High Court Rules in Online Threat, Religious Rights Cases.

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Abstract: The article reports on two recent U.S. Supreme **Court** decisions which it says may apply to school-related situations: Elonis v. United States, pertaining to **online** social media postings apparently making threats of violence, and Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores Inc., pertaining to a young Muslim woman not hired for a job due to wearing a head scarf. The latter case was brought by Oklahoma resident Samantha Elauf.

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High Court Rules in Online Threat, Religious Rights Cases

In two decisions last **week**, the U.S. Supreme **Court** touched on a pair of issues -- potentially threatening **online** speech and **religious** accommodation -- that are playing out in schools as much as in the rest of society.

The speech case, Elonis v. United States (No. 13-983), saw the justices ruling 8-1 to overturn the federal criminal conviction of Anthony Elonis, a Pennsylvania man whose postings on Facebook included talk of shooting up a kindergarten class. But the majority stopped short of making any broad First Amendment rulings about Internet threats.

Meanwhile, in a separate case being watched by educators, Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores Inc. (No. 14-86), the **court** bolstered **religious** protections for employees by ruling for a young Muslim woman who was denied a job at a clothing retailer because she wore a hijab, or head scarf.

Both rulings, however, had some advocates saying they had hoped for more clarity from the **high court** on how the rulings should be applied by those seeking to make decisions in these contentious areas. The Elonis ruling involved a 27-year-old amusement-park employee in 2010 who was experiencing difficulties with his wife and his job when he began posting violent material on Facebook, including: "Enough elementary schools in a 10-mile radius to initiate the most heinous school shooting ever imagined. And hell hath no fury like a crazy man in a kindergarten class. The only question is which one?"

Mr. Elonis testified in **court** that the posting was a reference to the song, "I'**m** Back," by the rap artist Eminem, in which the artist had criticized his ex-wife and fantasized about participating in the 1999 shootings at Columbine **High** School in Colorado. Mr. Elonis also maintained that his violent postings were part of a fictitious, rap-artist persona done in part for therapeutic reasons.

He was charged under a general federal criminal statute against making threats. His lawyers sought a jury instruction that would have required proof that he intended to communicate true threats to his targets. But the trial judge instead held that Mr. Elonis could be convicted if a "reasonable person" would have perceived his communications as threatening.

He was convicted on four counts and sentenced to nearly four years in prison, a sentence he has served.

High School Threats

Writing for six other members of the **court**, Chief Justice John G. Roberts Jr., said that it was not

enough to prove that reasonable people would feel threatened by a statement.

"Such a 'reasonable person' standard is inconsistent with the conventional requirement for criminal conduct -- awareness of some wrongdoing," the chief justice said.

Justices Antonin Scalia, Anthony **M**. Kennedy, Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan joined his opinion.

Though he concurred with the outcome, Justice Samuel A. Alito Jr. said in an opinion that the majority failed to provide enough guidance to lower courts in **threat cases**.

Justice Clarence Thomas filed a dissent, saying he would have upheld the subjective-intent standard.

"There is nothing absurd about punishing an individual who, with knowledge of the words he uses and their ordinary meaning in context, makes a **threat**," Justice Thomas said. "For instance, a **high** school student who sends a letter to his principal stating that he will massacre his classmates with a machine gun, even if he intended the letter as a joke, cannot fairly be described as engaging in innocent conduct."

Frank D. LoMonte, the executive director of the Student Press Law Center in Washington, said the **court**'s decision was "narrow" and cautious."

"It would have been much better if the **court** had grappled with the constitutional issues, because we are clearly **m** need of more guidance on First Amendment protection for potentially threatening Internet speech, Mr. LoMonte said. The SPLC had filed a friend-of-the-**court** brief in support of Mr. Elonis, arguing that students and other young people who are prolific users of social media often are unaware of how far their speech will travel in cyberspace and how it will be perceived.

"Our concern is for the kid who makes a feeble attempt at humor about how he wishes his school would blow up on the day of his calculus final," Mr. LoMonte said. "That student certainly doesn't belong in federal prison, and I think the world is a little safer for that student today after Elonis."

A 'Straightforward' Rule

In the head-scarf case, the justices ruled 8-1 to revive the reHgious-discrimination suit filed by Samantha Elauf, who had just graduated from **high** school in 2008 when she sought a job at an Abercrombie store at a Tulsa, Okla., mall.

Ms. Elauf interviewed for the job and received generally **high** marks. But the store manager, who presumed Ms. Elauf was Muslim and wore the scarf for **religious** reasons, consulted a higher-ranking manager, who said the head scarf would violate the chain's "look policy," which barred any head coverings by store employees, and thus Ms. Elauf could not be hired. (The retailer has softened its policy since then and made clear that Muslim head scarves are

permissible.)

A federal district **court** granted summary judgment to the EEOC, which had taken up Ms. Elauf s disCTimination complaint. After a trial over damages, a jury awarded her $20,000.

The U.S. **Court** of Appeals for the 10th Circuit, in Denver, threw out the suit, concluding that Title VII of the Civil **Rights** Act of 1974 does not bar an employer from taking action against an applicant or employee based on a **religious** practice unless the employer received explicit, verbal notice of the **religious** conflict.

Writing for the Supreme **Court** majority, Justice Scalia said that to prevail in a **religious**-bias claim, a job applicant need only show that his or her need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of the need.

"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," Justice Scalia said.

His opinion was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.

Justice Alito concurred in the judgment. Justice Thomas dissented, saying that Abercrombie was merely applying its neutral policy against head wear, not intentionally discriminating based on religion.

Lisa Soronen, the executive director of the State and Local Legal Center, based in Washington, said the ruling was a disappointment to employers, including those in the public sector such as school districts whose interests the center represented in a friend-of-the-**court** brief on Abercrombie's side.

"I think it is still unclear after this ruling how far an employer has to go to find out whether an employee needs a **religious** accommodation," she said. "Employers would have liked more clarity out of this opinion."

Jenifer Wicks, the litigation director of the Council on American-Islamic Relations in Washington, said the **court**'s decision "sends the message that Muslim women practicing their religion is something that has to be accommodated."

The group had filed a friend-of-the-**court** brief on Ms. Elauf s side that discussed abuse that some Muslim girls have faced in schools for wearing a hijab. While the legal principles of the case apply to employment, Ms. Wicks said, "this decision is one the schools can use to discuss these issues."

With the suit revived, the case now goes back to the 10th Circuit **court** for reconsideration.

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By Mark **Walsh**

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