

Federal Judge Rules Grocery Store Did Not Retaliate Over Facemask Dress Code Policy

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On January 23, 2023, a Massachusetts federal judge ruled that a group of former employees had not shown that a grocery store chain unlawfully retaliated against them for opposing a dress code policy that prohibited the wearing of facemasks with “Black Lives Matter” messaging.

In the case, *Kinzer v. Whole Foods Market, Inc.*, U.S. District Judge Allison Burroughs granted summary judgment to the company finding “that no reasonable jury could conclude by a preponderance of the evidence” that the reasons for discharging the employees “were pretextual and motivated by discriminatory animus.”

Three former employees raised retaliation claims under Title VII of the Civil Rights Act of 1964, alleging they were wrongfully discharged for opposing the company’s allegedly discriminatory dress code policy, which prohibits employees from wearing clothing with “any visible slogan, message, logo or advertising,” unless it was branded with the company logo. The employees—who were all discharged after repeatedly refusing to stop wearing facemasks that violated the dress code—alleged that the policy had not been consistently applied and was applied more harshly to them because their masks displayed “Black Lives Matter” messages.

However, the judge sided with the company, finding “there is little evidence in the record to refute” the company’s “legitimate business explanations for its strict enforcement of its dress code policy against the wearing of Black Lives Matter masks and its termination of Plaintiffs as a result.”

The company contended that it began more closely scrutinizing employee dress amid the COVID-19 pandemic when in April 2020, it began requiring all employees to wear a facemask or face covering while in the workplace and due to a coordinated increase in dress code violations by its employees around political and controversial issues between April 2020 and June 2020. According to the decision, the company maintained that when it did begin to strictly enforce the policy, it did so “uniformly against all employees, regardless of whether the employees had filed civil or administrative charges, their race, or the messages on their attire.” Notably, the judge stated that the former employees had “not identified any similarly situated employee who violated the dress code policy in a similar manner” and who “was treated differently.”

The judge further ruled that the quick timing of their discharge to the employees' refusal to stop wearing the masks was not sufficient to show discriminatory intent because there was evidence that the company had begun noting the dress code violations by the former employees "before they even began engaging in protected conduct."

The decision comes after the judge had previously dismissed other discrimination claims raised by the employees, a decision that was upheld by the U.S. Court of Appeals for the First Circuit Court. The appellate court noted that the COVID-19 pandemic had provided an opportunity for employees to display messages on their face coverings and that the company justifiably "did not want to allow the mass expression of a controversial message by employees in their stores."

Additionally, the legality of employers' rules that prohibit wearing the "Black Lives Matter" messages in the workplace is continuing in litigation before the National Labor Relations Board (NLRB). The district court decision comes amid several open NLRB cases alleging that the firings at issue in the case and others violated workers' rights pursuant to Section 7 of the National Labor Relations Act to engage in protected concerted activity. The issue is of particular concern as the NLRB general counsel in 2021 declared that expressions of support for civil rights issues can be "inherently" concerted activity protected by the law.

Key Takeaways

With employees across the United States increasingly expressing opinions on social issues in the workplace, the *Kinzer* decision is an example of how employers may enforce neutral and uniformly apply dress code policies that require employees to wear clothing with only company messages. The judge found that the company disciplining the employees for their failure to adhere to the dress code was a legitimate, nondiscriminatory business reason and that the employees had failed to point to any evidence that there was some sort of discriminatory intent behind the enforcement of the policy.

This case highlights for employers why consistent enforcement of workplace policies can be important. Employers wishing to control messages in the workplace may want to review the consistency with which they enforce such policies, especially when it is to prohibit important messages that employers may agree with in principle.

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National Law Review, Volume XIII, Number 51

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