

FEATURE STORY

Context Can Justify Violation of Employee Rights

By Andrea L. McDonald – April 22, 2026

A federal appellate court ruled that an employer’s dress code prohibiting “Black Lives Matter” insignia in the wake of George Floyd’s murder was a justified restriction on employee rights. Vacating the contrary decision of the National Labor Relations Board (NLRB), the court found the employer established special circumstances supporting the uniform policy based on the store’s proximity in time and location to the murder and surrounding civil unrest. [ABA Litigation Section](#) leaders and litigators in this area suggest that practitioners heed the context-driven approach to the “special circumstances” doctrine.

Challenges to Uniform Policy

In the spring of 2020, George Floyd’s murder at the hand of Minneapolis police officers ignited a wave of social uprising and nationwide protests and counter-protests, marking a period of civil unrest. Against this backdrop, Home Depot management instructed an employee to remove “BLM” (Black Lives Matter) markings from his work apron or not to return to work. In [Home Depot U.S.A., Inc. v. NLRB](#), the U.S. Court of Appeals for the Eighth Circuit backed Home Depot’s uniform policy as a justified, reasonable business decision considering the store’s location a few miles from the murder site.

Although the NLRB previously found the BLM apron ban violated employees’ right to engage in concerted activity to protest racial injustice in the workplace, the Eighth Circuit held that any such violations were excused by the “special circumstances” doctrine. The Eighth Circuit emphasized a context-driven approach to the doctrine, taking into account the time, place, and nature of employer restrictions. The court vacated the NLRB’s decision and remanded for further proceedings.

Racial Inequity Inside and Outside the Workplace

As part of its company-wide uniform policy, Home Depot’s retail employees are required to wear the signature orange apron. Home Depot encourages its employees to customize their aprons, using pins, doodles, or other personalization. However, the uniform policy expressly prohibits use of the aprons to promote “religious beliefs, causes or political messages unrelated to workplace matters” and instructs that “associate dress must not present a safety hazard.”

Following George Floyd’s murder, several employees at the Home Depot store in New Brighton, Minnesota—located less than seven miles from the murder site—added “BLM” markings to their aprons. One of these employees also became particularly involved in reporting a coworker’s discriminatory conduct, joining others in submitting complaints about blatant racial discrimination against himself, other associates, and customers. Despite management’s coaching efforts, the conduct continued, coming to a head in February 2021, when the Black History Month display in the store breakroom was vandalized, not once, but twice.

Frustrated, the employee called for further action, asserting “our fellow coworkers of color need to feel the support from the store they work for.” In response, local management met with the employee and conducted an internal investigation. During the meeting, the store manager noticed the employee’s apron and asserted that BLM symbols violated the uniform policy. Home Depot had previously banned “Blue Lives Matter” and “Thin Blue Line” messages on aprons. The store manager reasoned that allowing BLM insignia would necessitate tolerating other symbols such as the swastika. He encouraged the employee to use alternative messaging to support racial equality and respect for all. The district manager and district human resources manager echoed this sentiment. The employee resisted and claimed that alternative messaging was ineffective, citing both the lack of change following George Floyd’s murder and management’s insufficient response following the destruction of the Black History Month display and reported discrimination.

After these meetings, Home Depot notified other employees that BLM insignia violated the dress code and must be removed from aprons. The employee was told that he would not be permitted to work with “BLM” on his apron. Rather than remove the marking, the employee resigned and filed unfair labor practice claims with the NLRB.

Right to Engage in Concerted Activity

After investigating the employee’s charges, general counsel for the NLRB filed a complaint against Home Depot alleging violations of sections 7 and 8 of the [National Labor Relations Act](#) (NLRA). [Section 7](#) of the NLRA establishes employees’ rights to “self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” [Section 8\(a\)\(1\)](#) prohibits employers from interfering with the rights established under section 7. In the complaint, general counsel focused on Home Depot’s application of the policy and classification of “BLM” as a prohibited political symbol in order to thwart employee efforts to protest workplace conditions.

The administrative law judge (ALJ) held that, by writing “BLM” on his apron, the employee was not engaging in “concerted activities” directed to “mutual aid or protection” in the workplace. The ALJ noted the employee began displaying the marking prior to reported discrimination and the vandalism of the Black History Month display. The ALJ found there was insufficient evidence that wearing “BLM” related to “group action in the interests of the employees.” Because the employee “created and maintained the display at a location only six and a half miles from where George Floyd was murdered by a Minneapolis police officer and close in time to the officer’s trial and widescale protests near the store,” the message could “only reasonably be understood as relating to those issues, rather than to any labor dispute.” Thus, the ALJ found that Home Depot had not violated any section 7 rights by enforcing its uniform policy.

The NLRB disagreed in a 3–1 decision, finding that the employee exercised his right to join with coworkers in expressing dissatisfaction with racial equality in the workplace. The employee’s refusal to remove the BLM marking from his apron was protected activity. The NLRB majority rejected Home Depot’s argument that its prohibition of BLM insignia was justified by special circumstances due to safety risks and damage to Home Depot’s public image, citing lack of support.

On appeal, the Eighth Circuit addressed only the NLRB’s application of the “special circumstances” doctrine.

Traditional Application of the Special Circumstances Doctrine

The special circumstances doctrine arose from employers’ need to restrict union solicitation that interfered with business operations. In its 1945 decision in [Republic Aviation Corp. v. NLRB](#), the U.S. Supreme Court upheld the NLRB’s finding that an employer violated section 8 by prohibiting union solicitation on company property outside of work hours. The Court established that, while blanket no-solicitation rules impede employees’ right to organize, “special circumstances” may make limited restrictions necessary to maintain production efficiency, workplace discipline, or safety.

The NLRB later expanded the special circumstances doctrine to employer bans on union displays on publicly visible uniforms. Adopting the NLRB’s rules, the Supreme Court agreed that employers could restrict display of union insignia if the employer carried its burden to establish workplace disruption, danger to employees or customers, or unreasonable interference with the company’s established public image. The Court and the NLRB have also emphasized that uniform policies should not target protected activity by prohibiting displays supportive of employee rights while allowing others.

When considering a special circumstances defense, the NLRB or courts balance the employees' right to engage in protected conduct with the employer's stated need to limit that conduct. However, the Court established early on, for example in [Hudgens v. NLRB](#), that the NLRB, not the courts, is responsible for defining the proper balance between employer justifications and invasion of employee rights.

NLRB's Misinterpretation of Precedent Allows Closer Review

Before the NLRB, Home Depot maintained that its actions were justified under this special circumstances doctrine because it reasonably believed display of BLM insignia on customer-facing uniforms would jeopardize the company's relationship with customers and its public image. The NLRB rejected this argument, finding that Home Depot failed to establish a uniform policy allowing a ban of BLM insignia. The policy encouraged apron personalization, and Home Depot allowed display of other potentially controversial causes such as LGBTQ pride. The NLRB also rejected Home Depot's assertion that the display placed employee and customer safety at risk. Finding the contention speculative, the NLRB rested its decision on lack of evidence of actual harm. For instance, there was no evidence that employees experienced negative reactions or violence during the several months where they displayed "BLM" on their aprons.

Despite the deference typically afforded the NLRB, the Eighth Circuit vacated the decision because the majority's "conclusions rest on erroneous legal foundations." In particular, the Eighth Circuit determined that the NLRB based its decision on inapplicable precedent involving employer bans targeting the substance of the message (i.e., prohibition on all displays supportive of unions in the workplace). Here, Home Depot's policy, as applied, was not a ban on the message underlying the BLM symbol. Rather, it operated as a restriction on the means of expressing that message. Home Depot had encouraged the employee to support racial equality through alternative, less politically charged displays. By failing to appreciate this distinction, the court reasoned, the NLRB viewed the "special circumstances" analysis through the wrong lens.

Proper Balance of Employer and Employee Rights Cannot Ignore Reality

The Eighth Circuit then addressed the NLRB's rejection of Home Depot's "special circumstances." First, the court found that Home Depot established a legitimate concern regarding public perception. Disagreeing with the NLRB's assertion that Home Depot was "picking and choosing" which social causes it allowed on apron displays, the court reemphasized that Home Depot's limit applied only to a particular expression, not the underlying message, and that the tailored restriction was rationally supported.

The court explained that, at the time, Black Lives Matter was widely associated with a political movement and tied to certain policy reforms. Considering the current, local tension surrounding the movement, Home Depot established a justified business reason for prohibiting the BLM symbol while encouraging other displays supporting racial equality. The policy had been evenly enforced as Home Depot also prohibited display of “Blue Lives Matter” and “Thin Blue Line” on its aprons. The court asserted that the NLRB majority “improperly applied precedent on balancing public image interests, effectively prohibiting an employer that provides equal alternatives and has legitimate concerns about customer perception from exercising reasonable oversight of customer-facing interactions.”

Next, the Eighth Circuit rejected the NLRB’s conclusion that there was no “evidence of nonspeculative, imminent risks” to support Home Depot’s asserted safety concerns. The Eighth Circuit found this reasoning “blinks reality.” The court explained, “the activity in dispute was not a display at a random location in the United States; it was not at a normal moment in time; and it was not a generic message for equal rights or employee protection.”

The court held that the civil unrest surrounding the store justified Home Depot’s concerns. In February 2021, when management ordered the employee to remove BLM from his apron, local tension was rising as trial approached for the officer charged with George Floyd’s murder. Furthermore, evidence that other employees responded with “Blue Lives Matter” apron displays supported Home Depot’s safety concerns. The court cautioned that “it is not the province of the Board or of this court to substitute its judgment for that of management so long as the exercise is reasonable and does not interfere with a protected purpose.” According to the court, the NLRB overstepped this boundary by failing to properly balance the competing interests underlying Home Depot’s need “to preserve the store’s apolitical face to customers and safeguard employee safety in a risk-filled environment.” The court therefore vacated the NLRB’s opinion and order and remanded for further proceedings.

***Home Depot* Both Narrows and Broadens the Scope of Special Circumstances Doctrine**

Litigators hold differing views on the opinion. “The Eighth Circuit emphasized the narrow scope of the special circumstances doctrine, yet the court leaned its decision on generalizations,” remarks [Tiffani E. Mims](#), Chicago, IL, Co-Chair of the Litigation Section’s [Mental Health & Wellness Committee](#). She agrees with the court’s observation that precedent requires more than “lip service on the balancing of interests” and “needed to be remanded” for further consideration of the context.

“By focusing on the context—including the timing, location, and general public sensitivities—the Eighth Circuit in *Home Depot* expanded the scope of the analysis for evaluating a ‘special circumstances’ exception,” comments [Ashley Kutz Kelley](#), Charleston, SC, member of the [ABA Tort Trial & Insurance Practice Section’s Employment & Labor Law Committee](#). She adds: “While the basic tenet favoring employees’ ability to display union insignia clearly remains, the Eighth Circuit recognizes the importance of considering the facts and context of workplaces and employees, who function within communities who experience and live in the same context.”

However, on this point, Mims found the court’s analysis “a little disingenuous.” She explains, “the court emphasized this is a narrow exception to be applied narrowly, but then it did not really get into the specifics.” For example, the court relied “on a generalized extension of what ‘BLM’ means” and did not consider “the personal implications to the employee” when “the [uniform policy] encourages personalization.” Mims notes further that the court also failed to engage with other contextual factors such as the impact of the global pandemic on the number of in-store customers, the size of the company and overall effect on its business, or the visibility of the “BLM” marking and the fact that the employee wore the mark on his apron for several months before any action was taken. “I hope to see more of this fleshed out on remand,” she states.

Practical Application of a Context-Driven Approach

“From a practical perspective, employers and human resources teams who establish neutral and non-discriminatory dress code policies and consistently enforce them are better positioned to mitigate risks,” advises Kelley. She states that companies with consistently applied uniform policies “may be given wider latitude to restrict employee dress when, in certain contexts, limitations are needed to avoid jeopardizing safety or security.”

Mims notes that this becomes more difficult when introducing uniform personalization. “The upside of personalizing uniforms and having that opportunity to engage with employees and customers on that level should be weighed against the risks.” While the *Home Depot* “test is so tethered to this particular situation that it might be difficult for employers and litigators to lean on it with certainty,” Mims believes that “the Eighth Circuit test is workable if you put in the work.” Practitioners and their employer clients “should be aware of ‘exceptional’ circumstances and related hot-button issues. For example, the pandemic, vaccinations, ICE, Iran. If employers allow personalization on uniforms,” she says, “these issues will constantly arise.”

[Andrea L. McDonald](#) is an associate editor for Litigation News.

Related Resources

- Pablo Orozco, "[From Risk to Resilience: Rethinking DEI to Avoid Employment Litigation](#)," *Corp. Couns.* (Feb. 26, 2026).
- [Noble v. Cincinnati & Hamilton Cnty. Pub. Library](#), 112 F.4th 373 (6th Cir. 2024).
- [Frith v. Whole Foods Mkt, Inc.](#), 38 F.4th 263 (1st Cir. 2022).