



Retailers Should Heed Supreme Court Guidance On Religion

Insights

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Earlier this summer, the U.S. Supreme Court held that retail giant Abercrombie & Fitch committed religious discrimination by refusing to hire an applicant (*EEOC v. Abercrombie & Fitch*, read [Alert here](#)). The company believed the applicant's religion would require her to wear a hijab, which it concluded would be in violation of its standard look policy.

The case wasn't about whether Abercrombie & Fitch should or shouldn't have allowed the applicant to wear her hijab as a reasonable accommodation. Instead, the focus of the case was on the company's ignorance of the conflict between the applicant's religious needs and its own dress code.

The hiring managers only suspected, but did not know, that a religious accommodation would be required. The applicant did not raise the issue, and the interviewers did not ask about the hijab during the interview process.

Between A Rock And A Hard Place?

By not exploring the need for a possible accommodation, the Court ruled that Abercrombie & Fitch violated Title VII's religious discrimination prohibitions. The overall message of the decision is clear: you cannot stick your head in the sand and rely on ignorance as a defense to religious discrimination claims.

However, most retailers know that inquiring about religion during interviews is also frowned upon; by asking the question, you could be construed as wanting to know about such information for discriminatory purposes. So how can you comply with these two conflicting principles? Walking this tightrope could require some initial internal assessment, revision of hiring materials, and additional managerial training.

Typical Accommodation Requests In Retail

Generally, the most common religious accommodation situations in a retail setting are:

- employees who can't work at certain times because of a conflict with religious services or observances;
- workers who need to wear particular clothing or facial hair, which would otherwise violate a retailer's appearance policy; and

- employees required to engage in religious practices at work who would rather refrain from so doing.

The best way to address these concerns is usually by addressing them on a secular basis without ever having to mention religion. You can often identify those applicants who would have an issue with standard company requirements on a non-religious basis, before engaging in a discussion about whether religion plays any role at all in their ability to meet your policies. For example:

Conflicts with work schedules. With regard to work times, you should require applicants to identify their work availability up front in relation to weekly store hours. If an applicant identifies some unavailability, you should have a discussion about the reasons for it.

Such a discussion will reveal if the need is related to religion and provide the perfect opportunity for an interactive process addressing possible accommodations. If religion is not raised, you are clear to act freely.

Appearance policies. Historically, dress and grooming policies have not been regularly included as a discussion point during a job interview. Perhaps this is due to the fact that a hiring manager can observe the applicant's appearance, or because there is a normal expectation of employees at your business. But in light of the *Abercrombie* decision, this should change.

You should provide all applicants with a copy of the company's dress and grooming policy during the interview process, asking them if there is any reason they cannot comply. This simple process will identify any conflicts and determine whether there is a need for potential accommodation. A quick visual scan during the interview may not work; remember, many applicants interview in one form of dress and change to another when they come to work.

Religious Practices. Inquiring into religious practices occurring during working hours is somewhat more difficult. If, however, you provide applicants with an explanation of work times, break periods, and scheduling practices, and ask if they can perform within those parameters, you should uncover religious needs that conflict with those practices.

The benefit of raising the potential need for accommodation in this way is that the same questions can be asked of all employees. Religion will only become a topic when it should – in conjunction with the applicant's need for religious accommodation.

Training Managers Is Essential

The final piece of this puzzle is to train those who will be conducting interviews. You should provide updated guidance and expectations of what your interviewers should do if an employee raises a conflict between religious beliefs and the requirements of the job.

If employees who conduct hiring are primarily involved in that function, then training them on the legal requirements may be effective because they will put the information to use on a regular basis.

But if your interviewers do not spend significant time in the hiring process, training them on the legal requirements will likely not stick.

Instead, such employees should be trained to reach out to a subject matter expert within the organization, allowing your experts to engage in the interactive process with the applicant. This proactive approach will assist you in obtaining the information needed to comply with Title VII, while at the same time avoiding claims of religious discrimination.

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