


# Appellate Reports and Cases in Brief

## EEOC v. Abercrombie & Fitch Stores

*An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions*

By Jeffrey I. Ehrlich

### *EEOC v. Abercrombie & Fitch Stores, Inc.*

(2015) __ U.S. __ (U.S. Supreme).

**Who needs to know about this case?** Lawyers handling Title VII claims based on religious discrimination.

**Why it's important:** Holds that Title VII has no knowledge requirement. Hence, an employer can be held liable for violating Title VII even if it does not know that the employee or applicant requires a religious accommodation, and even if the employee or applicant has not requested such an accommodation.

**Synopsis:** Samantha Elauf, a practicing Muslim, applied for a job in an Abercrombie store. She wears a headscarf consistent with her understanding of her religion's requirements. The store's assistant manager gave Elauf a rating that qualified her to be hired, but was concerned that her headscarf would violate the company's "Look Policy," which governs how employees dress, and bars "caps." The store's manager decided that the headscarf would violate the Look Policy and directed the assistant manager not to hire Elauf. The EEOC sued for a violation of Title VII. The EEOC prevailed in district court, obtaining a $20,000 award. The 8th Circuit reversed, finding that an employer could not be held liable for violating Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of the need for a religious accommodation. Reversed.

Abercrombie's primary argument was that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. The Court disagreed. It held that, "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."

Title VII, unlike some other anti-discrimination statutes, contains no knowledge requirement as a prerequisite to liability. "Instead, the intentional discrimination provision prohibits certain *motives,* regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. 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."

"Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII."

## Short(er) takes:

**FEHA actions; costs; prevailing party; asymmetrical court discretion to award costs and fees to defendants:** *Williams v. Chino Valley Independent Fire Dist.* (2015) Cal.4th (Cal. Supreme)

Williams sued the District under FEHA and lost on summary judgment. The trial court granted the District its costs. Williams appealed, arguing that in a FEHA action, costs cannot be awarded against a losing plaintiff unless the court finds that the lawsuit was frivolous, unreasonable, or groundless. The Supreme Court agreed. Section 1032 of the Code of Civil Procedure says that, except as otherwise provided by statute, the prevailing party is entitled to an award of costs as a matter of right. Government Code section 12965, which is part of FEHA, states that in FEHA actions, the trial court has discretion to award fees and costs to the prevailing party. By

Copyright © 2015 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**




making a cost award discretionary in FEHA cases, section 12965 modifies the mandate in section 1032 that requires a cost award to a prevailing party.

Although section 12965, on its face, does not distinguish between awards to plaintiffs or defendants in FEHA actions, the legislative history of the provision convinced the Court that the Legislature intended an asymmetrical standard like the one adopted by the U.S. Supreme Court in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 416-418. Accordingly, in FEHA actions, the trial court's discretion in awarding fees and costs is subject to the same standard: a prevailing plaintiff should ordinarily receive an award of fees and costs, unless special circumstances would render such an award unjust; a prevailing defendant, by contrast, should not be awarded fees or costs unless the trial court determines that the action was objectively without foundation when brought, or the plaintiff continued to litigate it after it clearly became so.

**Medical malpractice actions; advance or partial payment of damages; tolling statute of limitations; Ins. Code § 11583**: *Blevin v. Coastal Surgical Institute* (2015) 232 Cal.App.4th 1321 (2d Dist., Div. 6).

Insurance Code section 11583 states that no advance payment of damages made by any person or by his insurer as an accommodation to an injured person or the heirs of a decedent shall be construed as an admission of liability. The statute further states that the party who makes such an advance payment "shall" at the time of beginning payment notify the recipient in writing of the applicable statute of limitations. The failure to provide such notice "shall operate to toll any such applicable statute of limitations" from the date of payment until notice is actually given. But notification is not required if the recipient is represented by an attorney.

Blevin had knee surgery at Coastal and contracted a bacterial infection from a sponge that had been used to clean surgical equipment. Coastal paid him $4,118 for the medical expenses he incurred in treating the infection. He was not represented by counsel and did not sign any release. More than 15 months after receipt of the payment, he sued Coastal for medical malpractice and obtained a judgment. On appeal, Coastal argued that Blevin's claim was time barred and that Ins. Code § 11583 did not apply to medical-malpractice actions. Affirmed. MICRA's one-year statute of limitations provision, Code Civ. Proc. § 340.5, prohibits any tolling of the statute of limitations beyond three years. This limitation would apply to tolling under Ins. Code § 11583 that extended more than three years. But since the tolling in this case was only several months, the tolling provision in § 11583 applied. And since the relevant facts surrounding the application of the provision were undisputed, the trial court could apply the section as a matter of law, without the need for a trial on the defendants' limitations defense.

**Medical negligence; MICRA; premises liability; ordinary versus professional negligence; statute of limitations**: *Pouzbaris v. Prime Healthcare Services-Anaheim, LLP* (2015) __ Cal.App.4th __ (4th Dist., Div. 3):

Pouzbaris was admitted as a patient to Prime's hospital, West Anaheim Medical Center, complaining of chest tightness and shortness of breath. She was placed in a room with a private bathroom. Two days after her admission, she used the bathroom to freshen up and change her clothes, and she slipped and fell while walking back to her bed. She claimed that the floor was wet and appeared to have been recently mopped. There were no warning cones present. Almost 2 years after the fall, she filed suit against Prime for premises liability. The trial court granted summary judgment, finding that the case was subject to MICRA and that the one-year statute of limitations for MICRA cases, Code Civ. Proc. § 340.5 governed. Reversed.

MICRA applies to cases involving "professional negligence." The inquiry under section 340.5 requires the court to determine whether the negligence alleged in the complaint occurs in the rendering of professional services and not the level of skill required for each individual task. For purposes of section 340.5, subdivision (2), "professional negligence" is defined as "a negligent act or omission to act by a health care provider in the rendering of professional services." Because mopping the floor and putting a warning sign up did not occur during the rendering of such services, plaintiff sufficiently alleged facts to support an ordinary negligence claim so as to bring her action within the two-year limitations period of section 335.1 of the Code of Civil Procedure.

**Federal Tort Claims Act; claim-presentation deadlines; equitable tolling:** (2015) __ U.S. __ (U.S. Supreme). The Federal Tort Claims Act (FTCA) requires that a tort claim be presented to the appropriate federal agency within two years after it accrues, and then brought to federal court within six months after the agency acts on the claim. (28 USC § 2401(b).)

In two cases that were consolidated, the plaintiffs missed one of the deadlines, but asserted equitable tolling based on the government's conduct. The government argued that equitable tolling was not available under the FTCA because the deadlines in § 2401(b) are jurisdictional. Held: the deadlines are not jurisdictional, and are subject to equitable tolling. "In enacting the FTCA, Congress . . . provided no clear statement indicating that § 2401(b) is the rare statute of limitations that can deprive a court of jurisdiction. Neither

Copyright © 2015 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**




the text nor the context nor the legislative history indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar."

**Mandatory duty; proximate cause; government claims**: *State Dept. of State Hospitals v. Superior Court* (*Novoa*) (2015) __ Cal.4th __ (Cal. Supreme).

The Sexually Violent Predators Act ("SVPA") allows for civil commitment of prison inmate who has committed a prison term, but has been found to be a sexually violent predator ("SVP"). Under the statutory scheme, when the Department of Corrections determines that an individual in custody may be an SVP, it must refer the case for evaluation by the Department of Mental Health ("DMH"). The DMH must have an evaluation made by two psychiatrists or psychologists. If they agree the inmate is likely to be an SVP, the DMH must begin civil commitment proceedings. If the evaluators disagree, a second evaluation is made by two new evaluators. If they agree that the inmate is a potential SVP, then civil commitment proceedings are initiated. The commitment process requires a jury trial to determine under the beyond-a-reasonable-doubt standard that the inmate is an SVP.

Here, Gilton Pitre was convicted and imprisoned for the 1996 rape of his roommate. He came up for parole in 2007. He was referred to the DMH for evaluation as a potential SVP. Instead of having him evaluated by two evaluators, the DMH had a single evaluator review his records, and on that basis Pitre was determined to be suitable for release. Four days after his parole, Pitre raped and murdered Alyssa Gomez. Gomez's sister, Elaina Novoa, sued the DMH for wrongful death, claiming Gomez's death was caused by the DMH's failure to discharge its mandatory duties under the SVPA. The Superior Court overruled a demurrer; the Court of Appeal reversed, finding that the SVPA imposed mandatory duties on the DMH, but that its breach of those duties was not the proximate cause of Gomez's death. Affirmed.

The Court's opinion contains an extended discussion of sovereign immunity and duty, and concludes that the duties imposed by the SVPA on the DMH are mandatory, and that the DMH's failure to have Pitre evaluated by two evaluators was a breach of its mandatory duties. But the Court held that this breach was not the proximate cause of Gomez's death, as a matter of law. The Court explained, as it has in prior cases, that proximate cause includes two components: (a) cause in fact, i.e., but-for causation; and (b) considerations of public policy. The Court held that neither component was satisfied here. With respect to cause-in-fact, the outcome of the SVP evaluations was discretionary, and the one evaluator who did evaluate Pitre determined he was suitable for release. In order to establish her case, the plaintiff would have to show that if two evaluators had been used, the process would have ultimately satisfied all the steps leading up to a civil commitment after a jury trial. This was too speculative. In addition, as a matter of public policy, the breach of the duty should not be considered to be the proximate cause of Gomez's death because it "trenches closely upon the discretionary functions of the evaluation process established by the SVPA."


Ehrlich

*Jeffrey I. Ehrlich is the principal of the* Ehrlich Law Firm, *with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine.*

Copyright © 2015 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**