How Employers Can Reconcile the Tension between the Supreme Court's Holding in EEOC v. Abercrombie & Fitch Stores, Inc. and the EEOC's Guidelines Relating to Pre-Employment Inquiries

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HOW EMPLOYERS CAN RECONCILE THE TENSION BETWEEN THE SUPREME COURT’S HOLDING IN EEOC V. ABERCROMBIE & FITCH STORES, INC. AND THE EEOC’S GUIDELINES RELATING TO PRE-EMPLOYMENT INQUIRIES

In 1972, Title VII of the Civil Rights Act of 1964 (“Title VII”) was amended to include the definition of religion. This new addition required employers to “reasonably accommodate” employees’ religious observances or practices, unless the accommodation was an undue hardship to the employer’s business. The duty to accommodate begins at the application process and continues throughout the employment relationship.

Although an employer cannot take into account an applicant’s or employee’s religion or religious beliefs when making employment decisions, an employer “has an affirmative obligation to take into account an individual’s religion by providing ‘reasonable accommodation’ of applicants’ and employees’ religious tenants or precepts.” Despite this obligation, the United States Equal Employment Opportunity Commission (“EEOC”) has made clear that “[q]uestions about an applicant’s affiliations or beliefs . . . are generally viewed as non job-related and problematic.

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2 See 42 U.S.C. § 2000e(j) (2016); 3-76 LABOR AND EMPLOYMENT LAW § 76.10(1) (LexisNexis 2017) (discussing how definition of religion in Title VII incorporates duty to accommodate); see also Prohibited Employment Policies/Practices, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/ (last visited Feb. 21, 2016) (discussing prohibited employment practices). “The law requires an employer to reasonably accommodate an employee’s religious beliefs or practices, unless doing so would cause difficulty or expense to the employer. This means an employer may have to make reasonable adjustments at work that will allow the employee to practice his or her religion . . . .” Id.

3 See Grisham, supra note 1, at 18 (discussing employer’s duty to accommodate). “Reasonable religious accommodations include, but are not limited to, time and/or a place to pray, leave for religious observances, job reassignments, and the ability to wear religious attire.” Id. at 19.

4 See SHAW ROSENTHAL, EMPLOYMENT LAW DESKBOOK, § 18.01(4.0a) (2016) (providing general overview of reasonable accommodation requirement).
under federal law," and thus should not be asked. Section 2000e-2 of Title VII explicitly states that it is unlawful for an employer

[T]o 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.”

Thus, employers can only ask questions to determine if the applicant or employee is qualified for the job and not whether he or she may need a religious accommodation.

Although Title VII requires that employers provide religious accommodations to its applicants and employees, the law is silent as to whether applicants and employees are required to give notice to their employers that they require a religious accommodation. Several circuit courts have interpreted Title VII to have a knowledge requirement. These circuit courts have held an employer must have knowledge of the need for an accommodation for the employee or applicant to make its prima facie case.

The Supreme Court, however, recently held in *EEOC v. Abercrombie & Fitch Stores, Inc.* that an employee need not show that the employer had knowledge of the employee’s religious accommodation in order to prove his or her prima facie case and, in doing so, it overturned

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5 Pre-Employment Inquiries and Religious Affiliation or Beliefs, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/inquiries_religious.cfm (last visited Feb. 21, 2016) (“Employers should avoid questions about an applicant’s religious affiliation, such as place of worship, days or worship, and religious holidays and should not ask for references from religious leaders, e.g., minister, rabbi, priest, imam, or pastors.”); see also Prohibited Employment Policies/Practices, supra note 2 (stating illegal for employer to discriminate against applicant, job assignment, or promotions based on religion).


7 See Prohibited Employment Policies/Practices, supra note 2 (discussing generally pre-employment inquiries).

8 See Woodman v. WWOR-TV, Inc., 411 F.3d 69, 81-83 (2d Cir. 2005) (identifying circuits requiring employees show their employer had knowledge accommodation to meet prima facie case).

9 See Geraci v. Moody-Tottrup, Int’l, 82 F.3d 578, 581 (3d Cir. 1996) (citing Protos v. Volkswagen, Inc., 797 F.2d 129, 133 (3d Cir. 1986); see also Lubecksky v. Applied Card Sys. Inc., 296 F.3d 1301, 1307 (11th Cir. 2002) (finding no religious discrimination where employer rescinded applicant’s offer because no knowledge of applicant’s religion); see generally EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE § 2.05(5) (LexisNexis, 2016) (“An employee may forego his or her rights to accommodations if he fails to inform the employer of his needs or refuses to cooperate with the employer in trying to reach an accommodation.”).

the circuit courts’ holding that Title VII has a knowledge requirement. The Supreme Court also held that “[a]n employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decision.”

The Court’s holding creates a lesser burden for persons bringing a religious accommodation claim and also increases the burden on employers to inquire into potential religious accommodation needs. In the past, the employee was responsible for informing his or her employer of his or her need for a religious accommodation; the employer now has the burden of initiating the process of determining whether a prospective employee may need an accommodation. Thus, the Abercrombie & Fitch Inc. decision creates a tension between an employer’s duty to accommodate and the employer’s inability to inquire as to an applicant’s or employee’s religious affiliations or beliefs, leaving many questions unanswered.

How does one show an employer’s motive when the employer does not have confirmed knowledge? What does the court mean by “or otherwise”? How does an employer avoid a potential religious

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11 See id. (finding employer must only have motive, rather than knowledge with respect to religious discrimination).

12 See id. at 2030 (stating rule for disparate-treatment claims based on failure to accommodate religious practice).


14 See Perlman supra note 15 and accompanying text.

15 See Barbara D’Aquila & Margaret Rudolph, Headwinds and headscarves—Charting a Prudent Course for Employers in the Wake of EEOC v. Abercrombie & Fitch, GLOBAL WORK PLACE INSIDER (June 8, 2015), http://www.globalworkplaceinsider.com/2015/06/headwinds-and-headscarves-charting-a-prudent-course-for-employers-in-the-wake-of-eecv-abercrombie-fitch-stores-inc/ (“Future litigation may center on what the words ‘or otherwise’ mean, especially as litigants attempt to show the real motive of an employer’s decision when the employer did not have ‘actual’ or ‘confirmed’ knowledge.”); see also Judy Greenwald, Supreme Court’s Religious
discrimination lawsuit without asking his applicants and employees whether or not they may need an accommodation. This note will discuss how this tension was created and how employers may resolve these questions and avoid litigation.

I. RELIGIOUS ACCOMMODATION – STATUTORY FRAMEWORK AND PRIMA FACIE CASE

In 1972, Title VII was amended to include the definition of religion thereby making it illegal for an employer to “treat an employee or applicant unfavorably based on the individual’s religious beliefs.” Under the amended act, religion is defined to include “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 of practice without undue hardship on the conduct of the employer’s business.”

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18 See Perlman, supra note 15 and accompany text.
19 See infra Parts VI-VII.
20 See JAMES ANELLI & MICHAEL GARDNER, LeClair Ryan, XPERTHR EMPLOYMENT LAW MANUAL 2348 (2017) (discussing 42 U.S.C.S. § 2000e-2(a)). Specifically, the Civil Rights Act makes it unlawful for an employer to:

(1) fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

The amendment imposes an affirmative duty on employers to accommodate their employees’ religious beliefs or practices so long as the accommodation does not impose an undue hardship on the employer.22

An individual can assert a religious discrimination claim under two theories: (1) disparate treatment and (2) religious accommodation.23 In order to make a prima facie religious accommodation claim, an employee must establish that: “(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; and (3) he or she was disciplined for failure to comply with the conflicting employment requirement.”24 Once the employee has made her prima facie case, the burden shifts to the employer to show that she or he could not accommodate the employee’s religious needs without undue hardship.25

II. RELIGIOUS ACCOMMODATION AND EMPLOYER’S KNOWLEDGE PRIOR TO ABERCROMBIE

Title VII does not explicitly require that an employer have knowledge of an employee or applicant’s religious belief or practice.26 It only requires that the employer knew that his employee was a member of a religion and that the employer discriminated against his employee on the basis of that religion.27 Prior to Abercrombie, many circuit courts held that evidence of an employer’s knowledge about an employee’s or applicant’s protected status is necessary in order for an employee to establish his or her

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23 See Abramson v. William Paterson Coll., 260 F.3d 265, 281-82 (3d Cir. 2001) (analyzing discrimination suit as involving two separate theories); Chalmers v. Tulon Co., 101 F.3d 1012, 1017 (4th Cir. 1996) (acknowledging courts have recognized employees may utilize two theories in religious discrimination claims); Mann v. Frank, 7 F.3d 1365, 1368-70 (8th Cir. 1993) (utilizing disparate treatment and religious accommodation to evaluate plaintiff’s claim).
24 See Chalmers, 101 F.3d at 1019 (finding employer must show he or she could not accommodate employee’s accommodation without undue hardship).
26 See Beasley v. Health Care Serv. Corp., 940 F.2d 1085, 1089 (7th Cir. 1991) (“[T]he plaintiff in a Title VII religious discrimination suit has the burden of showing that her religion was the basis of her discharge.”).
prima facie case of religious discrimination under Title VII. The circuit courts determined that Title VII not only imposed a duty on the employer to accommodate but also imposed a reciprocal duty on the employee to provide notice to his or her employer that his or her religion may interfere with the employer’s employment practices. For example, an employee who vaguely referenced a need for an accommodation without specific details did not make his prima facie case under this standard. Furthermore, under this standard an employee’s appearance did not automatically create a duty to accommodate unless the employee explicitly told the employer that she or he required an accommodation due to his or her religious beliefs or practice. By providing notice of the employee’s religious beliefs or practices, an employer has afforded the opportunity to accommodate the those religious beliefs or practices.

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28 See Woodman v. WWOR-TV, Inc., 411 F.3d 69, 82-83 (2d Cir. 2005) (discussing how different circuits have dealt with knowledge requirement); see also Lubetsky v. Applied Card Sys., Inc., 296 F.3d 1301, 1305 (11th Cir. 2002) ("[W]here intentional religious discrimination under Title VII is alleged, a prima facie case is established if the plaintiff demonstrates the challenged employment decision was made by someone who was aware of the plaintiff’s religion."); Johnson v. Angelica Uniform Group, Inc., 762 F.2d 671, 672 (8th Cir. 1985) (holding district no religious discrimination by employer because employee failed to provide advance notice); Beasley, 940 F.2d at 1088 ("To establish a prima facie case, a plaintiff must show that (1) the practices are religious in nature; (2) the employee call the religious practices to the employer's attention, and (3) the religious practices were the basis of the discharge."); Geraci v. Moody Tottrup, Int'l, 82 F.3d 578, 581 (3d Cir. 1986) (affirming non-visibly pregnant employee failed to provide notice to employer for pregnancy discrimination suit). The court in Geraci held:

Geraci, 82 F.3d at 581.

29 See Reed v. Great Lakes Cos., 330 F.3d 931, 935 (7th Cir. 2003) (discussing employee’s obligation to inform employer of need for accommodation).

30 See Johnson, 763 F.2d at 674 (discussing prima facie requirement for religious discrimination case).

31 See Reed, 330 F.3d at 936 ("Even if he wears a religious symbol, such as a cross or a yarmulka, this may not pinpoint his particular beliefs and observations; and anyway employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects."); see also Jennifer Ann Drobac & Jill L. Wesley, Religion and Employment Antidiscrimination Law: Past, Present, and Post Hosanna-Tabor, 69 N.Y.U. ANN. SURV. AM. L. 761, 791 (2014) (noting courts do not expect employers to be experts in religion nor monitor religious needs).

32 See Drobac & Wesley, supra note 31, at 791 ("The notification must be specific enough so that the employer has a general understanding of what the employee’s religious beliefs are and what accommodation of those beliefs might entail.").
The EEOC’s 2008 Compliance Manual ("Compliance Manual") similarly asserted that employees had a duty to provide their employers with notice of their need for an accommodation. The Compliance Manual states that “[a]n 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, therefore, could not assume that the employer knew that she needed a religious accommodation.

Although the Compliance Manual indicated that there was a notice requirement, it also stated that there were no “magic words” required to put an employer on notice of an applicant or employee’s potential need for religious accommodation. The employee was only required to “provide enough information to make the employer aware that there exists a conflict between the individual’s religious practice or belief and a requirement for applying for or performing the job.” The Compliance Manual, therefore, suggested that the notice requirement was met so long as the employer had enough information to determine that there could be a problem. The Compliance Manual cites Brown v. Polk County as an example. In Brown, the court found that an employer, despite never being told that his employee required an accommodation, was provided enough information to make him aware that his employee needed a religious accommodation.

33 See EEOC Compliance Manual, supra note 21.
34 See id. at 47 (emphasizing requirements of requesting religious accommodations); see also Religious Discrimination, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/types/religion.cfm (last visited Feb. 21, 2016) (“When an employee or applicant needs a dress or grooming accommodation for religious reasons, he should notify the employer that he needs such an accommodation for religious reasons.”).
35 See EEOC Compliance Manual, supra note 21, at 47 (“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.”).
36 See id.; EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1135 (10th Cir. 2013) (“To request an accommodation, an individual may use plain language and need not mention any particular terms such as ‘Title VII’ or ‘religious accommodation.’”).
37 EEOC Compliance Manual, supra note 21, at 47. See also Heller v. EBB Auto Co., 8 F.3d 1433, 1439 (9th Cir. 1993) (finding employee’s request to participate in religious conversion ceremony sufficient to put employer on notice). “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.” Id. (citations omitted).
38 See Walter Olsen, A Hijab and a Hunch: Abercrombie and the Limits of Religious Accommodation, 2014-15 CATO SUP. CT. REV. 139, 145 (2014) (“Cases from the U.S. Courts of Appeals for the Eighth, Ninth, and Eleventh Circuits could be read as holding that the notice requirement was met once the employer had enough information to figure out a conflict, whether or not the employee had stated it in so many words.”).
39 61 F.3d 650 (8th Cir. 1995) (suggesting notice is not as hard to meet as previously believed).
because the employee’s previous reprimand was directly related to the employee’s religious activities.\(^{40}\)

III. SUPREME COURT’S INTERPRETATION OF KNOWLEDGE REQUIREMENT

In *EEOC v. Abercrombie & Fitch Stores Inc.*,\(^{41}\) the Supreme Court overruled the circuit courts, finding that Title VII has a knowledge requirement, despite many other circuits having found knowledge necessary to create a prima facie case in a religious discrimination.\(^{42}\) In this case, Samantha Elauf (“Elauf”), a practicing Muslim who wears a headscarf, applied for a position at Abercrombie & Fitch Store, Inc. (“Abercrombie”).\(^{43}\) During Elauf’s interview, the assistant manager found Elauf qualified for the position but was worried that Elauf’s headscarf would violate the company’s Look Policy, which prohibited its employees from wearing “caps.”\(^{44}\) As a result, Elauf’s interviewer asked the store manager and the district manager if Elauf’s headscarf violated the policy and informed both managers that she believed Elauf wore the headscarf for religious reasons.\(^{45}\) The district manager told Elauf’s interviewer not to hire Elauf because her headscarf violated Abercrombie’s Look Policy.\(^{46}\)

Prior to *certiorari* review, the Tenth Circuit granted summary judgment in favor of Abercrombie because Elauf never informed Abercrombie that she wore her headscarf for religious reasons and, therefore, required an accommodation for her religious needs.\(^{47}\) The

\(^{40}\) See id. at 654 (rejecting argument that Title VII does not protect employees who have never requested religious accommodations); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1363 (S.D. Fla. 1999) (finding notice where employer had knowledge of employee’s refusal to sell condoms at prior job). *But see Wessling v. Kroger Co.*, 554 F. Supp. 548, 552 (E.D. Mich. 1982) (contesting employer notice). The court in *Wessling* found that the employer was not placed on notice when his employee requested to leave early to set up for a church play because the request “was not in terms of a request for an accommodation of her religious practices” and, thus, did not provide the employer with enough information to indicate that there was a conflict between his employee’s religious practice and his job obligations. *Id.* at 552.

\(^{41}\) 135 S. Ct. 2028 (2015).

\(^{42}\) See id. at 2031 (addressing issue of whether employees must inform employers of religious need).

\(^{43}\) See id. (setting up relationship between parties).

\(^{44}\) See id.; *Wilson*, *supra* note 15 (providing background for case).

\(^{45}\) See *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2031 (stating interviewer’s steps in addressing her concerns with Elauf’s headscarf).

\(^{46}\) See id. (stating district manager indicated all headwear, religious or otherwise, would violate “Look Policy”).

\(^{47}\) See *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1110-43 (10th Cir. 2013) (granting Abercrombie summary judgment). Even though the interviewer assumed Elauf was Muslim because of her headscarf, the court found that the EEOC could not establish a prima
Supreme Court overturned the Tenth Circuit’s finding, holding that Title VII does not impose a knowledge requirement, but rather imposes a motive requirement.  

Applying this rule, the Supreme Court found that an employer who has actual knowledge of an individual’s need for an accommodation does not violate Title VII so long as his refusal to hire was not motivated by the avoidance of the needed accommodation.  

Furthermore, the Court also found that an employer who has “no more than an unsubstantiated suspicion” of a needed accommodation may violate Title VII if his motive is to avoid the accommodation.  

Thus, an employer - who denies an applicant employment when he believes, but does not know for certain that the applicant is an orthodox Jew who requires Saturdays off - will violate Title VII because the employer’s desire to avoid the accommodation was a motivating factor in his decision not to hire.  

Although, the court did not
address how to determine motive, it stated “[a] request for accommodation, or the employer’s certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.”52 The Supreme Court also stated that “the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.”53

IV. LITIGATION POST-ABERCROMBIE

Lower courts have begun to apply Abercrombie’s motive standard. For example, the Fifth Circuit recently held in Nobach v. Woodland Village Nursing Center, Inc.54 that a former employee did not meet her prima facie case because she did not advise any of her supervisors that she required a religious accommodation.55 In Nobach, a former employee, who worked as a nursing home activities aid, brought a Title VII action against her former employer alleging that she was discharged from her position because she refused to pray the Rosary with a patient.56 Nobach asserted that she refused to pray with the patient because it was against her religion.57 Nobach alleged that she told the nurse’s assistant - an employee of the nursing home whom did not act as a supervisor of the employee -

know that a job applicant requires an accommodation may still discriminate against the applicant because the focus [is] on the employer[']s motivations.”); 10-261 LABOR AND EMPLOYMENT LAW § 261.03 (LexisNexis, 2017) (“The Supreme Court held that if an employer refuses to hire an individual based on its belief that she will require a religious accommodation such as a dress code exemption, and she actually would need one if hired, Title VII is violated.”).

52 Abercrombie & Fitch Stores, Inc., 135 S. Ct. at 2032-33 (explaining why Court disagrees with Defendant’s argument that actual knowledge is required under Title VII). The Court explained that:

[While] a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice—i.e., that he cannot discriminate ‘because of’ a ‘religious practice’ unless he knows or suspects it to be a religious practice. That issue is not presented in this case, since Abercrombie knew—or at least suspected—that the scarf was worn for religious reasons. The questions has therefore not been discussed by either side . . . . It seems to us inappropriate to resolve this unargued point by way of dictum . . . .

Id. at 2033 n.3.
53 Id. at 2033 (discussing Title VII’s disparate-treatment provision).
54 799 F.3d 374 (5th Cir. 2015).
55 Id. at 379 (finding no evidence that employee advised her supervisors about religious accommodation).
56 See id. at 376-77 (providing background sequence of events leading up to termination).
57 See id. at 376 (describing employee’s refusal to pay).
that she could not pray with the patient because it was against her religion.58 After telling the assistant that she could not read or pray the Rosary with the patient, the assistant remained silent.59 The patient was not read the Rosary and filed a complaint with the nursing home activities director who was also Nobach’s head supervisor.60 The activities director met with the nursing home’s director of operations, who advised the director to write up the employee.61 Following this meeting, Nobach was written up for the fifth time and, as a consequence, was discharged for her failure to assist the patient.62

The court found that the employee’s evidence was insufficient to support a finding that her employer knew or suspected that the employee’s religious beliefs required the employer to accommodate and exclude the employee from praying the Rosary.63 The court reasoned that the employee did not advise anyone involved with her discharge that her religion prevented her from reading patients the Rosary and that those involved with her discharge did not suspect that she refused to read the patient the Rosary because of her religious belief.64

58 See id. (delving into employee’s decision).
59 See Nobach v. Woodland Village Nursing Ctr., Inc., 799 F.3d 374, 376 (5th Cir. 2015) (recalling what occurred when Nobach told assistant she could not read to patient). Specifically, Nobach said: “[I]f you would like to perform the Rosary, you’re more than welcome to.” Id. (internal quotations omitted).
60 See id. (detailing what followed right before Nobach discharge).
61 See id. (detailing same).
62 See id. at 376-77. The court remarked that:

[W]hen Nobach asked the reason, [the activities director said that Nobach had been written up for the incident and was now fired for failing to assist a resident with the Rosary. . . . [T]he activities director] told Nobach: “I don’t care if it’s your fifth write-up or not. I would have fired you for this instance alone.”

63 See id. at 379 (noting employee did not meet showing of religious accommodation evidence). The court noted that:

[If] the employee] had presented any evidence that [the employer] knew, suspected, or reasonably should have known the cause for his refusing this task was her conflicting religious belief—and that [the employer] was motivated by this knowledge or suspicion—the jury would certainly have been entitled to reject [the employer’s] explanation for [the employee’s] termination.

64 See Nobach, 799 F.3d at 378-79 (citing EEOC v. Abercrombie & Fitch Stores Inc., 135 S. Ct. 2028, 2033 (2015)). The court relies on the holding in Abercrombie & Fitch Stores Inc., stating that actual knowledge is not required but that “[a] request for accommodation, or the employer’s certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.” Id. at 379 (quoting Abercrombie & Fitch Stores Inc., 135 S. Ct. at 2033).
In addition to circuit courts, district courts have also begun to apply the motive standard. The Eastern District of Texas recently held in *Mindrup v. Goodman Networks, Inc.* that an email between an employee and a high ranking individual at the employer’s company was sufficient to show that the employer knew, or should have suspected, that the employee required an accommodation. In *Mindrup*, a former employee, who was the company’s Director of Communications and a Buddhist, brought an action against his former employer under Title VII alleging he was fired because he refused to add Bible quotes to the daily email message that was sent to all of the employees at the company. The employer argued that the employee did not meet its *prima facie* case because there was no evidence it suspected that the employee was a Buddhist when the employee refused to include Bible verses in the daily email. The employee argued that he informed the employer of his religious belief because he had emailed the company’s Corporate Secretary the day after he was asked to add Bible quotes to a daily email message, and had explained that he was unable to perform this act because of his religious beliefs. The court found that there was sufficient evidence to show that the employer knew, or suspected that, the employee refused to perform his work duties due to his religious beliefs because the employee had informed him of his religious beliefs, and that there was a conflict between his religious practice and his job requirements.

Similarly, the District of Colorado recently held in *EEOC v. Jetstream Ground Services Inc.* that an employer knew or suspected the employee needed an accommodation because the employee wore her

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67 Id. at *20-23 (discussing ways employee informed employer of his religious belief).
68 See id. at *5-6 (alleging termination because of refusal to add Bible quotes to email).
69 See id. at *6 (outlining arguments of both parties). It was the employer’s position that its decision to terminate the employee was not due to the employee’s religious affiliation because the employer had no knowledge of the employee’s religious association. Id.
70 See id. at *20 (discussing email sent by employee to executive officer of company).
71 See *Mindrup*, 2015 U.S. Dist. LEXIS 139678, at *19-20 (citing Heller v. EEB Auto Co., 8 F.3d 1433, 1439 (9th Cir. 1993) & Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978)). The court states that the employee’s email to the executive office of the Company “specifically advises that he is unable to add Bible quotes, as he does not wish to offend others or his own personal religious belief, which is sufficient evidence to survive summary judgment on this point.” Id. at 20.
72 134 F. Supp. 3d 1298 (D. Colo. 2015).
religious garb consistently during non-work hours. In *Jetstream Ground Services Inc.*, five female Muslims cabin-cleaning employees, brought a Title VII action against their former employer for failing to re-hire them because their religious beliefs required them to wear hijabs and long-skirts in public. The employer had a uniform policy, which required cabin cleaners to wear pants while working. One of the employees wore a hijab and a skirt on her way to work and during breaks, but removed, regularly, her hijab and skirt to change into pants in preparation for work hours. However, she never requested to wear a skirt while at work.

The employer moved to dismiss the employee’s religious accommodation, and disparate treatment claims because it alleged that the employee never informed or requested a religious accommodation since she wore pants and did not wear a hijab during her shifts. The court found that there was sufficient evidence to show that the employer knew or suspected that the employee needed an accommodation and that her need for an accommodation was a motivating factor in its decision to lay her off. The court concluded that there was sufficient evidence to create a genuine dispute because the employee consistently wore her hijab and long skirt in the workplace, as well as during non-work hours and breaks.

Similarly, the Eastern District of Pennsylvania recently held in *Mathis v. Christian Heating and Air Conditioning, Inc.* that an employee’s voiced objection to an employer’s policy is sufficient evidence to show that an employer knew or suspected that the employee needed an accommodation. In *Mathis*, an employee, who worked as an installation

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73 See id. at 1318-19 (finding sufficient evidence supporting whether employer knew, or at least suspected, employee needed religious accommodation). The employee consistently wore her religious garments not only to work, but also during non-work hours. Id.

74 See id. at 1305-09 (providing background facts of case).

75 See id. at 1306 (stating employer’s dress code required cabin cleaners wear pants while working regardless of request to wear skirts).

76 See id. at 1311 (describing employee’s attire before work, during work, and during non-work hours).

77 See EEOC v. Jet Stream Ground Servs., 134 F. Supp. 3d 1298, 1301 (D. Colo. 2015) (stating employee did not request accommodation to wear skirt or hijab during work).

78 See id. at 1317 (discussing why employer believes employee’s claim should be dismissed). The employer maintained that there was no evidence the person who laid-off the employee had knowledge the employee was Muslim. Id.

79 See id. at 1319-20 (finding evidence that employer’s management knew or suspected employee desired accommodation and discharged for it).

80 See id. at 1319 (stating employee consistently wore religious garments in work place).


82 See id. at 331-32 (finding employees objection to ID badge sufficient to conclude employee informed employer of religious belief). The court stated, “[a] reasonable trier of fact could infer from this . . . that [employee] terminated plaintiff’s employment ‘with the motive of avoiding accommodation.’” Id. at 332.
mechanic, filed a Title VII action against his employer, a heating and air conditioning company, for terminating his employment because he covered the employer’s religious mission statement on the back of his employee ID badge. The employer had a policy where all its employees were required to wear an ID that had their name, photograph, and a portion of the company’s mission statement. The employee was an atheist and covered the statement with tape on his badge because he did not agree with it and did not believe that employees should have to wear a religious statement that connects to someone else’s religion. During a workday, the employer asked the employee why his badge was covered with tape and the employee responded that he did so because he did not agree with the mission statement and objected to the employer pushing his religion on him. The owner dictated that he would have to wear the badge uncovered or he would need to unequivocally quit the company. The owner subsequently took the employee’s badge and terminate his employment. The court found that the employee had presented sufficient evidence that the employer terminated the employee’s employment with the motive of avoiding an accommodation because the employee voiced his objection to the mission statement and said that he did so because of his religious beliefs. The court reasoned that the employee “need only show that [the employer] acted upon an improper motive when it terminated his employment and/or when it failed to accommodate him.”

83 See id. at 321 (discussing employer’s badge policy).
84 See id. at 322 (stating employee covered badge because he was atheist). The employee did not tell anyone involved in management that he covered his badge for religious purposes nor did anyone involved in management notice that the employee was covering the employer’s mission statement. Id. The employee did, however, tell other employees that he covered the mission statement on his I.D. because he did not feel that employees should “have to wear a religious statement because of somebody else’s religion.” Id. (citations omitted).
85 Id. (stating employer noticed tape on employee’s badge and requested employee to remove it).
87 See id. at 322-23 (articulating employer’s demand to remove tape and when employee disagreed, he was terminated).
88 See id. at 323 (arguing employee’s noncompliance decidedly was him quitting).
89 See id. at 332 (“A factfinder could... take notice of the lack of evidence that [the employer] attempted to have any constructive conversation with [the employee] about [the employee’s] disagreement with the mission statement to infer that [the employer] preferred to avoid accommodating [the employee’s] beliefs.”). The court concluded there was sufficient evidence for a jury to infer that the employee’s termination was motivated by the employer’s desire to avoid the employee’s religious accommodation. See id.
90 Id. at 331 (citing EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015)). The court agreed with employee’s contention that “Title VII, as interpreted in Abercrombie, does not require [the employee] to prove that he advertised his atheistic beliefs to his employer, nor does it
V. EMPLOYMENT PRACTICES POST-ABERCROMBIE

Post-Abercrombie, it has been suggested that employers revise their hiring procedures and document their hiring decisions.\(^1\) Specifically, commentators recommend that employers explain the essential requirements of the job and ask all applicants or employees whether they will be able to meet those requirements.\(^2\) Engaging in this informative process provides the applicant an opportunity to disclose any conflict he or she may have with the employer’s policies.\(^3\)

For example, if an applicant comes to an interview wearing religious clothing and the interviewer or employer suspects that there may be a conflict between the applicant’s religious practice and the employer’s uniform policy, the employer should tell the applicant about the rule and ask if it would pose any issues for the applicant.\(^4\) Describing policies to all applicants and employees allows the employer to investigate a potential accommodation without violating Title VII’s ban on questions directly related to religious beliefs and practices.\(^5\) However, questions should be require that he prove that he phrased his disagreement with the mission statement in terms of his atheism.” \(^6\)

\(^1\) See Maria Danaher, OMG! Panic Over the Supreme Court’s Decision on Religious Discrimination., EMPLOYMENT LAW MATTERS (June 7, 2015), http://www.employmentlawmatters.net/2015/06/articles/ada/omg-panic-over-the-supreme-courts-decision-on-religious-discrimination/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+EmploymentLawMatters+%28Employment+Law+Matters%29 (discussing consequence of Courts ruling in Abercrombie); D’Aquila & Rudolph, supra note 17 (“[T]he employers decision should be based solely on nondiscriminatory reasons, and the reasons should be legitimate, documented, and supported in the employer’s records”); Mollen & Smith, supra note 50 (“[T]he decision provides employers with a valuable reminder that they should train hiring and management personnel to ask good questions in the interview process.”).


\(^3\) See id. (noting employers do not have to “fish” for possible accommodations).

\(^4\) See Dawn Solowey & Ariel Cudowicz, You Can’t Stick Your Head in the Sand: Dos and Don’ts for Religious Accommodation in Hiring After EEOC v. Abercrombie, LABOR AND EMPLOYMENT L. COUNSEL (Jun. 16, 2015), http://www.laborandemployementlawcounsel.com (providing suggestions for interviewers). “This invites the applicant to disclose any conflict, but avoids a direct inquiry into the applicant’s religion or religious practice.” \(^7\)

\(^5\) See Wilson, supra note 15 (stating all applicants should be given full notice of essential job functions and workplace policies); Solowey & Cudowicz, supra note 94 (providing notice of job functions and workplace policies starts dialogue but avoids stereotyping).
fact-specific and directly related to job functions because not all applicants or employees will require an accommodation.96

VI. IMPLICATION OF ABERCROMBIE

The decision in Abercrombie creates a lower standard for individuals claiming religious discrimination and simultaneously increases the burden on employers to find creative solutions when determining whether an applicant or employee needs an accommodation.97 Prior to the Court’s decision, many circuit courts required a person claiming a religious accommodation violation to prove that his or her employer had confirmed knowledge of his or her employee’s or applicant’s religious practice in order for her to meet her prima facie case.98 Requiring that the employer have knowledge of a religious accommodation provided employers with greater protection because they would be put on notice.99 Employers did not need to worry about guessing whether someone might not need an accommodation nor did they have to worry about asking prohibited questions.100 Additionally, the knowledge requirement imposed a reciprocal duty on the employee.101 The employee had the duty to inform his employer of his need for a religious accommodation and the employer

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96 See Eck, supra note 13 (noting breadth of Abercrombie decision is narrowly tailored). Anyone with hiring authority “[m]aking reasonable inquiries into potential accommodation matters based on specific facts because it is safe to assume that not all applicants will or even should be questioned about their religious affiliation when the interaction is free of any facts supporting such an inquiry.” Id.; Mark G. Jeffries, Are You Being Nosy or Burying Your Head? re: Employment Law, NAT’L L. REV. (Feb. 1, 2016), http://sjlaboremploymentblog.com (“If the inquiry cannot be directly tied to job duties, it’s almost certainly better not to ask.”).
97 See Eck, supra note 13; Judy Greenwald, Supreme Court’s Religious Headscarf Ruling Increases Bias Risks, BUSINESS INSURANCE (Jun. 7, 2015, 12:00 A.M.), http://www.businessinsurance.com/article/00010101/NEWS06/306079977/Supreme-Courts-religious-headscarf-ruling-increases-employers-bias-risks (stating Abercrombie decision is “going to really increase the burden on employers ”).
98 See Lubetsky v. Applied Card Sys., Inc., 296 F.3d 1301, 1305 (11th Cir. 2002) (explaining how to make prima facie case). The court explained that “[w]here intentional religious discrimination under Title VII is alleged, a prima facie case is established if the plaintiff demonstrates the challenged employment decision as made by someone who was aware of the plaintiff’s religion.” Id. See also Johnson v. Angelica Unif. Grp., Inc., 762 F.2d 671, 672 (8th Cir. 1985) (affirming no prima facie case because employee failed to inform employer in advance of accommodation); Beasley, 940 F.2d at 1088 (holding plaintiff failed to establish credible prima facie case).
99 See Eck, supra note 13 and accompanying text (discussing Abercrombie’s holding).
100 See Greenwald, supra note 97 (noting increased difficulty for interviewers).
101 See Reed v. Great Lakes Cos., 330 F.3d 931, 935 (7th Cir. 2003) (discussing employee’s obligation to inform employer of need for accommodation).
had the duty to provide that accommodation.\textsuperscript{102} Thus, if an applicant or employee failed to give the employer actual notice of her need for an accommodation, then the employer would not have a duty to accommodate her religious practice.\textsuperscript{103}

Under the \textit{Abercrombie} motive requirement, an employee is not required to tell her employer that she requires an accommodation.\textsuperscript{104} Rather, she need only prove that her need for an accommodation was a motivating factor in her employer’s decision to fire or not hire her.\textsuperscript{105} Therefore, a person claiming a religious accommodation violation can meet her \textit{prima facie} case even if she only vaguely references a need for an accommodation or if she wears religious clothing.\textsuperscript{106} The applicant or employee need not provide the employer with a greater level of notice.\textsuperscript{107} Title VII does not require that the employer have confirmed knowledge of an employee’s need for a religious accommodation in order to be held liable for religious discrimination.\textsuperscript{108} So long as the employer has a substantiated suspicion and uses this suspicion as a factor in his employment decision, the employer will be held liable for religious discrimination.

\textsuperscript{102} See \textit{id.} (noting duty to accommodate is reciprocal). Title VII imposes an affirmative duty on the employers to accommodate and the knowledge requirement imposes an affirmative duty on the employee to provide notice of his need for religious accommodation. \textit{Id.}

\textsuperscript{103} See Drobac \& Weasley, \textit{supra} note 31, and accompanying text (giving reason for applicant’s duty to inform). An employer cannot determine what religious accommodation(s) an applicant or employee requires without knowing how his or her religious practice conflicts with current job practices and procedures. \textit{Id.} Similarly, the EEOC Compliance Manual also suggests that employees \textit{must} provide their employer with notice. \textit{See EEOC Compliance Manual, supra note 21} (providing instructions on dealing with religious discrimination). “An applicant or employee who seeks religious accommodation \textit{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.” \textit{Id.} (emphasis added).

\textsuperscript{104} See EEOC v. Abercrombie \& Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015) (stating applicant need not show employer had actual knowledge of applicant’s need for accommodation).

\textsuperscript{105} See \textit{id.} (stating applicant need only show need for accommodation was motivating factor in employer’s decision).

\textsuperscript{106} See \textit{Johnson v. Angelica Unif. Grp.}, 762 F.2d 671, 674 (8th Cir. 1985) (discussing \textit{prima facie} requirement of religious discrimination case); \textit{Reed}, 330 F.3d at 936 (“Even if he wears a religious symbol, such as a cross or a yarmulka, 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.”).

\textsuperscript{107} See \textit{Reed v. Great Lakes Cos.}, 330 F.3d 931, 935-36 (7th Cir. 2003) (discussing what person needs to do to indicate need for religious accommodation).

\textsuperscript{108} See \textit{Abercrombie \& Fitch Stores, Inc.}, 135 S. Ct. at 2033 (disagreeing with \textit{Abercrombie’s} argument). “[T]he intentional discrimination provision prohibits certain motives, regardless of the state of the actor’s knowledge . . . . An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” \textit{Id.} (emphasis added). “A request for accommodation, or the employer’s certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.” \textit{Id.}
discrimination unless he can show that the accommodation would have been an undue hardship.\textsuperscript{109}

The motive requirement, therefore, does away with the employer-employee reciprocal duty that had been established by the previous knowledge requirement and in some way imposes an additional burden on employers.\textsuperscript{110} The Court’s decision confirms that employers must take steps to accommodate individuals in the workplace if they wish to avoid potential litigation.\textsuperscript{111} However, implementing procedures that ensure an employee’s religious accommodations do not go unattended is much easier said than done.\textsuperscript{112} After all, an employee does not need to do much in order to put their employer on notice that they may need a religion accommodation.\textsuperscript{113}

What makes the Court’s decision complicated is that the EEOC’s Compliance Manual, states that there are no “magic words” required to put an employer on notice of applicant’s or employee’s potential need for a religious accommodation.\textsuperscript{114} The employee only needs to provide his employer with enough information so as to make his employer aware that his religious practice may be in conflict with his work.\textsuperscript{115} For example, an objection to a policy is sufficient to put an employer on notice that his employee needs an accommodation.\textsuperscript{116} Therefore, the motive requirement means that employers are left guessing as to whether a person might need an accommodation.\textsuperscript{117}

The Court’s holding that “an employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in

\begin{itemize}
\item[109] See id. (interpreting language of Title VII); Tinkle, supra note 92 (stating undue hardship still remains as defense to religious discrimination).
\item[110] See Eck, supra note 13 and accompanying text (explaining confusion caused by Abercrombie decision).
\item[111] See Greenwald, supra note 97 (noting increased burden on employers).
\item[112] See Wilson, supra note 15 and accompanying text (discussing difficulties of determining whether person needs accommodation without asking questions that are prohibited).
\item[113] See EEOC Compliance Manual, supra note 21 (outlining guidelines for employees and employers).
\item[114] See id. (describing duties of both employer and employees). “To request an accommodation, an individual may use plain language and need not mention any particular terms such as ‘Title VII’ or ‘religious accommodation.’” Id. at 47.
\item[115] See Olsen, supra note 38 and accompanying text (asserting employers only need “enough” information).
\item[117] See Greenwald, supra note 97 (discussing impact of Abercrombie on employers).
\end{itemize}
employment decisions" and the EEOC’s unequivocal suggestion that “[q]uestions about an applicant’s affiliations or beliefs . . . are generally viewed as non job-related and problematic under federal law” puts employers in a difficult position. If an employer suspects that an applicant or employee may need a religious accommodation and is unable to confirm his or her suspicion by asking the applicant or employee about accommodations, the employer can still face liability if he does not accommodate because he suspected that an accommodation was needed. How do employers fulfill their duty to accommodate if they are prohibited from inquiring as to an applicant’s or employee’s religious affiliation or beliefs?

Additionally, the Supreme Court’s use of the word “otherwise” is vague and provides little guidance to employers, leaving many questions unanswered. The Court seems to suggest that “otherwise” is referring to something that is “no more than an unsubstantiated suspicion.” However, this in of and itself does not provide much guidance to employers because the Court makes clear that “motive and knowledge are separate concepts,” but acknowledges that the motive requirement itself may not be met unless the employer suspects that religious practice is in question. Knowledge does not imply motive unless the employer’s decision is based in non-discriminatory reasons. Unsubstantiated suspicion

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118 See EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2028 (2015) (finding employer does not need to have knowledge for there to be religious discrimination).

119 See Pre-Employment Inquiries and Religious Affiliation or Beliefs, supra note 5 (“[E]mployers should avoid questions about an applicant’s religious affiliation, such as place of worship, days of worship, and religious holidays and should not ask for references from religious leaders, e.g., minister, rabbi, priest, imam, or pastor.”).

120 See D’Aquila & Rudolph, supra note 17 (“Although the EEOC discourages an employer from asking applicants about their religious beliefs and practices . . . Abercrombie’s manager asked no religious questions, and yet Abercrombie could face liability if the applicant’s religious practice was a motivating factor in the hiring decision.”).

121 See Wilson, supra note 15 and accompanying text (discussing implications of Court’s decision and tension between Court’s holding and EEOC’s general guidance); Eck, supra note 13 and accompanying text (noting new hardships causing confusion for employers).

122 See Perlman, supra note 15 and accompanying text (discussing questions left unanswered by Court); D’Aquila & Rudolph, supra note 17 and accompanying text.

123 See Abercrombie & Fitch Stores Inc., 135 S. Ct. at 2033 (“[A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.”).

124 See id. at 2033 n.3 (explaining why lack of motive does not apply in this case). The Court does not resolve this argument because it was clear that Abercrombie knew or at the very least suspected that Elauf’s headscarf was worn for religious reasons. Id.

125 See id. at 2033 (discussing intentional discrimination provision). “An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding the accommodation is not his motive.” Id.
implies motive when the employer’s decision not to hire is because of that unsubstantiated suspicion. These two concepts suggest that employers need to pay closer attention when they have knowledge or suspicion that a religious practice may conflict with current policies and procedures.

VII. WHAT EMPLOYERS CAN DO TO AVOID LITIGATION

Employers can take certain steps to avoid potential litigation including, but not limited to, explaining the essential requirements of the job and asking the applicant or employee whether he or she will be able to meet those requirements. Doing so creates an interactive process whereby it invites employees to notify the employer of potential conflicts and also allows the employer to determine whether an applicant or employee will need an accommodation without directly asking. The employer, however, should only raise the subject when the employer suspects that the employee or applicant’s practice is religious because questions about an applicant’s religion can itself give rise to a discrimination claim. Thus, if the employer does not suspect or know that the applicant or employee has a religious conflict, he should refrain from asking questions relating to the applicant or employee’s religious practice or belief.

Employers should also make sure that the questions they ask are directly linked to an applicant or employee’s job duties. The more fact specific the question, the less likely that the questions will themselves lead

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126 See id. (assuming employer’s intent is what matters).
127 See Danaher, supra note 91 (“When an issue of religion is raised—either directly by an applicant, or indirectly, through an interviewer’s ‘suspicion’ that a quality or characteristic contradicts company policy—further attention should be paid.”).
128 See Tankle, supra note 92 and accompanying text (providing guidance for employers).
129 See Solowy & Cudowicz, supra note 94 and accompanying text (explaining benefit of disclosing company policies). For example, if an applicant comes to an interview wearing religious clothing and the interviewer or employer suspects that there may be a conflict between the applicant’s religious practice and the employer’s uniform policy, the employer should tell the applicant about the rule and ask if the rule would pose any issue for the applicant. Id.
130 Wilson, supra note 15 (“[E]mployers are likely safer raising that subject only where, as in Abercrombie, they know or have reason to suspect that the employee’s practice is religious.”).
131 See Mollen & Smith, supra note 50 (digesting analysis of E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015)). “In some situations, this may require managers who suspect the presence of a religious motive for an employee’s behavior to act affirmatively to learn whether their suspicions are correct, and to explore whether and what kind of accommodations may need to be provided.” Id.
132 See Jeffries, supra note 96 (“If the inquiry cannot be directly tied to job duties, it’s almost certainly better not to ask.”).
to religious discrimination claims. Additionally, employers should be aware that in most instances they will have a duty to accommodate a religious practice whether or not an applicant or employee requests an exemption from the employer’s dress or grooming policies because religious clothing puts the employer on notice that the employee may need a religious accommodation. Employers can also reduce the risk of religious discrimination claims by documenting the process in its entirety so that in the event that they do not hire or fire an applicant or employee, they will be able to show that their employment decision was based solely on non-discriminatory reasons.

Conclusion

The Supreme Court’s holding in Abercrombie provides fewer protections to employers - it lowers the burden for claimants who bring a religious discrimination case to meet their prima facie case and increase employers’ duty to accommodate. The knowledge requirement pre-Abercrombie created a reciprocal duty whereby the employee would have a duty to inform her employer of her need for an accommodation and the employer would provide an accommodation. The motive requirement established by Abercrombie did away with the knowledge requirement and in doing so eliminated the employee’s reciprocal duty to notify her employer of a need for an accommodation. Therefore, an applicant or employee does not need to do very much in order to put the employer on notice. Simply wearing a religious garment can signal to the employer that the employee needs a religious accommodation.

What makes the Abercrombie decision particularly difficult for employers is that the EEOC guidelines prohibit employers from asking

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133 See Eck, supra note 13 (explaining burden on employers). “Making reasonable inquires into potential accommodation matters based on specific facts because it is safe to assume that not all applicant’s will or even should be questioned about their religious affiliation when the interaction is free of any facts supporting such an inquiry.” Eck, supra note 13. This is also supported by the EEOC’s suggestion that “[e]mployers 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.” Best Practices for Eradicating Religious Discrimination in the Workplace, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last modified July 23, 2008), (discussing employer’s best practices in context of disparate treatment based on religion).


135 See D’Aquila & Rudolph, supra note 17 (discussing what employers should consider when applying Court’s decision). Employers should base their decisions “solely on nondiscriminatory reasons, and the reasons should be legitimate, documented, and supported in the employer’s records.” Id.
applicants and employees direct questions about their religious practices. Therefore, an employer is put in an uncomfortable position. They must try their best to guess whether a person may need a religious accommodation while avoiding making judgments based on stereotypes.

Despite this, there are certain things that employers can do in order to ensure that they provide their applicants and employees with accommodations. Employers can: (1) ask the same questions to all of its applicants and employees; (2) provide all applicants and employees with the job assignment description and ask whether the applicants or employees will be able to satisfy the requirements; and (3) document the entire process including reasons for failing to hire or terminating a particular applicant or employee. Taking these necessary steps helps to mitigate any potential problems that may arise during the pre-hiring and hiring process.

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