YOUTH IN GOVERNMENT
APPEALS COURT 2022

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Respondent,

v.

ABERCROMBIE & FITCH STORES, INC., Defendant-Appellant.

The 2022 Appeals Court problem focuses on the application of Title VII of the Civil Rights Act of 1964, which is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. The Equal Employment Opportunity Commission ("EEOC") brought this case pursuant to Title VII on behalf of Samantha Elauf, alleging that Abercrombie & Fitch ("Abercrombie") refused to hire Elauf because she followed the Islamic practice of wearing a head scarf, which contradicted with Abercrombie's "Look Policy." Before trial, the EEOC moved for summary judgment against Abercrombie.[1] The district court granted summary judgment in favor of the EEOC, which Abercrombie appealed. On appeal, the United States Court of Appeal for the Flamingo Circuit affirmed the district court's decision to grant summary judgment for the EEOC.

You will be representing Abercrombie (the Appellant) or the EEOC (the Respondent) before the Supreme Court of the United States. The issues on appeal are (1) whether Abercrombie was sufficiently notified of Elauf's religious beliefs that conflicted with its "Look Policy"; and (2) whether, even if Abercrombie had notice, providing an accommodation for Elauf's religious belief would impose an "undue burden" on Abercrombie.

The materials for this problem consist of (1) the Statement of the Case; (2) the Statement of Applicable Legal Principles; (3) the opinion of the United States Court of Appeals for the Flamingo Circuit; (4) excerpts of the written briefs filed in the Supreme Court on behalf of the Appellant and the Respondent; and (5) selected relevant case precedent dealing with Title VII. The facts of the case are set out in the Statement of the Case. The legal principles governing this problem are those set out in the Statement of Applicable Legal Principles, the opinion of the Flamingo Circuit, and the case precedent provided to you. No other materials may be used, and no outside research is permitted.

The Supreme Court briefs contain discussions of the relevant cases, and they provide a roadmap for structuring your argument before the Court. Do not memorize the arguments in the briefs or read the briefs to the Justices during argument. You should read and understand the arguments made in the briefs, and use them to help you develop and present to the Court your own views on the issue. You are not required to follow the approaches set out in the briefs, and you are free to formulate your own arguments about the issues. Unless you are prepared to offer sound reasons for the Court to overrule a prior decision, however, you should be prepared to explain how your position is consistent with the existing case law, as provided in the briefs and court opinions.

[1] A party who moves for summary judgment claims that even if everything the opposing party claims is true, the moving party would still win the case.

STATEMENT OF THE CASE

Abercrombie operates retail stores across the country under a variety of brand names, including Abercrombie & Fitch, Abercrombie Kids, and Hollister. Abercrombie's Vice President of Human Resources, Emma Smew, testified that Abercrombie's largest and most successful form of advertising is its "in store experience with our models (sales associates), the look and feel of the store, what the customer has come to expect."

In 2019, Abercrombie operated an Abercrombie Kids store in Lapwing Mall in the State of Flamingo. At all times from 2005 to the present, Abercrombie has required employees in its stores to comply with a "Look Policy." Grace Prinia, an expert for Abercrombie, stated that the Look Policy is inherent to a model's (sales associate's) role and is a major component of the in-store experience. The Look Policy requires employees to dress in clothing and merchandise consistent with that sold in the store; it prohibits "caps" but does not mention any other head wear. The policy applies to all store employees, but applicants are not required to be in compliance at the time of the interview.

Abercrombie trains store managers "never to assume anything about anyone" in a job interview, and not to ask applicants about their religion. If there are issues or questions regarding the Look Policy or an employee requests a religious accommodation, the store manager is instructed to contact Abercrombie's Human Resources Department and/or their direct supervisor. According to Smew, the Human Resources managers have the individual discretion to grant accommodations "as long as it's not going to distract from the brand."

Samantha Elauf has been a Muslim since birth. Her parents are both practicing Muslims. Her mother wears a head scarf on a daily basis, and Elauf began to wear a head scarf[1] at age 13. Since then, she has worn a head scarf at all times when in public or in the presence of male strangers. She considers it a representation and reminder of her faith, a religious symbol, a symbol of Islam and of modesty. She testified that the head scarf becomes an obligation after one reaches puberty.

Elauf acknowledged the Quran does not explicitly require women to wear head scarves. She admitted that someone could be an observant Muslim without wearing a head scarf, and testified that several members of her family, and her friend Farisa Sepahvand, do not wear head scarves, but she does not think they are looked down upon or are not "good Muslims."

Elauf's Application and Interview

On June 25, 2019, Elauf, then 17, applied for a job as a model at the Abercrombie Kids store in Lapwing Mall. Assistant store manager Sora Gannet[2] interviewed her on June 26, 2019.

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[1] A head scarf is a type of hijab, a head covering common in Islamic cultures. There are different styles of hijabs. Elauf wears one that does not appear to cover her face, neck or shoulders.

[2] Gannet was responsible for recruiting, interviewing, and hiring new store employees. She supervised models in the store, had the authority to discipline them, and decided which model applicants would receive job offers. She did not usually seek approval from the District Manager before extending a job offer, and the District Manager was usually not involved in deciding whether to hire a specific applicant.

Before she applied for a job at Abercrombie, Elauf had shopped there and bought jeans, sweatshirts, tank tops and t-shirts from its stores. Elauf's friend, Farisa Sepahvand, who worked as a model at Abercrombie Kids, encouraged her to apply. Like Elauf, Sepahvand is a Muslim.

Elauf was unaware of Abercrombie's Look Policy when she applied. Elauf testified that Sepahvand told her she had discussed with Gannet whether it was okay if Elauf wore a black head scarf, and Gannet said she would probably have to wear a different color. Sepahvand told Elauf she would not be able to wear a head scarf that was black because Abercrombie required models to wear clothing similar to what it sold, and Abercrombie did not sell black clothing. Elauf testified she knew Abercrombie does not sell head scarves, although it sold scarves she could wear as head scarves. Gannet did not tell Sepahvand that Abercrombie would not permit models to wear head scarves or to wear black clothing.

During the interview with Gannet, Elauf wore an Abercrombie & Fitch like T-shirt and jeans, and a black head scarf. Gannet had previously seen Elauf wearing a head scarf in the Lapwing Mall. Gannet testified that the head scarf signified to her that Elauf was Muslim and, "I figured that was the religious reason why she wore her head scarf, she was Muslim," and "I just assumed that she was Muslim because of the head scarf, and that the scarf was for religious reasons." Gannet believed Elauf was a good candidate for the job, but she was unsure, at the time, whether it would be a problem for Elauf to wear the headscarf to work as a model for Abercrombie.

Gannet consulted with her District Manager, Rusty Sanderling. She testified Sanderling told her not to hire Elauf because she wore the head scarf, that employees were not allowed to wear hats at work, and that if Elauf wore the head scarf, then other associates would think they could wear hats at work. Gannet further testified:

> Q: And did you—did you discuss it with him in sort of—did you have any discussion with him over this?
>
> A: Yes, I did. I thought she was a very good candidate to work here. And I asked him, you know, she wears the head scarf for religious reasons, I believe. And he said, "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 them.
>
> And I told him that I believed that she was Muslim, and that was a recognized religion. And that she was wearing it for religious reasons. And I believe that we should hire her.
>
> Q: And what did he say?
>
> A: He told me not to hire her.[3]

Sanderling testified that the process for considering a request for an exception would be that he would contact his HR director, "and they would make that exception or determination if we could hire them or go forward with that applicant." He stated that he had "never had to make an

[3] In his deposition, Sanderling denied Gannet told him Elauf wore the head scarf for religious reasons and also denied making the remark about people painting themselves green. However, he believed the head scarf would have violated the Look Policy.

exception, no, or make-or call HR to make an exception." Sanderling knew that some Muslim women wear head scarves because he had seen them on television. Viewing photographs of Elauf, he stated that she would have been a good candidate to hire as a model except for the head scarf.

Elauf testified that, at the end of her interview, Gannet told her she would call her the next day or the day after and let her know when orientation was. Elauf never got a call, and her friend Farisa told her three days after the interview that the district manager had told Gannet not to hire her because of the head scarf.

Look Policy Exceptions

Requests for exceptions to the Look Policy must be approved by Abercrombie's Human Resources Department in corporate headquarters. Emma Smew, Abercrombie's Vice President of Human Resources, testified that exceptions to the Look Policy are recorded in the Human Resources contact records database, but Abercrombie has not tracked the exceptions or measured whether they have had any negative impact on how customers view the Abercrombie style.

In 2015, Abercrombie's Human Resources Department approved a head scarf exception to the Look Policy. After its rejection of Elauf's application, Abercrombie began to allow more head scarf exceptions. In an interview on September 23, 2015, Abercrombie's General Counsel said that Abercrombie "makes every reasonable attempt to accommodate the religious practices of associates and applicants, including, where appropriate, allowing associates to wear a hijab." Smew testified Abercrombie now allows exceptions to the policy against headwear and, with respect to the head scarf, has allowed eight or nine exceptions.

Abercrombie executives uniformly testified that allowing exceptions to the Look Policy has a negative impact on the brand and on sales. Smew testified she believes the Look Policy leads to a better in-store experience and more repeat customers, and that the in-store experience "is a core driver of our business." However, she also admitted that the report of Dr. Hart A. Tanager, Abercrombie's expert in this case, is the only study or analysis Abercrombie has conducted in the last two years on the effect of a Look Policy exemption, and Smew's department has not been asked to assess whether or how deviations impact customer views or to review sales for that purpose.

Howard Garganey, Director of Stores for Abercrombie, testified that he never did any empirical analysis to determine if failure to comply with the Look Policy corresponds with a drop in sales for any store, although he has "seen stores or managers that do a poor job of enforcing our Look Policy and ha[s] seen low sales scores because of it."

Shipra Merganser, Abercrombie's Human Resources Director, testified she believes that granting an exception for Elauf would have created an undue burden because it could negatively affect the "store experience" for Abercrombie's customers and the uniform enforcement of the Look Policy. In her deposition, she was not aware that Abercrombie had, since the Elauf incident, granted eight or nine exceptions for head scarves, but stated that knowledge would not change her opinion. Merganser was not aware of any study to measure the impact of Look Policy deviations.

Abercrombie's expert, Prinia, testified that she created the job description for the model position that was in effect in 2019. She stated that an essential function of the job as an Abercrombie model is to "act as a model for the brand," and in so doing "represent the

[Abercrombie] brands in their appearance and sense of style." She opined that "it is both critical to the job and an essential function of the job of Model at Abercrombie to maintain an appearance and sense of style consistent with the brand" and "critical ... to comply with standards of conduct including the Look Policy." Prinia has not performed any study or read any report regarding the impact of any store not being in compliance with the Look Policy and/or its impact on the brand.

Abercrombie relies on the Tanager report in support of its position that an exception would create an undue burden. Abercrombie has not assigned a specific financial value to the alleged undue burden. Tanager testified regarding marketing strategy and brands. The declaration and deposition of Tanager establish:

• Abercrombie does not use television advertising and uses only minimal print advertising, and that its "brand identity" is communicated through the "in-store brand experience," including interactions with employees.

• Abercrombie's Look Policy plays a critical role in "communicating the overall brand experience and desired brand image to consumers" because "it ensures consistent and positive portrayals of the Abercrombie brand in the important in-store environment."

• "An employee's look or dress that is contrary to the guidelines of the ... Look Policy is identity distorting and would appear visibly 'off-brand' to the Abercrombie target, and negatively impact Abercrombie's ability to communicate a consistent 'on brand' experience to its target customers," and "[t]here is potential to cause consumer confusion and decrease brand preference and value perceptions for the Abercrombie brand," including "a decreased ability to effectively market to its target and establish strong emotional bonds with them; a decreased ability to retain existing customers; and increased costs of marketing and merchandising its products successfully."

• Tanager was aware that Abercrombie's Human Resources Department has approved exceptions to the Look Policy for head scarves. He knows of no studies done by Abercrombie to determine if allowing employees to wear headscarves has resulted in lost sales. He has not done such a study himself.

• When asked to "square" his opinion that allowing models to wear head scarves could cause a negative impact on the brand with the fact that Abercrombie now allows exceptions to the policy to permit wearing of the head scarf, Tanager opined that the exceptions "still negatively impact the brand."

Statement of Applicable Legal Principles

Title VII of the Civil Rights Act of 1964

Under Title VII of the Civil Rights Act of 1964, it is an "unlawful employment practice" for an employer "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." 42 U.S.C. § 2000e-2. Title VII defines "religion" as including "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).

As the Supreme Court has explained, "[t]he . . . effect of this definition [i]s to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practice of his employees. . . ." Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977). An undue hardship is one that imposes "more than a de minimis cost" on the employer. Id. at 84.

Although the Supreme Court has not yet addressed the question, the Circuit Courts of Appeal have concluded that, to make a claim under Title VII against an employer for failure to accommodate an applicant's religious beliefs, the plaintiff must generally demonstrate the following:

> (1) the plaintiff had a bona fide religious belief that conflicts with an employment requirement;
>
> (2) the employer was informed of the religious conflict; and
>
> (3) the plaintiff was not hired for failing to comply with the employment requirement.

However, even if plaintiff demonstrates these factors, the defendant will still win if the defendant: (1) sufficiently rebuts one of the elements listed above; or (2) shows that accommodating the employee's religious needs would result in undue hardship to the employer.

EEOC COMPLIANCE MANUAL

The EEOC's "Compliance Manual" is a document created by the EEOC to provide guidance and instructions for investigating and analyzing claims of retaliation under the statutes enforced by the EEOC. Addressing religious discrimination under Title VII, section 12-1.A.1 of the EEOC Compliance Manual states:

> Title VII defines "religion" to include "all aspects of religious observance and practice as well as belief." Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, 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 illogical or unreasonable to others. Further, a person's religious beliefs need not be confined in either source or content to traditional or parochial concepts of religion. A belief is "religious" for Title VII purposes if it is "'religious' in the person's own scheme of things," i.e., it is a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by God. An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few – or no – other people adhere to it.
>
> Religious beliefs include theistic beliefs as well as non-theistic moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns ultimate ideas about life, purpose, and death. Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.
>
> Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Determining whether a practice is religious turns not on the nature of the activity, but 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. Whether or not the practice is "religious" is therefore a situational, case-by-case inquiry. For example, one employee might observe certain dietary restrictions for religious reasons while another employee adheres to the very same dietary restrictions but for secular (e.g., health or environmental) reasons. In that instance, the same practice might in one case be subject to reasonable accommodation under Title VII because an employee engages in the practice for religious reasons, and in another case might not be subject to reasonable accommodation because the practice is engaged in for secular reasons.

The Supreme Court has held that the positions expressed in the Compliance Manual "reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance. As such, they are entitled to a measure of respect." *Federal Express Corp. v. Holowecki,* 552 U.S. 389, 399 (2008) .

United States Court of Appeals
for the Flamingo Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Respondent

vs.

ABERCROMBIE & FITCH STORES, INC., Defendant-Appellant

EAGLEMAN, Chief Judge:

Abercrombie & Fitch ("Abercrombie") appeals from the district court's grant of summary judgment in favor of the Equal Employment Opportunity Commission ("EEOC"), on the EEOC's claim that Abercrombie violated Title VII of the Civil Rights Act of 1964. We affirm the district court's grant of summary judgment to the EEOC. The EEOC is entitled to summary judgment as a matter of law because Abercrombie was informed prior to its hiring decision that Elauf wore her headscarf or "hijab" for religious reasons. Additionally, we hold that providing an accommodation for Elauf would not impose an undue burden on Abercrombie. Accordingly, we affirm.

ANALYSIS

Title VII 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." 42 U.S.C. § 2000e. Title VII imposes an obligation on the employer "to 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." 29 C.F.R. § 1605.2.

I. Notice

In *Thomas v. National Association of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000), the 10th Circuit stated that a Title VII plaintiff claiming a failure to accommodate his religious beliefs must establish that court that "(1) he had a bona fide religious belief that conflicts with an employment requirement; (2) he informed his employer of this belief; and (3) he was fired [or not hired] for failure to comply with the conflicting employment requirement." (Emphasis added). Relying on *Thomas*, Abercrombie argues that since Elauf did not tell the interviewer she had a religious belief that conflicted with the Look Policy and that she needed an accommodation, the notice element of the prima facie case has not been satisfied.

The EEOC urges a less restrictive approach, asserting that although Abercrombie is required to have been informed that Elauf needed an accommodation, the information need not have been strictly in the form of Elauf verbally requesting such an accommodation.

As courts have observed, the employer's obligation to reasonably accommodate an employee's religious practices "involves an interactive process that requires participation by both the employer and the employee." *Thomas*, 225 F.3d at 1155; *see Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (stating that, consistent with the goals expressed in the legislative history of the

religious accommodation provision, "Courts have noted that bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business"). "Although the burden is on the employer to accommodate the employee's religious needs, the employee must make some effort to cooperate with an employer's attempt at accommodation." Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987) .

Notice to the employer of a need for accommodation, of course, is central to this interactive process. And in most cases, notice will come directly from the applicant or employee. The question in this case, however, is whether the information about the need for an accommodation must come directly from the applicant.

In *Smith v. Midland Brake, Inc.,* a case arising under the ADA rather than Title VII, the Tenth Circuit stated:

> In general, the interactive process must ordinarily begin with the employee providing notice to the employer of the employee's disability and resulting limitations, and expressing a desire for reassignment if no reasonable accommodation is possible in the employee's existing job. *Smith,* 180 F.3d at 1171–72.

In a footnote, the court, citing *Beck v. University of Wisconsin,* 75 F.3d 1130, 1134 (7th Cir. 1996), stated:

> An employee has the initial duty to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations-a duty dictated by common sense *lest a disabled employee keep his disability a secret and sue later for failure to accommodate. Id.,* n. 9.

These cases teach that the primary purposes of the notice requirement is to facilitate the interactive process and prevent ambush of an unwitting employer. These purposes would not be hindered by including information obtained through third parties in the definition of "informed."

While the Flamingo Circuit has not addressed the question of whether notice must be explicitly provided by the employee, 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. *See 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) ("It would be hyper-technical ... to require notice of the Plaintiff's religious beliefs to come only from the Plaintiff"); *Heller v. EBB Auto Co.,* 8 F.3d 1433, 1439 (9th Cir. 1993) ("A sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.").

Thus, faced with the issue of whether the employee must explicitly request an accommodation or whether it is sufficient that the employer otherwise has the information necessary to know that an accommodation is needed, the Flamingo Circuit opts for the latter choice.

In this case, it is undisputed that Elauf wore her head scarf at the interview with assistant store

manager Sora Gannet, and Gannet knew she wore the head scarf based on her religious belief. Because Gannet was uncertain whether Elauf would need an accommodation, she consulted the District Manager, Rusty Sanderling, who told Gannet not to hire Elauf because of the headscarf. Whether or not Sanderling himself knew that Elauf wore the headscarf for religious reasons is irrelevant, because Gannet knew that Elauf wore the headscarf because of her faith. Gannet had responsibility for hiring decisions at the Abercrombie Kids store, and her knowledge is therefore attributable to Abercrombie. Abercrombie therefore cannot rebut the EEOC's prima facie case establishing that Abercrombie had notice that Elauf wore a head scarf based on her religious belief.[4]

II. Undue Hardship

Abercrombie asserts that even if it has not rebutted the elements of EEOC and Elauf's prima facie case, allowing Elauf to wear a head scarf would result in "undue hardship."

An employer must prevail as a matter of law if the employer cannot reasonably accommodate the employee's religious beliefs without "undue hardship on the conduct of the employer's business." *Lee v. ABF Freight Sys.*, 22 F.3d 1019, 1022 (10th Cir. 1994). An accommodation which results in "more than a *de minimis* cost" is an undue hardship to the employer and the employer need not provide the accommodation. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, (1977).

Several Abercrombie executives have testified they believe granting Elauf an exception to the Look Policy would negatively impact the brand, sales, and compliance. However, none have conducted any studies or cite specific examples to support this opinion. Instead, Abercrombie relies on Tanager's expert opinion.

Tanager, in turn, testified extensively about the importance of the in-store experience to Abercrombie's marketing strategy, and opined that the granting of even one exception to the Look Policy would negatively impact the brand. He has made no effort, however, to collect or analyze data to corroborate his opinion. If Abercrombie had never granted exceptions, or perhaps even if it had never granted exceptions for head scarfs, this omission might be understandable. Eight or nine head scarf exceptions, though, *have* been made, and the expert has completely failed to consider the impact, if any, of those exceptions.

The Tenth Circuit has stated:

> An accommodation that requires an employer to bear more than a "de minimis" burden imposes undue hardship. Any proffered hardship, however, must be actual; [a]n employer cannot rely merely on speculation. A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardship ... The *magnitude* as well as the *fact* of hardship must be determined by examination of the facts of each case. *Toledo v. Nobel–Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989).

[4] It is worth noting that Abercrombie's actions in this case also made it impossible for the bilateral, interactive process of accommodation to function as intended under Title VII. Although Abercrombie was on notice that Elauf wore a head scarf for religious reasons, it denied Elauf's application for employment without informing her she was not being hired or telling her why.

In light of the fact that Abercrombie has granted numerous exceptions to the Look Policy since 2001, and in particular has recently granted eight or nine head scarf exceptions, Tanager's opinion is too speculative to establish actual hardship, as required by *Toledo.*

Abercrombie has failed to meet its burden of establishing that granting Elauf an exception to the Look Policy would have caused undue hardship.

Conclusion

We affirm the decision of the District Court as there is no genuine dispute as to any material fact, here. The District Court's grant of summary judgment in favor of the EEOC is proper because Abercrombie was sufficiently notified of Elauf's religious beliefs and Abercrombie failed to prove that accommodating Elauf's religious beliefs would amount to an "undue burden."

IT IS SO ORDERED.

Supreme Court of the United States

ABERCROMBIE & FITCH STORES, INC.,
Appellant,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

Brief of Appellant

I. THE CIRCUIT COURT ERRED IN DETERMINING THAT ABERCROMBIE WAS INFORMED OF A CONFLICT BETWEEN ELAUF'S RELIGIOUS BELIEFS AND ABERCROMBIE'S EMPLOYMENT POLICIES

To establish its *prima facie* case, the EEOC bore the burden of showing that (1) Elauf had a bona fide religious belief that conflicted with an employment requirement; (2) the employer was informed about the conflict; and (3) she was not hired for failing to comply with the employment requirement.

This Court should adopt the interpretation of the "inform" requirement set out by the 10th Circuit in *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000), which requires the employee to inform the employer of the need for a religious accommodation. Here, it is undisputed that Elauf failed to inform Abercrombie that she wore a headscarf due to her religious beliefs. Accordingly, the Circuit Court erred when it determined that Plaintiff established the second element of its *prima facie* case.

1. Title VII case law and EEOC guidance place the burden on the employee to inform the employer of a conflict between a religious belief and a job requirement.

As the 10th Circuit held in *Thomas*, an applicant or employee must *inform* the employer of a religious belief that conflicts with an employment requirement in order to establish a *prima facie* case. *Thomas*, 225 F.3d at 1155. The word "inform" indicates that an applicant must take an affirmative step to notify an employer of a conflict between her religious beliefs and a job requirement.

Most of the other federal circuits that have considered the question have similarly stated that an applicant or employee must *inform* the employer of a conflict between a bona fide religious belief and an employment requirement to establish a *prima facie* case.[1] *See Baker v. Home Depot*,

[1] The First and Seventh Circuits have slightly different frameworks that similarly require an applicant or employee to take affirmative action to notify the employer of a religious conflict. *See EEOC v. Union Independiente De La Autoridad De Acueductos Y Alcantarillados De P.R.*, 279 F.3d 49, 55 (1st Cir. 2002) (plaintiff must "*br [ing]* the [religious] practice to the [employer's] attention") (emphasis added); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997) (plaintiff must "call [] the religious observance or practice to her employer's attention").

445 F.3d 541, 546 (2d Cir. 2006) (plaintiffs must show that "they *informed* their employers of [their religious] belief"); *Shelton v. Univ. of Med. & Dentistry of N. J.*, 223 F.3d 220, 224 (3d Cir. 2000) (same); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996) (same); *Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 273 (5th Cir. 2000) (same); *Burdette v. Fed. Express Corp.*, 367 Fed. Appx. 628, 633 (6th Cir. 2010) (same); *Jones v. TEK Industries, Inc.*, 319 F.3d 355, 359 (8th Cir. 2003) (same); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (same); *Dixon v. Hallmark Cos.*, 627 F.3d 849, 855 (11th Cir. 2010) (same). [2]

The EEOC's own compliance materials also place the burden on the employee to inform the employer of a religious belief that conflicts with an employment requirement. *See* EEOC Compliance Manual, § 12-IV(A) ("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. The *employee is obligated to explain* the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it."); "EEOC Best Practices for Eradicating Religious Discrimination in the Workplace" (recommending that employees "advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules" by providing "enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or belief"). Thus, the language contained in the Manual contemplates a verbal or other active form of communication by the employee to the employer. The EEOC's guidance materials do not contemplate that silence is adequate to inform an employer of a religious conflict with a job requirement.

It is thus well-established that an applicant must take some affirmative action to inform an employer of a conflict between a religious belief and an employment requirement in order to establish a *prima facie* case.

2. Because it is undisputed that Elauf said nothing regarding her religious beliefs at her job interview, summary judgment should have been denied.

Elauf testified that before her interview, she knew the Model position required her to model the Abercrombie style; knew the style of clothing that Abercrombie sold; and also knew that Abercrombie did not sell headscarves. During the interview, Gannet explained portions of the Look Policy to Elauf, told Elauf that employees are expected to dress in the Abercrombie style, and gave Elauf an opportunity to ask questions. It is undisputed that Elauf asked no questions, neither discussed nor referred to her religious beliefs or her headscarf, and did not request a religious accommodation to wear a headscarf in the Model position.

Because Elauf failed to inform Abercrombie of a religious belief that conflicted with an employment requirement, the EEOC failed to establish the second element of its *prima facie* case. Summary judgment should therefore have been denied.

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[2] *See also, Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 673 (8th Cir. 1985) (Title VII claim failed because plaintiff failed to inform employer of need for religious accommodation regarding work schedule); *Redmond v. GAF Corp.*, 574 F.2d 897, 902 (7th Cir. 1978) ("The employee has the duty to inform his employer of his religious needs so that the employer has notice of the conflict."); *Reed v. The Great Lakes Companies*, 330 F.3d 931, 935 (7th Cir. 2003) ("Title VII imposes ... a reciprocal duty on the employee to give fair warning of the employment practices that will interfere with his religion").

3. The Circuit Court's holding is contrary to law, the purpose of the "notice" requirement, and good policy.

The Circuit Court determined that, as a matter of law, Abercrombie had notice that Elauf wore a headscarf due to her religious beliefs because "Elauf wore her head scarf at the interview with assistant store manager Sora Gannet, and Gannet knew she wore the head scarf based on her religious belief." The rule established by the Circuit Court's holding is contrary to law and good policy because it would require employers to inquire into the details of an applicant's religion if they have any reason to suspect that the applicant has a religious belief.

a. Wearing an article of clothing that could be religious in nature is insufficient to inform an employer of a conflict between an employee's religious beliefs and a job requirement.

Merely wearing a clothing accessory that could be interpreted as religious is insufficient to satisfy the requirement that an applicant "inform" the employer of a conflict between a sincerely held religious belief and an employment requirement. As the Seventh Circuit explained:

> A person's religion is not like his sex or race--something obvious at a glance. Even if he wears a religious symbol, such as a cross or a yarmulke, this may not pinpoint his particular beliefs and observances; and anyway employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects.

Reed v. The Great Lakes Companies, 330 F.3d 931, 935-36 (7th Cir. 2003). *See also Wilkerson v. New Media Technology Charter School Inc.*, 522 F.3d 315, 319 (3d Cir. 2008) (notice was insufficient where employee merely informed employer that she was Christian because "simply announcing one's belief in a certain religion, or even wearing a symbol of that religion . . . does not notify the employer of the particular beliefs and observances that the employee holds in connection with her religious affiliation"); *Baaqee v. Brock & Belving Construction Co.*, at *17-18 (S.D. Ala. 2000) ("signs" that employee was Muslim, including that employee did not curse, smoke, or drink, and wore Crescent Star ring symbolizing his religion, were insufficient to show employer had knowledge of plaintiff's religion).

Moreover, Title VII does require an employer to accommodate a "purely personal preference or aversion." *Reed*, 330 F.3d at 935. "Otherwise, [an employee] could announce without warning that white walls or venetian blinds offended his 'spirituality,' and the employer would have to scramble to see whether it was feasible to accommodate him by repainting the walls or substituting curtains for venetian blinds." *Id.* Without Elauf raising the issue herself, Abercrombie had no way of knowing whether Elauf wore the scarf for reasons of personal style or for reasons of personal faith. Only the latter is protected by Title VII,

Here, Elauf wore a headscarf to her employment interview but said nothing about it. Although a headscarf may constitute a religious symbol, a headscarf may also be worn for other reasons, such as the expression of cultural identity or personal fashion sense. If wearing an article of clothing is found to be sufficient to inform an employer of a need for religious accommodation, interviewers will be forced to become clairvoyant experts on all forms of personal religious expression. This is directly contrary to established case law. *See Reed*, 330 F.3d at 935-36; *Redmond v. GAF Corp.*, 574 F.2d 897, 902 (7th Cir. 1978) ("accommodation is not so onerous as to charge an employer with the responsibility for continually searching for each potential religious conflict of every employee").

Moreover, at the time of Elauf's interview, Gannet had not been told by anyone that Elauf

was Muslim and, contrary to the Circuit Court's statement, Gannet testified that she did not *know* Elauf's religion.[3] Gannet simply made an assumption about Elauf's religion, which could easily have been incorrect. Regardless of Gannet's assumption, the fact remains that Elauf -- having been placed on notice of the Look Policy and given the opportunity to ask questions -- failed to "inform" Abercrombie of a religious conflict. Under this Court's precedent and the EEOC's regulations, summary judgment should have been denied.

b. The Circuit Court's decision is contrary to the purpose of the "notice" requirement and good public policy.

In examining the notice issue, the Circuit Court examined case law discussing the "notice" requirement under the Americans With Disabilities Act and determined that "the purpose of the notice requirement is to facilitate the interactive process and prevent ambush of an unwitting employer."

Avoiding unfair surprise is a legitimate reason to require an employee to inform the employer of a conflict. *Averett v. Honda of America Mfg.*, at *29 (S.D. Ohio 2010) ("Public policy requires that an employer be informed of the alleged conflict and be given the opportunity to make an accommodation before being subjected to liability for religious discrimination."). However, this is not the sole purpose of the requirement. In addition to preventing unfair surprise, the notice requirement fits within the overall structure of Title VII, which (1) directs employers, or at least strongly suggests to employers, that they should not question applicants about their religion; and (2) prohibits employers from making assumptions based on stereotypes of protected classifications.

Employers are not permitted to ask (or are at least strongly discouraged from asking) applicants about their religious practices or beliefs, as noted by the EEOC's own Title VII Compliance Manual: "Questions about an applicant's religious affiliation or beliefs...are generally viewed as non job-related and problematic under federal law." To this end, the EEOC's Compliance Manual encourages the use of structured interviews for job applicants consisting of questions that are limited to the specific job functions: "In conducting job interviews, employers can ensure nondiscriminatory treatment by asking the same questions of all applicants for a particular job or category of job and inquiring about matters directly related to the position in question."

Moreover, the EEOC's Compliance Manual advises that "[e]mployers should individually assess each request and avoid *assumptions* or *stereotypes* about what constitutes a religious belief or practice or what type of accommodation is appropriate." Courts have applied similar reasoning in cases arising under the ADA:

> [t]he ADA does not require an employer to *assume* that an employee with a disability suffers from a limitation. In fact, better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately

[3] In some unique cases courts in other circuits have excused an employee from the obligation to directly inform the employer of a conflict where the employer is shown to have, at a minimum, *actual knowledge* of the employee's religious beliefs and the conflict with the job requirement. *See e.g. Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (employee's request for time off to attend wife's "conversion ceremony" was sufficient notice where employer knew employee was Jewish and knew employee's wife was converting).

> perform their jobs. Such a policy is supported by the E.E.O.C.'s interpretive guide: employers "are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of *stereo-types and myths* about the individual's disability. Rather, the capabilities of qualified individuals must be determined on an individualized, case by case, basis." 29 C.F.R. § 1630.5 (1995). *Taylor v. Principal Fin. Group*, 93 F.3d 155, 164 (5th Cir. 1996)

Thus, Title VII and related statutes reaffirm a policy framework in which employers may not inquire as to religion and may not rely on assumptions involving religion when making employment decisions.

In light of these policy considerations, this Court's precedent appropriately places the burden on the applicant to affirmatively inform the employer of a conflict between her religious beliefs and a job requirement. An employer that is faced with silence should not be required to inquire as to religion, or rely upon assumptions and to guess at the applicant's religious beliefs. As between an applicant with a deep religious conviction and an employer that is prohibited by law from considering religion in making employment decisions or inquiring as to an applicant's religion, fairness and good policy dictate that the applicant bear the burden of informing the employer of a potential religious conflict.

Ironically, although the Circuit Court stated that the "notice" requirement is intended to "prevent ambush" of an unsuspecting employer, a job applicant may "ambush" an interviewing manager by wearing a potentially religious symbol and remaining silent if the manager, consistent with Title VII case law and EEOC guidance, has been trained to explain job expectations, ask if the applicant has any questions about those expectations, and not inquire about the applicant's religious beliefs.

Affirming the Circuit Court's rule--that an applicant who merely wears a potentially religious item to an interview and says nothing about it sufficiently informs an employer of a conflict between the applicant's religious beliefs and a job requirement--would open the floodgates to Title VII litigation where the subject would be (1) what the employer assumed and did not assume about the applicant's religious belief(s); and (2) the credibility of that assumption. This framework places employers in untenable position, is contrary to Title VII, and should not be adopted by this Court.

II. THE CIRCUIT COURT ERRED IN HOLDING THAT ABERCROMBIE HAD NOT ESTABLISHED THAT THE RELIGIOUS ACCOMMODATION REQUESTED BY THE EEOC CAUSED AN UNDUE HARDSHIP TO ABERCROMBIE'S BUSINESS

An employer must prevail if the employer cannot reasonably accommodate applicant's religious beliefs without undue hardship. *Lee v. ABF Freight Sys.*, 22 F.3d 1019, 1022 (10th Cir. 1994). The undue hardship threshold is "not a difficult threshold to pass." *Webb v. City of Philadelphia*, 562 F.3d 256, 260 (3d Cir. 2009). In fact, an employer need only show that an accommodation would result in "more than a *de minimis* cost" to demonstrate undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). As a result of this low standard, the employer prevails as a matter of law on the undue hardship issue in many religious accommodation cases decided on a motion for summary judgment.

Employers are not required to prove undue hardship with exactitude. *See Cook v. Chrysler*, 981 F.2d 336, 339 (8th Cir. 1992) (finding that "costs, although not ascertained with exactitude, were present and real"). In fact, some courts have found undue hardship where the harm was speculative. *EEOC v. The GEO Group, Inc.*, 616 F.3d 265 (3d Cir. 2010) (finding undue hardship where defendant presented testimony from employee with "significant prior experience" and "practical experience" in the field who opined as to harm that *could* result from accommodation).

An employer need not establish an economic harm in order to prove undue hardship. *See Webb*, 562 F.3d at 260 ("Both economic and non-economic costs can pose an undue hardship upon employers."); *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995) ("The Court has also recognized that the phrase '*de minimis* cost' entails not only monetary concerns, but also the employer's burden in conducting its business."); *Sanchez-Rodriguez v. AT&T Wireless*, 728 F. Supp. 2d 31, 42 (D.P.R. 2010) (compromising scheduling system intended to accommodate shift preferences of employees constituted undue hardship). Indeed, courts have found undue hardship where an employer alleges that the requested accommodation will damage the company's public image or reputation, and several courts have held that accommodations which amount to exceptions from neutral dress policies create an undue hardship. *See EEOC v. Kelly Services, Inc.*, 598 F.3d 1022, 1029 (8th Cir. 2010) (undue hardship to allow exception to dress policy prohibiting head coverings); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (granting request for exemption from dress policy would damage public image, resulting in undue hardship); *Webb*, 562 F.3d at 261-62 (permitting dress code violation that would alter neutrality of dress code amounted to undue hardship); *Daniels v. City of Arlington*, 246 F.3d 500, 506 (5th Cir. 2001) (undue hardship to permit exception to neutral dress code for employee to wear religious pin).

Abercrombie submitted evidence of three harms that would result from permitting the Look Policy violation sought by the EEOC, each of which results in an undue hardship to Abercrombie. First, an exception to the Look Policy would require Abercrombie to eliminate an essential function of the Models' job. Second, noncompliance with the Look Policy damages the Abercrombie brand -- a valuable business asset. Third, an exception to the Look Policy would interfere with Abercrombie's ability to uniformly enforce the Look Policy.

1. Noncompliance with the Look Policy Would Eliminate an Essential Function of the Model Position.

An accommodation is unreasonable if it requires the employer to eliminate an essential function of the job. *Mason v. Avaya Communs., Inc.*, 357 F.3d 1114, 1122-23 (10th Cir. 2004). Essential functions are "the fundamental job duties" of the employment position an individual desires. *See id.* at 1123; 29 C.F.R. § 1630.2(n)(1).

The unrefuted testimony from Abercrombie's expert witness Dr. Prinia demonstrated that compliance with Abercrombie's Look Policy is an essential function of the model position: "It is my opinion that it is both critical to the job and an *essential function* of the job of Model at Abercrombie to maintain an appearance and sense of style consistent with the brand." Additionally, Abercrombie's witnesses uniformly testified to the importance to the Model job of compliance with the Look Policy.

The EEOC failed to submit any evidence to rebut Dr. Prinia's testimony, or any of the other evidence submitted by Abercrombie. Abercrombie thus established sufficient uncontroverted evidence to demonstrate that an exception to the Look Policy would eliminate an essential function

of the Model position and constitute an undue hardship.

2. Failure to Comply with the Look Policy Damages the Brand.

As the Circuit Court stated, "Abercrombie executives uniformly testified that allowing exceptions to the Look Policy has a negative impact on the brand and on sales." Indeed, the Circuit Court correctly cited much of the evidence Abercrombie submitted which established that exceptions to the Look Policy damage the brand and the business. This evidence demonstrated that the accommodation sought by the EEOC would damage Abercrombie's careful branding efforts, cause brand confusion, and distract Abercrombie customers from the style of clothing sold by Abercrombie. It would be similar to a requirement that a clothing retailer allow a fashion model to wear an off-brand headscarf in a television commercial. This would have resulted in more than a *de minimis* cost, and would have created an undue hardship. Given this unrefuted evidence, the Circuit Court erred by rejecting Abercrombie's undue-hardship defense.

3. Failure to comply with the Look Policy dilutes enforcement of the policy.

Forfeiting the ability to uniformly enforce a neutral policy can constitute an undue burden. Here, noncompliance with the Look Policy interferes with Abercrombie's enforcement of the Policy and negatively affects its ability to control the brand and enforce its policy, resulting in an undue hardship. *Cloutier*, 390 F.3d at 137 (employer who allows employees to violate dress policy "forfeits its ability to mandate compliance and thus loses control over its public image.")

Abercrombie produced evidence of the harmful effect of past, unapproved Look Policy violations. The evidence presented included a former Abercrombie employee's testimony that, a year prior to Elauf's application, he had seen another employee wearing a yarmulke to work on two occasions in a store in California. Word of this alleged exception traveled from California to Oklahoma and, over a year later, influenced other employees to believe that Abercrombie should allow further exceptions to the Look Policy.

By hindering Abercrombie's ability to enforce a key policy, the accommodation sought by the EEOC constituted an undue burden.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Circuit Court.

Supreme Court of the United States

ABERCROMBIE & FITCH STORES, INC.,
Appellant,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

Brief of Respondent

I. THERE IS NO GENUINE DISPUTE THAT ABERCROMBIE WAS INFORMED OF ELAUF'S RELIGIOUS BELIEF

In order to establish a prima facie case of discrimination based on an employer's failure to reasonably accommodate an individual's religious belief, the plaintiff must show that the defendant was informed of the individual's religious belief. "The notice requirement is meant in part to allow the company an opportunity to attempt to reasonably accommodate the plaintiff's needs." *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1363 (S.D. Fla. 1999). This is consistent with this Court's recognition that Title VII's religious accommodation "statutory and regulatory framework . . . involves an interactive process that requires the participation of both the employer and the employee." *Thomas*, 225 F.3d at 1155.

While courts typically describes the notice element in terms of the employee or applicant "inform[ing] the employer" of the religious belief, *see, e.g., Toledo*, 892 F.2d at 1486, the critical fact is the *existence* of the notice itself, not *how* the employer came to have such notice. *See Dixon*, 627 F.3d at 856 (holding that the employer's "awareness" of the religious belief was sufficient to satisfy this standard, even though the plaintiffs did not affirmatively "inform" the employer of their religious belief). Where there is evidence that the employer was on notice of the employee's or applicant's religious belief, such evidence is sufficient to satisfy the notice element regardless of the source of that notice. This, quite sensibly, is because an employer "[is] not deprived of the opportunity to attempt to accommodate the plaintiff's beliefs merely because the notice did not come from the plaintiff." *Hellinger*, 67 F. Supp. 2d at 1363. As the Eleventh Circuit observed, " '[i]t would be hyper-technical . . . to require notice of the Plaintiff's religious beliefs to come only from the Plaintiff.'" *Dixon*, 627 F.3d at 856.

This flexible, common-sense approach to notice is consistent with this Court's recognition that "the elements of proof in employment discrimination cases were not meant to be 'rigid, mechanized or ritualistic.'" *Shapolia*, 992 F.2d at 1037. Thus, When the facts indicate that notice of an individual's religious belief was provided by some means other than the individual affirmatively "informing" the employer of the belief, the prima facie notice requirement should be flexibly interpreted to conform to such factual situations.

There are strong policy reasons supporting this approach. Limiting Title VII's protection to individuals who affirmatively inform employers of their religious beliefs would have the absurd result of permitting employers to refuse to even consider accommodating an individual's known

religious beliefs simply because the employer learned of the religious belief from some other source.

Moreover, a rigid, hypertechnical approach to the notice requirement would have the perverse effect of discouraging employers from engaging in an interactive process with individuals whom the employer believes have religious beliefs that conflict with work requirements. Employers would avoid such discussions out of concern that, should the individual reinforce the employer's prior awareness of the religious belief by "informing" the employer of the belief during such a discussion, the employer would then--as a result of this "informing"--be obligated to consider reasonable accommodation options for the individual, but would not be so obligated if they simply left the matter unaddressed despite their awareness of the religious belief. This would plainly subvert the interactive process that plays such an important role in Title VII's statutory and regulatory framework. *See Thomas*, 225 F.3d at 1155.

Of course, this is not to say that employers are required to inquire of applicants or employees as to whether there are any religious beliefs that need to be accommodated, absent some reasonable indication to the employer that an accommodation may be needed. However, where, as here, an employer is aware that a conflict exists between an individual's religious belief and a work requirement, it is nonsensical to exempt the employer from Title VII's reasonable accommodation requirement simply because the *source* of the employer's knowledge was not the individual's own affirmative statement to the employer.

For all these reasons, the circuit court properly interpreted the notice requirement flexibly, rather than rigidly and hypertechnically, to only require evidence that the employer was aware of the religious belief and conflict, regardless of how that information was imparted to the employer.

Gannet, the Abercrombie official who interviewed Elauf, testified that she was aware that Elauf was Muslim and that she wore her headscarf for religious reasons.[1] Gannet had seen Elauf on numerous occasions prior to interviewing her, and had observed her wearing her headscarf. When Gannet interviewed Elauf, Elauf wore a headscarf to the interview. Gannet "figured that was the religious reason why [Elauf] wore the headscarf, she was Muslim." On this record, there is no question that Abercrombie, through Gannet, was on notice that Elauf wore a headscarf because she is Muslim.

Abercrombie's argument that the Commission's Compliance Manual and regulations "place the burden on the employee to inform the employer of a religious belief that conflicts with an employment requirement" is without merit. As with the case law Abercrombie relies on, the Commission's policy documents do not address the situation where there is evidence that the employer was aware of the applicant's religious belief without the applicant herself so "informing" it. As such, none of these policy documents indicates that an employer is excused from its obligation to provide reasonable accommodation for an applicant's religious belief that conflicts with a work requirement simply because someone other than the applicant herself informed the employer of the belief.

Abercrombie further asserts that the circuit court's approach is contrary to law, the "purpose

[1] Abercrombie has not contested that Gannet was an agent of Abercrombie such that her awareness of Elauf's religious belief is fully attributable to Abercrombie.

of the 'notice' requirement," and "good policy." This, Abercrombie posits, is because this approach will "require employers to inquire into the details of an applicant's religion if they have any reason to believe that the applicant has a religious belief." To the contrary, the court's approach presents no such difficulties and is fully consistent with Title VII, its purposes, and public policy.

Abercrombie predicts the circuit court's approach would compel employers to be "clairvoyant experts" on a wide range of religious practices, able to discern at a glance whether an individual has a religious belief in need of reasonable accommodation; force employers to either "question applicants about their religion," or make "assumptions based on stereotypes of protected classifications"; and permit an applicant to "ambush" an employer by attending an interview wearing a "potentially religious symbol" but remaining silent when presented with information about job duties.

The law already anticipates that employers may not be aware of an individual's specific religious beliefs or how to resolve any conflicts between such beliefs and work requirements. It does not require employers to affirmatively broach the issue of religious beliefs with every applicant or employee, regardless of whether the employer has reason to believe that the individual may have a religious belief that conflicts with a work requirement. The employer's obligation is to attempt reasonable accommodation (where no undue hardship would result) when it has notice--be it from an affirmative statement by the individual, or some other source--of an individual's religious belief that conflicts with a work requirement.

This is why the law requires employers to engage in an interactive process with employees or applicants with religious beliefs that conflict with work requirements, once they are on notice of such religious beliefs--to determine what reasonable accommodation, if any, may be provided in order to eliminate the conflict. *See Thomas*, 225 F.3d at 1155 (discussing the interactive process). It is inherent in the notion of an interactive process that the employer may not adequately understand the individual's religious belief, and that through such a process, the employer and the individual can discuss the religious belief at issue and possible accommodation options.

This approach also encourages employers to avoid stereotyping and unnecessary inquiries into an individual's religious beliefs. For example, if an employer is presented with a situation in which it believes an applicant may have a religious belief that conflicts with a work requirement, it can simply inform the applicant that it will make reasonable efforts to accommodate employees' religious practices, describe the relevant job duties, and then ask the applicant if she believes she can perform those duties. By so acting, employers can engage in just the type of narrowly-tailored interactive process intended under Title VII, and avoid making decisions based on stereotypes or assumptions about an individual's religious beliefs.

Abercrombie claims that the circuit court erred in concluding that the interactive process failed because Abercrombie failed to initiate it. However, it is well established that the burden of initiating the accommodation process is on the employer. *Toledo*, 892 F.2d at 1488-90. It is uncontested that Gannet was aware of Elauf's religious belief and its conflict with the Look Policy, but failed to pass this information along to Sanderling or HR as required so the company could explore accommodation options.

II. THE CIRCUIT COURT PROPERLY CONCLUDED THAT ABERCROMBIE FAILED TO PROVE THAT ACCOMMODATION OF ELAUF'S RELIGIOUS PRACTICES WOULD CAUSE AN UNDUE HARDSHIP

Once a plaintiff presents sufficient evidence to establish a prima facie case of an employer's failure to reasonably accommodate a religious belief, the burden shifts to the defendant to prove that it was unable to provide such accommodation without suffering undue hardship on the conduct of its business. *Toledo,* 892 F.2d at 1486. If, as happened here, the employer makes no effort to accommodate an individual's religious beliefs before taking action against her, liability attaches unless the employer "shows that no accommodation could have been made without undue hardship." *Id.* at 1490; *see also id.* at 1492 (concluding that the employer's failure to show that "accommodation of [the employee's] religious practices without undue hardship was impossible" resulted in liability). "Absent this showing, failure to attempt some reasonable accommodation would breach the employer's duty to initiate accommodation of religious practices." *Id.* at 1490.

Determining whether a particular accommodation would cause an undue hardship is a case-by-case factual inquiry. *Id.* While the employer is not required to incur more than a *de minimis* cost, "[a]ny proffered hardship . . . must be actual; '[a]n employer . . . cannot rely merely on speculation' " to meet its burden of proof. *Id.* at 1492. Similarly, as the Eighth Circuit, has recognized, "[a]ny hardship asserted, furthermore, must be 'real' rather than 'speculative,' 'merely conceivable,' or 'hypothetical.' 'Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts.' " *Brown v. Polk County, Iowa,* 61 F.3d 650, 655 (8th Cir. 1995). As the Flamingo circuit court correctly recognized, given the purely hypothetical and speculative nature of Abercrombie's undue hardship evidence, Abercrombie failed to meet this burden.

First, it must be noted that over the last few years Abercrombie has provided employees with exactly the reasonable accommodation sought by Elauf--permission to wear a headscarf for religious reasons while performing the Model position--without any indication that any harm resulted. If Abercrombie's assertion of undue hardship were correct, these multiple Look Policy exceptions would reveal exactly how detrimental to the conduct of its business such exceptions truly are. Yet Abercrombie has not identified a single adverse effect it has actually suffered from any of these instances--either to its sales, to its "brand," or otherwise.

Given Abercrombie's inability to identify a single harm it has actually suffered by permitting a tiny fraction of its Models to wear headscarves as reasonable accommodations--eight out of 70,000-100,000--it is not surprising that Abercrombie's witnesses were unable to identify any nonspeculative or nonhypothetical harm that would result from similarly accommodating Elauf's religious belief.

Abercrombie's expert witness, Tanager, opined that an employee wearing a headscarf "*can* negatively impact the brand and *can* impact sales," but would not go so far as to state that such a harm "would" in fact occur, because "[y]ou never know for sure." Tanager added that such certainty could be gained from "comprehensive empirical research"--in fact, this is exactly what Abercrombie asked him to perform, "comprehensive empirical research" on the potential impact "on sales performance" of employees wearing headscarves--yet he was *still* uncertain in his conclusion.

Tanager was supposed to examine the impact of permitting employees to wear headscarves on Abercrombie's sales performance. Yet he admitted that he knew Abercrombie had been permitting employees to wear headscarves, that he was unaware of any studies on whether Abercrombie's sales had been impacted by these exceptions, and that he himself did not undertake any such study

Abercrombie's management officials were just as speculative. Merganser, Abercrombie's Director of Human Resources, testified that permitting Elauf to wear a headscarf would have caused undue hardship because "if we accommodate every request for accommodation that we receive, that *could* negatively impact that store experience for our customers." Despite being Director of Human Resources, Merganser was unaware of and/or had not seen any measurement, study, or report by Abercrombie on any adverse impact from these exceptions. The basis for Merganser's opinion was simply "[her] own personal experience" where she has "walked into stores that have Look Policy exceptions, ones that we have dealt with, and the experience is different." Merganser did not describe, however, whether the Look Policy exceptions she experienced were analogous to permitting Elauf to wear a headscarf, if the exceptions she witnessed caused any actual harm to Abercrombie, or if Abercrombie's actual practice of permitting Models to wear headscarves had caused the harm she speculated. Similarly, Smew, Abercrombie's Group Vice President for Human Resources, testified that other than Tanager's report, Abercrombie had not studied how deviating from the Look Policy might impact how customers view Abercrombie.

Garganey, Abercrombie's Director of Stores, testified that while Abercrombie conducts audits of its stores, he was not aware of any effort by Abercrombie to examine the audit scores to see if they correlated with a store's lower sales. Garganey stated that Abercrombie has data on numerous factors relating to a store's operation. However, when asked if Abercrombie tries to draw a correlation between all this data and the store's sales performance, and to isolate whether a drop in the "properly dressed" score causes a drop in sales, Garganey could only opine that he "believed" that there was such a correlation and could not provide any specific examples.

Viewing all of this evidence in the light most favorable to Abercrombie, no reasonable jury could conclude that providing Elauf with a reasonable accommodation would have caused it to suffer an undue hardship, and the Circuit Court therefore properly affirmed the grant of judgment in favor of the EEOC. Despite having every opportunity to present evidence of its actual practice of permitting Models and other employees to wear headscarves as reasonable accommodations for their religious beliefs, Abercrombie instead relied only on speculative, hypothetical opinions. As such, Abercrombie has failed to satisfy the well-established requirement that evidence of undue hardship rise above the level of the speculative and theoretical and into the realm of the actual.

Abercrombie next asserts that its witnesses' testimony "demonstrated" and "established" that permitting an exception to the Look Policy damages its brand and business. However, as described above, these witnesses' testimony was devoid of any indication that harm would have *actually* resulted had Abercrombie hired Elauf and permitted her to wear her headscarf at work, and lacks any consideration of Abercrombie's actual practice of having provided exactly such a reasonable accommodation to other employees.

Abercrombie asserts that it would lose the ability to uniformly enforce" its Look Policy if it were required to permit Elauf to wear a headscarf at work, because noncompliance with the policy interferes with its ability to enforce the policy, compromising its control of the brand. As an example, it asserts that because it permitted one employee to wear a yarmulke at work, other employees in other stores "believe[d] that Abercrombie should allow further exceptions to the Look Policy." Even if true, this is hardly a harm suffered by Abercrombie--that employees simply *believed* it should permit exceptions to the policy. Moreover, highlighting the inconsequential nature of this alleged harm is the fact that the company produced some eighty pages of documented

requests for Look Policy exceptions (granted and denied), yet has presented no evidence that granting those exceptions (including several for non-religious purposes) in any way, shape or form diluted its ability to enforce the policy. Abercrombie's argument here is also in apparent disregard of Tanager's testimony that granting exceptions would *not* break down Abercrombie's control over the brand because when it decides to permit exceptions "they [Abercrombie] are in control."

CONCLUSION

For the aforementioned reasons, the Commission respectfully requests that this Court affirm the summary judgment ruling.