

**Wal-Mart Stores, Inc. and United Food and Commercial Workers International Union, AFL-CIO, CLC.** Cases 12-CA-20882 and 12-CA-22441

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On November 4, 2003, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,<sup>1</sup> conclusions,<sup>2</sup> and Order as modified.<sup>3</sup>

ORDER

The Respondent, Wal-Mart Stores, Inc., Port Orange, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the judge's Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discharging or otherwise disciplining employees because they engaged in protected concerted activity."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

<sup>1</sup> The Respondent has effectively excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In adopting the judge's finding that the Respondent unlawfully discharged employee Edward Eagen, we agree with the judge that Eagen's discharge violated Sec. 8(a)(1) of the Act. We therefore find it unnecessary to pass on the judge's finding that the discharge violated Sec. 8(a)(3), because this additional finding would be essentially cumulative with no material effect on the remedy. We shall modify the judge's Order accordingly.

In the absence of exceptions, we adopt the judge's dismissal of the remaining complaint allegations that the Respondent unlawfully interogated employee Eagen and unlawfully discharged employee Dennis Demint.

<sup>3</sup> Member Meisburg notes that this decision should not be read as a limitation on an employer's right to establish and enforce without discrimination prohibitions against the use of profanity in the workplace.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with your employer on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discipline you for engaging in protected concerted activity.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Edward Eagen full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other right or privilege previously enjoyed.

WE WILL make Edward Eagen whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Edward Eagen, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WAL-MART STORES, INC.

*Dallas Manuel, Esq.*, for the General Counsel.

*Charles A. Powell III and Spencer Kinderman, Esqs.*, for the Respondent.

*Renee Bowser, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The charge in Case 12-CA-20882 was filed by the United Food and Commercial Workers Union, AFL-CIO, CLC (the Union) on June 1, 2000,<sup>1</sup> and later amended on June 6, 2001. Based upon the allegations in the Union's charge and amended charge in Case 12-CA-20882, the Regional Director for Region 12 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on October 30, 2001. The charge in Case 12-CA-22441 was filed by the Union on August 15, 2002 and later amended on October 4, 2002. Based upon the allegations in Case 12-CA-22441, the Regional Director for Region 12 of the Board issued a complaint and notice

<sup>1</sup> All dates are in 2000 unless otherwise indicated.

of hearing on January 10, 2003. On January 16, 2003, the Regional Director for Region 12 of the Board issued an order consolidating Cases 12-CA-20882 and 12-CA-22441 for hearing. Based upon the allegations in the Union's charges, the complaints allege that Wal-Mart Stores, Inc. (the Respondent or Wal-Mart), terminated the employment of Edward Eagen and Dennis Demint because of their union and concerted activities. The complaint that issued in Case 12-CA-22441 also alleges that Respondent terminated Demint because he gave testimony to the Board in the form of an affidavit and because Demint was scheduled to testify at an unfair labor practice hearing before the Board in Case 12-CA-20882. The complaint that issued in Case 12-CA-20882 also alleges that by acting through Bob Mulack, Bob Teeter, and Steve Leake, Respondent interrogated its employees about employees' union activities. This case was tried in Deland, Florida, on August 18, 19, 20, 21, and 22, 2003. The General Counsel, the Union, and Respondent submitted posthearing briefs.<sup>2</sup>

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a Delaware corporation, with offices and places of business located throughout the state of Florida, including a facility at 1590 Dunlawton Avenue, Port Orange, Florida is engaged in the business of retail merchandising, where it annually derives gross revenues in excess of \$500,000. Annually, Respondent purchases and receives at its facilities located in the State of Florida, goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

###### 1. The operation of the store

As a Supercenter, Respondent's retail facility in Port Orange, Florida, includes grocery, fresh market, meat, produce, and deli departments in addition to other departments offering nonfood merchandise items. The store divisions are Home Lines, Hard Lines, and Grocery. In 2000, the facility employed approximately 520 to 530 employees and operated 24 hours a day. Bob Mulack was the store manager for the Port Orange facility from April 1999 to May 2003, and was responsible for all as-

<sup>2</sup> Respondent and General Counsel also filed separate posthearing briefs concerning Party-Opponent Admissions in GC Exh. 16. Counsel for the Union and counsel for the General Counsel also submitted a preliminary brief on this issue during the course of the trial. GC Exh. 16 is the transcript of the Florida Department of Labor and Employment Security Unemployment Compensation Appeals Bureau hearing in the claim filed by Edward Eagen. Only the portions of the transcript containing party-opponent admissions or testimony in conflict with trial testimony were admitted into evidence.

pects of the store's operations. During 2000, Mulack reported to District Manager Steve Leake. Gary Graves and Ron Dixon were salaried comanagers in 2000, and they were responsible for the three store divisions. Assistant managers in the three divisions reported to the comanagers and the individual department managers in each division reported to the assistant managers. In 2000, the six salaried assistant managers were Bob Teeter, Al Landi, Annette Figary, Cheryl Cantrell, Faye Bishop, and John DeWitt. Julie Backlund and Robbie Clark were assistant managers in training. Each assistant manager reported to one of the two comanagers.

In 2000, there were approximately 10 to 18 employees on the overnight stock crew in the dry grocery department. These employees were split into two shifts that worked different days. Both shifts worked on Thursday nights. The crews stocked the shelves in the dry grocery department with merchandise that was delivered by truck each night. During 2000, there were two lead associates or team leaders for the overnight stock crew. Gary Delaura held the position until April 20, 2000 when Bill Hale replaced him. Edward Eagen worked on Respondent's overnight stock crew from February 7, 2000, until May 22, 2000.

###### 2. The initiation of the Union's activity

Dennis Demint initially contacted the Union in early April via the internet and requested to talk with a union representative. In response to Demint's e-mail request, International Representative Steven D'Wayne Marrs telephoned Demint and set up a meeting. When Marrs met with Demint and his wife at their home in April, he explained the organizing process and the steps necessary to file a petition. Marrs left authorization cards with Demint for interested employees and Demint took the cards with him when he went into work the next scheduled workday. Demint estimated that he spoke with approximately 10 employees about signing the union authorization cards. In addition to soliciting employees to sign cards, Demint also printed information from the Internet. He left copies of the Internet materials in the breakroom and in other store departments. Demint described the materials as information concerning Respondent's past actions and information about the number of stock options owned by Sam Walton and others. In addition to leaving the materials in various areas of the store, Demint also distributed some copies to other employees. He did not identify the names, locations, or number of copies that he distributed to other employees. He did not distribute any of the materials to managers or supervisors.

Edward Eagen testified that near the beginning of April 2000, Demint approached him in the parking lot during lunch and asked him if he would be interested in signing a union card. Eagen returned the signed union authorization card to Demint the next evening. Eagen later received a telephone call from Marrs. During his telephone conversation, Marrs inquired as to whether Eagen thought that a union could succeed at Respondent's Port Orange store. Eagen replied it "possibly" could. Marrs asked Eagen if he would assist Demint in soliciting employees to sign cards and Eagen agreed. Toward the end of April, Marrs and the Union's Assistant to the Director of Strategic Programs Timothy Fitzpatrick met with Eagen at a local

restaurant. Eagen recalled that he spoke with Marrs and Fitzpatrick about how his background in both the union and management would be helpful in getting employees to sign the authorization cards. Eagen began talking with employees about the union the very next evening that he went to work. He estimated that he spoke with approximately five employees about the Union over the next 2 to 3 working days. On one occasion, Eagen asked Fitzpatrick to meet with an interested employee. Eagen attended no other meetings with employees concerning the Union. Marrs testified that he was aware that Eagen assisted Demint in the organizing efforts because the Union received authorization cards from Demint and from employees who had been solicited to sign cards by Eagen.

Marrs testified that the first meeting held at Demint's home was attended by approximately three to four employees. Marrs later held a meeting with employees at a restaurant. Marrs recalled that there were other meetings with employees that were either set up by Demint or Eagen. Marrs testified that after Eagen's discharge on May 22, 2000, the Union was unable to schedule any additional meetings with employees. Marrs testified that when the Union contacted those employees who had signed authorization cards, the employees declined. Marrs confirmed however, that even after Eagen's discharge, he continued to have contact with Demint and to receive signed authorization cards from Demint.

#### *B. Eagen's Discharge*

During his 3½ months of employment with Respondent, Eagen worked as a grocery stock clerk. Eagen worked 4 nights a week on one of the two shifts that comprised the stocking crew. As was true of the other employees on the overnight shift stocking crew, Eagen normally worked from approximately 9 or 10 p.m. in the evening until 7 or 8 a.m. the following morning. Eagen initially reported to Lead Associate Gary Delaura and then to Bill Hale prior to his discharge. Prior to his discharge on May 22, Eagen received no prior discipline or counseling related to the conduct for which he was discharged.

##### 1. Eagen's description of the events preceding his discharge

Eagen testified that he and other employees on his crew were having difficulties working with Team Leader or Lead Person Gary Delaura. When Eagen finished work on the morning of April 16, he went to the personnel office and spoke with a woman that he identified as "Andrea" and asked if she could set up a meeting for him with Store Manager Bob Mulack. He did not discuss with Andrea why he wanted to meet with Mulack. Later that same morning, Andrea called him and reported that Mulack was available to meet with him if he would return to the store. Eagen recalled that when he reported to an area that he described as the art ad office, he found both Mulack and Bob Teeter. Eagen explained to Mulack that Delaura not only talked to him and other associates on the crew in a derogatory fashion, but he had also damaged Wal-Mart stock and engaged in horseplay. Eagen provided examples of Delaura's behavior. Eagen told Teeter and Mulack that this kind of treatment from a supervisor is the kind of thing that causes unions to come in. Mulack responded: "Do we have union activities out there?" Eagen testified that he responded: "Yes. But I think at this

point in time it's on a small scale." Eagen testified that Mulack then asked him if he had signed a union card and he told Mulack that he had. Mulack then inquired as to whether other people had signed cards. Eagen acknowledged that others had signed cards and added: "But it's on a limited basis, small scale, not that many." When Mulack asked who had done so, Eagen replied that he did not know. Eagen told Teeter and Mulack that he really didn't have any more information and that he needed to go home to get some sleep because he had to work again that night. Teeter assured Eagen that he would be paid for the hour and a half that he had come in to talk with them. Eagen recalled that he told them that he didn't need the money but he did need the problem resolved. Teeter assured him that they would take care of it. On his way out of the store, Eagen asked to point out some safety concerns to Teeter. As Teeter and Eagen walked back from the safety tour, Teeter mentioned to Eagen that he would post for a leadman for Eagen's crew.<sup>3</sup> Eagen recalled Teeter's telling him: "You seem to have the maturity and the background. I'd like you to sign it." Eagen told Teeter that he had taken the job at Respondent's facility because he was retired and needed the benefits. Eagen explained that he was not interested in the lead position because it only paid 50 cents more an hour and it was not worth the stress and aggravation of supervising five other employees.

Three days later, the employees on Eagen's crew were told to report to the breakroom for a special meeting before beginning work. Eagen believed that on this particular evening the two shifts overlapped and all employees on the crew were present. Mulack began the meeting by telling the employees that he wanted to apologize for the way that Delaura had treated employees. Mulack acknowledged that Delaura had spoken to employees in a derogatory fashion, damaged freight, and engaged in horseplay. Mulack announced the Delaura had been terminated and that Bill Hale was acting leadman for both shifts until the job could be posted and filled. Following the announcement, Mulack then showed the employees a video that described Respondent's open door policy. The video lasted approximately 10 to 15 minutes and discussed how employees could bring their concerns to supervision without fear of retaliation. The video also explained that the open door policy is why Respondent believes that there is no need for a union.

Eagen testified that while he was scheduled to receive a performance appraisal after his first 90 days of employment, he actually received the appraisal on April 27. Eagen identified "Cheryl" the "store co-manager," as the manager who presented it to him. Eagen recalled asking her at the time why she was giving him the appraisal because he didn't know her and she didn't know him. Cheryl explained that Bob Teeter had completed and signed the appraisal and she was giving it to Eagen for Teeter. At the conclusion of going over the appraisal, Cheryl inquired: "How's things going out there?" Eagen responded: "They are going pretty good. There were some union activities but I think they are dying out. There's not a whole lot of support." Eagen testified that Cheryl then told him that she understood that he had signed a card. Eagen

<sup>3</sup> There are two leadsmen for each shift on the stocking crew. Eagen understood that Teeter meant that he would post for Delaura's position.

acknowledged that he had but added that he didn't think a whole lot of other people had done so. Cheryl then told Eagen that under Respondent's policy, she would have to report this to management. Eagen responded that Mulack and Teeter already knew. Cheryl explained however, that she would still need to inform District Manager Steve Leake. Eagen testified that he told Cheryl that he was pleased with his appraisal. On cross-examination however, Eagen acknowledged that he had included in his written comments on the appraisal form: "Julia did excellent job explaining Bob's comments."

Approximately 3 or 4 days after receiving his appraisal, the employees on Eagen's crew were told to report to the back conference room for a meeting with District Manager Steve Leake. There were approximately 9 or 10 employees present as both crew shifts were working that evening. During the meeting, Leake told the employees that they were doing a great job and he appreciated it. He asked that they keep up the good work and also asked if any of them had problems or complaints. When none of the employees raised any problems, Leake reminded them of the open door policy and explained that they could ultimately take their concerns to Mulack. He also added that employees could also call him as well. Leake explained: "That's the way the open door policy works and if you all do that there's really no need for unions."

Approximately an hour after the employee meeting, Eagen was told to report to the conference room to meet with Leake. No one else was present in the room other than Leake. Leake began by shaking Eagen's hand and he told Eagen that he was doing a fantastic job. Leake mentioned that he had seen Eagen's performance appraisal and he apologized that Teeter had not been able to give it to him in person. Eagen recalled that Leake added that this would never happen again. Leake also added that he had spoken with Teeter and that Eagen was the kind of employee that Wal-Mart wanted. Eagen recalled that Leake then changed the conversation by stating: "Now, I know that you signed a union card. I know it's illegal for me to talk with you unless you sign a decertification. However, just between us two, what's going on out there?" Eagen testified that he responded as following:

I'll tell you what I have already told Bob. You already know I signed a union card. A couple other associates have. I don't know their names. I don't think it's that many and I think after all these videos and Gary being gone, that a lot of the support will probably go away.

Leake thanked Eagen for the information and then added that he was aware that Teeter had spoken with him about applying for the leadman position. Leake urged: "I want you to reconsider because from what I hear and what I see you are the guy for the job and we need you." Although Eagen applied for the lead position 2 days later, the position was not filled before his discharge on May 22.

Eagen recalled that initially Bill Hale's performance in the lead position was "as different as night and day" from Delaura's performance. After about a week however, Hale began to act as Delaura had. While he didn't use derogatory language, he still raised his voice with the crew and commented on their work habits. Sometime between May 15 to 17, Hale in-

formed the crew that he was maintaining a record of how many cases individual crew members unpacked during a particular shift. He specifically stated to Eagen: "Well, old man. You did the worst of anybody." Eagen explained that he later found out that Hale had told everyone else on the shift except him how he wanted them to unpack the boxes for maximum stocking. The next night however, Eagen switched to the new system for unpacking and stocked either the highest or the second highest number of boxes. Eagen talked with the other employees on the crew and they also shared his frustration with the new system. After the third night of the case counts, Eagen discussed with fellow employee Eli Fernandez the need to share the employees' dissatisfaction with Gary Graves.

When Eagen spoke with Graves in Mulack's office, Eli Fernandez waited outside the office door. Eagen testified that he didn't know if Graves was aware of Fernandez' presence. Eagen testified that he told Graves:

Why are you taking measurements of only our crew? Is it because of the age of the guys on our crew? Is it because of the disabilities that some of us have? Is it because of the ethnic background of some of us? Or is it because you know that some of us on this crew have signed union cards?

Eagen described Graves as becoming "beet red" with his eyes "wide open." Graves simply told Eagen that he didn't know and that he would get back with him.

The next morning Eagen began looking for Graves. He saw him standing in the store aisle talking with Mulack and management trainee Ken Carney. Eagen recalled that when he saw these managers it had been before 8 a.m. and there were no customers nearby. When Eagen approached the managers, he asked Graves if he had had spoken with Mulack about the subject of their discussion the previous day. Graves said that he had not. Mulack asked what Eagen wanted to discuss. Eagen told Mulack that the crew had not unloaded the truck the previous night. He went on to add:

What I talked to Gary about yesterday was this new method of measuring. This method is bullshit. You are not accomplishing anything.

Mulack then explained that he had not directed the crew leader to measure or how to measure. He had simply directed that he wanted "numbers." Eagen testified that he responded:

Well, you are getting the blame for it because Bill is telling us that this is your idea and there's better ways of doing it than this because at times it's borderline unsafe. The customers don't like it. And to be honest with you, my aisle, which was one of the best aisles in the grocery department and you said so, at the end of the morning now looks like shit.

Mulack corrected him and told him rather than to use the word "shit," he should say "crap" and then he smiled. Mulack then asked Eagen for his suggestions on what were his suggestions for measurement. Eagen testified that after he gave Mulack a number of suggestions, Mulack replied: "Those were some good ideas. Let me get with Bill. You hang in here. Don't go home. Tell the other guys to hang around and I'll get back to you." Eagen recalled that he did not raise his voice and

he maintained a distance of approximately three feet during the conversation.

Approximately 30 minutes later, Hale told Eagen that Mulack wanted to see him in his office. In the presence of Graves, Mulack told Eagen: "As per Wal-Mart policy I'm terminating you for your profanity out on the floor. I am shocked that you used those words." Mulack directed Eagen to surrender his badge, tool belt, knife, and employee discount card before leaving the property. Mulack presented Eagen with a written exit interview form. When Eagen first saw the form, the explanation of termination included only one sentence: "In front of three members of management, Ed used profanity which is against Wal-Mart policy." When Eagen read the explanation, he told Mulack that he had not used profanity toward anyone, but had only used it to describe the way the aisle looked at the end of the night. He told Mulack that the statement as written would lead people to believe that he was "running around the store cursing everyone out." Eagen refused to sign the exit interview unless Mulack included the actual words that he was alleged to have used. Mulack then added the following to the form: "Ed said this is bullshit and used the word shit a few times in describing the aisle and the way of working the freight."

## 2. Respondent's description of its knowledge of Eagen's union activity

Mulack does not deny that he knew that Eagen signed a union card. He recalled a conversation that he had with Eagen in the office on April 17. Mulack recalled that while Teeter walked in and out of the office several times during his conversation with Eagen, Teeter was not present for the entire conversation.<sup>4</sup> Mulack recalled that Eagen called him directly to request a meeting. During the meeting, Eagen brought up his concerns about the way in which Delaura treated him. Eagen also mentioned Delaura's horseplay and his damaging merchandise. Mulack testified that during the conversation, Eagen simply volunteered that he had signed a union card and stated that he had done so to keep Mulack informed.

Mulack acknowledged because it is Respondent's policy to notify the district manager of any known union activities, he had done so after his conversation with Eagen. He also testified that he was sure that he had told all of his store managers that an employee had signed a union authorization card. Mulack admitted that during his appraisal interview with Assistant Manager of Training Julie Backlund, Eagen provided Tim Fitzpatrick's name and telephone number and volunteered that Fitzpatrick was scheduled to be on Respondent's sidewalk that next weekend. Within 2 weeks of his conversation with Eagen, two management officials from Respondent's corporate labor relations or personnel department visited the store. Leake told him that they were visiting the store because of the union activity at the time and because of their concern with the name of the union representative given by Eagen. The individuals from corporate office remained at the Port Orange store for a day and a half to 2 days. They provided store management with videos

and training tools and they also held group meetings with employees. One of the videos shown to employees was entitled "The Union attacks" and described the Union's tactics and suggested what the Union might say and do. Mulack denied that Respondent's corporate labor relations' representatives gave him any instructions as to how to handle the union activity. Mulack admitted however, that within 2 weeks after his April 17th conversation with Eagen, he believed that the Union would be contacting store employees.

Julie Backlund worked as an assistant manager trainee in April 2000, and she worked during Respondent's overnight shift. Backlund recalled that she gave Eagen his evaluation on April 27, 2000, at the request of Bob Teeter. While Teeter had prepared Eagen's evaluation, he was not able to be personally in the store to give it to Eagen on the 27th. Backlund denied that Assistant Manager Cheryl Cantrell had anything to do with preparing the evaluation or that she was present in the room when Backlund gave him the evaluation. Backlund went over the evaluation with Eagen and then told him that if he had any questions or anything further that he needed to discuss he could go to her or to any other member of management. As Eagen was exiting the room, he told her that he didn't want to get her involved in anything. Backlund explained that if there was a problem, that was why she was there. She suggested that if he didn't feel comfortable discussing the matter with her, he should go to somebody else. At that point, Eagen then shared that he had signed a union card. Backlund recalled that Eagen explained that he had signed a union card because he was working undercover for Mulack. Eagen told her that employees were signing union cards and there was union activity in the store. She testified that he also mentioned there was to be some upcoming activity however she could no longer recall the details. The next morning Backlund told Mulack about her conversation with Eagen and District Manager Leake was contacted pursuant to procedure.

District Manager Leake recalled that on April 29, 2000, he had held a 3 a.m. meeting with the employees on the food side of the store. Leake testified that as district manager he was required to schedule visits to stores during third shift. Leake explained that he scheduled the April 29 meeting to make sure that all of the new employees knew who he was and knew how to contact him if they needed to do so. During the meeting, Leake explained that he was Mulack's supervisor and that employees could discuss any issues with him at any time. Leake recalled that as he was exiting the room after the employee meeting, Eagen initiated a conversation with him. Eagen told him that he thought that Respondent was a great company and that Mulack was good store manager. Eagen added that he appreciated Leake's coming in overnight to introduce himself to the employees. Eagen finished by stating that Wal-Mart is a great place to work and they didn't need a union at Wal-Mart. Leake denied that he had mentioned unions or union issues with the employees in the meeting and he did not know what prompted Eagen to make the comment. Leake denied that he had any further conversation with Eagen other than when Eagen later introduced another new employee to him. Leake denied that he ever had any conversation with Eagen about union activity in the store or about Eagen's union activity.

<sup>4</sup> Teeter was never called to testify to corroborate Mulack's testimony.

### 3. Respondent's evidence on Delaura's discharge

Mulack testified that his conversation with Eagen was his first notice that there were concerns about Delaura's conduct. In response to the complaints, Mulack investigated the matter and interviewed 15 to 20 employees. All of the employees confirmed that they had issues with Delaura and told him about the way in which he spoke to them and the things that he had done.<sup>5</sup> In response to the investigation, Delaura was discharged on April 20. On the same night as Delaura's discharge, Mulack met with all of the grocery employees. Mulack told the employees that Delaura had been discharged and he apologized to them for having to work under Delaura. Following the meeting concerning Delaura, all of the store employees were shown "The Union Attacks" video.

### 4. Respondent's evidence on Eagen's discharge

Mulack admitted that prior to his discharge on May 22, Eagen had never received any discipline and that Eagen's discharge was based upon Eagen's conduct on May 22. Mulack recalled that on the morning of May 22, Eagen approached him as he was talking with Gary Graves and Ken Carney on the sales floor. Eagen walked up quickly and said that he needed to talk with him. Mulack testified that Eagen: "got right up in my face and he started describing the way Team Leader Bill made a decision the night before about a truck." Mulack recalled that Eagen used the words "shit" and "bullshit" three to five times and he described Eagen as aggressive in his demeanor. On cross-examination, Mulack was asked to identify the context in which Eagen used these words. Mulack recalled that Eagen's statements included: "This is bullshit," "counters look like shit," and "shit way of doing things."

Respondent's coaching for improvement program provides the procedure for investigating employee misconduct and for determining the appropriate discipline. The disciplinary progression provides for a verbal coaching at level one. If the verbal coaching is not successful in changing or correcting the unacceptable behavior or performance, an employee will receive a level two written coaching. Level three of the disciplinary progression is identified as "Decision Making Day." The employee is informed of the deficiencies noted at earlier coaching for improvement levels and the specific improvement required. The employee must complete and sign an acceptable detailed action plan. The employee is then given a day off with pay to decide whether he or she will make the required improvement. The policy also provides that employees who are deemed to have engaged in gross misconduct are subject to immediate termination. The policy lists 13 kinds of conduct as examples of conduct that are usually classified as gross misconduct and which may result in immediate termination. Mulack testified that the coaching for improvement policy was not used with Eagen because his conduct constituted gross misconduct. Mulack testified that while "using profanity" is not included among the list of the 13 behaviors, "Serious Harassment/Inappropriate Conduct" is included.

<sup>5</sup> Mulack testified that all of his notes from his meetings with employees had been lost or misplaced.

### C. Dennis Demint's Termination

Dennis Demint was employed by Respondent from November 1999, until June 25, 2002. At the time of his discharge, Demint worked as an inventory clerk specialist or ICS. While Demint worked on the night stocking crew in 2000, he was on a mid shift at the time of his discharge in 2002, and worked from 11 a.m. to 8 p.m. At the time of his discharge, Demint reported to Grocery Manager Mike Burke.

#### 1. Demint's description of his union and protected activity

##### a. Demint's affidavit to the Board

Demint became aware of Eagen's discharge in April 2000 when Eagen failed to report to work. Demint later learned that the Union had filed an unfair labor practice on Eagen's behalf. In February 2002, Demint provided an affidavit to the Board in conjunction with the Union's charge concerning Eagen. The next day after giving the affidavit, Demint saw Furniture Manager Brad Horner, as he was about to clock in for work. No one else was present during the conversation. Demint shared that he had just given an affidavit on Eagen's behalf. Horner responded by stating that he felt that Eagen was trying to take the company for a ride for money. Demint explained to Horner that he had spoken with Eagen and that Eagen had assured him that was not the case. Demint testified that he had not discussed any of the specifics of his testimony with Horner. Demint recalled discussing with Horner incidents in which other employees had used profanity.

During the same week as his conversation with Horner, Demint telephoned his friend John Newburn and told him that he had given testimony to the Board concerning Eagen. Demint described Newburn as the floor supervisor for the cleaning crew. Demint recalled that Newburn had a response similar to Horner and expressed negative feelings about Eagen. Demint also shared with Newburn his conversation with Eagen and reiterated his belief that Eagen only wanted reinstatement.

During the same week Leslie Baxter visited in Demint's home. Demint described Baxter as a friend who was over the unloaders in the back of the Port Orange store. During her visit, Demint told her that he had given an affidavit for Eagen. Baxter's only response was "Oh, you did." She neither asked questions nor made any additional response.

##### b. Demint's continued union activity

Demint testified that from June through December 2000, he continued to leave fliers at the store and he also tried to talk about the Union with a few employees. He recalled that he continued with the same activities in 2001 as well. While Demint testified that he collected some signed authorization cards from employees in 2001 and early 2002, he did not identify the number. He recalled however, that after Memorial Day in 2002, he received some additional authorization cards from Marrs. Demint estimated that he spoke with approximately 10 to 15 employees after receiving the new cards from Marrs and prior to his discharge in June 2002. He also estimated that he received approximately six signed authorization cards during this same time period.

Approximately a month before his discharge, Demint talked with Mike Burke on the sales floor. At the time of the conversation Demint was unhappy because he had just learned that he would have to wait a year after signing up for long-term disability insurance before it would become effective. Demint recalled telling Burke that the only way that things were going to change in the store would be if they could get a union. Burke replied that if they ever had a union, he would quit. He also added that employees at the store “had it made.”

Demint also recalled that approximately a month before his termination, he had a conversation with someone named Barrett and whom he identified as the manager of the store’s restaurant area. Demint did not know Barrett’s last name. During the conversation, Demint stated that he was going to do everything that he could to try to “bring in a union.” Demint went on to add that by bringing in a union, all of the managers in the store would be replaced because Respondent would have lost control. Barrett’s response was “Go for it.”

## 2. Respondent’s description of the events preceding Demint’s discharge

Grocery Manager Mike Burke recalled that he and Demint worked together stocking the store shelves on June 24, 2002. While they worked, Demint told Burke what a bad week that he was having. Demint explained that not only had his wife been recently terminated,<sup>6</sup> an electrical storm had damaged both his satellite dish and telephone, and then finally his dog had died. Approximately 30 to 45 minutes later, Burke and Demint were working in the store’s back room. Meat employees Damin Moore and Assistant Manager in Training Rick Wells were working nearby in the hallway. Demint continued his earlier conversation about his misfortune during the week. Burke testified that he heard Demint make the statement that he could understand how someone could go “postal.” Burke understood Demint’s comment to refer to the bad things that had happened to him during the week. Burke recalled that as Demint continued to talk he made a comment about “blowing this place up.” Wells testified that at the time of the conversation, he knew Demint but did not normally work side by side with him. Wells recalled that when Mike Burke laughed<sup>7</sup> at Demint’s comment, Demint added: “No, I’m serious. I’ve got the stuff to do it.” Both Burke and Wells recalled that Moore told Demint to remember him or to wait until he was not at work. Burke recalled Demint’s saying that it is usually upper management that gets its first. Wells recalled that Demint told Moore: “Well, you don’t have nothing to worry about, you know, just upper management.”

Wells testified that while Demint didn’t make any further comments on the subject, he had thought to himself that such comments were not funny. Moore and Wells went back to the floor area of the store and continued their work. As they worked, they talked about Demint’s comments and considered whether he had been joking or was serious. Wells admitted that

he wasn’t sure how serious Demint had been but he did not want to let it go because he felt that it was his responsibility to tell someone. Wells explained that the “Towers” had just blown up and there had been incidents in which individuals had gone into businesses killing people. Wells and Moore decided that they should report the incident to management. As they were walking toward the manager’s office they saw Comanager Todd Maufroy and asked to speak with him. When they told Maufroy what Demint had said, he asked them to prepare written statements. While Wells agreed, Moore explained that he did not feel comfortable in doing so. In declining, he cited a hearsay account of Demint and his wife’s alleged actions at a former place of employment. Maufroy testified that as he spoke with Moore and Wells, Moore seemed to be visibly upset as evidenced by his facial expression and his overall demeanor. While Wells and Moore were still in the office, Maufroy paged Burke to come to the office and to give his account of Demint’s comments. When Burke told Maufroy that he thought that Demint was joking, Burke recalled that Wells remarked that Demint’s wife had been terminated and that he had threatened to blow up the store. Burke testified that Wells appeared to take Demint’s statements seriously. After Maufroy informed Mulack of the situation, Maufroy escorted Burke, Wells, and Moore to Mulack’s office and they again described the conversation with Demint. Burke testified that when talking with Mulack he reiterated that he thought that Demint was joking. Both Wells and Moore however, told Mulack that they believed that Demint was serious.

After the meeting with Burke, Wells, Moore and Maufroy, Mulack excused Wells and Moore to return to their work area. He asked Burke to bring Demint to his office. When Burke and Demint entered Mulack’s office, Mulack and Maufroy met them. Maufroy recalled that Mulack mentioned Demint’s comments and explained that whether joking or not, such statements were inappropriate. Burke recalled that Mulack mentioned that because of “9/11” and the various things going on in the world, Demint had to refrain from making comments like that in the store. Mulack told Demint that he needed Demint’s assurance that he would not make those types of comments in the future. Both Maufroy and Burke recalled that Demint said nothing in response to Mulack’s comments. Burke recalled that Demint just stared directly at him and turned his shoulder away to avoid looking at Mulack. After Demint’s continued silence, Burke stated: “The man asked you a question.” While still continuing to stare at Burke, Demint simply stated: “I have nothing to say.” Maufroy also corroborated that Demint offered no explanation of the alleged comments. Maufroy described Demint as “very placid” and without expression. He never looked at Mulack and continued to stare at Burke during the entire conversation. Burke recalled that Demint’s demeanor shocked him because Demint was “acting so strange.” When Demint made no further response, Mulack excused him to return to work. After Demint left the room, Burke told Mulack that he could then understand how Wells and Moore felt and that he felt uncomfortable as well. Burke told Mulack that he no longer believed that Demint was joking. Mulack testified that he had been more concerned about the alleged threat after his meeting with Demint. His concern had

<sup>6</sup> Dianna Demint worked for Respondent from 1998 until her discharge in June 2002. At the time of her discharge, she was bakery manager and an assistant store manager. Demint testified that she was terminated for causing a hostile work environment.

<sup>7</sup> Burke testified that he initially thought that Demint was joking.

also heightened after Burke told him that he no longer believed that Demint was joking.

After talking with Demint, Mulack contacted Regional Personnel Manager Verian Booker in Respondent's corporate office. After Mulack explained what occurred, Booker directed him to offer Demint counseling through Respondent's employee assistance program. In the second of several conversations throughout the afternoon, Booker directed Mulack to discharge Demint. Booker also advised Mulack to have District Loss Prevention Manager Joe Moore present at the time of Demint's discharge. Prior to the discharge interview, Joe Moore arranged for a police officer to be present at the facility. Mulack notified his store managers of the threat and advised them to be on alert and to heighten the security of the store.

Brad Horner testified that he had been called into the office at the time of Demint's discharge. Prior to going to the office, he had not known the purpose of the meeting. Horner recalled Loss Prevention Manager Moore asking Demint about statements relating to blowing up the store or something similar to that. Horner recalled that Demint simply "smirked" and said nothing. "I said all I was going to say yesterday and that's it" was the only statement that Horner recalled Demint's making during the meeting.

### 3. Respondent's evidence concerning knowledge of Demint's protected activity

Barrett Worst testified that he had a conversation with Demint in Respondent's Radio Grill on the day of Demint's discharge. Worst testified that he was not sure but he believed that he had been working as Radio Grill manager at the time of the conversation. Worst described Demint as "high strung." Demint told Worst that he had just "told Bob off" and he thought that he was about to be fired. Then Demint added laughingly "I might just come back and blow the place up." Worst admitted that he had not taken Demint seriously and he had not reported this comment to anyone. Worst also testified that since he began working at Respondent's facility in 1999, he had occasionally spoken with Demint about working conditions and Demint had expressed his aggravation with his employment with Respondent. Although presented as a witness for Respondent, Worst was not asked nor did he deny that Demint had told him that he would do all that he could to bring in a union.

Horner testified that prior to Demint's termination, he had not known that Demint had given an affidavit to the Board. Horner recalled that it had only been after Demint's termination that Demint told him about giving the affidavit. Demint told him about the affidavit when Horner was visiting Demint in his home. Horner knew that Demint supported the Union because Demint asked him to sign a union authorization card and he had done so. Horner recalled that this had occurred however, "way before" Demint's discharge.

### 4. Demint's description of the events preceding his termination

#### *a. Demint's testimony concerning the events of June 24 and 25, 2002*

Demint testified that the day before his discharge he was called to the office to meet with Mulack. He remembered that Burke was also present. Demint recalled Mulack's saying to him: "You can't say you are going to take out upper level management. Okay?" Demint admitted that he said nothing in response to Mulack and Mulack repeated the same question. Demint further acknowledged that in addition to his saying nothing in response to Mulack's questions, he simply stared at Burke. Finally, Mulack told him to return to work. Later that same evening, Demint was returning to work from his break. Mulack approached him and handed him a card. Mulack told Demint that he could either talk with Mulack or he could call the people identified on the card if he had problems. Demint recalled that he read the card and then put it into his pocket. He told Mulack that he didn't like the way that Comanager Roy DiPietrantonio had treated his wife and that he was going to seek an attorney about it. Demint told him that he was mad about his wife's discharge. Demint recalled that Mulack stated that he would be unhappy if he were Demint. Mulack urged Demint to think about his career.

On June 25 2002, Demint was called into the office to meet with Mulack. Demint recalled that in addition to Mulack, a police officer and the loss prevention manager were present in the office. Brad Horner was also present at Demint's request. Demint recalled that he was asked to sign the exit interview form and that he was informed that he was terminated for gross misconduct.

### 5. Demint's testimony concerning the alleged threats

Demint recalled that he had a conversation with Burke, however it had not been on June 24, 2002.<sup>8</sup> Demint estimated that the conversation occurred approximately June 22. Demint recalled that he and Burke had been working near each other on aisle #5 of the store. During this time, he received a call from his wife on his personal cell phone telling him that their dog had died. Demint recalled that he told Burke "It's been a very bad week. Lightning took my phone out. My dog died. Dianna got, you know, she just got previously fired." Demint denied making any statement about going postal when he talked with Burke. Demint also denied that he had any conversation with Damin Moore on the same day as his conversation with Burke.

Demint recalled however, that he did have a conversation with Moore on June 24. Demint testified that on June 24 he had been loading a stock cart in the back room. Demint described Moore as impatient as he attempted to get through the room's crowded space. Demint testified that their verbal interchange had been as follows:

And I kind of looked at him and I said, 'You need to back it up or I'll take you out.' And he kind of snickered and said

<sup>8</sup> All of the dates concerning Demint's alleged threats and his termination are in 2002.

‘You’ll go postal, right?’ I said, ‘Yea. Right.’ He says ‘Like I’m worried.’ And he laughed. So I continued to load up the cart and at some point I said, ‘Well you better be worried because I’ve got the things to do it.’

Demint explained that he moved the cart for Moore to pass and Moore continued into the meat freezer. Thinking about his conversation later, Demint wondered if he might have offended Moore. Demint went into the cooler where Moore was working and told him: “Hey. I’m not going to take you out. I’ll just take out upper level management.” Demint then walked away without further comment. He acknowledged that he wouldn’t have been able to see if there was anyone else in the cooler, as he had not walked that far into the cooler. Demint denied that he made any statement about going postal and that no one said anything about blowing up the store.

### III. ANALYSIS AND CONCLUSIONS

General Counsel alleges that Respondent terminated Edward Eagen and Dennis Demint because of their activities in support of the Union and thus violated Section 8(a)(3) of the Act. General Counsel also alleges that Eagen was terminated because he concertedly complained to Respondent regarding wages, hours, and working conditions of Respondent’s employees. General Counsel further alleges that Respondent terminated Demint because of his having given testimony to the Board in violation of Section 8(a)(4) of the Act. Respondent denies knowledge of Demint’s previous Board testimony and alleges that either Eagen or Demint were terminated because of gross misconduct.

In *Meyers Industries (Meyers II)*, 268 NLRB 493 (1984), the Board stated that an employee must be engaged with or on the authority of other employees, and not solely by or on behalf of the employee himself to constitute “concerted” activity. Once the activity is found to be concerted, an 8(a)(1) violation will be found, if, in addition, the employer knew of the concerted nature of the employee’s activity, the concerted activity was protected by the Act, and the adverse employment action at issue was motivated by the employee’s protected concerted activity. Respondent argues that Eagen’s complaints to Mulack on May 22 did not constitute concerted activity because he only complained about the way in which Hale “worked the truck” the previous night and because the case count system made the aisles “look like shit.” Respondent asserts that no other employees accompanied Eagen when he confronted Mulack and that there is no evidence that he was acting as a spokesperson for any other employees on this issue.

In determining the existence of concerted activity, the Board has considered such factors as whether the comments involved a common concern regarding conditions of employment and whether the issue was framed as a common concern. See *Air Contact Transport, Inc.*, 340 NLRB No. 81 slip op. at 12 (2003), *Neff-Perkins Co.*, 315 NLRB 1229, 1232 (1994). In *Amelio’s*, 301 NLRB 182 fn. 4 (1991), the Board stated that it would “find that an individual is acting on the authority of other employees where the evidence suggests a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group.” As Counsel for the General Counsel points out in his brief, an employee’s complaints about the behavior of their supervisor can be con-

duct protected by Section 7 of the Act. See *American Tissue Corp.*, 336 NLRB 435, 448 (2001), *Astro Tool & Die Corp.*, 320 NLRB 1157, 1162 (1996), *Hoytuck Corp.*, 285 NLRB 904 (1987). Eagen testified that during his discussion with Comanager Graves on May 21, he asked Graves why case counts were conducted on only his night crew. Eagen went on to question as to whether his crew was singled out because of the age of the crew members, their disabilities, their ethnic background, or their union activity. Eagen testified that when he confronted Graves with Mulack the next day, he asked if Graves had discussed these concerns with Mulack. Although Graves told Eagen that he had not had a chance to discuss these concerns with Mulack, Graves was never called to testify and thus never rebutted Eagen’s description of the May 21 conversation. Respondent admits that Assistant Manager Bob Teeter was a supervisor and agent of Respondent at all material times. At the time of Eagen’s conversation with Graves, Graves was one of only two managers in the store who reported directly to Mulack and there is no dispute that the assistant managers reported to either Graves or Dixon. Accordingly, while Graves was not pled as a supervisor, the record demonstrates his supervisory status within the management hierarchy of the store. Accordingly, it is undisputed that Eagen not only complained about the case counting process to Graves, but also specifically addressed the age, ethnicity, disability, and individual union activities of the members of the crew. Clearly, Eagen’s comments to Graves were on behalf of the entire crew and fell within the scope of concerted activity. The Board does not require that an employee have direct personal authorization from other employees in order to engage in concerted activity. *Pomeroy’s, Inc.*, 232 NLRB 95 (1977). Additionally, when Eagen spoke with Mulack on May 22, he confirmed that he had complained about the case counting process to Graves the previous day. Eagen went on to complain about Hale and the effect of the process not only on customers but also upon the work process.<sup>9</sup> Accordingly, I find that Eagen was engaged in concerted activity on May 21 and 22, 2000.

The analytical framework for determining when a discharge violates Section 8(a)(3) and (1) of the Act has been set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). *Wright Line* is premised on the legal principle that an employer’s unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. *American Gardens Management Co.*, 338 NLRB 644 (2002). Therefore the analysis is appropriate in cases such as this one where there is disputed motivation. See *Aluminum Co., of America*, 338 NLRB 20, 21 (2002). Based upon the *Wright Line* analysis, the burden rests with the General Counsel to make a prima facie showing sufficient to support the inference that protected conduct was a “mo-

<sup>9</sup> The Board has held that even a complaint made for oneself constitutes protected concerted activity if the effect of the complaint is to better conditions for all employees. *Hanson Chevrolet*, 237 NLRB 584 (1978).

tivating factor” in the Respondent’s decision to terminate Eagen and Demint. To establish a prima facie case, General Counsel must show the existence of protected activity, Respondent’s knowledge of that activity, evidence of union animus, and the link or nexus between the protected activity and the adverse employment action. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line* above at 1089. Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct. *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), enf. 942 F.2d 1140 (7th Cir. 1991). In the matter before me, I find that Respondent has met its burden of demonstrating that it would have terminated Demint even in the absence of his protected activity. I do not find that Respondent has met this burden with respect to Eagen’s discharge.

#### A. Whether Respondent Unlawfully Terminated Eagen

Respondent does not dispute that as early as April 17, there was knowledge of Eagen’s union activity. Admittedly, Eagen not only told Mulack that he signed a union card, he also identified for Julie Backlund the union representative who was involved in the store organizing. Mulack admitted that within 2 weeks of his talking with Eagen, he believed that the Union would be contacting employees. Both Mulack and Backlund admitted that Eagen’s information on the Union organizing was immediately communicated to District Manager Leake. Within 2 weeks of receiving the first information from Eagen, corporate labor relations’ personnel visited the store and admittedly did so because of the union activity. Thus, there is no dispute that not only did local management officials have knowledge of the Union’s organizing activities at the store, but corporate management knew as well. Mulack testified on cross-examination that while he could not recall whether he told the corporate visitors that Eagen was the employee who signed the union authorization card, he added: “I probably did say the name. I’m sure I did.” Mulack testified in Eagen’s hearing before the Florida Department of Labor and Employment Compensation Appeals Bureau on August 1, 2000, that at the time of Eagen’s discharge, Eagen was the only employee for which he had knowledge of union activity. Thus, General Counsel has met the burden of demonstrating Respondent’s knowledge of Eagen’s union activity.

There being no dispute that Respondent had knowledge of Eagen’s union activity and that Respondent took adverse employment action against Eagen, the remaining element for the General Counsel’s prima facie case is whether there is a link between the protected activity and the adverse employment action sufficient to support an inference of unlawful motivation. *Signature Flight Support*, 333 NLRB 1250 (2001). While General Counsel alleges that Mulack, Teeter, and Leake interrogated Eagen about his union activity, there is no specific evi-

dence that Respondent harbored any animus toward Eagen for supporting the Union. Even without direct evidence however, the Board may infer animus from all of the circumstances. *Electronic Data Systems Corp.*, 305 NLRB 219 (1991). In *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enf. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S. 1118, (1997), the Board affirmed the administrative law judge in finding an employee’s discriminatory discharge. While there was no direct evidence of animus, the employee had been the only employee disposed toward the union whose identity was known to the employer at the time of the employee’s discharge. The fact that the employee was discharged shortly after the employer acquired knowledge of the employee’s union activity was considered as further support for an inference of unlawful motivation.

The record is lacking in direct evidence of animus toward Eagen. The Board however, has in certain circumstances inferred animus from the record rather than relying upon or requiring direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). The Board has noted that such things as suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees as support for an inference of animus and discriminatory motivation. *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1126 (2002), *Metro Networks Inc.*, 336 NLRB 63, 65 (2001), *Medic One, Inc.*, 331 NLRB 464, 475 (2000), *Adco Electric Inc.*, 307 NLRB 1113, 1129 (1992). The Board has further noted that because there is seldom direct evidence of unlawful motivation, circumstantial evidence may be relied upon to draw an inference of unlawful motivation. See *Abbey’s Transportation Services*, 284 NLRB 698, 701 (1987), enf. 837 F.2d 575 (2d Cir. 1988).

I find that the record as a whole supports an inference of animus and unlawful motivation. The most persuasive factor in finding an inference of animus is the timing of Eagen’s discharge. It is apparent that upon learning that there was union activity in the store, Respondent mobilized its regional and corporate personnel to combat the union’s organizational efforts. Within 2 weeks of Eagen’s admission that he had signed a union authorization card, labor relations representatives from Respondent’s corporate office were in the store conducting employee meetings. Less than 2 weeks after Eagen’s disclosure, Respondent’s district manager made it a point to visit the Port Orange store for a 3 a.m. meeting with employees. Mulack admitted in Eagen’s State unemployment compensation hearing that as of the date of Eagen’s discharge, he was the only employee specifically known to have signed a union card. Mulack also admitted in the Board proceeding that within 2 weeks of his learning that Eagen had signed a card, he expected the Union to contact other employees. Thus, while Respondent responded to what appeared to be an ongoing campaign, Eagen was the only known union supporter and he was terminated less than 6 weeks after he made his support known.

Admittedly Eagen received no discipline prior to his discharge and he was discharged without benefit of Respondent’s progressive disciplinary policy. Respondent contends however, that its progressive disciplinary policy was not applicable be-

cause Eagen engaged in gross misconduct. In support of this argument, Respondent submitted records to show that it has also discharged 14 other employees for similar gross misconduct. Respondent's records however, do not support a finding that other employees have been similarly treated. Eagen admitted that he used the words "shit" and "bullshit" when describing the appearance of the aisles and the work process affected by conducting case counts. While Mulack asserts that Eagen used these words more than once, he acknowledges that the usage was within the same context as asserted by Eagen. Neither Mulack nor any other management official testified that Eagen used these words or any alleged profanity to describe an individual or to address any specific individual.

Respondent's records demonstrate that it has discharged other employees for gross misconduct involving statements made by the employees at Respondent's facility. The circumstances in which the other employees were terminated and the context and content of their statements are distinguishable from the present case. Employee statements that led to discharge involved such comments "Oh my God, you're fucking stupid," "Don't fuck with me today," and "kiss my ass."<sup>10</sup> One of the discharges based upon an employee's profanity involved an insubordinate response to a crew leader.<sup>11</sup> Five discharges resulted after an employee's use of profanity in the presence of customers or were based upon customer complaints.<sup>12</sup> Two of the discharges resulted from an employee's specific description of another employee.<sup>13</sup> In one instance, the employee is alleged to have "lost his temper with seven associates in the Bakery" and to have shown "Total lack of respect for the individual." Rather than discharge however, the employee received a voluntary termination and his exit interview reflected that he would be considered for rehire.<sup>14</sup> One of the records submitted by Respondent reflected that on June 20, 2001, Department Manager DeMarco requested an employee to "please help him" with some work that he was doing. The employee responded by shouting "Can you hold on a damn minute, I just got done carrying out 25 rock." The record reflects that a customer was standing nearby and commented on the employee's "dirty mouth" and complained to management that she was offended. Rather than discharging the employee, Respondent gave the employee a decision-making day consistent with the progressive discipline policy. When the employee refused to sign the coaching for improvement form, he was terminated.<sup>15</sup> In reviewing Respondent's record of employees whose employment was terminated for allegedly similar conduct, I note that only one of the 14 employees was terminated prior to Eagen. I also note that the employee was shown to have been terminated for violation of company policy. The note in the personnel file reflects that the employee and her husband purchased items at one of Respondent's registers. During the course of the purchase, the employee and her husband caused a disturbance

because of the prices on certain items. The written account described the husband as loudly belligerent and argumentative. Three customers were noted to have walked away from the checkout line. In the course of the conversation, the employee told the manager that she was not going to drink that "crappy store brand." The explanation of termination reflected that the employee was terminated for inappropriate conduct and her lack of respect by using profanity with the manager.<sup>16</sup>

The record also reflects that an employee was terminated on April 9, 1997, for fighting on company property. His personnel file however, reflects that previously on September 24, 1996, the same employee was reprimanded for calling another employee a "bitch." On November 29, 1996, the employee was again reprimanded for his attitude around others and his language.<sup>17</sup> While an employee was documented to have used obscene language on the sales floor on January 2, 2001, she was given a decision-making day rather than termination.<sup>18</sup> On May 18, 2001, an employee was given a decision-making day based upon other employees' complaints that the employee used inappropriate language and offensive comments.<sup>19</sup> On October 28, 2002, an employee was given a decision-making day when the employee allegedly used the phrase "God damned" to another employee. On December 19, 2000 an employee was terminated after provoking an argument with one of the store's vendors. His file reflects however that just a month earlier, the same employee repeatedly called another employee "asshole" in front of other employees.<sup>20</sup> On April 10, 2001, an employee was terminated after calling another employee "bitch." Respondent's records reflect however, that Respondent rehired the same employee on August 28, 2001. On November 8, 2001, he was promoted to a crew leader position.

Thus, the record evidence reflects that while Respondent has terminated other employees for their use of profanity, the circumstances have not been similar to those involving Eagen. When other employees have been discharged, the actual statements have been different and the contexts of the statements were different. Respondent's records also reflect that other employees have used profanity and were disciplined under the coaching for improvement program rather than discharged. Mulack testified at Eagen's State unemployment compensation hearing that Respondent does not have a list of words that are defined as profanity. Mulack also admitted that it is his decision as to what constitutes "profanity" and his determination depends upon the context in which it is used.

Mulack testified that while Respondent's corporate labor relations' representatives visited the store because of the reports of union activity, they gave him no instructions as to how to respond to the union activity. He also testified that when he made the decision to terminate Eagen, he did so without consulting the district manager or any other management official at any level higher than his own store management. I do not find Mulack's testimony credible. To assert that he terminated the

<sup>10</sup> R. Exhs. 21, 22, and 61.

<sup>11</sup> R. Exh. 59.

<sup>12</sup> R. Exhs. 22, 24, 57, 58, and 60.

<sup>13</sup> R. Exhs. 63 and 62 alleging that the discharged employees described other employees as "dickhead" and a "fat f—b—" respectively.

<sup>14</sup> R. Exh. 23.

<sup>15</sup> R. Exh. 58.

<sup>16</sup> R. Exh. 28.

<sup>17</sup> U. Exh. 4.

<sup>18</sup> U. Exh. 7.

<sup>19</sup> U. Exh. 9.

<sup>20</sup> GC Exh. 29.

only known union supporter without consulting either his district manager or the corporation's headquarters is simply not plausible. Respondent obviously viewed the employees' organizing activity as having a high priority inasmuch as it merited a store visit from corporate labor relations' personnel. As manager of a store of over 500 employees, it is reasonable that he would evaluate and consider the effect of Eagen's discharge on the existing union organizing. To assert that he did so without considering Eagen's union activity or consulting higher management supports an inference that Eagen was terminated for reasons other than his alleged profanity.

Respondent contends that Eagen is not a credible witness and asserts in its brief "Eagen will say whatever he thinks he needs to say to advance his position regardless of the truth." In part, I agree with Respondent that much of Eagen's testimony appeared to be self-serving with obvious embellishment. His testimony also contained conflicts and inconsistencies.<sup>21</sup> Despite the inconsistencies however, Respondent's witnesses corroborate that he repeatedly told Respondent's managers about his involvement with the union. It was in fact Backlund who confirmed that Eagen reported the name and telephone number of the union representative who was targeting the Port Orange store for organizing.

Respondent argues that General Counsel has not established a prima facie case because Respondent had no knowledge that Eagen supported the union. Respondent contends that while Eagen told Mulack and Backlund that he had signed a union card, he had also done so to "keep Mulack informed." Eagen's own testimony reflects that when he talked of his union activity with management, he downplayed or minimized the extent of his activity and that of others. Candidly, his own description of his comments reflects an attempt to ingratiate himself to management. There is no allegation that he made any threats or predictions related to his involvement with the Union. His apparent cordial communication however, does not diminish his union activity. Mulack clearly admitted that he anticipated the Union's attempt to contact employees and that Eagen was the only employee known to have had contact with the Union. Eagen not only told Mulack that he signed a union card, but he also told Backlund and Leake. Eagen was the only employee who appeared to be talking about the union. For Respondent to assert that it did not know that Eagen supported the union when he disclosed to three separate management officials that he had signed a union card is disingenuous.

Respondent further asserts that even if Eagen was engaged in concerted activity at the time of his discharge, his statements to Mulack removed him from the protection of the Act. Specifically, Respondent relies upon the Board's ruling in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), where an employee was lawfully terminated after calling his supervisor a "lying son of a bitch." In its brief, Respondent also cites the Board's recent ruling in *Aluminum Co.*, 338 NLRB No. 3 (2002). The facts of

that case reflect that within a 3-day period, a probationary employee made a number of statements in the presence of supervisors and other employees. On one occasion, the employee stated: "Wonder how Kid Mitch (Supervisor Mitchell) is going to fuck us now?" After observing a supervisor performing bargaining unit work, the employee stated in reference to the supervisor: "if the son of a bitch wanted to be a maintenance man, to get tools, or to get his a—back in the office." The employee continued by yelling, "so you're telling me what we have is chicken—shit—bosses out here." A several minute tirade followed, punctuated with other expletives, including references to supervisors as "those mother fuckers" and accusations that they were trying to "pull some bullshit." In finding that the employee's conduct was outside the protection of the Act, the Board noted that none of the profane outbursts involved face-to-face meetings with management where the employee sought to present his grievances. The Board noted that the outbursts were made in employee breakrooms where the statements could be overheard by coworkers and would reasonably tend to affect workplace discipline by undermining the authority of the supervisors subject to his vituperative attacks. Additionally, two of the employees witnessing the tirade went to the supervisor and voiced their opinion that he should not tolerate that kind of behavior by an employee. I find the circumstances of these cases distinguishable from the circumstances of the case herein.

Respondent is correct in its assertion that an employer's conduct may be so flagrant or opprobrious that it may lose the protection of the Act even when it occurs during the course of Section 7 activity. *PPG Industries*, 337 NLRB 1247 (2002), *New Process Gear*, 249 NLRB 1102 (1980). Not all inappropriate conduct however, removes the employee from the protection of the Act. The Board and courts have found that even foul language or epithets directed to a member of management insufficient to remove the protection of the Act. *Burle Industries*, 300 NLRB 498 (1990), *enfd.* 932 F.2d 958 (3d Cir. 1991),<sup>22</sup> *Postal Service*, 241 NLRB 389 (1979),<sup>23</sup> *Thor Power Tool Co.*, 148 NLRB 1379 (1964), *enfd.* 351 F.2d 584 (7th Cir. 1965),<sup>24</sup> *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724 (5th Cir. 1970).<sup>25</sup>

The Board's test for determining whether an employee engaged in protected activity loses the protection of the Act includes a consideration and balancing of several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816–817 (1979). There is no dispute that while Eagen used such words as "shit" or "bullshit," he used them only in context of describing the case counting production measurement and its effect upon the appearance of the store. Respondent does not contend that he used these words or any profanity to describe another

<sup>21</sup> Eagen testified that he received his performance appraisal from Assistant Manager "Cheryl" but admits that he complimented "Julie" on her presentation of the appraisal. At the State unemployment hearing, Eagen contended that he had used "bull" rather than "bullshit" in talking with Mulack.

<sup>22</sup> An employee was discharged in part for calling his supervisor a "fucking asshole."

<sup>23</sup> Calling an employer an "asshole."

<sup>24</sup> Calling an employer a "horse's ass."

<sup>25</sup> Calling an employer a "damned liar."

employee or a member of management. There was no associated insubordination to any supervisor. While the discussion occurred in the retail area of the store, there is no evidence that any other employees or customers overheard the conversation. Inasmuch as Eagen had accused Graves the previous day of instituting the case count on his crew in part because of union activity on the crew, it may be argued that the comments were provoked by Respondent's unfair labor practices. Thus, crediting Eagen's description of his conversation with Mulack, I do not find that Eagen's remarks removed him from the protection of the Act.

Respondent also argues that even if General Counsel has established a prima facie case, General Counsel cannot establish that Respondent would not have taken the same action regardless of any unlawful motive. Respondent contends that Eagen's discharge was totally consistent with Respondent's policy on the use of profanity in the store. In its brief, Respondent acknowledges that while there is some evidence that employees used profanity but were not terminated, such a number was small in comparison to those who were terminated. Additionally, Respondent argues that Eagen's profanity occurred on the sales floor in a hostile and threatening manner. As discussed above, Respondent has presented evidence that employees have been terminated for the use of profanity. A review of those discharges however, reflects that the circumstances and context of the profanity can be distinguished from the instant case. Respondent's discharge of other employees for the use of profanity involved primarily circumstances of insubordination or hostile and disrespectful comments about other employees. Additionally, I do not credit Mulack's testimony that Eagen's comments were made in a hostile or threatening manner. Eagen testified that when he spoke with Mulack, he had been approximately three feet away and had not raised his voice. Mulack described Eagen's voice as aggressive although he acknowledged that Eagen spoke in a normal speaking voice. Mulack testified that both Graves and Ken Carney were present during Eagen's conversation with him on May 22. Neither Graves nor Carney testified or corroborated Mulack's description of Eagen's conduct.

Accordingly, I do not find that Respondent has established that it would have terminated Eagen even in the absence of his protected and union activity. I find Respondent's discharge of Eagen on May 22 as violative of Section 8(a)(1) and (3) of the Act.

#### *B. Whether Respondent Unlawfully Interrogated Employees*

In the complaint, General Counsel alleges that in late April 2000, Bob Mulack, Bob Teeter, and Steve Leake interrogated employees about employees' union activity. General Counsel presented only the testimony of Edward Eagen in support of these complaint allegations. Specifically Eagen testified that he met with Mulack on or about April 17 to discuss his concerns about Grocery Stock Crew Leadsperson Gary DeLaura. In describing DeLaura's treatment of employees on his crew, Eagen commented that this is the kind of treatment by a supervisor "that causes unions to come in." Eagen alleges that Mulack responded by asking "do we have union activities out there?" Eagen also alleges that Mulack inquired as to whether

Eagen and others had signed union authorization cards and the identity of those who had signed cards. Eagen recalled that Teeter had been present during this conversation with Mulack. In response to Eagen's testimony, Mulack recalled that Eagen told him that he had signed a union card to keep Mulack informed. Mulack denied asking Eagen if he had signed a card and denied asking if any other employees signed a card. Mulack testified that as a manager for Respondent, he had been trained on Respondent's position on unions and he knew that he could not ask questions or threaten or spy or "anything like that." Mulack also testified that Teeter had not been present during his entire conversation with Eagen.

Eagen also testified that when he met alone with Leake after the group stock crew meeting on or about April 30 or May 1, Leake told him that he knew that Eagen had signed a union card. Leake then followed up by stating that he knew that it was illegal for him to talk with Eagen but "just between us two, what's going on [out] there?" Eagen recalled that he then told Leake that other employees had signed cards but he didn't know their names. Eagen also opined that he didn't think that many employees had signed cards and he thought that with all of the videos and DeLaura's termination, a lot of the union support would go away. In contrast to Eagen, Leake not only denied having a meeting with Eagen after the group meeting, but also denied asking Eagen any questions about the Union. Leake testified that Eagen approached him after the meeting and told him that Respondent's store was a great place to work, thanked him for coming, told him that Mulack was a good store manager, and added, "We don't need a union at Wal-Mart."

The Board has determined that the issue of whether questioning is coercive is to be decided on the basis of all the surrounding circumstances. See *Rossmore House Hotel*, 269 NLRB 1176, 1179 (1984), *enfd. sub. nom. Hotel Restaurant Employees v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In analyzing the "totality of the circumstances" several factors are considered: (1) the background of the employer; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the reply. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Although "strict evaluation of each factor" is not required, the indicia have been found as a starting point for assessing the totality of the circumstances. See *Perdue Farms, Inc., v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

In its brief, Respondent cites the Board's decision in *John W. Hancock Jr., Inc.*,<sup>26</sup> in support of its argument that Mulack did not violate §8(a)(1) in his April 17 conversation with Eagen. In *John W. Hancock Jr., Inc.*, a supervisor asked an employee how many men were at the union's meeting the previous night. When the employee responded that he did not know, the supervisor dropped the subject. The Board noted that while the employer had voiced its opposition to the union before this statement there had been no threats or promises related to the union. Additionally, the Board noted that the answer to the question would not have revealed the union sentiments of any one employee. The Board cited Board and court decisions where simi-

<sup>26</sup> 337 NLRB 1223 (2002).

lar questions gauging nothing more than numerical support for a union have not been found to constitute unlawful interrogation.<sup>27</sup> The Board considered the fact that the questioner was a low level supervisor who asked the question as he and the employee rode together as a part of breaktime and there was no accompanying explicit or implicit threat of reprisal. Based upon the totality of the circumstances, the question was not found to be violative of the Act. In a more recent decision, the Board affirmed the administrative law judge in finding that a supervisor's interrogation about the location and date of a union meeting was not violative of the Act. While the interrogation came from a high level supervisor, the employees were open union activists and there was nothing intimidating or coercive in the manner of the questioning. Although one of the employees did not answer truthfully, the judge did not find this as evidence of coercion. Based upon the atmosphere of the questioning, the limited nature of the single question, the employees' open union sympathies, and the absence of any threat or intimidation, the judge found no violation of §8(a)(1). *Superior Emerald Park Landfill, LLC*, 340 NLRB No. 54 slip op. at 19 (2003).

Based upon the totality of the circumstances, I do not find that Mulack interrogated Eagen in violation of §8(a)(1). While the conversation between Eagen and Mulack occurred in an office on Respondent's premises, Eagen specifically initiated the meeting. There is no allegation that Mulack was involved in any prior unfair labor practices at this facility. The record in fact, contains no evidence of any prior union activity at this facility. It is without dispute that Eagen first brought up the subject of the Union. Once Eagen brought up the subject of the Union, Mulack asked if there was union activity in the store. Eagen alleges that Mulack then asked him whether he had signed a union card and then followed up as to whether other employees had signed cards. I do not credit his testimony that Mulack specifically asked if he signed a card. Crediting Mulack in part, I find that Eagen volunteered that he signed a card. Based upon Eagen's own testimony, it appears that he sought Respondent's favor by volunteering that he had signed a union card and by freely discussing the extent of union activity with Mulack. Eagen does not allege that Mulack accompanied his questions with any threats or promises. While Eagen alleges that Teeter encouraged him to apply for DeLaura's crew leader position, there is no evidence that Teeter participated in the alleged interrogation<sup>28</sup> or that either Mulack or Teeter promised this job or any other benefit for his information about the Union. Accordingly, I do not find the conversation as alleged by Eagen as coercive or in violation of Section 8(a)(1) of the Act.

In describing his conversation with Leake on April 30th or May 1, Eagen alleges that Leake began by stating that he knew that Eagen had signed a union card. Eagen alleges that Leake then inquired, "what's going on out there?" Eagen acknowl-

edges that he then reiterated that he signed a card and he identified that others had signed cards. Eagen testified that he then volunteered his opinion as to how the Union's support had been affected by Respondent's videos and terminating the offensive supervisor. Again, I do not find the totality of the circumstances to support that Leake's comments were coercive or violative of the Act. Based upon Eagen's testimony, Leake knew that he had signed a union card before they spoke. Eagen reiterated this fact at the beginning of the conversation and then talked about others' signing cards. As with his conversation with Mulack and Backlund, Eagen appeared to seek Respondent's good graces by volunteering information about the Union's organization. There is no evidence of any accompanying threat or animus toward the Union or employees supporting the Union. Accordingly, there is not sufficient evidence to support a finding of Leake's interrogation in violation of §8(a)(1) of the Act.

#### C. Demint's Union and Protected Activity

Based upon the testimony of Demint as well as Eagen and MARRS, it is apparent that Demint was the employee who initiated contact with the Union in April 2000. Demint alleges that he continued to solicit authorization cards and distribute materials that he obtained from the internet even after Eagen's discharge in May 2000. Union Representative MARRS testified that Demint contacted him around Memorial Day 2002. MARRS explained to Demint that the previously signed authorization cards were dated and the Union needed to resign employees if the Union restarted the union campaign. MARRS recalled that he gave cards to Demint during the first week of June 2002. Although MARRS testified that Demint returned some of the signed cards during the second and third weeks of June, he did not identify the number of cards. Crediting the testimony of Eagen, Demint, and MARRS as related to Demint's union activity, I find that Demint was involved in the initial organizing efforts in 2000, and that Demint continued his support for the Union with some degree of activity until the date of his discharge.

The original charge in Case 12-CA-20882 that was filed by the Union on June 1, 2000, alleges that Respondent unlawfully terminated Eagen. A complaint and notice of hearing issued on October 30, 2001, setting the matter to be heard on February 21, 2002. Demint alleges that he gave an affidavit to the Board on behalf of Eagen in February 2002. Respondent does not dispute that Demint provided the sworn testimony as he alleges, but maintains that it had no knowledge of Demint's having done so.

#### D. Respondent's Knowledge of Demint's Union and Protected Activity

The overall record evidence indicates that Demint was not only engaged in activities in support of the Union but he also provided testimony to the Board under the protection of Section 8(a)(4) of the Act. Respondent argues that the General Counsel cannot establish an essential prong of the prima facie analysis because there is no credible evidence that Regional Personnel Manager Verian Booker, the decisionmaker, knew of any union activity by Demint or that he had given an affidavit to the Board. Booker testified that at the time that she made the deci-

<sup>27</sup> Including *Farr Co.*, 304 NLRB 203, 217 (1991); *NLRB v. Champion Laboratories, Inc.*, 99 F.3d 223 (7th Cir. 1996), denying enforcement in relevant part to 316 NLRB 1133 (1995); *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 108 (6th Cir. 1987), denying enforcement in relevant part to 275 NLRB 1019 (1985).

<sup>28</sup> Although the complaint alleges that both Teeter and Mulack interrogated employees, there is no evidence of interrogation by Teeter.

sion to terminate Demint, she had no knowledge of his union activity or knowledge that he had given an affidavit to the Board. Mulack testified that he was aware only generally of union activity in 2000, and that he had no knowledge of any activity after 2000.

In his brief, counsel for the General Counsel points to Demint's testimony concerning conversations with both Grocery Department Manager Mike Burke and Radio Grill Manager Barrett Worst to support Respondent's knowledge of his union activity. Demint alleged that during the week before his discharge, he told Burke that the only way that things would change in the store would be if they could get in a union. Burke denied that he discussed Demint's union activity at any time on June 24 with Mulack or Maufroy. Burke also denied that at the time of Demint's statements on June 24, he was unaware that Demint had given an affidavit or participated in the Board's investigation of Eagen's unfair labor practice charge. Demint alleges that he told Worst after his June 24 discussion with Mulack that he was going to try to get in union in order to get rid of the managers. Worst however, testified that during his June 24th conversation with Demint, Demint told him that he was "about" to be fired because of his earlier conversation with Mulack. Worst alleges that Demint made the statement: "I might just come back and blow up [sic] the place up." Worst acknowledged that he had not reported to management any of the conversation with Demint.

With respect to Respondent's knowledge of Demint's union activity, the most credible witness was City of Port Orange Police Officer Joseph Swetz. He testified that on June 25th, his dispatcher notified him by radio for a call of a "disgruntled employee at Wal-Mart making threats." Upon his arrival at the store, he initially met with Respondent's Loss Prevent Manager Moore and then later with Store Manager Mulack. Respondent's representatives informed Officer Swetz that an employee had been overheard by other employees to make threats. While Officer Swetz did not recall which manager made the statement, he recalled that he was told that there was to be an interview with the employee and because of the severity of threats the employee was to be terminated. Officer Swetz recalled that during his conversation with Moore and Mulack, he was informed of Demint's wife's recent termination from Wal-Mart. He also recalled that the managers told him that "at one point" Demint had tried to bring a union into Wal-Mart. Swetz added however, that it was his impression that this had occurred in the past and not at that time. He recalled that the only reference to Demint's union activity had been his passing out literature at work. Based upon the credible testimony of Officer Swetz, the record reflects that at the time of Demint's termination, Respondent was aware of Demint's past support for the Union. Although crediting the testimony of Officer Swetz, there is no evidence that Respondent was aware of any resurgence of his activities.

Demint testified that after he gave his affidavit to the Board in February 2002 on behalf of Eagen, he shared his having done so with Furniture Manager Brad Horner, John Newburn, and Leslie Baxter. Horner credibly testified that he had been aware that Demint supported the Union because Demint asked him to sign a union card and he had done so. While Horner did not

identify whether this solicitation occurred in 2000 or later, he recalled that it had been "way before" Demint's discharge. Horner denied that he knew about Demint's having given an affidavit to the Board until after Demint's discharge. I credit Horner's testimony and I further find that there is no evidence that Horner either reported Demint's union or protected activity to Respondent prior to his Demint's discharge. Demint also alleges that he told his friends John Newburn and Leslie Baxter that he had given an affidavit to the Board. Demint describes Newburn as the floor supervisor for the cleaning crew and Baxter as "over the unloaders in the back of the store." There is no record evidence that establishes the supervisory status of either Newburn or Baxter. Additionally, there is no evidence that Newburn or Baxter ever communicated this information to Mulack or to Booker prior to Demint's discharge.

Mulack was asked if he discussed Demint's union activity with Verian Booker when he spoke with her prior to Demint's discharge. Mulack responded by stating: "No, We had no union activity outside of what happened back in April of 2000." Mulack then testified that at the time of Demint's termination, he was not aware of any organizing activity at the store by Demint in May or June of 2002. I do not find Officer Swetz's credited testimony to contradict Mulack's testimony. Based upon the total record evidence, it is apparent that Respondent was aware of Demint's participation in the Union's 2000 organizing campaign. There is insufficient evidence however, that Respondent was aware of any renewed activity by Demint. Additionally, there is insufficient evidence to demonstrate that Respondent was aware that Demint had given an affidavit on behalf of Eagen in February 2002.

#### *E. Whether Respondent Terminated Demint in Violation of the Act*

Respondent asserts that in applying the *Wright Line* framework to Demint's discharge, General Counsel cannot meet its burden of establishing a prima facie case. Respondent contends that there is no evidence that Verian Booker, the decision-maker, knew of Demint's union activity or the fact that he had given an affidavit to the Board. Respondent further asserts that even assuming a prima facie case; Respondent has demonstrated that it would have made the decision regardless of any impermissible motive. As discussed above, I find that General Counsel has demonstrated that Demint engaged in union activity and that Respondent was aware of that activity at the time of his discharge. While Respondent may only have been aware of Demint's previous 2000 union activity, the union activity was sufficient for Respondent to mention it to Officer Swetz on the day of Demint's discharge. Based upon such a reference to Demint's union activity, it is reasonable that the termination was in part motivated by Respondent's union animus. Accordingly, General Counsel has met its burden and has established a prima facie case that Demint's union activity was a "motivating factor" in Respondent's decision to terminate Demint. Despite the fact that Demint's union activity may have been a motivating factor, the Respondent has nevertheless demonstrated that it would have terminated Demint in the absence of any union or protected activity. *Wal-Mart Stores, Inc.*, 340 NLRB No. 83, slip op. at 1 fn. 1 (2003).

The strongest evidence to support my conclusion that Respondent would have terminated Demint in the absence of his union activity is the testimony of Burke and Wells as well as that of Demint. Burke credibly testified that Demint stated that he could understand how somebody can “go postal” and followed with a comment about “blowing the place up.” Burke also recalled that when Damin Moore said something about remembering him, Demint explained that it is usually upper management that gets it first. Wells credibly testified that he also heard Demint’s comment about going postal and blowing up the place. Wells testified that when Burke laughed at Demint’s comment, Demint responded: “No, I’m serious. I’ve got the stuff to do it.” Wells also corroborated Demint’s statement that his actions were directed to upper management. Wells credibly testified that after hearing Demint’s comments, Damin Moore and he discussed what they should do. Ultimately, they decided that they could not let the comments go without reporting them to management. The credible evidence reflects that Respondent would not have been aware of Demint’s comments if Wells and Moore had not decided to report them to management. Burke testified that when he first heard the comments, he thought that Demint was joking and he did not report the threats to management. Burke also testified that when Mulack and Maufroy first questioned him, he told them that he thought that Demint was joking. Although Burke was the grocery manager at the time of the conversation, it is apparent that he did not immediately perceive Demint’s comments in the most negative light. His testimony would demonstrate that he, in effect, gave Demint the benefit of the doubt. I note that this is the same supervisor to whom Demint alleged that he had earlier reported his union support. Nevertheless, Burke told Mulack and Maufroy that he thought that Demint was only joking. Burke went on to testify however, that after seeing Demint’s response when confronted by Mulack, he changed his opinion. Burke explained: “I no longer took it as a joke.” Burke described Demint’s demeanor as “strange” during his meeting with Mulack, Maufroy, and Burke. Demint stared at Burke throughout the meeting and failed to even look at Mulack. Despite anything said by Mulack, Demint made no response. Finally, Burke told Demint “The man asked you a question.” Demint simply responded that he had nothing to say. Burke’s description of Demint’s behavior during the June 24 meeting is further bolstered by Demint’s own testimony. Demint admitted that during his meeting with Mulack, he said nothing and simply stared at Burke. Demint admits that he had a conversation with Burke about his wife’s termination, his dog dying, and other misfortunes. He denies however, that it occurred on June 24, and he denies that he mentioned anything about going postal during the conversation. He admits that he had a conversation with Moore on June 24. He testified that it had been Moore who made the comment about his going postal and that he had simply agreed. Demint recalled that when Moore had allegedly laughed at the comment, he told Moore that he better be worried because he had the things to do it. Demint also admitted that he had told Moore: “Hey, I’m not going to take you out. I’ll just take out upper management.” Thus, admittedly Demint talked with Moore about “going postal” and threatened that he would take out upper manage-

ment. He admits that he also told Moore that he had the “things to do it.” Accordingly, Demint’s own testimony corroborates that he made threats on June 24 and his contention that he was joking with Moore does not diminish the admitted threat.

An employer does not meet its burden under *Wright Line* merely by showing that it would have been reasonable to discharge an employee for violations of work rules. The employer must affirmatively show that such action would have been taken in any event. *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). I find that Respondent has demonstrated that it would have terminated Demint regardless of his union or protected activity. Respondent argues in its brief that “It would fly in the face of reason and public policy to hold that union activity can be cited as a justification for putting an entire workforce at risk of workplace violence.” While Demint’s past union activity may have been a motivating factor in his termination, it is inconceivable that he would not have been fired even in the absence of such activity. Respondent’s policies and procedures provide that certain conduct may result in immediate termination. Fighting/assault or threats as well as violation of the workplace violence policy are identified as conduct for which there may be immediate termination. Respondent’s corporate policy on workplace violence provides that harassment; violence, threats of violence, or other similar conduct is unacceptable behavior and is a violation of Company policy. The policy provides that any employee who violates this policy will be disciplined up to and including termination from the Company. Listed among the conduct which will not be tolerated are veiled threats of harm, intimidation, and threatening harm or harming another person. There is no evidence that any other employee has engaged in such threats and has not been terminated. The Board has previously found that an employer has not violated the Act when it has terminated a known union activist for threatening or causing violence. See *Stemilt Growers*, 336 NLRB 987 fn. 2 (2001). Accordingly, I find that Respondent’s discharge of Demint did not violate Section 8(a)(3), (4), and (1) of the Act as alleged in the complaint.

#### CONCLUSIONS OF LAW

1. Respondent, Wal-Mart Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(3) and (1) by discharging Edward Eagen.
3. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
4. Respondent has not engaged in any unfair labor practice not specifically found herein.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Respondent discriminatorily discharged Edward Eagen, I shall recommend that Respondent offer him reinstatement and make him whole for any loss of earnings and

other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>29</sup>

#### ORDER

The Respondent, Wal-Mart Stores, Inc., Port Orange, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because they engaged in union or other protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Edward Eagen full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. Make Edward Eagen whole for any loss of earnings and any other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employees in writing that this has

<sup>29</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

been done and the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Port Orange, Florida facility copies of the attached notice marked "Appendix."<sup>30</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 22, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>30</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."