

Within minutes from where George Floyd was murdered by police, an employee at a Home Depot store in Minneapolis wrote “BLM” on their apron in September 2020. After taking other action with their coworkers regarding racial discrimination in the workplace, managers noticed the “BLM” on their uniform for the first time and told them it violated the dress code. In a meeting with management the next day, the employee was ultimately given the choice between removing BLM from their uniform or quitting. This worker, committed to racial justice in the workplace, resigned. Unfair labor Practice charges were brought before an Administrative Law Judge.

This brings us to the burning question presented: Is wearing insignia and apparel or signs in support of the statement Black Lives Matter in the workplace protected under the law? We know that it is free speech, but speech is not free or protected in the workplace unless it relates to terms and conditions as defined or interpreted under the National Labor Relations Act.

I submit that to understand and answer that question we must reflect back in history, because, to quote Maya Angelou, “You Can't Really Know Where You Are Going Until You Know Where You Have Been.” Have Black lives always mattered in the context of the workplace?

### **I. Historical Background**

Black Lives built America: Slaves and some freed blacks built the White House, the capital, major historic churches, and most antebellum buildings in the South.<sup>1</sup> And yet, African American artisans were denied entry into the guilds formed by white artisans, a pattern that would continue.<sup>2</sup> African American slaves were the labor of early America, so much so that W.E.B Du Bois calls the “general strike” of four million slaves that took place during the U.S. Civil War America’s first major labor strike.<sup>3</sup> And yet, Black people were denied entry into the labor movement.

As American trade unions increased during the early Reconstruction period, Black workers excluded from white unions began to organize on their own.<sup>4</sup> However, this was met by violence and tragedy. For instance, in the Thibodaux Massacre of 1887, 60 Black farmers were murdered after trying to unionize in Louisiana.<sup>5</sup> This was just one of hundreds of incidents where Blacks

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<sup>1</sup> See, e.g., Sarah Fling, “Enslaved Labor and the Construction of the U.S. Capitol,” The White House Historical Association (last visited Sept. 2023), <https://www.whitehousehistory.org/enslaved-labor-and-the-construction-of-the-u-s-capitol>

<sup>2</sup> Philip S. Foner, *Organized Labor and the Black Worker* (Haymarket Books 2nd Ed. 2017), 4-5

<sup>3</sup> See W.E.B. Du Bois, *Black Reconstruction in America toward a history of the part of which Black folk played in the attempt to reconstruct democracy in America, 1860-1880*, (Transaction Publishers, 2012)

<sup>4</sup> See Foner, *supra* note 2, 21

<sup>5</sup> In 1883, Black farmers in Louisiana tried to unionize and strike for better working conditions, in response to their deplorable work conditions which were equivalent to slavery. On November 23, 1887, a mass shooting of these farm workers in Louisiana left 60 dead. Bodies were dumped in unmarked graves while the white press cheered a victory against a fledgling Black union. It was one of the bloodiest days in United States labor history, Days after, a local planter widow wrote, “I think this will settle the question of who is to rule, the nigger or the white man for the next fifty years.” See Calvin Schermerhorn, “The Thibodaux Massacre Left 60 African-Americans Dead and Spelled the End of Unionized Farm Labor in the South for Decades,” *Smithsonian Magazine* (November 21, 2017)

were massacred, and communities destroyed because Black workers either wanted to unionize, or because Black workers were brought in to break a striking union that refused to let them in.<sup>6</sup>

In response, Black workers organized for protection—in 1869 Colored National Labor Union, the counterpart to the white National Labor Union, held a convention in Washington, D.C. where they sent a petition to President Rutherford B. Hayes asking for intervention on behalf of the Black farmers in the South, seeking protection, 40 acre farms and low interest loans.<sup>7</sup> The petition was denied, as were similar petitions to subsequent administrations. Black farm workers in the South wouldn't have the opportunity to unionize for generations. And this was because Black lives *didn't* matter to those who controlled the American Economy.

During the 1930s and 1940s, as union membership went from less than three million to almost 15 million in 1945, strikes escalated.<sup>8</sup> Millions struck for better wages and violence intensified. This activity was in direct response to the Great Depression, and no group was harder hit than Black people.<sup>9</sup> By 1932, approximately half of Black workers were unemployed.<sup>10</sup> At the same time, racial violence surged, especially in the South. Lynchings, which had declined 1932, increased in 1933.<sup>11</sup>

Despite this violence, however, Black workers persisted. A. Philip Randolph and the Brotherhood of Sleeping Car Porters was among the groups of courageous black men and women who knew that one critical way for people of color to get what they are entitled to was to unionize.<sup>12</sup> And the time seemed right in terms of the political moment; FDR implemented a suite of legislation to get the economy back on its feet and to address labor strikes, passing the National Labor Relations Act, the Social Security Act, and the Fair Labor Standards Act.<sup>13</sup> However, this legislation failed Black workers. Although 31.8 percent of the African American

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<https://www.smithsonianmag.com/history/thibodaux-massacre-left-60-african-americans-dead-and-spelled-end-unionized-farm-labor-south-decades-180967289/>

<sup>6</sup> For example, the 1917 East St. Louis massacre. See Dan Kaufman, "A Labor Day Reflection on Unions, Race, and Division," *New Yorker* (September 3, 2018),

<https://www.newyorker.com/news/daily-comment/a-labor-day-reflection-on-race-and-unions> ("During a 1917 strike at the Aluminum Ore Company, in St. Louis, the company brought in several hundred African-Americans as strikebreakers. In two outbreaks of rioting, white union workers killed black residents and burned hundreds of homes and businesses in East St. Louis.")

<sup>7</sup> See James Gilbert Cassedy, "African Americans and the American Labor Movement," *Prologue Magazine* (1997),

<https://www.archives.gov/publications/prologue/1997/summer/american-labor-movement.html>

<sup>8</sup> Cody R. Melcher & Michael Goldfield, "Moments of Rupture: The 1930s and the Great Depression," *Convergence* (Nov. 9, 2021),

<https://convergencemag.com/articles/moments-of-rupture-the-1930s-and-the-great-depression/>

<sup>9</sup> "Race Relations in the 1930s and 1940s," Library of Congress (last visited Sept. 2023),

<https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/race-relations-in-1930s-and-1940s/>

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> "Brotherhood of Sleeping Car Porters Union Formed," Library of Congress, (last visited Sept. 2023)

<https://guides.loc.gov/this-month-in-business-history/august/brotherhood-of-sleeping-car-porters>

<sup>13</sup> "The New Deal," Library of Congress (last visited Sept. 2023),

<https://www.loc.gov/classroom-materials/new-deal/>

population in 1940 was employed in agriculture (and 40.4 percent in the South), these New Deal programs did not extend to agricultural workers.<sup>14</sup> This exclusion was the result of trying to appease the racist instincts of powerful southern legislators whose support and votes were needed to pass the legislation.<sup>15</sup>

Not only did the NLRA exclude agricultural and domestic workers, it failed, despite the efforts of A. Philip Randolph and the NAACP, to make the exclusion of blacks from white labor unions illegal.<sup>16</sup> Meaningful protection from discrimination within the labor movement did not occur until the '60 when the Civil Rights Bill was passed.<sup>17</sup> The takeaway? Once again, Black Lives Didn't Matter.

Despite these legal setbacks, Black workers were able to achieve tremendous success. I return to the example of A. Philip Randolph and the Brotherhood of Sleeping Car Porters. The passage of the National Labor Relations Act aided A. Philip Randolph in his 12 year struggle to finally achieve recognition of this union from the Pullman Sleeping Car Company, becoming one of the largest Black Labor Unions of its time.<sup>18</sup> The trains on which these porters worked went across the country. The porters, along with their wives in the Ladies Auxiliary of the Brotherhood of Sleeping Car Porters, disseminated knowledge of social, political, and cultural developments to black people across the country.<sup>19</sup> They knew that Black Lives Mattered, and that unionizing was a way to send this message.

A. Philip Randolph was the personification of the merger of Worker Rights and Civil rights. • In the 1940s Randolph focused on the question of black employment in the federal government and in industries with federal contracts.<sup>20</sup> The New Deal provided opportunities for white workers in the defense industries making planes, ships, tanks and guns. Blacks, however, were not welcome. In 1941, more than two decades before Dr. King's historic march, Randolph and the NAACP threatened a national March on Washington protesting the racial discrimination in defense industry employment.<sup>21</sup> Roosevelt yielded to the pressure and on June 25, 1941, issued Executive Order, E.O.8802 barring discrimination in defense industries and federal bureaus, and creating the Fair Employment Practices Committee.<sup>22</sup> Although discrimination in the defense industry persisted, this was the first Federal action ever taken against racially biased employment practices and that gave the world the other Rosies of the WWII defense industries—the Rosies I depict in my Art—the Rosies not shown on the defense industry posters.

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<sup>14</sup> Cassedy, *supra* note 7.

<sup>15</sup> Juan F. Perea, *The echoes of slavery: Recognizing the racist origins of the agricultural and domestic worker exclusion from the National Labor Relations Act*, Ohio St. LJ, 72, 95 (2011).

<sup>16</sup> Cassedy, *supra* note 7.

<sup>17</sup> *Id.*

<sup>18</sup> See Cassedy, *supra* note 7; Library of Congress, *supra* note 12.

<sup>19</sup> See, e.g., Paula Pfeffer, "The Women Behind the Union: Halena Wilson, Rosina Tucker, and the Ladies' Auxiliary to the Brotherhood of Sleeping Car Porters," *Labor History* 36, no. 4 (1995), 557-578.

<sup>20</sup> Cassedy, *supra* note 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*



Art by Mark Gaston Pearce (all rights reserved)

Description:

Painting of five Black women working in a trainyard. The painting is entitled "Trainyard Women," and is part of a series by Mark Gaston Pearce called "The Other Rosies."

This combination of workers rights and civil rights made a big difference in the economic welfare of Black workers. After WWII it was unions like UAW that negotiated the retention of Black workers at plants making way for returning white soldiers.<sup>23</sup> Martin Luther King Jr. supported union membership and criticized US employment laws, and unions funded the Memphis sanitation strike of Black workers that was to be MLK's last crusade.<sup>24</sup> We have seen that unions contribute to the economic well-being of Black people. For example, the Economic Policy

<sup>23</sup> See, e.g., Richard Rothstein, *The Color of Law*, (Liveright Publishing Corp, 2017), 4. However, other unions continued to maintain racist policies. See *Rothstein*, supra note 23 at 160-61.

<sup>24</sup> See "Dr. Martin Luther King, Jr. on Labor," AFSCME (last visited Sept. 2023), <https://www.afscme.org/about/history/mlk/dr-martin-luther-king-jr-on-labor>; "Memphis Sanitation Workers' Strike," Stanford University, The Martin Luther King, Jr. Research and Education Institute (last visited Sept. 2023), <https://kinginstitute.stanford.edu/memphis-sanitation-workers-strike>

Institute found that unions provide a higher pay boost for Black and Hispanic workers than white workers, which provides a mechanism to address wage gaps.<sup>25</sup>

## II. The Cases at Hand

So let us return to the question at hand. Is Black Lives Matter a workplace issue that would find protection under the law?

This question is being posed in a number of different cases to the NLRB.<sup>26</sup> The Board itself has yet to weigh in on this question, but the General Counsel Jennifer Abruzzo has made her case.<sup>27</sup> According to Abruzzo, political and social justice advocacy qualifies as a protected activity when it directly connects with workers' interests as employees. Abruzzo stated that an "employer can certainly control that people of color are not discriminated against in their workplace or treated inequitably with regard to pay, hours, and other working conditions" to justify the nexus between issues like Black Lives Matter and the workplace.<sup>28</sup>

However, stating this does not mean it is the law. So far, only Administrative Law Judges have weighed in on the issue and they have reached different conclusions.

### 1. Home Depot

This case poses the question of whether writing "BLM" on an employee uniform should be protected under the NLRA. The case takes place at a Home Depot store in New Brighton Minnesota, 6.5 miles from where George Floyd was murdered. At all stores, Home Depot requires employees to wear the signature orange aprons to work and encourages employees to customize their aprons. However, under Home Depot's dress code policy, employees are prohibited from displaying political messages "unrelated to workplace issues."<sup>29</sup>

Employee Antonio Morales wrote "BLM" on their apron shortly after starting work at Home Depot.<sup>30</sup> Morales stated that they wanted to signal safety and support for people of color, including co-workers and customers. Within days of beginning work, Morales encountered another Home Depot employee behaving in a racist manner towards customers, a pattern that would continue.<sup>31</sup> Additionally, a display that Morales and a coworker constructed for Black

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<sup>25</sup> Economic Policy Institute, *Unions help reduce disparities and strengthen our democracy*, (April 23, 2021), <https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy/>

<sup>26</sup> See *Home Depot USA Inc.*, Case No. 18-CA-273796, <https://www.nlr.gov/case/18-CA-273796>; *Whole Foods Market Inc.*, Case No. 01-CA-263079, <https://www.nlr.gov/case/01-CA-263079>; *Fred Meyer Stores, Inc.*, Case No. 19-CA-272795, <https://www.nlr.gov/case/19-CA-272795>.

<sup>27</sup> See, e.g., Robert lafolla, "Black Lives Matter Protests Protected, Top NLRB Lawyer Says," *Bloomberg Law* (Oct. 6, 2021, 4:38 PM),

[https://www.bloomberglaw.com/product/labor/bloomberglawnews/daily-labor-report/BNA%20000017c571cdcd7a37cf77c09c10001?bna\\_news\\_filter=daily-labor-report](https://www.bloomberglaw.com/product/labor/bloomberglawnews/daily-labor-report/BNA%20000017c571cdcd7a37cf77c09c10001?bna_news_filter=daily-labor-report)

<sup>28</sup> *Id.*

<sup>29</sup> *Home Depot USA Inc.*, Case No. 18-CA-273796, JD-34-22 ("Home Depot ALJ Decision") at \*3

<sup>30</sup> *Id.* at \*6

<sup>31</sup> *Id.*

History Month was defaced.<sup>32</sup> It was in a meeting about this when management first noticed the “BLM” on Morales’ apron.<sup>33</sup> It was communicated to Morales that this was against dress code policy and that Morales could not wear the apron.<sup>34</sup> Home Depot wouldn’t back down, nor would Morales. Morales was eventually forced to quit.<sup>35</sup>

During the administrative hearing before the NLRB, the NLRB General Counsel argued to the ALJ that such a policy was an unfair labor practice displaying BLM is not unrelated to the workplace issues.<sup>36</sup> Racial discrimination has a major impact on employee health and safety and other working conditions.<sup>37</sup> Further, displaying BLM constitutes protected, concerted activity. It is protected because there is a direct connection between racial justice and the workplace, especially where, like this store, employees were facing racial discrimination and hostility from other employees.<sup>38</sup> Even without the involvement of other employees however, the GC is arguing that, because issues of racial discrimination are impact working conditions to such a great degree that they should fall under the NLRB’s doctrine of inherently concerted activity.<sup>39</sup>

The ALJ did not agree, and found that BLM was focused only on police brutality, and therefore too attenuated from workplace issues to qualify as protected activity.<sup>40</sup> He rejected the significance of the defacement of the black history month display in his analysis-finding no connection to BLM. Thus, according to the ALJ, there is no protection for Morales under the Act.<sup>41</sup>

The General counsel has appealed, and this case is currently pending before the NLRB Board Members.<sup>42</sup>

## 2. Whole Foods

The Whole Foods case brings together multiple complaints focused on Whole Foods’ national dress code rules which prohibit employees from wearing any non-company affiliated messages or logos on their clothing.<sup>43</sup> Prior to 2020, employees were able to display images from sports

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<sup>32</sup> *Id.* at \*8

<sup>33</sup> *Id.* at \*9

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 12-13.

<sup>36</sup> See “Brief To The Administrative Law Judge On Behalf Of The Counsels For General Counsel,” *Home Depot USA Inc.*, Case No. 18-CA-273796

<sup>37</sup> *Id.* at \*40

<sup>38</sup> *Id.* at 26

<sup>39</sup> *Id.* at 37

<sup>40</sup> Home Depot ALJ Decision, *supra note 29*, at \*22

<sup>41</sup> *Id.* at 23

<sup>42</sup> See case status at: <https://www.nlr.gov/case/18-CA-273796>

<sup>43</sup> “Region 20-San Francisco Issues Consolidated Complaint Against Whole Foods for Unlawfully Disciplining Workers in Response to Wearing Black Lives Matter Apparel,” News & Publications, NLRB (Dec. 6, 2021), <https://www.nlr.gov/news-outreach/region-20-san-francisco/region-20-san-francisco-issues-consolidated-complaint-against>

logos to cartoon characters, as well as political related symbols and logos such as pride flags and political buttons.<sup>44</sup>

In early June 2020 employees throughout the country began to display messaging related to Black Lives Matter on their work attire, including facemasks, buttons, pins, jewelry, shoes, nametags, and temporary tattoos and body art.<sup>45</sup> When asked about their reasons, some employees emphasized police brutality and protesting state violence—for many, there was a direct connection to the racial justice protests that erupted after the murder of George Floyd. Like the protests, however, employees also acknowledged the systemic issues implicated by BLM, discussing the wide-sweeping impact of anti-Black racism in the U.S. and characterizing BLM as a human rights issue. Black employees emphasized how BLM related to their own safety.<sup>46</sup> Other employees also focused on wanting to make their Black co-workers feel safe and supported during a period that provided a stark reminder of the violence Black people encounter.<sup>47</sup> Additionally, employees wanted Whole Foods to address racial inequity within its stores and to take action to improve racial equality and inclusion within the company.<sup>48</sup>

Although employees anticipated that Whole Foods would be supportive because of their own racial justice messaging, they were not. Instead, the company enforced its dress code provision against BLM attire.<sup>49</sup> This led to demands for Whole Foods to change its policy, but the company did not acquiesce.<sup>50</sup> Management took disciplinary action against employees who refused to comply with the dress code policy, leading in some cases to termination.<sup>51</sup>

The NLRB General Counsel asserts that this rule is a violation of the NLRA because it impinges on employees' ability to speak out against racial issues at work. The purpose of wearing the attire was to show support for Black co-workers, improve racial equity in the workplace, and protest the dress code.<sup>52</sup> These issues related to employees' interests as employees, and therefore satisfied the mutual aid and protection prong. Additionally, The policy had not been enforced uniformly. Employees were able to display images from sports logos to cartoon characters, as well as political related symbols and logos such as pride flags and political buttons.<sup>53</sup>

To counter this assertion, Whole Foods cites instances before 2020 where employees were asked to remove MAGA gear, BLM messaging, and Blue Lives Matter messaging.<sup>54</sup> However, it

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<sup>44</sup> See "General Counsel's Post-Hearing Brief to the Administrative Law Judge," *Whole Foods Market Inc.*, Case No. 01-CA-263079, at \*15

<sup>45</sup> *Id.* at 25.

<sup>46</sup> *Id.* at 40.

<sup>47</sup> *Id.* at 29.

<sup>48</sup> *Id.* at 30.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 37-42.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 78.

<sup>53</sup> *Id.* at 38.

<sup>54</sup> See "Respondent Whole Foods Market's Post Hearing Brief to the Administrative Law Judge," *Whole Foods Market Inc.*, Case No. 01-CA-263079, at \*3.

is clear that Whole Foods had previously allowed workers to don non-company images without reprimanding them. Interestingly, Regional management also expressly wrote that they could not let employees wear BLM pins because it could lead to unionization.<sup>55</sup>

Currently the ALJ has not issued a recommended decision for the Board because the judge wants to hear from the parties on two major decisions issued within the last few months.<sup>56</sup> One of the decisions was *Stericycle, Inc.*, issued by the NLRB on August 7, 2023.<sup>57</sup> *Stericycle* requires employers to clarify its handbook and work rules sufficiently for an employee not to reasonably believe that the rule violates the employees rights under the Act, which may impact the dress code policy analysis.<sup>58</sup> The other case was *303 Creative LLC v. Elenis*, a Supreme Court case issued in June.<sup>59</sup> In that case, the conservative majority held that a web designer with religious convictions cannot be forced to design a wedding website for a gay couple.<sup>60</sup> This decision impacts the social justice cases before the NLRB because employers will argue that allowing political and social justice speech in their facility is compelled speech in violation of their first amendment rights under the Constitution.

### 3. Fred Meyer

Most recently, in May of 2023, an ALJ reached a different conclusion than the Administrative Law Judge in Whole Foods, finding that BLM displays were protected.<sup>61</sup> The case focuses on workers at Kroger Company Subsidiaries Fred Meyer Stores, Inc. (Fred Meyer) and Quality Food Centers. The dispute began in the summer of 2020 when employees at several Fred Meyer and QFC stores in Washington State began wearing BLM pins and face masks.<sup>62</sup> Although employees had worn, without consequence, other pins and face masks with LGBTQ+ messages, pronouns, inspirational messages, and sports team insignia, Fred Meyer and QFC supervisors ordered employees to remove the BLM pins and masks and sent home workers who refused to do so.<sup>63</sup>

The GC litigated the case before ALJ Mara-Louise Anzalone who found that employees were wearing insignia in support of their Black coworkers, both at their own workplace and elsewhere who "... do not check their skin color at the door when they start their shifts."<sup>64</sup> In stating this,

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<sup>55</sup> "General Counsel's Post-Hearing Brief to the Administrative Law Judge," *supra note 44*, at \*2

<sup>56</sup> "Order Directing the Parties to File Supplemental Briefs," (Aug. 7, 2023)

<sup>57</sup> *Stericycle, Inc.*, 372 NLRB No. 113 (2023)

<sup>58</sup> *Id.*

<sup>59</sup> *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023)

<sup>60</sup> *Id.* at 2322.

<sup>61</sup> "Region 19-Seattle Wins Administrative Law Judge Decision Finding Kroger Grocery Stores Unlawfully Discriminated Against Workers Wearing 'Black Lives Matter' Pins and Masks," NLRB, News & Publications (May 5, 2023),

<https://www.nlr.gov/news-outreach/region-19-seattle/region-19-seattle-wins-administrative-law-judge-decision-finding>; *Fred Meyer Stores, Inc.*, Case No. 19-CA-272795, JD(SF)-12-23 ("Fred Meyer ALJ Decision").

<sup>62</sup> Fred Meyer ALJ Decision, *supra note 61*, at 13

<sup>63</sup> *Id.* at 13-24.

<sup>64</sup> *Id.* at 30.



she recognized that racism is a workplace issue. Thus, wearing the insignia constituted mutual aid and protection, and was therefore protected activity under Section 7 of the National Labor Relations Act.<sup>65</sup> Thus, the store's prohibitions and discipline of employees were unlawful.

Kroger/Fred Meyer Stores have appealed this case and it is currently before the Board.<sup>66</sup>

### **III. Where Do We Go Now?**

What is the likely outcome across all of these cases? The GC is asking that the Board find that issues of race in the workplace be found as "inherently concerted," and therefore protected even if only one employee takes an action. This would undoubtedly expand the scope of protection that workers have to take a stance regarding Black Lives Matter, and to draw connections between systemic racism and the challenges they face in the workplace. I am worried, however, that this is not a likely outcome. It also brings up some new issues: how might the lines be drawn? Would every instance of a worker talking about race in the workplace be protected, or does there need to be an active concern about racism in that particular workplace?

In any event I don't think we will get an answer to those questions in the cases at hand because the Board won't need to get there: In Home Depot, Whole Foods, and Fred Meyers, the racial inequities were right there in the workplaces, and there were multiple employees involved. Thus, the Board won't need to reach the issue of inherent concert, and just needs to demonstrate that taking a stance on BLM constitutes acting for mutual aid and protection. I think what we may see is the Board finding that in instances where employees have expressed concerns about racism in the workplace, actions like displaying BLM will be protected.

History tells us that "Black Lives Matter" is obviously related to workplace issues, but some seem to purposefully ignore this truth. In Home Depot, for example, we had an instance where an employee vandalized a Black History Month display. And yet the ALJ contends the statement "Black Lives Matter" has too weak a connection to the workplace. The issue distilled is seemingly, what is considered a workplace issue, and whose workplace issues are prioritized. On the one hand, we have A Supreme Court case decided in the 1960's that informs us that it is enough for workers to be advocating for the "concerns of employees as employees," even if these concerns are "political" issues.<sup>67</sup> To say that "Black Lives Matter" is not a workplace issue is a rejection of the concerns of Black employees as employees. If we are to take seriously the mandate of the Supreme Court in *Eastex*, then the Board must develop a doctrine that recognizes the intersections between systemic racism and the shop floor. I believe that Home Depot, Whole Foods, and Fred Meyers present easy cases to establish that intersection.

The next question is how should workers and organizers move forward given the state of the law right now? While we have this progressive NLRB General Counsel, workers need to keep using their voices. But, I think it is wise for workers to focus on the explicit connections between systemic racism and that particular workplace in order to ensure protection. This is not because

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<sup>65</sup> *Id.* at 38.

<sup>66</sup> See current status of the case at: <https://www.nlr.gov/case/19-CA-272795>

<sup>67</sup> *Eastex, Inc. v. NLRB*, 437 U.S. 556, (1978)

I think such a nexus is legally necessary. It is more so a matter of prudence. We know that labor law is already stacked against workers. Making the argument upfront as to how messaging like Black Lives Matter connects to the terms and conditions of employment will help to neutralize employer's arguments that BLM is too remote from the workplace to be protected. We can give workers a bigger sphere of protection by encouraging them to draw these connections between social movements and their workplaces.

I also think that doing so can help galvanize organizing efforts, and provide an opportunity for the labor movement to reckon with its history. Now is the time to focus on the concerns of employees from the vantage point of the workers who have for too long been sidelined. If we want labor law to reflect the belief that Black Lives Matter, we need to ensure that the issues of Black Workers are at the forefront of labor's actions.

I will end with a quote from my hero A. Philip Randolph – whose sentiments are as relevant now as they were in the darkest times of our history: “Justice is never given, it is exacted, and the struggle must be continuous, for freedom is never a final fact, but a continuous evolving process ...” Keep up the fight my kin, because the struggle continues.