

KD Alert: U.S. Supreme Court Rules Against Abercrombie in Religious Garb Case – Sets New Standards of Employer Liability.

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On June 1, 2015, the U.S. Supreme Court issued an 8-1 decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, long awaited by the business community. The decision holds that an employer may be liable under Title VII of the Civil Rights Act of 1964 (“Title VII”) for refusing to hire an applicant or discharging an employee based on a “religious observance and practice” even if the employer does not have actual knowledge that a religious accommodation is required. According to the Court, “knowledge” is irrelevant – “An applicant need only show that his need for an accommodation was a motivating factor in the employer’s decision.” The decision is disturbing on a number of levels in that it imputes liability to employers even if they did not have actual knowledge of the religious practice.

The Facts: In 2008, the plaintiff, a devout Muslim who wears a headscarf, applied for a job as a salesperson at clothing retailer Abercrombie & Fitch. Abercrombie had a dress code that prohibited employees from wearing – among other things – “caps.” During her initial interview, plaintiff did not indicate that she wore her headscarf for religious reasons and never requested any accommodation from Abercrombie’s long controversial “Look Policy.” The company refers to sales associates as “models”—hence, the “Look Policy.” Apparently, Abercrombie’s interviewer assumed that the plaintiff was Muslim, and wore the headscarf for religious reasons. Because the headscarf conflicted with Abercrombie’s policy, she was not hired. Abercrombie argued that it did not have to accommodate plaintiff because it was an undue hardship to deviate from its “Look Policy” in her case. Specifically, Abercrombie argued that allowing the exception “would disrupt its careful branding efforts, resulting in customer confusion,” and that it would “hurt store performance.”

Court’s reasoning: In distinguishing between motive and knowledge, the Court held that an employer who has actual knowledge of an applicant’s or employee’s need for a religious accommodation, but does not use that as a motive for refusing to hire the applicant, would not violate Title VII. By contrast, an employer whose motive in refusing to hire is the desire to avoid a religious accommodation — even if based on “no more than an unsubstantiated suspicion that accommodation would be needed”— may violate Title VII.

The Impact: This decision highlights the practical pitfalls for employers by expanding employer liability in religious discrimination claims by finding that Title VII demands more than ‘mere neutrality with regard to religious practices,’ but rather that employers have an affirmative obligation to not take adverse action against any individual because of religious observance or practice (whether known or unknown). There is no requirement that the employer actually know that there could be “a conflict between an applicant’s or employee’s religious practice and a work rule.” In other words, an employer is prohibited from using an applicant’s or employee’s religious practice, regardless of the employer’s knowledge, as a motivating factor in failing to hire the applicant or refusing to accommodate an employee. As a result, employers now face the possibility of violating federal law by failing to hire someone who follows a religious practice, even if the employer is completely ignorant of that fact. On the one hand, employers may be held liable for ‘an unconfirmed suspicion’ about an applicant’s or employee’s religious practices, which suggests a greater need for employers to understand what the applicant’s or employee’s religion actually requires. On the other hand, employers can face potential liability for religious discrimination if they pose questions to an applicant or employee about religion that it might not ask someone else. Striking this delicate balance will be difficult for many employers, but this is the new reality in the workplace.

Tips for Employers: The Court’s decision appears to run contrary to longstanding advice to avoid asking applicants or employees about religion or making assumptions based on stereotypes. In light of this decision, an employer who has any reason to believe, or even suspect, that accommodation may be necessary – from any source – will need to consider engaging in an interactive process with the individual. Depending on the circumstances, that process may entail explaining the relevant work rule, inquiring as to whether the individual could comply with the rule or would require an accommodation, and analyzing whether any required accommodation is reasonable or would impose an undue hardship. This decision also underscores the importance of training all managers and

supervisors on the nuances of religious accommodation. The burden is no longer on the employee to raise the issue of accommodation, so employers need to be ready to proactively address the issue.