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## “Bad Hair Day” Case Reveals Lessons for Facility Managers

*Shorts on Long Term Care, February 2012*

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The National Labor Relations Act (NLRA) prohibits employers from disciplining or discriminating against employees who engage in “concerted activity.” Under the NLRA, protected concerted activity includes, among other things, two or more employees discussing wages, hours, or working conditions. The NLRA applies to most private-sector workplaces, whether or not they are unionized, and the National Labor Relations Board (NLRB) is the federal agency that enforces the NLRA.

A recent decision from the U.S. Court of Appeals for the Fourth Circuit affirmed the NLRB’s ruling that a long term care facility in North Carolina violated an employee’s right to engage in protected concerted activity when it terminated the employee after she engaged in discussions with her coworkers about the employer’s enforcement of the dress code policy.

The employee was a supply clerk in a nonunionized long term care facility. She wore a hat to work to cover up a “terrible haircut.” She went home after one of the managers

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told her to take off the hat or go home because wearing it violated a part of the facility's dress code policy.

The next day, when employees were invited to wear costumes to work for Halloween, the employee wore a hat as part of her costume but removed the hat when requested by the facility's administrator. The employee protested that she was being unfairly singled out because other employees were not disciplined for wearing hats at work. The administrator gave her a written warning for insubordination.

In the following days, the employee took cell phone photos of coworkers who were wearing hats at work and violating another part of the facility's dress code by displaying visible tattoos. She got permission from some, but not all, of her coworkers to photograph them. The employee also began talking to other employees about the dress code being applied unfairly to her and showed them the cell phone photos she had taken. Her coworkers were generally supportive of her complaint.

The facility's management was informed that the employee was taking photos of employees violating the dress code, and an employee complained she had taken his photo without his permission. During an investigation, the administrator asked the employee if she was "going to let a hat come in between the food on her [kids'] table." The administrator later terminated the employee for violating a policy prohibiting the taking of photos inside the facility without permission.

The employee filed an unfair labor practice charge with the NLRB, claiming the facility had violated her right to engage in protected concerted activity. During the NLRB's hearing procedure, the employee presented evidence that other employees took photos of each other without permission and displayed the photos around the facility with no

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repercussions from management. The NLRB concluded that the employee's complaint about the facility's dress code was the real reason for her termination and was protected concerted activity because she had enlisted support for her complaint from other employees.

In affirming the NLRB's decision, the Fourth Circuit Court of Appeals agreed the employee had engaged in protected concerted activity by protesting the unfair enforcement of the dress code in discussions with other employees. In rejecting the facility's argument that the employee's conduct was not protected concerted activity because she was acting out of self-interest and not on behalf of a broader group of employees, the Fourth Circuit found the employee's conduct went beyond self-interest and became protected by law when she sought support from her coworkers. The Fourth Circuit emphasized that the facility was not consistent in its enforcement of both the dress code policy and the policy against photography when it agreed with the NLRB's conclusion that the employee was terminated because of her protest.

This case illustrates how important it is for a facility's management to be careful about disciplining or firing an employee making complaints about wages, hours, or working conditions, especially if the employee has shared his or her complaints with coworkers. This case also emphasizes the value of being consistent when enforcing workplace policies and having effective procedures for responding to employee complaints.

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