

**UNWRAPPING RELIGIOUS ACCOMMODATION CLAIMS:
THE IMPACT ON THE AMERICAN WORKPLACE AFTER
*EEOC v. ABERCROMBIE***

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You never get a second chance to make a first impression.

I. INTRODUCTION

“Let’s say four people show up for a job interview So the first is a Sikh man wearing a turban, the second is a Hasidic man wearing a hat, the third is a Muslim woman wearing a hijab, [and] the fourth is a Catholic nun in a habit,”¹ Justice Alito proposed during oral argument in *EEOC v. Abercrombie & Fitch Stores, Inc.*² Although this may seem like the start of a casual dinner table joke, this hypothetical, in part, mirrors a real scenario that quickly escalated into a religious discrimination lawsuit.

In 2008, Samantha Elauf, a 17-year-old community college student, interviewed for a “model” (i.e., salesperson) position at Abercrombie & Fitch, Inc., but Abercrombie turned her down.³ Although Elauf initially scored high marks on the interview checklist, meeting the expectations for hire,⁴ the hiring manager later lowered Elauf’s score, as per the request of a higher-ranking employee, so that she was no longer eligible for the position.⁵ Abercrombie denied Elauf the retail job because the hijab⁶ that Elauf wore to the interview

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¹ Transcript of Oral Argument at 31, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

² 135 S. Ct. at 2028.

³ See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1112–14 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1111 n.1 (citing JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH* 310 (4th ed.

conflicted with Abercrombie's "Look Policy."⁷ Abercrombie staff—correctly—assumed that Elauf was Muslim and further assumed that her practice of wearing a hijab would have required an exemption from the company's Look Policy.⁸ Notably, neither the hiring manager nor Elauf discussed the clothing conflict at the interview.

Elauf filed a religious discrimination suit against Abercrombie, alleging that the company failed to provide her a reasonable religious accommodation, in contravention of Title VII of the Civil Rights Act of 1964.⁹ In response, Abercrombie argued that it was not required to accommodate Elauf's religious beliefs—even though it knew about them—because Elauf failed to *inform* the store that she would need an exemption from the Look Policy.¹⁰

Title VII of the Civil Rights Act of 1964 protects employees from two forms of discrimination: disparate treatment and disparate impact.¹¹ The disparate treatment provision of Title VII prohibits employers from: (1) failing to hire an applicant (2) because of (3) "such individual's . . . religion" (which includes her religious practice).¹² The disparate impact theory prohibits employers "from using a facially neutral employment practice that has an unjustified impact on members of a protected class."¹³ Title VII also incorporates a mandate of accommodation of employees' religious practices.¹⁴

2011)) (defining a "hijab" as the "veil or head covering worn by Muslim women in public"). Some Islam scholars interpret the Quran to require women to wear a hijab, or headscarf, in order to show their modesty. MANAL HAMZEH, PEDAGOGIES OF DEVEILING: MUSLIM GIRLS AND THE HIJAB DISCOURSE 79 (Curry Stephenson Malott ed., 2012). There is no single type of hijab that must be worn by a devout Muslim woman; there are many different styles and colors of hijabs or headscarves that are consistent with Islam. PAUL GWYNNE, WORLD RELIGIONS IN PRACTICE: A COMPARATIVE INTRODUCTION 235 (2008). For the purposes of this Comment, the terms "hijab" and "headscarf" are used interchangeably.

⁷ *Abercrombie*, 731 F.3d at 1114. The Abercrombie brand exemplifies a classic East Coast collegiate style of clothing. The company's "Look Policy" requires all of its employees to dress in clothing that is consistent with the kinds of clothing it sells in its stores, and as a part of its policy, the company "prohibits employees from wearing caps;" notably, the policy does not explain the meaning of the term "cap." *Id.* at 1111.

⁸ *Id.* at 1114.

⁹ *Id.* at 1112.

¹⁰ *Id.* at 1114.

¹¹ 42 U.S.C. § 2000e-(2) (a) (2014).

¹² *Id.*

¹³ *Id.*

¹⁴ Before the *Abercrombie* decision, the lower courts and the Equal Employment Opportunity Commission (EEOC) in its employment guidelines have understood failure-to-accommodate religious practices as a separate, third category under Title VII; however, as all nine justices of the *Abercrombie* Court make clear, failure-to-

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Traditionally, to bring a religious accommodation claim, the applicant must show that: (1) she had a bona fide religious belief that conflicted with an employment requirement; (2) she *informed her employer of this belief*; and (3) she was not accommodated, resulting in sufficiently adverse employment action.¹⁵

Applying Title VII's reasonable accommodation mandate, the United States District Court for the Northern District of Oklahoma granted summary judgment in favor of the Equal Employment Opportunity Commission (EEOC), reasoning that Abercrombie had enough notice to make it aware that there was a conflict between Elauf's religious belief or practice and the Look Policy requirement of the job.¹⁶ Specifically, the court determined the EEOC met its burden by showing that Elauf wore the headscarf to the interview, the interviewing manager assumed that Elauf was a Muslim and wore the headscarf for religious reasons, and the interviewing manager conferred with the district manager because she thought that Elauf would require an accommodation of the store's Look Policy.¹⁷

On appeal, the United States Court of Appeals for the Tenth Circuit reversed the district court and instead ordered summary judgment in favor of Abercrombie.¹⁸ Abercrombie's winning argument stated that an applicant needed to provide explicit, direct notice to the employer of her religious practices.¹⁹ Therefore, Elauf failed to satisfy the notice provision of accommodation because she did not explicitly inform the interviewing manager that she wore a hijab for religious reasons and would need an accommodation due to a conflict between her religious practice and the store's policy.²⁰ Because Elauf failed to make any such statement or request, the Tenth Circuit concluded that Abercrombie could not have violated Title VII.²¹ Furthermore, the Tenth Circuit rejected the EEOC's position that

accommodate is merely a way to characterize disparate treatment or disparate impact claims. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2041 (2015) (Thomas, J., concurring in part and dissenting in part). For purposes of this Comment, it is helpful to still provide the failure-to-accommodate claims as previously understood by the lower courts.

¹⁵ *Abercrombie*, 731 F.3d at 1122 (citing *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000)); *see also* *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 499 n.9 (5th Cir. 2001) (emphasis added).

¹⁶ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1286 (N.D. Okla. 2011).

¹⁷ *Id.* at 1286.

¹⁸ *Abercrombie*, 731 F.3d at 1110–11.

¹⁹ *Id.* at 1122–23.

²⁰ *Id.* at 1122.

²¹ *Id.*

either the employee informing the employer of the conflict *or* the employer otherwise becoming aware of the conflict established a prima facie case.²²

Although Abercrombie has since changed its Look Policy accommodations to avoid future claims like those of Ms. Elauf,²³ the United States Supreme Court agreed to hear an appeal by the EEOC to answer the question at the heart of this case:

Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship [Does this] prohibition appl[y] only where an applicant has informed the employer of his need for an accommodation[?]²⁴

In other words, must a job applicant provide an employer with direct, explicit notice that she requires a religious accommodation to gain the protections of Title VII, or is some lesser knowledge or notice sufficient to trigger an employer's duty to engage in a dialogue with the applicant or employee about the possible need for a religious accommodation?²⁵ For instance, if Abercrombie made an informed guess that Elauf wore a hijab for religious purposes, does that constitute "knowing?"

On June 1, 2015, the Supreme Court issued its 8-1 opinion, holding that "actual knowledge" of the need for an accommodation is not required, and the applicant need not specifically request an accommodation. Delivering the majority opinion, Justice Scalia stressed that even if an employer has no more than an "unsubstantiated suspicion" of an applicant's religious beliefs or practices, the employer violates Title VII where its action is *motivated* by a desire to avoid a potential accommodation.²⁶ Therefore, an "employer may not make an applicant's religious practice, confirmed

²² *Id.* at 1123.

²³ In 2013, Abercrombie issued an apology to the community after settling two other EEOC suits regarding discrimination against Muslim workers whose hijabs conflicted with the company's "Look Policy." Kim Bhasin, *Abercrombie Modifies Controversial Look Policy As Part of Settlement with Fired Muslim Workers*, HUFFINGTON POST (Sept. 23, 2013), http://www.huffingtonpost.com/2013/09/23/abercrombie-modifies-look-policy_n_3976237.html. The company stated: "As part of our commitment to fair hiring practices and fostering a diverse workplace, we continually evaluate our existing policies. With respect to hijabs, in particular, we determined three years ago to institute policy changes that would allow such headwear." *Id.*

²⁴ EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031 (2015).

²⁵ Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 65-66 (1986).

²⁶ *Id.*

or otherwise, a factor in employment decisions.”²⁷

While *Abercrombie*'s central holding is a deserving win for job applicants, the decision still fails to answer the question: what qualifies as an “unsubstantiated suspicion” or a “hunch” in a motive inquiry? By doing away with “knowledge” and “notice,” the majority’s “suspicion” standard puts an employer in uncertain situations, and it is easy to imagine scenarios where an employer may risk suit for both asking and not asking certain questions. For instance, if an employer proactively describes all the workplace policies (e.g., dress attire) and asks if complying with these policies would pose a problem for the applicant, such questions may be characterized as intended to weed out specific groups, and therefore, considered suspect. Furthermore, if the applicant states that she, in fact, cannot comply with the policies, the employer may be tempted to ask explicitly whether her reason is based on a religious belief. Such an action complicates common and accepted practice where employers avoid asking applicants questions about their religious beliefs. Or if the applicant states she cannot comply with the policy but the employer does not suspect she needs an accommodation, will the employer face liability for not inquiring further? The last scenario highlights Justice Alito’s point in his concurrence: the Court cannot just do away with the knowledge and notice standards because an inquiry into motive still raises questions of what the employer, in reality, “knew” at the time of the interview.²⁸

The *Abercrombie* case depicts how navigating a work-religion issue is more challenging than ever—for both the employee and the employer.²⁹ Claims of workplace religious discrimination are on the rise. Since 2000, religious discrimination claims filed with the EEOC have almost doubled, with 3502 claims filed in 2015.³⁰ In light of today’s globalized world, technology advances, and emphasis on political correctness, it can be difficult for employers to balance their interests against employees’ interests. Employers are ultimately interested in running their business operations as they see fit, but are limited by the protections Title VII affords to employees.³¹ Central to

²⁷ *Abercrombie*, 135 S. Ct. at 2033.

²⁸ *Id.* at 2035–36 (Alito, J., concurring in part).

²⁹ See also Press Release, EEOC, *Abercrombie & Fitch Settles Two Pending EEOC Religious Discrimination Suits* (Sept. 23, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/9-23-13c.cfm>.

³⁰ *Religion-Based Charges FY 1997– FY 2015*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> (last visited Apr. 6, 2016).

³¹ See 42 U.S.C. § 2000e(j) (2014). With the passage of Title VII, Congress extended the protection of religious freedom to the workplace.

the determination of the notice standard dispute was the tension between an employer's right to run business operations and an employee's right to religious freedom.

This Comment argues that the United States Supreme Court's decision about a college student and her part-time job has far-reaching implications for the American workplace; specifically, the new law fails to provide any guidelines for employer "best practices" during the interactive hiring process. Part II of this Comment provides a brief overview of religious discrimination claims under Title VII and the framework for analyzing such claims. Part III reviews the previous circuit split on religious reasonable accommodation claims as a starting point to discuss the EEOC and Abercrombie's positions in front of the high court. Part IV examines the Supreme Court's ruling in *Abercrombie*, with a specific focus on the "suspicion" standard Justice Scalia employed in the majority opinion and the more practical aspect of Justice Alito's concurrence. Part V considers the aftermath of the *Abercrombie* decision, particularly how the clarified religious accommodation claims analysis affects future claims, as well as pending litigation in the lower courts. Part VI discusses the impact on employer "best practices" after the Supreme Court failed to account for the practical aspects of interviewing, the balancing of employer and employee interests, and society's interest in eliminating unfair employment discrimination to allow for the most just outcome. Part VII concludes.

II. A BRIEF OVERVIEW OF TITLE VII: THE INTERPLAY BETWEEN DISPARATE TREATMENT AND RELIGIOUS ACCOMMODATION CLAIMS BEFORE *ABERCROMBIE*

With the passage of the Civil Rights Act of 1964, Congress declared the elimination of discrimination a national goal of the highest priority.³² Unlawful discrimination in the employment context falls under Title VII, which states that it is "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion," subject to certain limitations.³³ In 1972, Congress added to Title VII an express obligation of employers to reasonably accommodate an employee

³² See S. REP. No. 872, pt. 1, at 11, 24 (1964).

³³ 42 U.S.C. § 2000e-2(a)(1) (2014).

when that employee's sincerely held religious beliefs, practices, or observance conflict with a work requirement, absent undue hardship to the employer.³⁴ Until the recent *Abercrombie* decision, employers and employees alike have understood failure to accommodate claims as a third avenue of liability under Title VII, in addition to disparate treatment and disparate impact. Before addressing the recent clarification of Title VII claims, this section will provide an overview of disparate treatment and religious accommodation claims in past jurisprudence.

A. *Per Se Discrimination*

Disparate treatment claims arise where an employer takes an "adverse employment action"³⁵ due to the employee's religion.³⁶ An employee can prove a disparate treatment claim through direct evidence of discriminatory intent, such as, "I would never hire her because she is Jewish," or indirectly through presumptions and shifts in the burden of proof. In cases where the intentional discrimination must be proven through indirect evidence, the Supreme Court has established a burden-shifting framework.³⁷

To establish a prima facie case, the employee must show that: (1) she is a member of a protected class; (2) she was qualified for the position she held; (3) she suffered an adverse employment action; and (4) the adverse action took place under circumstances giving rise to the inference of discrimination.³⁸ The establishment of a prima facie

³⁴ § 2000e(j); *TWA v. Hardison*, 432 U.S. 63, 66 (1977).

³⁵ For purposes of a Title VII discrimination claim, an "adverse employment action" is a tangible change in work conditions that produces a material employment disadvantage. Civil Rights Act of 1964, 29 U.S.C. § 701 (2014); 42 U.S.C. § 2000e. For instance, a materially adverse action might include: discharge; demotion or transfer accompanied by decreased wages or salary, a less distinguished job title, a material loss of benefits, and/or a loss of seniority; a supervisor's decision not to take action to stop harassment by co-workers in retaliation for employee's opposition to civil rights violations; or a permanent transfer to another shift where the change in work hours impacted employee's ability to continue her education. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL NO. 915.003 § 8-II(D) (2008) [hereinafter EEOC Compl. Man.].

³⁶ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973) (refusal to rehire allegedly based on racial discrimination); see also *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (discussing disparate treatment claims in the context of the Age Discrimination in Employment Act of 1967).

³⁷ *McDonnell Douglas Corp.*, 411 U.S. at 802.

³⁸ *Marmulzsteyn v. Napolitano*, 523 F. App'x 13, 15 (2013) (quoting *Ruiz v. County of Rockland*, 609 F.3d 486, 492 (2d Cir. 2009)); *Moore v. City of Charlotte*, 754 F.2d 1100, 1105–06 (4th Cir. 1985) (reasoning that the inference of discrimination may include comparator evidence if an employee can show that the employer treated the employee more harshly than other employees of a different religion, or no

case creates a presumption of discrimination, which will result in liability unless the employer proffers a “legitimate, non-discriminatory reason” for the adverse employment decision.³⁹ If the employer is able to put such a reason into evidence, the plaintiff may still prevail by demonstrating that the proffered reason was merely a pretext (i.e., a cover up) for unlawful religious discrimination.⁴⁰ The burden of persuasion remains on the employee throughout.⁴¹

B. *Religious Accommodation Claims*

The duty to accommodate an employee’s religious beliefs is “implicated only when there is a *conflict* between an employee’s religious practice and the employer’s neutral policy.”⁴² To make a prima facie case of failure to accommodate a religious belief, the employee traditionally had to show that: (1) she had a bona fide religious belief that conflicted with an employment requirement; (2) she *informed her employer of this belief*; and (3) she was fired or not hired for failure to comply with the conflicting employment requirement.⁴³ Further, the fact that violating the employer’s rule is otherwise a legitimate reason for discharge is irrelevant: the duty of accommodation requires the employer to grant an exception to such a rule if the accommodation is reasonable and does not pose an undue hardship.⁴⁴ The plaintiff must also prove that there was an

religion, who had engaged in similar conduct).

³⁹ *McDonnell Douglas Corp.*, 411 U.S. at 802.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1120 (10th Cir. 2013) (quoting *EEOC Compl. Man.*, *supra* note 35, § 12-IV(A)(1)).

⁴³ *Id.* at 1122 (citing *Thomas v. Nat’l Ass’n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000)); *see also* *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 499 n.9 (5th Cir. 2001) (emphasis added).

⁴⁴ *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1018 (4th Cir. 1996). The court in *Chalmers* provides the following example:

[A]n employee who is terminated for refusing to work on Sundays can maintain an accommodation claim even if other nonreligious employees were also fired for refusing Sunday work, and even though the employer’s proffered reason for the discharge—the refusal to perform required Sunday work—is legitimate and nondiscriminatory (because the Sunday work rule applies to all employees, regardless of religion). If the employee has notified the employer of his religious need to take Sundays off, the burden rests on the employer to show that it could not accommodate the employee’s religious practice without undue hardship.

Id.

accommodation available and that the request was reasonable.⁴⁵ After an employee makes such a prima facie case, the burden shifts to the employer: (1) to rebut one or more elements of the plaintiff's case;⁴⁶ (2) to show that it offered a reasonable accommodation of religious practice;⁴⁷ or (3) to show that the accommodation would work an undue hardship upon the employer and its business.⁴⁸

As noted *supra*, this Comment focuses primarily on the second element of the prima facie case of a reasonable accommodation claim: when does the employer have knowledge or information of the employee's belief, such that the employer is aware of a possible conflict between the employee's belief and her employment? To better address this question, it is helpful to break down the religious accommodation framework into discrete parts. As a practical matter, there are three main issues to consider when addressing requests for accommodations: (1) what is a bona fide religious belief; (2) what constitutes a religious accommodation request that is entitled to Title VII protection; and (3) what is the extent of the employer's obligation to reasonably accommodate religious beliefs or practices?

⁴⁵ See, e.g., *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002) (holding that, in the Americans with Disabilities Act context, the employee must prove the reasonableness of an accommodation request).

⁴⁶ *Thomas*, 225 F.3d at 1156. The Tenth Circuit has also noted that using the *McDonnell Douglas* framework in a religious accommodation context presents a different inquiry. The *Thomas* court reasoned:

Thus, we use the burden-shifting mechanism, not to probe the subjective intent of the employer, but rather simply to provide a useful structure by which the district court . . . can determine whether the various parties have advanced sufficient evidence to meet their respective traditional burdens to prove or disprove the reasonableness of the accommodations offered or not offered.

Id. at 1155 n.6 (quoting *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178 n.12 (10th Cir. 1999) (en banc) (internal quotation marks omitted)).

⁴⁷ See, e.g., *Barnett*, 535 U.S. at 391.

⁴⁸ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977). The extent of hardship to the business that must be shown is minimal, but it must be more than mere inconvenience or some modest hardship. *Id.* at 84. The test is whether the employer would suffer "more than a de minimis cost" by accommodation. *Id.* Despite the minimal showing required by an employer to defeat an accommodation claim, the accommodation requirement does impose some burden on an employer and does favor the employee's rights over the employer's rights, at least to the extent of prohibiting utterly arbitrary discrimination against any person based solely on the employee's religious beliefs and practices. *Id.*; see also *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978).

1. Bona Fide Religious Belief

Title VII defines “religion” to include those “aspects of religious observance and practice” that an employer is able to “reasonably accommodate without undue hardship on the conduct of the employer’s business.”⁴⁹ Courts have held that religion includes both traditional mainstream religions, such as Judaism, Islam, and Christianity, and non-mainstream religions that may or may not be traditionally recognized as a formal, organized church.⁵⁰ Religion also encompasses atheism,⁵¹ as well as beliefs that are “only subscribed to by a small number of people, or that seem illogical or unreasonable to others.”⁵² A religious belief usually embodies distinctive, ultimate ideas about life, purpose, and death,⁵³ but does not include “[s]ocial, political, or economic philosophies, [or] personal preferences.”⁵⁴

Because the expansive definition of “religion” raises opportunities for a particular employee to falsely use “religion” to avoid job burdens or obtain job benefits,⁵⁵ the determination on this issue generally will depend on the fact finder’s assessment of the employee’s sincerity.⁵⁶ In *United States v. Seeger*, the Court reasoned that “[w]hile the ‘truth’ of a

⁴⁹ 42 U.S.C. § 2000e(j) (2014).

⁵⁰ *Telfair v. Fed. Express Corp.*, 934 F. Supp. 2d 1368, 1383 (S.D. Fla. 2013); EEOC Compl. Man., *supra* note 35, § 12-I(A)(1).

⁵¹ *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 n.1 (7th Cir. 2013) (“The incorporation of some form of deity . . . into a belief system is not required for Title VII protection, which recognizes atheism as a religion.”) (citing *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003)).

⁵² *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981); *see also* EEOC v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 56 (1st Cir. 2002) (reiterating that religious beliefs do not need to be acceptable, logical, consistent, or comprehensible to others).

⁵³ *Adeyeye*, 721 F.3d at 448; *see* *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005) (“[W]hen a person sincerely holds beliefs dealing with issues of ultimate concern that for her occupy a place parallel to that filled by God in traditionally religious persons, those beliefs represent her religion.”) (internal quotations and ellipses omitted); EEOC Compl. Man., *supra* note 35, § 12-I(A)(1).

⁵⁴ EEOC Compl. Man., *supra* note 35, § 12-I(A)(1), Ex. 6. (“Personal Preference That is Not a Religious Belief”); *Telfair*, 934 F. Supp. 2d at 1381 (noting that an employer is not obligated to accommodate an employee’s purely personal preference); *Slater v. King Soopers, Inc.*, 809 F. Supp. 809, 810 (D. Colo. 1992) (explaining that the Ku Klux Klan is not a religion, but rather an organization political and social in nature); *cf.* *Chenzira v. Cincinnati Children’s Hosp. Med. Ctr.*, No. 1:11-cv-00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012) (“The [c]ourt finds it plausible that [p]laintiff could subscribe to veganism with a sincerity equating that of traditional religious views.”).

⁵⁵ MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 405 (2d ed. 2012).

⁵⁶ *Union Independiente*, 279 F.3d at 56.

belief is not open to question, there remains the significant question whether it is ‘truly held.’⁵⁷ An analysis of plaintiff’s sincerity, however, “does not require a deep analysis of his conscious and/or subconscious reasons or motives for holding his beliefs,” mainly because, as the Court notes, “[t]hese are matters of interpretation where the law must tread lightly.”⁵⁸ Therefore, a relevant consideration for the fact finder is whether the employee’s conduct aligns with her professed belief.⁵⁹

These ideas and principles about life, purpose, and death “have significant implications for the enforcement of Title VII’s proscription against religious discrimination.”⁶⁰ First, a religious belief is not merely a matter of personal preference, but one of deep *religious* conviction.⁶¹ So if the belief does not truly relate to religious matters (i.e., ultimate ideas), the person’s conduct associated with that belief is not protected under Title VII.⁶² Second, to further complicate the analysis, an employee may personally possess a religious belief even if such belief is not reflected in the tenets of that individual’s announced faith.⁶³ Put differently, an employee’s beliefs can deviate from the tenets of her formal religion, but still be considered sincere, religious beliefs covered under Title VII.⁶⁴ And third, an employee may engage in what

⁵⁷ *United States v. Seeger*, 380 U.S. 163, 185 (1965) (clarifying the definition of religion and holding that a belief is religious if it “is sincere and meaningful [and] occupies a place in the life of the [employee] parallel to that filled by the orthodox belief in God”).

⁵⁸ *Adeyeye*, 721 F.3d at 452–54.

⁵⁹ *See Union Independiente*, 279 F.3d at 56–57 (denying summary judgment where evidence existed that the employee’s conduct was contrary to the tenets of his professed religious belief); *see also Adeyeye*, 721 F.3d at 451–52 (holding the plaintiff produced enough evidence of his desire to return to Nigeria to perform funeral rights for his father, such that his desire came from his personal and sincere religious beliefs).

⁶⁰ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1119 (10th Cir. 2013).

⁶¹ *Id.*

⁶² *Id.*; *see Reed v. Great Lakes Cos.*, 330 F.3d 931, 935 (7th Cir. 2003) (“[A]n employee is not permitted to redefine a purely personal preference or aversion as a religious belief.”); *cf. United States v. Meyers*, 95 F.3d 1475, 1483–84 (10th Cir. 1996) (determining, for purposes of the Religious Freedom Restoration Act, whether a belief qualifies as a “religious belief” by assessing, *inter alia*, whether the belief “address[es] fundamental questions about life, purpose, and death”).

⁶³ *Welsh v. United States*, 398 U.S. 333, 335–36, 343 (1970) (noting that the petitioner’s objection to engage in war was religious even though his church did not teach those beliefs).

⁶⁴ *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 476 (7th Cir. 2001) (holding that the employee’s belief that she needed to use the phrase “Have a Blessed Day” was a religious practice covered by Title VII even though using the phrase was not a requirement of her religion); *Rivera v. Choice Courier, Sys., Inc.*, No. 01 Civ. 2096 (CBM), 2004 WL 1444852, at *5 (S.D.N.Y. June 25, 2004) (finding that the statutory language providing that Title VII encompasses “all aspects of religious

appears to be a religious practice, but does so for cultural or other reasons.⁶⁵ Such behavior would fall outside the protections of Title VII and not require an accommodation.⁶⁶

While an employer need only accommodate sincerely held beliefs, the EEOC suggests that employers should ordinarily assume that an employee's request for a religious accommodation is sincere.⁶⁷ An employer, however, can request additional information if he has an objective basis for questioning either the religious nature or the sincerity of an employee's belief or practice.⁶⁸ Although not dispositive, factors relevant to evaluating the sincerity of an employee's beliefs include: (1) whether the employee has behaved in a manner inconsistent with his or her proclaimed religious belief; (2) whether the requested accommodation is a highly desirable benefit likely sought for secular reasons; (3) whether the timing of the accommodation request is suspect; and/or (4) whether the employer otherwise has reason to believe that the accommodation is not sought for religious reasons.⁶⁹

2. Religious Accommodation Requests Entitled to Title VII Protection

Although the term could include other requests, religious accommodation requests fall predominantly into two categories: dress/grooming policies⁷⁰ and scheduling.⁷¹ For example, religious

observance and practice, as well as belief," means that Title VII "protects more than . . . practices specifically mandated by an employee's religion") (internal citations omitted).

⁶⁵ *Abercrombie*, 731 F.3d at 1119.

⁶⁶ *Id.*

⁶⁷ EEOC Compl. Man., *supra* note 35, § 12-I(A)(2)-(3).

⁶⁸ *Id.* §12-I(A)(3).

⁶⁹ *Id.* §12-I(A)(2) (citing cases).

⁷⁰ Employees in these types of cases generally seek to wear an article of clothing that does not conform to an employer's uniform or dress policy. *See, e.g.*, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 966 F. Supp. 2d 949 (N.D. Cal. 2013) (permitting Muslim employee to wear her hijab at work as accommodation of her religious belief would not have resulted in undue hardship to clothing retailer); *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006) (holding employer failed to satisfy its burden to show it initiated good faith efforts to reasonably accommodate an employee's religious practice of wearing a head covering during Muslim holiday of Ramadan); *Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591 (S.D.N.Y. 2001) (failing to establish any element of a prima facie case regarding his employer's refusal to let employee work with a beard as a banquet waiter); *Sadrudin v. City of Newark*, 34 F. Supp. 2d 923 (D.N.J. 1999) (sufficiently alleging that the City of Newark terminated employee for refusing to shave his beard).

⁷¹ Employees in these types of cases wish to have time off to worship. *See,*

observances or practices may include attending religious services, praying, wearing religious garb or symbols, displaying religious objects, following certain dietary guidelines, or refraining from certain activities.⁷² Yet, whether a particular practice is based on a “religious” belief will turn “not on the nature of the activity but on the employee’s motivation.”⁷³ For example, an employee may forego a flu vaccine for religious reasons, while another employee might refrain from the shot for health reasons or based on personal preference.⁷⁴ So, in one case the practice might be subject to Title VII reasonable accommodation requirements, while the latter employee’s restrictions would not be. Whether or not an activity is “religious” becomes a fact-based, case-by-case inquiry focusing on the employee’s motivations for the practice in question.

3. Employer Obligations under Title VII

As previously stated, under Title VII an employer has the obligation to reasonably accommodate an employee’s sincerely held religious beliefs, practices, or observance, unless the accommodation would cause an undue hardship on the conduct of the employer’s business.⁷⁵ Therefore, there is typically an interactive process between the employer and employee in an effort for the employer to reasonably

e.g., *Thomas v. Nat’l Ass’n of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000) (holding that defendant reasonably accommodated employee’s observance that prevented letter carrier from working Saturdays when it approved his use of leave on Saturdays, approved use of substitutes when they could be found, and recommended he bid on position that would not require him to work on Saturdays); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997) (holding employer’s offer to allow employees to take a day off from work other than Yom Kippur was not reasonable accommodation of religious practices of employees who requested that day off because offered accommodation did not eliminate conflict between employment requirement and religious practice); *EEOC v. Bridgestone/Firestone, Inc.*, 95 F. Supp. 2d 913 (C.D. Ill. 2000) (opining employer’s offer to allow employee to swap shifts was not a reasonable accommodation because he could not work Sundays and could not personally ask another to work his Sunday shift).

⁷² EEOC Compl. Man., *supra* note 35, § 12-I(A)(1).

⁷³ *Id.* (citing cases). Compare *Tiano v. Dillard Dep’t Stores, Inc.*, 139 F.3d 679 (9th Cir. 1998) (holding employer not liable for denying employee’s request to be absent from work on particular dates to attend religious pilgrimage where evidence showed that her religious needs could be met by going on the pilgrimage at another time and that the particular dates she requested were simply a personal preference), with *Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993) (finding the employer liable for failing to accommodate Jewish employee’s attendance of spouse’s conversion ceremony).

⁷⁴ EEOC Compl. Man., *supra* note 35, § 12-I(A)(1) (citing *LaFevers v. Saffle*, 936 F.2d 1117 (10th Cir. 1991) (holding that “although not all Seventh-day Adventists are vegetarian, an individual adherent’s genuine religious belief in such a dietary practice warrants constitutional protection under the First Amendment”)).

⁷⁵ 42 U.S.C. § 2000e(j) (2014).

accommodate the employee's religious belief. If an accommodation is available and that accommodation is not an undue hardship for the employer, the employer is required to provide it. Title VII, however, does not define the exact parameters of "reasonable accommodation" or "undue hardship," which may make it difficult for the employer to understand the extent of its obligation. Before its decision in *Abercrombie*, the Supreme Court has twice interpreted religious accommodation claims under Title VII, the first case addressing the scope of a reasonable accommodation and the second case defining the parameters of undue hardship.⁷⁶

In *Ansonia Board of Education v. Philbrook*, the Court held that employers need offer only reasonable accommodations, whether an employee's preferred option or any other, to meet their statutory obligation.⁷⁷ A reasonable accommodation is an adjustment to workplace requirements that eliminates conflict between the employer's job requirements and the employee's religious beliefs or practices.⁷⁸ The burden of attempting to accommodate an employee's bona fide religious observance or practice rests with the employer.⁷⁹ Even so, Title VII does not require an employer to accommodate the religious practices of an employee exactly the way the employee requests.⁸⁰ Once the employer proposes a reasonable accommodation, its obligation under Title VII is discharged and the employee cannot insist on a different accommodation.⁸¹ Yet, sometimes the details matter: an employer's proposed accommodation will not be considered reasonable if a more favorable accommodation is given to other employees for nonreligious purposes.⁸²

⁷⁶ See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

⁷⁷ *Philbrook*, 479 U.S. at 69.

⁷⁸ *Morissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1322 (11th Cir. 2007); *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 475 (7th Cir. 2001); *Telfair v. Fed. Express Corp.*, 934 F. Supp. 2d 1368, 1384 (S.D. Fla. 2013); EEOC Compl. Man., *supra* note 35, § 12-IV(A)(3).

⁷⁹ *EEOC v. Townley Eng'g. & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988).

⁸⁰ *Mathewson v. Fla. Game & Fresh Water Comm.*, 693 F. Supp. 1044, 1050 (M.D. Fla. 1988); EEOC Compl. Man., *supra* note 35, § 12-IV(A)(3).

⁸¹ *Telfair*, 934 F. Supp. 2d at 1384 (reiterating that employer does not have to give employee a choice among several accommodations and does not have to give employee his or her preferred accommodation); *Mathewson*, 693 F. Supp. at 1050.

⁸² *Philbrook*, 479 U.S. at 70–71 (“[U]npaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones . . .”).

In *Trans World Airlines, Inc. v. Hardison*, the Court essentially reduced the demands on employers by holding that “undue hardship” must be more than a “de minimis” cost to the employer, which may be evaluated in terms of loss of profits or efficiency, injury to employee morale, or other criteria relevant to the individual situation.⁸³ Because Title VII does not define “undue hardship,” each case turns on its own facts.⁸⁴ Facts that influence this analysis include: (1) the cost of the accommodation regarding the size and operating costs of the employer; (2) the number of employees who will, in fact, need that particular accommodation; (3) the type of workplace at issue; and (4) the nature of the employee’s duties.⁸⁵ The EEOC’s Compliance Manual requires that, to establish an undue hardship, the employer must show how much money or disruption the employee’s accommodation would involve.⁸⁶ Furthermore, costs included in a court’s evaluation encompass more than direct monetary costs; they also include the burden on the conduct of the employer’s business. For example, accommodations that reduce employer efficiency,⁸⁷ impair workplace safety,⁸⁸ or cause co-workers to carry the accommodated employee’s share of work⁸⁹ involve more than a de minimis cost; in other words, they are unduly burdensome.

⁸³ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 65 (1977).

⁸⁴ *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995) (“[E]very case boils down to a determination as to whether the employer acted reasonably.”).

⁸⁵ EEOC Compl. Man., *supra* note 35, § 12-IV(B)(1). *See also Hardison*, 432 U.S. at 84 (holding that ignoring co-workers’ contractual seniority rights would be undue hardship, and the cost of hiring additional worker or loss of production from not replacing the unavailable plaintiff were beyond de minimis); *Tagore v. United States*, 735 F.3d 324, 329–30 (5th Cir. 2013) (ruling that allowing Sikh employee to bring a ceremonial sword to work was undue hardship because request conflicted with laws and regulations controlling security in federal buildings); *Harrell v. Donahue*, 638 F.3d 975, 980 (8th Cir. 2011) (noting that accommodation would have violated the collective bargaining agreement and would have caused more than de minimis imposition on co-workers).

⁸⁶ EEOC Compl. Man., *supra* note 35, § 12-IV(B)(1).

⁸⁷ *Brown v. Polk Cty.*, 61 F.3d 650, 655 (8th Cir. 1995) (holding that a de minimis cost existed where an employer assigned his secretary to type his Bible study notes because the secretary would otherwise have been performing employer’s work during that time); EEOC Compl. Man., *supra* note 35, § 12-IV(B)(2).

⁸⁸ *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004) (“[A]n employer need not accommodate an employee’s religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights.”); EEOC Compl. Man., *supra* note 35, § 12-IV(B)(1).

⁸⁹ *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999) (citing *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (holding that the cost of plaintiff’s requests accommodation was more than de minimis when it required co-workers to assume plaintiff’s share of the hazardous work)); EEOC Compl. Man., *supra* note 35, § 12-IV(B)(2).

Hardison and *Philbrook* define the criteria for an employer to make an assessment of whether a religious accommodation is reasonable and whether the employer can make the accommodation without undue hardship. Both cases underscore that the employer and the employee are expected to engage in an interactive communications process, by which the employer gathers information to determine whether it can accommodate the request, and the employee attempts to work with the employer's proposed accommodation.⁹⁰ As a result, the employer is expected to offer a reasonable accommodation absent an undue hardship. Inevitably, reasonable accommodation and undue hardship require a case-by-case inquiry.⁹¹

Ordinarily, a duty to accommodate arises once the employer has adequate notice of the conflict between the employee's religious beliefs, work duties, and her need for an accommodation.⁹² While other protected classes have more obvious, outward characteristics, a person's belief is often not readily apparent; "[a] person's religion is not like his sex or race—something obvious at a glance. Even if he wears a religious symbol, such as a cross or a yarmulka, this may not pinpoint his particular beliefs and observances."⁹³ Because an employee's religious beliefs may not be readily apparent, an employer must have notice about the beliefs before it can violate the statute.

According to the EEOC guidelines, no "magic language" is necessary to constitute notice; the only requirement is that the request alerts the employer to the presence of a religious motivation.⁹⁴ That notice to the employer then triggers a need for the employer to obtain

⁹⁰ See EEOC Compl. Man., *supra* note 35, § 12-IV(A)(2); see also *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013) (explaining that managers can ask employees to clarify the nature of their requests for religious accommodation).

⁹¹ See *Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010) ("Because Title VII does not explicitly define the terms 'reasonably accommodate' or 'undue hardship,' 'the precise reach of the employer's obligation to its employees is unclear . . . and must be determined on a case-by-case basis.'" (quoting *Beadle v. Hillsborough Cty. Sheriff's Dep't.*, 29 F.3d 589, 592 (11th Cir. 1994))).

⁹² See *Adeyeye*, 721 F.3d at 450; *Dixon*, 627 F.3d at 856; *Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591, 597 (S.D.N.Y. 2001) (finding that plaintiff did not provide sufficient notice when he simply showed up to work with a beard, in violation of company policy, and claimed the beard was a religious requirement); EEOC Compl. Man., *supra* note 35, § 12-IV(A)(1).

⁹³ *Reed v. Great Lakes Cos.*, 330 F.3d 931, 935–36 (7th Cir. 2003).

⁹⁴ *Adeyeye*, 721 F.3d at 450–51 (holding that employee's request for leave to travel to Nigeria and participate in a "funeral ceremony" or "funeral rite" involving animal sacrifice "so that death will not come or take away any of the children's life" [sic] was enough to put employer on notice that request for accommodation was religious); EEOC Compl. Man., *supra* note 35, § 12-IV(A)(1).

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more knowledge of the employee's specific religious beliefs and accommodations. Usually, this means that an employer will have a dialogue with the employee and inquire into the employee's beliefs and practices.⁹⁵ Yet, it is possible for an employer to have knowledge of an employee's beliefs and practices without direct notice from an employee. For instance, some circuit courts have held that employers are on notice of a religious conflict when they have acquired knowledge about the need for an accommodation through other sources.⁹⁶

Then, the question becomes: at what level of knowledge is an employer sufficiently on notice about a religious practice, and once that notice is triggered, even if the employer does not have complete knowledge, does the employer have a duty to inquire further? Before the Supreme Court weighed in, several circuit courts addressed this question.⁹⁷ While certain courts—especially the Tenth Circuit in *Abercrombie*—called for complete, particularized, and actual knowledge of the conflict, others argued that some knowledge of the conflict constitutes notice and thus triggers the duty to accommodate.⁹⁸ The EEOC and *Abercrombie* used the lower courts' knowledge standards as starting points for their positions; however, even more telling of the complicated and nuanced “knowledge” and “notice” issues is that the Supreme Court rejected all of the lower courts' decisions and created two new viewpoints.⁹⁹

⁹⁵ EEOC Compl. Man., *supra* note 35, § 12-IV(A)(2).

⁹⁶ *Dixon*, 627 F.3d at 855–56 (explaining that employer can become aware of tension even if employee does not expressly object to a work requirement based on her religion); *Brown v. Polk Cty.*, 61 F.3d 650, 654 (8th Cir. 1995) (holding that employer only needs to have enough information to understand that there is conflict between employee's religious practices and employer's job requirements); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1363 (S.D. Fla. 1999) (finding that employer's knowledge of employee's refusal to sell condoms at a prior job due to religious beliefs was sufficient).

⁹⁷ *See, e.g., Nobach v. Woodland Vill. Nursing Ctr., Inc.*, 762 F.3d 443 (5th Cir. 2014); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444 (7th Cir. 2013).

⁹⁸ *See* discussion *infra* Part III.A–C (discussing the circuit split on the notice standard).

⁹⁹ *See* discussion *infra* Part IV (discussing the Supreme Court's motive standard).

III. THE KNOWLEDGE STANDARDS AMONG THE CIRCUITS AND THE EEOC

Bringing a Title VII claim is complex and multifaceted. Because conflicts between work and religion are common, a need exists for an approach that would permit a nuanced inquiry into highly fact-sensitive religious discrimination claims. To understand why the Supreme Court in *Abercrombie* created an entirely new shield against religious bias, one must begin at the lower courts' decisions and understand the levels of knowledge that provided sufficient notice, depending on the jurisdiction.

This section uses the Tenth Circuit's *Abercrombie* decision as a starting point to analyze the three approaches of the circuits, as well as the EEOC, that have weighed in on this issue. First, this section highlights the Tenth Circuit's particularized, actual knowledge standard. Then, it discusses the courts representing the majority view—the express notice standard. Finally, it discusses the cases representing the EEOC's view—the flexible notice standard.

A. “Particularized and Actual Knowledge” in the Tenth Circuit’s *Abercrombie* Decision: The Command and Control View of Religious Accommodation¹⁰⁰

One of the most noteworthy reasonable accommodation cases is *EEOC v. Abercrombie & Fitch Stores, Inc.*, in which the Tenth Circuit held that an applicant or employee must establish that she initially informed the employer that she engaged in a particular practice for religious reasons and needed an accommodation for that practice due to a conflict between her religious practice and the company's dress policy.¹⁰¹ The court found that the retailer's failure to hire the applicant, Ms. Elauf, was not an act of religious discrimination since she never informed the company prior to its hiring decision that she wore a hijab for religious reasons and thus, notice was lacking.¹⁰² Unlike the other circuit courts adopting an express notice standard, however, the *Abercrombie* court set an even higher bar for express notice, holding that only the employer's *particularized, actual knowledge* of the key facts would meet the notice requirement that triggers the

¹⁰⁰ See Charles Sullivan, *Triggering the Duty of Accommodating Religion*, WORKPLACE PROF. BLOG (Oct. 20, 2013), http://lawprofessors.typepad.com/laborprof_blog/2013/10/a-similar-problem-arises-with-respect-to-the-duty-to-accommodate-two-recent-contrasting-opinions-from-the-same-circuit-indicat.html.

¹⁰¹ *Abercrombie*, 731 F.3d at 1131–33.

¹⁰² *Id.* at 1110–11.

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employer's duty to accommodate the applicant.¹⁰³ Put another way, an employer can be liable under Title VII for failing to accommodate an employee based on a "religious observance or practice" *only if* the employer has *actual* knowledge that the applicant or employee *needs* an accommodation for it (because the practice is an inflexible one), and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.¹⁰⁴ The Tenth Circuit further explained that the employer should not be held liable for failure to have "guessed, surmised, or figured out from the surrounding circumstances" that the practice was religiously-based and required accommodation, which means that under the express notice standard, the employee or applicant must always raise the need for an accommodation.¹⁰⁵ So, in the *Abercrombie* case, even though the hiring manager may have thought there was a conflict between the plaintiff's religious observance and the store's rules, she lacked actual knowledge of the conflict. Most notably, the Tenth Circuit distinguished *Elauf's* situation from the other significant cases in the flexible notice jurisdictions by reasoning that, even if notice was not sufficient in those cases, there was some notice.¹⁰⁶

Creating an even higher standard, the Tenth Circuit contended that even "actual knowledge" of the religious nature of "a particular applicant or employee" is not enough to trigger the duty to accommodate:

That is because the applicant or employee may not actually *need* an accommodation. In other words, an applicant or employee may not consider his or her religious practice to be inflexible; that is, he or she may not feel obliged by religion to adhere to the practice. If that is the situation, then there actually is no conflict, nor a consequent need for the employer to provide a reasonable accommodation.¹⁰⁷

In other words, until an employee claims to need an accommodation, an employer has no obligation to inquire even if the employer was "generally aware of the beliefs and observances traditionally associated with a particular religious group, and also knew that the applicant or employee displayed symbols associated with that group—or even that the applicant or employee specifically claimed to be a member of that

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1128.

¹⁰⁵ *Id.* at 1127–28.

¹⁰⁶ *Id.* at 1126 ("[T]here is no doubt that these cases settled for nothing less than some significant measure of particularized, actual knowledge.").

¹⁰⁷ *Abercrombie*, 731 F.3d at 1133–34.

group.”¹⁰⁸ Such a scenario could arise when the person does not consider his or her religious practice to be inflexible and may not feel obliged by religion to adhere to the practice. Accordingly, there would not be any conflict triggering the employer’s duty to accommodate.¹⁰⁹ Thus, even actual knowledge may not trigger notice and the duty to accommodate.

The court’s strict approach favored the policy goal of limiting liability for the employer. By adopting the express notice standard and specifying a minimum requirement of particularized, actual knowledge, the court placed the full burden on the employee, which prevents the employer from having to guess or surmise from the circumstances that a particular practice is based on religion and that the plaintiff requires an accommodation for it.¹¹⁰ It also encourages employers to refrain from inquiring into the religious affiliation of a prospective or current employee.

Actual knowledge is an extreme standard, especially in cases arising out of an interview setting and in those with an undisclosed workplace policy. In those situations, the applicant or employee will not learn about the work requirement and possible conflict unless the employer tells them, or, as in the *Abercrombie* case, could be misled to believe that there was no conflict at all. If the employer is the only party in a position to know whether a conflict exists, it would be blatantly unfair to place the burden on the applicant to detect and express the conflict.

B. *Express Notice Standard*

A variation on the express notice problem occurs when an employee informs a coworker, but not a direct supervisor of her beliefs.¹¹¹ In *Nobach v. Woodland Village Nursing Center*, the nursing center fired an employee after she refused to pray the rosary with a patient because it conflicted with her religious beliefs as a Jehovah’s Witness.¹¹² The court held there was no evidence that the employee ever advised anyone involved in her discharge that praying the rosary was against her religion.¹¹³ The employee acknowledged that the only time she made any mention of her religious beliefs was to a certified

¹⁰⁸ *Id.* at 1132.

¹⁰⁹ *Id.* at 1133–34.

¹¹⁰ *Id.* at 1127.

¹¹¹ *See* *Nobach v. Woodland Vill. Nursing Ctr., Inc.*, 762 F.3d 443 (5th Cir. 2014).

¹¹² *Id.* at 444, 445.

¹¹³ *Id.* at 444.

nurse's assistant (CNA), a non-supervisory employee, but the employee never claimed that the CNA told anyone of her reason for refusing to aid the resident.¹¹⁴ The court further stated that the first time the employee actually informed her supervisor that she refused to perform her job duty due to her religious beliefs was following her discharge for insubordination. Therefore, the United States Court of Appeals for the Fifth Circuit's holding expands on the Tenth Circuit's holding, maintaining that employees must convey their requests directly to their supervisors or the management, not coworkers, to satisfy the notice element.

Both the United States Court of Appeals for the Third and Fourth Circuits addressed situations where an employer had *some* knowledge of the employee's beliefs, but decided that that knowledge was not sufficient to "put it on notice." In *Wilkerson v. New Media Technology Charter School, Inc.*, the Third Circuit dismissed the plaintiff's religious accommodation claim because she failed to inform her employer of her need for an accommodation due to a conflict between her Christian beliefs and the employer's "libations" or alcohol-drinking ceremony.¹¹⁵ The court reasoned that the fact that the employer "knew she was a Christian does not sufficiently satisfy [the plaintiff's] duty to provide 'fair warning' to [the employer] that she possessed a religious belief that specifically prevented her from participating in the libations ceremony."¹¹⁶ Even if an employer "suspected" that the libations ceremony would be offensive to the plaintiff, the plaintiff would still have an obligation to "inform the defendants that the libation ceremony would offend her religious beliefs."¹¹⁷

Similarly, the Fourth Circuit found that the employer's knowledge of the plaintiff's strongly-held religious beliefs was not enough to "put it on notice" that those beliefs would compel her to "write, and send, personal, accusatory letters to co-workers at their homes."¹¹⁸ Even if an employer were on notice that an applicant or employee subscribed to a particular religious belief system, that

¹¹⁴ *Id.*

¹¹⁵ *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 319 (3d Cir. 2008). The court does not describe the libations ceremony in its opinion, but an article describes it as "an African-American ritual where liquid (water or alcohol) is poured in the four directions of the compass, while the names of the deceased are read aloud." *Id.* at 317 n.1; Paul Mollica, *Wilkerson v. New Media Technology Charter School*, OUTTEN & GOLDEN LLP BLOG (Apr. 8, 2008), <http://www.employmentlawblog.info/2008/04/wilkerson-v-new-media-technology-charter-school-no-07-1305-3d-cir-apr-9-2008.shtml>.

¹¹⁶ *Wilkerson*, 522 F.3d at 319.

¹¹⁷ *Id.* at 319–20.

¹¹⁸ *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1020 n.3 (4th Cir. 1996).

information would not be enough to tell the employer what practices are religious in “*the person’s own scheme of things*.”¹¹⁹ This is because religion is a uniquely personal matter. Ordinarily, the only way the employer would know such information is if the applicant or employee informed the employer.

C. *Some Knowledge from Some Other Source: The Flexible Notice Approach Requiring a Case-by-Case Analysis*

Other circuits, along with the EEOC and Judge Ebe’s dissent in *Abercrombie*, asserted that notice can derive from knowledge by the applicant or some other source, and that it need not be an affirmative statement. According to the EEOC guidelines, no “magic language” is necessary to constitute notice; the only requirement is that the request alerts the employer to the fact that it is motivated by a religious belief.¹²⁰ That notice to the employer then triggers a need for the employer to obtain more *knowledge* of the employee’s specific religious beliefs and accommodation.¹²¹ Usually, this means that an employer will have a dialogue with the employee and inquire into the employee’s beliefs and practices. Thus, the EEOC urged a less restrictive approach, emphasizing that notice need not be strictly in the form of an employee or applicant verbally requesting an accommodation. More specifically, the EEOC reasoned: “The employer’s obligation is to attempt reasonable accommodation (where no undue hardship would result) when it has notice—be it from an affirmative statement by the individual, *or some other source*—of an individual’s religious belief that conflicts with a work requirement.”¹²² So, in the Tenth Circuit *Abercrombie* case, although *Abercrombie* is required to receive notice

¹¹⁹ EEOC Compl. Man., *supra* note 35, § 12-I(A)(1) (emphasis added); *see also* LaFevers v. Saffle, 936 F.2d 1117, 1119 (10th Cir. 1991) (holding that a Seventh Day Adventist prisoner’s religious belief that he must adhere to a vegetarian diet, if sincerely held, was entitled to protection under the First Amendment even though the district court found that not all Seventh Day Adventists are vegetarian and that the “faith does not *require*” such a diet).

¹²⁰ *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 450–51 (7th Cir. 2013) (holding that employee’s request for leave to travel to Nigeria and participate in a “funeral ceremony” or “funeral rite” involving animal sacrifice “so that death will not come or take away any of the children’s life” [sic] was enough to put create a genuine issue of material fact whether the employer was on notice that the request for accommodation was religious); EEOC Compl. Man., *supra* note 35, § 12-IV(A)(1).

¹²¹ *Adeyeye*, 721 F.3d at 450–51.

¹²² *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1123 (10th Cir. 2013) (quoting Response Brief of Appellee U.S. Equal Employment Opportunity Commission at 41, *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013) (No. 11-5110)).

that Elauf needed an accommodation, the knowledge could come from Elauf's religious clothing attire instead of a verbal statement.

In the same vein, Judge Ebel in his Tenth Circuit dissent advocated for the flexible notice standard, reasoning that under certain circumstances, it makes "no sense" to require the plaintiff to show first that she informed the company that her religious practice conflicts with the company policy.¹²³ Judge Ebel relied on the principle adopted by other circuits—including the United States Court of Appeals for the Ninth Circuit in *Brown*—and also adopted by the EEOC and the Americans with Disabilities Act (ADA) in making his decision.¹²⁴ Specifically, Judge Ebel objected to the majority's requirement that a "job applicant must initiate a general discussion of her religious beliefs during the job interview just in case her religious beliefs and practices might conflict with some unstated policy or work rule of the employer."¹²⁵ The judge suggested that in situations where there is an *undisclosed* workplace policy, it should not be the employee's burden to initiate the discussion, but rather the employer's duty to initiate a dialogue.¹²⁶ Practically, the employer should inform the applicant of the work policy and then inquire into whether the applicant could comply with that policy or whether the company "could accommodate her belief in some reasonable way."¹²⁷ Under the dissent's approach, this inquiry would have been sufficient to initiate any dialogue between the job applicant, Ms. Elauf, and the employer, Abercrombie, as to whether Ms. Elauf had religious beliefs that conflicted with Abercrombie's dress code.

Judge Ebel then combined two evidentiary elements to show how the EEOC established its prima facie case. Those two elements—that Elauf was not aware of Abercrombie's conflicting policy and that Abercrombie had knowledge that Elauf might hold religious beliefs that conflicted with its Look Policy—"smack of exactly the religious discrimination that Title VII prohibits."¹²⁸ Abercrombie, Judge Ebel argued, was able to avoid any dialogue regarding a reasonable accommodation by failing to disclose the possible conflict and then refusing to hire Elauf.¹²⁹ Therefore, according to Judge Ebel, the

¹²³ *Id.* at 1143–44 (Ebel, J., concurring in part and dissenting in part).

¹²⁴ *Id.* at 1147–50.

¹²⁵ *Id.* at 1150.

¹²⁶ *Id.* at 1150–51.

¹²⁷ *Id.* at 1151.

¹²⁸ *Abercrombie*, 731 F.3d at 1150 (Ebel, J., concurring in part and dissenting in part).

¹²⁹ *Id.*

EEOC established a prima facie case of a failure-to-accommodate claim.¹³⁰

Providing an entirely different framework for the *Abercrombie* case, Judge Ebel described how the circumstances in the case “justif[ied] applying . . . a common sense exception to the usual rule,” and advocated for a known or should have known standard.¹³¹ Judge Ebel referenced a Ninth Circuit decision involving the ADA and recognizing an exception to the general rule that an employee request an accommodation where the employer knows, or has reason to know, that a disability prevents an employee from requesting an accommodation.¹³² Judge Ebel stated: “There are, then, exceptions to the general rule that an employer’s obligation to consider a reasonable accommodation is not triggered unless and until an employee or job applicant informs the employer of the need for an accommodation.”¹³³

This standard—the known or should have known standard—as proposed by Judge Ebel is a more forgiving and flexible approach to those employees or applicants who are in no position to have knowledge of a conflict. The standard also ensures that those persons receive the Title VII protection in a wide range of situations—including knowledge from some source other than the applicant or employee *and* the employer’s own observations. Essentially, if the employer should have known of the conflict, then the employer is on notice.

Similarly, the Seventh, Ninth, Eighth, and Eleventh Circuits have explicitly rejected the express notice standard and have found notice established by actions that signaled an employer’s awareness of a religious conflict.¹³⁴ The courts all adopted the same standard, reasoning that “[a]n employer need have only enough information about an employee’s religious needs to permit the employer to understand the existence of a conflict between the employee’s religious practices and the employer’s job requirements.”¹³⁵ For example, in *Adeyeye v. Heartland Sweeteners, LLC*, the United States Court of Appeals for the Seventh Circuit examined whether an

¹³⁰ *Id.*

¹³¹ *Id.* at 1148.

¹³² *Id.* (citing *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001)).

¹³³ *Id.*

¹³⁴ See *Dixon v. Hallmark Cos.*, 627 F.3d 849, 855–56 (11th Cir. 2010); *Brown v. Polk Cty.*, 61 F.3d 650, 654 (8th Cir. 1995); *Heller v. Ebb Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993).

¹³⁵ *Dixon*, 627 F.3d at 855–56 (internal quotation marks omitted) (citations omitted); see also *Brown*, 61 F.3d at 654; *Heller*, 8 F.3d at 1439.

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employee sufficiently notified his employer of the religious character of his request to attend his father's funeral in Africa.¹³⁶ The employee's two written requests contained language referring to a "funeral ceremony," a "funeral rite," and "animal *sacrifice*" and described his participation as "compulsory," with the spiritual consequence of his absence being his own and family members' deaths.¹³⁷ Because the plaintiff's written requests provided notice, the court's analysis centered on whether such notice was sufficient for the employer to know that the request was based on a religious belief. Although the plaintiff's religious beliefs and practices were not "as familiar as [others] closer to the modern American mainstream," the court held that the plaintiff's request for leave to attend his father's funeral gave rise to a genuine issue of material fact as to whether such a request provided sufficient notice of its religious nature.¹³⁸ The *Adeyeye* court emphasized that "Title VII has not been interpreted to require adherence to a rigid script to satisfy the notice requirement," and in fact, the court should "construe [Title VII] liberally in favor of employee protection."¹³⁹ In particular, the court underscored that "an 'employer cannot shield itself from liability . . . by intentionally remaining in the dark'" regarding a person's need for reasonable accommodation.¹⁴⁰ Therefore, while the employee should give fair notice of the need for an accommodation, the employer is free to seek clarification regarding an ambiguous request.¹⁴¹

In *Heller*, a Jewish employee was fired for missing work to attend his wife's conversion ceremony.¹⁴² While the employee had asked to attend the ceremony, the employer argued that "because Heller never explained the nature of the ceremony to [the employer], he did not give notice of his conflict."¹⁴³ The Ninth Circuit disagreed, explaining that plaintiff's supervisor "knew" that he was Jewish, "knew" that his "wife was studying for conversion," and "when [the plaintiff] requested the time off, he informed the [supervisor] why he needed to miss

¹³⁶ See *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 451–52 (7th Cir. 2013).

¹³⁷ *Id.* at 450–51 (emphasis added).

¹³⁸ *Id.* at 447, 451.

¹³⁹ *Id.* at 450.

¹⁴⁰ *Id.* (quoting *Xodus v. Wackenhut Corp.*, 619 F.3d 683, 686 (7th Cir. 2010)).

¹⁴¹ *Id.*

¹⁴² *Heller v. Ebb Auto Co.*, 8 F.3d 1433, 1437 (9th Cir. 1993). The *Heller* court also makes the argument that Title VII encompasses all aspects of religious observance and practice, even those that are not specifically required by the religion. *Id.* at 1438. Therefore, although attending the conversion ceremony was not specifically required, it was still protected conduct under Title VII. *Id.* at 1438–39.

¹⁴³ *Id.* at 1439.

work.”¹⁴⁴ Thus, the court held that no specific explanation was required, reasoning that “[a] sensible approach would require only enough information about an employee’s religious needs to permit the employer to understand the existence of a conflict between the employee’s religious practices and the employer’s job requirements.”¹⁴⁵

The Eighth Circuit also rejected the express notice standard.¹⁴⁶ In *Brown v. Polk County*, the employer reprimanded the employee for engaging in religious activities at work, such as referring to Bible passages and using office space for group prayers.¹⁴⁷ The employer terminated the employee based, in part, on the reprimand.¹⁴⁸ The court found sufficient notice because the employer’s conduct demonstrated its awareness of a religious conflict.¹⁴⁹ For instance, the employer issued a reprimand that “related directly to religious activities by Mr. Brown,” which established that the employer was “well aware of the potential for conflict between [its] expectations and Mr. Brown’s religious activities.”¹⁵⁰

Like the Eighth Circuit, the Eleventh Circuit, in *Dixon v. Hallmark Cos.*, rejected the explicit-notice defense raised by the employer, concluding that it was not fatal to a couple’s Title VII claims that they “never expressly told [their supervisor] that they did not want to take down their artwork because they opposed efforts to remove God from public places.”¹⁵¹ The court found this notice requirement satisfied by conduct showing that the employer had in fact received enough information to be aware of a conflict.¹⁵²

These courts of appeals do not demand that notice come from the employee’s explicit verbal statements giving rise to “actual, particularized knowledge” on the part of the employer. The prima facie notice requirement in the flexible notice jurisdiction should be flexibly interpreted when the facts indicate that notice of an individual’s religious beliefs was provided by some means other than the individual affirmatively “informing” the employer of the belief. As noted *supra*, three courts of appeals have held that an employer needs to have “only enough information . . . to permit the employer to

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See *Brown v. Polk Cty.*, 61 F.3d 650, 654 (8th Cir. 1995).

¹⁴⁷ *Id.* at 652.

¹⁴⁸ *Id.* at 652–53.

¹⁴⁹ *Id.* at 654.

¹⁵⁰ *Id.*

¹⁵¹ *Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010).

¹⁵² *Id.* at 855–56.

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understand the existence of a conflict,” without regard to the employer’s actual understanding.¹⁵³ A fourth court—the *Adeyeye* court—has likewise held that an employer can be liable under Title VII regardless of whether it actually concludes that a conflict exists.

D. *Three Notice Scenarios*

To better understand the lower courts’ notice standards, it may be helpful to consider the cases in light of the positions of the employee and employer with regard to knowledge of the conflict. These cases can be categorized into three possible situations.

Scenario one: An employee knows there could be a conflict but the employer does not know there could be a conflict. In this scenario, since the employee is the one with the actual knowledge of her religious belief *and* the conflict at the workplace, the onus falls on the employee to request an accommodation. This is the situation in many employment discrimination cases like in *Adeyeye*; however, in *Adeyeye*, the problem arose after the employee made the request, and the inquiry was whether the employee’s request was based on a religious need and if the employer knew that it was a religious request.¹⁵⁴ Since the court reasoned that the request itself did not have to explicitly state “Title VII” or “religious accommodation,” this category also warrants an inquiry into “how much” notice constitutes adequate notice.

Scenario two: Neither the employee nor the employer knows of the conflict. The employer will be aware of its work rules and the applicant will know her religious beliefs, but neither side will inform the other of these matters during the course of the job interview or work period. Under such circumstances, no dialogue will occur between the job applicant and the employer as to this unidentified conflict, through no fault of either party. In that scenario, in the event of a hire, the employer would not be liable for failure to accommodate until the conflict actually arises.

Scenario three: An employee does not know about the conflict between her belief and the employer’s workplace practice while an employer *might* know of the conflict. This is the situation that arose in *Abercrombie*, where testimony from the employee applicant shows she was completely unaware of any conflict, whereas the employer’s testimony highlighted its suspicions of the employee’s practice and

¹⁵³ *Heller v. Ebb Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *see also* *Dixon v. Hallmark Cos.*, 627 F.3d 849, 855 (11th Cir. 2009); *Brown v. Polk Cty.*, 61 F.3d 650, 654 (8th Cir. 1995).

¹⁵⁴ *See Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 450–51 (7th Cir. 2013).

correctly assumed it existed based on her religious beliefs.¹⁵⁵ In this scenario, an employer is then in a better position to determine whether the employee's attire is likely to create a conflict in the employer's own workplace.

These three scenarios highlight that, by virtue of the applicant's or employee's position, she may never acquire knowledge of the conflict, and conversely, by virtue of the employer's position, it may never acquire knowledge of the conflict, in which case there cannot be a problem. Moreover, because there are situations in which the applicant or employee may never be aware of the conflict, the burden should not automatically fall on the applicant or employee to initiate the dialogue with the employer.

IV. THE SUPREME COURT'S RULING IN RELIGIOUS ACCOMMODATION CLAIMS

"This is really easy," Justice Scalia stated from the bench before announcing the 8-1 opinion in *EEOC v. Abercrombie & Fitch Stores, Inc.*, finding in favor of the EEOC;¹⁵⁶ however, since that ruling, employers and employees alike have been questioning the "simplicity" of the opinion. Instead of clarifying the "knowledge" and "notice" standards previously articulated by the lower courts, the Court seemed to do away with a knowledge standard altogether and applied a new legal approach: *motive*, not knowledge, is the deciding factor in a Title VII religious accommodation claim.¹⁵⁷ The concurrence expressed concerns that to determine any motive, knowledge is still required, and furthermore, under Justice Scalia's interpretation, Title VII could be used to hold an employer liable without fault.¹⁵⁸ And in his dissent, Justice Thomas criticized the majority for its Title VII interpretation that an employer implementing a neutral workplace policy could engage in intentional discrimination. Here, the EEOC's claim is a disparate impact issue; as a result, it reasoned Abercrombie's Look Policy was neutral, and Abercrombie did not discriminate against Elauf.¹⁵⁹ With three new approaches to the knowledge-and-notice issue, the Supreme Court delivered a more complicated opinion than

¹⁵⁵ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1147–48 (10th Cir. 2013) (Ebel, J., concurring in part and dissenting in part).

¹⁵⁶ Adam Liptak, *Muslim Woman Denied Job over Head Scarf Wins in Supreme Court*, N.Y. TIMES (June 1, 2015), <http://www.nytimes.com/2015/06/02/us/supreme-court-rules-in-samantha-elauf-abcrombie-fitch-case.html>.

¹⁵⁷ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

¹⁵⁸ *Id.* at 2035–36 (Alito, J., concurring in part).

¹⁵⁹ *Id.* at 2038 (Thomas, J., concurring in part and dissenting in part).

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originally thought.

A. *The Majority's Decision: Motive, Not Knowledge, is the Deciding Factor*

The Supreme Court ruled that an employer is not required to have actual knowledge of a person's religious practice to violate Title VII if an employer refuses to make an accommodation for that person (i.e., an adverse employment action) with an illegal *motive* related to religious practice.¹⁶⁰ Justice Scalia highlighted that the statutory language of Title VII does not impose a knowledge requirement, unlike other antidiscrimination statutes; instead, he concluded that "the intentional discrimination provision" of Title VII "prohibits certain *motives*, regardless of the state of the actor's knowledge."¹⁶¹ In other words, "[m]otive and knowledge are separate concepts."¹⁶² Justice Scalia imagined a situation where an employer has actual knowledge of an applicant's need for an accommodation, but that employer's refusal to hire the applicant may not be motivated by any desire to avoid an accommodation. Therefore, he argued, the converse is true, as well: an employer who acts with motive to avoid an accommodation may violate Title VII even where the employer has an "unsubstantiated suspicion."¹⁶³ Such a scenario is consistent with what occurred in *Abercrombie*, where the hiring manager avoided asking questions about any accommodations despite having a "suspicion" that Elauf wore a headscarf for religious reasons. According to Justice Scalia: "[T]he 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."¹⁶⁴ Thus, when a refusal to hire is based on at least a "suspicion" or a "hunch" that a worker follows a religious practice and wants to keep doing so, even if contrary to company policy, an employer may be found liable for a Title VII violation.¹⁶⁵ Such a result, despite *Abercrombie's* objections, takes the burden off applicants by finding that a job applicant has no affirmative obligation to inform her potential employer of a religious conflict.¹⁶⁶

¹⁶⁰ *Id.* at 2032.

¹⁶¹ *Id.* at 2032–33 (emphasis added).

¹⁶² *Id.* at 2033.

¹⁶³ *Abercrombie*, 135 S. Ct. at 2033.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

What the opinion does not clarify, however, is how an applicant will demonstrate motive, given that a “hunch”—although less immeasurable and more intuitive—still requires thought or some form of “knowledge.” The Court reasoned it would be easier to infer motive where an applicant does make an accommodation request or an employer is certain that a particular religious practice exists, but such proofs are not necessary to establish liability.¹⁶⁷ In practice, this means that if an applicant requests an exception to a “Look Policy” because of her practice of wearing a hijab and an employer denies her request, such a denial would be sufficient to establish motive; however, such direct proof would not be necessary. Rather, if an employer “suspects” the headscarf is a hijab worn for religious purposes but avoids any conversation regarding accommodation, it may still have sufficient motive. But what happens in the case where the employer does not even suspect that the headscarf is worn for religious reasons? Can that employer be found liable? Justice Scalia considered this concern in a footnote:

While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met *unless the employer at least suspects that the practice in question is a religious practice—i.e.,* that he cannot discriminate “because of” a “religious practice” unless he knows or suspects it to be a religious practice. That issue is not presented in this case, since Abercrombie knew—or at least suspected—that the scarf was worn for religious reasons. The question has therefore not been discussed by either side, in brief or oral argument. It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.¹⁶⁸

With this footnote, Justice Scalia declined to answer whether motive can be met without a showing that the employer “at least suspects that the practice in question is a religious practice.”¹⁶⁹ It is undisputed that Abercrombie *at least suspected* that Elauf wore the hijab for religious reasons, as it is clear from the evidence that the hiring manager asked her supervisor about the head covering. From Justice Scalia’s statement, one understands that at minimum, suspicion is necessary to establish motive for liability purposes. Such a claim, however, raises the question: how does one measure “suspicion” without considering what the employer “knew” at the time of hiring? Justice Alito, critical

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 2033 n.3 (emphasis added).

¹⁶⁹ *Abercrombie*, 135 S. Ct. at 2033 n.3.

of the majority's "no-knowledge" standard, addressed this point in his concurrence.

B. *The Concurrence: Knowledge is Still Relevant*

It would "be very strange," Justice Alito stated, if Title VII did not impose a knowledge requirement.¹⁷⁰ According to Justice Alito, under the "no-knowledge" standard, the Court fails to answer the question of what level of "suspicion" is necessary to find the prohibited motive in an employer's hiring decision. As a result, an employer is essentially strictly liable for failing to accommodate a practice that an employer has no idea is religious in nature.¹⁷¹ Therefore, Justice Alito maintains that Title VII has a knowledge requirement and that as a result, if Abercrombie truly had no knowledge of Elauf's religious needs, it could avoid liability. He proffers that an underlying purpose of the Title VII discrimination statute is to require employers to engage in an interactive process with applicants and employees to consider whether their adherence to religious practices could be accommodated in light of a workplace policy without undue hardship.¹⁷² Asserting a strict liability standard would "deprive employers" of the opportunity to engage in such an interactive process.¹⁷³

To further clarify his knowledge standard, Justice Alito explained that it is still unnecessary for a plaintiff to show that an employer engaged in an adverse employment action because of the religious nature of the practice. An employer may be liable, for instance, where it institutes a policy to "reject[] all applicants who refuse to work on Saturday, whether for religious or nonreligious reasons," but nevertheless knows that one applicant's refusal to work on Saturday is based on religious practices.¹⁷⁴ In other words, even with a neutral workplace policy, an employer must engage in the interactive accommodation process with an applicant who cannot comply because of religious reasons. Justice Alito based his reasoning on the existence of the "undue hardship" defense, claiming that the very purpose of this defense is to shield an employer from liability for refusing to make an exception to a neutral work rule if it can prove undue hardship.¹⁷⁵

In his final point, Justice Alito criticizes the Court's interpretation of the plaintiff's burden in a reasonable accommodation claim. While

¹⁷⁰ *Id.* at 2035 (Alito, J., concurring in part).

¹⁷¹ *See id.* at 2036.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Abercrombie*, 135 S. Ct. at 2036 (Alito, J., concurring in part).

the Court asserts that it is the “plaintiff’s burden” to prove the failure-to-accommodate claim, Justice Alito argues that a plaintiff need only prove that an employer (1) failed or refused to hire an individual (2) because of (3) any aspect of the individual’s practice—elements which “make no mention of accommodation.”¹⁷⁶ An employer, therefore, bears the burden of production and persuasion if and when it asserts the undue hardship defense. As a result, the plaintiff need not show that the employer was motivated or was attempting to avoid making an accommodation, but once a plaintiff demonstrates that the employer failed to hire because of a plaintiff’s religious practice, then the employer must assert and prove the undue hardship defense.¹⁷⁷ Such a clarification of the parties’ burdens, Justice Alito believes, may make a difference in close cases.¹⁷⁸

C. *The Dissent: Against the “Disparate-Treatment-Based-on-Equal-Treatment Claim”*

In his dissent, Justice Thomas found that the majority’s interpretation created “an entirely new form of liability: the disparate-treatment-based-on-equal-treatment claim.”¹⁷⁹ He upheld the “undisputed proposition” that application of a neutral policy could not constitute “intentional discrimination;” as a result, because Abercrombie’s Look Policy was neutral, Abercrombie did not discriminate against Elauf.¹⁸⁰ Furthermore, Justice Thomas argued that the majority’s interpretation of Title VII was too broad, specifically criticizing the interpretation of the phrase, “because of such individual’s religious practice.”¹⁸¹ He argued that the majority’s “because of” reading includes scenarios in which an employer has a neutral workplace policy and an employee’s practice “happens” to be religious.¹⁸² This reading would “punish employers who have no discriminatory motive” in instituting the practice, and such a “strict liability” reading, he argued, is “at odds with intentional discrimination.”¹⁸³

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2041 (Thomas, J., concurring in part and dissenting in part).

¹⁸⁰ *Id.* at 2037.

¹⁸¹ See *Abercrombie*, 135 S. Ct. at 2038–39 (Alito, J., concurring in part).

¹⁸² *Id.* at 2039.

¹⁸³ *Id.* at 2038–39.

V. THE AFTERMATH OF *ABERCROMBIE*

After the opinion was handed down, the parties quickly settled. Abercrombie paid \$25,670 in damages to Elauf and \$18,983 in court costs.¹⁸⁴ While Elauf received only a small settlement, the *Abercrombie* ruling resulted in a great expansion of workplace religious accommodation. By eliminating “religious accommodation” as a freestanding claim and relaxing the “because of” standard, the Court afforded employees and applicants an easier way to prove motive in hiring decisions.

A. *Religious Discrimination or Accommodation?: How Eliminating the Distinction Influenced the Majority’s Decision*

It is possible that the knowledge and notice discussion could have been avoided altogether if the parties and courts had taken another approach from the outset. Professor Charles Sullivan considers: “The apparent circuit split on what is necessary to trigger the duty to accommodate needs to be resolved, but one good start would be to stop viewing all religious discrimination cases through an accommodation lens.”¹⁸⁵ He posits that the Tenth Circuit’s *Abercrombie* decision might have had a different outcome if litigated as a straightforward case of discrimination against Muslims. Suppose Elauf would have been willing to forgo wearing a hair covering. The store would then have turned her down *because of* her religion when, in fact, her religion was no obstacle to employment. This result then becomes a *per se* discrimination claim. Even so, an employer could still claim another defense, such as the bona fide occupational qualification (BFOQ), arguing that it is allowed to consider certain attributions when making hiring decisions because they are necessary to the profession.¹⁸⁶ Professor Sullivan suggests: “In that case, the focus would be how critical the Look Policy was to Abercrombie and whether some exceptions might co-exist with it. Not that such an inquiry might not have its own complications: hijab yes, burka, no?”¹⁸⁷

Professor Sullivan’s assessment foreshadows an interesting series of events: in a similar line of thinking, the EEOC switched its theory from religious accommodation to an intentional discrimination claim

¹⁸⁴ Press Release, EEOC, *Abercrombie Resolves Religious Discrimination Case Following Supreme Court Ruling in Favor of EEOC* (July 28, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/7-28-15.cfm>.

¹⁸⁵ Sullivan, *supra* note 100.

¹⁸⁶ 42 U.S.C. § 2000e-2(e) (2014).

¹⁸⁷ Sullivan, *supra* note 100.

right before oral argument at the Supreme Court.¹⁸⁸ And the Court agreed. In an unexpected analysis, the Court corrected lower courts' and the EEOC's previous assumptions that religious accommodation was a freestanding claim. Going forward, lower courts should refrain from analyzing reasonable accommodation claims in a vacuum. The Court's clarification of the law most likely had the biggest impact on the *Abercrombie* decision. Analyzing the EEOC's accommodation claim in *Abercrombie* as a straightforward disparate treatment claim warranted a direct analysis of the "because of" standard in the Title VII.

In its ruling, the Court relaxed the "because of" statutory language of Title VII disparate treatment claims. Title VII provides that it is unlawful for an employer to refuse to hire "because of" a religious practice. To show that the employer took an adverse employment action, the applicant need only show that her religious practice was a "motivating factor" in the action. It is irrelevant whether the employer knew that there would be a conflict between the employee's religious beliefs and a job duty. It is also irrelevant whether the employer knew about the employee's religious beliefs. What matters in a Title VII is what *motivated* the employer's decision.

B. Applying the Suspicion Standard Below

In light of *Abercrombie*'s lowered "because of" standard, the Fifth Circuit considered *Nobach* on a second appeal.¹⁸⁹ As previously stated, *Nobach* involved a nursing home activities aide who was fired after she refused to pray the rosary with a patient because it conflicted with her religious beliefs as a Jehovah's Witness.¹⁹⁰ Using the Supreme Court's analysis, the court still ruled in favor of the nursing home as a matter of law, but this time on per se discrimination grounds. Although the nursing home admitted that Nobach's refusal to pray the Rosary was a factor in her discharge, the court found no evidence that anyone involved in the termination suspected Nobach's refusal was "because of" her religious practice.¹⁹¹ When the nursing home director fired Nobach, she told Nobach: "I don't care if it's your fifth write-up or not. I would have fired you for this instance alone."¹⁹² Nobach—for the first

¹⁸⁸ See Brief for Petitioner at 19, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (No. 14-86).

¹⁸⁹ *Nobach v. Woodland Vill. Nursing Ctr., Inc.*, 799 F.3d 374 (5th Cir. 2015).

¹⁹⁰ *Id.* at 375.

¹⁹¹ *Id.* at 378–79.

¹⁹² *Nobach v. Woodland Vill. Nursing Ctr., Inc.*, 762 F.3d 443, 445 (5th Cir. 2014), *vacated*, 135 S. Ct. 2803 (2015).

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time—then informed the director that performing the Rosary was against her religion, stating: “Well, I can’t pray the Rosary. It’s against my religion.”¹⁹³ The director’s response was: “I don’t care if it is against your religion or not. If you don’t do it, it’s insubordination.”¹⁹⁴ Had this conversation taken place *before her discharge*, Nobach may have been able to argue that Woodland had a “certainty that the practice exist[ed]” and therefore it would have been “easier to infer motive.”¹⁹⁵ Even though Nobach framed the claim as intentional discrimination, Nobach was unable to proffer evidence that the director fired her as a direct result of her religious beliefs.

What is disconcerting about the Fifth Circuit’s outcome, however, is that the nursing home *admits* that Nobach’s refusal to pray the Rosary was a factor in its firing decision. It is hard to believe that during the firing process, the employer did not question Nobach’s refusal to pray the Rosary, given that such a request involves a highly religious practice. Although a conversation took place after the fact, such a scenario highlights the importance of communication among employees and employers. While Woodland may have escaped liability, it did so merely based on the timeline of its decision. Although “insubordination” is a valid reason for any termination, situations like that in *Nobach* deserve further consideration by employers who may make rash decisions without any dialogue.

VI. THAT’S A WRAP!: WHAT THIS DECISION MEANS FOR EMPLOYERS GOING FORWARD

Communication is key in any employment context. Not only is it important, but it is now also necessary for both sides to establish a rapport and open lines of communication, beginning with the interview process. It is fair to ask employers to institute a formal process through which they can disclose workplace policy conflicts that could interfere with an employee’s or applicant’s religious practices. And given the new ruling that prohibits employers from making an applicant’s religious practice a factor in an employment decision, it is highly recommended that employers move quickly to establish new policies if they are not already in place.

There are many practical ways that employers can institute procedures to better inform their future and current employees of a position’s essential requirements and ask if any accommodations are

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *Nobach*, 799 F.3d at 379 (quoting *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015)).

necessary. For instance, in this technological age where many job applications are submitted online, an employer can include a manual of its workplace policies with its application. It could add a statement on its application about being an equal opportunity employer and a clause regarding reasonable accommodation. It could read: “Employees who believe that they are entitled to a reasonable accommodation of our workplace policies due to religious beliefs, practices, or other grounds protected by relevant law should discuss the matter with their supervisor or hiring manager. Such accommodations will be granted unless they pose an undue burden on the employer.” And during the interview process, an employer could arguably make a statement such as: “It is our obligation as an employer to implement equal employment opportunities and refrain from discrimination based on race, religion, or gender. These are our policies (insert dress/grooming or scheduling policies). Would you need an accommodation for said policies?” This dialogue would provide an applicant or employee the opportunity to vocalize an accommodation request if needed in a way that still respects privacy.

Furthermore, employers still maintain the undue hardship defense if they can show that an applicant or employee’s request would pose more than a de minimis burden.¹⁹⁶ Specifically, if an employee can meet the expectations for hire, perform a job function, and the employer can reasonably accommodate that employee, then every reasonable measure should be taken to allow the employee to work. Ultimately, an employee should not have to choose between work and religion.

At the very least, employers should document hiring decisions and mark down their commonsense observations of an applicant as evidence of an attempt to start an interactive dialogue. As previously explained, given that motive is the deciding factor in religious discrimination claims, the majority’s approach creates a murky “suspicion” standard—one in which an employer is liable for having a hunch of a potential conflict, but failing to mention any such conflict. Documenting an employer’s internal evaluation process—specifically all factors unrelated to any protected traits—would better safeguard the employer and its hiring decisions.

¹⁹⁶ *Abercrombie*, 135 S. Ct. at 2042 n.1; *see also* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84–85 (1977).

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VII. CONCLUSION

Religious discrimination claims are on the rise, and sensitive interests are at stake—particularly the employee’s right to religious freedom and the employer’s interests in economic liberty. Employees want to feel protected and able to practice their religious beliefs. Employers, on the other hand, want to run their businesses efficiently and with autonomy. As religious discrimination law continues to play a part in the American workplace, employers and employees must understand their rights. Like other statutes that govern the workplace, religious accommodation claims require employer attention and compliance. Title VII expressly prohibits religious discrimination by protecting those workers who hold—or who refuse to hold—specific religious beliefs, thereby ensuring fair employment. Yet, an employer might find it difficult to comply with the law, as there is not yet a clear framework for proving the “motive” requirement without demonstrating “knowledge.”

Thus, it is essential for employers to adopt policies that comply with the approach in *Abercrombie*. But if faced with a future lawsuit, it is reasonable for employers to make the argument, based on Justice Alito’s concurrence, that knowledge is still required to show motive, and any lack of knowledge shields employers from liability.