CORPORATE COMPLIANCE INSIGHTS

U.S. Supreme Court Sides With EEOC in Abercrombie Headscarf Case

Robin Largent August 17, 2015 Governance

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On June 1, the U.S. Supreme Court issued its decision in *EEOC v. Abercrombie & Fitch Stores*, reversing a Tenth Circuit win for the retailer in a religious discrimination case brought by a Muslim applicant who was denied employment due to her headscarf being a violation of Abercrombie's dress policy – which prohibited caps of any kind. The Tenth Circuit had ruled in favor of Abercrombie, holding that Abercrombie could not be liable as a matter of law for discriminating against the applicant because Abercrombie did not have "actual knowledge" that the applicant needed an accommodation for her religious practice. Reversing the Tenth Circuit's ruling, the United States Supreme Court (in an opinion authored by Justice Scalia) held that a plaintiff suing for religious discrimination need not show that the employer was expressly informed of the need for religious accommodation. Instead, the plaintiff need only show that the desire to avoid accommodating the

employee was a "motivating factor" in the employment decision. Some understanding of the factual backdrop of the case is helpful to understanding the Court's ruling.

Samantha Elauf, who is a practicing Muslim, applied for a retail position with Abercrombie. Consistent with her religion, Elauf wore a headscarf to the interview. The store's assistant manager interviewed her and gave her a rating that qualified Elauf to be hired. However, the assistant manager was unsure whether the headscarf would be a violation of the company's "Look Policy" – a dress code that prohibited wearing "caps." The assistant manager inquired of the district manager about whether the headscarf would violate store policy. She told the district manager that she thought Elauf wore the headscarf as part of her faith. The district manager instructed the assistant manager not to hire Elauf, indicating that the headscarf would be a violation of the Look Policy – as would any type of headgear, religious or not. The EEOC sued Abercrombie on Elauf's behalf. At the trial court level, the judge found Abercrombie liable for religious discrimination as a matter of law. Elauf was awarded $20,000 in damages.

Abercrombie appealed, arguing that the trial court erred in finding it liable for religious discrimination because there was no evidence that the applicant informed Abercrombie that she needed a religious accommodation; therefore Abercrombie could not have discriminated against her "because of" her religion. The Tenth Circuit agreed with Abercrombie. Now it was the EEOC's turn to appeal. The U.S. Supreme Court accepted the EEOC's invitation to review the case, and earlier today reversed the Tenth Circuit's decision.

Siding with the EEOC, the Court reasoned:

> "[T]he intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed. Thus, 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. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII."

The Court stated that Abercrombie "knew – or at least suspected" that the scarf was worn for religious reasons. As such, that fact (along with avoiding a potential need to accommodate) could have been a "motivating factor" in the decision not to hire Elauf. The Court held that this was enough for the EEOC to state a claim for

religious discrimination, regardless of whether or not Abercrombie was expressly informed of the need for accommodation.

Notably, the Court also rejected Abercrombie's additional argument that it could not be liable for intentional discrimination because its Look Policy was a neutrally applied policy that did not treat religion any differently than any other characteristic. The Court held that it did not matter if the policy was neutral because neutral policies must give way to religious accommodation needs:

> "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual . . . because of such individual's' 'religious observance and practice.' An employer is surely entitled to have, for example, a no headwear policy as an ordinary matter. But when an applicant requires an accommodation as an 'aspec[t] of religious . . . practice,' it is no response that the subsequent 'fail[ure] . . . to hire' was due to an otherwise neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation."

The Supreme Court's opinion is available here. The takeaway for employers is that an applicant or employee need not expressly request religious accommodation in order to later bring a viable claim for religious discrimination. The applicant need only show that the employer could have been "motivated" by a desire to avoid accommodating the applicant's religious practices, based on some suspicion or knowledge on the employer's part that religious practices were in play.

ABOUT THE AUTHOR

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A regular presence in Northern California state and federal courts, **Robin E. Largent** has been lead defense counsel for California employers in litigation ranging from discrimination and harassment to wage and hour and trade secrets claims. Her bold and confident approach to positioning clients ahead of plaintiffs' claims and opposing counsel tactics have resulted in summary judgment dismissal and voluntary dismissal in several complex lawsuits. Largent represents employers, including major food and retail companies, in all types of employment litigation: wrongful termination, retaliation, breach of contract, wage and hour (California Labor Code) and unfair competition. She also regularly counsels and advises California employers on issues of compliance with California and federal employment laws. In her guidance to employers on best practices to avoid litigation, she addresses areas such as FMLA/CFRA, layoffs and reductions in force, state and federal wage and hour laws and protection of trade secrets. Largent serves as editor and primary contributor for CDF's California Labor & Employment Law Blog and ensures the topicality and quality of the firm's widely respected online resource for employers. She also is a regular contributor to various external employment law publications.