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D.C. Circuit Releases Employer From NLRB Jail

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We have frequently commented on the **National Labor Relations Board's (NLRB)** expansion and creation of sweeping protections to employees engaging in union organizing and other activities protected under the **National Labor Relations Act (Act)**. As but one example, we recently commented on the Board's concerning decision to consider offensive racial comments protected concerted activity under the Act. The Board – in yet another split decision by Board members with different political allegiances – had previously found employees could not be disciplined for suggesting to their employer's customers that they are incarcerated inmates when approaching customer homes. In a victory for common sense, a federal appeals court in Washington, D.C., [refused to enforce the Board's conclusion](#).

Imagine a telephone company employee walking up to your door wearing a shirt stating "INMATES#" on the front "Prisoner of [the Company]" on the back. Imagine this same individual also wearing a company badge when approaching your home after exiting a van bearing your company's logos and service marks. This is what occurred in the case at issue and what the Board considered an exercise of protected concerted rights, because the union representing the employees had distributed the inmate t-shirts to employees – apparently to claim they were economic prisoners of the employer – and employees wore them during house visits. Before disciplining anyone, the employer told only those who interacted with customers to remove the t-shirts. 183 employees did not, prompting the company to give them one-day suspensions.

The Board determined those suspensions violated employee rights to engage in protected concerted activity. The federal court reviewing that determination found that common sense dictated a different result, invoking the ["special circumstances"](#) exception to the Act. While the Act generally protects the right of employees to wear union apparel at work, as with most any protection, there are limits, and according to the appellate court, "common sense matters in resolving legal disputes."

Under the "special circumstances" exception, employers have the right to prohibit employees "from displaying messages on the job that the company reasonably believes may harm its relationship with its customers or its public image." This can include prohibiting grocery store employees from wearing t-shirts that say "Don't Cheat About the Meat!" or with a picture of a carcass labeled "Road Kill." In the recent case, both the "special circumstances" exception and common sense dictated that employees wearing inmate t-shirts to customers' homes could be bad for business, especially in an area where a notorious home invasion and murder had occurred. According to the court, the employer therefore had the right to direct employees not to wear inmate shirts at customers' homes and discipline those who did.

The case provides several reminders for employers. The first is that, at least for the foreseeable future, employers should remember that the NLRB is not likely to validate many restrictions on employee union or activity, regardless of an employer's view of the need or common sense basis for the restriction. In the current political landscape then, before issuing citations or prohibiting employees from displaying certain images in an effort to organize, employers should first consider carefully whether or not they reasonably believe the message might damage customer relations or harm the company's public image and how they can objectively demonstrate that potential harm. Employers should also remember that, if unfair labor practices result from such discipline, while there may be a common sense light and the end of the tunnel, the odds are high they will have to go through the Board process and expect an unfair labor practice finding before common sense arguments have a



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