

# KEEPING CIVIL RIGHTS DEBATES CIVIL: REMOVING OPPORTUNITIES FOR PREJUDICE

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## INTRODUCTION

Religious freedom played a large role in the founding of the United States of America and continues to be one of America's key tenets. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>1</sup> Laws governing religious freedom and equality in the United States, however, go beyond these First Amendment prohibitions.

Title VII of the Civil Rights Act of 1964 is one such attempt by Congress to reinforce religious rights by forbidding employers from discriminating against their employees or prospective employees on the basis of religion.<sup>2</sup> This statute extends the First Amendment's protections of religious minorities by prohibiting private employers from discriminating against their employees and applicants on the basis of religion.<sup>3</sup>

In *Equal Employment Opportunity Commission v. Abercrombie & Fitch*,<sup>4</sup> the Supreme Court will decide whether a job applicant bears the burden of expressly notifying the employer of a conflict between the applicant's religious beliefs and the employer's policies for the employer to be required to make a reasonable accommodation under Title VII.<sup>5</sup> This seemingly routine question of statutory interpretation, however, invokes much deeper issues of discrimination, equality,

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1. U.S. CONST. amend. I.

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C.A. § 2000e).

3. *See id.*

4. *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, No. 14-86 (U.S. argued Feb. 25, 2015).

5. *Id.*

religious freedom, and tolerance.

## I. FACTS

Abercrombie & Fitch Stores, Inc. (Abercrombie) operates several nationwide chains of clothing stores.<sup>6</sup> Its flagship store, Abercrombie & Fitch, is aimed at customers ages eighteen to twenty-two, and Abercrombie Kids targets children ages eight to sixteen.<sup>7</sup> Abercrombie goes to great lengths to preserve and maintain its “East Coast collegiate style,”<sup>8</sup> and it is unusually selective for a retail store in dictating the appearance of its employees.<sup>9</sup>

First, rather than hire ordinary sales clerks to staff its retail locations, Abercrombie hires “models” to perform sales functions.<sup>10</sup> In hiring these models, Abercrombie managers rate and hire applicants based on different categories: “the applicant’s ‘appearance & sense of style,’ whether the applicant is ‘outgoing & promotes diversity,’ and whether he or she has ‘sophistication & aspiration.’”<sup>11</sup> Applicants may receive up to three points for each category, and must total six or more points to be hireable.<sup>12</sup> Additionally, an applicant must receive at least two points in the appearance category, or else that applicant is automatically removed from consideration.<sup>13</sup> Second, Abercrombie enforces a “Look Policy” on all models, containing specific rules on grooming and dress.<sup>14</sup> Specifically, the Look Policy does not allow models to wear black clothing or “caps,” which Abercrombie interprets to prohibit headscarves.<sup>15</sup>

When she was seventeen years old, Samantha Elauf applied to work as a “model” at the Abercrombie Kids store at Woodland Hills Mall in Tulsa, Oklahoma.<sup>16</sup> Elauf self-identifies as a Muslim and has worn a hijab (or headscarf) for religious reasons since she was

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6. EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1275 (N.D. Okla. 2011) [hereinafter *Abercrombie I*].

7. *Id.*

8. EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1111 (10th Cir. 2013) [hereinafter *Abercrombie II*].

9. See *Abercrombie I*, 798 F. Supp. 2d at 1275.

10. Petition for Writ of Certiorari at 2–3, EEOC v. Abercrombie & Fitch Stores, Inc., No. 14-86 (U.S. Oct. 2, 2014).

11. *Abercrombie II*, 731 F.3d at 1113 (citation omitted).

12. Petition for Writ of Certiorari, *supra* note 10, at 3.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

thirteen years old.<sup>17</sup> Before her interview, Elauf asked a friend who already worked at the store, Farisa Sepahvand, if models were allowed to wear headscarves while working.<sup>18</sup> Her friend asked Kalen McJilton, a manager at the store, who stated “that he did not see any problem” with headscarves, especially if the headscarf was not black.<sup>19</sup> Sepahvand relayed this information back to Elauf.<sup>20</sup>

Elauf wore a black headscarf to her interview with assistant store manager Heather Cooke, but was otherwise dressed in Abercrombie-style clothing.<sup>21</sup> The subject of Elauf’s religion did not arise during the interview, but Cooke later stated that she assumed Elauf was Muslim, and she assumed the headscarf was worn for religious purposes.<sup>22</sup> Cooke never mentioned the Look Policy by name during the interview, nor did she mention that Abercrombie models are not allowed to wear black clothing or caps.<sup>23</sup>

Unsure about the headscarf, Cooke asked district manager Randall Johnson for advice.<sup>24</sup> Johnson told Cooke not to hire Elauf because she wore a headscarf.<sup>25</sup> Cooke pressed Johnson, telling him that she believed the headscarf was worn for religious reasons.<sup>26</sup> Johnson told her that it did not matter, Elauf could not be hired because the headscarf did not comport with the Look Policy.<sup>27</sup> Elauf had originally been given a “2” in all three categories.<sup>28</sup> After their discussion, Johnson instructed Cooke to reduce Elauf’s appearance score to a “1” so that Abercrombie would not hire her.<sup>29</sup> Cooke told Elauf during the interview that she would call in the next day or two to “let her know when orientation was.”<sup>30</sup> Elauf never heard from Cooke again.<sup>31</sup> Three days after the interview, Sepahvand told Elauf that Johnson instructed Cooke not to hire Elauf because of her

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17. *Id.*

18. *Id.*

19. *Id.* at 4.

20. *Id.*

21. *Abercrombie I*, 798 F. Supp. 2d at 1277.

22. Petition for Writ of Certiorari, *supra* note 10, at 4.

23. *Abercrombie I*, 798 F. Supp. 2d at 1277.

24. Petition for Writ of Certiorari, *supra* note 10, at 4–5.

25. *Abercrombie I*, 798 F. Supp. 2d at 1278.

26. *Id.*

27. *Id.*

28. *Id.* at 1279.

29. *Id.*

30. *Id.*

31. *Id.*

headscarf.<sup>32</sup>

Abercrombie has granted religious exemptions to its Look Policy in the past;<sup>33</sup> notably, Abercrombie has allowed Muslim employees to wear headscarves.<sup>34</sup> Since Elauf was rejected, Abercrombie has started to allow more headscarf exceptions.<sup>35</sup> Abercrombie has stated that it makes every reasonable accommodation it can; however, it has also stated that allowing Look Policy exceptions has a negative effect on the store.<sup>36</sup>

The EEOC, on behalf of Elauf, filed suit against Abercrombie.<sup>37</sup> The district court granted summary judgment to the EEOC. The court based this decision on the *prima facie* case established in *McDonnell Douglas Corp. v. Green*, discussed below.<sup>38</sup>

## II. LEGAL BACKGROUND

### A. *Title VII of the Civil Rights Act of 1964: Text and Purpose*

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discharge any individual, or otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion.”<sup>39</sup> “Religion” includes “all aspects of religious observance and practice, as well as belief,” that an employer is able to “reasonably accommodate . . . without undue hardship on the conduct of the employer’s business.”<sup>40</sup> Under Title VII, employers must “reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.”<sup>41</sup> The EEOC stresses that religion is a personal matter and protection does not require affiliation with an established belief

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1280.

36. *Id.*

37. *Abercrombie II*, 731 F.3d at 1114 (10th Cir. 2013).

38. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

39. 42 U.S.C.A. § 2000e-2(a)(1) (West 2014).

40. 42 U.S.C.A. § 2000e(j).

41. 29 C.F.R. § 1605.2(b)(1)–(2) (2014).

system.<sup>42</sup>

The purpose of Title VII is to prohibit discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>43</sup> Discrimination can be shown when an employer engages in disparate treatment on the basis of protected attributes.<sup>44</sup> Disparate treatment occurs when an employer acts with “discriminatory intent” in dealing with an employee.<sup>45</sup> Discriminatory intent, in turn, is found when an employer discriminates based on a protected attribute, regardless of the employer’s motivation.<sup>46</sup>

### *B. Burden-Shifting Framework*

On summary judgment, in a Title VII employment discrimination case, a burden-shifting approach is used.<sup>47</sup> Courts developed this burden-shifting approach to provide plaintiffs and courts with a tool for situations where there is only circumstantial evidence of employment discrimination.<sup>48</sup> In *McDonnell Douglas Corp. v. Green*, the plaintiff claimed to be rejected from a job due to his race, based on the facts that he was qualified and that defendant continued to search for equally qualified employees after plaintiff’s rejection.<sup>49</sup> The Court decided that petitioners should be able to present a discrimination case based on circumstantial evidence, after which the defendant can present evidence to rebut.<sup>50</sup>

Under *McDonnell Douglas*, initially, the plaintiff bears the burden of establishing a prima facie case.<sup>51</sup> This is met by producing evidence (1) of a conflict between her bona fide religious belief and an employer’s requirement; (2) that she informed the employer of this belief; and (3) that employer declined to hire her due to the conflict.<sup>52</sup> If the plaintiff satisfies these elements, the burden shifts to the

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42. EEOC Compl. Man. § 12-I(A)(1).

43. Brief for Petitioner at 19, *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 14-86 (U.S. Oct. 2, 2014) (quoting 42 U.S.C.A. § 2000e-2(a)(1)).

44. *Id.* at 24 (citing *Int’l Bd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977)).

45. *Id.* (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)).

46. *Id.*

47. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

48. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 526 (1993).

49. *McDonnell Douglas Corp.*, 411 U.S. at 805.

50. *Id.*

51. *Abercrombie I*, 798 F. Supp. 2d at 1282 (citing *Thomas v. Nat’l Ass’n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000)).

52. *Id.*

defendant who must “(1) conclusively rebut one or more elements of the plaintiff’s prima facie case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable to accommodate the employee’s religious needs reasonably without undue hardship.”<sup>53</sup>

The second element of the plaintiff’s prima facie case—that she informed the employer of this belief—is interpreted differently in different circuits. This issue was undecided in the Tenth Circuit prior to this case. *McDonnell Douglas* does not specify whether the notice given to the employer must be direct or whether it is enough for the employer to simply know of the applicant’s religious beliefs. Prior to this case, four circuit courts of appeals had decided that an explicit notice requirement is too strict and would run contrary to the purpose of Title VII.<sup>54</sup>

### C. EEOC Guidance

The EEOC has provided guidance on when an employer has an obligation to provide an accommodation. Such guidance states that an employer has an obligation to make an accommodation “[a]fter an employee or prospective employee notifies the employer . . . of his or her need for a religious accommodation.”<sup>55</sup> The EEOC compliance manual similarly states that “an applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work.”<sup>56</sup> Because Congress has not spoken directly to the notice requirement of Title VII, courts are likely to defer to the EEOC’s interpretation.<sup>57</sup>

## III. HOLDING

The Tenth Circuit reversed the district court’s decision and granted summary judgment for Abercrombie. The court of appeals concluded that Title VII’s notice requirements are only met when explicit notice of a conflict is given by the applicant to the employer.<sup>58</sup>

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53. *Id.* (quoting *Thomas*, 225 F.3d at 1156).

54. *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013); *Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1158 (1996); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993).

55. *Id.* at 1135 (quoting 29 C.F.R. § 1605.2(c)(1) (2014)).

56. *Id.* (quoting EEOC Compl. Man. § 12–IV(A)(1)).

57. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

58. *Abercrombie II*, 731 F.3d at 1122–23.

It is not enough for the employer to have knowledge of the conflict from another source, nor is it enough for the employer to infer a potential conflict from any interaction with the employee.<sup>59</sup> Rather, the plaintiff must establish that he or she expressly informed the employer of a conflict between his or her religion and the employer's work rule, thereby requiring an accommodation.<sup>60</sup>

The court of appeals used a number of different arguments to reach this conclusion.<sup>61</sup> First, it looked at the Tenth Circuit's precedent.<sup>62</sup> The court found that *Thomas v. National Association of Letter Carriers*<sup>63</sup> placed the burden on the applicant to inform the employer.<sup>64</sup>

Second, the court considered the realities of the hiring process, particularly the information that is ordinarily available to the parties involved.<sup>65</sup> In reaching its decision, the court emphasized that, often, the only way for an employer to know an applicant's religious beliefs is for the applicant to expressly inform the employer.<sup>66</sup> Without this express notice, it would be impractical to expect an employer to make an accommodation.<sup>67</sup> Even if an employer can infer that an applicant subscribes to an organized religion, the applicant's beliefs are still an individual choice and may differ from what the employer expects.<sup>68</sup> Further, the applicant likely has a better understanding of those beliefs, what the commitments required are, and what kind of accommodation would be necessary.<sup>69</sup>

Third, the court of appeals looked to the EEOC's guidance, which states that an employer has an obligation to make an accommodation "[a]fter an employee or prospective employee notifies the employer . . . of his or her need for a religious accommodation."<sup>70</sup> The

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59. *Id.*

60. *Id.*

61. *Id.* at 1123.

62. *Id.*

63. *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000).

64. *See Abercrombie II*, 731 F.3d at 1123 ("[W]e construe our own precedent (by its plain terms) as placing the burden on applicants or employees.").

65. *Id.*

66. *See id.* at 1133 ("[O]rdinarily, the only way the employer would know such information is if the applicant or employee informed the employer.").

67. *Id.*

68. *See id.* at 1133–34 (explaining that an employee or applicant may not consider his religious practice inflexible, so the employer would not need to provide a reasonable accommodation).

69. *Id.*

70. *Id.* at 1135 (quoting 29 C.F.R. § 1605.2(c)(1) (2014)).

court also noted that the EEOC compliance manual requires applicants to “make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work.”<sup>71</sup>

Judge Ebel concurred in part and dissented in part.<sup>72</sup> Judge Ebel agreed that it was a mistake for the district court to grant summary judgment, but he rejected the explicit verbal notice requirement endorsed by the majority.<sup>73</sup> While the applicant will have a better understanding of his or her religious requirements, the employer’s knowledge of the work rules may give the employer superior knowledge and awareness of a potential conflict.<sup>74</sup> Judge Ebel observes this case is an example of when the employer had better knowledge of a conflict than the applicant.<sup>75</sup>

#### IV. ARGUMENTS

##### A. EEOC’s Arguments

1. The plain meaning of Title VII, the precedent, and Congress’s clear intent refute the Tenth Circuit’s decision.

The EEOC begins with the text of Title VII, pointing out that the statute makes it unlawful for an employer to reject a job applicant based on his or her religion, unless the employer can demonstrate that an accommodation would constitute an undue hardship.<sup>76</sup> “Religion . . . includes all aspects of religious observance and practice.”<sup>77</sup> This language easily applies to a situation, such as the one at bar, where an employer chooses not to hire an individual after learning of her religious practice.<sup>78</sup> It is unlikely that Abercrombie’s accommodation of Elauf’s headscarf would constitute an undue hardship, especially considering that Abercrombie had previously

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71. *Id.* (quoting EEOC Compl. Man. § 12-IV(A)(1)).

72. *Id.* at 1143 (Ebel, J. concurring in part and dissenting in part).

73. *Id.*

74. *See id.* at 1144 (explaining that Abercrombie did know there might be a potential conflict).

75. *Id.*

76. Brief for Petitioner at 22–23, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 44 (Oct. 2, 2014) (No. 14-86) (quoting 42 U.S.C.A. § 2000e-2(a)(1) (West 2014)).

77. *Id.*

78. *See id.* at 23 (“[T]he language of this prohibition easily reaches cases in which an employer declines to hire someone based on what it correctly understands to be a religious practice.”).



made accommodations for headscarves under identical circumstances.<sup>79</sup>

The purpose of Title VII is to prohibit discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>80</sup> Applying court precedent,<sup>81</sup> disparate treatment occurs when an employer makes an employment decision based on a religious practice of an employee.<sup>82</sup> Disparate treatment is exactly what Title VII aims to prohibit and is exactly what happened to Elauf.<sup>83</sup>

The EEOC argues that Supreme Court precedent supports this interpretation of Title VII and decries any attempt to narrow it.<sup>84</sup> The Court has declared that Title VII “must be given a liberal interpretation” to achieve its broad goals of “prohibit[ing] and remedy[ing] discrimination.”<sup>85</sup> The Tenth Circuit has ignored this guidance and narrowed the scope of Title VII, diluting the statute’s potency.

The Supreme Court has also found that one of Congress’s main purposes in enacting Title VII was to focus employers’ decisions solely on the merits of employees and applicants, removing biases from the process.<sup>86</sup> The Court found that religion, among other factors, is unrelated to work qualification and should not be a factor in the hiring process.<sup>87</sup> The EEOC contends that the Tenth Circuit’s decision does not comport with this objective because it allows employers to reject applicants based solely on religion, as long as notice of that religion does not come from the applicant’s own admission.<sup>88</sup>

Similarly, Congress’s goal of bilateral cooperation suffers under the Tenth Circuit’s decision.<sup>89</sup> In enacting Title VII, Congress realized that there is no one-size-fits-all approach to civil rights. Congress hoped that Title VII would encourage dialogue between employers

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79. See *Abercrombie I*, 798 F. Supp. 2d at 1279–1280 (discussing prior instances of accommodations for headscarves).

80. Brief for Petitioner, *supra* note 43, at 19.

81. *Thomas v. Nat’l Ass’n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000).

82. Brief for Petitioner, *supra* note 43, at 24.

83. See *id.* (“[T]he employer has engaged in the type of disparate-treatment discrimination at the heart of Title VII’s prohibitions.”).

84. *Id.* at 24–25.

85. See *id.* (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 80–81 (1982)).

86. See *id.* at 25 (“By enacting Title VII, Congress sought to eliminate decision-making based on particular aspects of identity that Congress deemed unrelated to merit.”).

87. See *id.* (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 n.6 (1977)).

88. *Id.* at 26.

89. *Id.* at 26–27.

and employees, so that each individual situation could be resolved in the best way to meet both parties' needs.<sup>90</sup> The Tenth Circuit's decision creates incentives for employers that run contrary to Congress's objectives.<sup>91</sup> If an employer learns of a conflict from a source other than the applicant, that employer is suddenly disincentivized to continue with the hiring process for that individual because the employer knows it may lead to the need for an accommodation.<sup>92</sup> Applicants wearing clothing indicative of minority religious groups may well never get past the first stage of the process, prior to which they might not have had the opportunity to disclose their need for an accommodation.<sup>93</sup>

2. The Tenth Circuit's justifications do not warrant its narrow application of Title VII.

On reaching its decision, the Tenth Circuit relied on the language underlying the burden-shifting framework developed from *McDonnell Douglas*.<sup>94</sup> In doing so, the court of appeals gave its reading of *McDonnell Douglas* greater weight than the statute itself.<sup>95</sup> The EEOC points out that "burden-shifting frameworks do not impose requirements beyond those in the statute."<sup>96</sup> Rather, they provide an organized way to examine the evidence as it pertains to the law.<sup>97</sup> Thus the court of appeals overextended itself by favoring the rigid enforcement of the burden-shifting framework over the plain meaning and Congressional intent of the statute.<sup>98</sup>

The EEOC also refutes the court's reasoning that explicit notice is necessary because the applicant has superior knowledge of his or her religious needs.<sup>99</sup> While this assertion by the court is likely often accurate, it ignores an equally large imbalance of information.<sup>100</sup> That is, the employer will always know more about its own policies than the applicant will, especially at the first interview.<sup>101</sup> It is thus

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90. *Id.*

91. *Id.* at 27 (describing the incentives created as a result of this decision).

92. *Id.*

93. *See id.* at 27–28 (explaining that employers could decline to hire applicants based on perceived religious practices).

94. *See id.* at 28.

95. *Id.*

96. *Id.* at 29.

97. *See id.* (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

unreasonable to place the entire burden on the applicant.<sup>102</sup>

Lastly, the EEOC looks to EEOC guidance, arguing that it requires more deference under *Skidmore v. Swift & Co.*<sup>103</sup> than the court of appeals gave it.<sup>104</sup> The EEOC guidance rejects an explicit, direct notice requirement, and the EEOC contends that this should direct the court's decision.<sup>105</sup>

### B. Abercrombie's Arguments

Abercrombie first claims that EEOC must establish that Abercrombie *intentionally* discriminated against Elauf on the basis of her religion.<sup>106</sup> Abercrombie contends that its denial of employment—brought on by its work rule—did not have a discriminatory motive.<sup>107</sup> Rather, it merely had a discriminatory effect.<sup>108</sup> While Title VII does prohibit some discriminatory effects in addition to all events involving discriminatory motives,<sup>109</sup> it only requires employers to make accommodations when doing so does not cause an undue hardship.<sup>110</sup> Here, adjusting the work rule would cause an undue hardship because it is central to Abercrombie's branding and sales.<sup>111</sup> By denying an exemption, Abercrombie did not intentionally discriminate.<sup>112</sup>

Abercrombie next points to the EEOC's guidelines. The guidelines recognize that religion is a personal and sometimes sensitive topic.<sup>113</sup> To maintain an atmosphere of comfort and tolerance, the guidelines discourage employers from inquiring into applicants' religious beliefs.<sup>114</sup> Similarly, they state that it is preferable for an employee to ask for an accommodation, rather than for an employer to guess.<sup>115</sup>

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102. *Id.*

103. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

104. *See* Brief for Petitioner, *supra* note 43, at 30–31.

105. *Id.* at 31–33.

106. *See* Brief for Respondent at 1, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 44 (Oct. 2, 2014) (No. 14-86) (“The EEOC claims that Abercrombie thereby engaged in *intentional* religious discrimination under Title VII.”).

107. *See id.* (describing Abercrombie's religion-neutral dress and grooming standards).

108. *Id.*

109. *See generally* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

110. *See* Brief for Respondent, *supra* note 106, at 4 (describing requirement to make accommodations when it does not cause undue hardship).

111. *See id.* at 6–7 (explaining the importance of strong brands for retailer success).

112. *See id.* at 21 (arguing that denial of an exemption to a neutral rule is not discrimination).

113. *Id.* at 30.

114. *Id.*

115. *Id.*

Abercrombie concludes that it had no choice but to decline to hire Elauf, who followed neither of the two paths available to her: comply with Abercrombie's Look Policy or request a religious accommodation.<sup>116</sup> This type of situation, Abercrombie continues, is why a direct explicit notice requirement is necessary to Title VII.<sup>117</sup> As someone with significant enough interest in Abercrombie's store to apply for a job there, Elauf is very likely to observe that they have a Look Policy, even if she cannot detect what the exact requirements are.<sup>118</sup> It is much less likely that one of Abercrombie's managers will be familiar with the religions of every applicant interviewed.<sup>119</sup>

## V. ANALYSIS

Based on the text of Title VII and the Tenth Circuit's precedent, Abercrombie has a compelling case at first glance. Title VII requires an applicant or employee to "inform" their employer, thereby placing the onus on the one requesting an accommodation. Requiring explicit notice directly from the applicant or employee is the strictest interpretation of this language, but it is not the only valid interpretation. There is also an element of impracticality involved in requiring employers to make accommodations when they have no reason to know of that accommodation. For that reason, the explicit notice rule outlined by the Tenth Circuit has merit.

The Court, however, should also look to Congress's intent in passing the statute in determining the best interpretation of "inform." An analysis of Congressional intent sways this case in favor of Petitioner. Congress's stated goal of preventing discrimination in the workplace can only be fully achieved with a broader interpretation of the notice rule. An explicit notice rule leaves too many doors open for unethical employers to deny employment on prejudicial grounds, meanwhile placing the burden of proving their prejudice on the injured party.

Given the facts in this case, it runs contrary to Congress's conception of civil rights to allow Abercrombie to base its hiring decision on any consideration of Elauf's religion, as it admittedly did. The purpose of Title VII is to require employers to focus only on the applicant's merits. Based on Cooke's scores of Elauf in the three

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116. *See id.* at 9–10 (describing Elauf's options).

117. *Id.* at 18.

118. *Id.* at 10.

119. *Id.* at 11.

categories, Elauf was qualified for the model position she applied for. The factor that caused Abercrombie not to hire Elauf was her religious practice of wearing a headscarf.

While it is true that Abercrombie's Look Policy is neutral and does not discriminate, Abercrombie fails to defend against discrimination in this particular instance. Abercrombie accurately states that Elauf never requested an accommodation and argues that giving Elauf an accommodation was therefore impossible. More relevant, however, is that Elauf was never given the *opportunity* to request an accommodation, and this absence of opportunity originated from Abercrombie's understanding of her religion. No official representative of Abercrombie explained the portion of the Look Policy that might conflict with Elauf's beliefs, despite clear and recognized evidence that a conflict existed. Instead, the store simply refused to hire her without explanation, knowing that, if it hired her, it would have to provide an accommodation.

This issue—and this case, in particular—comes at a time when religious discrimination poses a renewed problem for American society. A recent survey shows that Americans are growing increasingly concerned about workplace discrimination.<sup>120</sup> Since the attacks of September 11, 2001, anti-Muslim sentiment has increased in the United States.<sup>121</sup> Fifty-two percent of Americans say that Western society does not respect Muslims.<sup>122</sup> Muslims are more likely than members of any other religious groups to report facing racial or religious discrimination in the past year, at a concerning rate of 48 percent.<sup>123</sup> Much of this anti-Muslim sentiment results from a lack of knowledge about Islam.<sup>124</sup> Considering this fact in light of Congress's wish that Title VII would encourage communication between applicants and employers, it becomes especially important to ensure that the doorway to conversation remains open. It is thus especially important for the Court—as the neutral protector of minority rights—to step in and enforce the rights granted by Title VII for all

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120. TANENBAUM CTR. FOR INTERRELIGIOUS UNDERSTANDING, WHAT AMERICAN WORKERS REALLY THINK ABOUT RELIGION: TANENBAUM'S 2013 SURVEY OF AMERICAN WORKERS AND RELIGION 5 (2013), available at [http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks/\\$File/2013TanenbaumWorkplaceAndReligionSurveyEmail.pdf](http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks/$File/2013TanenbaumWorkplaceAndReligionSurveyEmail.pdf).

121. *Islamophobia: Understanding Anti-Muslim Sentiment in the West*, GALLUP, <http://www.gallup.com/poll/157082/islamophobia-understanding-anti-muslim-sentiment-west.aspx> (last visited Mar. 17, 2015).

122. *Id.*

123. *Id.*

124. *Id.*

Americans.

#### CONCLUSION

This is a difficult question for the Court with strong arguments on both sides. The Court's hand should ultimately be tipped by Congress's intent in enacting Title VII: to prevent discrimination in the workplace based on irrelevant factors such as religion. This is exactly the type of discrimination that occurred here, and the Court should take this opportunity to reverse the court of appeals and create a rule that better serves Title VII's objectives.