



Actual Knowledge of Need for Religious Accommodation Not Required for Employer Liability

by Tina M. Aiken

The United States Supreme Court issued a decision regarding religious accommodation that will have a significant impact on employers. The Court held that an employer may not make an applicant's religious practice, whether or not the employer had actual notice of the religious practice, a factor in an employment decision. Now, since an employer's actual knowledge of a need for religious accommodation is immaterial, the duty to accommodate a religious practice is no longer triggered by a request from an applicant or employee or other notice to the employer of a need for accommodation.

The sole issue to be decided in *EEOC v. Abercrombie & Fitch Stores, Inc.* was what level of notice is required from an applicant or employee before an employer is required to provide a reasonable accommodation for the individual's religious practices. In 2008, a Muslim woman applied for a position with an Abercrombie store, and was not offered the position because her hijab (headscarf) did not comply with the company's "look policy." The applicant wore her hijab to the interview, but did not inform the interviewer that she wore it for religious reasons or that she would need an accommodation. The interviewer did not mention the dress policy to the applicant, which prohibited employees from wearing black clothing and caps. The interviewer consulted with her district manager regarding the applicant's hijab, and when she was told that the headscarf was inconsistent with the dress policy, the interviewer did not extend a job offer.

The EEOC brought suit, alleging that Abercrombie violated Title VII by refusing to hire the applicant because she wore a hijab and failing to accommodate her by making an exception to the look policy. Abercrombie argued that the applicant never informed anyone of a conflict between the look policy and her religious practices. The district court concluded that the clothing retailer had "notice" that she wore a headscarf because of her religious belief and refused to hire her because the garment conflicted with its policy. The Tenth Circuit reversed, ruling that failure-to-accommodate liability attaches only when the applicant provides the employer with actual knowledge of her need for an accommodation.

The Supreme Court reversed the Tenth Circuit's decision, holding that to prevail in a disparate-treatment claim based on religion, an applicant need show only that her need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of her need. The Court rejected Abercrombie's argument that it should be held responsible for providing accommodation only where a job applicant has explicitly informed the employer of her need for an accommodation. In explaining why actual knowledge of the need for accommodation isn't required for there to be a viable religious accommodation claim, the Court said that "[m]otive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, 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." The Court also noted that Title VII gives favored treatment to religious practices, rather than demanding that religious practices be treated no worse than other practices.

The Supreme Court's decision to place this burden on employers creates an unclear and confusing standard that will make employers more vulnerable to discrimination lawsuits. By not requiring that employers have actual knowledge of a need for accommodation, an employer could be held liable for violating Title VII by taking no action or some negative action even though it had no knowledge that there was a religious practice.

The Supreme Court's decision is in conflict with current Washington case law regarding religious accommodation. In order to state such a claim in Washington, an applicant or employee must show: (1) she has a bona fide religious belief, the practice of which conflicted with job duties; (2) she informed the employer of the beliefs and the conflict; and (3) the employer responded by subjecting the applicant or employee to discriminatory treatment. The second element requiring an applicant or employee to notify the employer of the need for religious accommodation is in direct conflict with the Supreme Court's *Abercrombie* decision. Given that Washington courts look to federal anti-discrimination case law to construe state law, and that the trend of courts is toward greater protections for applicants and employees, it is likely that Washington courts will follow the Supreme Court's lead and eliminate the notice requirement that is currently the burden of applicant/employee.

Because an employer's actual knowledge of the need for accommodation is no longer required for there to be a viable religious accommodation claim under Title VII, and Washington courts may likely follow suit, employers will likely see an increase in religious accommodation claims. Employers should take action now by updating language in employment policies, handbooks and job descriptions, as policies and job requirements may need to be modified in order to accommodate a religious practice (*e.g.*, dress codes, grooming standards such as prohibitions on wearing a beard or having a visible tattoo, and scheduling). Training should also be provided to managers and employees who have the ability to impact hiring decisions regarding the following:

- Religious discrimination is prohibited and there may be an affirmative duty to adjust a facially neutral policy as an accommodation to the religious practice of an applicant or employee
- Employers generally have to accommodate job applicants and employees with religious needs if the employer at least has a suspicion that such accommodation is necessary
- Hiring managers should not make assumptions about an applicant's religious belief or practice, or directly ask an applicant about religious needs. Rather, hiring managers should know the employer's policies and the job requirements, and be ready to ask job applicants if an accommodation is required to meet those policies or requirements
- Hiring managers should document hiring decisions. If the decision is made not to hire someone whom may need a religious accommodation, document the reasons for hiring another more-qualified candidate for the job

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