

Headscarf Headache: Supreme Court Considers EEOC’s Case Against Abercrombie

*By Stephen E. Fox and Jonathan Clark of Polsinelli – (March 11, 2015) – At the beginning of the closely-watched oral argument in the matter of the *EEOC v. Abercrombie and Fitch Stores, Inc.* (heard on Feb. 25, 2015), U.S. Supreme Court Justice Antonin Scalia wondered, “What is the difference between knowing and correctly understanding?”*



Stephen E. Fox

While a bit arcane, that question lies at the heart of the case—when does an employer “know” that an applicant has a need for a reasonable religious accommodation (such that refusal to accommodate imputes liability onto the employer)?

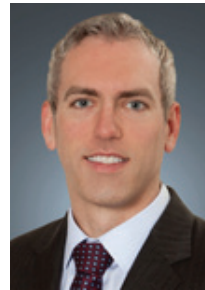
Specifically, the Court was asked to decide whether actual notice to the employer is required to trigger an accommodation obligation, or is something less than actual notice sufficient to trigger the duty to consider accommodations?

Title VII of the Civil Rights Act prohibits discrimination, harassment, and retaliation based on an employee’s religion. “Religious belief” is defined as a belief that is both “religious” in the employee’s own scheme of things and sincerely held by the employee. Thus, the law’s protection extends beyond “traditional” religions.

Title VII also requires employers to “reasonably accommodate” religious beliefs, practices, and observances unless “undue hardship” would result. In this context, the term “undue hardship” means expending more than a minimal effort or expense. This standard is very employer-friendly.

Abercrombie and Fitch is an iconic multi-national clothing brand with hundreds of stores

throughout the United States. The company follows a “Look Policy” that requires employees maintain a certain type of appearance consistent with the retailer’s “hip” image, prohibiting, among other things, employees from wearing “caps” while working.



Jonathan Clark

In 2008, Samantha Elauf—then 17 years old—applied for a job at an Abercrombie location in Tulsa. Elauf is Muslim and claims to have worn a headscarf (also known as a hijab) for years for religious reasons.

During the job interview, to which she wore the headscarf, Elauf said nothing to Abercrombie about the fact that she was Muslim. She did not bring up the subject of the headscarf, or say that she wore it for religious reasons, that she felt a religious obligation to do so, or that she would need an accommodation from the retailer’s “Look Policy.”

However, the store manager who interviewed Elauf testified that she believed the headscarf indicated Elauf was a Muslim and wore the head covering for religious reasons. After the interview, a district manager instructed the store manager not to hire Elauf on the basis that the clothing violated the company’s Look Policy.

While the district manager acknowledged that he instructed the store manager not to hire Elauf because her headscarf violated the Look Policy, he denied knowing that Elauf’s headscarf was religious.

The EEOC brought suit on Elauf’s behalf, alleging that Abercrombie had violated Title VII by refusing to hire her because she wore >

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a headscarf and failing to accommodate her religious beliefs by creating an exception to the Look Policy.

The lower court entered summary judgment for the EEOC, holding that the EEOC had presented evidence sufficient to establish that Abercrombie had notice of the religious nature of Elauf's headscarf when the company refused to hire her and, even if it did not, explicit and direct notice of a religious conflict was not a prerequisite for protection under Title VII.

The U.S. Court of Appeals for the Tenth Circuit reversed and awarded summary judgment for Abercrombie.

The Court held that the burden is squarely on the applicant/employee to advise the employer that she has a religious practice that conflicts with a job requirement, because religion is an inherently individual matter, and she is uniquely qualified to know those personal religious beliefs and whether an accommodation is necessary.

The court rejected the EEOC's argument that the employer has a duty to attempt reasonable accommodation when the employer has notice from any source that the applicant or employee has a religious belief that conflicts with a job requirement.

At the Supreme Court, the EEOC argued Title VII bars an employer from refusing to hire an applicant based on what the employer "correctly understands" to be the applicant's religious practice—and that explicit, direct, and verbal notice from the employee is not a statutory requirement.

Further, the EEOC argued that Tenth Circuit's reasoning was flawed because—while an applicant has a superior understanding of her religious practices—it is the **employer** who has superior knowledge of the actual company policies that may infringe on the applicant's religious practice and require accommodation.

Thus, in some cases only the employer will know that an applicant's religious practice may conflict with work rules. Stated another way, how should an applicant know that she must seek a religious accommodation from her employer if she does not know the policy she will need an accommodation from?

Abercrombie argued that the EEOC could not establish any "intentional discrimination" because the Look Policy was a facially neutral work rule that did not differentiate between any religious practices. Rather, the policy treated all headwear—religious and non-religious—alike. Accordingly, Elauf was not entitled to recover \$20,000 in compensatory damages because such damages are only available to victims of intentional discrimination.

Second, Abercrombie suggested that the EEOC's "correctly understood" standard would be impractical and require employers to either stereotype or intrusively prod into applicants' religious beliefs and practices in order to ensure that proper accommodations are made.

At argument, many of the justices appeared skeptical of Abercrombie's position that only actual knowledge from the applicant of the religious belief was adequate to put the employer on notice of the duty to accommodate.

Noting that Elauf was not told the specifics of the "Look Policy" dress code during the interview, many justices suggested that Abercrombie, as the employer, had superior knowledge of its work rules and, therefore, should be charged with knowledge of the employee's probable need for an accommodation based upon what it observes during the interview.

Justice Kagan—during a back-and-forth exchange with Abercrombie's lawyer Shay Dvoretzky—was particularly dismissive of Abercrombie's position, stating that the company was "essentially saying that the problem with the rule is that it requires Abercrombie to engage >

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in what might be thought of as an awkward conversation ... but the alternative to that rule is a rule where Abercrombie just gets to say, ‘We’re going to stereotype people and prevent them from getting jobs. We’ll never have the awkward conversation because we’re just going to cut these people out.’”

Only Justice Scalia appeared to fully endorse the company’s position, concluding that the Tenth Circuit’s rule avoids problematic situations by making clear that, “if you want to sue me for denying you a job for religious reason, the burden is on you to say, ‘I’m wearing the head scarf for a religious reason.’”

However, even the Court’s more liberal justices—concerned about what level of notice, short of an actual statement from the applicant would be sufficient—asked the EEOC to define what level of notice would be adequate to put the employer on notice of the need for an accommodation.

It appeared that the Justices found the EEOC’s answers less than compelling.

Inferring from oral argument which way the Supreme Court will decide a case is like predicting the stock market—an iffy proposition at best. Regardless of which side wins, though, the Court’s decision as to what notice triggers the duty to explore religious accommodation is likely to provide welcome guidance for both employers and workers alike.

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