Supreme Court Sides with EEOC in Longstanding Hijab Dispute with National Clothing Retailer

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On June 1, 2015, the U.S. Supreme Court sided with the EEOC in the well-chronicled case involving a Muslim job applicant who the EEOC claimed was illegally denied employment because of her religion. In EEOC v. Abercrombie & Fitch Stores, Inc., the job applicant, Samantha Elauf, wore a traditional black Muslim headscarf (called a hijab) when she attended an interview with the retailer in 2008. After the interview, an Abercrombie district manager informed the store manager that the hijab would violate the company?s ?Look Policy? (since repealed), as would all other headwear, religious or otherwise, and the policy further prohibited wearing black clothing. The district manager directed the store manager not to hire Elauf. Importantly, during the interview process, Elauf never mentioned her religious faith, and the company never asked her any questions about the hijab, her religious beliefs, or her ability to comply with the employer?s Look Policy.

In its ruling, the Court determined that a job applicant alleging religion-based discrimination under Title VII is only required to show that the need for a religious accommodation (whether perceived or actual) was ?a motivating factor? in the decision not to hire. Abercrombie had essentially argued that the Court should require "actual knowledge" of the applicant's need for a religious accommodation before it could be liable for making an impermissible hiring decision based on religion. In its clearest form, by way of example, ?actual knowledge? would be a direct request from an applicant to deviate from a dress code for a religious reason resulting in the employer's refusal to hire.

The Court sided with the EEOC and outlined a different standard that fell far short of an ?actual knowledge? requirement. Writing for the 8-1 majority, Justice Antonin Scalia wrote:

Abercrombie?s primary argument is that an applicant cannot show disparate treatment without first showing that an employer has ?actual knowledge? of the applicant?s need for an accommodation. We disagree. Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer?s decision.

Justice Scalia went on to write:

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.

Based on the Court?s holding, if an applicant requires an accommodation of that religious practice (whether or not the applicant actually makes the request to the employer), and the employer?s desire to avoid the prospective accommodation is ?a motivating factor? in its decision, then the employer has violated Title VII. This is true even where the employer only suspects or assumes the anticipated need for an accommodation is related to the applicant's religious beliefs.

According to Abercrombie, the supervisors who interviewed Elauf could not have known that she wore the headscarf for religious purposes just by looking at her. The employer argued that if the EEOC?s position was adopted by the Court, then companies would likely be forced to do the type of religious stereotyping that Title VII is intended to prevent by ?preemptively probing the suspected religious views of their employees.?

In reaching its decision, the Court did not determine that Abercrombie actually discriminated against Elauf. The Court was focused, rather, on outlining the correct legal standard and framework applicable to a job applicant making a claim for disparate treatment based on religion. Having done so, the Court remanded the case to the 10th Circuit Court of Appeals for further proceedings consistent with its decision.

While everyone can agree that religious discrimination in the workplace is intolerable, employers looking to follow the legal standards outlined by the Court in this decision could find themselves walking a slippery slope. As Abercrombie pointed out, how is an employer to handle the job applicant who wears clothing or garb (traditionally associated with a particular religion or faith) that violates a religion-neutral grooming or dress policy? What if the applicant, like Elauf, fails to initiate a discussion about religious accommodation during the interview? Will the employer risk violating Title VII by starting a conversation about dress or grooming accommodations with the applicant if it makes stereotypical assumptions about the clothing's relationship to religion?

In the latter instance, the ruling could complicate some basic advice that management-side employment lawyers have offered human resource professionals for years, i.e., that employers should typically *avoid* asking applicants about their religious beliefs and avoid making any assumptions about applicants? beliefs. Perhaps employers will need to consider asking applicants to review dress codes and grooming standards prior to hire and make accommodation-type questions (similar to those asked under the ADA) a routine part of the interview process. It will be important to track the continued progression of this case as it returns to the lower court and to follow the litigation that flows from its applicability to future hiring decision cases.

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- Edward S. Schenk III ? 919.981.4303 ? eschenk@williamsmullen.com

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