Eighth Circuit Says Context Matters in Employer Limits on Political Workwear

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The Eighth Circuit's recent decision in *Home Depot USA, Inc. v. National Labor Relations Board* marks a significant turn in the long-running dispute over Home Depot's ban on an employee's "BLM" apron message. The court overturned the National Labor Relations Board's (NLRB) prior determination that the employee had engaged in protected activity under federal law, and determined that the NLRB improperly rejected Home Depot's "special circumstances" and business justification defenses.

Many of you may remember that we covered this issue in some detail after the NLRB issued its decision in early 2024. The underlying facts arose in the summer of 2020, at the height of the protests surrounding the murder of George Floyd while in the custody of Minneapolis police officers. Home Depot hired the employee at issue to work at its New Brighton, Minnesota store in August 2020. Soon after the employee was hired, the employee wrote "BLM" in black marker on a work-issued apron. Store management required the employee to remove the message, citing the company's policy prohibiting political messages on work uniforms. Rather than remove the slogan, the employee chose to resign.

In February 2024, the NLRB issued a decision holding that the employee engaged in protected activity under the National Labor Relations Act, that Home Depot violated the Act by forcing the employee to remove "BLM" from the apron, and that Home Depot constructively discharged the employee by conditioning continued employment on compliance. The NLRB dismissed Home Depot's arguments that, even if the employee had engaged in protected activity, "special circumstances" and business justification warranted enforcement of the dress code to protect employee safety and the company's public image.

Earlier this month, the Eighth Circuit Court of Appeals issued a decision vacating and reversing the NLRB's decision. The court held that the NLRB "improperly evaluated the 'special circumstances' and business justification defenses asserted by Home Depot in defending an action taken in the wake of George Floyd's murder in Minneapolis following civil unrest that directly affected this particular store[.]" The court believed that "[t]hese circumstances were unlike the more typical union organizing dispute" commonly seen in cases concerning employee political expression.

In reaching its holding, the court noted that Home Depot applied its dress code policies in a consistent, non-discriminatory, and limited manner. The evidence in the record showed that Home Depot "did not attempt to prohibit the substance of [the employee's] message," but rather "sought to limit display of [the employee's] opinions on the *employer-required uniform* to less politically charged messaging." (emphasis in original). Home Depot also "did not disparately enforce its policy against statutorily protected activity while not enforcing it against other similar activity under similar circumstances." (internal quotations and alterations omitted). Rather, "[t]he record establishe[d] that Home Depot has a consistent apron policy that prohibits causes or political messages unrelated to workplace matters," which "demonstrates consistent enforcement of its policy." For example, Home Depot also prohibited employees from placing political slogans supportive of the police on their aprons.

Given the policy's consistent and limited application, the court determined that there were “special circumstances” that justified the prohibition on wearing “this kind of message in a customer-facing job at this location during this period of time.” Though there was little direct evidence in the record that Home Depot faced any safety or other issues related to the message, the court concluded that “[c]ontext matters” when assessing the issue of special circumstances. In particular, the store's proximity both in time and space to a historical event warranted unique consideration: “The activity in dispute was not a display at a random location in the United States; it was not at a normal moment in time; and it was not a generic message for equal rights or employee protection.” Rather, the “BLM message was broadcast only a few miles from the site of George Floyd's murder. Community tensions were extraordinarily high, and significant unrest and turmoil that at times closed this Home Depot store followed.” In such a context, the Court held that Home Depot required only a “reasonable belief that the employee's message risked harm to a legitimate and substantial business interest.” Home Depot thus “demonstrated that the narrow special circumstances defense should apply.”

Takeaways For Employers

The decision is a win for employers, but it is more limited than it might appear. The court's decision rests heavily on its determination that the NLRB ignored the significant and historical events occurring just miles from the store. Employers who are not caught in the midst of similar moments of social significance may face more difficulty in establishing special circumstances. The decision is also not a binding precedent outside of the Eighth Circuit, and therefore will not bind state or federal courts in New Jersey, New York, or Pennsylvania.

Nonetheless, there are important lessons here for employers. Employers should apply all policies, including dress code policies, consistently and uniformly. Dress codes should be clear and justified by a legitimate business purpose. The court made much of the fact that customers could see the employee's apron, and so employers can expect to have more breadth for dress codes applicable to customer-facing positions and for employees who are issued specific uniforms. A blanket prohibition on political messaging on employer-issued and customer-facing uniforms likely will be easier to justify than prohibitions on certain kinds of messaging, or prohibitions that appear to favor one side of an issue over another. Employers also should distinguish carefully between messages of personal expression regarding wider social and political issues, and those that reflect group or concerted employee action or touch upon workplace conditions, the latter of which receives much more scrutiny and stronger protection.