

MEMORANDUM

To: ES&A, Inc. Clients and Friends
From: Anna Elento-Sneed, Esq.
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Date: 6/18/2015
Subject: **U.S. Supreme Court Ruling in *Abercrombie & Fitch* --
What Does This Mean For Employers**

SUMMARY:

On June 1, 2015, the U.S. Supreme Court reversed a Tenth Circuit decision that said that clothing retailer, Abercrombie & Fitch Stores Inc., had not violated Title VII by refusing to hire a woman who wore a hijab to her interview because she never informed the interviewer that she was a Muslim and would need to be exempted from the company's dress code, which forbade wearing headgear. The Supreme Court held that in order to prevail in a disparate-treatment claim, an applicant need only show that his/her need for an accommodation was a motivating factor in the employer's decision, not that the employer had actual knowledge of the applicant's need.

FACTS OF THE CASE:

In 2008, Samantha Lauf applied for a job as a "sales model" at Abercrombie. As a practicing Muslim, Lauf wore a Muslim headscarf, called a hijab, to her job interview. Although Lauf received strong scores on the three "competencies" required for the sales model position, she did not receive a job offer because of Abercrombie's belief that she would not be able to comply with its "Look Policy" which prohibited employees from wearing "caps".

Lauf and the Equal Employment Opportunity Commission ("EEOC") filed a lawsuit in federal district court, which ruled that Abercrombie was liable for religious discrimination in violation of Title VII. The Tenth Circuit reversed the district court and granted summary judgment in favor of Abercrombie, reasoning that it could not be held liable because Lauf did not inform the company that she wore a headscarf for religious reasons.

The Supreme Court reversed the Tenth Circuit, rejecting Abercrombie's argument that an applicant cannot show that she was discriminated against unless she can demonstrate that the employer had "actual knowledge" that she was wearing a headscarf for religious reasons and would need an accommodation. The Court held that in disparate-treatment claims, an applicant need only show that her need for an accommodation was a motivating factor in the employer's decision, and not that the employer had actual knowledge of the need.

The Court reasoned that Title VII of the Civil Rights Act of 1964 prohibits employers from refusing to hire an applicant "because of" his/her religion, which includes his/her religious practices, unless the employer demonstrates that it is unable to reasonably accommodate the religious practice without undue hardship. The Court emphasized that unlike other anti-discrimination laws such as the ADA, the statutory language of Title VII does not explicitly require actual knowledge of a conflict between an applicant's religious practice and a work rule. Instead, "the disparate-treatment provision [of Title VII] prohibits actions taken with the *motive* of avoiding the need for accommodating a religious practice."

The Court also rejected Abercrombie's alternative argument that it did not intentionally discriminate against Elauf because its Look Policy applied to all employees, regardless of religion. The Court explained that Title VII gives religious practices "favored treatment", requiring "otherwise-neutral policies to give way to the need for an accommodation."

WHAT THIS MEANS FOR EMPLOYERS:

Title VII clearly prohibits an employer from making an applicant's religious practice, confirmed or otherwise, a factor in employment decisions unless accommodating the religious practice would impose an undue hardship on the company. With the Court's decision in *Abercrombie*, an employer that takes action in order to avoid having to accommodate an applicant's or an employee's assumed religious beliefs or practices, may be liable for religious discrimination even if it has no more than an unsubstantiated suspicion that an accommodation would be needed.

Bottom line, *employers should not ask or guess* whether an applicant or employee may need accommodation for religious beliefs. Employers may establish legitimate, business-related policies and procedures. If and when an applicant or an employee asks for accommodation, then and only then should the company engage in discussions with the individual to see if a reasonable accommodation can be made to allow the individual to practice his/her religion while, at the same time, performing the essential functions of his/her job.