The Supreme Court's Abercrombie Decision Reminds That Neutral Work Rules Will Not Save You

Labor & Employment Law Update

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On June 1, 2015, the U.S. Supreme Court decided *EEOC v. Abercrombie & Fitch Stores, Inc.*, ruling that it was unlawful for an Abercrombie clothing store to reject an otherwise qualified applicant because, as a practicing Muslim, she wore a headscarf.

That rejection arose from Abercrombie's unfortunate application of the company's "Look Policy," which prohibited employees from wearing "caps"—a term that the Look Policy did not specifically define. Abercrombie believed—but was not certain, as there was no discussion of the issue with the applicant—that the applicant wore the headscarf for religious reasons. Nevertheless, also believing that the Look Policy was non-discriminatory because all headwear, religious or not, violated the policy, Abercrombie rejected the applicant because of her headscarf.

If the applicant had come to interview at Abercrombie wearing her favorite baseball cap, then Abercrombie likely would have been free to reject her in line with the Look Policy. That is not what happened. Abercrombie did not believe that the applicant simply made a fashion choice to wear a headscarf. Instead, what was clear to the court was that Abercrombie believed that the applicant wore the headscarf because she was a Muslim—and the court deemed that a violation of Title VII of the Civil Rights Act of 1964.

Here's the first lesson: Do not assume that your company complies with the law because it has neutral policies. Neutral policies often must yield to religious practices—unless the company can make a showing of undue hardship. And although it is not expressly addressed, this case carries the implicit warning to employers that maintaining an "image" or "look" is unlikely to be an undue hardship or otherwise justify application of a neutral policy that does not contain exceptions for religious practices or other legally protected characteristics.

This issue is analogous in many respects to the concept of employment at-will. Yes, an employer can generally terminate an employee for any reason or no reason at all—unless the reason is the employee's race, national origin, or other

protected characteristic. Similarly, an employer is generally allowed to have any number of seemingly neutral rules, and that is perfectly acceptable until those rules conflict with an employee's religious practices.

Here's the second lesson: Employers should not wait for a request for an accommodation when the company already believes it is making a decision that implicates an individual's religious practice (or any other legally protected characteristic for which an accommodation may be required). The fact that the applicant never raised the issue of her need for a religious exemption to Abercrombie's Look Policy made no difference to the court. Bearing that in mind, when an employer has reason to believe that a religious practice could be linked to an employment decision, the employer will be best-served by taking a proactive approach to determine whether the practice is one that can or should be accommodated.