

# Employment Law Briefing



SEPTEMBER/OCTOBER 2015

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# Dress code or discrimination?

*Supreme Court rules on case involving religious headscarf*

**T**he U.S. Supreme Court recently handed down an important decision regarding Title VII of the Civil Rights Act of 1964. Its ruling in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.* addressed a dispute between a Muslim plaintiff and the employer who refused to hire her because her headscarf — or “hijab” — violated the company’s dress code.

## “Caps” prohibited

The employer refers to its sales staff as “models” and requires them to comply with a “Look Policy.” The policy prohibits the wearing of “caps,” though it doesn’t clearly define the term.

The Equal Employment Opportunity Commission (EEOC) sued the employer, alleging religious discrimination for refusing to hire the plaintiff because of her religious practice of wearing the scarf. The agency asserted that she could have been accommodated without undue hardship. The trial court granted the EEOC summary judgment, and the plaintiff was awarded monetary damages. The employer appealed.

The U.S. Court of Appeals for the Tenth Circuit reversed and awarded summary judgment in the employer’s favor. The court found that an employer can’t be liable under Title VII for failure to accommodate a religious practice unless the applicant provided the employer with actual knowledge of the need for an accommodation. The EEOC appealed, and the Supreme Court accepted the case.



## No knowledge required

The High Court reversed the grant of summary judgment and remanded the case to the appellate level for further consideration. The Court stated, “To prevail in a disparate treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer’s decision, not that the employer had knowledge of his need.”

*The Supreme Court stated that, because Title VII defines religion to include religious practice, it’s a protected characteristic that must be accommodated and can’t be treated disparately.*

The disparate treatment provision of Title VII forbids employers to refuse to hire an applicant “because of” the individual’s religion. The Court stated that Title VII relaxes the usual but-for causation standard to that of a “motivating factor.” Thus, an individual’s religious practice may not be a motivating factor for refusing to hire that person.

The employer argued that the Supreme Court should adopt the appellate court’s rule requiring that the employer have actual knowledge of an applicant’s religious practice. But the Supreme Court held that Title VII’s disparate treatment provision doesn’t impose a knowledge requirement, and the Court wouldn’t add language to the law. Therefore, Title VII prohibits employer actions taken with the motive of avoiding a need for a religious accommodation — even if the employer had no more than an unsubstantiated suspicion that an accommodation may have been needed.

## Treatment analysis appropriate

The employer also argued that a claim based on failure to accommodate should be a disparate *impact* analysis, not a disparate *treatment* analysis. Disparate treatment claims

are ones in which the applicant or employee alleges that she was the victim of intentional discrimination on the employer's part. Plaintiffs must show that they were treated less favorably because of religion, and that the differential treatment is the result of a discriminatory motive or intent.

Disparate impact claims, on the other hand, involve employment practices that are apparently neutral in their treatment of different groups but, in fact, fall more harshly on one group than another. Disparate impact claims don't involve intentional discrimination, so plaintiffs aren't required to prove that they were the victim of discriminatory motive or discriminatory intent.

In this case, the Supreme Court stated that, because Title VII defines religion to include religious practice, it's a protected characteristic that must be accommodated and can't be treated disparately. As such, a disparate treatment analysis is appropriate for a failure-to-accommodate claim.

In addition, the employer argued that a neutral policy, such as its no "caps" requirement, couldn't constitute intentional discrimination. But the Court found that Title VII requires employers to provide religious accommodations — even for neutral policies. It isn't a defense for an employer to refuse to hire an applicant because the applicant would require a religious accommodation for an employer's neutral policy.

### Training is needed

This case demonstrates that even a seemingly neutral dress code may not hold up in court. Train your managers to recognize when you might need to provide a religious accommodation, and consult your attorney on whether you can do so without imposing undue hardship on your organization. ♦

# Applying the “economic realities” test in employee classification

**E**mployers are urged to step carefully when engaging independent contractors. Why? A real-life answer can be found in *Keller v. Miri Microsystems LLC*. In this case, the U.S. Court of Appeals for the Sixth Circuit applied the “economic realities” test to determine whether a plaintiff's claim to overtime pay under the Fair Labor Standards Act (FLSA) should stand.

### Overtime claim

The plaintiff, a satellite dish installer, initially agreed to provide his services as an independent contractor. He later filed a lawsuit against the installation company that had engaged him, claiming he was actually an employee entitled to substantial overtime pay under the FLSA.

A trial court rejected the plaintiff's claims but, on appeal, the Sixth Circuit reversed. It held that the FLSA claims should be tried by a jury, which could reasonably conclude that the company's control over the plaintiff was consistent with that of an employee.

### 6 pertinent factors

To reach its decision, the appeals court applied the “economic realities” test. In doing so, the court considered six pertinent factors:

**1. The permanency of the relationship.** The court stated that independent contractors generally have variable or impermanent relationships with a company because they transfer from place to place as work is offered. Employees, on the other hand, generally work for one employer continuously.

The trial court had considered that the plaintiff didn't have a contract with the company, nor did the two parties have an exclusive relationship. And the plaintiff did exercise control over the number of days he worked and jobs he took. But the plaintiff typically followed the work schedule he received from the company, and the company guaranteed the quality of his work.

Moreover, even though the installer was free to work for others, his geographic location made accepting other work difficult. Therefore, there was a genuine issue of fact as to the relationship's permanency.

**2. The degree of skill required.** The court asserted that how the worker acquired his skill was an important inquiry. The company provided the installer with the training to obtain a necessary certification, which was more consistent with that of an employee.

**3. The worker's investment in equipment or materials.** Here the appeals court stated that the worker's investment in equipment should be compared to the company's investment — with the worker's investment being evidence of economic independence. The worker provided his own vehicle, tools and equipment.

But the court held that both the worker and the company invested capital into the business and that the equipment the worker provided could be used for personal use as well. Thus, there was an issue of fact as to whether the installer's investments demonstrated economic independence.

**4. The worker's opportunity for profit or loss.** The trial court pointed out that the plaintiff:

- Determined the geographic region where he worked,
- Exerted control over how many jobs he took,
- Could have hired other technicians, and
- Earned money from another company for selling products.

*The appeals court stated that the worker's investment in equipment should be compared to the company's investment.*

Therefore, the appeals court held that there was a material dispute as to whether the worker could have increased his profits if he'd improved his efficiency, hired assistants or requested more assignments.

**5. The degree of the alleged employer's right to control the manner in which the work was performed.** The trial court considered that the plaintiff could refuse work assignments, and the company didn't supervise or monitor



how the plaintiff performed his work. Also, the plaintiff could work for other companies. But the company did influence the plaintiff's daily work. It scheduled installations in blocks of time and technicians were expected to arrive at the customer's house and finish their work within that time frame.

As such, the appeals court held that a reasonable jury could find that the way the company scheduled the installations made it impossible for the worker to provide his services to other companies. In addition, though the company didn't supervise the plaintiff's work, a jury could find that the company partly controlled his job performance through training he received.

**6. Whether the service rendered was an integral part of the alleged employer's business.** The company provides only satellite installation and repair services. Thus, the appeals court held that a reasonable jury could find that the plaintiff's services were an integral part of its business.

### Careful classification

Just because a worker agrees to be an independent contractor for your organization doesn't mean a court couldn't reclassify that individual as an actual employee. Monitor and abide by the relevant factors of the economic realities test. Otherwise, you could be held liable for overtime and other benefits that employees are entitled to by law. ♦

# How to identify the similarly situated

*Eighth Circuit takes hard look at comparable employees*

**W**hen looking to establish pretext for alleged racial discrimination, courts often look to “similarly situated” employees at the same organization. The recent case of *Austin v. Long* provides a working example of this practice.

## Job performance issues

The plaintiff was an African-American and former deputy prosecutor of an Arkansas judicial district. He filed a Section 1983 claim against the head state prosecutor, alleging that he (the plaintiff) was terminated because of his race.

The head state prosecutor had originally hired the plaintiff as a second deputy prosecutor. The plaintiff had replaced an African-American, as was the individual hired to replace him following his termination.

While working, the plaintiff had assisted the county’s senior deputy prosecutor. The plaintiff and the senior deputy prosecutor both received county funds each month for expenses. The head state prosecutor and the senior deputy prosecutor both believed that the plaintiff should have given his expense checks to the senior deputy prosecutor, who would then have paid the office expenses. The plaintiff failed to contribute his expense check for four months — even after the head state prosecutor had advised him to follow the senior deputy prosecutor’s instructions regarding the funds.

In addition, the head state prosecutor alleged that the plaintiff had job performance issues such as:

- Being out of touch during business hours,
- Deviating from office policy on bond reduction orders,
- Accumulating extraordinary, unapproved expenses, and
- Failing to appear in court.

The head state prosecutor allegedly met with the plaintiff regarding these problems, but the plaintiff offered no explanation and was therefore terminated. The plaintiff contended that he was never given an explanation for his termination.

At trial, the head state prosecutor moved for summary judgment. The trial court denied the motion, finding that there were disputes of material fact over whether the head state prosecutor’s stated reasons for firing the plaintiff were pretext for racial discrimination. The head state prosecutor appealed.

## Not a clone

The U.S. Court of Appeals for the Eighth Circuit affirmed the trial court’s denial. The appeals court found that the plaintiff could demonstrate triable issues of fact concerning pretext by showing that he was treated differently from other employees who were similarly situated in all relevant respects.

The head state prosecutor argued that the other employees in question weren’t similarly situated. He pointed out that other prosecutors had been cited for performance



issues, but their misconduct included being convicted for driving under the influence and sanctioned for ethics violations. The plaintiff's misconduct was his failure to follow instructions from the senior deputy prosecutor and head state prosecutor to contribute checks to the senior deputy prosecutor's operational expenses.

*To prevail in a Sec. 1983 claim, a plaintiff must prove that a person subjected the plaintiff to conduct that occurred under color of state law.*

But the appeals court stated that a similarly situated co-worker is one who's substantially similar to the plaintiff — not a clone. The court further held that a co-worker can be similarly situated in all relevant respects if that person's misconduct is comparable to or more serious than the plaintiff's. And the conduct of the other two prosecutors here was comparable to or more serious than the plaintiff's failure to contribute funds for operational expenses.

### Well-established right

To prevail in a Sec. 1983 claim, a plaintiff must prove that a person subjected the plaintiff to conduct that occurred under color of state law. The plaintiff also must prove that the conduct deprived him or her of rights, privileges or immunities guaranteed under the U.S. constitution.

The head state prosecutor asserted that the plaintiff had failed to set forth a violation of a clearly established constitutional right. But the appeals court stated that the constitutional right to be free from discrimination is so well established that public officials must be charged with knowledge of it. Therefore, the plaintiff did allege a violation of his clearly established right to be free from employment discrimination.

### Important points

You can still face legal liability if you replace a terminated employee with someone of the same race. When taking adverse employment actions, treat similarly situated employees consistently. Such employees are not only those whose offenses are exactly the same, but also those whose offenses are comparable or more serious in nature. ♦

## An earlier look at a similar case

The case of *Austin v. Long* (see main article) was hardly the Eighth Circuit's first go-round regarding similarly situated employees. The court had weighed in on the matter 12 years earlier in *E.E.O.C. v. Kohler Co.*

There the Equal Employment Opportunity Commission (EEOC) sued the employer, alleging discrimination and retaliation against a former employee on the basis of race. Only the retaliation claim was at issue on appeal, where the employer argued that it had terminated the plaintiff because he'd been cheating the company out of an hour of pay by working only seven hours while being clocked in for eight.

The EEOC asserted that the employer had disciplined the plaintiff disproportionately to others who'd violated company policies, and the unequal use of discipline showed that the company's termination decision arose from a retaliatory motive. The employer denied that the employees were similarly situated.

The appeals court held that those used in such a comparison must have: 1) dealt with the same supervisor, 2) been subject to the same standards, and 3) engaged in the same conduct without any mitigating or distinguishing circumstances. Additionally, for discriminatory discipline claims, employees are considered similarly situated if accused of the same offense and disciplined differently. Ultimately, the appeals court found that there was sufficient evidence to support a retaliation claim.

# Follow the steps: An ADEA case

**T**he concept of progressive discipline refers to a series of corrective steps a troubled employee must follow to correct employment-related shortcomings. If an employer stumbles when administering these steps, however, its legal arguments may fall flat in court. Case in point: *Soto-Feliciano v. Villa Cofresi Hotels, Inc.*

## Suspension and termination

The plaintiff worked for the defendant for seven years and was eventually promoted to head chef before he was suspended and terminated. The employer asserted that the plaintiff was terminated because he:

- Used profanity at work,
- Made disrespectful comments to his boss, and
- Arrived late often.

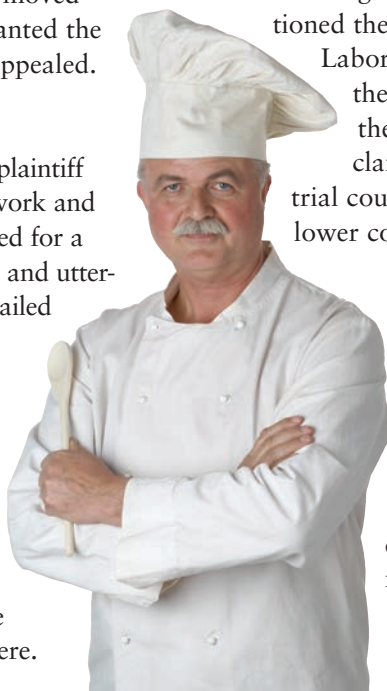
The plaintiff claimed that the general manager of HR told him, “You are no longer capable to work at the line because you are old,” and she was going to hire a new head chef. He also alleged that supervisors made comments such as, “Fool, you are too old.”

The plaintiff filed claims against his employer under the Age Discrimination in Employment Act (ADEA) for age discrimination and retaliation. The employer moved for summary judgment and the trial court granted the motion dismissing all claims. The employee appealed.

## Significant gaps

On that appeal, the employer claimed that the plaintiff had been verbally warned about being late to work and using profanity in the kitchen. He was suspended for a variety of reasons — including insubordination and uttering a threatening remark to a co-worker — detailed in a letter the employer sent to the plaintiff.

The plaintiff argued that he wasn’t advised of any issues before the suspension letter. Indeed, the record showed that complaints about his conduct were never documented in writing or placed in his file. Also, there was a meeting with hotel management four days before he was suspended and none of the incidents involving the plaintiff were raised there.



The U.S. Court of Appeals for the First Circuit agreed, finding that the employer’s records revealed “significant gaps and inconsistencies.” The employer claimed the plaintiff was terminated based on poor performance and conduct, but there were no records in the plaintiff’s file indicating so. The employer had a progressive discipline policy in place stating that verbal warnings were to be followed by written ones. Yet the plaintiff was suspended for one threat and two incidents of insubordination without first receiving any written warnings.

In short, the employer had failed to follow its own progressive discipline policy requiring a step-by-step approach from verbal warnings to more severe discipline for documented misconduct. And, the appeals court held, the company’s failure to abide by its own policy raised doubts about its true reasons for firing the plaintiff.

## Retaliation claims

In addition, the plaintiff alleged that he had informed hotel management about his age discrimination concerns on a number of occasions before his suspension. Doing so provided evidence of “temporal proximity” between his complaints and his termination.

The manager who’d signed the suspension letter had questioned the plaintiff about his visit to the Department of Labor days before he received said letter. This further supported temporal proximity. Therefore, there were issues of fact as to his retaliation claim. Ultimately, the appeals court reversed the trial court’s decision and remanded the case to the lower court for reconsideration.

## Great risk

Clearly, it’s important for employers to have progressive discipline procedures in place. But, as this case shows, such procedures are helpful only if you train your supervisors to follow the process diligently. If they enforce disciplinary procedures inconsistently — or not at all — you’ll face legal risk in the event of an employment discrimination claim. ♦

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*“Above all, we are at your service ...”*



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