

# PUBLICATION

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## **EEOC v. Abercrombie & Fitch Continued: Did the Supreme Court Pave the Way for ADA Claims Based on Nonobvious Disabilities?**

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**Earlier this month, the Supreme Court decided *EEOC v. Abercrombie & Fitch*, a Title VII case involving religious discrimination. While the case did not directly involve the Americans with Disabilities Act (ADA), the accommodation analysis could bleed into ADA cases. In particular, should employers be on the lookout for nonobvious disabilities?**

The Court determined that Abercrombie & Fitch unlawfully discriminated against a practicing Muslim when it denied her employment because her headscarf did not conform to its dress code or "look" policy. The fascinating aspect of the case is that the employer never discussed the headscarf with the applicant and thus only speculated as to its religious significance. Nevertheless, the Court ruled that "[a]n employer may not make an applicant's religious practice, *confirmed or otherwise*, a factor in employment decisions."

While the case did not concern disabilities, the accommodation analysis frequently bleeds into the ADA from Title VII. So, are employers under a duty to reasonably accommodate a "suspected" disability? Likewise, will employers be forced into the role of diagnosing disabilities?

Given the difficulties associated with identifying physical and mental impairments, these questions sound silly. But is it really that big of a leap from the newly-minted obligation to accommodate *unconfirmed* religious practices to an obligation to accommodate unconfirmed disabilities?

Up to this point, employers have taken solace in the notion that it is the employee's obligation to put an employer on notice of a disability or the need for an accommodation. But in the event that the concepts of *EEOC v. Abercrombie & Fitch* bleed into ADA cases, this may change. Whether and to what extent ADA cases will be impacted is not yet clear. Nevertheless, employers may want to reevaluate their ADA policies and procedures and consider a more proactive approach to providing accommodations. Ignorance may no longer be bliss.