June 4, 2015

SCOTUS: Employers Do Not Have to "Know" of Applicant's Need for Religious Accommodation to Be Liable for Failure to Accommodate

The U.S. Supreme Court has made clear in *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 14-86, 2015 U.S. LEXIS 3718 (U.S. June 1, 2015), that an employer must not only accommodate an applicant's religious belief or practice, but also ask whether a suspected conflict between a work rule and religion in fact exists if the applicant does not raise the issue.

Samantha Elauf applied for a position with Abercrombie & Fitch Stores, Inc. (Abercrombie), a retail clothing company well known for its signature "preppy" style. In keeping with its image, Abercrombie stores require employees to comply with a "Look Policy," or dress code. Elauf, a practicing Muslim, wore a headscarf to her interview with the assistant store manager. Although the assistant store manager determined Elauf was qualified based on Abercrombie's ordinary applicant evaluation system, she was concerned Elauf's headscarf would run afoul of the store's Look Policy, which banned "caps" without further description. The assistant store manager ultimately consulted with the district manager, saying she believed Elauf wore a headscarf because of her faith. The district manager determined that Elauf's headscarf, like all other headwear, would violate the Look Policy and directed that Elauf not be hired.

The Equal Employment Opportunity Commission sued Abercrombie on Elauf's behalf, alleging that its refusal to hire her violated Title VII of the Civil Rights Act of 1964. The district court found, at the summary judgment stage, that Abercrombie was liable and, after a trial, awarded $20,000 in damages. The U.S. Court of Appeals for the Tenth Circuit reversed, concluding that an employer ordinarily cannot be liable under Title VII for failing to accommodate a religious practice until the applicant or employee notifies the employer of her need for an accommodation.

The Supreme Court reversed the Tenth Circuit's ruling and remanded the case. Writing for the Court, Justice Antonin Scalia rejected Abercrombie's argument that an applicant cannot show unlawful disparate treatment, or "intentional discrimination," under Title VII unless the employer had "actual knowledge" of the need for an accommodation. Instead, the applicant must only show that her need for an accommodation was a motivating factor in the employer's decision. Thus, the Court articulated the following rule for disparate treatment claims based on failure to accommodate a religious practice: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

The Court observed that Title VII prohibits an employer from failing or refusing to hire an applicant "because of" the individual's religious belief or practice (barring undue hardship). The Court noted that Title VII does not contain a knowledge requirement, whereas some other nondiscrimination statutes do, and declined to read such a requirement into the statute. The Court thus characterized the "because of" standard as prohibiting certain *motives* independent of the actor's knowledge. It observed that "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 Court raised, but did not resolve, the question of whether the employer must at least suspect that the practice in question is a religious practice in order to discriminate "because of" a religious practice.

Finally, the Court rejected Abercrombie's argument that a neutral policy cannot constitute disparate treatment, stating that Title VII gives religious practices "favored treatment" and "requires otherwise neutral policies to give way to the need for an

accommodation."

This case places the burden squarely on employers to initiate a dialogue if there is any suspicion at all that an applicant may have religious accommodation needs. At the same time, such inquiry itself risks turning every decision not to hire a candidate into a potential religious discrimination claim. It also remains unclear what the courts will do in situations wherein the applicant's religious practice is not visible or otherwise apparent. In *Abercrombie*, the assistant store manager articulated her suspicion that Elauf wore the headscarf because of her faith. However, other religious accommodation cases may present facts where there is no possible way to prove motive without knowledge, such as when the employer had no reason to suspect the applicant may have needed an accommodation.