SCHOOLS LEGAL SERVICE

LAW UPDATE
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AN APPLICANT'S NEED FOR REASONABLE ACCOMMODATION OF RELIGIOUS BELIEFS OR PRACTICES CANNOT BE MOTIVATION FOR FAILURE TO HIRE

In the recently-decided case of *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, the Court considered a claim by the EEOC that Samantha Elauf, a practicing Muslim, was denied employment at her local Abercrombie clothing store in violation of federal law due to her religious practice of wearing a headscarf.[1] Title VII of the Civil Rights Act of 1964 makes it illegal for prospective employers to intentionally discriminate against an applicant by failing, or refusing, to hire the applicant because of his or her race, color, religion, sex, or national origin.[2] This prohibited employment practice is known as "disparate treatment."

An applicant can demonstrate disparate treatment or intentional discrimination by showing the employer failed to reasonably accommodate the applicant's religion, including religious observance, beliefs, or practices unless the employer can show the accommodation creates an undue hardship on the conduct of the employer's business.[3] In *Abercrombie*, the Court reviewed the question of whether an employer must reasonably accommodate an applicant's religious beliefs or practices only when an applicant has informed the employer of the need for an accommodation.

Abercrombie operates several brands of stores and seeks to project a particular style at each store. Consistent with this desired style, Abercrombie maintains an apparently neutral "Look Policy" which acts like a dress code for its employees. All "caps" are prohibited under the policy. Elauf wore a headscarf during her job interview with the Abercrombie store's assistant manager. The assistant manager rated her as qualified to be hired, but sought assistance from the store manager and district manager as to whether Elauf's headscarf would violate the Look Policy. Despite being aware that the assistant manager believed Elauf wore the headscarf for religious reasons, the district manager directed the assistant manager not to hire Elauf. According to the district manager, the headscarf, like all other headwear (religious or not), would violate the Look Policy and its prohibition against "caps."[4]

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[1] 135 S.Ct. 2028 (2015).

[2] *Id.* at 2031. *See also* California law which also prohibits employment discrimination because of an applicant's race, religious creed (including religious dress practices and religious grooming practices) color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. (Cal. Govt. Code § 12940.)

[3] *Id.* at 2032.

[4] *Id.* at 2031.

Abercrombie primarily argued before the Supreme Court that an applicant cannot demonstrate an employer intentionally discriminated against him or her unless the employer is shown to have had "actual knowledge" of the applicant's need for a religious accommodation. The Court disagreed with this argument and instead held that "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."[5]

The Court held that in disparate treatment (or intentional discrimination) cases based on a failure to accommodate a religious practice, the rule is: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."[6] It is not required that an applicant prove the employer received a request for accommodation or knew that the applicant adhered to a certain religious belief or practice which would require an accommodation. Instead, the law prohibits an employer from taking actions with the motive of avoiding the need for accommodating a religious practice.

The Abercrombie decision serves as an important reminder that federal and state anti-discrimination laws do not just protect employees, but also job applicants. Schools Legal Service continues to advise employers to review their hiring practices, interview questions, and written application materials to ensure that job applicants are not subjected to discriminatory hiring practices. Employers should be mindful that those practices which appear neutral and are equally applied to all applicants can prove problematic if reasonable accommodations are required, but not made. Under *Abercrombie*, if a decision not to hire an applicant is motivated by a desire to avoid reasonable accommodations of an applicant's religion, the employer can be held liable.

If you have any questions concerning this issue, please do not hesitate to contact our office.

– Melissa H. Brown

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[5] *Id.* at 2032. In footnote 3 on page 2033 of the Court's decision, the Court commented that in practice, "the motive requirement" may not be met unless the employer "at least suspects that the practice in question is a religious practice—i.e., that he cannot discriminate 'because of' a 'religious practice' unless he knows or suspects it to be a religious practice." This issue was not presented in the case because the evidence showed Abercrombie knew or suspected the reasons behind Elauf's practice of wearing a headscarf were religious in nature. As a result, the Court declined to resolve the issue of whether an employer can be said to have had a certain motive only if the employer knew or suspected the practice was religious.

[6] *Id.* at 2033.