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# In Abercrombie case, Supreme Court should protect religious freedom

*Requiring job applicants to state their faith-based observances undermines the rights of religious minorities*

February 26, 2015 1:00PM ET

by [Lauren Carasik](#) [@LCarasik](#)

The U.S. Supreme Court [heard arguments](#) yesterday in a case brought by the Equal Employment Opportunity Commission (EEOC) against Abercrombie & Fitch. The EEOC claims the retailer's decision not to hire 17-year-old Muslim applicant Samantha Elauf constituted discrimination. Elauf wore a headscarf during a job interview in 2008. Abercrombie did not offer Elauf the job because her hijab violated the store's "look policy," designed to uphold the retailer's preppy brand.

The court will now decide whether job applicants must provide direct and explicit notice of their need for accommodation of their religious observances or practices. But such a strict standard would undermine instead of safeguard the rights of religious minorities. Requiring applicants to identify and articulate potential conflicts between their faith and company policies during the application process would put them at a disadvantage. Instead, employers should state any job requirements up front so that prospective employees can disclose potential religious conflicts.

The case will be decided in a climate of growing anti-Muslim sentiment. Employers can visually identify certain religious dress and grooming practices, rendering Muslims particularly vulnerable to discrimination. While the competitive nature of employment makes subtle bias hard to discern and harder to prove, claims of religious bias have doubled in the past seven years.

## Shifting the burden

Abercrombie claims Elauf did not tell the hiring manager, Heather Cooke, her headscarf was obligated by religious beliefs. But Cooke correctly assumed that it was. She initially recommended Elauf for a sales-floor position but subsequently lowered her score in the “appearance and sense of style” category after another manager told Cooke that Elauf’s hijab violated company policy.

Elauf filed a religious discrimination complaint with the EEOC, which brought suit against the clothing chain in a U.S. District Court in Oklahoma. Elauf did not disclose that the hijab was required by her faith or request a deviation from the company’s policy prohibiting headgear because she was unaware of the conflict. The EEOC argues that the company knew Elauf wore the hijab as part of her religious practice and failed to inform her of its policy, making it impossible for her to request a religious accommodation.

The District Court sided with the EEOC and awarded Elauf damages. The 10th Circuit Court of Appeals [reversed the decision](#) in 2013. The appeals court held that employers must have “particularized, actual knowledge,” not merely notice, of the need for a religious accommodation and the notice must come directly from the employee. In a dissenting opinion, Judge David Ebel agreed that ordinarily, an employee has superior knowledge of a potential conflict and therefore bears the responsibility to initiate the request for accommodation. But here, Abercrombie was aware of “a credible potential conflict between its policies and the job applicant’s religious practices.” In such cases, Ebel said, “the employer has a duty to inquire into this potential conflict.”

Abercrombie maintains its policy is religion-neutral and that worker noncompliance “inaccurately represents the brand, causes consumer confusion, fails to perform an essential function of the position and ultimately damages the brand.” But the company has since changed its policy banning religious headscarves after several similar lawsuits.

**‘The reason that she was rejected was because you assumed she was going to do this every day, and the only reason why she would do it every day is because she had a religious reason.’**

**Justice Samuel Alito**

The retailer contends that relieving employees from the responsibility of asserting their faith-based requirements leaves the employer guessing, which may contribute to religious stereotyping. But the hiring process is vital to gaining employment. It is also a stage in which applicants have little knowledge about employers’ policies to identify potential conflicts. And employees may be understandably reluctant to assert their religious rights when they are competing for a job. If anything, shifting the responsibility to prospective employees encourages employers to cultivate a willful ignorance of applicant’s religious preferences, even when they are manifest, in order to avoid liability.

The suit was brought under Title VII of the 1964 Civil Rights Act, which requires employers to accommodate the religious observances and practices of employees unless doing so would cause an undue burden. The law is intended to protect people whose religious observances conflict with mainstream cultural norms from having to choose between their employment and their beliefs. This is particularly important Muslims, Jews and Sikhs, who are [disproportionately targeted because some of their grooming and dress observances are readily visible](#).

### **Deference to religious rights**

The Supreme Court’s most recent jurisprudence on religious rights has been deferential. Last May the court held that a Christian [prayer before a town council meeting](#) was constitutionally permissible. A month later, in a 5-4 decision in [Burwell v. Hobby Lobby Stores](#), the court ruled that for-profit companies are entitled to a religious exemption from providing contraceptive coverage under the Affordable Care Act. Last month the court unanimously [upheld a Muslim inmate’s](#) request to grow a short beard under the Religious Freedom Restoration

Act. The practice violates Arkansas prison regulations, which prohibit facial hair. The court rejected the state's argument that beards presented a security threat that could not be reasonably overcome.

In this case, the court once again appears poised to rule in favor of religious rights. The [questioning from the justices](#) during oral argument suggested that the court sympathizes with the argument that Elauf was at an informational disadvantage about the potential conflict and that job applicants are particularly vulnerable.

"Maybe she's just having a bad hair day so she comes in with a headscarf, but she doesn't have any religious reason for doing it," Justice Samuel Alito [said at the hearing on Wednesday](#). "Would you reject her for that? No. The reason that she was rejected was because you assumed she was going to do this every day and the only reason why she would do it every day is because she had a religious reason."

A ruling requiring prospective employees to provide explicit notice of a conflict between company policies and religious practices might be easier to administer and more business-friendly. But it won't protect those who are unaware of company policies that infringe on their religious practices or are uncomfortable asserting their rights when they are most vulnerable during the hiring process. If the court truly wants to protect job applicants and employees from having to choose between a job and the tenets of their faith, requiring explicit and direct notice of a conflict undermines that goal.

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*The views expressed in this article are the author's own and do not necessarily reflect Al Jazeera America's editorial policy.*