Sills Cummis & Gross P.C.

Client Alert Employment & Labor

Abercrombie U.S. Supreme Court Decision and NYC Legislation Limit Employer Practices

Employers must be vigilant in ensuring that their hiring and employment practices and policies are lawful, in light of a recent U.S. Supreme Court decision and newly enacted New York City laws. Not only do these recent developments affect the way in which employers must handle religious accommodations and credit history information with respect to current and prospective employees, but New York City employers must be mindful that the New York City Commission on Human Rights will now actively seek out discriminatory practices with the use of "testers."

Supreme Court Issues Decision Regarding Employer Obligations to Provide Religious Accommodations

The United States Supreme Court has issued a much awaited decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, reversing a Tenth Circuit ruling that held that an unsuccessful job applicant was required to inform the prospective employer that she wore a headscarf for religious purposes. The Court's holding makes clear that, in order to bring a disparate treatment claim against an employer for a failure to provide a religious accommodation, a plaintiff must show that her need for a religious accommodation was a motivating factor in the employer's allegedly discriminatory action. However, the Court found that an employee may meet this burden even if the employer did not have actual knowledge that the employee needed such an accommodation.

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In *Abercrombie*, an individual applied for a job with Abercrombie and wore a religious headscarf during her interview. Abercrombie did not hire the applicant despite the fact that she was qualified, because it believed her headscarf would conflict with its dress code, which prohibited employees from wearing any headwear, regardless if it was for religious reasons or not. The EEOC sued Abercrombie on the applicant's behalf, alleging that Abercrombie discriminated against the applicant in violation of Title VII by failing to accommodate the applicant's religious beliefs.

The Tenth Circuit held that Abercrombie could not be liable under Title VII for failing to accommodate the applicant's religious practice because the employer did not have actual knowledge that the applicant needed a religious accommodation. The Supreme Court rejected this rationale. In doing so, it noted that the intentional discrimination provision of Title VII "prohibits certain *motives*," but "does not impose a knowledge requirement," and that "[m]otive and knowledge are separate concepts." Accordingly, the Court reasoned that an "employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed." The Court held that an "employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

Also of concern to employers is the Supreme Court's rationale for rejecting Abercrombie's argument that it could not be liable under Title VII for disparate treatment because its dress code was facially neutral. In dismissing Abercrombie's argument, the Court stated that Title VII gives religious practices "favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual because of such individual's' 'religious observance and practice.'" The Court concluded that "Title VII requires otherwise-neutral policies to give way to the need for an accommodation."

NYC Strictly Limits Employers from Using Credit Checks in Employment Decisions and Mandates Increased Use of Secret Testers in Employment and Housing Discrimination Investigations

Credit Checks Limited

On May 6, 2015, New York City Mayor Bill de Blasio signed into law a bill that prohibits employers and employment agencies from using or requesting job applicant's consumer

credit history, and prevents management from discriminating against an applicant or employee based on their credit history. In a press release explaining the new legislation, which amended New York City's Human Rights Law, the Mayor's Office contended that "using credit checks during the hiring process to screen applicants disproportionately affects low-income applicants and applicants of color." There are several exceptions to the ban on credit checks in the new law, including for law enforcement and other professions involving a high level of public trust or access to sensitive information, and for employers who conduct credit history checks pursuant to state and federal laws or regulations. However, the City Council declined to enact a general exemption for financial services industry employees.

Because the new law amended the New York City Human Rights Law, employees claiming violations can file a complaint with the New York City Commission on Human Rights or commence a private action in a New York court. The City's Human Rights Law provides significant remedies to an employee who prevails, including hire, reinstatement, back pay, front pay, unlimited compensatory and punitive damages, and attorneys' fees. The new law will take effect on September 2, 2015 and will apply to all New York City employers with four or more employees.

Use of Secret Testers Mandated

On April 20, 2015, Mayor de Blasio also signed into law a set of bills aimed at strengthening the transparency of the New York City Human Rights Commission in its efforts to enforce the City's Human Rights Law. One bill, Intro. 421-A, requires the Commission to report additional information related to its investigations of discrimination, including the total number of investigations and the number of investigations that result in an enforcement action. A second bill, Intro. 689-A, requires the Commission to test for housing discrimination, and a third bill, Intro. 690-A, requires the Commission to test for discrimination in employment practices. These tests would involve sending a pair of testers who have similar qualifications, but differ in a characteristic such as race or gender, who would apply for housing or employment to determine if discriminatory practices are being used. These new laws also require the Commission to report the results of these tests, and to refer any incidents of discrimination, to the Commission's Law Enforcement Bureau for assessment.

This year long testing program, which must begin before October 1, 2015, marks the first time that legislation has mandated the Commission to seek out discrimination, instead of simply investigating claims of discrimination filed with the Commission. Although the new laws require the Commission to perform at least five of these tests each year

with regard to employment and with regard to housing, there is no limit on the number of tests that the Commission may perform. In view of the 25 percent budget increase that the Mayor is seeking for the Commission, employers and landlords can expect the frequent use of testers, as well as more aggressive enforcement efforts overall by the Commission.

Employer Tips

In light of the Supreme Court's recent decision and the newly enacted New York City laws, employers should review their current hiring and employment practices and policies. The attorneys in the Sills Cummis & Gross P.C. Employment and Labor Law Group can assist employers and landlords in dealing with these new employment and housing discrimination developments.

If you have any questions regarding information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

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