

WRAPPING YOUR HEAD AROUND ABERCROMBIE & FITCH'S LOOK POLICY: HOW THE RETAILER VIOLATED THE ESTABLISHMENT CLAUSE

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I. INTRODUCTION

Abercrombie & Fitch, Inc. (“Abercrombie”) maintains a “Look Policy.”² The Look Policy is Abercrombie’s grooming procedure that provides employees with guidelines regarding their appearance and the attire Abercrombie expects them to wear when at work.³ Under the 2010 version of the Look Policy, employees were prohibited from wearing headwear.⁴ Abercrombie’s official marketing strategy attempts to create an “in-store experience” for customers that serves as the “primary vehicle for communicating the spirit” of the brand.⁵ “[S]ales associates . . . are a central element in creating the atmosphere of the stores.”⁶ While the explicit language of the policy may not be common knowledge, the company’s message is clear: Abercrombie is a company “built on sex appeal.”⁷ *EEOC v. Abercrombie & Fitch Stores, Inc.* challenged the legality of Abercrombie’s limited religious exemption to its Look Policy after Umme-Hani Khan (“Khan”) was fired for refusing to remove her hijab⁸ for religious reasons.⁹

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2 *EEOC v. Abercrombie & Fitch Stores, Inc.*, 966 F. Supp. 2d 949, 954 (N.D. Cal. 2013).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 Ashley Lutz, *Abercrombie & Fitch Employees Describe its Tyrannical ‘Look Policy,’* BUSINESS INSIDER, (Sept. 18, 2003, 5:04 PM), <http://www.businessinsider.com/abercrombie-and-fitch-look-policy-2013-9>.

8 The hijab is a scarf used to cover the hair of Muslim women. Saulat Pervez, *Hijab: The Head Cover – Unveiled*, WHYISLAM.ORG., <http://www.whyislam.org/social-values-in-islam/gender-relations-in-islam/hijab/> (last visited Oct. 11, 2014). Those following Islam believe that Allah (God) has told them to wear this garment when out in public or in the presence of men that are not close relatives. *Id.* Muslims believe that the Qur’an instructs women to wear the hijab as an act of obedience to Allah and so that Islamic women are recognized as Muslims. *Id.*

9 *Abercrombie*, 966 F. Supp. 2d at 955.

The United States Equal Employment Opportunity Commission (“EEOC”) filed suit in the Northern District of California, asserting that by firing Khan, Abercrombie failed to accommodate her sincerely held religious belief that Islam required her to wear a hijab.¹⁰ Abercrombie argued that it could not reasonably accommodate Khan without undue hardship.¹¹ On September 3, 2013, Judge Yvonne Gonzalez Rogers granted Khan and the EEOC (“Plaintiffs”) partial summary judgment with respect to the Title VII religious accommodation claim.¹²

This article analyzes the District Court’s decision and concludes that it ruled correctly. The district court judge’s decision was proper in light of Abercrombie’s failure to accommodate Khan’s sincerely-held religious belief that Islam required her to wear a hijab at all times. Furthermore, the judge appropriately applied the undue burden and commercial free speech tests to Abercrombie’s affirmative defenses.

II. LEGAL BACKGROUND

This section discusses the ability of Abercrombie to control the personal appearance of its employees through its Look Policy.¹³ Also addressed in this section are the legal requirements in determining if the Plaintiffs established a prima facie case for a Title VII religious accommodation claim.¹⁴

Generally, an employer may establish a dress code that applies to all employees or all employees with the same job title and responsibilities.¹⁵ However, according to the EEOC, an employer must provide an exception to the dress code or modify the dress code if the policy conflicts with an employee’s religious practices and said employee requests an accommodation.¹⁶ Yet, if the employer can show that providing an accommodation or altering its policy would result in an undue hardship, then the employer need not acquiesce to the employee’s request.¹⁷

10 *Id.* at 960.

11 *Id.* at 962.

12 For the purposes of this article, the scope of religious infringements will be limited to the Title VII religious accommodation.

13 *Prohibited Employment Policies/Practices*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/#dress_code (last visited Oct. 11, 2014).

14 *Abercrombie*, 966 F. Supp. 2d at 961.

15 *Prohibited Employment Policies/Practices*, *supra* note 13.

16 *Id.*

17 *Id.*

The Establishment Clause of the First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁸ This passage has come to mean that, as with many other freedoms guaranteed in the Constitution, the freedom to choose and practice a religion is an inviolable right.¹⁹ Title VII of the Civil Rights Act of 1964 explicitly extends the freedom of religion into the private workplace, thereby prohibiting religious discrimination.²⁰

The Plaintiffs brought suit claiming that Abercrombie failed to accommodate Khan’s religious belief that, as a Muslim, she was required to wear a hijab.²¹ Under Title VII, it is an “unlawful employment practice for an employer . . . to discharge any individual . . . with respect to his compensation, terms, conditions, or privileges or employment, because of such individual’s . . . religion.”²² The Ninth Circuit employs a two-part test in analyzing Title VII religious accommodation claims.²³ First, a plaintiff must present a prima facie case.²⁴ Once this is established, the burden shifts to the employer to show that it “initiated good faith efforts to accommodate reasonably the employee’s religious practices or that it could not reasonably accommodate the employee without undue hardship.”²⁵ Since Abercrombie did not dispute that Plaintiffs established a prima facie case, the burden shifted to Abercrombie to prove a defense.²⁶

III. ANALYSIS

A. Factual Background

Umme-Hani Khan is a Muslim woman.²⁷ In adhering to her faith, Khan believes that she must wear a hijab²⁸ when in

18 U.S. CONST. amend. I.

19 Shane Ramsey, *Opting Out of Public School Curricula: Free Exercise and Establishment Clause Implications*, 33 FLA. ST. U. L. REV. 1199, 1200-01 (2006).

20 42 U.S.C. § 2000e-2 (2006).

21 *Abercrombie*, 966 F. Supp. 2d at 960.

22 42 U.S.C. § 2000e-2(a)(1).

23 *Abercrombie*, 966 F. Supp. 2d at 961; *see Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603, 606 (9th Cir. 2004).

24 *Peterson*, 358 F.3d at 603.

25 *Id.* at 606 (citing *Tiano v. Dillard Dep’t Stores, Inc.*, 139 F.3d 679, 681 (9th Cir. 1998)).

26 *Abercrombie*, 966 F. Supp. 2d at 961.

27 *Id.* at 954.

28 Hijab stems from the Arabic word “hajaba,” meaning, “to hide from view or conceal.” Mary C. Ali, *The Question of Hijab: Suppression or Liberation?*,

public or in the presence of men outside of her immediate family.²⁹ Khan wore her hijab during her interview with Abercrombie.³⁰ After she was hired, she agreed to abide by the store's Look Policy.³¹

Khan began to work for the Abercrombie Company³² in October 2009.³³ As a Part-Time Impact Employee,³⁴ she was mainly responsible for folding clothes and preparing merchandise for the sales floor.³⁵ Khan's duties were mainly confined to the stockroom, but she would circulate the floor to restock clothing intermittently during her shift.³⁶ Khan's typical attire included jeans and long-sleeved shirts from Hollister with flip-flops.³⁷ Khan asserts that her immediate supervisors allowed her to wear her headscarf so long as it matched company colors, and they never disciplined her or informed her that she was in breach of the Look Policy.³⁸

During a scheduled store visit in February 2010, District Manager Adam Chmielewski observed that Khan was not in compliance with the Look Policy since she was wearing a headscarf.³⁹ Chmielewski consulted with Amy Yoakum, Senior Manager of Human Resources, as to how to address the violation.⁴⁰ Yoakum, Chmielewski, and Khan discussed the policy breach over the phone and Khan was asked to remove her hijab.⁴¹ Khan

JANNAH.ORG, <http://www.jannah.org/sisters/hijab2.html> (last visited Oct. 11, 2014). In Islam, hijab refers to broader notions of modesty, privacy and morality. *Id.*

29 Abercrombie, 966 F. Supp. 2d at 954.

30 *Id.*

31 *Id.* at 955.

32 Khan was hired as a part-time employee at Hollister. *Id.* at 955.

Abercrombie & Fitch was originally an outdoor gear shop in the early 1900s. Meredith Lepore, *Abercrombie: How a Hunting And Fishing Store Became A Sex-infused Teenybop Legend*, BUSINESS INSIDER (Apr. 6, 2011, 12:31 PM), <http://www.businessinsider.com/abercrombie-fitch-history-2011-4?op=1>. The company transformed into a general clothing retailer over 80 years later. *Id.* In 2000 Abercrombie & Fitch started Hollister, a store offering lower-priced items. *Id.*

33 Abercrombie, 966 F. Supp. 2d at 955.

34 According to Abercrombie, Impact or Part-Time Impact employees are hired to work in both the stockroom and on the sales floor in order to restock merchandise. *Id.* at 953.

35 *Id.* at 955.

36 *Id.*

37 *Id.*

38 Abercrombie, 966 F. Supp. 2d at 955.

39 *Id.*

40 *Id.*

41 *Id.*

replied that she could not remove her headscarf because of religious beliefs.⁴² Khan was informed she would be suspended with pay while Abercrombie investigated the issue.⁴³ On February 22, 2010, Khan was terminated for refusal to remove her hijab.⁴⁴

On March 5, 2010, Abercrombie offered to reinstate Khan along with the accommodation of being able to wear her hijab to work.⁴⁵ Khan declined Abercrombie's offer.⁴⁶

B. Legal Analysis

This section addresses the affirmative defenses asserted by Abercrombie for failing to accommodate Khan's wearing of a hijab. Per the EEOC, an employer must modify or provide an exception to a dress code policy that conflicts with an employee's religious practices if the employee requests an accommodation, provided the exception does not result in an undue hardship for the employer.⁴⁷ Abercrombie proffered undue hardship and commercial free speech defenses in defending itself against Plaintiffs' assertion that the employer failed to provide Khan with a religious accommodation to the Look Policy.

1. Undue Hardship

Abercrombie's first defense was that it could not reasonably accommodate Khan without undue hardship.⁴⁸ In order to establish an undue hardship defense, an employer must show that a requested accommodation would result in "more than a de minimus cost."⁴⁹ The Ninth Circuit has required a heightened proof of the undue hardship defense.⁵⁰ According to the Ninth Circuit, hardships cannot be merely assumptions about

⁴² *Id.*

⁴³ *Abercrombie*, 966 F. Supp. 2d at 955.

⁴⁴ *Id.*

⁴⁵ *Id.* at 955.

⁴⁶ *Id.* at 955-56.

⁴⁷ *Prohibited Employment Policies/Practices*, *supra* note 13.

⁴⁸ *Abercrombie*, 966 F. Supp. 2d at 962.

⁴⁹ *Id.* (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

⁵⁰ *Abercrombie*, 966 F. Supp. 2d at 962.

accommodations that have yet to be put into practice.⁵¹ Rather, proof of actual imposition or disruption is required.⁵²

Abercrombie contended that it did not need to show economic harm to prove undue hardship, nor did it need to show proof as to “specificity or exactitude.”⁵³ Abercrombie proffered testimonial evidence from employees stating that based on their own experiences, that compliance with the Look Policy is “key to Abercrombie’s success.”⁵⁴ These employees also posited that deviations from the policy “detract from the in-store experience and negatively affect [the] brand.”⁵⁵ It was Abercrombie’s position that its Look Policy went to the “very heart of [its] business model;” therefore, any requested accommodation requiring deviation from the policy threatened the company’s success.⁵⁶

Plaintiffs’ contended that Abercrombie’s evidence supporting an undue hardship defense was speculative and failed to include “specific admissible evidence’ showing the degree to which compliance with the Look Policy affects store performance or brand image, or causes financial hardship.”⁵⁷ Abercrombie lacked the evidence to show: “i) that Khan’s wearing of a hijab during her four months of employment had a negative effect on sales, the brand, or any customer’s experience; nor ii) any tracking or correlation between Look Policy deviations, including wearing a hijab, and a negative impact on sales.”⁵⁸ Plaintiffs also emphasized that the offer to reinstate Khan with an accommodation⁵⁹ to wear her hijab was inconsistent with any

51 *Abercrombie*, 966 F. Supp. 2d at 962; see *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978).

52 *Abercrombie*, 966 F. Supp. 2d at 962.

53 *Id.*

54 *Id.* at 962-63.

55 *Abercrombie*, 966 F. Supp. 2d at 962-63 (citing Cross-Motion at 19-20).

56 *Abercrombie*, 966 F. Supp. 2d at 963.

57 *Id.*

58 *Id.*

59 Additionally, Abercrombie’s undue hardship defense is undermined by the fact that Abercrombie has granted “almost 80 Look Policy exceptions since at least 2005.” *Id.* at 963 n.17. These include permitting male employees to grow facial hair or wear head coverings such as a yarmulke or baseball cap; allowing female employees to violate the policy by wearing jewelry such as a crucifix or a long skirt that did not conform with the store’s look. *Id.* Additionally, Abercrombie granted more than 16 exceptions for headscarves since 2006. *Id.* Abercrombie responded to this by stating that the majority of permitted Look Policy exceptions “were made when religious garb was not observable” and were “thus distinguishable from Khan’s request to wear a highly visible headscarf.” *Id.* (citing Cross-Motion at 19-22).

claim of hardship.⁶⁰ Therefore, Plaintiffs’ argued that Abercrombie “failed to produce even one document, survey, customer complaint, sales report or financial statement linking an employee’s non-compliance with the Look Policy with an adverse impact on its brand or bottom line, or as the root cause of some sort of customer confusion.”⁶¹

The Court disagreed with Abercrombie’s interpretation of the nature of evidence necessary to establish its burden.⁶² In *Balint v. Carson*, the Ninth Circuit did not explicitly hold that economic harm is not required.⁶³ Rather, the Ninth Circuit mentioned that undue hardship “could include ‘additional costs in the form of lost efficiency or higher wages,’” however, it may also exist where “an accommodation would cause more than a de minimis impact on coworkers, such as depriving coworkers of seniority rights or causing coworkers to shoulder the plaintiff’s share of potentially hazardous work.”⁶⁴

In this case, the Court found that Abercrombie merely submitted “unsubstantiated opinion testimony of its own employees” in support of its undue hardship defense.⁶⁵ The declarations and deposition testimony from Abercrombie employees demonstrated their personal opinions, but are not linked to any concrete proof.⁶⁶ Khan worked as an associate at Hollister for four months before Chmielewski saw her during his site visit.⁶⁷ Abercrombie failed to submit any evidence arising from those four months demonstrating a decrease in sales, customer complaints, or brand damage attributable to Khan’s wearing of a hijab.⁶⁸ Additionally, Yoakum, the senior manager of human resources who fired Khan, testified that Khan’s wearing of a hijab violated the Look Policy irrespective of the amount of time she spent on the sales floor or whether the hijab confused customers, which contradicts Abercrombie’s assertion of undue hardship.⁶⁹ Therefore, without evidence demonstrating any negative effect resulting from Khan’s hijab, Abercrombie failed to

60 *Abercrombie*, 966 F. Supp. 2d at 963.

61 *Id.* at 963 (citing Motion at 20).

62 *Abercrombie*, 966 F. Supp. 2d at 963.

63 *Id.*

64 *Id.* (quoting *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999)).

65 *Abercrombie*, 966 F. Supp. 2d at 963.

66 *Id.*

67 *Id.*

68 *Id.* at 963-64.

69 *Id.* at 964.

show that providing Khan with a religious accommodation in this instance would have caused the company an undue hardship.⁷⁰

The Court was not persuaded by Abercrombie's argument that an accommodation for Khan would have "threatened the core" of the company's business model and success.⁷¹ Not one of Abercrombie's witnesses were able to provide solid evidence that such harms resulted from Khan wearing her hijab.⁷² Rather, the testimony of these witnesses hinged upon personal beliefs.⁷³ Two Abercrombie sales executives even testified that the Company "does not specifically examine the effect of the Look Policy on sales."⁷⁴ James Roth, former Director of Stores and current Director of Stores for Asia-Pacific, testified that Abercrombie "wouldn't look' specifically at a link between the Look Policy component of the in-store experience and an increase or decrease in sales."⁷⁵ Director of Sales Jessica Passalacqua stated that Abercrombie does not assess how much revenue is lost at a store as a result of employees being improperly dressed, nor does the company place emphasis on drawing a connection between the Look Policy and financials.⁷⁶

Despite instances where Abercrombie employees were able to pinpoint specific occurrences to support their beliefs, the Court was not persuaded.⁷⁷ Rather the Court deemed those instances "speculative and purely subjective in nature."⁷⁸ The judge referenced three examples in support of her finding.⁷⁹ First, Chmielewski stated he assumed control of the Palo Alto store, which had "Look Policy issues," yet once employees were trained on the policy, "sales increased dramatically over time."⁸⁰ Yet Chmielewski also testified that the Look Policy was only "[o]ne of many" issues plaguing the Palo Alto store.⁸¹ Second, executive Timothy McKinsey cited the Valley Fair store as doing a subpar job of "protecting the brand and being 'a concern for a significant

70 *Abercrombie*, 966 F. Supp. 2d at 964.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Abercrombie*, 966 F. Supp. 2d at 964 (citing Clark Decl., Ex. H; Roth Dep. 187:8-12).

76 *Abercrombie*, 966 F. Supp. 2d at 964.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.* (quoting Chmielewski Dep. 60:25-61:13 & 201:5-16).

81 *Abercrombie*, 966 F. Supp. 2d at 964 (quoting Chmielewski Dep. 60:25-61:13 & 201:5-16).

period of time.”⁸² However, Look Policy issues and declining sales were not the Valley Fair store’s only problems.⁸³ Staffing issues where the employees were introverted also plagued his store.⁸⁴ Third, when Group Vice President of Human Resources Deon Riley was asked whether allowing the hijab accommodations had any negative impact on sales, he responded:

I was going to say I’m unable to say whether they have a negative impact on sales because I don’t study the impact on sales. However, our goal is to provide the right customer service, or the right customer in-store experience, and our policy is part of that. We’ve had very slow sales in the past two years, but I wouldn’t say that was just because of hijabs. I’m sure the economy played a part, but that would just be purely speculative.⁸⁵

The judge concluded that these examples postulate only a “tenuous, potential connection” between Abercrombie’s Look Policy and undue hardship.⁸⁶ Since multiple store issues contributed to declining sales and the evidence could not establish that the hijab worn by Khan had an actual imposition or disruption as required by the standard set forth by the Ninth Circuit, Abercrombie’s assertions lacked support.⁸⁷

In order to prove that deviations from the Look Policy would negatively affect the store’s sales or the Company’s brand, Abercrombie must provide more than “generalized subjective beliefs or assumptions.”⁸⁸ The evidence presented does not substantiate that any hardship would have stemmed from allowing Khan to wear her hijab, especially in light of the fact that she had already been wearing the hijab during the four months under Abercrombie’s employ without any “complaints, disruption, or a noticeable effect on sales.”⁸⁹

82 *Abercrombie*, 966 F. Supp. 2d at 965 (quoting Clark Decl., Ex. D [Dep. of Timothy John McKinsey (“McKinsey Dep.”)] 41:10–44:18.).

83 *Abercrombie*, 966 F. Supp. 2d at 965.

84 *Id.*

85 *Abercrombie*, 966 F. Supp. 2d at 965 (quoting Mitchell Reply Decl., Ex. 22 [Deposition of Deon Riley (“Riley 3/17/11 Dep.”)] 236:7–19.).

86 *Abercrombie*, 966 F. Supp. 2d at 965.

87 *Id.*

88 *Id.*

89 *Id.*

2. Abercrombie's Free Speech

Abercrombie also asserted an affirmative defense of commercial free speech.⁹⁰ The Company proffers that its in-store employees are "living advertisements;" therefore, their appearance is protected commercial speech.⁹¹ The United States Supreme Court case, *Bolger v. Youngs Drug Products Corp.*, set forth the test for determining the existence of free speech.⁹² The three prongs necessary for establishing commercial free speech are found where the speech: 1) is an advertisement; 2) refers to a particular product; and 3) the speaker has an economic motivation for the speech.⁹³

It is Abercrombie's contention that these three prongs are satisfied since the store associates are "living advertisements" for the Company brand, making their appearance commercial free speech.⁹⁴ Therefore, the in-store associates' appearance, or commercial speech, promotes the Hollister brand, which is the economic driving force behind maintaining such an appearance.⁹⁵

It is Plaintiffs' position that the appearance of Part Time Impact employees is not commercial free speech.⁹⁶ These employees are not "living advertisements."⁹⁷ Rather, Impact employees, or stockroom personnel, handle shipments, fold clothes, and restock the sales floor.⁹⁸ Therefore, employees like Khan were not hired to serve as "living advertisements."⁹⁹ Additionally, since employees are not required to wear Hollister or Abercrombie clothing, the Company fails to identify the advertising of a particular product.¹⁰⁰ If employees are permitted to wear clothing sold in other stores then what, exactly, does Abercrombie have these employees advertising?¹⁰¹

The Court agreed with Plaintiffs on the defense of commercial free speech.¹⁰² In finding that stockroom employees

90 *Id.*

91 *Abercrombie*, 966 F. Supp. 2d at 966.

92 *Id.*; see *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

93 *Abercrombie*, 966 F. Supp. 2d at 966.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Abercrombie*, 966 F. Supp. 2d at 966.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

such as Khan are mainly responsible for behind the scenes duties, using them as “living advertisements” does not comport with their assigned employment obligations.¹⁰³ The Court also found Abercrombie’s assertion of commercial free speech lacking because the Company was unable to identify a particular product as being advertised.¹⁰⁴ The employees’ ability to wear clothing from other companies detracts from the argument that employees are “living advertisements” for Abercrombie.¹⁰⁵

IV. THE RELIGIOUS ACCOMMODATION TREND

Khan’s case marks the third time that a district court has ruled against Abercrombie’s undue hardship defense in cases involving Muslim employees or applicants wearing hijabs.¹⁰⁶ In July 2011, a district court in Oklahoma ruled that it was religious discrimination for the company not to hire a Muslim applicant for a sales position solely because of her hijab.¹⁰⁷ In April 2013, another judge in the Northern District of California ruled for the EEOC on the issue of undue hardship in a case separate from Khan’s.¹⁰⁸

This recent trend of ruling in favor of plaintiffs in religious accommodation cases is a deviation from the past trend¹⁰⁹ of courts deferring to employers’ interests over the rights of religious

¹⁰³ *Abercrombie*, 966 F. Supp. 2d at 966.

¹⁰⁴ *Id.* at 967.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 971; *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1287 (N.D. Okla. 2011); *EEOC v. Abercrombie*, No. 5:10-cv-03911-EJD, 2013 WL 1435290, at *17 (N.D. Cal. Apr. 9, 2013).

¹⁰⁷ *Abercrombie*, 598 F. Supp. 2d at 1273. While the district court denied summary judgment in favor of Abercrombie after a Muslim female was denied employment, the United States Court of Appeals, Tenth Circuit, reversed and remanded the case. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1107 (10th Cir. 2013) (holding that Abercrombie is entitled to summary judgment as a matter of law because there is no genuine issue of material fact that plaintiff never informed Abercrombie prior to its hiring decision that she wore a hijab for religious reasons. Therefore, Abercrombie could not have known that she needed a religious accommodation).

¹⁰⁸ *Abercrombie*, 2013 WL 1435290, at *17.

¹⁰⁹ Ishra Solieman, *Born Osama: Muslim-American Employment Discrimination*, 51 ARIZ. L. REV. 1069, 1082-83 (2009) (discussing the previous trend of employer victory in religious discrimination cases as a result of subtle discrimination).

employees.¹¹⁰ This section explores the precedent on reasonable accommodations and the evolution of Title VII interpretation.

The “reasonable accommodation” and “undue hardship” concepts, as interpreted by courts, were not an explicit part of the Civil Rights Act when it was first enacted in 1964.¹¹¹ The Civil Rights Act made no mention of employees’ rights to practice their religion in the workplace, or employers’ obligations to allow employees to do so.¹¹² While Title VII of the Civil Rights Act extended the prohibition of discrimination into the employment realm, Title VII did not define “religion” or indicate whether the protection against religious discrimination covered religious practices *and* beliefs.¹¹³

The EEOC¹¹⁴ interpreted the ban against religious discrimination to require that employers accommodate the religious practices of employees.¹¹⁵ The EEOC eventually determined that the employer’s obligation to provide religious accommodations ended where the accommodation would cause “undue hardship” to the employer.¹¹⁶ However, the courts did not accept the EEOC’s interpretation of Title VII.¹¹⁷ In *Dewey v. Reynolds*, the Supreme Court of the United States upheld the Sixth Circuit’s overturning of the verdict in favor of Dewey.¹¹⁸ The Dispute in *Dewey* arose when the plaintiff refused to work on Sundays because of his religious beliefs, despite the fact that his

110 See *Abercrombie*, 598 F. Supp. 2d at 1273; *Abercrombie*, 2013 WL 1435290, at *1; *Litzman v. New York City Police Dept.*, No. 12 Civ. 4681(HB), 2013 WL 6049066, at *7 (S.D.N.Y. Nov. 15, 2013). These cases illustrate that the past trend of employees losing religious discrimination cases has ceased to continue as of late.

111 See Civil Rights Act of 1964 § 703 (current version at 42 U.S.C. § 2000e-2).

112 *Id.*

113 *Id.*

114 The EEOC was created by Title VII to help resolve employment disputes., *Pre 1965: Events Leading to the Creation of the EEOC*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/35th/pre1965/> (last visited Oct. 12, 2014).

115 42 U.S.C. § 2000e-4 (stating that “[t]he Commission shall have power . . . upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter.”).

116 29 C.F.R. § 1605.2(b) (2014).

117 *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971); *Riley v. Bendix Corp.*, 330 F. Supp. 583, 591-92 (M.D. Fla. 1971).

118 *Riley*, 330 F. Supp. at 589.

employment contract provided for occasional compulsory weekend work.¹¹⁹ In interpreting Title VII, the Sixth Circuit held that “[n]owhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another.”¹²⁰

In *Riley v. Bendix Corp.*, the plaintiff was terminated after he refused to work from sundown on Friday to sundown on Saturday as part of his faith in the Seventh Day Adventist Church.¹²¹ The Middle District of Florida denied Riley’s religious discrimination claim asserting that while a person’s religious beliefs cannot be infringed upon, “surely the great and diversified types of American business cannot be expected to accede to the wishes of every doctrine or religious belief.”¹²² Therefore, if the plaintiff “accepts a position knowing that it may in some way impinge upon his religious beliefs, he must conform to the working conditions of his employer or seek other employment.”¹²³

The following year, in 1972, Congress responded to the verdicts of *Dewey* and *Riley* by amending Title VII’s definition of religion.¹²⁴ By adding section 701(j), Congress adopted the EEOC’s interpretation of Title VII.¹²⁵ The new language stated: “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.”¹²⁶

Although Congress explicitly adopted the EEOC’s definition of religion, the courts still tended to give employers great deference in asserting an affirmative defense of undue hardship.¹²⁷

119 *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 327 (6th Cir. 1970).

120 *Id.* at 334.

121 *Riley*, 330 F. Supp. at 584.

122 *Id.* at 590.

123 *Id.*

124 Congress included *Dewey* and *Riley* in the legislative record of 701(j) to show specifically the reasoning they meant to overturn in amending Title VII. Thomas D. Brierton, “Reasonable Accommodation” Under Title VII: Is It Reasonable to the Religious Employee?, 42 CATH. LAW. 165, 171-72 (2002).

125 Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2014).

126 *Id.*

127 *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding the airline could not reasonably accommodate an employee whose religious obligations prohibited him from working on Saturdays without suffering undue hardship); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 61 (1986) (finding that there was no basis in either the 701(j) section of Title VII or its legislative history requiring an employer to make specific accommodations).

However, there has been a breakthrough in court rulings in the last few years.¹²⁸ As addressed above, from 2011-2013 Abercrombie has lost its undue hardship defense in three district court cases.¹²⁹ In addition, the Southern District of New York was not persuaded by the New York City Police Department's undue hardship defense in *Litzman v. New York City Police Dept.*¹³⁰ Litzman asserted that the NYPD deprived him of his constitutional rights under the Free Exercise and Due Process clauses of the United States Constitution when he was fired after refusing to shave his beard for religious reasons.¹³¹ The NYPD argued that when Litzman made a religious accommodation request to maintain his one-half inch beard, the Office of Equal Employment Opportunity repeatedly told him his beard would have to be trimmed to the length of one-millimeter or less.¹³² The judge granted Litzman summary judgment with respect to his Free Exercise claim.¹³³ It appears as though district courts are beginning to apply a heightened standard of scrutiny to cases where employers assert an undue hardship defense.

V. CONCLUSION

The United States District Court for the Northern District of California ruled correctly when it granted Umme-Hani Khan partial summary judgment with respect to her Title VII religious accommodation claim. While Abercrombie may have a legitimate interest in maintaining a Look Policy in order to portray a

128 *Litzman*, 2013 WL 6049066, at *7 (granting summary judgment for plaintiff, probationary officer, because defendant, New York City Police Department, could not show that providing plaintiff with a religious accommodation to grow facial hair longer than one millimeter would cause an undue hardship on the NYPD); *Abercrombie*, 966 F. Supp. 2d at 965 (finding that Abercrombie violated the Title VII by failing to accommodate plaintiff's strongly held religious belief of wearing a hijab since the scarf would cause no undue hardship); *Abercrombie*, 2013 WL 1435290, at *17 (holding that Abercrombie could not prove the look of its employees amounted to commercial free speech, therefore, the denial of a religious accommodation violated Title VII); *Abercrombie* 598 F. Supp. 2d at 1287 (granting summary judgment for plaintiff because Abercrombie could not show that granting plaintiff a religious accommodation would be an undue burden in light of the fact that Abercrombie granted numerous exceptions to the Look Policy in recent years).

129 *Abercrombie*, 966 F. Supp. 2d at 971; *Abercrombie*, 798 F. Supp. 2d at 1287; *Abercrombie*, 2013 WL 1435290, at *17.

130 *Litzman*, 2013 WL 6049066, at *7.

131 *Id.* at *1.

132 *Id.*

133 *Id.* at *4.

particular image, the Company's failure to provide adequate religious accommodations violated Title VII of the Civil Rights Act. When an employee requests a reasonable religious accommodation, and doing so would not place an undue hardship on the company, the employer has to provide such an accommodation.

Additionally, while Abercrombie desires for all of its store employees to promote a particular image, terminating Khan for failure to remove her hijab, only to offer her reinstatement days later, does not comport with the Company's assertion of undue hardship. When Abercrombie has no proof to back its presumption that Khan's wearing of a hijab would decrease sales or confuse customers, the Company has a difficult time illustrating an undue hardship. Forcing Khan to choose between adhering to her religious beliefs and maintaining her employment, when Abercrombie cannot show that Khan's wearing of a hijab creates any hardship on the Company, falls short of demonstrating that Abercrombie terminated Khan for a reason other than religious discrimination.