Westlaw Journal
EMPLOYMENT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 29, ISSUE 23 / JUNE 9, 2015

RELIGIOUS DISCRIMINATION

Supreme Court Favors Muslim Woman in Abercrombie Discrimination Suit

By Tricia Gorman, Managing Editor, Westlaw Journals

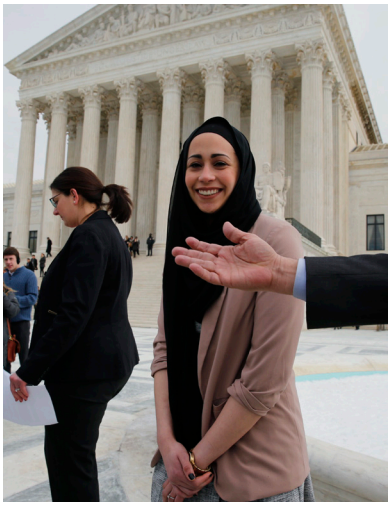
A Muslim woman who says Abercrombie & Fitch did not hire her because she wore a headscarf to a job interview can show discrimination by the clothing store even though she did not request an accommodation, the U.S. Supreme Court has ruled.

Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores Inc., No. 14-86, 2015 WL 2464053 (U.S. June 1, 2015).

The high court, with one dissent, reversed a 10th U.S. Circuit Court of Appeals decision that rejected Samantha Elauf's claims against the retailer because she had not specifically asked for a religious accommodation for her hijab.

Writing for the 8-1 majority, Justice Antonin Scalia said a job applicant does not have to show that an employer knew about a need for an accommodation, but only that the employer's adverse decision was motivated by a possible need for accommodation.

Justice Clarence Thomas wrote a separate opinion dissenting in part, arguing that Abercrombie did not discriminate by enforcing a neutral policy that banned workers from wearing anything but the retailer's clothes on the job.



REUTERS/Jim Bourg

Muslim Samantha Elauf, who was denied a sales job at an Abercrombie & Fitch store in 2008, is pictured at the U.S. Supreme Court on Feb. 25. The court ruled June 1 that the retailer discriminated against her based on her religion.

VICTORY FOR A 'DIVERSE SOCIETY'

The Equal Employment Opportunity Commission, which filed the suit on Elauf's behalf, immediately issued a statement praising the high court's decision.

"At its root, this case is about defending the quintessentially American principles of religious freedom and tolerance," EEOC General Counsel David Lopez said. "This decision is a victory for our increasingly diverse society and we applaud Samantha Elauf's courage and tenacity in pursuing this matter."

The National Federation of Independent Businesses, however, said the ruling is a "no-win situation for small businesses" that will likely cause more lawsuits.

The decision "will force employers to make assumptions about an applicant's religion" and "sets an unclear and confusing standard making business owners extremely

"At its root, this case is about defending the quintessentially American principles of religious freedom and tolerance," EOCC General Counsel David Lopez said after the ruling.

vulnerable to inevitable discrimination lawsuits," Karen Harned, director of the NFIB Small Business Legal Center, said in a statement.

The decision is a win not only for Elauf and other employees, but also for employers, according to **R. Scott Oswald**, managing partner at **The Employment Law Group**, who was not involved in the case.

"Many teenage job applicants would have accepted Abercrombie's behavior as the way of the world, choked back their gall, and moved on ... [but] Ms. Elauf has helped to secure what Justice Scalia rightly identifies as Title VII's 'favored treatment' of religious practices in the workplace," Oswald said.

The Supreme Court's clarification of the law will also help employers develop "better hiring practices — practices that, in the long run, will protect companies from litigation," Oswald said.

Katz, Marshall & Banks partner **Avi Kumin**, who was not involved in the suit, said the Supreme Court's ruling is "entirely consistent with the interpretation of other federal employment statutes" in which an employer is liable when it bases a decision on suspicions about a worker or applicant.

Jeanine Gozdecki, a partner at **Barnes & Thornburg**, labeled the ruling a victory for religion.

"The majority decision emphasized that religion is a protected class that requires 'favored treatment,' and also underscores that religious practices are equivalent to one's religious beliefs, and are accorded the same protection," said Gozdecki, who was not involved in the suit.

The high court emphasized that employers must give religious practices "favored treatment" when accommodating an employee, according to **Greensfelder, Hemker & Gale** partner **Susan Benton**, who was not involved in the case.

"Employers must be mindful of the Supreme Court's admonition that employers must provide *favored* treatment in accommodating the religious practices of applicants and employees, even if those practices and the related perceived need for accommodation are merely suspicions," Benton said.

"A no-hire rationale similar to that stated by the Abercrombie district manager — that headscarves, like all other non-religious head coverings, would violate the otherwise neutral policy — is no longer sufficient to defend a claim of intentional discrimination under Title VII," she added.

SALES JOB DENIED

The EEOC filed the suit after Elauf, who was 17 at the time, was denied a sales job at an Abercrombie Kids store in Tulsa, Okla., in 2008.

Although the person who interviewed Elauf said she assumed Elauf wore a hijab for religious reasons, the store did not hire her and failed to offer an accommodation to its "look policy," in violation of Title VII of the Civil Rights Act, the agency said.

A federal judge ruled in favor of Elauf and the government, but in an October 2013 ruling, the 10th U.S. Circuit Court of Appeals found that Elauf was required to ask for an accommodation. *EEOC v. Abercrombie & Fitch Stores*, 798 F. Supp. 2d 1272 (N.D. Okla. 2011); 731 F.3d 1106 (10th Cir. 2013).

In October 2014 the Supreme Court granted the EEOC's petition for *certiorari*.

Numerous religious groups, including the American Jewish Committee and the American-Arab Anti-Discrimination Committee, filed *amicus* briefs with the court in support of the EEOC and Elauf, while the U.S. Chamber of Commerce and other business groups supported Abercrombie.

During oral arguments in February, the EEOC said a company acting on assumptions about an employee's or job applicant's religious practices should be sufficient to show discrimination.

Attorneys react to Abercrombie ruling

R. Scott Oswald, managing partner
The Employment Law Group

A few years ago, Abercrombie said that Samantha Elauf couldn't be a 'model,' as it calls its salespeople. How wrong it was: In fact, she is a model for us all. She can enter the next stage of litigation with her head held high.

Ms. Elauf is not the only winner here, however.

Most notably, of course, employees and job seekers have a new assurance that Title VII's protections are not easily circumvented. Abercrombie's defense in this case, at bottom, was that it hadn't discriminated because it didn't know *for sure* that Ms. Elauf wore her headscarf for religious reasons.

Justice Scalia properly rejected this weaselly view of the law and restated the rule with crystal clarity: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

But as with every Supreme Court decision that clarifies the law, this is a victory for employers, too.

In particular, employers must become more diligent about giving applicants notice of all essential job functions and workplace policies, and requiring written affirmation from all applicants that they can comply — or, alternatively, that they will need a religious accommodation.

Avi Kumin, partner
Katz, Marshall & Banks

I found Abercrombie's claim that it applied the "no caps" requirement of its look policy in a neutral manner to be self-evidently false. If a job applicant presumed to be non-religious had worn a "cap" to an Abercrombie job interview, the hiring manager would have extended her a job offer and, if the new employee subsequently wore a cap or other headwear to work, would have then explained that caps were prohibited by the company's dress code. With Ms. Elauf, however, Abercrombie simply refused to offer her the job in the first place. This was because it understood, of course, that had it subsequently told Ms. Elauf that headscarves were forbidden, she would have likely requested a religious accommodation.

Had the Supreme Court affirmed the 10th Circuit's decision, it would have seemingly led to absurd results, whereby, for example, an employer could simply pick out of a job application line all applicants wearing a hijab, yarmulke, Sikh turban, or other religiously motivated headwear, refuse to hire them on the spot, and then claim that it had no "actual knowledge" of a need for a religious accommodation because it never allowed them to progress to an interview.

One practical implication of *Abercrombie* is that employers will likely need to engage job applicants in conversation about the rules of the workplace and ask whether they could abide by those rules (or whether, in cases like Ms. Elauf's, a religious accommodation may be required). Contrary to the concerns expressed by Abercrombie, this would not require them to religiously "profile" all job applicants (ironic, of course, because that is precisely what they did with Ms. Elauf). Rather, the employer could simply engage all job applicants in this conversation, and only discuss religious accommodations with the employees that then asked for one.

Jeanine Gozdecki, partner
Barnes & Thornburg

The majority opinion said, "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

This is good advice for employers, but practically, the *Abercrombie* decision makes life incrementally more complicated. Front-line supervisors and managers should be trained on key decisions for individuals where disability, pregnancy, and religion are involved — because all of those characteristics may require some form of reasonable accommodation. Requiring all employees to follow all the same rules ignores the nuances of the laws, and potentially will land companies in court.

Susan Benton, partner
Greensfelder, Hemker & Gale

While the holding, on its face, appears counterintuitive because motivation requires some level of acknowledgement of the need for accommodation, the court clarified in footnote 3: "[I]t is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice — *i.e.*, that he cannot discriminate 'because of' a 'religious practice' unless he knows or suspects it to be a religious practice." That issue is not presented in this case, since Abercrombie knew — or at least suspected — that the scarf was worn for religious reasons. The question has therefore not been discussed by either side, in brief or oral argument. It seems to us inappropriate to resolve this unargued point by way of dictum."

Significantly, the court emphasized that Title VII "does not demand mere neutrality with regard to religious practices — that they be treated no worse than other [secular] practices. Rather it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual's 'religious observance and practice."

"An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions," Justice Antonin Scalia wrote for the majority.

Abercrombie countered that religion is a very personal, individual issue, so the applicant or employee should initiate the conversation about accommodation.

MOTIVATING FACTOR

In reversing and remanding the appeals court decision, the Supreme Court majority ruled that a job applicant or employee does not need to demonstrate that an employer had actual knowledge of the need for an accommodation in order to bring claims of discrimination.

Title VII, 42 U.S.C. § 2000e-2(a)(1), does not include a "knowledge requirement," the court said. The law references only an employer's motives for taking adverse employment actions, according to the majority.

"[T]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions," Justice Scalia said.

In dissent, Justice Thomas said he would have affirmed the 10th Circuit's ruling because Abercrombie did not "intentionally discriminate" against Elauf but only enforced a neutral dress policy.

"[M]erely refusing to create an exception to a neutral policy for a religious practice cannot be described as treating a particular applicant 'less favorably than others,'" Justice Thomas said.

The case now goes back to the 10th Circuit for further consideration based on the high court opinion.