Last month, in two separate cases, the National Labor Relations Board (“NLRB” or the “Board”) and an NLRB Administrative Law Judge (“ALJ”) found against employers in cases involving the right of employees to wear union insignia at work. While the Board has long held that wearing union t-shirts, stickers and the like is a form of concerted protected activity protected by Section 7 of the National Labor Relations Act (“Act” or “NLRA”), it has historically recognized the right of employers to limit this when necessary to maintain an appropriate atmosphere, these decisions evidence a significant limitation on employers rights in these cases. However, as we have been reporting, Board and its General Counsel have been reexamining numerous precedents and finding that policies and practices deemed lawful interfere
with employees’ rights under the Act.

In the first case, *Pacific Bell Telephone Company, Nevada Telephone Company d/b/a AT&T, 362 NLRB No. 105 (2015)*, the Board found that the employer could not lawfully prohibit employees from wearing union buttons and stickers that contained what it argued was vulgar language, including “WTF, Where’s The Fairness,” “FTW Fight To Win,” and “CUT the CRAP! Not My Healthcare.” These slogans were worn by employees who regularly interacted with customers. The employer argued that because these buttons and stickers contained vulgar language and were offensive, they could not be worn in customer contact areas. The Board disagreed. The Board wrote:

*We agree with the judge that the content of the “WTF,” “FTW,” and “Cut the Crap!” buttons and stickers was not so vulgar and offensive as to cause employees wearing them to lose the protection of the [National Labor Relations Act]. In particular, we emphasize that the “WTF” and “FTW” buttons and stickers provided a nonprofane, nonoffensive interpretation on their face.*

The Board also noted that the “possible suggestion of profanity, or ‘double entendre,’” of the slogans was not sufficient to render them unprotected.

Similarly, in *Wal-Mart Stores, Inc., Case No. 13-CA-114222 (June 9, 2015)*, an NLRB ALJ found that the following dress code policy, which prohibited a broad range of logos and messages, not only those referring to union insignia, was unlawful:

*Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, pants, skirts, hats, jackets or coats are also permitted.*

The employer later added a qualifier about the size of logos, defining “small” as “no larger than the size of your associate name badge.” The ALJ found that this policy was overly broad and vague, and that the rule was not sufficiently “narrowly tailored” to justify the maintenance of the rule. First, the ALJ noted that the policy does not define the term “non-distracting,” which could lead to confusion on the part of associates. Second, the ALJ stated that the employer’s limitation on logos, which included union insignias, was not justified by any of the special circumstances (i.e. employee safety, damage to machinery or products, exacerbation of employees dissension, or unreasonable interference with the public image of the employer) that Board precedent has held can lawfully justify such a prohibition. The ALJ stated:

*Walmart did not present any evidence of a significant or widespread problem with associates wearing union insignia or other logos that actually made it difficult or impossible for others to see their Walmart nametags. . .Nor did Walmart present evidence of a significant or widespread problem with customers being distracted by logos worn by associates.*

The ALJ wrote, in conclusion, that the employer’s rule ran “afoul” of prior cases that “upheld that right of employees to wear union insignia of a variety of types and sizes, including insignia much larger than Walmart’s nametags.”

Both of these cases further evidence with Board’s efforts to be relevant to union and non-union employers alike, which is often done through cases challenging the
legality of a work rule, regardless of whether it has ever been enforced. Employers should continue to be careful when drafting and enforcing policies, specifically those regarding employee dress codes.

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National Law Review, Volume V, Number 191

Source URL: https://www.natlawreview.com/article/nlrb-and-alj-strike-down-button-stickers-bans