

LABOR LAW

Tesla tests envelope in employment and labor law

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Background

Tesla founder Elon Musk's famously controversial battle with Twitter has captivated the media for months. But Tesla's labor and employment law challenges are also emblematic of its founder's aggressiveness and willingness to take risks. Its novel, take-no-prisoners strategy in a recent case alleging race discrimination is of interest to labor and employment law professionals. Equally pertinent is a recent decision of the Biden National Labor Relations Board (NLRB), which invalidated a key aspect of Tesla's stringent, union-avoidance dress code.

DFEH vs. Tesla

California's Department of Fair Employment and Housing (DFEH)—now named the California Civil Rights Department (CRD)—is the state agency charged with enforcing the Fair Employment and Housing Act (FEHA), a comprehensive statute that protects public- and private-sector workers against unlawful discrimination. The CRD investigates allegations of discriminatory employment practices. It also acts as a public prosecutor, with authority to sue employers when an investigation uncovers adequate evidence of discrimination.

The allegations

This case centered on Tesla's production plant in Fremont, California, where over 15,000 employees work. It arose after a three-year investigation into hundreds of discrimination complaints.

Filed in February 2022, the CRD's court complaint presents a stark overview:

In the San Francisco Bay Area and elsewhere, a job at Tesla is often seen as a golden ticket. It is seen

as a way for those without a technical background or a college degree to secure a job in tech, and a path to a career and a living wage. Yet Tesla's brand, purportedly highlighting a socially conscious future, masks the reality of a company that profits from an army of production workers, many of whom are people of color, working under egregious conditions.

The CRD found pervasive evidence of racial harassment and discrimination in connection with assignments, discipline, promotions, pay, and terminations. The agency also found evidence of retaliation against black workers who reported the harassment or discrimination.

The CRD's complaint further reported that complaints of rampant racism remained unchecked for years and that oral and written racial slurs abounded. Complaints by black workers about racial harassment, race discrimination, and retaliation lodged over a span of almost a decade "have been futile, with Tesla turning a 'blind eye' to years of complaints from Black workers who protest the commonplace use of racial slurs on the assembly line."

The CRD also found that Tesla's investigative practices didn't pass legal muster and that the company failed to take appropriate measures to address allegations of discrimination and harassment. The CRD further depicted Tesla's move from its Palo Alto headquarters to Austin, Texas, as "another move to avoid accountability."

The CRD's court complaint appears at

<https://bit.ly/3Srhwv>.

Tesla's responses

On the same day the CRD filed its court complaint, Tesla posted on its internal blog a piece titled "The DFEH's Misguided Lawsuit" (<https://bit.ly/3E65v1a>). The blog entry lauded Tesla's antidiscrimination policy and practices, and assailed the CRD for its court action, claiming it was "a narrative spun by the CRD and a handful of plaintiff firms to generate publicity [without] factual proof." Since then, and predictably, Tesla has pursued a "grind them down" defense. This

included a motion to dismiss or limit the scope of the case, most interestingly based on the notion that the case was “unmanageable” due to the many allegations of discrimination. In late August, the court rejected all these arguments, observing in part that the courts were fully able to address multiple allegations of discrimination.

A key issue Tesla raised was whether the CRD’s process was infected by “underground” regulations. Under California law, general procedures used by administrative agencies must be grounded in formal regulations approved through a specific process dictated by the California Administrative Procedures Act (APA). Procedures an agency hasn’t adopted through this process can invalidate the agency’s case approach.

During this entire time, Tesla had shopped its argument that the CRD’s treatment of the case was illegal because it was based on illegal “underground” regulations. Previously, Tesla filed a 10-page complaint with California’s Office of Administrative Law (OAL) alleging the CRD has adopted “underground regulations” that flout the proper administrative process it must follow in investigating employers.

In essence, it accused the CRD of rushing to sue businesses without conducting proper investigations. Tesla said the agency acted without having regulations giving employers notice of:

- The particulars of the allegations;
- The information supporting a finding that the CRD had “cause” to prosecute; and
- Their opportunity to engage in good-faith mediation and conciliation efforts
- Tesla also maintained the CRD regulations should require the agency to give employers advance notice of the allegations. Also, in Tesla’s view, the CRD shouldn’t have authority to either bring lawsuits on issues that were not investigated or that the employer was not given notice about or waive legal rights

and protections that adhere to confidential mediation.

This was an effort to force the CRD to take additional steps before suing. In late August, the OAL rejected Tesla’s complaint, leading to its new lawsuit.

On September 22, Tesla filed its own lawsuit (“cross-complaint”) against the CRD. The lawsuit parroted the allegations Tesla made to the OAL. It did not mention the OAL’s rejection of Tesla’s argument, nor did it challenge the OAL.

Core to Tesla’s strategy is its argument that the CRD may file suit only after it has complied with all its presuit obligations. Tesla’s arguments, however, have not hit this point dead-on. A court decision is pending. The odds of success, in our view, are small.

NLRB decision in Tesla, Inc.

On August 29, 2022, the NLRB issued Tesla, Inc., where the Board overruled a Trump NLRB decision in Wal-Mart stores, Inc., 268 NLRB No. 146 (2019). In this case, Tesla maintained a policy that prohibited wearing black t-shirts with union markings, when black t-shirts were otherwise permissible.

The Biden NLRB reaffirmed prior, long-standing precedent holding that employer attempts to impose any restriction on the display of union insignia, including wearing union apparel, are presumptuously unlawful, “absent special circumstances that justify such a restriction.” The Board overrode the Trump NLRB’s determination in Wal-Mart Stores that the “special-circumstances” test applied only when an employer completely prohibited union insignia could be deemed lawful based on less compelling employer interests.

After considering public comment through a Notice and Invitation for Briefing, a new NLRB majority found that it was unlawful for Tesla to maintain a policy requiring employees to wear a plain black t-shirt or one imprinted with the employer’s logo, thus prohibiting employees

from substituting a shirt bearing union insignia. This reinstated prior board precedent (*Republic Aviation Corp v. NLRB*) prohibiting any employer interference with employees' right to display union insignia unless the employer has met its burden to establish "special circumstances" that make the rule necessary to maintain production or discipline. The majority then found that Tesla failed to establish special circumstances in this case.

Over the dissent of two holdover NLRB members, the majority held that "wearing union insignia, whether a button or a t-shirt, is a critical form of protected communication." As Chairman Lauren McFerran noted, "For many decades, employees have used insignia to advocate for their workplace interests – from supporting organizing campaigns, to protesting unfair conditions in the workplace – and the law has always protected them." The Tesla decision, he said, "reaffirms that any attempt to restrict the wearing of union clothing or insignia is presumptively unlawful and – consistent with Supreme Court precedent – an employer has a heightened burden to justify attempts to limit this important right.

Bottom Line

Given Elon Musk's willingness to risk approximately \$44 billion in his tussle with Twitter and with Tesla's

market value of around \$911 billion and annual revenue of about \$31.5 billion, we can expect the CRD will be in for a long ride in its case. But Tesla's phenomenal market value, Musk's wealth, and his reputation are also his company's Achilles' heel.

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