

# Religious Accommodation: Five Steps to Avoid Liability After Abercrombie Decision

Article By:

Steven T. Collis

---

Even if religion does not come up during a job interview, you still may be liable for religious discrimination under Title VII if you reject the applicant to avoid offering a presumed reasonable accommodation. The U.S. Supreme Court's June decision in *EEOC v. Abercrombie & Fitch Stores, Inc.* made clear that it is your motive in rejecting the applicant that matters. Here is a summary of why the Supreme Court ruled against Abercrombie & Fitch as well as five practical steps you can take to avoid a similar outcome.

## Applicant Wears Head Scarf to Interview

A seventeen-year-old applicant named Samantha Lauf arrived for her interview for a sales position at an Abercrombie & Fitch store wearing a head scarf. The assistant store manager, Heather Cooke, conducted the interview and neither she nor Lauf brought up the topic of religion or the wearing of a head scarf during the interview. Using Abercrombie's normal system for evaluating applicants, Cooke rated Lauf as qualified to be hired.

## Abercrombie's Dress Code (AKA Look Policy)

To maintain its desired image, Abercrombie & Fitch imposes a strict dress code on its employees. Called the Look Policy, the clothing chain's dress code, among other things, prohibits employees from wearing "caps" or headwear for any reason.

Despite rating Lauf as qualified to work at the store, Cooke was concerned that her wearing a head scarf would conflict with the store's Look Policy. Cooke assumed that Lauf was Muslim and that she wore the head scarf due to her Muslim religion, though Cooke never asked Lauf for confirmation of her religious beliefs. Cooke consulted with her district manager about the head scarf issue and was told she should not hire Lauf because wearing the head scarf would violate the Look Policy, as would all other headwear, religious or otherwise.

## EEOC Sued for Religious Discrimination

The Equal Employment Opportunity Commission (EEOC) sued Abercrombie on Lauf's behalf, alleging that Abercrombie's failure to hire Lauf violated Title VII's ban on religious discrimination.

---

The District Court granted summary judgment to the EEOC, finding Abercrombie liable for failing to accommodate a religious practice in violation of Title VII, with a jury awarding \$20,000 in damages. On appeal to the Tenth Circuit Court of Appeals, Abercrombie argued that it could not be liable for failing to accommodate a religious practice where Elauf never provided Abercrombie with actual knowledge of her need for an accommodation. The Tenth Circuit agreed, finding in favor of Abercrombie. The EEOC appealed to the Supreme Court.

## **Title VII Has No Knowledge Requirement**

In an 8-to-1 decision, the Supreme Court ruled that an employer that refuses to hire an applicant to avoid accommodating a religious practice may be liable for discrimination even though the applicant did not inform the employer of the need for an accommodation. As long as the applicant can show that her need for an accommodation was a motivating factor in the employer's decision to refuse to hire her, the employer can be liable for disparate treatment under Title VII.

In its opinion, written by Justice Antonin Scalia, the Court stated, "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." Title VII discrimination looks only to the employer's motives in making the employment decisions, not the employer's actual knowledge. Consequently, if an employer thinks or assumes that a job applicant might need an accommodation, such as time off to attend religious observances, and denies the applicant a job to avoid that prospective accommodation, the employer violates Title VII, regardless of whether the employer actually knows of the applicant's religious practices or need for accommodation.

## **Different Result Under the ADA**

The Court recognized the difference in an employer's reasonable accommodation duty under Title VII versus under the Americans with Disabilities Act (ADA). Discrimination under the ADA is defined to include an employer's failure to make reasonable accommodations to the *known* physical or mental limitations of an applicant. However, Title VII does not include the knowledge requirement. Therefore, failure to accommodate a religious practice will be deemed discrimination under Title VII as long as the employer's desire to avoid the accommodation was a motivating factor in its employment decision without the employer having actual knowledge of the individual's religion or need for an accommodation.

## **But Our Policies Apply to Everyone! How Can That Be Discriminatory?**

How can it be discrimination if the company rejects everyone who does not comply with its policies? In Abercrombie's case, they did not single Elauf, a Muslim, out and refuse to hire her based on her religion. Instead, she was rejected because she wore headwear in violation of the store's neutral Look Policy—a policy violation that would have doomed non-Muslims who desired to wear something on their heads.

The difference is that Title VII gives religious practices favored treatment. The Court acknowledged that an employer is entitled to have a neutral dress policy, such as a no-headwear policy, but when an applicant or employee requires an accommodation as an aspect of a religious practice, Title VII requires that the employer accommodate that practice, in the absence of an undue hardship.

## **Five Steps to Avoid Liability Based on Religious Accommodations**

---

The practical implications of the Abercrombie decision are worth studying, because they can help keep your organization out of court. Here are five steps to incorporate into your employment practices to help keep you out of trouble:

### **Step #1: Don't Assume.**

The old saying is that when you assume, you almost always make false assumptions. In the employment context, it can also make you liable for large sums of money for discrimination.

When it comes to religion, don't assume that an employee or job applicant believes in a particular faith based on what you see, hear, or infer. You may be tempted to conclude that a candidate belongs to a certain religious group based on his or her appearance, clothing, hair style, beard, headwear, name, accent, language, place of residence, or other characteristic. But making an assumption that the individual belongs to a certain faith or will need certain accommodations can lead you to make employment decisions that are motivated by your assumptions, which will land you in the same boat as Abercrombie & Fitch. As hard as it may be, stay neutral and don't assume anything.

### **#2: Don't Ask.**

After reading about the Abercrombie case, you might be tempted to conclude that actual knowledge about the person's religious beliefs is better than acting on your assumptions. Wrong. You should not ask about an applicant or employee's religion at any time. Not on your job application. Not during an interview. Not in casual conversation. You will taint all future employment decisions by inquiring into the individual's religious beliefs.

### **#3: Stick to Job Requirements.**

It is fair game to talk to applicants about the job requirements of the position under consideration and ask if he or she can meet those requirements. For example, you can tell candidates that they will be expected to work weekends and holidays and ask if they will make themselves available to work during those times. Or, you can describe the protective clothing and head gear that must be worn for safety purposes and ask if the person can meet those requirements. Keep the discussion specific to the job requirements, rather than asking if their religion will affect their ability to perform the job in any way.

### **#4: Engage in the Interactive Process.**

If an applicant or employee raises the need for an accommodation on religious grounds, engage in an interactive discussion to determine the range of possible accommodations. Remember that the individual does not need to use the magic word "accommodation" to trigger the interactive process. Instead, start the discussion after the individual indicates that they observe a particular religious practice that is at odds with your job requirements. Sabbath observance and clothing requirements are two issues that often arise, but other concerns occasionally pop up as well.

### **#5: Be Prepared to Reasonably Accommodate.**

Although you are not required to implement the specific accommodation requested by the individual, you are obligated to offer reasonable accommodations that do not impose an undue hardship on your

organization. Religious accommodations may include rearranging a work schedule, allowing unpaid time off, approving a shift trade to allow the individual to attend services or observe religious practices, making an exception to a dress or grooming code, or allowing alternate food at company functions. In many cases, these types of accommodations will not cause an undue hardship on your organization so you should try to stay open-minded and be prepared to accommodate religious beliefs at all stages of employment.

Copyright Holland & Hart LLP 1995-2025.

---

National Law Review, Volume V, Number 217

Source URL: <https://natlawreview.com/article/religious-accommodation-five-steps-to-avoid-liability-after-abercrombie-decision>