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EEOC REQUESTS 10TH CIRCUIT EN BANC REVIEW OF RELIGIOUS DISCRIMINATION RULING

The Equal Employment Opportunity Commission (EEOC) recently petitioned the Tenth Circuit Court of Appeals for an en banc rehearing of *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 11-5110 (10th Cir., Oct. 1, 2013), in which a split panel determined that, under Title VII, employees must prove that they informed their employer that they engage in a religious practice conflicting with workplace policies and that they need an accommodation for the practice.

Plaintiff Samantha Elauf wore a hijab, or head scarf, to her Abercrombie & Fitch interview; the company dress code forbids the wearing of headgear. Elauf neither informed Abercrombie that she was Muslim nor that she would need an exemption from any dress code prohibiting her from wearing a hijab. Abercrombie ultimately decided not to hire Elauf.

The panel majority determined that, because Elauf did not ask for a religious accommodation, Abercrombie lacked "particularized, actual knowledge" of her need to be exempted from the dress code. The majority reasoned that employees bear the burden of informing employers of religious practices and requesting accommodations because an employer's obligation to engage in an interactive process is triggered only when an employee informs the employer of his or her need for accommodation.

Further, because the details necessary for determining whether an accommodation can be provided are generally within the employee's, not the employer's, knowledge, and because the EEOC has expressly disapproved of employers inquiring about applicants' or employees' religious beliefs, the majority opined that the burden is better borne by employees.

Dissenting, Judge David Ebel noted that while job applicants generally must inform their employer of religious practices necessitating accommodation, a "common sense" exception should apply where the

employer has knowledge of a potential conflict between its policies and the job applicant's religious practices. The dissent also cautioned that the majority opinion creates a conflict among the circuits because others permit plaintiffs to establish a prima facie failure-to-accommodate claim simply by proving that their employer *knew of* a conflict between the employee's religious practices and the employer's work rules, regardless of how the knowledge was obtained.

Several organizations have filed briefs to support EEOC's request for rehearing. A number of religious groups argued that the panel decision would allow an employer to ignore a work/religion conflict even when it is aware of the conflict. The groups explained that employers will be incentivized under the ruling to "avoid any meaningful interaction with applicants and ignore recognized conflicts rather than communicate about possible solutions." When an employee fails to raise his or her need for accommodation, "the employer can simply stick its head in the sand and claim ignorance," stated their brief.

The National Employment Lawyers Association (NELA) also filed a brief supporting EEOC's request, noting that the majority opinion may affect Americans with Disabilities Act litigation because the majority drew its accommodation standards from the interactive process required by that Act. NELA emphasized that the majority decision conflicts with circuit precedent holding that a request for accommodation can be obvious or can come from persons other than the employee needing the accommodation.
