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COMMENTS

EEOC V. ABERCROMBIE & FITCH STORES, INC.: RELIGIOUS DISCRIMINATION

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I. INTRODUCTION

Freedom of religion, a fundamental right, has been a highly valued civil liberty since its conception in the First Amendment to the United States Constitution;[1] but discriminatory practices consistently occur, infringing on the religious beliefs of employees and applicants in workplaces across the country.[2] Although Title VII of the Civil Rights

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1. *See* U.S. CONST. amend. I; *see also* Thomas Reese, *Religious Freedom Is a Fundamental Human Right*, NAT'L CATH. REP. (May 16, 2014), http://ncronline.org/blogs/faith-and-justice/religious-freedom-fundamental-human-right [perma.cc/4KWH-CS2S] ("Religious freedom is a fundamental human right of every person on earth.").

2. *See, e.g.*, *Accommodating Religion: What Managers Need to Know*, HR SPECIALIST, http://www.thehrspecialist.com/46223/Accommodating_religion_What_managers_need_to_know.hr?cat=tools&sub_cat=memos_to_managers [perma.cc/JGS6-Y4NS] (last visited Mar. 1, 2016) (illustrating the progressive reporting of religion-based

Act of 1964 ("Title VII"),[3] which prohibits employment discrimination based on religion,[4] has—for more than fifty years—protected the constitutionally guaranteed right of freedom of religion,[5] religious discrimination within the country's workplaces continues to occur at a high rate.[6] Congress designed the Civil Rights Act of 1964—in particular, Title VII—to bar employment discrimination against minority groups.[7] However, employers consistently devalue job applicants' and employees' freedom of religion by continuously fostering discriminatory ideologies within workplace environments—ultimately inducing significant discrimination against minorities and religious practices.[8] Religious discrimination, therefore, continues to be a persistent issue in workplaces across the country because employers seemingly refuse to embrace diversity amongst their employees.[9]

To strengthen the prohibition on discriminatory practices in the workplace and to provide appropriate religious accommodations to employees and job applicants, Congress amended Title VII of the Civil Rights Act in 1972.[10] Despite that, and other, important improvements, Title VII has always—from the moment it was enacted—made it

discrimination); Marcia Pledger, *Complaints of Religious Discrimination in Workplace Are Increasing*, CLEVELAND.COM (Nov. 17, 2011, 6:00 AM), http://www.cleveland.com/business/index.ssf/2011/11/religion_and_the_workplace_don.html [perma.cc/GD2A-PQUW] ("Equal Employment Opportunity Commission statistics show that religious discrimination complaints in workplace settings have more than doubled from a little over a decade ago, resulting in roughly $10 million in settlements.").

3. 42 U.S.C. §§ 2000e to 2000e-17 (2012 & Supp. II 2014).

4. *See id.* § 2000e-2(a).

5. U.S. CONST. amend. I.

6. *See* sources cited *supra* note 2.

7. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

8. *See* sources cited *supra* note 2.

9. *See id.*

10. *See generally* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 and 42 U.S.C.). Originally, Title VII's section of definitions—codified at 42 U.S.C. § 2000e—did not include a definition for the term *religion*. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253–355 (codified as amended at 42 U.S.C. § 2000e (2012 & Supp. II 2014)). Section 2000e now reads as follows: "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." 42 U.S.C. § 2000e(j).

unlawful for an employer to discriminate against employees on the basis of "race, color, religion, sex, or national origin."[11] In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the United States Court of Appeals for the Tenth Circuit held that an employer is liable under a religious-accommodation claim (i.e., under Title VII) only if that employer had "actual knowledge" that a religious accommodation was required because the employee or applicant had the responsibility to provide the employer with "explicit notice" of this requirement.[12] Specifically, the court concluded that "plaintiffs must establish that they initially informed the employer that they engage in a particular practice for religious reasons and that they need an accommodation for the practice, due to a conflict between the practice and the employer's work rules."[13]

This Comment begins with the history and background of Title VII, discussed within the context of religious-discrimination claims; it does so while also exploring Congress's purpose for enacting Title VII. Next, this Comment describes and examines the facts, procedural history, and analysis of *Abercrombie.* Finally, this Comment discusses how the Tenth Circuit incorrectly reversed the decision of the U.S. District Court for the Northern District of Oklahoma, and it explains how the Tenth Circuit's misapplication of Title VII (which could have adversely affected employees or applicants by failing to provide them with the necessary and proper protections from discriminatory practices in the country's workplaces) was corrected by the United States Supreme Court.

II. HISTORICAL BACKGROUND

A. Pursuing Equality: Title VII

"The Civil Rights Act of 1964 was initially enacted for the purpose

11. Civil Rights Act § 703; *see also* 42 U.S.C. § 2000e-2. Section 2000e-2(a), one of the more oft-cited subsections, currently reads as follows:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id. § 2000e-2(a)(1).

12. *See* EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie II*), 731 F.3d 1106, 1129–31, 1135 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

13. *Id.* at 1131.

of prohibiting discrimination against minority groups in the United States."[14] Congress passed this comprehensive piece of legislation to end discriminatory practices in the workplace.[15] The Civil Rights Act of 1964, as enacted and amended, serves as a mandate for all, demanding that every workplace adopt practices in which equal opportunity is afforded to all employees—regardless of their religious convictions—while simultaneously fostering diversity and equality.[16] Consequently, Title VII provides individuals with an actionable claim against employers for religious discrimination.[17]

In enacting Title VII, Congress's goal was to effectively implement legislation prohibiting unequal practices;[18] therefore, "[t]he remedial purpose of Title VII . . . was to accord equality to everyone in the workplace regardless of gender, race, color, national origin, and other bases on which some employers had discriminated against employees and potential employees."[19] Indeed, Title VII's purpose is to diminish injustice and inequality by eliminating employment decisions improperly based on particular aspects of an applicant's or employee's identity (e.g., the applicant's or employee's religion); that also means that employers must take affirmative steps to *accommodate* religious beliefs and practices.[20]

Although the Supreme Court recognized that "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment,"[21] courts were initially hesitant to embrace, and often rejected, "early Title VII claims seeking religious accommodation."[22] This was due, in part, to a couple of significant

14. 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, 580 (2000).

15. *See id.* ("With regard to prohibitions on employment discrimination, Title VII, as originally passed, treated religion the same as race, color, sex, or national origin; the statute prohibited discrimination . . . ." (footnote omitted)).

16. *See id.* ("In 1972, Congress addressed this issue and amended the Civil Rights Act to include an affirmative duty of accommodation, which is incorporated rather awkwardly into Title VII's definition of religion.").

17. *See* 42 U.S.C. § 2000e-2 (2012).

18. *See* Kaminer, *supra* note 14.

19. Sadia Aslam, Note, *Hijab in the Workplace: Why Title VII Does Not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance*, 80 UMKC L. REV. 221, 225 (2011).

20. *See* Kaminer, *supra* note 14.

21. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 85 (1977).

22. Aslam, *supra* note 19, at 226.

congressional omissions: Congress failed to adequately address the issue of accommodation in the original version of Title VII, and it did not provide a firm definition of *religion* within the statute.[23] Accordingly, courts were left "to determine the question of whether Title VII conferred an affirmative duty on employers to reasonably accommodate their employees' religious beliefs."[24]

B. Scope of Protection for Religion and Religious Beliefs: The 1972 Amendment

Section 703 of Title VII, codified at 42 U.S.C. § 2000e-2, currently reads as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[25]

As originally enacted, Title VII—seemingly designed to treat religion in the same way as race, color, sex, or national origin—prohibited employment discrimination in workplaces; however, there was no explicit definition for the word *religion*.[26] The absence of a definition within the original set of statutes triggered numerous questions in workplaces across the country: Questions arose concerning the law's implications, its role within religious-discrimination claims,[27] and

23. *See* Huma T. Yunus, Note, *Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace*, 57 OKLA. L. REV. 657, 664–65 (2004); *see also* Kaminer, *supra* note 14.

24. Yunus, *supra* note 23, at 659.

25. 42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

26. *See* Jamie Darin Prenkert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467, 473–74 (2006).

27. *See, e.g.*, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided Court*, 402 U.S. 689 (1971); Riley v. Bendix Corp., 330 F.

whether, and to what extent, an employer's refusal to accommodate an employee's religious need was actionable.[28] Title VII was, therefore, ambiguous and failed to address an employer's duty to provide religious accommodations to employees and applicants.[29] The failure to include a definition for *religion* caused significant confusion; instead of using a liberal interpretation of the statutes to achieve the statutes' primary objectives, some courts narrowed the scope of an employee's protection against discrimination.[30]

Although courts, prior to the amendment in 1972, recognized that Title VII was enacted to eliminate discrimination in the workplace, they employed a restrictive interpretation of the statutes and "rejected early Title VII claims seeking religious accommodation."[31] That restrictive interpretation had a significant impact on Title VII—specifically, Title VII's reach with regard to an employer's affirmative duty to reasonably accommodate an employee's or applicant's religious practices and beliefs.[32] The Supreme Court attempted to address, but ultimately failed to resolve, that issue in *Dewey v. Reynolds Metals Co.*; indeed, the Court left employers unsure whether such a duty existed.[33] In an equally divided decision,[34] the Supreme Court summarily affirmed and upheld the Sixth Circuit's finding that—under the regulation in force at the time of the employee's discharge—the employer did not have an affirmative duty to accommodate the employee's religious beliefs.[35]

Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972); Yunus, *supra* note 23, at 659.

28. *See, e.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 69, 71–77 (1977).

29. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701, 703, 78 Stat. 241, 253–357 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-2 (2012 & Supp. II 2014)).

30. *See, e.g.*, Yunus, *supra* note 23, at 661 (noting that the Sixth Circuit and the Supreme Court "substantially limited the significance of Title VII's prohibition of employment discrimination based on religious beliefs").

31. Aslam, *supra* note 19, at 225–26.

32. *See* Yunus, *supra* note 23, at 657 ("Because Congress failed to define 'reasonable accommodation' and 'undue hardship,' there [was] no coherent and consistent framework addressing an employer's *duty to accommodate* minority religious beliefs under Title VII." (emphasis added)).

33. *See* Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971) (per curiam).

34. *Id.*

35. *Id.*; *see also* Dewey v. Reynolds Metals Co., 429 F.2d 324, 329–30 (6th Cir. 1970) ("In our opinion, it would have been more appropriate for the District Court to have applied the EEOC Regulation 1605.1 which was in force at the time of [the employee]'s discharge, and which became effective June 15, 1966. The 1966 regulation contained . . . provisions which restricted any obligation upon the part of the employer to accommodate to the reasonable religious needs of his employees . . . ."), *aff'd per curiam*

In *Dewey*, the employer, Reynolds Metals, and its employees (through the union that served as their "bargaining representative") entered into a collective bargaining agreement that required all employees to work mandatory overtime shifts, including shifts on Sunday.[36] One of the employees, Dewey, refused to work on Sunday because it violated his religious beliefs and practices.[37] Despite being reprimanded, Dewey—claiming that working on the Sabbath was a violation of his religious convictions—refused to work overtime on Sunday; and he also refused to find replacements for those shifts.[38] Those refusals ultimately led to his termination.[39] The Sixth Circuit found for Reynolds Metals, concluding that "[t]he reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union with his employer, which provisions were applicable equally to all employees."[40]

The Sixth Circuit found that Reynolds Metals lacked the necessary "inten[t] to discriminate on religious grounds," and the court determined that Reynolds Metals did not intentionally discriminate against the employee, noting that a failure to accommodate an employee's religious observance should not be equated with religious discrimination.[41] The court also stated as follows:

> To accede to Dewey's demands would require Reynolds [Metals] to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining

by an equally divided Court, 402 U.S. 689 (1971).

36. *See Dewey*, 429 F.2d at 327–29.

37. *See id.* at 329 ("He never volunteered for overtime work on Sunday after joining the [Faith Reformed Church], although he did volunteer for other days. . . . He refused to work because of his religious beliefs.").

38. *Id.* (noting that Dewey began by "obtain[ing] replacements as provided in [his] contract" but eventually "refused to obtain a replacement").

39. *Id.*

40. *Id.* at 330–31.

41. *Id.* at 335–36 (Weick, J., denying rehearing) ("The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees."); *see also id.* at 330 (majority opinion).

> agreement among the employees, and could create chaotic personnel problems and lead to grievances . . . .[42]

"Ultimately, the Sixth Circuit's holding and the Supreme Court's per curiam decision" apparently failed to consider the goals and intentions of Congress—effectively limiting the scope of protection afforded to religious applicants and employees seeking accommodations under Title VII.[43] These judicial determinations (1) frustrated Title VII's overarching objective; (2) seemingly overlooked the congressional intent behind Title VII; and (3) significantly limited the scope of protection intended for employees and applicants.[44] "*Dewey*, however, served as an impetus for an amendment to Title VII, which placed an affirmative duty of accommodation on employers when an otherwise neutral employment regulation may affect a religious minority, rather than a mere prohibition against overt discrimination by an employer."[45]

C. Aftermath of Dewey v. Reynolds Metals Co.*: Duty to Accommodate*

In response to *Dewey*, Congress amended Title VII in an effort to protect the religious beliefs and practices of employees and applicants; and in a more broad sense, it sought to further the goal of ending all discriminatory practices in workplaces across the country.[46] Senator Jennings Randolph noted that "the purpose of the Civil Rights Act of 1964 was to protect religious belief as well as religious conduct."[47] Indeed, as a Seventh-Day Baptist, Senator Randolph recognized that the term *religion* "encompasses . . . not merely belief, but also conduct; the freedom to believe, and also the freedom to act."[48] Believing that Congress intended for all employees to have the fundamental right to participate in, and be protected in the exercise of, their desired religious practices, Senator Randolph introduced the amendment "to 'assure that

42. *Id.*
43. Yunus, *supra* note 23, at 661.
44. *See id.* at 657.
45. *Id.* at 661; *see also* 42 U.S.C. § 2000e(j) (2012 & Supp. II 2014).
46. *See* Kaminer, *supra* note 14, at 583–85 ("The amendment was introduced by Senator Jennings Randolph, a Seventh-Day Baptist, with the express purpose of protecting Sabbatarians.").
47. *Id.* at 584.
48. 118 CONG. REC. 705 (1972) (statement of Sen. Randolph).

freedom from religious discrimination in the employment of workers is for all time guaranteed by law'"[49] and to "save employees the pain of having to choose between their religions and their jobs."[50]

In 1972, Congress—following Senator Randolph's lead—broadened the scope of protection against religious discrimination by providing a definition for *religion* in its amendment to Title VII: "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 an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[51]

Presently, the amended version of the statutes remains the law, and the Supreme Court seems to have provided a clear interpretation of the various statutory provisions. Title VII explicitly recognizes religion as a protected category, protecting individuals from religious discrimination; and it places an affirmative duty on all employers to accommodate religious practices—a duty that requires employers to offer protection to all employees and applicants who seek religious accommodations.[52] Importantly, "the amendment does not require [an employee seeking a religious accommodation] to belong to an established religious group."[53] Instead, in reviewing discrimination claims under Title VII,[54] the Supreme Court has found that plaintiffs must simply "demonstrate that they hold a sincere religious belief to establish a prima facie case of religious discrimination."[55]

49. Prenkert & Magid, *supra* note 26, at 475 (quoting 118 CONG. REC. 705 (1972) (statement of Sen. Randolph)).

50. *Id.* at 475–76.

51. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 2, § 701(j), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(j) (2012 & Supp. II 2014)).

52. *See* Kaminer, *supra* note 14.

53. Yunus, *supra* note 23, at 662.

54. For the statutory provision that is often the basis for discrimination claims, see 42 U.S.C. § 2000e-2(a).

55. Yunus, *supra* note 23, at 662; *see also* United States v. Seeger, 380 U.S. 163, 165–66 (1965) ("[T]he test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not." (quoting 50 U.S.C. app. § 456(j) (1958 & Supp. V 1964) (current version at 50 U.S.C.A. § 3806 (West, Westlaw through P.L. 114-115)))).

III. EEOC V. ABERCROMBIE & FITCH STORES, INC.

A. Facts

The plaintiff, Samantha Elauf, was a practicing Muslim.[56] Since the age of thirteen, Elauf had worn a headscarf—also known as a hijab—as part of her religious practice.[57] This practice reflected her understanding of what is required by the Qur'an—the holy, guiding text of Islam.[58] In 2008, at the age of seventeen, Elauf "applied for a Model position at the Abercrombie Kids store in the Woodland Hills Mall in Tulsa, Oklahoma."[59] She was denied the job because she wore a hijab, which the assistant manager, Heather Cooke, classified as "a clothing item that was inconsistent with [Abercrombie's] Look Policy."[60] Elauf was unaware of the retailer's official corporate policy when she applied for the position.[61]

Prior to the interview, Elauf regularly visited Abercrombie Kids to see her friend, Farisa Sepahvand, who was one of the store's models.[62] In fact, Cooke—the employee who conducted the interview—had seen Elauf in the store on various occasions, and she recalled "see[ing] Elauf wearing a head scarf in the Woodland Hills Mall."[63] Cooke later testified that she believed Elauf wore the hijab for religious purposes.[64] It is also important to note that "[d]uring the interview with Cooke, Elauf wore an Abercrombie & Fitch like T-shirt and jeans, and a head scarf."[65] More importantly, Cooke described the store's dress requirements during the interview, but she failed to suggest that wearing a headscarf would conflict with the store's policy, which prohibited employees from wearing caps and other similar types of headwear.[66] Furthermore, although having assumed, correctly in fact, that the headscarf signified a

56. *See* EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie I*), 798 F. Supp. 2d 1272, 1276 (N.D. Okla. 2011), *rev'd*, 731 F.3d 1106 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

57. *Abercrombie II*, 731 F.3d 1106, 1112 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

58. *See id.*; *see also* THE QUR'AN 24:31.

59. *Abercrombie II*, 731 F.3d at 1112.

60. *Id.* at 1113–14.

61. *Abercrombie I*, 798 F. Supp. 2d at 1276.

62. *Id.* at 1277.

63. *See id.* at 1276–77.

64. *See id.* at 1277.

65. *Id.*

66. *Id.* at 1277, 1283 n.6.

religious affiliation, Cooke claimed there was no discussion of Elauf's religion or headscarf during the interview.[67]

Following the interview, Cooke reviewed "Elauf's candidacy using Abercrombie's official interview guide"—specifically, the factors that the guide highlighted as important, which included an applicant's style and appearance.[68] Impressed by Elauf, Cooke "scored [her] at a two in each category, for a total of six," qualifying Elauf for hire and meeting the retailer's hiring expectations.[69] Despite that satisfactory score, which was high enough to garner a recommendation for hire, Cooke believed that an accommodation was necessary for Elauf to wear the headscarf while working; therefore, Cooke sought approval from her district manager, Randall Johnson.[70] As the assistant manager, Cooke customarily made hiring recommendations without consulting a district manager; however, in this case, Cooke sought guidance from Johnson because she was "unsure whether it would be a problem for [Elauf] to wear a headscarf as an Abercrombie Model."[71] Cooke informed Johnson that she believed Elauf was a practicing Muslim who wore a headscarf for religious reasons.[72] Johnson then instructed Cooke to change Elauf's interview score in the "appearance" section—despite the previously recorded passing marks.[73] Per those instructions, Cooke "threw away Elauf's original rating sheet and filled out a new one."[74] Thus, Elauf did not receive a recommendation for hire, and she was not extended a job offer.[75]

B. Procedural History

The Equal Employment Opportunity Commission ("EEOC") brought the action against Abercrombie & Fitch Stores, Inc. ("Abercrombie") in the United States District Court for the Northern District of Oklahoma, "alleging religious discrimination against [Elauf]."[76] The complaint

67. *Id.* at 1277 & n.4.
68. *Abercrombie II*, 731 F.3d 1106, 1113 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).
69. *Id.*
70. *Id.* at 1113–14.
71. *Id.*
72. *Abercrombie I*, 798 F. Supp. 2d at 1278.
73. *Id.* at 1279.
74. *Id.*
75. *Id.*
76. *Id.* at 1275.

alleged religious discrimination in violation of Title VII, claiming that Abercrombie refused to hire Elauf because she wore a hijab and failed to provide a reasonable accommodation for her religious beliefs (i.e., did not make an exception to its "Look Policy").[77] Conversely, Abercrombie "disputed the EEOC's allegations and argued that . . . Elauf failed to inform it of a conflict between the Look Policy and her religious practices."[78] Abercrombie "further argued that the proposed accommodation—allowing . . . Elauf to wear the headscarf—would have imposed an undue hardship on the company."[79] Moreover, Abercrombie questioned whether Elauf's hijab was worn for "a bona fide, sincerely held religious belief," and it argued that "its store managers [are] not to assume facts about prospective employees in job interviews and, significantly, [are] not to ask applicants about their religion."[80]

"The parties filed cross-motions for summary judgment on issues concerning liability."[81] The district "court concluded that the EEOC had established a prima facie case through evidence that . . . Elauf had a bona fide, sincerely held religious belief and a related practice that conflict[ed] with the Look Policy."[82] The court's reasoning rested largely on "evidence that Elauf w[ore] a head scarf based on her belief that the Quran requires her to do so, and that this belief conflicts with Abercrombie's prohibition against headwear."[83] Therefore, the "court rejected Abercrombie's argument that the notice element of the EEOC's prima facie case was not satisfied because . . . Elauf did not personally inform Abercrombie that she wore her hijab for religious reasons" or that she required a religious accommodation.[84] Abercrombie appealed the district court's grant of summary judgment in favor of the EEOC.[85]

The Tenth Circuit eventually determined that the "district court should have entered summary judgment in favor of Abercrombie."[86] It

77. *Id.* at 1283.

78. *Abercrombie II*, 731 F.3d 1106, 1114 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

79. *Id.*

80. *Id.* at 1112, 1114.

81. *Id.* at 1114.

82. *Id.*

83. *Abercrombie I*, 798 F. Supp. 2d 1272, 1283 (N.D. Okla. 2011), *rev'd*, 731 F.3d 1106 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015); *see also Abercrombie II*, 731 F.3d at 1114.

84. *Abercrombie II*, 731 F.3d at 1114.

85. *See id.* at 1115.

86. *Id.* at 1143.

came to this determination "because the EEOC did not satisfy the second element of its prima facie case."[87] Specifically, in the eyes of the Tenth Circuit, "there [was] no genuine dispute of material fact that . . . Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing her hijab stemmed from her religious beliefs and that she needed an accommodation for this (inflexible) practice."[88] Since the case involved an important interpretation question related to Title VII, the U.S. Supreme Court granted certiorari.[89] The Court concluded that "[t]he Tenth Circuit misinterpreted Title VII's requirements in granting summary judgment."[90] Even though the Court ultimately reversed the grant of summary judgment, it is important to take a deeper look at the analysis and interpretation applied by the Tenth Circuit—highlighting the court's conclusion as an example of an incorrect interpretation of Title VII.

C. Opinion

Before the case reached the Supreme Court, Judges Ebel, Kelly, and Holmes heard the appeal for the Tenth Circuit Court of Appeals,[91] and they reviewed the case de novo (i.e., the court reviewed the case independently, without deference to the lower court's decision).[92] Since the district court resolved the issue by declaring summary judgment, the court's review focused on whether there was a genuine issue of material fact within the record.[93] "[W]hen confronted with a motion for summary judgment, a party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a *genuine* issue of material fact which requires trial."[94]

87. *Id.*

88. *Id.*

89. *See* EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie III*), 135 S. Ct. 2028, 2031 (2015).

90. *Id.* at 2034.

91. *See Abercrombie II*, 731 F.3d at 1110.

92. *Id.* at 1116 (citing Helm v. Kansas, 656 F.3d 1277, 1284 (10th Cir. 2011)).

93. *Id. See generally* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986) ("By its very terms, [the summary judgment] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.").

94. Beard v. Whitley Cty. REMC, 840 F.2d 405, 410 (7th Cir. 1988) (first citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986); then citing *Anderson*, 477 U.S. 242).

Judge Holmes, writing for the majority, noted the court's acceptance of the argument advanced by Abercrombie—that it was not liable for unlawful discrimination because "Elauf never informed Abercrombie before its hiring decision that her practice of wearing a hijab was based upon her religious beliefs and that she needed an accommodation for that practice, due to a conflict between it and Abercrombie's clothing policy."[95] Moreover, the court (applying a specific burden-shifting approach[96]) determined that the EEOC failed to establish the necessary prima facie case.[97] To properly establish a prima facie failure-to-accommodate claim, the plaintiff must "show that (1) he or she had a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed his or her employer of this belief; and (3) he or she was fired [or not hired] for failure to comply with the conflicting employment requirement."[98] Accordingly, the court rejected the EEOC's claim as a matter of law because Elauf did not inform Abercrombie that her religious practice of wearing a hijab conflicted with the corporate clothing policy; in other words, Elauf failed to provide Abercrombie with explicit notice of her need for an accommodation.[99]

Essentially, the Tenth Circuit found that an employee or job applicant who is rejected based on the employer's perception of a work–religion conflict cannot make a prima facie case under Title VII if, during the hiring process, the applicant did not inform the employer of the conflict; in that situation, the employer would not have the requisite knowledge for the employee to establish that the employer engaged in unlawful discriminatory practices by failing to provide a proper accommodation.[100] More specifically, the Tenth Circuit concluded that an employee or applicant "must establish that he or she initially informed

95. *Abercrombie II*, 731 F.3d at 1122.

96. "In religion-accommodation cases, [the Tenth Circuit] appl[ies] a version of [the] burden-shifting approach" from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Abercrombie II*, 731 F.3d at 1122; *see also McDonnell Douglas*, 411 U.S. at 802–03 ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.").

97. *Abercrombie II*, 731 F.3d at 1143.

98. *Id.* at 1122 (emphasis omitted) (quoting Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1155 (10th Cir. 2000) (emphasis added)).

99. *Id.*

100. *See id.* at 1122–23.

the employer that [he or she] adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's . . . work rule."[101] Therefore, the court imposed a requirement that instructed employees or applicants seeking religious accommodations to show that the employer had "particularized, *actual* knowledge" of the work–religion conflict and the employee's or applicant's religious needs.[102]

The court's "actual knowledge" requirement demands that employers have actual knowledge, rather than an assumption or awareness, of a work–religion conflict between an employee's or applicant's religious practice and the employer's policies and procedures.[103] In adopting this standard, the Tenth Circuit further determined that "even if an employer has particularized, actual knowledge of the religious nature of the practice[,] . . . that still would not be sufficient information to trigger the employer's duty to offer a reasonable accommodation. That is because the applicant or employee may not actually *need* an accommodation."[104] In doing so, the court stated as follows: "[A]n applicant or employee may not consider his or her religious practice to be inflexible . . . . If that is the situation, then there actually is no conflict, nor a consequent need for the employer to provide a reasonable accommodation."[105]

Ultimately, the Tenth Circuit concluded that the district court's grant of summary judgment in favor of the EEOC was improper "because there [was] no genuine dispute of material fact that . . . Elauf never informed Abercrombie," during the course of the interview, about her work–religion conflict or the need for an accommodation due to the conflict.[106] In other words, the court found that the EEOC failed to satisfy "the second element of its prima facie case."[107]

Judge Ebel, concurring in part and dissenting in part, found that the majority's interpretation of the "actual notice" requirement was inconsistent and in direct conflict with other circuits.[108] Pointing to conflicting evidence, Judge Ebel argued that a jury should, in light of the factual disputes, decide whether Abercrombie is liable for religious

101. *Id.*
102. *Id.* at 1125–26.
103. *See id.* at 1128.
104. *Id.* at 1133.
105. *Id.* at 1133–34.
106. *Id.* at 1122.
107. *Id.*
108. *See id.* at 1143–47 (Ebel, J., concurring in part and dissenting in part).

discrimination; therefore, he concluded that the majority erred in granting summary judgment in favor of Abercrombie.[109] Judge Ebel reasoned that—in situations where the employer knew of a potential need for a religious accommodation but the employee did not—it is unreasonable to require the employee to give notice of the potential conflict in order to trigger the protections of Title VII.[110] He also rejected the majority's generalized elements of a prima facie failure-to-accommodate claim in situations—such as Elauf's—where the job applicant was not aware that her religious practice conflicted with the employer's policy; thus, he ultimately found that the majority's interpretation of the prima facie concept was inapplicable in that case.[111]

Following the reversal and grant of summary judgment in favor of Abercrombie, the EEOC petitioned for certiorari—urging the Supreme Court to reject the "actual knowledge" requirement set forth by the Tenth Circuit.[112] The question on which the Supreme Court granted certiorari was, in effect, whether the prohibition of Title VII, which "prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship," is relevant "only where an applicant has informed the employer of [a] need for an accommodation" (i.e., where the employer has actual knowledge of the conflict's existence).[113] The Supreme Court answered that question in the negative, reversing and remanding the Tenth Circuit's decision and holding that in order for a plaintiff's claim to prevail under Title VII, he or she "need only show that [a] need for an accommodation was a motivating factor in the employer's decision."[114] In other words, there is no additional requirement to demonstrate "actual knowledge."[115] Justice Scalia wrote for the majority, which included Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.[116] Justice Alito concurred in the judgment,[117] and Justice Thomas filed an opinion in which he partially concurred and partially dissented.[118]

109. *See id.*
110. *See id.*
111. *See id.*
112. *See Abercrombie III*, 135 S. Ct. 2028, 2031 (2015).
113. *Id.*
114. *Id.* at 2032–34.
115. *See id.*
116. *See generally id.* at 2030–34.
117. *See generally id.* at 2030, 2034–37 (Alito, J., concurring).
118. *See generally id.* at 2030, 2037–42 (Thomas, J., concurring in part and dissenting

Essentially, the Supreme Court interpreted the statutory text to determine whether an employer must have "actual knowledge" of a need for an accommodation in order for a plaintiff to present a prima facie case under Title VII.[119] Relying significantly on the text, the Court concluded that Title VII "does not impose a knowledge requirement."[120] Title VII actually relaxes the causation standard that "appears frequently in antidiscrimination laws," and it "prohibit[s] even making a protected characteristic a 'motivating factor' in an employment decision."[121] Ultimately, the Court rejected the Tenth Circuit's misapplication of Title VII and refused to allocate the burden of raising a religious conflict to the employee or job applicant, concluding Title VII "gives [religious practices] favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual . . . because of such individual's' 'religious observance and practice.'"[122]

Justice Alito, concurring in the judgment, rejected the Tenth Circuit's holding "that Abercrombie was entitled to summary judgment because, except perhaps in unusual circumstances, '[a]pplicants or employees must initially inform employers of their religious practices that conflict with a work requirement and their need for a reasonable accommodation for them'"; he reasoned that "[t]here [was] sufficient evidence in the . . . record to support a finding that Abercrombie's decisionmakers knew that Elauf was a Muslim and that she wore the headscarf for a religious reason."[123] Attempting to distinguish between knowledge and mere suspicion, Justice Alito concluded that some degree of knowledge is required for the employer to be held liable for the employment decision.[124] He specifically stated that "an employer cannot be held liable for taking an adverse action because of an employee's

in part).

119. *See id.* at 2031 (majority opinion).

120. *Id.* at 2032.

121. *Id.* (quoting 42 U.S.C. § 2000e-2(m) (2012)).

122. *Id.* at 2033–34 (second alteration in original) (first quoting 42 U.S.C. § 2000e-2(a)(1); then quoting 42 U.S.C. § 2000e(j) (2012 & Supp. II 2014)); *see also id.* at 2037 (Alito, J., concurring) ("[A] plaintiff need not plead or prove that the employer wished to avoid making an accommodation or could have done so without undue hardship. If a plaintiff shows that the employer took an adverse employment action because of a religious observance or practice, it is then up to the employer to plead and prove the defense.").

123. *Id.* at 2034–35 (Alito, J., concurring) (first alteration in original) (quoting *Abercrombie II*, 731 F.3d 1106, 1142 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015) (emphasis omitted)).

124. *See id.* at 2034–36.

religious practice unless the employer knows that the employee engages in the practice for a religious reason."[125] However, he also noted that "[t]he relevant provisions of Title VII . . . do not impose the notice requirement that formed the basis for the Tenth Circuit's decision."[126] Therefore, Justice Alito ultimately rejected the Tenth Circuit's reasoning and its application of Title VII.[127]

Justice Thomas, concurring in part and dissenting in part, found that the majority incorrectly interpreted and applied the language of Title VII.[128] He said, "Because the [EEOC] can prevail . . . only if Abercrombie engaged in intentional discrimination, and because Abercrombie's application of its neutral Look Policy does not meet that description, [he] would [have] affirm[ed] the judgment of the Tenth Circuit."[129] Accordingly, Justice Thomas dismissed the majority's expansive interpretation and application of Title VII, and he centered his argument on a much narrower interpretation.[130] Specifically, Justice Thomas argued that a narrower interpretation of the statute is necessary to ensure that employers who have not engaged in intentional discrimination are properly protected against frivolous claims.[131] He dismissed the majority's conclusion that "discriminatory motive" alone will suffice to properly establish that the employer engaged in unlawful activity, and he noted that "the majority [left] the door open to this strict-liability theory, reserving the question whether an employer who does not even 'suspec[t] that the practice in question is a religious practice' can nonetheless be punished for *intentional* discrimination"—a "view [that] is plainly at odds with the concept of intentional discrimination."[132] Ultimately, Justice Thomas rejected the majority's determination and concluded that an employer's awareness of an applicant's religious practices is not enough to generate liability; rather, in his opinion, the employer must have actual knowledge that a conflict exists before an employee or applicant can prevail under Title VII.[133]

125. *Id.* at 2035.
126. *Id.*
127. *Id.* at 2037.
128. *See id.* (Thomas, J., concurring in part and dissenting in part).
129. *Id.*
130. *See id.* at 2037–38.
131. *See id.* at 2037–39.
132. *Id.* at 2038–39 (second alteration in original) (quoting *id.* at 2033 n.3 (majority opinion)).
133. *Id.* at 2040–42.

IV. ANALYSIS

In this case, the Supreme Court got it right; the Tenth Circuit incorrectly reversed the district court's grant of summary judgment in favor of the EEOC. Throughout the opinion, the Tenth Circuit relied on the text of Title VII, reaching a determination that the EEOC failed to satisfy all of the elements necessary to establish a prima facie case of religious discrimination.[134] In reaching that decision, the court failed to consider Congress's policies and goals for enacting both Title VII and the subsequent amendment in 1972, and the court's decision did not advance the well-settled purpose of Title VII.[135] Furthermore, the Tenth Circuit's interpretation undercut the concept of equal opportunity—the central objective of Title VII.[136]

Title VII's prime objective is to eliminate discriminatory practices on the basis of "race, color, religion, sex, [and] national origin," but the court's restrictive application of the notice requirement placed significant constraints on the statute's application.[137] In fact, it undermined Congress's objective by permitting employers to choose their employees based on particular attributes—a possibility that Title VII sought to remove from the hiring process.[138] Furthermore, the court's restrictive, explicit notice requirement would allow employers to have a "lack of notice" defense at their disposal, which would permit employers to turn down an applicant based solely on one of the very criteria protected by Congress.[139] That result seemingly authorized employers to turn a "blind eye" to an employee's apparent need for an accommodation, allowing employers to continue discriminatory practices within workplaces. Ultimately, the court's decision seemed to indicate that employers

134. *Abercrombie II*, 731 F.3d 1106, 1131 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

135. *See* Yunus, *supra* note 23, at 657–58 ("Congress intended Title VII to allow individuals to express their religious beliefs freely without being hindered by otherwise facially neutral employment practices. Congress promulgated Title VII not only to prohibit overt religious discrimination, but also to remove impediments caused by neutral regulations that disproportionately impact adherents of minority religions." (footnote omitted)).

136. *See id.* at 685 ("Title VII's objective is to eliminate employment discrimination on the basis of race, color, religion, sex, and national origin."); *see also id.* at 677.

137. 42 U.S.C. § 2000e-2(a)(1) (2012).

138. *See* Yunus, *supra* note 23, at 657–58; *see also* 42 U.S.C. § 2000e-2(a)(1).

139. *See Abercrombie III*, 135 S. Ct. 2028, 2033–34 (2015) ("[R]eligious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.").

retained the ability to intentionally dismiss applicants or employees based on a protected attribute (i.e., religious practices); as a result, an employer's incentive to provide reasonable accommodations under that standard was considerably reduced.

Moreover, the Tenth Circuit's decision seems to demonstrate a severe misapplication of the law and misinterpretation of legislative intent.[140] The majority's opinion diverged from other circuit court decisions; it also created a conflicting interpretation of the well-settled principles of Title VII.[141] The decision ultimately allowed employers to freely discriminate against employees and applicants as long as those employers stayed "a step shy of certainty as to the religious nature of an applicant's practice."[142] Before the Supreme Court stepped in, the decision also seemed to suggest that religious employees and applicants would continue to fall victim to the stringent notice requirement. Indeed, the Tenth Circuit's decision briefly created "a safe harbor for discrimination," equipping employers with the right to knowingly discriminate against an employee or applicant based on what they understood to be a religious practice.[143]

A. A Burdensome Protection

The Tenth Circuit incorrectly applied the "*McDonnell Douglas* burden-shifting framework" because (as the Supreme Court indicated) Abercrombie had the requisite knowledge of Elauf's religious practices.[144] According to the Tenth Circuit, the EEOC did not establish a valid religious-discrimination claim because Elauf failed to request an accommodation for her religious practices prior to Abercrombie's hiring

140. *Id.* at 2034 ("The Tenth Circuit misinterpreted Title VII's requirements in granting summary judgment.").

141. *See Abercrombie II*, 731 F.3d 1106, 1149–50 (10th Cir. 2013) (Ebel, J., concurring in part and dissenting in part) ("The majority disagree[d] with the cases from the[] other circuits (thereby creating a conflict among the circuits) which permit a plaintiff to establish a prima facie failure-to-accommodate claim by establishing that the employer knew, by any means, of a conflict between the plaintiff's religious practice and the employer's work rules."), *rev'd*, 135 S. Ct. 2028 (2015).

142. Brief for the Petitioner at 26, *Abercrombie III*, 135 S. Ct. 2028 (No. 14-86), 2014 WL 6845691, at *26.

143. William Bradford Reynolds, *An Equal Opportunity Scorecard*, 24 GA. L. REV. 1007, 1039 (1987).

144. *See Abercrombie II*, 731 F.3d at 1143–47 (Ebel, J., concurring in part and dissenting in part).

decision.[145] Since the court was reviewing a religious-accommodation claim, it applied the *McDonnell Douglas* burden-shifting framework to determine whether the EEOC satisfied all of the elements necessary to establish a prima facie case.[146] The *McDonnell Douglas* framework is not a concrete formulation,[147] but as previously mentioned, it calls for "the employee [or applicant] to 'show that (1) he or she had a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed his or her employer of this belief; and (3) he or she was fired [or not hired] for failure to comply with the conflicting employment requirement.'"[148]

Here, the Tenth Circuit incorrectly concluded that the EEOC failed to establish the three prongs required for a prima facie case.[149] Specifically, the court said that "the EEOC did not satisfy the second element of its prima facie case [because] . . . Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for this (inflexible) practice."[150] But the EEOC *did* satisfy the second prong because Abercrombie was, at the very least, *aware* of Elauf's religious practice and the conflict between the practice and the corporate clothing policy.[151] In other words, Abercrombie had sufficient notice of Elauf's religious practice. Abercrombie's hiring personnel, Cooke, correctly inferred that Elauf's headscarf was part of her religious practice, and Cooke shared her inference with Abercrombie's District Manager, Johnson.[152] Cooke claimed to have informed Johnson that she believed "Elauf was Muslim and that [Elauf] wore a headscarf for religious reasons."[153] Despite Cooke's and Johnson's awareness of a work–religion conflict, the Tenth Circuit still concluded that Abercrombie did not have the knowledge required to hold it accountable.[154] Thus, the court erroneously limited Title VII's

145. *See id.* at 1131, 1143 (majority opinion).
146. *Id.* at 1122.
147. *Id.* at 1145 (Ebel, J., concurring in part and dissenting in part).
148. *Id.* at 1122 (majority opinion) (second alteration in original) (emphasis omitted) (quoting Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1155 (10th Cir. 2000) (emphasis added)).
149. *See Abercrombie III*, 135 S. Ct. 2028, 2034 (2015).
150. *Abercrombie II*, 731 F.3d at 1143.
151. *See id.* at 1113–14.
152. *Id.* at 1114.
153. *Id.*
154. *Id.* at 1143.

protections by misapplying the requirements of the statutory text.[155] For a brief period, the court seemingly transformed a protective tool into a dangerous weapon that employers could use at will to discriminate against applicants and employees.

Under the approach established by the Tenth Circuit, a Title VII claim fails unless an employee or job applicant directly provides the employer with explicit notice of his or her need for a religious accommodation.[156] The court's stringent approach created a heightened standard that failed to align with Title VII's language and Congress's underlying intent.[157] Elauf was, therefore, denied a religious accommodation even though it was undisputed that Cooke, the assistant manager, believed Elauf wore her hijab for religious purposes and was aware of the potential need for a religious accommodation.[158] Because Elauf did not expressly state her religion or request an accommodation during the course of her interview with Cooke, the court determined that Abercrombie did not engage in unlawful discrimination.[159] Thus, even though an employer had correctly assumed that a conflict existed between its policy and the applicant's religious practice, the court condoned the employer's discriminatory practices because the applicant failed to explicitly request a religious accommodation.[160]

Furthermore, the Tenth Circuit's strict application of Title VII failed to create a consideration of whether the employee or job applicant had knowledge of the employer's policies and procedures—an element that would, of course, be necessary for the employee or applicant to question whether his or her religious practice conflicts with an employer's policy.[161] Without proper knowledge of the employer's policies and procedures, the employee or applicant would be significantly disadvantaged; indeed, the employee or applicant would, in that case, be placed in a position where he or she is unable to satisfy the court's requirements. Although Title VII serves to protect against, among other things, religious discrimination in the workplace, the court's interpretation put the obligation on the employee or applicant to acquire

155. *See Abercrombie III*, 135 S. Ct. 2028, 2034 (2015).
156. *Abercrombie II*, 731 F.3d at 1121, 1131.
157. *See Abercrombie III*, 135 S. Ct. at 2033–34.
158. *See Abercrombie II*, 731 F.3d at 1113–14.
159. *Id.* at 1143.
160. *See id.* at 1113–14, 1125, 1127–29, 1135.
161. *See id.* at 1143–44, 1146–47 (Ebel, J., concurring in part and dissenting in part).

that protection.[162]

The Tenth Circuit not only gave employers an advantage over job applicants and employees but also diminished an employer's burden to provide a reasonable accommodation.[163] Essentially, the court's interpretation provided employers with a "safety net": An employer would not be held liable for religious discrimination if the employer could show that the individual did not provide notice of the religious practice prior to a hiring decision, regardless of the employer's knowledge or inference.[164] Thus, it seemed that employers could simply avoid any interactive dialogue with an employee or job applicant regarding religious practices to ensure that their obligation to provide a reasonable accommodation was never triggered. In other words, employers could presumably escape liability for their discriminatory practices under the approach employed by the Tenth Circuit.

B. The Burdensome Requirement of Actual Knowledge

The Tenth Circuit's formulation of the notice requirement regarding religious-accommodation cases was at direct odds with other authority.[165] On the other hand, the district court (and later the Supreme Court) correctly rejected Abercrombie's argument, stating as follows: "Courts in other circuits have held that the notice requirement is met when an employer has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job."[166] Indeed, other circuits have rejected the heightened notice requirement set forth by the Tenth Circuit in this instance, which, as previously noted, requires an employee or applicant to explicitly notify the employer of the religious belief that conflicts with a work requirement.[167] Those courts have employed a less restrictive approach.[168]

162. *See id.*
163. *See id.*
164. *See id.*
165. *See id.* at 1148–50.
166. *Abercrombie I*, 798 F. Supp. 2d 1272, 1285 (N.D. Okla. 2011), *rev'd*, 731 F.3d 1106 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).
167. *See generally, e.g.*, Dixon v. Hallmark Cos., 627 F.3d 849 (11th Cir. 2010); Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995) (en banc); Heller v. EBB Auto Co., 8 F.3d 1433 (9th Cir. 1993).
168. *See* cases cited *supra* note 167; *see also Abercrombie II*, 731 F.3d at 1148–50 (Ebel, J., concurring in part and dissenting in part) ("[O]ther circuits have held that a job

In *Dixon v. Hallmark Cos.*, the Eleventh Circuit determined that explicit notice of the need for a religious accommodation is not required to hold an employer liable for religious discrimination under Title VII.[169] The Eleventh Circuit rejected the employer's contention that discrimination was not established because the employees never advised the employer of the need for a religious accommodation.[170] In its reasoning, the court focused on the employer's "awareness" of the need, rather than requiring the employees to explicitly notify the employer of the work–religion conflict.[171] The court reasoned that the employer's awareness was enough to satisfy the second prong of the burden-shifting analysis.[172] Therefore, the Eleventh Circuit rejected the "actual knowledge" requirement that was adopted by the Tenth Circuit.[173] The Tenth Circuit, trying to distinguish *Dixon* (and other relevant precedent), incorrectly determined that the EEOC failed to satisfy the second prong;[174] Abercrombie was aware of a potential conflict between its clothing policy and Elauf's apparent religious practice, and that awareness should have been enough.[175]

Furthermore, the Tenth Circuit's decision collided with the text of Title VII, imposing an additional, strenuous burden on employees and applicants—the employee or applicant had to show that the employer had "particularized, *actual* knowledge of the key facts that trigger[ed] its duty to accommodate."[176] This was an additional requirement not provided in Title VII.[177] The text of Title VII was, and still is, silent

applicant or employee can establish a prima facie religious failure-to-accommodate claim if she can show that the employer knew of a conflict between the plaintiff's religious beliefs and a job requirement, *regardless of how the employer acquired knowledge of that conflict*." (emphasis added)).

169. *See Dixon*, 627 F.3d at 856.

170. *See id.*

171. *See id.*

172. *See id.* at 856–57.

173. *See Abercrombie II*, 731 F.3d at 1128 ("[T]here is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process had particularized, actual knowledge—from any source—that . . . Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it." (emphasis omitted)).

174. *See id.* at 1124–31.

175. *See id.* at 1149 (Ebel, J., concurring in part and dissenting in part) ("Thus, where, as here, the employer has knowledge of a credible potential conflict between its policies and the job applicant's religious practices, the employer has a duty to inquire into this potential conflict.").

176. *Id.* at 1125 (majority opinion).

177. *See Abercrombie III*, 135 S. Ct. 2028, 2033 (2015) ("The problem with this

regarding the source of an employer's information, requiring only that an employee or applicant show that he or she was discriminated against due to his or her religion.[178] Nevertheless, the court's decision indicated that the employer must have had "particularized, *actual* knowledge" to be found liable.[179] That heightened standard failed to align with surrounding circuits, and it completely defeated the amended legislation's purpose.[180]

Unlike the Tenth Circuit's interpretation, the text of Title VII does not impose unduly burdensome standards on employees and applicants who need an accommodation due to their religious beliefs; instead, Title VII affords employees and applicants protection through proper accommodations.[181] The court's misapplication of the statutory language placed employees and applicants at a disadvantage during the initial hiring process. Furthermore, the court's interpretation not only required employees and applicants to explicitly notify their employers of a work–religion conflict but also mandated that an employer must have "particularized, *actual* knowledge" of the work–religion conflict.[182] That interpretation empowered employers—who may actually be aware of an employee's or applicant's need for an accommodation—to freely ignore the apparent conflict. It is important to emphasize that the court had created yet another hurdle for applicants and employees to overcome in an effort to gain protection from religious discrimination.[183] Ultimately, the court's determination limited the significance of Title VII and undermined Congress's intent, which was to allow individuals to freely express their religious beliefs without being hindered by otherwise facially neutral employment practices.[184]

Following the Tenth Circuit's decision, job applicants and employees appeared to be left with minimal assistance—destined to continue falling

approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: silence.").

178. *See id.* at 2033–34.

179. *Abercrombie II*, 731 F.3d at 1125.

180. *See id.* at 1148–51 (Ebel, J., concurring in part and dissenting in part).

181. *See id.* at 1143; *see also* 42 U.S.C. § 2000e-2(j), (m) (2012).

182. *Abercrombie II*, 731 F.3d at 1123–25.

183. *See id.* at 1123, 1125–26.

184. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. . . . Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

victim to religious discrimination and the other negative effects of the court's "resolution." The court's decision undermined the primary intention of Title VII, and it eroded the promising progression within employment law.[185] History indicates that Congress did not enact Title VII to impose additional and strenuous burdens on applicants and employees; instead, it enacted (and later amended) Title VII to protect valued civil rights and to forbid the discriminatory actions of employers.[186] Rather than imposing a heightened duty to provide religious applicants or employees with proper accommodations, the court's rigid interpretation of Title VII significantly relaxed the burden and protected employers from possible liability.[187]

The Tenth Circuit's interpretation, along with its misapplication of the law, failed to align with the congressional intent behind the legislation. As noted, the court narrowly interpreted the statute—effectively limiting the scope of protection for religious employees and applicants.[188] Provoked by that interpretation, the Supreme Court engaged in a critical analysis of religious discrimination in the workplace.[189] The Court was faced with an important issue—whether a prospective employer can be held liable for religious discrimination under Title VII "only where an applicant has informed the employer of his need for an accommodation."[190]

In the end, the Supreme Court determined that applicants are not strictly required to establish an employer's actual knowledge of their specific religious practices.

> [T]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice,

185. *See id.* at 429, 431 ("Discriminatory preference for any group, minority or majority, is precisely . . . what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

186. *See id.* at 429–30 ("[Congress's objective] was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."); *see also* 42 U.S.C. § 2000e-2(a)(1).

187. *See Abercrombie II*, 731 F.3d at 1143–47 (Ebel, J., concurring in part and dissenting in part).

188. *See id.*

189. *See Abercrombie III*, 135 S. Ct. 2028 (2015).

190. *Id.* at 2031.

> *confirmed or otherwise*, a factor in employment decisions. . . . If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid [a] prospective accommodation is a motivating factor in his decision, the employer violates Title VII.[191]

The Supreme Court, therefore, correctly reversed and remanded the Tenth Circuit's decision, which had previously held that Elauf was not protected under Title VII because she did not explicitly inform Abercrombie that she wore her headscarf for religious purposes and would, as a result, need a religious accommodation.[192]

The Supreme Court heavily relied on the text of Title VII when determining (1) the scope of an employer's legal duty to properly accommodate an employee's or applicant's religious practice and (2) whether an employer can be found liable for religious discrimination under Title VII only where the applicant or employee gave the employer explicit notice that a religious accommodation was required.[193] Although the Tenth Circuit also considered the statutory language when it set out to determine the scope of an employer's legal duty,[194] the court's conclusion and application of the law differed drastically from that of the Supreme Court, which held that "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."[195] Specifically, the Court noted the significance of 42 U.S.C. § 2000e-2(a)(1), concluding that Title VII "does not impose a knowledge requirement" but instead "relaxes [the] standard . . . to prohibit even making a protected characteristic a 'motivating factor' in an employment decision."[196] Rejecting the Tenth Circuit's interpretation of *religion*, the Supreme Court highlighted that "Congress defined 'religion,' for Title VII's purposes, as 'includ[ing] all aspects of religious observance and practice, as well as belief.'"[197] Therefore, the Court determined that "religious practice is one of the protected characteristics" within the

191. *Id.* at 2033 (emphasis added).
192. *Id.* at 2031, 2034.
193. *See id.* at 2031–34.
194. *See Abercrombie II*, 731 F.3d 1106, 1116, 1128, 1131–32 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).
195. *Abercrombie III*, 135 S. Ct. at 2032.
196. *Id.* (quoting 42 U.S.C. § 2000e-2(m) (2012)).
197. *Id.* at 2033 (alteration in original) (quoting 42 U.S.C. § 2000e(j) (2012 & Supp. II 2014)).

statute, meaning that an accommodation was required.[198]

Notably, the Supreme Court also mentioned that "some antidiscrimination statutes," unlike 42 U.S.C. § 2000e-2(a)(1), "impose a knowledge requirement."[199] Specifically, "the Americans with Disabilities Act of 1990 defines discrimination to include an employer's failure to make 'reasonable accommodations to the *known* physical or mental limitations' of an applicant."[200] The Court was quick to reemphasize that "Title VII contains no such limitation."[201] Rather, the legislation's "intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge."[202] As "[i]t [was] undisputed that Abercrombie rejected Elauf because she wore a headscarf, and there [was] ample evidence in the . . . record to prove that Abercrombie knew that Elauf [was] a Muslim and that she wore the scarf for a religious reason," the Tenth Circuit's judgment in favor of Abercrombie seemed to completely undermine Title VII's overarching purpose, which is, as previously mentioned, to provide protection for an individual's religious observance and practice.[203] Therefore, the judgment could not lawfully stand.[204] In "our increasingly diverse society," the Supreme Court's determination and stern rejection of the Tenth Circuit's holding serves to "defend[] the quintessentially American principles of religious freedom and tolerance"[205] while simultaneously "protect[ing] the rights of workers to equal treatment in the workplace without having to sacrifice their religious beliefs or practices."[206] Ultimately, the Supreme Court's determination properly aligns with the text of, and the primary congressional intent behind, Title VII.

V. CONCLUSION

The Tenth Circuit's misapplication of Title VII disregarded

198. *Id.* at 2033–34.
199. *Id.* at 2032.
200. *Id.* at 2033 (quoting 42 U.S.C. § 12112(b)(5)(A) (2012) (emphasis added)).
201. *Id.*
202. *Id.*
203. *Id.* at 2037 (Alito, J., concurring).
204. *See id.* at 2033–34 (majority opinion); *see also id.* at 2037 (Alito, J., concurring).
205. Press Release, EEOC, 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/Z7RL-X5KE] (quoting David Lopez, general counsel of the EEOC).
206. *Id.* (quoting Jenny R. Yang, chair of the EEOC).

Congress's central objective—to protect employees and applicants in need of religious accommodations.[207] Congress enacted Title VII "to eliminate employment discrimination on the basis of race, color, religion, sex, and national origin,"[208] but employees and applicants across the country still seem to be encountering discriminatory practices from their employers. The Tenth Circuit's decision minimized the scope of protection under Title VII—undermining the congressional purpose behind its enactment and the subsequent amendment in 1972.

However, the Supreme Court's decision clarifies the standard for proving religious discrimination in an accommodation case—brought under Title VII—where there was no explicit request for an accommodation. The Court's decision does not impose a new duty on employers, but it does seem to give deference to the interests of religious applicants and employees. In the future, courts should continue to broadly construe the statutory language of Title VII, seeking to advance the congressional intent behind the legislation, which is to protect, among other things, religious practices in the workplace.

207. *See* Yunus, *supra* note 23, at 677, 685.
208. *Id.* at 685; *see also* 42 U.S.C. § 2000e-2 (2012).