Case No. 11-5110

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

ABERCROMBIE & FITCH STORES,
INC., an Ohio corporation d/b/a
Abercrombie Kids,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Oklahoma
Case No. 09-cv-602
Hon. Gregory K. Frizzell, U.S. District Judge

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF EEOC'S PETITION FOR REHEARING

FILED WITH PERMISSION OF THE PARTIES

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BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF EEOC'S PETITION FOR REHEARING

RULE 26.1 CERTIFICATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* herein state that it is not a publicly held corporation or has a parent corporation that is publicly held.

RULE 29 CERTIFICATE

The National Employment Lawyers Association (NELA) certifies that all parties have consented to the filing of this brief.

Amicus curiae certifies no party has written, assisted in writing or paid for the writing of this brief.

INTERESTS OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf o those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

NELA is concerned that the decision in *EEOC v. Abercombie & Fitch Stores, Inc.***,** 731 F.3d 1106 (10th Cir. 2013) will seriously undermine the protections of Title VII in the area of religious discrimination and have the unintended consequence of undermining the protections of the Americans With Disabilities Act. This decision would close the doors of opportunity for the most vulnerable segment of the workforce–those entering the workforce for the first time. This decision will preclude all but the most sophisticated job-searchers from protecting from themselves from unlawful discrimination.

Because this decision and its consequences directly and adversely impact the mandate of NELA to advance the protection of equal employment, NELA has a direct and important interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

Although *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013) is a religious accommodation case under Title VII, this Court has drawn its religious accommodation standards from the process under the Americans with Disabilities Act (ADA). Because *Abercrombie* conflicts with this Circuit's holdings regarding the ADA in several key respects, there is a very real possibility that the decision will erode the protections guaranteed by the ADA.

In particular, the *Abercrombie* decision conflicts with controlling precedent of this Circuit and therefore not only requires rehearing but warrants rehearing en banc to restore, enforce and clarify the precedent of this circuit. The particular areas of conflict to be addressed by this brief are:

1. The requirement that an employee make a request for accommodation conflicts with precedent holding that such requirement is excused in circumstances where the employer interferes with the interactive process.
2. The requirement that a request for accommodation come only from the employee conflicts with this Court's precedent that such a request can come from other persons or be obvious.
3. The requirement that a request for accommodation be particularized to initiate the process conflicts with this Court's precedent regarding the low burden for initiating the process.

ARGUMENT

I. THIS COURT HAS NEVER REWARDED EMPLOYERS WHO INTENTIONALLY DISREGARD THE INTERACTIVE PROCESS

Although this is a Title VII case, this Circuit has drawn its religious accommodation standards from the ADA's accommodation process. *See Thomas v. Ntl Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) and *Abercrombie*, 731 F.3d at 1141-42.

The ADA requires an interactive process for identifying reasonable accommodations. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999) ("The obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee.") This interactive process "includes good-faith communications between the employer and employee." *Id.* "Neither party may create or destroy liability by causing a breakdown of the interactive process." *Albert v. Smith's Food & Drug Centers, Inc.*, 356 F.3d 1242, 1253 (10th Cir. 2004).[1] In cases where the interactive process fails, the key inquiry is identifying who caused the breakdown in this process.

In this case, it is clear that the employer preempted the interactive process by making assumptions about Ms. Elauf's need for religious accommodation without bothering to make her aware of its policies or asking whether she could comply with them. As this Court has long recognized in the ADA context, an employer "cannot preempt the interactive process with its policy and actions and then escape liability by claiming [the employee] did not properly initiate the process." *Davoll v. Webb*,

[1] The panel's rigidity in this area, *see* 731 F.3d, at 1125, conflicts with *Tomsic v. State Farm Mutual Auto. Ins. Co.*, 85 F.3d 1472, 1476 (10th Cir. 1996) ("We agree that the district court erred in applying the *McDonnell Douglas* framework without modification to suit the circumstances of the particular controversy.") Additionally, the *prima facie* formulation has a limited role in ADA accommodation cases. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178 n. 12 (10th Cir. 1999) (en banc).

194 F.3d 1116, 1133 (10th Cir. 1993) (brackets by the court). Indeed, in *Davoll* this Court held that the employer could not lawfully preclude the interactive process even though no request for accommodation had been made.

Requiring an employee to make a "particularized and actual" request for accommodation before informing her of the facts giving rise to that need, undermines the policies of Title VII and the ADA by creating a perverse incentive for the employer not to hire applicants simply because the employer suspects that the applicant might seek an accommodation. *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997) (retaliation claims may be brought by former employee in part to deter employers from firing employees because they might bring Title VII claims).

Midland Brake cautioned that while "[*i*]*n general*, the interactive process must *ordinarily* begin with the employee providing notice to the employer of the employee's disability and any resulting limitations * * * [t]he exact shape of this interactive dialogue will necessarily vary from situation to situation and no rules of universal application can be articulated." *Id.*, at 1171, 1173 (emphasis added). In this regard, the district court correctly analyzed and applied *Midland Brake* in holding "there could be no bilateral, interactive process of accommodation because, although Abercrombie was on notice that Elauf wore a head scarf for religious reasons, it denied [her] application for employment without informing her [that] she was not being hired or telling her why." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1286 n. 11 (N.D. Okla. 2011) (quoted by the panel at 731 F.3d, 1115).

II. - REQUIRING ACCOMMODATION REQUESTS TO COME DIRECTLY FROM THE EMPLOYEE CONFLICTS WITH THIS COURT'S PRECEDENT

"The exact shape of this interactive process will necessarily vary from situation to situation and no rules of universal application can be articulated." *Midland Brake,*

supra, 180 F.3d at 1173. Contrary to this requirement of flexibility, the panel majority intractably "plac[es] the burden on applicants or employees to initially inform employers of the religious nature of their conflicting practice and of the need for an accommodation[.]" *Abercrombie*, 731 F.3d at 1123. The undesirability of this approach was emphasized by the panel's refusal to consider a request for accommodation initiated by the employer's own manager. *Id*, at 1128. In requiring the notice to come solely from the employee, *Abercrombie* conflicts with the earlier statement in *EEOC v. C.R. Eng., Inc*., 644 F.3d 1028, 1049 (10th Cir. 2011) that "the notice or request 'does not have to be in writing [or] *be made by the employee*'. . ." Quoting *Taylor v. Phoenixville Sch. Dist*., 184 F.3d 296, 313 (3d Cir. 1999) (emphasis added). *Also Dinse v. Carlisle Foodservice W.D. Okla. Prods*., 2013 U.S. App. LEXIS 22513, *11-12 (10th Cir. 2013) (unpublished) (repeating that "the notice or request 'does not have to be in writing [or] *be made by the employee*. . .'") *Cf. Davoll, supra,* 194 F.3d at 1133 (affirming a jury verdict although the plaintiff made no request for accommodation).

This Circuit has acknowledged that no request for accommodation is necessary in other circumstances such as when the employer itself recognizes (or should recognize) that need. In the analogous ADA Title II setting, this Court in *Robertson v. Las Animas Cnty Sheriff's Dept.*, 500 F.3d 1185, 1197 (10th Cir. 2007) stated that a party may be deemed to "know of the individual's need for an accommodation because it is 'obvious.' . . . When an individual's need for an accommodation is obvious, the individual's failure to expressly 'request' one is not fatal to the ADA claim." *Robertson* cited with approval "*Reed v. LePage Bakeries, Inc*., 244 F.3d 254, 261 n. 7 (1st Cir. 2001) [as] noting in a Title I case that a request for accommodation may not be required when the disabled individual's needs are 'obvious'[.]"

These exceptions to an express request for accommodation represent the rule

in other circuits as well. *See also U.S. E.E.O.C. v UPS Supply Chain Solutions*, 620 F.3d 1103, 1114 (9th Cir. 2010) ("Even if Centeno did not expressly request an interpreter to understand the Policy, a reasonable trier of fact could conclude that UPS was aware or should have been aware that the modification it offered–consulting an English-language dictionary–was not effective."); *E.E.O.C. v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606, 621 (5th Cir. 2009) (noting that employees must make a request "where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent."); *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008) (employer has duty to accommodate if it knew or reasonably should have known that the employee had a disability).

While the need for accommodation may not be obvious in every case, here that need was apparent to Abercrombie's managers. "[W]hen viewed in the light most favorable to the EEOC, the record indicates that Ms. Cooke assumed that Ms. Elauf wore her hijab for religious reasons and felt religiously obliged to so—thus creating a conflict with Abercrombie's clothing policy." *Abercrombie*, 731 F.3d, at 1128. While the panel viewed this evidence as reflecting an "assumption" rather than actual knowledge, the panel does not explain why such an assumption–one that management intends to act upon–would not be sufficient to trigger the interactive process. In this regard, *Abercrombie* is internally inconsistent. The panel majority states with approval that

> the EEOC has specifically cautioned employers to 'avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate.' *EEOC Best Practices*, . . . (noting that '[m]anagers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices').

Id., at 1121. Yet the rule adopted would allow employers to *act* upon stereotypical assumptions in order to avoid the interactive process and carry out the discrimination which federal law seeks to prevent. *Id.*, at 1113-14 (setting out that while Ms. Elauf's

application was initially approved by the interviewer, it was rejected when the interviewer advised of Ms. Elauf's likely need for an exception to the "Look Policy").

A proper application of the interactive process under this Court's precedent would have imposed on the employer the duty to carry the interactive process forward by *asking* Ms. Elauf if she could comply with the "Look Policy"[2] before rejecting her on the assumption that she could not and before unilaterally determining that no accommodation was possible.

III. APPLICANTS FOR EMPLOYMENT ARE NOT ALWAYS REQUIRED TO MAKE A PARTICULARIZED, ACTUAL ACCOMMODATION REQUEST AS A PREREQUISITE TO SUIT

There is no doubt that at some point the interactive process must become sufficiently particularized to allow development of a reasonable accommodation. Under the ADA, however, the employee's initial request (when one is required) need not be specific in order to commence the interactive process. *Midland Brake*'s en banc decision admonished that the interactive process itself must be flexible. 180 F.3d, at 1173. Pursuant to this flexible process, the employee need only "provide enough information about his or her limitations and desires so as to suggest at least the *possibility* that reasonable accommodation may be found[.]" *Id.*, at 1172, emphasis supplied. At least at the outset, this does not require specific information. For instance "'[a] request as straightforward as asking for continued employment is a sufficient request for accommodation.'" *Id.*, quoting *Hendricks-Robinson v. Excel Corp*., 154 F.3d 685, 694 (7th Cir. 1998). This, of course, poses the question: If a request for continued employment is sufficient to initiate the interactive process for an existing employee, why isn't an employment application also sufficient for that

[2] This is a neutral inquiry which would not implicate the kind of unnecessary probing which the panel feared. *Id*., at 1121-22.

purpose at least when the employer suspects that accommodation may be required?

The reason why the *initial* request need not be specific is obvious: "each party holds information the other does not have or cannot easily obtain." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 316 (3rd Cir. 1999).[3] This is not simply the information the employee possesses about needs, but also information the employer possesses about job duties. When it comes to the application of company policies or the feasibility of accommodation, "the employer has far greater access to information [about its own organization] than the typical plaintiff[.]" *Midland Brake*, at 1173 (sequence altered by counsel, quoting *Woodman v. Runyon*, 132 F.3d 1330, 1343 (10th Cir. 1997)). "Both parties thus have an obligation to interact in good faith to determine how to reasonably accommodate the employee. Typically, employees and employers will determine reasonable accommodations through this process." *Davoll, supra*, 194 F.3d at 1132 n. 8. Thus, "*it would make little sense to insist that the employee must have arrived at the end product of the interactive process before the employer has a duty to participate in that process*." *Taylor*, 184 F.3d at 316 (emphasis supplied).

This Court must consider how this process impacts the public interests embodied in the statute. The purpose of the interactive process is one designed to secure mutual cooperation by mutual communication. That policy is best served by imposing a low standard on what it takes to get the dialogue *started*, but without that first step–*mutual* communication–the policy goal of cooperative accommodation

[3] Taylor was cited in the *Abercrombie* panel's decision regarding the sufficiency of an employee's notice and request for accommodation to commence the interactive process. *Taylor* was cited for the same point in this Circuit's unpublished decision in *Dinse, supra*, 2013 U.S.App.Lexis 22512, * 12 and the published decision in *EEOC v. C.R. Eng., supra*, 655 F.3d at 1049. Thus, *Taylor*'s explanation of the interactive process provides context and guidance for understanding our Circuit's precedent.

cannot be accomplished. Indeed, the panel's approach is one which is likely to turn the process into an adversarial battle of tactics rather than one of mutual cooperation.

CONCLUSION

This Circuit is committed to stability in its precedent and to accomplish that has many times stated that in the event of an intra-circuit conflict, the earliest decision of the Circuit must control. *Cf. Haynes v. Williams,* 88 F.3d 898, 900 & n. 4 (10th Cir. 1996) ("[W]hen faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom.'"), *inter alia*.

Beyond the conflict with established precedent, rehearing en banc should be granted because of the devastating impact this decision will have on the entry of persons into the workforce. As illustrated in the case of Ms. Elauf, it will not be unusual to find young, unsophisticated persons seeking work for the first time. Such persons are particularly easy prey to employers who seek to evade the policies of this nation against discrimination and who, by this decision, can easily weed out disfavored applicants at the very first stage of the employment process. If employers can keep such persons from ever becoming part of their workforce, how can our nation's promise of non-discrimination have meaning? The impact of this decision has a far-reaching potential to undermine these national policies and thus requires the attention of the Court in full.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 2,751 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 with 14 font

Times Roman type style.

Dec. 10, 2013 s/ Mark E. Hammons

RESPECTFULLY SUBMITTED THIS 10th DAY OF DECEMBER, 2013.

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☒ I hereby certify that on this 10th day of December, 2013, the foregoing instrument was served on opposing counsel below listed by US mail postage prepaid and by use of this Court's ECF system of filing and service:

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