

# RELIGIOUS DISCRIMINATION BASED ON EMPLOYER MISPERCEPTION

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This Article addresses the circuit split over whether Title VII prohibits discrimination based on an employer’s misperception of an employee’s religion. This is an especially critical issue because misperception-based religious discrimination is likely to increase as the United States continues to experience unprecedented religious diversification. Some courts read Title VII narrowly to preclude such claims, reasoning that the statutory text only prohibits discrimination based on an individual’s actual religion. Other courts interpret the statute more expansively in concluding such claims are cognizable because the employer’s intent is equally malicious in misperception and conventional discrimination cases. I argue that the statutory text is ambiguous, but the legislative history, EEOC guidance, and the broader federal antidiscrimination regime all support recognition of misperception-based religious discrimination claims under Title VII. The Supreme Court’s recent decision in *EEOC v. Abercrombie & Fitch Stores, Inc.* further confirms the validity of such claims, as the Court held that Title VII liability is premised on an employer’s discriminatory motive, not its actual knowledge of an individual’s religious practices. Thus, if an employer’s motive is the touchstone for liability, it matters not whether an employer accurately perceives an employee’s religion, so long as religion motivates the adverse employment decision.

Introduction .....	88
I. Religious Misperception in a Changing America .....	91
A. America’s Changing Religious Landscape .....	91
B. Religious Misperception in the Workplace .....	95
II. Title VII and Misperception Discrimination .....	98
A. The Statutory Text.....	98
B. Legislative History.....	100
C. EEOC Guidance.....	103
D. Other Federal Antidiscrimination Laws .....	106
III. Judicial Analysis of Misperception Discrimination .....	109
A. Key Cases Rejecting Misperception Discrimination .....	111
B. Key Cases Recognizing Misperception Discrimination .....	117
IV. Misperception Discrimination After <i>Abercrombie</i> .....	124
A. The <i>Abercrombie</i> Decision.....	124

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B. <i>Abercrombie</i> 's Application to Misperception	
Discrimination .....	127
V. The Future of Misperception Discrimination .....	130
Conclusion.....	133

#### INTRODUCTION

Ashley graduated at the top of her class from Brigham Young University (BYU), which is owned and operated by The Church of Jesus Christ of Latter-day Saints. Unlike the vast majority of BYU students, Ashley is Catholic rather than Mormon. Ashley moves home after graduation and applies for a teaching position at a local elementary school. Although highly qualified for the job, Ashley does not receive so much as a first interview. She later learns from a friend who teaches at the school that the principal rejected her application because he assumed she was Mormon based on where she had attended college. The principal was suspicious of Mormons and feared that if he hired Ashley, she would proselytize her students and coworkers.

Although Ashley was not necessarily entitled to the job in question, she was nonetheless the victim of religious discrimination because she was denied an equal opportunity to be considered for the position under the school's nonreligious hiring criteria.<sup>1</sup> Despite this harm, there is a good chance Ashley will be unable to bring a claim under Title VII of the Civil Rights Act of 1964—even though the statute expressly prohibits religious discrimination in employment. This is because courts are split over whether Title VII prohibits discrimination based on an employer's misperception of an individual's religion (or other protected characteristic).<sup>2</sup> Some courts narrowly construe Title VII as only prohibiting discrimination based on an individual's actual religion.<sup>3</sup> Such courts would dismiss Ashley's claim because the

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1. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 12–13 (1976) (arguing that an applicant who is denied a job because of her race need not establish that she would have received a job offer but for her race to prove she was a victim of race discrimination; rather, “it suffices to show that, because of her race, she was denied an *equal opportunity* to enjoy the benefit—the opportunity to be considered under the employer's nonracial criteria”).

2. Title VII prohibits employment discrimination based on race, color, sex, religion, or national origin. 42 U.S.C. § 2000e-2(a)(1) (2012). For analytical purposes this Article focuses on misperception-based religious discrimination, but its arguments would likely apply with equal force to misperception discrimination based on Title VII's other protected traits.

3. See cases discussed *infra* Part III.A.

principal did not discriminate against her based on her actual religion (Catholicism) but rather her perceived religion (Mormonism).

Such a result undercuts Title VII's goal of eradicating discrimination in the workplace.<sup>4</sup> Employers who discriminate based on their erroneous beliefs about a person's religion are no less discriminators simply because their perceptions were wrong. Why then should they be allowed to discriminate based on their ignorance, when courts have consistently held in other contexts that ignorance is not an excuse for breaking the law?<sup>5</sup> Despite this inconsistency, surprisingly few commentators have pushed for judicial recognition of misperception discrimination,<sup>6</sup> and there are only a handful of reported cases in which courts have allowed such claims to survive summary dismissal.<sup>7</sup> Judicial resistance to misperception discrimination claims

4. See H.R. REP. NO. 88-914 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2391, 2393 (Comm. on the Judiciary) (observing that in enacting Title VII, Congress sought to "meet a national need" by "eradicating significant areas of discrimination on a nationwide basis" and "eliminat[ing] discriminatory employment practices by business"); see also *id.* at 2401 ("The purpose of [Title VII] is to eliminate . . . discrimination on account of race, color, religion, or national origin.").

5. See *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) ("[I]gnorance of the law is no defense."); *United States v. Hutzell*, 217 F.3d 966, 968 (8th Cir. 2000) ("[I]gnorance of the law is no excuse."); *Cutler v. City of New York*, No. 09 Civ. 5335 (PKC), 2010 U.S. Dist. LEXIS 97435, at \*20 (S.D.N.Y. Aug. 16, 2010) (explaining that ignorance of the law did not justify failure to timely file EEOC charge).

6. See D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 101–02 (2013) (first using the term "misperception discrimination"); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1290 (2005); Craig Robert Senn, *Perception over Reality: Extending the ADA's Concept of "Regarded as" Protection Under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 827 (2009); Charity Williams, Note, *Misperceptions Matter: Title VII of the Civil Rights Act of 1964 Protects Employees from Discrimination Based on Misperceived Religious Status*, 2008 UTAH L. REV. 357, 358–59 (2008).

7. See *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1299–300, 1304 (11th Cir. 2012); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401–02 (5th Cir. 2007); *Kallabat v. Mich. Bell Tel. Co.*, No. 12-CV-15470, 2015 U.S. Dist. LEXIS 78944, at \*8–11 (E.D. Mich. June 18, 2015); *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 849–50 (D. Md. 2015); *Boutros v. Avis Rent A Car Sys.*, No. 10 C 8196, 2013 U.S. Dist. LEXIS 103310, at \*19–20 (N.D. Ill. July 24, 2013); *Henao v. Wyndham Vacations Resorts, Inc.*, 927 F. Supp. 2d 978, 986–88 (D. Haw. 2013); *Zayadeen v. Abbott Molecular, Inc.*, No. 10 C 4621, 2013 U.S. Dist. LEXIS 12135, at \*22–24 (N.D. Ill. Jan. 30, 2013); *Wood v. Freeman Decorating Servs.*, No. 3:08-cv-00375-LRH-RAM, 2010 U.S. Dist. LEXIS 14971, at \*12–13 (D. Nev. Feb. 19, 2010); *Smith v. Specialty Pool Contractors*, No. 02:07cv1464, 2008 U.S. Dist.

appears to stem almost entirely from the absence of language in Title VII explicitly allowing such claims. By contrast, the Americans with Disabilities Act (ADA) specifically prohibits employment discrimination against individuals who are “regarded as” disabled.<sup>8</sup> This crucial difference between Title VII and the ADA led one district court to conclude, and several others to agree, that “Congress has shown, through . . . the [ADA] that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class.”<sup>9</sup> Thus, if Congress had intended Title VII to apply to persons mistakenly regarded as belonging to a particular religion, it would have amended the statute accordingly.<sup>10</sup>

I argue that discrimination claims based on an employer’s misperception of an individual’s religion should be cognizable under Title VII. Whether Title VII prohibits misperception discrimination cannot be determined from the statutory text alone, as the statute is ambiguous. However, the pertinent legislative history, U.S. Equal Employment Opportunity Commission (EEOC) guidance, and the broader federal antidiscrimination regime all support the recognition of such claims. Moreover, the Supreme Court’s recent decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*<sup>11</sup> further confirms the validity of misperception claims, as the Court held that an employer cannot escape liability for refusing to hire an applicant whom it believes—but does not actually know—will need a religious accommodation.<sup>12</sup> The Court reasoned that Title VII “does not impose a knowledge requirement . . . [but instead] prohibits certain *motives*, regardless of the state of the actor’s knowledge.”<sup>13</sup> Because the Court held that Title VII liability is premised on motivation, not knowledge, it follows that an employer violates the statute if religion motivates an adverse employment action,

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LEXIS 72551, at \*14–16 (W.D. Pa. Sept. 24, 2008); *Berrios v. Hampton Bays Union Free Sch. Dist.*, No. CV 02-3124, 2007 U.S. Dist. LEXIS 101366, at \*3–4 (E.D.N.Y. Mar. 12, 2007); *LaRocca v. Precision Motorcars, Inc.*, 45 F. Supp. 2d 762, 770–71 (D. Neb. 1999); *Perkins v. Lake Cnty. Dep’t of Utils.*, 860 F. Supp. 1262, 1277–78 (N.D. Ohio 1994); *see also infra* Part III for analysis of several of these cases.

8. 42 U.S.C. §§ 12102(1)(C), 12112(a) (2012).

9. *Butler v. Potter*, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004).

10. *See Lewis v. N. Gen. Hosp.*, 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007) (“In the [ADA], Congress provided for claims based on ‘perceived’ disability or being ‘regarded as’ having a disability. If Congress had wanted to permit a similar cause of action under Title VII for ‘perceived religion’ discrimination, it could have so provided. It did not.” (citation omitted)).

11. 135 S. Ct. 2028 (2015).

12. *Id.* at 2032–34.

13. *Id.* at 2032–33.

regardless of whether the employer's perception of the employee's religion is accurate.

This Article proceeds in five parts. Part I explores America's changing religious landscape and argues that the growing diversification of religion and religious expression increases the likelihood that employers will discriminate based on misperceptions about an individual's religion. Part II explains how Title VII's text is ambiguous regarding misperception discrimination and considers how the statute's legislative history, EEOC guidance, and the broader federal antidiscrimination scheme support the recognition of such claims. Part III examines judicial analysis of misperception discrimination under Title VII. Courts that reject misperception claims tend to rely on a single provision of the statute in isolation, whereas courts that recognize such claims typically focus on Title VII's overarching purposes and the EEOC's interpretation of the statute. Part IV analyzes the *Abercrombie* decision and addresses how the holding applies to misperception-based religious discrimination. Part V discusses the ramifications of allowing religious misperception claims after *Abercrombie*.

## I. RELIGIOUS MISPERCEPTION IN A CHANGING AMERICA

Misperceiving a person's religious beliefs is hardly a new phenomenon. But it is one that is likely to increase. This Part examines how the United States' religious landscape is changing both in terms of the variety of religious sects and the ways in which people are choosing to express—or not to express—their religious beliefs. It then considers how these changes are likely to increase the threat of misperception-based religious discrimination in American workplaces already rife with religious conflict.

### *A. America's Changing Religious Landscape*

The United States is more religiously diverse than ever before and will likely continue to diversify in coming years.<sup>14</sup> Although the United States remains predominantly Christian, with 70.6% identifying with some branch of the religion, non-Christian faiths continue to make

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14. See PAUL D. NUMRICH, *THE FAITH NEXT DOOR: AMERICAN CHRISTIANS AND THEIR NEW RELIGIOUS NEIGHBORS* 6 (2009).

considerable gains.<sup>15</sup> Between 2007 and 2014 alone, the percentage of Americans affiliated with non-Christian religions rose from 4.7% to 5.9%.<sup>16</sup> Immigration continues to be the primary driver of religious diversification, resulting in greater numbers of Buddhists, Muslims, Baha'is, and other non-Christians.<sup>17</sup> Immigration has also contributed to greater internal diversity within established religious traditions.<sup>18</sup> American Judaism, for example, has become increasingly diverse because of the influx of Jewish immigrants from Russia and Ukraine.<sup>19</sup> Christianity in the United States has likewise undergone a remarkable transformation due to sizeable Latino, Filipino, and Vietnamese Catholic communities; Korean Presbyterians; Indian Mar Thomas; and Egyptian Copts, among many others.<sup>20</sup>

The growing diversity of religions in American society is likewise evident in its workforce. Indeed, religious-discrimination plaintiffs have professed an impressive range of beliefs in recent lawsuits. For example, a Costco cashier who belonged to the Church of Body Modification sued her employer for forcing her to cover her religiously mandated tattoos and piercings.<sup>21</sup> A manager filed suit after his employer discovered he belonged to the World Church of the Creator, which promotes white supremacy.<sup>22</sup> An IRS agent sued the federal government for firing her because she refused to remove her kirpan, a Sikh ceremonial sword.<sup>23</sup> A Walmart employee, who described his religion as “Universal Belief System,” filed a lawsuit challenging his employer’s policy that prohibited him from simultaneously wearing various pieces of religious attire, including a priest’s shirt, a Muslim headdress, a fanny pack with an anarchy symbol, a chain with multiple

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15. See PEW RESEARCH CTR., AMERICA’S CHANGING RELIGIOUS LANDSCAPE 3 (2015) [hereinafter CHANGING RELIGIOUS LANDSCAPE], <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.

16. See *id.*

17. See *id.* at 2, 3, 11 (Christians comprise 70.6% of the American population, whereas Buddhists make up 0.7%, Muslims comprise 0.9%, and Hindus and members of other world religions constitute 1.0%).

18. See DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS NOW BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION 1–4 (2001).

19. *Id.* at 4.

20. *Id.*

21. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 128–30 (1st Cir. 2004).

22. *Peterson v. Wilmur Commc’ns*, 205 F. Supp. 2d 1014, 1015–17 (E.D. Wis. 2002).

23. *Tagore v. United States*, 735 F.3d 324, 325 (5th Cir. 2013).

crosses hanging from it, and a necklace with a crucifix.<sup>24</sup> The EEOC recently announced a lawsuit against a New York-based health network that required employees to participate in a belief system called “Onionhead.”<sup>25</sup> The Commission alleges employees were forced to wear Onionhead buttons, participate in prayers and candle burning, and keep only dim lighting in the workplace.<sup>26</sup>

Apart from the growing number of religious sects, there is also greater variation in how people express their religious beliefs. For instance, a recent survey found that the percentage of U.S. Catholics who self-identify as “strong” members has plummeted from 46% in 1974 to 27% in 2012.<sup>27</sup> As the strength of religious identity has declined among Catholics, so too has weekly church attendance: 47% of Catholics attended mass weekly in 1974, compared to just 24% in 2012.<sup>28</sup> By contrast, religious identity among Protestants appears to have strengthened during this same time period: the percentage of “strong” Protestants increased from 43% to 54%, and weekly church attendance rose from 29% to 38%.<sup>29</sup> Diversity is also growing within more traditionally homogenous faiths. For example, a recent study found a surprising amount of variation among the Amish on a wide range of behaviors, from family planning to cow milking.<sup>30</sup> Within Islam, there are substantial differences in women’s religious coverings, with some Muslim women wearing burkas, others wearing headscarves, others wearing face veils, and still others opting for no head covering at all.<sup>31</sup>

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24. *Lorenz v. Wal-Mart Stores, Inc.*, No. 05-0319, 2006 WL 1562235, at \*2-3, 6 (W.D. Tex. May 24, 2006).

25. See Press Release, EEOC, EEOC Sues United Health Programs of America and Parent Company for Religious Discrimination (June 11, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/6-11-14.cfm>.

26. See *id.*

27. PEW RESEARCH CTR., ‘STRONG’ CATHOLIC IDENTITY AT A FOUR-DECADE LOW IN U.S. 1 (2013), <http://www.pewforum.org/files/2013/03/Strong-Catholic-Identity-version-3-13-13-for-web.pdf>.

28. *Id.* at 2.

29. *Id.* at 1, 3.

30. See generally Mark Scolforo, *New Research Shows Diversity Among US Amish Groups*, DENVER POST (June 3, 2013, 12:04 PM), [http://www.denverpost.com/nationworld/ci\\_23378069/new-research-shows-diversity-among-us-amish-groups](http://www.denverpost.com/nationworld/ci_23378069/new-research-shows-diversity-among-us-amish-groups) (describing key findings from study).

31. See Faegheh Shirazi & Smeeta Mishra, *Young Muslim Women on the Face Veil (Niqab): A Tool of Resistance in Europe but Rejected in the United States*, 13 INT’L J. CULTURAL STUD. 43, 44-47 (2010) (explaining variations in veiling practices among Muslim women).

One of the most significant changes in America's religious landscape is the increasing fluidity of religious affiliation. Nearly half of American adults "have either switched religious affiliation, moved from being unaffiliated with any religion to being affiliated with a particular faith, or dropped any connection to a specific religious tradition altogether."<sup>32</sup> Whereas older Americans who change religious affiliations tend to switch "from one family to another within a religious tradition," affiliation changes tend to be much more drastic among younger Americans.<sup>33</sup> Nearly three-fourths of adults under age thirty who change religious affiliations leave one religious tradition for another or for no religion at all.<sup>34</sup> While it is relatively common for Americans to switch religious affiliations, recent research suggests that most people who leave a religion choose not to affiliate with another religion. Between 2007 and 2014, the percentage of "unaffiliateds" jumped from 16.1% to 22.8%—an increase of 6.7 percentage points in just seven years.<sup>35</sup> Importantly, nonaffiliation should not be mistaken for nonbelief: a full two-thirds of unaffiliated adults still believe in God, more than half feel "a deep connection with nature and the earth," approximately one-third classify themselves as "'spiritual' but not 'religious,'" and one-fifth pray daily.<sup>36</sup> Despite their nonaffiliation, this growing segment of Americans is still entitled to Title VII's protection from religious discrimination. Courts have consistently held that a lack of formal religious affiliation in no way disqualifies a plaintiff from asserting a religious discrimination claim under Title VII.<sup>37</sup>

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32. PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY, RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 5 (2008), <http://www.pewforum.org/files/2013/05/report-religious-landscape-study-full.pdf>.

33. *Id.* at 33.

34. *Id.*

35. See CHANGING RELIGIOUS LANDSCAPE, *supra* note 15, at 3.

36. See PEW FORUM ON RELIGION & PUB. LIFE, "NONES" ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 9–10 (2012), <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf>.

37. See, e.g., *Scott v. Montgomery Cnty. Sch. Bd.*, 963 F. Supp. 2d 544, 547, 559 n.11 (W.D. Va. 2013) (plaintiff who described her religious beliefs as "orthodox Christianity" not precluded from bringing Title VII claim based on lack of formal religious affiliation because "the statute protects persons who are not members of organized religious groups"); see also *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1117 (10th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 2008 (2015) ("Religion includes not only traditional, organized religions . . . 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." (quoting EEOC, COMPLIANCE MANUAL § 12-I(A)(1) (2008), <http://www.eeoc.gov/policy/docs/>)).



A final trend with important ramifications for misperception discrimination is the growing number of Americans who mix multiple faiths, rather than fitting neatly into a singular religious classification. A Pew survey found that “large numbers of Americans engage in multiple religious practices, mixing elements of diverse traditions.”<sup>38</sup> For instance, it is not uncommon today for Americans to “blend Christianity with Eastern or New Age beliefs such as reincarnation, astrology and the presence of spiritual energy in physical objects.”<sup>39</sup> The survey also found that more than one-third of Americans either regularly (9%) or occasionally (26%) attend worship services at more than one place, and nearly one-quarter report sometimes attending religious services of a faith different from their own.<sup>40</sup> The study predicts that as religiously mixed marriages become increasingly common, involvement in multiple faith communities will become even more normalized.<sup>41</sup>

The foregoing trends illustrate the growing complexity of religion in the United States today. While it has never been wise to make assumptions about a person’s religious beliefs, it is even less so now. Not all Amish drive buggies, not all Jews abstain from eating pork, and not all Catholics attend mass. Women wear headscarves for both religious and secular reasons, Mormons live in places other than Utah, and some Jehovah’s Witnesses donate blood. Moreover, most people who are unaffiliated with formal religion are not atheists, not everyone who attends weekly services is religious, and some people consider themselves members of multiple faiths. In short, as the United States continues to experience unprecedented religious diversification, the potential for misperceiving a person’s religion will only increase.

### *B. Religious Misperception in the Workplace*

It is often more difficult to correctly assess people’s religious beliefs than their race, color, sex, or even national origin. Unlike Title VII’s other protected traits, a person’s religion generally cannot be

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religion.pdf); *Bushouse v. Local Union 2209*, 164 F. Supp. 2d 1066, 1076 n.15 (N.D. Ind. 2001) (noting that Title VII has a “broad definition” of religious belief).

38. PEW FORUM ON RELIGION & PUB. LIFE, MANY AMERICANS MIX MULTIPLE FAITHS 1 (2009), <http://www.pewforum.org/files/2009/12/multiplefaiths.pdf>.

39. *Id.*

40. *Id.*

41. *See id.* at 2 (discussing link between religiously mixed marriages and attending multiple types of worship services).

detected from outward appearance alone.<sup>42</sup> Even national origin is more readily discernable than religion, as it tends to be more socially acceptable to ask other people where they are from than about their religious beliefs. Consequently, a person may look for clues about others' religious identity based on where they are from, the schools they attend, their manner of dress and grooming, their dietary restrictions, their vocabulary, their names, and a host of other characteristics. This is problematic for several reasons, not least of which is the fact that Americans tend to be fairly ignorant about religions other than their own.<sup>43</sup> The Pew Forum on Religion and Public Life's study of Americans' religious knowledge paints a fairly bleak picture in this regard.<sup>44</sup> On average, respondents correctly answered just sixteen of thirty-two religious knowledge questions in the survey.<sup>45</sup> Fewer than two-thirds (63%) correctly named Genesis as the first book of the Bible, about half (52%) said, incorrectly, that Catholicism teaches that the bread and wine used for Communion are merely symbolic of the body and blood of Jesus, fewer than one in five (16%) correctly identified Protestantism as the religion that traditionally teaches that salvation comes through faith alone, fewer than half (45%) correctly answered that the Jewish Sabbath begins on Friday, and just over half (54%) named the Koran as the holy book of Islam.<sup>46</sup> Additionally, only about one-third (38%) correctly associated Vishnu and Shiva with Hinduism, and fewer than half (47%) knew the Dalai Lama is Buddhist.<sup>47</sup>

In short, conditions are ripe for religious misperception in the workplace, given the growing complexity of religion, the lack of outward manifestations of a person's religion, the reluctance to inquire

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42. This is not to suggest that matters of racial, sexual, or national origin identity are necessarily straightforward. *See* Greene, *supra* note 6, at 101 ("With increased immigration, cultural diversity, interracial marriages, and transracial adoptions, as well as more formal recognition of mixed-race classifications and more fluid conceptualizations of gender, racial, and cultural identity, courts will likely encounter more discrimination cases where an alleged dissonance exists between the employer's categorization of an employee and the employee's self-identification.").

43. *See* STEPHEN PROTHERO, RELIGIOUS LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW—AND DOESN'T 1 (2007) ("Americans are both deeply religious and profoundly ignorant about religion.").

44. *See* PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS KNOWLEDGE SURVEY (2010), <http://www.pewforum.org/files/2010/09/religious-knowledge-full-report.pdf>.

45. *Id.* at 6.

46. *Id.* at 20–29.

47. *Id.* at 8.

about others' religious beliefs, and general ignorance about religion. Therefore, the probability is high that employers, who likely are not experts on the subtle nuances of religious diversity, will misperceive the religious beliefs of their employees. The potential for misperception-based religious discrimination is further heightened by the fact that the American workplace is already "a tinderbox for religious conflict."<sup>48</sup> Media reports of religious discrimination at work seem a near daily occurrence.<sup>49</sup> The EEOC has also experienced an uptick in both the number and percentage of charges alleging religious discrimination. In 1997, the EEOC received 1,709 religious discrimination complaints, constituting 2.1% of all charges.<sup>50</sup> By 2015, that number more than doubled to 3,502, which constituted 3.9% of all charges.<sup>51</sup> In light of this trend, the EEOC has become more proactive in educating employers about religious discrimination. For example, in the aftermath of the September 11 terrorist attacks, the EEOC issued guidance on the rights of Muslims, Arabs, South Asians, and Sikhs under the employment laws after experiencing what it characterized as "a significant increase in the number of charges alleging workplace discrimination based on religion and/or national origin."<sup>52</sup> More

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48. Dallan F. Flake, *Image is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 703 (2015).

49. See, e.g., Kate Abbey-Labertz, *Ford Worker Fired for Anti-Gay Comment Sues for Religious Discrimination*, HUFFINGTON POST (July 13, 2015, 9:23 PM), [http://www.huffingtonpost.com/entry/thomas-banks-ford-lawsuit\\_55a42530e4b0a47ac15d2669](http://www.huffingtonpost.com/entry/thomas-banks-ford-lawsuit_55a42530e4b0a47ac15d2669) (reporting that ex-employee filed a religious discrimination claim after Ford fired him for posting an anti-gay comment on the company website); Paula Burkes, *EEOC Files Lawsuit Against UPS on Religious Discrimination Claims*, OKLAHOMAN (July 21, 2015), <http://newsok.com/eec-files-lawsuit-against-ups-on-religious-discrimination-claims/article/5435222> (reporting that the EEOC has sued UPS for religious discrimination based on its grooming policy that prohibits certain male employees from wearing beards or growing their hair below collar length); *EEOC Sues Rotten Ralph's Restaurant for Religious Discrimination*, NAT'L L. REV. (July 12, 2015), <http://www.natlawreview.com/article/eec-sues-rotten-ralph-s-restaurant-religious-discrimination> (discussing EEOC lawsuit against restaurant that terminated a Muslim server for wearing a headscarf to work); *NC Dunkin' Donuts to Pay \$22,000 to Settle Religious Discrimination Lawsuit*, FOX8 (July 16, 2015, 9:18 PM), <http://myfox8.com/2015/07/16/nc-dunkin-donuts-to-pay-22000-to-settle-religious-discrimination-lawsuit/> (reporting settlement of lawsuit alleging Dunkin' Donuts refused to hire Seventh-Day Adventist applicant because he could not work Saturdays).

50. *Charge Statistics: FY 1997 Through FY 2015*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Mar. 11, 2016).

51. *Id.*

52. *Questions and Answers About Workplace Rights Muslims, South Asians, and Sikhs under the Equal Employment Opportunity Laws*, U.S. EQUAL EMP.

recently, the EEOC issued a question-and-answer guide on religious garb and grooming in response to growing concerns that employer dress codes are unfairly stifling employees' religious expression.<sup>53</sup>

Given the current state of religion in America, and in the workplace in particular, it is critical that courts are unified in their approach to misperception-based religious discrimination. Failure to do so not only potentially works an injustice to the victims of such discrimination but may also disincentivize employers from attempting to understand an employee's religious beliefs. Because of the complexity of religion today, it would be too easy for an employer to escape liability by pleading ignorance about a person's religion. If courts continue to allow employers to discriminate so long as they get a person's religion wrong, what motivation will employers ever have to get it right?

## II. TITLE VII AND MISPERCEPTION DISCRIMINATION

Because Title VII does not explicitly prohibit misperception discrimination, it is the province of the courts to determine whether Congress intended for the statute to cover such claims.<sup>54</sup> The text of Title VII itself is ambiguous as to whether misperception discrimination claims are cognizable under the statute. However, other sources, including the relevant legislative history, EEOC guidance, and the broader federal antidiscrimination regime, support the conclusion that Congress did, in fact, intend for Title VII to cover misperception discrimination.

### A. *The Statutory Text*

It is unclear from Title VII's text alone whether the statute prohibits misperception discrimination. This is because inconsistencies in two key provisions render it susceptible to different interpretations.

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OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/publications/backlash-employee.cfm> (last visited Feb. 24, 2016).

53. *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION [hereinafter *Religious Garb and Grooming*], [http://www.eeoc.gov/eeoc/publications/qa\\_religious\\_garb\\_grooming](http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming) (last visited Feb. 24, 2016).

54. See Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975) ("[T]he function of a court when dealing with a statute is to ascertain and effectuate the intention of the legislature.").

The first provision, § 2000e-2(a)(1), prohibits employers from refusing to hire, discharging, or otherwise discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>55</sup> Standing alone, courts could—and sometimes do—interpret this provision narrowly as prohibiting only discrimination that is based on an individual’s actual religion or other protected trait.<sup>56</sup> This is because the phrase “because of such individual’s” immediately precedes the list of protected traits, suggesting a discrimination claim must be rooted in an individual’s actual, rather than perceived, characteristic.

Of course, § 2000e-2(a)(1) is not a standalone provision but must be read in conjunction with the rest of Title VII.<sup>57</sup> Significantly, Congress added § 2000e-2(m) to the statute in 1991 to clarify that an employer commits an unlawful employment practice “when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”<sup>58</sup> Because subsection (m) does not include the “because of such individual’s” language present in subsection (a)(1), when read in isolation subsection (m) appears to prohibit employment decisions motivated by religion more generally. It seems that if Congress had intended to only ban discrimination motivated by a person’s actual religion, it could have done so easily enough by making the language of subsection (m) consistent with the language of subsection (a)(1). The fact that Congress chose not to use such language raises the possibility that it never meant for Title VII to apply only to discrimination based on a person’s actual characteristics. There is a clear conflict between subsections (a)(1) and (m). Under the former, Ashley could not bring a Title VII claim because the principal did not discriminate against her “because of such individual’s . . . religion.”<sup>59</sup> But under the latter, Ashley could bring suit because “religion . . . was a motivating factor” in the employment decision.<sup>60</sup> How could Title VII simultaneously recognize and reject Ashley’s claim? Either the statute prohibits

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55. 42 U.S.C. § 2000e-2(a)(1) (2012).

56. See cases discussed *infra* Part III.A.

57. See *Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560, 1564 (Fed. Cir. 1995) (holding that all parts of a statute must be construed together without according undue importance to a single or isolated portion).

58. § 2000e-2(m).

59. § 2000e-2(a)(1).

60. § 2000e-2(m).

misperception discrimination or it does not; it cannot do both. Because the statutory text is capable of two meanings, it is impossible for courts to discern Congress' intent by examining the statute's plain language alone.<sup>61</sup> When a statute is ambiguous, which is the case here,<sup>62</sup> courts "seek guidance in the statutory structure, relevant legislative history, congressional purposes expressed in the [pertinent act], and general principles" of law applicable to the circumstances of the statute to determine the appropriate interpretation.<sup>63</sup>

### *B. Legislative History*

Title VII is widely regarded as one of the most significant pieces of civil rights legislation Congress has ever enacted.<sup>64</sup> From the outset, Congress made clear that "[t]he purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."<sup>65</sup> Although courts may disagree over how to interpret various provisions of the statute, they are unified in their understanding that the intent of Title VII is to "eradicat[e] prohibited forms of discrimination

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61. See *In re Briggs*, 143 B.R. 438, 446 n.11 (Bankr. E.D. Mich. 1992) (holding that tension between statutory provisions "creates an ambiguity that renders this so-called 'plain meaning rule' inapplicable" (citing *United States v. Fairman*, 947 F.2d 1479, 1481-82 (11th Cir. 1991))).

62. See *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 736-37 (1985) (declaring that when a statute is capable of more than one reasonable reading, it is ambiguous on its face); *United States v. White Plume*, 447 F.3d 1067, 1074 (8th Cir. 2006) ("Under statutory interpretation, a statute is ambiguous if it is 'capable of being understood in two or more possible senses or ways.'" (quoting *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001))).

63. *Lorion*, 470 U.S. at 737; see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997) (interpreting ambiguous term in Title VII by considering the "primary purpose" of the statute).

64. See GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 6 (2d ed. 2007) ("In its provisions in Title VII, the act created the most important of the statutory prohibitions against employment discrimination and the one that most clearly expanded upon the protection offered by the Constitution."); Norbert Schlei, *Foreword* to BARBARA SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* vii (2d ed. 1983) ("The Civil Rights Act of 1964 was the most important civil rights legislation of this century. Title VII of that Act . . . has been its most important part."); Hubert H. Humphrey, *Preface*, 20 ST. LOUIS U. L.J. 219, 219 (1976) ("In my opinion, winning passage of enforceable federal standards to achieve equal employment opportunity surely was one of the most significant legislative actions of this generation.").

65. H.R. REP. NO. 88-914 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2401; see also 110 CONG. REC. 13079-80 (1964) (remarks of Sen. Clark).

from the workplace.”<sup>66</sup> According to the Supreme Court, “The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered . . . stratified job environments to the disadvantage of . . . minority citizens.”<sup>67</sup> The Court has further explained that the “intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute’s legislative history.”<sup>68</sup>

Although the legislative record does not directly reference misperception discrimination, it nonetheless contains important insights into what Congress hoped to accomplish through Title VII. An interpretive memorandum entered into the Congressional Record by Senators Case and Clark, co-managers of the bill in the Senate, is particularly noteworthy in its explanation that “[t]o discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited . . . are those which are *based on* any five of the forbidden criteria: race, color, religion, sex, and national origin.”<sup>69</sup> The authors’ concern lay not with whether a person claiming discrimination was actually black or male or Baptist; instead, they sought to enact sweeping legislation to eliminate distinctions and differential treatment in employment “based on” any of the protected traits more generally.

Title VII’s legislative history is replete with references to enacting a national policy of equal opportunity in employment free from wrongful discrimination, yet makes frustratingly little mention of the intended scope of the statute.<sup>70</sup> However, further insight into Congress’

66. *Martin v. United Way of Erie Cnty.*, 829 F.2d 445, 449 (3d Cir. 1987); see also *Butler v. Drive Auto. Indus. of Am.*, 793 F.3d 404, 409 (4th Cir. 2015) (noting that joint employer doctrine “serves Title VII’s purpose of eliminating ‘discrimination in employment based on race, color, religion, sex, or national origin’” (quoting *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 126 (S.D.N.Y. 1977))); *Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 104 (1st Cir. 2006) (referencing Title VII’s “dual purposes of eliminating discrimination and making its victims whole” (citing *Selgas v. Am. Airlines, Inc.*, 104 F.3d 9 (1st Cir. 1997))); *Hutchinson v. Lake Oswego Sch. Dist. No. 7*, 519 F.2d 961, 965 (9th Cir. 1975) (explaining Title VII’s purpose is to “eliminate all discriminatory employment practices” (citing H.R. REP. NO. 88-914 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2401)).

67. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

68. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989).

69. 110 CONG. REC. 7213 (1964) (emphasis added).

70. See Patricia Davidson, *The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 205 (1984).

intent can be discerned from two other sources. First, in considering the Title VII-amending Pregnancy Discrimination Act of 1978 (PDA), Congress “openly discussed” concerns over employers discriminating against female employees based on their misperceptions about women of childbearing age.<sup>71</sup> Congress emphasized the need not just to protect women who are pregnant, have given birth, or who experience related medical conditions, but also those who may be misperceived as such:

[T]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.

. . . .

. . . Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.<sup>72</sup>

Thus, the legislative history of the PDA illustrates congressional concern not only with discrimination based on a person’s actual status but also discrimination that stems from stereotypes and unfounded assumptions.

Congress’ intent to prohibit misperception discrimination under Title VII is further supported by a Senate committee report discussing the inclusion of “regarded as” language in the ADA:

[T]he new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection [protects] . . . those persons who do

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71. Senn, *supra* note 6, at 851 (quoting Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012))).

72. H.R. REP. NO. 95-948, at 3, 6-7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751, 4754-55 (Comm. on Educ. & Labor).



not in fact have the condition which they are perceived as having . . . [because they] may be subjected to discrimination on the basis of their being regarded as handicapped.<sup>73</sup>

Although the committee observed that the ADA's "regarded as" language is consistent with Title VI of the Civil Rights Act, it could have made this same comparison to Title VII; the antidiscrimination language throughout the Civil Rights Act is nearly identical.<sup>74</sup>

In short, Congress enacted Title VII with the clear intent of eradicating certain forms of discrimination from the workplace. There is nothing in the legislative history that suggests Congress intended to limit employer liability to only discrimination based on a person's actual religion. To the contrary, the legislative history reflects Congress' goal of eliminating discrimination more broadly whenever a protected trait such as religion forms the basis of an adverse employment action. Moreover, in considering subsequent antidiscrimination legislation, including the PDA and the ADA, Congress highlighted the importance of prohibiting all forms of invidious discrimination, whether based on a person's actual or perceived characteristics.

### C. EEOC Guidance

The EEOC's position on misperception discrimination is critical because, although nonbinding, courts often defer to the Commission on matters of Title VII interpretation.<sup>75</sup> The EEOC has long insisted

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73. S. REP. NO. 93-1297, at 17-18 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389-90.

74. *Compare* 42 U.S.C. § 2000d (2012) (prohibiting discrimination in federally-funded programs and activities based "on the ground of race, color, or national origin"), *with* § 2000e-2(a)(1) (prohibiting discrimination in employment because of an individual's race, color, religion, sex, or national origin), *and* § 2000e-2(m) (making unlawful any adverse employment action where "race, color, religion, sex, or national origin was a motivating factor for any employment practice").

75. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under [the Fair Labor Standards] Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 179 (2011) (Ginsburg, J., concurring) (EEOC's statements in its Compliance Manual merit judicial deference as to interpretation of language in Title VII).

misperception discrimination claims of all types are cognizable under Title VII. The federal regulations contain the EEOC's most detailed explanation of its position in the context of national origin discrimination: "The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."<sup>76</sup> The regulation makes clear that a national origin claim need not be based on a person's actual place of origin but can also arise from the misperception that a person is of a particular origin because she possesses certain characteristics of that national origin group. The regulation further explains that the Commission will examine "with particular concern" allegations of national origin discrimination based on the perception that an individual belongs to a national origin group because of her association with persons of a national origin group or organizations that promote the interests of a national origin group, participation in activities generally associated with persons of a national origin group, or because her name is associated with a national origin group.<sup>77</sup>

The EEOC is even more explicit about its position on misperception discrimination in other commentary. Expounding on the federal regulation, the Commission explained that "to have a claim of national origin discrimination under Title VII, it is not necessary to show that the alleged discriminator knew the particular national origin group to which the complainant belonged. . . . [I]t is enough to show that the complainant was treated differently than others because of his or her foreign accent, appearance or physical characteristics."<sup>78</sup>

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76. 29 C.F.R. § 1606.1 (2015). One question this regulation and subsequent EEOC guidance leaves open is whether the Commission believes that for a misperception discrimination claim to be actionable, an employer's misperception must bear some reasonable connection to an individual's actual characteristics. What if the individual does not possess such characteristics and the employer misperceives him as belonging to a certain national origin group anyway? More to the point, what if an employer believes a Jewish employee is Methodist, even though the employee wears a yarmulke, studies the Torah on his lunchbreak, observes Jewish holidays, is unavailable to work Friday nights, and even directly tells the employer he is Jewish? Misperceiving the employee as Methodist seems unreasonable, but should the employer's unreasonableness negate its liability? Although the EEOC has yet to address this issue, it seems doubtful the Commission would construe its own regulations in this way. Whether one's misperception is reasonable seems irrelevant to either intent or harm. Nevertheless, the EEOC should consider clarifying this issue in future guidelines.

77. *Id.*

78. Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 85,632, 85,633 (Dec. 29, 1980).

Elsewhere the EEOC has asserted that Title VII prohibits discrimination “based on the employer’s belief that [an individual] is a member of a particular national origin group, for example, discrimination against someone perceived as being Arab based on his speech, mannerisms, and appearance, regardless of how he identifies himself or whether he is, in fact, of Arab ethnicity.”<sup>79</sup>

Although most EEOC guidance focuses on perceived national origin, the Commission has made clear that its interpretation of Title VII applies to other protected traits, including religion. For example, the EEOC has cautioned that “[a]t this time, employers and unions should be particularly sensitive to potential discrimination or harassment against individuals who are - or are perceived to be - Muslim, Arab, Afghani, Middle Eastern or South Asian (Pakistani, Indian, etc.).”<sup>80</sup> In its *Compliance Manual*, the EEOC provides a hypothetical acknowledging the illegality of misperception-based religious discrimination: “Thomas, who is Egyptian, alleges that he has been harassed by his coworkers about his Arab ethnicity. He also has been subjected to derogatory comments about Islam even though he has told his coworkers that he is Christian. Thomas’ charge should assert both national origin and religious discrimination.”<sup>81</sup> In its recent guidance on religious garb and grooming, the EEOC provides a second hypothetical regarding religious misperception, albeit in a slightly different context:

Adarsh, who wears a turban as part of his Sikh religion, is hired to work at the counter in a coffee shop. A few weeks after Adarsh begins working, the manager notices that the work crew from the construction site near the shop no longer comes in for coffee in the mornings. When the manager makes inquiries, the crew complains that Adarsh, whom they mistakenly believe is Muslim, makes them uncomfortable in light of the anniversary of the September 11th attacks. The

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79. *Section 13: National Origin Discrimination*, EEOC COMPLIANCE MANUAL, § 13-II (Dec. 2, 2002) [hereinafter COMPLIANCE MANUAL 2002], <http://www.eeoc.gov/policy/docs/national-origin.html>.

80. *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, EEOC.GOV, [http://www.eeoc.gov/laws/types/fs-relig\\_ethnic.cfm](http://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm) (last visited Feb. 10, 2016); *see also* EEOC, COMPLIANCE MANUAL § 15-II (2006) [hereinafter COMPLIANCE MANUAL 2006], <http://www.eeoc.gov/policy/docs/race-color.pdf> (“Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.”).

81. COMPLIANCE MANUAL 2002, *supra* note 79, at § 13-II.

manager tells Adarsh that he will be terminated because the coffee shop is losing the construction crew's business. The manager has subjected Adarsh to unlawful religious discrimination by taking an adverse action based on customer preference not to have a cashier of Adarsh's perceived religion. Adarsh's termination based on customer preference would violate Title VII regardless of whether he was correctly or incorrectly perceived as Muslim, Sikh, or any other religion.<sup>82</sup>

According to this example, an employer not only can be held liable for its own misperceptions about a person's religion but also for taking adverse action based on the misperceptions of others.

#### *D. Other Federal Antidiscrimination Laws*

A final source of interpretive guidance is the broader federal antidiscrimination scheme. It is not uncommon for courts to apply the analytical framework of one antidiscrimination law to another in light of their shared goal of eradicating discrimination from the workplace.<sup>83</sup> Because the ADA is the only federal statute that explicitly prohibits "regarded as" discrimination, it is worth considering whether the statute's language should have any bearing on whether Title VII similarly prohibits misperception discrimination. On the one hand, courts that reject misperception claims under Title VII almost universally point to the fact that the ADA contains specific "regarded as" language, whereas Title VII does not, as proof that Congress did not intend for misperception discrimination to be cognizable under Title VII.<sup>84</sup> But on the other hand, this difference in the statutory texts does not have to be dispositive if courts focus on the similarities between the ADA and Title VII in terms of both philosophies and protections.

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82. *Religious Garb and Grooming*, *supra* note 53.

83. *See, e.g., Wishkin v. Potter*, 476 F.3d 180, 185 (3d Cir. 2007) (noting that because the ADA, ADEA, and Title VII "all serve the same purpose—to prohibit discrimination in employment against members of certain classes. . . . [I]t follows that the methods and manner of proof under one statute should inform the standards under the others as well" (quoting *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153 (3d Cir. 1995)); *Kroske v. US Bank Corp.*, 432 F.3d 976, 986 (9th Cir. 2005) (explaining that "the ADEA shares a common purpose with Title VII," such that its antidiscrimination provisions are "modeled upon the prohibitions of Title VII" (citing *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995))).

84. *See infra* Part III.A for analysis of cases so holding.

Indeed, courts have repeatedly held that Title VII and the ADA must be interpreted consistently in light of their shared purpose.<sup>85</sup>

In advocating for the extension of “regarded as” protection under Title VII, Professor Craig Robert Senn explains that the ADA, Title VII, and the Age Discrimination in Employment Act (ADEA) have long shared “an identical congressional and judicial philosophy” that “employer perception or stereotype is an appropriate justification for imposing employment discrimination liability, even when that perception or stereotype is erroneous and inaccurate.”<sup>86</sup> He points out that when Congress enacted the ADA, it expressed concern about “myths, fears and stereotypes,” “generalizations,” “presumptions,” “prejudging,” “preconceived and . . . erroneous judgment . . . based on labeling,” “negative attitudes,” “misconceptions,” “unfounded, outmoded stereotypes and perceptions,” “false presumptions, . . . misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies,” and “stereotypical assumptions.”<sup>87</sup> These same concerns have surfaced in the ADEA context, where Congress and the Supreme Court have discussed age-related “negative stereotypes,” “pervasive belief,” “myth,” “wrong[] assum[ptions],” “perception,” and “inaccurate and denigrating generalization.”<sup>88</sup> In the Title VII context, Congress and the Supreme Court have used virtually identical terminology (e.g., “assumption,” “view,” “stereotype,” “stereotyping,” and “belief”) in expressing discrimination-related concerns.<sup>89</sup> Professor Senn argues that these interchangeable terms and concerns across various federal antidiscrimination statutes evidence a “central philosophy” that discrimination based on misperceptions and stereotypes is unlawful.<sup>90</sup> It therefore follows that “[c]omparable perception-based *philosophies* should translate to comparable perception-based *protections*.”<sup>91</sup>

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85. *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1038 n.11 (10th Cir. 2011) (“Due to the similarities between the ADA and Title VII, we generally interpret those statutes consistently.”); *EEOC v. Valero Refining-Texas L.P.*, No. 3:10-CV-398, 2013 U.S. Dist. LEXIS 42776, at \*9 n.3 (S.D. Tex. Mar. 13, 2013) (“[T]he Fifth Circuit interprets the language of the ADA consistently with that of Title VII.”); *Gretzula v. Camden Cnty. Technical Sch. Bd. of Educ.*, 965 F. Supp. 2d 478, 488 (D.N.J. 2013) (“Title VII and the ADA should be interpreted consistently . . .”).

86. Senn, *supra* note 6, at 827, 847.

87. *Id.* at 854 (quoting H.R. REP. NO. 101-485(II), at 30, 58 (1990); H.R. REP. NO. 101-485(III), at 30 (1990)).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 855.

Professors Angela Onwuachi-Willig and Mario Barnes contend that “there is nothing that prevents a court from using doctrinal analyses and understandings from other antidiscrimination statutes to assist in understanding the operation of discriminatory conduct within the Title VII context.”<sup>92</sup> Given the shared philosophies and purposes of Title VII and the ADA, courts regularly rely on doctrinal analyses and understandings from Title VII to interpret the ADA. For example, in determining whether the ADA permits suits against individual defendants, a district court noted that the statute is similar to Title VII both in purpose and remedial structure and that the Fifth Circuit had required in a separate case that “the language of Title VII and the ADA dictates a consistent reading of the two statutes.”<sup>93</sup> In considering the validity of hostile work environment claims under the ADA, the Tenth Circuit likewise relied on the statute’s similarities to Title VII in concluding that “nothing indicates that Congress intended disability-based employment discrimination to be treated any less expansively.”<sup>94</sup>

Just as courts have relied on Title VII for guidance in interpreting the ADA, so too can they look to the ADA in discerning whether misperception discrimination claims are cognizable under Title VII. Professors Onwuachi-Willig and Barnes urge that “[t]he turn to the ‘regarded as’ prong need not be understood as literal, but can be encouraged as an intellectual tool to assist the court in answering the critical question: ‘How is discrimination working?’”<sup>95</sup> Given the similarities between the ADA and Title VII, and in particular their common goal of eliminating discrimination, it would be inconsistent for

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92. Onwuachi-Willig & Barnes, *supra* note 6, at 1328.

93. *McLennan v. Oncor Elec. Delivery Co.*, No. 3:12-CV-00531, 2012 U.S. Dist. LEXIS 105858, at \*7–8 (N.D. Tex. July 6, 2012) (quoting *Flowers v. S. Reg'l Phys. Serv., Inc.*, 247 F.3d 229, 233 (5th Cir. 2001)).

94. *Lanman v. Johnson Cnty.*, 393 F.3d 1151, 1155–56 (10th Cir. 2004); *see also, e.g., Bristol v. Bd. of Cnty. Comm'rs*, 281 F.3d 1148, 1164 (10th Cir. 2002) (concluding that the definition of employer is substantially similar under the ADA and Title VII and applying Title VII cases to disability discrimination analysis), *vacated in part on other grounds by* 312 F.3d 1213 (10th Cir. 2002) (en banc); *Brown v. Brody*, 199 F.3d 446, 456 n.10 (D.C. Cir. 1999) (explaining that “[c]ourts of appeals routinely apply the same standards to evaluate Title VII claims as they do ADA claims. . . .”), *Butler v. City of Prairie Vill.*, 172 F.3d 736, 744 (10th Cir. 1999) (noting reasons for precluding individual supervisor liability under Title VII apply equally to ADA); *Gallagher v. San Diego Unified Port Dist.*, 14 F. Supp. 3d 1380, 1386 (S.D. Cal. 2014) (holding that ADA retaliation claims must be analyzed under same standards as Title VII retaliation, “[g]iven the similar use of the ‘because’ of language in both [provisions]”).

95. Onwuachi-Willig & Barnes, *supra* note 6, at 1328.

Congress to prohibit discrimination based on misperceptions about an employee's abilities but not an employee's religion. It is unlikely that Congress intended such a result, especially where both types of discrimination seem equally intentional and harmful. There is no hierarchy of protected statuses under the federal antidiscrimination laws: the prohibition against employment discrimination applies equally to religion, disability, age, sex, race, and a host of other characteristics.<sup>96</sup> It therefore follows that courts should interpret Title VII and the ADA as consistent in prohibiting misperception-based discrimination.

### III. JUDICIAL ANALYSIS OF MISPERCEPTION DISCRIMINATION

Misperception discrimination claims are a relatively recent phenomenon, with the first case not arising until 1994—a full three decades after Title VII's enactment.<sup>97</sup> Although the courts have considered this issue more than two dozen times since then, the misperception discrimination jurisprudence remains far from settled. This is because the vast majority of these cases are decided at the district level and thus generally lack the analytical depth or precedential weight of appellate cases. Just three federal courts of appeals have addressed misperception discrimination under Title VII: the Fifth and Eleventh Circuits allow such claims,<sup>98</sup> whereas the Fourth Circuit rejects them.<sup>99</sup> Two other courts of appeals, the Third and Ninth Circuits, have recognized misperception claims under other statutes.<sup>100</sup>

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96. See James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1034 (2004) (Despite arguable differences between religion and other protected statuses under Title VII, "religion's inclusion [in Title VII] enshrined it as something beyond the reach of employers in making relevant workplace decisions and, in so doing, equated it with other indisputably immutable characteristics, such as race or sex, at least for the purpose of legal protection.").

97. See *Perkins v. Lake Cnty. Dep't of Utils.*, 860 F. Supp. 1262, 1263–65 (N.D. Ohio 1994).

98. See *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1299–300 (11th Cir. 2012); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401–02 (5th Cir. 2007).

99. *El v. Max Daetwyler Corp.*, 451 F. App'x 257, 257 (4th Cir. 2011) (per curiam).

100. See *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 571–72 (3d Cir. 2002) (endorsing perception theory of retaliation under the ADA); *Estate of Amos v. City of Page*, 257 F.3d 1086, 1093–94 (9th Cir. 2001) (holding that a race-based misperception discrimination claim was cognizable under § 1983 because the defendant's "alleged discrimination is no less malevolent because it was based upon an erroneous assumption").

*Perkins v. Lake County Department of Utilities*<sup>101</sup> was the first case to address misperception discrimination. Arthur Perkins alleged his employer discriminated against him based on his status as a Native American.<sup>102</sup> The County moved for summary judgment on the ground that Perkins was not a member of a protected class because he was not actually Native American.<sup>103</sup> After engaging in a lengthy analysis of the evidence of Perkins' ancestry, the court determined the question of whether Perkins was Native American was too close for summary judgment.<sup>104</sup> Although Perkins himself never raised the issue of misperception discrimination, the court explained that there was "an alternative, and perhaps more significant," reason to deny summary judgment that required no proof of Perkins' ancestry.<sup>105</sup> The court reasoned that because there was evidence that the County had perceived Perkins as Native American based on his physical features, the County's subjective belief that Perkins was Native American—not his actual ancestry—controlled whether he was a member of a protected class.<sup>106</sup>

Without the benefit of any precedent to support its conclusion, the court looked instead to Title VII's purpose and concluded, "[C]onsistent with the intent of Title VII, when racial discrimination is involved perception and appearance are everything. As with the joy of beauty, the ugliness of bias can be in the eye of the beholder."<sup>107</sup> The court thought it "unnecessary, and indeed inappropriate, to attempt to measure [Perkins'] percentage of Indian blood or to examine his documentable connection to recognized existing tribes."<sup>108</sup> The court further reasoned that "[e]mployers do not discriminate on the basis of such factors;" instead, "[o]bjective appearance and employer perception" are the most relevant factors in determining whether unlawful discrimination occurred.<sup>109</sup> In so holding, the court seemed disinterested in Title VII's precise wording, opting instead to take a more pragmatic approach that emphasized how, in the context of discrimination, perception is reality.

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101. 860 F. Supp. 1262 (N.D. Ohio 1994).

102. *Id.* at 1263–64.

103. *Id.* at 1264.

104. *Id.* at 1266–77.

105. *Id.* at 1277.

106. *Id.*

107. *Id.* at 1277–78.

108. *Id.* at 1278.

109. *Id.*



Despite its importance as the first case to consider misperception discrimination, *Perkins* has failed to gain much traction with other courts.<sup>110</sup> Two opposing lines of cases have since emerged, with almost no middle ground between them. As the following analysis indicates, courts that reject misperception claims interpret Title VII as permitting only discrimination claims based on an individual's actual religion or other protected characteristic, absent a congressional amendment comparable to the ADA's "regarded as" provision. By contrast, courts that recognize such claims tend to take a more expansive view, focusing on Title VII's purpose and EEOC guidance. Although most of the key misperception discrimination cases involve race or national origin claims, courts have applied the reasoning from such cases to misperception-based religious discrimination claims as well.<sup>111</sup>

#### A. Key Cases Rejecting Misperception Discrimination

The most influential case rejecting a misperception discrimination claim is *Butler v. Potter*.<sup>112</sup> Jesse Butler brought suit against his former employer, the U.S. Postal Service, alleging discrimination based on his perceived race and national origin.<sup>113</sup> Butler claimed a supervisor screamed obscenities at him and accused him of being Indian or Middle Eastern, even though he identified as a "white Caucasian."<sup>114</sup> The district court dismissed Butler's claim on summary judgment, reasoning that Title VII only protects employees belonging to a protected class and "says nothing about protection of persons who are *perceived* to belong to a protected class."<sup>115</sup> In what has subsequently become the most oft-cited language from the decision, the court further explained that "Congress has shown, through the Rehabilitation Act, and the

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110. In fact, only two courts have even referenced *Perkins* in deciding the validity of Title VII misperception claims. Both courts found *Perkins* persuasive and followed its holding. See *Wood v. Freeman Decorating Servs., Inc.*, No. 3:08-cv-00375-LRH-RAM, 2010 U.S. Dist. LEXIS 14971, at \*12-15 (D. Nev. Feb. 19, 2010); *Greene v. Swain Cnty. P'ship for Health*, 342 F. Supp. 2d 442, 451-52 (W.D.N.C. 2004).

111. See *Kallabat v. Mich. Bell Tel. Co.*, No. 12-CV-15470, 2015 U.S. Dist. LEXIS 78944, at \*8-11 (E.D. Mich. June 18, 2015); *Smith v. Specialty Pool Contractors*, No. 02:07cv1464, 2008 U.S. Dist. LEXIS 72551, at \*14-16 (W.D. Pa. Sept. 24, 2008); *Berrios v. Hampton Bays Union Free Sch. Dist.*, No. CV 02-3124, 2007 U.S. Dist. LEXIS 101366, at \*3-4 (E.D.N.Y. Mar. 12, 2007).

112. 345 F. Supp. 2d 844 (E.D. Tenn. 2004).

113. *Id.* at 847-48.

114. *Id.* at 846.

115. *Id.* at 850.

Americans with Disabilities Act that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class.”<sup>116</sup> Implicit, of course, in the court’s observation was the assumption that Congress deliberately chose not to include “regarded as” language in Title VII because it did not want to allow misperception discrimination claims. Curiously, the court claimed to be unaware of any contrary authority that would allow Butler’s claim to survive summary judgment.<sup>117</sup> It is peculiar that the court would not at least acknowledge *Perkins*, which, although not controlling *per se*, was decided just ten years earlier by a district court within the same circuit.

Two years later, *Uddin v. Universal Avionics Systems Corp.*<sup>118</sup> presented facts similar to those at issue in *Butler*. Zaheer Uddin claimed he was harassed and eventually terminated because his coworkers misperceived him as Middle Eastern, when in reality he was from India.<sup>119</sup> Uddin alleged his coworkers asked him, “What’s going on with your cousin in Afghanistan?” (in reference to Osama bin Laden) and “Can you marry four wives?” and commented that “a Middle-Easterner like [Uddin] would never make it through airport security while carrying a particular product prototype.”<sup>120</sup> In dismissing Uddin’s perceived national origin claim, the court cited *Butler* for the proposition that “Title VII does not explicitly protect persons who are perceived to belong to a protected class.”<sup>121</sup> The court did not discuss whether Title VII implicitly protects victims of misperception discrimination. Like in *Butler*, the court claimed to be unaware of any precedent to the contrary, again ignoring the *Perkins* decision.<sup>122</sup>

In *Lewis v. North General Hospital*,<sup>123</sup> the district court built off the *Butler* analysis in even more forcefully rejecting a misperception claim.<sup>124</sup> Darren Lewis claimed his coworkers wrongly perceived him as Muslim after he temporarily changed his name to Serh Talmadge Farid Efe.<sup>125</sup> He believed this misperception led to rumors he was a

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116. *Id.*

117. *Id.*

118. No. 1:05-CV-1115-TWT-GGB, 2006 U.S. Dist. LEXIS 101798 (N.D. Ga. June 1, 2006), *adopted by* 2006 U.S. Dist. LEXIS 47238 (N.D. Ga. June 30, 2006).

119. *Id.* at \*1–2.

120. *Id.* at \*3.

121. *Id.* at \*14.

122. *Id.*

123. 502 F. Supp. 2d 390 (S.D.N.Y. 2007).

124. *Id.* at 401.

125. *Id.* at 393–94.

“child molester,” “not an American,” “homophobic,” and “racist.”<sup>126</sup> In granting the hospital summary judgment, the court first determined that Lewis had not articulated a factual basis for his perceived-religion claim.<sup>127</sup> Although it could have ended its analysis there, the court further asserted that “the protections of Title VII do not extend to persons who are merely ‘perceived’ to belong to a protected class.”<sup>128</sup> The court then made explicit what *Butler* left implicit: “If Congress had wanted to permit a similar cause of action under Title VII for ‘perceived religion’ discrimination, it could have so provided. It did not.”<sup>129</sup>

The only appellate case rejecting a misperception discrimination claim is *El v. Max Daetwyler Corp.*<sup>130</sup> Darryl El alleged he was terminated because his employer misperceived him as a Muslim, when in reality he was a Universalist.<sup>131</sup> The district court dismissed El’s claim based on the absence of “regarded as” language in Title VII.<sup>132</sup> The Fourth Circuit upheld the decision on appeal, explaining in a four-sentence opinion that it found “no reversible error” in the record and “affirm[ed] for the reasons stated by the district court.”<sup>133</sup> Thus, the Fourth Circuit declined to expound on the district court’s reasoning and consequently missed an opportunity to provide much-needed appellate analysis of why Title VII precludes misperception discrimination claims.

The *Butler*, *Uddin*, and *Lewis* decisions, together with the appellate authority of *El*, have provided like-minded courts with all the authority they feel is necessary to deny misperception claims. Since *Lewis* was decided in 2007, seven other courts have declined to recognize misperception discrimination claims under Title VII.<sup>134</sup>

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126. *Id.* at 394–95.

127. *Id.* at 401.

128. *Id.*

129. *Id.*

130. 451 F. App’x 257 (4th Cir. 2011) (per curiam).

131. *El v. Max Daetwyler Corp.*, No. 3:09cv415, 2011 U.S. Dist. LEXIS 49645, at \*1 (W.D.N.C. May 9, 2011).

132. *Id.* at \*12–15.

133. *El*, 451 F. App’x at 258.

134. See *Sears v. Jo-Ann Stores, Inc.*, No. 3:12-1322, 2014 U.S. Dist. LEXIS 58148, at \*21 (M.D. Tenn. Apr. 25, 2014); *Yousif v. Landers McClarty Olathe KS, LLC*, No. 12-2788-CM, 2013 U.S. Dist. LEXIS 154504, at \*9–10 (D. Kan. Oct. 28, 2013); *Guthrey v. Calif. Dep’t of Corr. & Rehab.*, No. 1:10-cv-02177-AWI-BAM, 2012 U.S. Dist. LEXIS 89174, at \*16 n.2 (E.D. Cal. June 27, 2012); *Burrage v. FedEx Freight, Inc.*, No. 4:10CV2755, 2012 U.S. Dist. LEXIS 43365, at \*13–14 (N.D. Ohio Mar. 29, 2012); *El*, 2011 U.S. Dist. LEXIS 49645, at \*12–15; *Adler v.*

Without exception, each court relied on *Butler*'s narrow interpretation of Title VII's text.<sup>135</sup> While it is certainly understandable that these courts would cite to other cases reaching their same conclusion, what is surprising is that not one has acknowledged that several courts have reached the opposite conclusion. Some courts have even gone so far as to claim to be unaware of any authority that would allow a misperception discrimination claim.<sup>136</sup> Consequently, these courts have made no effort to reconcile their position with the opposing line of cases.

Likewise, these courts have yet to acknowledge, much less resolve, the ambiguity resulting from the 1991 amendment to Title VII. While it is true that § 2000e-2(a)(1) could be read in isolation as prohibiting only discrimination based on a person's actual religion,<sup>137</sup> it is equally true that, standing alone, subsection (m) suggests religious misperception claims are cognizable when religion in general motivates an adverse employment action.<sup>138</sup> Although courts must attempt to read a statute in a manner that harmonizes its provisions and avoids ambiguity,<sup>139</sup> there has been no such effort by courts rejecting misperception discrimination claims,<sup>140</sup> and just one court recognizing such claims has attempted to do so.<sup>141</sup>

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*Evanston Nw. Healthcare Corp.*, No. 07 C 4203, 2008 U.S. Dist. LEXIS 101744, at \*11–12 (N.D. Ill. Dec. 16, 2008); *Lopez-Galvan v. Mens Wearhouse*, No. 3:06cv537, 2008 U.S. Dist. LEXIS 53456, at \*23–24 (W.D.N.C. July 10, 2008).

135. See cases cited *supra* note 134.

136. See, e.g., *Sears*, 2014 U.S. Dist. LEXIS 58148, at \*21 (concluding that “the plaintiff has provided no legal basis supporting her ‘regarded as’ claims under Title VII and such claims have not been recognized by the courts”); *Yousif*, 2013 U.S. Dist. LEXIS 154504, at \*11 (“Plaintiff cites no valid authority recognizing perceived discrimination claims under Title VII, and the court finds none.”).

137. 42 U.S.C. § 2000e-2(a)(1) (2012) (prohibiting employment discrimination against any individual “because of such individual’s race, color, religion, sex, or national origin”).

138. *Id.* § 2000e-2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice.”); Greene, *supra* note 6, at 117–18 (arguing that a “faithful construal” of subsections (a)(1) and (m), in light of Case and Clark’s interpretive memorandum, “permits [claims of intentional discrimination] on the basis of Title VII’s proscribed characteristics regardless of whether such treatment derives from the plaintiff’s self-ascribed or mistaken identity”).

139. See *In re Davis*, 565 F.3d 810, 823 (11th Cir. 2009) (A statute must be read so as “to give full effect to each of its provisions.”); *United States v. Able Time, Inc.*, 545 F.3d 824, 831 (9th Cir. 2008) (Where the plain language of a statute is ambiguous, conflicting provisions “should be interpreted harmoniously.”).

140. Greene, *supra* note 6, at 118 (“[N]o express deconstruction of Title VII’s original and more recent statutory language or of Title VII’s purpose and meaning

Furthermore, although the EEOC has been outspoken in acknowledging misperception discrimination, these courts pay almost no attention to the EEOC's position. In fact, just one court has even acknowledged the federal regulations or other EEOC materials in support of misperception discrimination. In *Yousif v. Landers McClarty Olathe KS, LLC*,<sup>142</sup> the plaintiff cited to and attached the EEOC *Compliance Manual* and an EEOC fact sheet in support of his claim of misperception discrimination.<sup>143</sup> The court made short work of these documents, deeming them “unpersuasive here and not entitled to any special deference, especially when the explicit language in Title VII and clear case law stand for the opposite proposition.”<sup>144</sup>

Perhaps most perplexing is these courts' seeming disregard for how their interpretation of Title VII undermines the statute's goal of ending discrimination in the workplace. None of these courts acknowledge how their interpretation of Title VII disadvantages victims of misperception discrimination, who are denied their day in court simply because their employers were mistaken about their religious beliefs. Nor do any of the courts concede that their construal of Title VII permits employers to discriminate, so long as their perception of an individual's religion is inaccurate. Instead, they appear content to mechanically apply *Butler* to reach a conclusion that seems at odds with Title VII's express goals.

Rigid adherence to such a narrow interpretation of § 2000e-2(a)(1) seems curious in light of subsection (m), EEOC guidance, and Title VII's overarching purpose. One possible reason for this is because of how courts tend to apply the *McDonnell Douglas* burden-shifting framework to disparate-treatment claims where there is no direct evidence of discrimination. The Supreme Court established this framework in *McDonnell Douglas Corp. v. Green*,<sup>145</sup> a case involving a claim that the employer refused to hire the plaintiff because he was black.<sup>146</sup> The Court explained that in order to prevail on such a claim, Green initially had to establish a prima facie case of discrimination by

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emerges in the opinions [rejecting Title VII misperception discrimination claims] . . .”).

141. See *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 847 (D. Md. 2015).

142. No. 12-2788-CM, 2013 U.S. Dist. LEXIS 154504 (D. Kan. Oct. 28, 2013).

143. *Id.* at \*10.

144. *Id.*

145. 411 U.S. 792, 794-96 (1973).

146. *Id.*

showing (1) he belonged to a racial minority, (2) he applied and was qualified for the position, (3) despite his qualifications, he was rejected, and (4) after his rejection, the position remained open and the employer continued to seek applications from persons with Green's same qualifications.<sup>147</sup> The burden then would shift to the employer to articulate a legitimate, nondiscriminatory reason for rejecting Green's application, and Green would thereafter bear the burden of showing the employer's reason was a pretext for discrimination.<sup>148</sup> Out of necessity, courts occasionally modify certain elements of the prima facie case to adapt to different forms of disparate treatment; yet the one element that has remained constant is the requirement that a plaintiff belong to a protected class.<sup>149</sup> As Professor Wendy Greene points out, courts that reject misperception discrimination claims appear to be engaging in a literal application of the protected class element of the *McDonnell Douglas* framework, even though the Supreme Court has repeatedly cautioned that the elements of the prima facie case were never intended to be applied in formulaic fashion.<sup>150</sup> She argues that the protected class element may simply have been the manifestation of the facts at issue in *McDonnell Douglas*.<sup>151</sup> Professor Greene also contends that when articulating the membership prong, perhaps "the Supreme Court did not contemplate that a Title VII discrimination plaintiff's allegations of invidious, differential treatment may not comport with [one's]

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147. *Id.* at 802.

148. *Id.* at 802, 804.

149. *See, e.g., Duffy v. Belk, Inc.*, 477 F. App'x 91, 94 (4th Cir. 2012) (In the context of an age-based reduction-in-force claim, a plaintiff establishes a prima facie case of discrimination by showing "(1) he qualified as a member of the protected class, (2) he was demoted or terminated, (3) at the time of his termination, he met the employer's legitimate expectations, and (4) he was replaced by a substantially younger individual."); *Wooler v. Citizens Bank*, 274 F. App'x 177, 180 (3d Cir. 2008) (To establish a prima facie case of gender discrimination, a plaintiff must show "(1) she was a member of a protected class; (2) she was qualified for the job; and (3) she suffered an adverse employment decision under circumstances that give rise to an inference of discrimination.").

150. Greene, *supra* note 6, at 118–19; *see also McDonnell Douglas*, 411 U.S. at 802 n.13 ("[F]acts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations."); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (reiterating that the *McDonnell Douglas* test "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of the common experience as it bears on the critical question of discrimination").

151. Greene, *supra* note 6, at 119.

self-ascribed identity.”<sup>152</sup> She further suggests that the membership prong “may have also been a function of the lack of clarity at the time concerning whether Title VII was solely meant to redress discrimination against nonwhites, or if all individuals regardless of their classification would be protected against discrimination.”<sup>153</sup>

In short, courts that reject misperception discrimination claims almost exclusively rely on the fact that Congress has not amended Title VII to include “regarded as” language to justify their position. Their disinclination to address the line of cases permitting misperception claims, reconcile their interpretation of § 2000e-2(a)(1) with subsection (m), consider the EEOC’s guidance, or acknowledge the difficulty of their position in light of Title VII’s express purpose may stem from a narrow interpretation of subsection (a)(1) in isolation, as well as strict adherence to the membership prong of the *McDonnell Douglas* framework. Both rationales seem tenuous at best.

### *B. Key Cases Recognizing Misperception Discrimination*

Unlike cases rejecting misperception discrimination claims, courts that recognize such claims benefit from substantive appellate decisions to guide their analyses. The first appellate case to directly address misperception discrimination under Title VII was *EEOC v. WC&M Enterprises, Inc.*<sup>154</sup> Mohommed Rafiq was born in India and was a practicing Muslim.<sup>155</sup> As with the plaintiffs in *Butler* and *Uddin*, Rafiq alleged his coworkers misperceived him as Middle Eastern.<sup>156</sup> Following the September 11 attacks, Rafiq’s coworkers allegedly implied he was a terrorist, began calling him “Taliban,” and often referred to him as an “Arab.”<sup>157</sup> Like in *Butler*, the district court dismissed Rafiq’s perceived national origin claim because none of the alleged harassment related to the fact he was Indian.<sup>158</sup> The Fifth Circuit disagreed with the lower court’s assessment, holding “a party is able to establish a discrimination claim based on its own national origin even though the discriminatory acts do not identify the victim’s actual country of origin.”<sup>159</sup> The Fifth Circuit considered the EEOC’s

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152. *Id.*

153. *Id.*

154. 496 F.3d 393 (5th Cir. 2007).

155. *Id.* at 396.

156. *Id.* at 396–97.

157. *Id.*

158. *Id.* at 401.

159. *Id.*

guidance, noting that the Commission had defined national origin discrimination “broadly” in the federal regulations to include discrimination undertaken because an individual possesses the characteristics of a national origin group.<sup>160</sup> The court further observed that the EEOC had elsewhere explained that a national origin discrimination claim does not require proof that the discriminator had actual knowledge of the plaintiff’s national origin; “it is enough to show that the complainant was treated differently because of his or her foreign accent, appearance, or physical characteristics.”<sup>161</sup> Based on this guidance, the court concluded Rafiq’s country of origin was irrelevant; the employer’s misperception that he was Middle Eastern was sufficient to allow his claim to survive.<sup>162</sup>

The Eleventh Circuit followed the Fifth Circuit’s reasoning in *Jones v. UPS Ground Freight*.<sup>163</sup> One of the key issues on appeal was whether the trier of fact could take into account a misperception-based racial slur in determining whether Reginald Jones endured a hostile work environment.<sup>164</sup> Jones alleged that while on a training run a coworker told him, “I know how to train you Indians.”<sup>165</sup> When Jones responded that he was not Native American, the coworker allegedly replied, “I don’t care what race you are, I trained your kind before.”<sup>166</sup> Citing *WC&M Enterprises*, the court held that “a harasser’s use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment.”<sup>167</sup> The court did not analyze the reasonableness of the coworker’s misperception other than to note in passing that perhaps the slur was directed at Jones “based on his dark complexion [sic] or some other perceived shared characteristic with Native Americans.”<sup>168</sup>

Ironically, perhaps the appellate case that courts cite most often in recognizing misperception discrimination under Title VII actually involved an ADA retaliation claim. In *Fogleman v. Mercy Hospital*,

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160. *Id.* (citing 29 C.F.R. § 1606.1 (2015)).

161. *Id.* (quoting Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 85,632, 85,633 (Dec. 29, 1980)).

162. *Id.* at 402.

163. 683 F.3d 1283 (11th Cir. 2012).

164. *Id.* at 1299–300.

165. *Id.* at 1288.

166. *Id.*

167. *Id.* at 1299 (citing *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401 (5th Cir. 2007)).

168. *Id.* at 1300.



*Inc.*,<sup>169</sup> Greg Fogleman alleged he was fired because his employer mistakenly believed he was assisting his father in a separate lawsuit against the hospital.<sup>170</sup> The district court dismissed the claim, concluding the ADA did not support a perception theory of retaliation.<sup>171</sup> The Third Circuit disagreed, explaining that the law focuses on an employer's subjective reasons for discriminating against an employee, "so it matters not whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter."<sup>172</sup> It then provided an analogy that subsequent courts often reference in recognizing misperception claims in the Title VII context:<sup>173</sup>

[I]magine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the applicant is a Muslim. The employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not in fact a Muslim. What is relevant is that the applicant, whether Muslim or not, was treated worse than he otherwise would have been for reasons prohibited by the statute.<sup>174</sup>

This analogy makes clear that, like the Fifth and Eleventh Circuits, the Third Circuit reads Title VII as permitting claims of misperception discrimination.<sup>175</sup> The court seemed unconcerned with the accuracy of the hypothetical employer's perception of the individual's religion. Instead, the relevant inquiry was whether the individual was "treated worse" because of religion more generally.<sup>176</sup>

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169. 283 F.3d 561 (3d Cir. 2002).

170. *Id.* at 564.

171. *Id.* at 571.

172. *Id.*

173. See, e.g., *Kallabat v. Mich. Bell Tel. Co.*, No. 12-CV-15470, 2015 U.S. Dist. LEXIS 78944, at \*9 (E.D. Mich. June 18, 2015); *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 848 (D. Md. 2015); *Smith v. Specialty Pool Contractors*, No. 02:07cv1464, 2008 U.S. Dist. LEXIS 72551, at \*15 (W.D. Pa. Sept. 24, 2008).

174. *Fogleman*, 283 F.3d at 571.

175. See Greene, *supra* note 6, at 156–62 (discussing these Third, Fifth, and Eleventh Circuit opinions as precedential support for Title VII misperception discrimination claims).

176. *Fogleman*, 283 F.3d at 571.

A final appellate decision that also has proven influential is *Estate of Amos v. City of Page, Arizona*.<sup>177</sup> Like *Fogleman*, the case is significant even though it does not involve a Title VII claim. Burton Amos was involved in an automobile accident near Page, Arizona, and subsequently fled the scene and disappeared into the desert.<sup>178</sup> Despite discovering blood inside Amos' vehicle and tracks leading into the desert that evidenced a person possibly in distress, the responding officers cut short their search when their flashlights lost power.<sup>179</sup> After Amos' remains were discovered nearly a year later, his estate brought suit against the City, alleging it had violated Amos' due process and equal protection rights by conducting an insufficient search.<sup>180</sup> The estate argued that the City failed to effectively search for Amos because it misperceived him as Native American, when in reality he was white.<sup>181</sup> Because Page is a border town surrounded by the Navajo Reservation, it is apparently common for Native Americans involved in car accidents to leave the scene, abscond into the desert, and call the police the next day to report their vehicle as stolen.<sup>182</sup> In reversing summary judgment for the City, the Ninth Circuit held that misperception discrimination claims are cognizable under the Equal Protection Clause.<sup>183</sup> The court pointed out that the City's misperception of Amos as Native American "does not make that discrimination or its resulting injury less direct," nor was it "less malevolent because it was based upon an erroneous assumption."<sup>184</sup> The court concluded, "Amos should be viewed as . . . the police officers viewed him: as a Native American."<sup>185</sup> Thus, like the *Perkins* and *Fogleman* courts, the Ninth Circuit focused on the defendant's subjective belief rather than Amos' actual race.

With the backing of four courts of appeals, like-minded district courts are outspoken about what they view as the injustices of denying misperception claims, characterizing the contrary position as "superficially logical, but fundamentally abhorrent,"<sup>186</sup> "as offensive as

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177. 257 F.3d 1086 (9th Cir. 2001).

178. *Id.* at 1092.

179. *Id.* at 1089.

180. *Id.* at 1089–90.

181. *Id.* at 1093.

182. *Id.* at 1090.

183. *Id.* at 1095.

184. *Id.* at 1094.

185. *Id.*

186. *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 845 (D. Md. 2015).

it is incorrect,”<sup>187</sup> and “objectively unreasonable.”<sup>188</sup> One court remarked that “[t]he fact that [the defendant] ignorantly used the wrong derogatory ethnic remark toward the plaintiff is inconsequential.”<sup>189</sup> According to another court, “Plaintiffs do not lose the protection of discrimination laws because they are discriminated against for the wrong reasons.”<sup>190</sup> Another court reasoned that permitting an employer to escape liability simply because of misperception “would allow prohibited discrimination to go unredressed on the basis of an error in no way diminishing the harm to the victim of the discrimination.”<sup>191</sup>

Aside from these broader policy arguments, courts have also addressed the textual argument relied upon by *Butler* and its progeny. For instance, in *Arsham v. Mayor & City Council of Baltimore*,<sup>192</sup> the court voiced surprise that district courts have rejected misperception claims based on the text of Title VII, reasoning that “Congress may not have thought it necessary to revise Title VII to conform to the wording of the ADA if it was aware of the EEOC’s . . . long-standing interpretation of Title VII.”<sup>193</sup> The court found the EEOC guidance to be consistent with § 2000e-2(m).<sup>194</sup> According to the court, subsection (a)(1), which prohibits discrimination based on “such person’s . . . religion,” must be read together with subsection (m), which prohibits discrimination where religion (or some other protected trait) motivates an adverse employment decision.<sup>195</sup> “Doing so,” the court explained, “allows the conclusion that Congress did not intend to cabin Title VII’s prohibition of invidious discrimination such that some forms of discrimination on the basis of protected characteristics are permissible. The narrow reading of section a . . . is inconsistent with Title VII’s purpose . . . .”<sup>196</sup>

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187. *Boutros v. Avis Rent A Car Sys., LLC*, No. 10 C 8196, 2013 U.S. Dist. LEXIS 103310, at \*19 (N.D. Ill. July 24, 2013).

188. *Wright v. Yacovone*, No. 5:12-cv-27, 2012 U.S. Dist. LEXIS 157544, at \*67 (D. Vt. Nov. 2, 2012).

189. *LaRocca v. Precision Motorcars, Inc.*, 45 F. Supp. 2d 762, 770 (D. Neb. 1999).

190. *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958, at \*4 n.6 (W.D. W. Va. Sept. 25, 2005).

191. *Henao v. Wyndham Vacations Resorts, Inc.*, 927 F. Supp. 2d 978, 987 (D. Haw. 2013).

192. 85 F. Supp. 3d 841 (D. Md. 2015).

193. *Id.* at 846.

194. *Id.* at 847.

195. *Id.* at 845–47.

196. *Id.* at 847; *see also Henao*, 927 F. Supp. 2d at 987 (acknowledging that although Congress did not expressly address misperception discrimination in Title VII,

Although most reported cases recognizing misperception discrimination involve race or national origin claims, three courts have specifically addressed misperception-based religious discrimination. In *Berrios v. Hampton Bays Union Free School District*,<sup>197</sup> Lauren Berrios alleged she was terminated from her teaching position because her employer mistakenly believed she was a Wiccan.<sup>198</sup> She alternatively claimed she was fired because of her actual religion, which is Jewish.<sup>199</sup> Before sending the case to the jury, the court entered an order noting that Title VII does not expressly recognize misperception discrimination and that two district courts had rejected such claims.<sup>200</sup> But the court did not feel comfortable dismissing the claim and instead advised it would instruct the jury on both the perceived and actual religious discrimination claims, so that if the jury found in favor of Berrios on the misperception claim, the finding would be clear and could be appealed.<sup>201</sup> In essence, the court was unsure how to rule on the misperception discrimination claim, so it set up the jury instructions in a way that would allow the Second Circuit to decide the issue.<sup>202</sup>

In *Smith v. Specialty Pool Contractors*,<sup>203</sup> Robert Smith alleged he was harassed based on a supervisor's misperception that he was Jewish.<sup>204</sup> Even though Smith was Catholic, the supervisor allegedly insisted he was Jewish and repeatedly called him "Hebrew," "Abraham," "Jew Boy," and "Kike."<sup>205</sup> The supervisor also allegedly told Smith that "Hitler did not do a good enough job because you . . . are still alive."<sup>206</sup> The court denied the employer's summary judgment motion, despite acknowledging that neither the Supreme Court nor the

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reading the statute to allow misperception claims "is entirely consistent with what Congress . . . [was] attempting to prohibit").

197. No. CV 02-3124, 2007 U.S. Dist. LEXIS 101366 (E.D.N.Y. Mar. 12, 2007).

198. *Id.* at \*1.

199. *Id.*

200. *Id.* at \*2-3.

201. *Id.* at \*3-4.

202. The case never reached the Second Circuit, as the jury returned a verdict for the employer on both counts of discrimination. *See* Judgment in a Civil Case, *Berrios v. Hampton Bays Union Free Sch. Dist.*, No. CV 02-3124 (E.D.N.Y. Mar. 13, 2007).

203. No. 02:07cv1464, 2008 U.S. Dist. LEXIS 72551 (W.D. Pa. Sept. 24, 2008).

204. *Id.* at \*4.

205. *Id.*

206. *Id.*

Third Circuit had decided the issue of misperception discrimination.<sup>207</sup> The court found persuasive the Third Circuit's analogy in *Fogelman*.<sup>208</sup> After quoting the entire analogy, the court concluded that a reasonable jury could find that the employer discriminated against Smith based on the mistaken belief that he practiced Judaism.<sup>209</sup>

The most recent case to consider a religious misperception claim was *Kallabat v. Michigan Bell Telephone Co.*<sup>210</sup> Basil Kallabat, an Iraqi, claimed his coworkers harassed him because they mistakenly believed he was Muslim.<sup>211</sup> According to Kallabat, his coworkers ridiculed him for wearing his hat backward, remarking that it looked like a "topi" (a skullcap worn by Muslim men for religious reasons).<sup>212</sup> There was also graffiti in the restroom showing what appeared to be the World Trade Center with a plane crashing into it, with a caption stating that Kallabat was learning how to fly.<sup>213</sup> In rejecting the employer's argument that misperception claims are not cognizable under Title VII, the court acknowledged the line of cases invalidating such claims but noted the issue remained undecided in the Sixth Circuit.<sup>214</sup> Like in *Smith*, the court found persuasive the *Fogelman* analogy, concluding that a reasonable jury could find that Kallabat was discriminated against based on the misperception he was Muslim.<sup>215</sup>

In short, courts that recognize misperception discrimination tend to focus on Title VII's overarching purpose rather than any single provision of the statutory text. These courts emphasize the unfairness of allowing an employer to escape liability for discrimination simply because the employer is mistaken about the victim's religion (or other protected trait). In addition to this policy rationale, these courts have also relied on the text of Title VII and EEOC guidance to support their position.

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207. *Id.* at \*13–15.

208. *Id.* at \*14–15.

209. *Id.* at \*15–16.

210. No. 12-CV-15470, 2015 U.S. Dist. LEXIS 78944 (E.D. Mich. June 18, 2015).

211. *Id.* at \*1–3.

212. *Id.* at \*10.

213. *Id.*

214. *Id.* at \*8.

215. *Id.* at \*9–11.

IV. MISPERCEPTION DISCRIMINATION AFTER *ABERCROMBIE*

Although the Supreme Court has never directly addressed whether misperception discrimination claims are cognizable under Title VII, its recent decision in *EEOC v. Abercrombie & Fitch Stores, Inc.* may ultimately put this issue to rest. This Part analyzes *Abercrombie* and explains how the decision requires courts to recognize misperception-based religious discrimination claims going forward.

A. *The Abercrombie Decision*

Abercrombie & Fitch is a clothing retailer that is known for being highly image conscious.<sup>216</sup> The company maintains a Look Policy to ensure its employees properly and consistently model Abercrombie's brands.<sup>217</sup> This policy prohibits "caps" because Abercrombie considers them too informal.<sup>218</sup> Samantha Elauf, a practicing Muslim who wears a headscarf in accordance with her religious tenets, applied for a position at an Abercrombie store.<sup>219</sup> The store's assistant manager interviewed Elauf and rated her as qualified to be hired.<sup>220</sup> The interviewer did not ask Elauf why she wore the headscarf, nor did Elauf volunteer that information.<sup>221</sup> The assistant manager was unsure whether Elauf's headscarf would violate the Look Policy, so she consulted with her district manager.<sup>222</sup> Although the assistant manager did not know for certain that Elauf was Muslim, she told the district manager that she thought Elauf wore the headscarf because of her religious beliefs.<sup>223</sup> The district manager then instructed her not to hire Elauf because her headscarf would violate the Look Policy.<sup>224</sup>

The EEOC brought suit on Elauf's behalf, alleging Abercrombie's refusal to hire (and accommodate) Elauf violated Title VII.<sup>225</sup> The district court granted the EEOC summary judgment as to liability.<sup>226</sup>

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216. See Flake, *supra* note 48, at 738.

217. See *id.* at 738–39.

218. See *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031 (2015).

219. *Id.*

220. *Id.*

221. *Id.* at 2034 (Alito, J., concurring).

222. *Id.* at 2031.

223. *Id.*

224. *Id.*

225. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1275 (N.D. Okla. 2011).

226. *Id.* at 1287.

The Tenth Circuit reversed and awarded Abercrombie summary judgment, holding that the defendant could not be liable for denying a religious accommodation because Elauf did not provide the company with actual knowledge that she would need an accommodation.<sup>227</sup> The Supreme Court granted certiorari to resolve whether Title VII's prohibition against religious discrimination "applies only where an applicant has informed the employer of his need for an accommodation."<sup>228</sup>

In an eight-to-one decision, the Supreme Court held that an applicant or employee need only show that her need for an accommodation was a motivating factor in the employer's adverse employment action, not that the employer had knowledge of her need.<sup>229</sup> While this holding is remarkable in its own right, the Court's underlying rationale is equally significant. Writing for the majority, Justice Scalia first explained that Title VII prohibits two kinds of discrimination: disparate treatment and disparate impact.<sup>230</sup> He then noted that Title VII's disparate-treatment provision prohibits employers from failing to hire an applicant "because of such individual's . . . religion."<sup>231</sup> The parties did not dispute that Abercrombie failed to hire Elauf, so the only question before the Court was whether Elauf was not hired "because of" her religious practice.<sup>232</sup> Justice Scalia observed that although the "because of" language in § 2000e-2(a)(1) would ordinarily require but-for causation, "Title VII relaxes this standard" because subsection (m) prohibits even making a protected characteristic a "motivating factor" in an adverse employment action.<sup>233</sup>

In what will surely become the most critical line from the decision, Justice Scalia subsequently explained that "[i]t is significant that § 2000e-2(a)(1) does not impose a knowledge requirement."<sup>234</sup> Unlike the ADA, which only requires accommodation of "known physical or mental limitations," Title VII does not mandate that an employer accommodate only known religious practices.<sup>235</sup> "Instead, the intentional discrimination provision prohibits certain *motives*, regardless

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227. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1131 (10th Cir. 2013).

228. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2031.

229. *Id.* at 2032.

230. *Id.* at 2031–32.

231. *Id.* at 2032 (quoting 42 U.S.C. § 2000e-2(a)(1) (2012)).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 2032–33 (citing 42 U.S.C. § 12112(b)(5)(A)).

of the state of the actor's knowledge."<sup>236</sup> According to Justice Scalia, "[m]otive and knowledge are separate concepts."<sup>237</sup> An employer with knowledge of an applicant's religious practices would not be liable for refusing to hire the applicant so long as avoiding the accommodation is not the employer's motive, but "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."<sup>238</sup>

Based on this reasoning, the Court pronounced what it considered a "straightforward" rule: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."<sup>239</sup> In announcing this rule, the Court rejected the notion that an applicant must inform the potential employer of her need for a religious accommodation, reiterating that Title VII's "disparate-treatment provision prohibits actions taken with the *motive* of avoiding the need for accommodating a religious practice. A request for an accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability."<sup>240</sup> Thus, even if an employer has no actual knowledge that an applicant would need a religious accommodation, as long as the employer subjectively believes this to be the case and refuses to hire the applicant based on its belief, the employer has violated Title VII.

In his concurrence, Justice Alito took issue with the Court's declaration that Title VII does not impose a knowledge requirement.<sup>241</sup> He reasoned that if there truly were no knowledge requirement, Abercrombie could be held liable even if the interviewer thought Elauf was wearing the headscarf for purely secular reasons.<sup>242</sup> According to Justice Alito, such an interpretation is "surely wrong."<sup>243</sup> In his view, the Court should have determined "that an employer cannot be held liable for taking an adverse action because of an employee's religious practice unless the employer knows that the employee engages in the practice for a religious reason."<sup>244</sup> The majority opinion only briefly

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236. *Id.* at 2033.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 2035 (Alito, J., concurring).

242. *Id.* (Alito, J., concurring).

243. *Id.* (Alito, J., concurring).

244. *Id.* (Alito, J., concurring).



responds to this argument, asserting that “[w]hile a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice.”<sup>245</sup> The Court chose not to further explore this point, explaining that because the issue was not presented in this case, “[i]t seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.”<sup>246</sup>

### *B. Abercrombie’s Application to Misperception Discrimination*

Although *Abercrombie* involved a religious accommodation claim, its holding is directly applicable to other forms of disparate treatment. Indeed, the Court made clear that failing to accommodate an employee’s religious practices is a form of disparate treatment, noting that in this case, “[f]ailing to hire . . . is *synonymous* with refusing to accommodate the religious practice.”<sup>247</sup> It likewise rejected *Abercrombie*’s alternative contention that “a claim based on a failure to accommodate an applicant’s religious practices must be raised as a disparate-impact claim, not a disparate-treatment claim.”<sup>248</sup> Because an employer’s failure to accommodate is a form of disparate treatment, there is no reason *Abercrombie* should not apply with equal force to other forms of disparate treatment where misperception discrimination may be even more likely to arise.

*Abercrombie* likewise is no less applicable because the case did not involve employer misperception about the applicant’s religion. Although the assistant manager correctly guessed that Elauf wore a headscarf for religious reasons, the Court seemed uninterested in this fact.<sup>249</sup> If the assistant manager had been incorrect in her assumption about why Elauf wore a headscarf, the outcome of the case almost certainly would have remained unchanged, as the Court’s central holding—that Title VII does not impose a knowledge requirement—suggests that what an employer does or does not know about an

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245. *Id.* at 2033 n.3.

246. *Id.*

247. *Id.* at 2032 n.2.

248. *Id.* at 2033.

249. The Court mentions just once, by way of a footnote, that *Abercrombie* knew Elauf wore the headscarf for religious reasons. *See id.* at 2033 n.3 (“*Abercrombie* knew—or at least suspected—that the scarf was worn for religious reasons.”).

individual's religion is irrelevant to whether it can be held liable for religious discrimination.

The Court made clear that an employer's motive, not its actual knowledge, is the gravamen of a disparate-treatment claim. Even though Elaaf did not provide Abercrombie with actual knowledge of her need for an accommodation, the fact that Abercrombie suspected—substantiated or not—that Elaaf might need an accommodation and refused to hire her on that basis was enough to hold the defendant liable. Just as the Supreme Court refused to allow Abercrombie to hide behind its lack of actual knowledge about Elaaf's religious practices, by extension courts must also refrain from giving employers a free pass to discriminate based on their misperception (i.e., lack of knowledge) about an individual's religion. Because it is motive, not knowledge, that matters, the focus in religious discrimination cases going forward must be on whether religion—actual or perceived—motivated an adverse employment decision.

Critics of this view may point to two passages in the majority opinion that could potentially be misconstrued as requiring a religious discrimination claim to be based on an employee's actual religion. First, in deciphering the "because of" language of § 2000e-2(a)(1), the Court observed that "an individual's actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on."<sup>250</sup> Second, after announcing the rule that an employer cannot make an applicant's religion, "confirmed or otherwise," a factor in employment decisions, the Court gave the example of an employer that suspects an applicant is Jewish and thus could not work on Saturdays.<sup>251</sup> The Court explained that "[i]f the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII."<sup>252</sup> Although both passages refer to a person's "actual" religious practices, the Court does not condition liability on this basis. These references are likely a reflection of the Court's sensitivity toward only deciding the issues before it based on the precise facts of the case. Lurking in the background of the case is the reality that Elaaf actually would have needed an accommodation, so it is understandable that the Court would frame its analysis to be

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250. *Id.* at 2032.

251. *Id.* at 2033.

252. *Id.*

consistent with that fact.<sup>253</sup> Moreover, the decision focuses almost exclusively on Abercrombie’s motivation for denying Elauf employment and makes almost no mention of Elauf’s actual religious practices. If Elauf’s actual religion had been vital to the outcome of the case, the Court almost certainly would have placed greater emphasis on such a crucial fact.

In actuality, the application of *Abercrombie* to misperception cases falls squarely in line with the recent shift in employment discrimination jurisprudence from an antisubordination to an anticlassification orientation.<sup>254</sup> Anticlassification values prohibit practices that “classify people either overtly or surreptitiously on the basis of a forbidden category.”<sup>255</sup> Whereas the antisubordination principle emphasizes broad, group-based subordination that enforces the inferior social status of historically oppressed groups, “the anticlassification principle reflects a narrower objective of eliminating individual unfairness.”<sup>256</sup> Such unfairness stems, in part, from an employer’s immoral belief that “some types of people are morally worthier than others.”<sup>257</sup> Hence, when a person is judged to be of lesser moral worth and is treated accordingly, that treatment is morally wrong regardless of its effects or whether the judgment was indeed accurate.<sup>258</sup> From an anticlassificationist view, applying *Abercrombie* to misperception discrimination claims is logical, and in fact necessary, because it holds employers accountable for making immoral judgments about an individual’s worth based on religion—a characteristic that correlates so weakly with job performance that Congress has forbidden employers from almost ever considering it.

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253. See *id.* at 2033 n.3 (declining to rule on an unargued point by way of dictum).

254. See generally Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955 (2012) (arguing that recent laws, such as the Genetic Information Nondiscrimination Act and the Americans with Disabilities Act Amendments Act, and the Supreme Court’s decision in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), signal a shift away from antisubordination and toward anticlassification values).

255. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003).

256. Areheart, *supra* note 254, at 957–58 (quoting Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004)).

257. Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 161 (1992).

258. See *id.* at 159.

After *Abercrombie*, it would be improper for a court to dismiss a religious discrimination claim based on an employer's misperception of an employee's religion, when the Supreme Court has declared that an employer's motive—not its knowledge—determines liability. In light of the Supreme Court's decree that Title VII does not impose an "actual knowledge" requirement,<sup>259</sup> it seems illogical that an employer could escape liability simply because it was mistaken about an individual's religious beliefs. Furthermore, if an employer's motivation is what matters, courts cannot ignore the fact that an employer's motivation for discriminating against an employee is just as intentional and malevolent in perceived-religion cases as it is in conventional discrimination cases.<sup>260</sup> After *Abercrombie*, courts cannot allow an employer's knowledge, or lack thereof, to trump its motivation. Whether Ashley is Catholic or Mormon is neither here nor there; what matters is that religion motivated the principal's adverse employment decision. The principal's action violated Title VII before, and especially after, *Abercrombie*.

#### V. THE FUTURE OF MISPERCEPTION DISCRIMINATION

Up until now, there has been considerable disagreement among the courts as to the validity of misperception discrimination claims under Title VII. Courts that reject such claims focus almost exclusively on the absence of "regarded as" language from the text of Title VII to support their position. But the lack of such language hardly settles the question; the statutory text itself is susceptible to multiple interpretations, and the legislative record, EEOC guidance, and the broader federal antidiscrimination scheme favor recognition of such claims. In *Abercrombie*, the Supreme Court emphatically declared that an employer's actual knowledge of an employee's religious practices is irrelevant to Title VII liability. Instead, it is the employer's motive that matters. The implication of this holding for misperception discrimination claims is clear: an employer is liable if religion (or another protected trait) motivates an adverse employment decision, regardless of whether the employer has actual knowledge of the individual's religion.

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259. See *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015).

260. See Greene, *supra* note 6, at 101-02 ("In conventionally framed discrimination cases, the employer's perception of the plaintiff's identity simply happens to comport with her self-perception.").

The most significant ramification of the Court's holding is that victims of misperception discrimination are now assured their day in court, as the viability of their claims no longer hinges on whether the employer perceived their religion correctly. Victims of misperception discrimination are no longer second-class plaintiffs, whose claims are somehow less worthy of adjudication. By treating misperception discrimination claims like conventional discrimination claims, courts acknowledge that the harm individuals suffer is no less valid or worthy of reparation simply because an employer is mistaken about their religious beliefs. In Ashley's case, the injury she suffered (being passed over for the teaching position because the principal mistakenly believed she was Mormon) is not somehow less damaging because she is actually Catholic. Whether Mormon or Catholic, Ashley was the victim of religious discrimination and deserves to be compensated accordingly.

A second important implication of the *Abercrombie* decision is that employers can no longer escape liability for religious discrimination simply by pleading ignorance. The holding sends a clear message to employers that discrimination based on stereotypes and unfounded assumptions about an employee's religion will not be tolerated. If religion in any way motivates an employment decision, an employer can and will be held liable. Moreover, removing this escape hatch may motivate employers to better familiarize themselves with an employee's religious beliefs when necessary. This can help break down stereotypes, promote greater tolerance and understanding, and reduce the risk of an employer making unfair and erroneous assumptions about an employee's religion.

Third, by recognizing misperception discrimination claims, courts appropriately shift the focus away from identity adjudication and onto the employer's motive. If the validity of a religious discrimination claim were dependent upon the employer correctly perceiving the employee's religion, an employer could defeat the claim simply by showing the employee was not a member of the religion to which the employer thought she belonged. This could lead to personal and invasive inquiry into an employee's religious beliefs, which courts have consistently maintained falls outside their realm of expertise in most cases.<sup>261</sup> *Abercrombie* renders a person's actual religion irrelevant, thus

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261. See *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 486 (5th Cir. 2014) (“[J]udicial inquiry into the sincerity of a person's religious belief must be handled with a light touch, or judicial shyness. Examining religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread. Indeed, the sincerity of a plaintiff's engagement in a particular religious practice is rarely challenged, and claims of sincere religious belief in a particular practice have

eliminating the need to scrutinize a plaintiff's religious beliefs. This frees up courts to focus on an employer's motivations, which the Supreme Court has made clear is the touchstone of Title VII liability. It likewise acknowledges what the *Perkins* court first observed more than two decades ago: in the context of discrimination, an employer's perception is very much its reality.<sup>262</sup>

Fourth, *Abercrombie's* reach is not limited only to misperception-based religious discrimination. Misperception discrimination based on race, color, sex, and national origin is likewise prohibited. Just as religious identity is becoming more complex, so, too, are these other protected categories, due to "increased immigration, cultural diversity, interracial marriages, and transracial adoptions, as well as more formal recognition of mixed-race classifications and more fluid conceptualizations of gender, racial, and cultural identity."<sup>263</sup> After *Abercrombie*, individuals who are misperceived as belonging to a particular race, national origin, or sex are assured the same protections under Title VII as are victims of conventional discrimination.

Finally, fully recognizing misperception discrimination claims will move us closer to reaching Title VII's goal of eradicating unlawful workplace discrimination. In prohibiting discrimination based on a person's race, sex, religion, or national origin, Congress declared these categories largely irrelevant to whether an individual is qualified for employment.<sup>264</sup> To eliminate employment decisions based on these traits, it is not enough merely to ban discrimination based on an individual's actual characteristics. Instead, Title VII must prohibit employers from using any of these protected characteristics as a basis for discrimination, regardless of whether the victim actually possesses the trait in question. Closing the misperception loophole will ensure employers are held liable whenever religion or any other protected trait motivates an adverse employment action.

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been accepted on little more than the plaintiff's credible assertions." (citations omitted) (quoting *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013) (internal quotation marks omitted)).

262. See *Perkins v. Lake Cnty. Dep't of Utils.*, 860 F. Supp. 1262, 1277-78 (N.D. Ohio 1994).

263. Greene, *supra* note 6, at 101.

264. *But see* 42 U.S.C. § 2000e-2(e)(1) (2012) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .").

## CONCLUSION

The United States is in the midst of unprecedented religious diversification. There are more religions and greater diversity of religious expression than ever before. This remarkable shift in the religious landscape increases the possibility of discrimination based on misperceptions about an employee's religion. Consequently, it is more important than ever that courts hold employers liable whenever they take an adverse employment action based on an individual's religion, whether perceived or actual. This will ensure victims of misperception discrimination are adequately compensated for their damages, while sending a strong message to employers that any form of religious discrimination will not be tolerated.

The courts are presently divided over whether Title VII prohibits misperception discrimination. Although legislative intent, EEOC guidance, and the broader federal antidiscrimination scheme favor recognition of misperception claims, some courts refuse to acknowledge such claims until Congress amends Title VII to include a "regarded as" provision comparable to the ADA. While a congressional amendment may be ideal, it is not necessary after *Abercrombie*. Although the case was decided in the context of a religious accommodation, its holding directly applies to misperception-based religious discrimination claims. The Supreme Court made clear that disparate-treatment liability under Title VII is premised on an employer's motives, not its actual knowledge. As such, whether an employer is aware of an employee's actual religious beliefs is unimportant; what matters is whether religion in general motivated the employment decision.

Congress passed the Civil Rights Act more than five decades ago with the goal of eliminating discrimination in the workplace. To reach this goal, it is not enough to prohibit discrimination based on an employee's actual religion. Indeed, employers can and do discriminate based on erroneous beliefs, assumptions, and stereotypes about religion. And given the growing complexity of the religious landscape, the likelihood of employers discriminating against employees based on erroneous assumptions about religion is likely only to increase. Such discrimination is no less malicious or injurious simply because the employer was wrong. If anything, it may be worse because the employer is not only biased but also ignorant. To truly end religious discrimination in the workplace, Title VII must be read as prohibiting both conventional and misperception-based discrimination. Although this interpretation has long been defensible, after *Abercrombie* it seems necessary.