



## Religious Discrimination: Analyzing the Oral Arguments In *EEOC v. Abercrombie & Fitch*

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On Feb. 25, the U.S. Supreme Court heard oral arguments in *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 14-86, a closely watched religious discrimination case. In practical terms, the Court's decision likely will focus on what level of knowledge an employer must have that an applicant's religious practice conflicts with a job requirement, and from what source, before the employer has to explore a religious accommodation. As employers await the decision, there are some steps they should take when faced with questions about a job applicant's religious practices.



### Headlines from the Oral Argument

The U.S. Equal Employment Opportunity Commission's petition for Supreme Court review framed the legal question like this: "Whether 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."

As the Court deliberates on the issue, questions include: Is it the employee's burden to notify the employer, as Abercrombie claims? Or is actual notice to the employer from *any* source — even if it is not the employee — enough? Or will the Court adopt the EEOC's position that even something less than the employer's actual notice is sufficient?

There are three headlines from the oral argument.

1. Many of the justices were openly skeptical of the retailer's assertion that only actual notice from the

applicant of the conflicting religious belief was sufficient to trigger a duty to explore a reasonable accommodation.

2. The justices grappled with precisely what level of notice, short of actual knowledge from the applicant, would be sufficient.
3. The Court wrestled with the practicalities — that is, how can the employer address the issue with the applicant without engaging in exactly the kind of religious stereotyping that Title VII of the Civil Rights Act of 1964 prohibits?

### 10-second Recap of the Facts

Muslim teenager Samantha Elauf had worn a headscarf for years for religious reasons when she applied for a sales position in a Tulsa Abercrombie store. She wore the hijab to her job interview, but did not talk about it. She did not tell Abercrombie that she was Muslim, that she wore the hijab for religious reasons or that wearing it was a religious requirement. She did not say that she would need an accommodation from the retailer's "Look Policy." But her interviewer assumed that Elauf was Muslim and wore the hijab for religious reasons and there was evidence that those assumptions influenced the decision not to hire Elauf.

### The Lower Courts' Opinions

A federal district court granted summary judgment for the EEOC, but the U.S. Court of Appeals for the 10th Circuit reversed and granted summary judgment to Abercrombie instead. The 10th Circuit held that the burden rests with the applicant to advise the employer of a religious practice that conflicts with a job requirement. The Court reasoned that religion is inherently individual, and that the applicant is uniquely qualified to know his or her personal religious beliefs and what accommodation might be needed. The Court expressly rejected the

**See *Religious Discrimination*, p. 2**

## **Religious Discrimination** (continued from p. 1)

EEOC's argument that the employer has a duty to consider reasonable accommodations once the employer has notice from *any* source that the applicant has a religious belief that conflicts with a job requirement.

### **Oral Argument: Skepticism for Abercrombie's Position**

Abercrombie's lawyer faced a tough crowd. Many of the justices were openly 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.

Justice Stephen Breyer expressed concern that the 10th Circuit's position gave the employer too much of a free pass, summarizing it this way: "Employer, unless you receive direct, explicit notice that what she wants to wear is based on religion and she wants an accommodation, unless you receive direct, explicit notice from her, you're home free to do what you want."

Justice Ruth Bader Ginsburg suggested that the employer's knowledge of its own work rules was inherently superior to the applicant's, asking, "How could [the applicant] ask for something when she didn't know the employer had such a rule?"

The skepticism was not limited to the Court's more liberal justices. Justice Samuel Alito challenged Abercrombie to "admit that there are at least some circumstances in which the employer is charged with that knowledge based on what the employer observes."

Justice Antonin Scalia was alone in offering a fulsome endorsement of the company's position. The 10th Circuit's rule "avoids all problems," Scalia said. "If you want to sue me for denying you a job for a religious reason, the burden is on you to say, I'm wearing the headscarf for a religious reason."

### **Oral Argument: Grappling With Exactly What Level of Notice Suffices**

Having seemed to discount the possibility that only actual notice from the applicant was sufficient to trigger the religious accommodation process, the justices used the argument to explore precisely what level of notice would be adequate.

Even the Court's more liberal justices pressed the EEOC to clarify what level of notice was adequate. Justice Elena Kagan asked the EEOC's counsel whether, if the employer is on notice of a duty to accommodate with "less than certainty, how much less than certainty is it?"

Breyer appeared to endorse the EEOC's position that "if the employer believes, thinks, this woman is religious and needs an accommodation and he's right," the employer would be obligated to explore an accommodation. However, at one point, Breyer said that he was "sort of interested" — hardly a ringing endorsement — in Abercrombie's counsel's suggestion during argument that the employer's knowledge would have to be, if not from the applicant, at least "traceable" to the applicant. But this idea was not explored in depth by either counsel or the Court.

### **Practical Nuts and Bolts**

The justices' questions revealed a desire to find a rule that would be practical to implement for both employers and applicants.

Abercrombie argued that the EEOC's position would promote just the type of stereotyping that the law prohibits. The retailer suggested that an employer faced with the EEOC's rule could only protect itself by "training their managers to stereotype about possible religious beliefs because a judge or jury might later find that ... an employer correctly understood, or must have correctly understood" that the applicant had a religious belief incompatible with a workplace rule. The concern about stereotyping seemed to resonate with at least Chief Justice John Roberts, who warned the EEOC's counsel that its position "may promote stereotypes to a far greater degree than what you're objecting to."

The justices used the argument to explore various scripts that an employer might use to broach the subject with an applicant. Justice Sonia Sotomayor suggested, "So why can't the employer just simply say, we have a Look Policy that doesn't permit beards. Can you comply with that policy?" That proposed question triggered some debate about whether a religious employee *can* comply with the policy, even if it makes the employee religiously uncomfortable. Alito then suggested a revised formulation: "Well, couldn't the employer say, we have a policy [of] no beards ... do you have any problem with that?" That idea seemed to gain some traction with at least Sotomayor and Ginsburg.

The justices make it sound easy, but the pitfalls for employers are many. The rule leaves the interviewer having to draw an on-the-spot inference from the way the employee looks — or possibly other markers, such as a last name — about the employee's potential religion, and which workplace rules might cause a conflict. There also is the risk that an applicant will misinterpret a reference

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**See *Religious Discrimination*, p. 3**

## **Religious Discrimination** (continued from p. 2)

to religious attire or grooming as evidence of a discriminatory animus against the applicant based on religion.

Breyer distilled the essence of Abercrombie's argument this way: "There are millions of people who are practicing one religion or another where you get a clue of that from their name or maybe their dress or whatever it is. And whenever we have such a person applying, if she doesn't say anything ... and we don't hire them ... we're going to get sued. ... [W]ithout that simple rule, tell us, we're going to be in a real administrative rat mess getting sued left, right and center." Abercrombie's counsel agreed that this just about summed it up.

### **What Are the Rules While We Await The Court's Decision?**

It is notoriously hard to infer from Supreme Court oral argument which way the Court will come down in its decision, but there was little in the argument to provide comfort to employers that the Court will affirm the 10th Circuit's decision.

Until the Court issues a decision, employers should continue to avoid asking applicants about religion, or making assumptions based on stereotypes. At the same time, an employer that has reason to believe that

accommodation may be necessary — even if applicant has not asked — should seek guidance from counsel who specializes in this area. Employers also should make sure to follow state or local religious discrimination laws, which can vary from federal law.

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