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The United States Supreme Court Rules in Favor of Employees in the Young and Abercrombie Cases: What Do They Really Hold?

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Abstract

Two recent decisions by the U.S Supreme Court have been characterized as “losses” for employers, and “wins” for employees who wish to have workplace accommodations due to their particular situations. Those perceptions are demonstrated in the popular press reports regarding the decisions, shown in the sidebar on the next page. While the employee indeed prevailed in both of those Supreme Court holdings, neither one indicates that the sky is falling for employers nor that nirvana has been reached for employees. Instead, the Young and Abercrombie decisions are so narrow that it is nearly impossible to determine what they really stand for. With that in mind, the purpose of this article is to dispel any myths regarding these cases, to set forth a detailed analysis of the Supreme Court’s holdings, and to outline how employers should react, subject to advice of counsel.

Keywords

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by David Sherwyn and David B. Ritter

EXECUTIVE SUMMARY

An analysis of two recent employment-related decisions by the U.S. Supreme Court finds that the two holdings neither expanded the scope of accommodation required for certain special employee situations nor did they clarify the complex and conflicting statutes and regulations regarding employee accommodation. In the case of *Young v. United Parcel Service, Inc.*, the Court disturbed a long-standing precedent regarding accommodations of pregnant employees under civil rights law by essentially turning each case into one where the facts of the situation must be tried under a challenging new standard. In the second case, *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, the Court sidestepped the question of the extent to which an employer should go to accommodate a religious belief, but affirmed an obvious civil rights principle that an employer cannot discriminate in a hiring decision based on the assumption that an employee would seek accommodation for religious observances.

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Popular reports regarding the Abercrombie *and* Young *holdings*

Politico: The Supreme Court ruled Monday against the retailer Abercrombie & Fitch, 8-1, deciding that the company's failure to accommodate a job applicant who wore a hijab violated civil rights law.1

The EEOC: EEOC General Counsel David Lopez hailed the decision. "At its root, this case is about defending the quintessentially American principles of religious freedom and tolerance," Lopez said. "This decision is a victory for our increasingly diverse society and we applaud Samantha Elauf's courage and tenacity in pursuing this matter."2

The Guardian: At the crux of Young's case is whether or not employers should allow for temporary assignments when workers are restricted from certain tasks due to pregnancy.3

1 www.politico.com/story/2015/06/ambercrombie-fitch-hijab-case-supreme-court-ruling-118492#ixzz3n8W0YEeq.

2 www.eeoc.gov/eeoc/newsroom/release/6-1-15.cfm

3 www.theguardian.com/us-news/2015/mar/25/us-supreme-court-ups-pregnancy-discrimination-suit

The two cases we analyze here are *Young v. United Parcel Service, Inc.*[1] and *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*[2] Both cases concerned an employee's workplace accommodation, and in each case the employee prevailed, albeit for very different reasons.

Young

The *Young* case deals with pregnancy accommodations. It hinges on UPS's policy of offering light duty to employees who: **(1)** were hurt on the job; **(2)** lost their Department of Transportation certifications to operate a vehicle; or **(3)** had disabilities covered by the Americans with Disabilities Act (ADA). With regard to point 1, the company did not offer light duty to employees who were hurt outside of work (e.g., slipping in the shower, carrying a child) or who could not lift due to pregnancy.

Based on the perception that there are no issues of material fact to be decided, the district court granted summary judgment in favor of UPS, and the Court of Appeals for the Fourth Circuit upheld the lower court's decision. However, Young argued that some employees who did not fit into any of the three categories listed above did, in fact, receive an accommodation. Such an allegation, if it has any merit, makes summary judgment inappropriate. Since facts were at issue, it was logical for the Supreme Court to overturn the decisions of the lower courts. The Supreme Court's opinion, however, did not stop there. Instead of simply remanding the case, the Supreme Court provided guidance on the law. Unfortunately, as explained more fully below, the guidance did not really provide much clarification, but did lead to misperceptions.

The Parties' Positions

The employer and the employee, as is to be expected, argued two different interpretations of the Pregnancy Discrimination Act (PDA) requirements with regard to accommodations. The first clause in the statute, which was not in contention, states that discrimination because of sex includes discrimination because of pregnancy.[3] That much is clear. Employers cannot fire, refuse to hire, fail to promote, or demote a woman because she is pregnant. Such actions would violate Title VII's prohibition against sex discrimination. The case hinged on the second clause in the PDA, which is much less clear: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes…as other persons not so affected but similar in their ability or inability to work."[4]

The employee argued that the employer must provide accommodations to pregnant women if it provides such accommodations to anyone with a similar inability to work. In other words, accommodations, whether mandated under the ADA or provided as part of a Workers' Compensation plan, would now have to be available to pregnant employees. This would be the case even if other employees (e.g., those with non-work, non-ADA injuries) do not receive accommodations.

As to be expected, UPS argued that this interpretation did not accurately reflect the language of the statute. Instead, UPS argued that the term "shall be treated the same… as other persons not so affected…" means that employers can have different policies for different types of injuries and people as long as there is a facially neutral policy. In other words, a policy that allowed for accommodations for work limitations caused by ADA disabilities and Workers' Compensation injuries, but did not provide for accommodations for limitations necessitated by off-the-job injuries or pregnancy would be lawful.

EEOC's Regulation Changes

To make matters more complex, in 2014 the Equal Employment Opportunity Commission (EEOC), the agency that enforces and promulgates rules on how to comply with the discrimination laws, made a major change or, depending on one's point of view, a clarification. However, this rule making took place after the Supreme Court agreed to hear the *Young* case.

The 2014 rule making represented a further step for earlier guidelines. After the PDA went into effect in 1978, the EEOC

1 135 S.Ct. 1338 (2015).

2 135 S.Ct. 2028 (2015).

3 42 U.S.C. § 2000e(k).

4 *Id.*

issued a guideline stating: "Disabilities caused or contributed to by pregnancy…for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions."[5] Furthermore, the regulations stated: "If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function."[6]

This 1978 statement by the EEOC, however, does not resolve the discrepancy between the employer's and the employee's positions. One could read it as standing for the proposition that an employer that accommodates any work limitation caused by a medical condition must also accommodate pregnant employees. Such a reading seemingly conflicts with the first part of the regulation stating that pregnancy needs to be treated like other medical conditions. Employers who allowed light duty for "on the job" injuries and thus denied light duty to pregnant employees would seemingly be in compliance with the first part of the regulation. If so, the phrase "other employees temporarily unable…" could be read as "other employees whose limitations are caused by disabilities in the same category as pregnancy" (i.e., non-work-related injuries). In that case, policies that provided some light duty, but not for all disabilities, including pregnancy, could be lawful.

In contrast, the EEOC's 2014 regulations are clear:

> An employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job).[7]

The EEOC also provided an example of disparate treatment that would violate the act:

> An employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request.[8]

The EEOC further eliminated any ambiguities in its regulations by adding, "an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries."[9]

The EEOC's clarified regulations could have settled the issue in *Young* if the Supreme Court had adopted them. That did not occur. According to the Supreme Court, the EEOC issued the new regulations *after* the Court agreed to hear the *Young* case, thereby undermining the regulations' validity and the EEOC's credibility. Moreover, the government had, in the past, argued the UPS interpretation of the regulations. Because the EEOC failed to explain the basis for its new regulation and, specifically, why it conflicted with the government's previous position, the Supreme Court stated it could not rely significantly on the EEOC's determination.

The *Young* Holding

The question the Supreme Court addressed was fairly straightforward: Do pregnancy limitations require the same accommodations as the ADA (which are clearly required by law) and any other accommodations given to any employees with work limitations caused by medical conditions *or* may employers refuse such accommodations as long as some other group is not being accommodated?

In addressing this matter, the Supreme Court could have done one of three things: **(1)** focus on the facts; **(2)** make a clear ruling of law; or **(3)** address the conflict, but not give a clear answer. In terms of setting precedent, the first option would be the worst, the second the best, and the third would lead to confusion. The Supreme Court chose the third option.

The reason that focusing on the facts would have been the worst choice is that the factual issues here are fairly straightforward. Young argued that some employees who did not fall into any of three categories above were still given light duty, while pregnant women were denied such accommodations. If Young's assertions are accurate, this is likely a clear case of discrimination because pregnancy is being treated differently than other causes of work limitations not set forth in the policy. As stated above, since this question of fact is not resolved, summary judgment is inappropriate, and the case needs to be remanded to determine whether Young is correct. If she is, then there is no guidance. If she is wrong, then the question is one of law: the Supreme Court would have not given any guidance, and the case would begin all over again.

The second option would be best because it would provide clear guidance for employers: **(1)** either pregnancy is equal to the ADA in that employers must accommodate unless the accommodation creates an undue hardship, and any accommodations for any employees with medical work limitations must be applied to pregnancy; *or* **(2)** employers can distinguish between the cause of the injury (i.e., on the job versus off the job) and employers must treat pregnancy like any other short-term disability. While employers and employees may disagree over which outcome is best, we contend that clarity always trumps uncertainty. Unfortunately, the Supreme Court gave us uncertainty.

In trying to create some kind of middle ground, the Supreme Court created an issue of fact for *every* case, and disturbed a long-standing precedent. The *Young* decision initially follows

[5] 29 C.F.R. § 1604.10(b).

[6] 29 C.F.R pt. 1604, App., p. 918.

[7] 2 *EEOC Compliance Manual* §626–I(A)(5), p. 626:0009 (July 2014).

[8] *Id.* at 626:0013, Example 10.

[9] *Id.* at 626:0028.

the well-established *McDonnell Douglas* framework. Under that precedent, the employee must prove that: **(1)** she is pregnant; **(2)** she sought an accommodation; **(3)** she was denied an accommodation; and **(4)** the employer accommodated other employees similarly situated in their ability or inability to work. [10] Then, the employer can produce a legitimate, non-discriminatory reason for denying the accommodation. Finally, the employee may (if possible) then prove that the employer's legitimate, non-discriminatory reason was a pretext for discrimination.[11] Under this framework, for decades, employers have generally defended claims of discrimination by providing a legitimate, non-discriminatory reason for the action that the plaintiff claims was discrimination.

In this framework, limiting accommodations to work-related or ADA disabilities would not be unlawful. However, the Supreme Court moved beyond the *McDonnell Douglas* framework. Instead, the Court stated that the employer's reason for not adding pregnancy to its list of covered disabilities cannot be based on cost or convenience. While such a statement seems reasonable, the Supreme Court has never before qualified the employer's legitimate, non-discriminatory reason in this manner. Indeed, lower courts throughout the country have held that courts should not act as a "super personnel department" or "second guess" an employer's legitimate business justifications.[12]

The Supreme Court's "cost or convenience" edict certainly adds a new layer to the analysis. Under this approach, the employer must explain why it limited the eligible accommodation conditions and justify its reasoning. If costs or convenience will not justify distinguishing pregnancy, then what will? Furthermore, the Supreme Court created a challenging standard:

> We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.[13]

There are two major problems for employers with this statement. First, as stated above, the rationale for the employer's non-discriminatory decision is now at issue. Instead, the question should be: Is the purpose of the employer's decision to discriminate? If so, guilty, and if not, not guilty. Second and far worse, the last part of the statement creates a standard that will be difficult to navigate: "reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination."[14]

Here is why this will be a challenge. Assume that an employer has a policy that limits accommodations to on-the-job injuries and ADA disabilities. Say further that the employee proves that this policy burdens her greatly as she cannot work and needs the money. That certainly would be an easy matter for an employee to demonstrate. The employer's reason for the policy is that the ADA requires accommodations, and the employer's workers' compensation carrier provides a discount on its insurance premiums for providing light duty. (It's also worth noting that many employers are small and cannot afford to pay employees who cannot do their job.)

Unwinnable. From a legal standpoint under the new standard, employers can never win this contest. Because costs cannot justify a policy, the Supreme Court would find that the employer here discriminated (due to cost). But the employer did not in fact discriminate. Instead, it followed the law of the ADA and took advantage of the discount provided by its insurance carrier. How can that be considered discrimination when employees who get hurt playing a sport or who choose to donate bone marrow or a kidney to a loved one would also not be accommodated under this policy? It is one thing to require accommodations and hold an employer liable for failing to provide such. It is another issue to state that an employer who establishes a policy based on costs and perceived fairness is to be considered guilty of pregnancy discrimination—a reprehensible act, if true.

From a practical standpoint, this standard makes even less sense. Say that the employee proves that such a policy burdens her. The question now becomes does such a policy justify the

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10 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

11 *Young*, 135 S.Ct. at 1354.

12 See, e.g.: *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986) ("This Court does not sit as a super-personnel department that reexamines an entity's business decisions."); *Chiarmonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 400 (7th Cir. 1997), cert. denied, —U.S.—, 118 S.Ct. 1795 (1998) ("This Court has established that it "does not sit as a super-personnel department that reexamines an entity's business decisions.'"); *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1120 (8th Cir. 1997) (stating that employment discrimination statutes do not "entitle courts to "sit as super-personnel departments,' second-guessing the wisdom of businesses' personnel decisions."); *Brill v. Lante Corp.*, 119 F.3d 1266, 1272 (7th Cir. 1997) ("Courts refuse to sit in judgment as super-personnel departments overseeing corporate decisions, even if some judges think the decisions to be mistaken or perplexing or silly."); *Day v. Johnson*, 119 F.3d 650, 657 (8th Cir. 1997), cert. denied, —U.S. —, 118 S.Ct. 707, (1998) ("federal courts are not self-appointed personnel managers, and they may not second-guess the fairness or wisdom of an employer's nondiscriminatory employment decision"); *Walton v. Bisco Indus. Inc.*, 119 F.3d 368, 372 (5th Cir. 1997) ("we do not view the discrimination laws as vehicles for judicial second-guessing of business decisions.); *Greenslade v. Chicago Sun-Times, Inc.*, 112 F.3d 853, 865 (7th Cir. 1997) ("this court "does not sit as a super-personnel department that reexamines an entity's business decisions'"); *Fischbach v. D.C. Dep't. of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Even if a court suspects that a job applicant "was victimized by poor selection procedures' it may not "second-guess an employer's personnel decision absent demonstrably discriminatory motive.'"); and *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 537 (1st Cir. 1996) ("Courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions.'").

13 *Young*, 135 S.Ct. at 1354.

14 *Id.*

burden? How does an employer know whether the benefits of its policy outweigh the burden on a specific employee? If the policy is based on cost, the Supreme Court's decision means that the employer will lose. If it's not a cost issue, the issue becomes a jury question, based on the Court's statement.

In fact, it seems that all policies that exclude pregnancy accommodations are now jury questions. If so, the costs of a full trial will, 99.9 percent of the time, exceed the cost of any one accommodation. Unless the employer believes it will soon have a pregnancy epidemic, it will never make sense to litigate the case. The practical impact is that pregnant employees will be treated more favorably than other employees seeking accommodation. The holding, however, does not end there.

Employers and their counsel should be ready for lawyers representing employees in all types of discrimination cases to use this balancing approach whenever feasible. It would not be surprising to start seeing employees using cost or arguing that the employer's legitimate, non-discriminatory reason was not "sufficiently strong" to justify the burden on the employee in cases alleging discrimination based on race, age, national origin, and the like. If this concept is applied elsewhere in Title VII, it could forever tip the balance in favor of the employee and upend decades of law relied on by employers.

That said, it does not appear that the is sky falling or that employees won across the board with regard to accommodations. Since pregnancy accommodations are, for all intents and purposes, short-term accommodations, and because the ADA has expanded coverage to include other short-term disabilities, the additional burden is likely not that great, and from a good will standpoint, it seems like the right thing to do.

Nevertheless, the case leaves a question open. What if the employer does not provide light duty to anyone? Light duty is not required under the ADA unless it's reasonable, not an undue hardship, and the employer provides it for others. Employers who do not have light duty for anyone now should not have to do it only for pregnant employees. There is nothing in this case that disputes this conclusion, except that the "new" interpretation of *McDonnell Douglas* creates new questions, but no clear answers.

Lessons of *Young*. Before we move on to the *Abercrombie* case, let's look at what employers should do in the wake of *Young*. It's time to review policies. If the employer has light duty—expand it to include pregnancy. If the employer does not have light duty and sees it as a true burden, do not let a workers' compensation carrier attempt to start such a program to save workers' compensation premiums at the expense of the proverbial slippery slope. As long as the company does not provide light duty to anyone, it should be able to avoid it for ADA and pregnant employees. This statement, however, is a "should," not a "will," and you will need to check with counsel if you get such a request.

Abercrombie

The second accommodation case, *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, is another example of the EEOC attempting to expand employers' obligations to accommodate employees—in this instance, for religious observance. The Supreme Court ruled for the employee in this case, but in doing so did not really expand the law.

The Law of Religious Accommodation

Any analysis of the *Abercrombie* case has to begin with *Trans World Airlines, Inc. v. Hardison*,[15] the Supreme Court's 40-year-old decision on religious accommodations. Hardison, the employee, was a Jehovah's Witness who worked in building 1 at the job site, where he had enough seniority to be able to practice his religion by not working weekends.[16] After transferring to building 2, however, he was second from last in the collectively bargained seniority pool. Hardison was then scheduled to work on Saturdays when a fellow employee was on vacation. Hardison requested an accommodation to observe his Sabbath.

Hardison proposed four different options for his proposed absence: **(1)** overrule the seniority system; **(2)** have a manager perform Hardison's tasks; **(3)** work with one fewer person; or **(4)** have an employee work overtime. The last three options would result in a four-day work week for Hardison. After stating that the union refused to allow the company to override the seniority system, TWA contended that the work was essential and could not be performed by a supervisor nor could it not be performed at all (as would occur with a short-staffed crew). Thus, the only way to get the job performed and not have Hardison work was to have the company pay overtime wages. TWA refused to do that and scheduled Hardison to work on a Saturday. When Hardison did not report to work, TWA fired him.

Then and now, Title VII of the Civil Rights Act requires that an employer make reasonable religious accommodations to its employees, as long as an accommodation does not result in an "undue hardship" for the employer.[17] The question before the Supreme Court in *Hardison* was relatively simple: Was the accommodation reasonable and not an undue hardship?

Before analyzing the Supreme Court's holding, one must remember this was 1977, and there was neither an ADA nor a body of law with regard to accommodations under the statute. The Rehabilitation Act of 1973, a precursor to the ADA, was in place, but this only applied to government contractors. It required reasonable accommodations as long as they were not undue hardships. Because it was a relatively new statute, applied only to government contractors, and was enacted after the *Hardison* case arose, the Supreme Court did not even look to how the terms "reasonable accommodation" and "undue

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[15] 432 U.S. 63 (1977).

[16] The religion's Sabbath is from sundown Friday to sundown Saturday.

[17] 42 U.S.C. § 2000e(j).

hardship" were applied under the Rehabilitation Act. Instead, the Supreme Court simply examined the facts of the case in the context of undue hardship.

In finding for TWA, the Supreme Court held that "[t]o require TWA to bear more than *de minimis* cost in order to give Hardison Saturdays off is an undue hardship" (emphasis added).[18] This is an extraordinarily low standard, as the cost must essentially be negligible. Any cost greater than something that can be disregarded is too much to ask of an employer.

In the world of the ADA, no employment lawyer would ever advise an employer that in the ADA context the standard for undue hardship is *de minimis*. Even so, if TWA were still flying today, it probably would not argue that paying overtime when someone is on vacation would be an undue hardship (even if that amounted to one or two hundred hours in a year), since it would allow the employee to hold a job and fulfill his religious observances.

Despite this, *Hardison* is still good law! Neither the Supreme Court nor Congress has overturned *Hardison* or the *de minimis* standard. The EEOC and plaintiffs' lawyers, however, have been attempting to overcome this and bring religious accommodations to the ADA level for at least a decade.

In *Cloutier v. Costco Wholesale Corp.*,[19] for example, the employee was a member of the Church of Body Modification, which required her to wear facial piercings. The employer, however, had earlier implemented a policy prohibiting facial piercings besides earrings.[20] The case featured a number of ancillary issues—including whether the Church of Body Modification was a sincerely held religious belief, whether facial piercings were required by the church, and whether Costco, which offered to let the employee cover her piercings or wear clear jewelry, offered an acceptable accommodation. These issues were all irrelevant because the court, for the sake of expediency, accepted that this was a truly held religious belief and analyzed the case under an accommodation versus hardship standard, after the employee argued that the only acceptable accommodation was to allow her to wear all her piercings.

Relying on *Hardison*, the First Circuit Court of Appeals held that requiring Costco to amend or relax its grooming policy was more than a *de minimis* cost on the employer and was therefore an undue hardship. The law is therefore clear: religious accommodations with respect to hours, appearance, and whatever else could be requested need not be granted if they impose anything more than the most minimal of costs on the employer.

The *Cloutier* holding is muddled for two reasons. First, while the law is clear that any sincere religious belief is protected, one must wonder if the tenets of the Church of Body Modification might have been viewed with some amount of suspicion. Second, unlike in *Hardison*, the "cost" of the accommodation is difficult or even impossible to quantify—does a nose ring have any effect on the business? Appearance policies are difficult to square with *Hardison* because TWA was able to show tangible, albeit nominal, financial costs of accommodation. Appearance, however, is an issue as we analyze the Supreme Court's decision in *Abercrombie*.

Abercrombie Overview

In *Abercrombie*, the employee, Samantha Elauf, a practicing Muslim, interviewed for a job with Abercrombie and Fitch while wearing a headscarf. Elauf did not volunteer an explanation for the headscarf, and the interviewer, Heather Cooke, did not ask. Cooke rated Eluaf high enough to merit a job offer, but the company did not offer her a position. The reason for not offering the job was that the company had a policy against employees wearing "caps," and Cooke assumed that the headscarf was a religious obligation that Elauf would insist on wearing. In fact, when seeking guidance from her supervisors about the headscarf and company policy, Cooke stated that she believed that Elauf wore the headscarf because of her religion. Randall Johnson, district manager, concluded that the scarf violated the company's "Look Policy," regardless of whether it was worn for religious purposes or not.

If Cooke had asked Elauf whether she wore the headscarf for religious purposes and would not work without it, and if the company then refused to accommodate Eluaf, this would be a straightforward case. The question for the Supreme Court would be simple: Is it a reasonable accommodation and not an undue hardship for an employee to be allowed to wear a headscarf or other religious headwear even if the company has a policy against such apparel? Regardless of the result, employers would have guidance. Although many commentators have reported the decision as if that were the question, it was far more limited than that.

The Limited Supreme Court Holding

Because the employer did not ask about the headwear and because the employee did not volunteer any information, the Supreme Court answered a different question: Can an employer, seeking to avoid accommodating a religious requirement, refuse to hire an applicant whom the employer *thinks* may require a religious accommodation? The Court's answer is no. An employer may not refuse to hire such an employee. Thus, as the Supreme Court stated, an employer cannot refuse to hire an applicant because the company inferred that the applicant is an observant Jew who cannot work Saturdays and the company does not wish to make such an accommodation. This is a different matter from refusing to make an accommodation for an employee.

The Supreme Court did not examine whether headwear should be accommodated or were an undue hardship, and it

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[18] *Hardison*, 432 U.S. at 84.

[19] 390 F.3d 126 (1st Cir. 2004).

[20] There was no dispute that the employer implemented its policy with no idea that Cloutier's piercings were a part of her religious belief.

did not address the *de minimis* standard from *Hardison*. Instead, it simply held that it is unlawful to base a hiring decision on a perceived need for an accommodation. The difference is not so subtle. Employers cannot refuse to hire an applicant because the applicant likely needs an accommodation. Employers may, however, refuse to make an accommodation for an employee if it is an undue hardship.

Because it was not answering the relevant question, the legal analysis briefed by the parties and discussed at oral argument centered on contentions that were similar to the *Young* case, but in this situation were, at best, misguided. *Young* involved pregnancy accommodation, but *Abercrombie* involved a discriminatory hiring decision. In that regard, Title VII defines protected religion as "includ[ing] all aspects of religious observance and practice, as well as belief."[21] The Court rightly noted that in addition to being protected against disparate treatment, religious practice "must be accommodated."[22]

In his concurring opinion, Justice Samuel Alito contended that the Tenth Circuit, which will hear the case on remand, must now decide whether accommodating the headwear is an undue hardship. There is nothing in the majority opinion that conflicts with this statement and, thus, interested observers will need to stay tuned to see how the case is finally resolved.

Another Aspect: Burden of Proof

One last issue that arose out of Justice Alito's concurrence is the issue of the burden of proof, which his statement appears to place on the employer. The conflict between the majority and Alito shows the uncertainty surrounding the issue. Alito cites the statute, which states:

> It shall be an unlawful employment practice for an employer...to fail or refuse to hire...any individual... because of [any aspect of] such individual's...religious...practice...unless an employer demonstrates that he is unable to reasonably accommodate to [the] employee's or prospective employee's religious... practice...without undue hardship on the conduct of the employer's business.[23]

Alito argues that if an employee requests a religious accommodation, the *employer* must prove it's an undue hardship. Under the ADA, however, the *employee* must prove that the accommodation is reasonable (i.e., costs of the accommodation, from a societal standpoint, outweigh the benefits). If not, the employer need not provide that accommodation. If, however, the employee demonstrates that the benefits outweigh the costs, the employer can still prevail by showing the accommodation is an undue hardship. Neither the majority opinion nor Alito's concurrence separate the analysis into two parts, however. Alito simply states the employer must prove undue hardship, while the majority opinion collapses the failure to hire and failure to accommodate into one allegation and then states that, of course, it is the plaintiff's burden.

This is an important distinction, since the outcome of the case may rest on which party bears the burden of proof.[24] This is true because in appearance cases it may be impossible for an employer to prove that making an accommodation creates an undue hardship. Similarly, it will also be impossible for the employee to prove an appearance accommodation does not cause an undue hardship. Thus, whichever side has the burden may be unable to prevail. Who has the burden, at this point, is not clear.

What Employers Can Do

The EEOC, through regulations and litigation, is clearly attempting to expand religious and pregnancy accommodations so that the terms "reasonable accommodation" and "undue hardship" with respect to these protected classes have the same or similar meanings as those under the ADA. The reality that neither case law nor statutes support such an interpretation is not stopping the EEOC, however, and those who refuse to offer accommodations may face the commission's wrath. Indeed, in the *Abercrombie* case, the EEOC litigated on behalf of the employee.

Employers must therefore make a cost-benefit analysis. Does the benefit of refusing to accommodate pregnancy and religion (in terms of money saved or brand indemnity, for example) outweigh the costs of litigation, bad publicity, and ill will that may accompany such a refusal? If the benefits of not accommodating are, in fact, high, employers must work with counsel to ensure that their religious accommodation policies are in accordance with *Hardison,* and their pregnancy accommodation policies are in accordance with *Young*.

Borrowing a page from the ADA, an employer should consider engaging in the so-called "interactive process," whereby the parties discuss possible accommodations and the employer can attempt to provide options for the employee. There is no authority stating that this is necessary or that it will result in the employer prevailing in subsequent court action. Still, the history of the district courts in discrimination cases is that these courts are results oriented, and they are more likely to rule in favor of employers who are "good actors" attempting to do the right thing." That said, employers who refuse to accommodate must be ready to spend time and money to defend their policies. ■

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[21] 42 U.S.C. § 2000e(j).

[22] *Abercrombie*, 135 S.Ct. at 2033.

[23] Justice Alito combined 42 U.S.C. § 2000e-2(a) & § 2000e(j).

[24] See: David Sherwyn and Michael Heise, "The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes," *42 Ariz. St. L. J.* 901 (2010).

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