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U.S. Supreme Court Case Asks Whether Employers Must Inquire About Potential Employees' Religious Dress

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In 2015, the Supreme Court will determine whether religious dress that clashes with an employer's dress code should be constitutionally protected as freedom of religion. Employers may impose a dress code for marketing or other purposes, but religious dress, particularly headwear, may violate that. At issue in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores* is a hijab, a head scarf worn as a symbol of modesty in the Muslim faith.

SECREST WARDLE NOTES:

Conducting appropriate and sympathetic discussions when an employee's religious dress conflicts with employer policy could prevent potential lawsuits. The Supreme Court's decision in *E.E.O.C. v. Abercrombie & Fitch Stores* will present clarity on whether employers must ask about religious dress.

In *A&F,* Samantha Elauf was a job applicant for a model opening at an Abercrombie & Fitch store. Abercrombie's clothing lines hold an "East Coast collegiate" style. This essentially means preppy looks and, notably, no headwear. When interviewing for the position, Ms. Elauf wore her hijab. After an excellent job interview, Elauf was denied the position solely because her hijab clashed with Abercrombie's no headwear policy.

During the interview, the Abercrombie interviewer did not discuss Elauf's hijab. She believed it would be religious discrimination to do so despite the eventual rejection based on Elauf's hijab. Treading carefully, she recommended Abercrombie hire Elauf but discussed the hijab concerns with the district manager. Elauf was rejected on his recommendation.

This presents a difficult question. Under the Civil Rights Act of 1964, religious discrimination is prohibited when hiring employees.[1] This forces many employers to skirt the issue entirely. This was certainly the case in *A&F.* The trial court awarded Elauf $20,000 in damages, but the 10th Circuit reversed.[2] Writing for the majority, Judge Jerome A. Holmes rested on the distinction that Elauf never informed Abercrombie prior to the hiring decision that she wore her hijab for religious reasons.[3] This begs the following question: does the burden rest on an applicant to discuss his or her faith, or is an employer required to inquire?

The test used in the trial court addressed the three following factors: (1) whether the religious dress symbolized a bona fide religious belief; (2) whether bilateral notice of religious belief and employer policy exists; and (3) whether accommodation would present an undue hardship on the employer.[4] A bona fide religious belief is one that is religious within the plaintiff's scheme of things and is sincerely held.[5] Courts should not investigate the source of the beliefs, but instead give great weight to them.

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[1] Civil Rights Act of 1964, 42 USCS § 2000e-2.

[2] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 798 F. Supp. 2d 1272 (N.D. Okla. 2011); *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 731 F.3d 1106 (10th Cir. 2013).

[3] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 731 F.3d 1106 (10th Cir. 2013).

[4] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 798 F. Supp. 2d 1272 (N.D. Okla. 2011).

[5] *United States v. Seeger,* 380 U.S. 163, 185 (1965).

The notice factor requires action from both parties. "Bilateral cooperation" is necessary to acceptably reconcile an employee's religion with the employer's policies.[6] This links appropriately with the undue hardship factor in that, through bilateral cooperation, a religious accommodation should not present an undue hardship to the employer.[7] Undue hardship is anything more than a de minimis burden, but the hardship must be actual and not offered as a hypothetical situation.[8]

Procedurally, the employee must present a prima facie case.[9] The burden would then shift to the employer, and the employer must rebut at least one of the elements. In *A&F,* Elauf presented a prima facie case and Abercrombie alleged the accommodation would present an undue hardship based on their policies. The trial court determined that the hardship was too speculative and would not prevent an accommodation.[10] On appeal, the test did not get that far. The 10th Circuit found that Elauf did not present a prima facie case because Abercrombie was not put on notice of Elauf's beliefs.[11]

The Supreme Court's decision in *A&F* will clarify the religious accommodation test and will issue a standard by which employers can adequately accommodate their employee's religious beliefs. It is unclear as to how they will rule, but the nuances of the test will be clarified. Particularly, the Supreme Court's ruling on the notice factor will assert who holds the burden of discussing religious beliefs and appropriate accommodations in the workplace. Employer policy and practices in hiring, maintaining, and terminating their employees can be crafted based on the decision.

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[6] *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 69 (1986).

[7] *Toledo v. Nobel-Sysco, Inc.,* 892 F.2d 1481, 1492 (10th Cir. 1989).

[8] *Id.*

[9] *Thomas v. National Ass'n of Letter Carriers,* 225 F.3d 1149 (10th Cir. 2000).

[10] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 798 F. Supp. 2d 1272 (N.D. Okla. 2011).

[11] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 731 F.3d 1106 (10th Cir. 2013).

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