The Legal Intelligencer



Employment Law

# Justices Revive Religious Accommodation Case Against Abercrombie & Fitch

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The U.S. Supreme Court recently addressed a case regarding a Muslim woman's right to have her religious practices accommodated under Title VII of the Civil Rights Act of 1964. In a much anticipated, and in many ways, surprising decision, the high court decided the hiring practices of the popular retail clothing company Abercrombie & Fitch violated Title VII. The case, *EEOC v. Abercrombie & Fitch Stores*, No. 14-86, was decided June 1. Unfortunately, this is not the first time Abercrombie's employment and hiring practices made headlines. (See "A&F to Pay $50 Million to Settle Race, Sex Bias Claims," published in The Legal on Nov. 15, 2004.)

## ABERCROMBIE'S 'LOOK POLICY'

According to the recent Supreme Court decision, the U.S. Equal Employment Opportunity Commission sued Abercrombie on behalf of applicant Samantha Elauf, claiming that its refusal to hire Elauf because she wore a headscarf (also known as a hijab) to her job interview constituted religious discrimination. Elauf applied for a position in an Abercrombie store and was interviewed by the store's assistant manager. Though Elauf was given a rating that qualified her to be hired, the manager expressed concern that Elauf's headscarf would conflict with the store's "Look Policy." Consistent with the image Abercrombie seeks to project for each store, the suit alleged the company imposes the "Look Policy" to govern its employees' dress. Among other things, the "Look Policy" prohibits "caps" as too informal for Abercrombie's desired image. Without any discussion with Elauf about her headscarf or her religious practices, Abercrombie refused to hire her.

After the suit was filed, the district court granted the EEOC summary judgment on the issue of liability and an eventual trial on damages resulted in an award of $20,000. On appeal to the U.S. Court of Appeals for the Tenth Circuit, the appellate court reversed and awarded Abercrombie summary judgment. The panel concluded that an employer cannot ordinarily be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of her need for an accommodation.

# SCALIA'S MAJORITY OPINION

Title VII prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship. This much we know. The question before the Supreme Court, however, was whether it was enough that Abercrombie had no specific knowledge of Elauf's religious practices/need for accommodation, or, was the company's mere suspicion of such enough. The court reversed the Tenth Circuit and held that actual knowledge was not something the statute required to prove an illegal practice.

What makes the *Abercrombie* decision so surprising is not necessarily the result but rather the way in which the majority of the justices arrived at their conclusion. Writing for the majority, Justice Antonin Scalia, someone whose name is not necessarily synonymous with employee rights, went to great lengths to explain why this was an example of disparate treatment (intentional discrimination). To that end, he examined the text of Title VII, which is silent with respect to any specific "knowledge" requirement.

Scalia wrote, "The 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." The overarching rule here is that "an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions," he wrote. Such a result constitutes disparate treatment.

For the majority of the justices, which also included Chief Justice John Roberts Jr. and Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan, there was a clear distinction between religious "beliefs" and religious "practices." As explained by Scalia, Congress defined "religion," for Title VII's purposes, as "includ[ing] all aspects of religious observance and practice, as well as belief." Since religious practice is one of the protected characteristics that cannot be accorded disparate treatment, it must therefore be accommodated.

Scalia's rationale, while somewhat circular, makes sense when you consider that Title VII demands more than mere neutrality with regard to religious practices. Title VII gives applicants favored treatment, affirmatively obligating employers to accommodate religious observance and practice.

# THE CONCURRENCE

Justice Samuel Alito Jr. wrote a concurring opinion reversing the Tenth Circuit; however, he disagreed with the majority's contention that there was no "knowledge" requirement for a religious accommodation claim under Title VII. Alito wrote that he "would hold that 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." Notwithstanding this knowledge requirement, Alito was convinced there was ample evidence in the record to support a finding that Abercrombie knew that Elauf was a Muslim and that she wore the scarf for a religious reason.

# THOMAS' STRONG DISSENT

In a concurring/dissenting opinion that was nearly twice as long as the majority opinion, Justice Clarence Thomas took great issue with Scalia's classification of the case as one involving disparate treatment. To Thomas, mere "application of a neutral policy cannot constitute intentional discrimination." Rather, Abercrombie's facially neutral policy should have been examined under the disparate-impact paradigm. Per Thomas, the terms "intentional discrimination" and "disparate impact" have settled meanings in federal employment discrimination law. Intentional discrimination occurs where an employer has treated a particular person less favorably than others because of a protected trait. Disparate-impact claims, by contrast, involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

Thomas, the former chairman of the EEOC, argued Abercrombie's conduct did not constitute "intentional discrimination" merely because it refused to create an exception to its neutral Look Policy for Elauf's religious practice of wearing a headscarf. In doing so, he said, it did not treat religious practices less favorably than similar secular practices, but instead remained neutral with regard to religious practices. In his opinion, this neither constituted disparate treatment (intentional discrimination) nor disparate impact.

# THE TAKEAWAY

An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. That is the very clear message from the majority opinion. Since the employer is in a far better position to know its own policies, it behooves employers to determine if there is a particular religious practice that would require accommodation. Employers may lament the fact that they are not soothsayers when it comes to an applicant's religion. That is not what the law requires. Employers are free to ask applicants to self-identify and are within their rights to ask if there are any particular religious accommodations needed in order to perform the essential functions of the job. In this writer's opinion, this is far better than rejecting an applicant purely because she does not fit some corporate image.

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