Abercrombie Supreme Court Case Raises Difficult Questions Of Religion In Job Interviews

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After granting certiorari in four employment law cases for the coming term, the United States Supreme Court has added one more case to its employment law docket. The Court will hear an appeal from the 10th Circuit Court of Appeals, in which the summary judgment in favor of Plaintiffs and the U.S. Equal Employment Opportunity Commission ("EEOC") was overturned, and instead was granted to the defendant, Abercrombie & Fitch Stores, Inc. ("Abercrombie"). EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106 (10th Cir. 2013).

Factual Background and Case Allegations

Abercrombie is a national clothing retailer that focuses on a "preppy" and "casual" style. Abercrombie locations typically employ a number of sales-floor employees, who are referred to as "models." In order to maintain its "East Coast collegiate style," Abercrombie maintains a "Look Policy." The Look Policy requires that models wear clothes in the same style as those sold by Abercrombie, and specifically prohibits black clothing and caps.

When a manager interviews a prospective model, one of the factors the manager must consider, per company policy, is the applicant's appearance and style. Managers also are expected to inform applicants about the job, including the Look Policy. Managers, however, are explicitly told not to ask applicants about their religion. However, if any questions arise during the interview, including a request for a deviation from the Look Policy, the managers are instructed to contact their own supervisor or Human Resources ("HR"), who are enabled to make accommodations in certain circumstances.

In 2008, Plaintiff Samantha Elauf applied to be a model with Abercrombie. Ms. Elauf asked her friend, Farisa Sepahvand, a friend who already worked for Abercrombie, whether she would be permitted to wear a hijab, or headscarf, at work. An assistant manager, Kalen McJilton, told Sepahvand that he did not think it would be a problem as long as the hijab was not black. Sepahvand relayed this information to Elauf, who did not take issue with the restriction.

Elauf was interviewed by another assistant manager, Heather Cooke. Cooke, using Abercrombie's interview guide, gave Elauf a high enough score in every category to be recommended for hiring. However, Cooke was unsure whether it would be a problem for Elauf to wear a hijab at work, so she contacted her supervisor, Randall Johnson, for advice. Johnson told Cooke that the headscarf would be in contravention of the Look Policy, and instructed Cooke to lower Elauf's "appearance" score, which resulted in her no longer being recommended for hire. A few days after the interview, Elauf learned from Sepahvand that she had not been hired because of her hijab.

Legal Issue

A prima facie case (i.e., what a plaintiff must allege at a minimum) in the religious accommodation context requires a plaintiff to show that: (1) he or she had a bona fide religious belief that conflicts with a requirement of employment, (2) the employee informed the employer of the belief, and (3) the employee was fired or not hired because of the conflict.

On September 17, 2009, the EEOC filed the lawsuit at issue against Abercrombie, alleging violations of Title VII regarding failure to accommodate religious beliefs. Abercrombie argued that the EEOC had failed to establish the second prong of a prima facie case for religious discrimination, arguing that Elauf failed to inform Abercrombie that she would need to wear her hijab for religious reasons. Therefore, Abercrombie argued, Abercrombie's decision not to hire Elauf was based on a religion-neutral Look Policy, and not on a religiously discriminatory policy.

The EEOC argued that Abercrombie had notice that Elauf wore a head scarf because of a religious belief, and that Abercrombie refused to hire her because the hijab conflicted with its Look Policy. Based on these arguments, both sides moved for summary judgment (i.e., judgment before a trial). The District Court for the Northern District of Oklahoma held that the EEOC had, indeed, made out a prima facie case and rejected Abercrombie's argument that Elauf failed the notice element because she had not informed Abercrombie that she wore her hijab for religious reasons. The District Court therefore denied summary judgment to Abercrombie and granted summary judgment to the EEOC. Abercrombie then appealed to the 10th Circuit Court of Appeals, which reversed the district court, and ordered it to deny summary judgment to the EEOC and grant summary judgment to Abercrombie.

The Circuit Court framed the question before it as whether, under Title VII, a plaintiff must establish that he or she initially informed the defendant of the need for a religious accommodation due to a conflict between the religious practice and the employment requirement. The Court answered in the affirmative.

The EEOC argued that an employer's responsibility is to attempt to reasonably accommodate an employee when it has notice, either directly or indirectly, that the employee's religious belief will conflict with an employment requirement. The Court disagreed, and found that the employer must have actual knowledge, not constructive notice, that a religious accommodation is required.

The Court cited a number of cases for the proposition that an employer must have actual notice. See, e.g., Reed v. Great Lakes Cos., 330 F.3d 931, 935 (7th Cir. 2003) (holding that Title VII requires an employee to give fair warning of employment practices that interfere with his religion); Chalmers v. Tulon Co., 101 F.3d 1012, 1019 (4th Cir. 1996) (holding that a prima facie religious accommodation case requires a showing that the employee informed her employer of the religious conflict and affirmatively requested an accommodation).

The Court of Appeals went on to distinguish the present case with other cases where the plaintiff himself or herself did not tell the employer that he or she needed a religious accommodation, but was not found to have failed the second prima facie prong. In those cases, the Court explained, the employer had actual knowledge from other sources, such as through personal knowledge or having been told by third parties. The Court conceded that the plaintiff herself need not directly inform the employer of her

need for a religious accommodation, but that the employer must be put on actual notice of the need for an accommodation by *someone*. The Court, quoting from the EEOC's brief, summarized this point, finding that "the critical fact is the *existence* of the notice itself, not *how* the employer came to have such notice." (emphasis in original).

The Court also found that even if Abercrombie had actual knowledge that a hijab is traditionally and typically used for religious purposes, the mere fact that Elauf was wearing one was insufficient to give Abercrombie actual knowledge that she personally was wearing it for religious purposes. The Court noted that under the First Amendment, courts focus on an individual's belief system, not that of the religion as a whole. The Court pointed out that the same practice may be religious to some people and secular to others. Furthermore, the Court reasoned, even if a person does engage in a religious practice that conflicts with an employment requirement, Title VII only applies if the religious practice is an inflexible one. An employer need not offer or provide an accommodation if the employee does not need one.

Finally, the Court pointed out that the EEOC discourages employers from making inquiries regarding an applicant's religious beliefs or practices during the interview process. This, the Court reasoned, provided all the more reason that the onus of requesting an accommodation should fall on the employee.

Practical Implications

If the Supreme Court reverses the 10th Circuit Court's decision, employers will be concerned that when an applicant displays any kind of religiously affiliated paraphernalia, the interviewer must affirmatively ask whether the applicant will need a religious accommodation. One problem with having such a conversation before a job offer is made is that if the applicant is not offered a position, he or she may assume it was due to his or her religion, and may sue the employer for religious discrimination. Additionally, employers may be concerned that adherents of lesser-known religions may be enabled to bring suit for not being affirmatively offered a pre-offer religious accommodation when rejected for a job. For example, if a person with a number of visible tattoos applies for a job with Abercrombie and is not given an offer because of the tattoos, Abercrombie may be concerned that the tattoos may be part of the applicant's religious expression, and thus entitled to an accommodation.

On the other side of the argument, if the Supreme Court affirms the Circuit Court's decision, applicants may be put in the uncomfortable position of being forced to declare their religious beliefs during the interview process and ask for an accommodation even before a job offer is made. Furthermore, as is noted by Judge David M. Ebel in his dissent in this case, the applicant may not even know that there is a conflict that requires accommodation during the interview process. Judge Ebel further pointed out that Elauf never informed Abercrombie that she needed an accommodation because she was under the impression that her hijab, as long as it was not black, would not cause a conflict between her religious practice and Abercrombie's Look Policy.

Both the plaintiff and defense bars will be following this case closely.

Brian Bodansky
Associate

WIGDOR LLP
85 Fifth Avenue, New York, NY 10003
T: (212) 257-6800 | F: (212) 257-6845
wigdorlaw.com