
Court Refuses to Enforce an NLRB Order Finding Employer's Ban on T-Shirts with Union Message an Unfair Labor Practice

By Thomas P. Brady / Jul 14, 2015

In *Southern New England Telephone Company (AT&T) v National Labor Relations Board*, No 11-1099 (D.C. Cir., July 10, 2015), the United States Court of Appeals for the District of Columbia rejected the National Labor Relations Board's (Board) narrow definition of "special circumstances" and upheld AT&T's discipline of employees who wore t-shirts with a message that AT&T believed hurt its public image.

AT&T and The Communications Workers of America (CWA) were engaged in contentious contract negotiations. To put pressure on AT&T, CWA distributed t-shirts to the employees which read "Inmate" on the front and "Prisoner of AT&T" on the back. The t-shirts also contained several vertical stripes above and below the wording. When employees wore the "Inmate" t-shirts to work, AT&T instructed workers, who interacted with the public, to remove the t-shirts. AT&T issued one-day suspensions to 183 employees who refused to remove the t-shirts.

AT&T's personnel policies required employees, who had contact with the public, to present a professional appearance at all times and to refrain from wearing clothing with "printing and logos that are unprofessional or will jeopardize the Company's reputation." In the past, AT&T had not enforced the policy by disciplining employees who wore t-shirts with messages stating, "Support your local hookers" (with an image of a fishing lure); "The liver is evil. It must be punished"; "I'm not drunk. I'm just a race fan"; "If I want your opinion . . . I'll take the tape off your mouth!"; and "Out Of Beer. Life Is Crap."

The CWA filed a charge with the Board claiming the disciplines violated employees' Section 7 rights. AT&T responded by claiming the "special circumstances" doctrine which permits a company banning union messages on publicly visible apparel where the company reasonably believes the message may harm its relationship with its customers or its public image. A Board majority held that the "Inmate" t-shirt "would not have been reasonably mistaken for prison garb" and that "the totality of the circumstances would make it clear" that a technician wearing the t-shirt was an AT&T employee and not a convict."

The court noted that in previous decisions, "the Board has repeatedly recognized that an employer **that reasonably believes** its employees' union apparel at work may damage the employer's relationship with its customers or its public image may invoke the 'special circumstances' exception." The employer can meet this burden by "demonstrating a reasonable belief that the message may damage customer relations - even in the absence of evidence of actual harm."

The court noted that AT&T was concerned that a home in the area covered by the agreement had recently been the scene of a break in and three murders. AT&T worried that the "Inmate" t-shirts would lead the public to believe AT&T was hiring convicts and hurt AT&T's image. The court rejected that Board's argument that the "Inmate" t-shirt could not have been reasonably mistaken for prison garb, and would not cause fear or alarm among AT&T's customers. The court noted that AT&T could reasonably believe that the "Inmate" t-shirt could harm its public image.

The court also rejected the Board's argument that AT&T failed to uniformly enforce the ban on unprofessional clothing because it permitted some employees to wear unprofessional apparel in public. The court reasoned that the other t-shirts that were not banned "were not nearly as problematic as the 'Inmate' shirt." The court reasoned that "the ultimate question for the Board in any individual case is whether the employer has shown a reasonable belief that the particular apparel may harm the employer's relationship with its customers or its public image. The court refused to enforce the Board order against AT&T.

Employers who claim that "special circumstances" permit a rule that prohibit employers from wearing apparel with messages that might hurt the employer's public image should:

- Enact the rule on apparel before union activity or messaging becomes an issue;
- Narrowly apply the apparel rule, for instance as AT&T did by applying it only to employees who have contact with the public;
- Uniformly apply the apparel rule and do not confine it to only union activity;
- Ensure that the company can demonstrate that the company reasonably believes that the message contained on the apparel will damage the company's relationship with its customers; and
- If the company decides to discipline an employee for violating the apparel rule, consult counsel prior to announcing the discipline to ensure that the rule is enforceable as applied.

If you have any questions about this case or other issues regarding the National Labor Relations Board's rulings regarding protection of Section 7 rights, please contact Thomas P. Brady at (313) 965-8291 | tbrady@clarkhill.com, or another member of Clark Hill's Labor and Employment Practice Group.