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# Religious Accommodation Liability Does Not Require That Employer Has Actual Knowledge of The Need for An Accommodation, Says High Court

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An employer's motives, not its actual knowledge, determine whether it has discriminated against an applicant or employee in violation of Title VII, ruled the U.S. Supreme Court today. In an 8-to-1 decision, the Court ruled that an employer that refuses to hire an applicant in order to avoid accommodating a religious practice may be liable for discrimination even though the applicant did not inform the employer of the need for an accommodation. As long as the applicant can show that her need for an accommodation was a motivating factor in the employer's decision to refuse to hire her, the employer can be liable for disparate treatment under Title VII. The Supreme Court reversed the Tenth Circuit's opinion which held that liability for failure-to-accommodate a religious practice applies only when the applicant directly informs the employer about the need for an accommodation. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. \_\_\_\_ (2015).

### Head Scarf Versus “Look Policy”

This case arose when Samantha Elauf, a seventeen-year old applicant, went to an interview for an in-store sales position at an Abercrombie & Fitch store wearing a headscarf. Although the topic of religion did not come up at the interview, the interviewer, assistant store manager Heather Cooke, assumed that Elauf was Muslim and that she wore the headscarf due to her Muslim religion.

Cooke rated Elauf as qualified to be hired but was concerned that the headscarf would conflict with Abercrombie's strict “Look Policy” which forbids wearing of “caps.” Cooke consulted with her district manager who told Cooke not to hire Elauf because wearing the headscarf would violate the Look Policy, as would all other headwear, religious or otherwise.

The Equal Employment Opportunity Commission (EEOC) sued Abercrombie on Elauf's behalf. The District Court granted summary judgment to the EEOC, finding Abercrombie liable for failing to accommodate a religious practice in violation of Title VII, with a jury awarding \$20,000 in damages. Abercrombie appealed and the Tenth Circuit reversed, concluding that Abercrombie could not be liable for failing to accommodate a religious practice where Elauf never provided

Abercrombie with actual knowledge of her need for an accommodation. The EEOC appealed to the Supreme Court.

### **No Knowledge Requirement in Title VII**

“An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions,” stated the Court in an opinion written by Justice Scalia. Intentional discrimination under Title VII looks only to the employer's motives in making its employment decisions, not its actual knowledge. Consequently, if an employer thinks that a job applicant might need an accommodation, such as time off to attend religious observances, and denies the applicant a job in order to avoid that prospective accommodation, the employer violates Title VII, regardless of whether the employer actually knows of the applicant's religious practices or need for accommodation.

### **ADA Has Knowledge Requirement**

The Court recognized the difference in the reasonable accommodation duty under Title VII versus under the Americans with Disabilities Act (ADA). Discrimination under the ADA is defined to include an employer's failure to make reasonable accommodations to the *known* physical or mental limitations of an applicant. However, Title VII does not include the knowledge requirement. Therefore, failure to accommodate a religious practice will be deemed discrimination under Title VII as long as the employer's desire to avoid the accommodation was a motivating factor in its employment decision.

### **Neutral Policies Still Require Religious Accommodation**

Abercrombie argued that its Look Policy was neutral and that it did not treat religious practices less favorably than similar secular practices so it could not be liable for intentional discrimination. The Court disagreed, stating that Title VII gives religious practices favored treatment. The Court acknowledged that an employer is entitled to have a neutral dress policy, such as a no headwear policy, but when an applicant or employee requires an accommodation as an aspect of a religious practice, Title VII requires that the employer accommodate that practice, in the absence of an undue hardship.

### **Lessons on Religious Accommodations**

The practical implication of this decision is that you may not make employment decisions based on suspected religious accommodations. In other words, if you think that an applicant has certain religious beliefs which might lead to the need for an accommodation once hired, you cannot reject them – even if you never discussed or confirmed their religious practices. If the applicant's potential need for an accommodation is a factor in your decision not to hire them, you may be found liable for discrimination under Title VII.

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