Employment Law Daily Wrap Up, STRATEGIC PERSPECTIVES —*Abercrombie* case: Little question with big implications, (Nov. 6, 2014)

Click to open document in a browser

By Pamela Wolf, J.D.

Pending before the Supreme Court is a rather narrow question about the type of notice that an individual must give an employer in order to invoke Title VII's protection against religious discrimination and to obtain a needed accommodation for a religious practice. However, as is often the case, this narrow question also could have broad implications for other circumstances in which an employee may seek an accommodation. The EEOC has doggedly pursued relief for applicants and employees whom the agency believed were denied their rights to religious accommodations by Abercrombie & Fitch, the employer whose practices are under scrutiny in the case.

"Look" policy modified. More than a year ago, Abercrombie & Fitch finally stopped trying to justify religious discrimination via its "look policy." Courts had rejected the notion that the policy could be sustained to justify the employer's refusal to accommodate the religious practices of applicants or employees who were under an obligation to wear a hijab (religious headscarf). Abercrombie agreed to change its policies as part of a settlement agreement with the EEOC that resolved two separate religious discrimination lawsuits brought by agency on behalf of Muslim teens wearing hijabs.

A week after the EEOC announced the settlement, on October 1, 2013, the Tenth Circuit rendered a ruling that ultimately placed before the Supreme Court the question of whether indirect notice of the need for religious accommodation will suffice to support a prima facie case of religious discrimination.

What constitutes "notice" to employer? The appeals court reversed the district court's grant of summary judgment to the EEOC finding that Abercrombie & Fitch violated Title VII by failing to provide a reasonable religious accommodation to a Muslim woman's wearing of a hijab. Instead, Abercrombie was entitled to summary judgment as a matter of law, ruled the Tenth Circuit, because there was no genuine issue of material fact that the prospective employee never informed the store prior to its hiring decision that she wore her hijab for religious reasons and that she needed an accommodation for that practice due to a conflict with Abercrombie's clothing policy. Accordingly, the case was remanded to the district court with instructions to vacate the earlier ruling and enter judgment in favor of Abercrombie.

EEOC takes it to the top. After losing its argument that proof by any means of an employer's knowledge of an existing conflict between an employee's religious practice and the employer's workplace policy is enough for purposes of a prima facie religious accommodation case, the EEOC turned to the High Court with a petition for certiorari filed on July 25, 2014. The agency cited a circuit split as to the meaning of the "actual knowledge" that employers must have about a required religious accommodation in order to spark liability for Title VII religious discrimination as reason for granting the petition. Apparently persuaded, the Justices granted the petition on October 2.

To understand how the outcome of the case may impact employment law practitioners, employers and employees, *Employment Law Daily* turned to ELD Advisory Board Member David Wachtel, who represents plaintiffs, and his associate, Lauren Mendonsa, of the Washington, D.C. law firm Bernabei & Wachtel.

Narrow question, potentially broad implications. The case presents a rather narrow question, but it could nonetheless have pretty broad implications for the employment law landscape. It centers on the type of notice required to trigger an employer's Title VII obligation to accommodate an employee's religious practice, Mendonsa observed. "The essential question the Court will review is whether an employee or job applicant has an affirmative obligation to provide her employer with actual notice that she requires a workplace accommodation because her religious observance or practice conflicts with her employer's policies."

If the majority answers the question in the affirmative, "an employer cannot be liable for failing to accommodate an employee or job applicant's religious practice unless the employee or job applicant personally informs the employer that she requires a workplace accommodation because of her religion," Mendonsa said. "This is so

©2014 Wolters Kluwer. All rights reserved.
Subject to Terms & Conditions: http://researchhelp.cch.com/License_Agreement.htm

even if the employer is independently aware of the employee's religious practice and that the practice may conflict with its workplace policies."

How often does the question come up? While the question raised in *Abercrombie* does not come up often, it nonetheless points to other questions that occur much more frequently for employees. "Whether an express request for religious accommodation is required in the job application process comes up rarely, because individual hiring cases are not all that common overall," Wachtel said. Religious discrimination charges are the fourth least common type filed with the EEOC, behind only GINA, Equal Pay, and color. "In the analogous ADA cases, there is a strict protocol: Disability should not be discussed at all until after a job offer is made," Wachtel noted.

However, the case evokes even broader, more practical questions that arise much more frequently, Wachtel suggested, providing these examples: "Is an employee better off making an explicit request or complaint, or raising an incendiary issue subtly to reduce the chance of unpleasantness or confrontation? If an employee has gone the less-confrontational route, with bad results, did she do or say enough to put the employer on notice of the need for accommodation, or of workplace concerns like harassment?"

Tricky for employees. Depending on how the Justices rule, the outcome of the case could be very tricky for employees. "If the Court affirms the Tenth Circuit's 'actual notice' requirement, it will place an onerous burden on workers, particularly job applicants, and give employers wide latitude to deny jobs to workers who may require religious accommodations," suggested Mendonsa.

"Asymmetry of information." She also observed that "an asymmetry of information exists between job applicants and employers regarding employer expectations and workplace policies." As was the case in *Abercrombie*, while a job applicant may not realize that her religious practice conflicts with her potential employer's workplace policies, the conflict may be readily apparent to or at least identifiable by the employer. "Requiring job applicants to provide potential employers with actual notice of their need for accommodation gives employers a perverse incentive to conceal their expectations and policies and deny jobs to individuals with potential religious conflicts rather than determine whether religious accommodations are possible," Mendonsa said.

"Requiring job applicants to start the accommodation conversation may also force some job applicants, out of an abundance of caution, to disclose to their potential employers religious beliefs or practices that have no bearing on the workplace, which, in turn, may invite judgment and stereotyping based on those beliefs and practices," according to Mendonsa. "The rule places workers in a Catch-22: Disclose and risk judgment and discrimination, or don't disclose and risk being denied a job or terminated."

New standard expected? As to the whether the Court will likely set forth a new standard for notice in religious accommodation cases, Wachtel predicted that the we can expect a new standard, noting that "the Court normally does not take cases just to right individual wrongs."

However, he also pointed to some exceptions, such as the recent reversal of summary judgment in a civil rights case, *Tolan v. Cotton*, which the Court labeled as error correction. Wachtel also said there is a way for the Court to change the result in *Abercrombie* without creating a broader change. Samantha Elauf, the young woman who brought the charge, wore her hijab to the interview, he noted. The manager who interviewed her thought she was wearing the hijab for religious reasons. "The manager's understanding explains why Abercrombie did not simply offer the young woman the job and ask her not to wear a head scarf to work," Wachtel said. "The Court could issue a ruling that will help Ms. Elauf without changing very much for people in similar, but not identical, situations."

Application to other contexts. The High Court's ruling in *Abercrombie* could also have application in other contexts. "The most obvious area of potential impact is in disability accommodation cases, Mendonsa said, noting that the Tenth Circuit found support for the "actual notice" requirement in the case law surrounding the ADA's reasonable accommodation requirement, which puts the burden of requesting an accommodation on the employee. But as the EEOC's ADA regulations make clear, the question of whether an employee may require an

©2014 Wolters Kluwer. All rights reserved.
Subject to Terms & Conditions: http://researchhelp.cch.com/License_Agreement.htm

accommodation is not to be discussed until *after* a job offer is made. Thus, the Court's resolution of *Abercrombie* may have implications for job applicants with disabilities, she said.

Pointing to potentially broader implications of the Court's ruling, Wachtel noted that "the legal requirements for religious accommodation under Title VII and disability accommodation under the ADA are very similar, with the same key terms appearing in the law relating to both obligations, such as 'undue hardship' and 'interactive process.'" He said that in the Tenth Circuit below, an *amicus* brief supporting an unsuccessful motion for rehearing *en banc* argued that the panel ruling conflicted with the circuit's ADA precedent.

The outcome of the case may have implications even beyond Title VII religious discrimination and the ADA. "If there is a broad holding, it could also have a persuasive impact in retaliation cases and in the many states that now protect gender identity, because there can be disputes about whether an employer knows that particular clothing or grooming choices reflect the employee's gender identity," Wachtel explained.

"*Abercrombie* may also have implications for trans- and gender-nonconforming workers," according to Mendonsa. "Although gender identity is not a protected category under Title VII, it is becoming a protected category across the country at the state and local level." Going forward, she observed, "*Abercrombie* could dictate how courts and legislatures approach workplace accommodations for these individuals."

Best practices. Wachtel and Mendonsa each suggested a few best practices based on their experiences and the issues raised in *Abercrombie*. As to employees, "We regularly counsel clients on the risks and rewards of initiating the reasonable accommodation process," Mendonsa explained. "Asking an employer for an accommodation based on a religious practice or disability is an uncomfortable conversation and may invite unwanted consequences, but we generally believe that the reward of getting or keeping a job with an accommodation outweighs the risk of being denied a job or terminated." While every case presents its own unique circumstances, Medonsa said that it's "generally best to advise clients who think their religious practice might conflict with their employer's policies or expectations to request an accommodation."

On the employer side, Wachtel observed: "This case shows how management training could keep many employers from accidentally ending up in court." By way of example, he recommended that "managers should have enough training to recognize a hijab and a yarmulke, and understand that they are religious requirements." In *Abercrombie*, he pointed out, there is evidence the manager knew — or at least suspected — what a hijab meant in terms of its religious significance. "Once in court, Abercrombie appealed from a $20,000 verdict, and will spend a few times that amount to go to the Supreme Court," Wachtel observed, also noting that the case is one of three that the EEOC has brought against the company over similar issues.

Companies: Abercrombie & Fitch Stores, Inc.; Abercrombie Kids

MainStory: LitigationNewsTrends SupremeCourtNews Discrimination ReligiousDiscrimination PracticeTip

©2014 Wolters Kluwer. All rights reserved.
Subject to Terms & Conditions: http://researchhelp.cch.com/License_Agreement.htm