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Legal Update

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DRESS CODES AND RELIGIOUS ACCOMMODATION AFTER *EEOC V. ABERCROMBIE & FITCH*

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Last month, the U.S. Supreme Court ruled the clothing company, Abercrombie & Fitch Stores, Inc. (Abercrombie), violated federal antidiscrimination law when it refused to hire a Muslim job applicant whose headscarf—a hijab—conflicted with the company's dress code. The decision confirms that employers may not use a job applicant's religious practice as a factor in employment decisions.

The Background Facts in *EEOC v. Abercrombie & Fitch*

Samantha Elauf had applied for a position in an Abercrombie store. She received a rating that qualified her to be hired by the assistant store manager who had interviewed her. The assistant store manager was concerned, however, that Elauf's hijab would conflict with Abercrombie's dress code. Abercrombie's "look policy" prohibited employees from wearing "caps." After seeking guidance from her store manager, as well as her district manager, the assistant store manager ultimately decided not to hire Elauf, believing that Elauf's headscarf or any other headwear—religious or otherwise—would violate company policy. The Equal Employment Opportunity Commission (EEOC) then sued Abercrombie on Elauf's behalf, claiming religious discrimination.

Federal Law Prohibiting Religious Discrimination in the Workplace

Title VII of the Civil Rights Act of 1964 (Title VII) generally prohibits employers from employment discrimination based on an individual's religion, race, color, sex, or national origin. Title VII defines religion to include "all aspects of religious observance and practice, as well as belief." Title VII does provide an exception for employers who can demonstrate that they are "unable to reasonably accommodate" an employee's or a prospective employee's "religious observance or practice without undue hardship on the conduct of the employer's business." Title VII thus prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship.

The U.S. Supreme Court's Decision

Although Elauf wore her hijab to the interview, she did not mention her religion or hijab and did not request an accommodation with respect to Abercrombie's dress code. Abercrombie argued that an applicant could not prove religious discrimination without first showing that Abercrombie had "actual knowledge" of the applicant's need for a religious accommodation. The Supreme Court rejected this argument, finding that Title VII's protections for religion do not impose a knowledge requirement.

Instead, the Court ruled that a job applicant needs to show only that her need for a religious accommodation was a motivating factor in the employer's decision. The Court further emphasized the difference between an employer's motive and its knowledge. Thus, the Court explained that an

employer who has actual knowledge of the need for a religious accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not the employer's motive. Conversely, an employer who acts with the motive of avoiding religious accommodation may violate Title VII even if the employer has no more than an unsubstantiated suspicion that an accommodation would be needed.

Lessons for Employers

The Supreme Court's decision makes clear that employers may not make a job applicant's religious practice—confirmed or otherwise—a factor in employment decisions. For example, an employer may think (but not know for certain) that an applicant may be an orthodox Jew who will observe the Sabbath and 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 accommodation is a motivating factor in his decision, the employer will violate Title VII, absent proof of an undue hardship.

Accordingly, employers should avoid stereotyping job applicants in the interviewing and hiring process, with or without actual knowledge of the applicants' religious observances, practices, or beliefs. In *EEOC v. Abercrombie*, the assistant store manager, the store manager, and the district manager all failed to understand the employer's responsibilities with respect to religious accommodation. The case illustrates the importance of training managers at all levels who may be involved in the hiring process. Employers should:

- focus on whether the applicant can do the job during the interviewing and hiring process;
- train managers to recruit and hire based on objective factors and job duties;
- inform hiring managers of the employer's obligations to make reasonable accommodations;
- review the company's anti-discrimination/anti-harassment trainings for managers and employees and schedule new or refresher training courses as necessary;
- update employee handbooks or other image-based policies that dictate dress code or discuss employees' appearance to be consistent with applicable law and *EEOC v. Abercrombie*;
- consider including language in employee handbooks regarding the employer's commitment to being an EEO employer and providing religious accommodation; and
- consult with counsel prior to making an employment decision when a job applicant or employee may require a religious accommodation.

Conclusion

The Supreme Court's decision reminds employers that an employer may be liable for religious discrimination even if an employee does not make a request for religious accommodation and the employer does not know for certain that an employee's religious practice exists. While an employer is entitled to have a general "no headwear" policy as an ordinary matter, an employer may be required to accommodate an individual's religious observance or practice even under an otherwise neutral policy.

Employers may also need to be aware of other applicable laws prohibiting religious discrimination. For example, the Illinois Human Rights Act prohibits employers with 15 or more employees in Illinois from engaging in unlawful religious discrimination. The Cook County Human Rights Ordinance also prohibits employers with one or more employees, who have their principal place of business within

Cook County or who do business within Cook County, from refusing to make "all reasonable efforts" to accommodate the religious beliefs, observances, and practices of employees or prospective employees unless the employer demonstrates that it is unable to reasonably accommodate such religious observance or practice without undue hardship. The City of Chicago Human Rights Ordinance similarly prohibits religious discrimination in employment decisions. Employers should consult with counsel to ensure that their interviewing and hiring processes comply with all applicable federal, state, and local laws.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Jon Vegosen 312.701.6860 jvegosen@fvldlaw.com, Cecilia M. Suh 312.701.6841 csuh@fvldlaw.com, or your regular FVLD contact.

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