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Trials & TRIBULATIONS

Court rules on Title VII violation by Abercrombie & Fitch

An employer can violate Title VII's prohibition against religious discrimination even without actual knowledge that a prospective employee requires an accommodation

On June 1, the U.S. Supreme Court determined that a prospective employer violates Title VII's prohibition against religious discrimination if the employer fails to hire an applicant because it seeks to avoid accommodating a religious practice, even if the employer has no actual knowledge that the prospective employee needs such an accommodation.

By SARAH SNYDER MERKEL
Daily Record Columnist

The court found that Abercrombie & Fitch stores violated Title VII by refusing to hire an applicant who was wearing a headscarf. Although Abercrombie surmised that the applicant was wearing this headscarf for religious reasons, the store failed to hire her, because her headscarf was considered a forbidden "cap" under the store's "Look Policy."

The complainant, Samantha Elauf is of the Muslim faith, and in practicing her faith, believes that her religion required her to wear a headscarf. Elauf applied and was interviewed for a position at an Abercrombie store. Although the assistant manager rated Elauf as qualified, she was concerned that the headscarf would violate the store's Look Policy.

The Look Policy itself was not clear as to whether a headscarf would be prohibited. Ultimately, the assistant manager contacted the district manager, informed him that she believed Elauf wore a headscarf in observation of her religious faith, and sought advice as to whether this head covering would violate the Look Policy. The district manager determined that the Look Policy banned all headwear, "religious or otherwise," and directed her not to hire Elauf, 575 U.S. ____ (2015), Slip Op. 14-86, p. 2.

Elauf filed a complaint with the Equal Opportunity Employment Commission. The EEOC elected to file suit on behalf of Elauf, arguing that Abercrombie's decision violated Title VII's prohibition against discrimination on the basis of religion.

The EEOC was awarded summary judgment before the District Court. The Tenth Circuit reversed, holding that the applicant's prima facie burden included showing that he or she "informed his or her employer" of a "bona fide religious belief that conflict[ed] with an employment requirement," *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1122 (10th Cir. 2013). Because Elauf never actually notified Abercrombie that she wore a headscarf as part of a religious practice, and that she would require an accommodation, the EEOC could not establish its prima facie case. The Supreme Court, in an 8-1 opinion delivered by Justice Scalia, reversed.

An employer with only a discriminatory motive can violate Title VII's prohibition on religious discrimination

Title VII prohibits disparate treatment on the basis of an individual's race, color, religion, sex or national origin and also prohibits conduct which has a disparate impact on an individual because of his or her membership in those protected classes. As such, it is unlawful for an employer:

1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. (42 U.S.C. §2000e–2[a]).

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The term "religion" "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business," *Id.* at §2000e(j).

The court summarized the disparate-treatment provision as forbidding employers from: "'fail[ing] … to hire' an applicant (2) 'because of' (3) 'such individual's … religion' (which includes his religious practice)," Slip Op., p. 4.

There was no question that the store failed to hire Elauf, and the parties appeared to have conceded that Elauf wore a headscarf as a religious practice. Thus, the court phrased the sole question before it as whether Abercrombie failed to hire Elauf "'because of'" her religious practice, *Id*.

Abercrombie argued that because it had no actual knowledge that Elauf required a religious accommodation, and because its Look Policy was facially neutral, it did not discriminate against Elauf on the basis of her religion. In other words, where the employer does not know that an applicant needs a religious accommodation, it cannot violate Title VII by failing to provide one.

Analyzing the specific language of Title VII, the court found that the statute prohibits certain motives, regardless of the employer's actual knowledge. Specifically, Title VII prohibits the failure to hire and individual "because of such individual's race, color, religion, sex or national origin," 42 U.S.C. §2000e–2(a). In contrast, the Americans with Disabilities Act of 1990 requires an employer to reasonably accommodate "the *known* physical or mental limitations" of an applicant, 42 U.S.C. §12112(b)(5)(A) (emphasis added).

As a result, Title VII does not require that a prospective employer have actual knowledge of an employee's need for a reasonable accommodation. Instead, it is sufficient for the applicant to show that "his need for an accommodation was a motivating factor in the employer's decision," Slip Op., p. 3.

Must the employer know that the practice is a religious one?

The court specifically refused to address whether the employer must also know that the practice itself is a religious practice. Because this issue was not briefed by the parties, the court declined to consider it. The court did, however, note that "[w]hile a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice – i.e., that he cannot discriminate 'because of' a 'religious practice' unless he knows or suspects it to be a religious practice," Slip Op., p. 6, n. 3.

Conclusion

The facts of this case, as described by the court, suggest that Abercrombie specifically assumed that Elauf would insist on wearing a headscarf in violation of its neutral policy. While this fact pattern seems simple, most cases do not lend themselves to such a clear-cut factual analysis. Moreover, the court's decision calls into question the method by which the courts, including the Second Circuit, describe a plaintiff's prima facie burden. The court also left open the question of whether an employer must actually know that the practice in question is in fact a religious one.

Despite these many uncertainties, one thing is clear: This decision will have a wide-ranging impact on religious discrimination jurisprudence for years to come.

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