Labor & Employment Issues
In Focus

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FIFTH CIRCUIT SHORT CIRCUITS NLRB'S ORDER REGARDING UNION T-SHIRTS AT TESLA

On November 14, 2023, the New Orleans-based United States Court of Appeals for the Fifth Circuit ("Fifth Circuit" or "Court") overruled the National Labor Relations Board's ("NLRB" or "Board") holding in *Tesla, Inc.*, 371 NLRB No 1311 (2022). The case is *Tesla v. NLRB*, No. 22-60493 (5th Cir. Nov. 14, 2023).

This case involves Tesla's "Team Wear" uniform policy which required workers to wear black t-shirts and pants that Tesla provided, or other black t-shirts if Tesla approved them. The Team Wear policy allowed workers to wear union stickers. In 2017, workers began to wear black t-shirts with the logo for the United Auto Workers union ("Union"). Tesla then began disciplining workers who did not wear Tesla's shirts and the Union challenged this to the Board.

As previously reported in *In Focus,* in *Tesla Inc.*, the Board held that as for employer uniform policies, when an employer interferes in any way with its employees' right to display union insignia, the employer must prove special circumstances that justify its interference. In that case the Board overturned its decision in *Wal-Mart Stores, Inc.*, 369 NLRB No. 146. Under *Wal-Mart*, where the employer maintains a facially neutral rule that limits the size and/or appearance of union buttons and insignia that employees can wear but does not prohibit them, the Board would analyze the rule on a balancing test weighing the nature and extent of the potential impact on labor rights and the legitimate justifications associated with the workplace uniform rule.

Here, the Fifth Circuit vacated the NLRB's decision in *Tesla, Inc.* The Court found that the Board failed to properly balance the competing interest of self-organization and the right of employers to maintain discipline in their establishment. The Court found that the Board "elevated employee interests at the expense of legitimate employer interests." The Board is required to show that a uniform policy truly diminishes the ability of the union involved to carry its message to the employees. Here, the Court found the Board had not done so.

The Court held that Tesla's Team Wear policy advances a legitimate interest of the employer (discipline, uniformity, *esprit de corps*, among others) and neither discriminates against union communications nor affects non-working time. The Court found that the Board failed to balance the employer's and employees' rights by treating the Team Wear policy like a total prohibition, rather than a restriction, on union insignia. In doing so, the Court overturned *Tesla Inc.* and reinstated *Wal-Mart.*

NEW NYC LAW BANNING DISCRIMINATION BASED ON HEIGHT AND WEIGHT GOES INTO EFFECT

On November 22, 2023, New York City joined a small number of other United States jurisdictions in instituting a law against workplace discrimination based on size, weight, and height. The law provides for private lawsuits and sanctions by the New York City Human Rights Commission.

Under the law, such discrimination is also banned in housing and public accommodations. Other United States jurisdictions with similar regulations include Binghamton, New York; Madison, Wisconsin; Santa Cruz, California; San Francsico, California; and Urbana, Illinois. Moreover, Washington, DC bans discrimination based on "personal appearance." In addition, the states of Massachusetts, New Jersey, New York, and Vermont have considered but not enacted statewide bills to ban height and weight discrimination.

Under current law, workers seeking to claim size-related bias historically have had to connect the discrimination to another protected category, such as claiming a physical impairment protected under the Americans with Disabilities Act. Those kinds of claims have been mostly unsuccessful in the courts, as courts generally seek specific statutory language on which to base decisions.

The New York City law holds out the possibility that certain occupations will be exempt from the ban on height and weight discrimination. The measure calls for the City's Human Rights Commission to issue regulations that spell out the exemptions for jobs where "person's height or weight could prevent performing the essential requisites of the job." New York employers also have an affirmative defense against claims, even when there's no specific exemption, if they can argue that they are making employment decisions for a job where height or weight have a legitimate effect on an employee's ability to safely perform key functions of their job. Such an exemption would likely only apply where size has genuine impact on the work, as opposed to, for example, a retail establishment seeking employees who project an "image."

The impetus for the law is the fact established by years of research that the plus-sized often face discrimination in hiring, promotions, and pay, as well as harassment on the job. "All New Yorkers, regardless of their body shape or size, deserve to be protected from discrimination under the law," New York City Council Speaker Adrienne Adams and Councilman Shaun Abreu said in a joint statement. "Body size discrimination affects millions of people every year, contributing to harmful disparities in medical treatment and outcomes, blocking people from access to opportunities in employment, housing and public accommodations, and deepening existing injustices that people face," the statement added. "New York City is leading the nation with this groundbreaking anti-discrimination law."

NATIONAL LABOR RELATIONS BOARD SAYS UPS' 2015 GRIEVANCE PANEL PROCEEDINGS WERE NOT "FAIR AND REGULAR"

On November 21, 2023, the National Labor Relations Board ("NLRB" or "Board") issued a decision in which it considered whether to defer to United Parcel Service's ("UPS") internal joint grievance panel proceedings which led to an Employee's discharge in 2015. The case was remanded from the United States Court of Appeals for the Third Circuit and the Board considered both whether the proceedings at UPS were "fair and regular" and, if not, whether the Employee's discharge violated the National Labor Relations Act ("NLRA" or "Act"). *United Parcel Service, Inc. and Robert C. Atkinson, Jr.*, Case 06–CA–143062, 372 NLRB No. 158 (November 21, 2023).

The trouble began in 2013, when the Employee vociferously opposed ratifying a collective bargaining agreement, and his campaign among fellow employees and on Facebook was closely monitored by UPS management. In April 2014, after the "Vote No" campaign ultimately proved unsuccessful and the contracts were ratified, the Employee decided to run against an incumbent business agent in the upcoming local elections. Soon thereafter, the Employee was selected among several other employees for "On-the-Job Supervision" rides, wherein supervisors monitor drivers' compliance with policies. Citing these ride-alongs, UPS discharged the Employee in June 2014 for inefficiencies and methods violations. However, the Employee continued to work under a working discharge policy while he grieved the discharges. After the Employee lost his business agent campaign, but before the discharges went to the grievance panel, UPS discharged the Employee again in October 2014, this time for failing to properly download delivery data he needed to complete a delivery. In January 2015, a joint grievance panel upheld the October discharge in full. All four panel members (two from the Employer and two from the Union) had served on the bargaining committee that had negotiated the contract the Employee had tried to get his Union to reject. Further, the Employee was represented by the incumbent Business Agent he ran against. The Employee then filed unfair labor practice charges with the Board alleging that UPS had violated the Act by discharging him.

The Board's General Counsel determined that deferring to the grievance panel decisions in this case would be inappropriate under Board law and issued a complaint alleging that UPS violated both 8(a)(3) and (1) of the Act when it discharged the Employee. An Administrative Law Judge ("ALJ") agreed. However, the ALJ did not order reinstatement because the Employee had since posted comments on Facebook that the ALJ found violated UPS's antiharassment policy. On December 23, 2019, the Trump-era Board reversed the ALJ's unfair labor practice findings, overruled the then-applicable standard established in *Babcock & Wilcox*, 361 NLRB 1127 (2014), and reinstated an older post-arbitration deferral framework established in *Olin Corp.*, 268 NLRB 573 (1984) and *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955). Applying this framework, the Board found that the joint grievance panel's proceedings were "fair and regular." On review, the Third Circuit did not take issue with the Board's reinstatement of the

Olin/Spielberg framework, but did take issue with the Board's application of it, finding that it did not adequately explain its decision in light of record evidence suggesting that the proceedings were not fair and regular.

Thus, the current Board reviewed the record and found that the proceedings were not fair and regular, and consequently, did not warrant deference. The Board agreed with the ALJ's findings that UPS violated the Act when it discharged the Employee in both June and October. Further, the Board reversed the ALJ's finding that the Employee's post-discharge conduct should preclude his reinstatement or limit his backpay. Specifically, the Board found that the ALJ had wrongly applied the standard for after-acquired knowledge of pre-discharge misconduct instead of the standard for evaluating post-discharge misconduct. As such, the Board found that the Employee was entitled to reinstatement and full back pay and expenses, plus interest until UPS makes him a valid offer of reinstatement.

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