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Nonprofit & Religious Organizations Alert

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Supreme Court to Address Workplace Religious Accommodations

by Mark E. Chopko and Zeenat A. Iqbal

An applicant arrives for an interview. You notice that the applicant is wearing distinctive clothes that may – or may not – be associated with the applicant's religious practices. Can you ask without risking a discrimination claim? Or – under the facts of a case just accepted for review by the Supreme Court of the United States – must the applicant disclose religious practices that will signal a need for an accommodation with a workplace policy? Next year, when the Court decides a high-profile religious accommodation case, Equal Employment Opportunity Commission (EEOC) v. Abercrombie & Fitch Stores, Inc., everyone will know the answer.

This case has significant implications for religious communities and businesses alike. The issue before the Court is whether an employee or applicant is required to inform an employer of his or her religious beliefs and to provide verbal notice of the need for an accommodation in order for an employer to have adequate notice for purposes of Title VII.

Samantha Elauf, a young Muslim woman, interviewed for a job as a sales associate at an Abercrombie Kids store in Tulsa, Oklahoma. Although Ms. Elauf wore a headscarf during the interview, neither she nor the manager interviewing her addressed the significance of the headscarf or any potential conflict with company policy. Ultimately, Ms. Elauf was not hired and later learned that she was not hired because of her headscarf, which conflicts with Abercrombie's expected dress code for employees. She filed a discrimination complaint with the EEOC, which in turn sued Abercrombie for religious discrimination and failure to accommodate. The crux of the complaint was whether Abercrombie's knowledge that Ms. Elauf wore the headscarf for religious reasons was sufficient notice to support a finding of religious discrimination when it did not hire her.

The lower courts split on the question. The District Court held that the notice requirement is met when an employer has enough information to make it aware there exists a conflict between an individual's religious practice or belief and a requirement of the job. The Court of Appeals reversed, holding that "only explicit, verbal notice of a conflict directly from an applicant or employee could suffice." If that rule prevails, parties seeking accommodation will always have the burden to inform employers or potential employers explicitly of their religious belief and need for accommodation.

The issue before the Supreme Court raises practical concerns for businesses and for religious adherents. Without some firm benchmark, employers will be faced with having to straddle a fine line between exploring an employee's or prospective employee's religious beliefs to determine whether an accommodation may be necessary without violating Title VII's ban on discrimination. Asking about religion is generally seen as "off-limits." On the other hand,

advocates believe that the Court of Appeal's decision subjects religious persons to potentially adverse action due to policies that they may not be aware of and creates a Catch-22. The Supreme Court's consideration of this matter will undoubtedly have a major impact on the business community and may affect existing employment policies and practices. That decision could also impact millions of Americans who, for religious reasons, dress, act and behave in ways that employers may sometimes have to accommodate.

The matter before the Court raises the profile of this issue, which has nagged religious adherents and businesses for years: What constitutes notice of a need to accommodate? And what can be asked (and be disclosed) without risking an anti-discrimination claim? No matter what the Court decides, the facts and circumstances of actual cases will require expert assistance to unravel and guide. ■

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