National Labor Relations Board Rules Altering a Work Uniform With a BLM Insignia Can Be Protected, Concerted Activity

PUBLISHED ON
March 6, 2024

Two weeks ago, the National Labor Relations Board (NLRB) told Home Depot that it violated the National Labor Relations Act (NLRA) when the company prohibited an employee from writing "BLM" on a work apron. This is an evergreen reminder that non-unionized workers have rights to engage in protected, concerted activity, which includes altering work uniforms with civil rights' slogans.

The facts. It started when Antonio Morales and coworkers thought Home Depot treated them unfairly on account of their race, so they complained to management. Morales wrote emails about perceived discrimination and called for a broader discussion about discrimination at work. Morales and others then wrote "BLM" on their work uniforms. Home Depot prohibited it and required employees to wear a BLM-less apron as a condition of employment. Morales refused to comply, resigned, and filed an unfair labor practice charge.

The law. The NLRA protects employees who engage in "concerted activities" for the purpose of "mutual aid or protection," regardless of whether they are represented by a union. At its root, all employees have the right to engage together to try to improve their working conditions. This is coined with the legal phrase "protected concerted activity." The NLRB has also held that an employee's conduct is protected, even if acting individually, if an act is done to support a group protest regarding a workplace issue.

Companies and employees most often think about protected concerted activity synonymous with employees' rights to discuss wages and salaries with coworkers. But these protections cover all working conditions, like alleged workplace discrimination, uniforms, work rules and more.

The ruling. In a 3-1 decision, the NLRB found that Home Depot violated the NLRA when it told Morales and others that they may not write "BLM" on their work aprons. The Board emphasized that the motivation for the insignia came after complaints from a group of employees about racial discrimination. The NLRB called Morales's writing "concerted" because it was a "logical outgrowth" of these employee protests and another attempt to bring those group complaints to management's attention.

When an employer interferes with employees' right to display protected insignia, that interference is presumptively unlawful. Therefore, Home Depot had the burden of establishing special circumstances that made the rule necessary to maintain production or discipline. According to the majority, Home Depot failed to do so. The decision may be appealed, but even if that occurs, we are months away from a decision by an appellate court.

Similar cases. In December 2023, a comparable situation with Whole Foods Market went the other way. An Administrative Law Judge within the NLRB (an Administrative Law Judge is the reviewing authority before,

and one level below, the Board that decided the Home Depot case) held that Whole Foods did not violate the NLRA when it disciplined employees for wearing masks, pins, and other accessories with the same Black Lives Matter slogan. The NLRB General Counsel, who brought the case on behalf of the employees, argued that workers wore the insignia to make black coworkers feel safe during nationwide protests. The General Counsel claimed banning the apparel violated workers' rights to advocate for better working conditions. But the Administrative Law Judge thought the arguments were conjecture that did not touch upon the workplace. The decision noted there was "simply no evidence that there were any employee concerns, let alone complaints or grievances about racial inequality or any manner of racially based discrimination by Whole Foods Market prior to or at the time they started donning BLM messaging." According to the Judge, Whole Foods acted lawfully when it tried to avoid controversy and conflict, which it believed the insignia would spawn. This decision is being appealed to the full NLRB.

It is easy to rationalize the Whole Foods decision with the Home Depot decision. One involved prior group complaints in the workplace, the other did not, and therefore, one was protected concerted activity and the other was not. Unfortunately, the law is not that black and white. Take the *Fred Meyers Stores, Inc.* decision, for example, from May 2023. A different Administrative Law Judge found that Fred Meyer Stores violated the NLRA when it prohibited employees from wearing Black Lives Matter pins and masks and by sending workers home who refused to remove them. No employee who was disciplined had previously complained of racism or discrimination in the workplace, like at Home Depot. Nonetheless, the Judge stated, "I find that, by collectively displaying the Black Lives Matter' message on their work uniforms, the employees in this case acted to advance their interest - as employees - to an affirmatively anti-racist, pro-civil rights, and pro-justice workplace." This decision was unique because it was a unionized workplace and the union distributed the pins and masks.

Compliance can be frustrating, especially given the differing opinions among the Administrative Law Judges within the NLRB. There are a couple important takeaways, though.

- First, be consistent. The Home Depot decision noted the company's tolerance of Pride flags on the apron but not BLM insignia. If your organization maintains a blanket ban on all political messaging, be consistent, but also understand that the work rule would need a carveout in instances like the Home Depot case where it is intertwined with protected concerted activity.

- Second, do not make managerial decisions in a vacuum. Each situation is different depending on the action, the employee, other employees' actions, prior complaints and more. These important, situational facts tell attorneys and the NLRB if the action is indeed concerted and if it touches upon the workplace.

- Lastly, understand that the burden of interfering with displays and insignia. When an employer interferes with employees' rights to display protected insignia, that interference is presumptively unlawful. To rebut that, companies must show special circumstances that make the rule necessary to maintain production or discipline. That is a pretty high bar, and considering the NLRB's aggressiveness, the agency will be quick to argue against any such company determination.

If you have any questions regarding the non-unionized workers' rights in the workplace, protected activity, work uniforms and insignia, or anything else related to the NLRA or NLRB, please contact Caleb P. Setlock, Kevin A. Moore or any member of the Barley Snyder Labor Law Practice Team.

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