

Dos and Don'ts for Religious Accommodation in Hiring After EEOC v. Abercrombie

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INTRODUCTION

On June 1, 2015, in a 8-1 decision, the U.S. Supreme Court ruled for the Equal Employment Opportunity Commission in the religious discrimination case of *EEOC v. Abercrombie & Fitch Stores, Inc.*, holding that an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.

Human resources professionals are wondering: Now what? Read on for some practical "dos" and "don'ts" for hiring in the wake of the Supreme Court's ruling.

BACKGROUND TO THE SUPREME COURT'S RULING

Teenager Samantha Lauf, a Muslim who wore a headscarf for religious reasons, applied for a sales floor position in an Abercrombie store. At the job interview, to which she wore the headscarf,

Ms. Lauf said nothing about the fact she was Muslim. In the interview, she did not bring up the headscarf or say 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." But her interviewer assumed she was Muslim and wore the head-covering for religious reasons, and that influenced Abercrombie's decision not to hire her. The EEOC brought a religious discrimination suit on her behalf.

The district court granted summary judgment for the EEOC. The Tenth Circuit Court of Appeals reversed and granted summary judgment to Abercrombie. The Tenth Circuit held that the burden is on the applicant to advise the employer of a religious practice that conflicts with a job requirement because the applicant is uniquely qualified to know those personal religious beliefs and whether an accommodation is necessary. The appeals court rejected the EEOC's argument that the employer has a duty to attempt reasonable accommodation when the employer has notice of the conflict from any source.

The case then headed to the Supreme Court. The question in the high court was what level of knowledge an employer must



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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. Is it the employee's burden to notify the employer? Or is actual notice to the employer from any source — even if it is not the employee — enough? Or is even something less than the employer's actual notice sufficient?

THE SUPREME COURT'S DECISION

The Court recognized that Title VII prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that could be accommodated without undue hardship. As the Court framed the issue, the question before it was “whether this prohibition applies only where an applicant has informed the employer of his need for an accommodation.”

The Court rejected Abercrombie's argument that an applicant cannot show a violation of Title VII without first showing the employer had “actual knowledge” of the applicant's need for accommodation. Instead, the Court held that “an

applicant need only show that his need for an accommodation was a motivating factor in the employer's decision.”

The bottom line? “[T]he 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 employment decisions.”

DO UPDATE TRAINING

Update training programs to ensure hiring managers and interviewers learn best hiring practices. What questions are OKAY to ask, or not ask? How do you handle a religious accommodation request? When does a hiring manager bring in human resources or legal? Remind trainees there can be no retaliation against an applicant for having requested an accommodation.

DON'T ASK DIRECTLY ABOUT RELIGION

Many of the old rules still apply. Employers should NOT ask applicants directly about religion or religious practices and should NOT assume anything about an applicant's religion based on stereotypes.

DON'T STICK YOUR HEAD IN THE SAND

When the employer is aware of, or even suspects, a potential conflict between an applicant's religious practice and a work rule, from any source, the employer should explain the work rule and ask if the rule would pose any problem for the applicant. Let's say an applicant arrives to the interview wearing religious clothing that violates the employer's uniform policy. The employer should communicate the rule and ask if that rule would pose any issues for the applicant. This invites the applicant to disclose any conflict, but avoids a direct inquiry into the applicant's religion or religious practice.

DOS AND DON'TS

Here are some practical dos and don'ts following the Supreme Court's ruling.

Facial hair, long hair, head coverings, religious clothing or jewelry, tattoos, and body art are some personal attire or grooming practices that might be religious in nature, and apparent in an interview, and may also conflict with certain employers' policies on uniforms, grooming, professional appearance, or safety policies.

The employer may consider alerting applicants more broadly to policies that could pose conflicts for applicants of various religious groups. For example, an employer whose policy is to require weekend work might consider letting all applicants know up front. The question can be simple: “This position requires work on Saturdays and Sundays, would that pose any problem for you?” This starts the dialogue but avoids stereotyping or prying. It also means the employer does not have to guess from dress or other clues whether an applicant is an Orthodox Jew, an evangelical Christian, or a Seventh-Day Adventist who might observe the Sabbath, and what that means in practice.

DO ENGAGE IN THE INTERACTIVE PROCESS (WHEN WARRANTED)

Once the employer explains the work rule and asks if it would pose a conflict, the applicant's response determines what happens next.

If the applicant says there is no conflict, leave it at that. Let's say the employer explains to an applicant with dreadlocks that the grooming policy forbids long hair, and the applicant says the rule poses no problem for him. Do not ask for more detail or question whether the applicant can really abide by the rule.

If the applicant says there is a conflict, ask why. The answer may or may not relate to religion. One applicant may say she cannot work weekends because she wants to spend time with her kids, and another may say that any work from Friday sundown to Saturday sundown conflicts with





her religious belief against work on the Jewish Sabbath.

If the applicant cites a religious reason, the employer must engage in a dialogue — what the law calls “the interactive process” — to explore whether a reasonable accommodation is possible, or whether it will pose an undue hardship.

DO SET THE RIGHT TONE

Be careful to set the right tone. Always be respectful of any religious practice, no matter how unusual. Do not make assumptions about whether a practice is a “real” requirement of a given religion; under the law, a “sincere religious belief” does not necessarily need to be part of an organized religion, or practiced by many people, or long-held by the employee. The interviewer should avoid making comparisons to her or her employees’ religious identity or practice, or citing advice from a priest or rabbi. As seasoned HR professionals know, like so much in the workplace, respect and communication can go a long way.

HOW CAN HR HELP?

If the interactive process is warranted, the hiring manager should involve

human resources. HR has expertise in the area of religious accommodation and a deeper knowledge of the company’s religious-accommodation policy and of the consistency of enforcement of its dress code or similar policies. HR likely has a broader perspective about how the company has handled similar accommodation requests, which helps ensure consistency. HR can document the interactive process so there is an accurate record of the request and any accommodations offered or refused.

The employer, or its HR professional, should also consider consulting legal counsel who specializes in this area for guidance. A legal expert can help navigate the thorny, fact-specific questions of what is a reasonable accommodation and what is an undue hardship. Counsel can help the employer to ensure compliance with state or local religious discrimination laws, which can vary from the federal law at issue in *Abercrombie*.

Both HR and legal can brainstorm creative solutions to a conflict between religious practice and a workplace rule. An employee observing the Sabbath might be able to swap shifts with a co-worker

or be scheduled around services. A worker seeking a religious exemption to a safety policy forbidding long hair could be allowed to tie his hair up. Religious accommodations are not a one-size-fits-all proposition, and creative thinking can be invaluable. ■

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