Supreme Court Rules for EEOC in Religious Accommodation Case

By Allen Smith 6/1/2015

The Equal Employment Opportunity Commission (EEOC) won a significant victory June 1, 2015, for those alleging religious discrimination in a hiring case that involved retailer Abercrombie & Fitch's refusal to hire an applicant whose headscarf, worn for religious reasons, did not conform to its dress code policy.

In an 8-1 opinion, the U.S. Supreme Court held that an employer may not refuse to hire an applicant if the need for a religious accommodation is a motivating factor in the employer's decision, unless accommodation would pose an undue hardship.

The court rejected Abercrombie's argument that it should be held responsible for providing accommodation only where a job applicant has explicitly informed the employer of his or her need for an accommodation.
The decision means that HR professionals should become especially familiar with their policies and discuss them with applicants to see if an accommodation might be needed, according to Andrew Hoag, an attorney with Fisher & Phillips in Los Angeles.

Anyone with authority to hire or fire should be trained on religious discrimination, added Michael Droke, an attorney with Dorsey & Whitney in Seattle.

Job Denied

The case arose when Samantha Elauf, then a teenager who wore a headscarf or hijab as part of her Muslim faith, applied for a job at Abercrombie & Fitch in Tulsa, Okla.

Heather Cooke, the store's assistant manager, interviewed Elauf and gave her a rating that qualified her to be hired. But Cooke was concerned that Elauf's headscarf might conflict with the store's dress code. She sought guidance from the store manager to clarify whether the headscarf would be considered a forbidden "cap," per the store's employee dress code. When she got no answer from the store manager, she turned to Randall Johnson, the district manager, who told her that the headscarf would violate the store's dress code, as would all other headwear, religious or not, and directed Cooke not to hire Elauf.

The EEOC sued on Elauf's behalf, claiming that Abercrombie's refusal to hire her violated Title VII of the Civil Rights Act of 1964. Title VII prohibits employers from discriminating based on race, color, sex, religion or national origin. The district court ruled for Elauf, but the 10th U.S. Circuit Court of Appeals decided in Abercrombie's favor.

Supreme Court Opinion

The Supreme Court reversed. In explaining why actual knowledge of the need for accommodation isn't required for there to be a viable religious accommodation claim, the Supreme Court said that "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 rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward, the high court said. "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," Justice Antonin Scalia wrote in the majority opinion. "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."

"I was a teenager who loved fashion and was eager to work for Abercrombie & Fitch," Elauf said. "Observance of my faith should not have prevented me from getting a job. I am glad that I stood up for my rights, and happy that the EEOC was there for me and took my complaint to the courts."

Concurrence and Dissent

Justice Samuel Alito Jr. concurred with the majority opinion, but stated that he would have required employer knowledge of the need for accommodation. He said, "It is entirely reasonable to understand the prohibition against an employer's taking an adverse action because of a religious practice to mean that an employer may not take an adverse action because of a practice that the employer knows to be religious." However, he emphasized that "If there is no knowledge requirement, an employer could be held liable without fault."

Alito concluded that there was "ample evidence in the summary judgment record to prove that Abercrombie knew that Elauf is a Muslim and that she wore the scarf for a religious reason."

Justice Clarence Thomas concurred in part, agreeing there are only two causes of action under Title VII: disparate-treatment claims and disparate-impact claims. But he also dissented in part, stating, “Mere application of a neutral policy cannot constitute intentional discrimination.”

David Rapuano, an attorney with Archer & Greiner in Haddonfield, N.J., said that he found the majority’s justification for the decision to be “troubling,” and wished the court instead had sided with Alito’s reasoning. “The real difficulty for employers is the court said employers could be guilty of violating Title VII by taking no action or some negative action even though they had no knowledge that there was a religious practice,” Rapuano remarked.

Discussion of Policies

Employers shouldn’t ask job applicants directly if they are wearing attire for religious reasons, Hoag said. But HR—or anyone else interviewing job candidates—should know their company's policies, including dress codes, and be ready to ask job applicants if those policies might be problematic for them, he added.

This can then lead to a discussion with the applicant over possible accommodations if the clothing is being worn for religious reasons, or serves to clarify that the clothing is not being worn for religious reasons if it is not.

Don’t trade one lawsuit for another by asking, for example, if a headscarf is being worn for religious reasons, Hoag cautioned. A fine line must be walked in these discussions, and an inquiry of this kind might raise a religious discrimination lawsuit of its own, he said.

Importance of Training

A case that rises to the level of the Supreme Court is extraordinarily expensive to litigate, Droke said. “It reinforces the importance of management training at the lowest level,” he remarked.

Religious discrimination claims fall into three categories, Droke noted:

- Dress codes.
- Grooming standards, such as prohibitions on wearing a beard or having a visible tattoo.
- Scheduling.

HR should tell managers to inform the human resources department if a job applicant or employee requests an accommodation or if a hiring decision hinges on an expected request for accommodation.

Keep in mind that there are three different standards for accommodation, one for pregnancy accommodations, one for religious accommodations and one for Americans with Disabilities Act

(ADA) accommodations, noted Lucretia Clemons, an attorney with Ballard Spahr in Philadelphia. “They are completely different standards. You can’t put them all in one bucket.”

With pregnancy accommodations, the comparison is whether pregnant employees are treated worse than other employees granted accommodations. With religious accommodations, employers can’t rely on a neutral policy, as Title VII gives an individual seeking a religious accommodation favored status, she said. Under the ADA, there is the question of whether an accommodation is reasonable and the employer must have actual or perceived knowledge for the obligation to accommodate to kick in, Clemons explained.

“I ask managers if they have the power to make multimillion [dollar] decisions on behalf of their company and they say, ‘no.’ But when they make hiring decisions, they do,” Droke said.

This case is *EEOC v. Abercrombie & Fitch Stores*, No. 14-86 (2015).

Allen Smith, J.D., is the manager of workplace law content for SHRM. Follow him @SHRMlegaleditor.