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More EEOC V. Abercrombie & Fitch: Why No Disability Accommodation Angle?

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The U.S. Supreme Court recently heard oral argument in the case involving the scope of an employer's obligation, if any, to initiate religious accommodation discussions with an applicant who was wearing clothing that would violate the company's apparel policy but that would seem to be being worn for religious purposes. The federal court of appeals that heard the case seemed to say the company had no affirmative obligation, it had not discriminated if the applicant did not raise the issue. In reading the argument transcript, it is evident the justices were wrestling with where to draw the line (but seemed like they would not simply affirm the lower court's decision).

One of the things that surprised me about the argument and the coverage of the case generally is that there is no discussion of if and how the well-developed body of law regarding when an employer's disability accommodation obligations are triggered might apply. When I speak on disability discrimination issues, I usually ask the audience: With respect to what other (i.e. in addition to disability) form of discrimination does the employer have an accommodation obligation in addition to the usual discrimination law obligation not to take adverse action because of the legally protected characteristic? Not too many people answer, but it's religion. (I suspect more people will be answering that question in the future after this high profile case.) Other types of discrimination generally do not entail that obligation.

We have been talking about all aspects of reasonable accommodation – a lot – since the ADA was passed decades ago, much more so than about the less frequently arising religious accommodation issue. A quick search of the Currents blog demonstrates the frequency of disability accommodation issues for employers. With respect to applicants and current employees alike, the employer is obligated to accommodate a "known" disability. There is plenty of gray – and therefore plenty of case law – on whether and when an employer has knowledge of a disability. Generally we counsel employers to consider the possibility of an accommodation obligation as soon as they are asking themselves the question whether they know of a disability and to proceed accordingly (though not necessarily by labeling their actions as reasonably accommodating a disability, they are just being a good employer, which happens to help them defend legal actions later).

In any event, it seems that both sides could have supported their respective arguments with analogies to the disability situation, and that the Justices would have wanted to know if the areas relate. In any event, rest assured

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that we will be comparing those obligations *here* when the Supreme Court issues its decision later this year. By the way, the oral argument transcript can be read here.