THE REAL IMPACT OF EEOC V. ABERCROMBIE & FITCH STORES, INC.:

Inside"Look Policies"—Effective Business Strategies or Legal Liabilities?

By Alix Valenti & Vanessa L. Johnson

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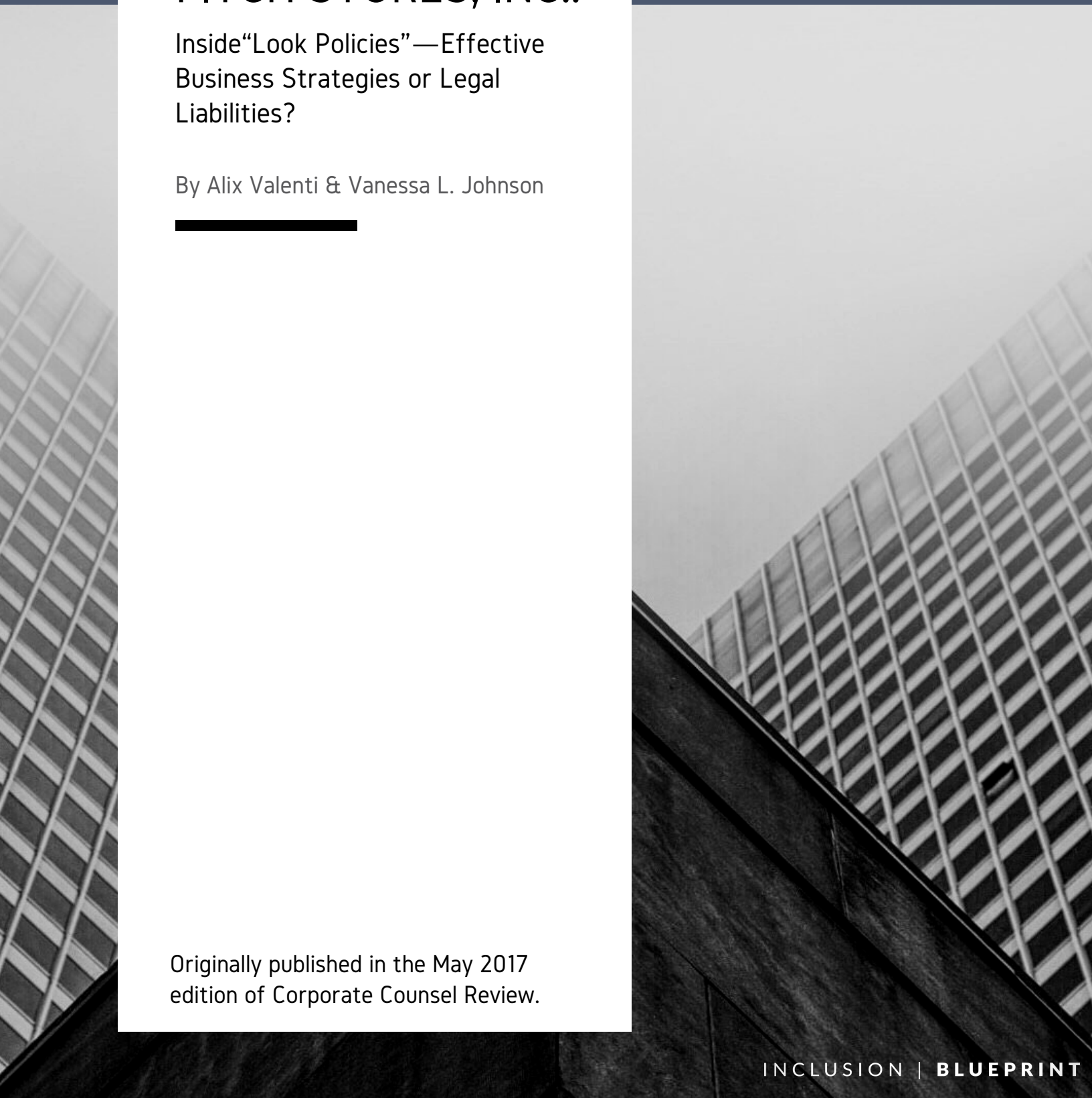

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The Real Impact of *EEOC v. Abercrombie & Fitch Stores, Inc.*: "Look Policies"—Effective Business Strategies or Legal Liabilities?

*By Alix Valenti & Vanessa L. Johnson**

Today's highly competitive business environment requires companies to establish a well-defined and well-recognized, unique image that sets them apart from their competitors.[1] The appearance and conduct of a company's frontline employees who interact with customers on a daily basis and are the "face of the company" are critical to sustaining a business image.[2] During the 1990s, Abercrombie & Fitch executed an image-driven/appearance-focused branding strategy, which was successful for many years. CEO Mike Jeffries took the helm of Abercrombie & Fitch in 1992, when its revenues were

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1. Dallan F. Flake, *Image Is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 720 (2015).
2. *Id.* at 721.

suffering.[3] Jeffries established the Abercrombie & Fitch "look" which turned the retailer's products "into a status symbol that nearly every teenager in America sought to [obtain]."[4] Within two years after Jeffries became CEO, sales nearly doubled to $165 million, and by 2012 the company grew to more than 1,000 stores, with annual sales of over $4.5 billion.[5] By creating and sustaining a company image, Jeffries turned a lackluster clothing store into "the most dominant and imitated lifestyle-based brand in America."[6] However, the look policy ultimately became the undoing of Abercrombie & Fitch by alienating potential customers and violating federal and state discrimination laws, resulting in bad press and plummeting sales. As a result, in January 2014, Jeffries was removed from his position as Chairman of the Board.[7] After nearly three years of declines and a ten-percent drop in same-store sales in fiscal 2013,[8] Jeffries was forced to retire in December 2014.[9]

The brand lost its luster over time for a variety of reasons.[10] Industry experts argued that Abercrombie was hit by a major shift in teen consumption following the Great Recession,[11] but Abercrombie's "exclusionary" brand had started becoming a liability at least a decade before Jeffries's exit. In June 2003, the NAACP Legal Defense Fund (LDF) filed a class action lawsuit, Gonzalez v. Abercrombie & Fitch Stores,

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3. Hayley Peterson, *Abercrombie CEO Is Out,* Business Insider (Dec. 9, 2014, 8:52 AM), http://www.businessinsider.com/abercrombie-ceo-is-out-2014-12.
4. *Id.*
5. Michael Thrasher, *How Consumers Fell in and out of Love with Abercrombie & Fitch*, Business Insider (2013), http://www.businessinsider.com/the-rise-and-fall-of-abercrombie-and-fitch-2013-7?op=1%2F#-started-as-a-store-for-outdoorsmen-1.
6. Benoit Denizet-Lewis, *The Man Behind Abercrombie & Fitch*, Salon (Jan. 24, 2006, 5:16 AM), http://www.salon.com/206/01/24/jeffries/.
7. Adita Shrivastava & Devika Krishna Kumar, *Struggling Abercrombie Strips CEO Jeffries of Chairman Role,* Reuters (Jan. 28, 2014, 5:03 PM), http://www.reuters.com/article/us-abercrombie-ceo-idUSBREA0R11720140128.
8. Sarah Kaplan, *The Rise and Fall of Abercrombie's 'Look Policy,'* The Washington Post (Jun. 2, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/06/02/the-rise-and-fall-of-abercrombies-look-policy/?utm_term=.f16a99efdf1e.
9. *Id.*
10. Peterson, *supra* note 3.
11. *Id.*

against the company.[12] The lawsuit "charged that in addition to selling so-called 'classic' looks, Abercrombie also practiced a classic form of discrimination against African-American, Latino and Asian American [sic] applicants and employees."[13] The suit also "alleged that Abercrombie refused to hire qualified minority applicants as Brand Representatives working on the sales floor while discouraging applications from minority candidates . . . [and] charged that in the rare instances when minorities were hired, they were given undesirable positions to keep them out of the public eye."[14] LDF joined with the Mexican American Legal Defense and Educational Fund (MALDEF), the Asian Pacific American Legal Center, and several private law firms to represent the nine original plaintiffs. The class grew as other minority applicants and employees across the country joined the lawsuit.[15] In 2004, the Equal Employment Opportunity Commission joined the suit.[16] In November 2004, LDF and co-counsel reached a $40 million dollar settlement with the company.[17] The settlement's consent decree required the company to institute policies and programs to promote diversity among its work force and to prevent discrimination based on race or gender.[18]

Despite this enormous settlement and the CEO's acknowledgment in a 2006 interview that, before the lawsuit, Abercrombie "just didn't work hard enough as a company to create more balance and diversity," Jeffries said the following:

> That's why we hire good-looking people in our stores. Because good-looking people attract other good-looking people, and we want to market to cool, good-looking people. We don't market to anyone other than that.
> . . . .
> In every school there are the cool and popular kids, and then there are the not-so-cool kids . . . . Candidly, we go after the cool kids. We go after the attractive all-American kid with a great attitude and a lot of friends.

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12. ABERCROMBIE & FITCH EMPLOYMENT DISCRIMINATION, NAACP Legal Defense Fund, http://www.naacpldf.org/case-issue/abercrombie-fitch-employment-discrimination.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

> A lot of people don't belong [in our clothes], and they can't belong. Are we exclusionary? Absolutely. Those companies that are in trouble are trying to target everybody: young, old, fat, skinny. But then you become totally vanilla. You don't alienate anybody, but you don't excite anybody, either. . . . .
>
> We try to stay authentic and relevant to our target customer. I really don't care what anyone other than our target customer thinks.[19]

That attitude worked for several years.[20] Later, however, other controversies and discrimination lawsuits followed. Although Jeffries's comments quoted above did not make many waves when the interview was published in 2006, they resurfaced seven years later in articles discussing the reasons why the retailer did not carry XL, XXL, or sizes larger than a ten in women's clothing.[21] The comments motivated body image activists from organizations such as the National Eating Disorders Association (NEDA) to call for a boycott of the retailer due to the "company's emphasis on serving only cool, thin customers."[22] As for other lawsuits, there were several. For example, "in 2009, a British tribunal ruled in favor of a woman with a prosthetic arm who said she was forced to work in a back room and then dismissed because the cardigan she wore to cover her arm didn't fit with Abercrombie's 'look policy.'"[23] Furthermore, a total of three Muslim women, Samantha Elauf, Umme-Hani Khan, and Halla Banafa, sued the company for religious discrimination as a result of its policy on headscarves or hijabs.[24]

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19. Denizet-Lewis, *supra* note 6.
20. Kaplan, *supra* note 8.
21. Ashley Lutz, *Abercrombie & Fitch Refuses to Make Clothes for Large Women,* Business Insider (May 3, 2013, 10:36 AM), http://www.businessinsider.com/abercrombie-wants-thin-customers-2013-5.
22. Kaplan, *supra* note 8; *National Eating Disorders Association Tells Abercrombie & Fitch 'The Emperor Has No Clothes,' Calls for Boycott of Retailer*, National Eating Disorders Association (Jun. 11, 2013), https://www.nationaleatingdisorders.org/national-eating-disorders-association-tells-abercrombie-fitch-%E2%80%98-emperor-has-no-clothes%E2%80%99-calls.
23. Kaplan, *supra* note 8.
24. *Id.*; Omar Sacirbey, *Abercrombie & Fitch to Change 'Look Policy,' Allow Hijabs,* The Washington Post (Sept. 23, 2013), https://www.washingtonpost.com/national/on-faith/abercrombie-and-fitch-to-change-look-policy-allow-hijabs/2013/09/23/cd4ca3c2-2494-11e3-9372-92606241ae9c_story.html?tid=A_inl&utm_term=.0756a6ed0364.

Abercrombie ultimately settled the legal matters with Khan and Banafa out of court and agreed to amend the 'Look Policy' to allow accommodations for religious practice.[25] However, the religious accommodation claim brought by Elauf went all the way to the Supreme Court before the company ultimately settled.[26]

In the summer of 2015, the United States Supreme Court decided the religious accommodation/discrimination case, *EEOC v. Abercrombie & Fitch Stores* ("Abercrombie").[27] In an 8-1 decision, the Supreme Court held that "Title VII's disparate-treatment provision requires Elauf to show that Abercrombie (1) 'failed[ed] . . . to hire' her (2) 'because of" (3) '[her] religion' (including a religious practice)."[28] According to the Court, to prevail in her disparate-treatment claim, Samantha Elauf, the plaintiff and a practicing Muslim, needed only show that her need for an accommodation was a motivating factor in Abercrombie & Fitch's decision not to hire her, not that the company had "actual knowledge" of her need.[29] Because the facts of the case, which are discussed in greater detail below, overwhelmingly supported the holding, it is somewhat surprising that the case received a considerable amount of attention from legal practitioners and scholars. Both argued that because *Abercrombie* changed the elements of a prima facie religious accommodation claim "by doing away with 'knowledge' and 'notice,'" the impact of the decision was significant.[30] The legal practitioners and scholars expressed particular concern about the majority's assertion that "an 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."[31] These authors claimed that this "suspicion" standard will create substantial uncertainty for employ-

25. Kaplan, *supra* note 8.

26. *Abercrombie Resolves Religious Discrimination Case Following Supreme Court Ruling in Favor of EEOC* (July 28, 2015), https://www.eeoc.gov/eeoc/newsroom/release/7-28-15.cfm.

27. Walter Olson, *A Hijab and a Hunch: Abercrombie and the Limits of Religious Accommodation*, 2014-15 CATO SUP. CT. REV. 139 (2014-15).

28. *EEOC v. Abercrombie & Fitch Stores, Inc.,* 135. S. Ct. 2028, 2032 (2015).

29. *Id.*

30. *See* Valerie Weiss, *Unwrapping Religious Accommodation Claims: The Impact on the American Workplace After EEOC v. Abercrombie*, 46 SETON HALL L. REV. 1113, 1117 (2016).

31. 135. S. Ct. at 2033.

ers, as "it is easy to imagine scenarios where an employer may risk suit both for asking and not asking certain questions."[32]

To the contrary, this article contends that the Supreme Court decision should be interpreted narrowly and that the more impactful result of the legal reasoning in the *Abercrombie* decision is that it will raise the standard for employers who assert that an exception to their dress and grooming policies will cause undue hardship by negatively affecting or harming their corporate brands. Accordingly, the article argues that the management and legal implications for employers who rely on strict appearance/dress and grooming policies as a major component of their corporate image/branding strategies are significant enough to call this business strategy into question. Therefore, the article examines the current status of religious accommodation cases, with a special emphasis on those regarding employer dress and grooming policies; discusses the District Court, Tenth Circuit, and Supreme Court *EEOC v. Abercrombie & Fitch Stores, Inc.*[33] opinions; and deliberates on the legal and management implications of these decisions to argue that, in the context of an increasingly diverse America, "look policies" are both ineffective strategies as well as potential legal liabilities.

I. RELIGIOUS DISCRIMINATION AND ACCOMMODATION

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, national origin, sex, and religion. Religion is defined under Title VII in section 701(j) as "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates the inability to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[34] In the context of religion, discrimination includes (1) disparate treatment based on religion in the recruitment, hiring, promotion, benefits, training, job duties, termination, or any other aspect of employment;[35] (2) workplace or job segregation or classification that would deprive any individual of employment opportunities or otherwise adversely affect an employee's status based on religion;[36] and (3) failure to

32. *See* Weiss, *supra* note 30, at 1117.
33. 135 S. Ct. 2028 (2015).
34. 42 U.S.C. § 2000e(j) (2012).
35. *Id.* §2000e-2(a)(1).
36. *Id.* §2000e-2(a)(2).

reasonably accommodate an employee's religious beliefs or practice without undue hardship.[37]

However, prior to 1972 there was no requirement for accommodation for religious or other Title VII discrimination claims. The EEOC adopted guidelines in 1967 that required reasonable accommodation by employers, but courts did not impose an affirmative duty on employers to accommodate religious beliefs.[38] In 1972, an amendment to the Civil Rights Act, which included a requirement of accommodation as part of the religious discrimination provision, was adopted,[39] but charges based on religious discrimination have traditionally represented a relatively small percentage of the total number of discrimination claims filed with the EEOC.[40] For example, they were only four percent of the total in 2013 and 2014.[41] However, claims of workplace religious discrimination are generally on the rise.[42] Since 2000, religious discrimination claims filed with the EEOC have almost doubled, with 3,502 claims filed in 2015.[43] Accordingly, data suggest that employees are becoming increasingly concerned over their religious rights in the workplace: 50% of non-Christians and 60% of Evangelical Christians' report that employers ignore their religious needs and otherwise discriminate against them.[44] Given these facts, the increasing diversity

37. *Id.* § 2000e(j).
38. Patricia Pattison, Donald E. Sanders, & John Ross. *The Squiggly Line: When Should Individual Choices Be Protected from Employment Discrimination*? 24 S.L.J. 29, 31 (2014). The courts were leery of extending Title VII to impose any affirmative obligations on employers and rejected the EEOC's argument that employers would be forced to accommodate the varying religious beliefs and practices of their employees. Dewey v. Reynolds Metals, Co., 429 F.2d 324, 334-35 (6th Cir. 1970), *aff'd per curiam*, 402 U.S. 689 (1971). The Court's affirmation of *Dewey* prompted Congress to amend Title VII and impose the accommodation requirement on employers absent undue hardship.
39. 42 U.S.C. § 2000e(j) (2012). According to the Supreme Court, the intent of this change "was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of its employees and prospective employees." Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977).
40. EEOC, *Charge Statistics, FY 1997 Through FY 2016* (2016), http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
41. *Id.*
42. Weiss, *supra* note 30, at 1117.
43. *Id.*
44. Michael W. Fox, *Religious Discrimination: It's Even More Complicated Than You Thought*, presented at the Advanced Employment Law

among workers in America,[45] and an increase in religious expression in the workplace,[46] it is likely that failure to accommodate religious claims will continue to be an issue in the future.

The analysis in a religious accommodation case requires a determination whether the employee has established a prima facie case. Although "the duty to accommodate an employee's religious beliefs is 'implicated only when there is a *conflict* between an employee's religious practice and the employer's neutral policy,'"[47] traditionally, to make a prima facie case of failure to accommodate a religious belief, the employee "had to show that: (1) she had a bona fide religious belief that conflicted with an employment requirement; (2) she *informed her employer of this belief*; and (3) she was fired or not hired for failure to comply with the conflicting employment requirement."[48] Further, the duty to accommodate requires the employer to grant an exception to such a rule if an accommodation is available, reasonable, and does not pose an undue hardship on the employer.[49] After the employee establishes a prima facie case, the burden then "shifts to the employer: (1) to rebut one or more elements of the plaintiff's case; (2) to show that it offered a reasonable accommodation of religious practice; or (3) to show that the accommodation would be an undue hardship for the employer and its business."[50]

The first element, whether there exists a sincerely held religious belief or practice, often presents a difficult and delicate determination and is "one to which the courts are ill-suited."[51] A court's inquiry into whether a practice or belief is religious often turns on the facts and "must be handled with a light

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45. Diana L. Eck, A New Religious America: How a "Christian Country" Has Now Become the World's Most Religiously Diverse Nation 1-4 (1st ed.2001).
46. Flake, *supra* note 1, at 703.
47. Weiss, *supra* note 30, at 1120 (quoting *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1120 (10th Cir. 2013) (quoting EEOC, Compliance Manual § 12-IV(A)(1)) (2008))).
48. *Id.*
49. *Id.*
50. *Id.*
51. Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 132 (1st Cir. 2004) (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981)).

touch, or judicial shyness."[52] The U.S. Supreme Court defined the standard as follows: "A sincere and meaningful belief which occupies in the life of its possessor a place to parallel that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[53] Department of Labor regulations explain that religious beliefs include both theistic and non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[54] In addition, it is not necessary that such beliefs be widely held by an entire religion or branch of a religion[55] or that the practice be mandated by a religion.[56] Nor does the term require participation in an organized church.[57] Thus, atheists may assert a religious discrimination claim when a work policy would force them to participate in a religious prayer service.[58] However, a mere personal preference will not give rise to a religious belief protected under Title VII.[59] Further, the religious belief must be sincerely held. The court must undertake an analysis to verify whether the employee's fidelity to a religious practice or belief is, in fact, sincere. This determination must be made from the employee's point of view. The fact that an employee might have worked on the Sabbath in the past does not negate a later assertion of an employee's religious beliefs, and the employer cannot question the employee's request

52. Tagore v. United States, 735 F.3d 324, 328 (5th Cir. 2013) (quoting *Moussazadeh v. Texas Dept. of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2012), as corrected (Feb. 20, 2013)).
53. Welch v. United States, 398 U.S. 333, 339 (1970) (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)). Both *Welch* and *Seeger* involved the question whether the petitioners' refusal to enter military service based on a conscientious objection to all war was in fact "religious" within an exempting provision.
54. 29 CFR § 1605.1 (2015).
55. *Id.*
56. Redmond v. GAF Corp., 574 F.2d 897, 900 (7th Cir. 1978).
57. *Religion* has a broad definition according to Title VII, as it 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." EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1117 (10th Cir. 2013) (quoting EEOC Compliance Manual § 12-I(A)(1) (2008)), *rev'd on other grounds,* 135 S. Ct. 2028 (2015).
58. Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975).
59. Vetter v. Farmland Indus., Inc., 120 F.3d 749, 751 (8th Cir. 1997).

for accommodation for a change in scheduling.[60] Based on these directives, the courts and the EEOC have been faced with a number of challenging claims on what constitutes a religion. For example, Wicca,[61] espousing white supremacy,[62] the American Krishna Consciousness Movement,[63] and belief in cold fusion[64] have been held to be religions. Conversely, the Ku Klux Klan,[65] veganism,[66] or belief in eating Kozy Kitten People/Cat Food[67] is not a religion.

The second element, which was the basis of the *Abercrombie & Fitch* decision, requires that the employer is aware of the conflict between the employee's religious belief and an established working condition or policy. Generally, this requirement imposed an affirmative duty on employees to inform their employers of their religious beliefs and what accommodations might be needed.[68] If the employee does not provide the em-

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60. Baker v. Home Depot, 445 F.3d 541, 547 (2d Cir. 2006). *But see* Hansard v. Johns-Manville Prods. Corp., No. 1902, 1973 WL 129 (E.D. Tex. Feb. 16, 1973) (holding that the employee could not prove his request for Sundays off was based on a sincere religious conviction when he had worked on Sundays for years); *see also* Hussein v. The Waldorf Astoria, 134 F. Supp. 2d 591, 597 (S.D.N.Y. 2001) (holding that where the plaintiff never wore a beard during his 14 years of employment, a jury could conclude that his religious explanation for his unshaven appearance was simply an excuse), *aff'd*, 31 F. App'x 740 (2d Cir. 2002).
61. Benz v. Rogers Mem'l Hosp., 2006 U.S. Dist. LEXIS 8451, at 34 (E.D. Wis. 2006).
62. Peterson v. Wilmur Commc'ns., Inc., 205 F. Supp. 2d 1014, 1024 (E.D. Wis. 2002).
63. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).
64. LaViolette v. Daley, EEOC Appeal No. 01A01748 (July 6, 2000), retrieved from www.eeoc.gov/decisions/01A01748.txt; *see* Drew A. Swank, *Cold Fusion Confusion: The Equal Employment Opportunity Commission's Incredible Interpretation of Religion in* LaViolette v. Daley, 2002 ARMY L. 74 (2002).
65. Slater v. King Soopers, Inc., 809 F. Supp. 809, 810 (D. Colo. 1992).
66. Friedman v. S. Cal. Permanente Med. Grp., 125 Cal. Rptr. 2d 663, 686 (Cal. App. 2d Dist. 2002).
67. Seshadri v. Kasraian, 130 F.3d 798, 800-801 (7th Cir. 1997); Brown v. Pena, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977), *aff'd*, 589 F.2d 1113 (5th Cir. 1979).
68. 29 CFR § 1605.2(c)(1) (2015). The following cases support the notice requirement: *Nobach v. Woodland Village Nursing Ctr., Inc.*, 762 F.3d 442, 447 (5th Cir. 2014), *vacated*, 135 S. Ct. 2803 (2015); Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1978); *Weber v. City of N.Y.*, 973 F. Supp. 2d 227, 267 (E.D.N.Y. 2013); *Kreilkamp v. Roundy's Inc.*, 428 F.Supp.2d 903, 908 (W.D. Wis. 2006); *Massie v. Ikon Office Solutions, Inc.*, 381 F.Supp.2d 91, 99 (N.D.N.Y. 2005); EEOC v. J.P. Stevens & Co.,

ployer with notice of a need for accommodation, the employee cannot later claim discrimination. In Chalmers v. Tulon Co. of Richmond,[69] the employee admitted that she did not expressly notify her employer that she wrote letters to her co-workers based on religious beliefs or that she needed accommodation.[70] However, she argued that the notoriety of her religious beliefs put the company on notice of her need to send the letters.[71] The Fourth Circuit rejected this argument, stating that "knowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious activity, no matter how unusual."[72] However, some courts have recognized the obligation on the part of the employer to accommodate an employee even if the employee does not specifically request a religious accommodation. In *Brown v. Polk County, Iowa*,[73] the employer argued that the employee never explicitly asked for accommodation for his religious activities, and thus he may not claim the protections of Title VII. The Eighth Circuit disagreed, stating that an employer need have "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."[74] Similarly, in *Dixon v. The Hallmark Companies, Inc.*,[75] the employer knew that the husband and wife employees were dedicated Christians who had previously opposed policies prohibiting them from displaying religious items

740 F. Supp. 1135, 1137 (E.D.N.C.1990); *Lorenz v. Wal-Mart Stores, Inc.*, No. SA-05-CA-0319, 2006 WL 1562235 *10 (W.D. Tex. May 24, 2006), *aff'd*, 225 F. App'x 302 (5th Cir. 2007). *See* Jiglov v. Hotel Peabody, G.P., 719 F. Supp. 2d 918, 930 (W.D. Tenn. 2010) (holding that notice was sufficient where the employee asked for a Sunday off so that he could observe the Russian Orthodox Easter holiday); Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 450-51 (7th Cir. 2013) (Whether an employee's request for leave to attend his father's funeral could be treated as a notice for a religious accommodation was found to be a question of fact for the jury and thus precluded summary judgment.).

69. 101 F.3d 1012 (4th Cir. 1996).
70. *Id.* at 1019-20.
71. *Id.*
72. *Id.* at 1020.
73. 61 F.3d 650 (8th Cir 1995).
74. *Id.* at 654 (quoting Heller v. EBB Auto Co., 8 F.3d 1433, 1439 (9th Cir. 1993)).
75. 627 F.3d 849 (11th Cir. 2010).

in their offices.[76] Although the employees never expressly stated that they did not want to remove religious pictures from the office because they opposed efforts to remove God from public places, the court concluded that there was ample evidence that the employer was aware of the connection and that this awareness would satisfy the second prong of the accommodation argument.[77]

The third element of the claim and the focus of this article is that the employer could have made an accommodation for the employee without suffering an undue hardship. On this point, courts have generally viewed the existence of an undue hardship favorably for the employer. The *de minimus* standard was established by the Supreme Court in 1977 with its seminal decision in *Trans World Airlines, Inc. v. Hardison*.[78] However, more recently, federal, state, and local legislators have attempted a variety of reforms to more sharply define the parameters of religious accommodation law.[79] Since 1994, each Congress has considered The Workplace Religious Freedom Act (WRFA), but despite bipartisan support, it has not become law. Therefore, the Supreme Court's holding in *Hardison*, which states that requiring an employer "to bear more than a de minimis cost . . . is an undue hardship,"[80] is still the legal standard. De minimis cost "entails not only monetary concerns, but also the employer's burden in conducting its business."[81] Undue hardships can include the "cost of hiring an additional worker or the loss of production that results from not replacing a worker who is unavailable due to a religious conflict."[82] Furthermore, in its *Ansonia Board of Education v. Philbrook* decision, the Supreme Court held that if more than one accommodation is possible, the accommodation preferred or suggested by the employee is not required in order to satisfy Title VII.[83] The fact that a plaintiff "may prefer an accommodation that allows him to remain in [the district] does not render a transfer [to another district] 'un-

76. *Id.* at 855. *Compare* Lubetsky v. Applied Card Sys., Inc., 296 F.3d 1301 (11th Cir. 2002), *with* Hellinger v. Eckerd Corp., 67 F.Supp.2d 1359 (S.D. Fla. 1999).
77. 627 F.3d at 856.
78. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
79. Flake, *supra* note 1, at 709.
80. Hardison, 432 U.S. at 84.
81. Beadle v. City of Tampa, 42 F.3d 633, 636 (11th Cir. 1995).
82. Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994); see also Brener v. Diagnostic Ctr. Hosp. l, 671 F.2d 141, 144 (5th Cir. 1982).
83. 479 U.S. 60, 70-71 (1986).

reasonable'."[84] However, although "*Hardison* and *Philbrook* helped to solidify the framework for analyzing religious accommodations," considerable uncertainty has persisted "as to whether a particular accommodation is reasonable or imposes an undue hardship,"[85] primarily because "this determination lies in the highly fact-specific nature of the inquiry," and "without clearly defined parameters, courts seem to pick and choose which facts to emphasize to support the preferred outcomes. Consequently, both employers and employees have little judicial guidance as to when Title VII requires a religious accommodation."[86]

II. RELIGIOUS ACCOMMODATIONS AND DRESS AND GROOMING POLICIES

More specifically, the case law is equally inconsistent with respect to religious accommodations when employers are asked to create exceptions to appearance/dress and grooming policies for employees whose religious beliefs require them to wear certain articles of clothing such as turbans, hijabs, yarmulkes, or medals, or for men to have beards or long hair.

Generally, courts will not require accommodations to be made when the grooming or dress policies are based on safety concerns. As stated in Draper v. United States Pipe and Foundry Co.,[87] "safety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on an employer's business."[88] For example, a policy prohibiting employees from wearing jewelry while handling food was found to be legitimate and non-discriminatory even though it required an employee to remove his Star of David necklace while working in the bakery department of a

84. Rodriguez v. City of Chi., 156 F.3d 771, 776 (7th Cir. 1998).

85. Flake, *supra* note 1, at 717.

86. *Id.*; *see, e.g.*, Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1030 (8th Cir. 2008) ("What is reasonable depends on the totality of the circumstances and therefore might, or might not, require elimination of a particular, fact-specific conflict."); Hudson v. W. Airlines, Inc., 851 F.2d 261, 266 (9th Cir. 1988) (examining the accommodations made available to the employee by the employer and concluding that "[a]ll of these accommodations together" provided the employee with a reasonable accommodation).

87. 527 F.2d 515 (6th Cir. 1976).

88. *Id.* at 521.

Target store.[89] Similarly, an employer may refuse to hire an employee for a position working near dangerous machinery if the employee refuses to remove a loose fitting garment or khimar that could get caught in the machinery.[90] In *Bhatia v. Chevron*, the court held that an employer could enforce its policy of no facial hair for any employees who could be exposed to toxic poisons because the facial hair interfered with the face seal of the respirators employees were required to wear.[91] The employee, a devout Sikh, claimed that his religion prohibited him from shaving his beard, and the employer attempted to accommodate him by offering him a job that did not require a respirator but was a lower paying position.[92] The court ruled in favor of the employer, stating that it had made reasonable efforts to accommodate the plaintiff and that it had established that retaining the plaintiff in a position that required use of a respirator for safety purposes and in accordance with OSHA standards imposed an undue hardship.[93]

Also, when the employer is a law enforcement agency, the courts are more likely to find that an accommodation for religious dress imposes an undue hardship. In *Webb v. City of Philadelphia*,[94] the Third Circuit found it would be an undue hardship for a police department to allow an employee to wear religious clothing or ornamentation, in this case a hijab, with

89. Zedeck. v. Target Corp., No. 07-60364-CIV, 2008 WL 2225661 at *10 (S.D. Fla. May 29, 2008). While the plaintiff in *Zedeck* did not specifically raise the accommodation issue, he claimed that the employer violated his Title VII religious rights because it required him to remove his necklace or face discipline while not imposing the same punishment on similarly situated employees. The court did not find any evidence supporting this claim. *Id.* at *8-*9. Even though the court found that the plaintiff did not establish a prima facie case under Title VII, it nevertheless considered Target's defense of a legitimate business reason for its actions.
90. *See* EEOC v. Kelly Services, Inc., 598 F.3d 1022, 1031 (8th Cir. 2010); *see also* EEOC v. Oak-Rite Mfg. Corp., No. IP99-1962-C-H/G, 2001 WL 1168156, at *14 (S.D. Ill Aug. 27, 2001).
91. 734 F.2d 1382 (9th Cir. 1984).
92. *Id.* at 1383.
93. *Id.* at 1384. Similarly, in Kalsi v. N.Y.C. Transit Auth., 62 F.Supp.2d 745, 756 (E.D.N.Y. 1998), *aff'd*, 189 F.3d 491 (2d Cir. 1999), the court held that a transit authority's termination of a Sikh subway car inspector for his refusal to wear a hard hat was not pretext for religious discrimination but instead reflected the transit authority's nondiscriminatory, legitimate interest in protecting its employees from workplace hazards.
94. 562 F.3d 256, 264 (3d Cir. 2009).

her uniform. The court agreed with the department's assertion that "it is critically important to promote the image of a disciplined, identifiable and impartial police force by maintaining the Philadelphia Police Department uniform as a symbol of neutral government authority, free from expressions of personal religion, bent or bias."[95] Further, stated the court,

> safety is undoubtedly an interest of the greatest importance to the police department and . . . uniform requirements are crucial to the safety of officers (so that the public will be able to identify officers as genuine, based on their uniform appearance), morale and esprit de corps, and public confidence in the police.[96]

A similar analysis led the Third Circuit to support a ban on prison workers from wearing khimars because evidence was presented that they could be used to smuggle contraband into the prison, they might conceal the identity of the wearer, and they could be used against a prison employee in an attack.[97]

If safety is not an issue, an employer may nevertheless argue that its dress and grooming policy is required to maintain a certain image or organizational identity. A state statute prohibiting the wearing of religious attire by teachers while teaching did not violate Title VII as it was needed for the maintenance of religious neutrality in the public school system. In *United States v. Bd. of Educ. for the Sch. Dist.t of Philadelphia*,[98] the U.S. Circuit of Appeals for the Third Circuit held that allowing a teacher to wear religious garb would impose an undue hardship to the state.[99] One of the first cases involving a private company was *EEOC v. Sambo's of Georgia, Inc.*[100] On behalf of a practicing Sikh, the EEOC claimed that Sambo's, a restaurant

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95. *Id.* at 261.
96. *Id.* at 262 (quoting *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 2009) (internal quotation marks omitted)); *see also* Daniels v. City of Arlington, 246 F.3d 500, 506 (5th Cir. 2001) (a police department cannot be forced to let individual officers add religious symbols to their official uniforms).
97. EEOC v. GEO Grp., Inc., 616 F.3d 265, 274 (3rd Cir. 2010).
98. 911 F.2d 882, 891 (3d Cir. 1990).
99. *Id.* at 894. *But See* Nichol v. ARIN Intermediate Unit 28, 268 F. Supp. 2d 536, 555 (W.D. Pa. 2003) (Under the current legal landscape of the Establishment Clause, it is unlikely that the Garb Statute would withstand heightened scrutiny and would likely be found in violation of the Free Exercise Clause of the First Amendment.).
100. 530 F. Supp. 86 (N.D. Ga. 1981).

chain in Georgia, violated Title VII when it refused to hire him unless he shaved his beard, which was contrary to his religious beliefs. The court ruled in favor of the employer, finding that Sambo's grooming policy, forbidding its restaurant employees to wear facial hair, with the exception of neatly-trimmed mustaches, had been uniformly applied in all of its restaurants and complied with the public image that Sambo's had built up over the years.[101] Further, the court recognized that customer preference may be a legitimate reason for upholding the company's grooming policy.[102] Finally, the court recognized that absent shaving his beard there was no accommodation that could be made that would not cause undue hardship to the restaurant.[103] Courts have also recognized an employer's need to enforce grooming policies if allowing exemptions from those requirements would jeopardize the employer's reputation and also set a bad precedent for dealing with other employees.[104] For example, the often-cited decision in *Cloutier v. Costco* supports the argument that the employer should be able to establish grooming policies that enhance its corporate image.[105] The employee, Cloutier, who worked as a cashier, had facial piercings, which were related to her religious beliefs in the Church of Body Modification (CBM).[106] The employer, Costco, had a dress policy which was revised to specify that facial piercings were prohibited.[107] There were no complaints about the employee, and she was performing her job without issues.[108] After being sent home multiple times because she refused to remove her facial piercings, the employee was fired for violating the dress policy.[109] Costco did not believe that CBM was a real religion. The company took the position that the employee's decision to put in her facial piercings was voluntary and not mandated by her

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101. *Id.* at 89.
102. *Id.* at 91. The court also noted that clean-shavenness is a bona fide occupational qualification for a manager of a restaurant and thus permissible. *Id.*
103. *Id.* at 92.
104. Hussein v. The Waldorf-Astoria, 134 F. Supp. 2d 591, 594 (S.D.N.Y. 2001), *aff'd*, 31 F. App'x 740 (2d Cir. 2002). In *Hussein* there was also a question whether the plaintiff, who suddenly showed up for work with a beard and never mentioned his religion before, sincerely held a religious belief or was merely using religion as an excuse for not shaving. *Id.*
105. 390 F.3d 126, 137 (1st Cir. 2004).
106. *Id.* at 129.
107. *Id.* at 128-29.
108. *Id.* at 135.
109. *Id.* at 130.

supposed religious beliefs.[110] At this point, the EEOC intervened, and Costco offered Cloutier her position back if she wore a clear piercing or wore a bandage over the piercing.[111] Cloutier refused and sued Costco on the grounds of religious discrimination.[112] The district court granted summary judgment in favor of Costco, finding that Cloutier's refusal to accept the reasonable accommodation of the bandage created an undue hardship on Costco.[113] The district court acknowledged that "'Costco has a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance.' Costco's dress code . . . furthers this interest."[114] Quoting from Costco's handbook, the court noted the company's concern with its ability to maintain a professional demeanor:

> Appearance and perception play a key role in member service. Our goal is to be dressed in professional attire that is appropriate to our business at all times . . . . All Costco employees must practice good grooming and personal hygiene to convey a neat, clean and professional image.[115]

On appeal, Cloutier argued that since there was no evidence of customer or coworker complaint, exempting her from the policy did not cause an undue hardship for Costco.[116] The First Circuit disagreed, stating that it was at Costco's "discretion to institute codes to promote a professional public image or to appeal to customer preference."[117] The court noted that the importance of personal appearance regulations have been recognized by the courts even in the face of Title VII challenges.[118]

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110. *Id.* at 131-32.
111. *Id.* at 129-30.
112. *Id.* at 130.
113. Cloutier v. Costco Wholesale, 311 F.Supp.2d 190, 199-200 (D. Mass. 2004), *aff'd on other grounds sub nom.* Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004). Both the district court and the court of appeals raised the question whether the CMB is in fact a religion subject to the protections of Title VII but concluded that the question need not be addressed since it was clear that Costco had provided a reasonable accommodation, and that to allow an outright exception to the policy would cause undue hardship. 390 F.3d at 137.
114. *Cloutier*, 390 F.3d at 135.
115. *Id.*
116. *Id.*
117. *Id.* at 136.
118. *Id.*

The court stated: "Perhaps no facet of business life is more important than a company's place in public estimation . . . . Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility."[119]

Following the First Circuit's decision in *Cloutier*, courts have granted employer motions for summary judgment based on the argument that the mere existence of a conflict between an accommodation and a company's image creates an undue hardship. In *Brown v. F. L. Roberts & Co.,*[120] the plaintiff had worked as a technician at a Jiffy Lube and, as a practicing Rastafarian, did not shave or cut his hair.[121] During the plaintiff's employment, Jiffy Lube changed its policy to require employees who came into contact with customers to be clean-shaven.[122] It offered an accommodation to the plaintiff where he could work in the lower bay, which was out of customers' view.[123] The plaintiff objected to the transfer, claiming that the working conditions in the lower bay were significantly worse than those in the upper bay.[124] The court granted summary judgment for the employer.[125] Without deciding whether the accommodation was reasonable, the court concluded that exempting the plaintiff from the grooming policy would cause undue hardship because it would adversely affect the company's public image.[126]

However, employers do not always prevail in cases where there is a conflict with dress or grooming policies. If the employer cannot show that it attempted to offer a reasonable accommodation[127] or that the proposed accommodation would cause undue hardship,[128] summary judgment will not be granted to the employer. As in the *Cloutier* and *Sambo's* cases,

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119. *Id.* at 135 (quoting Fagan v. Nat'l Cash Register Co. 481 F.2d 1115, 1124-25 (D.C. Cir. 1973)).
120. 419 F. Supp. 2d 7 (D. Mass. 2006).
121. *Id.* at 9-10.
122. *Id.* at 9-10.
123. *Id.* at 11.
124. *Id.*
125. *Id.* at 12.
126. *Id.* at 15, 17.
127. *See* United States v. N.Y.C. Transit Auth., No. 04-CV-4237, 2010 WL 3855191, at *17 (E.D.N.Y. Sept. 28, 2010).
128. EEOC v. Alamo Rent-a-Car, LLC, 432 F. Supp. 2d 1006, 1015 (D. Ariz. 2006).

in *EEOC v. Red Robin Gourmet Burgers, Inc.*,[129] the employer argued that its dress policy requiring employees to cover all visible tattoos was essential to its need to establish and maintain a family-friendly environment.[130] The employee's tattoo was representative of the Kemetic religion.[131] The employee's Kemetic beliefs directed that he intentionally cover the tattoo only during one month of the year, in which the process of death and rebirth was symbolized.[132] Red Robin did not offer the employee a reasonable accommodation and at trial presented a survey and profile to support that the visible tattoo was inconsistent with the company's family-friendly business.[133] The district court found the evidence unpersuasive[134] and that the piercings did not pose any threat to the family-friendly business since customers had never complained about the visibility of the small tattoo.[135] Unlike the facts in *Cloutier v. Costco,* where the court was able to justify the connection between the plaintiff's piercings and a threat to Costco's business, Red Robin was unable to produce concrete evidence of loss of profit or disruption to the work routine needed to demonstrate undue hardship.[136] Additionally, the court did not agree with Red Robin that exempting an employee this time would lead to future conflict with employees about the policy in the future.[137] Essentially, the employer argued, this would create a "slippery slope," and in the future, Red Robin would have a difficult time drawing a

129. No. C04-1291JLR, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005).
130. *Id.* at *5.
131. *Id.* at *1.
132. *Id.*
133. *Id.* at *5.
134. Unlike the First Circuit, the district court in *Red Robin* did not accept the employer's justifications at face value but required that the employer present proof of a connection between its policy and actual job performance, to establish undue hardship. Lucille M. Ponte & Jennifer L. Gillan, *Gender Performance Over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine*, 14 DUKE J. GENDER L. & POL'Y 319, 345 (2007).
135. *Red Robin Gourmet Burgers*, 2005 WL 2090677, at *5.
136. *Id.* The district court acknowledged the *Cloutier v. Costco* case but pointed out that it was bound by decisions of the Ninth Circuit that required "proof of actual imposition on coworkers or disruption of the work routine." *Id.* at *4. Further, the court distinguished the facts in both cases where the plaintiff's tattoos were small and written in a language that most customers would not recognize, unlike the employee in Cloutier whose facial piercings were imminently visible. *Id.*
137. *Id.* at *5.

line with other employees.[138] The court was not persuaded, stating that whether an undue hardship exists depends on the facts of each case, and "the mere possibility that there would be an unfulfillable number of additional requests for similar accommodations by others cannot constitute undue hardship."[139] A final example occurred one year after the *Red Robin* decision. A district court granted the EEOC's motion for summary judgment in *EEOC v. Alamo Rent-a-Car, LLC.*[140] Alamo maintained a Dress Smart Policy for employees working at the rental counter, aimed at promoting a favorable first impression with customers, but did not specifically prohibit head coverings.[141] When a Muslim employee asked to wear a head scarf during the month of Ramadan, Alamo responded that she could wear the scarf while working in the back office but not while at the rental counter.[142] The court held that requiring the employee to remove her head scarf while working with customers was not a reasonable accommodation of her religious beliefs.[143] Further, Alamo did not establish that allowing the employee to wear a head scarf would cause undue hardship as it presented no evidence about the cost of "any deviation" from the uniform policy.[144]

Relying on *Cloutier v. Costco*, the employer in *United States v. New York City Transit Authority*[145] argued that to require an accommodation to its dress code that prohibited passenger service employees from wearing headwear other than depot logo caps would require it to lose control of its public image.[146] Based on this position, the New York City Transit Authority (TA) had rejected an exception requested by Sikh employees that the Authority's logo be affixed to the front pockets or collars of their

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138. *Id.*
139. *Id.* (quoting Opuku-Boateng v. State of Cal., 95 F.3d 1468, 1474 (9th Cir. 1996)).
140. 432 F. Supp. 2d 1006 (D. Ariz. 2006).
141. *Id.* at 1008.
142. *Id.* at 1008-09.
143. *Id.* at 1013.
144. *Id.* at 1015. In fact, the employee's supervisor testified that he "did not believe that allowing Ms. Nur to wear a head covering at the rental counter would affect the impression she would make on customers, or [that it would] negatively impact customer expectations concerning the level of service or quality of the product they would receive, or otherwise create any type of negative expectations with customers." *Id.*
145. No. 04-CV-4237, 2010 WL 3855191 *19 (E.D.N.Y. Sept. 28, 2010).
146. *Id.*

uniforms and not to their turbans.[147] The district court held that TA's rejection of the proposed accommodation was not reasonable, finding differences in the circumstances between a for-profit company and a city agency.[148] In *Cloutier*, there was no question that granting an exception to Costco's dress policy would hurt the employer's public image.[149] Conversely, in this case, the court found "no proof that the subtle change in the placement of the TA logo would adversely affect the TA's business in any way."[150] The court reasoned that, unlike the highly competitive environment of commercial businesses, the Transit Authority virtually had sole responsibility and control in running New York's subways and buses.[151]

To summarize, the case law with respect to religious accommodations when employers are asked to create exceptions to appearance, dress, and grooming policies is somewhat inconsistent. Generalizations can be made, but given the highly fact-specific nature of each inquiry and the absence of clearly defined parameters, courts seem to pick and choose which facts to emphasize to support the preferred outcomes. This paper next discusses the *Abercrombie & Fitch Stores* case and its implications for religious discrimination disputes.

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

Samantha Elauf applied for a job as a model at an Abercrombie Kids store (owned by Abercrombie & Fitch) in Oklahoma.[152] During the interview, Elauf wore a hijab (headscarf) that covered her hair but not her face or neck.[153] While there was some discussion about Abercrombie & Fitch's dress code, the hijab was not mentioned during the interview.[154] In addition, Elauf did not inform Heather Cooke, the Assistant Store Manager and interviewer, that she was Muslim, that she wore the hijab for religious reasons, or that she would need an accommodation to allow her to wear the hijab as an exception to

147. *Id.* at *21.
148. *Id.* at *21-22.
149. *Id.* at *19.
150. *Id.* at *22.
151. *Id.* The court also rejected the TA's argument that deviation from the dress policy posed legitimate safely concerns. *Id.* at *21.
152. EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1276 (N.D. Okla. 2011), *rev'd*, 731 F.3d 1106 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).
153. *Id.* at 1277.
154. *Id.*

Abercrombie's "Look Policy."[155] The interviewer gave Elauf a rating that qualified her for hire.[156] However, Cooke was concerned that Elauf's hijab would violate Abercrombie & Fitch's "Look Policy," which prohibited in-store personnel from wearing "caps."[157] The term cap was not explicitly defined in the Look Policy but had been interpreted to include any head covering, including hijabs.[158] Cooke consulted with the Store Manager and then the District Manager, Randall Johnson, for insight on the matter.[159] While communicating with Johnson, Cooke informed him that she believed Elauf wore the hijab for religious reasons.[160] Johnson believed the hijab would not have complied with the Look Policy, whether or not it was for religious purposes.[161] Cooke was then directed by Johnson to change Elauf's rating to "below expectations" and "not recommended for hire."[162]

The EEOC sued Abercrombie & Fitch on behalf of Elauf for violating Title VII's prohibition against religious discrimination.[163] The EEOC argued that the refusal to hire of Elauf was based on Abercrombie & Fitch's failure to provide religious accommodation.[164] Since Elauf is a practicing Muslim woman, her daily practice includes wearing a hijab and is therefore protected under Title VII.[165] The EEOC argued that Abercrombie

155. *Id.*
156. *Id.* at 1279.
157. *Id.* at 1278.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 1279.
163. *Id.* at 1274.
164. *Id.* at 1285.
165. At trial, Abercrombie & Fitch argued that since the Quran does not require women to wear a head covering, Elauf's wearing a hijab was not a religious belief. *Id.* at 1283. The district court rejected this argument and concluded that the broad definition of a religious practice or belief does not require a specific mandate. *Id.* Elauf's testimony that she wore the hijab based upon the Quran's teaching that women must display modesty and she had done so since she was 13 years old was sufficient for the court to conclude that her wearing the hijab was based on a sincere religious belief. *Id.* at 1284. This was probably Abercrombie & Fitch's weakest argument, as courts have consistently recognized observance of the hijab as a sincerely held religious belief. Sadia Aslam, *Hijab in the Workplace: Why Title VII Does Not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance*, 80 U.M.K.C L. Rev. 221, 225 (2011).

and Fitch's motivation not to hire Elauf was based on not wanting to accommodate her religious practices.[166] The U.S. District Court granted Elauf summary judgment and awarded her $20,000.[167] However, the U.S. Circuit of Appeals for the Tenth Circuit reversed the ruling and ordered summary judgment for Abercrombie & Fitch on the basis that Elauf did not inform the employer of the need for religious accommodation.[168]

A. District Court Decision

The U.S. District Court for the Northern District of Oklahoma analyzed the facts according to the standards articulated for religious accommodation cases.[169] The court found that Elauf's wearing the hijab was based on a religious belief and that such belief was sincere.[170] It then turned its attention to the notice requirement.[171] Abercrombie & Fitch argued that Elauf did not set forth a prima facie case of religious discrimination because she did not explicitly request a religious accommodation.[172] The EEOC argued that a less restrictive approach should be applied and that, while notice is required, it need not be in the form of the plaintiff verbally asking for an accommodation.[173]

Recognizing that the Tenth Circuit had not previously ruled whether failure of the employee to expressly request an accommodation would cause her claim to fail, the court relied on cases from other circuits and district courts which held the notice requirement is met as long as the "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."[174] The purpose of the notice requirement, held the court, is to trigger the interactive process between employer and employee as to what accommodation is appropriate given the facts of the situation.[175] The district court found that, according to the hiring manager's testimony, she

166. 798 F. Supp. 2d at 1283.
167. *Id.* at 1287; 731 F.3d 1106, 1115 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).
168. 731 F.3d at 1122-23.
169. *Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d at 1282-83.
170. *Id.* at 1285.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 1286.

had sufficient information to put Abercrombie & Fitch on notice that an accommodation was probably needed.[176]

Finally, the court rejected Abercrombie & Fitch's argument that to allow Elauf to wear the hajib at work would cause undue hardship.[177] Abercrombie & Fitch argued that its Look Policy was a way to increase sales.[178] Its reasoning was that, if it has models with a particular look, customers will be more inclined to purchase the products.[179] Abercrombie & Fitch used this explanation as a way to defend the importance and the neutrality of the Look Policy.[180] Although it was not a primary argument, Abercrombie & Fitch also used this explanation as way to show that an accommodation for Elauf's religious practice would have brought undue hardship on the business.[181] If Abercrombie & Fitch could have proven that the Look Policy had a significant impact on sales and that making an accommodation could have resulted in a loss of profit, the court might have found that the accommodation was an undue hardship on the employer. However, very little evidence was presented to support this argument, and further, evidence showed that the company had made exceptions for other employees in the past, thus negating its position that accommodating Elauf would cause an undue hardship.[182]

B. 10th Circuit Court of Appeals Decision

The 10th Circuit Court of Appeals in Denver reversed the original decision made by the District Court.[183] The 10th Circuit based its decision on the fact that Elauf did not explicitly inform Abercrombie & Fitch of her religious practices and need for religious accommodation.[184] It reasoned that Abercrombie & Fitch had no opportunity to make the accommodations necessary for Elauf because it had no knowledge that she needed an accommodation.[185] The court noted that the responsibility to inform the employer was specifically part of the prima facie case

176. *Id.*
177. *Id.* at 1287.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1110 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).
184. *Id.* at 1128.
185. *Id.* at 1130-31.

to be established by the employee or applicant.[186] The employee or applicant has a duty to inform the employer, and the employer has a duty to reasonably accommodate the need based on that information. Abercrombie & Fitch, as well as the 10th Circuit, believed this responsibility should remain with that party since the employee is the one most informed regarding what is needed for accommodation.[187]

A large part of the court's opinion was based on the EEOC's own guidelines on the employer's duty to accommodate religious beliefs.[188] The court noted that the EEOC in its regulations and compliance manuals "repeatedly, expressly, and unequivocally" placed the notice responsibility on the applicant or employee.[189] Further, the EEOC had specifically cautioned employers to "avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate."[190] In this case, the Court stated: "[A]ny awareness that Mr. Johnson had of Ms. Elauf's religious beliefs and required practices would have been derived solely from Ms.

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186. *Id.* at 1131. The 10th Circuit followed the position adopted by the 3d Circuit, which held that the fact that the employer was aware of the employee's religious beliefs did not satisfy the employee's duty to provide "fair warning" that a weekly drinking party would offend her religious beliefs, even if the employer suspected that she might be so offended. Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315, 319 (3d Cir. 2008).

187. *Abercrombie & Fitch Stores, Inc.*, 731 F.3d at 1135.

188. EEOC, Pre-Employment Inquiries and Religious Affiliation or Beliefs, http:// www. eeoc.gov/laws/practices/inquiries_religious.cfm. In its notice of best practices, the EEOC states, "Employees should advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules." EEOC, Best Practices for Eradicating Religious Discrimination in the Workplace, http://www.eeoc.gov/policy/docs/best_practices_religion.html. The Department of Labor's website also reiterates the need for the employee to initiate the request for an accommodation. It states, "In requesting an accommodation, an employee or applicant is not required to use 'magic words' (such as indicating that he or she is seeking 'an accommodation'). However, an employee or applicant must make the agency aware of the need for an accommodation based on a conflict between the individual's religious belief or practice and their work duties or the agency's application process." U.S DEP'T OF LABOR, *Religious Discrimination and Accommodation in the Federal Workplace*, http://www.dol.gov/oasam/programs/crc/2011-Religious-Discrimination-and-Accommodation.htm.

189. 731 F.3d at 1135.

190. *Id.* at 1134.

Cooke's assumption; so, Mr. Johnson, too, possessed no particularized, actual knowledge."[191]

C. Supreme Court Decision

The Tenth Circuit's decision was directly at odds with cases decided by the Eighth,[192] Ninth,[193] and Eleventh[194] Circuits, which found that the notice requirement is met as long as the employee can show that the employer was aware of the conflict between the employee's religious belief and a job requirement, regardless of how the employer received that knowledge. Accordingly, the Supreme Court granted certiorari and ultimately reversed the Tenth Circuit.[195]

Writing for the majority, Justice Scalia ruled in favor of Elauf because Abercrombie & Fitch's decision not to hire Elauf was motivated by its desire to avoid her need for religious accommodation.[196] Motivation is enough to argue intentional discrimination, even if actual notice was not provided by the employee.[197] Under this argument, the Supreme Court reversed and remanded the case.[198]

In reaching its decision, the Court examined the disparate treatment and disparate impact provisions of Title VII of the Civil Rights Act of 1964 and noted that motive and knowledge are two different concepts.[199] Unlike the Americans with Disabilities Act, the disparate treatment prong does not "impose a

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191. *Id.* at 1129.
192. Brown v. Polk Cty., 61 F.3d 650, 654 (8th Cir. 1995) (rejecting the argument that because plaintiff never explicitly asked for accommodation for his religious activities, he is not entitled to Title VII protection, because the first reprimand was related directly to the plaintiff's religious activities, making the defendants "well aware" of the potential for conflict between their expectations and his religious activities).
193. Heller v. EBB Auto Co., 8 F.3d 1433, 1439 (9th Cir. 1993) (supervisor knew that plaintiff was Jewish, that his wife was studying for conversion, and, when plaintiff requested the time off, he informed supervisor that he was going to attend the conversion ceremony).
194. Dixon v. Hallmark Cos., 627 F.3d 849, 856 (11th Cir. 2010) (supervisor's remark that the plaintiff was "too religious" when she fired him supported finding that employer was aware of religious beliefs without actual notice).
195. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2034 (2015).
196. *Id.* at 2033.
197. *Id.* at 2032-33.
198. *Id.* at 2034.
199. *Id.* at 2031-33.

knowledge requirement."[200] Instead, the ban on intentional discrimination "prohibits certain motives, regardless of the state of the actor's knowledge."[201] While a request for accommodation or proof of explicit knowledge might help prove motive, actual knowledge is not an essential part of the claim.[202] The Supreme Court concluded that Abercrombie & Fitch's motivation not to hire Elauf was based on a desire to avoid religious accommodation and therefore found the company at fault for disparate treatment.[203] Since she passed all of the other criteria in the interview, Elauf's wearing the hijab must have been the sole motivation behind Abercrombie and Fitch's actions.

IV. LEGAL IMPLICATIONS

After *Abercrombie,* it seems clear that the second prong of a prima facie religious accommodation claim has been changed. The Supreme Court's decision confirms that actual notice by the employee to the employer is no longer needed. Instead, to prove a prima facie case, the plaintiff must now only show "(1) she had a bona fide religious belief that conflicted with an employment requirement . . . and (3) she was fired or not hired for failure to comply with the conflicting employment requirement."[204] Therefore, "[b]y doing away with 'knowledge' and 'notice,' the majority's 'suspicion' standard puts the employer in uncertain situations. Since Title VII includes anti-discrimination clauses that preclude employers from asking potential employees questions based on sex, age, race, or religion,[205] it is easy to imagine scenarios where an employer may risk suit for both asking and not asking certain questions."[206] In fact, the EEOC's guidelines specifically state that employers should not make assumptions or conjectures about an employee's or applicant's religious beliefs.[207] Only after an employer has notice of the need for a re-

200. *Id.* at 2032.
201. *Id.* at 2033.
202. *Id.*
203. *Id.* at 2033-34.
204. Weiss, *supra* note 30, at 1120.
205. EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs*, http://www.eeoc.gov/laws/practices/inquiries_religious.cfm (last visited Jan 29, 2017).
206. *Id.* at 1117.
207. EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace*, https://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited Jan 29, 2017) (Employers should "avoid assumptions or stereotypes about what constitutes a religious belief or practice or

ligious accommodation does the EEOC's policy manual encourage the employer to begin the conversation with an applicant or employee regarding the conflict and possible accommodations that the employer might provide. If the manager is not otherwise aware of the need, however, EEOC guidelines suggest that no inquiry should be made. Not only does the decision in *Abercrombie* appear to contradict this advice, but, to make matters worse, the Court failed to provide much guidance regarding what is required to prove awareness sufficient to substantiate intentional discrimination. For these reasons, legal scholars have argued that "the United States Supreme Court's decision about a college student and her part-time job has far-reaching implications for the American workplace . . . [and that] the new law fails to provide any guidelines for employer 'best practices' during the interactive hiring process."[208] However, this decision should be interpreted narrowly. Arguably, the holding is most applicable in situations where there is clear evidence supporting a discriminatory motive. After all, in *Abercrombie*, the testimony of Abercrombie's Assistant Manager, Heather Cooke, was sufficient to prove Elauf's case. Otherwise, from a practical legal perspective, it will be difficult for an applicant to move forward with a claim simply as the result of applying for a job and being denied the position without being given the opportunity to discuss reasonable accommodations. The record showed that the reason that Elauf sued was because her friend, Farisa Sepahvand, who worked at the Abercrombie Kids store where she interviewed, "told her three days after the interview that the district manager had told Cooke not to hire her because of the head scarf."[209] Without such evidence, neither the EEOC nor any competent legal professional would have accepted the case.

Instead, the more impactful result of the legal reasoning is that it seems to weaken the *de minimus* standard established by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*. While the Supreme Court did not directly address the hard-

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what type of accommodation is appropriate . . . . Managers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices and should not assume that atypical dress will create an undue hardship.").

208. *See* Weiss, *supra* note 30, at 1118.

209. EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1279 (N.D. Okla. 2011), *rev'd*, 731 F.3d 1106 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

ship issue, the district court considered the evidence and found that none of the executive witnesses had conducted any studies or cited specific examples to support their opinions.[210] Furthermore, the court found that the expert testimony, which stated that the granting of "even one exception" to the Look Policy would negatively impact Abercrombie's brand, was negated by the fact that exceptions had been made in the past.[211] This rationale suggests that employers who rely on the undue hardship defense regarding branding or image harm, especially in regard to "appearance policies," will have to produce hard evidence to support their claims.[212]

Finally, although image is not a federally protected characteristic, several state and local ordinances prohibit discrimination on the basis of image, personal appearance, or physical characteristics.[213] In fact, "it is illegal to discriminate against an individual on the basis of appearance in Santa Cruz, CA, the

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210. *Id.* at 1287.

211. *Id.*

212. Several prior district court cases required more than testimony from employees that exceptions to dress policies would cause undue hardship. In another case involving Abercrombie & Fitch's Look Policy, testimony was introduced by the company that the Look Policy was an essential part of Abercrombie's business plan and "key to its success" and to allow deviations from the policy would "detract from the in-store experience and negatively affect [the] brand." EEOC v. Abercrombie & Fitch Stores, Inc., 966 F. Supp. 2d 949, 963 (N.D. Cal. 2013). On the other hand, the EEOC countered that no concrete financial data were submitted to substantiate these claims, such as a link between wearing a hijab and a decrease in sales. *Id.* The court agreed, stating: "Abercrombie must provide more than generalized subjective beliefs or assumptions that deviations from the Look Policy negatively affect the sales or the brand." *Id.* at 965. In addition, perceptions of customer preferences are not sufficient to establish justification for failures to accommodate. EEOC, Compliance Manual §12 (2008), http:// www.eeoc.gov/policy/docs/religion.html (last modified Feb. 8, 2011). A claim that an employee's wearing a hijab would cause undue hardship because it would make a negative impression on customers or would negatively impact customer expectations concerning the level of service they would receive from the employee was rejected by the district court. EEOC v. Alamo Rent-a-Car, LLC, 432 F. Supp. 2d 1006, 1015 (D. Ariz. 2006). Title VII protection cannot be denied based solely on assumptions and opinions based on hypotheticals. Proof of actual costs are required. *Id.* at 1017.

213. Amy E. Hurley-Hanson & Cristina M. Giannantonio, *Recruiters' Perceptions of Appearance: The Stigma of Image Norms*, 25 EQUAL OPPORTUNITIES INTERNATIONAL 450 (2006), available at http://dx.doi.org/10.1108/02610150610713755 (citing James McDonald, *Civil Rights for the Aesthetically Challenged*, 29 EMP. RELATIONS L. J. 118, 129 (2003)).

District of Columbia, and the City of New York,"[214] and "a few nations, such as France, have outlawed discrimination based on physical appearance."[215] Consequently, corporate image and branding strategies similar to that of Abercrombie & Fitch may be outright illegal in some jurisdictions and, at a minimum, "these types of branding efforts may result in an increase in image discrimination lawsuits."[216] In fact, the EEOC's General Counsel Eric Dreiband addressed the issue directly, stating, "[T]he retail industry and other industries need to know that businesses cannot discriminate against individuals under the auspice of a marketing strategy or a particular 'look' . . . and the EEOC will continue to aggressively pursue employers who choose to engage in such practices."[217] Furthermore, "[m]any legal scholars have called for appearance to become a protected legal category."[218] They argue that organizational appearance policies "emphasize standards of beauty which are, at their core, associated with youth, whiteness, heterosexuality, ability, and economic privilege. Thus, such policies compound other group disadvantages, 'particularly those based on class, gender, race, ethnicity, disability, and sexual orientation.'"[219]

V. STRATEGIC MARKETING/MANAGEMENT IMPLICATIONS

Although Abercrombie & Fitch clearly flourished for at least a decade utilizing its image-driven, appearance-focused branding strategy, which centered around its 'Look Policy,' ultimately, "consumer's disapproval of Abercrombie's brand image and look policy"[220] likely contributed significantly to its drastic

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214. *Id.*
215. McDonald, *supra* note 213, at 129.
216. Hanson, *supra* note 213, at 450-63.
217. EEOC, *EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch*, https://www.eeoc.gov/eeoc/newsroom/release/11-18-04.cfm (last visited Jan 29, 2017).
218. *See* Mary Nell Trautner & Samantha Kwan, *Gendered Appearance Norms: An Analysis of Employment Discrimination Lawsuits, 1970-2008*, 20 RESEARCH IN THE SOCIOLOGY OF WORK 127, 147 (2010).
219. *Id.* (quoting Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033,1052 (2009)).
220. Stephanie Scott, Look Policies: Can Employers Discriminate Based on Their Physical Attractiveness? (Mar. 2, 2016) (unpublished note, on file with the University of Cincinnati Law Review Forum), https://uclawreview.org/2016/03/02/look-policies-can-employers-discriminate-based-on-their-physical-attractiveness/ (citing Kaplan, *supra* note 8).

drop in sales during the past decade.[221] First, Abercrombie's branding was so exclusionary that it ultimately became offensive and therefore ineffective. "Exclusivity in brands is a powerful thing. If your brand is able to attain an appearance of exclusivity, it instantly becomes more attractive to potential customers."[222] Furthermore, "[a]ll brands target specific types of customers, but they do so without telling people outside of their target market that they're not welcome. They invite everyone to become a customer, but use their marketing efforts to reach out to the people who are most likely to shop and spend money with them."[223] However, Jeffries went "out of his way to exclude and even marginalize entire groups of people in a frank and offensive way . . . . The key is finding a way to become 'exclusive' without actually going out of your way to exclude others."[224] Second, in a global business environment, a publicly-traded company is expected to grow. Diversity and inclusion, rather than exclusion, is often key. To remain competitive for talent and for customers, it is imperative that companies attract and value diverse talent and enable that talent to attract and value diverse customers. "Companies increasingly rely on a heterogeneous workforce to increase their profits and earnings" and the companies' adaptability and innovation.[225] Furthermore, "diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits."[226] In short, from a strategic business perspective, an extreme, image-driven, appearance-focused branding strategy may not be the best approach.

VI. CONCLUSION

To summarize, the case law regarding appearance, dress, and grooming policies is somewhat inconsistent, and the highly fact-specific nature of each inquiry makes the outcomes of these cases unpredictable. Further, the elimination of the second prong of a prima facie religious accommodation claim; the weak-

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221. *Id.*
222. Tim Backes, *A Lesson from Abercrombie About Exclusivity in Marketing*, ProPRcopy (May 9, 2013), http://www.proprcopy.com/copywriters-blog/exclusivity-in-marketing-a-lesson-from-abercrombie/.
223. *Id.*
224. *Id.*
225. Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Sociological Rev. 208, 224 (2009).
226. *Id.*

ening of the *de minimus* standard regarding undue hardship, plus the trends toward closer scrutiny of business practices which focus on a particular 'look;' and legislation that prohibits discrimination on the basis of image, personal appearance, and/or physical characteristics should definitely make business practitioners pause before pursuing such strategies, due to the legal risks involved.

The business performance of Abercrombie & Fitch, particularly from 2003–2014, is a perfect illustration of the problems created by an "exclusionary" image strategy. Furthermore, the Supreme Court's holding in *EEOC v. Abercrombie & Fitch* perhaps signals that employers who rely on strict appearance/dress and grooming policies as a major component of their corporate image and branding strategies may need to rethink these business practices, as it will be more difficult to prove that elimination of such policies would create an undue hardship. In the context of an increasingly diverse environment, "look policies" are proving to be ineffective strategies as well as potential legal liabilities.