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## What Matters is Motive: Religious Accommodation Need as a “Motivating Factor” in Employment Decisions

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The U.S. Supreme Court’s decision in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*<sup>1</sup> resulted in an expected outcome but provided an unexpectedly small amount of practical guidance for employers. The Court held that to avoid summary judgment in a religious accommodation case, a job applicant with a bona fide need for religious accommodation must prove only that a prospective employer’s desire to avoid the accommodation was a motivating factor in its decision not to hire her. She need not prove the employer had actual knowledge of her need for religious accommodation. In an 8-1 decision, the Court definitively establishes:

- Title VII “affirmatively obligates” employers to make exceptions to neutral employment policies to accommodate employees’ religious beliefs and practices;
- A failure to make such an exception is a form of disparate treatment: it is **intentional** discrimination “because of” religious practice;<sup>2</sup>
- The U.S. Court of Appeals for the Tenth Circuit erred when it inserted an “actual knowledge” requirement into Title VII’s prohibition against disparate treatment on the basis of religious practice; and
- An employer who makes an employment decision “**with the motive of avoiding [a religious] accommodation**” violates Title VII, even if the applicant or employee needing accommodation never requested accommodation **and** the employer lacks actual knowledge that accommodation is needed because of religion.

But the decision provides no explicit practical guidance to employers about how best to handle a suspicion that a particular candidate may need a religious accommodation to do a job. Instead, the Court simply says:

Thus the rule for disparate treatment claims based on a failure to accommodate a religious practice is straightforward. An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in

<sup>1</sup> *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, No. 14-86 (U.S. June 1, 2015).

<sup>2</sup> *Abercrombie*, slip op. at 6-7. An employer can, of course, prove the affirmative defense of undue hardship in a Title VII case by demonstrating that accommodation would place more than a de minimis burden on its business. *Transworld Airlines v. Hardison*, 432 U.S. 63 (1977) (interpreting 42 U.S.C. §2000e(j) and establishing a “de minimis” standard for undue hardship in Title VII religion cases). But the *Abercrombie* decision “for brevity’s sake” discusses the accommodation requirement “as though it is absolute.” *Abercrombie*, slip op. at 3, n.1.

employment decisions. For example, suppose that an employer thinks (although he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus 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 his decision, the employer violates Title VII.<sup>3</sup>

Unfortunately, as explained below, the facts of *Abercrombie* allowed the Court to cease its analysis before explaining what sort of fact pattern—other than an unheeded request for accommodation or a manager's admission—might form a sufficient basis from which to infer improper motivation for an employment decision. Accordingly, while some best practices are articulated below, a discussion of the specific facts *Abercrombie* presents is warranted.

## What Happened in *Abercrombie*?

**The Interview.** The *Abercrombie* case began when a young Muslim woman interviewed for a salesperson/model job at defendant's store wearing a hijab (headscarf) that covered her hair but not her face, neck or shoulders. The hiring manager testified she assumed the applicant was Muslim when she interviewed her because of her headscarf. There was some discussion about the defendant's dress and grooming requirements in the interview, but neither the hiring manager nor the applicant mentioned the scarf. The manager thought the applicant was a good candidate for the position, but she did not know if the applicant could work for defendant while wearing a scarf. She consulted her district manager, advising him that she had a Muslim applicant who had worn a headscarf to her interview. The district manager, who claimed the hiring manager did not mention the candidate was Muslim, said the defendant could not make any exceptions to defendant's "Look Policy," which prohibited employees from wearing "caps" in the workplace. He testified he would have said the same thing if he had known the religious reason for wearing the scarf. The hiring manager never called the applicant back.

**The District Court.** The EEOC sued on applicant's behalf, claiming failure to accommodate. Both sides moved for summary judgment. Among other things, the defendant argued the EEOC failed to establish a *prima facie* case of discrimination because the applicant had not explicitly requested a religious accommodation.<sup>4</sup> While recognizing the Tenth Circuit had not yet held whether something other than a direct, explicit request from an employee or applicant could trigger the duty to accommodate, the district court relied on cases from the Eighth, Ninth, and Eleventh Circuits and the Southern District of Florida to conclude the duty to accommodate arises when the employer has enough information, either from the employee or applicant or from some other source, to be aware a conflict exists between the employee's or applicant's religious observance or practice and a job requirement.<sup>5</sup> The district court found that the hiring manager's testimony demonstrated she had adequate notice of the applicant's need from the applicant's appearance at the interview. No formal request was necessary. After drawing this conclusion, the district court rejected the defendant's undue hardship defense and granted the EEOC summary judgment on liability, leaving nothing to resolve except damages. The applicant had obtained another, higher-paying job, so back pay was not at issue. A jury awarded \$20,000 in compensatory damages.

**The Tenth Circuit.** The U.S. Court of Appeals for the Tenth Circuit not only reversed the grant of summary judgment to the EEOC, but it also ordered the district court to grant summary judgment to the defendant. The court's opinion focused entirely on the second prong of the plaintiff's *prima facie* case:

In reaching our conclusion that [the company] is entitled to summary judgment, we resolve a question vigorously contested by the parties; specifically, whether, in order to establish a *prima facie* case under Title VII's religion-accommodation theory, a plaintiff ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that

<sup>3</sup> *Abercrombie*, slip op. at 5.

<sup>4</sup> Historically, to establish a *prima facie* case of religious discrimination based on failure to accommodate, a plaintiff has been required to demonstrate he or she: (1) has a bona fide religious belief that conflicts with an employment requirement; (2) informed his or her employer of the conflict; and (3) was disciplined, discharged, not hired, or subjected to some other adverse employment action for failing to comply with the conflicting requirement. See, e.g., *Lubetsky v. Applied Card Systems, Inc.*, 296 F.3d 1301, 1306 n.2 (11th Cir. 2002) (collecting cases from the Second, Third, Fourth, Fifth, Sixth and Ninth Circuits); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449 (7th Cir. 2013); *Antoine v. First Student, Inc.*, 713 F.3d 824, 831 (1st Cir. 2013); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989); *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 673 (8th Cir. 1985).

<sup>5</sup> *EEOC v. Abercrombie & Fitch, Inc.*, 798 F. Supp. 2d 1272, 1285 (N.D. Okla. 2011), rev'd, 731 F.3d 1106 (10th Cir. 2013) (citing *Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Brown v. Polk County, Iowa*, 61 F.3d 650, 654 (8th Cir. 1995) ("It would be hyper-technical ... to require notice of the Plaintiff's religious beliefs to come only from the Plaintiff"); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Hellinger, v. Eckard Corp.*, 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999)).

practice, due to a conflict between the practice and the employer's neutral work rule. We answer that question in the affirmative. Consequently, because [the applicant] did not inform [the company] prior to its hiring decision that she engaged in the conflicting practice of wearing a hijab for religious reasons and that she needed an accommodation for it, the EEOC cannot establish its *prima facie* case.<sup>6</sup>

The Tenth Circuit supported its conclusion with its own prior precedent, its interpretation of cases from other circuits, select language from EEOC regulations, and certain cases addressing the interactive process in the context of the Americans with Disabilities Act (ADA).

The Tenth Circuit's extremely detailed reasoning was, however, far less important than the starkness of its conclusion: an accommodation claim could not move past summary judgment unless the plaintiff personally informed the employer that he or she: (1) engaged in a particular practice; (2) did so *for religious reasons*; and (3) needed an accommodation to do (or continue to do) the job in question—in other words, that the practice was "inflexible" and conflicted with work.<sup>7</sup> An employer was neither expected, *nor allowed*, to assume—as the interviewer in the *Abercrombie* case did—that an employee's dress or grooming practice had a religious motivation and might need to be accommodated—even if the need for accommodation seemed obvious at the time of the interview.<sup>8</sup>

This strict notice requirement created a split in the circuits as the Eighth, Ninth, and Eleventh Circuits allow an applicant or employee to establish the second prong of a *prima facie* case of religious failure to accommodate if he or she can show the employer was aware of a conflict between the employee's religious practice and a job requirement, regardless of how or from whom the employer gathered the knowledge. Indeed, the Eighth Circuit described the level of notice required to meet the second prong of the *prima facie* case by saying, "[a]n employer need have 'only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'"<sup>9</sup>

## The Supreme Court. The EEOC sought certiorari on the following question:

[W]hether an employer can be liable under Title VII for refusing to hire an applicant or for discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.<sup>10</sup>

The Supreme Court answered the question presented in the negative. Justice Scalia, writing for the majority, began with the basic fact that Title VII's disparate treatment provision makes discrimination "because of" religion an unlawful employment practice.<sup>11</sup> An employee or applicant establishes the existence of such an unlawful employment practice if he or she demonstrates religion, which includes religious practice, was a "motivating factor" in an employer's decision.<sup>12</sup> However, unlike the ADA, Title VII does not "impose a knowledge requirement" on the decision-maker.<sup>13</sup> To the contrary, Title VII's intentional discrimination provision "prohibit[s] certain *motives*, regardless of the state of the actor's knowledge."<sup>14</sup> For example, a manager could know with certainty an applicant would need a religious accommodation, but decide not to hire the applicant for completely unrelated reasons. The same manager could merely suspect another applicant would need a religious accommodation and refuse to hire the applicant because he does not wish to go through the hassle of accommodating. Assuming the applicant really did need a religious accommodation, the manager with knowledge would not have violated Title VII, but the manager acting on his speculation would have violated the statute. In simplest terms, Title VII's "disparate treatment provision prohibits actions taken with the motive of avoiding the need for accommodating a religious practice. A request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability."<sup>15</sup>

6 *EEOC v. Abercrombie & Fitch LLC*, 731 F.3d 1106, 1122–23 (10th Cir. 2013).

7 *Abercrombie*, 731 F.3d at 1115–16, 1122, 1142–43.

8 *Abercrombie*, 731 F.3d at 1133–34.

9 *Brown*, 61 F.3d at 654.

10 Brief of Petitioner at (I); Brief of Respondent at Question Presented.

11 *Abercrombie*, slip op. at 3-4 (citing 42 U.S.C. §2000e-2(a)).

12 *Abercrombie*, slip op. at 4 (citing 42 U.S.C. §2000e-2(m)).

13 *Abercrombie*, slip op. at 4-5 (citing 42 U.S.C. §12112(b)(5)(A) as defining discrimination "to include an employer's failure to make 'reasonable accommodations to the known physical or mental limitations' of an applicant.")

14 *Abercrombie*, slip op. at 5.

15 *Abercrombie*, slip op. at 5-6.

In *Abercrombie*, the hiring manager **admitted** that the no-hire decision was based on a series of assumptions about a possible need for a religious accommodation. No inference of improper motive was necessary. By securing the admission, the EEOC demonstrated the applicant's need for accommodation was a motivating factor in the decision not to offer her a job. Accordingly, the Tenth Circuit erred in granting the company summary judgment.

Justice Scalia devotes the final paragraphs of the majority opinion to rejecting the company's alternative argument that religious accommodation should be treated as a matter of disparate impact rather than disparate treatment,<sup>16</sup> and stating in unequivocal terms that Title VII's religious accommodation provision "requires otherwise-neutral employment policies to give way to the need for an accommodation."<sup>17</sup>

## Where Do Employers Go From Here?

The only additional information Justice Scalia provides about how an applicant or employee who has been deprived of a reasonable accommodation would go about proving motive is in a footnote:

While a knowledge requirement cannot be added to the motive requirement, 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. That issue is not presented in this case, since *Abercrombie* knew—or at least suspected—that the scarf was worn for religious reasons. The question therefore has not been discussed by either side, in brief or oral argument. It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.<sup>18</sup>

The assertion about this point being unargued is curious in the wake of an oral argument that focused on multiple hypotheticals designed to ferret out exactly how an employer should react when an applicant presents in dress suggesting the need for religious accommodation. The above proclamation certainly leaves open more questions than it answers:

- Should the *prima facie* case for religious accommodation claims change?
- Exactly how much and what kind of motive evidence will a plaintiff need to escape summary judgment in the absence of either an explicit request for accommodation or an admission from a manager?
- To what extent will the employer's articulation of a legitimate non-discriminatory reason for hiring someone other than the applicant with a religious accommodation need trump evidence of improper motive?
- Should employers go out of their way to hire supervisors who are religiously illiterate in order to avoid accommodation claims based on what supervisors "suspected"?

The first three questions will need to be answered in future litigation, but we believe the fourth must be answered in the negative. To the contrary, while employers need not educate their managers on the finer points of religious beliefs and practices, they do need to educate them about the obligation to provide religious accommodation. Now is the time to foster a culture that is receptive to religious accommodation.

The *Abercrombie* decision leaves no doubt that Title VII requires employers to work actively to make exceptions to their neutral employment policies in order to accommodate religious practices. When faced with a possible need for accommodation, an employer needs to focus first and foremost on whether accommodation is possible—not how to avoid making the accommodation. And employers should turn to the issue of undue hardship only *after* considering reasonable accommodation possibilities. If an employer currently lacks a comprehensive policy on religious accommodation and a procedure for implementing the policy's assurances, now is the time to adopt both.

Managers charged with hiring for jobs in which many different types of religious dress and scheduling needs could be accommodated—**and that is most jobs**—need to be trained to think about a need for religious accommodation, whether known or suspected, the same way they think about an applicant's race, color, sex, or national origin—**as a non-issue**. If an applicant requests an accommodation during the interview, the manager needs to be prepared to ask only enough questions to understand the request and either make note of it for his or her own future post-hire consideration or pass on to Human Resources for further analysis.

<sup>16</sup> Justice Thomas' dissent demonstrates that he alone found this argument viable.

<sup>17</sup> *Abercrombie*, slip op. at 6-7.

<sup>18</sup> *Abercrombie*, slip op. at 6, n. 3.

If a manager suspects—based on the employee’s garb or some other non-verbal cue—that an employee may need a religious accommodation, the manager should be well informed about the obligation to provide such accommodation so that he or she can truthfully testify the suspicion was no more than a fleeting thought that did not impact the hiring decision. If the company selects another candidate, the manager or Human Resources should carefully document the legitimate, non-discriminatory reasons for the selection. Finally, either the manager or Human Resources should work hard to close the loop with each and every rejected candidate, providing appropriate, non-discriminatory reasons for the decision not to hire.

Hiring for jobs where common types of religious accommodation might be difficult or impossible poses a tougher challenge. While all of the principles articulated in the last two paragraphs remain true, the employer should take particular care in drafting both the job description and the posting for the position. For example, if the position requires an employee to work a minimum of eight hours between 9:00 a.m. and 5:00 p.m. each day of every weekend, and shift swapping, shift splitting, the use of paid time off and other similar accommodations are not viable options, then both the job description and the posting should clearly reflect these scheduling requirements.

The hiring manager should also consider specifically informing each applicant of the scheduling requirements during the interview and asking whether the applicant “has a problem” with them. Both Justice Alito and Justice Sotomayor used this question during the *Abercrombie* oral argument. Nothing in the Court’s opinion suggests it is inappropriate. If an applicant responds by raising a religious accommodation issue, the hiring manager needs to know what to do: namely, either speak briefly with the applicant about exactly what religious accommodation would be needed, or let the applicant know the manager will pass the need along to Human Resources for further consideration and follow up.

If the employer hires the applicant who has expressed a need for accommodation, then the groundwork will already be set for the accommodation process. If the employer does not select the applicant, then either the manager or Human Resources can reject the applicant, providing the true reason for the rejection, be it another’s superior qualification or the undue hardship involved with accommodating religion. Either way, the employer will have treated the applicant with respect and minimized any concerns about improper motivations.