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Employment Law Outlook

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U.S. SUPREME COURT RULES AGAINST ABERCROMBIE IN RELIGIOUS DISCRIMINATION CASE

Stephanie N. Gilbert

On June 1, 2015, the U.S. Supreme Court ruled that, to prevail on a religious discrimination claim based on disparate treatment, an applicant only needs to show that her "need for [a religious] accommodation was a motivating factor in the employer's decision [not to hire the applicant]." The applicant does not need to show that the employer had actual knowledge of her need for a religious accommodation.

The decision means that HR professionals should become particularly familiar with their hiring policies and discuss them with applicants to see if an accommodation might be needed for religious reasons.

Refusal to Hire

The case, *EEOC v. Abercrombie & Fitch Stores,* No. 14-86, was brought by the Equal Employment Opportunity Commission (EEOC) on behalf of Samantha Elauf, who had applied for a sales clerk position with Abercrombie & Fitch when she was a teenager. Elauf is a practicing Muslim who wears a headscarf or *hijab* as part of her religion. When Elauf applied for the position, the Assistant Manager who interviewed her gave her a rating that qualified Elauf to be hired, but she was concerned that Elauf's headscarf conflicted with Abercrombie's dress code, which prohibits employees from donning "caps." The Assistant Manager consulted with her District Manager who advised her that Elauf's headscarf would violate Abercrombie's dress code and instructed her not to hire Elauf.

The EEOC filed suit against Abercrombie on Elauf's behalf, claiming the retail chain's refusal to hire Elauf violated Title VII of the Civil Rights Act of 1964, which prohibits employers from refusing to hire any individual "because of such individual's race, color, religion, sex or national origin." One method of proving religious discrimination under Title VII is often referred to as a "disparate treatment" or "intentional discrimination" claim, which requires the claimant to show that the applicant's protected characteristic (e.g. religious practice) was a "motivating factor" in the employer's decision not to hire the applicant.

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U.S. DOL ISSUES PROPOSED OVERTIME REGULATIONS

William M. Furr

On June 30, 2015, the U.S. Department of Labor (DOL) issued proposed regulations regarding the "white collar" exemptions under the Fair Labor Standards Act (FLSA). The FLSA requires covered employers to pay overtime at a rate of time and one-half to nonexempt employees who work more than 40 hours in a workweek. Certain salaried employees are exempt from the overtime requirements of the FLSA including certain executives, professionals, and administrative employees. The DOL refers to these exemptions as the "white collar" exemptions.

In order to qualify for a white collar exemption under existing DOL regulations, an employee must earn $455 per week (or $23,660 per year). This threshold has not risen in eleven years. In the DOL's proposed regulations, the minimum salary threshold will increase annually based on salary increases in the marketplace.

The DOL proposes to set the salary threshold at the 40th percentile of weekly earnings for full-time salaried workers in the United States. Using this statistic, the proposed minimum salary for white collar exemptions would be $921 per week or $47,892 per year in 2015 and $970 per week or $50,440 per year in 2016 when the DOL's regulations are finalized.

The DOL also proposes to increase the minimum salary threshold for "highly compensated employees" under the FLSA. The DOL's white collar duties test is easier to meet if the employee is a "highly compensated employee." Under the existing DOL regulations, highly compensated employees are those employees earning over $100,000 per year. The DOL proposes to increase the salary for highly compensated employees to the 90th percentile of weekly earnings for full-time salaried workers in the United States. This would be $122,148 in 2015.

Although the DOL has not proposed changes to the duties test for the white collar exemptions, it has invited the public to comment on whether the duties tests should be revised. For years advocates on both sides have criticized the DOL's white collar duties criteria

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SUPREME COURT DOES LITTLE TO CLARIFY AN EMPLOYER'S OBLIGATIONS UNDER THE PREGNANCY DISCRIMINATION ACT

Phillip H. Hucles

On May 25, 2015, the Supreme Court of the United States reversed and remanded the Fourth Circuit Court of Appeals in *Young v. United Parcel Serv., Inc.*, 575 U.S. __, No. 12-1226 (2015). The Fourth Circuit affirmed the district court's grant of summary judgment to UPS when UPS argued that it did not violate the Pregnancy Discrimination Act (PDA) when it refused to accommodate Young's request for light duty due to her pregnancy.

UPS maintains a policy that its drivers must be able to lift up to 70 pounds individually or 150 pounds with assistance. Ms. Young's physician told her she could lift no more than 20 pounds for the first 20 weeks of her pregnancy and only 10 pounds thereafter. Because Ms. Young could not meet the job requirement, UPS placed her on unpaid leave.

The PDA requires an employer to treat pregnant workers the same as similarly situated non-pregnant employees in their ability or inability to work. UPS argued that its policy of offering light-duty work to employees who suffer injuries on-the-job, does not violate the PDA because employees injured on-the-job are not similarly situated to pregnant employees (whose restrictions do not arise from on-the-job conduct). UPS also accommodates employees when they are not able to drive a truck (for example, due to a loss of Department of Transportation certification) and when required under the Americans with Disabilities Act.

The Supreme Court focused on the PDA's use of the word "other persons." Both Young and UPS argued polar opposite positions for the phrase. Young argued that "other persons" necessarily includes all persons UPS accommodates. According to Young, because UPS accommodated "other persons," it should accommodate pregnant employees. On the other hand, UPS argued that "other persons" means only those who are directly parallel to the pregnant employee – in this case, employees who do not fit within a category approved for an accommodation. UPS argued that, if it accommodated pregnant employees when they did not fall within one of the three categories approved for accommodation, pregnant employees would receive an additional benefit not provided to other employees – the PDA does not confer a special benefit to pregnant employees, just a requirement that they receive the same treatment.

The Supreme Court, in a 6-3 majority (with Justices Scalia, Thomas, and Kennedy dissenting), rejected both views. It acknowledged that Young's view would raise pregnant employees to a "most favored nation" status – something that the legislature did not intend. Similarly, it found UPS's approach too restrictive as it did not adequately address the proper category of similar persons.

In a somewhat interesting twist, the Supreme Court merely held that the burden-shifting scheme first announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applied to cases brought under the PDA. Under *McDonnell Douglas*, a plaintiff must prove a prima facie case of discrimination. This burden is not onerous on the plaintiff and the plaintiff need not show that other persons are similar in all but the protected way. To establish a prima facie case, the plaintiff must show (1) she belonged to a protected class; (2) she requested an accommodation; (3) the employer did not grant her an accommodation; and (4) the employer granted accommodations to others similarly situated in their ability or inability to work.

If a plaintiff establishes a prima facie case, the burden shifts to the employer to establish a legitimate, non-discriminatory reason for its actions – a reason that cannot simply consist of the cost to accommodate or its inconvenience. If the defendant establishes a legitimate non-discriminatory reason, the plaintiff must provide sufficient evidence that the employer's policies impose a "significant burden on pregnant workers," that the employer's reasons are "not sufficiently strong to justify the burden," and when considered with the burden imposed, give rise to an inference of intentional discrimination. In dicta, the Supreme Court opined that a plaintiff can establish this burden by showing the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers.

In its decision, the Supreme Court did little to clarify the PDA. While the Court did express doubt over the Equal Employment Opportunity Commission's guidance that an employer cannot accommodate with light-duty work employees injured on the job but not pregnant workers, it may prove difficult for such policies to survive given the ruling by the Court. Furthermore, courts already generally recognized that the *McDonnell Douglas* framework applied to PDA cases. The Supreme Court passed on the opportunity of providing any clear guidance on the proper class of employees who are "other persons" similarly situated in their ability or inability to work.

The Supreme Court in *Young* noted that Congress passed amendments to the Americans with Disabilities Act in 2008 which could affect its ruling. Congress amended the ADA by adding language that physical or mental impairments that substantially limit an individual's ability to lift, stand, or bend are ADA-covered disabilities. Although pregnancy itself is not considered a disability, employers may still have a duty under the ADA to accommodate if an employee, like Ms. Young, has a lifting restriction.

For now, employers should critically evaluate their policies to determine whether said policies tend to disfavor pregnant employees over non-pregnant employees. Although an employer may have legitimate non-discriminatory reasons for any of its policies, an employee may survive summary judgment through a showing that a large percentage of pregnant employees do not receive accommodations when non-pregnant employees do.■

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Abercrombie's primary argument in the case was that it did not have actual knowledge that Elauf wore the headscarf as part of her faith, and therefore, its decision not to hire her could not have been "because of" Elauf's religion. In fact, Elauf never informed the Assistant Manager that she was Muslim during her interview and the interviewer never inquired as to why Elauf wore the headscarf. The Assistant Manager testified, however, that she suspected Elauf wore the headscarf for religious purposes and advised the District Manager of her suspicion. The trial court rejected Abercrombie's argument on summary judgment and the Tenth Circuit Court of Appeals reversed, agreeing with Abercrombie that an employer cannot be held liable for discrimination unless it had actual knowledge of the applicant's need for a religious accommodation.

Supreme Court Opinion

The Supreme Court reversed the Court of Appeals and held that the EEOC's claim should go forward despite Abercrombie's claim that it lacked actual knowledge of Elauf's need for a religious accommodation. The Court explained that the language of Title VII says the need for an accommodation must be a "motivating factor" in the employer's decision not to hire the applicant; nowhere does the statute contain the word "knowledge." As stated by the Court, "motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."

In rejecting Abercrombie's argument, the Court further noted: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions..."

In rejecting Abercrombie's argument, the Court further noted: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays." "If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII." Justice Antonin Scalia wrote the majority opinion for the Court.

Justice Samuel Alito, Jr. concurred with the majority opinion, but thought it went too far. Justice Alito found ample evidence in the record that Abercrombie had knowledge that Elauf wore the scarf for religious reasons and thought that, by concluding that proof of such knowledge was unnecessary, the Court was setting up employers for liability without fault. The majority responded to Justice Alito in a footnote, stating "it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice….That issue is not presented in this case, since Abercrombie knew—or at least suspected—that the scarf was worn for religious reasons."

Best Practices for Employers

Because the case presents a risk that employers can be held liable for discrimination even without affirmative knowledge that an applicant requires a religious accommodation, employers should become familiar with their policies, including dress codes, and be prepared to ask applicants if the policies may create a problem for them. This at least broaches the subject of whether a religious accommodation may be needed, without the employer directly questioning the applicant regarding their religious practices (which is not advised).

Also, employers should be aware that the mere uniform application of a neutral dress policy is not sufficient to avoid a religious discrimination claim. As Justice Scalia explained, "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices." Title VII requires employers to give religious practices "favored treatment" by accommodating those practices (e.g. making an exception to the dress policy) unless such an accommodation would create an undue hardship.■

CONTACTS

Labor & Employment Law

William M. Furr, Chair	wfurr@wilsav.com
William E. Rachels, Jr.	wrachels@wilsav.com
Gregory A. Giordano	ggiordano@wilsav.com
Samuel J. Webster	swebster@wilsav.com
Christopher A. Abel	cabel@wilsav.com
Susan R. Blackman	sblackman@wilsav.com
David A. Kushner	dkushner@wilsav.com
Stephanie N. Gilbert	sgilbert@wilsav.com
Phillip H. Hucles	phucles@wilsav.com

Immigration

Susan R. Blackman	sblackman@wilsav.com
James B. Wood	jbwood@wilsav.com

Employee Benefits

Cher E. Wynkoop	cwynkoop@wilsav.com
David A. Snouffer	dsnouffer@wilsav.com
Corina V. San-Marina	csanmarina@wilsav.com

WILLCOX SAVAGE
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510

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as confusing and unworkable. Despite 295 pages of proposed regulations, the DOL has not recommended any changes to the duties tests. The DOL will consider the public comments and issue a Final Rule in 2016.

President Obama has predicted that an additional five million individuals will become eligible for overtime pay under the new regulations. Once the Final Rule is issued, employers will need to conduct annual checks to ensure that their exempt employees are paid above the minimum salary thresholds. For employees paid below the salary threshold, the employers must either: 1) re-classify the employee as non-exempt and pay the employee the overtime rate for hours worked over 40 hours in a work week, or 2) increase the affected employees' salaries to meet the new salary threshold.

When the DOL issues its Final Rule next year, we will update this article. Stay tuned.■

MANDATORY OUT-OF-POCKET LIMITS IN 2016 FOR NON-GRANDFATHERED PLANS

Cher E. Wynkoop & Corina V. San-Marina

Effective January 1, 2016, high deductible health plans must apply an embedded self-only out-of-pocket (OOP) maximum to each individual enrolled in family coverage if the plan's family OOP maximum exceeds the OOP limit for self-only coverage, which is $6,850 for 2016. This will affect the design of many employer-sponsored plans that impose a single overall family limit on family coverage without an underlying self-only OOP limit.

For example, in 2016, a family of four with family OOP maximum of $13,000 incurs the following claims: one member $10,000 and each of the other three members $3,000. Because the new self-only OOP maximum applies to each individual, the first member cost-sharing is limited to $6,850 and the plan must pay the $3,150 difference between $10,000 and $6,850. The plan would also pay the $2,850 difference between the family aggregate cost sharing, $15,850 and the plan's $13,000 annual OOP limit for family coverage.

Sponsors of group health plans with an overall family deductible or OOP maximum greater than $6,850 must discuss with their third-party administrator or insurer how they will administer embedded self-only OOP limits.