

## **Teaching Note**

### **A Hijab: Not Quite “The Look”**

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#### **Critical Incident Overview**

In June 2008, Heather Cooke interviewed Samantha Elauf for a position at Abercrombie & Fitch. Samantha was well dressed and wore a hijab, a headscarf, to the interview. Cooke told Samantha that she would have to wear clothing similar to that sold by Abercrombie but never told her about their “look” policy which prohibited employees from wearing “caps” (EEOC v. Abercrombie & Fitch, 2013). At the end of the interview, Ms. Cooke asked Samantha if she had any questions. She did not.

Although Samantha had scored well during the interview, Cooke consulted with her district manager who thought that a headscarf would be inconsistent with the look policy. After informing Samantha that she did not get the job, Ms. Cooke wondered if she should have asked if Samantha was Muslim. Did she need religious accommodation for the hijab? But Samantha hadn’t requested such accommodation and Ms. Cooke couldn’t ask her about her religion, could she?

This incident, a decision case, is appropriate for use in Human Resource Management, Diversity, and Business Law courses. Students should first be familiar with Equal Employment Opportunity (EEO) laws.

#### **Research Methods**

This incident occurred in 2008 and resulted in an EEOC complaint and subsequent court actions. All material used was from publicly available secondary sources.

#### **Learning Outcomes**

In completing this assignment, students should be able to:

1. Identify the issues involved in evaluating a religious practice in light of business requirements.

2. Analyze whether an employer violated the equal employment opportunity rights of an applicant.
3. Evaluate and articulate the responsibility of employers and employees on religious accommodation needs in the hiring process.

### **Discussion Questions**

1. Using your knowledge of HR best practices and EEO law, what arguments can Abercrombie & Fitch make to support their decision to not hire Samantha? (LO 1)
2. Using your knowledge of HR best practice and EEO law, what arguments can Samantha make for religious discrimination? (LO 1)
3. Should an interviewer ask an applicant about his or her religion or does the applicant have the responsibility to make the HR person aware of his or her religion? (LO 2)
4. Develop a best practice solution for Ms. Cooke. What could she have said and done differently? (LO 3)

### **Answers to Discussion Questions**

#### **1. Using your knowledge of HR best practices and EEO law, what arguments can Abercrombie & Fitch make to support their decision to not hire Samantha? (LO 1)**

It is generally unlawful for an employer to consider religion in making employment decisions and, therefore, it is generally unlawful for an employer to ask about an applicant's religion in a job interview.

Abercrombie's defense is primarily based on the fact that Samantha did not make any verbal disclosure about her religious choice; wearing the hijab. Generally, the obligation for an employer to provide religious accommodations does not begin until the employee requests an accommodation. In most cases, the religious belief or practice conflicting with a workplace requirement is not obvious to an employer, even if the employer knows that the employee follows a particular faith. Ms. Cooke did not know that Samantha was Muslim. She did not know if the hijab was a requirement. Having a "cap" was not in line with their "look" policy.

Therefore, an applicant is not entitled to religious accommodation unless the employer has actual, particular knowledge of the applicant's accommodation need. This would usually require that the employee or applicant specifically tell the employer about the need.

When an employee or applicant needs a dress or grooming accommodation for religious reasons, he or she should notify the employer that he needs such an accommodation for religious reasons. If the employer reasonably needs more information, the employer and the employee should engage in an interactive process to discuss the request. If it would not pose an undue hardship, the employer must grant the accommodation.

#### **2. Using your knowledge of EEO best practice and EEO law, what arguments can Samantha make for religious discrimination?**

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating in employment based on race, color, *religion*, sex, or national origin. With respect to religion, Title VII prohibits among other things: disparate treatment based on religion in recruitment, hiring, promotion, benefits, training, job duties, termination, or any other aspect of; denial of reasonable accommodation for sincerely held religious practices, unless the accommodation would cause an undue hardship for the employer; workplace or job segregation based on religion (see <http://www.eeoc.gov/laws/types/religion.cfm>).

Samantha was otherwise qualified, wore a headscarf as a necessary part of her religion, and was not informed wearing one would pose a problem. Therefore, she should have been offered a reasonable accommodation (a waiver of the “no cap” requirement).

*Note to Instructor:* In fact, Samantha Elauf filed a claim with the EEOC. In 2009, they brought suit in district court, alleging that Abercrombie violated Title VII of the 1964 Civil Rights Act by refusing to hire her because she wore a hijab and didn’t accommodate her by making an exception to the look policy. There was a “conflict” between the applicant’s presumed religious beliefs and the workplace requirement - a conflict of which the employer was, or should have been, reasonably aware. Perhaps, at this point, Abercrombie should have called Samantha back and asked her if she needed to wear the *hijab* at all times, and if so, whether her need was a requirement that was religious in nature, and if so, whether accommodations were possible.

In 2011, the District Court ruled in favor of the EEOC, finding that Abercrombie was “informed” of the religious belief because it had enough information to make it aware of a conflict between Samantha’s religious practices and the requirements of the model position.

### **3. Should an interviewer ask an applicant about his or her religion or does the applicant have the responsibility to make the HR person aware of his or her religion? (LO 2)**

This is the crux of this EEOC case. Traditionally, according to the EEOC, an applicant or employee who seeks religious accommodation must make the employer aware of both of the need for accommodation and that it is being requested due to a conflict between religion and work (see [http://www.eeoc.gov/policy/docs/qanda\\_religion.html](http://www.eeoc.gov/policy/docs/qanda_religion.html)). This is Abercrombie’s argument.

However, 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 employer requests additional information reasonably needed to evaluate the request, the employee should provide it. For example, if an employee has requested a schedule change to accommodate daily prayers, the employer may need to ask for information about the religious observance, such as time and duration of the daily prayers, in order to determine whether accommodation can be granted without posing an undue hardship on the operation of the employer’s business. Moreover, even if the employer does not grant the employee’s preferred accommodation, but instead provides an alternative, the employee must cooperate by attempting to meet his religious needs through the employer’s proposed accommodation if possible.

When an employee or applicant needs a dress or grooming accommodation for religious reasons, he or she should notify the employer that he or she needs such an accommodation for religious reasons. If the employer reasonably needs more information, the employer and the employee should engage in an interactive process to discuss the request. If it would not pose an undue hardship, the employer must grant the accommodation.

*Note to Instructor:* Ask whether there is evidence of *intentional* discrimination in this situation. Summarizing and re-visiting the court decisions can be useful. One could argue there was intention: the manager told Ms. Cooke that Samantha's headscarf violated their look policy and told her to reduce the points of her interview. On the other hand, if they had no real knowledge of a need for religious accommodation, the manager could have just been asking to reduce the points of the interview to reflect that Samantha was *not*, in fact, dressed appropriately for the Abercrombie position.

**4. Develop a best practice solution for Ms. Cooke. In hindsight, what *could* she have said and done differently in the course of the interview? (LO 3)**

Equal employment opportunity laws exist to encourage employers to evaluate job applicants on the basis of their qualifications rather than on a particular class to which they may belong. It appears in this incident that Ms. Cooke may not have intentionally discriminated but she did not share enough, nor ask the right questions, to ascertain if Samantha was an appropriate fit for the job. Ms. Cooke felt that she couldn't ask Samantha directly if she was Muslim. But what questions could have been asked to lead to a more productive outcome?

For example, Ms. Cooke could have shown and explained the "look" policy to Samantha (as she should be doing with every candidate). Ms. Cooke could have then asked, "Are you able to work without wearing a head covering?" At the least, Samantha would have had the opportunity to share that she was Muslim and had been told that wearing a scarf was not a problem. Another applicant might very well reply "yes" even though a Muslim. Another applicant might just have a fondness for head scarves. Regardless, a productive conversation could have ensued and a good candidate hired.

At least after the fact, Ms. Cooke could have called Samantha back and informed her of the perceived violation of the "look" policy and ask whether her attire was a requirement that was religious in nature, and if so, what accommodations were necessary. Federal law requires employers to accommodate head scarves as well as prayer breaks and other practices based on sincere religious beliefs unless doing so would impose an undue hardship on the employer.

*Note to Instructor:* This is not dissimilar to having policies such as a smoke-free workplace. Should one routinely discriminate against smokers? In most states, there are laws prohibiting discrimination against an individual's use or nonuse of lawful products away from work. Best practice would be to share the knowledge that your organization is smoke-free, share break times, and ask if the applicant could work within those constraints. In sum, best practice always encourages the following:

- Review the essential job functions. What skills will be needed by an applicant to successfully perform the job?
- What interview questions will help determine if an applicant can perform the essential job functions?
- What policies exist that should be made explicit to applicants so that they are fully informed of the job and business requirements?

An effective class activity is to have students role-play their proposed best practice solutions for Ms. Cooke. How could have Ms. Cooke handled this? What conversation would have been appropriate to clarify the look policy and discover Samantha's needs? This activity allows for a "live" experience, bringing real interaction to their written responses. Other students can provide constructive, as well as reinforcing feedback, on their performance.

### **General Discussion and Other Pedagogical Materials**

A Hijab is an expression of the Islamic religious persuasion and a woman's most salient signifier of Muslim religious identity (Syed, 2010; Khosravi, 2012; Reeves, McKinney & Azam, 2013). Muslim job applicants complain about verbal harassment, unfair employment practices, job termination or denial of employment, and denial of religious accommodations (Rippy & Newman, 2006). According to the research which was conducted by Reeves et al. (2013), there is prejudice, discrimination, and barriers in the workplace and difficulties in hiring process due to wearing the hijab. Although this incident focuses on religious accommodation and not overt discrimination, it is useful for students to have some context.

Understanding the concept of undue hardship as a reason for discrimination is important for students and organizations may legitimately make a case for it. The questions below are often used with students to continue the discussion of accommodation, dress, and business requirements.

#### *1. Why, and to what extent, should an employer regulate an employee's appearance?*

Dressing appropriately for the job and company culture enhances corporate image and lends credibility, and reflects an image of person-organization fit (Shri & Nair, 2010). Employers have quite a bit of flexibility when writing a policy on employee dress or appearance. Organizations certainly have the flexibility to have a dress code that is business-related, promotes the company's image needs, or is consistent with customers' wishes.

So can a business' dress code policy prohibit its employees from wearing jeans, short skirts, tight-fitting clothes, muscle shirts, and flip-flops? Or require them to wear those things? Can employers prohibit their employees from having visible tattoos or body piercings, wearing earrings (particularly multiples), and displaying funky hair? The answer is yes.

Dress codes should aim to project some message which is important to the corporate structure such as conformity and workplace norm-acceptance messages (Brower, 2013).

As companies want to hire people whose image is consistent with the product or corporate image, these efforts may result in discrimination lawsuits. The EEOC's General Counsel has stated that "companies cannot discriminate against individuals under the auspice of a marketing strategy or a particular 'look'" (Hurley-Hanson & Giannantonio, 2006, p. 451).

An appearance policy is not automatically illegal pursuant to Title VII and other civil rights laws unless the employer's appearance policies and standards can be connected to one of the protected categories in Title VII or other laws (Cavico, Muffler & Mujtaba, 2012).

While some companies intentionally discriminate on the basis of image (such as Abercrombie & Fitch), others may not be aware of the ways that image influences their recruitment and selection policies and restricts equal employment opportunities (see Hurley-Hanson & Giannantonio, 2006). These image norms influence recruiters' evaluations of applicants during the interview process. An applicant can be stigmatized for not conforming to the image norm of the organization and be negatively evaluated in terms of fit (Hurley-Hanson & Giannantonio, 2006). The stigmatization of applicants due to these image norms may occur at a conscious or unconscious level (Link & Phelan, 2001).

2. *The law requires an employer to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause difficulty or expense for the employer. Explain undue hardship. Find a case where the employer made, or tried to make, the case of denying accommodation because of undue hardship.*

If a dress code conflicts with an employee's religious practices and the employee requests an accommodation, the employer must modify the dress code or permit an exception to the dress code unless doing so would result in *undue hardship*. "An accommodation would pose an undue hardship if it would cause more than *de minimis* cost on the operation of the employer's business. Factors relevant to undue hardship may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation" (see [http://www.eeoc.gov/policy/docs/qanda\\_religion.html](http://www.eeoc.gov/policy/docs/qanda_religion.html)).

Courts have found undue hardship where the accommodation (1) reduces efficiency in other jobs, (2) infringes on other employees' job rights or benefits, (3) might impair workplace safety, or (4) causes coworkers to take on the employee's share of work.

The following are some of the likely examples students will find:

- Hertz Corporation terminated 12 Muslim women who refused to wear knee length skirts and tight fitting trousers to comply with Hertz's dress code policy. However, Hertz eventually approved the women to return and wear modest clothing (see Findley et. al, 2014).
- In Washington State, the EEOC filed suit against Red Robin restaurants for firing a server who refused to cover tattoos on his wrists that he claimed represented his devotion to Ra, the Egyptian sun god. Red Robin argued that its policy forbidding visible tattoos was essential to its family-friendly image. The court disagreed with the employer, finding that Red Robin

failed to demonstrate that allowing an employee to have visible religious tattoos was inconsistent with its goals. The court denied the employer's motion for summary judgment, and instructed the employer to provide *evidence of actual imposition on co-workers or disruption of work routine to demonstrate undue hardship* (EEOC. v. Red Robin Gourmet Burgers).

- Accommodating Muslim women to dress more modestly is appropriate except where dress goes to the *heart of business* such as a waitress wearing a provocative costume in a Las Vegas casino or bar (Findley et al., 2014).
- A Muslim female was denied a stocking position in a California store because she was asked to not wear her hijab which was deemed inconsistent with their "look" policy. While Abercrombie argued that the way sales representatives dressed was the advertising for the company, there was no evidence presented that the dress code significantly affected store sales or brand image (EEOC v. Abercrombie & Fitch, 2013). The court, in granting summary judgment to the EEOC, pointed out that "*hypothetical or merely conceivable hardships cannot support a claim of undue hardship*" (Findley et al., 2014, p. 247).
- David wore long hair pursuant to his Native American religious beliefs. David applied for a job as a server at a restaurant which required its male employees to wear their hair "short and neat." When the restaurant manager informed David that if offered the position he would have to cut his hair, David explained that he kept his hair long based on his religious beliefs, and offered to wear it in a ponytail or held up with a clip. The manager refused this accommodation, and denied David the position based on his long hair. Since the evidence indicated that David could have been accommodated, without undue hardship, by wearing his hair in a ponytail or held up with a clip, the employer was liable for denial of reasonable accommodation and discriminatory failure to hire (see [http://www.eeoc.gov/policy/docs/religion.html#\\_Toc203359524](http://www.eeoc.gov/policy/docs/religion.html#_Toc203359524)).
- Patricia alleged she was terminated from her job as a steel mill laborer because of her religion (Pentecostal) after she notified her supervisor that her faith prohibited her from wearing pants, as required by the mill's dress code, and requested as an accommodation to be permitted to wear a skirt. Management contended that the dress code was essential to the safe and efficient operation of the mill, and had evidence that it was imposed following several accidents in which skirts worn by employees were caught in the same type of mill machinery that Patricia operated. Because the evidence established that wearing pants was truly necessary for safety reasons, the accommodation requested by Patricia posed an undue hardship (see [http://www.eeoc.gov/policy/docs/religion.html#\\_Toc203359524](http://www.eeoc.gov/policy/docs/religion.html#_Toc203359524)).

## Epilogue

**The EEOC lawsuit.** Upon learning that her hijab was the reason Abercrombie did not extend an offer, Samantha told her mother who told a friend, and eventually was referred to CAIR (Council on American-Islamic Relations), an advocacy organization (Couric, 2015). On Samantha's behalf, they filed a claim with the EEOC. In 2009, they brought suit in district court, alleging that Abercrombie violated Title VII of the 1964 Civil Rights Act by refusing to hire her because

she wore a hijab and did not accommodate her by making an exception to the “look” policy. Abercrombie argued that Samantha never informed anyone of a conflict between the “look” policy and her religious practice of wearing the hijab.

In 2011, the District Court ruled in favor of the EEOC, finding that Abercrombie was “informed” of the religious belief because it had enough information to make it aware of a conflict between Samantha’s religious practices and the requirements of the model position.

**The Appeal.** On appeal, in 2013, two judges on a three-judge panel of the U.S. Court of Appeals for the Tenth Circuit reversed the district court’s decision. Their ruling followed a more strict interpretation of Title VII in religious accommodation cases:

- Generally, the obligation for an employer to provide religious accommodations does not kick in until the employee requests an accommodation. In most cases, the religious belief or practice conflicting with a workplace requirement is not obvious to an employer, even if the employer knows that the employee follows a particular faith.
- It is generally unlawful for an employer to consider religion in making employment decisions and, therefore, it is generally unlawful for an employer to ask about an applicant’s religion in a job interview. Therefore, it’s not fair to penalize an employer for not affirmatively asking about religion or religious accommodation needs in the hiring process.
- Therefore, an applicant is not entitled to religious accommodation unless the employer has actual, particular knowledge of the applicant’s accommodation need. This would usually require that the employee or applicant specifically tell the employer about the need.

**The Look Policy.** Abercrombie & Fitch revised its “look” policy, the strict dress code in place for its store employees, in 2010. The teen retailer updated its policies to specifically acknowledge that hijabs, or headscarves, can be accommodated in the workplace. In addition, Abercrombie will ensure that job applicants are informed of the “look” policy and that exceptions can be made if requested. The company added information regarding headscarf accommodations into manager training sessions and instituted quarterly reviews of religious accommodation requests.

**U.S. Supreme Court.** In October 2014, the U.S. Supreme Court agreed to review the Tenth Circuit Court decision. The issues were framed this way: “Whether an employer can be liable [for discrimination based on an employee’s religious belief or practice] only if the employer has *actual knowledge* that a religious accommodation was required and the employer’s actual knowledge resulted from *direct, explicit notice* from the applicant or employee.”

Samantha Elauf made the following statement on February 25, 2015, after the Supreme Court heard her case (see <http://www.eeoc.gov/eeoc/newsroom/release/2-25-15a.cfm>):

I was born and raised in Tulsa, Oklahoma. When I applied for a position with Abercrombie Kids, I was a teenager who loved fashion. I had worked in two other retail stores and was excited to work at the Abercrombie store. No one had ever told me that I



could not wear a head scarf and sell clothing. Then I learned I was not hired by Abercrombie because I wear a head scarf, which is a symbol of modesty in my Muslim faith. This was shocking to me.

I am grateful to the EEOC for looking into my complaint and taking this religious discrimination case to the courts. I am not only standing up for myself, but for all people who wish to adhere to their faith while at work. Observance of my faith should not prevent me from getting a job.

On June 1, 2015, the Supreme Court ruled (in Elauf's favor) that "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" (see [http://www.supremecourt.gov/opinions/14pdf/14-86\\_p86b.pdf](http://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf)).

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