U.S. Supreme Court Holds That Employers Must Not Use Religious Dress As Motivating Factor In Employment Decisions

By: Caroline A. Grech-Clapper & Jeffrey R. Bozell **June 12, 2015**

SECREST WARDLE NOTES

The U.S. Supreme Court's holding in *E.E.O.C. v. Abercrombie and Fitch Stores, Inc.* states that an applicant can show disparate treatment without first showing that the employer has actual knowledge of the applicant's need for an accommodation. An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.

* * * *

On June 1, 2015, the U.S. Supreme Court held that Abercrombie & Fitch Stores, Inc. violated an applicant's civil rights when they used her religious dress as a motivating factor in their hiring decision.[1] The holding specifically noted that Title VII of the Civil Rights Act of 1964 does not require an employer to have knowledge that the applicant's practice was a religious practice that required an accommodation.[2] Rather, it prohibits the use of religious dress as a motivating factor in hiring decisions.

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. 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.

---

[1] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 2015 WL 2464053 (2015).
[2] Civil Rights Act of 1964, 42 USCS § 2000e-2.

Initially, the trial court awarded Elauf $20,000 in damages, but the 10th Circuit reversed.[3] The Court rested on the distinction that Elauf never informed Abercrombie prior to the hiring decision that she wore her hijab for religious reasons.[4] This begged the following question: does the burden rest on an applicant to discuss his or her faith, or is an employer required to inquire?

The U.S. Supreme Court's recent holding clarifies the standard.[5] Abercrombie had argued essentially two things: (1) that the employer must have "actual knowledge" of the applicant's need for an accommodation; and (2) that since Abercrombie's dress policy was neutral and barred all headwear, it could not be seen as discriminatory. Abercrombie argues that they have to know the practice requires a religious accommodation and, barring that, a neutral policy cannot be discriminatory.

The U.S. Supreme Court disagreed. First, the Court distinguished that this situation is a "disparate treatment" claim and not a "disparate impact" claim. This distinction is important: a disparate impact claim would mean that the hiring decision based on the dress policy disparately impacted a class of employees.[6] The Court is much more direct by identifying it as a disparate treatment claim, effectively pointing out that Abercrombie specifically discriminated against Elauf because of her religious practice. Actual knowledge of the need for an accommodation is not required, and mere neutrality regarding religious practices is not enough. Applicants requiring a religious accommodation should be treated no worse than applicants not requiring an accommodation.

Writing for the majority, Justice Antonin Scalia stated that Elauf satisfied the disparate treatment provision by showing Abercrombie (1) failed to hire her (2) because of (3) her religious practice (broadly, her religion).[7] The Court focused on the second prong of the test and stated that Title VII expressly prohibits using a religious practice as a motivating factor in hiring decisions.[8]

Thus, by Abercrombie using Elauf's religious practice in deciding whether to hire her, they violated her civil rights protected by Title VII. Title VII does not require Abercrombie to have known that her practice requires an accommodation. They could not use Elauf's religious practice in their hiring decision.

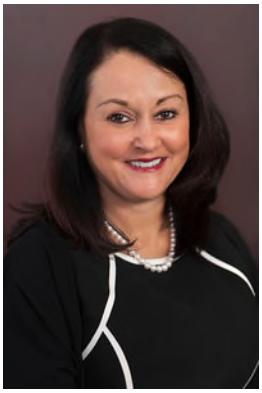
The Supreme Court's decision in *A&F* clarifies the religious accommodation test. First, employers must not use religious practices as motivating factors in hiring decisions. Further, an applicant does not need to show that the employer knew of the need for an accommodation. Employer policy and practices in hiring, maintaining, and terminating their employees should be crafted based on the decision.

---

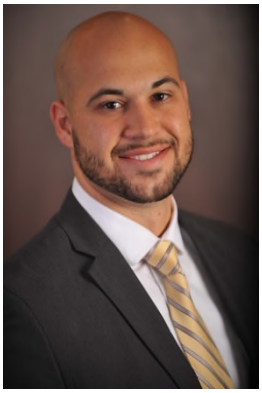
[3] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272 (N.D. Okla. 2011); *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013).
[4] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013).
[5] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 2015 WL 2464053 (2015).
[6] Civil Rights Act of 1964, 42 USCS § 2000e-2.
[7] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 2015 WL 2464053 (2015).
[8] *Id.*

PLEASE CLICK HERE TO SIGN UP FOR SECREST WARDLE NEWSLETTERS PERTINENT TO OTHER AREAS OF THE LAW

WE WELCOME YOUR QUESTIONS!



Caroline A. Grech-Clapper
Executive Partner
248-539-2843
cgrech@secrestwardle.com



Jeffrey R. Bozell
Associate
248-539-2868
jbozell@secrestwardle.com

Tweet Share Forward

Secrest Wardle Email YouTube LinkedIn Twitter

SECREST WARDLE

Troy 248-851-9500
Lansing 517-886-1224
Grand Rapids 616-285-0143
www.secrestwardle.com

CONTRIBUTORS

Employment Law Practice Group Co-Chairs
Bruce A. Truex
Caroline A. Grech-Clapper

Editor
Linda Willemsen