

Beware of Dog(ma): Did the Supreme Court just Require Employers to Accommodate Whenever a Request ***Might*** be due to Religion?

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The U.S. Supreme Court has issued its long-awaited decision in the “Looks Policy” case. It’s not terribly unexpected, but it is a little scary considering the potential far-reaching effects going forward.

As many may recall, this case involved a girl named Samantha Elauf, who is a practicing Muslim and who wears a headscarf. She applied to work at Abercrombie & Fitch. Her interview went well and she was considered a good candidate for hire. The manager recognized, however, that the applicant was wearing a headscarf, and that the company had a Looks Policy which prohibited the wearing of any “caps.” Though this was never discussed, the manager assumed that Elauf wore the headscarf because she was Muslim. A higher level manager ultimately concluded that they could not hire Elauf because the headscarf (or other headwear) would violate the Looks Policy.

The EEOC filed suit on her behalf claiming that the refusal to hire her violated Title VII because the retailer failed to accommodate her religious practices by allowing her to wear a headscarf. The case actually went to trial and Elauf was awarded \$20,000 in damages. The Tenth Circuit Court of Appeals 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.

This “knowledge” element became the focal point of the matter before the Supreme Court. The question before the Court was whether Title VII, in prohibiting a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice, applies only where an applicant has actually informed the employer of the need for an accommodation.

As you may have well figured out by now, the Court [answered this question with a resounding no](#).

Recall from the facts that neither the interviewing manager nor the applicant herself ever discussed why she wore the headscarf. There was no discussion about her faith or religious practices. Rather, the manager simply assumed it was because of her religious beliefs. The Court found this to be irrelevant, however, because Title VII does not contain a “knowledge” standard. Though Abercrombie argued that an applicant cannot prove discrimination unless she first shows that the employer had actual knowledge of the need for an accommodation, the Court said that the applicant need only show her need for an accommodation was a motivating factor in the employer’s decision. The court held that “[a]n employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” The applicant’s failure to request an accommodation is not a condition of liability.

Therein lies the slippery slope.

As the concurrence and dissenting opinion point out, this places employers in a bit of a pickle. The employer’s knowledge is important, the other members of the court point out, because without it, employers may almost be held strictly liable for making employment-based decisions. The concurrence, written by Justice Alito, ponders this:

The scarves that Elauf wore were not articles of clothing that were designed or marketed specifically for Muslim women.

Instead, she generally purchased her scarves at ordinary clothing stores. . . . Suppose that the interviewer thought Elauf was wearing the scarf for a secular reason. Suppose that nothing else about Elauf made the interviewer even suspect that she was a Muslim or that she was wearing the scarf for a religious reason. If “§2000e-2(a)(1) does not impose a knowledge requirement,” Abercrombie would still be liable. . . .

The statutory text does not compel such a strange result.

Justice Alito then concludes that an employer should not be liable for taking adverse action because of a religious practice if the employer does not know that the practice is religious.

The dissenting opinion, written by Justice Thomas, is equally as interesting, as he takes the analysis a step further by stating that this is a disparate impact case, not a disparate treatment case. He opines that the application of the Looks Policy does not constitute intentional discrimination, and that the employer did not engage in intentional discrimination. Rather, the employer failed to make an exception to its neutral policy regarding head wear. It did not treat religious practices less favorably than secular practices. Rather, it remained neutral regarding religious practices. Justice Thomas expresses concern that the majority opinion creates a new form of liability: disparate treatment based on equal treatment.

That being said, the majority opinion is clear, and employers must take caution when making employment based decisions based upon this newly expansive standard. For an employee or applicant to prevail on such a claim

going forward, he or she need only show that her need for an accommodation was a motivating factor in the decision making process, not that the employer had knowledge of this need. Hiring managers and human resources professionals alike should consult with legal counsel when addressing such accommodation issues to ensure compliance with the law.

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