

# Overly broad dress codes haunt employers

By Eli Kantor

With Halloween approaching, employers may wonder if they can regulate what employees may wear at work. What is wrong with an employer's dress code that prohibits clothing that displays obscene phrases or images, which may be racially, sexually or otherwise offensive? Or clothing that displays words or images that are derogatory to the company? According to the National Labor Relations Board, such a dress code is overly broad and interferes with employees' Section 7 rights under the National Labor Relations Act to engage in union activity or other protected concerted activity.

What do striped "prisoner shirts," "slave shirts" and baseball caps all have in common? According to the NLRB in three recent cases, employers may not ban them at work.

## Prisoner shirts

In *Southern New England Telephone Company d/b/a AT&T Connecticut and CWA*, 356 NLRB No. 118 (2011), the NLRB in a 2-1 decision held that AT&T violated Section 8(a)(1) and (3) of the NLRA by suspending employees who wore striped prisoner shirts to customer calls. AT&T had a dress code which regulated employee dress and grooming at work, which stated that certain clothing would be forbidden, including: "clothing with printing or logos that are unprofessional or will jeopardize our company's reputation."

During collective bargaining negotiations, the union distributed prisoner shirts. They were plain white T-shirts with "Inmate #" in relatively small print on the upper left front and on the back of the shirt, two sets of vertical stripes with "PRISONER OF AT&T" written in large letters on the back. AT&T ordered employees directly dealing with customers not to wear the striped shirts, citing possible confusion among customers as to whether they

were dealing with real prison inmates. Service technicians who wore these prisoner shirts on service calls after they were instructed not to were suspended.

The NLRB held that the ban was overly broad in that it constituted unlawful interference with employees' bargaining rights.

## Baseball caps

More recently, an NLRB administrative law judge held that an employer's policy prohibiting employees from wearing baseball caps displaying logos other than the employer's is an unlawful restriction of employee Section 7 rights in *Quad Graphics, Inc.*, No. 32-CA-062242 (July 31, 2013).

The employer implemented a work rule prohibiting employees from wearing baseball caps unless the company logo was displayed on the front. The employer raised three business justifications, each of which the ALJ rejected:

The employer contended that the policy was necessary for safety reasons to prevent hair from being entangled in machinery. The ALJ noted, "there is no evidence that a baseball hat with a union logo would not secure employees' hair to their heads preventing the hair from being caught in the employer's machinery." The ALJ also rejected the employer's argument that the ban was necessary to alleviate concerns about gang activity. Lastly, the ALJ dismissed the employer's argument that the logo ban was to facilitate employees' interactions with customers.

In conclusion, the ALJ held: "I find the company's hat policy forbids or prohibits employees from displaying union logos, or for that matter other protected messages, on their hats, if they chose to wear hats, thereby restricting employees from engaging in activity protected by the Act."

## Slave shirts

Thereafter, in *Alma Products Company*, No. 07-CA-89537 (Aug.

14, 2013), an NLRB administrative law judge held that an employer improperly disciplined a union employee for wearing a t-shirt that had the word "SLAVE" along with a picture of a ball and chain and the employee's time clock number.

The slave shirt had been created by the union 20 years earlier during prior bargaining periods and had been worn by various employees over the years on the picket line and during contract negotiations. When a new president took over in 2005, he noticed employees wearing the slave shirt. Finding the shirts to be racially offensive, he directed the human resources manager to draft a dress code policy, which was implemented in 2006. The dress code policy did not specifically reference the slave shirt,

but included general prohibitions against clothing that displayed: "vulgar/obscene phrases, remarks or images which may be racially, sexually or otherwise offensive and clothing displaying words or images derogatory to the Company."

After implementing the dress code, it appears that employees seldom wore the slave shirt to work. However, during difficult union contract negotiations in April 2012, a long-time employee and a supporter of the union began wearing the slave shirt to work. A supervisor gave the employee the option of removing the shirt or turning it inside out. When the employee refused to do so, he was sent home without pay. The union filed an unfair labor practice charge.

The company argued that the shirt's "slave" reference was offensive to African-Americans, and therefore it was entitled to discipline the employee for violation of its dress code policy. The ALJ, however, noted that the NLRB had repeatedly found employees to be protected even when they displayed messages that likened their working conditions to slavery. The company's dress code policy prohibiting words or images derogatory to

the company was overly broad since it interfered with employee's Section 7 rights, and the ALJ found it would prohibit employees from objecting to their working conditions and seeking the support of others to improve them.

## Takeaway

These three cases highlight the need for employers and their counsel in both union and nonunion settings to review their dress code policies to make sure that their policies are acceptable under the NLRA. While there is no bright-line test, employers can learn key lessons from these decisions. First, employers should use specific examples of acceptable and unacceptable clothing, rather than general statements that require interpretation. Second, if the workplace has different standards for those employees who deal with the public and those that do not, those standards should be clearly set forth and supported by a business justification. Third, if the policy contains a general statement that prohibits derogatory words or images on clothing, the employer needs to include a disclaimer that all communications protected by Section 7 concerning wages, hours and working conditions are permissible under the dress code. Lastly, the dress code policy should be enforced in a uniform and consistent manner, so that all dress code violations are treated similarly regardless of the employee and supervisor involved.

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*Eli M. Kantor has extensive experience as an attorney in private practice. He represents employers and employees in all aspects of labor, employment and immigration law. He can be reached at (310) 274-8216 or at [eli@elikantorlaw.com](mailto:eli@elikantorlaw.com).*

