

Hospitality Update



Looking For That "Special Look"?

By Michael Mitchell

(Hospitality Update, No. 3, September 2011)

Lots of hospitality employers, and a fair number of retail employers as well, spend time, money, and thought creating a brand or "look." They're trying to create something beyond just a logo or store colors; something that stands out just by looking at the very employees who work there. The way they look. The way they dress.

Is this legally safe? The answer is "yes" . . . and "no." Creating "that special look" is fine, but only as long as it doesn't infringe on one of the protected categories under federal or state discrimination laws. And that includes not only race and sex, but – as some recent high profile cases have shown – religion.

"You'll Be Fine If You Lose The Headscarf"

Samantha Elauf, a 19-year-old community college student from Tulsa, wore a black headscarf (called a hijab) to her interview with retail giant Abercrombie & Fitch. She was not hired, and later heard through a friend that it was because of her dress. Ms. Elauf filed a charge with the Equal Employment Opportunity Commission, and in its defense Abercrombie stated that it failed to hire her because she violated the "Look Policy," under which "associates must wear clothing that is consistent with the Abercrombie brand, cannot wear hats or other coverings, and cannot wear clothes that are the color black." Elauf filed a lawsuit and was recently awarded \$20,000 by a Tulsa jury.

A second suit against Abercrombie has been filed by the EEOC on behalf of Halla Banafa. In this case, Banafa applied for a job at an Abercrombie & Fitch subsidiary stocking merchandise. According to the woman, she was "into fashion, and wore skinny jeans and imported scarves that matched my outfits." Wearing a colorful headscarf to her interview, she was asked if she was a Muslim and if she had to wear the scarf. Then the interviewer marked "not Abercrombie look" on the interview form and turned her down, according to an EEOC press release. Her case is still pending.

Most recently, Abercrombie has been sued again, this time by Hani Khan, who was in fact hired, at least initially. She was told that she would be fine for work in the company's stock room, so long as her hajib matched company colors of navy blue, gray, or white, according to reports. But her job in the stock room also required her occasionally to be on the sales floor, and when she was spotted by a district manager she was told to remove the scarf. She refused and was fired.

But Don't Employers Have Rights?

Of course they do, and that includes the right to set the tone, style, and yes the "look" of your employees. In fact, employers tend to win dress code lawsuits more often than not. Establishing a corporate image allows employers to set requirements for clothing, makeup, jewelry (or lack of it), and other "mutable" factors, and this right is especially strong when aimed at employees who meet with the public, such as front desk clerks or wait staff. Even such subjective standards as "hip" or "cool looking" have been upheld as legal.

But there are certain "immutable" factors that are off limits because they are protected by federal or state law. These are things such as an applicant's race, sex, ethnic background or national origin, and religion. Refusing to hire minorities because they don't fit a company's corporate image would not get to first base legally, and the vast majority of employers understand this instinctively.

In the area of religion things get a little trickier. Many religions require distinctive garb or appearance and it's certainly not limited to Muslims. Sikhs, Rastafarians, many Jewish groups, and some Pentecostal Christian groups follow similar dress or appearance guidelines. An employer's obligation is to never give an automatic "no" to a religious-based request, even if the request violates longstanding company policy.

The proper response – even if the request sounds farfetched on the surface – is to attempt a reasonable accommodation. That's defined as some accommodation, such as a waiver of policy or slight change in job duties, that does not cost the employer any significant amount of money. (Note, this is *not* the same standard as reasonable accommodation under the Americans with Disabilities Act – the ADA requirement is much stricter.) If you *can* make such an accommodation, then you *must* make it.

The response of asking the employee to wear a headscarf of store colors is likely a reasonable one. In fact, a similar case arose in Britain at an Ikea store. Female Muslim staff members were supplied with headscarves that were not only in the corporate colors of navy blue and yellow, but which actually had the Ikea logo sewn into the back. This approach was applauded by the Muslim Council of Britain. Similar arrangements have been reached by other companies including well-known Domino's Pizza, which agreed to allow employees to wear the signature Domino's baseball cap over a red and blue scarf.

What's Next?

The EEOC reports a 31% rise in claims of religious discrimination claims over the last 10 years. Many of these are settled amicably. Of the ones that aren't, the companies are certainly not always found to be unlawful, especially since many such claims are based on flimsy religious grounds attempting to justify tattoos and piercings. Indeed, as employment defense lawyers know well, things are not always what they seem in EEOC press releases, and the pending cases in Abercrombie may well end up in the company's favor.

But even when an employer wins a discrimination suit, the outcome is often unpleasant, either because of the lost time and money, the investment of energy and emotion, and of course the unfavorable publicity. In the words of Halla Banafa: "To this day, I can't walk into Abercrombie & Fitch stores. They didn't just miss out on a hard worker, they lost a customer."

For more information contact the author at mmitchell@laborlawyers.com or 504-522-3303.