RELIGION IN THE WORKPLACE

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FIRST AMENDMENT

U.S. Constitution – First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of such speech."

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FIRST AMENDMENT

- Protects individuals against restrictions imposed by the government, not by private entities

- Government employees' religious expression is protected by both the First Amendment and Title VII

Idaho Human Rights Act

- Since 1969, the Idaho Human Rights Act (Title 67, Chapter 59 of the Idaho Code) has prohibited discrimination in employment (as well as public accommodations, education, and real estate transactions) on the basis of religion

HISTORY OF TITLE VII OF THE CIVIL RIGHTS ACT

- Originally Enacted by Congress in 1964
  - Illegal to discriminate in hiring on the basis of religion, among other practices

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HISTORY OF TITLE VII

- 1967 Equal Employment Opportunity Commission (EEOC)
  - Issues regulations imposing obligation on employers to attempt to "reasonably accommodate" the religious practices of employees to the extent they could do so without undue hardship or inconvenience

HISTORY OF TITLE VII

- *Dewey v. Reynolds Case*
  - 6th Circuit Affirmed by U.S. Supreme Court
  - Left open the question of whether the EEOC had authority to issue regulations imposing an affirmative obligation upon employers to reasonably accommodate the religious practices of their employees

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HISTORY OF TITLE VII

- Congress Responds to *Dewey* Case
  - In1972, added to Title VII of the Civil Rights Act of 1964 an express obligation of employers to "reasonably accommodate" the religious practices of their employees if they can do so without "undue hardship"

Title VII

- *Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e.*

- *Title VII prohibits employment discrimination based on race, color,* **religion**, *sex and national origin.*

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Title VII

- Compensatory and Punitive Damages in cases of Intentional Violations of Title VII

What does Title VII Prohibit?

- **Treating applicants or employees differently** based on their religious beliefs or practices – or lack thereof – in any aspect of employment, including recruitment, hiring, assignments, discipline, promotion, and benefits (disparate treatment)

What does Title VII Prohibit?

- **Harassment** because of religious beliefs or practices – or lack thereof – or because of the religious practices or belief of people with whom they associate (i.e. relatives, friends, etc.)

What does Title VII Prohibit?

- **Denying a requested reasonable accommodation** of an applicant's or employee's sincerely held religious beliefs or practices – or lack thereof – if an accommodation will not impose more than a *de minimis* cost or burden on business operations (**if not an undue hardship on the employer**)

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What does Title VII Prohibit?

- **Retaliating**, such as for filing an EEOC claim or complaining to HR

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"Religion" Defined

- Section 701 of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000e) provides in relevant part:
- **Definitions**
- (j) "The term 'religion' includes all aspects of religious observance and practice, as well as belief …"

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“Religion” Defined

- Not just traditional organized religious (Christianity, Judaism, Islam, Hinduism, Buddhism)
- Can be new, uncommon, not part of formal church or sect, can seem illogical or unreasonable to others
- Theistic beliefs (belief in God) and non-theistic beliefs (moral or ethical beliefs as to right and wrong

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Sincerely Held Religious Belief

- Factors
  - Is employees behavior inconsistent with the professed belief
  - Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons
  - Whether the timing of the request renders it suspect (e.g. it follows an earlier request by the employee for the same benefit for secular reasons)
  - Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons

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What Is Not Included under Title VII?

- Social, political, or economic philosophies, mere personal preferences

- Courts usually resolve doubts as to particular beliefs in favor of finding that they are religious, but no protected just because they are strongly held

Exceptions

- "**Religious Organizations**" – exempt from certain religious discrimination provisions
  - 42 U.S.C. § 2000e-1 (the religious corporation exemption) makes the subchapter of the law that requires equal opportunity inapplicable with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by an educational institution or corporation of its activities. This section of the law has been interpreted by the courts to allow a religious institution to discriminate on the basis of religion (but not race, sex, etc.), assuming of course that the defense is not used as a pretext for discrimination on some other illegal basis.

Exceptions

- "**Religious Education Institutions**" - exempt from certain religious discrimination provisions
  - 42 U.S.C. § 2000e-2(e)(2), (the religious schools exemption) states that it shall not be an unlawful employment practice for an educational institution to hire persons of a particular religion if such school, college or university is, in whole or in substantial part, owned, supported, controlled or managed by a particular religious corporation, association, or society, or if the curriculum is directed toward the propagation of a particular religion. This provision of Title VII is a specific statutory exemption placed in the law by Congress for the purpose of allowing a religious institution to limit its hiring to coreligionists for all jobs, not merely those jobs connected with the institutions religious activities. This provision does not allow the institution to discriminate on the basis of race, sex, color, national origin, the other protected classes under Title VII.

Exceptions

- **"Ministerial" exception** bars Title VII claims by employees who serve in clergy roles
  - Clergy (performs essential religious functions) generally cannot bring Title VII and other federal employment discrimination claims
    - First Amendment Principle that government regulation of church administration impedes the free exercise of religion and impermissible government entanglement with church authority

Reasonable Accommodation

- Generally, Title VII requires an employer, once on notice that a religious accommodation is needed, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship

What Triggers the Need to Provide Religious Accommodation?

- An applicant or employee who seeks religious accommodation usually must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work
  - No magic words required to request accommodation

Reasonable Accommodation

- Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation.
- If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective.
- If the employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

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Examples of Religious Accommodation

- Scheduling changes; shift swaps
- Changing job tasks or lateral transfer
- Making an exception to dress and grooming rules
- Accommodating prayer during breaks

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Undue Hardship

- Means that an accommodation poses a **"more than *de minimis*" cost or burden on the operation of the employer's business**.
  - Note: this is a lower standard for the employer than under the ADA which defines undue hardship as "significant difficulty or expense"

Undue Hardship

- Costs non only include direct monetary costs, but also the burden on the conduct of the employer's business
- Employer has to prove how much cost or disruption a proposed accommodation would involve
- Employer cannot rely on potential or hypothetical hardship

Undue Burden - Factors

- Type of workplace
- Nature of the employee's duties
- The identifiable cost of the accommodation in the relationship to the size and operating costs of the employer
- Number of employees who will in fact need a particular accommodation

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Summary of Basic Law Applicable to Employees

Employee first has the burden and must show religious discrimination in employment by showing that the employee:

- (1) holds a sincere religious belief that conflicts with an employment requirement,
- (2) usually has to inform his employer of the conflict, and
- (3) was discharged or disciplined for failing to comply with the requirement.

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Summary of Basic Law Applicable to Employer

- Burden then shifts to the employer to show that it **could not reasonably accommodate the employee without undue hardship.**
  - Undue hardship "more than *de minimis* cost or burden"
    - Lower standard than ADA "significant difficulty or expense"
- The reasonableness of an employer's attempt accommodate is determined on a **case–by–case basis**
- If the employer's efforts to fail to eliminate the religious conflict, the burden remains on the employer to establish that it is unable to reasonably accommodate the employer's practices without incurring undue hardship.

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Employer Dress and Grooming Policies

- Generally speaking, an employee may ask for reasonable accommodation if the employer dress or grooming policy that conflicts with that employee's religious beliefs or practices.
    - But, there can be exceptions based on undue hardship

Employer Dress and Grooming Policies

- How does an employer know when it must consider making an exception to its dress and grooming policies or preferences to accommodate the religious practices of an applicant or employee?

- Issue explored in the Abercrombie case.

EEOC v. Abercrombie

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Facts of the Abercrombie Case

Abercrombie "Look Policy"

- Abercrombie calls its sales-floor employees "Models"
- Employees must dress in clothing that is consistent with the kinds of clothing that Abercrombie sells in its store
- Abercrombie contends that its Look Policy is critical to the health and vitality of its "preppy" and casual" brand

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Facts of the Abercrombie Case

Abercrombie "Look Policy"

- To Abercrombie, a "Model" who violates the Look Policy by wearing inconsistent clothing "inaccurately represents the brand, causes consumer confusion, fails to perform an essential function of the position, and ultimately damages the brand."

Abercrombie "Look" Policy

Abercrombie "Look Policy"

- Policy that is intended to promote and showcase the Abercrombie brand, which "**exemplifies a classic East Coast collegiate style of clothing**"

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Abercrombie & Fitch “Models”

Abercrombie & Fitch “Models”

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Facts of the Abercrombie Case

Abercrombie "Look Policy"

- No black clothing
- Natural looking make-up and no fingernail polish
- Slender figure
- Tight denim
- Long hair for women
- **No "caps"**

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Facts of the Abercrombie Case

Abercrombie "Look Policy"

- An employee is subject to "disciplinary action … up to and including termination"

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Facts of the Abercrombie Case

Abercrombie Job Interview Process

- Managers assess applicants on appearance and style during the interview
- Managers supposed to inform job applicant of the “Look Policy”
- Store managers are not to assume facts about prospective employees in job interview and not to ask applicants about religion

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Facts of the Abercrombie Case

Abercrombie Job Interview Process

- If question about application of Look Policy comes up during interview, store manager is instructed to contact human resources department or direct supervisor
- HR managers may grant accommodations if doing so would not harm the brand

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Facts of the Abercrombie Case

Samantha Elauf

- Mid-2008 applied for a Model position at the Abercrombie Kids store in the Woodland Hills Mall in Tulsa, Oklahoma
- 17 years old when applied
- Previously wore Abercrombie clothes

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Facts of Abercrombie Case

- Ms. Elauf says she is a practicing Muslim
- She testified that she had worn a hijab (head scarf) since she was 13 years old and testified she wears it for religious reasons

Samantha Elauf wearing “hijab”

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Facts of Abercrombie Case

<u>According to testimony in the case:</u>

- Quran – the "sacred scripture" of the Islamic faith – counsels women to protect their modesty, and some religious scholars "believe that the Quran does require a hijab.
  - However, there are many who disagree with that interpretation
  - Could be worn for cultural reasons or to demonstrate rejection of certain aspects of Western-style dress

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Facts of the Abercrombie Case

- Before the interview, Ms. Elauf spoke with a friend who worked at Abercrombie
  - The friend talked with assistant manager who said he did not see any problem with Ms. Elauf wearing a headscarf, especially if she didn't wear black (Ms. Elauf seemed agreeable with such an arrangement)
    - Noted an Abercrombie employee wore a white yarmulke at another store he worked at

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Facts of the Abercrombie Case

- Ms. Elauf interviewed with assistant manager for the Model position
- Ms. Elauf wore a black headscarf (hijab) to the interview
- Also wore an Abercrombie-like T-shirt and jeans

Facts of the Abercrombie Case

- Assistant Manager did not ask Ms. Elauf if she was a Muslim during the interview

- Assistant Manager did not know Ms. Elauf's religion, **but assumed that she was a Muslim and figured that she wore her headscarf for religious reasons (Key Fact)**

- Ms. Elauf never informed Assistant Manager that she was Muslim and the topic of the headscarf never came up in anyway

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Facts of the Abercrombie Case

- Assistant Manager never mentioned the Look Policy by name, but did describe some of the dress requirements for Abercrombie employees

Facts of the Abercrombie Case

- Abercrombie's Interview Guide
  - Assess on
    - "Appearance & sense of style"
    - "Outgoing and promotes diversity"
    - "Sophistication and aspiration"
  - Three-point scale
    - If score in "appearance" of less than 2, or total combined score of 5 or less, not recommended for hire

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Facts of the Abercrombie Case

- Assistant Manager initially assessed Ms. Elauf 2 points in each category (total of 6 points), which amounts to a recommendation that she be hired
- Then spoke with District Manager because unsure if employee could wear a headscarf and if it could be black

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Facts of the Abercrombie Case

- District Manager said that Ms. Elauf should not be hired because she wore a headscarf – a clothing item that was inconsistent with the "Look Policy"
- Per District Manager, score on "appearance" changed from 2 to 1, thereby ensuring that Ms. Elauf would not be recommended for hire
  - Original Interview sheet thrown away

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Facts of the Abercrombie Case

- Samantha Elauf was not hired by Abercrombie store

Lawsuit

- EEOC filed lawsuit against Abercrombie on Sept. 17, 2009
- EEOC alleged violations of Title VII
- EEOC alleged Abercrombie "refused to hire Ms. Elauf because she wears a hijab" and "failed to accommodate her religious beliefs by making an exception to the Look Policy"

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EEOC's Arguments

- (1) Initial showing that Ms. Elauf had a sincere religious belief – i.e. wearing the headscarf
- (2) Abercrombie had enough information to make it aware (be on notice) that there was a conflict between Ms. Elauf's religious practice or belief and a requirement for applying for or performing the job
- (3) Initial showing that Ms. Elauf did not get the job because of her religious headscarf

Abercrombie's Arguments

- Ms. Elauf failed to inform Abercrombie of conflict between the Look Policy and her religious practices
- Proposed accommodation – allowing Ms. Elauf to wear the headscarf - imposed an undue hardship on the company
- Challenged whether Ms. Elauf had a bona fide, sincerely held religious belief

Abercrombie's Arguments

- Abercrombie claims that it did not discriminate because Ms. Elauf was subject to a "neutral" dress code that applies to all applicants who would be in public view.
  - Abercrombie argued the company would have refused to hire any applicant who did not comply with the dress code, whether they had on a "headscarf," "baseball cap," "helmet," or any other headgear.

District Court

- What happened at the District Court?
- Jury Trial: $20,000 compensatory damages to EEOC; injunctive relief denied

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10th Circuit

- Initial burden on employee to expressly inform employer of:
  - Conflict between religion and work, and
  - Need for accommodation (no magic words required)

10th Circuit

- Reasoning by 10th Circuit:
  - How is an employer to know that applicants or employees are engaged in a particular activity for religious reasons, unless they inform the employer?
    - Even if applicant or employee is engaged in practices that are traditionally associated with a particular religion, an employer is not required to become knowledgeable about the customs and observances of religions
      - Religion is uniquely personal and individual

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10th Circuit

- 10th Circuit's Decision in Abercrombie case in favor of Abercrombie:
  - "Ms. Elauf never informed Abercrombie before its hiring decision that her practice of wearing a hijab was based upon her religious beliefs and that she needed an accommodation for that practice, due to a conflict between it and Abercrombie's clothing policy"

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10th Circuit

- EEOC argued notice of conflict between religion and work can come from another source besides the applicant or employee
  - 10th Circuit holds, even if this is the law (which it does not acknowledge), then notice must be particularized, actual knowledge
    - Employer must have *actual* knowledge that conflicting practice of the *particular* applicants or employees is based upon their religious beliefs and that they need accommodation

10th Circuit

- No evidence Abercrombie had actual and particularized knowledge that Ms. Elauf wore the head scarf based on her religious belief
  - "Assumed" by interviewing Assistant Manager
    - EEOC – But, what about conversation with other Abercrombie employees before the interview?
      - 10th Circuit – but hiring agents didn't have knowledge of these conversations

SCOTUS

- The applicable provision of the Title VII of the Civil Rights Act forbids employers to:
  - (1) “fail … to hire” an applicant
  - (2) “because of”
  - (3) “such individuals … religion” 42 U.S.C. Section 2000e-2(a)(1)

SCOTUS

- **(1) Straightforward rule: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."**
  - An employer can violate Title VII even when its motive not to hire is based on an unsubstantiated suspicion that an applicant needs a religious accommodation
    - Footnote: the motive requirement arguably is not met unless the employer at least suspects that the practice in question is a religious practice; but such facts were not at issue in the Abercrombie case

SCOTUS

- Said another way: Applicant only has to show that the need for an accommodation was a “motivating factor” in the employer’s decision

SCOTUS

- Court focused on the "because of" element
  - Noted it is significant that this portion of the Civil Rights Act does not have a "knowledge" requirement
    - Distinguished from ADA that defines discrimination to include an employer's failure to make "reasonable accommodations to the **known** physical or mental limitations" of an applicant

SCOTUS

- Court focused on the "because of" element
  - Section (m): "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a **motivating factor** for any employment practice, even though other factors also motivated the practice."

SCOTUS

- Liability turns not on what employer knew about the need for an accommodation, but on whether the employer's employment decision was motivated to avoid the religious accommodation

SCOTUS

- (2) Religious practice is included in the protections that religion receives under the disparate treatment provision, and claims for failure to accommodate religious practice can proceed under that provision
  - SCOTUS rejected Abercrombie's argument that an applicant can only bring a claim for failure to accommodate a religious practice as a disparate impact claim and never as a disparate treatment claim.
  - SCOTUS Looked at the broad definition of religion

SCOTUS

- (3) Supreme Court held that even though the Look Policy applied to all employees, regardless of religion, Title VII gives religious practices "favored treatment" and "requires otherwise-neutral policies to give way to the need for an accommodation."
  - However, Court did not address whether Abercrombie's Look Policy violates Title VII, or whether accommodating Elauf would have constituted an undue hardship

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Let's Get Practical

- Straightforward rule: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."
  - An employer's motive, not knowledge, is the central focus

Let's Get Practical

- Generally, it's still best to avoid discussing religion in job interviews
  - EEOC advises employers to avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate

Let's Get Practical

- If employer has concerns about a particular policy conflicting with an applicant's religion,
  - Practical approach: Without referencing religion, the employer should inform the applicant of the policy and ask if there is any reason that he or she may not be able to comply.
    - If doesn't indicate there is a conflict, then should be no need to discuss religion at all
    - If applicant confirms he or she may need an accommodation, then interactive dialogue

Let's Get Practical

- If possible, it helps if employer has engaged in interactive process and tried to reasonably accommodate
  - Generally, court's tend to view claims of undue hardship with more favor when the employer has already attempted to accommodate the employee

Let's Get Practical

- An employer can still have dress codes and appearance standards that are based on legitimate business reasons
  - But, absent undue hardship, such policies must give way to the need for religious accommodations

Let's Get Practical

- An employer's reliance on the broad rubric of "image" or marketing strategy to deny a requested religious accommodation may amount to relying on customer preference in violation of Title VII, or otherwise be insufficient to demonstrate that making an exception would cause an undue hardship on the operation of the business.

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Let's Get Practical

- Good idea for employers to reexamine if their policies allow for reasonable accommodation, whether for religion or other protected categories

Let's Get Practical

- Employers should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion

Let's Get Practical

- Managers and interviewers should be well trained
  - On duty to accommodate religious practices
  - That religion and accommodation should be nonfactors in employment decisions
  - How to handle situations where an employee or applicant requests an accommodation for religious practices (or where there appears to be a conflict between religious practices and a workplace rule or policy)

Thank You

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