

ALERT

Eighth Circuit Upholds Businesses' Discretion to Control Their Own Brands

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In a recent decision, the Eighth Circuit held that a retailer could, consistent with the National Labor Relations Act, terminate an employee who displayed a political message on the company-branded uniform. In doing so, the court rejected the National Labor Relation Board's (NLRB) contrary conclusion and remanded the matter to the agency. The ruling is a significant victory for businesses and for retailers in particular, as it will help to preserve their ability to control their own brands. Wiley attorneys helped the court reach this outcome by filing an *amicus* brief on behalf of the Retail Litigation Center.

Below, we discuss the Eighth Circuit's decision and its implications for employers going forward.

The Eighth Circuit's Decision

The case, *Home Depot U.S.A., Inc. v. NLRB*, 158 F.4th 910 (8th Cir. 2025), concerned a retailer's workplace dress code that required all customer-facing employees to wear a company-branded work apron. Under that policy, employees were encouraged to personalize their aprons – but they were prohibited from using the apron to "promote or display religious beliefs, causes or political messages unrelated to workplace matters." This case arose from an employee who had adorned the company-branded work apron with a political message in violation of that policy and then refused to remove it when asked by management.

Section 7 of the National Labor Relations Act allows employees to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Although Section 7 does

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not purport to address employee clothing, the NLRB has long interpreted the statute as allowing employees to wear union insignia at work. But that interpretation is subject to an important limit. Under the “special circumstances” doctrine, courts have held that a company may lawfully ban union messages on publicly visible apparel on the job when the company reasonably believes the message may, among other things, harm its relationship with its customers or its public image.

The Eighth Circuit assumed without deciding that the employee’s display of a political message on the employee’s apron was Section 7 activity. The question was thus whether the retailer had shown “special circumstances” that would allow it to prohibit the activity.

The court found that there were special circumstances under a factual, context-dependent analysis. “In the aftermath of [several] police shootings,” the Eighth Circuit wrote, “there was nationwide debate over whether the BLM protests were an appropriate response when they resulted in alleged violence, destruction of property, and looting of businesses that had no relationship to the shootings.” The employee in this case had written “BLM” on the employee’s work apron and refused to remove it when directed by the employer. “Rightly or wrongly,” the Eighth Circuit said, “Black Lives Matter was seen as a controversial message associated with a political movement advancing an array of policy proposals.” And the NLRB had “failed to properly consider [the employee’s] BLM apron display in the context of this dispute at this location at this point in time.” As a result, the court explained, “[c]ases involving employers prohibiting employee displays regarding self-organization and unions – cornerstones of Section 7 protection – are readily distinguishable.”

The court emphasized several points as part of its special-circumstances analysis. *First*, observing that “context matters,” the court found that prohibiting this controversial message served to protect workplace safety because it would avoid entangling the company in a complicated political issue while “tensions were extraordinarily high.” *Second*, the court explained that prohibiting a politically divisive message on its aprons by customer-facing employees was a legitimate way for the retailer to protect its public image and to further positive customer relationships. And *third*, the court noted that the retailer had a reasonable, consistent dress-code policy that sensibly balanced employee expression with these workplace-safety and reputational interests. For example, the court noted that the retailer was primarily concerned with its own branded apron rather than employee speech more broadly, applied its policy consistently in a way to exclude “politically controversial messages,” and offered alternative messages that the employee could display that did not show support for a specific movement that the public perceived as controversial.

“In these unique circumstances,” the Eighth Circuit explained, the retailer satisfied the “special circumstances defense.” The court thus vacated the NLRB’s order that reached the opposite conclusion.

Implications for Employers

The Eighth Circuit’s decision protects a business’s discretion to control its brand and other public messaging. But that discretion is not absolute, and the court reiterated multiple times that the “special circumstances defense” is “narrow” and that the case before it was “unique.” Businesses should consider some guideposts established by the opinion:

- First, businesses should consider maintaining clear and consistent policies concerning employee dress. Here, the Eighth Circuit considered important to its analysis the retailer's "consistent apron policy" that specifically prohibited the display of "causes or political messages unrelated to workplace matters." It also found significant a record of "consistent enforcement of" that policy.
- Second, businesses should consider documenting their reasons for finding that an employee's dress violates company policy. "The demonstration of a legitimate and substantial business justification," the Eighth Circuit explained, "is the employer's burden." Thus, the Eighth Circuit's analysis relied on the facts and broader political atmosphere – as well as the reasons given during the employer's documented interactions with its employee – to conclude that the employer was acting consistent with its business judgment about potential risks to customer relations and safety.
- Third, businesses should consider how employee dress standards fit within their overall brand and communications strategy. The retailer in this case argued that its exercise of editorial discretion over the employee messages allowed on the work apron is protected by the First Amendment. Although the Eighth Circuit did not reach that issue in this case, future cases may more fully explore how company uniforms and dress policies are expressive.
- Fourth, businesses should be clear and consistent in their communications with employees, emphasizing that any instructions to comply with a corporate dress code or impose discipline be rooted in the company's legitimate and neutral business interests. Businesses should avoid the appearance and reality that they are making selective decisions based on the employee's particular expressive content.

While every case is different, observing these guideposts may help an employer avoid litigation or improve its ability to prevail on special-circumstances or other defenses.

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