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EEOC v. Abercrombie: Mere suspicion insufficient to give rise to claim

By Gary R. Siniscalco, Erin M. Connell and Lauri A. Damrell

- Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores Inc., 14-86

- Argument: Feb. 25, 2014

FACTS

When Samantha Elauf, a Muslim, interviewed for a sales position at an Abercrombie & Fitch retail store, she wore a black hijab (a headscarf worn by Muslim women for modesty), which violated the company's "Look Policy" prohibiting sales employees from wearing black clothing or "caps." Although the assistant manager interviewing Elauf assumed that Elauf wore her hijab because she was Muslim, neither of them expressly said anything about it. When Abercrombie did not hire Elauf, there was evidence suggesting it was because her attire did not conform with Abercrombie's Look Policy.



Title VII of the Civil Rights Act of 1964 prohibits an employer from discharging or refusing to hire someone because that individual's religious observance or practice conflicts with the employer's neutral policy unless the employer demonstrates that it is unable to accommodate the practice without undue hardship in the conduct of its business. Title VII also prohibits intentional discrimination on the basis of religion.

The Equal Employment Opportunity Commission sued Abercrombie on Elauf's behalf, alleging that Abercrombie failed to accommodate Elauf's religious beliefs by making an exception to its Look Policy. The district court granted the EEOC's motion for summary judgment on liability, concluding that Abercrombie knew of Elauf's need for a religious accommodation, thereby supporting a prima facie case of discrimination. The 10th U.S. Circuit Court of Appeals reversed based on a finding that the undisputed evidence showed that no agent of Abercrombie involved in the hiring process had actual knowledge that Elauf wore the hijab for religious reasons. Thus, the EEOC could not make out a prima facie case that Abercrombie failed to accommodate Elauf's religious beliefs.

QUESTION

How much information must an employer receive before it is on notice that an applicant or employee has religious needs that conflict with a job requirement, thereby requiring the employer to provide a reasonable accommodation under Title VII?

Before even addressing the notice issue that drove the 10th Circuit's decision, in *EEOC v. Abercrombie & Fitch Stores Inc.*, the U.S. Supreme Court must address an important procedural issue involving the type of claim to be resolved in this case. It appears the EEOC's appeal is based on a claim of intentional discrimination, a claim it never alleged in its complaint and was never before the courts until now. That procedural flaw could preclude the court from opining on the notice standard.

Title VII prohibits two types of discrimination: disparate treatment and disparate impact. Unlike disparate treatment claims, claims of disparate impact do not involve intentional discrimination. Rather, they involve scenarios where an employer has a neutral policy that has an adverse impact on a protected group, which in certain contexts can trigger an employer's duty to accommodate unless the accommodation would present an undue hardship. Usually, failure to accommodate claims arise under the disparate impact framework.

Questions and Comments

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Litigation

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A group of trial court judges recently pointed out that more than half of February meetings were closed, calling it proof that the state's Judicial Council wants to avoid accountability.

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President Barack Obama announced an upgrade to immigration rules Tuesday that will make it easier for spouses of high-skilled immigrant workers to apply for their own work authorizations.

Here, the underlying claim originally brought by the EEOC - and the claim upon which the 10th Circuit decision is based - is a claim for failure to accommodate (i.e., the EEOC alleged that Abercrombie failed to accommodate Elauf's religious beliefs by making an exception to its Look Policy). Although the EEOC also could have brought a separate claim for disparate treatment discrimination alleging that Abercrombie intentionally discriminated against Elauf by failing to hire her because of her religious beliefs, the agency did not do so.

In its briefing to the Supreme Court, however, the EEOC appears to have abandoned its failure to accommodate theory and instead alleges that Abercrombie engaged in intentional discrimination. This likely is because the only damages at issue are compensatory damages (as opposed to back pay, reinstatement or an injunction), and such damages are not available under a disparate impact theory. Yet the underlying facts do not support a claim for disparate treatment, because even the EEOC appears to acknowledge that the reason Abercrombie did not hire Elauf was because she did not comply with its religion-neutral Look Policy. The EEOC does not allege, for example, that the Look Policy was a pretext for intentional religious discrimination.

Apparently recognizing it must succeed under a disparate treatment theory to sustain its claim for compensatory damages, the EEOC conflates the two theories of liability. In doing so, the EEOC's position runs contrary to Title VII's plain language and the court's own well-settled case law. In light of this procedural posture, the Supreme Court might dismiss the case based simply on a finding that the EEOC cannot now invent a disparate treatment claim. The court could then duck the failure to accommodate issue, both because the EEOC has abandoned the accommodation claim on appeal and because an accommodation claim cannot support the compensatory damages at issue.

If the court reaches the failure to accommodate issue, it should affirm the 10th Circuit's decision and confirm that only *actual* knowledge of a religious conflict can give rise to liability under Title VII. Indeed, although the EEOC claims otherwise, such a ruling would be consistent with decades of jurisprudence confirming the actual-knowledge standard.

Even the cases on which the EEOC relies involve situations where the employer already had *actual* notice of the employee's belief. For example, in *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (which interpreted California state law), when the employee requested time off to attend his wife's "conversion ceremony," the employer also knew that the employee was Jewish and that his wife was converting to Judaism. Similar facts were presented in other cases cited by the EEOC. See *Adeyeye v. Heartland Sweeteners*, 721 F.3d 444 (7th Cir. 2013) (employee requested time off for his father's funeral, explaining that it involved "compulsory" burial rites and that he and his family would "suffer at least spiritual death" if he did not attend); *Dixon v. Hallmark Companies Inc.*, 627 F.3d 849 (11th Cir. 2010) (employer "knew that the [employees] were dedicated Christians who had previously opposed policies prohibiting the public display of religious items in the workplace"); *Brown v. Polk County, Iowa*, 61 F.3d 650 (8th Cir. 1995) (employee affirmed his Christianity throughout his employment and referred to Bible passages).

The EEOC challenges the well-established actual-notice standard, insisting instead that an employer is on notice when it merely *suspects* a religious conflict *might* exist. Under such circumstances, the EEOC claims it is the employer's burden to advise the applicant of the potentially conflicting work rule and ask the applicant whether (and why) he or she could not comply.

Not only does the EEOC's position have no support in the case law, but it also contradicts the EEOC's own guidance. The EEOC's Compliance Manual expressly states, "[a]n applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work." And, the case cited in the manual reflecting insufficient notice, *Wessling v. Kroger Co.*, 554 F. Supp. 548 (E.D. Mich. 1982), is not that dramatically different from the case here.

In *Wessling*, the employee asked to leave work early in order to arrive early for a Christmas play at her church so she could decorate and receive children. As the EEOC points out, that was insufficient to notify the employer of a religious practice because it was more of a social activity or family obligation that happened to be associated with the church. Similarly here, as the EEOC's own expert acknowledges, wearing a headscarf could be cultural rather than religious. In both cases, while knowledge of a religious conflict could be inferred from the circumstances, it is not the only reasonable interpretation of the facts, and therefore, it cannot be said that the employer is on "notice" of the need for an accommodation.

Since filing this case, the EEOC conveniently has provided updated guidance on its website regarding "Religious Garb and Grooming in the Workplace," claiming that, "[i]n some instances, even absent a request, it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed." The new guidance then cites a self-serving example with facts almost identical to those presented here, suggesting that wearing a headscarf is an "obvious" religious practice.

Labor/Employment

***EEOC v. Abercrombie*: Mere suspicion insufficient to give rise to claim**

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***EEOC v. Abercrombie*: A&F's arguments don't pass muster**

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Superior Court Judge Los Angeles County (Los Angeles)

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Not only is this flip-flopping disingenuous, it puts employers in a double-bind. For example, federal and California laws and regulations generally prohibit employers from inquiring about an applicant's religion during an interview, with limited exceptions. Employers who get it wrong can face a presumption of religious discrimination.

The EEOC's proposed standard suffers on a policy level, too, because it encourages employers to use stereotypes to evaluate whether an applicant has a potential need for accommodation - a concept that cuts against the core purpose of anti-discrimination laws. Even the EEOC has warned against this type of action in its "Best Practices for Eradicating Religious Discrimination in the Workplace," explaining that, "[e]mployers should individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate."

Given these issues, employers should hope for a decision that affirms the 10th Circuit decision and confirms that mere suspicion of a religious conflict is not enough to give rise to a failure-to-accommodate claim. The court may well punt this substantive issue, however, based on the EEOC's procedural errors.

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