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The Impact of the Supreme Court's Ruling in *EEOC v. Abercrombie & Fitch*

By Dawn Reddy Solowey and Ariel D. Cudkowicz

On June 1, 2015, in a 8-1 ruling, the U.S. Supreme Court sided with the EEOC in the closely-watched religious discrimination case of *EEOC v. Abercrombie & Fitch Stores, Inc.*

Headline from the Majority Opinion

The Court started with the premise that Title VII prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that could be accommodated without undue hardship. The Court then framed the question presented as "whether this prohibition applies only where an applicant has informed the employer of his need for an accommodation."

In Justice Scalia's brief majority opinion, the Court rejected outright Abercrombie's argument that an applicant cannot show disparate treatment without first showing that the employer had "actual knowledge" of the applicant's need for accommodation. Instead, the Court held that "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."

The Court held that "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

The Underlying Facts

Seventeen year-old Samantha Elauf, a Muslim who wore a headscarf for religious reasons, applied for a sales floor position in an Abercrombie store in Oklahoma. At the job interview, to which she wore the headscarf, Ms. Elauf said nothing to Abercrombie about the fact that she was Muslim. In the interview, she did not bring up the headscarf, or say that she wore it for religious reasons, that she felt a religious obligation to do so, or that she would need an accommodation from the retailer's "Look Policy." However, her interviewer testified that she assumed that Ms. Elauf was Muslim, and wore the head-covering for religious reasons. There was evidence that the headscarf influenced the company's decision not to hire her.

The district court granted summary judgment for the EEOC. The Tenth Circuit not only reversed that judgment, but granted summary judgment to Abercrombie. The Tenth Circuit held that the burden is squarely on the applicant or employee to advise the employer that he or she has a religious practice that conflicts with a job requirement, because religion is an inherently individual matter, and he or she is uniquely qualified to know those personal religious beliefs and whether an accommodation is necessary. The appeals court rejected the EEOC's argument that the employer has a duty to attempt reasonable accommodation when the employer has notice from any source that the applicant or employee has a religious belief that conflicts with a job requirement.

The EEOC's Position

At the Supreme Court, the EEOC argued that under the plain language of Title VII, an employer who refuses to hire an applicant on the basis of what it correctly understands to be a religious practice has violated the statute. The EEOC urged the Court to reject a "rigid notice requirement," reasoning that employers have superior knowledge of work rules, and may be able to identify religious conflicts not known to applicants. The EEOC claimed that its approach would not require an employer to pry into the sensitive area of religious practice; instead, the agency suggested, an employer who suspected a possible religious conflict could simply advise the applicant of the relevant work rules and ask whether or not the applicant could comply. The EEOC argued that under the Tenth Circuit's approach, employers would be "free to discriminate" in cases where the employer's awareness of a conflict between a work rule and an applicant's religion came from a current employee, an applicant's indirect statement suggesting a conflict, or the employer's own accurate inference of religious practice.

Abercrombie's Position

Abercrombie urged the high court to reaffirm what the retailer called the "established rule for over 40 years": that only actual knowledge of a religious conflict, rather than a mere guess, gives rise to Title VII liability. Abercrombie reasoned that employees and applicants must tell employers if they need religious accommodations, eliminating any need for the employer "to speculate, guess, or probe." The retailer explained that the applicant or employee is best positioned to recognize the conflict, given the "multitude of religious beliefs and their uniquely personal and individual" nature, and will ordinarily also be made aware of the applicable work rules. Abercrombie argued that neither Title VII nor any case precedent supported imposing a duty on employers who merely "suspect" a possible conflict with religion, a standard that the retailer called "invented, unadministrable and inequitable." Abercrombie reasoned that such a duty would leave employers in an unfair "Catch-22," as they tried to avoid stereotyping, but also tried to avoid litigation by probing suspected religious views of applicants and employees.

Oral Argument

At oral argument, most of the justices expressed skepticism or outright disapproval of Abercrombie's position that only actual knowledge from the applicant of the religious belief was adequate to put the employer of notice of the duty to accommodate. For example, Justice Breyer characterized the Tenth Circuit's position this way: "Employer, unless you receive direct, explicit notice that what she wants to wear is based on religion and she wants an accommodation, unless you receive direct, explicit notice from her, you're home free to do what you want."

Interestingly, it was Justice Scalia, the author of the majority opinion, who appeared at argument to endorse the company's position, stating that the Tenth Circuit's rule "avoids all problems" by making clear that "if you want to sue me for denying you a job for a religious reason, the burden is on you to say, I'm wearing the headscarf for a religious reason."

The Court's Analysis

In reaching its holding that an applicant need only show that his need for accommodation was a motivating factor in the employer's decision, the Court relied primarily on an analysis of the text of Title VII.

The Court reasoned that Title VII's disparate-treatment provision prohibits an employer from using an applicant's religious practice as a motivating factor in failing to hire the applicant. The Court noted that Title VII "does not impose a knowledge requirement," and declined "to add words to the law." Instead, the Court reasoned that the statute's "intentional discrimination provision prohibits certain *motives*," regardless of the employer's knowledge.

In distinguishing between motive and knowledge, the Court held that an employer who had actual knowledge of the applicant's need for a religious accommodation, but did not have that as a motive for refusing to hire the applicant, would *not* violate Title VII. By contrast, an employer whose motive in refusing to hire is the desire to avoid an accommodation -- even if based on "no more than an unsubstantiated suspicion that accommodation would be needed"-- may violate Title VII.

The Court acknowledged that if the applicant requested an accommodation, or the employer was certain that the applicant followed a practice that would require accommodation, it may be easier to infer motive, but held that neither is required for liability.

However, in an important footnote, the Court declined to reach the question of whether the motive requirement can be met without a showing that the "employer at least suspects that the practice in question is a religious practice." The Court reasoned that it need not decide that question since it was undisputed in this case that Abercrombie at least suspected that Ms. Elauf wore the hijab for religious reasons.

The Court's opinion sidestepped Abercrombie's concerns that without an actual knowledge requirement, employers will be forced to inquire about religion, or engage in religious stereotyping, which are practices that the EEOC's own guidance cautions against. Indeed, the Court offered an example that highlights the practical pitfalls for employers: the employer who thinks, but does not know for certain, that an applicant may be an orthodox Jew who will observe the Sabbath and be unable to work on Saturday. In that case, the Court held, if the applicant actually required the accommodation, and the employer's desire to avoid it was a motivating factor in not hiring the employee, the employer would violate Title VII.

The Court also rejected Abercrombie's defense that its "Look" policy was a neutral policy that could not be discriminatory; the Court emphasized that Title VII demands more than "mere neutrality with regard to religious practices." Finally, the Court rejected the retailer's position that a claim based on failure to accommodate an applicant's religious practice must be raised as a disparate-impact, rather than a disparate-treatment, claim.

Concurrence by Justice Alito

Justice Alito filed a concurrence to disagree with the majority's decision to reserve the question of whether the employer must know or suspect that the practice in question is a religious practice to trigger liability. Justice Alito declared the "answer to this question . . . is obvious": an employer cannot be held liable for taking an adverse action because of an employee's religious practice unless the employer knows that the employee engages in the practice for a religious reason.

Justice Alito also took issue with the majority's opinion that it is a plaintiff's burden to prove a failure to accommodate, opining that the inability to reasonably accommodate a religious practice is instead an available affirmative defense for the employer.

Justice Thomas' Dissent

Only Justice Thomas dissented from the majority opinion, holding that he would affirm the Tenth Circuit ruling. Justice Thomas grounded his dissent on his view that "Mere application of a neutral policy cannot constitute intentional discrimination." Therefore, he reasoned, the EEOC could not advance a disparate-treatment claim in this case.

Conclusion

There is still much wisdom in the time-honored advice to employers to avoid asking applicants about religion, or making assumptions based on stereotypes. However, in light of this decision, an employer who has any reason to believe, or even suspect, that accommodation may be necessary—from any source—will need to consider engaging in an interactive process with the applicant. Depending on the circumstances, that process may entail explaining to the applicant the relevant work rule, inquiring as to whether the applicant could comply with the rule or would require an accommodation, and analyzing whether any required accommodation is reasonable or would impose an undue hardship. Employers would be well advised to consult counsel who specializes in this area for guidance on how to meet the obligations imposed by the Court's ruling while minimizing the risk of other claims, as well as ensuring compliance with state or local religious discrimination laws, which can vary from federal law. Finally, employers would also be wise to update their internal hiring practices training to ensure that hiring managers and interviewers are aware of best practices following the Supreme Court's ruling.

Dawn Reddy Solowey is senior counsel in Seyfarth's Boston office, and *Ariel Cudkowicz* is a partner in the firm's Boston office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Dawn Solowey at *dsolowey@seyfarth.com* or Ariel Cudkowicz at *acudkowicz@seyfarth.com*.