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Religious Protection or Religious Preference? – Supreme Court Rules in Abercrombie Headscarf Case

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On Monday, June 1, the Supreme Court decided a religious discrimination case involving Abercrombie & Fitch and the EEOC. The Court held that "[a]n employer may not make an applicant's religious practice, *confirmed or otherwise*, a factor in employment decisions." The Court also re-affirmed that to succeed on a disparate treatment discrimination claim (i.e., a discrimination claim related to a specific person), one must satisfy the motivating factor standard. The motivating factor standard requires a showing that the protected characteristic (e.g., one's religion, race, etc.) was a "motivating factor" in the at-issue employment decision.

Samantha Elauf is a practicing Muslim who, consistent with her understanding of her religion's requirements, wears a headscarf. She applied for and was denied a position with Abercrombie & Fitch. Abercrombie rejected Elauf because her headscarf did not conform with Abercrombie's dress code or "look" policy. At the time it made the decision to reject Elauf, the facts revealed that Abercrombie knew—or at least suspected—that Elauf wore the headscarf for religious reasons. Abercrombie did not hire Elauf because she wore the headscarf, and Elauf wore the headscarf because of her religion. Therefore, in the eyes of the Supreme Court, Abercrombie unlawfully discriminated against Elauf because of her religion.

The Court's opinion is fairly succinct (only 7 pages), but employers will be dealing with it and working to understand it long after the media attention fades. First, the Court arguably eliminated failure to accommodate claims based on a religious practice. Such claims traditionally arise where an employee requests a religious accommodation, but the employer unreasonably fails to provide or allow the requested accommodation. As Justice Thomas wrote, "[t]he Court today rightly puts to rest the notion that Title VII creates a freestanding religious-accommodation claim." This holding does not alleviate an employer from any Title VII obligations. It merely provides an additional defense should an employee file a failure to accommodate claim.

Second, the Court raised but did not answer the following question: What level of knowledge must an employer have about an employee's religion or religious practice before the employer can be held liable for religious discrimination? As explained above, Abercrombie admitted that it knew Elauf wore a headscarf because of her religion. But absent actual knowledge, what level of knowledge is required to hold an employee liable for religious discrimination? The answer is not entirely clear from the Supreme Court's decision, but it is likely that a mere suspicion is legally sufficient. In footnote 3 of his majority opinion, Justice Scalia addresses this. An employer cannot discriminate based on a religious practice, explains Justice Scalia, unless the employer "knows *or suspects"* the practice to be religious.

Finally, the Court appears to recognize a religious preference in the workplace. Abercrombie's "look" policy was a neutral workplace policy. Neutral workplace policies apply equally to all employees, regardless of age, sex, race, religion, etc. Other examples of neutral workplace policies include no jewelry, no tennis shoes, no visible tattoos, or all employees must work Saturdays. To date, so long as neutral workplace policies were applied equally to all employees, employers were unlikely to be held liable for any resulting discrimination. This, however, no longer seems to be the case. In his majority opinion, Justice Scalia wrote that Title VII gives religious practices "favored treatment" in the workplace, and Title VII "requires otherwise-neutral policies to

give way to the need for [religious practices]." In other words, an employer can enforce a neutral workplace policy, unless and until an employee's religious practice conflicts with that policy. At which time, the neutral workplace policy must "give way" to the religious practice, as religious practices enjoy "favored treatment." In such situations, employers can likely still argue that favoring the religious practice would work an undue hardship on the employer. The Court's majority opinion did not address the undue burden analysis, and it will take some time for the lower courts to provide the necessary guidance.

In the meantime, employers should understand that they will be required to accommodate any religious accommodation that they suspect an employee needs, even if the employee does not expressly request an accommodation.