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Employers must rethink employee 'look' policies after high court decision

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Many employers rely on work policies or guidelines to address an individual employee's dress, grooming and overall appearance in the workplace. These policies are often motivated either by the employer's desire to maintain a "professional" appearance in the work environment or by an overall marketing or image strategy.

A recent Supreme Court decision, *EEOC v. Abercrombie and Fitch Stores Inc.*, No. 14-86 (June 1, 2015) should cause employers to rethink how these "policies" are applied in the context of job applicants who may require a religious accommodation based on dress or grooming practices.

In *Abercrombie*, Samantha Elauf, a practicing Muslim, applied for a position as a "model" in an Abercrombie store. The assistant manager conducting the interview evaluated Elauf according to the standard rating system that Abercrombie applies to all store applicants and found that Elauf qualified for the job.

The assistant manager was concerned, however, because Elauf wore a headscarf, which would conflict with the store's "look" policy prohibiting "caps." The manager believed that Elauf wore a scarf because of religious obligation, but did not have actual knowledge regarding the reason for the scarf. A corporate supervisor advised that a headscarf would conflict with Abercrombie's "look" policy, and thus, Abercrombie declined to extend a job offer to Elauf.

The Supreme Court reversed the 10th U.S. Circuit Court of Appeals' award of summary judgment in favor of Abercrombie on Elauf's Title VII claim of religious discrimination.

The court held that for a job applicant to prevail on a disparate-treatment claim, the applicant must show only that her need for an accommodation was a motivating factor in the employer's decision, not that the employer actually had knowledge of the need.

(E)mployers should also be wary that the court's decision in Abercrombie *may be a first step in rolling back image-based dress and grooming policies.*

The court stated that "an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." In other words, "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."

The court noted that Title VII, unlike the Americans with Disabilities Act, does not impose a knowledge requirement. Instead the intentional discrimination provision of Title VII prohibits certain motives regardless of the employee's knowledge.

While employers may view the court's decision as requiring them to guess as to whether or not an applicant or employee requires a religious accommodation, the court seems to reject such a broad reading of its decision stating " ... it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice ... "

That issue is not presented in this case since Abercrombie knew, or at least suspected, that the scarf was worn for religious reasons." In other words, bad facts tend to make "challenging" law.

To ensure compliance with the court's holding in *Abercrombie*, employers with "look" policies should re-examine their hiring practices and procedures and retrain decision-makers on proper considerations for hire and/or promotion.

If an employer's decision to hire or promote is at all motivated by avoiding a religious accommodation need, the decision will likely conflict with Title VII's prohibition against religious discrimination.

Finally, looking forward, employers should also be wary that the court's decision in *Abercrombie* may be a first step in rolling back image-based dress and grooming policies. EEOC guidance in this area has for a long time asserted that customer preference does not constitute a valid basis for denying a request for a religious dress or grooming accommodation.

Further, the EEOC guidelines state that, "an employer's reliance on the broad rubric of "image" or marketing strategy to deny a requested religious accommodation may amount to relying on customer preference in violation of Title VII or otherwise be insufficient to demonstrate that making an exception would cause an undue hardship on the operation of the business."