
**TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS**

ATTORNEYS AT LAW, A LAW CORPORATION
700 Bishop Street, 15th Floor
Honolulu, Hawaii 96813-4187
Telephone (808) 523-6000 • Facsimile (808) 523-6001

**Chamber of Commerce Hawaii
22nd Annual
2015 Hawaii
Employment Law Seminar**

August 5, 2015

Opening Session
8:15 – 9:15 am

Jeffrey S. Harris
John S. Mackey
Christine K. Belcaid

Avoiding Costly Discrimination Claims

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (June 1, 2015)

- The United States Supreme Court reversed a 2-1 Tenth Circuit Court of Appeals decision, which had given Abercrombie & Fitch Stores, Inc. a win in a suit that the EEOC brought over the clothing retailer's failure to hire Samantha Elauf, who wore a Muslim headscarf, called a hijab, to a 2008 job interview but never mentioned her faith or asked for an exception to the company's dress code.
- The Court held that to prevail in a Title VII disparate treatment claim, a job applicant need only show that her need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of her need for accommodation; Title VII's definition of religion clearly indicates that failure-to-accommodate challenges may be brought as disparate-treatment claims; and Title VII gives *favored* treatment to religious practices, rather than demanding that religious practices be treated no worse than other practices.
- Justice Scalia, writing for the 8-1 majority, stated that an employer who refuses to hire someone based on a desire to avoid providing an accommodation may run afoul of Title VII even if there is no more than an "unsubstantiated suspicion" that an accommodation would be necessary. Scalia explained that Title VII is concerned with motive, not knowledge.
- Lessons learned from decision:

- A job applicant should not be denied a job for a reason that a religious accommodation could “correct,” even if the applicant does not mention religion or a need for an accommodation.
- Hiring managers should be trained on appropriate and inappropriate questions during the interview process regarding religion.
 - Rather than asking “Do you need Saturdays off because you’re Jewish?” interviewers should describe relevant workplace policies (dress codes, grooming requirements, scheduling demands), and ask applicants whether they can comply with those policies. This allows for the applicant to explicitly request an accommodation. However, hiring managers must remember that even if the applicant does not request the accommodation, the employer must still offer it to an otherwise qualified applicant if there is even an “unsubstantiated suspicion” that an accommodation would be necessary.
- There should be no stereotypes made in the hiring process.
- Hiring managers should be trained to base hiring on objective factors and job duties and should focus on whether the applicant can do the job.

Complainant v. Foxx, U.S. Equal Opportunity Commission Ruling (July 15, 2015)

- The EEOC, in a 3-2 vote, held that *all* types of discrimination based on sexual orientation are forms of sex discrimination prohibited by Title VII.
- The EEOC stated that the question for purposes of Title VII coverage of a sexual orientation claim is whether the employer has relied on sex-based considerations or taken gender into account when taking the challenged employment action.
- The EEOC’s view on sexual orientation, however, runs counter to the rulings of several circuit courts. These courts have reasoned that sexual orientation is not among the list of prohibited bases for employment action, that Congress did not intend to eliminate anti-gay discrimination when it enacted Title VII, and that Congress has repeatedly refused to add sexual orientation to employment protections.
- The EEOC calls these circuit court decisions “dated,” and some of them have been undermined by subsequent decisions in the same circuits recognizing that gender stereotyping, including gender stereotypes evidenced by anti-gay comments, is sex discrimination.
- The EEOC argues that sex discrimination is broad enough to encompass sexual orientation discrimination, as such discrimination rests on stereotypes about how men and women should behave and punishes employees for their association with others of the same sex. The EEOC explained that “sexual orientation as a concept cannot be defined or understood without reference to sex.”
- The question remains how many circuit courts will follow the EEOC’s new interpretation of Title VII. The EEOC’s views are considered persuasive, but not binding, authority on the courts. Furthermore, the next U.S. President could appoint commission members who feel differently about the meaning of Title VII, and they could reverse this divided ruling. Either way, a circuit split on the issue could be resolved by the United States Supreme Court in the next few years.