

Duff on Hospitality Law

U.S. Supreme Court Clarifies That Employers May Not Make Religious Practices, Confirmed or Not, a Factor in Employment Decisions

By Diana Shukis on 6.5.15 | Posted in Employment Law

In the hospitality industry, dress code policies are very important. [Diana Shukis](#), member of our [Labor, Employment & Immigration](#) group, brings us the latest US Supreme Court ruling regarding image-based policies. Thank you, Diana! – Greg

On June 1, 2015, the U.S. Supreme Court ruled in favor of the US Equal Employment Opportunity Commission (EEOC), concluding that an employer cannot refuse to hire a qualified job applicant in order to avoid accommodating a religious practice – even if the applicant did not request an accommodation. An applicant must only show that her need for a religious accommodation was a motivating factor in the potential employer’s decision not to hire.

In [EEOC v. Abercrombie & Fitch](#), Samantha Elauf, a Muslim who wore a headscarf for religious reasons, interviewed for a sales floor position at Abercrombie. Ms. Elauf wore a headscarf to the interview, but did not discuss her religion or say that she wore the headscarf for religious reasons. The assistant store manager who interviewed Ms. Elauf did not ask about the headscarf, but later testified that she assumed Ms. Elauf was Muslim. The assistant store manager gave Ms. Elauf a rating that qualified her to be hired, but was concerned that Ms. Elauf’s headscarf conflicted with Abercrombie’s dress code, which prohibited headwear of any kind. The assistant store manager checked with the district manager, who directed the assistant store manager not to hire Ms. Elauf because her headscarf would violate Abercrombie’s dress code.

The EEOC sued on Ms. Elauf’s behalf, claiming that Abercrombie’s refusal to hire Ms. Elauf because of her religious practice violated [Title VII of the Civil Rights Act of 1964](#) (Title VII), which prohibits discrimination based on race, color, sex, religion or national origin. Abercrombie argued that it did not violate Title VII because its dress code banned all headwear, whether religious or not, and because Ms. Elauf had not requested an accommodation due to her religion.

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The Supreme Court rejected Abercrombie’s argument that Ms. Elauf had to prove Abercrombie knew she needed a religious accommodation, noting that Title VII does not include a knowledge requirement. Title VII outright prohibits certain motives, including making employment decisions based on religion, regardless of an employer’s actual knowledge. The evidence showed that Abercrombie at least suspected Ms. Elauf wore the headscarf because of her religion and it refused to hire her because of it.

Take Aways:

- **Don’t stick your head in the sand.** If you suspect that an applicant may need a religious accommodation if hired, you should engage in an interactive process with her. Typically this would include explaining the relevant policy and asking whether she can comply with it. If not, ask why. If it is because of religion, ask whether she would need an accommodation and what that might be. Then, evaluate whether granting the accommodation would impose an undue hardship. Remember to use caution in asking the follow up questions. Focus on the job requirements and whether the applicant can meet them – not on the applicant’s religious beliefs and practices.
- **Train interviewing teams.** Be sure that you provide regular training to those who interview in your organization. They need to understand what they can and cannot ask in the interview process and when they need to call in reinforcements to assist with more challenging issues. Also make sure that higher level managers have appropriate training, including on when to contact HR before making a decision. I bet Abercrombie & Fitch wishes its district manager had called HR before giving the “do not hire” instruction as to Ms. Elauf.
- **Review your appearance policy.** Dress codes and appearance policies are very important in the hospitality industry, but this case is a good reminder of some of the dangers lurking in and around them. The EEOC is very skeptical of image-based policies that seem to exclude people based on how they look and/or what they wear. Be sure your appearance policy is updated and in-line with what is truly important for your business.

If you have any questions regarding this ruling, please contact [me](#) or [Diana](#).

Tags: EEOC v. Abercrombie & Fitch, religious accommodation, Title VII of the Civil Rights Act of 1964, US Supreme Court