

Supreme Court Holds That Employers Do Not Need Actual Knowledge of an Applicant's Need for a Religious Accommodation Before They Can Be Held Liable for Discrimination

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The Supreme Court recently held that job applicants may hold their potential employer liable for intentional discrimination under Title VII if the applicant can show that his or her need for an accommodation was a motivating factor in the potential employer's decision not to hire that applicant, and it is irrelevant whether the employer had actual knowledge of the need for the accommodation. While the Court's holding was relatively straightforward, its practical import presents additional challenges for employers.

Brief Overview of Case

In *EEOC v. Abercrombie & Fitch Stores, Inc., No. 14-86 (June 1, 2015)*, the employer instituted a "Look" policy intended to promote a style of appearance among store employees that prohibited the wearing of "caps." A job applicant, who was a practicing Muslim and wore a religious headscarf, had received a "qualified" rating. The assistant manager who interviewed her stated that she "believed" that the applicant wore the headscarf for religious reasons, and a district manager determined that the headscarf violated the company's Look policy and directed the assistant manager not to hire the applicant. The EEOC filed a lawsuit on the applicant's behalf and obtained a \$20,000 judgment, but the Tenth Circuit reversed, holding that an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant provides the employer with "actual knowledge" of the need for an accommodation, which Abercrombie did not have.

Writing for the Supreme Court's majority, Justice Scalia rejected the Tenth Circuit's "actual knowledge" requirement and explained that "an applicant need only show that his need for an accommodation was a *motivating factor* in the employer's decision." As the Court acknowledged, "it 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." However, the Court concluded that "an 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."

The Court further held that Title VII does not limit disparate treatment discrimination claims to policies that treat religious practices less favorably than similar secular practices. "Title VII does not demand mere neutrality with regard to religious practices," the Court reasoned. "Rather, it gives them favored treatment, affirmatively obligating employers" not to refuse to hire an individual on the basis of "religious observance or practice."

Takeaways

At first glance, the decision seems to put employers in an awkward position. On one end, those involved in the interview process are typically trained to stay away from questions about an applicant's religion. On the other end, this decision may tempt employers to affirmatively inquire whether the applicant needs a religious accommodation. This is where proper interviewer training comes in.

Hiring managers and others involved in the interview process shouldn't ask questions about an applicant's religion, but where the potential need for a religious accommodation may be obvious (as was the case in *Abercrombie*), they may want to ask whether the applicant can satisfy certain work

requirements with or without a religious accommodation. This is especially so where the employer has a policy or other requirement that it believes is susceptible to religious accommodation requests (again, as was the case with Abercrombie's "Look" policy).

Of course, employers must go one step further. They should then make sure that their interviewers are trained to clearly document the (primarily competency-based) reasons for hiring or not hiring an applicant. The only time the "religious accommodation" issue should play a role in the decision making process is if the applicant will need an accommodation, but the employer still rejects the applicant because it believes the accommodation would impose an undue hardship – a very difficult standard to meet.

Authors



George Patterson