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Tenth Circuit Clarifies Notice Requirement for Religious Accommodation Cases

By Matthew J. Feery

One of the practical difficulties employers encounter in their efforts to comply with the many employment discrimination laws is the sometimes conflicting obligations facing them by the interaction of these various laws and statutes. For example, under Title VII employers are often required to provide employees and applicants with accommodations for religious practices that conflict with the employer's neutral employment policies. However, as most employers are well aware, the EEOC (Equal Employment Opportunity Commission) strongly discourages employers from asking applicants and employees about their religious practices. What then, for instance, should an employer with a strict dress code do when an applicant appears at the interview wearing a religious style of dress that violates the dress code but potentially implicates a religious accommodation? What constitutes sufficient knowledge of an applicant's religious beliefs that would trigger the need to engage in the interactive process for a possible accommodation?

The United States Court of Appeals for the Tenth Circuit (covering Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) was recently presented with this question in *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 11-5110, 2013 WL 5434809 (Oct. 1, 2013). Abercrombie famously employs a "Look Policy" that requires its employees (which the company calls "Models") to appear and dress in a particular way. One of the requirements is that employees cannot wear black clothing or "caps" (which was not defined by the policy). During the interview process for new employees, managers assess applicants on appearance and style to

help ensure that they adhere to the Look Policy. Abercrombie also instructs its store managers not to assume facts about applicants and to not ask applicants about their religion.

In 2008, Samantha Elauf, then 17 years old and a Muslim, applied to work at an Abercrombie store in Tulsa, Oklahoma. Ms. Elauf testified that she had worn a hijab, or headscarf, since she was 13 years old and that she did so for religious reasons. Before interviewing, Ms. Elauf asked a friend who worked at the Abercrombie store (but was not a manager) whether wearing a hijab to work would be acceptable. That friend in turn raised the issue with an assistant manager, who related a story of previously working with an individual who wore a yarmulke while working at the company and suggested there would be no problem with a hijab if it was not black. The friend relayed the information to Ms. Elauf, who then appeared for the interview wearing a black hijab.

Ms. Elauf was interviewed by assistant manager Heather Cooke, who was familiar with Ms. Elauf through Ms. Elauf's friend at the store and from the mall in general. Ms. Cooke did not "know" Ms. Elauf's religion, but testified that she "assumed [Ms. Elauf] was Muslim" and "figured that was the religious reason why she wore" the hijab. During the interview, however, neither the hijab or Ms. Elauf's religion came up at all. When Ms. Cooke described the company's dress requirements and asked Ms. Elauf if she had any questions, Ms. Elauf did not ask any. Ms. Cooke initially gave Ms. Elauf an interview score that amounted to a recommendation for hire, but Ms. Cooke also was unsure of whether Ms. Elauf would be able to wear the head scarf as an Abercrombie Model and whether it could be black in color. Ms. Cooke's direct supervisor did not know the answer and directed Ms. Cooke to the district manager, who informed Ms. Cooke that the headscarf violated the Look Policy and that Ms. Elauf should not be hired. Ms. Cooke then changed Ms. Elauf's interview score, lowering it to a score that amounted to a no-hire recommendation. She was not hired for the position, and eventually the EEOC sued Abercrombie on her behalf, alleging that Abercrombie violated Title VII by failing to accommodate Ms. Elauf's religious beliefs by making an exception to its Look Policy and allowing her to wear a hijab. A federal court awarded summary judgment to the EEOC, and Abercrombie appealed.

The Tenth Circuit ruled, 2-1, in favor of Abercrombie and held that to assert a viable religious accommodation claim, an applicant (or employee) "must establish that he or she initially informed the employer that the [applicant or employee] adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice." It is only after an employer learns of a religious practice conflicting with a workplace rule that the employer's obligation to explore accommodations is triggered.

In making its decision, the majority looked at, among other things, the personal nature of religion and the EEOC's own guidance to employers on the matter. The court noted that one cannot just claim a belief to be religious because it is strongly held. Rather, the belief must go to ultimate ideas of "life, purpose, and death." Moreover, just because one's practice is associated with a religious belief does not necessarily mean it is done for a religious reason. The Tenth Circuit cited EEOC's expert testimony proffered at trial that some Muslim women wear a hijab for religious reasons and others do so for cultural or other, non-religious reasons. Whether a practice is religious in nature, then, is a determination that must be made on an individual basis. The Court also noted that the EEOC's guidance to employers on conducting job interviews counsels employers to avoid questions on religion because "an applicant's religious affiliation or beliefs . . . are generally viewed as non job-related and problematic under federal law." Thus, if employers cannot inquire about potential conflicts and should not assume the existence of a conflict because of the individualized nature of religion, the only solution, in the majority's mind, is to require that an applicant or employee prove that he or she put the employer on notice.

In making this determination, the Tenth Circuit rejected the EEOC's argument that Abercrombie had adequate knowledge of the potential conflict through other sources, as Ms. Cooke assumed the hijab was worn for religious reasons and had discussed the issue with managers above her. Thus, although Ms. Cooke *assumed* Ms. Elauf was Muslim and *assumed* she wore a hijab for religious reasons, that was not enough to establish a prima facie case of failure to make a religious accommodation. Rather, the EEOC needed to prove that Ms. Elauf not only told Abercrombie of her religious reason for wearing a hijab, but also that she needed an accommodation because her dress conflicted with the Look Policy. Because, according to the majority, there was no evidence of that fact, not only should the decision of the federal court be reversed, but Abercrombie should be granted summary judgment on all claims.

The *Abercrombie* case is not only another reminder of the sometimes conflicting obligations facing employers, but it also shows the importance of training managers and interviewers. Abercrombie correctly instructed all interviewers to not ask about religion, and that fact helped it ultimately prevail, at least thus far. The EEOC has until December 4, 2013, to request a rehearing of the case before the entire Tenth Circuit.

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