Supreme Court wrestles with accommodating religious faith on the job

by Lauren Markoe

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WASHINGTON (RNS) Samantha Elauf was a teenager who loved clothes and applied to work in an Abercrombie & Fitch Kids store in her native Tulsa, Okla., in 2008. But Elauf, a Muslim, also wears a headscarf. So she didn't get the job.

No one—not even Abercrombie & Fitch—disputes that her hijab cost her the job offer. And the law, Title VII of the Civil Rights Act of 1964, states that an employer can't deny employment based on an worker's religious practice, unless accommodating it would prove terribly burdensome.

At the time, Abercrombie had a "no hats" policy for its sales associates. When the U.S. Supreme Court heard Elauf's case Wednesday (February 25), Justice Ruth Bader Ginsburg summed up the religious exemption required of the company: "Title VII doesn't require accommodating baseball caps, but it does require accommodating religious practice."

So why did this case make it all the way to the Supreme Court?

Elauf, though she won in a federal district court in 2011, lost in a federal appeals court in 2013. At the Tenth U.S. Circuit Court of Appeals in Denver, the company's argument—that it shouldn't have had to give a religious accommodation because Elauf never asked for one—found traction.

Do we really want companies delving into an applicant's religious practice in order to determine whether the person might want an accommodation, Abercrombie lawyer Shay Dvoretzky asked the justices on Wednesday.

"This will inevitably lead employers to stereotype," he said.

It may lead to some “awkward conversations,” agreed Justice Elena Kagan. But the alternative is what happened to Elauf: a prospective employee gets no opportunity to discuss an accommodation. She is simply not given the chance, or the job.

“Now, between those two options, the option of using a stereotype to make sure that somebo stereotype to have an awkward conversation, which does this statute seem to think is the worse problem?” Kagan asked Dvoretzky.

The question the justices need to decide in this case, *EEOC v. Abercrombie & Fitch Stores Inc.*, is whether an employer is guilty of religious discrimination only if a job applicant has expressly asked for an accommodation. The U.S. Equal Employment Opportunity Commission, which enforces federal employment discrimination laws, has represented Elauf as her case has risen through the courts.

Like Kagan, other justices signaled discomfort with Abercrombie’s stance that it was not liable because Elauf was not more vocal. Justice Clarence Thomas, who chaired the EEOC from 1982 to 1990, maintained his usual silence during oral arguments.

“Many members of the court seemed sympathetic to the EEOC’s position and Ms. Elauf,” said Daniel Mach, director of the American Civil Liberties Union’s Program on Freedom of Religion and Belief, who attended Wednesday’s argument. “It’s a clear case of religious discrimination, and I’m optimistic that the court will agree.”

Groups that filed legal briefs on behalf of Elauf include the Becket Fund for Religious Liberty, the American Jewish Committee and the Council on American-Islamic Relations. Major business groups sided with Abercrombie, including the U.S. Chamber of Commerce.

Some legal observers said the 10th Circuit, in ruling for Abercrombie, realized that it does not make sense to make companies responsible for figuring out prospective employees’ religious needs.

“As an employer, you should not ask applicants what their religion is or make assumptions as to what their religion might be,” said Laura O’Donnell, who represents companies in the employment practice of Texas firm Haynes and Boone. “EEOC guidelines make that very clear.”

But this case raises a deeper question that goes beyond whether the law requires an employee to give “explicit notice” that she will need a religious accommodation,

said Rick Garnett, a University of Notre Dame law professor who studies First Amendment issues.

“We should not want our law to reflect a presumption that religion is entirely ‘private,’ that the workplace is a faith-free zone and that the default position in the public sphere is to be, in terms of religious faith, a blank slate,” Garnett said.

Elauf, now 24, made a statement on the Supreme Court steps Wednesday morning, read by an EEOC spokeswoman.

“No one had ever told me that I could not wear a headscarf and sell clothing,” she said. “I am not only standing up for myself, but for all people who wish to adhere to their faith while at work.”

The court is expected to decide the case in the spring or early summer.