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HR 101 from Abercrombie & Fitch

By James Irving

Most human resources professionals know this simple rule governing job interviews: don't ask candidates about religion.

In *EEOC v. Abercrombie & Fitch*, (2015) Abercrombie's job interviewer complied with this axiom, but ran afoul of Title VII nonetheless.

When Samantha Elauf applied for a position at Abercrombie & Fitch ("A&F"), she was wearing a headscarf or hijab. The interviewer didn't ask about it during the interview, and Elauf, a practicing Muslim, didn't mention it or indicate that she would need an accommodation from what A&F described as its "Look" policy. The Look policy prohibits black clothes and caps, although "cap" is not defined in the policy. Elauf's religion was not mentioned. The interviewer dropped Elauf's score on the appearance section of the application because of the hijab with the result that she wasn't hired.

The Equal Employment Opportunity Commission ("EEOC") brought suit on Elauf's behalf, claiming that A&F had violated Title VII of the Civil Rights Act by refusing to hire Elauf because of her hijab. A&F argued (among other things) that Elauf had a duty to inform A&F that she would require an accommodation from their "Look" policy. The District Court entered judgment in favor of the EEOC. On appeal, the Tenth Circuit reversed, holding that Summary Judgment should have been granted to A&F because Elauf never sought an accommodation.

By an 8-1 margin, the U.S. Supreme Court held that an employer can be held liable for refusing to hire an applicant based on a religious observance or practice even if the employer lacked direct knowledge that an accommodation was required. Justice Scalia's opinion noted that an applicant must only show that his or her need for an accommodation was a motivating factor in the employer's decision not to hire. If the applicant can show that the hiring decision was based on a desire to avoid making an accommodation, then the employer has violated Title VII. Title VII does not mandate neutrality, said Scalia. It creates an affirmative duty to accommodate religious practices.

While it remains axiomatic that a job interviewer should refrain from asking any candidate about his or her religion, prudent interviewers will take this several steps further. Don't make assumptions about a candidate's religion; instead, focus on the requirements of the job. In inquiring whether a candidate can perform the job duties, a need for an accommodation is likely to be revealed. For example, if the job requires Saturday hours, certain applicants may request an accommodation. If a candidate asks the employer to accommodate a sincerely held religious belief, it becomes incumbent on the employer to seek an accommodation that does not impose an undue burden on the business. This often requires interactive discussion, which is permissible to achieve a workable accommodation.

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In some cases, an accommodation cannot be made, but in all cases, the employer must remain open-minded and prepared to make reasonable concessions to religious conviction.

James Irving is a shareholder focusing his practice in business law. He can be reached at jirving@beankinney.com.

A Tale of Two Cases: The Perils of Using Temporary Workers

By Doug Taylor

Is your business among the many that utilize contract or temporary employees, workers hired through a third-party staffing agency? Did you know that using temporary workers may subject you to liability under federal employment laws as a joint employer of that worker? Two recent federal appeals court decisions highlight the pitfalls of using temporary workers. Continue reading to see if your business is at risk.

The Use of Temporary Workers Has Expanded

Since the end of the Great Recession in 2009, the demand among employers for temporary or contract labor has steadily increased, and staffing companies have been in high demand. The use of temporary workers in the U.S. economy, when staffing agencies nationwide hired more than 14.6 million temporary and contract workers. This represented nearly a thirty-three percent increase over 2013 hiring levels.

Employer Benefits of Using Temporary Help

There are many business advantages in using temporary workers. Foremost, it is far less expensive in most employment situations. Temporary workers allow employers the flexibility to increase or reduce their work force far more readily, which can be helpful in managing payroll costs, particularly in a fluctuating business environment.

Yet with all of these cost savings and other advantages, there are also significant risks that employers face in hiring temporary or contract workers. For one, the federal government, namely the U.S. Department of Labor (DOL), has substantially stepped up its enforcement efforts in the past few years. The DOL is targeting employers who maintain sufficient control over their temporary workers but seek to avoid the obligations of federal employment laws by classifying workers as the employees of a third-party staffing agency, rather than as joint employees of both the employer and the staffing agency. This subjects businesses who do so to potential damages.

Two recent federal circuit court decisions highlighted this potential peril for employers. The Fourth Circuit (VA, MD, NC, SC and WV) in *Butler v. Drive Automotive Industries of America, Inc.* and the Third Circuit (PA, DE and NJ) in *Faush v. Tuesday Morning, Inc.* both decided that temporary staffing agency workers were the joint employees of both the staffing agency that hired them initially and the business for whom they performed work as a temporary worker.

The Fourth Circuit's Decision in *Butler*

In *Butler*, plaintiff Brenda Butler was hired by ResourceMFG, a temporary employment agency, to work at defendant Drive Automotive, a South Carolina manufacturer of doors, fenders and other automotive parts. During the course of her time with Drive Automotive, Butler claimed that her supervisor had sexually harassed her, both verbally and physically. Ultimately, Butler was terminated by ResourceMFG, at the demand of Drive Automotive, after she had complained to Drive Automotive's HR department about the alleged supervisor harassment.

Butler filed suit against Drive Automotive, alleging violations of Title VII of the Civil Rights Act of 1964 (Title VII). Drive Automotive defended, in part, on the grounds that Title VII is applicable only to an employer-employee relationship, and Butler was not its employee. The Fourth Circuit, applying a nine factor "hybrid test," containing elements of both the "common law control test" (used by the Third Circuit) and "economic realities test" (used by the DOL), rejected Drive Automotive's contention, finding instead that Butler was a joint employee of both Drive Automotive and ResourceMFG. Crucial to the Court's determination was that Drive Automotive had retained for itself a sufficiently high degree of control over the terms and conditions of Butler's employment, to make her an employee of Drive Automotive, relying on the following facts:

- Drive Automotive determined Butler's work schedule;
- It arranged for Butler's job training;
- Its managers nearly exclusively supervised Butler's work;
- Butler performed the same tasks on the job as Drive Automotive's own employees, using the same equipment; and
- The goods she produced were a part of Drive Automotive's core business.

Combined, these reasons more or less ensured that Drive Automotive exercised substantial control over Butler and her work product, thereby making Butler Drive Automotive's employee. Drive Automotive, in other words, could be held liable to Butler for employment discrimination under Title VII.

The Third Circuit's Decision in *Faush*

In *Faush*, the Third Circuit considered the circumstances of plaintiff Matthew Faush, an employee of Labor Ready, a staffing firm that provided temporary workers to a number of its clients, including defendant Tuesday Morning. Labor Ready hired Faush and sent him to a new, yet-to-open Tuesday Morning retail store in Pennsylvania, where over the course of a month, he unloaded merchandise, set up display shelves and stocked merchandise, in preparation for the store's grand opening. Faush alleged that during his time at Tuesday Morning he was accused of stealing merchandise by the company's store manager and was subjected to ongoing race-based hostility.

Faush ultimately filed suit against Tuesday Morning alleging employment discrimination on the basis of race, in violation of Title VII. Tuesday Morning, like Drive Automotive, defended against Faush's claims on the grounds that he was not its employee, but was Labor Ready's employee instead, proffering that the company could not be held liable for discrimination in the absence of an employer-employee relationship with Faush.

The Court applied the so-called "common law control test," a test substantially similar to the Fourth Circuit's "hybrid test." The "control test" focuses, broadly, on whether an employer has "paid the employees' salary, hired and fired them and had control over their daily activities." The Court, after evaluating a litany of facts, concluded that Tuesday Morning had created a "common law employment relationship" with Faush, i.e. Tuesday Morning had:

- Assumed responsibilities with respect to payment of Faush's wages;
- Paid Faush and other temporary workers on a straight hourly basis;
- Maintained ultimate control over whether Faush was permitted to work at its store;
- Exercised nearly unfettered control over Faush's daily activities at the store, including providing training, assigning work, furnishing equipment, directly supervising his work, and verifying the number of hours he worked on a daily basis; and
- Tasked Faush with performing unskilled work that was functionally indistinguishable from that performed by Tuesday Morning's own employees.

Also persuasive to the Third Circuit was the fact that, under EEOC policy:

> [A] client of a temporary employment agency typically qualifies as an employee of the temporary employer during the job assignment, for Title VII purposes because the client usually exercises significant supervisory control over the worker.

*EEOC Notice 915.002, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, at *5-6 (Dec. 3, 1997).*

The Takeaway from *Butler* and *Faush*

Given the Courts' decisions in *Butler* and *Faush* - and with the increased vigilance demonstrated recently by the DOL - Virginia business owners have good reason to assume, absent compelling circumstances to the contrary, that the use of temporary or contract workers supplied by a third party staffing agency is likely to create a joint employment relationship for the duration of the work project. With that joint employment relationship comes potentially significant liability under federal employment laws, such as Title VII and the Fair Labor Standards Act (governing minimum wage and overtime pay). Close scrutiny should be paid to whether the relationship with your temporary or contract worker is circumscribed by the factors led to the findings of joint employment in both *Butler* and *Faush*. In other words, it is important to ask: Do you have the authority to discipline or fire the worker? Do you exercise significant day-to-day supervision and control over the worker and his or her work product? And do you furnish the worker with the needed equipment and space necessary to do the work? If you do, your relationship with the temporary or contract worker is likely one of employer and employee, with all of the potential pitfalls that go with it.

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Trade Secrets and Confidentiality

By James Irving

In light of the clear trend in Virginia law against the enforcement of non-competition agreements, savvy practitioners and their clients increasingly rely on trade secret and confidentiality agreements as effective surrogates. While it is undeniably true that courts in Virginia are more inclined to enforce such agreements, the case of *SanAir Technologies Laboratory, Inc. v. Burrington* demonstrates that although subject to less stringent analysis, trade secret and similar arrangements must also comply with enforceability standards.

David Burrington, a long-time employee of SanAir left that company to go to work for a competitor, Hayes Microbial Consulting. As a result, SanAir sued Burrington for breach of contract and violation of the Virginia Trade Secret Act and Hayes for tortious interference with Burrington's employment contract. Curiously, the plaintiff did not sue for conspiracy between the two defendants, which is usually part of the litigation package in cases of this sort. Hayes and Burrington answered and demurred and SanAir asked the Court to enjoin Burrington and his new employer from competing against SanAir or disclosing its confidential information and trade secrets. The Court's opinion addressed these preliminary issues.

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An injunction is an extraordinary remedy and the applicable standard requires a plaintiff to satisfy a four pronged test. The plaintiff must demonstrate a likelihood of success on the merits, irreparable harm in the absence of an injunction, that the balance of equities favors the plaintiff and that the injunction is in the public interest.

Because the Court found that a "reasonable dispute" existed both as to the type of jobs the plaintiff could not hold under the non-compete and the geographical scope of the agreement, the court denied the injunction on the non-competition issue. Even though the Court went out of its way to express "no opinion as to the enforceability of the agreement," ambiguity is usually the kiss of death for any non-compete. The Court's conclusion that it could not find the plaintiff likely to succeed on the merits sounded like the prelude to a final judgment.

The Court also expressed doubt about the plaintiff's trade secret and confidentiality claim.

The Court noted that although customer lists are not included within the statutory definition of a trade secret, a customer list may become one in a particular circumstance. This, however, depends on the uniqueness of the information, the public availability of the information and the steps taken by the employer to protect it. Because SanAir and Hayes service a limited clientele, because most of the clients are well-known in the industry and because the contact information is readily available on the internet, the Court ruled that the plaintiff had not shown that the customer list was likely to be a trade secret and the Court "cannot find that the plaintiff is likely to succeed on the merits."

The Court reached a similar conclusion with respect to the reach of the confidentiality agreement. Those agreements (there were several substantially identical versions) protected a broad range of information, but each included a standard carve out for information "lawfully obtained from third parties" or that "may be generally available to the public." Following the rationale that led it to refuse the injunction application on the trade secret claim, the Court found that the allegedly sensitive information was easily available on line and from other sources.

Applications for injunction often dictate the final resolution of business tort cases because the result often forces the losing party to capitulate on the broader issues. That appears to be the likely result in this case. This does not mean that reliance on confidentiality agreements or trade secret protections is a misplaced; rather *SanAir* is a reminder that the legitimate protections offered by the law must be properly documented and the rights within them carefully policed.

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