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Supreme Court Rules Against Abercrombie and Fitch in Religious Discrimination Case

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In a previous blog post, we discussed the facts, and potential consequences of a pro-plaintiff holding in *Equal Employment Opportunity Commission v. Abercrombie and Fitch Store, Inc*. As a brief recap, in 2008, Samantha Elauf, a practicing Muslim, arrived in her interview at Abercrombie and Fitch Stores, Inc. ("Abercrombie") wearing a headscarf, also known as a hijab, which she wears every day in accordance with her religious beliefs. At the time of Elauf's interview, the national retailer had a "Look Policy" in place. This Policy barred its employees from wearing "caps" although it failed to define the term. During her interview, Elauf made no mention of her headscarf and neither did her interviewer, Heather Cooke. Once the interview concluded, Cooke contacted her district manager to clarify whether the headscarf was a forbidden "cap." Cooke allegedly informed the district manager of her belief that Elauf wore her headscarf because of her faith. In response, the district manager instructed Cooke not to hire Elauf as the headscarf would violate the Look Policy.

In 2009, the Equal Employment Opportunity Commission ("EEOC"), arguing on Elauf's behalf, instituted a lawsuit against Abercrombie for religious discrimination in violation of Title VII. Title VII is a federal law that prohibits discrimination based on religion and requires an employer to reasonably accommodate workers' religion-based requests as long as the request does not cause undue hardship on the employer. If an employer will lose more than a "de minimus" amount of money due to the accommodation, then an undue hardship exists.

Abercrombie argued that religious accommodation was not required since Elauf failed to explicitly request one. Even if the interviewer *assumed* that the headscarf was being worn for religious purposes, in Abercrombie's view, the company needed "actual knowledge" of the applicant's need for an accommodation to be in violation of the law. Agreeing with Abercrombie, the Tenth Circuit reversed the District Court's decision and held that actual knowledge is required.

Thus the issue posed to the Supreme Court centered on whether Title VII's prohibition "applies only where an applicant has informed the employer of his need for an accommodation." Overruling the Tenth Circuit's decision, and agreeing with the EEOC, the Supreme Court answered in the negative. Instead, the Court ruled that "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." The Court clarified that the only causes of action under Title VII are found in the "disparate treatment" (or "intentional discrimination") provision and the "disparate impact" provision. Abercrombie was held liable for the former. Moreover, the Court acknowledged that some antidiscrimination statutes do impose knowledge requirements, but it made clear that the intentional discrimination standard under Title VII does not. Instead, the

intentional discrimination provision only prohibits certain "motives," despite the actor's knowledge. The Court explicitly noted that motive and knowledge are two separate concepts and "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 the accommodation would be needed." Thus, the Court held that the rule for Title VII purposes is that "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

This ruling obviously has the potential to affect other constitutionally protected accommodation requests, such as pregnancy and disability. And, while the Court's holding seems like a straightforward rule for employers to apply, in reality, complications may still arise, particularly for employers who take the initiative to ask questions. As the Supreme Court pointed out, when the employer is certain that an applicant will need an accommodation, it is easier to infer motive. Moreover, the Court's decision leaves unsettled whether the motive requirement can be satisfied without a showing that the "employer at least suspects that the practice in question is a religious practice."

While the Court's holding certainly answered some important questions, it inadvertently created several more. For example, does the mere mental acknowledgment that a person is pregnant, obviously over 40, a minority and/or disabled create liability? Employers should not take risks with this area of the law; it is imperative to consult with counsel who specializes in employment matters for guidance on how to avoid liability before an issue arises. Employers still must comply with state and local religious discrimination laws, which can differ from federal law. Employers should check, and update their hiring policies, while also keeping in mind that seemingly neutral policies may not shield them from liability.

If you or your institution has any questions or concerns regarding employment related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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