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Fifth Circuit Bites into NLRB: Apple's Union Campaign Conduct Lawful

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In the latest (of many) U.S. Court of Appeals' decisions reviewing National Labor Relations Board ("NLRB") orders, the Fifth Circuit has tackled employer actions during organizing campaigns. In *Apple Inc. v. NLRB*, No. 24-60242 (5th Cir. July 7, 2025), the court reversed an NLRB decision and found Apple did not violate the National Labor Relations Act (the "Act" or "NLRA") during a union organizing drive at its New York City retail store.

Background: The Apple Store Organizing Drive

The dispute stemmed from a unionization effort by Apple employees working with the Communication Workers of America ("CWA"). The NLRB had found Apple at fault for (1) coercively interrogating an employee about union activities, and (2) unlawfully removing union flyers from the breakroom. Apple pushed back, arguing its actions were routine, neutral, and lawful.

Fifth Circuit's Findings

1. No Coercive Interrogation

The court scrutinized a manager's conversation with an employee involved in the organizing effort. The manager's questions about wage discussions and unionization took place during a routine, public check-in on the sales floor. Crucially, the manager reaffirmed the employee's right to discuss unionization and made no threats or reprisals. The court found no evidence of union animus or coercion, emphasizing that casual, non-threatening inquiries—even about union matters—are not automatically unlawful. The employee's evasive response was attributed to strategic secrecy, not fear. The court held that the NLRB's finding of coercive interrogation was unsupported by substantial evidence.

2. Lawful Removal of Union Flyers

Apple managers removed union flyers left unattended in the breakroom, citing both an unwritten housekeeping practice and a written Solicitation and Distribution Policy. The Fifth Circuit found Apple consistently enforced these policies, removing all types of unattended materials—including non-union flyers and personal invitations—regardless of content. The court rejected the NLRB's reliance on isolated lapses (like the occasional newspaper or coupon left behind) as insufficient to show discriminatory enforcement. The court also declined to follow out-of-circuit precedent that would categorically prohibit removal of union materials, reaffirming that only selective or targeted removal is unlawful under Fifth Circuit law.

Takeaways

- Routine, Non-Threatening Inquiries Are Lawful: Managers may ask employees about workplace issues, including unionization, as long as the context is non-coercive and free from threats or reprisals. The line here is not a bright one, however, which makes applying this principle in practice difficult. The context of the communications is critical and not subjective to the supervisor—the employee and an objective fact-finder may view a conversation as coercive and threatening based on the totality of the circumstances, even if the supervisor does not.
- Consistency Is King: Employers may enforce neutral housekeeping and non-solicitation policies—even if this results in the removal of union materials—so long as enforcement is evenhanded and not aimed at union activity.
- Maintain Vigilance: This decision underscores the importance of clear, consistently applied policies and well-trained supervisors during a union organizing campaign to avoid any conduct that could be construed as coercive or discriminatory.

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