BLM Mask Cases May Shape Activist Free Expression At Work

By **Dina Kolker, Tina Milburn and Samantha Mehring** (August 2, 2021)

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In the next few months, the First and Third Circuit Courts of Appeals will likely be the first appellate courts to opine on the limits of workplace expression in the context of the Black Lives Matter movement, with potentially opposite outcomes for public and private sector employees.

In the public sector, lower courts seem receptive to expanding the types of speech that are protected by the First Amendment, reversing the trend that developed since the U.S. Supreme Court's 2006 decision in Garcetti v. Ceballos, which narrowed circumstances in which public employee speech is protected.[1]

The shift in approach is a response to public sector arguments that BLM-related attire is not disruptive to the workplace or related to employees' official duties.

Private sector workers, on the other hand, must make the opposite argument in seeking to defend their rights to workplace expression by pressing to expand anti-discrimination protections under Title VII of the Civil Rights Act.

Private sector plaintiffs have advocated for their right to wear BLM-related apparel in the workplace on the basis that Title VII's prohibition against racial discrimination extends to protest of discrimination related to their workplace.

Thus, public and private sector employees are taking seemingly contrary positions in their efforts to distinguish the BLM movement from prior case law permitting employers to limit workplace freedom of expression under the First Amendment and Title VII.

At a moment when social activism is increasing in the U.S., can the BLM movement serve as a bellwether for future employees to argue that their messaging is a form of activism protected in the workplace?

The Public Sector: BLM Masks as Passive Protest

Since 2006, the Supreme Court has significantly limited public employee speech protected by the First Amendment.

Historically, courts applied the Pickering test, derived from the Supreme Court's 1968 decision in Pickering v. Board of Education, to balance the employee's interest in commenting on matters of public concerns as a citizen with the government employer's interest in performing its mission.[2]

The Supreme Court refined the Pickering test in Garcetti to provide that where an employee makes statements pursuant to his or her official duties, that speech is not protected by the First Amendment.[3]

Courts interpreted "official duties" broadly, to include wearing political campaign buttons as a teacher,[4] decorating one's classroom[5] and selling explicit videos that included a uniform similar to the one plaintiff wore for work.[6]

In addition, the categorical exception to First Amendment protection of speech made pursuant to official duties included speech about workplace conditions, such as a memorandum criticizing management of staff and resources,[7] complaints that workplace conditions violated federal laws[8] and even reporting child abuse.[9]

These expressions were conceived of as individual grievances related to work and workers' official duties, and therefore not matters of public concern protected by the First Amendment.[10]

Despite the often restrictive application of the First Amendment to public sector speech, courts now appear to be adopting a broader understanding of what constitutes protected expression in the workplace in the wake of massive public support for the BLM movement following George Floyd's murder In May 2020.

Much of this shift also results from recent framing of the BLM movement as an issue-based ideology, not a political one, that transcends any individual workplace.

In an advisory opinion interpreting the Hatch Act — which prohibits political activity in the federal workplace — the U.S. Office of Special Counsel concluded that BLM materials do not raise Hatch Act concerns when used or displayed in the workplace or while on duty, because BLM terminology is issue-based, not political.[11]

A case on appeal in the U.S. Court of Appeals for the Third Circuit, Amalgamated Transit Union Local 85 v. Port Authority of Allegheny County, will directly take on these issues.

There, the transit union successfully challenged public employer restrictions on BLM face masks for bus operators by distancing BLM from divisive politics that could create substantial disruption in the workplace.[12]

They used the immense support for the BLM movement to roll back the courts' traditionally restrictive approach to public employer speech established by Garcetti and its progeny.

Their approach characterized the BLM movement as a nationwide, issue-based movement, not mere politics or workplace complaints, describing BLM as a "social movement" that seeks to address "systemic violence inflicted on Black and Brown communities by state actors and vigilantes."[13]

By emphasizing that BLM is apolitical and unrelated to the workplace, plaintiffs highlighted the undisruptive, unprovocative nature of BLM attire. In their view, employees wearing BLM gear in the workplace do so "without any adverse incident, without facing any discipline or threat of discipline, without any interference with their duties and responsibilities, and without any interruption in service being provided."[14]

The U.S. District Court for the Western District of Pennsylvania agreed in January, holding that the BLM movement was indisputably a matter of great public concern and bus operators were acting in their capacity as citizens when they chose which face mask to wear.[15]

The district court emphasized that the Port Authority's ban on political or social-protest

messaging "passively displayed on a facemask" was "arbitrary and overbroad, [and] the Port Authority's predictions of likely disruption [were] unsupported by the evidence."[16]

The court therefore found that the choice of face masks was protected by the First Amendment, and struck down the Port Authority's ban.

This decision is on appeal to the Third Circuit, and will likely be heard before the end of the summer.

The Amalgamated case marks a distinct departure from previous cases decided under Garcetti. Instead of holding that BLM face masks create a threat of future disruption sufficient to establish restrictions on free expression, the district court found that

> a restriction on First Amendment rights in a government workplace cannot be based on speculation over a risk of disruption caused by speech or messages that others may potentially convey in the future. That is simply too attenuated a risk of disruption.[17]

This reading not only raises the bar for employers to show a threat of disruption, but impliedly declines to give deference to the government employer's own assessment of such threat.

Thus, at least in the public sector, courts seem to be taking a more permissive approach to BLM messaging than other uniform adornments, buttons or stickers, that an employer claims would likely disrupt the workplace by conveying a political opinion.

The Private Sector: BLM Masks as Defiance Against Workplace Discrimination

Less than two months after the killing of George Floyd, Whole Foods Market Inc. employees brought a class action challenging a similar dress code policy disciplining employees for wearing BLM masks at work.[18] The case, Frith v. Whole Foods, was decided in February by the U.S. District Court for the District of Massachusetts.

Because the First Amendment typically applies to the government's infringement on speech, the Whole Foods plaintiffs used Title VII of the Civil Rights Act instead of the First Amendment as an avenue to protect their right to wear BLM face masks.

Title VII prohibits discrimination in the workplace based on a number of characteristics, including race. The private sector plaintiffs alleged that the dress code policy, which had rarely been enforced with respect to LGBTQ and National Rifle Association messaging, was selectively used as a pretext to discipline employees who wore BLM masks to work.[19]

The Whole Foods plaintiffs raised novel speech-based associational discrimination claims under Title VII. This required them to show that banning BLM attire directly implicates their workplace and that of their Black colleagues.

The plaintiffs maintain that the "race of [Whole Foods'] Black employees is imputed to non-Black employees who advocated on behalf of and associated with Black employees by wearing BLM masks and apparel and by linking the BLM masks to calls for racial justice in the workplace."[20]

In support of this argument, the plaintiffs rely on a National Labor Relations Board advice response memo recognizing that "employee discussions regarding alleged racial

discrimination in the workplace should be deemed inherently concerted" activity under the National Labor Relations Act, "because an employer's racial discrimination can implicate every term and condition of employment and is a matter of vital importance to employees."[21]

Although the NLRB was analyzing a different statutory scheme in this memo, its recognition that discussions of racial discrimination are inherently concerted provides fodder for the plaintiffs' assertion that simply wearing BLM masks and attire establishes association protected by Title VII.

They therefore say that Title VII's broad remedial purpose was intended to apply to BLM messaging that demands better treatment of Black employees in the terms and conditions of their employment.[22]

To further support this theory, the plaintiffs cite to other circuit court decisions acknowledging associational discrimination as a valid way to protect "individuals who, though not members of a protected class, are 'victims of discriminatory animus toward [protected] third persons with whom the individuals associate."[23]

Although these decisions addressed familial or friendly relationships and not association via speech, they still indicate certain courts' willingness to extend Title VII's reach to those who associate with and support protected classes.

The result is that private sector employees are taking a contradictory stance on the impact of the BLM movement in the workplace from their public sector counterparts.

Instead of emphasizing that BLM attire is not disruptive or related to employees' jobs or official duties (like the Amalgamated Transit Union), private sector workers must explicitly link their BLM attire with their jobs in an effort to expand Title VII's anti-discrimination protections.

They expressly stated that they worked in "defiance of [Whole Foods'] ban on wearing the BLM masks" and "organized boycotts and protests at Whole Foods locations." [24]

They demanded "the release of Whole Foods' demographic data regarding Whole Foods' workforce and management" and the removal of armed guards from store locations (as acknowledgement of police brutality against Black Americans and because the presence of those in law enforcement roles can cause Black employees to feel unsafe at work).[25]

The plaintiffs went so far as to say that "workers understand raising the issue of racial discrimination in the workplace (by wearing the BLM masks) as automatically implicating their employer and the terms and conditions of their employment."[26]

The district court rejected the plaintiffs' argument and held that Whole Foods had not violated Title VII.

The court explained that "[a]t heart, this is a First Amendment claim that Plaintiffs are trying to shoehorn into Title VII in recognition of the fact that there is no right to free speech in a private workplace."[27]

Although recognizing that plaintiffs' speech was limited by their employer, the district court did not agree that Whole Foods' actions were discriminatory under Title VII even though they targeted BLM speech specifically.

Following the Massachusetts district court's skepticism that plaintiffs had adequately alleged a Title VII claim, this case is currently being appealed in the U.S. Court of Appeals for the First Circuit.[28]

Organizations like Lawyers for Civil Rights, the Massachusetts Employment Lawyers Association and the American Civil Liberties Union of Massachusetts have submitted amicus briefs urging the First Circuit to adopt the theory of associational discrimination in this case.[29]

It may present an opportunity for the First Circuit to expand Title VII's protections to private sector employees who show solidarity with their co-workers in protected classes consistent with Title VII's broad remedial purpose.

As the Whole Foods plaintiffs argue on appeal, the district court "los[t] sight of the purpose of Title VII, which is to reverse the course of racial discrimination in the workplace — and specifically the course of anti-Black racism at work."[30]

BLM Masks as a Bellwether for the Future of Protection of Speech

The historically limited First Amendment and Title VII protections for public and private sector employees forced both groups to frame their positioning around BLM masks in seemingly competing ways.

The outcomes of the pending cases in the First and Third Circuits could have implications for other messaging that supports social activism rather than pure partisan politics, including speech relating to abortion rights, the #MeToo Movement, LGBTQ rights, and the Israel/Palestine conflict.

If BLM-related messaging is allowed in the workplace, what does that mean for pro-choice slogans or the Palestinian flag?

Eventually, courts will have to either draw a more distinct line between what is political and what is issue-based, or do away with the distinction altogether. Courts will have to grapple with what is an official duty and what is not, what constitutes associational discrimination and what does not, or, again, adopt a different standard to determine speech protections in the workplace altogether.

Whatever the outcome, it is sure to have an impact on the progress of many of these social issues.

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Disclosure: Stroock represented plaintiffs, the president of the United Federation of Teachers and three New York City public school teachers in Weingarten v. Board of Education of the City School District of the City of New York, a Southern District of New York case referenced in the endnotes.

article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See Adam Shindar, Public Employee Free Speech and the Privatization of the First Amendment, 46 U. Conn. L. Rev. 1, 14-17 (2013).

[2] See Pickering v. Bd. of Educ. of Township High Sch. Dist. 205 , 391 U.S. 563 (1968).

[3] See Garcetti v. Ceballos , 547 U.S. 410 (2006).

[4] See Weingarten v. Bd. of Educ. of Sch. Dist. of N.Y ., 591 F. Supp 2d 511 (S.D.N.Y. 2008).

[5] See Johnson v. Poway Unified Sch. Dist. , 658 F.3d 954, 961 (9th Cir. 2011).

[6] See City of San Diego v. Roe , 543 U.S. 77, 81 (2004).

[7] See Alves v. Bd. of Regents , 804 F.3d 1149, 1165 (11th Cir. 2015).

[8] See Fox v. Traverse City Area Pub. Schs. Bd. of Educ ., 605 F.3d 345 (6th Cir. 2010); Ross v. N.Y. City Dept. of Educ ., 935 F. Supp. 2d 508, 519 (E.D.N.Y. 2013); Taylor v. N.Y. City Dept. of Educ ., No. 11 Civ. 7833(AJN), 2012 WL 3890599, at *5 (S.D.N.Y. Sept. 6, 2012) ("Garcetti and Weintraub suggest that if the content of an employee's speech is directed toward the proper performance of their own, specific job duties, it was likely as an employee even if made through external channels.").

[9] See Eugenio v. Walder , No. 06-CV-4928(CS)(GAY), 2009 WL 1904526 (S.D.N.Y. Jul. 2, 2009).

[10] Although the First Amendment did not apply in these circumstances, that did not preclude the applicability of other workplace protections like labor relations statutes covering public employees.

[11] See Black Lives Matter and the Hatch Act Advisory Letter, Off. Of Special Couns. 3 (July 14, 2020).

[12] See Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty , No. 20-cv-01471, 2021 WL 164315, at 23 (W.D. Pa. Jan. 19, 2021).

[13] First Amended Complaint at ¶ 19, Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty, No. 20-cv-01471, 2021 WL 164315 (W.D. Pa. Jan. 19, 2021) (emphasis added).

[14] Id. at ¶ 27.

[15] See Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty , No. 20-cv-01471, 2021 WL 164315, at 22 (W.D. Pa. Jan. 19, 2021).

[16] Id. at 2.

[17] Id. at 17.

[18] See Frith v. Whole Foods Mkt., Inc ., No. 20-CV-11358-ADB, 2021 WL 413606, at *2

(D. Mass Feb. 5, 2021).

[19] See Brief for Appellant at 9, Frith v. Whole Foods, Mkt., Inc., No. 21-1171 (1st Cir. 2021).

[20] Id. at 50 (internal quotations omitted).

[21] Id. at 46.

[22] See id. at 46.

[23] Barrett v. Whirlpool Corp ., 556 F.3d 502, 512 (6th Cir. 2009) (quoting Tetro v. Popham , 173 F. 3d 988, 994 (6th Cir. 1999)).

[24] Brief for Appellant at 10, Frith v. Whole Foods, Mkt., Inc., No. 21-1171 (1st Cir. 2021).

[25] See id.

[26] Id. at 47.

[27] Frith v. Whole Foods Mkt., Inc., No. 20-CV-11258-ADB, 2021 WL 413606 at *9 n.9 (D. Mass Feb. 5, 2021).

[28] Oral argument is set to take place on Wednesday, September 15, 2021 at 9:30 a.m.

[29] See Brief for Lawyers for Civil Rights et al. as Amici Curiae Supporting Plaintiffs-Appellants, Frith v. Whole Foods, Mkt., Inc., No. 21-1171 (1st Cir. 2021); Brief for The Massachusetts Employment Lawyers Association and American Civil Liberties Union of Massachusetts, Inc. as Amici Curiae Supporting Plaintiffs-Appellants, Frith v. Whole Foods, Mkt., Inc., No. 21-1171 (1st Cir. 2021).

[30] Brief for Appellant at 15, Frith v. Whole Foods, Mkt., Inc., No. 21-1171 (1st Cir. 2021) (citations omitted). Indeed, the Fifth Circuit explained that Title VII "provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in a battle with semantics." Culpepper v. Reynolds Metals Co ., 421 F.2d 888, 891 (5th Cir. 1970) (emphasis in original). Several other circuit courts have also acknowledged that, because of the "remedial goals" of Title VII, "the statute itself, the procedural framework, and the pleadings must be liberally construed in favor of those who are alleged victims of discrimination." Ramirez v. Nat'l Distillers and Chem. Corp ., 586 F.2d 1315, 1321 (9th Cir. 1978); see also Parr v. Woodmen of the World Ins. Co ., 791 F.2d 888, 892 (11th Cir. 1986).