How the Case of EEOC v. Abercrombie & Fitch Changes the Religious Accommodation Landscape

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The issue of accommodation of religious beliefs and practices in the workplace has come front and center with the Supreme Court's landmark decision in the case of *EEOC v. Abercrombie & Fitch Stores, Inc.,* __ U.S. __ (June 1, 2015). This article traces the history of this case and explains its implications for employers, employees, and attorneys.

The EEOC files suit.

The EEOC filed suit on behalf of a Muslim, Samantha Elauf, who wore a hijab (headscarf) in accordance with her religious beliefs. She applied for a job with Abercrombie & Fitch, which had a "Look Policy" that prohibited the wearing of caps. When she interviewed for the job she wore a headscarf. She received good marks from the assistant manager who interviewed her. Before offering her the job, however, the assistant manager decided to check with a district manager to ask whether the headscarf violated the company's "Look Policy." When the district manager told the assistant manager that it violated the policy, the assistant manager stated that he believed Elauf was a Muslim and that she wore the headscarf for religious reasons. The assistant manager recommended that Elauf be hired. The district manager, however, ordered the assistant manager to lower her score in the category of "appearance and sense of style" and not to hire her.

Elauf then filed a Charge of Discrimination with the EEOC.

How the case wound up in the Supreme Court.

The EEOC alleged that Abercrombie & Fitch had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) ("Title VII"), by refusing to hire Elauf because she wore a headscarf and by failing to accommodate her religious beliefs by making an exception to its "Look Policy." The District Court granted summary judgment to the EEOC on liability, finding that the EEOC had made out a *prima facie* case of religious discrimination despite the failure of Elauf to have literally met the second criteria for a *prima facie* case, *i.e.*, the notification to the employer of a religious practice or belief. It found, in accordance with several Courts of Appeals, that the notice requirement was met when an employer has enough information to make it aware that the individual's religious belief or practice conflicted with a requirement for the job.

The Tenth Circuit Court of Appeals, in a 2-1 decision, reversed and granted summary judgment in favor of Abercrombie & Fitch. The Tenth Circuit concluded that there could be no violation of Title VII based upon religious belief or practice unless the applicant or employee gave the employer explicit, verbal notice of a religious conflict so that the employer would have particularized, actual knowledge of the key facts necessary to trigger a duty to accommodate. By an evenly divide vote, the Court of Appeals denied a hearing *en banc.*

The U.S. Supreme Court granted the EEOC's petition for *certiorari* and heard oral argument on February 25, 2015.

The Supreme Court finds against Abecrombie and Fitch.

In an 8-1 decision written by Justice Scalia, the Supreme Court ruled in favor of the EEOC, finding that Abercrombie & Fitch was not entitled to summary judgment because Title VII does not require that an employer have actual knowledge of a conflict between an employee's or potential employee's religious practice and an employer's policy.

The Court noted that Title VII prohibits an employer from refusing to hire an applicant in order to avoid accommodating a religious practice or belief that it could accommodate without undue hardship. The issue before the Court was whether this prohibition applies only when an applicant has informed the employer of his/her need for an accommodation.

Abercrombie & Fitch argued that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. The Court disagreed, finding that an applicant could show disparate treatment by showing that his/her need for an accommodation was a "motivating factor" in the employer's decision, even where that need for an accommodation was never confirmed by the employer.

The Court explained that even an "unsubstantiated suspicion" of the applicant's belief or practice was sufficient to establish a violation so long as it could be proven that the avoidance of an accommodation was a motivating factor in the decision to refuse to hire the applicant. An employer simply may not consider the employee's religious practice as a factor in its employment decision unless accommodating the religious practice would constitute an "undue hardship." 42 U.S.C. § 2000e(j).

The example used by the Court was a case of an employer who thinks, though does not know for certain, that a job applicant may be an Orthodox Jew who observes the Sabbath, and will be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in its decision, the employer violates Title VII.

Finally, the Court rejected Abercrombie's argument that a facially neutral policy, such as a "no cap" rule for anyone, regardless of religion, could not violate Title VII's prohibition on intentional discrimination. Rather, the Court specifically found that Title VII required religious practices to be given "favored treatment," requiring employers not to fail to hire or discharge any individual because of the individual's sincerely held religious belief or practice. Therefore, the Court concluded that Title VII requires "neutral policies," such as a "no cap" rule to give way to the need for an accommodation.

Lessons learned from *Abercrombie and Fitch*.

First, employers need to ensure that those involved in making employment decisions, particularly in the hiring process, fully understand that they cannot simply rely on company policy to avoid hiring an individual who they suspect may have a religious practice that conflicts with a work policy. This is true even where, as in *EEOC v. Abercrombie & Fitch*, the policy was facially neutral with respect to religion.

The next step, however, is a bit tricky, and generally will require a case by case review, ideally with consultation with HR or counsel. Suppose an applicant has a beard and the employer suspects this is for religious reasons. One option would be for the interviewer to advise the applicant that the employer has a policy of no beards, and to ask the bearded applicant if the applicant is able to meet that requirement. If the employee says he wears the beard for a religious reason, then the employer cannot refuse to hire the applicant because of the beard unless such an accommodation would present an "undue hardship." The employer would normally be obligated in such circumstances to discuss with the applicant the possibility of a reasonable accommodation.

One of the problems with this option, however, is that although the above question to the applicant would be permissible, the interviewer is not free in the first instance to ask the employee directly about the employee's religious beliefs and practices. Therefore, an inappropriate inquire could lead to a discrimination charge. If this option is chosen, interviewers would have to be carefully trained in what they can and cannot ask the applicant and when they can ask it.

Another option where the employer suspects that an applicant may have a religious practice that conflicts with a work policy is to totally disregard that factor in making the decision as to whether or not to hire the individual. Then, if the employee is hired and at that point informs the employer of a religious practice or belief that conflicts with a work policy, the employer could then engage in discussions with the employee to determine if there can be a reasonable accommodation.

In view of the potential land mines, the best option may just be to have the interviewer speak to HR or counsel on how to proceed whenever the interviewer perceives an issue involving a religious belief or practice that could conflict with a work policy.

One other interesting development in this case is the Court's finding that the applicant/employee's burden of proof in these types of religious accommodation cases is one of showing that the religious practice or belief was a "motivating factor." Thus, the Court adopted the mixed-motive burden of proof standard set forth in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) rather than the burden of proof scheme in pretext cases set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

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