

Three steps employers need to take to minimize discrimination claims

by David J. Oberly

In the June 2015 case *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, the U.S. Supreme Court ruled in favor of a Muslim woman who applied to work for the clothing retailer Abercrombie & Fitch, but was denied a position because the hijab that she wore to her interview conflicted with the company's personal appearance policy. In that case, the Court held that if an employment decision is motivated by an applicant's religious beliefs or practices, even if the employer does not actually know of the religious observance, then the employer may be liable for religious discrimination or failure to accommodate if religion was a factor in the employer's hiring decision. As a result, employers—and human resources departments in particular—will now face an added layer of complexity in properly carrying out the process for hiring new employees.

The law

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]” Title VII's intentional discrimination provision bars employers from refusing to hire an applicant “because of” his or her religious observance or practice. Employers under Title VII have a defense for refusing to hire applicants under such circumstances if it can be established that providing the applicant with an accommodation relating to a religious practice would result in “undue hardship on the conduct of the employer's business.”

U.S. Supreme Court Decision

Abercrombie relied primarily on its argument that an applicant cannot show a violation of Title VII without first showing that an employer had “actual knowledge” of the applicant's need for an accommodation, and that a job applicant cannot prove intentional discrimination if the company did not know of the applicant's need for an accommodation. The company further argued for the adoption of an approach that placed the burden on employees and applicants to initially raise the issue of any religious conflicts and potential accommodations.

The Supreme Court disagreed, holding that “to prevail in a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of his need.” The Court explained that Title VII's disparate-treatment provision required Elauf to show that Abercrombie (1) “fail[ed]

... to hire” her (2) “because of” (3) “[her] religion” (including a religious practice), with the “because of” standard meaning that the protected characteristic cannot be a “motivating factor” in an employment decision. Rather than requiring knowledge, then, Title VII prohibits certain motives, irrespective of the state of the actor's knowledge. The Court explained the important distinction between the separate concepts of motive and knowledge:

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.

The Court then reiterated that an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions and concluded that Title VII contains no knowledge requirement. Rather, the Court suggested that the lesser standard of mere suspicion that an employee requires a religious accommodation is sufficient to state a claim.

How employers can minimize risk of discrimination claims

Abercrombie significantly expands the responsibility of employers in conducting the interview process appropriately and properly so as to avoid claims of discrimination by applicants. Now, human resources departments must be able to strike a balance between avoiding the type of stereotypical profiling based on protected characteristics that Title VII was instituted to prevent on the one hand, and ensuring that issues concerning religious accommodations are adequately addressed on the other. As such, employers can take three important steps to minimize the potential of future discrimination claims by applicants and candidates who don't make the final cut for employment.

Provide employee training on workplace discrimination

All employees who play a role in the interviewing and hiring process should be provided with adequate training concerning the law of workplace discrimination. Employers should strive to train all personnel on matters concerning permissible and prohibited pre-employment practices and inquiries, adherence to anti-discrimination and anti-harassment laws, and the parameters of an employer's responsibility to provide reasonable accommodations on the basis of religion so long as such accommodations do not result in an undue hardship to the company.


Focus only on the interviewee's qualifications

When it comes to the interview itself, a good rule of thumb in all cases is to initially focus on an interviewee's qualifications for employment. Then, when the employer reaches a point in the hiring process where it wishes to extend a job offer to a particular candidate, the employer can then discuss its essential job requirements and company policies, and inquire as to whether the candidate would require any accommodations. Still, even at this juncture the employer should design questions that narrowly elicit only necessary information without any specific reference relating to the candidate's religious observances.

In the event that the candidate feels that an accommodation would be necessary, the employer would then be required to engage in the process of determining whether providing the proposed accommodation would result in an undue hardship to the employer; however, where the interviewer has other legitimate, non-discriminatory rationales for choosing not to extend an offer to a candidate that are completely divorced from any concerns pertaining to religion or possible accommodations, then the interviewer should steer clear of making any inquiries during the interview process concerning the individual's ability to adhere to company policies and procedures.

Document the interview

Documentation throughout the hiring process is crucial in guarding against workplace discrimination claims. In this respect, interviewers should take detailed notes during all conversations and interactions with potential candidates, taking great care to record any and all legitimate, non-discriminatory rationales for choosing not to hire a candidate. And from a broader perspective, detailed documentation demonstrating the company's internal evaluation

and selection process of candidates for a given position, and how all hiring decisions were made based solely on the consideration of legitimate, non-discriminatory factors, will serve as a powerful shield against any discrimination claims that may arise during or after the hiring process. 

Author bio



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