

COLUMNS

Must job seekers give employers a reason to reject them?

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By **R. Scott Oswald**

Imagine you're a storeowner who is interviewing three finalists for a sales job. All are equally qualified-but two need a little flexibility.

Daniel is Jewish. He does not work on Friday nights or Saturdays.

Lisa is a Christian who does not work on Sundays.

The third candidate, Kim, can work any day.

At your store, everyone gets weekend duty twice a month. A while ago, you bent the rules for a Sabbath observer: It was no hardship, but it caused muttering. You would prefer not to do it again.

During interviews neither Daniel nor Lisa mentions religion; you never ask. But Daniel talks about growing up in Israel, just as your last Sabbath observer did. A potential problem, you conclude, and cross him off your list. You offer the job to Lisa, unaware she has a similar conflict.

Have you discriminated illegally against Daniel? Probably so: The law requires you to discuss reasonable accommodations for religious practices.

But let us be frank: Unless you reveal your private thoughts, you will likely get away with it.

Bias in garb?

Hiring bias thrives on such silent brush-offs. Job seekers in wheelchairs know the shabby routine. So do job seekers of color, job seekers with foreign accents, older job seekers and others. Every day these applicants must swallow unjust rejection, knowing they cannot call anyone to account.

Every once in a while, however, an employer tips its hand.

Back in 2011, for instance, a federal court found that Abercrombie & Fitch, the clothing retailer, discriminated when it rejected a Muslim job seeker who interviewed in a headscarf, or hijab.

The U.S. Supreme Court yesterday started hearing arguments on whether to let Abercrombie off the hook. The case focuses on religious bias, but it may also affect disabled workers and some pregnant women.

In effect, the court could deny protection to applicants who do not warn employers explicitly that they will need flexibility even if the employers end up rejecting them on exactly that basis.

Some background: At ber-preppy Abercrombie, black clothing is verboten for salespeople, as is some headwear.

Nonetheless, in 2008 Heather Cooke, an Abercrombie hiring manager in Tulsa, OK, decided she wanted to hire then-17-year-old Samantha Elauf, who had worn a black headscarf to her interview.

Ms. Cooke correctly assumed that Ms. Elauf wore the scarf for religious reasons, but she never raised the issue and figured that Abercrombie could adapt its rules. When Ms. Cooke checked with a higher-up, however, she was ordered to ding Ms. Elauf for the hijab. The lower rating made Ms. Elauf unhirable, and Ms. Cooke never called the teenager back.

For most job seekers, the story would end there: another silent rejection.

But a friend at Abercrombie tipped Ms. Elauf, who contacted the U.S. Equal Employment Opportunity Commission. The EEOC sued Abercrombie on her behalf, claiming that the retailer knew it should try to accommodate the hijab-yet failed to discuss it. The judge agreed, and a jury awarded Ms. Elauf \$20,000.

Abercrombie appealed, saying it could not be liable for failing to do something that Ms. Elauf never requested and anyhow, that it did not know for sure about the scarf. A federal appeals court bought that logic, setting up this week's showdown.

How would our imaginary job seekers fare if Abercrombie wins again?

Come to judgment

First Daniel, who studied in Israel and never knew of your Sabbath issue. Out of luck, says Abercrombie: He did not specify his need, so you do not have to accommodate it.

But suppose, in a fit of honesty, you tell Daniel why you rejected him. Now can he hold you accountable? Still no, says Abercrombie: Liability kicks in only after an explicit request.

How about Lisa, who does not work Sundays? Let us say she spoke up during your interview, trying to protect her rights. Would you still have hired her? Or would you maybe have "realized" that flexible Kim is a better candidate for totally non-discriminatory reasons, of course and issued another silent rejection?

Thought so.

EMPLOYEES LIVE in the real world. So must our laws. Hiring bias is common, and already tough to prove.

The Supreme Court should not make things worse by making job seekers' legal rights depend on their mind-reading ability or on their willingness to risk a job offer.

If an employer shows bias, it should answer to a jury.

Associated Press coverage yesterday of this case: [Justices appear to favor Muslim denied job over headscarf](#)

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