"Motives" After *EEOC v. Abercrombie & Fitch*

Where Do Religious Accommodation and Appearance Standards Intersect?

By Tara Martens Miller

By rejecting the "actual knowledge" standard and adopting a "motivation" standard, the U.S. Supreme Court has indicated that employers must prioritize reasonable accommodation when it comes to workplace dress codes.

In *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), the Supreme Court of the United States held that an employment applicant seeking to establish a disparate treatment claim under Title VII of the Civil Rights Act of 1964 must demonstrate that a religious accommodation was a motivating factor in an adverse employment hiring decision. *Id.* at 2032–34. Importantly, the Court held a claimant need *not* prove that an employer had actual knowledge of the need for an accommodation based upon a religious practice that may conflict with the employer's appearance standards. *Id.* The decision was issued early this summer, in June 2015, and reversed the United States Circuit Court of Appeals for the Tenth Circuit's grant of summary judgment in favor of the employer. *Id.* at 2034.

Religious Accommodation Under Title VII

Title VII of the Civil Rights Act of 1964, 78 Stat. 253 (Title VII), as amended, prohibits discrimination based upon religion, among other characteristic bases, and requires an employer to accommodate reasonable requests for religious accommodation as long as the requests do not cause undue hardship to the employer. The central provisions of Title VII prohibit discrimination in employment based upon religion as well as religious harassment and retaliation. To be clear, however, the law exempts religious organizations. As a result, this article will not address a religious organization's obligations under the law. Note also, that many states, Idaho included, have state laws prohibiting discrimination based upon religion.

Title VII also prohibits employers from refusing to hire an applicant because of his or her religion or religious practice. Before the decision in *Abercrombie*, the federal circuit courts had been split on whether or not an employment applicant bringing a Title VII claim based upon failure to accommodate a religious practice must first prove that the applicant actually had notified the employer that the applicant needed an accommodation. The Tenth Circuit held that the applicant in *Abercrombie* must establish that she

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had informed the potential employer that she needed an accommodation due to a religious practice, which would require the employer to modify its "appearance standard"—that is, that the employer had "actual knowledge" of the necessity for the accommodation. *Abercrombie*, 135 S. Ct. at 2031.

According to the Court, the disparate-treatment provision of Title VII, 42 U.S.C. §2000e-2(a)(1), contains no knowledge element, and therefore, it is inappropriate to write a knowledge requirement into Title VII.

The Court Rejects "Actual Knowledge" and Adopts a "Motivation" Standard

The *Abercrombie* decision, a succinct opinion authored by Justice Scalia, analyzed the U.S. Equal Employment Opportunity Commission (EEOC) claim, brought on behalf of a teenage applicant for a job at an Abercrombie & Fitch retail store in Oklahoma in 2008. Samantha Elauf, a practicing Muslim, wore a traditional black headscarf to her interview. 135 S. Ct. at 2030. At the time, Abercrombie & Fitch maintained and imposed a strict "look policy" that governed employees' dress. *Id.* at 2031. Dress codes often are now commonly named "look policies," "dress expectations," or "appearance standards." The Abercrombie & Fitch look policy prohibited all "caps," without defining the term "caps," because the company viewed them as "too informal for Abercrombie & Fitch's desired image." *Id.* While Ms. Elauf never requested an accommodation, Abercrombie & Fitch apparently thought that her headscarf would violate its look policy and that was a factor in its choosing not to hire her. *Id.* The EEOC filed suit on Ms. Elauf's behalf, alleging a violation of Title VII, which prohibits a prospective employer from refusing to hire an applicant because of the applicant's religious practice when the practice could be accommodated without undue hardship. *Id.* at 2030. Construing the facts in favor of the EEOC, as required at the summary judgment stage, the Court accepted as true that the district manager informed the store assistant manager in charge of hiring that Ms. Elauf's headscarf would violate the look policy, as would all other headwear, religious or otherwise, and instructed the store assistant manager to not hire Ms. Elauf. *Id.* Ms. Elauf was otherwise a fully qualified candidate. *Id.*

The district court granted summary judgment in favor of the EEOC, on behalf of Ms. Elauf, and against Abercrombie & Fitch and awarded damages of $20,000. The Tenth Circuit reversed, awarding Abercrombie & Fitch summary judgment, holding that to find the defendant liable for failure to accommodate, the applicant must show that Abercrombie & Fitch had "actual knowledge" of her need for an accommodation. *Id.*

The Supreme Court rejected the Tenth Circuit's actual knowledge requirement and sided with the EEOC. *Abercrombie*, 135 S. Ct. at 2032. The Supreme Court, rather than sustaining the Tenth Circuit approach, adopted a "motivating factor" standard, holding that "motive and knowledge are separate concepts," and the Title VII analysis is intended to prohibit motivations, regardless of an employer's actual knowledge. *Id.* at 2033. An employer that "has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant [for employment] if avoiding that reasonable accommodation is not [the employer's] *motive*." *Id.* (emphasis in original). Correspondingly, an employer acting with motive to avoid a reasonable accommodation "may violate Title VII even if [the employer] has no more than an unsubstantiated suspicion that accommodation would be needed." *Id.*

The Court provided the following example:

> [S]uppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.

Abercrombie, 135 S. Ct. at 2033.

Importantly, as applied to our client employers, we must defend not only what an employer actually knew, but must also undertake to defend an employer against employee or prospective employee claims that an employer was "motivated" to avoid an accommodation by its hiring decision. According to the Court, the disparate-treatment provision of Title VII, 42 U.S.C. §2000e-2(a)(1), contains no knowledge element, and therefore, it is inappropriate to write a knowledge requirement into Title VII. *Id.* at 2032. In sum, "[T]he rule for disparate treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." *Id.* at 2033.

"Motivating Factor" Standards as Applied to Appearance Policies

As it relates to dress codes, look policies, dress expectations, appearance standards, or whatever companies call them, the Court explained that an employer's duty to accommodate religious practices requires building "favored treatment" into neutral policies. 135 S. Ct. at 2034. An appearance standard, or a "look policy," as Abercrombie & Fitch termed its policy, that conflicts with a religious belief may only be enforced for a neutral reason related to business operations. While employers are permitted to maintain dress codes, an employer will not, on the basis of the neutrality of the policy, be permitted to apply an appearance standard in a manner that violates its duty to accommodate an individual's religious observances and practices. *Id.* Indeed, the Court explained, "Title VII requires otherwise-neutral policies to *give way* to the need for a reasonable accommodation." *Id.* (emphasis added).

Of course, many employers maintain and enforce standards for very appropriate business purposes, including, without limitation, to promote safety or a legitimate intention to project a certain image. So should an employer create, maintain, amend, or entirely do away with a dress code or appearance standards?

Culturally Motivated Modifications to Appearance Policies

This summer, Starbucks announced that it would liberalize its appearance policy, which would allow employees to display tattoos visibly and would relax the company position on piercings. The policy presents the Starbucks rules and standards to employees (and applicants) in a positive light. For instance, the policy now has a heading for tattoos that reads, "TATTOOS. Yes!", with a "thumbs up" illustration, and it explains: "We want customers to focus on you, not your body art. Tattoos are allowed, but not on your face or throat. Treat tattoos as you treat speech—you can't swear, make hateful comments or lewd jokes in the workplace, neither can your tattoos." Making an Appearance, Starbucks, U.S. Retail Dress Code Guidelines, available at http://globalassets.starbucks.com/assets/0AA3D61F-1E22-47BD-A2A2-55F30D357138.pdf.

Likewise, the heading for piercing reads, "PIERCINGS. Less is more," and it elaborates: "When it comes to earrings, it's small or moderately sized and no more than two per ear. Yes to ear gauges, ideally no bigger than 10 mm and a small nose stud is allowed (no septum or rings). No other visible pierced jewelry or body adornments." *Id.*

It was reported that the change in the Starbucks policy came as a result of an employee petition and Starbucks' determination that employee retention and satisfaction outweighed the need for a strict, "clean cut" appearance policy. Starbucks is not alone, and many national organizations, businesses, employers, and human resources departments are listening to employee requests and are relaxing appearance standards, perhaps not only for worker satisfaction or retention, but also to avoid the difficult considerations related to religious accommodation.

Many grooming practices and dress expectations potentially implicate religious observances and practices. Facial hair, nontraditional hair styles and colors, body art, body piercings, tattoos, clothing, jewelry, and related personal practices, all potentially might relate to accommodation. Indeed, even Starbucks' relaxed U.S. Retail U.S. Dress Code Guidelines might implicate a number of religious practices and observances requiring an accommodation that would not be considered unduly burdensome.

Also of significance, in 2009, after becoming vice president of Global Resources at General Motors, now-CEO Mary Barra, when confronted with a 10-page comprehensive and complicated dress code, did away with it entirely. The extensive General Motors dress code was replaced with a simple and concise statement: "Dress appropriately." At the 2015 Catalyst Awards, honoring gender initiatives in American corporations, Ms. Barra credited her dress code modifications as "the smallest biggest change" that she made at General Motors. Richard Feloni, Business Insider, *GM CEO Mary Barra Explains How Shrinking the Dress Code to 2 Words Reflects Her Mission for the Company* (Mar. 27, 2015).

While there is no specific indication that Ms. Barra based her decision on any concerns related to religious or other accommodation, changing cultures apparently informed her decision. At the Catalyst event she indicated that the decision was "a window into things that we attacked early to empower the managers . . . and I say we seized that opportunity to really drive a significant culture change in the company." *Id.* As explained by Ms. Barra, she felt that General Motors had been mired in a long tradition of bureaucracy, and the debate over the dress code was a perfect example. *Id.*

Purportedly, there were some difficulties implementing the "dress appropriately" standard, which involved invoking common sense. She cited as an example that one of General Motors high-ranking managers complained that the new standard caused his team of subordinates to begin wearing jeans, which caused the leader embarrassment at important meetings. When Ms. Barra asked if he had talked to his team, and he said no, she responded: "Well, why don't you at your next team meeting tell them what you're worried about and see what they say?" Apparently, two weeks later he related to her that he spoke with his team and they decided collectively they could wear jeans to the office with the condition that the team members keep a pair of dress slacks in their offices for impromptu, more formal, meetings. Ms. Barra recounted, "He was overjoyed." *Id.*

When she encountered another complaint that a manager's female subordinate was wearing "skimpy" clothing, Ms. Barra responded that there was no rule that Barra could write to change the behavior: It was up to the manager to act as a leader. She insisted that her management team be accountable to lead their teams, "instead of having a culture where [Ms. Barra] developed a rule and then needed to continually explain it." *Id.*

Are the solutions advanced by Starbucks and General Motors right for every company? No. However, it is important that all employers examine existing dress codes and look and appearance policies carefully and take care when they create new rules or enforce existing rules and policies. The risk and benefit to employers of creating, maintaining, and enforcing look policies depends entirely upon the business value to an organization. Culturally, at least in some industries and organizations, dress codes are becoming less appealing, even burdensome. In such organizations inclusion and tolerance is often favored over formal or traditional standards of the "clean cut" or mainstream stereotypes. As global economies develop and grow, so must the image of an organization or an industry and the appearance of its employees.

"Undue Hardship" in Response to Religious Accommodation Needs

Unless it would create an "undue hardship" for an employer, religious discrimination laws require employers to accommodate religious beliefs. If an employer will endure more than a de minimus amount of sacrifice of resources due to an accommodation, then an undue hardship exists. Therefore, consideration must be given to the real risk of failure to accommodate and the difficulty in establishing an "undue hardship" by an employer or a prospective employer

in yielding its dress code to accommodate a religious practice.

Title VII is liberally construed: The only relevant considerations are whether a religious belief is "sincerely held," no matter how outlandish it may appear to an employer, and whether the necessary accommodation represents an "undue hardship" for the employer. *See* 42 U.S.C. §2000e(j). What counts as a religion goes way beyond what most employers may understand. As the Court explained in *Abercrombie*, Congress defined "religion" for Title VII purposes as "includ[ing] all aspects of religious observance and practice, as well as belief." *Abercrombie,* 135 S. Ct. at 2033 (citing 42 U.S.C. §2000e(j)).

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The EEOC is presently focused on enforcing religious accommodation, even when a request for accommodation appears to be based on what an employer might consider to be a "crazy" religious concern. The EEOC recently announced a major victory in an action that it pursued on behalf of an employee against Consolidation Coal Company and its parent company CONSOL Energy, Inc. The EEOC relates that the verdict was just the latest in a series of cases involving Title VII's prohibition against religious discrimination. Press Release, U.S. Equal Emp't Opportunity Comm'n, Court Awards Over Half Million Dollars Against Consol Energy/Consolidation Coal in EEOC Religious Discrimination Lawsuit (Aug. 27, 2015). The EEOC general counsel, David Lopez, said, "This victory underscores two important American values: religious freedom and inclusiveness." *Id.*

The case, *U.S. EEOC v. CONSOL Energy, Inc. and Consolidation Coal Company*, Civil Action No. 1:13-CV-00215, 2015 WL 106166 (N.D.W.V. 2015), was pursued by the EEOC on behalf of a former employee of the defendants, Beverly R. Butcher, Jr., who had worked at the mine in West Virginia for 35 years. When the defendants installed biometric hand scanners to track employee time and attendance, Mr. Butcher repeatedly informed his employer that submitting to the hand scanning violated his sincerely held religious beliefs as an evangelical Christian. According to Mr. Butcher, the hand-scanning technology represented the "Mark of the Beast" and the antichrist discussed in the Book of Revelation. He requested, but was denied, an exemption from the technology. The EEOC charged that Mr. Butcher was forced to retire because the defendants refused to provide a reasonable accommodation for his religious beliefs.

In January 2015, a unanimous jury in Clarksburg, West Virginia, decided that the defendants had violated federal law when they required Mr. Butcher to retire because they refused to accommodate his religious beliefs and awarded $150,000 in compensatory damages. The federal district court then held an evidentiary hearing to determine lost wages, benefits, and injunctive relief and awarded a total of $586,860 in lost wages and benefits and compensatory damages and permanently enjoined the defendants from committing similar acts in the future deemed in violation of Title VII.

While an appeal is certainly likely, and the decision will not necessarily legally bind most employers to certain practices, the case serves as a warning of the risks associated with denying a request for religious accommodation. Likewise, the EEOC's response serves as an even stronger warning. The EEOC Philadelphia regional attorney, Debra M. Lawrence, is quoted in the press release as follows: "This jury verdict and federal court ruling should remind all employers that EEOC will take cases to trial when appropriate and that juries and courts may award sizeable verdicts to compensate victims of employment discrimination." Press Release, U.S. Equal Emp't Opportunity Comm'n, Consol Energy, *supra*. The EEOC district director, Spencer H. Lewis, Jr., followed: "Many times when there is a conflict between an employee's religious beliefs and a work rule, there are easy modifications to company (sic) permitting an employee to continue to work without violating his religious beliefs." *Id.* Religious accommodation is, apparently, a hot topic for the EEOC, and employers must carefully calculate the risks associated with denying a requested or even "suspected" religious accommodation.

In addition, it must be considered that lawyers with training, study, and experience addressing the Title VII standards that apply to religious accommodation after *Abercrombie* are not likely to be the individuals charged with enforcing the standards on a day-to-day basis. Instead, mid- to lower-level managers, with little training or understanding of complex and numerous religious practices, will have to address these issues. In fact, even the most educated academic in theology may not have a complete understanding of what the phrase "sincerely held religious beliefs" encompasses. Religious observances must be accommodated, even when an employer might not believe that a requesting employee belongs to a particular religion. Similarly, practices must be accommodated even when an employer considers the beliefs illegitimate or outside of the mainstream or when they are unfamiliar to the employer. In all instances, "religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be reasonably accommodated." *Abercrombie*, 135 S. Ct. at 2034.

Concluding Recommendations

In any event, if an employer desires to maintain workplace appearance standards, those charged with interviewing or hiring or enforcing the standards must receive training on an employer's duty "to reasonably accommodate" all religious practices. Now, due to the *Abercrombie* decision, this is true whether or not a requested accommodation is voiced by an employee or a prospective employee. An understanding must be advanced by an employer through comprehensive and informed training that

the employer has applied a neutral policy is no excuse for not accommodating an actual or reasonably suspected religious belief. Indeed, the Court in *Abercrombie* ruled that otherwise neutral policies must "give way to the need for accommodation." *Abercrombie*, 135 S. Ct. at 2034.

Those same individuals applying or enforcing workplace appearance policies or standards must be particularly sensitive to an employee's—or a prospective employee's—external dress and grooming; and yet, employers and those applying or enforcing its policies, must also be careful to avoid discussing religious beliefs with them. Employers should discourage discussions of religion in the workplace to avoid "motivating factor" arguments being advanced against them. This directive—to accommodate religious belief without discussing religion in the workplace— creates conflict and natural tension for those carrying it out and asks them to walk a fine line. An employer and those with policy-making authority should avoid risk unnecessary to the employer's legitimate business plan and concerns with respect to workplace appearance rules and policies because even "neutral" policies may ultimately fail to shield an employer from liability.

If a request for religious accommodations is denied as an "undue hardship," the important business reason should be clearly documented. Furthermore, it is recommended that the issue be fairly addressed with the employee or the prospective employee. As noted, establishing an "undue hardship" with respect to application of a dress code, look policy, or appearance standard may prove very difficult, and when possible, employers are encouraged to err on the side of accommodation. When hiring personnel, human resource officers, or other managers are called upon to address religious accommodation, it is important that those individuals be advised to seek appropriate legal counsel before applying or enforcing a rule or a policy. FD