Employment Decisions Stemming from Discriminatory Motives Outlawed: *Equal Employment Opportunity Commission, Petitioner v Abercrombie & Fitch Stores, Inc.*

US Supreme Court, 1 June 2015, 575 U.S. 14–86 (2015)

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With its decision in the *Abercrombie* case, the US Supreme Court has shown growing understanding of equality in its true, substantive form. It has taken a significant step towards protecting applicants and employees from religious discrimination and shown its progressive approach by highlighting that, in order to comply with equality law, employers may need to provide accommodation for religious practices. Despite critique on the practical side of some aspects of the ruling, the Court has made a substantial contribution to enhancing equal opportunities in the US employment market. This note will briefly discuss why the judgment has such positive implications and attempt to address some of the practical challenges the ruling may impose.

1. Facts

Samantha Elauf, a practicing Muslim, wears a headscarf following her religious belief. She applied for a job at a clothing store, Abercrombie and Fitch, and was invited for an interview. During the interview neither Ms Elauf nor the interviewer mentioned the headscarf, and Ms Elauf was rated well for her skills. However, Ms Elauf was not offered the position, as her headscarf was deemed incompatible with the company's "Look Policy", which prohibited wearing "caps" at work. The policy was interpreted to prohibit all headwear worn by staff, religious or non-religious.

The Equal Employment Opportunity Commission (EEOC) filed a suit against Abercrombie and Fitch Stores (Abercrombie) on behalf of Ms Elauf, alleging that Abercrombie's refusal to

1 Iina Sofia Ransom is a volunteer at the Equal Rights Trust. She has benefited from the case summary of this judgment published by the Equal Rights Trust on 15 June 2015, which forms the basis for sections 1 and 2. The comment on this note is the author's own and does not necessarily represent the views of the Trust. The author would like to thank Joanna Whiteman for her helpful comments on the note.

hire her was discrimination on the basis of her religious practice, which breached Title VII of the Civil Rights Act 1964.

There was no dispute over the fact that an employer cannot refuse to hire an applicant for discriminatory reasons, such as religious practice. The question was, however, does the employer need to be informed of a need to accommodate such a practice in order for the prohibition of discrimination to apply?

It is worth noting that Title VII of the US Civil Rights Act[2] distinguishes between "disparate treatment" (often referred to as "intentional discrimination") and "disparate impact" discrimination. Intent to discriminate is linked to the provision on "disparate treatment", while the "disparate impact" refers to a discriminatory effect, an outcome that creates a disadvantage even when there was no discriminatory motive for the treatment in question. The EEOC relied on the disparate-treatment provision stating that Ms Elauf was intentionally discriminated against when she was not hired because she wears a headscarf. Abercrombie, on the other hand, argued that there cannot be discriminatory intent without actual knowledge of the applicant's need for accommodation. Abercrombie further claimed that the "Look Policy" was neutral towards all applicants, and could not as such constitute "intentional discrimination".

2. Decision

The Court ruled in favour of the EEOC with a majority of eight to one.[3] It reversed the previous judgment by the Tenth Circuit, and remanded the case for further consideration consistent with the Supreme Court's opinion. Justice Scalia, who delivered the majority opinion, rejected the "knowledge requirement" suggested by Abercrombie as being part of the test for disparate-treatment discrimination by concluding that the applicant needs only to show that his or her need for accommodation was a motivating factor in the employer's decision.

The Court noted that while some anti-discrimination statutes do actually impose a requirement of actual knowledge (e.g. the Americans with Disabilities Act 1990), this was not the case in the relation to religious practice. On the contrary, the prohibition of disparate treatment in Title VII outlaws certain motives, regardless of the level of the employer's knowledge. With this decision, the Court confirmed that an employer cannot make employment decisions based on an applicant's religious practice, or a need for accommodation that may rise from it. The important point the Court made is that it will not matter whether the need for accommodation is actual or only suspected. While a request for accommodation may in practice make it easier to infer motive in any subsequent decision not to hire, it was not considered a necessary condition of liability.

2 Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. §2000e2(a) and §2000e(j).

3 Justice Alito filed an opinion concurring in the judgment. Justice Thomas filed an opinion concurring in part and dissenting in part.

The Court stated that ruling in favour of Abercrombie on this point would have required it to read words into Title VII in order to produce what Abercrombie considered as a desirable result. As such, changing the existing law was not a matter for the Court, but for Congress.

Further, the Court rejected Abercrombie's view that the issue should have been addressed as a disparate-impact claim, not as a disparate-treatment claim. The Court noted that the meaning of "religion" includes one's religious practice. Hence, religious practice is part of the protected characteristics that cannot lead to disparate treatment, and must be accommodated. While an employer is entitled to have a general no-headwear policy, the policy will need to be adapted to an applicant's need for an accommodation of their religious practice.

In a concurring judgement Justice Alito took the view that knowledge should generally be required, but in this case the evidence was sufficient to show Abercrombie did know of Ms Elauf's religious practice. The only one dissenting was Justice Thomas, who held that the application of a neutral staff policy could not be taken as "intentional discrimination", and hence the case should not have succeeded as a disparate-treatment claim.

3. Comment

This case has two main merits in terms of equality: firstly, it is an important step towards acknowledging the right to "substantive equality" in the US jurisprudence as it clarifies that an employer cannot make a need to reasonably accommodate an applicant's religious practice a factor in its recruitment decision, and secondly, it recalls that an applicant does not have a duty to inform an employer of such a need in order to receive protection against discrimination.

The Supreme Court's judgment is an important approach from the perspective of achieving "substantive equality" in this case. In equality law, it is commonly held that treating everyone the same, pursuing "formal equality", will not guarantee full equality. Formal equality will not ensure possibility for individuals from diverse backgrounds to participate in the society on equal footing. This is due to the fact that treating everyone in the same manner upholds majority norms. If rules of procedure, expected behaviour and institutional arrangements such as Abercrombie's Look Policy are the same for all applicants, the ones who differ from the majority norm will most likely be disadvantaged based on the differences between them and the norm of a "white, able-bodied, heterosexual, Christian male".[4]

As mentioned, the second significant aspect of the Court's ruling was the emphasis it placed on the motive behind an employment decision, abandoning the "knowledge requirement". By doing so, the Court outlawed discriminatory motives regardless of whether they are based on actual knowledge or a mere suspicion. The Court was right to draw a causal link between the protected characteristic and the disparate treatment – the existence of this link is what

4 Faculty of Law, University of Hong Kong, *Case study on equality*, Based on *Dothard v Rawlinson*, 433 U.S. 321 (1977) and Fredman, S., Discrimination Law, Oxford University Press, 2002, p. 9.

ultimately decides whether a situation amounts to discrimination or not. Denying this causality would allow employers to freely discriminate unless they had received a direct, explicit notice that the applicant required accommodation for their religious practice. Such an end result would hardly have been in the interests of any applicant protected by the Title VII non-discrimination provisions.

The parties to the case spent considerable time debating the difference between the disparate-treatment and disparate-impact provisions of Title VII. In Abercrombie's view, the existence of a neutral Look Policy could not as such amount to disparate-treatment discrimination – this view was also supported by the dissenting Justice Thomas. It may well be a legitimate question to ask whether the mere existence of a seemingly neutral staff policy can amount to disparate treatment. On the surface it would appear not to, as generally a disadvantage created by a policy that is neutral in wording would be described as having a disparate impact, which may happen irrespective of discriminatory motive. However, this exactly is the clue – when the motive is discriminatory, the act itself is intentional (disparate-treatment) discrimination. The issue in the *Abercrombie* case was not the existence of the disputed Look Policy, but the fact that Abercrombie did not make an exception to the policy in order to accommodate Ms Elauf's religious practice. By failing to do this, Abercrombie violated Title VII's disparate-treatment provision, which prohibits certain motives, regardless of the employer's knowledge.

Following the Court's reasoning, the applicant needs only to show that the need for accommodation for religious practice was a motivating factor in the decision not to hire. While this certainly is the correct finding to provide applicants with protection from discrimination, it could be argued that enforcing it may be challenging in practice. As knowledge and motive are separated as concepts, motive being the one that matters, it may be difficult for the applicant to show the employer had a discriminatory motive, as opposed to showing they held the relevant knowledge. The employer might claim that while they did indeed know about the need for accommodation, it was not the reason for denying an applicant a job.

The Court acknowledged that if the applicant requests accommodation, or the employer is certain accommodation would be needed, it may be easier to infer motive when that applicant is then not hired, but declined to opine whether the motive requirement can be met without showing that the employer at least suspects that the practice in question is a religious one. In the case at hand it did not make a difference as it was clear that Abercrombie suspected a religious practice would prevent Ms Elauf from complying with the Look Policy if it were strictly applied, but for the future application of this precedent, elaboration of this issue would have been helpful.

Much like other critics of the decision, Abercrombie reasoned that abandoning the knowledge requirement is going to leave employers in an unfair "Catch 22" situation trying to avoid stereotyping and at the same time trying to avoid litigation for probing applicants' suspected religious views. The ruling has raised questions of when and how any need for accommodation of a religious practice can be discussed without any later hiring decision being seen as

stemming from a discriminatory motive. While a concern over how to discuss a possible need for accommodation of a religious practice within the limits of the law may be legitimate, it is not one that could not be overcome.

As Abercrombie argued, direct enquiries about an applicant's convictions and engaging in religious stereotyping are not recommended practices. Indeed, employers should not ask applicants about their religion in an interview nor should they assume certain religious views or practices based on stereotypes. However, this does not exclude the possibility of an open, interactive process between the employer and the applicant. The interviewer can, for example, explain the key requirements of the job, and then enquire whether the applicant will be able to comply with them. If the applicant replies that his or her religious practice conflicts with the requirement(s), the interviewer can ask what type of accommodation would be needed, and then review whether accommodation could be provided without undue hardship.[5] The details of the review should be documented and shared with the applicant in order to ensure a transparent process. It is especially crucial to outline the reason(s) behind a possible negative decision to make sure the reasons are not unlawful.

Finally, managers responsible for hiring should be trained following the Abercrombie decision to raise awareness of the importance of seeking to accommodate religious practices where possible. It should be emphasised that the possible need for accommodation is irrelevant for the hiring process in a similar way that one's race or gender is.[6]

It is to be noted that the Abercrombie decision does not impose a new duty on employers, but merely clarifies the existing standard of Title VII when no explicit request for accommodation of a religious practice has been made by an applicant.[7] As such, it does not result in insurmountable difficulties for hiring managers as suggested by Abercrombie, but rather challenges them to review their practices to comply with the existing equality law.

The Abercrombie decision is part of a wave of recent progressive developments in relation to equality in US jurisprudence. In July, it was followed by the case of *Obergefell v Hodges*,[8] which legalised same-sex marriage unifying the legislation across the country. These precedents are leading the way towards a more comprehensive understanding of equality in the US and imply a progressive approach adopted by the US Supreme Court for placing a growing emphasis on substantive as opposed to merely formal equality.

5 Colling and Sokolowski discuss employers' obligations following the Abercrombie case in Collins, C. and Sokolowski, J., *Supreme Court sides with EEOC in Abercrombie & Fitch Hijab Case*, Labor & Employment Law Blog, 12 June 2015.

6 *Ibid.*

7 *Ibid.*

8 *James Obergefell, et al., Petitioners v Richard Hodges, Director, Ohio Department of Health, et al.*, 576 U.S. 14–556 (2015).