

Alert

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Fifth Circuit Refuses to Enforce the NLRB's Ban on Uniform Requirements

Executive Summary

The Fifth Circuit's decision in *Tesla, Inc. v. National Labor Relations Board* is a victory for employers seeking to enforce their uniform requirement without fear of running afoul of federal labor laws. The decision affirms an employer's ability to enforce its uniform policies so long as the content of the policy is neutral, non-discriminatory, and gives employees the freedom to attach any expressive union insignia to their work uniform.

Facts

Section 7 of the NLRA provides that employees have the right to self-organize, form, join, and assist labor organizations and engage in concerted activities for collective bargaining. The NLRA applies both to union and non-union employers. The National Labor Relations Board (NLRB) is the government agency tasked with interpreting and enforcing the NLRA.

This case arises out of an unfair labor practice charge filed by the UAW (United Auto Workers), accusing Tesla of violating employees' Section 7 rights with its uniform policy requiring employees to wear assigned uniforms (black cotton t-shirts with Tesla logos). Employees were initially allowed to wear black cotton t-shirts with union logos printed on them, but Tesla reversed its position when the embossed union logos damaged a number of new car paint jobs. As a result, Tesla threatened to send home any employee for wearing anything other than assigned uniforms but allowed employees to place as many union stickers or other union paraphernalia on their Tesla uniform as they wished. The UAW argued that Tesla was violating the employees' rights to unionize under the National Labor Relations Act (NLRA) by not letting them wear union shirts to work as part of their union organizing efforts.

At the center of this lawsuit is Tesla's uniform policy, which states: "[i]t is mandatory that all Production Associates and Leads wear the assigned Team Wear."¹ As part of this policy, Tesla employees were not allowed to wear any non-uniform attire, including union shirts, but were allowed to affix any number or size of union stickers to their uniforms.

Importantly, Tesla argued that its uniform policy "was neutral and [employees] could display union insignia freely – just not by wearing a union shirt." Tesla had two main justifications for its uniform policy:

1. Reduction of damage to their vehicles caused by non-uniform attire during the production process; and
2. Visual management of their workforce – a way of tracking that employees are in the correct work areas based on their shirt color.

The NLRB Decision

In a 3-2 decision, the National Labor Relations Board rejected Tesla's arguments, finding that when an employer interferes in *any way* with its employees' rights to display union insignia, the *employer must prove special circumstances* that justify the interference.² The Board held that Tesla had not



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proven such special circumstances to justify its prohibition against employees wearing union shirts. **In other words, the NLRB's decision treats all employer-required uniforms as presumptively unlawful unless employers could show that special circumstances justified their uniform requirement.**³ The Board majority opinion also overruled *Wal-Mart Stores, Inc.*, 368 N.L.R.B. No. 146 (2019), which assessed a facially neutral rule limiting the size and appearance of union buttons and insignias that employees could wear and held it should be subject to a less restrictive standard. Overruling *Wal-Mart* meant the Board would subject all limitations on union insignia to the special circumstances test.

The Fifth Circuit Decision

In a blow to the NLRB, the Fifth Circuit refused to enforce the Board's decision and sided with Tesla. *First*, the Fifth Circuit rejected the cases cited by the Board, such as *Republic Aviation*, as too dissimilar to *Tesla*. In *Republic Aviation*, the employer "prohibited an employee from passing out union application cards during lunch and discharged three other employees for wearing union steward buttons."⁴ The U.S. Supreme Court found the company violated the employees' Section 7 rights while noting the NLRB must balance the "undisputed right of self-organization ... and the equally undisputed right of employers to maintain discipline in their establishments."⁵

Whereas the employer in *Republic Aviation* banned employees from wearing any union buttons, Tesla permitted employees to wear any union sticker they wanted. Furthermore, the employees in *Republic Aviation* could not solicit employees for unionization during lunch hours or other non-working time. In contrast, employees at Tesla could wear union insignia during their working time. Thus, Tesla's uniform policy did not place a prohibition on *union* insignia or limitations on the solicitation of employees during work and non-work hours; it simply prohibited *any* attire, regardless of logo, that could damage vehicle paint. While the court clarified that *Republic Aviation* is still good law, the Fifth Circuit found that *Republic Aviation* and progeny cases were too dissimilar to be directly applied to Tesla in this case.

Additionally, The Fifth Circuit joined the DC Circuit in "refusing to enforce a prohibition of nondiscriminatory policies under which employees are permitted to 'adorn' their company uniforms with union insignia." Stated differently, the Fifth Circuit will enforce an employer's uniform requirement that does not discriminate against unions, where employees can affix their work uniforms with union insignia.⁶

Second, the Fifth Circuit noted the NLRB's lack of balance in creating an overly broad presumption *against* all uniform requirements. The U.S. Supreme Court has held the NLRB must balance the competing interests of the employees to self-organize and the right of employers to maintain discipline in their establishments.⁷ Here, however, the NLRB failed to strike such a balance and swung too far in favor of employees. *Third*, the Circuit Court made it clear that such a far-reaching rule effectively invalidating all uniform requirements across the nation was not Congress's intention because if it intended to give the NLRB such authority, it would have given more explicit authorization to the NLRB.⁸

In conclusion, this decision by the Fifth Circuit is an important one that supports the rights of employers to enforce their uniform requirements in the workplace. Employers seeking to enforce such uniform policies should ensure their policies are content-neutral, do not discriminate against any protected affiliations (e.g., unions), are enforced consistently, and give employees the freedom to affix some form of union insignias to their work uniforms.

¹ Tesla's Team Wear Policy also states: "On occasion, Team Wear may be substituted with all black clothing if approved by supervisor. Alternative clothing must be mutilation free, work appropriate, and pose no safety risks (no zippers, yoga pants, hoodies with hood up, etc.)."

² 371 NLRB No. 131 citing *Republic Aviation Corp v. NLRB*, 324 U.S. 793 (1945).

³ The special circumstances test is derived from *Republic Aviation Corp v. NLRB*. The case

affirmed that employees have a protected right under the NLRA to display union insignia, and any limitation on such a right is presumed invalid unless the employer can show special circumstances exist to interfere with such a right. In the past, the NLRB has clarified that such special circumstances include situations where the display of such insignia might “jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established as part of its business plan, through appearance rules for its employees.” *Pac. Bell Tel. Co.*, 362 NLRB 885 (2015).

⁴ *Republic Aviation*, 324 U.S. at 795.

⁵ *Id.* At 797-98.

⁶ Citing *World Color (U.S.A) Corp. v. NLRB*, 776 F.3d (D.C. Cir. 2015).

⁷ Citing *Republic Aviation Corp v. NLRB*, 324 U.S. 793 (1945).

⁸ Citing the recent case of *West Virginia v. EPA*, 142 S. Ct. 2587, 2611-14 (2002).
