'A MOTIVATING FACTOR' – THE IMPACT OF EEOC V. ABERCROMBIE & FITCH STORES, INC. ON TITLE VII RELIGIOUS DISCRIMINATION CLAIMS

INTRODUCTION

Since the Supreme Court's decision in Abercrombie, lower courts have been faced with the task of applying its holding to failure to accommodate cases, which has in some instances altered the entire standard, and in others provided an alternative means by which an employee can prove his or her case.[7] This Note will examine the background of religious discrimination cases on the grounds of failure to accommodate, the standard of notice for these cases prior to Abercrombie, the decision itself, and the impact the decision has had thus far on lower courts. Finally, the Note will predict the future policy implications the Abercrombie case may have on religious discrimination law as a whole.

I. BACKGROUND – TITLE VII RELIGIOUS DISCRIMINATION

A. Title VII Overview

Title VII, the Equal Employment Opportunities provision of the Civil Rights Act of 1964, provides statutory guidance for federal employment discrimination litigation.[8] Title VII broadly encompasses all aspects of employment discrimination, including but not limited to discriminatory practices in recruitment, hiring, promotion, provision of wages or benefits, layoffs, termination, and discharge.[9] Title VII covers the following "protected classes": race, color, religion, sex, and national origin.[10] The Act was passed in response to the Civil Rights Movement of the 1960s and the demand to protect individual rights and enforce equal treatment in the context of the workplace.[11] Title VII also created the Equal Employment Opportunity Commission (EEOC), the federal administration and enforcement agency to which all employment discrimination claims and grievances must be submitted before litigation can be pursued.[12]

The language of the intentional discrimination portion of Title VII provides:

> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discr

C. Analyzing Failure to Accommodate Cases: The Burden-Shifting Framework

Over the years, courts have developed a well-established, two-part burden-shifting analysis for approaching failure to accommodate cases.[22] This framework first requires that a plaintiff establish what is known as a prima facie discrimination case.[23] If the plaintiff is successful in doing so, the burden then shifts to the employer to show that it either attempted to accommodate the employee's practice, or was unable to do so without imposing an undue hardship on itself.[24] Though courts have facilitated this standard through the

employer could fire him without being thought guilty of failing to accommodate his religious needs.[48]

Other circuits have likewise cited to Judge Posner's guidance in retaining a stricter view of notice for failure to accommodate cases.[49]

II. EEOC V. ABERCROMBIE & FITCH, INC. – SAMANTHA ELAUF'S CASE

A. Facts

On June 25, 2008, then seventeen-year-old plaintiff Samantha Elauf applied for a job at an Abercrombie Kids retail clothing store at a shopping

belief.[56] Cooke believed Elauf was a good candidate for the job, but was uncertain of how to reconcile Elauf's headscarf with the company's headwear prohibition.[57] Cooke then contacted her district manager to discuss Elauf's interview, informing the district manager she felt as though Elauf were a strong candidate and should be hired, despite the fact that she wore a headscarf in violation of the "Look Policy," since the headscarf was worn for religious reasons.

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E. Concurrence and Dissent of the Supreme Court Case

Concurring with the judgment, Justice Alito agreed that the Tenth Circuit misinterpreted the notice requirement, since Title VII does not impose an actual knowledge standard, but felt that some degree of awareness should be clearly established in order to trigger an employer's duty to accommodate.[82] Otherwise, a "strange result" would ensue in that, in this case for example, Abercrombie could be liable whether or not it knew that Elauf wore her headscarf for religious reasons.[83] Here, because there was sufficient evidence to show that Abercrombie was aware that Elauf wore her headscarf for religious reasons, liability under Title VII was appropriate.[84] Dissenting, Justice Thomas did not feel as though it were possible that Abercrombie had engaged in any violation under Title VII while merely applying a neutral dress policy that incidentally "fall[s] more harshly" upon Muslim women or any other religious group.[85] Justice Thomas disagreed that section 2000(e)(j) and the Supreme Court's decision in Hardison "create[d] a freestanding failure-to-accommodate claim distinct from either disparate treatment or disparate impact."[86] Thomas argued that while the Court today had "rightly put[] to rest the notion" that a freestanding religious accommodation action exists, it had replaced it with an "entirely new form of liability: the disparate-treatment-based-on-equal-treatment claim," and thus erroneously redefined "intentional discrimination."[87]

III. POST-ABERCROMBIE CASES – APPLYING THE SUPREME COURT'S HOLDING

Since the Supreme Court's decision in Abercrombie, lower courts have been tasked with applying the holding to religious discrimination cases where appropriate. Even in a short time, courts have already taken varying approaches in doing so.

82. Id. at 2035 (Alito, J., concurring).

83. Id.

84. Abercrombie, 135 S. Ct. at 2035.

85. Id. at 2038 (Thomas, J., dissenting).

86. Id. at 2041.

87. Id. at 2041–42. Interestingly, the majority in its decision stated that Title VII creates just two causes of action: "disparate treatment" (intentional discrimination) and "disparate impact." Id. at 2032. Section 2000(e)(j) and the duty to accommodate was seemingly merged in with the definition of "religion" under Title VII's "disparate treatment" provision, creating a standard which provides that it is unlawful for employer to "(1) 'fail . . . to hire' an applicant (2) 'because of' (3) 'such individual's . . . religion' (which includes his religious practice)." See id. at 2031–32. Thus far, lower courts have not substituted cases alleging failure to accommodate claims as "disparate treatment", as Justice Thomas has predicted. See, e.g., Equal Emp't Opportunity Comm'n v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298, 1317 (D. Colo. 2015); see also Schwingel v. Elite Prot. & Sec., Ltd., No. 11 C 8712, 2015 WL 7753064, at *4 (N.D. Ill. Dec. 2, 2015).

facie case, the court provided that the plaintiff "must show (1) [he] holds a sincere religious belief that conflicts with a job requirement; (2) [he] informed his employer of the conflict; and (3) [he] was disciplined for failing to comply with the conflicting requirement."[94] In examining the second element, the court first discussed evidence showing that plaintiff did in fact inform his employer of his religious objection to wearing the badge.[95]

In addition to this, however, the court cited to Abercrombie and stated that plaintiff had also presented evidence that would allow the jury to "infer that [the employer] failed to accommodate plaintiff 'because' of plaintiff's atheism."[96] Title VII, the court continued, "does not require him to prove that he advertised his atheistic beliefs to his employer, nor does it require him to prove that he phrased his disagreement with the mission statement 5.3(ous)62(s)2.7(s)-8.7(i)5.20/[7(

know of or suspect her bona fide religious belief" before her discharge.[101] The only evidence presented in the case, the court reasoned, was that Nobach had informed an assistant that she could not read the Bible because it was against her religion, but there was no evidence that Nobach or the assistant ever relayed this information regarding her religious belief to the employer before her termination.[102]

Interestingly, in setting out the standard for Nobach's claim, the Fifth Circuit chose to analyze the claim as an intentional discrimination or disparate treatment claim, stating that "Title VII makes it unlawful for an employer to discharge an individual 'because of such individual's religion.'"[103] The court went on to discuss that, based on the Supreme Court's decision in Abercrombie,

> When evaluating causation in a Title VII case, the question is not what the

2. Was the Decision "Anti-Employer?"

On the other hand, employers were immediately concerned about the negative impact the holding may have on them, namely the potential of increasing their likelihood of liability under Title VII.[112] One major concern was that the implications of the case on the already difficult balance between good hiring practices and the need to ask probing or possibly illegal questions to potential employees.[113] Small businesses were also concerned that the holding would fall more harshly upon them in that it "force[s] employers to make assumptions about an applicant's religion" and "sets an unclear and confusing standard making business owners extremely vulnerable to inevitable discrimination lawsuits."[114]

B. Legal Commentary

1. The Supreme Court's Failure to Accommodate Case History

The Supreme Court's decision in *Abercrombie* was the third of all cases it has decided pertaining to failure to accommodate a religious practice, and the first of those being decided in favor of the religious employee.[115] Generally speaking, the Supreme Court's previous decisions regarding the duty to accommodate narrowly defined an employer's obligation to accommodate an employee's religious 0.016 T [(e)0.H(om)5.3eEMC /Span <</MCID 32 >>BD4 0 Tw 6.9(6)-6.3(6)/T1

limitation of the scope of covered individuals under the statute.[123] The ADAAA served to vastly expand the range of individuals considered "disabled" under the law, as well as define other terms and requirements in employees' favor.[124]

Since the passage of the ADAAA, many more plaintiffs in disability discrimination cases survive summary judgment because the amendments have made the threshold question of whether an indivsave

availability of accommodations in the workplace the "new normal."[131] It is likely that these trends in cases under the ADA will help predict the future of Title VII, and that policy shifts in disability discrimination as a whole may serve to influence religious discrimination law as well.

3. Extending the Case Beyond Failure to Hire

Another general policy matter is determining the extent to which this holding will be expanded beyond the failure to hire context, rather than limited

employers to accommodate religious practices in the workplace. If nothing else, Justice Scalia and the Court made clear that under Title VII, employees' religious practices are given "favored treatment," and employers are liable where even suspicion of religious behavior is a "motivating factor" in an adverse employment decision.[136] In an ideal world, open dialogue, acceptance, and tolerance in the workplace would prevent Title VII claims from even reaching courts. But until that time, we can only hope that the legal world will come to a consensus and establish a clear and workable standard for religious discrimination claims—or, at the least, find the means by which each smaller piece can make up a larger, cohesive whole.

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136. See EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032–34 (2015).

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