

Religious Accommodation Requires "Actual Knowledge"

By Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

IMLA's amicus activities continue at a rapid pace. Two of the more interesting cases we are involved in on behalf of IMLA members are *Abercrombie* and *Patel,* described below:

EEOC v. Abercrombie & Fitch Stores, Inc.- Supreme Court Merits Stage – Religious Accommodation Case

This case involves a question of whether an employer should be held liable for failing to offer a religious accommodation to an applicant for employment who did not request an accommodation or even mention her religion. Put another way, should an employer be required to ask a prospective employee about his or her religion in order to ascertain whether a religious accommodation is necessary?

Facts: Abercrombie & Fitch is a clothing store chain that depends on its sales associates, called "Models"—to represent its brand and promote its products. Abercrombie accordingly maintains a "Look Policy" designed to ensure that employees display brand-consistent looks at all times. Part of that Look Policy forbids employees from wearing headwear (Though the Tenth Circuit decision does note that Abercrombie grants accommodations to its Look Policy if doing so will not harm the brand. According to the respondent's attorney, Abercrombie has routinely allowed employees to wear head scarves when they ask to do so for a religious accommodation).

In 2008, Samantha Elauf applied for a position with Abercrombie in Oklahoma. Before her interview, Elauf was aware that Abercrombie had a Look Policy for its employees. Elauf arrived at the interview wearing a black head scarf ("hijab").

Elauf was interviewed by an assistant manager. Neither the assistant manager nor Elauf mentioned the scarf or Elauf's religion in the interview. The assistant manager did, however, inform Elauf that Abercrombie had a Look Policy that comprehensively governed the appearance of its sales associates; Elauf asked no questions and expressed no need for an accommodation. While the assistant manager later testified that she *guessed* and *assumed* that Elauf was Muslim because of the scarf, she also testified that she did not *know* Elauf's religion at the time of the interview. Indeed, Elauf could not have *known* of Elauf's need for a religious accommodation based on her appearance alone because, as the EEOC's own expert testified, headscarves can be worn for religious as well as non-religious, cultural reasons.

Ultimately, Elauf was not hired because head coverings are generally not permitted under Abercrombie's Look Policy. The EEOC then brought a failure-to-accommodate claim against Abercrombie, winning on summary judgment. Elauf was subsequently awarded compensatory damages of $20,000. Abercrombie challenged that outcome at the Tenth Circuit.

Tenth Circuit Ruling: In *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 11-5110 (10th Cir. Oct. 1, 2013), the Tenth Circuit held in favor of Abercrombie. It found that a plaintiff "ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice ...", which Elauf had not done. It further held that even if the employee herself need not give notice of her religious conflict, Abercrombie would still prevail because an employer must have "particularized, *actual* knowledge of the key facts that trigger its duty to accommodate," and Abercrombie indisputably lacked actual knowledge—"*from any source*"—that Elauf wore her scarf for religious reasons or needed an accommodation for it.

The EEOC petitioned for certiorari, which was granted on October 2, 2014.

Issue: Whether an employer can be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a "religious observance and 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.

Significance to Local Government: Under the EEOC's proposed rule an employer can be held liable—and ordered to pay compensatory and punitive damages—for failing to provide a religious accommodation to an employee or applicant who never notified the employer of a religious practice or asked for an accommodation. In other words, on the EEOC's proposed rule, employers would be liable for failing to inquire about and accommodate religious practices—even if the employer did not know for a fact that the employee's conduct had a religious motivation, and thus could not have known that a religious accommodation

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middleman between passengers and drivers. The City is arguing that by definition, Uber's taxi and also its limousine service works as a brokerage "without the lawful authority to do so." The city's court application states "it is abundantly clear from Uber's operations that it is not engaged in or facilitating carpooling. It brokers vehicle transportation for compensation only."

Uber has maintained it exists as a technology provider and is not directed by taxi licensing standards. It does not own one car, nor does it have the middleman infrastructure of dispatchers and staff relaying phoned-in taxi orders.

Under Toronto's licensing rules, an individual who would like to become a licensed taxi driver would go to City Hall, pay a fee ($634 in Toronto), undergo a police check, prove his or her work status and take a 17-day training course. A vehicle is also required. This necessitates obtaining the new Toronto Taxicab Licence, which costs $4,742 and requires that the owner do most of the driving. What is the wait time to get the new Licence? Long--there are 1,095 individuals currently on the waiting list. This approach has created a system where there is a limited number of licensed cabs and an unlimited number of licensed cab drivers.

Perhaps the argument by Uber proponents is that the new company is not the problem, but is merely introducing a breakthrough technology and changing transportation paradymes, whether cities like it or not.

At this point it remains unclear whether ongoing legal challenges against Uber will be successful. The City of Toronto's legal bid for a quick shut-down of Uber faces a frustrating six-month delay. After filing the injunction and asking for an 'expedient' treatment the City has learned that the case will not be heard until May 19, 2015. ML

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was needed. This proposed rule is in direct contradiction to current EEOC guidance and Title VII cases admonishing employers to *avoid* discussions about religion.

As noted in the Tenth Circuit decision, individuals wear head coverings for a number of reasons, some religious and some cultural, and Title VII does not require accommodations for a cultural practice. Additionally, other practices that may or may not be religious in nature further illustrate the difficulties that the EEOC's position would create for employers. Many male religious believers must maintain facial hair either continuously or at certain times of the year. Under the EEOC's proposed rule, a government employer with a reasonable policy prohibiting facial hair might (or might not, depending on the post hoc judgment of a judge or jury) have to ask every beard-wearing applicant about his religious beliefs during the interview, and it might have to ask any non-compliant employee about those views before disciplining him for failing to conform.

IMLA will be writing an amicus brief (or joining as an amicus) in *EEOC v. Abercrombie*. Respondent's brief is currently due by January 21, 2015.

City of Los Angeles v. Patel–Supreme Court Merits Stage–Fourth Amendment / Facial Challenge to Municipal Hotel Records Ordinance

This case raises the question of whether a municipality can require hotel and motel operators to provide guest records to police without a warrant.

Facts: Los Angeles Municipal Code § 41.49 requires hotel and motel operators to keep specific information about their guests like their name, address, room number, and information about their vehicle parked at the hotel. Section 41.49 also states that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection." In a facial challenge to the ordinance, motel operators objected to § 41.49 authorizing warrantless inspection of guest records.

Issues: (1) Whether facial challenges to ordinances and statutes are permitted under the Fourth Amendment; and (2) whether a hotel has an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest-supplied information is mandated by law and an ordinance authorizes the police to inspect the registry, and if so, whether the ordinance is facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry.

Lower court ruling: In *Patel v. City of Los Angeles*, no. 2:05-cv-01571 (9th Cir. Dec. 24, 2013), the Ninth Circuit ruled in favor of the motel operators. In an en banc opinion reversing the Central District of California decision, the majority concluded that § 41.49 is facially unconstitutional because it fails to expressly provide for pre-compliance judicial review before the police can inspect the registry. The Ninth Circuit noted that the "procedural deficiency" with the ordinance affected all searches authorized by that ordinance and therefore there are "no circumstances in which the record-inspection provision may be constitutionally applied." Both dissenting opinions agree that the ordinance in this case isn't facially invalid because the standard for facial invalidity is so high and the motel operators failed to meet it. The challenger must establish that the ordinance wouldn't be valid under any set of facts. The Tallman dissent points out, for example, that police officer may routinely seek warrants before searching hotel guest registries regardless of the fact they are not required under the ordinance and that warrantless searches would be valid in some circumstances under the exigent circumstances or community care exception, (for example if someone in a hotel room is suicidal).

Significance to local government: This case involves at least two issues relevant to local governments. First, a number of municipalities have ordinances like the one adopted by Los Angeles and if the Ninth Circuit is correct all of these ordinances are invalid. The second and broader issue is whether someone can make a facial challenge to an ordinance based on the Fourth Amendment at all. The cornerstone of the Fourth Amendment is reasonableness, and reasonableness requires a factual analysis. Thus, it is difficult to understand how a facial challenge could be met under the Fourth Amendment.

IMLA joined the State and Local Legal Center's brief; the case will be argued March 3, 2015. ML