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E.E.O.C. v. ABERCROMBIE & FITCH STORES, INC.[1]—REEXAMINING THE NOTICE REQUIREMENT IN RELIGIOUS ACCOMMODATION CASES

by

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In recent years, the U.S. Supreme Court has addressed a number of cases involving religious claims arising out of the employment relationship. The Court's unanimous decision in the case of *Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C.*[2] recognized a ministerial exception that allowed a religious organization to avoid liability for the violation of an employee's statutory workplace rights if the employee in question was a "ministerial employee." The more contentious 5-4 decision in the case of *Burwell v. Hobby Lobby*[3] affirmed an employer's claim that government regulations, which required employers (including for-profit corporations opposed to the use of contraceptives for religious reasons) to provide no-cost access to contraception on the grounds, were invalid since they violated the Religious Freedom Restoration Act.[4] More recently, the Court, in the case of *E.E.O.C. v. Abercrombie & Fitch, Inc.*, considered the question of whether a job applicant's Title VII religious discrimination claim could prevail even though the applicant had never informed the employer that she needed a religious accommodation.

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As in *Hosanna-Tabor* and *Hobby Lobby,* the party asserting the religious claim prevailed. But, in this case that party was the employee.

I. FACTS

Samantha Elauf was seventeen years old when she applied for a sales job at an Abercrombie store in the Woodland Hills Mall in Tulsa, Oklahoma.[5] Elauf had purchased Abercrombie clothes in the past and was familiar with the clothing brand. Abercrombie, which self-identifies its brand as one that "exemplifies a classic East Coast collegiate style of clothing,"[6] was so committed to its image that it required all of its employees to adhere to a "Look Policy." Under the "Look Policy," employees were required to wear clothes that were, at the very least, similar to those sold in the stores. The policy also prohibited employees from wearing either black clothing or caps. Any employee who failed to comply with the "Look Policy" would be subject to "disciplinary action . . . up to and including termination."[7]

At the time, Elauf applied for the job, Abercrombie's marketing strategy was somewhat unique in that it did not rely on advertising through traditional media outlets such as print publications and television. It chose instead to create a "holistically brand-based, sensory experience" for its target customers when they entered an Abercrombie store.[8] It was considered crucial to this strategy that the sales-floor employees be more than just people who rang up purchases. Abercrombie consistently referred to its sales staff as "models" and expected them to project the Abercrombie experience for its customers. It was Abercrombie's belief that a "model" who violated the "Look" fail[ed] to perform an essential function of the position, and ultimately damage[d] the brand."[9]

When Elauf interviewed for the job, she was wearing clothes that were consistent with the Abercrombie image . . . except for the fact that she was also wearing a hijab.[10] (Elauf considered herself to be a Muslim and, since the age of 13, had followed the example of her mother and worn a headscarf whenever in public or in the presence of male strangers.[11]) Although Elauf was unaware of the "Look Policy" when she applied for the job, she did approach her friend, Farisa Sepahvand, an Abercrombie employee, to find out whether wearing a black headscarf would present a problem. Sephavand, who did not herself wear a headscarf, discussed the matter with Kalen McJilton, an assistant manager at the store who was acquainted with Elauf. McJilton told Sephavand that he thought Elauf could wear a headscarf so long as it was not black. (Abercrombie models were required to wear clothing similar to those sold by Abercrombie and Abercrombie did not sell black clothing.)[12]

Elauf applied for the job and was interviewed by Healther Cooke, the assistant manager in charge of recruiting, interviewing and hiring new employees. Cooke, following Abercrombie's official interview guide, evaluated Elauf in three categories: "appearance & sense of style," whether the applicant is "outgoing & promotes diversity," and whether the applicant has "sophistication & aspiration."[13] According to the interview guide each candidate had to be rated on a 1-3 scale in each category. In order to qualify for a position as a model, a candidate had to receive a score of two or more in appearance and a total score of more than five. Elauf received a score of two in each category, which according to the "Model Group Interview Guide" meant that she had met company's expectations and amounted to a recommendation that she be hired.

During the interview, Cooke never mentioned the "Look Policy" by name to Elauf. She did, however, explain some of the dress requirements including the requirements that the models had to wear clothes similar to those sold by Abercrombie and that they were not to wear heavy make-up or nail polish. Elauf, in turn, never told Cooke that she was a Muslim, never brought up the topic of the headscarf, never indicated that she wore the headscarf for religious reasons, and never asked for a religious accommodation.[14] Later on Cooke would admit in a deposition that she while she "did not know" Elauf's religion, she had "assumed that she was Muslim" and "figured that was the religious reason why she wore her head scarf."[15]

Cooke had the authority to make hiring decisions for the store in the Woodland Hills Mall without seeking the approval of anyone else at Abercrombie. In this particular case, she decided to first check with her store manager before making the job offer to Elauf since she was not sure if Elauf's headscarf would conflict with the company's "Look Policy." When the manager was unable to give her a definitive answer, she contacted the Randall Johnson, the district manager, who told her not to hire Elauf. In a deposition, Cooke testified that she told Johnson that she thought Elauf was a very good candidate. She also alleged that when she told Johnson that Elauf wore a headscarf for what she believed were religious reasons, he responded by saying ""You still can't hire her because someone can come in and paint themselves green and say they were doing it for religious reasons and we can't hire him.""[16] Cooke further claimed that she had informed Johnson that she thought Elauf was a Muslim, a recognized religion, that she wore the headscarf for religious reasons, and, that they should hire Elauf. According to Cooke, Johnson continued to instruct her not to extend a job offer.[17]

Johnson would subsequently deny that he had been told that Cooke thought Elauf wore the headscarf for religious reasons or that he had made the remark about people painting themselves green.[18] He testified that if there had been any question about whether a hijab constituted a prohibited cap, he would have contacted the Human Resources Department for clarification. [19] But, he did state that he thought the wearing of a hijab would violate the "Look Policy" and that "there was no difference between a yarmulke, head scarf, "[o]r a ball cap or a helmet for all that matters. It's still a cap," and if an applicant asked to wear a ball cap for religious reasons, he "[s]till would have denied them, yes, sir.""[20]

After her conversation with Johnson, and as per his instructions, Cooke redid her original written evaluation of Elauf and downgraded the "appearance and sense of style" score to a 1—which lowered the overall score to a 5.[21] The altered score disqualified Elauf for a position at Abercrombie. Elauf only found out that she would not be hired when her friend, Sepahvand, told her that the district manager had instructed Cooke not to offer her a position because of her headscarf.

II. LOWER COURT DECISIONS

A. U.S. District Court

The E.E.O.C filed a lawsuit on behalf of Elauf and against Abercrombie & Fitch, in the U.S. District Court for the Northern District of Oklahoma, alleging religious discrimination based on Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(f)(1) & (3) and Title I of the Civil Rights Act of 1991 (42 U.S.C. § 1981a). Both parties filed Motions for Summary Judgment. The E.E.O.C.'s motion was based "on the issue of liability or, in the alternative, on one or

more elements of its prima facie case and/or on Abercrombie's affirmative defense of undue hardship," and Abercrombie's was based on the assertion that "the E.E.O.C. ha[d] not established a prima facie case, and because an accommodation for Elauf would cause Abercrombie undue hardship."[22]

The District Court began its analysis by making three observations about religious discrimination claims. The first was that 42 U.S.C. § 2000e(j) only applied to those aspects of religious observance and practice of the employee or prospective that an employer was able to reasonably accommodate without undue hardship on the conduct of the employer's business. The second was to indicate that the applicable burden-shifting approach for this kind of case was that of *McDonald Douglas Corp. v. Green*.[23] And, the third was to show how the Tenth Circuit had applied that burden-shifting approach in the case of *Thomas v. National Ass'n of Letter Carrier.*[24] In *Thomas,* the plaintiff had the initial burden of showing that: 1. the plaintiff had a bona fide religious belief that conflicts with an employment requirement; 2. the plaintiff had informed the employer of this belief; and 3. the plaintiff had not been hired because he or she failed to comply with the employment requirement.[25] The burden then shifted to the defendant to: 1. conclusively rebut one or more elements of the plaintiff's prima facie case; 2. show that it had offered a reasonably accommodation, or 3. show that it was unable to accommodate the employee's religious needs reasonably without undue hardship.[26] The Tenth Circuit, in *Thomas,* also noted that there was a significant difference in the burden shifting approach for disability and religious discrimination cases as opposed to other types of discrimination cases:

> In [an ADA or religious failure to accommodate] case, the Congress has already determined that a failure to offer a reasonable

> accommodation to an otherwise qualified disabled employee is unlawful discrimination. Thus, we use the burden-shifting mechanism, not to probe the subjective intent of the employer, but rather simply to provide a useful structure by which the district court, when considering a motion for summary judgment, can determine whether the various parties have advanced sufficient evidence to meet their respective traditional burdens to prove or disprove the reasonableness of the accommodations offered or not offered.[27]

The District Court had no problem concluding that the plaintiff met the requirements, articulated in both *McDonald Douglas* and *Thomas*, for establishing a prima facie case. There was evidence that Elauf wore the headscarf based on her understanding of the Koran. The Abercrombie "Look Policy" prohibited the wearing of head coverings. Abercrombie had notice that the reason Elauf wore the headscarf was because of a religious belief. Finally the defendant did not hire the plaintiff because to wear a headscarf would be in violation of the "Look Policy."[28]

The defendant's rebuttal of the plaintiff's prima facie case had centered on two issues. The first was whether the wearing of a headscarf was based on a bona fide religious belief and whether Elauf, in fact, wore her hijab for a religious reason. The second was whether the notice requirement had been met. In response to the first claim, the District Court cited three U.S. Supreme Court cases. In 1953, the Supreme Court had held that "it is no business of the courts to say . . . what is a religious practice or activity."[29] Twelve year later, the Supreme Court held that an action was a "bone fide religious belief" if it was religious within the plaintiff's own scheme of things and was

sincerely held.[30] Thus, the individual's assertion "that [her] belief is an essential part of a religious faith must be given great weight."[31] The most recent of the cited cases went even further and held that if a person's beliefs were religiously based, it was not for the court to question whether those beliefs were "derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible."[32]

It was Abercrombie's claim that women wore hijabs for a variety of non-religious reasons, including cultural and nationalistic ones. The defendant also asserted that the Quran did not explicitly require Islamic women to wear headscarves. In response to the first assertion, the court noted that there was nothing in the record to indicate that Elauf's decision to begin wearing the hijab when she was thirteen was based on any reason other than her religious beliefs. As for the fact that the Quran does not require women to wear head coverings, the district court, citing a Seventh Circuit case,

> [N]ote[d] that to restrict [Title VII claims] to those practices which are mandated or prohibited by a tenet of religion, would involve the court in determining not only what are the tenets of a particular religion, which by itself perhaps would not be beyond the province of the court, but would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion. We find such a judicial determination to be irreconcilable with the warning issued by the Supreme Court.[33]

The District Court concluded that even though Elauf did not consider Muslim women to be bad Muslims if they did not

wear hijabs, she wore the hijab based on the Quran's teaching that women should be modest. As such, her wearing of the hijab was based on a religious belief.

The District Court also dismissed Abercrombie's challenge to the sincerity of Elauf's religious belief based on the fact that she did not know the street address of her mosque, did not regularly attend Friday services, and did not prayer five times a day every day. In this matter, the court agreed with the Second Court of Appeals that "it was appropriate, indeed necessary, for a court to engage in an analysis of the sincerity—as opposed to the verity—of someone's religious beliefs in . . . the Title VII context."[34] It was legitimate to do a sincerity analysis "to differentiat[e] between beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud."[35] The District Court limited its sincerity inquiry to the question of whether Elauf believed that she was required to wear the headscarf and not to whether she followed all of the tenets of the Islamic faith. The only accommodation in this case involved the wearing of a headscarf. And, the issue was whether Elauf's motivation was a matter of conscience or a matter of deception and fraud. The District Court rejected Abercrombie's argument that Elauf's sincerity was an issue of credibility—and a matter properly decided by a trier of fact—and concluded that there was nothing in the record to dispute the fact that she wore the headscarf based on a bone fide religious belief.

Abercrombie's more interesting argument involved the issue of whether, under the Civil Rights Act, the company could be liable for failing to reasonably accommodate Elauf if she had not explicitly notified the company that she needed a religious accommodation to wear the headscarf. While the Courts of Appeal in the Eighth, Ninth, and Eleventh Circuits had ruled that the notice requirement could be satisfied if "the

employer has enough information to make it aware there exits a conflict between the individual's religious practice or belief and a requirement for applying for or performing a job,"[36] the Tenth Circuit had not addressed this particular matter. The Tenth Circuit had, however, acknowledged that notice was essential to the interactive process leading to accommodation[37] and that it was the employee who ordinarily provided the employer with notice of a need for an accommodation.[38] The District Court concluded, "since the purpose of the notice requirement was to facilitate the interactive process and prevent ambush of an unwitting employer . . . it was enough that the employer has notice an accommodation is needed."[39] Abercrombie did not need to receive an explicit request from Elauf. In this instance, the fact, that Elauf wore her headscarf to the interview and the assistant store manager who interviewed her knew that the headscarf was worn for religious reasons, meant that Abercrombie could not rebut the second element of the prima facie case. Abercrombie had notice that Elauf wore a headscarf based on her religious belief.

Abercrombie's final argument was that even if it did not rebut the prima facie case, it should still prevail on the grounds that it would be an "undue hardship" for the retail firm to accommodate Elauf. Noting that an "undue hardship" constitutes something "more than a de minimus cost"[40] and that the proffered hardship must be actual and not the result of mere speculation,[41] the District Court concluded that Abercrombie's unsubstantiated claim that allowing Elauf to wear a headscarf would have a negative impact on the brand, sales and compliance failed to meet the burden of establishing an undue hardship and denied Abercrombie's motion for summary judgment. The E.E.O.C.'s motion for a partial summary judgment was granted and the case went to trial to determine the issue of damages. The jury awarded $20,000 in damages but denied prospective injunctive relief.

B. U.S. Court of Appeals (10th Circuit)

In its appeal to the Tenth Circuit, Abercrombie argued that allowing Elauf to wear a headscarf would create an undue hardship for the company and require an accommodation that was not based on a sincerely held religious belief. In addition, and, more importantly, the appellant claimed that the company should not be liable for failing to make an accommodation since Elauf had not properly notified Abercrombie that she wore the headscarf for religious reasons and that she needed a religious accommodation. In its de novo review of the record, the appellate court reversed the trial court's denial of Abercrombie's motion for summary judgment, reversed the granting of the E.E.O.C.'s motion for a summary judgment, and remanded the case to the district court instructing it to vacate its judgment and enter one in favor of Abercrombie.

The Circuit Court began by examining the meaning of the term "religion" as it is understood in the context of Title VII of the Civil Rights Act. According to the *E.E.O.C. Compliance Manual*, religion is broadly defined under Title VII and it "includes not only traditional organized religions such as Christianity, Judaism, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem unreasonable to others."[42] But, the Compliance Manual also recognizes that "[w]hether a practice is religious depends on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons."[43] The Circuit Court identified two significant implications stemming from the E.E.O.C.'s general principles for the enforcement of Title VII proscriptions against religious discrimination. The first was that it was possible for an applicant or employee to engage in a practice that was associated with a particular religion, but to do

so for cultural or other reasons that were not religious.[44] The second was that unless a person's conduct is based on religious beliefs that have "a distinctive content related to ultimate ideas about life, purpose, and death,"[45] that conduct is outside of the "protective ambit" of Title VII.

The Circuit Court went on to explain that in order to successfully make a claim for a religious accommodation, there must be a true conflict between the employee's religious practice and the employer's neutral policy. The employee must consider the religious practice in question to be inflexible and required by his or her religion.[46] On the other hand, there is no actual conflict, and therefore no need for an accommodation, if the employee neither feels obliged to adhere to the practice nor considers it to be an inflexible practice.

The appellate court held that the discussion about whether an employee has a religious belief or practice that must to be accommodated was one that needed to be initiated by the employee and not the employer. It cited the E.E.O.C. publication, *Best Practices for Eradicating Religious Discrimination in the Workplace*, which cautioned that the employer should "avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate."[47] This would include insuring that its managers and employees were trained not to make stereotypical assumptions based on a person's religious dress and grooming practices. It was only after the employee puts the employer on notice of a religious conflict that the employer may ask for additional information to determine whether an accommodation was necessary and available.[48]

The Tenth Circuit used its own modified version of the *McDonnell Douglas* burden-shifting approach for religious accommodation cases as it had set forth in *Thomas v. National*

Ass'n of Letter Carriers.[49] That test was the same one presented by the District Court. (In order to establish a prima facie case the employee had to show that he or she had a religious belief that conflicted with an employment requirement; that the employee informed the employer of that belief; and that the employer either failed to hire or fired the employee because of the employee's failure to comply with an employment requirement.) The appellate court, however, focused on the second element of the employee's prima facie case and concluded that Elauf had not informed her employer directly of a particular religious need to wear a headscarf. The E.E.O.C. had tried to argue that there were additional permissible ways for an employer to be put on notice that the employee had a particular religious belief. The court, however, found that even if an employer had some notice that a religious belief existed, the employer would still lack knowledge as to whether the employee considered the religious practice to be inflexible and in conflict with an employment requirement, and, therefore, in need of a reasonable accommodation.[50] In this case, "there is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process had such *actual* knowledge—*from any source*—that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it."[51] The Court of Appeals concluded that most that could be said was that the person who conducted the interview *assumed* that Elauf "wore her hijab for religious reasons and felt religiously obliged to do so—thus creating a conflict with Abercrombie's clothing policy."[52] The assistant manager's subsequent call to the regional manager to find out if wearing a hijab for religious reasons would violate the "Look Policy" was also derived from assumptions about Elauf and not on any actual knowledge that an accommodation would be necessary.

Much of the Circuit Court's rationale for reversing the lower court's decision was based on its conclusion that an employer was only permitted to engage in an interactive religion-accommodation discussion with the employee after the employer had actual knowledge that the employee had a sincere religious belief and that that belief required the employee to follow a religious practice that was in conflict with the employment requirements.[53] One of the court's concerns was that if the employer initiated a conversation with an applicant or employee about possible religious beliefs (without the topic being brought up by the applicant/employee), it could be viewed as non-job related inquiry and, therefore, in violation of the Civil Rights Act. Another concern was that in religious accommodation cases, the employee needed to establish that the actual motivation for following a particular practice was, in fact, of a religious nature. While some people might follow a practice for religious reasons, that does not mean that everyone following that practice is similarly motivated. "A person's religion is not like his sex or race—obvious at a glance. Even if [the person] wears a religious symbol, such as a cross or a yarmulke, this may not pinpoint [*that person's*] *particular beliefs and observances."*[54] An employer need not be familiar with all traditionally religious practices and should not be required to speculate on whether an employee follows such a practice for a religious reason. "Religion is a uniquely personal and individual matter."[55] It is the duty of the employee to give the employer fair warning of employment practices that interfere with his or her religion . . . and, in addition, to inform the employer that the employee considers the religious practice to be inflexible and in need of a reasonable accommodation by the employer.

According to the Tenth Circuit, the employee's affirmative obligation to inform the employer of a need for a religious

accommodation is met when the employee or applicant "provide[s] enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job."[56] The court saw no justification for granting deference to the E.E.O.C.'s contention that the plain language in its manual could be disregarded when the employer had notice of a religious belief and the need for a religious accommodation from a source that did not involve an explicit communication from the employee. It concluded instead that under a natural reading of the regulation in question, "the employer's obligation to provide a reasonable religious accommodation would be triggered only when applicants or employees explicitly informed the employer of their conflicting religious practice and need for an accommodation."[57]

In a separate opinion that concurred in part and dissented in part, Justice Ebel stated that while the trial court should not have granted the E.E.O.C.'s motion for summary judgment, it also should have left it for a jury to decide whether Abercrombie was liable for religious discrimination. His opinion was based on three conclusions. The first was that the majority's second requirement for establishing a prima facie case (which required showing that Elauf had informed the employer that its "Look Policy" conflicted with her religious beliefs) was inflexible and made no sense under the law and the circumstances of the case.[58] The second was that the plaintiff had, in fact, established a prima facie claim that Abercrombie had failed to reasonably accommodate Elauf's religious practice.[59] And, finally, summary judgment in favor of either party was inappropriate since Abercrombie's evidence contradicted the prima facie evidence and created a triable issue of fact whether the defendant had failed to accommodate the plaintiff's religious practice of wearing a headscarf.[60]

C. U.S. SUPREME COURT DECISION

1. Majority Opinion

The U.S. Supreme Court reversed the decision of the Tenth Circuit and remanded the case for further consideration. The majority opinion was delivered by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayer, and Kagan. Justice Alito filed a separate concurring opinion and Justice Thomas filed an opinion concurring in part and dissenting in part.

The majority decision focused on one issue--whether an applicant's Title VII disparate treatment claim, which was based on an employer's refusal to hire the applicant in order to avoid having to make a reasonable accommodation for a religious practice, could succeed if the applicant had failed to inform the employer of the need for an accommodation.[61] The majority opinion rejected Abercrombie's claim that the employer had to have "actual knowledge" of the applicant's need for an accommodation and focused instead on whether the employee's need for an accommodation was a motivating factor behind the employer's refusal to hire the applicant.

Not surprisingly, Scalia began the opinion with a textual analysis of Title VII of the Civil Rights Act. For the purposes of the statute, "religion" "includ[ed] all aspects of religious observance and practice, as well as belief, unless the employer demonstrates that he is unable to reasonably accommodate to" a "religious observance or practice without undue hardship on the conduct of the employer's business."[62] In a disparate-treatment claim, the plaintiff must be able to establish three things: 1. the employer "fail[ed] . . . to hire" the applicant; 2. "because of"; 3. "such individual's . . . religion" (including the applicant's religious practice.) In this case "Abercrombie (1)

failed to hire Elauf and since the parties concede that (if she sincerely believed that wearing a headscarf was required by her religion) Elauf's wearing of a headscarf was (2) a "religious practice", then the only issue to be decided was whether she was not hired (3) "because of" her religious practice."[63]

The majority opinion noted that while many anti-discrimination statutes include the phrase "because of," they do not necessarily use it in the same way. In most instances, the phrase can, minimally, be interchanged with the traditional standard of "but-for" causation. That, however, is not what occurs in Title VII cases where the meaning of the phrase is relaxed to the extent that it would prohibit allowing a protected characteristic to be a "motivating" factor in an employment decision.[64] As such, the Court concluded that the use of "because of" in 42 U.S.C. §2000e-2(a)(1) "links the forbidden consideration to each of the verbs preceding it; an individual's actual religion practice may not be a motivating factor in failing to hire, in refusing to hire, and so on."[65]

The Court specifically differentiated Title VII cases from cases brought under the Americans with Disability Act of 1990 (ADA).[66] Under the ADA, the requirement to make "reasonable accommodations" only applies when the employer has actual knowledge of the applicant's physical or mental limitations.[67] A similar knowledge requirement is missing for Title VII cases. Under Title VII, knowledge and motivation are considered to be separate concepts. In a disparate treatment case, actions taken by an employer may result in liability when they are based on the employer's motives regardless of what the employer actually knows about the applicant. Consequently, an employer would be liable if the motive for not hiring an applicant is to avoid making a reasonable accommodation—even if that action is based on nothing more than an "unsubstantiated suspicion" that an accommodation

would be needed. Conversely, an employer who had actual knowledge of the need for an accommodation would not be liable if the reason for not hiring the applicant was not motivated by a desire to avoid accommodation.[68]

The Supreme Court announced a straightforward rule for disparate-treatment cases. "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."[69] This was different from the rule followed in the Tenth Circuit that placed the burden on the applicant to inform the employer that there was a religious conflict between the religious practice and the job requirements. Scalia characterized that rule as the product of a flawed statutory interpretation. The lower court had simply added words to the law in order to get a desired result. Although Congress could have included the requirement in the statute, it decided not to do so. It chose instead to prohibit actions "taken with the *motive* of avoiding the need for accommodating a religious practice."[70] (In dictum, the Supreme Court noted that it would leave for future consideration the issue of whether the applicant must show that the employer, at the very least, suspected that the practice in question was a religious practice in order for the motive requirement to be met. The Court was not required to consider it in this instance, since Abercrombie knew, or at least suspected, that the practice was religious.)

The majority opinion concluded with a rejection of Abercrombie's claim that the case was inaccurately argued as a disparate-treatment case rather than a disparate-impact claim. The Court presented two reasons for its conclusion. The first was based on the fact that the definition of religion in Title VII included "all aspects of religious observance and practice, as well as belief."[71] Since a religious practice is a protected characteristic under the statute, discrimination based on that

practice would in fact raise a valid disparate treatment claim. The second reason was that the Court rejected the employer's claim that disparate-treatment can only apply to cases where the employer's policies treat religious practices less favorably than similar secular practices. A neutral policy might result in intentional discrimination. But, that is not enough. Under Title VII religious practices are given "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.""[72] Abercrombie's policy prohibiting headgear was otherwise neutral with regard to all employees. However, without an accommodation, the otherwise-neutral policy discriminated against Elauf because of her religion.

2. Concurring Opinion

Justice Alito's concurring opinion agreed that Title VII did not impose the Tenth Circuit's interpretation of the notice requirement on the applicant. He did, however, assert that Title VII provided for a knowledge requirement by the employer. It seemed obvious to Alito that "an employer cannot be held liable for taking an adverse action because of an employee's religious practice unless the employer knows that the employee engages in the practice for a religious reason."[73] Alito's concern with the majority's approach was that an unknowing employer could be held liable for not hiring an applicant even though the employer honestly thought that the applicant wore the scarf for secular reasons and did not know the applicant was a Muslim. He suggested that it was "entirely reasonable to understand the prohibition against an employer's taking an adverse action because of a religious practice to mean that an employer may not take an adverse action because of a practice that the employer knows to be religious."[74] Intentional discrimination is "blameworthy conduct" for which an

employer should be held liable only when there is a knowledge requirement. Alito's concern was that an employer would not even know to begin to consider accommodating a practice if there was no knowledge that the practice was of a religious nature.

Alito concluded by taking exception with the majority's assertion that the plaintiff had the burden of proving that the employer failed to accommodate the religious practice.[75] He argued instead that Title VII specifically states "it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of [any aspect of] such individual's . . . religious . . . practice . . . *unless an employer demonstrates that he is unable to reasonably accommodate to [the] employee's or prospective employee's religious . . . practice . . . without undue hardship on the conduct of the employer's business."*[76] (Emphasis added by Alito.) While he concedes that the burden is on the plaintiff to prove that the employer failed to or refused to hire the employee because of a religious practice, he also argues that the burden of proof is on the employer to demonstrate that it was unreasonable to accommodate the employee's religious practice without undue hardship.

3. Opinion Dissenting in Part and Concurring in Part

Justice Thomas concurred with the majority only to the extent that he agreed that there were two causes of action under Title VII—a disparate treatment claim and a disparate impact claim. His far more serious disagreement with the majority rested on his belief that the *Abercrombie* case was, in fact, a disparate impact case.

According to Thomas, intentional discrimination required the employer to treat a person less favorably than others because of a protected trait.[77] Disparate-impact discrimination, on the only hand, "involve[d] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[78] It followed then that Abercrombie did not engage in "intentional discrimination" since it had a neutral dress code policy that did not treat religious practices less favorably than similar secular practices. Absent an accommodation, on the other hand, its policy would fall more harshly on someone who wore headscarves as a religious practice.

Thomas' problem with the majority opinion was that he thought it ignored the relevant statutory text and twisted the meaning of "intentional treatment" to include refusing to give a religious applicant "favored treatment."[79] Thomas contended that inserting the Title VII definition of religion[80] onto Title VII's specific charge that it is illegal "to fail or refuse to hire . . . any individual . . . because of such individual's . . . religion"[81] did not resolve the question of whether Elauf had been rejected "because of her religious beliefs." Thomas identified two possible ways of applying the "because of one's religion" provision in disparate treatment cases. One would make it illegal to base an employment decision on the religious nature of the particular practice of the employee. The other would make it illegal to make an employment decision based on the fact that the employee's practice *happens* to be religious.[82] The problem with the second approach is that it would make the employer liable even though the employer had no discriminatory motive. For Thomas this would result in a strict liability situation that would preclude the employer from asserting a defense that the employer had no idea that the particular practice was, in fact, religious.[83]

While Thomas did not accuse the majority of creating a strict liability option for cases alleging intentional religious discrimination, he did contend that the Court had opted for a compromise that would punish employers "who refuse to accommodate applicants under neutral policies when they act "with the motive of avoiding accommodation.""[84] As a result, the employer in a religious discrimination case based on disparate treatment case might have to demonstrate that his or her actions constituted something more than equal treatment.[85] Thomas applauded the majority for "put[ting] to rest the notion that Title VII creates a freestanding religious-accommodation claim" but disagreed with the Court's "creat[ion] in its stead [of] an entirely new form of liability: the disparate-treatment-based-on-equal-treatment claim."[86]

D. CONCLUSIONS

During oral arguments, Justice Alito presented a hypothetical to the attorney for Abercrombie & Fitch. Four people show up for a job interview. One is a Sikh man wearing a turban. The second is a Hasidic man wearing a hat. The third is an Islamic woman wearing a hijab. And, the fourth is a Catholic nun wearing a habit. Would the applicants have an affirmative obligation to explain to the employer that they dressed the way they did for religious reasons? And, if they did not provide that information to the employer, would the employer (assuming that the applicants *might* need some kind of a religious accommodation) be liable under Title VII for refusing to hire them in order to avoid possible accommodation issues?

The Tenth Circuit clearly thought that a job applicant had an affirmative obligation to inform a prospective employer that there was a need for a reasonable accommodation based on

religious beliefs. If the applicant failed to give that information to the employer, the employer would not have an obligation to even raise the issue of reasonable accommodations. Under the Supreme Court's ruling, an applicant could claim disparate treatment even though the applicant failed to provide the employer with actual knowledge of the need for a reasonable accommodation. The only thing that the applicant would have to prove is that the employer's assumption or suspicion of a possible need to accommodate was the motivating factor in denying employment. The Court suggested, at least in oral arguments, that the best practice in situations where the employer has reason to believe that a particular applicant might need a reasonable accommodation would be for the employer to inform the applicant of all the job requirements and then to ask if the applicant would have any problem complying with them. In the *Abercrombie* case, the person who conducted the interview suspected that Elauf wore the headscarf for religious reasons. And, even though she told Elauf some of the particulars about "The Look" policy, she never mentioned that Abercrombie models were prohibited from wearing caps or black clothing. As far as the applicant was concerned, there was no reason to ask for a religious accommodation. What the assistant manager should have done instead was to inform Elauf all of the particulars of "The Look" policy (including the prohibition regarding caps) and then to have asked whether she would have any problem complying with the policy.[87] If Elauf had said that she had no problems with the requirements, then the employer would have had no obligation to enter into a discussion about a religious accommodation. If, on the other hand, Elauf had informed the interviewer that she had a problem because she wore her headscarf for religious reasons, she would have put the employer on notice that there was a need for an accommodation.

In this particular case, the Supreme Court never had to address the question of whether it was possible for Abercrombie to reasonably accommodate Elauf's need to wear a hijab. The legal issue was not whether the employer had refused the applicant's request for a reasonable accommodation. It was simply whether the employer's suspicions that the applicant might need a religious accommodation constituted sufficient notice to meet the second prong of employee's burden of proof in a disparate treatment case. The *Abercrombie* case affirmed that an applicant could prevail, even though the applicant had not informed the employer of the need for a religious accommodation, if the applicant can show that the motivating factor in the employer's decision not to hire the person was the possibility of having to make a religious accommodation. When Justice Scalia announced the Court's decision from the bench, he indicated that it was an easy decision. "Title VII forbids adverse employment decisions made with a forbidden motive whether this motive derives from actual knowledge, a well-founded suspicion or merely a hunch."[88]

ENDNOTES

[1] 575 U.S. ______; 135 S. Ct. 2028 (2015).

[2] 565 U.S. 171; 132 S. Ct. 694 (2012).

[3] 573 U.S. _____; 134 S. Ct. 2751 (2014).

[4] 42 U.S.C. ch. 21B § 2000bb et seq.

[5] Abercrombie is a large retail clothing company in the United States. Its stores include Abercrombie & Fitch, Abercrombie Kids, and Hollister. Elauf applied to work in an Abercrombie Kids store. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 731 F.3d 1106, 1111 (10th Cir., 2013).

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[6] Id. at 1111, citing Aplt. Opening Br. At 5.

[7] Id. at 1111, quoting Aplee. Supp. App. at 69 (Abercrombie Store Associate Handbook, dated Sept. 2006.)

[8] Id. at 1111, citing Aplt. App. at 70 (Dep. of Deon Riley, taken Mar. 17, 2011. ("Abercrombie has made a name because of brand. It's a fact that you walk into an environment, and its not just the smell or the sound, it's the way the merchandise is set up. It's the lighting. Most of all, it's the stylish clothing . . .")

[9] Id. at 1111-1112 quoting Aplt. Opening Br. at 8.

[10] A hijab is a head covering commonly worn by Islamic women. Elauf's headscarf only covered her hair and differed from other hijabs that also cover a woman's her face, neck, and shoulders.

[11] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 798 F. Supp. 2d 1272, 1276 (ND. Okla., 2011, citing Dkt. #68, Ex. 2, Elauf Dep., 30: 23-31: 10; 31: 14-16; 32: 7-33: 5.

[12] *Id.* at 1277, citing Dkt. #68, Ex. 2, Elauf Dep., 57: 7-58: 2; 56: 17-57: 12; Ex. 17.

[13] *Supra,* n. 5, at 1113, citing Aplee. Supp. App. At 61 (Model Group Interview Guide, dated June 26, 2008.)

[14] *Id.* at 1113.

[15] *Id.* at 1113.

[16] *Supra,* n. 11, at 1278, quoting Dkt. #68, Ex. 4. Cooke Dep., 107: 14-108: 5.

[17] *Id.* at 1278.

[18] *Id.* at 1278, citing DKT #68, Ex. 5, Randall Johnson Dep., 86: 4-21.

[19] *Id.* at 1278, citing DKT #68, Ex. 5 Randall Johnson Dep., 48: 24-49:10.

[20] *Id.* at 1278, quoting DKT #68, Ex. 5 Randall Johnson Dep., 71: 13-72: 3.

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[21] *Id.* at 1279, citing DKT #68, Ex. 4 Cooke Dep., 122: 13-25.

[22] *Id.* at 1275.

[23] 411 U.S. 792, 93 S. Ct. 1817 (1973).

[24] 225 F. 3d 1149 (10th Cir. 2000).

[25] *Supra,* n. 11, citing *Thomas, id.* at 1155.

[26] *Id.* at 1283, citing *Thomas, id.* at 1156.

[27] *Id.* at 1282, quoting *Thomas, id.* at 1155.

[28] *Id.* at 1283.

[29] *Id.* at 1283, quoting *Fowler v. Rhode Island*, 345 U.S. 67, 70; 73 S.Ct. 526 (1953).

[30] *Id.* at 1283*,* citing *United States v. Seeger*, 380 U.S. 163, 185; 85 S.CT. 850 (1965).

[31] *Id.* at 1283, citing *Fowler, supra,* n. 29*,* at 184.

[32] *Id.* at 1283, quoting *Hobbie v. Unemployment Comm'n of Fla.,* 480 U.S. 136, 144 n. 9, 107 S. Ct. 1046 (1987).

[33] *Id.* at 1284, quoting *Redmond v. GAF Corporation,* 574 F. 2d 897, 900 (7th Cir. 1978).

[34] *Id.* at 1284, quoting *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 481 (2d Cir. 1985).

[35] *Id.* at 1284, quoting *Philbrook, id.* at 482.

[36] *Id. at* 1285, citing *Dixon v. Hallmark Cos.,* 627 F. 3d 849, 856 (11th Cir. 2010); *Brown v. Polk County, Iowa,* 61 F. 3d 650, 654 (8th Cir. 1995); *Heller v. EBB Auto Co.,* 8 F. 3d 1433, 1439 (9th Cir. 1993); and *Hellinger v. Eckerd Corp.,* Fed. Supp. 2d 1359, 1362 (S.D. Fla. 1999).

[37] *Id.* at 1285, citing *Thomas, supra,* n. 24, at 1155.

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[38] *Id.* at 1285, citing *Smith v. Midland Brake, Inc.,* 180 F. 3d 1154, 1171-72 (10th Cir. 1999) (en banc).

[39] *Supra,* n. 5, at 1186.

[40] *Supra,* n. 11, at 1287, quoting *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84 (1977).

[41] *Id.* at 1287, citing *Toledo v. Nobel-Sysco, Inc.,* 892 F. 2d 1481, 1492 (10th Cir. 1989).

[42] *Supra,* n. 5, at 1117, quoting *E.E.O.C. Compliance Manual* § 12-I(A)(1).

[43] *Id.* at 1117, quoting *E.E.O.C. Compliance Manual* § 12-I(A)(1).

[44] *Id.* at 1119.

[45] *Id.* at 1119.

[46] *Id.* at 1120.

[47] *Id.* at 1121, at http://www.eeoc.gov/policy/docs/best_practices_religion.html.

[48] *Id.* at 1121.

[49] *Id.* at 1122 , citing *Thomas, supra*, n. 24.

[50] *Id.* at 1125.

[51] *Id.* at 1125.

[52] *Id.* at 1125.

[53] *Id*. at 1131.

[54] *Id.* at 1132, quoting *Reed v. Great Lakes Cos.*, 330 F.3d 931, 935-36 (7th Cir. 2003).

[55] *Id.* at 1132.

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[56] *Id.* at 1135, quoting *E.E.O.C. Compliance Manual* § 12-IV(A)(1).

[57] *Id.* at 1140.

[58] *Id.* at 1143.

[59] *Id.* at 1147.

[60] *Id.* at 1151.

[61] *Supra,* n. 1, at 2031.

[62] *Id.* at 2032, quoting 42 U.S.C §2000e-2(a).

[63] *Id.* at 2032.

[64] *Id.* at 2032, citing 42 U.S.C. §2000e-2(m).

[65] *Id.* at 2032.

[66] 42 U.S.C. §12101ff.

[67] *Supra* n. 1, at 2033, citing *id.* at §12112(b)(5)(A).

[68] *Id.* at 2033.

[69] *Id.* at 2033.

[70] *Id.* at 2033.

[71] *Id.* at 2033, quoting 42 U.S.C. §2000e(j).

[72] *Id.* at 2034.

[73] *Id.* at 2035.

[74] *Id.* at 2035.

[75] *Id.* at 2036. See also, *id.* at 2032, n. 2.

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[76] *Id.* at 2036. This represents J. Alito's combining of §2000e-2(a) and §2000e(j) of the Civil Rights Act of 1964.

[77] *Id.* at 2037, citing *Ricci v. DeStefano,* 557 U.S. 557, 577, 129 S. Ct. 2658 (2009).

[78] *Id.* at 2037, quoting *Raytheon Co. v. Hernandez,* 540 U.S. 44, 52, 124 S. Ct. 513 (2003).

[79] *Id.* at 2038.

[80] *Id.* at 2038. "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." §2000e(j).

The original Title VII, enacted in 1964, prohibited discrimination "because of . . . religion." It was not until 1972 that the statute was amended to include the current expanded definition of "religion" that also encompasses "religious observance and practice."

[81] *Id.* at 2038, citing §2000e-2(a)(1).

[82] *Id.* at 2038.

[83] *Id.* at 2039.

[84] *Id.* at 2039.

[85] *Id.* at 2039.

[86] *Id.* at 2041.

[87] The inquiry by the employer should be framed in neutral terms. The employer should avoid the stereotypical question: "You're a nun. Do you need to wear the habit?" The more appropriate question would be: "This is our dress code policy. Do you have any problems complying with it?"

[88] Liptak, Adam, *Muslim Woman Denied Job Over Head Scarf Wins in Supreme Court,* NY Times, June 1, 2015.