court did state in a footnote that "it is arguable that the move requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice." It still seems likely that, in many cases, employees or prospective employees who are unable to demonstrate that their employers had actual knowledge of their need for a religious accommodation will be unlikely to succeed on the merits. In attempting to predict how other courts may interpret and apply the Supreme Court's decision, it is important to keep the facts at issue in *Abercrombie* in mind. Most particularly, the assistant manager who interviewed Ms. Elauf acknowledged her belief that the headscarf was worn for religious reasons. As addressed below, one of the key takeaways from *Abercrombie* for employers is how important it can be to communicate company policies during the hiring process and to ask prospective employees whether those policies present any issues.

Recommendations for Employers

In light of the *Abercrombie* decision, which puts employers in a delicate position with respect to the religious beliefs and practices of their employees and prospective employees, employers should ensure that their hiring managers are up to date on company policies, including dress codes, and that they are able to elicit information from applicants necessary to determine whether an accommodation will be required without asking about the prospective employee's religious beliefs. Because questions regarding religious beliefs and practices are generally off limits during the job application process, employers should focus on the applicant's ability to perform job duties and fulfill job requirements. One way to address the potential need for religious accommodations with applicants is to provide a list of job duties and requirements, as well as company policies. If Ms. Elauf had been told about the Look Policy, it would have at least been possible to have a conversation regarding whether she could comply with the policy and, if not, whether Abercrombie could accommodate her religion without undue hardship. However, because the employment decision was made without communicating the policy, that conversation never happened. As shown by *Abercrombie*, the failure to take such basic steps has the potential to result in litigation that could otherwise be avoided.

If you have questions, please contact Denis Jacobson at (336) 271-5242 or Richard Andrews at (336) 271-5219 in the Labor & Employment Law practice group.