# EEOC V. Abercrombie & Fitch: Win For Employees, Questions Remain Unanswered

June 12, 2015 • Legal Updates & Insights



On June 1, 2015, the Supreme Court handed down its ruling in EEOC v. Abercrombie & Fitch Stores, Inc., — U.S. –, 135 S. Ct. 2028 (2015). In an 8-1 decision, the Court held that the 10th Circuit Court of Appeals erred in granting summary judgment to Defendant Abercrombie & Fitch Stores, Inc. ("Abercrombie") where it was alleged to have unlawfully failed to hire Samantha Elauf ("Elauf") because of her religion.

**Background and Procedural Posture**

In 2008, Elauf applied to be a "model" with Abercrombie. Abercrombie "models" are sales employees who work on the floor of the Abercrombie store, and are required to abide by an internal "Look Policy," which is marked by Abercrombie's signature "East Coast collegiate style." Abercrombie's Look Policy requires that models wear clothing similar in style to those sold by Abercrombie and specifically prohibits caps.

Samantha Elauf wore a hijab, or headscarf, as part of her religious observation. When Elauf interviewed for a model position with Abercrombie in 2008, she was wearing her hijab. Her interviewer, an assistant manager named Heather Cooke, took note of the headscarf but still gave Elauf a high enough score to recommend her for hiring. After the interview, unsure of whether wearing the hijab at work would be a problem for Elauf, Cooke contacted her supervisor, Randall Johnson, for advice. Johnson told Cooke that the headscarf would be in violation of the Look Policy and instructed Cooke to lower Elauf's "appearance" score on her interview, which dropped her overall score below that required to be given an offer of employment. Elauf found out through a friend at Abercrombie, Farisa Sepahvand, that she had not been hired because of her hijab.

Thereafter, the U.S. Equal Employment Opportunity Commission ("EEOC") sued Abercrombie on behalf of Elauf in the Northern District of Oklahoma. After cross-motions for summary judgment, the district court granted summary judgment to the EEOC and held a trial on damages, which resulted in a $20,000 verdict for the EEOC. On appeal, the 10th Circuit Court of Appeals reversed and remanded to the district court with instructions to enter summary judgment on behalf of Abercrombie. The Circuit Court reasoned that, as Abercrombie argued, under Title VII, an employer must have actual knowledge that a religious accommodation is required by the plaintiff. The EEOC, to the contrary, argued that once the employer has either direct or indirect notice that an employee's religious belief or practice will conflict with a term of their employment, the employer must reasonably accommodate that belief or practice. The 10th Circuit held that because Elauf had failed to inform Abercrombie of her need for an accommodation, Abercrombie had not violated Title VII by not accommodating her. The EEOC then appealed to the Supreme Court, which granted certiorari.

**Analysis**

The Supreme Court framed the question as whether Title VII prohibits an employer from hiring a prospective employee in order to avoid accommodating a religious practice only where the applicant actually informed the employer of her need for an accommodation. In an 8-1 decision (including a concurrence from Justice Alito and a dissent from Justice Thomas), the Supreme Court answered this question in the negative.

The Court began its argument by quoting from Title VII, citing the so-called "disparate treatment" and "disparate impact" clauses. The Court addressed Abercrombie's argument that actual knowledge was required for a failure to accommodate claim by stating that the applicant "need only show that his need for an accommodation was a motivating factor in the employer's decision." The Court further elucidated the point by noting the difference between motive and knowledge. The Court reasoned that "an employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed." Therefore, the Court held, because Abercrombie's motive was to avoid accommodating Elauf's headscarf (which was used for religious purposes), it was irrelevant whether they had actual knowledge, as the touchstone of an intentional discrimination claim under Title VII turns on an employer's motive, not its knowledge.

At this point in its analysis, the Court acknowledged that "a request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability." It is here that the Court dropped a footnote that ultimately became the center around which this case's controversy focuses. The majority's footnote (footnote 3), reads as follows:

While a knowledge requirement cannot be added to the motive requirement, 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. That issue is not presented in this case, since Abercrombie knew – or at least suspected – that the scarf was worn for religious reasons. The question has therefore not been discussed by either side, in brief or oral argument. It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.

Justice Alito, in his concurrence, points out that while the Court disclaims any actual knowledge requirement for Title VII, it simultaneously reserved the question as to whether at least some suspicion on the part of the employer would be necessary to find liability. Justice Alito stated that he would have answered that question in the affirmative, arguing that if knowledge were entirely irrelevant, an employer could be held liable for failing to accommodate a practice that the employer had no idea was religious in nature. Thus, Justice Alito concluded, with a strict "no-knowledge" interpretation, Title VII could be used to hold an employer liable without fault.

While some questions remain unanswered – such as the precise level of knowledge or suspicion that an employer must have to be capable of acting on a discriminatory motive – this decision was a resounding win for employees. The Court has made it clear that employees cannot be discriminated against based on a religious accommodation, even if the employer does not have direct and actual knowledge of the person's religion.

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