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How should government regulate the employer-employee relationship?

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SALT LAKE CITY — People of faith have joined together with the gay, lesbian, bisexual and transgender community in two significant developments less than a week apart.

On Wednesday, officials from Equality Utah spoke side-by-side with top leaders from The Church of Jesus Christ of Latter-day Saints. They all supported a proposed anti-discrimination and religious freedom bill that appears poised to pass the Utah Legislature this coming week.

Exactly one week earlier, the Lambda Legal Defense and Education Fund sang from the same hymnal as more than a dozen churches and religious freedom organizations, including the Becket Fund for Religious Liberty. They were supporting Samantha Elauf's headscarf dispute with Abercrombie & Fitch at the Supreme Court.

In that case, the federal government's Equal Opportunity Employment Commission sued the clothing retailer for its refusal to hire the woman, who interviewed for a job wearing a hijab. Abercrombie's sales policy bars its employees from wearing any black clothing on its sales floor.

Those who attended oral arguments on Feb. 25 said that the justices appeared to side with Elauf in her employment discrimination case. "Many members of the court seemed sympathetic to the EEOC's position and Ms. Elauf," said Daniel Mach of the American Civil Liberties Union's Program on Freedom of Religion and Belief. "It's a clear case of religious discrimination, and I'm optimistic that the court will agree."

Here in Salt Lake City, that same coalition of gay rights advocates and people of faith united for legislation that puts convictions about religion and sexuality on an equal footing in the workplace and the housing market.

The Utah bill, introduced by Sen. Stephen Urquhart and Sen. Stuart Adams, does this in declaring that employers may not discriminate "for lawful expression or expressive activity outside of the workplace regarding the person's religious, political or personal convictions, including convictions about marriage, family, or sexuality, unless the expression or expressive activity is in direct conflict with the essential business-related interests of the employer."

In other words, under the bill, employers in Utah may not discriminate against a person because of his or her sexuality, but they also may not fire an individual because she or he expresses the view that marriage should be limited to a man and a woman.

There is something to celebrate about unity, which University of Illinois law professor Robin Fretwell described as a "détente" in a broader culture war.

"We have to find a way to live together," she said. "If Utah can get this balance between religious liberty and gay rights right, I really think it will be the pivot moment for the country."

But it's also important to recognize the consequences of taking disputes about religion and sexuality out of private sector mediating institutions and turning them to federal and state officials who will decide what are socially acceptable mores.

Consider Elauf's case against Abercrombie. Interviewing for the sales job, she never said that her faith prescribed that she wear a headscarf, and she never requested an accommodation because of her religion.

Under Title VII of federal employment law, the model for the Utah bill currently before the Legislature, the burden to seek exemptions from company policies has traditionally been upon the employee or prospective employee.

"In the last several years, however, the EEOC has apparently taken the position that employers must pry into their employees' religious practices whenever they have an inkling of suspicion that an accommodation may be needed," wrote Cato Institute scholars Julio Colomba and Ilya Shapiro in Newsweek.

Indeed, during oral arguments over the matter, the justices debated whether Abercrombie did not inquire enough — or inquired too much — about Elauf's religion while she was applying for the job.

Consider instead the world that would exist in the marketplace without any Title VII protections, as proposed by Stanford University professor Richard Epstein. "Ms. Elauf would apply for a job. The company would ask whether she was prepared to take off her hijab on the floor. At that point, she would have to make a decision. Decide no, and she would be told that no offer could be extended. It would be totally irrelevant whether she insisted on wearing the hijab because of religious, cultural or personal beliefs."

Abercrombie is hardly the only clothing retailer, let alone the only employer, to whom a job applicant may apply. And that's why Epstein urges this simpler world. It keeps employers and potential employees out of a "theater of the absurd" situation where employers can't ask about religion and sexuality, but must also reasonably accommodate employees' "lawful expression or expressive activity."

Whether in families, communities or businesses, good relationships do not arise from coercion. Even when influential stakeholders agree on the need for laws, we should pause to consider the cost before further regulating the employer-employee relationship.