The question the Supreme Court will decide in *EEOC v. Abercrombie & Fitch Stores* is simple: who must ask about the need for a religious accommodation—the employer or the employee/applicant? The State and Local Legal Center's (SLLC) *amicus* brief argues the employee/applicant should ask.

Abercrombie & Fitch’s “Look Policy” requires sale-floor employees to wear clothing consistent with what Abercrombie sells in its stores and prohibits headwear. Samantha Elauf wore a head scarf to an interview at Abercrombie but didn’t ask for a religious accommodation. Her interviewer assumed but did not ask if she were Muslim and wore the headscarf for religious reasons. Ms. Elauf was ultimately not hired because of the headscarf. The Equal Employment Opportunity Commission (EEOC) sued Abercrombie alleging it violated Title VII by failing to accommodate Ms. Elauf’s religious beliefs. At trial, EEOC’s expert testified that some women wear headscarves for cultural rather than religious reasons.

The Tenth Circuit held in favor of Abercrombie, finding that an applicant/employee “ordinarily must establish that he or she initially informed the employer that [he or she] adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice,” which Ms. Elauf did not do.

The SLLC’s *amicus* brief argues that the applicant/employee should have to notify the employer of the need for a religious accommodation. After all, until this case, that had been the EEOC’s position. A contrary position requires employers to make assumptions based on stereotypes about what physical characteristics indicate a person might practice a particular religion. Requiring employers to ask about an employee’s religion to avoid a failure to accommodate claim may lead to employers being liable for a disparate treatment claim. EEOC guidance says that an employer asking about a protected characteristic like religion may be used as evidence of discrimination in a disparate treatment case. And public employers don’t want to ask an applicant/employer about religion to avoid violating the First Amendment’s Establishment Clause.

Amanda Kellar and Chuck Thompson, *International Municipal Lawyers Association*, wrote the SLLC’s brief which was joined by the *National Conference of State Legislatures*, the *National League of Cities*, the *United States Conference of Mayors*, the *National Association of Counties*, the *International City/County Management Association*, the *International Municipal Lawyers Association*, the *International Public Management Association for Human Resources*, the *National Public Employer Labor Relations Association*, and the *National School Boards Association*.

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