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Recent Cases

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EEOC v. Abercrombie & Fitch Stores, Inc.: Religious Accommodation in the Workplace

INTRODUCTION

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the plaintiff, Samantha Elauf, was rejected from a sales clerk position because her headscarf clashed with Abercrombie & Fitch's employee dress code.[1] This code, Abercrombie's "Look Policy," required all employees to dress in a "classic East Coast collegiate style" and prohibited "caps."[2] However, Elauf, a practicing Muslim, wore a headscarf (or "hijab") as a representation and obligation of her religion.[3] After Abercrombie rejected her employment application, the Equal Employment Opportunity Commission ("EEOC") sued the company on Elauf's behalf, alleging a Title VII violation for failure to accommodate a religious practice. The highly publicized case that ensued sparked a national debate about the scope of religious accommodations in the workplace. Ultimately, the Supreme Court granted certiorari to settle the controversy.[4] In a nearly unanimous decision, the Court held that Title VII only requires job applicants to show that their need for a religious accommodation was a "motivating factor" in the employer's adverse decision.[5] Moreover, the employer need not have "actual knowledge" of the need.[6] With this plaintiff-friendly rationale, the Court remanded the case, which later settled.[7] This case note explores what equal employment and

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1. EEOC v. Abercrombie & Fitch Stores, Inc. *(Abercrombie III)*, 135 S. Ct. 2028, 2031 (2015).
2. *Id*.
3. EEOC v. Abercrombie & Fitch Stores, Inc. *(Abercrombie I)*, 798 F. Supp. 2d 1272, 1277 (N.D. Okla. 2011).
4. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 44 (2014).
5. *Abercrombie III*, 135 S. Ct. at 2032.
6. *Id.* at 2032-33.
7. *Abercrombie Resolves Religious Discrimination Case Following Supreme Court Ruling in Favor of EEOC*, EQUAL EMP'T OPPORTUNITY COMM'N (July 28, 2015), http://www.eeoc.gov/eeoc/newsroom/release/7-28-15.cfm [hereinafter *EEOC Press Release*].

religious freedom advocates really took home—and what remains to be accomplished. All in all, the Court's holding in *Abercrombie* may not have substantially increased protections for religious liberty in the workplace, but it was an incremental step in the right direction.

I.
FACTS

Samantha Elauf was seventeen years old when she applied to work at an Abercrombie & Fitch children's store in Tulsa, Oklahoma.[8] Elauf previously worked in two other retail stores[9] and was encouraged to apply for this new position by her friend, Farisa Sepahvand, an Abercrombie employee.[10] Elauf was "excited to work at the Abercrombie store" because she loved fashion.[11] Her interview with Heather Cooke, the store's assistant manager, went very well and Cooke considered Elauf to be a "good candidate" for the job.[12] Based on Abercrombie's official interview guide, Cooke ranked Elauf a two out of three in every category[13] for a total of six points—a score that "meets expectations" and equates to a recommendation to be hired.[14]

Normally, Cooke would have extended a job offer to Elauf.[15] However, Cooke had noticed that Elauf wore a black headscarf during the interview.[16] She was unsure if Elauf's headscarf would conflict with Abercrombie's "Look Policy," a dress code that prohibits employees from wearing black clothing and "caps."[17] Accordingly, Cooke brought up the issue with her store manager who, being unable to give her an answer, directed her to contact the district manager, Randall Johnson.[18] When consulted, Johnson informed Cooke that employees are not allowed to wear "hats" at work, and if Elauf were allowed to wear the headscarf, then others would think they could wear

8. Adam Liptak, *In a Case of Religious Dress, Justices Explore the Obligations of Employers*, N.Y. TIMES (Feb. 25, 2015), http://www.nytimes.com/2015/02/26/us/in-a-case-of-religious-dress-justices-explore-the-obligations-of-employers.html.

9. *Id*.

10. EEOC v. Abercrombie & Fitch Stores, Inc. *(Abercrombie II)*, 731 F.3d 1106, 1112 (10th Cir. 2013).

11. Liptak, *supra* note 8.

12. *Abercrombie II*, 731 F.3d at 1114.

13. The three categories were "appearance & sense of style," whether the applicant was "outgoing & promotes diversity," and whether the applicant had "sophistication & aspiration." *Id.*

14. *Id*.

15. EEOC v. Abercrombie & Fitch Stores, Inc. *(Abercrombie I)*, 798 F. Supp. 2d 1272, 1277 (N.D. Okla. 2011).

16. *Abercrombie II*, 731 F.3d at 1113.

17. *Abercrombie I*, 798 F. Supp. 2d at 1277; *Abercrombie II*, 731 F.3d at 1111.

18. *Abercrombie II*, 731 F.3d at 1114.

hats.[19] On this reasoning, Johnson directed Cooke not to hire Elauf.[20] Cooke mentioned that she believed Elauf wore the headscarf for religious reasons.[21] Nonetheless, Johnson responded that Cooke "still [couldn't] hire her because someone [could] come in and paint themselves green and say they were doing it for religious reasons."[22] Johnson then instructed Cooke to fill out a new rating sheet and change Elauf's score on "Appearance and Sense of Style" from a two to a one, thereby reclassifying her as "below expectations."[23]

In the meantime, Elauf, unaware of these events, waited for Cooke's call.[24] She had been informed that Cooke would call her within a couple days to tell her about orientation.[25] But that call never came.[26] Instead, three days after the interview, Elauf found out from her friend Farisa that she had been rejected from the position for wearing a headscarf.[27]

Elauf was shocked.[28] As a practicing Muslim, Elauf had worn a hijab on a daily basis since she was thirteen and considered it "a representation and reminder of her faith, a religious symbol, a symbol of Islam and of modesty."[29] Upon discovering that she could not sell clothing at an Abercrombie store because of her hijab, she felt "disrespected because of [her] religious beliefs."[30]

II.
PROCEDURAL HISTORY AND THE SUPREME COURT'S REASONING

On September 17, 2009, the EEOC filed suit against Abercrombie & Fitch Stores on Elauf's behalf.[31] The EEOC alleged that Abercrombie had violated Title VII of the Civil Rights Act of 1964 by refusing "to hire Ms. Elauf because she wears a hijab" and by "fail[ing] to accommodate her religious beliefs by making an exception to the Look Policy."[32] The EEOC's claim was based on the "disparate treatment" provision of Title VII, which forbids employers from "(1) fail[ing] . . . to hire" an applicant (2) "because

19. *Abercrombie I*, 798 F. Supp. 2d at 1278.
20. *Id.*
21. *Id*.
22. *Id*.
23. *Id*. at 1279.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*.
28. Liptak, *supra* note 8.
29. *Abercrombie I*, 798 F. Supp. 2d at 1275.
30. Liptak, *supra* note 8.
31. EEOC v. Abercrombie & Fitch Stores, Inc. *(Abercrombie II)*, 731 F.3d 1106, 1114 (10th Cir. 2013).
32. *Id*.

of" (3) "such individual's . . . religion" (which includes religious practice).[33] At the trial level, the EEOC won summary judgment on the issue of liability.[34] The district court subsequently held a trial on damages, and the jury awarded Elauf $20,000 in compensatory damages.[35]

On appeal, however, the Tenth Circuit reversed and awarded Abercrombie summary judgment.[36] The court held that employers cannot be held liable under Title VII for failing to accommodate a religious practice if an applicant does not explicitly notify the employer of his or her need for an accommodation.[37] Accordingly, the court found that Elauf failed to establish a prima facie Title VII claim because she never informed Cooke that she was Muslim, never indicated that she wore a headscarf for religious reasons, and never requested an accommodation for her religious practice.[38] The Tenth Circuit acknowledged that other courts took a broad view of Title VII's religious accommodation provision.[39] Nevertheless, the Tenth Circuit reasoned that "the most natural reading" of the statute burdened job applicants with informing employers about needing a religious accommodation.[40]

The Supreme Court granted certiorari to resolve the issue,[41] and ultimately overruled the Tenth Circuit in an 8–1 decision.[42] Ironically, the Court found the Tenth Circuit's supposedly "natural reading"[43] of Title VII to be inconsistent with the statute's text.[44] Determining that the Tenth Circuit's constrained reading "add[ed] words" to the law where there is only "silence," the Court held that a Title VII disparate-treatment claim does not require employers to have "actual knowledge" of an applicant's need for a religious accommodation.[45] A job applicant can prevail on a Title VII claim simply by showing that her perceived need for a religious accommodation was a "motivating factor" in an employer's adverse decision.[46]

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33. *See* 42 U.S.C. § 2000e–2(a)(2) (2012).

34. *Abercrombie I*, 798 F. Supp. 2d at 1287.

35. *Abercrombie II*, 731 F.3d at 1115.

36. *Id*. at 1143.

37. *Id*. at 1140.

38. *Id*. at 1113.

39. *Id*. at 1124-25, 1131 (noting Dixon v. Hallmark Cos., 627 F.3d 849, 849 (11th Cir. 2010); Heller v. EBB Auto Co., 8 F.3d 1433, 1439 (9th Cir. 1993); Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359 (S.D. Fla. 1999); Brown v. Polk Cnty., 61 F.3d 650, 654 (8th Cir. 1995) (en banc)).

40. *Abercrombie II*, 731 F.3d at 1133.

41. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 44 (2014).

42. EEOC v. Abercrombie & Fitch Stores, Inc. *(Abercrombie III)*, 135 S. Ct. 2028, 2030 (2015).

43. *Abercrombie II*, 731 F.3d at 1133.

44. *Abercrombie III,* 135 S. Ct. at 2033.

45. *Id*.

46. *Id*. at 2032.

In reaching this holding, the Court distinguished between a motive requirement and a knowledge requirement.[47] An employer does not violate Title VII by rejecting an applicant while knowing about, but not being motivated by, her need for a religious accommodation.[48] Conversely, an employer could violate Title VII by rejecting an applicant based solely on an unsubstantiated suspicion, and no actual knowledge, of the applicant's need for a religious accommodation.[49] In other words, employers simply "may not make an applicant's religious practice, 'confirmed or otherwise,' a factor in employment decisions."[50]

The Court also unequivocally rejected Abercrombie's alternative argument that a failure to accommodate a religious practice, as opposed to a "religion," could only be brought as a Title VII disparate-impact claim, not a disparate-treatment claim.[51] Stating that "Congress defined 'religion' . . . [to] 'includ[e] all aspects of religious observance and practice, as well as belief,'" the Court determined that "religious practice" itself is clearly a "protected characteristic."[52] Therefore, Title VII's cause of action for disparate treatment, as well as disparate impact, includes an employer's failure to accommodate religious practices.[53]

As a necessary predicate to its decision, the Court reaffirmed that Title VII grants religious practices "favored treatment," not just "mere neutrality," when they conflict with employer policies.[54] Thus, Abercrombie's equal application of the Look Policy to all employees did not insulate the company from Title VII liability.[55] Abercrombie could only have avoided accommodating Elauf's religious practice by proving that such an accommodation would impose an "undue hardship on the conduct of [its] business"—a defense the company failed to establish.[56] Accordingly, the

47. *Id.* at 2032-33.

48. *Id*. at 2033.

49. *Id*.

50. *Id.* at 2033. In a footnote, the Court acknowledged that a motive requirement could arguably still require that an employer "at least suspect" that a practice is religious to be held liable for discriminating on that basis. However, the Court determined that this finer point was not at issue in the case at hand and left it unaddressed since Abercrombie clearly suspected that Elauf wore a headscarf for religious reasons. *Id*. at 2033 n.3.

51. *Id.* at 2033-34. A disparate-impact claim is based on 42 U.S.C. § 2000e–2(a)(2) (2012), which makes it "unlawful for an employer . . . 'to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion.'" *See Abercrombie III,* 135 S. Ct. at 2031-32 (quoting 42 U.S.C. § 2000e-2(a)(2)).

52. *Id.* (quoting 42 U.S.C. § 2000e(j)).

53. *Id.* at 2033-34.

54. *Id*. at 2034.

55. *Id*.

56. *Id*. at 2032.

Court ruled that the Tenth Circuit misinterpreted Title VII's standards for a religious accommodation claim and remanded the case.[57] Abercrombie subsequently settled the case for $25,670 in damages and $28,983 in court costs.[58]

In his concurrence, Justice Samuel Alito nodded to the Tenth Circuit's "natural reading" of Title VII, noting that without a knowledge requirement, innocent employers could be held liable for unintentional religious discrimination.[59] Nevertheless, he agreed with the majority that applicants do not have a duty of notification.[60] In fact, he argued that plaintiffs should not even bear the burden of proving that an employer failed to make a reasonable accommodation.[61] Justice Alito reasoned that, once the plaintiff proves that the employer made an adverse decision "because of" a religious practice, the statutory language places the burden of proof on the employer to show that it made a reasonable accommodation.[62] He further noted that this burden shifting could be decisive in close cases.[63]

Justice Clarence Thomas's dissent, on the other hand, expressed sweeping condemnation of the majority's holding.[64] He asserted that the majority imposed "strict liability" on innocent employers who may not even be aware that a religious practice was at stake.[65] Justice Thomas also rejected the majority's fundamental assumption that equal application of a neutral policy could constitute discrimination under Title VII.[66] Explaining that precedent defines discriminatory purpose as demanding "more than [an] awareness of consequences," he disparaged the majority's interpretation that any "motive" to avoid religious accommodation could constitute discrimination.[67] Ultimately, he concluded that the majority had created a new "disparate-treatment-based-on-equal-treatment" claim in violation of both statutory language and precedent.[68]

57. *Id*. at 2034.
58. *EEOC Press Release*, *supra* note 7.
59. *Abercrombie III*, 135 S. Ct. at 2035-36 (Alito, J., concurring).
60. *Id*. at 2035 (Alito, J., concurring).
61. *Id*. at 2036 (Alito, J., concurring).
62. *Id*.
63. *Id*.
64. *Id.* at 2039 (Thomas, J., dissenting).
65. *Id.*
66. *Id.*
67. *Id.* (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).
68. *Id*. at 2038, 2041 (Thomas, J., dissenting).

III.
ANALYSIS

Equal-employment organizations and religious-liberty advocates alike have largely celebrated the Supreme Court's decision in *Abercrombie*.[69] For them, the decision represents a step forward in enforcing Title VII's prohibition against religious discrimination.[70] At the same time, many defense-side law firms and employment law blogs have been quick to reassure each other and employers that the *Abercrombie* decision did not "effect a significant change in the law" or "impose a new duty on employers."[71] Though paradoxical at first glance, this unusual cohort of responses can be explained by examining (1) what the *Abercrombie* decision aimed to accomplish, (2) what it actually achieved, and (3) its potential future impact.

To put it bluntly, the *Abercrombie* decision aimed to accomplish fairly little. Justice Scalia seemed to acknowledge this when he ad libbed that the decision was "really easy."[72] Indeed, while Justice Scalia's majority opinion helped clarify the doctrine for religious accommodation claims,[73] it was not a particularly controversial decision. Despite Justice Thomas' allegations in his dissent,[74] the majority did not create a new Title VII disparate-treatment claim. Instead, the Court sought merely to elucidate the boundaries of a preexisting protection. To do so, the Court addressed proven, but not explicitly informed, discriminatory intent by barring employers from making adverse decisions based on the mere suspicion of a need for religious accommodation.[75] In addition, the Court made clear that protection against disparate treatment covers religious practices; in other words, the statute's

69. *CAIR-SFBA and LAS-ELC Welcome Supreme Court Ruling in EEOC v. Abercrombie & Fitch Stores, Inc.*, LAS–ELC (Jun. 1, 2015), https://las-elc.org/media/releases/cair-sfba-and-las-elc-welcome-supreme-court-ruling-in-eeoc-v-abercrombie-fitch-stores.

70. *See, e.g.*, *EEOC Press Release*, *supra* note 7.

71. *See e.g.*, *U.S. Supreme Court Calls an "Easy" One in EEOC v. Abercrombie & Fitch*, BAKER BOTTS (Jun. 4, 2015), http://www.bakerbotts.com/ideas/publications/2015/06/labor-and-employment; Christopher Collins & Jonathan Sokolowski, *Supreme Court Sides with EEOC in Abercrombie & Fitch Hijab Case*, SHEPPARD MULLIN, http://www.laboremploymentlawblog.com/2015/06/articles/discrimination/supreme-court-sides-with-eeoc-in-abercrombie-fitch-hijab-case/; *see also* Gregory J. Eck, *Heads or Tails? New Guidance from the Supreme Court Nearly Flips Religious Accommodations Law on Its Head*, HR LEGALIST (Jun. 9, 2015), http://www.hrlegalist.com/2015/06/heads-or-tails-new-guidance-from-the-supreme-court-nearly-flips-religious-accommodations-law-on-its-head/.

72. Liptak, *supra* note 8.

73. *Abercrombie III*, 135 S. Ct. at 2033.

74. *Id*. at 2041 (Thomas, J., dissenting).

75. *Id*. at 2033.

definition of "religion" encompasses all forms of religious practices and expressions.[76] Neither of these holdings were particularly novel or far-reaching given existing Title VII jurisprudence.

What *Abercrombie* actually achieved is also plainly circumscribed. The Court's narrow holding is both simple to implement and limited to particular situations—hence the sigh of relief from employers and defense lawyers. To avoid Title VII lawsuits, employers can (but are not required to) proactively inform applicants of company policies that could potentially conflict with religious practices. Alternatively, they could also circumvent the holding's limited application by simply becoming savvier at obscuring their true motives for employment decisions. In this manner, the decision essentially clarified Title VII procedural standards for employers without requiring them to substantively increase religious protections for employees. At the same time, the opinion only applies in the relatively rare circumstance when the plaintiff can prove that the employer, in making the adverse decision, was motivated by—but not actually informed of—the plaintiff's need for religious-practice accommodation.[77] This hardly represents a significant change in the scope, volume, or process for bringing disparate-treatment claims under Title VII.

Nonetheless, the modest victory of this decision cannot be entirely discounted. For employees, *Abercrombie* reduced the burden for bringing religious discrimination claims under Title VII. Now, plaintiffs need only prove that a potential employer suspected, rather than knew of, their need for a religious accommodation.[78] By rejecting the Tenth Circuit's notification requirement,[79] the Court extended greater protection to plaintiffs who fail to request a religious accommodation during a job interview. This allows Title VII to protect plaintiffs who are unaware of their need for an accommodation. *Abercrombie* also specifically benefits plaintiffs such as Elauf who display religiosity and therefore can be identified as belonging to a particular religious group. From a broader perspective, the decision also encourages greater diversity and tolerance by upholding the right of a Muslim woman and favoring the inclusion of a visible religious minority into a trendsetting cultural industry.[80]

Altogether, *Abercrombie* laid down important groundwork for establishing more robust protections for religious practices in the future. While incremental, the majority opinion represents a clear affirmation of

76. *Id*. at 2033-34.

77. *Id*. at 2030.

78. *Id.* at 2033.

79. *Id*.

80. *See* EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie II*), 731 F.3d 1106, 1111-12 (10th Cir. 2013).

religious liberty in the workplace. The Court recognized and built upon the basic building blocks of religious-liberty jurisprudence—for instance, emphasizing the inclusion of religious practices under disparate-treatment claims; reiterating the "favored treatment" of religious practices; and establishing that motivation, not just explicit knowledge, can constitute discrimination.[81] The majority, however, should have gone further by adopting Justice Alito's burden shifting recommendation[82] to counter the asymmetric bargaining power between employers and prospective employees. Additionally, the Court could have addressed questions such as how much of a "suspicion" is required, and to what extent a visible need for religious accommodation is sufficient. Consequently, lower courts are left to wrestle with these questions.

Ultimately, policymakers will also need to consider deeper issues raised by the Court's interpretation of Title VII in *Abercrombie*. Are American ideals of tolerance and equity really satisfied by making one-off exceptions to a "preppy" marketing strategy? Is discrimination against religious minorities really addressed by holding employers accountable based on internal motives? While these policy considerations may extend beyond the purview of the judiciary, they are vital to truly including religious minorities in society and realizing their rights beyond the minimum legal standards reflected in *Abercrombie*.

CONCLUSION

Samantha Elauf, now 24, works at an Urban Outfitters store in Tulsa, Oklahoma.[83] She is "glad [she] stood up for [her] rights" and hopes that "other people realize that this type of discrimination is wrong."[84] Elauf's desires encapsulate the modest victory that was won in *Abercombie* and the battles that still need to be fought. Because Elauf stood up for her rights, employees across the United States have gained at least a foothold on the protection of their religious liberties: they no longer need to overcome the "knowledge requirement" previously required by some circuits. However, while the path to success in Title VII litigation may be clearer, the root of the issue, religion-based discrimination and exclusion from the workplace, still persists. Thus, while equal-employment and religious-liberty advocates rightly celebrate this decision, there is more ground to be gained under Title VII—as well as at the broader policymaking level. Ultimately, while progress

81. *See Abercrombie III*, 135 S. Ct. at 2034.
82. *See id*. at 2035-36 (Alito, J., concurring).
83. Liptak, *supra* note 8.
84. *EEOC Press Release*, *supra* note 7.

towards true inclusion of religious minorities may be slow, at least the conversation is alive and moving forward.

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