



## Fourth Circuit Rules Employer Must Enforce Dress Code Evenhandedly

November 23, 2011

**NLRB v. White Oak Manor, 11-CA-21786 (reported at 355 NLRB No. 211) (4th Cir., October 28, 2011)**

On October 28, 2011, the Fourth Circuit granted the National Labor Relations Board's application for enforcement of an administrative law judge's decision that White Oak Manor ("White Oak") violated the National Labor Relations Act ("NLRA") by terminating an employee for engaging in protected concerted activity.

The defendant in this case operates a long-term care facility in Shelby, North Carolina. The plaintiff – in the original action – worked as a central supply clerk until her termination on November 16, 2007. A controversy arose between the plaintiff and her employer after she was sent home for a day because she refused to take off her hat, which she felt she needed to wear in order to conceal an unattractive haircut. Upon her return, she noticed that other employees – particularly men – wore hats, displayed tattoos, and otherwise breached the dress code on a regular basis. The employee subsequently complained to management about the unfair treatment, but they failed to address the situation.

In frustration, the employee discussed the disparity with (mainly female) co-workers, who all agreed with her. She then, with the help of another female co-worker, used her cell phone's camera to document the dress code violations despite a company policy that discourages employees from taking photos of other employees without their permission. Soon after finding out about the pictures, management confronted the employee, and when the employee objected to the uneven application of the dress code, management asked if she was "going to let a hat come in between the food on [her] kids' table." The next day, management terminated the employee for photographing a particular male employee without his permission.

When reviewing the Board's decision, the Court held that the employee had engaged in protected concerted activity by protesting the unfair enforcement of the dress code. More specifically, the employee "was engaged in a joint discussion of the unfairness of the dress code, and . . . it was implicit, therein, that she was seeking a change in the enforcement of the dress code." Therefore, the Court concluded that her discussions with other employees were in regards to the terms and conditions of their employment, and was protected concerted activity.

The Court further agreed with the Board's determination that the employee's photography was not "egregious conduct" that would cause her to lose the protection of the Act. The Court relied on the fact that "employees freely took pictures of each other, without first receiving permission, and often displayed these pictures throughout the facility," and the fact that "the act for which [the employee] was terminated never even occurred" because a co-worker, not the discriminatee, photographed the male employee.

Ultimately, the Court held that substantial evidence supported the ALJ's conclusion that White Oak discharged the employee for engaging in protected concerted activity, in violation of the NLRA, and granted the Board's application for enforcement.