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EEOC v. Abercrombie & Fitch Stores, Inc.: United States Supreme Court Holds an Employer May Be Liable for Failure to Accommodate Religious Practice Absent Actual Knowledge of Any Need for Accommodation

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Title VII of the Civil Rights Act prohibits employers from intentionally discriminating against employees based on their religion. 42 U.S.C. § 2000e–2(a). In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court addressed the question of whether an applicant can show disparate treatment (*i.e.*, intentional discrimination) without first showing that an employer had "actual knowledge" of the applicant's need for a religious accommodation. In an opinion joined by seven justices, the Court found that "actual knowledge" is not necessary so long as the employer was motivated by a desire to avoid religious accommodation.

By separating motive from actual knowledge, the Court expanded employers' responsibility to offer religious accommodations, even when employees do not request such accommodation — and even when employers have nothing more than "an unsubstantiated suspicion" that such accommodation is, in fact, needed. The Court also affirmed that Title VII protects an employee's religious practices just as strongly as it protects an employee's religious beliefs. The Court's decision opens the door for employees to claim intentional discrimination absent evidence that their employers actually knew of any needed religious accommodation.

Background

Defendant Abercrombie & Fitch Stores had a Look Policy, which governed employees dress as part of Abercrombie's efforts to maintain a particular image. The Look Policy prohibited employees from wearing "caps," but the policy did not define what constituted a cap.

Samantha Elauf was a practicing Muslim who wore a headscarf as part of her religious practice. She applied for a position at an Abercrombie store and was interviewed by Heather Cooke, an assistant manager. Cooke rated Elauf as qualified for the job but was concerned about Elauf wearing a headscarf. Cooke previously had seen Elauf, always wearing a headscarf, and Cooke believed that Elauf wore the headscarf because of her religious beliefs. Cooke, however, did not inquire whether Elauf wore the headscarf for religious reasons nor did Elauf volunteer any information about her reasons for wearing the headscarf.

Cooke sought guidance about whether Elauf could be employed under Abercrombie's Look Policy, first asking the store manager and then the district manager. The district manager told Cooke that Elauf's headscarf violated Abercrombie's Look Policy and directed Cooke not to hire Elauf.

The EEOC sued Abercrombie on Elauf's behalf, alleging that Abercrombie's refusal to hire Elauf violated Title VII. The EEOC prevailed on summary judgment and was awarded $20,000 after a trial on damages. Abercrombie appealed, and the Tenth Circuit Court of Appeals reversed and awarded summary judgment to Abercrombie. The Tenth Circuit concluded that an employer cannot be liable under Title VII for failure to accommodate a religious practice if the employee does not provide actual notice of the need for accommodation.

The Supreme Court Holds that Title VII Does Not Require Actual Knowledge that an Accommodation is Needed, Only a Motive to Avoid Accommodation

The central question that the Supreme Court confronted was whether Abercrombie refused to hire Elauf "because of" her religious practice. Title VII protects employees whenever "a protected characteristic is a 'motivating factor' in an employment decision."

Focusing on this "motivating factor" language, the Court found that Title VII "does not impose a knowledge requirement." In contrast to the American with Disabilities Act of 1990 which specifies that employers must provide reasonable accommodations for "*known* physical or mental limitations," Title VII contains no knowledge reference or requirement. The key inquiry is what motivated the employer to act: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

The Court explained the distinction between motive and knowledge by positing two situations. In the first, the employer knows that the employee needs a religious accommodation but refuses to hire the applicant for other reasons. In the second, the employer refuses to hire based on a desire to avoid providing an accommodation, even though the employer does not know for certain that an accommodation is needed. The first employer is not liable under Title VII even though the employer had actual knowledge of the needed accommodation. The second employer, however, is liable because it was motivated by the desire to avoid accommodation, despite not knowing if the accommodation was needed. The only limitation on the second employer's liability is whether the potential employee actually needed a religious accommodation.

In an important footnote (footnote 3), the Court expressly stated that it was not deciding the question of whether an employer could be held liable in the absence of *any* knowledge regarding an employee's needed religious accommodation. The Court suggested that some knowledge is needed: "it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice — *i.e.*, that he cannot discriminate 'because of' a 'religious practice' unless *he knows or suspects it* to be a religious practice." (Emphasis added.) The Court's implicit finding is that an employer at least must have an "unsubstantiated suspicion" about the need for accommodation in order for liability to attach. The decision, however, does not expressly create such a floor and thus leaves open the possibility that an employer who does not even suspect that a practice is religious may be liable for intentional discrimination.

Religious Practices Given the Same Protections as Religious Beliefs

In an important but undeveloped side note to its main decision, the Court held that Title VII protects an employee's religious practices, not only the employee's religious beliefs. Abercrombie argued that the EEOC should have asserted a "disparate impact" claim, not a "disparate treatment" claim. In short, argued Abercrombie, Title VII does not prohibit an employer for prohibiting a religious practice; it prohibits the disparate impact that a facially-neutral policy may have on employees with certain religious beliefs. The Court disagreed.

The Court held that Title VII protects religious beliefs and religious practices equally. "[R]eligious practice is one of the protected characteristics that cannot be accorded disparate treatment and *must be accommodated*." (Emphasis added.) While the Court did not fully flesh out the impacts of this holding,

the Court stated that this rule requires employers to give "favored treatment" to religious practices and that "Title VII requires otherwise-neutral policies to give way to the need for accommodation."

Practical Impact and Takeaways

The majority in *EEOC v. Abercrombie* clearly saw their decision as a straightforward application of Title VII. Indeed, the decision is unremarkable insofar as it holds that intentional discrimination requires a causal link between the employer's state of mind and the adverse employment action, *i.e.*, the prohibited reason (here, the need for accommodation) must have motivated the employer's decision.

However, the decision is remarkable — and raises far more questions than it answers — insofar as it holds that an employer somehow can be motivated by (and thus liable for) intentional religious discrimination even if it has no knowledge, or does even not suspect, that a particular practice is religious. In footnote 3, the Court seemed to acknowledge that motive cannot be divorced entirely from knowledge. But by refusing to address the issue directly, the Court failed to give much-needed guidance on what level of proof will be required to establish an employer's motive in the absence of actual knowledge. An employer that is able to demonstrate it genuinely had no knowledge or suspicion of the need for accommodation likely will be able to foreclose liability, but most cases will involve closer and arguably more fact-specific questions about context and what the employer should have known or suspected. It remains to be seen how lower courts will work through these issues.

The practical implication is that employers now are open to a variety of discrimination claims even when an employee does not request an accommodation or specifically notify an employer of potential conflicts with religious practices. Employers will need to walk a narrow path. On the one hand, employers may be liable for disparate treatment religious discrimination if they fail to accommodate unknown or merely suspected religious practices. On the other hand, employers may open themselves up to liability for disparate treatment by asking direct questions about an applicant's religious beliefs or practices, or need for accommodation. Employers should consider indirect ways of eliciting whether applicants need a religious accommodation, for example, asking generally whether they can comply with appearance or dress code policies with or without an accommodation. In addition, employers should evaluate their appearance and dress code policies for possible conflict with their obligation to accommodate religious practices.

Employers should take this opportunity to reexamine their anti-discriminatory policies, particularly as regards accommodation for religious practices. Employers also will need to train their human resources personnel and hiring managers to be mindful of potential religious accommodation needs, even when not specifically requested by employees, and ways to address questions about potential needs in a respectful, non-discriminatory manner.

If you have questions about *EEOC v. Abercrombie* or its effect on your policies or practices, please contact us.