

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 28, 2012

TO: Rhonda P. Ley, Regional Director
Region 3

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: New York State Public Employee Federation
Case 3-CA-083205

This case was submitted for Advice as to whether the Employer violated Section 8(a)(1) of the Act by prohibiting the attorneys in its legal department from wearing t-shirts in the workplace, including those with a pro-union message. We agree with the Region that the Employer did not violate the Act because its interest in maintaining a professional image within the legal department is a “special circumstance” sufficient to justify this narrowly-tailored restriction on the attorneys’ Section 7 rights.

FACTS

New York State Public Employee Federation, the Employer, is a labor union representing employees in the public sector. The Union, the United Steelworkers Local 9265, represents all of the Employer’s non-managerial employees, including attorneys, field representatives, health and safety specialists, contract administration specialists, and various administrative and support staff personnel. The parties’ most recent collective-bargaining agreement expired in June 2011, and the parties have been engaged in negotiations for a successor agreement since May 2011.

During the course of these negotiations, unit employees have engaged in a variety of protected concerted activities that publicized their struggle to obtain a successor agreement. Employees in the Employer’s headquarters have, for example, displayed Union signs on various Employer bulletin boards, on their desks, and on their car dashboards. Unit employees have also worn badges bearing the Union insignia and various messages about the labor dispute. All of this activity was permitted without incident.

In May 2012,¹ the Union distributed t-shirts for its members to wear to work on May 17 in support of a scheduled negotiation session. These bright red t-shirts bore the message “Unionism Begins at Home” over the Union’s name on the front, with “PEF Staff” on the back. Nearly all of the bargaining-unit members wore the t-

¹ All subsequent dates are in 2012.

shirt to work on May 17, including the legal department's two support staff and five of the six unit attorneys in the legal department.² Two additional attorneys who work in a separate department also wore the Union t-shirt. That morning, the Employer's General Counsel sent an email to all six lawyers in the legal department stating that "t-shirts are not acceptable attire in this office. Please do not wear them while you are in this office." After this email circulated, all but one of the attorneys in the legal department removed their t-shirts; the attorney who continued to wear her shirt was on Union release time to participate in the bargaining session.³ When this attorney asked for clarification on the issue, the General Counsel emphasized that her email regarding the t-shirts did not constitute discipline and was not an express order. No one was disciplined for wearing the Union t-shirt.

The legal department serves as the general law office for the Employer. Its clients are the elected officers of the Employer union as well as individual union members. According to the Employer, these clients frequently visit the legal department, often without a scheduled appointment. The Employer attempts to present its legal department in the image of a private law firm by, *inter alia*, housing the department in a suite of offices that is physically separate from other departments and providing gold nameplates on each lawyer's office door. Moreover, all parties agree that the attorneys in the legal department are expected to wear professional "business attire," although there is no written dress policy. The Employer asserts that this business attire policy is critical to its professional image. Although the Employer acknowledges limited circumstances under which it allows its legal-department lawyers to dress casually—for example, when they are returning from a long car trip—it also provided examples where it enforced the professional attire policy in circumstances that did not involve union insignia.⁴ No one has ever been disciplined for violating the dress policy.

ACTION

We conclude that the Employer's request that its attorneys not wear t-shirts, including Union t-shirts, in the legal-department office did not violate the Act. The Region should dismiss the charge, absent withdrawal.

Although employees have a presumptive right to wear union insignia while at work, an employer may be able to demonstrate "special circumstances" sufficient to justify a prohibition of or limitation on this conduct.⁵ "One of the special

² The sixth unit attorney, a probationary employee, wore a small union lapel pin in lieu of the t-shirt.

³ The two administrative staff in the legal department and the two lawyers outside the legal department wore their t-shirts all day without incident.

⁴ Specifically, the Employer cited an incident in February when the General Counsel reminded an attorney of its business attire policy because the attorney wore jeans to the office on a Friday. The Employer also asserts that in March a newly-hired attorney asked about the dress code and was informed of the business attire policy.

⁵ See generally *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–04 (1945).

circumstances that has been recognized [by the Board] is where the display of union insignia unreasonably interferes with a public image which the employer has established, as part of its business plan, through appearance rules for its employees.”⁶

Here, the Employer has a legitimate business interest in maintaining a professional image for its legal department, and a cornerstone of this image is its requirement that the lawyers in the department dress in professional attire. The Employer has narrowly tailored its dress code policy in order to maintain its professional image while infringing as little as possible on its employees’ Section 7 rights. To that end, the Employer has only enforced the business dress policy against t-shirts with regards to the attorneys in the legal department, while allowing the administrative legal department staff and attorneys in other departments to wear the Union t-shirts. And the Employer’s policy does not prohibit the legal-department attorneys from wearing other forms of Union insignia, such as badges and lapel pins, or from displaying Union posters on their desks.

Accordingly, the Employer has demonstrated special circumstances justifying its request that its attorneys not wear t-shirts while in the legal department offices.⁷ The charge should be dismissed, absent withdrawal.

/s/

B.J.K.

⁶ *Produce Warehouse of Coram*, 329 NLRB 917, 918 (1999). *See also, e.g., W San Diego*, 348 NLRB 372, 373 (2006) (wearing union button in public areas would have interfered with employer’s use of all-black server uniform to create special atmosphere in hotel); *Langer Security Associates*, Cases 21-CA-35324, et. al, Advice Memorandum dated February 9, 2004 at pp. 4–5 (employer could limit wearing of union insignia on security guard uniforms because of potential interference with message of authority and public image as law-enforcement officers). *Cf. BellSouth Telecommunications*, 335 NLRB 1066, 1069–71 (2001) (uniform policy requiring employees to wear uniform with union logo was lawful where employer’s objective was to present image of highly-trained and -skilled workforce), *enf. denied* 393 F.3d 491 (4th Cir. 2005).

⁷ We agree with the Region that the Employer’s other asserted defense, that wearing the t-shirts was inconsistent with the duty of loyalty owed by attorneys to their clients under the New York Rules of Professional Conduct, is unpersuasive.