"No, You Can't Wear That"—D.C. Circuit Sets Important Limitation On Union Apparel in the Workplace

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In the opening sentence of its recent decision, *Southern New England Telephone Co. v. NLRB*, the federal D.C. Circuit Court of Appeals stated: "Common sense sometimes matters in resolving legal disputes." If only that were always true in labor disputes.

The legal dispute in this matter centered on the fact that the company prohibited publicly visible employees—those who had direct contact with customers or the public—from wearing union t-shirts that said "Inmate" on the front and "Prisoner of AT$T" on the back. These shirts were part of a campaign by the union representing certain company employees to apply bargaining pressure in the midst of contentious contract negotiations. Notably, the company did allow the shirts to be worn by employees who were not publicly visible.

Common sense says it is less-than-ideal to have your customers and prospects think that you imprison your employees—metaphorically or otherwise.

Generally speaking, however, the National Labor Relations Act protects union members' rights to wear clothing with union logos and slogans in the workplace. In light of the NLRB's efforts to expand its reach into non-union workplaces, that same protection conceivably extends to articles of clothing linked to concerted activities relating to wages and working conditions, regardless of whether the clothing is worn by union or non-union employees.

Relying on that generalized protection, prior to this matter reaching the D.C. Circuit, the NLRB ruled that the company acted unlawfully by prohibiting employees from wearing the "prisoner" shirts, and suspending employees who refused to comply with the prohibition.

The D.C. Circuit, however, cited the "special circumstances" exception to the generalized protection favoring union apparel, and stated that this exception allows employers to stop employees "from displaying messages on the job that the company reasonably believes may harm its relationship with its customers or its public image." In applying that exception to the union's "prisoner" shirts, the

court reinforced the strength and significance of an employer's concerns of potential damage to customer relationships. Such concerns may outweigh employees' rights on the subject of union apparel.

All of that said, the bottom line here is that companies do have some rights when it comes to limiting union apparel in the workplace. However, companies must tread carefully when attempting to impose apparel rules because the "special circumstances" exemption will not apply in every case. Common sense eventually prevailed in this matter, but that happened only after a lengthy legal battle that lasted more than five years.