# Courts Eye Employer "Look Policies" for Civil Rights Violations

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"Look Policies" – policies intended to promote the company brand by recruiting and requiring employees that fit specific cultural or physical characteristics or restricting clothing accessories – are currently a hot topic at the EEOC. The agency and others have, in recent years, challenged companies that institute such policies on civil rights grounds. Though not generally considered outright illegal, employers may apply

“Look Policies” in a way that violates applicants’ and employees’ civil rights.

Looks-conscious, clothing retailer Abercrombie & Fitch has had several high profile problems with its look policy. For instance, in 2005, Abercrombie agreed to a six-year consent decree and paid $40 million dollars to a class of minority – including African Americans, Latinos and women – job applicants and employees for its alleged failure to hire, promote, and retain minorities because they did not fit Abercrombie’s “All-American look.”

Several years later, Abercrombie again sparked EEOC interest when it refused to hire several Muslim women who wore hijabs for religious reasons. In one case, a California federal district court determined that Abercrombie violated Title VII of the Civil Rights Act of 1964 by refusing to hire a Muslim job applicant because she wore a hijab. EEOC v. Abercrombie & Fitch Stores, Inc., Case No. 10-cv-03911-EJD (N.D. Cal. Sept. 3, 2013). When the court agreed that Abercrombie had failed to accommodate the applicant’s sincerely-held religious beliefs, Abercrombie, in September 2013, ultimately agreed to settle.

In another case, however, the Tenth Circuit reversed a jury verdict for a female, Muslim job applicant who was not hired because she wore a hijab. EEOC v. Abercrombie & Fitch Stores, Inc., No. 11-5110 (10th Cir. Oct. 1, 2013). The court agreed that while Abercrombie was required to accommodate a job applicant’s (or employee’s) sincerely-held religious beliefs, because the applicant never informed Abercrombie prior to its hiring decision that she needed an accommodation due to her religious beliefs, applicant could not establish a prima facie discrimination claim. According to the court, a plaintiff must act for religious, not cultural, reasons and his or her religious beliefs must place him or her in the position of “choos[ing] between their religious convictions and their job.” Slip Op. at 25.

Important for employers, at least in the Tenth Circuit, an employer cannot be liable for failure to accommodate a religious belief unless the applicant or employee explicitly tells the employer of the conflict and seeks an accommodation. Id. at 31. That is, an employer has no duty to glean from the circumstances that an accommodation may be necessary and begin a dialog. The dissent argued that the majority rule was too inflexible, because under the facts of the case, it allowed Abercrombie to escape censure. Although Abercrombie obviously knew that the applicant wore a head scarf, it never told her that wearing a hijab conflicted with its look policy, and the applicant was not aware that the hijab conflicted with the look policy. Dissent at 2. The dissent advocated for a "common sense exception to the usual rule" when an employer "has knowledge of a credible potential conflict." Id. at 10, 1.

Of course, some corporate look policies do not raise issues. For example, a policy that requires certain clothing for safety reasons – say one that bans loose-fitting clothing worn around machinery – is generally permissible. On the other hand, an employer cannot restrict an employee's protected rights merely because his or her co-workers are uncomfortable with a particular item of clothing. And, what about a policy that prohibits staff from wearing jewelry, but an applicant must wear a medical alert bracelet? Applying the policy could result in American's with Disabilities Act liability. A savvy employer may well determine that a conservative approach is a better one. Although delving into a job applicant's or employee's religious beliefs or other protected characteristics is verboten according to the EEOC, the common sense approach advocated by the Tenth Circuit dissent may be advisable.

And what is an acceptable accommodation? A case filed against Walt Disney Corporation in 2012 may help answer that question. Imane Boudlal, a Muslim woman began working as a hostess at Storyteller's Café, a Disney-owned facility. After working two

years, Ms. Boudlal requested permission to wear hijab at work due to her religious beliefs. Disney denied the request as a violation of its “look policy,” but offered to either reassign her to a position which did not require interaction with the public or require her to wear a hat to cover the hijab. Ms. Boudlal refused the offered accommodations claiming that Disney was impermissibly attempting to stifle her “Muslim-ness”. The case is currently in litigation.