

The Abercrombie Case, Dress Codes, and Religious Discrimination

By Jeffrey W. Larroca, JD

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex, color, race, national origin, and religion. The law's protections are elemental. An employer cannot choose a man over a woman for a position based on his presumption that women lack the strength to perform the job in question. They cannot deny a current employee a promotion because of a prejudice against African Americans, whites, or people with dark skin. And they cannot relegate Hispanic employees to less desirable positions in the "back office" for fear that their predominantly non-Hispanic customers might feel uncomfortable.

The common theme in the application of Title VII's protections is prohibitive. The law disallows certain actions on the basis of bias. But the law does not require preferential treatment for most of the people it protects. Affirmative action is a hot button issue, but it is largely an issue affecting public employers or government contractors. For private employers, Title VII does not mandate that they do anything affirmatively for applicants or employees of a particular sex, color, race, or national origin.

Except for religion. Title VII does require an employer to accommodate an employee's religious beliefs as long as the accommodation does not result in an undue hardship on the employer. Translated, this means that an employer must adjust its policies and practices to allow for the smaller impositions that may be posed by employees' religious practices, such as adjusting schedules for worship, allowing an employee to pray in a break room over his or her lunch, or relaxing dress codes to accommodate a religious tenet.

This brings us to the Abercrombie & Fitch case recently decided by the Supreme Court.

Abercrombie & Fitch operates several lines of clothing stores and, like many clothing stores, adopted a policy governing its employees' dress that prohibits "caps." A practicing Muslim woman who wears a *hijab*— or headscarf — applied for a job with the company and was denied the position because Abercrombie believed her headscarf would violate the policy regarding caps. The Equal Employment Opportunity Commission (EEOC) sued on the applicant's behalf. Abercrombie prevailed in the lower courts, and the Supreme Court took up the matter.

Justice Scalia, writing for the court, explained that under Title VII, "an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." He continued, "For example, suppose 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." As such, in a very short opinion, Justice Scalia essentially held that Abercrombie erred out of the gate by assuming that the applicant would be wearing a headscarf at work and thus engaged in religious discrimination.

The takeaway from the case is twofold.

First, employers cannot look at an employee and make presumptions as to the accommodations he or she might require for religious practices. In doing so, the employer puts the cart before the horse, and without even getting into the issue of whether an accommodation is an undue burden, the employer ends up discriminating based on religion. An easier example, as cited in Justice Scalia's remarks, might be if an applicant came to an interview and, in conversation, mentioned that he is an Orthodox Jew. Then, the employer assumes that the employee will be unable to work on the Sabbath and makes the decision not to hire based on that assumption. It is not a far cry from that scenario to have employers make any number of assumptions about

potential employees based on their stated religious observances. Simply asking if a potential employee can work Saturdays takes care of that issue.

Second, the decision in no way suggests that Abercrombie would be required to allow the employee to wear her headscarf if she stated that it was a religious requirement. If you do an online search for the words "Abercrombie" and "Supreme Court," you will elicit such headlines as "Top Court Backs …" and "Muslim Woman Wins …," and technically, that's correct — she won the case. But Justice Scalia's decision is very limited.

She is not required to be hired; the case was sent back to the lower court to apply the Supreme Court's analysis. Even if she is required to be hired, nothing in the decision suggests that Abercrombie would be required to allow her to wear the headscarf. Basically, the court is saying go back to square one. After that, if the employee was hired, a broader discussion would need to occur as to whether allowing her to wear the headscarf in contravention of Abercrombie's policy violates Title VII.

That fight has been going on for some time in the courts, with mixed results. In its guidance on Title VII, religious accommodation, and dress codes, the EEOC noted: "Some courts have concluded that it would pose an undue hardship if an employer was required to accommodate a religious dress or grooming practice that conflicts with the public image the employer wishes to convey to customers. While there may be circumstances in which allowing a particular exception to an employer's dress and grooming policy would pose an undue hardship, an employer's reliance on the broad rubric of 'image' to deny a requested religious accommodation may amount to relying on customer religious bias ('customer preference') in violation of Title VII. There may be limited situations in which the need for uniformity of appearance is so important that modifying the dress code would pose an undue hardship. However, even in these situations, a case-by-case determination is advisable."

So, who won? It seems that the Abercrombie case has posed more questions — and will force employers to do the same — than it has answered, so stay tuned.

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