

Supreme Court Ruling Endangers Ignorance Defense

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Until now, job application and interview questions that reveal applicants' protected characteristics have been strongly discouraged. In an economy where dozens of people apply for a vacant job posting, knowing too much about the applicants can create liability where there might otherwise have been none. For example, rejecting an application at the screening stage cannot be disability discrimination if the employer did not know the applicant has a disability, nor race discrimination if the employer did not know the applicant's race. Asking questions about protected characteristics puts the applicant on notice that the employer is sensitive to it, and if the applicant is not selected, may make the applicant believe that the protected characteristic was a factor in the adverse decision.

Even where a protected characteristic is obvious, asking questions about it can be unwise. While an employer is permitted to ask an applicant with an obvious disability how he or she could perform the essential functions of the job (with or without reasonable accommodation), the question is imprudent if the individual was unlikely to be selected because of some other legitimate and non-discriminatory reason. In the same way, asking an applicant about religious clothing or jewelry exposes the employer to claims of religious discrimination if the applicant is not selected. That approach should probably now change.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the EEOC filed a lawsuit against an employer for religious discrimination for not hiring an applicant who wore a headscarf to an interview. The employer has a "Look Policy" that prohibits employees from wearing "caps." The person who conducted

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the interview thought that the headscarf was religious attire and conflicted with the Look Policy and so the applicant was not hired. When the applicant filed an EEOC Charge, the EEOC filed a lawsuit and won at trial. The Court of Appeals reversed and entered judgment for the employer because there was no evidence that the employer knew of the applicant's religion, it was only suspected.

The Supreme Court rejected the argument that an employer must have "actual knowledge" of the applicant's need for an accommodation and ruled "[i]nstead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." While the Supreme Court's opinion included a footnote purportedly avoiding the "knowledge requirement," the impact of the decision is that where an applicant's protected characteristic is obvious and where it may have some impact on the job, an employer may no longer simply ignore it with impunity.

Where there is an obvious protected characteristic that might conflict with the job, employers should consider specifically asking if the applicant would need an accommodation regarding the employer's work rules (such as dress codes and attendance requirements) or the essential functions of the job (for applicants with obvious physical disabilities) and then engage in the interactive process about the reasonableness of the accommodation request. Then, if the employment decision is based upon the protected characteristic because the accommodation requested was not reasonable or constituted an undue burden, the employer has a defense. Otherwise, the employer should make the decision based upon legitimate and nondiscriminatory reasons and be prepared to substantiate those reasons.