



## **Supreme Court to Weigh Employer's Responsibility in Avoiding Discrimination**

**Abercrombie case could result in a reinterpretation of how religious protections are recognized in the workplace.**

**By Tierney Sneed**

**February 23, 2015**

The Supreme Court on Wednesday is scheduled to hear the appeal of a Muslim woman denied a job at a retail clothing store because of her headscarf – a case with broad implications for the way religious protections are recognized in the workplace.

The arguments concern Samantha Elauf, a practicing Muslim who was 17 in 2008 when she applied for a job at an Abercrombie and Fitch store in Tulsa, Oklahoma. Abercrombie has strict appearance requirements of its sales-floor employees, referred to as "models," including a prohibition of headgear. How applicants present themselves in the job interview is an important element of the hiring process.

The Equal Employment Opportunity Commission, which is representing Elauf in the case, argues that Title VII of the Civil Rights Act of 1964 protects Elauf from being disqualified from the job due to the fact she was wearing a headscarf, known as a hijab. Title VII requires that employers offer accommodations to certain policies, such as dress code, where religion is concerned, given that the accommodations don't incur an "undue hardship on the conduct of the employer's business."

A district court sided with Elauf, who was awarded \$20,000 in compensation. But the decision was overturned on appeal. Abercrombie, which has said its policy was to grant religious accommodations – including the wearing of hijabs – when employees requested them, argued that the store had no way of knowing she was seeking an accommodation since she didn't explicitly say in the interview that she wore the headscarf for reasons of faith.

That argument is what distinguishes the case and could set precedent going forward.

"It really shifts the burden onto the employee to raise every aspect of what every employee needs in the workplace in a job interview," says R. Scott Oswald, managing principal of The Employment Law Group.

Though the headscarf didn't come up in Elauf's the interview, the manager who interviewed her asked a higher-up about it. The manager says she told her superior she "did not know" but "assumed" that Elauf was Muslim and says the higher-up told her to lower the score on Elauf's application because of the headscarf, disqualifying her for the job. EEOC lawyers have said in court filings that the exchange shows the company was aware of her religious identity and raises the question of whether Title VII should be read to require Abercrombie to offer an exemption.

The higher-up disputes that the manager told her that the headscarf was likely religious, and in any case, Abercrombie is arguing that it is up to the job applicant to bring up whether he or she could qualify for a religious accommodation, particularly as other EEOC guidelines prohibit interviewers from inquiring about an applicant's religion.

Ilya Shapiro – a senior fellow at the libertarian Cato Institute, which filed a brief in support of Abercrombie – agrees with this line of thought.

"Employers shouldn't have to be mind-readers," he says, and given that job interviewers are discouraged from asking questions about an applicant's personal life, "they're walking on a tightrope."

The Chamber of Commerce is also among the organizations supporting Abercrombie with case filings.

However, Oswald says that employers hold much of the power in the hiring process and thus the burden should belong to them to act on assumptions that an applicant unfamiliar with company policies might need a religious exemption.

"It really reflects the reality of the job interview process, that the employer has better knowledge of what is required in a job performance," Oswald says.

He adds that a court ruling in favor of Abercrombie could also put people in other classes protected by Title VII, such as disabled people and even pregnant women, at a disadvantage, as employers would not have to consider certain accommodations unless applicants specifically sought them.

The conservative-bent Supreme Court has made religious freedom a priority in decisions such as Hobby Lobby, which said certain private, non-religious employers do not have to cover an employee's birth control if it infringes upon their religion, and in a recent ruling in favor of a Muslim inmate seeking to grow a beard for religious purposes that was prohibited by prison policy.

But it has also been in tune to the interests of business, for instance ruling in December that companies are not required to compensate employees for time spent adhering to certain security protocols.

“The justices that have been most solicitous of religious liberty are also most solicitous of economic liberty, so I think they'll be torn,” Shapiro says.

Not surprisingly, a number of religious organizations – including Jewish and Christian groups – have been supportive of the EEOC’s case.

“There should be a natural acknowledgement of the role religion plays in people's lives,” says Eric Baxter, senior counsel at the public interest law firm the Becket Fund for Religious Liberty, arguing that Abercrombie should have been able to reasonably assume that Elauf’s headscarf could be worn for religious reasons.

“They’re trying to play dumb and the court shouldn’t allow that,” he says.

A ruling in favor of Abercrombie wouldn't be the first in which the justices acted in a manner that could potentially limit recognized civil liberties. The Supreme Court has also peeled back the reach of some civil rights legislation, for instance in 2013, gutting a key part of the Voting Rights Act.

“There’s been a backpedaling on the protections that the minorities have had for so many years,” says Yolanda Rondon, staff attorney at American-Arab Anti-Discrimination Committee.

“Is there still a need for these civil rights laws? That's at the core of these cases.”

Still, some experts believe, despite the other concerns, believe religious liberty – particularly as it applies to job applicants – will win out.

"Overall, this is a court that has very much favored employers in employment discrimination suit," says Erwin Chemerinsky, dean of the University of California, Irvine School of Law. "But the context of this case makes it likely the court will be much more sympathetic to the woman who did not get hired because of wearing a head covering."