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Supreme Court Sets Standard for Religious Discrimination Claims

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On June 1, 2015, the U.S. Supreme Court ruled in the case of *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, resolving the question of whether an applicant must demonstrate that a prospective employer had actual knowledge of his or her need for a religious accommodation in order to sustain a claim of religious discrimination. In an 8 to 1 decision authored by Justice Scalia, the Court ruled that a job applicant can establish a disparate treatment claim of religious discrimination by showing that the applicant's need for a religious accommodation was the motivating factor behind the employer's decision not to hire him or her. The Court made it clear that an applicant is not required to show that the prospective employer had actual knowledge of his or her need for a religious accommodation.

For employers, this decision makes it abundantly clear that they may not decline to hire an applicant because of a known or suspected need for a religious accommodation, regardless of whether the applicant has informed the employer of the need for an accommodation. Accordingly, employers should be very careful about making hiring or other employment decisions because of a practice of the applicant or employee that they suspect is religiously based. The decision will put the employer in the proverbial "rock and a hard place". We have long taught employers not to inquire about religion, disability or other protected classes. Interviewers in particular will have to be trained to navigate the minefield when they are confronted with an obvious religious practice, such as headscarves or beards. It the employer has a dress codes, care should be taken to ask whether there is any reason why the applicant cannot conform. The Court makes it clear that then making a decision on the need for accommodation is prohibited.

Title VII of the Civil Rights Act prohibits an employer from refusing to hire an applicant or discharging an employee based on a "religious observance or *practice*." The *Abercrombie & Fitch* case involved an applicant who was not hired for a position as a sales employee at Abercrombie & Fitch after wearing a headscarf to her interview. The company took the position that the applicant was not hired because the headscarf conflicted with the neutral "look policy" that Abercrombie & Fitch had established for its sales employees which prohibited employees from wearing "hats." Neither the applicant's religion nor her need for an accommodation was addressed during the interview or otherwise before the decision was made not to hire her. However, the manager who interviewed the applicant stated that she believed that the headscarf was worn for religious reasons. The EEOC sued Abercrombie & Fitch on behalf of the applicant.

The District Court ruled in favor of the EEOC. Abercrombie & Fitch appealed the decision to the Tenth Circuit Court of Appeals which reversed the decision granting judgment in favor of the EEOC on the basis that the employer must have actual knowledge of the need for accommodation to be liable under Title VII. The EEOC took the case to the Supreme Court.

Before the Supreme Court, the EEOC argued that Title VII's prohibition against religious discrimination is triggered when the employer knows of a specific practice and understands that practice to be religious in nature. Abercrombie & Fitch, on the other hand, argued that in order to be protected under Title VII the applicant or employee must inform the employer about their need for a religious accommodation.

In rejecting Abercrombie's argument and finding in favor of the EEOC, the Court emphasized that, unlike other antidiscrimination statutes (like the Americans with Disabilities Act), Title VII does not include a knowledge requirement. The Court determined that to read a knowledge requirement into Title VII would be inconsistent with the language of the statute and a knowledge requirement could only be added by Congress, not the Court. The Court also rejected Abercrombie & Fitch's argument that its neutral policy should be analyzed under a disparate impact theory.

In its decision, the Court emphasized that knowledge and motive are two distinct concepts and that Title VII focuses only on an employer's motivation in deciding not to hire an applicant. In this context, the Court

determined an employer's refusal to hire an applicant because of his or her religious practice is synonymous with refusing to accommodate that practice and turns the employer's decision not to hire into an intentional act constituting disparate treatment under Title VII. In drawing these conclusions, however, the Court did note that its ruling is limited to circumstance in which the employer has reason to believe that the applicant may have a need for a religious accommodation. The Court did not address what liability may exist for an employer who refuses to hire an applicant based on a practice that the employer does not suspect is religious but that is, in fact, religious.

One very interesting aspect of the case is the Court's statement that religious practices, unlike other Title VII bases, must be treated with more than "mere neutrality". In the Court's words, "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment." To support that statement, the Court cites a provision of Title VII that in fact does not distinguish religion from other Title VII bases. Perhaps because elsewhere Title VII requires reasonable accommodation for religion, the Court unambiguously concluded that "Title VII requires otherwise-neutral policies to give way to the need for accommodation."

Concluding that an applicant can sustain a disparate treatment religious discrimination claim solely on a showing that the employer did not hire the applicant because it believed the applicant would need a religious accommodation, the Court remanded the case to the Tenth Circuit for further consideration. Both the EEOC and Abercrombie & Fitch will have more days in court, but under the Court's new standard.

