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Client Update

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D.C. Circuit Court of Appeals Rejects NLRB's Lack Of Common Sense And Holds That Employer Is Entitled To Ban Employees From Wearing Unprofessional T-Shirt on House Calls

For one union in Connecticut, their use of creative t-shirts as a weapon against AT&T Connecticut (AT&T) has finally gone too far. In the past, employees had been permitted to wear union apparel at work, including shirts that read, "If I want your opinion...I'll take the tape off your mouth" and "I'm not drunk. I'm just a race fan." However, when employees were given shirts that read "Inmate #" with a black box beneath the lettering on the front and "Prisoner of AT&T" on the back, the company objected more strongly.

On two occasions, during contentious contract negotiations, the leaders of the Communication Workers of America told employees to wear the shirt to work. Hundreds of employees did so, and it caused immediate problems for management. AT&T supervisors instructed employees with customer interaction to change their shirts and issued day-long suspensions to the 183 employees who failed to remove them. AT&T requires its public-facing employees to present a professional appearance and does not allow them to wear clothing with "printing and logos that are unprofessional or such that would jeopardize the Company's reputation." While a company can ban the display of inappropriate messages on clothing, it cannot stop an employee from wearing union apparel at work. This right is implicit in Section 7 of the National Labor Relations Act.

The union filed an unfair labor practice charge after the suspensions, claiming that AT&T had infringed on employee's rights when it disciplined the employees who had refused to remove their "Inmate" shirts. AT&T argued that under the "special circumstances" doctrine developed under Section 7, a company may forbid a union message on publicly visible clothing when it reasonably believes that the message could harm its relationship with its customers or damage its public image. The company further stated that it was concerned that the shirts would be cause for alarm or confusion for its local clients in light of a well-known and recent home invasion in Cheshire, Connecticut where three people were murdered.

Administrative Trial and NLRB Decision

At trial, an administrative law judge found that AT&T had violated the law when it prohibited employees to wear those t-shirts. On appeal, the National Labor Relations Board affirmed the conclusion, and added that the shirt would not have been mistaken for prison garb and that by the nature of the circumstances it would be clear that the offenders were not convicts. One NLRB member dissented and said that he felt that there was sufficient reason to suggest that the shirts could “alarm customers and thereby damage” the company’s reputation. AT&T then filed a petition to review the Board’s decision in the federal court.

Other companies have invoked the “special circumstances” doctrine to protect their images. One union’s t-shirt stated, “I don’t need a WOW to do my job.” The t-shirt mocked the company’s “WOW” incentive program, and the NLRB agreed that customers seeing the shirt might be less likely to return as customers. Another company banned t-shirts that were distributed by its union that showed employees as carcasses and were labeled as “Road Kill.”

When the NLRB rejected the idea that AT&T met the criteria for special circumstances, the Board noted that the company had not consistently enforced the ban on unprofessional clothing. It had allowed other questionable shirts to be worn at other times and not disciplined employees.

D.C. Circuit Court of Appeal’s Reversal of NLRB Decision

The federal appeals court said that it believed that the Board should have recognized AT&T’s “straightforward evidence” and allowed that the “Inmate” t-shirt is precisely the reason for the special circumstances noted in Section 7. In addition, the court examined the allowance of the other t-shirts and noted that the “Inmate” shirt was much more problematic than the others. The allowance of the previous union shirts did not mean that the company could not prohibit other unprofessional clothing. The Court admonished the Board that “the appropriate test for ‘special circumstances’ is not whether AT&T’s customers would confuse the ‘Inmate/Prisoner’ shirt with actual prison garb, but whether AT&T could reasonably believe that the message may harm its relationship with its customers or its public image..” As Judge Kavanaugh pointed out, “Common sense sometimes matters in resolving legal disputes,” and further adopted the one dissenting member of the NLRB who got it right: “What would you think about a company that permitted its technicians to wear such shirts when making home service calls?” Fortunately for this company, the D.C. Circuit Court of Appeals has put the brakes on this activist NLRB’s continuing effort to erode the rights of employers.

Conclusions

Prohibiting or allowing the wearing of union t-shirts is not straightforward. A message on a shirt may strike a manager as unprofessional, offensive and obviously not to be worn in public. However, sending an employee home for not changing could have unforeseen consequences.

These situations usually arise in the midst of a labor dispute or organizing activity. Before reacting impulsively, it is best to seek legal advice.