Supreme Court Abercrombie & Fitch Ruling: It's the Motive that Matters

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As most lawyers and HR professionals know, on June 1, 2015, Justice Antonin Scalia authored a concise opinion, overturning the Tenth Circuit and holding that Abercrombie & Fitch had intentionally discriminated against Samantha Elauf, a young Muslim job applicant, when it refused to hire her because of concerns about her head scarf. The company had attempted to defend its hiring decision by arguing that Elauf had never disclosed that she was Muslim, or asked to wear the scarf at work. Thus, it claimed that it could not have discriminated when it had no knowledge that she needed a religious accommodation.

The Court was unmoved by this argument, and held that Abercrombie's lack of "specific knowledge" of Ms. Elauf's need for a religious accommodation was not a defense to the claim. To the contrary, the Court held that a plaintiff need only show that her need for an accommodation was a "motivating factor" in the employer's decision in order to prevail. Justice Scalia explained:

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 (but does not know for certain) that a job applicant may be an Orthodox Jew who observes the Sabbath, and thus may be unable to work on Saturday. If the applicant actually requires an accommodation of a religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.
The Court thus found that since there was evidence that Abercrombie had known, "or at least suspected" that plaintiff's head scarf was a religious practice, and considered that headscarf when it decided not to hire her because it violated its "Look" policy, Elauf had presented sufficient evidence to support her claim that her religion was a motivating factor in the hiring decision. In this regard, the Court noted that Title VII had defined the term "religion" broadly, "to include all aspects of religious policy and observance."

The Court concluded by noting that the company could not hide behind its "neutral" policy: "Title VII does not demand mere neutrality with regard to religious practices …Rather, it gives them favored treatment, affirmatively obligating employers not to 'fail or refuse to hire or discharge any individual because of … such individual's religious observance and practice.." SO, an employer can have a dress code, but that 'neutral' dress code "must give way to the need for an accommodation."

I have two observations about this decision, which conflict with some commentaries I have read from other management-side lawyers:

- First, is this decision a significant change in the law or a sharp turn to the plaintiff's side for SCOTUS? I say NO, as it has always been the law that an employer cannot consider religion or

religious accommodations when it makes hiring decisions

- Second, was this the correct result, in light of the specific facts? Yes. In fact, when considering these facts, one could see why the Court reached the result it did.

In short, employers should not be in a panic over this decision and may need to just re-affirm existing policies in order to remain compliant with the law.

Facts

Plaintiff Elauf had applied for a sales job at an Abercrombie & Fitch store in 2008. During the interview, she wore the scarf, but said nothing about it and did not say she wore it for religious reasons.

The assistant manager who interviewed her rated her qualified for the job. However, after mentioning the headscarf while attempting to clear the hire with a manager, the interviewer and manager discussed and decided that the scarf was inconsistent with the brand's "look policy" – as Abercrombie's salespeople are treated as "models" for their merchandise. Abercrombie eventually declined to hire Ms. Elauf. The assistant manager testified that she told the manager she thought the applicant was Muslim. The manager denied this, but the discussion of religion was likely a "bad fact" which hurt Abercrombie's position before the High Court.

Elauf filed a charge with the EEOC, which investigated and subsequently brought a case against the retailer on her behalf, claiming that Abercrombie had refused to hire her due to her religion, in violation of Title VII. While there is some evidence that the manager and the interviewer discussed why Ms. Elauf wore a hijab, both parties agree that Ms. Elauf never explicitly said it was for religious expression, or formally requested an accommodation for her religious belief.

The district court in Oklahoma found for Ms. Elauf. However, the Tenth Circuit overturned and granted summary judgment for Abercrombie

The Issues before SCOTUS

The EEOC, representing Ms. Elauf, argued that an employer should not be permitted to refuse to hire someone based on its "understanding" of her religious practices – as this is a blatant violation of Title VII. They asked the court to reject a "rigid" notice requirement, so that an applicant would not be expected to ask for an accommodation. In response to criticism of the fact that this would require an employer to inquire about religion – which is prohibited by law – the EEOC claimed that the employer could advise the applicant of work rules and ask if they could comply. If the applicant could not, he or she could then raise the issue of the accommodation.

The EEOC also argued that affirming the Tenth Circuit's decision could allow employers to get around the anti-discrimination laws simply by rejecting any applicant they suspect may need an accommodation, as long as they aren't "certain" about an applicant's religious practices.

Company counsel continued to maintain that the court was asking employers to guess what an applicant might need based on appearance, which was effectively asking employers to stereotype.

The Rationale and Impact of the Decision

The core principle underlying the decision was that it did not matter when Elauf had requested the accommodation or not, but what mattered was whether the Company was "motivated," even in part, by a desire to avoid giving this accommodation when it decided not to hire her. As explained above,

Justice Scalia made it very clear that "(A)n 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."

To go back to my observations:

First, this decision **does not** radically change the law and should not cause an employer - which has the right policies and training in place - to lose much sleep. A couple of points to keep in mind:

- Title VII (and virtually all state laws) already prohibited discrimination based on religion and religious observances and required reasonable accommodation of those observances. ***This has not changed.***
- Title VII also requires that employers consider modifications to policies, in order to accommodate employee's sincerely held religious beliefs and practices. ***This has not changed.***
- Title VII has always allowed an employer to decline to provide an accommodation, ***if*** the employer can show that the accommodation would cause it an undue hardship***. This has not changed***.
- An employer should not make a hiring decision based on a suspicion that an applicant may need some religious accommodation (which seems to be what happened here). ***This is not a change in the law.***

Second, in my view this was the right decision, given the facts that were presented to the Court. In fact, the majority arguably took a common sense approach to the law. The unspoken "fact" about this case was that everyone who hears the story knows that the reason Elauf was not hired is because the company suspected she was Muslim and would want to wear the scarf every day at work, which would violate the "look" policy. Indeed, Scalia talked in the decision and during oral argument about the "elephant in the room." Put another way, if Ms. Elauf was just wearing a baseball cap or a rain hat, does anyone think there would have been any concern about her headwear? She would likely have been hired. The reason there was a concern about the scarf was it was assumed to be a religious observance, and thus it was assumed that she would wear it every day. Thus, the Court looked at that as evidence that the employer was motivated by a desire not to give her that accommodation in deciding not to hire her.

This same rationale would apply to other religious applicants, or applicants whose appearance leads to the conclusion that they are religious. Title VII (and common sense) would tell you that you cannot decline to hire a Jewish applicant wearing a yarmulke, if you "think" he might wear the yarmulke every day; or if you think he may then want every Saturday off, regardless of whether the applicant stated that was his intent. This would be religious discrimination.

It is said that bad facts often make bad law, and the facts in the Abercrombie case were not favorable to the company. However, the decision is not a "bad" decision; it merely clarifies, in stronger terms, what was already the law.

Going Forward:

The key is training

- Managers and interviewers SHOULD NOT be raising or discussing religion during job interviews

(as I have seen suggested by others). If your company or a job has specific dress or attendance requirements, discuss these clearly with all applicants and ask if they need some accommodation. Again, I do not believe you should ask about religion, but you should be clear about the job requirements and let the applicant tell you if there is a religious issue.

- However, employers should take heed and reiterate to all managers that they simply cannot reject a request by an applicant or employee for a job accommodation based on religion, without giving her request serious consideration.
- Managers who have not discussed an accommodation with an applicant should not reject the applicant because they “think” or ‘suspect’ that he may need an accommodation. Every applicant should be judged on their credentials and the accommodation conversation should be an open one, which happens during the interview.