The Other Title VII Secret

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Everyone loves a secret. One epic Title VII secret recently became public. For almost fifty years, as reflected in the introduction of the Equality Act of 1974,[2] members of Congress thought that Title VII of the Civil Rights Act of 1964[3] did not include homosexuality as part of the protected category of "sex." When the U.S. Supreme Court revealed the secret that "sex" included not only homosexuality, but gender dysphoria, it came with great publicity. Even the White House changed colors at the news.[4]

Five years earlier, the Supreme Court revealed another surprising secret, but it had little publicity, no celebration, and even today is not generally understood by the lower courts. The second secret is about religious faith in the workplace. Stating that secret is not complicated, the Supreme Court wrote plainly. What has been lacking is publicity. That this second secret has to do with protecting faith rather than protecting LGBTQ rights might have something to do with the lack of publicity.

This is Regent. Faith is what we promote. That is why I'm sharing with you today this important second secret that protects employees of faith in the workplace. It also

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[1] I gratefully acknowledge the important work of Blaine Hutchison on this paper. Blaine is a graduate of Regent, a former federal court law clerk, and is currently a litigator for the National Right to Work Legal Defense and Education Foundation. Blaine and I wrote a law review article on this subject published by the Pepperdine School of Law: Bruce N. Cameron & Blaine L. Hutchison, *Thinking Slow About* Abercrombie & Fitch: *Straightening Out the Judicial Confusion in the Lower Courts*, 46 Pepp. L. Rev. 471 (2019). Blaine is the sole author of the attached chart.

[2] H.R. 14752, 93rd Congress (1974). The bill did not cover employment, but rather public accommodations.

[3] 42 U.S.C. §2000e *et seq.*

[4] Gregory Korte, *White House Turns to Rainbow After Gay Marriage Ruling*, USA TODAY (10:04 p.m. ET Jun. 26, 2015), https://www.usatoday.com/story/theoval/2015/06/26/white-house-rainbow-gay-marriage/29374471/. This is a bit of literary license. The hues celebrated an earlier Supreme Court ruling.

might help you to avoid malpractice or having critical law review articles written about your judicial decision, or worse, getting reversed!

The Supreme Court decision revealing the second secret is *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015). Samantha Elauf, a young Muslim lady, applied for a sales job in an Abercrombie & Fitch store. Abercrombie & Fitch had a "look policy" that prohibited headgear, and Samantha was wearing a headscarf during her job interview. It turned out that both Abercrombie and Samantha were too polite to discuss why she was wearing a scarf. Abercrombie's silence might have been less about politeness and more about EEOC publications discouraging such inquiries.[5] Not wanting to take the chance that Samantha's motives might be religious, Abercrombie decided not to hire her.

This fact pattern presents a classic religious accommodation case under Title VII. Religious freedom rights under Title VII are unique in that the statute *prohibits* unequal treatment based on religion (disparate treatment), and *requires* unequal treatment based on religion (religious accommodation). If Samantha's scarf were worn for religious reasons, and head scarves were prohibited by company policy, this clash would require Abercrombie to attempt to accommodate her religious beliefs.

Before *Abercrombie* the Circuits were uniform that a prima facie case for a religious accommodation required three elements of proof.[6] Plaintiffs had to show: "(1) they had a bona fide religious belief that conflicts with an employment requirement; (2) they informed the employer of this belief; (3) they were disciplined for failure to comply with the conflicting employment requirement."[7] And a failure to accommodate was a separate cause of action from claims involving disparate treatment of religion.[8]

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[5] *Pre-Employment Inquiries and Religious Affiliation or Beliefs*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/pre-employment-inquiries-and-religious-affiliation-or-beliefs (last visited July 1, 2021).

[6] The Pepperdine article more fully discusses these issues and can be found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216741 or https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2498&context=plr

[7] *See, e.g.*, *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 133 (3d Cir. 1986). Cameron & Hutchison, *Thinking Slow*, *supra*, at 474 n.12 (citing cases from every circuit).

[8] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 787 (2015) (Thomas, J., concurring in part dissenting in part) ("[M]any lower courts, including the Tenth Circuit below, wrongly assumed that Title VII creates a freestanding failure-to-accommodate claim distinct from either disparate treatment or disparate impact."). *E.g.*, *Porter v. City of Chicago*, 700 F.3d 944, 953 (7th Cir. 2012) (treating claims for disparate treatment and failure to accommodate as a separate claims); *Reed v. UAW*, 569 F.3d 576, 579 (6th Cir. 2009) ("There are two basic types of religious discrimination claims that an individual may bring . . . under Title VII: disparate treatment claims and religious accommodation claims."); *Peterson v. Hewlett–Packard Co.*, 358 F.3d 599, 603 (9th Cir.2004) ("A claim for religious discrimination under Title VII can be asserted under several different theories, including disparate treatment and failure to accommodate."); *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1018 (4th Cir.1996) ("[A]n employee is not limited to the disparate treatment theory to establish a discrimination claim. An employee can also bring suit based on the theory that the employer discriminated against her by failing to accommodate her religious conduct."); *Protos*, 797 F.2d at 134 n.2 ("In addition to her religious accommodation argument, [the plaintiff] maintains that she prevailed in the district court on a disparate treatment claim").

The Supreme Court never adopted this three-part proof requirement. But because of this otherwise universal understanding, the Tenth Circuit decision in *Abercrombie & Fitch* reached two conclusions that got it reversed. First, quoting the EEOC Compliance Manual, it followed the conventional circuit understanding: "A religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally." Second, it applied the traditional three-part prima facie proof standard.[9]

The publicity garnered by *Abercrombie* is that it eliminated the second of the three elements of a prima facie case – notice. Formal notice is no longer required of the plaintiff.[10] But that view of *Abercrombie* is very much like the reports of "mostly peaceful" protests backdropped by a burning city. Somehow the reporters missed the main story.

The main story is not that the second element of the traditional proof of a religious accommodation case was dropped, the High Court dropped the entire cause of action! Religious accommodation no longer exists as an independent cause of action under Title VII. Circuit and district court decisions which follow *Abercrombie* blithely discuss whether a Title VII plaintiff proved the elements of an accommodation case or a disparate treatment case. It is still a secret to them that religious accommodation as a stand-alone cause of action no longer exists.

Hopefully, you will not make that mistake. This second secret is as plain as things ever get in the law. An independent cause of action for religious accommodation no longer exists. Period. Here is the proof.

The Supreme Court opened its Abercrombie opinion with this: Title VII only "prohibits two categories of employment practices."[11] "These two proscriptions, often referred to as the 'disparate treatment' (or 'intentional discrimination') provision and the 'disparate impact' provision, are the only causes of action under Title VII."[12] Notice "only causes of action." Religious accommodation is not mentioned as an independent cause of action.

Justice Thomas's dissent states it positively, the majority opinion "put to rest the notion that Title VII creates a freestanding religious-accommodation claim." That should have been the headline because that was a very well-kept secret among the federal bar and the judiciary before *Abercrombie.*

Just to be clear, a right to a religious accommodation *still exists*. The religious accommodation language of Title VII did not go away. What went away was religious

[9] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1122 (10th Cir. 2013), *rev'd and remanded*, 575 U.S. 768 (2015).
[10] The employer argued that the company did not violate the law because it did not have "actual knowledge" about the need for a religious accommodation. *Abercrombie*, 575 U.S. at 772. But the Supreme Court disagreed, and instead held that an applicant need only show that the "need for an accommodation was a *motivating* factor in the employer's decision." *Id.* (emphasis added).
[11] *Id.* at 771.
[12] *Id.*

accommodation as an independent claim. It should now be litigated as a disparate treatment claim – a matter explained below.

Since *Abercrombie*, two primary approaches have emerged for the prima facie elements for a claim involving religious accommodation. The first approach ignores or misapprehends *Abercrombie* and continues to carelessly assert the old prima facie elements for a freestanding religious accommodation claim. The second approach recognizes that *Abercrombie* altered the framework for a claim involving religious accommodation, but those courts have responded by only eliminating the second element—the notice requirement—from the previous three elements required for a religious accommodation claim. They also fail to recognize that a stand-alone religious accommodation cause of action no longer exists.

Now that you are in on this secret, what should you do?

The first step is to try to understand the thinking of Justice Scalia, who authored *Abercrombie.* He is famous for starting his evaluation of a case by asking "What does the statute say?" Section 703 prohibits discrimination based on five characteristics, one of which is religion. § 2000e-2(a)(1). You will read courts criticize the drafting of Title VII by saying that accommodation rights were "awkwardly" added. It is doubtful that Justice Scalia would agree when he wrote *Abercrombie*. If you want to know what the statute says about religion, you need to look at how "religion" is defined. Section 701(j) defines religion to "include[] all aspects of religious observance and practice, as well as belief." Thus, the plain language of Title VII bars discrimination against an employee based not only on what he might believe about religion, but also on what he does to observe his beliefs, how he practices those beliefs.

The protected characteristic is now everything that employees do, say, or believe based on their understanding of God's will. It is hard to imagine any broader protection of faith in the workplace. The straightforward conclusion in *Abercrombie* is that "[a]n employer [or union] may not make an [employee's] religious practice, confirmed or otherwise, a factor in employment decisions." *Id.*, at 2033.

Religion now has this enormously broad description, and none of what is described can be a factor in employment decisions.

By walking along the path of Justice Scalia's simple logic, you can see why he and the court rejected the idea that religious accommodation is a free-standing claim. Employees of faith have a right to be free from discrimination in every aspect of what they believe about their relationship to God. These claims are now all disparate treatment claims.

The next step is to contemplate how these disparate treatment cases should be litigated, and if you are a judge, how you should decide them. This is where things become more complicated. Here the author changes roles from reporting an obvious secret that no one seems to have noticed, to putting on his law professor hat and telling you how he thinks you should litigate religious accommodation cases in the future. Again, make no mistake, employees still have a right to religious accommodation under

Title VII. How they prove that right will be hammered out in future litigation. This is best practice advice for litigating and judging future cases.

How should the former religious accommodation claims be repackaged as disparate treatment claims? Go back to the *Abercrombie* decision. The Court held that an employer violates § 703(a)(1), the disparate treatment provision, when it: (1) impermissibly discriminates against an applicant or employee (2) because of (3) that individual's religion, "which includes his religious practice."[13]

How should that be proven? Direct proof, as always, remains available. Direct proof would track the three elements laid out in *Abercrombie*: (1) Discrimination; (2) Because of; (3) Religion – as broadly defined.[14] If *Abercrombie* told Samantha during the interview that it would not hire anyone wearing a Muslim hajib, that would constitute direct evidence that Abercrombie failed to hire Samantha because of her religious practice. When there is direct evidence of discrimination, the *McDonnell Douglas* burden shifting paradigm for circumstantial proof is inapplicable.[15]

"Title VII's 'because of' test incorporates the simple and traditional standard of but for causation."[16] Yet the Supreme Court in *Abercrombie*, and even more recently, tinkered with that element of proof. In *Abercrombie*, the Court held that "Title VII relaxes this [but for] standard, however, to prohibit even making a protected characteristic a 'motivating factor' in an employment decision."[17] And an employer need not know that the employee's behavior resulted from religious belief. If the employer's action was motivated by a desire to avoid accommodating religious belief, that is enough.[18] It added, "an individual's actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on."[19]

In *Bostock* the Court added this new wrinkle to "but for" causation: "When it comes to Title VII, the adoption of the traditional but-for causation standard means that a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment action. So long as the plaintiff's [religion] was one but-for cause of that decision, that is enough to trigger the law." 140 S. Ct. at 1739 (emphasis in original).[20]

The circumstantial proof method aligns better with what happened in *Abercrombie* because no one said anything to Samantha about why she was not hired. She was left to speculate on the reasons, one of which might have been her headscarf.

As a result, the prima facie proof for claims involving speculation on the reasons for a failure to accommodate should be controlled by the standards for circumstantial disparate treatment claims established by the Supreme Court in *McDonnell Douglas*.[21] To

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[13] *Id.* at 772.
[14] *Id.*
[15] *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020).
[16] *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739 (2020).
[17] *Abercrombie*, 575 U.S. at 773.
[18] *Id.*
[19] *Id.*
[20] Precisely how this language will be reconciled with Title VII's mixed motive provision, 42 U.S.C. §2000e-5(g)(2)(B), remains to be seen.
[21] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (affirming that *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), established the framework under Title VII for disparate treatment cases).

establish a prima facie circumstantial case for disparate treatment claims under *McDonnell Douglas*, a plaintiff must prove: (1) that he is a member of a protected class; (2) that he was qualified for a position; (3) that despite his qualifications, he was rejected or suffered an adverse employment action; and (4) that after his rejection, the position was filled by someone with the same qualifications, or the position remains open and the employer seeks someone with the same qualifications.[22]

By eliminating the former independent religious accommodation claim, the Supreme Court *thus* eliminated the prima facie elements for that claim. Because claims involving a failure to accommodate are now disparate treatment claims, the prima facie elements should be governed according to the prima facie test for disparate treatment claims. Either they agree with the direct proof elements discussed above from *Abercrombie*, or if the case is circumstantial, they follow some version of the *McDonnell Douglas* test. Any lawyer who continues to argue the old three element prima facie test for a failure to accommodate claim, and any court that applies the old three elements, effectively treats religious accommodation as a separate cause of action with distinct prima facie elements in conflict with the Supreme Court's opinion in *Abercrombie*.

Adopting the new *Abercrombie* three element standard for direct proof cases or the *McDonnell Douglas* standard for circumstantial cases provides substantial practical litigation benefits for the plaintiff. The *McDonnell Douglas* approach to proof of a prima facie case is an effective tool for employees who are not privy to the reason their employer (or union) rejected or otherwise discriminated against them. Courts that simply invoke the two remaining elements for the old, independent, religious accommodation cause of action deprive the employee of faith of the advantage of the circumstantial proof approach endorsed by *McDonnell Douglas.*

The new *Abercrombie* three element standard and the *McDonnell Douglas* standard also better reflect the First Amendment. The First Amendment's right to privacy of belief, Establishment Clause, and Free Exercise Clause, at the very least, cast doubt on the sincerity requirement in the old three element prima facie case. This defect remains when reading *Abercrombie* as merely dropping the old notice requirement but retaining the other two elements.

By requiring a "sincere" religious belief, rather than simply accepting proof that the employee is a member of a protected class, courts, and defendants often cross the line of what the First Amendment permits. In *Hobbie v. Unemployment Appeals Com'n of* Florida, 480 U.S. 136, 145 n.9 (1987) the Court cited with approval *U.S. v. Ballard*, 322 U.S. 78 (1944) and *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981) for the proposition that "courts may not inquire into the truth, validity, or reasonableness of the religious belief," and it is irrelevant whether the belief is "derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible."

The author's experience is that defendants have often used the sincerity requirement to turn litigation into a religious inquisition. In one case involving an employee's religious objections to supporting a labor union, a union lawyer tried to

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[22] *McDonnell Douglas*, 411 U.S. at 802. *McDonnell Douglas* was a failure to hire case. It notes that the specifications may vary with different facts. *Id.* at 802 n.13 The essence of the fourth element is that something adverse happened to the protected class member that did not happen to those outside the protected class, meaning employees (when the claim involves religious accommodation) who do not share the protected religious belief or practice.

undermine an employee's religious beliefs by questioning if he had ever viewed pornography or if he had ever, since becoming a Christian, looked at Playboy magazine. A similar ploy used by defendants in cases involving religious accommodation is to ask the employee if he patronizes any commercial establishment which is involved in "sinful" activity. For instance, if a grocery store or gas station that the employee shops at or has shopped at sells alcohol, tobacco, or magazines with nudity, and the employee considers these activities sinful, defendants commonly argue that such employees do not have a sincere religious belief. They are therefore precluded from having a sincere religious objection to supporting a labor union because of its perceived sinful activities.

The theoretical underpinnings of the sincerity requirement conflict with the First Amendment's right to privacy of belief. The Supreme Court has "repeatedly" stated that the First Amendment guarantees both "privacy of association and belief."[23] In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977), the Court held that an employee cannot be force to forego the right to privacy of belief as a condition of withholding support from a labor union.[24] Thus, in *Abood*, the Court held that an employee did not have to disclose which union expenditures he specifically opposed, beyond generally objecting to any ideological union expenditures, since individuals are entitled to the "freedom to maintain [their] own beliefs without public disclosure."[25]

In many contexts, the Supreme Court recognized the importance of protecting the privacy of belief.[26] The Court noted that public disclosure may subject employees to "economic reprisal, . . . threat of physical coercion, and other manifestations of public hostility," which might dissuade individuals from exercising their rights "because of fear of exposure of their beliefs . . . and [because] of the consequences of this exposure."[27] This is a distinct concern in today's "cancel culture." Thus, subjecting plaintiffs to examination of their religious beliefs and faithfulness to receive accommodation is at odds with the right to maintain personal "beliefs without public disclosure."

The sincerity requirement also conflicts with the First Amendment's Establishment Clause by impermissibly entangling courts in sensitive religious inquiries and by impermissibly discriminating between different religious beliefs. The Supreme Court and other courts have been careful to note that it is not only the conclusions reached by a government entity that may infringe on the rights guaranteed by both Religion Clauses, "but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). In *Catholic Bishop of Chicago* the Supreme Court held that NLRB jurisdiction over religious schools could lead to impermissible entanglement because jurisdiction would require resolving theological issues whenever a school maintained that its challenged actions were religiously mandated.[28] As a result, the Court denied jurisdiction because the

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[23] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (listing cases).
[24] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977).
[25] *Id.*
[26] *Id.* at 241 n.42 (listing cases involving compelled disclosure of political campaign contributions, giving and spending money, joining organizations, and disclosing causes an employee opposes).
[27] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958); *see also* Abood, 431 U.S. at 241 n.42 (noting the chilling effect and consequences of public disclosure).
[28] *Id.*

very process of "inquiry into the good faith of the position asserted by the clergy-administrators"[29] impinged upon "rights guaranteed by the Religious Clauses."[30]

Likewise, in *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the Court of Appeals for the District of Columbia referred to religious examination and inquiry by courts and government entities as "offensive,"[31] citing a plurality opinion by the Supreme Court that rejected "inquiry into . . . religious views."[32] The court of appeals stated that it was "well established" that "courts should refrain from trolling through a person's or institution's religious beliefs."[33] That court rejected the NLRB's "substantial religious character" test for jurisdiction, because the very inquiry into an institution's religious character, mission, and primary purpose implicated First Amendment concerns.[34] "Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims."[35]

The sincerity prong requires a direct inquiry into the religious faith and practices of religious employees and into the good faith position asserted by such individuals. This practice not only promotes judging the centrality of different religious practices but requires a minimal basis in religious faithfulness, as determined by courts, to establish a prima facie case. This type of government requirement contradicts the Establishment and Free Exercise Clauses. Every circuit,[36] including the Supreme Court, has recognized a ministerial exception to protect churches from lawsuits by their ministers.[37] Important to this exception is the belief that the judiciary should not be passing on religious faith and practice. "In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content."[38] Likewise, the government is not constitutionally permitted to require a minimum basis of religious faithfulness to establish a sincere religious belief. The very inquiry is offensive to the First Amendment and irredeemably entangles courts with religion.

The sincerity requirement impermissibly discriminates against different theological beliefs and practices by discriminating between individual requirement and commitment. The Supreme Court has declared that "[t]he clearest command of the Establishment Clause is that one religious denomination [or kind of religion] cannot be officially preferred over another."[39]Therefore, it is constitutionally improper to discriminate between those who take a lax approach and those who take a rigorous approach to their religious faith.[40]

It is hard to square a substantive understanding of the Free Exercise Clause with the requirement that a plaintiff must survive religious scrutiny by the state to exercise his or her religion in the workplace.

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[29] *Id.*
[30] *Id.*
[31] *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).
[32] *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).
[33] *Univ. of Great Falls*, 278 F.3d at 1341 (quoting *Mitchell*, 530 U.S. at 828).
[34] *Id.* at 1340.
[35] *Id.* at 1343 (quoting *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990)).
[36] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 n.2 (2012) (listing cases).
[37] *Id.* at 188.
[38] *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).
[39] *Larson v. Valente*, 456 U.S. 228, 244 (1982).
[40] *Univ. of Great Falls*, 278 F.3d at 1342.

In contrast, neither the new *Abercrombie* three-part test nor the *McDonnell Douglas* proof elements require proof of sincerity of religious belief. *Abercrombie* requires proof of: (1) Discrimination; (2) Because of; (3) Religion. The third element has the plaintiff employee proving that whatever got him in trouble with the employer arose from a religious belief or practice, and not that he adhered to some level of consistency of religious practice that the court considered "sincere."

Unfortunately, applying the *McDonnell Douglas* approach with its shifting elements creates some complexity. What follows is a suggestion on how to best prove a circumstantial religious accommodation case using the *McDonnell Douglas* approach and the *Abercrombie* fact pattern.

(1) *Employee is a member of a protected class*: The protected class for Samantha Elauf, the plaintiff in *Abercrombie*, is a Muslim who believes that she must wear a head scarf. Including the employee's religious practice is essential to correctly identifying the protected class. There is no indication that the employer had any other applicants like Ms. Elauf, so she would be the only one in the protected class.

(2) *Employee is qualified for the position*: There was no factual dispute about Ms. Elauf's qualifications for the open position. If she were an existing employee seeking a religious accommodation, to satisfy this element, she would need to prove that she has been satisfactorily performing her job. Notice that being qualified for the job cannot include the job requirement that conflicts with the employee's religious beliefs. In Ms. Elauf's case, a court could not hold, consistent with Ms. Elauf's accommodation rights, that she failed to prove this element because her religious beliefs required her to wear a head scarf. As the Supreme Court held, employers "may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." *Abercrombie*, 135 S. Ct. at 2033.

(3) *Employee, despite qualifications, was rejected or suffered an adverse employment action*: Ms. Elauf was not hired, which satisfies this element. Had she been discriminated against or suffered some other adverse action[41] for any other reason connected with her religious belief or practice, she would present that discrimination here.

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[41] Because accommodation is required by law, failure to accommodate should *itself* be an adverse action in contravention of Title VII. Congress unambiguously included a statutory duty for employers to reasonably accommodate religious employees, absent undue hardship. Imposing another requirement that an employee must suffer *another* adverse action, beyond being denied reasonable accommodation, improperly adds words to Title VII. And as the Supreme Court stated, "add[ing] words to the law to produce what is thought to be a desirable result . . . . is Congress's province" not the courts. *Abercrombie*, 575 U.S. at 774. Unlike other forms of discrimination where it is reasonable to require a sufficiently adverse action, here, Congress has already decided that failing to accommodate is itself an action that violates Title VII, and so must be sufficiently adverse. A statute is rendered meaningless if its direct violation is not enough merit relief under that very statute. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 799 (2021) ("Because the common law recognized that 'every violation imports damage,' Justice Story reasoned that '[t]he law tolerates no farther inquiry than whether there has been the violation of a right.'"). Employers have an obligation under Title VII to reasonably accommodate religious employees, absent undue hardship. Showing that an employer has failed to provide reasonable accommodation is all that is required to show that an employer has violated its duty. A contrary holding contradicts the duty imposed by Congress and violates essential principles of federalism by invading the province of Congress to add another adverse action requirement. Such a holding would require religious employees to be insubordinate and suffer *another* adverse action to be entitled to the relief necessary to exercise their faith.

(4) *After rejection, the position is filled by someone with the same qualifications, or the position remains open and the employer seeks someone with the same qualifications*: This refers to the position being filled by someone outside the protected class or in some other way treated more favorably. Because of the clarified definition of the protected class for employees of faith in *Abercrombie*, the protected class here is a Muslim who believes that she must wear a head scarf. Using the clarified definition of a protected class makes it unlikely that Ms. Elauf could fail to satisfy this element. She would merely have to prove that her employer hired someone for the job that was not required by faith to wear a head covering, or the position was left open for someone who did not have Elauf's religious practices.

Following these traditional *McDonnell Douglas* elements squares with the *Abercrombie* holding that "the applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." These elements are circumstantial proof of the basis for the employer's decision. Using the traditional *McDonnell Douglas* proof elements makes it as easy for an employee of faith as it is for an employee in any other protected class to prove a Title VII violation. The victim of discrimination need not know (and prove at this stage of litigation) information that is likely known only to the employer (or labor union) to allege a prima facie case.

After proof of these elements, the *McDonnell Douglas* shifting proof approach traditionally requires the employer to carry the burden of the production of evidence to articulate some legitimate, nondiscriminatory reason for rejecting the employee or challenge the prima facie proof of the employee. This nondiscriminatory reason cannot, based on the expanded understanding of the protected class, be the challenged policy. For example, the employer in *Abercrombie* could not present evidence of its "Look" policy as the nondiscriminatory reason for its conduct. That is the offending policy. But the employer could present evidence of any other nondiscriminatory reason for its challenged actions.

Under either the new *Abercrombie* three-part test, or the *McDonnell Douglas* shifting proof approach, the employer's defensive options do not end with attacking the elements of a prima facie case or presenting a nondiscriminatory reason for its actions. Section 701(j) provides employers with an undue hardship defense. Unlike the mere burden of production of evidence in support of a nondiscriminatory reason for its actions, undue hardship requires the employer to carry the burden of proof and persuasion of incurring an undue business hardship in affording the accommodation.

McDonnell Douglas allows the employee to prove that the employer's asserted nondiscriminatory reasons are a pretext, but never removes the ultimate burden of proof placed on the employee. This would also be true under the new *Abercrombie* three-part test. In future cases the burden of proof of discrimination falls on the employee of faith, and the burden of proof of undue hardship falls on the employer (or union).

The Appendix which follows shows that the judiciary has yet to understand the secret revealed by *Abercrombie.* You are invited to share this secret good news for employees of faith.