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5353 Wayzata Blvd., Suite 600
Minneapolis, MN 55416-4758
phone 800.845.0778 or 952.746.2580

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Tammy Yuen *is a principal at Skarzynski Black LLC in New York. She can be reached at tyuen@skarzynski.com.*

Jonathan Sorkowitz *is an associate at Skarzynski Black, LLC. He can be reached at jsorkowitz@skarzynski.com.*

Jane H. Lee, Esq., *is a senior claims examiner in the Executive Assurance division at Arch Insurance Group. Jane can be reached at jalee@archinsurance.com.*

Known Unkowns: The Uncertain State of Religious Discrimination Claims in the Wake of *EEOC v. Abercrombie & Fitch*

By Tammy Yuen, Jonathan Sorkowitz & Jane H. Lee, Esq.,

In 2002, then-Defense Secretary Donald Rumsfeld famously categorized the possibilities of war into "known knowns," "known unknowns," and "unknown unknowns." Rumsfeld's formulation provides a pithy summary of the limits of risk assessment in nearly any endeavor.[1] It goes without saying that in evaluating any risk, one must consider the facts on hand, those facts which are identifiably absent, as well as the likely existence of facts unavailable for consideration.

Employers wishing to avoid discrimination claims based on religious practices have recently been faced with uncertainties following the Supreme Court's decision in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*[2] It has long been well-understood that the federal civil rights laws prevent intentional discrimination based on a religious practice. As discussed in more detail below, however, *Abercrombie* requires employers to make reasonable accommodations for practices even where they merely suspect, though they do not know for sure, that those practices are motivated by a sincerely held religious belief. The *Abercrombie* majority reserved decision on whether an employer may be liable for discrimination if it does not even suspect that a practice is religious in nature.

This holding has potential consequences for all employers. Although religious discrimination cases have generally constituted only a small percentage of the EEOC's total Charges of Discrimination in the past,[3] enforcement is growing in this area. The total number of EEOC Charges for religious discrimination has increased by about 44% over the past ten years in absolute terms, while the total number of Charges has increased by only about 12%.[4] Given the increasing diversity of religious groups in the U.S., commentators have predicted a further increase of similar lawsuits.[5] Understanding the state of the law is crucial to resolving these claims before they are brought, especially in a world where employers may be held liable even if they did not receive clear notice of the religious practice.

The Recent Spotlight on Employers' Obligations to Accommodate Religious Practices

A. EEOC v. Abercrombie & Fitch Stores, Inc.

The Equal Employment Opportunity Commission's suit against Abercrombie & Fitch Stores generated considerable press owing primarily to the melting-pot image of a young Muslim woman in a hijab seeking a job at the Abercrombie chain, which sells apparel usually found on what Justice Alito termed "the mythical preppy." But the case raises the specter of significant uncertainty for employers in how to treat religious practices which may raise tension with their established policies and practices.

In *Abercrombie*, Samantha Elauf, an applicant for a position in sales at the popular retail clothing chain, was denied the position based on the fact she regularly wears a headscarf, known as a hijab, as part of her religious practices as a Muslim. Elauf wore the hijab to her interview for the position. Though she received high marks, the store manager was unsure of what to do because the hijab conflicted with Abercrombie's "look policy," which called for a "classic East Coast collegiate style" and contained many restrictions, including prohibitions against wearing caps.[6] The term "caps" was not defined in the policy. The store manager who interviewed Elauf did not know for certain that she had been wearing the hijab for religious purposes, and did not ask. The store manager later informed a district manager that she believed Elauf wore the headscarf for religious reasons, but did not know for sure; the district manager directed her not to hire Elauf because the headscarf conflicted with the "look policy." Therefore, while Abercrombie suspected that the hijab was worn as part of the applicant's religious practices, it did not have "actual knowledge" of that fact.

The Equal Employment Opportunity Commission ("EEOC") filed a lawsuit

against Abercrombie, asserting it failed to accommodate the applicant's religion by refusing to hire her in violation of Section 703 of Title VII of the Civil Rights Act of 1964. Section 703 makes it unlawful for employers to "fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." Section 701(j) of Title VII defines 'religion' to include all aspects of religious observance and practice, "unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." In other words, as Justice Alito's concurrence in *Abercrombie* summarized: "[a]n employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice unless the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship."[7]

After the U.S. District Court for the Northern District of Oklahoma granted summary judgment for the EEOC,[8] Abercrombie appealed. The Tenth Circuit dismissed Elauf's claim, holding that, in order to establish the second element of their prima facie case under Title VII's religion-accommodation theory, a plaintiff must ordinarily establish that (s)he initially informed the employer that (s)he engages in a particular practice for religious reasons and that (s)he needs an accommodation for the practice.[9] Because Elauf had not notified Abercrombie that she required an accommodation—i.e., an exemption from the "look policy"—for her religious practice of wearing a hijab, the Tenth Circuit reasoned, she could not satisfy this requirement.

The Supreme Court reversed. The Court, in a relatively brief majority opinion by Justice Scalia, rejected the notion that the applicant/EEOC was required to prove that Abercrombie had actual knowledge of her need for a religious accommodation, given Abercrombie's concession that it had a suspicion that the hijab was worn for religious purposes. Writing for an 8 to 1 majority (Justice Thomas dissented), Justice Scalia wrote, "the intentional discrimination provision [of Title VII] prohibits certain motives, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts." In reading the opinion from the bench, Justice Scalia added that this reasoning applies "whether this motive derives from actual knowledge, a well-founded suspicion or merely a hunch."[10] In other words, even if an employer does not know for sure that a practice is religious, the employer is barred from refusing to hire an applicant for the purpose of avoiding an accommodation for that practice. Arguably, the Court placed the onus for determining whether or not a prospective employee's behavior is a religious practice in need of accommodation under Title VII on the employer, rather than the employee.

However, the Court also stated in a footnote that "it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice—i.e., that he cannot discriminate because of a religious practice unless he knows or suspects it to be a religious practice." But the majority reserved decision on this point, as it was not presented by Elauf's case.[11] Justice Alito's concurrence discusses this concept at length, noting his view that the answer is "obvious": that employers must have at least some inkling that the practice is religious or else they cannot be held liable.

Leaving aside the question of whether the majority should or should not have decided this question, Justice Alito's concurrence alone, in addition to the majority's emphasis on the employer's state of mind with respect to religious practice, makes it likely that the lower courts will require at least some level of awareness on the employer's part in order to demonstrate intentional discrimination. *Abercrombie* suggests that the requisite level of awareness may be a mere suspicion or hunch. In any event, however, where even the possibility of a religious accommodation is raised internally, *Abercrombie* requires the employer to act to protect it.

The Court held that, as long as the employer has a suspicion that an employee or applicant's need for an accommodation is based on a religious belief, the employee/applicant "need only show that his need for an accommodation was a motivating factor in the employer's decision." Ultimately, the Court remanded the case to the Tenth Circuit for consideration of the issue under the "motivating factor" standard.

Abercrombie had also argued in the District Court that providing an accommodation would have imposed an undue hardship on it because the "look policy" was neutral, insofar as secular headgear would be also barred, leaving the hijab at no relative disadvantage. The majority rejected this argument because Title VII obligates employers not to fail to hire anyone because of their religious practices unless an accommodation would cause an undue hardship. To that extent, the statute gives religiously motivated practices "favored treatment. . . . An employer is surely entitled to have, for example, a no headwear policy as an ordinary matter. But when an applicant requires an accommodation as an aspect of religious practice, it is no response that the subsequent failure to hire was due to an otherwise-neutral policy."[12]

Finally, Abercrombie argued in the District Court that exceptions to its "look policy" would create an undue hardship because of the critical role the personal appearance of employees plays in its branding. The court rejected this argument because Abercrombie had not conducted any study supporting that position, and the record showed that it had made similar accommodations for other employees. Accordingly, the appeals court held that Abercrombie failed to show that allowing the hijab would have created an undue hardship on the company.

B. EEOC v. United Parcel Service complaint

Another kind of uncertainty inheres in the EEOC's recent suit against UPS. On July 15, 2015, the EEOC sued United Parcel Service Inc., for discriminatory practices dating back to 2004 against job

applicants and workers whose religious practices conflicted with the company's uniform and appearance policies.

The lawsuit is based on UPS's "appearance policy," which prohibits male supervisors and male employees who interact with customers from wearing beards and/or growing their hair below collar length. The EEOC alleges that UPS has, since at least 2004, failed to hire or promote employees whose religious practices conflict with this policy, and has also required its employees to shave their beards and cut their hair in order to comply with the policy.

UPS has protocols in place for employees to request religious accommodations, including variations for appearance and grooming guidelines. While UPS contends that these protocols demonstrate its policy and practice of accommodating religious practices, the EEOC charges that the process involves lengthy delays—sometimes consisting of several years—in processing requests for religious accommodations, which are tantamount to a denial of an accommodation, particularly as the employees are required to shave their beards or cut their hair for the duration of the delay.

The suit is a reminder that formalities cannot rescue an employer from the prospect of religious discrimination suits. The EEOC scrutinized beyond UPS' facially-compliant written policy to examine employees' actual ability to secure exceptions to the grooming policy. The suit now alleges that religious exemptions, despite being theoretically available, are too hard to get from UPS. Similarly, the EEOC successfully asserted in Abercrombie that an employer could not rely on the lack of a formal notification to avoid confronting the need for an accommodation; the Supreme Court required Abercrombie to accommodate Elauf's hijab even though the company had not been given a notice it could react to by rote, according to a standard set of procedures.

The Requirements of Title VII of the Civil Rights Act of 1964

In addition to the notice and knowledge issues presented by Abercrombie, a thorough understanding of the full framework for discrimination claims is key to decreasing the risk of lawsuits and liability.

As discussed above, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against people because of their religious beliefs or practices. Section 701(j) of Title VII includes an employee's "bona fide" religious beliefs and practices, unless providing a reasonable accommodation would impose an undue hardship on the employer. For purposes of Title VII, "religion" is defined very broadly and covers a wide range of faiths. The prohibition against religious discrimination also protects employees who have no religious beliefs, such as atheists.

A. The "Bona Fide Religious Belief" Standard

Upon learning about a religious requirement, employers need only afford an accommodation if the religious belief is "bona fide," meaning sincerely held. "Bona fide religious belief" has been defined as one that is "religious within the plaintiff's own scheme of things" and "sincerely held."[14] The key inquiry is whether the employee's belief is a matter of conscience, or rather, is spurred by deception and fraud, or a mere personal preference. While the employee's perspective is given great weight, courts will look closely at the facts to determine whether a request for an accommodation arises from a bona fide religious relief.

For example, in *Cloutier v. Costco Wholesale Corp.*, 311 F. Supp. 2d 190 (D. Mass. 2004), the U.S. District Court for the District of Massachusetts expressed serious doubts as to whether an employee's claim for an accommodation based on facial piercings was based on a "bona fide religious practice." The employee in *Cloutier* was a member of the Church of Body Modification (CBM), a religious organization whose members engage in in piercing, tattooing, branding, cutting, and body manipulation as part of a belief in spiritual growth through body modification. The court found that even assuming *arguendo* that the CBM were a bona fide religion, its principles (as stated on its web site) did not require a display of facial piercings at all times. As such, the court found that the employee's stated requirement that she openly display her piercings at all times represented her own "personal interpretation of the stringency of her beliefs."[15] The court also questioned the sincerity of the employee's personal interpretation, given that she had initially offered to cover her piercing with a band-aid, an alternative that she later claimed would violate her religion.

Here, again, employers encounter a "known unknown"—how to judge the sincerity of an unusual religious belief or practice of which management may have little experience or knowledge. Ultimately, even courts may often prefer not to wade into these murky waters. The District Court in *Cloutier* declined to answer the question of bona fide belief, instead holding that the accommodation Cloutier requested was not a reasonable one.[16] Costco was not required to grant the accommodation sought by the employee, who would not accept any accommodation short of an outright exemption from the dress code. The First Circuit affirmed,[17] on the alternative ground that Costco had demonstrated that providing the accommodation requested by Cloutier would work an undue hardship on Costco as a loss of control over its public image as manifested by its employees.

B. What Is an "Undue Hardship"?

Courts have held that an accommodation constitutes an "undue hardship" if it would impose more than a *de minimis* cost on the employer. The term "cost" here refers to both economic costs, such as lost business or having to hire additional employees to accommodate an employee who cannot work on certain days due to religious beliefs, and non-economic costs, such as compromising the integrity of a seniority system. According to the EEOC, an accommodation may cause an undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work.[18]

The burden is on the employer to show an undue hardship. As noted above, in the *Abercrombie* case, the employer failed to conduct any study supporting its belief that an accommodation would impose an undue hardship, and made similar accommodations in other markets. Accordingly, the Court held that Abercrombie failed to show that accommodating the applicant's hijab would have created an undue hardship on the company.

One fairly straightforward example of an undue hardship would be a dress or grooming code implemented due to health or safety concerns. For example, in *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir.1984), the court granted summary judgment to an employer who refused to exempt a Sikh employee from the requirement that all machinists be clean-shaven, where the policy was based on the necessity of being able to wear a respirator with a gas-tight face seal because of potential exposure to toxic gases.

This issue has come into play in the context of police officers' uniforms. For example, in *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir.2001), the court held that Title VII did not require a police department to permit an officer to wear a gold cross pin on his uniform. Noting that, "[v]isibly wearing a cross pin—religious speech that receives great protection in civilian life—takes on an entirely different cast when viewed in the context of a police uniform," the court granted summary judgment to the police department, concluding that "[t]he only accommodation Daniels proposes [i.e., permitting him to wear his pin at all times] is unreasonable and an undue hardship for the city as a matter of law." *Id*. at 506.

However, as the discussion above makes clear, the question of what type of evidence an employer has to muster to show an undue hardship can vary with the court. The District Court in *Abercrombie* rejected Abercrombie's argument that Elauf's hijab would compromise its "look policy" because it had conducted no studies to demonstrate this. However, the First Circuit in *Cloutier* concluded that the body modifications Cloutier sought to display would deprive Costco of the ability to present a professional-looking workforce without requiring any empirical data to prove it.

C. What Kind of Accommodation Is Necessary?

Determining reasonable accommodation involves communication between the employee and employer. The employer need not always have to provide the exact accommodation sought by the employee, but it should consider the employee's preference. For example, an employer need not remove another employee from his/her position in order to accommodate the religious practices of another employee. However, allowing someone to adjust their hours to accommodate a Saturday Sabbath might be reasonable. For example, the EEOC filed a lawsuit in September 2015 on behalf of a Seventh-Day Adventist nurse whose job offer at a Minnesota hospital was revoked after she requested such a schedule.[19]

If accommodations are reasonable and not inordinately expensive, the employer must offer an accommodation. However, a court will consider the good faith efforts made by an employer and an employee to reach an accommodation in considering the undue hardship issue. For example, in the *Cloutier* and *Daniels* cases noted previously, the employees' refusal to accept any accommodation other than an outright exemption was integral to the courts' holdings that affording the accommodations sought would cause the employers an undue hardship.

Suggestions for Employers

Given the *Abercrombie* decision's deferral of the question whether an employer with "no knowledge" of an employee's need for a religious accommodation may be held liable for a failure to make such an accommodation, employers may feel they are in a strange position, stuck between wanting to avoid lawsuits based their knowledge of an employee's religious beliefs and practices, and lawsuits arising from their ignorance of such beliefs and practices. Employers typically avoid asking job applicants about their religious belief to avoid the "known known" of intentional discrimination, but even where the question is not asked, if the suspicion is raised internally that a practice is religious in nature, the employer is obliged under *Abercrombie* not to base employment action on that practice. In short, if an employer knows that it does not know whether an offending practice is a religious one, it must be prepared to accept the practice if doing so would not present an undue hardship. Moreover, when it comes to unusual or little-known religious practices like the body modification in *Cloutier*, the employer may be faced with an additional question as to the legitimacy of the practice or belief involved.In this fashion, the law places the burden of the "known unknown" on the employer.

In negotiating this minefield, what can employers do to avoid claims like those asserted in the *Abercrombie* suit?

First, objective assessment of job applicants should, of course, be afforded the highest weight in making hiring decisions. If practices or beliefs which may plausibly be religious are not considered in taking employment action, liability is unlikely. And granting accommodations to such practices, while often bearing costs, can be cheaper in the long run than inviting litigation by the employee or the EEOC.

Second, educating personnel on the relevant law with regular training may halt problems before they start. Specifically, in the wake of *Abercrombie*, hiring managers should know that if the question of religion is raised at all, the company has three choices: (i) make a reasonable accommodation for the religious practice; (ii) ascertain that the practice is not, in fact, religious; or (iii) determine that an undue hardship would be presented and prepare to possibly defend a lawsuit—which could require marshaling objective studies as to the hardship question. Maintaining uncertainty as to whether a religious practice is involved and relying on plausible deniability is not an option. Employees, too, should be kept apprised of current standards, changes in employment law, and labor

and employment trends. For example, the EEOC offers a detailed guide on its website entitled, "Religious Garb and Grooming in the Workplace: Rights and Responsibilities."

Third, interactive dialogues which keep the channels of communication open on discrimination issues may be helpful. If personnel are presented with a situation where an applicant's possible religious or other protected characteristics conflict with company policy, it is appropriate for an employer to ask an applicant whether, if hired, s/he would be able to comply with company policies with or without accommodation. This applies to current employees as well. Such a policy ensures engagement in the interactive process and that any potential needs for a reasonable accommodation are being addressed early.

Additionally, questions that any employees who are involved in the hiring process may have should be promptly presented to the company's human resources department. Human resources can offer guidance on how best to approach an uncertain employment decision and, ultimately, can help in avoiding liability in the future. As always, employee interactions with human resources should be documented, so as to protect the company in a litigious area. Legitimate, nondiscriminatory reasons for hiring decisions, as well as requests for accommodation, are especially worth recording if present.

Finally, as discussed in *Abercrombie*, a neutral employment policy does not defeat a claim for religious accommodation. Religious practices occupy a "privileged" position in the legal landscape and cannot be denied on the basis that non-religious instances of the same practice are also barred. Before implementing a specific employment policy, it would be invaluable for a company to consult with either employment counsel or human resources experts to assess whether its employment policies comply with current employment law.

Endnotes

1 In his memoir "Known and Unknown," Rumsfeld attributes the phraseology to former NASA administrator William R. Graham.

2 *135 S. Ct. 2028 (2015).*

3 According to EEOC Charge Statistics for FY 1997 through FY 2014, religious discrimination Charges, at their height in 2011, only constituted 4.2% of the total Charges filed. In 2014, religious discrimination Charges made up 4.0% of the total Charges. See U.S. Equal Opportunity Commission, "Charge Statistics FY 1997 Through FY 2014," available at http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

4 *Id.* (showing 2,466 Charges for religious discrimination in 2004 and 3,549 in 2014, as opposed to an increase in total Charges from 79,432 to 88,778).

5 *E.g.* Melanie Trottman, "Religious-Discrimination Claims on the Rise," The Wall Street Journal, October 27, 2013 (available at http://www.wsj.com/articles/SB10001424052702304682504579153462921346076); Gerald L. Maatman, Jr. and Lily M. Strumwasser, "Compliance: Religious discrimination – It's on the EEOC's radar," *Inside Counsel,* November 13, 2013 (available at http://www.insidecounsel.com/2013/11/13/compliance-religious-discrimination-its-on-the-ee).

6 Abercrombie has since changed its "look policy" to permit caps and headgear, including hijabs.

7 135 S. Ct. at 2034.

8 798 F. Supp. 2d 1272 (N.D. Okla. 2011).

9 731 F.3d 1106.

10 *See* Robert Barnes, "Supreme Court allows suit by Muslim woman who says headscarf cost her a job," Wash. Post, June 1, 2005 (available at https://www.washingtonpost.com/national/supreme-court-allows-suit-by-muslim-woman-who-says-head-scarf-cost-her-a-job/2015/06/01/977293f0-088c-11e5-9e39-0db921c47b93_story.html).

11 *135 S. Ct. at 2033 n.3 (internal quotations omitted).*

12 135 S. Ct. at 2034 (internal quotations omitted). Justice Thomas' dissent contends that under established federal law application of a neutral policy of this type cannot constitute intentional discrimination under Title VII.

13 This article discusses only considerations involved in "disparate treatment" (also known as "intentional discrimination") claims, as opposed to "disparate impact" claims, pertaining to religion. For a helpful general discussion of "disparate impact" claims from the perspective of an employer, see Steve Moore, "Labor: Avoiding discrimination class actions," *Inside Counsel*, July 18, 2011 (available at http://www.insidecounsel.com/2011/07/18/labor-avoiding-discrimination-class-actions).

14 *See United States v. Seeger,* 380 U.S. 163, 185 (1965).

15 311 F. Supp. 2d at 199.

16 Costco offered to allow Cloutier to cover her piercings with a band-aid or to wear a clear plastic retainer in place of certain piercings. Cloutier refused despite having made the band-aid suggestion initially. Because Costco had a legitimate interest in mandating a professional appearance as Costco defined it, the court found that it had offered a reasonable accommodation.

17 390 F.3d 126 (1st Cir. 2004).

18 U.S. Equal Employment Opportunity Commission, "Religious Discrimination" (available at http://www.eeoc.gov/laws/types/religion.cfm).

19 *See* Complaint, E.E.O.C. v. N. Mem. Health Care, No. 15-cv-3675 (D. Minn. filed Sept. 16, 2015); EEOC press release available at http://www1.eeoc.gov/eeoc/newsroom/release/9-16-15b.cfm.