Supreme Court Closes Off "Hear No Evil, See No Evil, Speak No Evil" Defense in Religious Discrimination Suits

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In an 8-1 decision, the United States Supreme Court closed off a potential defense for employers in religious discrimination claims. In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Court sided with a young woman who alleged that clothing retailer Abercrombie & Fitch refused to hire her because she wore a hijab, a Muslim headscarf. The Court held that employers are liable for religious discrimination if a job applicant's potential need for a religious accommodation is a motivating factor in the decision not to hire the applicant – even if the employer does not have actual knowledge of the applicant's religion and the applicant does not ask for an exception.

The dispute centered on a young woman, Samantha Elauf, who applied for a job in retail at an Abercrombie store. Although Elauf wore her headscarf to the interview, the interviewer never asked her about it. Based on the interview, Elauf scored high enough that she qualified for hiring. But the interviewer had second thoughts about Elauf's headscarf and discussed it with a regional manager, disclosing her belief that Elauf wore the headscarf because she was a Muslim. The regional manager told her to dock Elauf points for failure to conform to Abercrombie's dress code, which prohibited "caps." The lower point total disqualified Elauf as a candidate. When Elauf found out from a friend why she did not get the job, she filed a charge with the EEOC and the EEOC filed a lawsuit on her behalf.

The trial court sided with the EEOC and held that Abercrombie suspected Elauf would require an exception to the dress code and refused to hire her based on that speculation. The Tenth Circuit Court of Appeals reversed, reasoning that a job applicant must specifically inform the employer of the need for a religious accommodation and because Abercrombie did not actually know

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Elauf would need an exception, it could not have discriminated against her. The Supreme Court took the case because the appellate courts were split on whether a job applicant had to tell an employer in an interview about the potential need for an accommodation.

Justice Scalia, writing for the Court, settled the argument against the Tenth Circuit, stating that to prove unlawful religious discrimination in a failure to hire case, "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." As the Court explained, motive and knowledge are two different concepts and Title VII prohibits discriminatory motives. An employer may know for certain that a job applicant needs a religious accommodation and yet decide not to hire the candidate because they do not have the required education. On the other hand, an employer may only suspect a job applicant needs a religious accommodation but nonetheless refuse to hire that person based on that suspicion. In the former situation, there is knowledge but no motive. It the latter, no knowledge but motive. Only the latter is discriminatory. In this case, Abercrombie claimed it only suspected that Elauf needed a religious accommodation, but did not have actual knowledge of her religion. The Court held that actual knowledge was irrelevant because avoiding the potential accommodation was the primary driver of the decision not to hire. Thus, the motive was discriminatory.

Prior to the Supreme Court's decision, some employers operated under the assumption that a job applicant's failure to ask for an accommodation to a facially neutral work policy served as a solid defense to a discrimination charge from the applicant. After the Supreme Court's ruling, this is no longer the case. As the Court explained, "Title VII does not demand mere neutrality with regard to religious practices – that they be treated no worse than other practices. Rather, it gives them favored treatment."

For more information on the Supreme Court's ruling or any other aspect of accommodating religion in the workplace, please contact Steven McDevitt, Neal Shah or any other member of Frost Brown Todd's Labor and Employment practice group.

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