www.morganbrown.com

CLIENT ALERT: National Labor Relations Board Rules Employer Violated the Law in Prohibiting Employee from Displaying Black Lives Matter Symbol on Work Uniform

On February 21, 2024, in a decision that provoked strong dissent, the National Labor Relations Board (the "Board") ruled in *Home Depot USA, Inc. and Antonio Morales Jr.* that Home Depot violated the National Labor Relations Act ("NLRA") by prohibiting an employee from wearing a "BLM" (Black Lives Matter) marking on his work apron and constructively discharging him after he refused to remove it.

The NLRA protects employees, union and non-union, when they engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Concerted activity encompasses those circumstances where "individual employees seek to initiate or to prepare for group action, as well as individual employees bringing group complaints to the attention of management" when they seek to improve the terms and conditions of employment or otherwise improve their lot as employees. Concerted activity generally exists where the activity is engaged "with or on the authority of other employees, and not solely by and on behalf of the employee himself."

Additionally, when an individual employee's actions are related to a prior or ongoing group of protests, the activity is considered a "logical outgrowth" of the prior collective concerted activities and is protected under the NLRA.

In ruling that Home Depot violated the NLRA when it directed an employee to remove a "BLM" marking from his work apron, the Board clarified what is considered a logical outgrowth of prior concerted activities.

The Home Depot "Logical Outgrowth" Decision

The NLRB described the background facts as follows. Home Depot operated a store in New Brighton, Minnesota (the "Store"), approximately six-and-a-half miles from where George Floyd was murdered in May 2020. The week following George Floyd's death, several employees at the Store wrote "BLM" on their aprons.

Approximately three months later, in August 2020, the NLRB found that a Store employee, ("Morales"), engaged in what was considered concerted activities for the purposes of mutual aid and protection related to racial policies and practices at the Store. The activities included displaying the "BLM" marking on his apron, writing emails and engaging in conversations with fellow Store colleagues regarding what he believed was discrimination and harassment occurring among employees and supervisors within the Store.

Morales continued to wear the "BLM" letters on his apron until February 2021, when he was asked by

management to remove them because it was not part of the standard Home Depot uniform and in violation of the policy banning political activity and/or messaging. Morales refused to remove the marking and expressly linked his refusal to Home Depot's failure to take effective action to address employees' prior concerted complaints about racially discriminatory conditions at the Store. Morales ultimately resigned after he was not allowed to work until he removed the "BLM" letters from his uniform.

In its decision, the Board focused on the August 2020 time frame, and what it determined were protected concerted activities for the purpose of mutual aid or protection to improve the conditions of employment, and ruled that Morales' display of BLM letters on his apron in February 2021 was the logical outgrowth of those prior concerted activities by Store employees.

Home Depot contended that they were exempt from this protection and enumerated various exceptions including special circumstances, public image, employee safety and employee dissention. However, the Board determined that none of these exceptions applied and further declared that the exercise by employees of their rights under the NLRA includes union-button wearing, and does not turn on the pleasure or displeasure of an employer's customers. Additionally, the Board declared that "in a store full of personalized aprons, customers are far more likely to assume that the markings on any particular employee's apron reflect the sentiments of the employee wearing it."

The Board made other relevant determinations, including:

1. Requiring Home Depot to permit "BLM" markings does not violate the First Amendment because accommodating the employee's message does not affect Home Depot's speech, as Home Depot was not speaking when employees personalize their aprons;
2. Requiring Home Depot to permit "BLM" markings does not violate federal trademark laws because in these circumstances, there is no risk that the public will believe that a small, hand-drawn "BLM" marking was part of Home Depot's trademarked apron;
3. Home Depot applied its facially neutral dress code and apron policy in violation of the NLRA and;
4. Home Depot constructively discharged Morales when he was precluded from working until he removed the "BLM" marking.

Final Note for Employers Going Forward

Employers have been permitted to lawfully discipline an employee's use of obscene and offensive language in a company newsletter, as well as for wearing a derogatory t-shirt. In addition, the most significant aspect of this ruling may be that the Board used the employee's challenges of alleged racial discrimination in the workplace (which would always be protected), reached to connect these actions to be "concerted" (on behalf of others, rather than merely himself), and then on that basis, permitted the employee to display a political message on his work uniform.

There is another case currently pending before the full Board that was decided on narrower grounds by an Administrative Law Judge ("ALJ"), *Whole Food Markets,* Cases 01-CA-263079, et al. (Dec. 20, 2023), where the ALJ held that "the General Counsel has failed to establish, by a preponderance of

the evidence, the required nexus between the donning of BLM messaging by [Whole Foods] employees and a goal related to their terms and conditions of employment or their lot as employees—a nexus that is necessary to bring such activity within the 'mutual aid and protection' requirement under Section 7." It is possible the Board in the *Whole Foods* case may further delineate work uniform rules where messages are purely political and not necessarily connected to prior claims of racial discrimination in the workplace. Indeed, employers are right to be concerned that almost any political message may be deemed to be tied into a workplace complaint and must therefore be permitted by an employer.

For now, if an employer wishes to lawfully ban certain messages or markings in order to remain neutral to avoid political controversy, it must justify the restriction by showing that the messages or markings adversely affect its business.

In this context, it is important to note that symbols (such as the "BLM" marking), can accumulate meaning in a workplace over time, as events occur and employees respond. Here, the Board determined that based on events on the ground at the Store, the "BLM" symbol accumulated meaning relevant to working conditions and therefore constituted protected activity.

MBJ will continue to monitor these issues for any forthcoming guidance. In the meantime, please contact your MBJ attorney with any questions you may have regarding this recent decision.

Jeffrey Collins, who is a partner with Morgan Brown & Joy, LLP and Nicole Davies, who is an associate, authored this client alert. They may be reached at (617) 523-6666, or jcollins@morganbrown.com or ndavies@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was prepared on February 29, 2024.