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Seven Best Practices on Hiring Based on High Court Ruling in *EEOC v. Abercrombie & Fitch*

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On June 1, 2015, the U.S. Supreme Court held that a job applicant only needs to show that the need for a religious accommodation was a motivating factor in an employer's hiring decision — the employer does not have to have "actual knowledge" of that need. This 8-1 ruling in *EEOC v. Abercrombie & Fitch Stores, Inc.* supported the position of the U.S. Equal Employment Opportunity Commission in that case. It also raises the issue of what now should be an employer's next steps in evaluating its hiring process. This article discusses seven best practices for employers following the *Abercrombie* decision.

Headlines from 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. The Court framed the question presented as "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 that 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 Court held that "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 employment decisions."

Facts and Procedural History

Teenager Samantha Elauf, 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, Elauf said nothing about the fact that she was Muslim. She also did not bring up 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." But her interviewer assumed that Elauf was Muslim and wore the head-covering for religious reasons, and that influenced Abercrombie's decision not to hire her.

> As before, employers should avoid asking applicants directly about religion or religious practices, or making assumptions based on stereotypes.

The district court granted summary judgment for the EEOC. The 10th U.S. Circuit Court of Appeals reversed and granted summary judgment to Abercrombie. The 10th 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 Supreme Court's Analysis

In holding that an applicant need only show that his need for accommodation was a motivating factor in the employer's decision, the Court reasoned that Title VII prohibits an employer from using an applicant's religious practice as a motivating factor in failing to hire the applicant. The Court noted that Title VII "does not impose

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a knowledge requirement," and declined "to add words to the law." Instead, the Court reasoned that the statute's "intentional discrimination provision prohibits certain *motives*," regardless of the employer's knowledge.

The Court held that an employer who had actual knowledge of the applicant's need for a religious accommodation, but did not have that as a motive for refusing to hire the applicant, would *not* violate Title VII. But an employer whose motive in refusing to hire is the desire to avoid an accommodation, even if based on "no more than an unsubstantiated suspicion that accommodation would be needed," may violate Title VII.

The Court acknowledged that if the applicant requested an accommodation, or the employer was certain that the applicant's practice would require accommodation, it may be easier to infer motive, but held that neither is required for liability.

The Court declined to answer the question of whether the motive requirement can be met without a showing that the "employer at least suspects that the practice in question is a religious practice." The Court ducked that question because it was undisputed in this case that Abercrombie at least suspected that Elauf wore the hijab for religious reasons.

The Court sidestepped Abercrombie's concerns that without an actual knowledge requirement, employers will be forced to ask about religion, or engage in stereotyping. Indeed the Court offered an example that highlights the practical pitfalls for employers. The Court posited an employer that thinks, but does not know for sure, that an applicant may be an orthodox Jew who cannot work on Saturdays. In that case, the Court held, if the applicant actually required the accommodation, and the employer's desire to avoid it was a motivating factor in not hiring the employee, the employer would violate Title VII.

Employer Best Practices

Best practices for the hiring process in light of the decision include:

- **Update training for hiring managers and interviewers.** Employers should update training programs to ensure that hiring managers and interviewers learn best hiring practices. Standard anti-discrimination training is not enough; hiring managers and interviewers need specific training on the hiring process, including what questions to ask and not to ask, how to handle religious accommodation requests, and when to involve the human resources or legal departments. The training should include a reminder that there can be no retaliation against an applicant for having requested an accommodation.
- **Don't ask directly about religion.** As before, employers should avoid asking applicants directly about religion or religious practices, or making assumptions based on stereotypes.
- **Make work rules clear to applicants.** On the other hand, 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.

  For example, if an applicant comes to the interview wearing religious clothing, headwear, tattoos or jewelry that violates the employer's uniform, grooming or safety policy, the employer should communicate the rule and ask if that rule would pose any issues for the applicant. By asking that question, the employer invites the applicant to disclose any conflict, but avoids a direct inquiry into the applicant's religion or religious practice.

  On the other hand, the employer may consider alerting applicants more broadly to policies that could pose conflicts for applicants of many different religious groups. For example, an employer whose policy is to require weekend work might consider letting all applicants know that up front. By doing so, the employer avoids having to surmise 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 observance might mean in practice. A simple question — "This position requires work on Saturday and Sunday, would that pose any problem for you?" — starts the dialogue without stereotyping or prying.
- **Engage in the interactive process if warranted.** Once the employer explains the work rule and asks if it would pose a conflict, what happens next depends on the applicant's response.

  If the applicant says that there is no conflict, the employer should leave it at that. For example, if the employer explains to a yarmulke-wearing applicant that the uniform forbids headwear, and the applicant says that rule poses no problem for him,

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the employer should not press the applicant for more detail, or question whether the applicant can really abide by the rule.

If the applicant says that there *is* a conflict, the employer should ask why. The answer may or may not relate to religion; one applicant may say she prefers not to work weekends because of her child's soccer schedule, and another may say that Sunday work conflicts with her religious belief that work on the Sabbath is a sin.

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.

- **Bring in HR.** If the interactive process is warranted, employers should involve HR. HR personnel likely have greater expertise in the area of religious accommodation and a deeper knowledge of the company's religious-accommodation policy. HR likely has a broader perspective about how the company has handled similar accommodation requests, which will help ensure consistency. Finally, HR can help document the interactive process so that there is an accurate record of the request and any accommodations offered or refused.
- **Set the right tone.** In any discussion about religious accommodation, the interviewer should be careful to set the right tone. The interviewer should always be respectful of any religious practice, no matter how unusual. The interviewer always should avoid questioning the sincerity or wisdom of a religious practice, or making assumptions about whether a given practice is a "real" requirement of a given religion. The interviewer should avoid making comparison to his or her own, or other employees' religious identity or practice.
- **Get legal advice from an expert.** For guidance on the interactive process, the employer also should consider consulting counsel who specializes in this area for guidance. An expert in this area can help navigate the thorny and fact-specific questions of what is a reasonable accommodation, and what is an undue hardship. Counsel also can help the employer to ensure compliance with state or local religious discrimination laws, which can vary from federal law. ❖

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