IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 11-5110

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **PLAINTIFF - APPELLEE**

v.

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

BRIEF OF A*MICI CURIAE* GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, NATIONAL ASSOCIATION OF EVANGELICALS, CHRISTIAN LEGAL SOCIETY, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, AMERICAN JEWISH COMMITTEE AND THE SIKH COALITION IN SUPPORT OF EEOC'S PETITION FOR REHEARING

Respectfully submitted,

Todd R. McFarland
Associate General Counsel,
GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS
12501 Old Columbia Pike
Silver Spring, MD 20904-6600
(301) 680-6321 (Voice)
(301) 680-6329 (Fax)
mcfarlandt@gc.adventist.org

Charles M. Kester
KESTER LAW FIRM
1160 N. College Ave.
Fayetteville, AR 72703
(479) 582-4600 (Voice)
(479) 571-1671 (Fax)
cmkester@nwark.com

Attorneys of Record for Amici Curiae

RULE 26.1 CERTIFICATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* herein state that none of them are publicly held corporations or have parent corporations that are publicly held.

TABLE OF CONTENTS

RULE 26.1 CERTIFICATION i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* vii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Many persons observe religious practices that cannot be accommodated without active cooperation by the employer. 2

A. Sabbath and Holy Day observances frequently conflict with an employer's work schedule. 3

B. Religiously-required appearance frequently conflicts with an employer's rules relating to "look." 5

C. Any argument that Title VII's accommodation process does not apply unless an employee personally makes statements sufficient to create "actual particularized knowledge" frustrates that process. 6

II. Title VII's requirement of employer cooperation arises whenever an employer is willfully blind (*i.e.*, conscious of, or deliberately indifferent) to an employee's work-religion conflict. 10

A. A willful blindness standard strikes the balance necessary to preserve Title VII's protections while minimizing inquiry into an employee's religious practices. 11

B. A willful blindness standard is appropriate due to the employer's superior knowledge of applicable work rules. 12

C. An employer must treat religion at least equal with secular choices when evaluating perceived conflicts with work rules. 13

CONCLUSION 14

CERTIFICATE OF COMPLIANCE 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Statutes and Regulations

42 U.S.C. § 2000e 2

42 U.S.C. § 2000e-2 .... vii n. 1

29 C.F.R. § 1605.1 13

Cases

Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) 2, 3, 13, 14

Balint v. Carson City, 180 F.3d 1047 (9th Cir. 1999) 3

Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382 (9th Cir. 1984) 5

Brown v. General Motors Corp, 601 F.2d 956 (8th Cir. 1979) 3

Brown v. Polk County, 61 F. 3d 650 (8th Cir. 1995) 10

Chalmers v. Tulon Co., 101 F.3d 1012 (4th Cir. 1996) .... 8, 8 n. 3

Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010) 11

EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles,
450 F.3d 476 (10th Cir. 2006) 11

EEOC v. Hacienda Hotel, 881 F.2d 1505 (9th Cir. 1989) 14

EEOC v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005) 10

Goldman v. Weinberger, 475 U.S. 503 (1986) 5

Heller v. EBB Auto Co., 8 F.3d 1433 (9th Cir. 1993) 10, 11

Hellinger v. Eckerd Corp., 67 F. Supp.2d 1359 (S.D. Fla. 1999) 8, 10

Hickey v. S.U.N.Y. at Stony Brook Hosp.,
2012 WL 3064170 (E.D.N.Y. Jul. 27, 2012) 6, 9, 10

International Broth. of Teamsters v. U.S., 431 U.S. 324 (1977) 12

Johnson v. Angelica Uniform Group, 762 F.2d 671 (8th Cir. 1985) 7

Karki v. Holder, 715 F.3d 792 (10th Cir. 2013) 11

Kaukab v. Harris, 2003 WL 21823752 (N.D. Ill. Aug. 6, 2003) 5

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 7

Rivera v. Choice Courier Systems, Inc.,
2004 WL 1444852 (S.D.N.Y. Jun. 25, 2004) 6, 9

Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (*en banc*) 12

Taylor v. Phoenixville School Dist., 184 F.3d 296 (3rd Cir. 1999) 12

Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149 (10th Cir. 2000) 2

Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481 (10th Cir. 1989) .... vii n. 1, 7, 12

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 3

U.S. v. 16328 South 43rd East Ave., Bixby, Tulsa County, Okla.,
275 F.3d 1281 (10th Cir. 2002)... 10-11

U.S. v. Delreal-Ordones, 213 F.3d 1263 (10th Cir. 2000) 10

U.S. v. Sasser, 974 F.2d 1544 (10th Cir. 1992) 10

Other Authorities

Albert Mehrabian, SILENT MESSAGES: IMPLICIT COMMUNICATION OF EMOTIONS AND ATTITUDES (2nd ed. 1981) 8

EEOC, *Charge Statistics FY1997 through FY2012*, available at http://www.eeoc.gov/eeoc/statistics/ enforcement/charges.cfm (last viewed Dec. 11, 2013) .... 1 n. 2

EEOC Compliance Manual 12-IV.A.1 8

Francis J. Vaas, *Title VII: Legislative History*, VII BOSTON COLLEGE INDUSTRIAL & COMMERCIAL LAW REV. 431 (1966) 1

Gallup, *Religion* (2013), available at http://www.gallup.com/poll/1690/religion.aspx (last viewed Dec. 11, 2013) 1

Online Job Recruitment: Trends, Benefits, Outcomes and Implications, available at http://www.hr.com/en/communities/staffing_and_recruitment/ online-job-recruitment-trends-benefits-outcomes-an_f70ogs0y.html (Sept. 25, 2007) (last viewed Dec. 11, 2013) 3-4

Pew Forum on Religion and Public Life, U.S. RELIGIOUS LANDSCAPE SURVEY (2008), available at http://religions.pewforum.org/pdf/ report-religious-landscape-study-full.pdf (last viewed Dec. 11, 2013)...................... 1

Recruiting Technology and Recruiting Software Trends 2013, available at http://www.recruiter.com/recruiting-technology-and-recruitingsoftware-trends.pdf (last viewed Dec. 11, 2013) 4

INTERESTS OF *AMICI CURIAE*

The parties have consented to the filing of this brief of *amici curiae*. *See* Fed. R. App. Pro. 29(a).

Amici curiae are religious and public policy organizations concerned about the impact of this case upon the ability of religiously observant job applicants to obtain employment. *Amici* are especially concerned that the arguments by Appellant (referred to herein as "Abercrombie") regarding the notice required before Title VII is implicated would eviscerate the protection of Title VII.

Amici are deeply concerned about Abercrombie's argument that an applicant[1] who is unlawfully rejected for hire for a reason believed by the employer to be religious cannot make a *prima facie* case, and is therefore denied the protections of Title VII, simply because that employee did not expressly identify a specific religious practice during the hiring process. The disparity of position between employer and employee is nowhere greater than during the hiring process. Frequently, an employee will be unaware of a work-religion conflict because of the employee's inferior knowledge of the employer's work requirements. Even if the employee is aware of a potential conflict, hiring processes are often structured in such a way that the employee is unable to raise the

issue without a specific opportunity from the employer. The approach urged by Abercrombie creates a perverse incentive for employers to act as "ostriches" and remain willfully blind to the religious needs of employees.

By allowing an employer to act based upon the perceived inflexibility of a religious conviction because it is religious, Abercrombie's approach turns Title VII on its head. It provides religious convictions with even less protection than other non-protected choices, rather than providing the additional necessary protections that were enacted by Congress.

Amici believe that when an employer is aware of a potential work-religion conflict, the employer should not be allowed to remain willfully blind, but should initiate the accommodation process. This does not require anything more than a simple inquiry that apprises the employee of the potential conflict and offers the employee the opportunity to provide the information necessary for the employer to evaluate whether religious accommodation is required. Without such an inquiry, the employee will frequently not even realize the existence of a potential conflict.

For all these reasons, *amici* are strongly interested in and concerned about the outcome of this case. Statements of interest of the various *amici* are as follows:

[1] Title VII prohibits religiously motivated failures to hire. 42 U.S.C. § 2000e-2(a). *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989). Accordingly, the term "employee" includes applicants for employment.

The General Conference of Seventh-day Adventists – The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents more than 72,000 congregations with more than 17 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,400 congregations with more than 1.1 million members. Observance of the Sabbath is a central tenet of the Seventh-day Adventist church. The Adventist church has a strong interest in seeing that its members and all individuals of faith are protected from workplace discrimination.

The National Association of Evangelicals – The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It believes that religious freedom is God-given, and that the government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of safeguarding religious freedom, and believes that this jurisprudential heritage should be carefully maintained.

Christian Legal Society (CLS) – The Christian Legal Society is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS believes that pluralism, which is essential to a free society, prospers only when the religious

liberty of all Americans is protected, regardless of the current popularity of their particular religious beliefs and conduct. Religious individuals' ability to pursue their livelihoods without forfeiting their religious beliefs and conduct, and without being discriminated against based on those religious beliefs and conduct, lies at the heart of religious liberty.

The American Civil Liberties Union Foundation (ACLU) – The ACLU is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The **ACLU of Oklahoma** is a state affiliate of the national ACLU. Throughout its 90-year history, the ACLU has been at the forefront of efforts to protect religious liberty and equality, and has appeared before this Court in numerous cases involving those issues, both as direct counsel and as *amicus curiae*. As organizations that have long been dedicated to protecting and preserving religious freedom and equality, the ACLU and the ACLU of Oklahoma have a strong interest in the proper resolution of this controversy.

Baptist Joint Committee for Religious Liberty (BJC) – The BJC serves fifteen Baptist entities, including national and regional conferences and conventions with supporting congregations throughout the nation. The BJC, which focuses exclusively on religious liberty and church-state issues, works to promote

religious liberty for all through strong support for the principles of no establishment and free exercise.

American Jewish Committee (AJC) – The AJC is a global Jewish advocacy organization with over 175,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC has strongly supported the principle that religious discrimination has no place in the workplace.

The Sikh Coalition – The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Founded on September 11, 2001, the Sikh Coalition works to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination, and educate the broader community about Sikhism in order to promote cultural understanding and diversity. The Sikh Coalition has successfully litigated cases on behalf of Sikh Americans who wear visible articles of faith, including turbans and unshorn hair (and beards), and have been denied employment or fired because of uniform or grooming policies and/or employers' claims of "lack of notice." Unlike some faiths where only the clergy are in uniform, all Sikhs are required to wear external articles of faith such as a steel bracelet (kara), uncut hair and beard (kesh), comb (kangha) to care for their hair, and a turban (dastaar) to cover their hair. Globally and in the U.S., these articles of faith distinguish members of the Sikh

religion and make him or her instantly recognizable, similar to a person's race or sex. Through our years of work on behalf of the Sikh community, we have found that qualified Sikh applicants are at a severe disadvantage during the hiring process, unaware or uninformed of dress code or grooming policies, and frequently victimized by an employer's willful failure to engage in an interactive religious accommodation process.

SUMMARY OF ARGUMENT

Since its inception, Title VII has included among its objectives the protection of religious rights in the workplace. The earliest versions of the statute identified the protected classes as "race, color, and religion." Francis J. Vaas, *Title VII: Legislative History*, VII BOSTON COLLEGE INDUSTRIAL & COMMERCIAL LAW REV. 431 (1966).

Recent trends confirm the need to protect religious rights in the workplace. Charges of religion-based discrimination filed with the EEOC have more than doubled over the last fifteen years, and the percentage of charges relating to religion has also increased.[2] This trend continues as the diversity of religious beliefs and practices increases. *See* Pew Forum on Religion and Public Life, U.S. RELIGIOUS LANDSCAPE SURVEY (2008) (available at http:// religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf) (last viewed Dec. 11, 2013); Gallup, *Religion* (2013) (available at http:// www.gallup.com/poll/1690/religion.aspx) (last viewed Dec. 11, 2013).

Amici believe that the appropriate balance in the accommodation process is to apply a notice standard that accounts for the superior knowledge and position of the employer during the job application process.

[2] EEOC, *Charge Statistics FY1997 through FY2012*, available at http:// www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last viewed Dec. 11, 2013).

ARGUMENT

Title VII of the Civil Rights Act of 1964 obligates employers to "reasonably accommodate to [a] … prospective employee's ... religious observance or practice" so long as such accommodation may be accomplished "without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Courts have consistently recognized that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and … the employer's business." *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 69 (1986); *accord Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000).

The issue in this case is simple: May an employer refuse to hire an employee based upon the perceived "inflexibility" of a religious practice which may conflict with a work requirement without engaging in minimal cooperation towards an accommodation? Unless the religious accommodation requirement of Title VII is to be stricken from the statute, the answer is clearly "No."

I. Many persons observe religious practices that cannot be accommodated without active cooperation by the employer.

Among the disparate beliefs held by *amici* and their members, one common element is the inability of individual believers to achieve any accommodation

when an employer remains willfully blind to the need to discuss a perceived work-religion conflict.

A. Sabbath and Holy Day observances frequently conflict with an employer's work schedule.

One of the most frequent conflicts between religious convictions and job duties involves Sabbaths and Holy Days. *See, e.g., Ansonia*, 479 U.S. 60; *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977); *Balint v. Carson City*, 180 F.3d 1047 (9th Cir. 1999); *Brown v. General Motors Corp*, 601 F.2d 956 (8th Cir. 1979). For example, Seventh-day Adventists, observant Jews, and Seventh Day Baptists all observe Sabbath from sundown on Friday to sundown on Saturday. Other Christian groups hold similar beliefs regarding Sunday observance. Many Jews, Muslims and other Christians observe holy days that occur during the business week.

While religious limitations upon an employee's work schedule may not be as visible as the hijab in this case, recent trends in the employment application process indicate that this is a serious, although largely hidden, problem. Online recruiting and employment applications have exploded over the past decade. *See Online Job Recruitment: Trends, Benefits, Outcomes and Implications*, available at http://www.hr.com/en/communities/staffing_and_recruitment/online-job-recruitment-trends-benefits-outcomes-an_f70ogs0y.html (Sept. 25, 2007) (last

viewed Dec. 11, 2013). These trends are accelerating as automated screening of online and mobile applications becomes more prevalent. *See Recruiting Technology and Recruiting Software Trends 2013*, available at http://www.recruiter.com/recruiting-technology-and-recruitingsoftware-trends.pdf (last viewed Dec. 11, 2013).

The problem for applicants whose religious practices create scheduling limitations is this: Unless the employer provides an opportunity for the applicant to bring the religious reason for this limitation to the employer's attention, these applicants are simply shut out of the job market. Under Abercrombie's reasoning, an employer need not provide an opportunity for an applicant to raise the issue. Indeed, an employer is given a perverse incentive to deny any such opportunity, since under Abercrombie's reasoning, this ignorance automatically defeats a *prima facie* case, and effectively eliminates Title VII's accommodation protections. If Abercrombie's position is adopted, observers of the Sabbath and Holy Days will find themselves effectively excluded from a large and growing sector of the workforce that is hired through online applications.

Amici have received numerous troubling reports of this growing trend. The typical scenario goes something like this: An applicant initiates an online application process. Upon visiting a website, the applicant proceeds through a series of pages. Once a page is completely filled out, it is submitted and the next

page appears. During this process, a page inquires about the applicant's scheduling availability. If the applicant indicates any limitation, the response is not accepted and the applicant is unable to proceed with the application and cannot be hired. Thus, a Sabbath-observer who does not indicate availability for work during her Sabbath is unable to complete the application and is excluded from employment, even if the scheduling accommodation could be accomplished with no effort or cost whatsoever to the employer.

B. Religiously-required appearance frequently conflicts with an employer's rules relating to "look."

Another issue that often arises in the workplace relates to religious garb and appearance. Many Muslim women, like Ms. Elauf, believe that the Quran requires them to cover their heads in public. *See, e.g., Kaukab v. Harris,* 2003 WL 21823752 (N.D. Ill. Aug. 6, 2003). Sikhs are required to wear turbans and beards. *See, e.g., Bhatia v. Chevron U.S.A., Inc.,* 734 F.2d 1382 (9th Cir. 1984). Many Jews wear head coverings such as hats or yarmulkes. *See, e.g., Goldman v. Weinberger*, 475 U.S. 503 (1986).

Religious practices regarding appearance are also often found in Christian denominations. Many Pentecostal women do not cut their hair and wear head coverings. Christians of all denominations wear various forms of religious jewelry such as crosses/crucifixes, religious medals or evangelistic messages. *See, e.g.,*

Rivera v. Choice Courier Systems, Inc., 2004 WL 1444852 (S.D.N.Y. Jun. 25, 2004); *Hickey v. S.U.N.Y. at Stony Brook Hosp.,* 2012 WL 3064170 (E.D.N.Y. Jul. 27, 2012).

Some of these religious practices are, by their nature, apparent during an interview. Frequently, accommodation is possible simply by modifying apparel in a manner that eliminates the conflict. However, such accommodation cannot be achieved unless it is first identified and discussed, rather than assumed to be impossible.

C. Any argument that Title VII's accommodation process does not apply unless an employee personally makes statements sufficient to create "actual particularized knowledge" frustrates that process.

Abercrombie argues an interpretation of Title VII which defeats Title VII's accommodation requirement. Two aspects of Abercrombie's interpretation are particularly troubling to *amici*.

First is Abercrombie's interpretation of Title VII to require that the only acceptable source of information concerning a work-religion conflict is the employee, regardless of all other information of which the employer is aware. *See* Slip Op., at 11, 14, 29-31, 71. Under Abercrombie's view, Title VII is simply inapplicable unless Ms. Elauf personally utters certain (unspecified) statements to trigger its application. Even if Ms. Elauf were accompanied by her imam who gave

a dissertation upon the Quranic requirement of the hijab, the employer would have no obligation under Title VII because the information did not come directly from Ms. Elauf. This is plainly absurd.

Second, Abercrombie urges a highly restrictive threshold of "particularized, actual knowledge" of a specific conflict before Title VII is implicated. Slip Op., at 36, 41, 43, 54. This restrictive standard is not found in Title VII. Indeed, it is contrary to the purpose and goals of Title VII. Title VII is a broad remedial measure, designed "to assure equality of employment opportunities." *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982).

Although the burden of accommodation is indisputably upon the employer, *Toledo v. Nobel-Sysco, Inc.,* 892 F.2d 1481, 1488-90 (10th Cir. 1989), an employer cannot have a duty to eliminate a conflict of which it is not aware. *Johnson v. Angelica Uniform Group*, 762 F.2d 671, 673 (8th Cir. 1985). The purpose of Title VII's accommodation process is to allow the "employer [to] have … the chance to explain the [relevant] policy in relation to [the employee's] religious needs, and perhaps work out an arrangement satisfactory to both parties." *Id*. at 673. Accordingly, a work-religion conflict must be brought to the employer's attention in order to give it this chance to investigate and explain. However, "[n]o 'magic words' are required to place an employer on notice of an applicant's or employee's

conflict between religious needs and a work requirement." EEOC Compliance Manual 12-IV.A.1.

While it is certainly true that formulations of the *prima facie* case frequently refer to notice by the employee, this is merely because that is the most common fact pattern. In the typical case, the work-religion conflict will be exposed as a matter of course by an employee who objects to a conflicting work requirement once she learns of it. The same cannot be said of potential conflicts with work rules that are known only to an employer during the hiring process.

A commonly cited statistic is that 93% of communication is non-verbal. *See* Albert Mehrabian, SILENT MESSAGES: IMPLICIT COMMUNICATION OF EMOTIONS AND ATTITUDES (2nd ed. 1981). A hyper-technical rule that requires a verbal communication of something that has already been effectively conveyed non-verbally is simply non-sensical and redundant. If the point of the accommodation process is to give the employer a chance to work out a satisfactory arrangement, once the employer is aware of the conflict it has this opportunity. *See Hellinger v. Eckerd Corp*., 67 F. Supp.2d 1359, 1363-64 (S.D. Fla. 1999).

Even *Chalmers v. Tulon Co*., 101 F.3d 1012 (4th Cir. 1996), upon which Abercrombie heavily relies,[3] recognizes that the dispositive question is the

[3] In *Chalmers,* an employee claimed that the employer should infer a specific conflict (sending disturbing letters) from an awareness of the employee's general

employer's awareness and opportunity to address of the conflict, regardless of whether the information is received "directly" from the employee or "indirectly." 101 F.3d at 1021.

The key question is whether the employee informed the employer as soon as the employee learns that a conflict exists. *Hickey,* 2012 WL 3064170 at *8; *Rivera,* 2004 WL 1444852 at *8. Where the employee never learns of the conflict, there is no reason for the employee to provide this information. The employer is in the unique position to know whether it perceives a conflict with a work rule, particularly where, as here and in *Hickey*, the employer's policy is less than clear. *See* Slip Op., at 9.

To permit an employer to ignore a work-religion conflict of which it is aware wholly frustrates the goal of Title VII. Under the standard urged by Abercrombie, employers are incentivized to avoid any meaningful interaction with applicants and ignore recognized conflicts rather than communicate about possible solutions. Employers may sit back, secure in the knowledge that if an employee seeks to enforce compliance with Title VII's accommodation requirement, the employer can simply stick its head in the sand and claim ignorance, since despite

---

religious views. This differs from Ms. Elauf's situation where the employer's awareness was not merely a general awareness of her religion, but a specific awareness of the work-religion conflict (*i.e.,* the conflict between her wearing a hijab and the "Look Policy").

the employer's actual awareness of the conflict, the employee used no "magic words" to describe the need for accommodation. Such an approach defies both the purpose of Title VII and common sense. As *Heller v. EBB Auto Co*. recognized when addressing this issue:

> A sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.

8 F.3d 1433, 1439 (9th Cir. 1993); *accord Brown v. Polk County*, 61 F. 3d 650, 654 (8th Cir. 1995); *Hellinger*, 67 F. Supp.2d at 1363; *Hickey,* 2012 WL 3064170 at *7.

II. Title VII's requirement of employer cooperation arises whenever an employer is willfully blind (*i.e.,* conscious of, or deliberately indifferent) to an employee's work-religion conflict.

Courts have recognized that an employer "cannot shield itself from liability by choosing not to follow up on an employee's requests for assistance, or by intentionally remaining in the dark." *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 804 (7th Cir. 2005) (ADA accommodation case). This principle of willful blindness is common in the law. Defendants serve lengthy prison sentences based on such evidence under "willful blindness" or "ostrich" instructions. *See, e.g., U.S. v. Delreal-Ordones,* 213 F.3d 1263, 1268 (10th Cir. 2000); *U.S. v. Sasser,* 974 F.2d 1544, 1553 (10th Cir. 1992). This principle is also applied in other contexts. *See, e.g., U.S. v. 16328 South 43rd East Ave., Bixby, Tulsa County, Okla.,* 275 F.3d

1281, 1285 (10th Cir. 2002) (civil forfeiture); *Karki v. Holder,* 715 F.3d 792, 806-07 (10th Cir. 2013) (immigration). Willful blindness has been applied to Title VII and other civil rights cases. *See, e.g., EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 486 (10th Cir. 2006) (Title VII); *Dodds v. Richardson*, 614 F.3d 1185, 1211 (10th Cir. 2010) (42 U.S.C. § 1983). This well-established standard should be applied in this case.

A. A willful blindness standard strikes the balance necessary to preserve Title VII's protections while minimizing inquiry into an employee's religious practices.

The panel majority's decision appears to have been concerned that a standard other than "particularized, actual knowledge" would require the employer to inquire regarding religion. *See, e.g.,* Slip Op. at 26. However, the panel's heightened standard is counterproductive because, as *Heller* noted, any "greater notice requirement would permit an employer to delve into the religious practices of an employee in order to determine whether religion mandates the employee's adherence." 8 F.3d at 1439.

Once an employer is aware of a potential work-religion conflict, the employer is obligated to exercise common sense and ask a question. This question need not be religious. In this case, the question could have been as innocuous as merely stating the requirements of the "no headwear" aspect of the Look Policy and asking "Is there any reason that you could not comply with that policy?" At

that point, the employer has done all that it is required to do. It has brought the conflict to the applicant's attention and given the applicant the opportunity to explain the protected nature of the conflict, if there is one.

B. A willful blindness standard is appropriate due to the employer's superior knowledge of applicable work rules.

Abercrombie argues that Title VII requires nothing more than merely turning a blind eye to conflicts between an employee's job duties and her religious convictions about which the employer is actually aware. Abercrombie's attempt to shift the burden to find an accommodation from an employer, who has vastly superior knowledge about its business practices and possible accommodations, to the employee, who has less knowledge, will put *amici's* members at a significant disadvantage and frustrate the purpose of Title VII. It is also contrary to existing law. *See Toledo*, 892 F.2d at 1488-90.

Placing the burden to inquire upon the employer is not only the existing law, but makes sense because the employer is in the best position to know the work rules and anticipate a conflict. *See International Broth. of Teamsters v. U.S.,* 431 U.S. 324, 359 n. 45 (1977); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 315-16 (3rd Cir. 1999); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1173-74 (10th Cir. 1999) (*en banc*).

C. An employer must treat religion at least equal with secular choices when evaluating perceived conflicts with work rules.

Equally troubling is Abercrombie's suggestion that religious needs stand on a lesser footing than secular preferences. Title VII provides religious practices with *greater* protection than many secular choices, and was based on the understanding that certain characteristics, such as race and religion, were unfairly targeted for discrimination in the workplace. 29 C.F.R. § 1605.1. At the least employers must treat the religious and secular needs of its employees on an *equal* basis. *Ansonia*, 479 U.S. at 71. Abercrombie's proposed standard does not give Ms. Elauf's religious convictions proper protection, nor does it even treat those convictions equally with secular choices.

Under Abercrombie's reasoning, an employer is permitted to take adverse action against an employee based upon the "inflexible" nature of a religious practice, but simultaneously deprives the employee of Title VII's protections. *See, e.g.,* Slip Op. at 5, 24-25, 57. The effect of Abercrombie's proposed standard is to relegate religious convictions to a position even lower than purely secular – even trivial – decisions, such as *ad hoc* fashion choices.

The irony here is that Abercrombie was less flexible with a religious need protected by law than it was with secular desires that enjoy no special protection. Because of their statutory protection, religious needs should receive even greater

protection than most other desires. But at a minimum, religious needs should get at least the level of consideration that secularly-based desires receive. *Hishon* 467 U.S. at 75; *Ansonia*, 479 U.S. at 71; *EEOC v. Hacienda Hotel*, 881 F.2d 1505, 1513 (9th Cir. 1989).

Rather than providing greater protection for religious convictions, as envisioned by Title VII, Abercrombie's approach has the effect of penalizing religious convictions. It labels religious convictions as "inflexible" and thus treats them less seriously than other desires. This approach violates the fundamental principle of equal treatment for religious conviction, a principle at the heart of Title VII. *Hishon,* 467 U.S. at 75; *Ansonia*, 479 U.S. at 71.

CONCLUSION

For all these reasons, *amici* urge this Court to grant rehearing *en banc* and affirm the judgment of the district court.

Respectfully submitted,

/s/ Todd R. McFarland
Todd R. McFarland
Associate General Counsel,
GENERAL CONFERENCE OF
SEVENTH-DAY ADVENTISTS
12501 Old Columbia Pike
Silver Spring, MD 20904-6600
(301) 680-6321 (Voice)
(301) 680-6329 (Fax)
mcfarlandt@gc.adventist.org

and

Charles M. Kester
KESTER LAW FIRM
1160 N. College Ave.
Fayetteville, AR 72703
(479) 582-4600 (Voice)
(479) 571-1671 (Fax)
cmkester@nwark.com

Attorneys of Record for Amici Curiae
General Conference of Seventh-day Adventists, National Association of Evangelicals, Christian Legal Society, American Civil Liberties Union Foundation, American Civil Liberties Union of Oklahoma, Baptist Joint Committee for Religious Liberty, American Jewish Committee and The Sikh Coalition

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2967 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

/s/ Charles M. Kester

CERTIFICATE OF SERVICE

I, Charles M. Kester, attorney of record for the *Amici Curiae*, do hereby certify that on this 11th day of December 2013, I delivered the foregoing Brief, to:

James M. Tucker
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
131 M St. NE, Rm. 5NW10P
Washington, DC 20507
James.Tucker@eeoc.gov (email)

Natasha Liana Abel
Jennifer Lynn Hope
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
801 Market Street, Suite 1300
Philadelphia, PA 19107-3127
Natasha.Abel@eeoc.gov (email)
Jennifer.Hope@eeoc.gov (email)

Melvin David Kennedy
Carl Felix Miller
Barbara Seely
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1222 Spruce Street
Room 8.100
St. Louis, MO 63103-2818
Melvin.Kennedy@eeoc.gov (email)
Felix.Miller@eeoc.gov (email)
Barbara.Seely@eeoc.gov (email)

Jeffrey A. Lee
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
215 Dean A. McGee, Suite 524
Oklahoma City, OK 73102
Jeff.Lee@eeoc.gov (email)

Mark A. Knueve
Daniel J. Clark
VORYS, SATER, SEYMOUR AND PEASE, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
maknueve@vorys.com (e-mail)
djclark@vorys.com (e-mail)

Jon Edward Brightmire
Kristen Brightmire
DOERNER, SAUNDERS, DANIEL, & ANDERSON, LLP
2 West Second Street
Williams Center Tower II, Suite 700
Tulsa, OK 74103-3117
jbrightmire@dsda.com (email)
kbrightmire@dsda.com (email)

Via the Court's CM/ECF system.

/s/ Charles M. Kester