

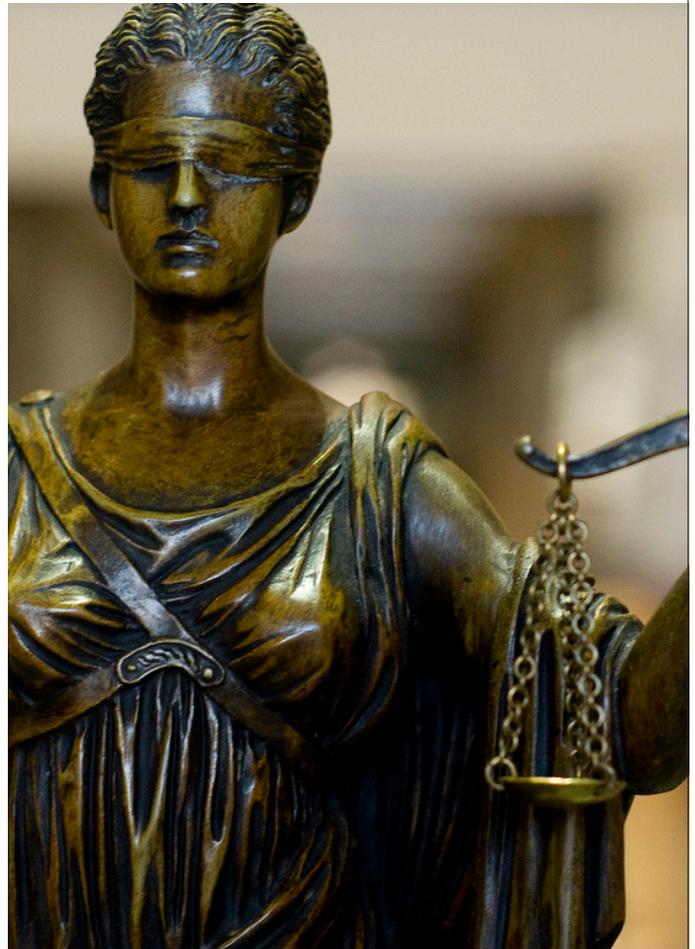
A Year in Review: The Laws and Cases that Shaped 2015

2015 was a big year for religion in the courts and legislatures around the country. Here at Tanenbaum, we closely monitored those developments, especially the ones that could affect our clients. We do this, not as your lawyers, but to give you a heads up about laws and cases pertaining to religion in the workplace, so we can work with you to plan preemptively. Below we share a synopsis of Indiana's Religious Freedom Restoration Act and recent Supreme Court decisions involving *Abercrombie & Fitch* and marriage equality, all of which have implications for Corporate Members dedicated to creating inclusive workplaces.

THE CASE: *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*

THE FACTS: On June 1, 2015, the Supreme Court ruled in favor of the EEOC on behalf of Samantha Elauf, a young woman who was not hired by Abercrombie & Fitch, notwithstanding a promising interview in 2008, because her hijab violated the company's "Look Policy." The EEOC said that the company violated Title VII of the 1964 Civil Rights Act by not making an accommodation for Elauf.ⁱ

THE TAKEAWAYS: The responsibility for religious accommodation was central to the decision in this case. The Supreme Court found that Elauf was denied employment because Abercrombie was unwilling to provide a religious accommodation—specifically, an exemption from its policy prohibiting headwear. Even though Elauf did not tell her interviewer that she



Title: Liberty & Justice | Photo Credit: Sue McGrew

wore a hijab for religious reasons and did not ask to be exempted from the policy prohibiting headwear, the Court still held that Abercrombie had violated the federal statute prohibiting employment discrimination on the basis of religion (Title VII). The Court found that Abercrombie's decision not to hire Elauf because of her hijab was based on her religious practice and could have been reasonably accommodated. It did not matter that the employer may not have officially known that Elauf wore her hijab for religious reasons.

Here, the takeaway is that employers should not automatically shy away from learning about the religious needs of their employees and applicants; rather, employers should ensure that employees who have responsibilities for personnel (such as with hiring authority) are educated in how to address such issues in accordance with lawⁱⁱ and an Accommodation Mindset™.

“ Are hiring managers prepared to handle questions about religious accommodations?”

WHAT NOW? Tanenbaum’s tool, the [10 Bias Danger Signs](#), can help employers learn about some of the primary ways that religious discrimination may show up in their own workplaces, so they can prevent it. We invite Corporate Members to look at their existing dress codes to ensure that they meet legal standards and leave room for religious accommodations. Additionally, we invite Corporate Members to be proactive in thinking about accommodations on other issues noted in the 10 Bias Danger Signs.

The Abercrombie case provides a reminder to revisit hiring and training procedures. Are hiring managers prepared to handle questions about religious accommodations? Are potential and new employees made aware of how to request an accommodation should they need one? Has refresher training been provided to those responsible for hiring/supervising/promoting and firing personnel?

THE BILL: *Religious Freedom Restoration Act (Indiana)*

THE FACTS: Indiana Governor Mike Pence signed the Religious Freedom Restoration Act (RFRA) into law on March 26, 2015.ⁱⁱⁱ The bill prohibits governmental

entities from placing a substantial burden on a person’s freedom to exercise his or her religious beliefs, unless the government can show that its action is the least restrictive way of achieving a compelling governmental interest. The bill was modeled after the 1993 federal RFRA, signed by President Bill Clinton. Congress (almost unanimously) passed the federal version after a controversial 1990 Supreme Court decision (*Employment Division v. Smith*). In that case, the Court upheld the firing of two American Indians who worked for a drug rehabilitation facility and used peyote during religious ceremonies. Designed to address this type of fact pattern, the law states that “governments should not substantially burden religious exercise without compelling justification.”^{iv}

However, many opponents saw the bill as pushback from conservatives who had been unhappy with Indiana’s legalization of same-sex marriage. They voiced concerns that the bill would allow business owners to discriminate against lesbian, gay, bisexual, and transgender (LGBT) customers.^v After the bill was passed, news media reported a significant public outcry, and some corporations called for the law to be repealed.

Governor Pence then signed an amendment specifically clarifying that the RFRA did not legalize discrimination based on sexual orientation.^{vi} Although 21 states currently have various versions of RFRA, Indiana’s received much more press coverage than that received by other states.^{vii}

THE TAKEAWAYS: Multinational and national corporations played a critical role in changing the conversation about Indiana’s RFRA. Leaders from [Salesforce](#), [Apple](#), [Angie’s List](#), [Eli Lilly](#), and [Yelp](#) condemned the bill, in some cases threatening to cease business in the state should the bill remain unchanged.^{viii} The bill was amended, and though it was not satisfactory to all parties, language around anti-discrimination based on sexual orientation and gender identity was added. In essence, corporations took a stand and the result was a readjustment



that established a new balance designed to ensure both religious freedom and equal protection from discrimination based on sexual orientation.^{ix}

By exercising corporate muscle and threatening Indiana with lost revenue, the corporate sector seized an opportunity to promote LGBT equality as a core corporate value. However, this model has greater ramifications. It could also be used by companies to publically foster inclusivity for both religious and LGBT identities at work.

“Companies can stand up for lesbian, gay, bisexual, and transgender employees, while also respecting and including employees of all faiths and none.”

WHAT NOW? The conversation about the federal RFRA is far from over. The Supreme Court has recently agreed to take up another case (reminiscent of [Hobby Lobby](#)) involving religious exemptions for schools, hospitals, and other institutions that do not want to provide birth control for employees.^x What we are seeing is the continuing evolution of the meaning of “religious freedom” in the United States, as this issue is increasingly politicized. In the current political climate, companies need thoughtful strategies for addressing religious issues.

While it was exciting to see corporations stand up for equality, we caution Corporate Members against choosing between supporting LGBT rights and religious interests. Companies can stand up for lesbian, gay, bisexual, and transgender employees, while simultaneously respecting and including employees of all faiths and none. The response to Indiana’s RFRA

shows that corporations can make a difference. And this gives companies all the more reason to publicly stand for respect and inclusivity for all.

THE CASE: *Obergefell v. Hodges/Kim Davis*

THE FACTS: On June 26, 2015, the Supreme Court found that states are required to license and recognize same-sex marriages.^{xi} It was a watershed moment for the LGBT equality movement—a time of celebration for many. Plenty of people, however, were not so excited about the decision, and many of those people are religious.

In the wake of the decision, Kim Davis, an elected county clerk in Kentucky, became a symbol for many of those who opposed the decision. Davis refused to issue marriage licenses to same-sex couples despite the Court’s decision. As a result, she spent several days in jail. Davis was released subject to an order that she not attempt to prevent deputy clerks from issuing the licenses.^{xii} As an elected official, Davis cannot be fired, so she remains in office and the state has made adjustments so that her continued refusal to sign licenses for same-sex couples does not impact couples from getting their licenses. For some, Davis became a champion of religious freedom in a changing country, where acceptance of LGBT rights is becoming increasingly widespread. For others, she became a pariah.

“To what degree are employers expected to make accommodations for employees who cannot or will not perform certain duties because of conflicting religious beliefs?”



THE TAKEAWAYS: In one sense, the abundant media coverage of Kim Davis's story highlighted an important issue that appears in many different kinds of workplaces: the conscientious refusal. To what degree are employers expected to make accommodations for employees who cannot or will not perform certain duties because of conflicting religious beliefs? This question must be answered on a case-by-case basis. But one thing is certain. When the question involves treating an individual employee differently just because of one of their identities, the issue is one of discrimination. And that is a problem. (For more information on conscientious refusals, see Tanenbaum's [Fact Sheet](#) on the topic.)

This story also brought to light a current political and social challenge: how to balance allowing employees to express their religious identities while fostering inclusiveness for LGBT employees and customers. Where do you draw the line?

WHAT NOW? In the wake of the Supreme Court's decision and the national focus on Kim Davis, we received questions from several Corporate Members about how to manage conversations about these topics in the workplace. We found that many of these workplace conversations were taking place on internal social media platforms, particularly in response to company statements directed toward respect and inclusion for LGBT customers and employee groups. Some employees responded with posts voicing religious objections to LGBT inclusion. HR and D&I professionals faced the challenge of determining whether these posts should be treated as religious expression or harassment.

In our view, this issue has not run its course. We predict that other Corporate Members will face similar challenges around LGBT inclusion initiatives during Pride Month in June (if not before). To be prepared, consider reviewing your non-discrimination, harassment, and social media policies to see where language can be sharpened and examples can be added. More robust policies will be a valuable tool for leaders, when the time comes to make these tough calls.

Ultimately, it is important to keep in mind that some employees are more vulnerable than others in the current legal landscape. Religious, ethical, and moral beliefs are protected under Title VII of the 1964 Civil Rights Act, a federal law. In contrast, while the marriage equality decision was a major step for LGBT equality, equality in the workplace is not today guaranteed for all LGBT employees. Currently, there is no federal protection for LGBT employees, and 29 states lack such protections.^{xiii} Some courts have interpreted Title VII to protect LGBT employees from discrimination in the workplace, but this interpretation has not been accepted in every court or every state.^{xiv}

- i. <http://www.politico.com/story/2015/06/ambercrombie-fitch-hijab-case-supreme-court-ruling-118492>
- ii. http://www.nytimes.com/2015/06/02/us/supreme-court-rules-in-samantha-elauf-abercrombie-fitch-case.html?_r=0
- iii. <http://www.msnbc.com/msnbc/religious-freedom-bill-becomes-law-indiana>
- iv. <http://blog.constitutioncenter.org/2014/06/what-is-rfra-and-why-do-we-care/>
- v. <http://www.indystar.com/story/news/politics/2015/03/25/gov-mike-pence-sign-religious-freedom-bill-thursday/70448858/>
- vi. <http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/>
- vii. <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx>
- viii. <http://www.inc.com/thompson-wall/indianas-new-religious-freedom-act-detering-big-business.html>
- ix. <http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/>
- x. <http://www.nytimes.com/2015/11/07/us/politics/supreme-court-health-care-contraception-coverage.html>
- xi. <http://www.msnbc.com/msnbc/supreme-court-rules-favor-marriage-equality>
- xii. <http://www.cnn.com/2015/09/04/us/kim-davis-things-to-know/>
- xiii. <http://www.hrc.org/resources/entry/an-important-step-toward-workplace-equality-an-executive-order-on-federal-c>
- xiv. http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol31_2004/summer2004/irr_hr_summer04_protectlgbt.html

