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NEVADA LAW BULLETIN

U.S. Supreme Court Expands Claims for Employment Discrimination

by John A. Aberasturi, Esq.

On June 1, 2015 the United States Supreme Court in an 8-1 decision held that an applicant for employment need not make a specific request for religious accommodation to obtain relief under Title VII of the Civil Rights Act which prohibits religious discrimination in hiring. In writing for the majority, Justice Antonin Scalia stated that Title VII forbids adverse employment decisions made with a forbidden motive, whether this motive derives from actual knowledge, a well-founded suspicion, or merely a hunch. The Court's ruling essentially holds that if an adverse employment decision is based in any way on religious considerations, that decision is subject to action under Title VII. Justice Scalia stated that, "an employer may not make a job applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

This decision arose from the application of a 17-year-old Muslim woman, Samantha Elauf, for a sales associate position with Abercrombie & Fitch at her local mall in Oklahoma. Ms. Elauf wears a hijab or headscarf. Abercrombie had a policy, called its "Look Policy," which prohibited "caps" and black clothing of any kind. Abercrombie adopted this dress policy to further its "classic East Coast collegiate style of clothing." During her interview, in which she was wearing a black headscarf, no one asked Ms. Elauf any questions about her religious beliefs nor did she bring up the issue. Although she met the requirements for hiring, the store declined to offer Ms. Elauf a job because it claimed that her headscarf did not fit Abercrombie's clothing policy.

In testimony at the trial it was learned that Ms. Elauf wore a t-shirt and jeans for her interview which the employer agreed fit well within its dress policy. Other than the headscarf, for which she was downgraded, Ms. Elauf was found by the employer to be highly rated and qualified. Abercrombie argued at all stages that if Ms Elauf wanted a religious exception allowing her to wear the headscarf it was up to her to make the request.

A complaint was filed by the United States Equal Employment Opportunity Commission (EEOC) and at trial resulted in a verdict in favor of Ms. Elauf awarding $20,000 in damages. On appeal the Tenth Circuit Court of Appeals reversed the decision holding that

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Ms. Elauf should have informed the employer before the hiring decision that she wore the hijab for religious reasons. The Supreme Court reversed and rejected this position. The majority decision held that job seekers need only show that their need for accommodation was a motivating factor in an employment decision, not that the employer knew for certain that the prospective employee would need an accommodation. In coming to this conclusion, the Supreme Court declared that "religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated" and that "an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

The only dissent was filed by Justice Clarence Thomas, former head of the EEOC, who wrote that the dress code was a neutral policy, applied evenhandedly, and therefore could not be a basis for a charge of discrimination. The remaining justices disagreed and stated that "Title VII does not demand mere neutrality with regard to religious practices...rather, it gives them 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." Instead, Title VII requires otherwise neutral policies to give way to the need for an accommodation.

Commentators note, therefore, that a neutral policy that prohibits all employees from wearing headscarves would not exempt a company from providing a religious accommodation that would allow some employees to wear headscarves for religious purposes. These commentators argue that this case may be a basis for further arguments requiring more than neutral evaluation of policies in other areas of civil rights litigation.

The case will now be returned to the Tenth Circuit and many predict that the underlying verdict and judgment in favor of the EEOC and Ms. Elauf will be restored.

You can contact John Aberasturi, or any of ETS's employment law attorneys, to discuss this case and how it might impact your company. Mr. Aberasturi can be reached at (775) 786-3930 or **jaberasturi@etsreno.com**.

Access to Public Places under the ADA and the NRS: No more monkeys jumping on the bed!

By Ann M. Alexander, Ph.D., Esq.

On April 17, 2015, Erin McMullen of the Nevada Resort Association addressed the Nevada Senate Committee on Commerce, Labor and Energy, to introduce Assembly Bill 157 ("AB 157"). This Bill, which takes effect October 1, 2015, amends provisions of Nevada Revised Statutes Chapter 426 to align Nevada's definition of "service animal" with the federal definition of "service animal" under the Americans with Disabilities Act (ADA). The ADA defines "service animals" as dogs, but in some limited circumstances, the ADA provides that public places

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must also accommodate persons with disabilities who use miniature horses to perform tasks. To be a service animal, the dog must be "individually trained" to "perform tasks for the benefit of an individual with a disability." Those tasks must relate directly to the person's disability. Dogs or miniature horses whose sole function is to provide comfort or emotional support are not "service animals" under the ADA.

The ADA ensures people with disabilities who use service dogs equal access to public places such as restaurants, hospitals, hotels, theaters, shops, and government buildings. These places must allow service dogs, and the ADA requires them to modify their practices to accommodate the dogs, if necessary. To determine if an animal is a service animal, a public entity or a private business may ask only two questions:

Is this animal required because of a disability?

What work or task has this animal been trained to perform?

You can't ask these questions if the need for a service animal is obvious (e.g., a dog is pulling a wheelchair). You also can't ask about the nature or extent of an individual's disability or require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal, or require the animal to wear an identifying vest.

What can you do? You can exclude a service animal from an area where its presence interferes with legitimate safety requirements (e.g., a burn unit in a hospital). You can also ask a person with a disability to remove a service animal if the animal is not housebroken or is out of control and the person is not able to control the animal. You are not responsible for the care and supervision of a service animal.

Prior to the passage of AB 157, Nevada law permitted any animal to be a service animal, with sometimes bizarre results. Ms. McMullen described the experience of Nevada's businesses: "Resorts in the Nevada Resort Association have experienced situations where various animals are claimed as service animals, like 'service pythons' or a stroller full of 'service cats.'" As Ms. McCullen testified, "Aligning the definitions would eliminate some of the inappropriate use and allow the individuals who truly need service animals to be able to use them properly."

AB 157 was passed without a "nay" vote by both the Assembly and Senate. Governor Sandoval signed the bill on May 14, 2015. No more monkeys (or pythons, or cats) jumping on the bed!

The Creation of the Nevada Court of Appeals

by Andrea K. Pressler, Esq.

After many unsuccessful years on the voter ballots, in November 2014, voters approved to amend Article 6 of the Nevada Constitution to create a Court of Appeals that will decide appeals of district court decisions in certain civil and criminal cases. Prior to this amendment, all district court appeals were decided by the Nevada Supreme Court.

The new court began hearing cases in January 2015, and its expected to hear one-third of all appealed cases based upon case assignments from the Nevada Supreme Court. The Court of Appeals operates out of the Regional Justice Court in Las Vegas, Nevada.

The inaugural three-judge panel was selected by Governor Sandoval and includes the Honorable Michael Gibbons, the Honorable Jerome Tao, and the Honorable Abbi Silver. Judge Gibbons was named the Chief Judge of the Nevada Court of Appeals by Nevada Supreme Court Justice James Hardesty on January 5, 2015. Prior to his selection, Judge Gibbons was a district judge in the Ninth Judicial District of Douglas County for twenty years.

Prior to his selection to the Court of Appeals, Judge Tao was a District Court Judge in the Eighth Judicial District Court, having served since his appointment by Governor Sandoval in 2011. At the time of her selection to the Nevada Court of Appeals, Judge Silver was also a Eighth Judicial District Judge, having served since elected in 2009 and re-elected in 2014.

Since hearing its first case in January 2015, the Nevada Court of Appeals has issued seven published opinions and more than 100 unpublished orders. It will be interesting to track the success of the Nevada Court of Appeals and to assess the impact this court will have upon the Nevada Supreme Court's heavy docket.

SAVE THE DATE

ETS EMPLOYMENT LAW SEMINAR

October 22, 2015,
9:00 a.m. to 4:00 p.m.

The ETS Employment Law Seminar will be held Thursday, October 22, 2015, at The Grove in south Reno. The agenda will include recent legislative developments, recent court rulings, and hot topic issues such as medical marijuana, wellness programs, and social media. We will also have a presentation on the Dos and Don'ts of Documentation, and we'll end the day with a mock investigation. ETS will apply for HRCI credits as well as the new SHRM recertification credits. To register, please contact Gale Sanders at gsanders@etsreno.com or 775-786-3930.