Supreme Court Rules Against Abercrombie In Case Of Religious Accommodation

Insights
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In an 8–1 opinion authored by Justice Antonin Scalia, the U.S. Supreme Court held today that Abercrombie & Fitch Stores, Inc. is liable for refusing to hire an applicant who wore a hijab for religious reasons despite the fact that she never informed Abercrombie why she was wearing the headscarf. The decision increases the burden on employers to ensure they accommodate the religious beliefs of all applicants and employees. *EEOC v. Abercrombie & Fitch*

Background
Abercrombie is a retail clothing company, operating stores across the United States. Abercrombie requires all of its employees to comply with a "Look Policy," intended to exemplify its "classic East Coast collegiate style of clothing." Abercrombie's Policy is outlined in its Employee Handbook. Employees, including sales-floor employees whom Abercrombie refers to as "Models," are prohibited from wearing black clothing and "caps." Abercrombie claims that the Look Policy is vital to its "preppy" and "casual" brand.

Samantha Elauf was 17 when she applied for a position as a Model at an Abercrombie store in Tulsa, Oklahoma. Prior to her application, Elauf, a Muslim, had worn a hijab every day since she was 13 years old. Her wearing a hijab over her head reflected her understanding of the requirements of the Quran. Elauf wore a black hijab to her interview for a Model position, unaware of Abercrombie's Look Policy. During her interview, she did not inform Abercrombie that her hijab was worn for religious reasons or that she felt religiously obligated to wear it. An Abercrombie assistant manager made indirect references to its Look Policy during Elauf's interview, but neither the interviewing manager nor Elauf made any references to the hijab.

As part of its hiring guideline, Abercrombie evaluates prospective employees on three categories: "appearance & sense of style"; whether the applicant is "outgoing & promotes diversity"; and whether the applicant has "sophistication & aspiration." Each category is assessed on a three-point scale. An applicant with a combined score of five or less is not recommended for hire. Elauf originally scored 2/3 points in each category for a total of six points, which "meets expectations" and amounts to a recommendation for hire.

Nonetheless, on account of Elauf's hijab, the interviewing assistant manager sought approval from her superiors. Her district manager—interpreting Abercrombie's proscription against wearing

"caps" as applicable to hijabs—stated that Abercrombie should not hire Elauf because her hijab was inconsistent with Abercrombie's Look Policy. The District Manager denied knowledge that Elauf's hijab was worn for religious reasons. He told the assistant manager to change Elauf's interview score from six points to five (based on a one-point reduction for the "appearance & sense of style" section), resulting in Abercrombie not hiring Elauf.

The Equal Employment Opportunity Commission filed a Title VII religious accommodation claim against Abercrombie alleging that Abercrombie violated the law when it "refused to hire Ms. Elauf because she wears a hijab" and "failed to accommodate her religious beliefs by making an exception to the Look Policy." Under Title VII of the Civil Rights Act of 1964, it is "an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … religion."

An Implied Need For Accommodation Triggers Protection

The Supreme Court held that an employer may be liable under Title VII for refusing to hire an applicant or for discharging an employee based on a "religious observance or practice" regardless of whether the employer has direct, explicit notice from the applicant or employee that a religious accommodation was required. According to the Court's opinion: "[A]n applicant need only show that his need for an accommodation was a motivating factor in the employer's decision" in order to show that the employer's action violated Title VII.

The test is not whether an employer has explicit, direct notice of a conflict of employer requirements and a prospective (or current) employee's religious practices. Rather, the test is whether the employer has enough information to make it aware that there exists a conflict between the individual's religious belief or practice and a requirement for applying for or performing a job. "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."

Result: A Burden To Recognize The Need For A Potential Religious Accommodation

The Court's opinion establishes that the test now facing employers is straightforward. But while the test itself may be straightforward, its implications on hiring are not. The Court's holding places the onus on employers to speculate whether potentially religious dress or other religious practices are, in fact, religious practices requiring accommodation. Employers must now take second-hand information (or intuition) regarding applicant or employee religious observances and practices into account for fear of running afoul of Title VII. The Court did not provide a bright line test for what constitutes sufficient information regarding a prospective or current employee's religious practices to constitute knowledge sufficient to require accommodation.

In the wake of this decision, our advice is to maintain a heightened awareness of potential Title VII claims. Employers cannot idly await direct, explicit information from an applicant or employee

regarding his or her religious beliefs and practices. You should proactively train your supervisors to recognize potential religious beliefs and observances that might require accommodation.

But on the other hand, remember that inquiring in the first instance or speculating about applicant or employee religious beliefs or practices could cause problems of its own. This balancing act will certainly be difficult for employers, who will eagerly await further direction from lower courts in applying this decision.

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