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PERSPECTIVE

Guarding the liberties of religious Americans

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A half-century after the enactment of Title VII of the Civil Rights Act of 1964, the U.S. Supreme Court, in an 8-1 decision authored by conservative Justice Antonin Scalia, has finally provided a bright-line rule to assist lower courts in enforcing the federal civil liberties of religious Americans.

Last week, in *Equal Employment Opportunity Commission v. Abercrombie and Fitch Stores Inc.*, the court made clear that the plaintiff in a religious discrimination case need not prove the employer had actual knowledge of her need for a religious accommodation in order to meet her burden to prove religious discrimination under federal employment law. An employee need only show the need for the accommodation was a motivating factor in the employer's decision to take an adverse employment action. Scalia clarified that "motive and knowledge are separate concepts." Put another way, if it is apparent that an individual is wearing an article of clothing for a religious purpose, an employer cannot claim ignorance simply because the employee did not explicitly state that it was worn for that purpose, and thereafter refuse to hire that person.

In *Abercrombie*, Samantha Elauf applied for a position at Abercrombie and Fitch, which maintained a strict "no-caps" policy as part of its dress code. To her interview, as mandated by her Islamic faith, Elauf wore a headscarf, or hijab. Abercrombie employees debated internally as to whether Elauf's scarf would violate the no-caps policy, ulti-

mately concluding that it would, and thereafter refusing to hire her for that reason. At no point did Elauf tell Abercrombie employees that she required an accommodation or that she wore her headscarf for religious reasons. Nevertheless, the interviewer suspected she wore the hijab because of her Muslim faith, and that fact was a motivating factor in Abercrombie's decision to deny Elauf employment for which she was otherwise qualified. This, the Supreme Court ruled, is prohibited by Title VII. The court reversed the 10th U.S. Circuit Court of Appeals, rejecting that court's reasoning that the employee bore the burden of proving that she had affirmatively informed the employer that her attire was dictated by her faith, as no such obligation appears in the plain language of Title VII.

Scalia demonstrated the reach of the court's opinion beyond the instant case and articles of the Islamic faith, providing the observance of the Sabbath as an example. He reasoned, "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." It is the employer's discriminatory motive to refuse to hire an individual, regardless of its basis, that runs afoul of Title VII. The court assumed, for purposes of the opinion, that no valid defense to the obligation to accommodate articles of faith — such as undue hardship — applied in the case be-



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Samantha Elauf, the plaintiff in *EEOC v. Abercrombie*, stands outside the Supreme Court in Washington, Feb. 25.

fore it, although an employer who had such a defense could assert it in the appropriate case.

Elauf's victory has wide-reaching implications beyond the hijab. Its rationale logically extends to protect individuals of all religious faiths, whether Sikh employees wearing turbans and beards, Jewish applicants wearing yarmulkes or Hasidic attire, or Sabbath observers of different faiths. It will now be simpler for employees with patently obvious religious needs to obtain the accommodations they require — just as it will now be clearer to employers that they need to be as sensitive to religious factors as they already are to gender, race, national origin, disability and other protected categories under Title VII.

A turban-wearing Sikh man applying for a job, for example, would not need to inform his potential employer that he wore a turban because of his Sikh faith, so long as the need to wear the turban were a motivating factor in the denial of employment. Even a suspicion that the turban was worn for religious reasons would be enough to protect his rights. Sc-

lia noted that Title VII does not merely "demand neutrality ... it gives [religious practices] favored treatment, affirmatively obligating employers" not to discriminate in hiring and firing because of religious observance.

The effects of *Abercrombie* will be of particular import in California, as one of the most diverse states in the nation. Californian Sikhs, for example, many of whom are obligated by their faith to wear turbans and beards, comprise nearly 40 percent of the country's total estimated Sikh population, and number approximately 250,000. California is also one of the 10 states with the largest populations of Muslim-Americans. The decision will allow these and other religious individuals to be free from invidious discrimination based on their sincerely held religious practices, and will provide them with the opportunity to contribute actively to the economy of our state, without having to jump through a series of procedural hoops to inform their potential employer of the religious basis for their readily apparent religious observances.

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