

Employment Alert
September 8, 2011

DRESS CODES BRING DRESSING DOWN BY EEOC

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It hasn't been a great summer for clothing retailer Abercrombie & Fitch when it comes to employee dress codes. Two lawsuits--one filed and one decided at trial--allege the company's appearance practices violated federal civil rights laws protecting employees from discrimination based on religion.

Companies with similar policies and practices could also find themselves facing charges. As the Abercrombie cases show, the U.S. Equal Employment Opportunity Commission (EEOC) is willing to pursue what it believes is illegal religious discrimination by employers.

Choice between job or hijab. Take the suit the EEOC filed against Abercrombie on June 27, 2011, (*U.S. Equal Employment Opportunity Commission, v. Abercrombie & Fitch Stores, Inc. dba Hollister, Hollister Co. California, LLC*, 2011 WL 2536400 (N.D. Cal. 2011)). According to the agency, Umme-Hani Khan, a 19-year-old Muslim woman, started working at a California Hollister store (an Abercrombie & Fitch brand targeting teenagers aged 14 through 18) in October 2009. Khan wore a hijab, a head scarf traditionally worn by Muslim women, and worked primarily in the store's stockroom.

The agency alleges that in her early months of employment, Khan was asked to wear headscarves in Hollister colors, which she agreed to do, but the company later told her she could not wear headscarves at all. "In mid-February, [Khan] was informed that her hijab violated Abercrombie's 'look policy,' an internal dress code, and was told she would be taken off the schedule unless she removed her headscarf while at work," the EEOC said when announcing the suit. Khan was fired on February 23, 2010, for refusing to take off the hijab that her religious beliefs compelled her to wear.

"Ms. Khan held a low-visibility position, willingly color-coordinated her headscarf with the store's brand and capably performed her stockroom duties for four and half months until a visiting manager flagged her hijab as a violation of their 'look policy,'" EEOC San Francisco District Director Michael Baldonado said.

Hijab brings refusal to hire. Two weeks later, the EEOC won a suit against Abercrombie in Oklahoma for another incident involving a hijab. In this case, a federal judge granted summary judgment for the EEOC on claims that employees at an Abercrombie Kids store had refused to hire Samantha Elauf, a 17-year-old Muslim teen. Elauf wore a hijab when she was interviewed, which the employees thought violated the company's "look policy" that prohibited the wearing of any head coverings. A jury awarded Elauf \$20,000 in compensatory damages. (*E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 112 Fair Empl. Prac. Cas. (BNA) 1241, 2011 WL 2748406 (N.D. Okla. 2011)).

"In this case, the Court's ruling makes clear an employer's 'corporate image' policy does not relieve an employer of the obligation to provide a reasonable religious accommodation," David Lopez, EEOC general counsel, says.

Beyond hijabs. Head scarves aren't the only apparel or appearance issue to trigger religious discrimination claims. Turbans, tattoos, facial hair, religious symbols, and even buttons decrying abortion have been at the heart of lawsuits against employers trying to enforce standards in their workplaces.

The key to avoiding lawsuits such as those Abercrombie and other employers have faced is to comply with Title VII of the Civil Rights Act's requirements related to religion, especially the need to offer employees or applicants reasonable accommodations for their religious beliefs.

"Title VII of the Civil Rights Act of 1964 contains a reasonable accommodation provision requiring employers to make adjustments to an employee's or prospective employee's work environment that will allow him or her to observe a sincerely held religious practice," says Kevin Smith, special counsel at Kelley Drye in New York.

"The reasonable accommodation requirement extends to religious practices concerning dress and other personal grooming habits. Religious dress may include clothes, head or face coverings, jewelry or other items. For example, an employer may be required to accommodate a Muslim employee's request to wear her headscarf; a Hindu employee's request to wear her bindi, a religious forehead marking; and an Orthodox Jewish employee's request to keep a beard when the employer has a no facial hair policy," Smith says.

Employers have some discretion. "An employer, however, does not need to accommodate every type of clothing or covering. It depends on the circumstances of the particular case, such as the type of business and the employees' conduct.... An employer will not be required to accommodate an employee's religious beliefs and practices if doing so would impose an undue hardship on the employer's legitimate business interests," Smith says.

Jeffrey I. Pasek, a member at Cozen O'Connor in Philadelphia, says meeting the undue hardship standard is easier in religious discrimination cases than in disability discrimination cases. "The standard in disability cases is more stringent; employers need to show pretty significant hardship. In the religious context, they just have to show the hardship is something more than de minimis."

"An employer's dress code and grooming rules will likely be upheld if the rules are applied consistently among all employees and involve legitimate business issues, such as safety concerns," Smith says.

Err on the side of accommodation. Still, says John Balitis, a director at Fennemore Craig in Phoenix, employers should try to accommodate employees where possible. "It's clear that religion does not always trump a dress code, but employers must be mindful that dress code modifications out of respect for bona fide religious beliefs typically are easy to accommodate... UPS, for example, allows Muslim workers to wear brown head scarves to coordinate with the company uniform scheme. Other employers offer employees the option of wearing head scarves that display company logos so that the scarf continues to promote the image of the business."

Steps to take. Employers confronted with the issue of a clash between religious requirements and company dress codes should consider taking the following steps:

Determine if an accommodation is in order. "An employee or prospective employee who seeks a religious accommodation must make the employer aware that 1) there is a need for an accommodation; and 2) the accommodation is requested due to a conflict between religion and work," Balitis says.

Keep an open mind. “For antidiscrimination purposes, federal law defines religion very broadly as a belief system that is sincerely held in the employee's personal scheme of things. This definition goes well beyond our traditional notions of religion and requires employers to be open-minded in analyzing and handling issues relating to religion in the workplace,” Balitis says.

Articulate the business need for dress code requirements. “Whenever an employer attempts to impose a dress code, it should carefully consider what the basis for it is and what the employer's real interest is. If they can articulate a legitimate interest, they will be upheld,” Pasek says.

Consistently enforce policies. Imagine the odds of winning a suit if evidence is presented that employees routinely wear baseball hats at work in spite of a “no head coverings” policy, but an employee was terminated for wearing a hijab.

Provide religious discrimination training to managers. According to Newson6.com, a local Tulsa news site, Abercrombie's vice president of HR testified in court that store managers are not trained to handle requests for religious accommodations, but are required to take diversity training. “[The VP] said the company has too many managers and too much turnover to train them to be experts in handling touchy issues. She testified that's why it's company policy for managers to automatically refer all such issues to HR.”

“HR should periodically review all its policies, including its non-discrimination policies, with all managers, especially front-line managers to ensure everyone understands them and they act accordingly,” Smith says.

Check state laws. Finally, Smith says. “Employers also have to remember that there may exist state laws that are more restrictive than that set forth in Title VII, which the employer should certainly be aware of.”

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