

‘A MOTIVATING FACTOR’ – THE IMPACT OF *EEOC v. ABERCROMBIE & FITCH STORES, INC.* ON TITLE VII RELIGIOUS DISCRIMINATION CLAIMS

INTRODUCTION

Title VII of the Civil Rights Act of 1964 protects, amongst other things, an employee or potential employee from being discriminated against on the basis of his or her religion.¹ A primary tool for religious discrimination cases, Title VII makes it unlawful for an employer to fail or refuse to hire, discharge, or otherwise discriminate against any individual on the basis of religion, which is defined to include religious observance or practice.² Additionally, the statute places an affirmative duty upon employers to reasonably accommodate an employee’s religious beliefs or practices in the workplace, so long as the accommodation does not impose an undue hardship upon the employer’s business.³ Prior to summer 2015, there was a lack of clarity regarding the standard of knowledge that an employer must hold of a current or potential employee’s need for a religious accommodation in order to have notice and be potentially liable under Title VII. Generally, lower courts held that an applicant or employee needed to directly and specifically inform the employer of his or her need for an accommodation in order to establish the standard of notice required to succeed on a failure to accommodate claim.⁴

On June 1, 2015, the Supreme Court issued guidance regarding this standard in its decision *EEOC v. Abercrombie & Fitch Stores, Inc.*⁵ In this case, brought by a Muslim, headscarf-wearing plaintiff, Samantha Elauf, the Court separated the concepts of knowledge and motive under Title VII, and held that an employee is not required to explicitly inform an employer of the need for a religious accommodation; rather, so long as the employee can show that the need for an accommodation was a *motivating factor* in the employer’s adverse decision, then the employer is potentially liable.⁶

1. See 42 U.S.C. § 2000e-2(a)(1) (2012).

2. *Id.* See also 42 U.S.C. § 2000e(j); Jennifer Ann Drobac & Jill L. Wesley, *Religion and Employment Antidiscrimination Law: Past, Present, and Post Hosanna-Tabor*, 69 N.Y.U. ANN. SURV. AM. L. 761, 783 (2014).

3. See 42 U.S.C. § 2000e(j).

4. Drobac & Wesley, *supra* note 2, at 791.

5. 135 S. Ct. 2028 (2015).

6. *Id.* at 2032–33.

Since the Supreme Court's decision in *Abercrombie*, lower courts have been faced with the task of applying its holding to failure to accommodate cases, which has in some instances altered the entire standard, and in others provided an alternative means by which an employee can prove his or her case.⁷ This Note will examine the background of religious discrimination cases on the grounds of failure to accommodate, the standard of notice for these cases prior to *Abercrombie*, the decision itself, and the impact the decision has had thus far on lower courts. Finally, the Note will predict the future policy implications the *Abercrombie* case may have on religious discrimination law as a whole.

I. BACKGROUND – TITLE VII RELIGIOUS DISCRIMINATION

A. *Title VII Overview*

Title VII, the Equal Employment Opportunities provision of the Civil Rights Act of 1964, provides statutory guidance for federal employment discrimination litigation.⁸ Title VII broadly encompasses all aspects of employment discrimination, including but not limited to discriminatory practices in recruitment, hiring, promotion, provision of wages or benefits, layoffs, termination, and discharge.⁹ Title VII covers the following “protected classes”: race, color, religion, sex, and national origin.¹⁰ The Act was passed in response to the Civil Rights Movement of the 1960s and the demand to protect individual rights and enforce equal treatment in the context of the workplace.¹¹ Title VII also created the Equal Employment Opportunity Commission (EEOC), the federal administration and enforcement agency to which all employment discrimination claims and grievances must be submitted before litigation can be pursued.¹²

The language of the intentional discrimination portion of Title VII provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

7. See, e.g., *Equal Emp't Opportunity Comm'n v. Jetstream Ground Servs., Inc.*, 134 F. Supp. 3d 1298, 1317 (D. Colo. 2015).

8. 39 CAUSES OF ACTION 327 (2d ed. 2009).

9. *Laws Enforced by the Employment Litigation Section*, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHT DIVISION, <https://www.justice.gov/crt/laws-enforced-employment-litigation-section> (last visited Dec. 12, 2016) [<http://perma.cc/D3DL-LBTY>].

10. See 42 U.S.C. § 2000e-2(a) (2012).

11. RAYMOND F. GREGORY, *ENCOUNTERING RELIGION IN THE WORKPLACE: THE LEGAL RIGHTS AND RESPONSIBILITIES OF WORKERS AND EMPLOYERS* 27 (2011).

12. See 39 CAUSES OF ACTION, *supra* note 8, at 329.

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.¹³

Broadly speaking, Title VII provides employees and potential employees with a federal statutory avenue for resolving discrimination claims, whether it be on the basis of race, ethnicity or nationality, religion, or sex. Religious discrimination claims under Title VII in particular have generally been divided into two categories by courts and commentators: disparate treatment and failure to accommodate.¹⁴

B. Section 2000(e)(j) – The Duty to Accommodate

In 1972, Title VII was amended to include section 2000(e)(j), which states that “the term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”¹⁵ This section places an affirmative duty upon employers to reasonably accommodate an employee or prospective employee’s religious practices in the workplace.¹⁶ The language of section 2000(e)(j) has brought about the category of claims known as failure to accommodate cases, where an employee complains that he or she suffered an adverse employment decision as a result of the employer disallowing a religious practice in the workplace, or failing to accommodate such practice. These cases often involve situations such as scheduling issues due to religious obligations,¹⁷ violations of grooming or dress code policies,¹⁸ or various miscellaneous acts or omissions such as: a truck driving employee’s ingesting of a hallucinogenic drug as part of a religious practice and against company policy;¹⁹ a pharmacist’s refusal to sell birth control pills for religious reasons;²⁰ and an employee’s desire to wear a graphic anti-abortion button at work.²¹

13. 42 U.S.C. § 2000e-2(a)(1).

14. Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. CIN. L. REV. 1411, 1411 (2009).

15. 42 U.S.C. § 2000e(j).

16. *See* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977). (Essentially, an employer’s refusal to accommodate is justified only where it can demonstrate that an undue hardship will result through making the accommodation). *See also* GREGORY, *supra* note 11, at 186.

17. *See* *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1027 (8th Cir. 2008).

18. *See* *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1382 (9th Cir. 1984); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 128 (1st Cir. 2004).

19. *See* *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989).

20. *See* *Noesen v. Med. Staffing Network*, 232 F. App’x 581, 582 (7th Cir. 2007).

21. *See* *Wilson v. U.S. W. Commc’ns*, 58 F.3d 1337, 1339 (8th Cir. 1995).

C. *Analyzing Failure to Accommodate Cases: The Burden-Shifting Framework*

Over the years, courts have developed a well-established, two-part burden-shifting analysis for approaching failure to accommodate cases.²² This framework first requires that a plaintiff establish what is known as a prima facie discrimination case.²³ If the plaintiff is successful in doing so, the burden then shifts to the employer to show that it either attempted to accommodate the employee's practice, or was unable to do so without imposing an undue hardship on itself.²⁴ Though courts have facilitated this standard through the use of specific elements, generally, these cases are extremely fact-intensive, requiring an in-depth case-by-case inquiry.²⁵

D. *What Constitutes Notice?*

1. EEOC Guidance

The 2008 EEOC Compliance Manual provided guidance regarding the extent to which an employee is responsible for informing an employer of the need for an accommodation under section 2000(e)(j). Regarding notice, the manual states that "[a]n applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work," and that the employee is required "to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it."²⁶ And although the EEOC contends that there are no "magic words" an employee must use in order to place the employer on notice, it does state that the "applicant or employee must *provide enough information* to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job," and further goes on to outline a "Discussion on Request."²⁷ This implies that, based on EEOC guidelines, inferred knowledge

22. Sarah Abigail Wolkinson, *A Critical Historical and Legal Reappraisal of Bhatia v. Chevron U.S.A., Inc.: Judicial Emasculation of the Duty of Accommodation*, 12 U. PA. J. BUS. L. 1185, 1189 (2010). (This is a version of the *McDonnell-Douglas* burden-shifting approach utilized in other realms of Title VII discrimination). See Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1122 (10th Cir. 2013).

23. See *Abercrombie*, 731 F.3d at 1122.

24. See *id.* (This two-part burden-shifting analysis for religious discrimination cases was originally established in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986)).

25. See *EEOC v. Robert Bosch Corp.*, 169 F. App'x 942, 944 (6th Cir. 2006).

26. EEOC Compliance Manual, No. 915.003 § 12-IV (July 2008), www.eeoc.gov/policy/docs/religion.html [<http://perma.cc/VJL8-SENY>].

27. *Id.* (emphasis added).

alone is insufficient to place an employer on notice regarding the need for an accommodation.

2. The Prima Facie Standard and Establishing Sufficient Notice

Reflected in the specific prima facie standard that courts applied prior to the Supreme Court's decision in *Abercrombie* is the notion that an employer was required to have actual knowledge of an employee's need for an accommodation in order to trigger the duty to accommodate. A large majority of courts applied a three-prong prima facie case, the second element of which was that an employee must "tell" or "inform" his or her employer of a religious belief in some capacity.²⁸ For example, in the Tenth Circuit, the Circuit out of which Samantha Elauf's case arose, a plaintiff made a prima facie case by showing that (1) she had a bona fide religious belief that conflicts 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.²⁹

3. Notice Across the Circuits – The "Split"

Aside from being reflected in the language of the prima facie standard itself, before the Supreme Court's decision in *Abercrombie*, various circuits were faced with questions regarding the extent to which an employee must inform its employer, and the level of knowledge an employer must have of the employee's accommodation need, in order for a failure to accommodate case to move forward. These cases and the varying holdings across circuits provide some insight into the tension surrounding the notice standard of failure to

28. See *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 319 (3d Cir. 2008) (The second element of plaintiff's prima facie case is that "she told the employer about the conflict."); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449 (7th Cir. 2013) ("[The plaintiff] must show that he 'called the religious observance or practice to [his] employer's attention.'"); *Sanchez-Rodriguez v. AT & T Mobility Puerto Rico, Inc.*, 673 F.3d 1, 8 (1st Cir. 2012) (holding the second element of plaintiff's case is "that he or she brought the practice to [employer's] attention"); see also *Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000); *Equal Emp't Opportunity Comm'n v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008); *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 144 (5th Cir. 1982); *Smith v. Pyro Min. Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987) (each holding that the second element of a plaintiff's prima facie case is to "inform" the employer of the bona fide religious belief).

29. *Abercrombie*, 731 F.3d at 1122 (Notably, "failure to accommodate" cases do not end here. All courts then shift the burden to the employer to "(1) conclusively rebut one or more elements of the . . . prima facie case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable reasonably to accommodate the employee's religious needs without undue hardship," before holding the employer liable for religious discrimination as a matter of law).

accommodate cases leading up to the Supreme Court's decision in Samantha Elauf's case.

a. The Ninth Circuit – *Heller v. EBB Auto Co.*

The Ninth Circuit was faced with the issue of the extent to which an employee is required to inform an employer of the need for a religious accommodation in the case *Heller v. EBB Auto Co.* In *Heller*, a Jewish used-car salesman asked his supervisor for permission to miss work to attend his wife's conversion ceremony on a Friday morning.³⁰ He was not given permission to miss work and was subsequently fired for doing so.³¹ The court held that although Heller did not explain the specific nature of the ceremony to his employer, the overall circumstances of the case showed that the employer had sufficient notice of Heller's need for an accommodation, and thus Heller succeeded in establishing a prima facie case.³² The employer in this case knew that Heller was Jewish, that his wife was studying for a conversion ceremony, and that this ceremony was the reason he needed to miss work.³³ In holding that this was sufficient to establish notice, the court stated that "[a]ny greater notice requirement would permit an employer to delve into the religious practices of an employee in order to determine whether religion mandates the employee's adherence," which, the court reasoned, was beyond the realm of both courts and employers.³⁴

b. The Eighth Circuit – *Brown v. Polk County Iowa*

Following *Heller*, the Eighth Circuit's decision in *Brown v. Polk County Iowa* also impacted lower courts' interpretation of the notice standard. The plaintiff in this case, Brown, identified himself as a born-again Christian, and was reprimanded and later fired after holding prayers in his office and having his work secretary type Bible study notes for him during work hours.³⁵ After Brown brought a religious discrimination claim under Title VII, the employer argued that because he "never explicitly asked for accommodation for his religious activities, he may not claim the protections of Title VII."³⁶ The court, however, rejected this argument, holding that an employer need have "only

30. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1437 (9th Cir. 1993).

31. *Id.*

32. *Id.* at 1438–39.

33. *Id.* at 1439.

34. *Id.* The court in *Heller* declined to follow *Wessling v. Kroger Co.*, 554 F. Supp. 548 (E.D. Mich. 1982). This case concluded that a plaintiff merely informing her employer that she needed to miss work to assist with her daughter's Christmas play was insufficient notice under Title VII, as the notice "was not in terms of a request for an accommodation of her religious practices." *Wessling*, 554 F. Supp. at 552.

35. *Brown v. Polk Cnty.*, Iowa, 61 F.3d 650, 652 (8th Cir. 1995).

36. *Id.* at 654.

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."³⁷ The court held that in the particular circumstances of this case, where Brown's reprimand related "directly to religious activities," it could be inferred that the employer "[was] well aware of the potential for conflict between their expectations and Mr. Brown's religious activities."³⁸

c. The Eleventh Circuit – *Dixon* and *Hellinger*

Cases in the Eleventh Circuit following *Brown* likewise provided a broader, more inferential standard in establishing notice. In *Dixon v. The Hallmark Companies, Inc.*, the court held that plaintiffs possibly satisfied the second prong of a prima facie failure to accommodate case although they never explicitly informed their employer the religious grounds on which they opposed its policy of removing artwork in the workplace.³⁹ The court held that under *Brown*, so long as a jury could reasonably infer that the employer "connected" the employees' behavior with their religious beliefs, then this awareness was sufficient to establish notice.⁴⁰ Also following *Brown*, the court in *Hellinger v. Eckerd Corp.* found notice to be sufficient where the employer received information about a plaintiff's religious restrictions from a third party rather than from the plaintiff himself, and the evidence supported the conclusion that the employer decided not to hire the plaintiff based upon this information.⁴¹

d. The Third Circuit – *Chalmers v. Tulon Co. of Richmond*

Other circuits, however, had not been as friendly in making inferences in the employee's favor on the issue of notice. The Fourth Circuit established a guideline regarding notice in *Chalmers v. Tulon Co. of Richmond*. In this case, an employee was terminated for writing strongly-worded letters to co-workers regarding God being displeased with their immoral lifestyles.⁴² The court held that the plaintiff had failed to establish the second prong of her prima facie case, since there was no evidence that she notified her employer that her

37. *Id.* (citing *Heller*, 8 F.3d at 1439).

38. *Id.*

39. 627 F.3d 849, 855 (11th Cir. 2010).

40. *Id.* at 856 ("[W]e conclude that if Saunders was aware of the tension between her order and the Dixons' religious beliefs—and there is ample evidence that she was—her awareness would satisfy the second prong.").

41. 67 F. Supp. 2d 1359, 1363 (S.D. Fla. 1999) ("It would be hyper-technical, based on the facts of this case, to require notice of the Plaintiff's religious beliefs to come only from the Plaintiff.").

42. 101 F.3d 1012, 1016 (4th Cir. 1996).

religion required her to send the letters.⁴³ The plaintiff claimed that because of “the notoriety of her religious beliefs within the company,” she did not need to directly inform her employer of this particular belief in order to establish notice for her claim.⁴⁴ The court rejected this argument, holding that “[k]nowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious activity, no matter how unusual.”⁴⁵ Finally, the court rejected plaintiff’s argument that the letters themselves provided the employer with sufficient notice, reasoning that the contemporaneous nature between her violation of company policy and potential notice of her conflict precluded her claim, since notice must occur in advance of the adverse employment decision.⁴⁶

e. The Seventh Circuit – *Reed v. Great Lakes Companies, Inc.*

In construing the notice standard, Judge Posner of the Seventh Circuit refused to provide great latitude to an employee in placing an employer on notice of religious beliefs or practices. In *Reed v. Great Lakes Companies, Inc.*, a hotel employee refused to attend a meeting involving Bible readings and prayer, and was later fired for insubordination after a hostile exchange with a manager.⁴⁷ In rejecting the plaintiff’s contention that he was fired because of his religious beliefs under Title VII, Posner stated:

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; and anyway *employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects*. Suppose the employee is an Orthodox Jew and believes that it is deeply sinful to work past sundown on Friday. He does not tell his employer, the owner of a hardware store that is open from 9 a.m. to 6 p.m. on Fridays, who leaves the employee in sole charge of the store one Friday afternoon in mid-winter, and at 4 p.m. the employee leaves the store. The

43. *Id.* at 1019.

44. *Id.* at 1020.

45. *Id.*

46. *Id.* Notably, the court did not hold that the nature of the letters were themselves insufficient to establish notice, only that the timing was misaligned. Further, it held that “refusal even to attempt to accommodate an employee’s religious requests, prior to the employee’s violation of employment rules and sanction, provides some indication, however slight, of improper motive on the employer’s part.” *Id.* at 1020–21 (Interestingly, in a footnote in this case, the Court stated that “[w]e emphasize that we do not hold . . . that an employer’s knowledge of an employee’s sincere religious beliefs can never put an employer on notice of the possibility of some religious conduct by an employee at work, e.g. display of ashes on Ash Wednesday or wearing a yarmulke, etc.”). *Id.* at 1020 n.3.

47. 330 F.3d 931, 933 (7th Cir. 2003).

employer could fire him without being thought guilty of failing to accommodate his religious needs.⁴⁸

Other circuits have likewise cited to Judge Posner's guidance in retaining a stricter view of notice for failure to accommodate cases.⁴⁹

II. *EEOC v. ABERCROMBIE & FITCH, INC.* – SAMANTHA ELAUF'S CASE

A. *Facts*

On June 25, 2008, then seventeen-year-old plaintiff Samantha Elauf applied for a job at an Abercrombie Kids retail clothing store at a shopping mall in Tulsa, Oklahoma.⁵⁰ A practicing Muslim, Elauf wears a headscarf, or hijab, at all times while in public or in the presence of male strangers, which she believes is a requirement of her faith.⁵¹ At the time she applied, Elauf was unaware that the Abercrombie company had a "Look Policy," a dress and appearance code with which employees were required to comply.⁵² Abercrombie's "Look Policy" prohibited, amongst other things, an employee from wearing "caps," but did not specify the type of headwear encompassed within this definition.⁵³

The day after she submitted her job application, Elauf was interviewed at the Tulsa store by assistant store manager Heather Cooke.⁵⁴ At no point during the interview was Elauf's headscarf or the no "caps" store policy discussed.⁵⁵ Elauf wore her headscarf at the interview, and Cooke testified in a deposition that she was aware that Elauf wore the headscarf because of a religious

48. *Id.* at 935–36 (emphasis added).

49. *See, e.g.,* *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 319 (3d Cir. 2008) (holding that that an employer's general knowledge of an employee's Christian beliefs was not sufficient to put the employer on notice that the employee would need an accommodation at a ceremony where alcoholic drinks were served).

50. *Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores*, 798 F. Supp. 2d 1272, 1277 (2011).

51. *Id.* at 1276.

52. *Id.* at 1277.

53. *Id.* at 1275–76. According to the evidence presented to the trial court, Abercrombie trains store managers 'never to assume anything about anyone' in a job interview, and not to ask applicants about their religion. If there are issues or questions regarding the Look Policy or an employee requests a religious accommodation, the store manager is instructed to contact Abercrombie's Human Resources Department and/or their direct supervisor. The Human Resources managers have the individual discretion to grant accommodations 'as long as it's not going to distract from the brand.'

Id.

54. *Id.*

55. *Abercrombie*, 798 F. Supp. 2d at 1277.

belief.⁵⁶ Cooke believed Elauf was a good candidate for the job, but was uncertain of how to reconcile Elauf's headscarf with the company's headwear prohibition.⁵⁷ Cooke then contacted her district manager to discuss Elauf's interview, informing the district manager she felt as though Elauf were a strong candidate and should be hired, despite the fact that she wore a headscarf in violation of the "Look Policy," since the headscarf was worn for religious reasons.⁵⁸ According to Cooke's testimony, the district manager advised her to not hire Elauf, since employees were "not allowed to wear hats at work."⁵⁹ Based on this conversation with the district manager, Cooke threw out Elauf's original interview rating sheet and created a new one, subtracting points in the category of "Appearance and Sense of Style" such that Elauf's score was below that which is required for hiring.⁶⁰ Elauf was not extended a job offer by the Tulsa store.⁶¹

B. District Court – Notice Was Met

On behalf of Elauf, the EEOC brought a Title VII failure to accommodate case against Abercrombie, and filed for summary judgment regarding the issue of Abercrombie's liability.⁶² In attempting to rebut an element of Elauf's prima facie case, Abercrombie contended that Elauf did not satisfy the notice requirement, since she did not tell the interviewer that she had a religious belief that conflicted with the "Look Policy" and that she needed an accommodation.⁶³ The trial court cited to *Brown* and *Dixon* in stating that "the notice requirement is met when an employer has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job."⁶⁴ The court

56. *Id.* ("Cooke testified that the head scarf signified to her that Elauf was Muslim and, 'I figured that was the religious reason why she wore her head scarf, she was Muslim,' and 'I just assumed that she was Muslim because of the head scarf was for religious reasons.'").

57. *Id.*

58. *Id.* at 1278.

59. *Id.* The district manager denied that he was informed by Cooke that Elauf's headscarf was worn for religious reasons.

60. *Abercrombie*, 798 F. Supp. 2d at 1279.

61. *Id.*

62. *See id.* at 1282. The trial court applied the same burden-shifting standard as the Tenth Circuit discussed above, wherein the plaintiff initially bears the burden of production with respect to a prima facie case by showing that (1) she had a bona fide religious belief that conflicts with an employment requirement; (2) she informed the employer of this belief; and (3) she was not hired for failing to comply with the employment requirement; the burden then shifts to the defendant, who must: "(1) conclusively rebut one or more elements of the plaintiff's prima facie case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable to accommodate the employee's religious needs reasonably without undue hardship." *Id.*

63. *Id.* at 1285.

64. *Id.*

went on to discuss the policy reasons that notice is required, since it facilitates an interactive process between employer and employee and aligns with the statutory requirements of the Americans with Disabilities Act, where the employee has the initial duty to inform the employer of the need for an accommodation.⁶⁵ However, the court ultimately found that because Elauf was wearing her headscarf at the job interview, and Cooke testified that she was aware that Elauf wore the headscarf based on a religious belief and may possibly need an accommodation, the notice requirement was met in this case.⁶⁶ After also examining the issues of a sincerely held religious belief and undue hardship, the District Court granted summary judgment against Abercrombie and in favor of Elauf.⁶⁷

C. Tenth Circuit Appeal – Equating Notice and Actual Knowledge

Abercrombie appealed the case to the Tenth Circuit Court of Appeals, claiming, in pertinent part, that notice was not established in this case.⁶⁸ The court first looked to the “plain language” of precedent in the Tenth Circuit in *Thomas* and *Toledo*, stating that the second prong of the prima facie case required that the employee or prospective employee must show that “she informed . . . her employer of this [religious] belief” that conflicts with the employer’s workplace policy.⁶⁹ The court continued on to cite multiple other circuits that also required the “informed” component in a plaintiff’s prima facie case.⁷⁰ The court countered the holdings in *Dixon*, *Hellinger*, and *Brown*, asserting that none of these cases rebutted the idea that actual knowledge of the need for a religious accommodation is required in order to place an employer on notice.⁷¹ Therefore, the Tenth Circuit concluded that in meeting a prima facie case, an employee must establish that the employer had “particularized, actual knowledge” of a conflicting religious practice and the need for an accommodation.⁷² Here, it was not enough that Cooke “assumed” or “figured” that Elauf wore a headscarf for religious reasons; this was insufficient to show that Abercrombie possessed actual knowledge and therefore notice of the need

65. See *Abercrombie*, 798 F. Supp. 2d at 1285–86.

66. *Id.* at 1286.

67. See generally *id.*

68. *Equal Emp’t Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1122–23 (10th Cir. 2013).

69. *Id.* at 1123 (citing *Thomas v. Nat’l Ass’n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) and *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989)).

70. See *Abercrombie*, 731 F.3d at 1124.

71. See *id.* at 1124–26 (“[T]here is no doubt that these cases settled for nothing less than some significant measure of particularized, actual knowledge.”).

72. *Id.* at 1126–27.

to accommodate.⁷³ Thus, the Tenth Circuit reversed the District Court's grant of summary judgment, holding that because Elauf had not informed her potential employer of her religious conflict or the need for an accommodation, the second element of the prima facie case was not satisfied, and the duty to accommodate was not triggered for Abercrombie.⁷⁴

D. Supreme Court Holding – Motive and Knowledge as Separate Concepts

Elauf's case was then appealed to the Supreme Court, with the sole issue being whether Title VII's prohibition on an employer's refusal to hire an employee in order to avoid accommodation of a religious practice only applies where the applicant has informed the employer of his or her need for an accommodation.⁷⁵ Writing for the majority, Justice Scalia disagreed with the Tenth Circuit's decision and found that, rather than showing actual knowledge, an applicant need only show that the "need for an accommodation was a *motivating factor* in the employer's decision."⁷⁶ The Court took sections 2000e-2(a)(1) and 2000(e)(j) of Title VII together in holding that the language of the statute does not impose a knowledge requirement,⁷⁷ and laid out the idea that "[m]otive and knowledge are separate concepts."⁷⁸ Thus, the Court held, the rule in failure to accommodate religious practice cases is "straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."⁷⁹ Further, the Court rejected Abercrombie's contention that a neutral company policy could not be in violation of Title VII, since the statute "does not demand mere neutrality with regard to religious practices," but rather, "gives them favored treatment."⁸⁰ Therefore, the Tenth Circuit's interpretation of Title VII's requirements was incorrect, and the case was remanded.⁸¹

73. *Id.* at 1128. "In sum, in light of Title VII's conception of religion and the interactive nature of the religion-accommodation process, we have difficulty seeing how we could logically reach a conclusion other than the one that we explicate here regarding the notice element of the prima facie case." *Id.* at 1135. The Court also cited to the EEOC compliance manual in holding that the informing of and request for an accommodation must be explicit and specific. *Id.*

74. *Id.* at 1143.

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

76. *Id.* at 2032 (emphasis added).

77. *Id.* at 2032–33 ("We construe Title VII's silence as exactly that: silence.").

78. *Id.* at 2033 ("An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.").

79. *Id.*

80. *Abercrombie*, 135 S. Ct. at 2034.

81. *Id.*

E. Concurrence and Dissent of the Supreme Court Case

Concurring with the judgment, Justice Alito agreed that the Tenth Circuit misinterpreted the notice requirement, since Title VII does not impose an actual knowledge standard, but felt that some degree of awareness should be clearly established in order to trigger an employer's duty to accommodate.⁸² Otherwise, a "strange result" would ensue in that, in this case for example, Abercrombie could be liable whether or not it knew that Elauf wore her headscarf for religious reasons.⁸³ Here, because there was sufficient evidence to show that Abercrombie was aware that Elauf wore her headscarf for religious reasons, liability under Title VII was appropriate.⁸⁴ Dissenting, Justice Thomas did not feel as though it were possible that Abercrombie had engaged in any violation under Title VII while merely applying a neutral dress policy that incidentally "fall[s] more harshly" upon Muslim women or any other religious group.⁸⁵ Justice Thomas disagreed that section 2000(e)(j) and the Supreme Court's decision in *Hardison* "create[d] a freestanding failure-to-accommodate claim distinct from either disparate treatment or disparate impact."⁸⁶ Thomas argued that while the Court today had "rightly put[] to rest the notion" that a freestanding religious-accommodation action exists, it had replaced it with an "entirely new form of liability: the disparate-treatment-based-on-equal-treatment claim," and thus erroneously redefined "intentional discrimination."⁸⁷

III. POST-ABERCROMBIE CASES – APPLYING THE SUPREME COURT'S HOLDING

Since the Supreme Court's decision in *Abercrombie*, lower courts have been tasked with applying the holding to religious discrimination cases where appropriate. Even in a short time, courts have already taken varying approaches in doing so.

82. *Id.* at 2035 (Alito, J., concurring).

83. *Id.*

84. *Abercrombie*, 135 S. Ct. at 2035.

85. *Id.* at 2038 (Thomas, J., dissenting).

86. *Id.* at 2041.

87. *Id.* at 2041–42. Interestingly, the majority in its decision stated that Title VII creates just two causes of action: "disparate treatment" (intentional discrimination) and "disparate impact." *Id.* at 2032. Section 2000(e)(j) and the duty to accommodate was seemingly merged in with the definition of "religion" under Title VII's "disparate treatment" provision, creating a standard which provides that it is unlawful for employer to "(1) 'fail . . . to hire' an applicant (2) 'because of' (3) 'such individual's . . . religion' (which includes his religious practice)." *See id.* at 2031–32. Thus far, lower courts have not substituted calling "failure to accommodate" claims "disparate treatment," as Justice Thomas has predicted. *See, e.g.,* Equal Emp't Opportunity Comm'n v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298, 1317 (D. Colo. 2015); *see also* Schwingel v. Elite Prot. & Sec., Ltd., No. 11 C 8712, 2015 WL 7753064, at *4–5 (N.D. Ill. Dec. 2, 2015).

A. *Creating a New Prima Facie Standard*

Some courts have taken the approach of adjusting a plaintiff's prima facie case under Title VII religious discrimination to two elements, eliminating the "informed" component altogether.⁸⁸ This new standard requires that a plaintiff show "(1) she had a *bona fide* religious belief that conflicted with an employment requirement; and (2) her need for an accommodation was a *motivating factor* in the employer's decision to take an adverse employment action against her."⁸⁹ Under this new standard, the previous discussion of notice becomes obsolete, as courts are specifically directed to take a more broad view of the "motivating factor" issue in determining liability.

In *Jetstream*, for example, the court determined that there was sufficient evidence to show that the reason the employer laid off a Muslim employee was because it "knew—or, at the very least, suspected" that the employee wore clothing (a headscarf and long skirts) that was non-compliant with company dress code due to a religious belief, and therefore required an accommodation.⁹⁰ In making this determination, the court pointed to evidence that this employee wore religious garments in the workplace during non-work hours, as well as the fact that this particular employee was associated with other employees who had informed their employer that they were Muslim and desired a religious accommodation in dress.⁹¹

B. *The Same Prima Facie Standard and Allowing an Alternative Means of Proof*

Rather than adjusting the standard completely, other lower courts have since kept the prima facie elements the same but have provided, based on *Abercrombie*, a new means by which a plaintiff may satisfy element two, thus allowing alternative grounds of proof.⁹² In *Mathis*, the plaintiff, an atheist, brought a failure to accommodate claim after being discharged for obscuring a religious mission statement on his company badge.⁹³ In discussing a prima

88. See, e.g., *Jetstream Ground Servs.*, 134 F. Supp. 3d at 1318; see also *Schwengel*, 2015 WL 7753064, at *5.

89. *Jetstream Ground Servs.*, 134 F. Supp. 3d at 1318 (emphasis added). Notably, the remainder of the burden-shifting analysis remains the same: "If the employee establishes a *prima facie* case, the burden shifts to the defendant employer to '(1) conclusively rebut one or more elements of the plaintiff's *prima facie* case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable to accommodate the employee's religious needs reasonably without undue hardship.'" *Id.* (quoting *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1156 (10th Cir. 2000)).

90. *Id.* at 1298, 1318.

91. *Id.* at 1318–19.

92. See *Mathis v. Christian Heating & Air Conditioning, Inc.*, No. CV 13-3740, 2016 WL 304766 (E.D. Pa. Jan. 26, 2016).

93. *Id.* at *3.

facie case, the court provided that the plaintiff “must show: ‘(1) [he] holds a sincere religious belief that conflicts with a job requirement; (2) [he] informed his employer of the conflict; and (3) [he] was disciplined for failing to comply with the conflicting requirement.’”⁹⁴ In examining the second element, the court first discussed evidence showing that plaintiff did in fact inform his employer of his religious objection to wearing the badge.⁹⁵

In addition to this, however, the court cited to *Abercrombie* and stated that plaintiff had also presented evidence that would allow the jury to “infer that [the employer] failed to accommodate plaintiff ‘because’ of plaintiff’s atheism.”⁹⁶ Title VII, the court continued, “does not require him to prove that he advertised his atheistic beliefs to his employer, nor does it require that he prove that he phrased his disagreement with the mission statement in terms of his atheism;” rather, the plaintiff only need show that the employer acted with an improper motive when it terminated him.⁹⁷ This discussion was grouped into the court’s discussion under element two of the prima facie case, demonstrating that it was an alternative to actually informing the employer of the need for an accommodation.⁹⁸

C. *Abandoning the Prima Facie Standard and Taking a Broad Approach*

Finally, there is a possibility that, like the “disparate treatment/intentional discrimination” language set forth in *Abercrombie* and Justice Thomas’s prediction, courts will now abandon the traditional prima facie standard for failure to accommodate cases and instead take a broader approach to these claims.

The Fifth Circuit was recently tasked with the question of applying *Abercrombie* in the case *Nobach v. Woodland Vill. Nursing Center, Inc.*⁹⁹ In this case, a nursing home aide named Kelsey Nobach was discharged for not praying the Rosary with a patient as required by her job, which she refused to do based upon a religious belief.¹⁰⁰ The court held that there was no evidence that Nobach’s religious beliefs were a motivating factor in her discharge under *Abercrombie*, given that she had failed to show that her employer “came to

94. *Id.* at *8 (quoting EEOC v. GEO Grp., Inc., 616 F.3d 265, 271 (3d Cir. 2010)).

95. *Id.* at *9.

96. *Id.* at *10.

97. *Mathis*, 2016 WL 304766, at *10. The court cited to varying evidence reflecting the fact that the employer was possibly aware that plaintiff’s refusal to wear the badge was for religious reasons, and thus may have terminated him with the motive of avoiding making an accommodation.

98. *See id.*

99. 799 F.3d 374 (5th Cir. 2015).

100. *Id.* at 376. Nobach was a former Jehovah’s Witness who had been expelled from the Church at age sixteen.

know of or suspect her bona-fide religious belief” before her discharge.¹⁰¹ The only evidence presented in the case, the court reasoned, was that Nobach had informed an assistant that she could not read the Rosary because it was against her religion, but there was no evidence that Nobach or the assistant ever relayed this information regarding her religious belief to the employer before her termination.¹⁰²

Interestingly, in setting out the standard for Nobach’s claim, the Fifth Circuit chose to analyze the claim as an intentional discrimination or disparate treatment claim, stating that “Title VII makes it unlawful for an employer to discharge an individual ‘because of such individual’s . . . religion.’”¹⁰³ The court went on to discuss that, based on the Supreme Court’s decision in *Abercrombie*,

When evaluating causation in a Title VII case, the question is not what the employer knew about the employee’s religious beliefs. Nor is the question whether the employer knew that there would be a conflict between the employee’s religious belief and some job duty. Instead, *the critical question is what motivated the employer’s employment decision.*¹⁰⁴

In a footnote, the court noted that Nobach’s failure to accommodate claim would have been dismissed for the same reasons stated above, given that her employer lacked any knowledge or suspicion that there was a conflict between Nobach’s religious beliefs and her job duties.¹⁰⁵ So although this case did not specifically contain a failure to accommodate claim, it alludes to the idea that intentional discrimination under Title VII also encompasses the failure to accommodate religious practices. Thus, it is possible that these claims can be analyzed broadly by utilizing the standard set forth in *Abercrombie*, thereby replacing the “failure to accommodate” category of cases in some instances.¹⁰⁶

101. *Id.* at 379.

102. *Id.* at 376–77, 379. This holding has been summarized as follows:

If Nobach presented any evidence that Woodland knew, suspected, or reasonably should have known the cause for her refusing this task was her conflicting religious belief—and that Woodland was motivated by this knowledge or suspicion—the jury would certainly have been entitled to reject Woodland’s explanation for Nobach’s termination. But no such evidence was ever provided to the jury. The court therefore held that a reasonable jury would not have had a legally sufficient evidentiary basis to find that Woodland intentionally discriminated against Nobach because of her religion. Kimberly Kemper, *There Was No Evidence That Religion Was the Motive*, 32 NO. 22 EMP. ALERT NL 3 (2015).

103. *Nobach*, 799 F.3d at 378 (quoting 42 U.S.C. § 2000e–2(a)(1) (2012)).

104. *Id.* (emphasis added; internal citations omitted).

105. *Id.* at 379 n.8.

106. Based upon statutory language, there would, of course, still be the requirement that an employer show that a reasonable accommodation was offered or could not have been sustained without undue hardship. *See* 42 U.S.C. § 2000e(j).

IV. POLICY IMPLICATIONS

Commentators have thus far been in discussion regarding the implications that *Abercrombie* may have upon religious discrimination as a matter of policy. The idea of whether the case was “pro-employee” or “anti-employer” was immediately discussed by mainstream media. Beyond this, it is important to look at what impact, if any, this case will have upon the future of religious employment discrimination law in the realm of accommodations and as a whole.

A. *Public Commentary*

1. Was the Decision “Pro-Employee?”

From one perspective, it certainly seems as though Samantha Elauf’s case was a “victory” for employees—the Supreme Court reversed the Tenth Circuit’s adverse decision against her, and the case soon after settled in her favor.¹⁰⁷ The case was decided on an 8-1 majority,¹⁰⁸ and Justice Scalia even proclaimed, “[t]his is really easy” from the bench before announcing the Court’s ruling.¹⁰⁹ The General Counsel for the Equal Employment Opportunity Commission released a statement following the decision, calling it “a victory for our increasingly diverse society.”¹¹⁰ The decision was also praised by religious and civil liberties organizations such as the Americans United for Separation of Church and State, celebrating the fact that “employers cannot put their head in the sand when they suspect that an applicant will need a religious accommodation.”¹¹¹

107. Abercrombie paid \$25,670 in damages to Elauf and \$18,983 in court costs. Press Release, U.S. Equal Employment Opportunity Commission, *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> [<http://perma.cc/ARD3-AKF6>].

108. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2030 (2015). Additionally, while the case was pending, Abercrombie announced that it planned to relax its “Look Policy” for employees. Sarah Kaplan, *The Rise and Fall of Abercrombie’s ‘Look Policy,’* WASH. POST, (June 2, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/06/02/the-rise-and-fall-of-abercrombies-look-policy/> [<http://perma.cc/3UWH-F4B4>].

109. Walter Olson, *A Hijab and A Hunch: Abercrombie and the Limits of Religious Accommodation*, 2014-2015 CATO SUP. CT. REV. 139, 139.

110. Press Release, U.S. Equal Employment Opportunity Commission, *Supreme Court Rules in Favor of EEOC in Abercrombie Religious Discrimination Case* (June 1, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/6-1-15.cfm> [<http://perma.cc/A7YH-MC5S>].

111. Robert Barnes, *Supreme Court Allows Suit by Muslim Woman Who Says Headscarf Cost Her a Job*, WASH. POST (June 1, 2015), https://www.washingtonpost.com/national/supreme-court-allows-suit-by-muslim-woman-who-says-head-scarf-cost-her-a-job/2015/06/01/977293f0-088c-11e5-9e39-0db921c47b93_story.html [<http://perma.cc/7FBZ-A485>].

2. Was the Decision “Anti-Employer?”

On the other hand, employers were immediately concerned about the negative impact the holding may have on them, namely the potential of increasing their likelihood of liability under Title VII.¹¹² One major concern was that the implications of the case on the already-difficult balance between good hiring practices and the need to ask probing or possibly illegal questions to potential employees.¹¹³ Small businesses were also concerned that the holding would fall more harshly upon them in that it “force[s] employers to make assumptions about an applicant’s religion” and “sets an unclear and confusing standard making business owners extremely vulnerable to inevitable discrimination lawsuits.”¹¹⁴

B. Legal Commentary

1. The Supreme Court’s Failure to Accommodate Case History

The Supreme Court’s decision in *Abercrombie* was the third of all cases it has decided pertaining to failure to accommodate a religious practice, and the first of those being decided in favor of the religious employee.¹¹⁵ Generally speaking, the Supreme Court’s previous decisions regarding the duty to accommodate narrowly defined an employer’s obligation to accommodate an employee’s religious conduct.¹¹⁶ In *Trans World Airlines, Inc. v. Hardison*, the Court held that the employer was not required to accommodate an employee’s religious practice where it would violate the employer’s seniority system, since this constituted an “undue hardship,” defining the term narrowly as anything that bears “more than a *de minimis* cost” to the employer.¹¹⁷ Later, in *Ansonia Board of Education v. Philbrook*, the Court determined that an employer’s

112. Tricia Gorman, *Supreme Court Favors Muslim Woman in Abercrombie Discrimination Suit*, 22 No. 6 WESTLAW JOURNAL CLASS ACTION 1 (2015).

113. See Barnes, *supra* note 111. In oral argument for the case, Justice Kagan asserted that *Abercrombie* was contending that:

[T]he problem with the rule is that it requires *Abercrombie* to engage in what might be thought of as an awkward conversation, to ask some questions. Now, people can disagree about whether one can ask those questions in a way that’s awkward at all, but you’re saying that we should structure the whole legal system to make sure that there is no possibility of that awkward conversation ever taking place. Transcript of Oral Argument at 52, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (No. 14-86).

114. Gorman, *supra* note 112.

115. Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 TEX. REV. L. & POL. 107, 109, 122 (2015). The other two cases were *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84–85 (1977) and *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63, 66 (1986), which pertained to the issues of “undue hardship” and “reasonable accommodation,” respectively.

116. Kaminer, *supra* note 115, at 121.

117. 432 U.S. at 84.

offered accommodation of unpaid leave was reasonable although it caused the employee to suffer lost pay, since a reasonable accommodation is merely one that “eliminates the conflict between employment requirements and religious practices,” and employees do not hold an entitlement to their preferred accommodation.¹¹⁸ In contrast, through its decision in *Abercrombie*, the Court seemed to for the first time expand the reach of Title VII more broadly, by refusing to narrowly construe the notice requirement, and holding that religious practices receive “favored treatment.”¹¹⁹ This in itself may demonstrate a legal policy shift towards more expansive protections for employees under Title VII.

2. Similarities to the ADA – Surviving Summary Judgment and Expanding Accommodations

Other legal commentators have proposed the possibility that that like accommodating disabilities under the Americans with Disabilities Act (ADA), religious practices may be generally shifting into a more “accommodation-friendly” direction.¹²⁰ The ADA places an affirmative duty upon employers to accommodate an otherwise-qualified employee’s known physical or mental limitations (a “disability”), unless the employer can “demonstrate that the accommodation would impose an undue hardship on the operation of the [employer’s] business.”¹²¹ Originally passed in 1990, the ADA was amended in 2008 through Congress’s passage of the Americans with Disabilities Act Amendments Act (ADAAA).¹²² The amendments came about in response to the Supreme Court’s narrow interpretation of the term “disability” and

118. 479 U.S. at 66, 70. As Professor Debbie N. Kaminer points out, there is a “striking lack of consensus” within the American legal system regarding “the appropriate treatment of religious employees in the workplace.” Kaminer, *supra* note 115, at 118. This is illustrated by the fact that in all three cases discussed above, the reasoning of the district courts was rejected by the appeals courts, and the reasoning of the appeals courts were ultimately rejected by the Supreme Court. *Id.* This is further demonstrated through the lack of a uniform standard across circuits in analyzing failure to accommodate cases both prior to and after the *Abercrombie* decision. *Id.* at 111–12.

119. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015). Professor Kaminer also contends that the Supreme Court’s decisions in *Hardison* and *Philbrook* were at odds with Congressional intent, which sought that an employee’s religious beliefs be accommodated in the workplace. Kaminer, *supra* note 115, at 131.

120. *See* Olson, *supra* note 109, at 155–56.

121. *See* 42 U.S.C. § 12112(b)(5)(A) (2012).

122. Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 3 (2014). Thus, these cases also require a two-step, burden-shifting analysis, wherein an employee must first make a *prima facie* showing that he or she is statutorily disabled and otherwise qualified under the Act, and if so the burden then shifts to the employer to show that it offered a reasonable accommodation, or that offering such an accommodation would be an undue hardship. *See, e.g.*, *McMillan v. N.Y.C.*, 711 F.3d 120, 125, 128 (2d Cir. 2013).

limitation of the scope of covered individuals under the statute.¹²³ The ADAAA served to vastly expand the range of individuals considered “disabled” under the law, as well as define other terms and requirements in employees’ favor.¹²⁴

Since the passage of the ADAAA, many more plaintiffs in disability discrimination cases survive summary judgment because the amendments have made the threshold question of whether an individual meets the statutory definition of disability broader and therefore easier to meet.¹²⁵ Thus, cases are more frequently proceeding to the merits.¹²⁶ Additionally, similar to Title VII and the decision in *Abercrombie*, the ADA amendments only require a plaintiff to show that an employer made an adverse decision “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”¹²⁷

While this area of law is still open and developing, researchers have observed that since the ADAAA, in reaching the merits of cases, courts have trended towards drawing more favorable inferences for plaintiffs and generally reaching pro-employee outcomes in certain areas.¹²⁸ For example, where plaintiffs were requesting accommodations pertaining to the physical functions of a job, courts were more likely to deny summary judgment for the employer and find that a plaintiff was otherwise qualified, as well as more willing to require employers to provide a reasonable accommodation moving forward.¹²⁹ However, where plaintiffs were likely to be placed in danger through employment or were requesting an accommodation pertaining to the structural norms of the workplace, such as attendance, hours, schedule shifts, and leaves of absence, courts were more likely to dismiss the case on summary judgment, and thus unable to proceed to the merits.¹³⁰ Growing case law in this area will provide more definitive outcomes of the amendments, including the potential that this will “change the landscape” of this area of law, making the

123. Porter, *supra* note 122, at 4, 9. See also Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1120 (2010).

124. Weber, *supra* note 123, at 1120, 1123.

125. Porter, *supra* note 122, at 4. One research study conducted found that courts granted summary judgment to employers on the issue of disability in 74.4% of the cases pre-Amendments, which decreased to only 45.9% post-Amendments. See Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050–51 (2013).

126. Porter, *supra* note 122, at 18.

127. 42 U.S.C. § 12102(3)(A) (2012) (emphasis added); See Porter, *supra* note 122, at 17. (“The focus is now on the employer’s motivation for its adverse action, rather than focusing on how serious the employer considered the plaintiff’s condition.”).

128. See Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 227–28 (2016).

129. *Id.*

130. *Id.* at 229–30.

availability of accommodations in the workplace the “new normal.”¹³¹ It is likely that these trends in cases under the ADA will help predict the future of Title VII, and that policy shifts in disability discrimination as a whole may serve to influence religious discrimination law as well.

3. Extending the Case Beyond Failure to Hire

Another general policy matter is determining the extent to which this holding will be expanded beyond the failure to hire context, rather than limited to cases that are analogous to *Elauf*'s. As demonstrated by case law following the decision thus far, courts have not hesitated to extend the holding in *Abercrombie* to all aspects of religious discrimination, particularly termination and discharge.¹³² Yet the question remains as to what bearing *Abercrombie* will actually have where an employee is already at work under an employer and is aware of a company policy.

One issue discussed in detail at oral arguments was that Samantha *Elauf* did not herself have notice that she was or would be non-compliant with *Abercrombie*'s “Look Policy” at the time of her application.¹³³ Because of this, it would be unreasonable to expect her to request an accommodation for a job requirement that she did not know existed.¹³⁴ This is distinguishable from a case like *Nobach*, where because the current employee knew of and chose to violate the employer's workplace policy *before* the employer was made aware of her need for a religious accommodation, there was no liability under Title VII, even following the Court's decision in *Abercrombie*.¹³⁵ The question therefore remains as to how the Court's holding in *Abercrombie* will apply or even be beneficial to such employees in the future.

CONCLUSION

Close examination of the Supreme Court's decision in *Abercrombie* and the various circuit case law leading up to it reveals the complexities and intricacies of religious employment discrimination law. Perhaps it is an enigma of a case, only beneficial to Samantha *Elauf* in her job application for a retail store with a now-extinct and arguably arbitrary “Look Policy.” Perhaps its legacy, however, will extend deeply into employment discrimination on the basis of religion, with a positive policy spin towards employees and the duty of

131. *Id.* at 258.

132. *See, e.g.,* Equal Emp't Opportunity Comm'n v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298, 1317–18 (D. Colo. 2015); *see also* *Schwingel*, 2015 WL 7753064, at *5. The altering of the prima facie standard and elimination of the “informed” component in some circuits may or may not be one lasting legacy from the case.

133. Transcript of Oral Argument, *supra* note 113, at 37–38.

134. *Id.*

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

employers to accommodate religious practices in the workplace. If nothing else, Justice Scalia and the Court made clear that under Title VII, employees' religious practices are given "favored treatment," and employers are liable where even suspicion of religious behavior is a "motivating factor" in an adverse employment decision.¹³⁶ In an ideal world, open dialogue, acceptance, and tolerance in the workplace would prevent Title VII claims from even reaching courts. But until that time, we can only hope that the legal world will come to a consensus and establish a clear and workable standard for religious discrimination claims—or, at the least, find the means by which each smaller piece can make up a larger, cohesive whole.

AMINA MUSA*

136. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032–34 (2015).

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