

BLOGS

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Employers' Hiring Practices May Need New "Look" After EEOC v. Abercrombie & Fitch

A hiring policy based on looks is like nails on a chalkboard to an employment lawyer. So it comes as no surprise that the "Look Policy" of an Abercrombie & Fitch (A&F) store caused A&F trouble before the Supreme Court last week when the Court found in favor of the EEOC on a charge of religious discrimination against the clothing retailer. However, the decision has implications that reach beyond image-based hiring and sets standards of proof for religious accommodation claims and Title VII generally.

The Court's 8-1 opinion held that an employer need not have actual knowledge of an applicant's need for a religious accommodation; rather, the applicant need only show that the need for an accommodation was a motivating factor in the employer's decision. The facts of the case are helpful to understanding the Court's holding.

Samantha Elauf is a practicing Muslim who wears a headscarf in accordance with her religious beliefs. Ms. Elauf applied for a position with an A&F store and interviewed with the store's assistant manager. The assistant manager found Ms. Elauf qualified for the job, but was concerned that her headscarf may violate the store's "Look Policy," which prohibited "caps." The assistant manager sought input from the district manager on the issue and told the district manager that she believed Ms. Elauf wore her headscarf because of her faith. The district manager told the assistant manager that the headscarf would violate the Look Policy, as would any other type of headwear, religious or otherwise, and instructed the assistant manager not to hire Ms. Elauf.

A&F argued that it never had actual knowledge of Ms. Elauf's need for a religious accommodation, so it therefore could not have violated Title VII's disparate treatment prohibition. The Supreme Court held that Title VII does not have a knowledge requirement and "an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed." It did not matter that A&F never received confirmation that Ms. Elauf wore a headdress as a religious practice or that she would need an exception to the Look Policy as a reasonable accommodation; it is enough that they suspected as much and based their decision not to hire her on that suspicion.

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The Court differentiated disability discrimination claims based on failure to accommodate under the Americans with Disability Act (ADA). Unlike Title VII, the Court stated, the ADA does have a knowledge requirement; the ADA's definition of discrimination includes an employer's failure to make reasonable accommodations to the *known* physical or mental limitations of an applicant. Therefore, an unsuccessful applicant would need to show that the employer actually knew of their need for an accommodation and based its decision not to hire on that need.

In holding that Title VII does not have a knowledge requirement, the Court's opinion may have implications beyond cases of religious accommodation. For example, if an employer only suspects that an applicant is pregnant, a certain age, or a particular nationality and bases their hiring decision on that suspicion, the applicant may be able to succeed on a discrimination claim without showing that the employer actually knew they were a member of that protected class.

The Court also emphasized that it did not matter that A&F's Look Policy was neutral. The Court reasoned that Title VII requires more than neutrality with regard to religious practices; it requires special treatment through religious accommodations.

The main take-away for employers is to ensure that everyone involved in hiring or other employment decisions receives proper training, including instructions to not base employment decisions on suspected or confirmed protected-class status. And for those employers with image-based job qualifications like A&F's Look Policy, this case provides one more reason to carefully review the need for and terms of those requirements.