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COZEN O'CONNOR

Supreme Court Clarifies Religious Accommodation Requirements in Hijab Case, but May Create New Problems for Unwary Employers

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In a decision that came as no major surprise to Supreme Court watchers, on June 1, 2015, the Court ruled 8-1 in *EEOC v. Abercrombie & Fitch* that Abercrombie & Fitch violated the civil rights of a Muslim job applicant when it refused to hire her because the headscarf that she wore pursuant to her religious obligations conflicted with the company's dress code policy.

In a normal case, the applicant and the employer might be expected to discuss whether the applicant could adhere to the company's policy prohibiting employees from wearing any head coverings. That discussion would likely give rise to an explanation that the applicant wore the headscarf for religious reasons and would be seeking an accommodation. The employer would then decide whether it could grant an accommodation or whether doing so would impose an undue hardship upon it.

But this was not a normal case in which some interactive communication took place. Here, the company never informed the applicant that its "look policy" at the time prohibited employees from wearing head coverings. In turn, the applicant never informed the company that she was wearing the scarf for religious reasons and would be seeking an accommodation. At most, Abercrombie had an unconfirmed hunch that an accommodation might be needed at the time it made its decision not to hire her.

With both parties ignorant of the other's motivation, the question before the Court was whether the employer bore the responsibility to provide an accommodation even when the job applicant did not ask for one. In an opinion by Justice Scalia, the Court ruled that the employer did bear that responsibility, noting that in a Title VII case, "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." In the absence of an undue hardship, an employer violates the act when it fails to make an accommodation, "even if he has no more than an unsubstantiated suspicion that accommodation would be needed."

Clarifying the Law – Only Two Types of Claims Under Title VII

Until this case came along, it was a widely shared view that there were three ways to prove a religious discrimination claim under Title VII:

- disparate treatment, which requires proof of intentional discrimination;
- disparate impact, where a protected group is disadvantaged by a facially neutral policy that is not supported by a showing of business necessity; or
- failure to accommodate an employee's religious observance, practice or belief in the absence of showing that doing so would impose an undue hardship on the employer.

In the *Abercrombie* case, the Court held that there are two and only two causes of action for violations of Title VII. The failure to accommodate is not a separate ground to impose liability. It is up to the plaintiff to prove the failure to accommodate as part of the intentional discrimination claim, even if it is the employer's burden to prove a defense of undue hardship.

Clarifying the Law – Disparate Treatment Hinges on Motivation, Not Knowledge

The unusual fact pattern in this case allowed the Court to clarify another aspect of Title VII law. Abercrombie had argued that a job applicant could not show disparate treatment without showing that the employer had "actual knowledge" of the applicant's need for an accommodation. The Court disagreed, holding that an applicant need only show that his need for accommodation was a motivating factor in the employer's decision. Title VII does not impose a knowledge requirement.

"Motive and knowledge are separate concepts," according to the Court, and "the intentional discrimination provision of the law prohibits certain *motives* regardless of the state of the actor's knowledge."

Laying the Seeds for Future Claims

In many cases, the existence of a discriminatory motive will itself rest on knowledge that the employee or applicant is a member of a protected class, or in this case, that some form of accommodation is needed. But the loose language in the Court's opinion opens the door to a series of religious discrimination claims when the employer decides not to hire based upon some aspect of the applicant's appearance that turns out to be for religious reasons, even if the employer does not know that this is the fact. Or, as the Court said, "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

It is not clear how far the Court meant this principle to apply. Justice Alito was concerned by the scope of the majority opinion and filed a separate concurrence arguing that liability should attach only if the employer was aware that the applicant's practice was religious in origin. He found sufficient evidence in the record to believe that Abercrombie knew that the applicant in this case was a Muslim and wore a head scarf for religious reasons, but without such knowledge, he argued that an employer could be found liable under the majority's opinion without fault.

Justice Alito's concurring opinion exposes some of the risks unwary employers may face in future "no knowledge" cases. Examples of rejected job applicants who may have viable future claims under a more literal reading of the Court's opinion are:

- A woman, wearing a dress, shows up for a job interview for a factory position where all of the employees wear pants. She is not hired in part because of her appearance, although nothing is said specifically about the dress. She later claims to wear dresses because of her Hutterite religious faith that precludes her from dressing as a man.
- A job applicant indicates on the application form that he cannot work on Saturday. He is passed over for an applicant who can work Saturdays. Nothing about religion is discussed during his interview, if he is interviewed at all, and no consideration of any accommodations is made. He later claims he was not hired because he is a Seventh-day Adventist who cannot work on his Saturday Sabbath.
- Two applicants show up for job interviews wearing eyebrow rings. Neither is hired. One claims to be a member of the Church of Body Modification who wears the eyebrow ring as a religious practice. The second applicant wears the eyebrow ring for non-religious reasons, but claims that the employer rejected him because the employer thought he was a member of that religion and did not want to accommodate him.

In each of these examples, it is not clear that the employer's motive can be brought into question unless there is a basis to think that the employer at least suspects that the practice in question is a religious one. The burden of showing this will be on the plaintiff.

Another issue lurking in the Court's opinion is whether a neutral rule such as the Abercrombie "look policy" may be subject to attack under the disparate impact theory of discrimination because of how it affects members of a particular minority faith. The Court did not reach this issue, or the potential employer defense that is based on the protection given to commercial speech under the First Amendment.

Practical Advice

Because the *Abercrombie* case now puts the onus on an employer when there is a lack of communication regarding company policies, employers may find it helpful to prompt some dialogue to identify accommodation issues.

One way to do this is to have a list of some of their policies available for review by the applicant prior to any interview. Then, one of the interview questions might be along the following lines:

> *You have had a chance to review our basic employment policies regarding attendance, appearance, and other rules. Will you be able to comply with them?*

If the applicant indicates a conflict exists, the interviewer can then inquire into the reason for the conflict. If the applicant indicates that it is because of the applicant's religious belief, observance or practice, the employer can explore if there are ways to accommodate the applicant without creating an undue hardship for the company. In this way, the employer can avoid falling into the trap which caught Abercrombie. On the other hand, if the applicant indicates that there are no conflicts, then the employer can complete the interview and hiring process with relative confidence that the process will not be attacked on religious discrimination grounds.

Cozen O'Connor's Labor & Employment attorneys are available to provide counsel and guidance on the issues discussed in this Alert.