RELIGIOUS DISCRIMINATION: AN EMPLOYEE'S BURDEN OF PROOF UNDER TITLE VII

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INTRODUCTION

In addition to the claims available to all of Title VII's protected classes,[1] religious discrimination claimants have traditionally had access to an additional type of claim against intentional discrimination that is not available to the other classes[2]: failure to reasonably accommodate.[3] The basis for this claim comes from the statute's Definitions section, with the applicable provision reading: "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."[4] This language originated in an Equal Employment Opportunity Commission (hereinafter, EEOC) Guideline from 1967[5] and was adopted by Congress in its 1972 amendment.[6] The change demonstrated Congress' intent to recognize employees' religious observances and/or practices in addition to merely their religious identifications and/or beliefs.[7]

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[1] "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *race*, *color*, *religion*, *sex*, or *national origin*." 42 U.S.C. § 2000e-2(a)(1).

[2] *But see id.* § 12112(b)(5) (reasonable accommodation claims are also applicable in the context of disability discrimination in employment).

[3] *See id.* § 2000e(j).

[4] *Id.* (emphasis added). *See also* Holly Marie Wilson and Ronald Mingus, *Accommodations In The Work Place: Disability And Religion*, Reminger Co., LPA Spring 2015 Employment Practices Newsletter, https://www.reminger.com/media/publication/302_EmploymentNewsletterSpring2015interactivefinal.pdf (last visited Feb. 17, 2019) (noting that there are three common categories into which claims for reasonable accommodation based on religion under Title VII most often fall: (1) conflicts between work requirements and holy day or Sabbath observances; (2) religious clothing requirements; and (3) grooming requirements).

[5] 29 C.F.R. § 1605.1.

[6] 42 U.S.C. § 2000e(j).

[7] *Id.*

Since the United States Supreme Court case of *EEOC v. Abercrombie*,[8] decided in 2015, some courts have called this traditional view into question and have concluded that there is no separate, freestanding claim for reasonable accommodation, simply folding such claims into their disparate treatment inquiries.[9] Not all circuits have made the switch, however, with many continuing to follow essentially the same approach they followed prior to *Abercrombie* (i.e., treating reasonable accommodation as a separate claim and applying the pre-*Abercrombie* burden-shifting framework in virtually identical form except for the second element of the prima facie case).[10]

This note will examine the history of these doctrinal frameworks, the Supreme Court's analysis and holding in *Abercrombie*, how the public reacted to the *Abercrombie* decision, how circuit courts have responded to – or, if they've maintained their same approach, why they've continued to do so – the public's reactions to the circuit courts' approaches, and whether or not these different circuit court approaches will have an effect on future cases brought by plaintiff-employees claiming religious discrimination.

Part I: A Brief History of Title VII Claims of Disparate Treatment and Reasonable Accommodation Based on Religion Before *Abercrombie*.

a. Proving Disparate Treatment Through the *McDonnel Douglas*/*Burdine* Framework and the Mixed-Motives Paradigm:

The cases of *McDonnel Douglas v. Green*[11] and *Texas Department of Community Affairs v. Burdine*[12] established a three-part, burden-shifting framework for addressing individual disparate treatment claims that is used to this day.[13] First, the plaintiff must establish a prima facie case.[14] This may be accomplished by demonstrating that the plaintiff: (i) belongs to a

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[8] EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).
[9] *See, e.g.,* Nobach v. Woodland Vill. Nursing Ctr., 799 F.3d 374 (5th Cir. 2015).
[10] *See, e.g.,* Tabura v. Kellogg USA, 880 F.3d 544 (10th Cir. 2018).
[11] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[12] Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).
[13] *McDonnel Douglas*, 411 U.S. at 802.
[14] *Id*. at 802.

protected class[15]; (ii) applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite these qualifications, the plaintiff was rejected; and (iv) that, after this rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.[16] Next, the burden shifts to the employer, who then has the opportunity to rebut the prima facie case by "articulat[ing] some legitimate, nondiscriminatory reason[17] for the employee's rejection."[18] The plaintiff will then have one last opportunity to refute the employer's reasoning and prevail overall by showing that the employer acted out of pretext (i.e. an indirect showing "that the employer's proffered explanation is unworthy of credence") or direct, intentional discrimination (i.e. that "a discriminatory reason more than likely motivated the employer").[19]

Another way for plaintiffs to show intentional religious discrimination is through the mixed-motives paradigm as laid out in *Price Waterhouse v. Hopkins*.[20] Here, plaintiffs are similarly required to establish a prima facie case of discrimination, however, they must do so by showing that a "motivating factor" precipitated the adverse employment action.[21] In its in-depth analysis of the appropriate standard of causation to apply under Title VII, the

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[15] *See id.* at 802 n.13. Although *McDonnel Douglas* was decided in the context of racial discrimination, "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent [here, the plaintiff-employee] is not necessarily applicable in every respect to differing factual situations." Similarly, all circuits have formulations of the *McDonnell Douglas* prima facie case for different employment contexts, such as hiring, firing, etc.

[16] *See McDonnel Douglas*, 411 U.S. at 802.

[17] *See Burdine*, 450 U.S. at 256-57 (The Court makes clear that this is a burden of production, not of persuasion, when it clarifies: "The plaintiff retains the burden of persuasion." It goes on to note: "We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."). *See also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) ("[T]he precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized or ritualistic.'") (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

[18] *Id.*

[19] *See McDonnel Douglas*, 411 U.S. at 802, 804-05; *Burdine*, 450 U.S. at 256.

[20] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[21] *Id.* at 249.

Court explained that "[to] construe the words 'because of'[22] as colloquial shorthand for 'but-for causation' . . . is to misunderstand them,"[23] noting that Congress could not have meant "to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges."[24] Instead, the Court determined that Congress must have intended that plaintiffs show that their employers considered their protected class statuses upon taking the adverse employment action.[25] Since the 1989 decision, circuit courts have imposed varying evidentiary standards on plaintiffs, with some requiring a showing of direct evidence (1st, 5th, 6th, 7th, 10th, and 11th), others requiring "circumstantial-plus" evidence (2nd, 3rd, and 8th), and one using a nonrestrictive standard that allows for either direct or circumstantial evidence (4th).[26]

At the second step of the *Price Waterhouse* mixed-motives paradigm, an employer is able to avoid liability by asserting the affirmative "same decision" defense, where it must explain "that it would have made the same decision in the absence of the unlawful motive."[27] If the employer successfully meets this requirement, then it will have established that the employee's protected class status was not the "but-for" cause of the adverse employment action.[28]

In 1991, Congress amended the Civil Rights Act of 1964 and added a new subsection in which it formally recognized the mixed-

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[22] 42 U.S.C. § 2000e-2(a)(1), (2).

[23] The Court's reasoning here is strange, considering protected class status can still be a "but-for" cause even if the employer has another legitimate, nondiscriminatory reason for taking an adverse employment action.

[24] *Id*. at 241.

[25] *Id*. at 242.

[26] *See* Michael A. Zubrensky, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 STAN. L. REV. 959. *See also* Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir. 1990) (holding that plaintiffs were required to show "direct evidence," or "evidence which, in and of itself, shows a discriminatory animus"); Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992) (holding that plaintiffs could meet their "circumstantial-plus" evidentiary burden by producing a decisionmaker's documents or statements "directly reflecting" the alleged discriminatory animus); White v. Fed. Express Corp., 939 F.2d 157, 160 (4th Cir. 1991) (holding that plaintiffs could use direct or circumstantial evidence since both conform to "ordinary principles of proof").

[27] *Id*. at 250. In the *Price Waterhouse* context, an example of this defense might read: even though Hopkins is a woman, she was still denied partnership because of her poor inter-personal skills.

[28] *Id*.

motives paradigm that, up until this point, had only been inferred from the statute's language.[29] The result of this amendment was to make illegal any discriminatory consideration in employment activities by changing whether an employer's defense would obviate damages or result in total liability, depending on whether it was able to prove that it would have made the same action absent the employee's protected class status.[30]

Over a decade later, the Supreme Court had its first chance to take up the question of whether plaintiffs bringing mixed-motives cases are required to present direct evidence, as many circuits had required.[31] In *Desert Palace*, the employer challenged the jury instructions presented at trial that followed the Civil Rights Act of 1991's mixed-motives test because the employee had failed to present direct evidence of discrimination.[32] Justice Thomas, writing for a unanimous court, sided with the employee, however, and held that direct evidence is not required in mixed-motives cases under Title VII; only sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that the protected class status was a motivating factor for the employment practice is required.[33] Conducting a textual analysis of the statute, the Court held that under Section 2000e-2(m), "a plaintiff need only *demonstrate* that an employer used a forbidden consideration with respect to any employment practice."[34] The Court reasoned that, because Congress specifically defined "demonstrates" as to "meet the burdens of production and persuasion,"[35] without specifying how this must be done, that direct evidence could not be read into the statute; it would have included specific language if that had been its intention.[36] The Court further bolstered its decision by pointing out that Congress' silence must have meant that it intended for a "preponderance of

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[29] 42 U.S.C. § 2000e-2(m). The subsection clarifies that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." *Id.* (emphasis added).

[30] *Id.* Under the law as amended, even if the employer were successful in its defense and the plaintiff-employee was limited to injunctive relief, rather than damages, the employer would still be found to have violated Title VII.

[31] *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003).

[32] *Id.* at 96-97.

[33] *Id.* at 98 (emphasis added), 101.

[34] *Id.*

[35] 42 USCS § 2000e(m).

[36] *See Desert Palace*, 539 U.S. at 98.

the evidence" standard, as applied in every other type of civil case, to be applied.[37] Finally, the Court noted that because a direct evidence requirement had not been incorporated into any other provision within Title VII that uses the word "demonstrates," it should not be applied in this context.[38]

b. Reasonable Accommodation Claims:

After Congress' 1972 amendment to Title VII, circuit courts interpreted the statute's changes in similar fashions in order to establish a uniform framework for analyzing religious accommodation claims.[39] This interpretation required plaintiff-employees to make a prima facie showing by establishing that they: (i) had a bon fide religious belief that conflicted with an employment requirement; (ii) informed the employer of this belief; and (iii) suffered an adverse employment action as a result of the conflict (firing, not hiring, diminished pay, etc.).[40] If the employee succeeded in establishing a prima facie case of failure to reasonably accommodate, then the burden would shift to the employer, whereby it was required to prove that met its affirmative obligations[41] by: (i) offering the employee a reasonable accommodation; or (ii) by proving that it was unable to reasonably accommodate the employee's religious needs without undue hardship.[42]

The Supreme Court had its first opportunity to analyze what the terms "reasonable accommodation" and "undue hardship" truly meant in the seminal case of *Trans World Airlines Inc. v. Hardison*.[43] In *TWA*, the plaintiff-employee, Larry G. Hardison, worked as a clerk in TWA's Stores Department, which operated 24 hours per day, 365 days per year.[44] Hardison was also a member of

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[37] *Id*. at 99.
[38] *Id*. at 100.
[39] *See* 42 U.S.C. § 2000e(j), Chalmers v. Tulon Co., 101 F.3d 1012, 1019 (4th Cir. 1996).
[40] *See* Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985) (quoting Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984)), *aff'd on other grounds*, 479 U.S. 60, 65 (1986).
[41] *See* Shawe Rosenthal, EMPLOYMENT LAW DESKBOOK, § 18.01(4.0a) (2016) (providing a general overview of religious reasonable accommodation requirements).
[42] *Id*.
[43] Trans World Airlines, Inc. v. Hardison (TWA), 432 U.S. 63 (1977).
[44] *Id*. at 66.

the International Association of Machinists and Aerospace Workers with whom TWA had a partnership, and as such, was subject to the seniority system used to staff TWA's operations that was included in the union's collective bargaining agreement.[45] About one-year into his employment, Hardison joined the Worldwide Church of God and requested to have off on the Sabbath (sundown on Friday to sundown on Saturday) and on certain unique religious holidays observed by the church.[46] Hardison's supervisor was able to accommodate his request, however, upon bidding to new building where he no longer had seniority, Hardison was unable to obtain accommodation, even after proposing several different alternatives.[47] Ultimately, Hardison was fired for insubordination when he refused to report to his Saturday shift in order to practice the Sabbath.[48]

The Supreme Court reversed the Eighth Circuit's previous decision and held that TWA had done all it needed to under the statute vis-à-vis the plaintiff; TWA did not have to go any further in accommodating Hardison.[49] The Court rejected Hardison's first

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[45] *Id*. at 67.
[46] *Id*. at 68.
[47] *Id*.
[48] *Id*. at 69.
[49] *TWA*, 432 U.S. at 77. Here, the Court sets the stage for a fairly ungenerous approach to reasonable accommodation in the religion context. Examples of reasonable accommodation include: reassignment or transfer, restructuring of job duties, allowing reasonable time off for religious practices, flexibility in dress and appearance standards, and allowing voluntary exchanges of work schedules. *See* 29 C.F.R. § 1605.3. Courts, in comparison, have tended to be more expansive in accommodations that they allow under the Americans with Disabilities Act. *See* 42 U.S.C. § 12112; *see, e.g.* Hoskins v. Oakland County Sherriff's Dept., 227 F.3d 719, 728 (6th Cir. 2000) (reasonable accommodations may include, but are not limited to, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the previsions or qualified readers or interpreters), 42 U.S.C. § 12111(9)(B). *See also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-M1A, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT (1992), § 9.4 at 156 (indicating that light duty work, or giving the employee additional leave, are also potentially reasonable accommodations). *But cf.* U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002), Tobin v. Liberty Mutual Ins. Co., 553 F.3d 121 (1st Cir. 2009) (holding that the employer is not required to create a new position or go against an existing non-discriminatory seniority system; the form of the accommodation must be reasonable); Keith v. Cty. of Oakland, 703 F.3d 918 (6th Cir. 2013) (the accommodation must be efficacious, in other words, related to the limitations

alternative – to be given Saturdays off and have another employee fill his shift – because this would have essentially been reverse discrimination in the form of disparate treatment against TWA's non-religious employees.[50] The Court went on to engage in a textual analysis of Section 703(h),[51] finding that TWA was not required to make accommodations to its bona fide seniority system to accommodate Hardison.[52] Finally, the Court determined that TWA was not required to accept Hardison's proposal that he only work four days per week as a form of accommodation since this would place an undue hardship on the business. [53] Even though others wouldn't necessarily be required to replace Hardison on these

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posed by the disability and it must be cost-effective, meaning, it must provide the employer with a proper cost-to-benefit ratio).

[50] *See TWA*, 432 U.S. at 81 ("[T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath . . . Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities."). However, this broad argument has not held up over the years, since it would essentially eliminate reasonable accommodations altogether. The reasonable accommodation provision itself contemplates situations in which religious employees will require different and more favorable treatment in order to be reasonably accommodated. *See* 118 CONG. REC. 706 (1972) (in proposing the 1972 amendment to Title VII, Senator Randolph expressed that Congress intended to permit unequal treatment for the benefit of religious employees).

[51] 42 U.S.C. § 2000e-2(h) ("Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of . . . religion.").

[52] *See TWA*, 432 U.S. at 82. The Court could have only made this argument and still ruled as it did; courts today continue to cite to this provision when deciding reasonable accommodation claims. *See, e.g.*, Genas v. Dep't of Corr. Servs., 75 F.3d 825, 832 (2d Cir. 1996) (holding that the employer, operating under a collective bargaining agreement, did not violate the employee's rights when it did not more than what was required of the agreement in order to accommodate the employee's religious preference).

[53] *TWA*, 432 U.S. at 84 ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.".) This sets a low bar in terms of the total cost or inconvenience that the employer must face in order for the undue hardship defense to apply. *See also* Harrell v. Donahue, 638 F.3d 975, 980 (8th Cir. 2011) (noting that "an accommodation creates an undue hardship if it causes more than a de minimis impact on co-workers" (citing Brown v. Polk Cnty., 61 F.3d 650, 655 (8th Cir. 1995)), or, in other words, significant third-party harm).

Saturdays off, the Court held that this alternative would be the equivalent of requiring "TWA to finance an additional Saturday off and then . . . choose the employee who will enjoy it on the basis of his religious beliefs" and would not only result in "more than a de minimis cost," but also, disparate treatment against non-religious employees.[54]

c. A Hypothesis: Two Distinct Categorizations or One Single Concept?

Although disparate treatment and reasonable accommodations have been treated as distinct claims in cases of discrimination based on religion, Roberto L. Corrada, Mulligan Burleson Chair in Modern Learning and Professor at University of Denver Sturm College of Law, explained in a 2009 article just "how malleable and ill-defined the lines between Title VII disparate treatment and accommodation cases can be."[55] Corrada went on to note how even employers have tried to use the same defenses for both types of religious discrimination claims:

> If the two categories are distinct, a defense in one of the categories should have little relevance for the other. For example, someone alleging religious bias based on diste [sic] treatment would not ordinarily have his or her case dismissed merely because the employer could show that it offered a reasonable accommodation or that it failed to offer such an accommodation because to do so would have imposed an undue hardship on the employer. [56]

Corrada further explained that "Title VII's legislative history provides little express guidance about how to conceptualize the two frameworks [of religious disparate treatment and reasonable accommodation] together, and Supreme Court case law has exclusively focused on cases of accommodation in which discriminatory bias does not seem to be present."[57]

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[54] *TWA*, 432 U.S. at 84.
[55] *See* Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. CIN. L. REV. 1411, 1412 (2009).
[56] *Id.* at 1413.
[57] *Id.* at 1415 (alteration added).

All of these observations made by Corrada essentially hypothesized the need for a hybrid approach to these claims that some circuit courts have adopted in the wake of *EEOC v. Abercrombie & Fitch Stores, Inc.*[58] In fact, Corrada proposed an integrated framework for religion cases under Title VII that looks similar to the analyses that these circuits conduct in order "to prevent courts from overlooking possible bias" and to "protect against constrained classification judgments by the parties themselves."[59]

Part II: The Seminal Case of *EEOC v. Abercrombie.*

In the Lower Courts: The United States District Court for the Northern District of Oklahoma and the Tenth Circuit:

In 2008, Samantha Elauf, a practicing Muslim who was seventeen-years-old, decided to apply for a Model position at an Abercrombie Kids location, which is an offshoot of Abercrombie & Fitch (hereinafter, A&F).[60] Before doing so, Ms. Elauf spoke with her friend, Farisa Sepahvand, who was already employed by A&F, about whether she would be allowed to wear a hijab to work, assuming she was hired.[61] Ms. Sepahvand then consulted with her assistant manager, who knew Ms. Elauf from her prior visits to the store, and reported back to Ms. Elauf that she should have no problem as long as the headscarf[62] wasn't black, seeing as that would violate A&F's "Look Policy."[63]

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[58] *Id.* at 1413; *see also Abercombie,* 135 S. Ct. at 2028.
[59] *Id.* at 1433, 1439.
[60] *See* EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1111-12 (10th Cir. 2013).
[61] *Id.* at 1112.
[62] *See id.* at 1111 n.1 ("A leading scholar of Islam, who was the EEOC's expert in this case, John L. Esposito, Ph.D., has defined a 'hijab' as the 'veil or head covering worn by Muslim women in public.' John L. Esposito, *Islam: The Straight Path* 310 (4th ed. 2011). In their briefing, the parties use the terms 'headscarf' and 'hijab' interchangeably, and so do we.").
[63] *Abercrombie*, 731 F.3d at 1113. A&F's "Look Policy" prohibited employees from wearing black clothing and "caps." The policy did not define the term "cap." *Id.* at 1111. *See also* Alix Valenti, Vanessa L. Johnson, *The Real Impact of EEOC v. Abercrombie & Fitch Stores, Inc.: "Look Policies" – Effective Business Strategies or Legal Liabilities?*, 36 CORP. COUNS. REV. 1, 30–31 (2017) (noting that "[a]lthough Abercrombie & Fitch clearly flourished for at least a decade utilizing its image-

After applying, Ms. Elauf then interviewed with another assistant manager, Heather Cooke, who was also already familiar with Ms. Elauf because of her friendship with Ms. Sepahvand and through her employment at other stores in the same mall.[64] During the interview, Ms. Elauf and Ms. Cooke discussed A&F's "Look Policy" in broad terms, but neither mentioned Ms. Elauf's headscarf or the company's prohibition on black clothing and caps, specifically.[65] More precisely, Ms. Elauf never informed Ms. Cooke that she wore her headscarf for religious purposes and that she would require an accommodation.[66] Ms. Cooke believed Ms. Elauf would be a good candidate for the job; however, because she assumed that Ms. Elauf would not be able to remove her headscarf, she decided to consult with a supervisor and later, a district manager.[67] The district manager then instructed Ms. Cooke to rework the "appearance section" of the interview score she had given Ms. Elauf to ensure that she was not recommended for hire.[68] A few days later, Ms. Elauf found out from her friend, Ms. Sepahvand, that she had not been hired because of her headscarf.[69]

After Ms. Elauf filed a charge with the EEOC, the agency brought suit against A&F in the United States District Court for the Northern District of Oklahoma and framed its case as one of failure to reasonably accommodate based on Ms. Elauf's religion.[70] Because the EEOC did not present the case as straightforward disparate treatment (religious discrimination per se), the issue that A&F appealed after receiving a judgment against it by the District Court was whether Ms. Elauf ever notified the store that she had a religious practice that required accommodation in the form of an exemption from the "Look Policy," not whether the store discriminated on her assumed – and actual – religion.[71] The United States Court of Appeals for the Tenth Circuit reversed and remanded the District Court's decision, finding that it is essential

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driven, appearance-focused branding strategy, which centered around its 'Look Policy,' . . . [the policy] likely contributed significantly to [the store's] drastic drop in sales during the past decade") (alterations added).

[64] *Abercrombie*, 731 F.3d at 1113.

[65] *Id.*

[66] *Id.*

[67] *See id.* at 1113-14.

[68] *Id.* at 1114.

[69] *Id.*

[70] *See* EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1283 (N.D. Okla. 2011).

[71] *See Abercrombie*, 731 F.3d at 1110-11.

for plaintiff-employees to inform their employers of a need for accommodation in order to meet their burden of establishing a prima facie case.[72] The EEOC then appealed to the United States Supreme Court.[73] Oral argument was held on February 25, 2015 and the Supreme Court issued its opinion on June 1, 2015.[74]

a. In the Supreme Court of the United States:

The Majority Opinion: *"This is really easy."*[75]

Upon reaching the Supreme Court, the lower courts' reasonable accommodation analyses were essentially overlooked, as Justice Scalia, writing for the majority, pointed out that Title VII only recognizes two categories of employment practices: disparate treatment and disparate impact.[76] Justice Scalia went on to further rationalize that Title VII's provision "affirmatively obligating employers" to make exceptions to their "otherwise-neutral [employment] policies" in order to accommodate employees' religious beliefs and practices,[77] in conjunction with these antidiscrimination provisions,[78] requires that claims for failure to reasonably accommodate be viewed as disparate treatment claims.[79]

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[72] *Id*. at 1123.
[73] *See* Abercombie & Fitch, 135 S. Ct. at 2031-32.
[74] *See Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, OYEZ, https://www.oyez.org/cases/2014/14-86 (last visited Mar 7, 2019).
[75] *See* 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-abercrombie-fitch-case.html (last visited Mar. 7, 2019) (Justice Scalia began announcing his opinion for the Court with this ironic phrase. Clearly, the lower courts overseeing this case did not find it to be "easy.")
[76] *Abercrombie*, 135 S. Ct. at 2032. ("These two proscriptions, often referred to as the 'disparate treatment' (or 'intentional discrimination') provision and the 'disparate impact' provision, are the only causes of action under Title VII."). *See also* 42 U.S.C. §2000e-2(a)(1), (2).
[77] *Abercrombie*, 135 S. Ct. at 2034. *See also* 42 U.S.C. §2000e(j).
[78] *See* 42 U.S.C. §2000e-2(a)(1), (2).
[79] *See Abercombie*, 135 S. Ct. at 2032, 2034. (The concurrence mysteriously concludes that it is not the plaintiff 's burden to prove failure to accommodate. *Post*, at ___, 192 L. Ed. 2d, at 45. But of course that is the plaintiff's burden, if failure to hire 'because of' the plaintiff's 'religious practice' is the gravamen of the complaint. Failing to hire for that reason is synonymous with refusing to accommodate the religious practice. To accuse the employer of the one is to accuse him of the other. If he is willing to 'accommodate'—which means nothing more than allowing the plaintiff to engage in her religious practice despite the employer's normal rules to the contrary—adverse action 'because of' the religious practice is not shown.) *Id*. at 2032 n. 2.

The Court quickly rejected A&F's argument that the EEOC's claim be, in the alternative, treated as a disparate impact claim, noting that it would be impossible to read Title VII in this way after Congress passed the 1972 amendment whereby religion included observance, practice, and belief.[80] Here, the Court made especially clear that "religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated."[81]

Consequently, the Supreme Court found that the Tenth Circuit erred when it inserted an "actual knowledge" requirement into Title VII's prohibition against disparate treatment on the basis of religious practice, since "the intentional discrimination provision prohibits certain motives, regardless of the state of the actor's knowledge."[82] Therefore, in order for the EEOC, Ms. Elauf, and other plaintiff-employees to be successful, they must only show that their "need for an accommodation was a *motivating factor* in the employer's decision," not that the employer was actually informed of the need for accommodation.[83] Upon reaching this decision, A&F settled with the EEOC on behalf of Ms. Elauf, paying $25,670 in damages to Ms. Elauf and $18,983 in court costs.[84]

This holding created a lesser burden for plaintiff-employees bringing religious accommodation claims (dismissing a knowledge requirement and accepting proof of motive instead) while simultaneously creating a need for employers to do some type of inquiry into the religious observances, practices, and beliefs of their prospective employees.[85] The Supreme Court did not address this

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[80] *Abercrombie*, 135 S. Ct. at 2033-34. *See also* 42 U.S.C. §2000e(j).
[81] *See Abercombie,* 135 S. Ct. at 2033-34.
[82] *Id*. at 2033.
[83] *Id*. at 2032. (emphasis added).
[84] Press Release, U.S. Equal Emp. Opportunity Comm'n, *Abercrombie Resolves Religious Discrimination Case Following Supreme Court Ruling in Favor of EEOC* (July 28, 2015), https://www.eeoc.gov/eeoc/newsroom/release/7-28-15.cfm (last visited Mar. 7, 2019).
[85] *See* Gregory J. Eck, *Heads or Tails? New Guidance from the Supreme Court Nearly Flips Religious Accommodation Law on Its Head*, HR LEGALIST (June 9, 2015), http://www.hrlegalist.com/2015/06/heads-or-tails-new-guidance-from-the-supreme-court-nearly-flips-religious-accommodations-law-on-its-head/ (last visited Mar. 7, 2019) (discussing when employers must offer religious accommodations to applicants). *See also Pre-Employment Inquires and Religious Affiliation or Beliefs*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/practices/inquiries_religious.cfm (last visited Mar. 7, 2019) (insisting that "employers should avoid questions about an applicant's religious affiliation, such as place of worship, days or worship, and religious

question directly but instead "focused on preferential treatment in explaining why the plaintiff could bring her claim as a disparate treatment claim," unlike in the cases of *TWA* and *Ansonia*.[86]

The Concurring and Dissenting Opinions:

Justice Alito's concurrence rejected the Tenth Circuit's holding that the employer was not liable since it did not have explicit knowledge of Elauf's religious beliefs and/or practices; however, he also rejected a "no-knowledge" interpretation.[87] Justice Alito stated that "an employer cannot be held liable for taking an adverse action because of an employee's religious practice unless the employer knows that the employee engages in the practice for a religious reason."[88] Consequently, Justice Alito took the position that some degree of knowledge is required in order to hold employers liable, he just didn't elaborate on how much knowledge exactly is required.

Justice Thomas concurred in part,[89] but largely dissented from the majority opinion, noting: "Because the Equal Employment Opportunity Commission (EEOC) can prevail here only if Abercrombie engaged in intentional discrimination, and because Abercrombie's application of its neutral Look Policy does not meet that description, I would affirm the judgment of the Tenth Circuit."[90] Justice Thomas took issue with the fact that employers without any "discriminatory motive" would end up being punished under the majority's "strict-liability view," which he found to be "plainly at odds with the concept of intentional discrimination."[91] Accordingly, Justice Thomas disagreed with the majority's expansion of Title VII, arguing for a narrower interpretation of the statute that requires actual knowledge in order "to ensure that

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holidays and should not ask for references from religious leaders, e.g., minister, rabbi, priest, imam, or pastor").

[86] *See* 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, 156 (2015) (citing 135 S. Ct. at 2034) (emphasizing that Title VII gives religious practices "favored treatment").

[87] *See Abercombie*, 135 S. Ct. at 2036.

[88] *Id*. at 2035.

[89] *See id*. at 2037. ("I agree with the Court that there are two—and only two—causes of action under Title VII of the Civil Rights Act of 1964 as understood by our precedents: a disparate-treatment (or intentional-discrimination) claim and a disparate-impact claim. Our agreement ends there.")

[90] *Id*.

[91] *Id*. at 2038-39.

employers who have not engaged in intentional discrimination are properly protected against frivolous claims."[92]

b. The Public's Reaction:

According to the opinion in *Abercrombie*, an employer who makes an employment decision "with the motive of avoiding [a religious] accommodation" violates Title VII, even if the applicant or employee needing accommodation never made such a request and the employer lacked actual knowledge that accommodation was needed because of religion.[93] As such, any adverse employment action "because of" or "motivated in part" by an employee's religious practice or belief will trigger a disparate treatment analysis.[94]

Following the Supreme Court's plaintiff-friendly decision,[95] the General Counsel for the EEOC released a statement calling it "a victory for our increasingly diverse society."[96] Religious and civil liberties organizations also reacted positively to the outcome of the case, celebrating that, going forward, "employers cannot put their head in the sand when they suspect that an applicant will need a religious accommodation."[97] Scholars have also noted how the *Abercrombie* decision has helped move the emphasis away from the principle of "formal equality," which encompasses our most basic understanding of discrimination and "focuses on protecting employees from an employer's biased consideration of certain

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[92] *See* Kristin Richards, *EEOC v. Abercrombie & Fitch Stores, Inc.: Religious Discrimination*, 41 OKLA. CITY U.L. REV. 53, 70 (2016).
[93] *See Abercombie & Fitch*, 135 S. Ct. at 2033.
[94] *Id*. at 2032 n. 2, 2033.
[95] *See* Elizabeth K. Dofner, *The Supreme Court Acknowledges Title VII's Relaxed Standard in Favor of Plaintiffs: Equal Employment Opportunity Commission (EEOC) v. Abercrombie & Fitch Stores, Inc.*, 18 DUQ. BUS. L.J. 81, 100 (2016). ("While Title VII's knowledge and notice requirement appear to be an issue of discussion in the lower courts, the Supreme Court held that knowledge is not necessary in a disparate treatment claim. . . . The Supreme Court correctly addressed Congressional statutes to decide that since Title VII says nothing, silence is silence.")
[96] Press Release, U.S. Equal Emp. Opportunity Comm'n, *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].
[97] *See* 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].

protected characteristics," and toward something more substantive and more than "'mere neutrality,'" with regard to our treatment of religious employees in the workplace[98]. Employers, however, grew concerned over "the potential of increasing their likelihood of liability under Title VII."[99]

In narrowly construing the notice requirement and holding that religious practices receive "favored treatment," the Supreme Court almost unanimously "expanded the reach of Title VII more broadly" for plaintiff-employees bringing religious discrimination claims.[100] Scholars noted how "[t]his in itself may demonstrate a legal policy shift [by the Supreme Court] towards more expansive protections for employees under Title VII."[101] Being only the third case pertaining to failure to accommodate a religious practice that the Supreme Court has ever ruled on,[102] and the first one in nearly thirty years, *Abercrombie* "was the rare case in which an expansion of workplace religious accommodation managed to slip through without tripping these alarms" among conservatives, who "prize[] the rule of law with its dispassionate application of neutral rules to all," and progressives, who "find[] democratic value in the equal application of law, and fear[] that public programs and standards will disintegrate if individual opt-out rights are provided too freely under the heading of conscience [religion-based] exemptions."[103] Therefore, as some scholars have noted, "[i]t seems unlikely that the next big case [from the Supreme Court regarding reasonable accommodations for religion] will be as uncontroversial."[104]

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[98] *See* Kaminer *supra* note 86, at 113, 131 (citing 135 S. Ct. at 2034.)
[99] *See* Amina Musa*, "A Motivating Factor" – The Impact of EEOC v. Abercrombie & Fitch Stores, Inc. on Title VII Religious Discrimination Claims*, 61 ST. LOUIS L.J. 143, 160 (2016) (citing Tricia Gorman, *Supreme Court Favors Muslim Woman in Abercrombie Discrimination Suit*, 22 No. 6 Westlaw J. Class Action 1 (2015)).
[100] *Id*. at 161.
[101] *Id*.
[102] The other two cases are *TWA*, *supra* note 42, at 84-85 and *Philbrook*, *supra* note 40, at 63, 66 (1986).
[103] *See* Walter Olson, *A Hijab and A Hunch: Abercrombie and the Limits of Religious Accommodation*, 2014-2015 CATO SUP. CT. REV. 139, 163-64 (2014, 2015). *See* Dofner, *supra* note 95, at 97. "This is a good outcome for future discrimination plaintiffs, but it is hard to imagine all of the lower court's opinions were never taken into consideration. It seems as though the Supreme Court did not want to rehash all of the supporting ideas and simply had nothing left to say to Abercrombie, other than this is clearly what Congress intended."
[104] *Id*. at 164.

However, other scholars, such as Elizabeth King, have noted how the Supreme Court's narrow holding can cut both ways.[105] King noted that the Court's "decision aimed to accomplish very little" and that, contrary to Justice Thomas' partial dissent, "the majority did not create a new Title VII disparate-treatment claim."[106] Instead, King argued that the Court "sought merely to elucidate the boundaries of a preexisting protection" and the "Title VII procedural standards for employers without requiring them to substantively increase religious protections for employees." [107] As such, the case's narrow holding is limited to the "rare circumstance when the plaintiff can prove that the employer, in making the adverse decision, was motivated by – but not actually informed of – the plaintiff's need for religious-practice accommodation."[108]

Part III: The Circuit Split Post-*Abercrombie*.

"The federal courts have [always] interpreted § 701(j)[109] in a manner that has provided both minimal and inconsistent protection of religious employees in the workplace."[110] Unfortunately, not much has changed since *Abercrombie*, with circuit courts continuing to approach plaintiff-employees' claims of religious disparate treatment and reasonable accommodation inconsistently.[111]

Some circuit courts have modified the way that they handle these cases so that their approaches fit more in line with the Supreme Court's holding requiring more than "formal equality."[112] In these instances, reasonable accommodation becomes a variation of the disparate treatment claim whereby its procedural framework

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[105] Elizabeth King,, *RECENT CASE: EEOC v. Abercrombie & Fitch Stores, Inc.: Religious Accommodation in the Workplace*, 37 BERKELEY J. EMP. & LAB. L. 327, 333 (2016).
[106] *Id*.
[107] *Id*. at 333-34.
[108] *Id*. at 334.
[109] 42 U.S.C. § 2000e(j) (2020).
[110] *See* Kaminer, *supra* note 86, at 155.
[111] *Id*. ("It is unclear at this early date what the impact of Abercrombie will be on future § 701(j) jurisprudence. While Abercrombie may simply be the latest in a series of pro-religion decisions by the Roberts Court, it is notable because it is the first time the United States Supreme Court has ruled in favor of a religious employee in a § 701(j) case.").
[112] *Id*. (citing 135 S. Ct. at 2036) ("The prohibition of discrimination because of religious practices is meant to force employers to consider whether those practices can be accommodated without undue hardship.").

is replaced by the standard set forth in *Abercrombie*. As such, reasonable accommodation only becomes relevant in terms of the employer's defense.

Under this approach, the important questions in analyzing a plaintiff-employee's claim of individual, religious discrimination become: (1) was the plaintiff subjected to an adverse employment action based on a religious observance, practice, or belief (as proved under either the *McDonnell Douglas*/*Burdine* framework or the mixed-motives paradigm)? and (2) if yes, does the employer have an affirmative defense to nullify said claim (i.e. is the employer unable to reasonably accommodate an employee's, or prospective employee's, religious observance or practice without undue hardship?)?

However, some circuit courts have read *Abercrombie* more narrowly and continue to maintain separate approaches for analyzing religious disparate treatment and reasonable accommodation claims. Here, when the two claims are treated as distinct affirmative causes of action, plaintiff-employees are required to satisfy additional burdens of proof. The only caveat post-*Abercrombie* is that within the reasonable accommodation cause of action, plaintiff-employees are no longer required to actually inform their employers of their religious belief or practice under the second element of the claim.[113] Therefore, the prima facie case for plaintiff-employees ends up looking like this: (1) plaintiff has a bona fide religious belief/practice that conflicts with an employment requirement; (2) ~~he or she informed his or her employer of this belief/practice~~; (3) he or she suffered an adverse employment action as a result of the conflict.

Under this reading of *Abercrombie*, it is sufficient for an employer to have either only a suspicion or actual knowledge of the employee's belief or practice; there is no rigid adherence to former rule about providing the employer with notice of the conflict.[114]

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[113] *But see* Melanie I. Stewart, *Of Hijabs and Hiring: Religious Accommodation in the Workplace After EEOC v. Abercrombie & Fitch Stores, Inc.*, 104 ILL. B.J. 28, 31 (2016) (noting that "[a]lthough plaintiffs are now required to prove motive rather than actual knowledge, it may be beneficial for plaintiffs' counsel to present evidence that the objected-to practice was religious and the applicant made the employer aware of that").

[114] *But see* Valerie Weiss, *Unwrapping Religious Accommodation Claims: The Impact on the American Workplace After EEOC v. Abercrombie*, 46 SETON HALL L. REV. 1113, 1117 (2016). "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

Therefore, if the employee's religious belief or practice was a motivating factor in the employer's decision, that will be enough for the employee to prevail unless the employer provides an affirmative defense showing: (1) that it offered a reasonable accommodation; or (2) that it was unable to reasonably accommodate the employee's religious needs without undue hardship.

a. A Hybrid Approach Whereby Claims are One in the Same:

The Fifth Circuit:

The Fifth Circuit had its first opportunity to apply the holding from *Abercrombie* to a case of its own in *Nobach v. Woodland Village Nursing Center*.[115] In this case, Kelsey Nobach, a nursing home aide, refused to pray the Rosary with one of the residents.[116] Nobach was brought up as a Jehovah's Witness and, although she no longer practiced the religion, she claimed to still have those beliefs ingrained in her.[117] Nobach informed her assistant of why she felt she could not read the Rosary with the resident, however, Nobach never informed her employer directly.[118] After the resident complained to Nobach's supervisor, Nobach was terminated for failing to assist the resident with a regularly scheduled activity that also formed part of Nobach's job duties.[119]

Nobach filed religious discrimination charges with the EEOC and upon receiving her "right to sue" letter, filed suit against the nursing home in the United States District Court for the Southern District of Mississippi.[120] The nursing home motioned for judgment as a matter of law, claiming that Nobach had not presented sufficient evidence for her claim, however, the District Court denied the motion.[121] On appeal, the Fifth Circuit applied a straightforward intentional discrimination (disparate treatment)

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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."

[115] Nobach v. Woodland Vill. Nursing Home Ctr., Inc., 799 F.3d 374 (5th Cir. 2015).

[116] *Id*. at 376.

[117] *Id*. at 376 n.1.

[118] *Id*. at 376, 378.

[119] *Id*. at 376-77.

[120] *Id*. at 377. *See also* Nobach v. Woodland Vill. Nursing Home Ctr., Inc., 2013 U.S. Dist. LEXIS 69037 (S.D. Miss. 2013).

[121] Nobach, 2013 U.S. Dist. LEXIS 69037 at *16.

analysis and reversed the district court's holding, finding that Nobach did not prove that her employer knew or should have known that she required a religious accommodation.[122] In short, the Fifth Circuit held that there was insufficient evidence of an "impressible motive" that would prove discrimination because, though actual knowledge by the employer is not required after *Abercrombie*, Nobach's employer had no idea of her religious observances, practices, or beliefs that could have motivated her termination.[123]

The court reiterated that "Title VII makes it unlawful for an employer to discharge an individual '*because of* such individual's . . . religion.'"[124] Then, the court went on to discuss how the holding in *Abercrombie* makes clear that "the critical question [when evaluating causation in a Title VII case] is what *motivated* the employer's employment decision."[125] Finally, the court clarified in a footnote that had Nobach also brought a reasonable accommodation claim, it would have been dismissed for the same reasons, writing: "[w]ith regard to Nobach's allegation of Woodland's failure to accommodate her religious beliefs, her claim fails for essentially the same reason—the failure to advise Woodland of her religious belief and the conflict with her job duties and Woodland's lack of knowledge or suspicion of any such conflict."[126] Therefore, although this case did not specifically contain a reasonable accommodation claim, the opinion suggests that the Fifth Circuit has adopted the hybrid approach to religious discrimination post-*Abercrombie*, whereby intentional discrimination under Title VII considers the failure to accommodate religious practices.

b. Claims Remain Separate Causes of Action:

The Tenth Circuit:

Richard Tabura and Guadalupe Diaz, two Seventh Day Adventists who observe the Sabbath by refraining from work from sundown on Friday through sundown on Saturday, were the plaintiffs of a very recent religious discrimination case that originated in the United States District Court for the District of Utah and that was appealed up to the Tenth Circuit.[127]

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[122] *Id*. at 378-79.
[123] *Id.* at 379.
[124] *Id*. at 378 (citing 42 U.S.C. § 2000e-2(a)(1) (emphasis added)).
[125] *Id*. (emphasis added).
[126] *Id*. at 379 n.8.
[127] *See Tabura*, 880 F.3d at 546.

Tabura and Diaz regularly worked ten-hour shifts, four days per week when they first began working for Kellogg at its food production plant in Clearfield, Utah.[128] This schedule continued for years, until suddenly Kellogg "changed its shift schedule, adopting 'continuous crewing' by dividing the plant's workforce into four shifts, designated A, B, C, and D."[129] "Each of the four shifts had to work every other Saturday, or twenty-six Saturdays each year."[130] At this point, Tabura and Diaz began working on Shift A, which included twelve-hour shifts, from about 6 a.m. to 6 or 6:30 p.m., two or three days per week.[131]

When Kellogg made these changes to its shift schedule, Tabura and Diaz informed their employer that they could not work on Saturdays because that was when they observed the Sabbath.[132] This scheduling conflict was made even worse during the winter months, when Tabura and Diaz would be in the middle of their Friday shifts when the sun would start to set.[133] Kellogg's solution to this scheduling conflict was to allow Tabura and Diaz to use "paid vacation and sick/personal time and arrang[e] to swap shifts with other employees" as they would allow "any employee who wanted to take a day off for any reason" to do.[134] This solution was less than satisfactory to Tabura and Diaz since they "had to arrange their own swaps, the swapping employees had to be qualified to perform each other's jobs, and Kellogg had to approve the swap."[135]

The ineffectiveness of this alternative led Tabura and Diaz to accumulate points under Kellogg's disciplinary rubric (seventeen and eighteen, respectively).[136] Kellog's disciplinary system worked as follows:

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[128] *Id*. at 547.
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] *See Tabura*, 880 F.3d at 547.
[134] *Id*.
[135] *Id*. "Swapping was further complicated because, for safety reasons, Kellogg would not permit an employee to work more than thirteen straight hours, so Plaintiffs could not swap with anyone on C Shift, the night shift that followed Plaintiffs' Shift A. Instead, Plaintiffs had to find someone from either Shift B or D. But Plaintiffs were not at the plant at the same time as those shifts, and the D night shift members would have had to alter their sleep schedules in order to work the A day shift."
[136] *Id*. at 547-58.

> Generally ten points would result in a verbal warning, twelve points would result in a written warning, and fourteen points would result in a "final warning." Kellogg would fire an employee if he accumulated sixteen disciplinary points in any twelve-month period, once the progressive disciplinary steps had been exhausted.[137]

In continuously failing to report for their Saturday shifts and accumulating more than the permissible sixteen disciplinary points per year, Tabura and Diaz were fired.[138] Subsequently, Tabura and Diaz sued Kellogg for disparate treatment, failure to accommodate, and retaliation under Title VII.[139]

After motions for summary judgment from both parties were filed, the district court granted summary judgment in favor of the defendant-employer and denied the plaintiffs' motion.[140] The court held, as a matter of law, "both that Kellogg did reasonably accommodate Plaintiffs' religious practice and, alternatively, that Kellogg could not further accommodate their Sabbath observance without incurring undue hardship."[141] However, the Tenth Circuit reversed summary judgment for Kellogg, noting that summary judgment would not be proper for Tabura and Diaz either, given the disputed issues of material fact that a jury needed to resolve, and remanded the case.[142]

In its analysis, the Tenth Circuit explained the under the subheading of "Inapplicable or unhelpful tests proposed by the parties" that:

> Plaintiffs and Amicus EEOC attempt to engraft additional broad rules that would complicate this otherwise straightforward case-specific analysis. We decline to adopt their proffered per se rules, at least in the factual context of this case. Nor do we agree with Plaintiffs and the EEOC that the Supreme Court has, in Abercrombie & Fitch, changed the straightforward statutory analysis called for here.[143]

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[137] *Id.*
[138] *Id.*
[139] *Id.* at 548.
[140] *See Tabura*, 880 F.3d at 546.
[141] *Id.* at 546-57.
[142] *Id.* at 548, 555, 557.
[143] *Id.* at 551.

The court clarified that this rejection was based on the fact that the issue in this case was one of "effectiveness of accommodation," (i.e. whether Kellogg needed to go beyond the provisions of its religiously neutral policy in order to accommodate Tabura and Diaz) not of "motivation," as was the case in *Abercrombie*.[144] Even after making this distinction, however, the court continued to apply the traditional test for determining whether or not Kellogg reasonably accommodated Tabura's and Diaz's conflict, asking whether or not Kellogg offered Tabura and Diaz a reasonable accommodation or if it was unable to reasonably accommodate their religious needs without undue hardship, without addressing disparate impact at all.[145]

c. The Issue Remains Unclear, but is (Mostly[146]) Looking Good for Plaintiff-Employees:

The Fourth Circuit:

A plaintiff-employee from the Fourth Circuit recently tried to make an argument in line with the Supreme Court's holding in

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[144] *Id*. at 554.

[145] *Id*. at 555. This is especially puzzling given the court's summarization of the holding from *Abercrombie* in Footnote 3: "The Supreme Court, in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031-32, 192 L. Ed. 2d 35 (2015), indicated that a 'failure to accommodate' claim is a claim for 'disparate treatment' and thus must ultimately satisfy the general elements of a 'disparate treatment' claim." *Tabura,* 880 F.3d at 549 n.3. *See also* 3 Larson on Employment Discrimination § 56.04 (2018) (noting how in *Tabura*, the Tenth Circuit "rejected the conclusion that *Ansonia* supports the proposition that 'an accommodation could never be reasonable if it failed totally and under every conceivable fact scenario to eliminate every conflict or all tension between reasonable work requirements and religious observation,'" finding that Kellogg fulfilled its duty under Title VII).

[146] The First, Second, Third, Sixth, Eleventh, and D.C. Circuits have yet to address the interplay of disparate treatment and reasonable accommodation in religious discrimination claims post-*Abercrombie*. To date, there are only district court cases from these jurisdictions that have ruled on the issue, which is not indicative of how exactly the different circuits will proceed, given that the district court opinions are not binding. *See e.g.*, EEOC v. United Health Programs of Am., Inc., 213 F. Supp. 3d 377 (E.D.N.Y. 2016); Mathis v. Christian Heating & Air Conditioning, Inc., 158 F. Supp. 3d 317 (E.D. Pa. 2016); Passmore v. 21st Century Oncology, LLC, No. 3:16-CV-1094-J-34PDB, 2018 WL 1738715 (M.D. Fla. Apr. 11, 2018).

Abercrombie but was unsuccessful.[147] In that case, Susan H. Abeles was a practicing Orthodox Jew who regularly took leave from work to observe the Sabbath and other religious holidays.[148] As such, Abeles' employer of 26 years, the Metropolitan Washington Airports Authority (hereinafter, "MWAA"), and her direct supervisors, Valerie O'Hara and Julia Hodge, were aware of Abeles' beliefs and always allowed her to take leave in order to follow by her religious practices.[149]

In January 2013, Abeles used MWAA's internal planning calendar to indicate that she intended to take leave on April 1 and 2, 2013, the final two days of Passover.[150] Then, on March 29, 2013, the last business day before Abeles was going to take leave, she sent an Outlook calendar invite to O'Hara and Hodge as a reminder that she would be out of the office.[151] O'Hara was also on leave at this time and did not receive Abeles' calendar invitation until she returned to the office on April 3, though Hodge apparently "accepted" the invitation.[152] O'Hara found Abeles' absence to be unacceptable, as, in her view, Abeles had failed to follow the procedures established in MWAA's Absence and Leave Program, or the "Leave Policy."[153] Hodge then proposed that Abeles be placed on a five-day suspension "as discipline for (1) insubordination, for failing to meet deadlines regarding deliverables including a plan to automate her work and completion of her annual performance goals; (2) failure to follow the procedure for requesting leave; and (3) absence without leave on April 1 and 2."[154]

Abeles sued MWAA and her supervisors for disparate treatment based on religion, though the United States District Court for the Eastern District of Virginia eventually granted MWAA's and Abeles' supervisors' motions for summary

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[147] *See* Abeles v. Metro. Wash. Airports Auth., 676 F. App'x 170, 176-77 (4th Cir. 2017).
[148] *Id*. at 171.
[149] *Id*.
[150] *Id*. at 171-72.
[151] *Id*. at 172.
[152] *Id*. *See also* Lit. Employment Disc. Cases § 2:152.2 (noting that "even though employee . . . received a response from one of them apparently 'accepting' the calendar invitation; plaintiff's position [was] likely undermined by her apparent testimony that she did not intend the Outlook calendar invitation to be a request for leave, but merely a 'reminder' of the dates she had placed on the internal calendar").
[153] *Abeles*, 676 F.App'x at 171-72.
[154] *Id*. at 172-73.

judgement.[155] Abeles appealed those decisions to the Fourth Circuit, arguing that "the court erred in failing to analyze her suit under the accommodation theory," implying that religious accommodation should have formed part of the district court's disparate treatment analysis.[156]

The Fourth Circuit did not reject the basis of Abeles' argument, but rather, stated that Abeles had not met her burden under the rule established in *Abercrombie*, whereby:

> '[T]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an [employee's] religious practice, confirmed or otherwise, a factor in employment decisions.' Here, Plaintiff adduced evidence of neither, although we need not proceed beyond the first.[157]

Therefore, it is unclear what the Fourth Circuit's exact position is, however, it appears as though the court will apply the hybrid approach that Scalia's majority opinion in *Abercrombie* outlined.

The Eighth Circuit

In 2018, the Eighth Circuit acknowledged that "[w]hether an employee or job applicant must make a request for religious accommodation to maintain a Title VII claim for religious discrimination under 42 U.S.C. § 2000e-2(a) is an open question after Abercrombie & Fitch."[158] In this case, Emily Sure-Ondara, a registered nurse, applied to, and was interviewed for, a residency program in the Collaborative Acute Care for the Elderly (hereinafter, "CACE") Unit at Northern Memorial Healthcare.[159] Sure-Ondara did not disclose via her application or interview that she was a practicing Seventh Day Adventist and that "her religion would prevent her from working from sundown on Fridays to sundown on Saturdays," even after discovering that "a registered nurse working night shifts in the CACE Unit was required to work eight-hour shifts every other weekend" under the union agreement

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[155] *Id*. at 173.
[156] *Id*. at 173, 176 (*citing* Chalmers v. Tulon Co., 101 F.3d 1012, 1018 (4th Cir. 1996).
[157] *Id*. at 176 (*citing* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. at 2028, 2033 (2015)).
[158] *See* EEOC v. N. Mem'l Health Care, 908 F.3d 1098, 1103 (8th Cir. 2018) (*citing Abercrombie*, 135 S. Ct. at 2033, n.3).
[159] *Id*. at 1099.

at the hospital.[160] Sure-Ondara only informed the hospital of her need for religious accommodation once she reported to the Human Resources Department to complete her pre-employment paperwork.[161]

A Human Resources generalist later followed up with Sure-Ondara and informed her that, because of the hospital's union agreement, the hospital might need to offer the position to another candidate.[162] Sure-Ondara assured the generalist that she "would 'make it work' by finding a substitute for her Friday night shift or come in herself in an emergency or life-or-death situation."[163] However, after the generalist relayed the particulars of these conversations with Sure-Ondara to other members within the Human Resources Department, a decision was made to rescind Sure-Ondara's offer "because it would not be possible for a newly-trained nurse in the Advanced Beginner Program to consistently trade her Friday night shifts, which are unpopular with most nurses" and because "they were concerned that Sure-Ondara would only show up for what she considered to be emergencies."[164] In essence, the hospital did not believe that it could accommodate Sure-Ondara in the way that she requested.[165]

After Sure-Ondara's offer was rescinded, she filed charges with the EEOC against the hospital for retaliation, "alleging *inter alia* that she was 'discriminated against because of [her] religious beliefs/7th Day Adventist . . . and/or in retaliation for requesting religious accommodation in violation of Title VII.'"[166] After an investigation, the EEOC then filed an enforcement action against the hospital on Sure-Ondara's behalf.[167] The EEOC argued that in requesting accommodation, Sure-Ondara "necessarily was complaining that requiring her to work Friday shifts conflicted with

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[160] *Id*.
[161] *Id*.
[162] *Id.* at 1100.
[163] *Id*.
[164] *EEOC v. North Memorial*, 908 F.3d at 1100.
[165] *Id*.
[166] *Id*.
[167] *Id*.; s*ee* Press Release, *EEOC Sues North Memorial for Retaliating Against Job Applicant*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Sept. 16, 2015), https://www.eeoc.gov/eeoc/newsroom/release/9-16-15b.cfm (last visited Mar. 7, 2019) (quoting Jean P. Kamp, the EEOC's associate regional attorney in the Chicago District, who noted: "This lawsuit is about what happened next. We plan to show North Memorial's decision to withdraw the job offer after Sure-Ondara's request was retaliatory and unlawful.").

her religious beliefs," and, therefore, was a violation of § 2000e-3.[168] The court found this to be an improper expansion of the standard its precedents had established for retaliation claims under Title VII and noted that "Sure-Ondara's Title VII remedy as an unsuccessful job applicant was a disparate treatment claim under § 2000e-2(a) for failure to reasonably accommodate," rather than an example of protected activity under § 2000e-3, the opposition prong of Title VII's antiretaliation clause.[169] So, although the court did not analyze Sure-Ondara's situation under an outright disparate treatment and/or reasonable accommodation lens, the case's dicta suggests that the Eight Circuit reads *Abercrombie* to require a hybrid approach going forward. This is encouraging for plaintiff-employees in one respect, however, the court's narrow reading of *Abercrombie* to not allow for retaliation claims poses a separate problem.[170] This

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[168] *Id*. at 1102.

[169] *Id*. (*citing* 135 S. Ct. at 2032). *See also* Dawn Reddy Solowey, *is a Request for Religious Accommodation "Protected Activity" for a Title VII Retaliation Claim?*, EMPLOYMENT LAW LOOKOUT BLOG (June16, 2017), https://www.laborandemploymentlawcounsel.com/2017/03/is-a-request-for-religious-accommodation-protected-activity-for-a-title-vii-retaliation-claim/ (last visited Mar. 7, 2019) (noting how requests for reasonable accommodations give rise to claims of retaliation under the Americans with Disabilities Act and could support similar claims under Title VII); *see also* Barbara Hoey and Jennie Woltz, *The Latest On Religious Accommodations In The Workplace*, LAW360 (Mar. 29, 2017), https://www.law360.com/articles/1125369/the-latest-on-religious-accommodations-in-the-workplace (pointing out that "[t]he public has not responded to this decision favorably: Along with the EEOC's request for a rehearing, on Jan. 8, 2019, an amicus brief was filed by the Mid-America Union Conference of Seventh-Day Adventists, the Minnesota Catholic Conference, American Jewish Committee, the Union of Orthodox Jewish Congregations of America, the Christian Legal Society, the American Civil Liberties Union, and the American Civil Liberties Union of Minnesota, urging an en banc rehearing of the case").

[170] *See EEOC v. North Memorial* at 1099. Although the Eighth Circuit rejected Sure-Ondara's claim of retaliation, the court stated that "the issue [of whether such requests constitute protected activity] cannot be resolved categorically." *See also* Greg Grisham, *Appeals Court Rejects Retaliation Claim Based On Religious Accommodation Request*, FISHER PHILLIPS LEGAL ALERT (Nov. 14, 2018), https://www.fisherphillips.com/pp/alert-appeals-court-rejects-retaliation-claim-based-on.pdf?92545 ("The 8th Circuit Court of Appeal's decision narrows the legal avenues under which an employer's failure to provide a religious accommodation can be challenged under Title VII—at least for employers within its jurisdiction (Arkansas, Missouri, Iowa, Nebraska, Minnesota, South Dakota and North Dakota). However, the court recognized that Title VII retaliation claims can still arise in the religious accommodation context, but not where an employer simply denies a requested accommodation.").

is another example of a question that was left open post-*Abercrombie*.[171]

The Ninth Circuit:

Like the Fourth Circuit, the Ninth Circuit also analyzed a case where an employee suffered an adverse employment action after taking leave from work.[172] In *Mendoza*, a church's bookkeeper took a ten-month medical leave. Upon returning to work, the pastor offered the bookkeeper a part-time position, insisting that the church no longer had a full-time bookkeeping position to fill.[173] Mendoza, the bookkeeper, rejected this offer and brought claims of disparate treatment and disability discrimination against the church under the Americans with Disabilities Act (hereinafter, "ADA").[174] Although the Ninth Circuit noted that its decision was not impacted by the Supreme Court's holding in *Abercrombie*, since it was dealing with the ADA rather than Title VII, it did restate the rule whereby the plaintiff of "a Title VII action alleging disparate treatment . . . need only show that the need for a religious accommodation was a factor motivating the employer's adverse decision" and that "[k]nowledge is not a requirement of a Title VII claim."[175] The court went on to reiterate that:

> '[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions . . . . If the [job] applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.'[176]

This tangential analysis seems to suggest that the Ninth Circuit will only factor in an employer's denial of, or inability to offer, a

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[171] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N., Compliance Manual, Religious Discrimination, No. 228 (Jan. 31, 2019). In response to the Eight Circuit's holding, the EEOC updated the "Religious Discrimination" section in its Compliance Manual to be in line with Judge L. Steven Grasz's dissenting opinion. *See* 908 F.3d at 1104-07. Therefore, the EEOC has taken the position that requesting for an accommodation is the same as opposition, and, as such, is a statutorily protected activity.

[172] *See* Mendoza v. Roman Catholic Archbishop of Los Angeles, 824 F.3d 1148, 1149 (9th Cir. 2016).

[173] *Id*.

[174] *Id*.

[175] *Id*.

[176] *Id*. at 1149-50 (*citing* 135 S. Ct. at 2033).

religious accommodation as a form of defense, also fitting in with the hybrid method suggested by *Abercrombie*.

Part IV: The Legal Profession's Reaction to the Circuit Courts' Interpretations of *Abercrombie*.

Many circuit courts have struggled with the "tension between an employer's duty to accommodate and the employer's inability to inquire as to an applicant's or employee's religious affiliations or beliefs," that was left unexplained by the Supreme Court in *Abercrombie*.[177] For example, in applying the new motive standard for analyzing reasonable accommodation claims, the Fifth Circuit held that the nursing home aid in *Nobach* had not established that her employer was motivated by her religious beliefs in deciding to terminate her.[178] But, if the nursing home was not allowed to ask the aid about her religious beliefs, and the aid did not offer this information up voluntarily (as was the case with the nurse whose conditional job offer was revoked in *EEOC v. North Memorial*), how else was the aid supposed to prove that her religion motivated the nursing home?

Some experts in the field of labor and employment law suggest that employers approach this area of difficulty by explaining the essential requirements of the job for which the individual is applying and to then ask whether or not the individual would be able to meet those requirements.[179] Describing policies this way and engaging in productive dialogue puts the employer and the potential employee on the same footing, given that the employee is provided the opportunity to mention any possible conflicts.[180]

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[177] Bianca De Carvalho Munoz, *How Employers Can Reconcile the Tension Between the Supreme Court's Holding in EEOC v. Abercrombie & Fitch Stores, Inc. and the EEOC's Guidelines Relating to Pre-Employment Inquiries*, 22 SUFFOLK J. TRIAL & APP. ADV. 355, 357 (2016-17).

[178] *Nobach*, 799 F.3d at 378.

[179] *See* Lee Tankle, *Supreme Court: Motive Matters in Hiring Decisions*, PENNSYLVANIA LAB. & EMP. BLOG (June 9, 2015), http://www.palaborandemploymentblog.com/2015/06/articles/discrimination-harassment/abercrombie/ (discussing how employers can protect themselves against reasonable accommodation claims post-*Abercrombie*).

[180] *Id*. (citing Stephanie Wilson, *EEOC v. Abercrombie & Fitch: Do You Need to Ask Applicants Whether They Require Religious Accommodation?*, REEDSMITH: EMP. L. WATCH (June 11, 2015), https://www.employmentlawwatch.com/2015/06/articles/employment-us/eeoc-v-

However, many are skeptical of this approach. For example, some worry that "religious individuals who show less visible signs of faith may discover that *Abercrombie* has created an incentive system that makes it more difficult for them to find employment."[181] Others note that this approach might even allow for – or possibly encourage – employers to act on any implicit biases and make inappropriate assumptions about their employees.[182] This latter concern should not be given considerable weight, however, since Title VII has "no textual 'regarded as' protection for mistaken assumptions." [183] Employees will remain responsible for confirming whether they do or do not have a religious observance, belief, or practice that conflicts with the employer's policies.[184] The only thing that has changed is that employers should now emphasize the importance of "train[ing] hiring and management personnel to ask good questions in the interview process."[185] Therefore, in applying these considerations to the facts of *Nobach*, one could argue that the nursing home should have made clear to all of its employees and applicants that reading the rosary to its residents was a "regularly scheduled activity" that they would be responsible for completing.[186] This is a line that remains blurry after *Abercrombie*.[187] However, the nursing home and similarly situated employees would counter that *Abercrombie* explicitly removes any "actual knowledge" requirement, considering that "the critical question is what

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abercrombie-fitch-do-you-need-to-ask-applicants-whether-they-require-religious-accommodation/.

[181] Jeffrey M. Hirsch, *EEOC v. Abercrombie & Fitch Stores, Inc.: Mistakes, Same-Sex Marriage, and Unintended Consequences*, 94 TEX. L. REV. 95, 100 (2016).

[182] *See* Judy Greenwald, *Supreme Court's Religious Headscarf Ruling Increases Bias Risks*, BUSINESS INSURANCE (June 7, 2015), http://www.businessinsurance.com/article/00010101/NEWS06/306079977/Supreme-Courts-religious-headscarf-ruling-increases-employers-bias-risks.

[183] *See also* Neal Mollen & Sean Smith, *"Confirmed" Knowledge of Need for Religious Accommodation Not Required Element in Title VII Case, Says Supreme Court*, PAUL HASTINGS (June 3, 2015), https://www.paulhastings.com/publications-items/details/?id=e575e469-2334-6428-811c-ff00004cbded.

[184] *Id*.

[185] *Id*.

[186] *Nobach*, 799 F.3d at 377.

[187] *See* Scott A. Moss, *Labor and Employment Law at the 2014-2015 Supreme Court: The Court Devotes Ten Percent of its Docket to Statutory Interpretation in Employment Cases, But Rejects the Argument that What Employment Law Really Needs is More Administrative Law*, 31 ABA J. LAB. & EMP. LAW 171 (2016).

motivated the employer's employment decision."[188] In fact, Justice Scalia laid this out clearly in *Abercrombie*:

> [S]uppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation . . . and the employer's desire to avoid the prospective accommodation is a motivating factor . . . the employer violates Title VII.[189]

However, Justice Scalia did not take into consideration the possibility that employers might adopt best practices, whereby they would ensure to have hiring managers:

> (1) ask the same questions to all of its applicants and employees; (2) provide all applicants and employees with the job assignment description and ask whether the applicants or employees will be able to satisfy the requirements; and (3) document the entire process including reasons for failing to hire or terminating a particular applicant or employee.[190]

By implementing a uniform standard such as this, employers would not be burdened, nor would applicants and employees be reasonably accommodated on an unequal basis.

Part V: Conclusion: Different Doctrinal Frameworks, Same Outcome.

As evidenced by the circuit split, and by the many circuits that have yet to rule one way or another, it remains unclear post-*Abercrombie* whether religious reasonable accommodation will be treated as a separate claim from disparate treatment in the future, or whether it will simply act as an affirmative defense for employers who otherwise would be liable for disparate treatment.

The traditional approach of circuit courts, and how some continue to proceed – under a narrow reading of *Abercrombie* – in treating disparate treatment and reasonable accommodation as individual claims, requiring plaintiff-employees to present two separate prima facie cases, is inconsistent with the case's actual

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[188] *Nobach*, 799 F.3d at 378-79.
[189] *Abercrombie III*, 135 S. Ct. at 2033.
[190] *See* Moss, *supra* note 187, at 376.

reasoning. The principal way to explain why this narrow reading is incorrect is demonstrated through the following point: the basic, ultimate question in a case of a disparate treatment based on religion is whether or not the plaintiff-employee was treated differently because of his or her religion. Consequently, when conducting a strictly textual reading of Title VII and applying the facts of *Abercrombie*, we end up asking the question of whether A&F failed to hire Ms. Elauf because of her hijab/headscarf. This question does not reach the core of the issue in case of discrimination based on religion, however.

On the other hand, when one takes Title VII's definition of "religion" into consideration in analyzing a case of disparate treatment based on religion, the ultimate question can be slightly modified to ask whether or not the plaintiff-employee was treated differently because of any aspect of his or her religious observance, practice, or belief. Under this broader analysis, A&F's failure to hire Ms. Elauf because of her hijab/headscarf would violate the statute, as Ms. Elauf's hijab/headscarf would be considered an observance/practice that was part of her Muslim faith and that is included in the statute's definition.[191]

This second approach will not be unfair to employers, because, as Justice Scalia clarified, although no formal notice is required from the plaintiff-employee, employer liability will still require some level of knowledge. In other words, the employee must prove that the employer made its decision based on some "motivating factor" or "because of" the employee's protected class status in order to prevail. Therefore, if A&F had neither known nor suspected that Ms. Elauf's use of a hijab/headscarf was obviously part of her religious observance/practice and instead believed that she was simply violating their "Look Policy," then A&F would have no longer been on the hook for deciding not to hire Ms. Elauf. This was not the case in *Abercrombie*, however, as demonstrated by A&F's concessions.[192]

In future cases where there are questions of fact, these must be resolved in depositions, for example. If there had been a genuine question as to whether or not A&F knew that Ms. Elauf's use of a hijab/headscarf was part of a religious observance/practice, then a coworker's testimony recalling how the employer called it a hijab

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[191] Analogy to pregnancy: sex includes pregnancy; plug pregnancy into the statute wherever it says sex.

[192] *See Abercrombie III*, 135 S. Ct. at 2032.

instead of simply a headscarf might be sufficient to indicate knowledge.

And yet, while these questions seem, on their face, to yield two different possibilities, where one track allows plaintiff-employees to bring all of their claims through a disparate treatment framework and the other requires them to still bring a separate (albeit slightly modified) reasonable accommodations claim, the bottom-line outcomes will remain the same. It is true that pleading practices and the types of arguments that are made before courts will change. However, by eliminating the need for plaintiff-employees to show that they informed their employers of their religious beliefs and practices, the plaintiff-employees' ultimate burden of showing that they suffered an adverse employment action (being fired, not being hired, receiving diminished pay, being reassigned, etc.) as a result of the conflict ends up being the same for both disparate treatment (under both the McDonnel Douglas/Burdine and Mixed Motives frameworks) and reasonable accommodations. As such, reasonable accommodation becomes nothing more than an affirmative defense for employers who are able to show that they were unable to reasonably accommodate the employee's (or prospective employee's) religious observance or practice without undue hardship.

In conclusion, plaintiff-employees should not be required to bring separate disparate treatment and reasonable accommodation claims in light of *Abercrombie's* reasoning because even though the claims have different doctrinal frameworks, the outcomes of the cases will be the same. Requiring separate claims places an additional, unnecessary burden on plaintiffs. Likewise, this reading of *Abercrombie* is not inherently bad for employers, since their obligations to accommodate will remain limited by the relaxed "undue hardship" standard established in *TWA*.[193] Furthermore, the potential to erroneously classify a Title VII religion case would negatively affect plaintiff-employees – and caselaw more generally – in the future.[194]

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[193] *TWA*, 432 U.S. at 63.

[194] This is especially worrisome given the prevalence of religious discrimination in the workplace. *See* Andrea J. Sinclair, Delimiting Title VII: Reverse Religious Discrimination and Proxy Claims in Employment Discrimination Litigation, 67 VAND. L. REV. 239, 259 (2014) (*citing* Courtney Rubin, Religious Discrimination Complaints on the Rise at Work, Inc. (Oct. 20, 2010), http://www.inc.com/news/articles/2010/10/complaints-of-religious-discrimination-on-the-rise.html. "Over the past ten years, complaints of religious discrimination

As the United States' religious identity continues to change, with less and less white Christians over time,[195] it is even more crucial that circuit courts reach a consensus as to how to best interpret the requirements of *Abercrombie*. The continuing increase in claims,[196] coupled with the need for efficiency, fairness, and equality, requires that a uniform stance be taken by the U.S. courts.[197] Furthermore, because the hybrid approach seems to meet the requirements of both sides of these disagreements and has already been implemented – or at least suggested – by many circuit courts already, it does not seem like a farfetched one to adopt.

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in the workplace have increased eighty-seven percent – far more than any other type of workplace complaint."

[195] *See* Kaminer, *supra* note 86, at 110 (citing America's Changing Religious Landscape, Pew Research Ctr. (May 12, 2015), http://pewrsr.ch/1cAYVbV [perma.cc/39MR-HJ9P]. "According to a major recent survey, the United States has become significantly more religiously diverse."

[196] *See* Kaminer, *supra* note 86, at 110 (*citing* Dallan F. Flake, Image is Everything: Corporate Branding and Religious Accommodation in the Workplace, 163 U. PA. L. REV. 699, 705-08 (2015). "Americans have also become more likely to bring their religion and accompanying requests for religious accommodation into the workplace."

[197] *See* Kaminer, *supra* note 86, at 111. "While religious freedom has always been one of the most important civil rights in the United States, there are segments of American society that doubt the validity or importance of religion." The author further expounds on this dichotomy by referencing an earlier article. *See* Debbie N. Kaminer, Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment, 21 BERKELEY J. EMP. & LAB. L. 575 (2000).