
Supreme Court Clarifies that an Employer Can Be Liable for Failing To Accommodate a Religious Practice that the Employer Suspects, But Does Not Know, To Be Religiously Based

SUMMARY

Yesterday in Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc., No. 14-86, the U.S. Supreme Court addressed the prohibition in Title VII of the Civil Rights of 1964 on adverse employment actions “against any individual . . . because of such individual’s . . . religion.” The Court held that Title VII does not require that employers have actual knowledge of an applicant or employee’s need for a religious accommodation in order for an adverse employment action to be unlawful. Rather, an employer violates Title VII if the employee’s religious practice is a motivating factor in the adverse employment action, even if the employer only suspects (though does not know) that the employee’s practice is a religious one.

BACKGROUND

Under Title VII, employers may not intentionally discriminate by “fail[ing] or refus[ing] to hire” or “discharg[ing]” an applicant or employee “because of such individual’s race, color, religion, sex, or national origin.”¹ Employers also may not “limit, segregate, or classify” applicants or employees “because of” those protected characteristics if it would “deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.”² Title VII thus prohibits both intentional discrimination based on certain protected characteristics and actions that would have a disparate impact based on any of those same characteristics.
To establish that an employment action is unlawful under the disparate-treatment provision, an individual is required to show that a protected characteristic was a "motivating factor" for the employer’s action, even if other factors also may have played a role. Among those protected characteristics, Title VII defines “religion” as “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate [a] prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”

Thus, under Title VII’s disparate-treatment provision, an employer may not take adverse action against a job applicant that is motivated in part by the applicant’s religious practice, unless the employer could not accommodate the practice without undue hardship.

The dispute in Abercrombie arose when the assistant manager of an Abercrombie Kids store in Tulsa, Oklahoma, did not hire seventeen-year-old Samantha Elauf. Abercrombie Kids has a “Look Policy” that governs employees’ attire and prohibits the wearing of caps. Ms. Elauf is a Muslim who wears a headscarf as part of her religious practice, and she wore a headscarf to her interview at Abercrombie Kids. The assistant manager suspected, but neither knew nor attempted to confirm, that Ms. Elauf wore a headscarf because of her faith. After verifying with a corporate official that Ms. Elauf’s headscarf would violate the Look Policy, the assistant manager declined to hire Ms. Elauf.

The Equal Employment Opportunity Commission (EEOC) brought suit on Ms. Elauf’s behalf, claiming that Abercrombie’s failure to hire Ms. Elauf constituted disparate treatment under Title VII. The district court granted summary judgment on liability to the EEOC and, after a trial on damages, awarded Ms. Elauf $20,000. The Tenth Circuit reversed, granting summary judgment to Abercrombie on the ground that an employer is not liable under Title VII for failure to accommodate a religious practice unless the employee provides notice of the need for an accommodation. The Supreme Court subsequently granted review.

**YESTERDAY’S DECISION**

In an 8-1 decision authored by Justice Scalia, the Supreme Court held that an employer may be liable under Title VII for failing to accommodate an employee’s religious practice, even if the employer only suspects (but does not know) that the practice is a religious one. Relying on the language of the disparate-treatment provision, the Court set out a “straightforward” rule for claims based on a failure to accommodate a religious practice: “An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” The Court gave the example of an employer who “thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath.” In the Court’s view, “[i]f 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 distinguished Title VII from antidiscrimination statutes that contain explicit knowledge requirements. For example, the Americans with Disabilities Act of 1990 makes unlawful an employer’s failure to provide “reasonable accommodations to the known physical or mental limitations” of an applicant. Title VII, the Court noted, has no similar language. The Court also distinguished Title VII’s causation standard from other antidiscrimination statutes, reasoning that although the statutory term “because of” typically requires but-for causation, Title VII “relaxes this standard . . . to prohibit even making a protected characteristic a ‘motivating factor’ in an employment decision.” The Court concluded that Title VII “prohibits certain motives, regardless of the state of the actor’s knowledge,” emphasizing that “[m]otive and knowledge are separate concepts.”

The Court rejected Abercrombie’s invitation to adopt a burden-shifting test that would put the burden on plaintiffs to seek a religious accommodation, stating that “[i]t asks us to add words to the law to produce what is thought to be a desirable result. That is Congress’s province.” The Court also rejected Abercrombie’s argument that claims like Ms. Elauf’s—i.e., those based on a failure to accommodate an applicant or employee’s religious practice—must be raised as disparate-impact claims, not disparate-treatment claims. The Court relied on the definition of religion in Title VII, which includes “all aspects of religious observance and practice, as well as belief.” Based on that statutory text, the Court reasoned that “religious practice” is itself a “protected characteristic[] that cannot be accorded disparate treatment and must be accommodated.” As a result, even a facially neutral policy like Abercrombie’s Look Policy may be the basis for a claim of intentional discrimination, because Title VII “gives [religious practices] favored treatment” and “requires otherwise-neutral policies to give way to the need for an accommodation.”

The Court noted that a motive to discriminate arguably cannot exist without some knowledge that the practice in question is a religious practice, but found that the issue was not presented in the case because “Abercrombie knew—or at least suspected—that the scarf was worn for religious reasons.”

Justice Alito concurred in the judgment. Although he would have interpreted Title VII “to require proof that Abercrombie knew that Elauf wore the headscarf for a religious reason,” he found “the evidence of Abercrombie’s knowledge” sufficient to reverse the Tenth Circuit’s grant of summary judgment to Abercrombie. Justice Thomas concurred in part and dissented in part. He would have held that the application of a neutral policy—like Abercrombie’s Look Policy—cannot constitute intentional discrimination for purposes of Title VII’s disparate-treatment provision.

**IMPLICATIONS**

Yesterday’s decision provides important guidance on how Title VII applies to religious accommodations in employment. Under the Court’s decision, an employer may be liable for failing to accommodate an employee’s religious practice, even if the employer only suspects that the practice is a religious one.
Indeed, an employer with "no more than an unsubstantiated suspicion that accommodation would be needed" may be liable, if the employer’s desire to avoid the accommodation is a motivating factor in the adverse employment action.\textsuperscript{29}

The Supreme Court did not resolve whether an employer must at least suspect that the practice in question is religious in nature. In cases where employers were unaware that the practice was religious, employers may continue to argue that they have not discriminated “because of” a “religious practice” for purposes of Title VII. Plaintiffs and the EEOC, however, are likely to argue in such cases that employers should have surmised that the practices at issue were religious. Employers may want to consider asking, as a standard part of their intake procedures, whether an applicant may need a religious accommodation in order to perform the job at issue and, if so, what that accommodation would be. Employers who ask only those who appear to need an accommodation that question could find themselves criticized for making pre-employment inquiries about interviewees’ religion—something that various human rights agencies have said should not be done. Employers may also want to review the materials available to applicants, to include (if not already there) that the employer’s EEO policy includes accommodation of religious practices.

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ENDNOTES


2 Id. § 2000e-2(a)(2).

3 Id. § 2000e-2(m).

4 Id. § 2000e(j).


7 Id.

8 Id.

9 Id.

10 Id.

11 Id.

12 Id.

13 Id. at 5-6.

14 Id. at 5.

15 Id.

16 Id.

17 42 U.S.C. § 12112(b)(5)(A) (emphasis added).

18 Abercrombie & Fitch Stores, 575 U.S. ___, No. 14-86, slip op. at 5.

19 Id. at 4 (quoting 42 U.S.C. § 2000e-2(m)).

20 Id. at 5.

21 Id.

22 Id. at 6-7.


25 Id. at 6-7.

26 Id. at 6 n.3.

27 Id. at 2 (Alito, J., concurring in the judgment).

28 Id. at 1 (Thomas, J., concurring in part and dissenting in part).

29 Id. at 5 (majority opinion).
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**CONTACTS**

<table>
<thead>
<tr>
<th></th>
<th>New York</th>
<th>Washington, D.C.</th>
<th>Los Angeles</th>
<th>Palo Alto</th>
</tr>
</thead>
<tbody>
<tr>
<td>David H. Braff</td>
<td>+1-212-558-4705</td>
<td>+1-202-956-6930</td>
<td>+1-310-712-6640</td>
<td>+1-650-461-5650</td>
</tr>
<tr>
<td>Robin D. Fessel</td>
<td>+1-212-558-3832</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robert J. Giuffra Jr.</td>
<td>+1-212-558-3121</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tracy Richelle High</td>
<td>+1-212-558-4728</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sharon L. Nelles</td>
<td>+1-212-558-4976</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Richard C. Pepperman II</td>
<td>+1-212-558-3493</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Theodore O. Rogers Jr.</td>
<td>+1-212-558-3467</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robin A. Sacks</td>
<td></td>
<td></td>
<td>+1-310-712-6640</td>
<td></td>
</tr>
<tr>
<td>Brendan P. Cullen</td>
<td>+1-650-461-5650</td>
<td></td>
<td></td>
<td>+1-650-461-5650</td>
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June 2, 2015

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