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Management Alert

Key Takeaways from Oral Arguments in *EEOC v. Abercrombie & Fitch*

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On February 25, 2015, the U.S. Supreme Court heard oral argument in the closely-watched religious discrimination case of *EEOC v. Abercrombie & Fitch Stores, Inc*. The employment bar has followed the case with great interest, and numerous amici have weighed in, including diverse religious groups, the ACLU, business interests, and several states.

The EEOC's petition for certiorari framed the legal question this way: "Whether an employer can be liable under Title VII for refusing to hire an applicant or for discharging an employee based on a 'religious observance and practice' only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee."

In practical terms, the Court's decision is expected to focus on what level of knowledge an employer must have that an employee or applicant's religious practice may conflict with a job requirement, and from what source, before it has a duty to consider accommodation. Is it the employee's burden to alert the employer, as the Tenth Circuit held below? Or is actual notice to the employer from any source (even if it is not the employee) sufficient? Or, as the EEOC contends, is even something less than the employer's actual notice sufficient to trigger the duty to consider accommodations?

Takeaways for Employers and Employees

There are three key takeaways from the oral arguments. First, many of the justices seemed skeptical of the company's position that only actual knowledge from the applicant of the religious belief was adequate to put the employer of notice of the duty to accommodate. Second, the justices seemed keen to explore precisely what level of notice—short of actual knowledge from the applicant—would be adequate. Third, the Court wrestled with the practicalities of how the employer could raise the issue with the applicant without engaging in the stereotyping that the law prohibits.

The Underlying Facts

Seventeen year-old Samantha Elauf, who identifies herself as Muslim, and claimed to have worn a headscarf for years for religious reasons, applied for a sales floor position in an Abercrombie store in Tulsa, Oklahoma. At the job interview, to which she wore the headscarf, Ms. Elauf said nothing to Abercrombie about the fact that she was Muslim. She did not bring up the subject of the headscarf, or say that she wore it for religious reasons, that she felt a religious obligation to do so, or that she would need an accommodation from the retailer's "Look Policy." However, her interviewer testified that she assumed that Ms. Elauf was Muslim, and wore the head-covering for religious reasons. There was evidence that the headscarf influenced Ms. Elauf's interview scores, and in turn, the company's decision not to hire her.

The district court granted summary judgment for the EEOC. The Tenth Circuit not only reversed that judgment, but granted summary judgment to Abercrombie. The Tenth Circuit held that the burden is squarely on the applicant or employee to advise the employer that he or she has a religious practice that conflicts with a job requirement, because religion is an inherently individual matter, and he or she is uniquely qualified to know those personal religious beliefs and whether an accommodation is necessary. The court rejected the EEOC's argument that the employer has a duty to attempt reasonable accommodation when the employer has notice from any source that the applicant or employee has a religious belief that conflicts with a job requirement.

The EEOC's Position

The EEOC's Supreme Court briefing argued that under the plain language of Title VII, an employer who refuses to hire an applicant on the basis of what it correctly understands to be a religious practice has violated the statute. The EEOC urged the Court to reject a "rigid notice requirement," reasoning that employers have superior knowledge of work rules, and may be able to identify religious conflicts not known to applicants. The EEOC claimed that its approach would not require an employer to pry into the sensitive area of religious practice; instead, the agency suggested, an employer who suspected a possible religious conflict could simply advise the applicant of the relevant work rules and ask whether and why the applicant could not comply. The EEOC argued that under the Tenth Circuit's approach, employers would be "free to discriminate" in cases where the employer's awareness of a conflict between a work rule and an applicant's religion came from a current employee, an applicant's indirect statement suggesting a conflict, or the employer's own accurate inference of religious practice.

Abercrombie's Position

In its brief, Abercrombie urged the Court to reaffirm what the retailer called the "established rule for over 40 years"—that only actual knowledge of a religious conflict, not a mere guess, gives rise to Title VII liability. Abercrombie reasoned that employees and applicants must tell employers if they need religious accommodations, eliminating any need for the employer "to speculate, guess or probe." The retailer explained that the applicant or employee is best-positioned to recognize the conflict, given the "multitude of religious beliefs and their uniquely personal and individual" nature, and will ordinary also be made aware of the applicable work rules. Abercrombie argued that neither Title VII nor any case precedent supported imposing a duty on employers who merely "suspect" a possible conflict with religion, a standard that the retailer called "invented, unadministrable and inequitable." Abercrombie reasoned that such a duty would leave employers in an unfair "Catch-22," as they tried to avoid stereotyping, but also tried to avoid litigation by probing suspected religious views of applicants and employees.

Oral Argument
Skepticism for Abercrombie's Position

Many of the justices appeared skeptical of Abercrombie's position that only actual knowledge from the applicant of the religious belief was adequate to put the employer of notice of the duty to accommodate. For example, Justice Breyer characterized the Tenth Circuit's position this way: "Employer, unless you receive direct, explicit notice that what she wants to wear is based on religion and she wants an accommodation, unless you receive direct, explicit notice from her, you're home free to do what you want." Justice Ginsburg suggested that the employer had superior knowledge of its work rules, asking, "How could [the applicant] ask for something when she didn't know the employer had such a rule?" And Justice Alito challenged the company's counsel as to whether Abercrombie was "willing to admit that there are at least some circumstances in which the employer is charged with that knowledge based on what the employer observes."

Only Justice Scalia appeared to endorse the company's position fully, stating that the Tenth Circuit's rule "avoids all problems" by making clear that "if you want to sue me for denying you a job for a religious reason, the burden is on you to say, I'm wearing the headscarf for a religious reason."

Exploration of What Level of Notice (If Not Actual Notice from the Employee) Suffices

Many of the justices' questions explored precisely what level of notice—short of actual knowledge from the applicant—would be adequate.

Even the Court's more liberal justices pushed the EEOC to define what level of notice, short of actual notice, was adequate. For example, Justice Kagan asked the EEOC's counsel whether, if the rule were that the employer is on notice with "less than certainty, how much less than certainty is it?"

Justice Breyer appeared to endorse a rule that "if the employer believes, thinks, this woman is religious and needs an accommodation and he's right," that the employer would be obligated to explore an accommodation. Justice Breyer challenged Abercrombie's position that such a rule was "unadministrable," pointing out that many areas of the law turn on proof of a "belief." However, at one point, Justice Breyer said that he was "sort of interested" in Abercrombie's counsel's suggestion during argument that the employer's knowledge would have to be, if not from the applicant, at least "traceable" to the applicant.

Practical Nuts & Bolts

The justices' questions revealed a desire to enunciate a rule that would be practical to implement for both employers and applicants.

Abercrombie's concern that the EEOC's position would promote stereotyping seemed to resonate with at least some of the justices. Chief Justice Roberts challenged the EEOC that its solution "may promote stereotypes to a far greater degree than what you're objecting to." Indeed, Abercrombie's counsel argued that an employer faced with the EEOC's rule could only protect itself by "training their managers to stereotype about possible religious beliefs because a judge or jury might later find that . . . an employer correctly understood, or must have correctly understood" that the applicant had a religious belief incompatible with a workplace rule.

Justice Sotomayor initially suggested, "So why can't the employer just simply say, we have a Look Policy that doesn't permit beards. Can you comply with that policy?" After some debate about whether a religious employee *can* comply with the policy, even if it makes the employee religiously uncomfortable, Justice Alito suggested a revised formulation: "Well, couldn't the employer say, we have a policy [of] no beards . . . do you have any problem with that?" At least Justices Sotomayor and Ginsburg expressed support for such a rule during the course of the argument.

Justice Breyer distilled the essence of Abercrombie's argument this way: "There are millions of people who are practicing one religion or another where you get a clue of that from their name or maybe their dress or whatever it is. And whenever we have such a person applying, if she doesn't say anything . . . and we don't hire them . . . we're going to get sued. . . [W]ithout that simple rule, tell us, we're going to be in a real administrative rat mess getting sued left, right and center." While Justice Breyer did not endorse the position, Abercrombie's counsel agreed that the summary captured the essence of the company's argument.

Conclusion

It is notoriously hard to infer from Supreme Court oral argument which way the Court will come down in its decision. But clarification from the Court as to what notice triggers the duty to explore religious accommodation is likely to provide welcome guidance for both employers and workers alike.

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