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RELIGIOUS DISCRIMINATION

Can't be covered up: Applicant must request religious accommodation

by Ryan B. Frazier

Often, employees and applicants hold religious beliefs and engage in religious practices that conflict with workplace rules and employment practices. Title VII of the Civil Rights Act of 1964 typically requires employers to "reasonably accommodate" religious beliefs, practices, and observances unless the accommodation results in "undue hardship." A reasonable accommodation is something that eliminates the conflict between a religious practice and the work requirement.

Recently, the Equal Employment Opportunity Commission (EEOC) has filed several lawsuits against clothing retailers involving conflicts between dress codes and religious dress practices. One of those cases went before the U.S. 10th Circuit Court of Appeals (whose rulings apply to Utah employers). The court concluded that an employee or applicant must ask for a religious accommodation from a dress code before an employer has a duty to accommodate.

Modeling the 'look'

Abercrombie & Fitch Stores, Inc., operates retail clothing stores under the names Abercrombie & Fitch, abercrombie (which sells children's clothing), and Hollister. Abercrombie doesn't develop and maintain its brands through traditional marketing and advertising. Instead, it relies on the in-store experience to promote its products. The company focuses on ensuring that its customers have a brand-based sensory experience when they enter one of its retail locations.

To further the in-store experience and showcase its brand, Abercrombie requires its in-store employees, whom it calls "models," to comply with a "look policy." The look policy is intended to promote the Abercrombie brand by having models exemplify the style of clothing sold in stores. The models are not allowed to wear black

clothing or "caps." Every employee interacting with customers in a retail location must comply with the look policy. Abercrombie explains the policy to applicants during the interview process.

Samantha Elauf is a practicing Muslim who wears a headscarf, or hijab, for religious reasons. Before applying for a job at Abercrombie, Elauf discussed with a friend who already worked for the company, Farisa Sepahvand, whether wearing a hijab at work would be permissible. Sepahvand asked the assistant manager, Kalen McJilton, who knew Elauf from past visits to the store. Because she knew of an employee who wore a white yarmulke, McJilton suggested that she didn't see a problem with wearing a hijab as long as it wasn't black. Sepahvand communicated her response to Elauf.

The interview

In 2008, Elauf applied to work as a model in an abercrombie store at a mall in Tulsa, Oklahoma. Heather Cooke, an assistant manager, interviewed her for the position. Cooke was already familiar with Elauf because she had seen her talking with Sepahvand and working elsewhere in the mall. She had noticed Elauf wearing a headscarf on those occasions. Although she didn't know Elauf's religion, Cooke assumed she wears the headscarf because she is Muslim. Elauf wore Abercrombie-type clothing to the interview. She also wore a black headscarf.

During the interview, Cooke described some of the dress requirements, but she didn't refer to the "look policy" by name. She specifically told Elauf that she would be required to wear clothing that was similar to the clothing sold in the store. She also told Elauf that she couldn't wear heavy makeup or nail polish.

Elauf didn't tell Cooke that she is a Muslim during the interview, nor did the topic of the headscarf come up.



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As a result, Elauf didn't inform Cooke that she wears a headscarf for religious reasons. At the interview's conclusion, Cooke asked Elauf if she had any questions. Elauf responded that she did not.

Cooke assessed whether to hire Elauf using Abercrombie's official interview guide. The guide requires the interviewer to evaluate a candidate in several areas, including "appearance and sense of style." Up to three points are given for each category. Cooke initially gave Elauf sufficient points for Abercrombie to hire her. Specifically, Elauf received a score of two out of three in the appearance category.

However, Cooke was unsure whether Elauf would be allowed to wear the headscarf, so she asked the district manager, Randall Johnson. He responded that Elauf shouldn't be hired because her headscarf was inconsistent with the look policy. He told Cooke to change Elauf's "appearance" score from two to one, which reduced her overall score below the level required to hire her. Sepahvand told Elauf a few days later that she wasn't hired because of her headscarf.

The lawsuit

The EEOC filed suit on behalf of Elauf, alleging that Abercrombie failed to accommodate her religious practice of wearing a hijab. The agency claimed that Abercrombie should have accommodated Elauf by making an exception to its look policy and allowing her to wear the hijab.

Both the EEOC and Abercrombie sought judgment before trial. Abercrombie argued that the case should be dismissed because Elauf failed to notify the company of her need for a religious accommodation. The trial court denied Abercrombie's request and ruled in favor of the EEOC, finding that Abercrombie should have accommodated Elauf.

The case went to trial on the issue of damages. A jury awarded the EEOC \$20,000. Abercrombie appealed the trial court's conclusion that the EEOC had established its case.

Title VII and religious discrimination

Title VII prohibits an employer from discriminating against an employee or applicant because of her religion. The 10th Circuit noted that the term "religion" under Title VII broadly encompasses "all aspects of religious observance and practice, as well as belief." It added: "Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others." The 10th Circuit also recognized that "social, political, or economic philosophies, as well as mere personal

preferences, are not 'religious' beliefs protected by Title VII."

In reviewing religious discrimination cases, the courts often will focus on the employee's belief rather than the beliefs of a broader religious group. The 10th Circuit noted that one individual may engage in a practice for religious reasons, while another individual may engage in the same practice for purely secular reasons, including cultural reasons. As such, "an employer's discrimination against an individual for engaging in that practice—though possibly reprehensible and worthy of condemnation—would not contravene Title VII's religion-discrimination provisions." That's because the court would look at the employee's motivation for engaging in the practice, which may not be religious in nature.

Title VII and accommodation of religious practices

Title VII requires an employer to "reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." The 10th Circuit explained that the duty to reasonably accommodate a religious practice arises "only when there is a *conflict* between an employee's religious practice and the employer's neutral policy."

For an actual conflict to arise, the employee or prospective employee must consider the religious practice to be an inflexible one—in other words, she believes that the practice is required by her belief system. In such a situation, the law steps in because the employee would be forced to choose between her religious convictions and her job.

Typically, employers shouldn't ask applicants or employees about their religious beliefs or practices in the first place. Further, employers should avoid assumptions or stereotypes about religious beliefs or practices.

An employer needs to grant a religious accommodation only after it has been put on notice of an employee's need for accommodation of a religious practice. That usually means the employee must request an accommodation.

Burden-shifting analysis

In deciding religious accommodation cases, courts apply a version of the burden-shifting analysis used in other discrimination cases. First, the initial burden of proof is on the employee or job applicant. She must show that she has a bona fide religious belief that conflicts with an employment requirement, she informed the employer of her religious belief or practice, and she was discharged or not hired because she didn't comply with the conflicting employment requirement.

If the employee provides proof on all three points, then the burden shifts to the employer to show that (1) it has evidence to rebut one or more of the points proven by the employee; (2) it offered a reasonable accommodation for the religious practice; or (3) it was unable to reasonably accommodate the employee's religious practice without undue hardship.

Just ask for it

In this case, the 10th Circuit concluded that the EEOC's claim failed because it couldn't prove that Elauf put Abercrombie on notice of her need for religious accommodation. The 10th Circuit made clear that the employee or applicant must inform the employer of a conflicting inflexible religious belief or practice and the need for an accommodation. The evidence showed that Elauf didn't inform Abercrombie of her need to wear the hijab because of an inflexible religious belief that conflicted with the look policy. Accordingly, Abercrombie had no duty to accommodate her religious practice.

Further, constructive notice or an assumption of a conflict with a religious practice is insufficient to give rise to a need to discuss an accommodation. The 10th Circuit noted that even if it were to take the position that an employer could be put on notice from a source other than the applicant or employee, that source would need to provide the employer with enough information to give it "actual knowledge" that the conflicting practice of the "particular applicants or employees is based upon their religious beliefs and . . . they need an accommodation for it." In this case, the manager at most assumed that Elauf wears the hijab for religious reasons; indeed,

Cooke testified that she didn't know that Elauf wears the headscarf for religious reasons. That would not give rise to a duty to accommodate.

The 10th Circuit added that even if the employer is generally aware of the beliefs and observances associated with a particular religious group, the fact that an employee or applicant may engage in a conflicting practice that's consistent with the practices of the religious group doesn't put the employer on notice. The court reasoned that religion is "uniquely personal" and an "individual matter." As such, the employer has no way of knowing for certain that a conflicting practice stems from religious beliefs.

In addition, even if an employer gained actual knowledge of the religious nature of an employee's practice from an external source, the employer would still not know whether the employee needs an accommodation for the practice. The employee may not consider the practice inflexible or may not feel adherence to the practice is necessary. *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 713 F.3d 1106 (10th Cir.).

Lessons learned

Employers should accommodate religious practices that conflict with work policies. However, the employer should wait until the employee raises the need for a religious accommodation. An employer shouldn't assume that an applicant or employee holds particular religious beliefs, engages in particular religious practices, or has a religious practice that's inflexible. Further, an employer shouldn't assume that an applicant or employee requires a religious accommodation. ❖