Wal-Mart Stores, Inc. *and* United Food and Commercial Workers International Union.[1] Cases 28–CA–18255, 28–CA–18257, and 28–CA–18897

May 18, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On April 26, 2004, Administrative Law Judge Lana H. Parke issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, the Respondent filed cross-exceptions and supporting briefs, and all parties filed responding and reply briefs.[2]

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, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings as modified below,[3] and conclusions and to adopt the recommended Order.[4]

We agree with the judge that the Respondent did not unlawfully restrict worktime solicitation or discharge Larry Allen at its store in Las Vegas, Nevada; and that the Respondent did not unlawfully exclude nonemployee union solicitors from the common area in front of its store in Henderson.

I. THE ENFORCEMENT OF NO-WORKTIME-SOLICITATION RULES AND THE ALLEN DISCHARGE

We adopt the judge's findings, for the reasons stated in her decision, that the Respondent did not enforce its rules against worktime solicitation in violation of Section 8(a)(1), or discharge Allen in violation of Section 8(a)(3).

However, with respect to the Allen discharge, because we agree with the judge that the Respondent bore its burden of showing that it would have terminated Allen for soliciting on worktime even if he had not engaged in protected union activity,[5] we need not reach the question of whether the General Counsel showed that the Respondent acted with unlawful animus.[6]

II. THE EXCLUSION OF NONEMPLOYEE UNION SOLICITORS AT THE HENDERSON STORE

We agree with the judge that the Respondent did not violate Section 8(a)(1) by excluding nonemployee solicitors for the Union from soliciting and distributing literature near the entrance of its store at Henderson, Nevada. However, we adopt this finding on the following basis.

The Respondent leased the tract on which the Henderson store was located from the Wal-Mart Real Estate Business Trust (the owner of the tract). Under the terms of a three-party lease agreement between the trust, the Respondent, and a neighboring independent developer lessee, the tract included a "common area" for access, containing parking space and front walk, that was shared with an adjoining tract. The Union contends that a clause in the three-party lease that authorized "activity within the Common Areas other than the primary purpose of the Common Areas" confined the Respondent's possessory interest in the common areas to a "nonexclusive easement." That restricted easement, the Union argues, did not include the right to exclude nonemployee solicitors from engaging in nondisruptive union solicitation.

However, we need not decide that question because we find that, even assuming arguendo that the lease clause on which the Union relies would have barred the exclusion in other circumstances, the Respondent had the right, under the other terms of the lease, to require solicitors to provide advance notice before engaging in solicitation activity. Because the Respondent had such a requirement in place and was not shown to have enforced it in a disparate manner, and because the Union knowingly

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

[2] On November 15, 2004, we granted the Charging Party's motion to strike the Respondent's brief responding to its exception for exceeding page limits, but granted the Respondent permission to file a brief conforming to those limits. *Wal-Mart Stores*, 343 NLRB 579 (2004). The Respondent subsequently filed a conforming brief.

[3] The General Counsel and the Charging Party have 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] There are no exceptions to the judge's findings that the Respondent unlawfully confiscated union material from employees and implicitly ordered employees to destroy union literature at the Henderson store on October 17, 2002, or to the dismissal of the complaint allegations not discussed below.

[5] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] We also do not rely on the judge's statement that the Respondent could have lawfully discharged Allen if it "reasonably believed, albeit erroneously, that Allen had . . . giv[en] union literature to [another employee] while he worked and in a work area." Because distribution of union literature is protected under Sec. 7, Allen's conduct was unprotected for the sole reason that he engaged in that activity on worktime in violation of the Respondent's lawful rules. Under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), if Allen had solicited on his own time but the Respondent discharged him in the erroneous belief that he solicited on worktime, the discharge would have been unlawful.

failed to comply with that requirement, the exclusion of the solicitors was lawful.[7]

The lease authorized all three parties to develop the tracts "pursuant to a general plan of improvement to form a commercial shopping center." The facilities were to be "used for commercial purposes of the type normally found in retail shopping centers." With respect to common areas, the parties granted reciprocal easements to each other for access, parking, and "the use of facilities installed for the comfort and convenience of customers, invitees, licensees, tenants, and employees of all businesses and occupants of the buildings" on the property. By these terms, the lease gave the Respondent the right to use the property for its business. This right entailed the authority to exclude disruptive activity that would interfere with its use of the tract for its stated business purpose, and the correlative authority to require prospective solicitors to provide advance notice and a reasonable indication that their activity would *not* be disruptive.[8] Cf. *Glendale Associates, Ltd.*, 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9th Cir. 2003) (upholding advance-notice rule in context of California law, permitting reasonable time, place, and manner restrictions on access by union soliciting to public areas). None of the parties argues to the contrary.[9]

As the judge found, the Respondent had a written solicitation-distribution policy that established a procedure for organizations to apply for permission to solicit in the store's common area. The policy required applications to be made at least 3 days in advance of the requested solicitation date. The Union was admittedly aware of the policy but did not provide any advance notice of its intention to solicit.

When the Union's solicitors arrived at the Henderson store, the store's management told them they could not solicit without advance permission and had to leave, and called the police to have them expelled. The record indicates that other organizations had complied with the advance-permission procedure for soliciting at the Henderson store, and that most had received permission.[10] There is no indication that the Respondent had previously permitted solicitations at the Henderson store for which it had not received advance notice. Nor does the record show that the Respondent had treated unions differently, in policy or in practice, than it treated other organizations with respect to solicitation at the Henderson store.[11] We therefore cannot find that the Respondent's advance-permission requirement was disparately enforced.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wal-Mart Stores, Inc., Henderson, Nevada, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Joel Schochet, Esq., for the General Counsel.
Steven Wheeless and *Stefanie J. Evans, Esqs. (Steptoe & Johnson, LLP),of* Phoenix, Arizona, for Respondent.
George Wiszynski,Esq., Assistant General Counsel, UFCW, of Washington, D.C., for the Charging Party,

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Las Vegas, Nevada, on February 10–13, 2004, on an amended second consolidated complaint (the complaint) issued

[7] The General Counsel contends in its brief to the Board that because the property on which the store and its relevant common area were located was owned by the Wal-Mart Trust rather than by the Respondent, the Respondent had "no property interest" entitling it to expel the solicitors. However, the General Counsel did not make this argument to the judge. The argument is therefore untimely, and we do not consider it. *Detroit Newspapers*, 327 NLRB 799 (1999), affd. in relevant part 216 F.3d 109 (D.C. Cir. 2000); *International Paper*, 319 NLRB 1253, 1276 (1995), enf. denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997); *Yorkaire,* 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990); *Armour Con-Agra*, 291 NLRB 962 (1988). We consequently need not address the relationship between the Wal-Mart Trust and the Respondent.

[8] We do not reach the issue of whether, given the three-party lease's clause concerning "activity within the Common Areas other than the primary purpose," the Respondent would have been required to grant permission had the Union complied with the advance-request procedure here.

[9] The Respondent emphasizes that another section of the lease agreement disclaimed any intention of making any "gift or dedication" of property "to any governmental authority or the general public or for any public use or purpose whatsoever." In view of our disposition of this complaint allegation, we need not address the application of this provision.

[10] Scott Miller, the senior management official at the scene, testified that before the police were called one of the union solicitors "ask[ed] me if he could call me sometime to talk to me," to which Miller responded that "that would probably not be a good idea." This exchange was too unspecific for us to find it to be an indication that the Respondent would not have permitted union solicitation even if the Union had given advance notice.

[11] For this reason, *Wal-Mart*, 340 NLRB 1216 (2003), cited by the General Counsel and the Union, is distinguishable from this case. There, the advance-request requirement was not at issue and the Board found that the employer permitted other organizations but not the union to solicit.

[12] The General Counsel and the Union emphasize that the union solicitors had been permitted to distribute identical literature at two other Wal-Mart stores in the region earlier the same day without seeking advance permission. However, there was no showing that the Respondent's advance-permission policy was enforced by central Wal-Mart management, rather than by the local management at each store. We therefore cannot treat the discretionary tolerance of the solicitation at the other two Wal-Mart stores as a waiver of the written advance-permission requirement with respect to the Henderson store.

December 31, 2003,[1] by the Regional Director for Region 28 of the National Labor Relations Board (the Board) based on charges filed by the United Food and Commercial Workers International Union, AFL–CIO–CLC (the Union.) The complaint, as amended, alleges Wal-Mart Stores, Inc. (Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).[2] Respondent essentially denied all allegations of unlawful conduct.[3]

I. ISSUES

1. Did Respondent orally promulgate and enforce an overly broad and discriminatory no-solicitation and no-distribution rule.

2. Did Respondent create an impression of surveillance of employees' union activities.

3. Did Respondent ask its employees to ascertain and disclose the union activities of other employees.

4. Is complaint paragraph 5(b)(4), which alleged statement of futility, outside the 10(b) period, and if not, did Respondent inform employees it would be futile for them to select the Union as their collective-bargaining representative.

5. Did Respondent unlawfully prohibit union organizers from soliciting employees and distributing union literature on its property, confiscate union literature, threaten employees to prevent them from accepting union literature, and cause the Henderson, Nevada police to remove union organizers from its property.

6. Did Respondent discharge employee Larry Allen because of his protected activities, his union activities and/or because he gave testimony to the Board.

II. JURISDICTION

Respondent, a Delaware corporation with places of business located, inter alia, at 2310 East Serene, Las Vegas, Nevada, and 540 Marks Street, Henderson, Nevada (the Stores), has been engaged in the retail sale of consumer products. During a 12-month period ending October 23, which period is representative, Respondent, in connection with its operation of the Stores, annually derived gross revenues in excess of $500,000 and annually received at the Stores goods and services valued in excess of $50,000 directly from points outside the State of Nevada. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are 2003, unless otherwise specified.

[2] At the hearing, counsel for the General Counsel amended the complaint to substitute the words "soliciting for" for "talking about" in par. 5(b)(1) and withdrew par. 5(c). Counsel for the General Counsel moved to amend the complaint by adding as par. 5(e) the following:

> On or about June 6, 2003, the Respondent, by Aaron Rios, at Respondent's Serene Avenue facility, promulgated and enforced an overly broad and discriminatory no solicitation and no distribution rule by informing employees that they may not solicit in work areas.

Respondent objected that the amendment was untimely. The objection is overruled.

[3] At the hearing, Respondent amended its answer to include an affirmative defense that Sec. 10(b) of the Act prohibited litigation of the conduct alleged in par. 5(b)(4) of the complaint.

III. THE FACTS

A. Respondent's Solicitation/Distribution Policies

At all times relevant hereto, Respondent has maintained in its employee handbook, the following policy:

> [E]ngaging in non-work related activities during worktime is not permitted. Associates[4] may not engage in solicitation or distribution of literature during worktime. In addition, solicitation or distribution of literature is not permitted at any time in selling areas during the hours the store is open to the public. Distribution of literature is not permitted at any time in any work area. Non-Associates are prohibited from soliciting or distributing literature in any Company facility at any time.

A similar policy statement posted in the Stores during the relevant period, in pertinent part, reads:

> Associates may not engage in distribution of literature during working time [of either the solicitor/distributor and/or the solicitee/distributee.] Distribution of literature is not permitted at any time in selling or working areas [defined as all areas except breakrooms, restrooms, lobbies, and Associate parking areas]. Associates may not engage in solicitation in any selling area of the facility during business hours or in working areas when Associates are on working time. This applies to activities on behalf of any cause or organization, with the exception of corporately sponsored charities [Children's Miracle Network and Corporate United Way Campaigns].
>
> . . . .
>
> Solicitation and/or distribution of literature by non-Associates is prohibited at all times in any area of the facility, including the vestibule.
>
> . . . .
>
> The Facility Manager may approve . . . solicitation and/or distribution of literature outside the facility for all other groups and organizations.
>
> . . . .
>
> An area must be designated for all organizations to use that is at least 15 feet from the entrances and exits.
>
> . . . .
>
> Any organization that requests to solicit or distribute literature should be provided two copies of the *Solicitation and Distribution of Literature Rules*. One copy of the rules should be signed by . . . the organization as an acknowledgement of having read and agreeing to abide by the rules.

B. Respondent's Discipline Policy

Respondent utilizes a disciplinary program called Coaching for Improvement, which provides the procedure for investigating employee misconduct and applying appropriate progressive discipline. The disciplinary progression provides for a verbal coaching at level one. If the verbal coaching is not successful in changing or correcting the unaccept-

[4] Associate is Respondent's term for an employee.

able behavior or performance, an employee will receive a level two written coaching. Level three of the disciplinary progression is called "Decision Making Day" or "D-Day." At a D-day, Respondent informs the employee concerned of deficiencies noted at earlier coaching for improvement levels and the specific improvement required. The employee must write and sign an acceptable detailed action plan for modifying behavior and is given a day off with pay to decide whether he or she will make the required improvement. The D-day remains active in an employee's file for 12 months. Another rule or policy infraction occurring within that 12-month period may subject the employee to immediate termination.

C. Events at the East Serene, Las Vegas Store

The Stores are composed of both grocery and general merchandise sales areas. In the back and side hallways of the Stores, Respondent maintains product receiving, storage, and preparation areas where employees perform tasks relative to those functions.[5] Larry Allen (Allen) worked for Respondent at its 2310 East Serene, Las Vegas, Nevada facility (the LV store) from May 6 to August 1, 2002, as a produce sales clerk. At all relevant times, Aaron Rios (Rios) served as the LV store manager overseeing, inter alia, the work of about 700 employees.

During August 2002, Allen's wife, Jacqueline (J. Allen), worked at the same store in the service deli. In late August, having observed another deli employee inappropriately touch his wife, Allen threatened to "bust a cap in [his] ass."[6] Consequent to the threat, Respondent issued Allen a D-Day dated August 30, 2002, and suspended him for a day with pay.[7] On September 2, 2002, Allen asked to meet with Rios about his D-Day, protesting the discipline was too severe in light of the provocation involved. Rios said he would look into it.

During the next 10 days, the LV Store prepared for its annual 1-day inventory of the entire store, a work-intensive procedure to be conducted September 12. During the same period, Rios observed and had reported to him a dramatic increase in the amount of union-related literature left in work areas, including the sales floor: business cards (left primarily on the sales floor), flyers, pamphlets, and small cards that invited employees, respectively, to contact the Union (contact cards) and to listen to a live "Worker Voice Radio" webcast where callers could "tune in [and] speak up" in order to "make Wal-Mart/Sams Club a better place to work" (radio cards). On September 2, 2002, management found more than 300 union business cards in various locations on the sales floor. LV Store management reported the situation to the Union Hotline, a telephone communication set up between Wal-Mart's labor relations team in the Bentonville, Arkansas corporate offices and its stores.

An associate told Rios that Allen was the driving force behind the literature distribution at the LV Store.[8] According to Allen, he did not become involved in union organizing efforts at the LV store until September 11, 2002, when he signed a union authorization card and accepted appointment as lead organizer. From that time forward, Allen openly passed out union literature to coworkers, including several forms of union literature enclosed in small brown paper bags (the union packet).

Sometime in the early afternoon of September 12, 2002, Rios got back to Allen on his earlier request for a meeting, apologizing for the delay. Rios said the D-Day would stand. Allen complained the suspension had prevented his working scheduled overtime, and his wife had missed work consequent to her coworker's harassment. Rios agreed to pay Allen for missed overtime and compensate his wife for work missed because of the incident.

After addressing Allen's D-Day concerns, Rios cautioned him about union solicitation. Initially, Allen testified Rios said, "By the way, you're not allowed to talk about the union, you're not allowed to distribute out the literature about the union."[9] Under cross-examination, Allen admitted Rios might have told him he was not allowed to solicit on the sales floor. Rios said he told Allen he wanted to make sure he understood Respondent's solicitation/distribution policy and asked if he needed a copy. Rios said Allen told him he had a copy of the policy and had read it. Allen was admittedly aware of Respondent's no-solicitation/no-distribution policy and that he could distribute union literature in breakrooms, restrooms, lobbies, and associate parking areas but not in work areas. He understood Respondent's policy prohibited his soliciting employees on worktime.

By his own account, Allen told Rios, "Aaron, I know what I can and cannot do. I will put the literature in the breakrooms, and I will do it outside." He assured Rios he would not solicit on the sales floor, which he understood to be sacred ground. Where Rios' testimony of what was said in that conversation differs from Allen's, I credit Rios. I cannot accept Allen's testimony that Rios told him he could not talk about the Union or distribute its literature. Not only did Allen retreat from his initial assertion to that effect during cross-examination, but also the tenor of his admitted responses to Rios justifies an inference that Rios merely reminded him of established solicitation/distribution policies, which Allen did not challenge.

Allen denied ever distributing union literature on the sales floor or in any work area or asking any coworker to sign a union authorization card while he or the coworker was working.[10] He left union literature in Respondent's restrooms and breakroom and on outside benches.

[5] I find these constitute facility work areas.

[6] This slang term is a threat to shoot someone.

[7] The offending deli employee did not return to work after the incident and voluntarily terminated employment.

[8] The associate's report was not received for the truth of the assertion but to explain Rios' state of mind and to set in context his later discussions with Allen.

[9] Allen's testimony forms the basis of the complaint allegation at par. 5(a) regarding unlawful promulgation of an overly broad and discriminatory no-solicitation and no-distribution rule.

[10] Allen testified no supervisor had ever told him the back and side hallways of the LV Store were work areas, and he did not consider them to be such. He admitted the hallways were "work area[s] to some people," just not to him or to "lots of produce people."

Respondent held regular morning meetings with employees in the breakroom, which it expected all employees not occupied with customers to attend. Respondent discussed store priorities, quarterly reports, store earnings, and work issues at the meetings. The employee meetings constituted worktime for attending employees even though they were held in the breakroom. Although meeting discussion was generally restricted to work issues, in 2003, Respondent permitted an employee to announce in the meetings a blood drive for her nephew with leukemia. She was not permitted to distribute literature in sales or work areas.

On September 13, 2002, at a morning meeting with LV Store associates lasting nearly an hour, Rios told employees Wal-Mart had a no-solicitation policy, which applied to nonwork material: Avon sales, the Girl Scouts, religious groups, or anyone else. According to Allen, Rios showed the group examples of union literature found in the sales floor and other work areas and encouraged employees to report any distribution of the literature to management. Allen testified that Rios said Respondent did not have to negotiate with the Union, and employees ran the risk of losing benefits.[11] Allen remembered nothing else that was discussed at the meeting.

Regarding the September 13, 2002 meeting, Rios testified he and other managers thanked employees for the inventory results of the preceding day and highlighted top performing divisions. At the end of the meeting, Rios reminded employees of Respondent's solicitation/distribution policy, which he had covered in the past and which was posted on Respondent's policy board in the breakroom. He showed the employees union-related literature that had been found in work areas, and told them they could distribute literature on their time in restrooms, the breakroom, or outside the store but not in sales or work areas. He told employees they were not to get involved in enforcing the policy but to report violations to management who would take care of it.[12] Rios denied saying anything about negotiating with the Union or telling employees to report solicitation/distribution other than policy violations. I give weight to Rios' testimony. Emanuel Thomas Roth (Roth) and Lisa Washburn, assistant managers, corroborated Rios' version. Since Allen could recall nothing more of the meeting than the brief comments he testified to, which he could not set in context, I do not feel justified in relying on his memory of what was said.

In late September 2002, Rios received a written note signed by several overnight stockers complaining that Allen was "constantly [in the breakroom] peddling his union wares [which is] not welcome." Rios did not speak to Allen about the matter, as Allen had not violated Respondent's policy by soliciting/distributing in the breakroom. In early October, Rios received a written complaint from another employee that Allen had approached him on the sales floor about joining the Union. Rios took no action as Allen had merely been talking about the Union, which did not violate the policy. Rios received other reports concerning Allen's talking to or handing out some kind of literature to employees in the work area but as the evidence did not, in his opinion, clearly show any policy violation, he declined to discipline Allen.

On October 23, 2002, and January 22, the Union filed original and amended charges, respectively, alleging various violations of Section 8(a)(1) committed by Respondent at its LV Store. There is no evidence Respondent's managers or supervisors said anything about the charges to any employee.

On June 6, Allen left union cards on tables in the breakroom at the conclusion of the morning employee meeting. After the meeting, Ellen Little (Little), Respondent's people manager, told Rios she had observed Allen handing out union radio cards during the meeting. Later that morning in his office, Rios spoke to Allen about his conduct, asking him not to leave union contact cards "during the morning meeting."[13] Allen agreed, telling Rios he would respect Wal-Mart's policy. Rios told Allen he was free to solicit and leave contact cards in the breakroom during his nonwork periods. Allen told Rios he knew Rios had to enforce Respondent's policy, but Allen had to do what he had to do as well. Rios asked Allen if he understood the solicitation/distribution policy and if he understood that if he continued to violate the policy he would be held accountable. Allen said he understood the policy, and he would not hand out cards during a meeting again. An undated memorandum Rios prepared following this exchange states Allen placed radio cards on breakroom tables "as he was leaving the meeting," but while still on the clock. According to the memorandum, Rios told Allen he had "a right to solicit in nonwork areas on his own time but not while he was on the clock," and that he could not "solicit in any work areas of the store nor was he allowed to solicit any associates while they are on the clock."[14] Rios took no action against Allen because he wanted to give him the benefit of the doubt and because he did not want to terminate him, which another infraction during the 12-month D-Day period would have meant.[15]

At some time prior to June 20, Allen gave Sam Brown (Brown), a meat department employee, a union packet in the back work area. On June 20, in the same area, Allen asked Brown why he had turned the union packet over to Rios. Directing obscenities to Allen, Brown gestured toward him with a box cutter. As Allen retreated, Brown said, "I'll kill him; I'll kill him." Allen reported the incident to management.[16] Respondent conducted an investigation, including taking Allen's written statement. In the course of the investigation, Rios was informed that Allen had presented union literature to Brown in the back produce area. When asked about it, Allen told Rios

[11] Allen's testimony forms the basis for complaint paragraphs 5(b)(1)–(4).

[12] Employees are also asked to report workplace injuries or accidents, inappropriate employee conduct, violations of personal or business ethic, and sexual harassment.

[13] Both Allen and Rios used the words "during the morning meeting" to describe Rios' June 6 restriction on literature distribution.

[14] Counsel for the General Counsel asserts Rios' memorandum establishes the violation alleged in complaint par. 5(e) regarding unlawful promulgation of an overly broad and discriminatory no-solicitation and no-distribution rule.

[15] Although Respondent's policies permitted discretion in such terminations, Rios' practice was to terminate any employee who committed a disciplinary offense during the 12-month D-Day period.

[16] Brown received a D-Day because of his threat.

that Brown had come to him and asked for the literature. He said he did not think it a violation of Respondent's policy to accommodate Brown, and it would not happen again. Rios did not discipline Allen. The Union filed a charge with the Board concerning the incident, alleging Respondent had condoned threatening behavior toward Allen, a known union supporter. The charge was dismissed. I agree with counsel for the General Counsel that Respondent must have known Allen provided information to the Board in support of the charge; none of Respondent's managers or supervisors said anything about the charge to Allen.

On the morning of July 25, someone gave employee Miguel Zambrano Jr. (Zambrano) a union packet while he loaded product in the back hallway of the store (the Zambrano incident.) The parties dispute the identity of the individual who gave Zambrano the union packet.

Anita Garcia (Garcia), grocery department manager at the LV Store in July, was well acquainted with Allen, having known him for about 7 years. Sometime in July, she saw Allen and a produce employee named "Joe," talking to Zambrano in the back grocery receiving area. A couple of minutes later, Zambrano came to Garcia with a brown paper bag, folded at the top and stapled. Zambrano told Garcia he did not know what to do, that "the short guy [he] was talking to over there" had given him the bag, and he did not know what to do with it.[17] Garcia advised him to give it to his team leader, Maggie Schad (Schad) and Zambrano reported to Schad that "the guy in produce," a short guy, had given him a brown paper bag while he worked.[18]

Schad, accompanied by Zambrano, took the packet to Sheleen Petty (Petty), assistant manager, saying Larry in produce had given the packet to Zambrano. Zambrano told Petty Larry had given him the packet while he was loading his cart in the back room. Petty opened the packet and found various forms of union literature in it. Petty telephoned the union hotline and reported the incident.[19] Later that day, at the request of LV store managers, Zambrano furnished two signed statements that identified "Larry" as the employee who gave him a union packet while he worked in the back hallway.

During the investigation of the charges, the Board obtained a sworn affidavit from Zambrano. In his affidavit, Zambrano denied Allen had given him the packet. Concerning the affidavit, Zambrano testified that when he gave the affidavit, he was "panicking . . . not thinking right . . . had a headache . . . was losing his patience . . . wanted everything just to be on that paper." At the hearing, Zambrano testified about having been given the packet. His memory was demonstrably poor. Moreover, although sincere and obviously anxious to testify accurately and fully, he was an extraordinarily suggestible witness, agreeing with nearly every proposition any examining counsel put to him, without regard to consistency. I cannot give any weight to his testimonial identification of the person who gave him the union packet. Since it is reasonable to infer Zambrano was as unreliable when he gave the affidavit as he was in testifying, I cannot give weight to his affidavit statements either. Further, as it is clear Zambrano had no independent knowledge of the identity of the person who had given him a union packet but named "Larry" in reliance on the suggestions or information of others, I cannot accept the written statements he gave on July 25 as evidence of who gave him the packet.

Since, I cannot accept Zambrano's July 25 written statements, his Board affidavit, or his testimony at the hearing as identification of Allen or, conversely, as exculpation of Allen, I must look to other evidence to determine what transpired when someone gave Zambrano a union packet on July 25.

Allen denied ever giving Zambrano any union literature or asking him to sign a union authorization card. In corroboration of Allen's testimony, Ancel "Joe" Morse (Morse), LV store associate and active union supporter, testified he had given a union packet to Zambrano in July. Morse said he obtained the packet from Allen as Allen worked in the back hallway, telling him he was going to give it to Zambrano who was also working in the same hallway. At Allen's request, Morse provided Allen a signed statement dated September 21, which reads:

> On or about June or July of 2003, I Ancel Morse of the produce Dept. handed Miguel a union packet to look over and read and if he was interested to sign the union card and give it back to me later.
>
> This got Larry fired because they had thought that it was Larry that handed Miguel the packet.

Counsel for the General Counsel appropriately offered Morse's written statement into evidence as a prior consistent statement. However, the circumstances surrounding its preparation and production make it of dubious evidentiary value. According to Morse, he gave his statement to Allen after writing it, which means Allen had it in his possession since about September 21. Inexplicably, Allen did not submit the statement to the Board during the investigation of the charges herein, and although it was encompassed by Respondent's subpoena served on Allen prior to the hearing, he also failed to produce it for Respondent. The week prior to the hearing, after giving acceptable assurances, counsel for Respondent questioned Morse about the circumstances surrounding Zambrano's receipt of the union packet.[20] Morse told Respondent's counsel he had never given any union literature to Zambrano, assertedly dissembling because he "was in fear of losing [his] job." Morse's professed fear is at odds with his willingness to talk to Respondent's counsel even after being assured he need not do so, and I cannot accept his explanation for the duplicity; I can only find it severely diminishes his credibility. At the hearing, Allen finally furnished Morse's written statement to counsel for the

[17] Allen is 5' 2" tall. Joe Morse is taller than Zambrano who is 5' 9".

[18] Counsel for the General Counsel correctly points out that Zambrano's statements to Schad are hearsay, and I do not consider them for the truth of the matter asserted.

[19] The resulting investigation was complicated, involving numerous labor relation consultations over the course of several days. I do not find it necessary to recount all particulars of the investigation.

[20] Before Respondent's counsel questioned Morse in this pretrial meeting, he read to him the following statement, which Morse thereafter signed:

> [Y]our participation in this investigation is completely voluntary. You are not obligated to cooperate, nor to answer any of my questions. You are free to leave at any time, to refuse to answer any questions. If you choose not to participate in this investigation, you will not be punished in any way by the company.

General Counsel. The circumstances surrounding this statement are so questionable that I cannot find it bolsters Morse's testimony; rather it detracts from it. In sum, I decline to give any weight to Morse's testimony beyond finding that he was, in fact, involved in giving a union packet to Zambrano as Zambrano worked. I specifically decline to infer from Morse's testimony that Allen was not present when the union packet was given to Zambrano.

After considering the above evidence, I find Garcia provided the most reliable information as to what transpired on July 25 regarding Zambrano's being given union literature.[21] She knew Allen well and saw him and Morse talking with Zambrano as he worked. A couple of minutes later, Zambrano brought her the union packet, which he said the short guy he had been talking to had given him. From this credible testimony, it is reasonable to infer that whether he actually handed Zambrano the packet or not, Allen was one of a duo that presented the packet to Zambrano during both Zambrano's and his worktime.

After consultation with Respondent's corporate office labor team, Rios decided to discharge Allen and directed Little to handle the termination meeting with Roth in Rios' absence from the LV Store. On August 1, Allen met with Little and Roth in the manager's office. Allen said he wanted to invoke his *Weingarten* rights and read aloud a summary of them. When he finished reading, Roth told him the investigation was complete, and he was terminated from Wal-Mart. Roth read aloud the words from the exit interview form that Allen's termination was due to "Insubordination, repeated violation of company policy despite warning." In answer to Allen's request for clarification, Roth told him he had violated the Company's solicitation policy. Allen protested the policy was illegal under Federal law. After writing "soliciting" on the form, Allen signed it.[22]

At the hearing, Respondent presented the following evidence regarding Allen's solicitation/distribution activities, presumably obtained during preparation for the hearing. There is no explanation as to why manager observations or employee observations reported to management were not acted on:

> Mr. Allen gave then-employee Paul Walton (a Wal-Mart assistant manager since August) union literature in the Lay-Away area, a work area of the store.
>
> Mr. Allen gave Pamela Eylens, cake decorator, union literature in the bakery area several times during the relevant period, and she saw him place union materials on the bakery counter four to five times.
>
> Michaela Wilson, jewelry department manager, saw Mr. Allen distribute union literature in a work area in February.
>
> Mr. Allen gave union literature to employee Damon Webb in meat department.
>
> Mr. Allen gave overnight stocker Mona Lisa Adams union literature in the produce back area while she was working.
>
> When Gloria Kieffer overnight stocker in garden center wouldn't accept union literature from Mr. Allen, he laid it on the pallets and the stack bases, which she reported to an assistant manger.
>
> Department Manager Monica Cirrone saw Mr. Allen put union cards in the backroom bins of the boys and girls department.
>
> Mr. Allen gave Melvin Enriquez a union packet as he worked in the grocery side hallway.
>
> Mr. Allen gave overnight stocker Donell Havens a union authorization card in the produce sale areas, which she reported.
>
> Mr. Allen gave Tim Moreno a Weingarten card in the back hallway when they were returning to work from a morning meeting.[23]
>
> Mr. Allen gave contact and radio cards to maintenance employee Harvey Garcia on the sales floor.
>
> Mr. Allen gave union literature to Christina Ann Diaz Allen 15–20 times in the store's receiving area.[24]

D. Events at the Marks Street, Henderson Store

On the morning of October 17, 2002, union representatives William Meyer (Meyer), Marice Miller (Miller), and Jacqueline Stacy (Stacy) handbilled at two Wal-Mart stores in the Las Vegas Area (one on Cheyenne and one on Craig Road) for about an hour at each location. At the first store, a Wal-Mart manager initially protested the handbilling, but another manager told the trio as long as they stayed 15 feet from the entrance and did not interrupt flow of traffic they could remain. At the second store, essentially the same interchange occurred between the union representatives and Wal-Mart management, with the same consequences. The two stores permitted the handbilling without the Union's having obtained prior permission, including signing Respondent's solicitation/distribution policy. At about 12:30 p.m. that same day, the union representatives commenced handbilling employees at the grocery entrance to the Henderson Store. As with the earlier handbilling, the Union had not complied with Respondent's policy requiring advance notice and permission for such activity, although the representatives were aware of the policy.

When the union representatives began handbilling at the

[21] Counsel for the General Counsel argues I should not credit Garcia because she could not recall the time of day her exchange with Zambrano occurred. I do not find that time and even date confusion, without more, impacts credibility.

[22] I have accepted Little's and Roth's versions of the termination meeting. Allen testified Little initially told him he was under investigation and announced his termination only after he said he wanted to invoke his *Weingarten* rights. I find it inherently incongruous that Little would tell Allen he was under investigation when all other evidence shows the investigation was completed and the termination decision made before Little or Roth spoke to Allen that day.

[23] Moreno admitted selling chances for a 2004 super bowl pool to employees and several managers in work areas. There is no evidence Moreno's activity was reported to upper management.

[24] As the Charging Party points out, this evidence tends to support its position that Respondent accepted Allen's conduct until some factor (intensified union activity, according to the Charging Party) rendered it intolerable. I cannot, however, find activity of which Rios was not made aware until after the discharge meaningfully bolsters either the Charging Party or Respondent's positions.

Henderson store, Manager Shaun Mace told them they could not handbill there. Meyer said they were observing the 15-foot rule and intended to continue the activity. Scott Miller, co-manager of the Henderson store, and Manager Yvonne Garza (Garza) arrived at the store. As they approached the union representatives, Meyer observed Scott Miller take two handbills from employees sitting on a bench outside the store but did not hear what, if anything, was said.[25] Scott Miller said to the union representative, "You don't belong here; this is private property; you must leave." He told them they needed special permission to distribute literature there. Respondent owns the sidewalk and parking lot at the Henderson store. The General Counsel and the Charging Party argue easements so vitiated Respondent's property rights that the area in front of the store could not be considered private property. The evidence is insufficient to support such a conclusion, and I find the area where the handbilling occurred was Respondent's private property.[26] Store managers told Meyer at least four times that afternoon that the union representatives were on private property.

Meyer told Scott Miller the representatives had recently been to two other Wal-Mart stores where they had maintained the 15-foot separation between themselves and the store entrances and had no problems with management. Meyer suggested the managers call the other stores. Scott Miller said what other stores did was their "deal," but the Henderson store would not permit the union representatives to distribute literature there without prior approval. Meyers said they did not intend to leave.

During the interchange between union and management, Miller heard Garza say to two employees who had received handbills, "You know what to do with that."[27] After she spoke to them, the two employees threw the handbills away. Meyer told her she couldn't do that. At some point, Garza said she smelled something. The union representatives took the comment as a personal insult, and Stacy called Garza an offensive name.[28]

Miller said he observed Scott Miller grab handbills from employees as the representatives distributed them. Scott Miller denied taking any union literature from anyone on October 17. Respondent called several witnesses who observed at least portions of the handbilling activity: Jim Randolph, community involvement coordinator for the Henderson store, testified he did not see any member of management take any handbill from any employee. Customer Support Manager Sabrina Allyn and her sister, a store employee, received handbills as they walked into the store and threw them in a trash receptacle. Employees Laura Alvey and Jeff Hogan (Hogan) observed the handbilling while taking a 15-minute break together. They saw no member of management take any literature from anyone. When Miller attempted to hand Hogan a handbill, Scott Miller told Hogan it was optional if he wanted to take the flyer or not, in which Hogan refused the flyer. I credit Miller's testimony. I found him a believable witness, forthright, sincere, and seemingly careful to testify accurately. None of Respondent's corroborating employee witnesses saw the entirety of the incident, and I cannot find their testimonies preclude my acceptance of Miller's account of these events.

After some further and repetitive discussion between union and store representatives, Scott Miller directed another manager to call the police. The trio continued to handbill until a police officer arrived about 15 minutes later. After discussing the situation with both the union representative and management and after consulting his supervisor by radio, the police officer told the representatives they had to leave because they were trespassing. The union representatives left the Henderson store without further incident, having handbilled there for about an hour. According to Meyer, after October 17, 2002, the Union handbilled at Wal-Mart locations, including the Henderson Store, without giving prior notice or being asked to leave. He did not detail where the Union handbilled on those occasions or under what circumstances, and there is no evidence Respondent was aware of the union's handbilling activity after October 17, 2002.

IV. DISCUSSION

A. Alleged Independent Violations of Section 8(a)(1) at the LV Store

The General Counsel alleges Respondent independently violated Section 8(a)(1) of the Act at the LV Store by the following:

> 1. On September 12, 2002, orally promulgating and enforcing an overly broad and discriminatory no-solicitation and no-distribution rule by prohibiting its employees from talking about the Union and distributing union literature. (Complaint par. 5(a).)[29]
>
> 2. On September 13, 2002, orally promulgating and enforcing an overly broad and discriminatory no-solicitation and no-distribution rule by prohibiting its employees from soliciting for the Union and distributing union literature. (Complaint par. 5(b)(1).)

[25] In the absence of knowing what may have been said between Scott Miller and the employees, I cannot infer unlawful conduct by Scott Miller.

[26] In light of my finding, I deny Respondent's posthearing motion for leave to file notice of Nevada authority holding a property owner's grant of easement does not invalidate the right to exclude trespassers.

[27] Meyer testified Garza said, "You know what to do with those; you crumple them up and throw them away." I accept Miller's testimony. Garza is no longer employed by Respondent and lives out of state. She did not testify.

[28] Meyer testified Garza said the union representatives "stink." I have accepted Miller's testimony that Garza said she smelled something. According to Scott Miller, Garza referred to the odor of a septic tank behind the store, which occasionally created air quality problems. There is no evidence any employee heard the comment, and there is no complaint allegation regarding it. I do not find it necessary to determine whether the exchange was sufficient cause to summon police.

[29] No party contends Respondent's solicitation/distribution policies violate the Act. "[T]he Board has found that a rule prohibiting solicitation or distribution during 'working time' is presumptively valid . . . [citation omitted]." *United Services Auto Assn.,* 340 NLRB 784, 785 (2003). Similarly, distribution in work areas may be prohibited. *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615 (1962). No party contends enforcement of the policies was unlawfully timed. See *City Market, Inc.,* 340 NLRB 1260 (2003).

3. On September 13, 2002, informing employees that it would be futile for them to select the Union as their bargaining representative. (Complaint par. 5(b)(4).)[30]

4. On September 13, 2002, creating an impression among employees that their union activities were under surveillance. (Complaint par. 5(b)(2).)

5. On September 13, asking employees to ascertain and disclose to management the union membership, activities, and sympathies of other employees. (Complaint par. 5(b)(3).)

6. On June 6, orally promulgating and enforcing an overly broad and discriminatory no-solicitation and no-distribution rule by informing employees they may not solicit in work areas. (Complaint par.5(e).)

As to allegations 1 and 2, I have not found the General Counsel's supporting evidence to be credible, as explicated above. As to allegations 4 and 5 (impression of surveillance and improper request that employees report union activities), I find Rios' statements in the September 13 meeting lawful in view of Respondent's longstanding no-distribution/no-solicitation policy and ongoing reports to management about violations of that rule. An employer does not commit an unfair labor practice by lawfully enforcing a lawful plant rule or by reminding employees of the rule. Respondent regularly asked its employees to report violations of other company rules, and neither the content nor timing of Rios' statements could reasonably have created an impression of surveillance.

As to allegation 6 regarding the June 6 conversation between Rios and Allen, counsel for the General Counsel and the Charging Party argue Rios admitted in his memorandum of the conversation that he told Allen he could not solicit in any work areas of the store or while he was on the clock, which restrictions are overbroad. The memorandum states Rios reminded Allen "he was not allowed to solicit in any work areas of the store nor was he allowed to solicit any associates while they are on the clock." If I were to accept Rios' memorialized account of his conversation with Allen as establishing what he actually said to Allen, I would have to conclude Rios unlawfully promulgated an overly broad and discriminatory no-solicitation rule by unqualifiedly prohibiting solicitation in work areas and when employees are "on the clock."[31] However, I cannot view the memorandum as persuasive evidence of what Rios said in his and Allen's June 6 conversation and ignore the hearing testimony of what transpired. Neither Rios nor Allen testified that Rios told Allen he could not solicit in any work areas of the store, and neither of them testified he referred to any restriction against employees soliciting while "on the clock." I also note Allen did not protest Rios' directive although he would reasonably be expected to do so had Rios laid down the broad restrictions reflected by the memorandum. Rather, Allen told Rios, "That's fine. You know, I'll respect you . . . no problem." Allen admitted Rios had asked him not to leave the union cards on the tables during the store meeting and had told him he was free to solicit and leave contact cards in the breakroom during his nonwork periods. Allen told Rios he knew Rios had to enforce Respondent's policy, but Allen had to do what he had to do as well, which suggests Allen did not think Rios had deviated from established policy. Allen's testimony as a whole is consistent with Rios' asking him not to distribute literature during worktime but inconsistent with any finding that Rios had, without qualification, asked Allen not to leave union contact cards in the breakroom or had told Allen he could not solicit in work areas or while "on the clock."

Respondent held its morning meetings on worktime; when the June 6 meeting concluded, Allen and other attending employees were still on worktime. An admonition not to distribute literature or solicit at the morning meeting is consonant with an admonition not to distribute union material or solicit during worktime whether either activity occurred during the meeting or at its conclusion. Therefore, I cannot find Rios communicated to Allen on June 6, any unlawful restriction on soliciting in any work area of the store during nonworktime. As I have not found Respondent committed any violations of the Act as alleged in complaint paragraphs 5(a), (b)(1)–(4), and (e), I will, dismiss those allegations of the complaint.[32]

B. The Discharge of Allen

Respondent discharged Allen for giving Zambrano a union packet while he worked on July 25, a clear violation of Respondent's no-solicitation/no-distribution policy. Both the Charging Party and the General Counsel argue Respondent was motivated to discharge Allen by its animus toward his protected union activities. In resolving the question of Respondent's motivation, I follow the Board's analytical guidelines in *Wright Line*.[33] If the General Counsel's evidence supports a reasonable inference that protected concerted activity was a catalyzing factor in Respondent's discharge of Allen, he has made a prima facie showing of unlawful conduct.[34] The burden of proof then shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have made the same deci-

[30] The allegation meets the three-factor timeliness test of *Redd-I, Inc.,* 290 NLRB 1115, 1118 (1988). I deny Respondent's hearing motion to strike this allegation as untimely.

[31] Respondent's policy does not prohibit solicitation in all work areas, but only in selling areas during hours when the store is open to the public and only during worktime. If Rios expanded Respondent's policy to encompass Allen's protected union activity, it would be discriminatory. Restriction on solicitation while employees are "on the clock" is presumptively invalid as an absolute prohibition on solicitation. *Burger King,* 331 NLRB 1011 (2000).

[32] It is unnecessary to address Respondent's motion to strike complaint par. 5(b)(4) as untimely under Sec. 10(b) of the Act.

[33] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[34] "The General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. [Citation omitted.]" *American Gardens Management Co.,* 338 NLRB 644, 645 (2002).

sion, even in the absence of union activity.[35] *Avondale Industries*, 329 NLRB 1064 (1999); *T&J Trucking Co*., 316 NLRB 771 (1995). Respondent was well aware of Allen's prominent union organizational role, and Respondent opposed union organization of its employees. Finally, Respondent discharged Allen for conduct connected with his union activity. In these circumstances, I conclude the General Counsel has made "an initial 'showing sufficient to support the inference that protected conduct was a motivating factor'" in Respondent's decision to terminate Allen. *American Gardens Management Co*., supra at 645. The burden of proof therefore shifts to Respondent to show Allen's discharge would have (not just could have) occurred even in the absence of his vigorous participation in union organizing efforts. *Avondale Industries*, supra at 1066.

In assessing Respondent's evidence of lawful purpose in discharging Allen, I recognize that an employer's desire to curtail union activities does not, of itself, establish the illegality of a discharge. If an employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the employer's welcoming the opportunity does not render the discharge unlawful. *Avondale Industries*, supra; *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). Further, it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems*, 330 NLRB 1170, 1171 fn. 6 (2000), and cases cited therein. Nonetheless, the Board's role is to ascertain whether an employer's proffered reasons for disciplinary action are the actual ones. Ibid

Here, Respondent asserts that by giving union literature to Zambrano while he worked, and in a work area, Allen breached Respondent's no-solicitation/no-distribution rule after repeated warnings and while in his 12-month D-Day period. There is no question Respondent could lawfully have discharged Allen had he engaged in such conduct. Respondent could also have discharged Allen if Respondent reasonably believed, albeit erroneously, that Allen had engaged in such conduct, as *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."[36] The question, under the *Wright Line* analysis, is whether Respondent reasonably believed Allen engaged in such conduct or whether it seized upon a plausible opportunity to rid itself of a prominent union supporter whom it would not otherwise have discharged. In short, the question of whether Respondent violated the Act in discharging Allen rests on its motivation.

Motive is a question of fact, and the Board may infer discriminatory motivation from either direct or circumstantial evidence and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99 (2001). Indications of discriminatory motive may include expressed hostility toward the protected activity,[37] abruptness of the adverse action,[38] timing,[39] pretextual reason,[40] disparate treatment,[41] departure from past practice,[42] and/or the employer's inability to adhere to a consistent explanation for the action.[43]

Here, neither direct nor circumstantial evidence permits an inference of discriminatory motivation in Respondent's discharge of Allen. First, although Rios warned Allen on several occasions about the consequences of breaching Respondent's no-solicitation/no-distribution policy, Rios did not express animosity toward Allen's permissible union activities. Indeed, Rios allowed instances of Allen's noncompliance to pass without more than oral reminders.

Second, Respondent took no abrupt action toward Allen that might signal discriminatory intent. Rios reminded Allen of its policy restrictions for many months, during which time Allen openly promoted union organization among fellow employees without repercussion. Moreover, Respondent did not reach the discharge decision itself without a significant period of information gathering and reflection.

Third, the timing of Allen's discharge was unrelated to any action or event other than his ostensible violation of company policy. Although the Charging Party argues Allen's discharge was prompted by a significant increase in organizing interest, the evidence shows no nexus between purported increased interest and the discharge.

Fourth, no evidence was adduced of pretext in Respondent's decision. The Charging Party argues Respondent unreasonably and unlawfully claimed that all hallway areas of the LV Store were work areas; therefore, Allen was justified in disseminating literature in certain areas. I do not find it necessary to address that contention because there is no doubt Zambrano was given union literature as he worked, a clear violation of Respondent's policy under any circumstances. There is also no evidence Respondent conducted an inadequate or superficial investigation of the Zambrano incident or accepted biased information, either of which would point to animus. No reason has been shown why Rios should not have believed the information he received about the incident. See *American Thread Co*., 270 NLRB 526 (1984). I find Rios, on whom the discharge decision rested, and the managers who reported the events to him all believed in good faith that Allen had violated Respondent's no-solicitation/no-distribution policy. While, as the Charging Party points out, the investigation did not included questioning Allen, interviewing the subject employee is not a requirement for an adequate investigation. *Frierson Building Supply Co.,* 328 NLRB 1023 (1999). Given its past cautions to Allen, it was not unreasonable for Rios to decide termination was an appropriate disciplinary measure without further discussion with Allen.

Fifth, the evidence does not justify a finding of disparate treatment, which must be supported by a showing that employ-

[35] A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. *McCormick on Evidence*, § 676–677 (1st ed. 1954).

[36] *American Gardens Management Co*. supra at 645.

[37] *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001).

[38] *Dynabil Industries,* 330 NLRB 360 (1999).

[39] *Bethlehem Temple Learning Center,* 330 NLRB 1177 (2000).

[40] *Pacific FM, Inc,* 332 NLRB 771 (2000); *Fluor Daniel,* 311 NLRB 498 (1993).

[41] *NACCO Materials Handling Group*, 331 NLRB 1245 (2000).

[42] *Sunbelt Enterprises,* 285 NLRB 1153 (1987).

[43] *Atlantic Limousine,* 316 NLRB 822 (1995).

ees similarly circumstanced were treated differently from Allen. Although Moreno conducted a 2004 super bowl pool in work areas of the store, which violated Respondent's policy, there is no evidence Rios knew of Moreno's activity. Another employee was not permitted to distribute blood drive flyers for her nephew with cancer other than in the breakroom. Although she was allowed to announce the blood drive in some morning meetings, that does not show disparate treatment of Allen, whose conduct—distributing literature without permission during worktime and in work areas—was entirely different. Finally, Respondent has consistently offered the same explanation of Allen's discharge that it presented at the hearing.

Accordingly, I conclude Respondent has met its burden of showing Allen's discharge would have occurred even in the absence of his union activities. More specifically, Respondent has shown it would have discharged Allen if it believed he persisted in disseminating literature, nonunion or otherwise, in violation of Respondent's policies. As to the complaint allegation that Respondent discharged Allen in violation of Section 8(a)(4) of the Act, the same analysis described above applies. I find Respondent did not, therefore, violate Section 8(a)(3) or (4) of the Act by discharging Allen. I will, therefore, dismiss those allegations of the complaint.

It remains to determine whether Respondent violated Section 8(a)(1) by discharging Allen. Under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), it is not sufficient for Respondent to show a good-faith belief that misconduct occurred in defending a discharge decision. In *Burnup & Sims*, the Supreme Court affirmed the Board's rule that an employer violates Section 8(a)(1) by discharging or disciplining an employee based on its good-faith albeit mistaken belief the employee engaged in misconduct in the course of protected activity. Id. at 23–24. It is necessary, therefore, to decide whether Allen was, in fact, guilty of the conduct for which Respondent discharged him, i.e., giving union literature to Zambrano as he worked.

As explained above, I have accepted very little of the testimony regarding the Zambrano incident. I have found that of all the witnesses, only Garcia gave fully competent and credible evidence. From her evidence, I find it reasonable, indeed requisite, to infer that Morse, and not Allen, may have been the one who actually handed the packet to Zambrano; Allen, acting in concert with him, was no less guilty of violating Respondent's solicitation/distribution policy. Accordingly, I find Respondent did not violate Section 8(a)(1) of the Act when it discharged Allen for misconduct he had, in fact, engaged in. I will, therefore, dismiss that allegation of the complaint.

C. Alleged Violations of Section 8(a)(1) at the Henderson Store

The General Counsel alleges at paragraph 5(d)(1) that Respondent promulgated and enforced an overly broad and discriminatory no-solicitation and no-distribution rule by prohibiting union organizers from soliciting its employees and distributing union literature to its employees on its property at the Henderson Store. Respondent's solicitation/distribution policies provide that nonassociates may request and receive permission from Respondent to solicit/distribute outside its facilities. The organization granted such permission is to sign a copy of Respondent's solicitation/distribution rules to signify agreement to abide by them. Having been granted permission to solicit/distribute, the organization is to conduct its activities at least 15 feet from the entrances and exits of Respondent's facilities. In its October 17, 2002 solicitation/distribution at the Henderson Store, the only one of the above requirements with which the Union complied was the 15-foot distance rule.

Respondent has a right to restrict nonemployees in soliciting/distributing on its property. As stated in *New York New York Hotel & Casino*, 334 NLRB 762 (2001),[44]

> [I]ndividuals who do not work regularly and exclusively on the employer's property, such as nonemployee union organizers, may be treated as trespassers, and are entitled to access to the premises only if they have no reasonable non-trespassory means to communicate their message. *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). . . . Contrary to the Respondent, nothing in this decision or in those on which it is based suggests that the Respondent would be required to allow such individuals to solicit or distribute handbills on its property.[45]

Respondent has met its burden of showing a sufficient property interest in the Henderson Store entrance area to prohibit nonemployees who did not meet its solicitation/distribution prerequisites from soliciting/distributing on the property. Whether Respondent lawfully prohibited the Union's unapproved activity depends on whether, as alleged, Respondent discriminatorily applied its non-associate solicitation/distribution policies.

The General Counsel and the Charging Party contend Respondent either more strictly or inconsistently applied its non-associate solicitation/distribution policies to the union handbillers. The Charging Party points to the Union's having handbilled at the Henderson Store after October 17, 2002 as evidence of inconsistent policy enforcement, but there is no evidence Respondent was aware of the handbilling on that occasion. While the Charging Party points to occasions on which Respondent did not follow its internal policy requirements as to the number of days, organizations,

[44] Review granted, enf. denied on other grounds 313 F.2d 585 (D.C. Cir. 2002).

[45] See also *Farm Fresh, Inc.,* 326 NLRB 997 (1998), review granted, enf. granted in part and otherwise remanded 222 F.3d 1030 (D.C. Cir. 2000), remand accepted 332 NLRB 1424 (2000) (accepting the remand as "law of the case" the Board reversed its prior decision that respondent possessed a sufficient property interest in sidewalks outside some of its stores to justify removal of nonemployee union-literature distributors); *Oakland Mall,* 316 NLRB 1160, 1164 (1995), review denied 74 F.3d 292 (D.C. Cir. 1996) (respondents did not act unlawfully by prohibiting, or imposing requirements on union handbilling on their properties).

or repeat appearances it permitted for solicitation/distribution activity, the Charging Party could point to no situation where Respondent did not require an organization to obtain prior approval.[46] The Charging Party also argues that seeking prior approval would have been futile but provides no supporting evidence. Accordingly, I find Respondent consistently and nondiscriminatorally applied its nonassociate solicitation/distribution policies and did not violate the Act by refusing to permit noncompliant union representatives from soliciting or distributing handbills at the Henderson store on October 17, 2002. I will, therefore, dismiss that allegation of the complaint.

The complaint at paragraph 5(d)(4) further alleges Respondent violated the Act by causing the Henderson, Nevada police to remove the union organizers from its property on October 17, 2002. Inasmuch as the Union's conduct in handbilling on Respondent's property without permission and its persistent refusal to cease the activity were unprotected, it follows that Respondent did not violate Section 8(a)(1) of the Act when it summoned the police to enforce its lawful requests. *NYNEX Corp,* 338 NLRB 659, 660 (2002). I will, therefore, dismiss that allegation of the complaint.

At paragraphs 5(d)(4), (2), and (3) of the complaint, the General Counsel alleges that in the course of the confrontation between the Union and Henderson store managers on October 17, 2002, Respondent violated Section 8(a)(1) of the Act by confiscating union literature from employees and threatening employees with unspecified reprisals to prevent them from accepting union literature.

Credible testimony establishes Respondent's management engaged in the following conduct during the incident on October 17, 2002: Garza told two employees who had accepted handbills, "You know what to do with that," a clear directive to destroy or otherwise disregard the material. Scott Miller took handbills from employees as union representatives distributed them. In taking handbills away from employees and implicitly telling them to destroy them, Scott Miller and Garza, respectively, interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.[47]

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act by

(a) Impliedly telling employees to destroy or disregard union literature.

(b) Taking union literature away from employees.

2. Respondent has not violated the Act as otherwise alleged in the complaint.

REMEDY

Having found that 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[48]

ORDER

The Respondent, Wal-Mart Stores, Inc., Henderson, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly telling employees to destroy or disregard union literature.

(b) Taking union literature away from employees.

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

(a) Within 14 days after service by the Region, post at its facility in Henderson, Nevada, copies of the attached notice marked "Appendix."[49] Copies of the notice, on forms provided by the Regional Director for Region 28, 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 October 17, 2002.

(b) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this no-

[46] The fact that the Cheyenne and Craig Road stores waived the policy requirements and permitted the Union to handbill on October 17, 2002, neither created a precedent the Henderson store was obliged to follow nor showed inconsistency or discrimination.

[47] While I cannot find Garza's telling employees they knew what to do with the union flyers constituted a threat of reprisal as alleged in the complaint, her statement was unquestionably coercive.

[48] 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.

[49] 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."

tice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us 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 impliedly tell employees to destroy or disregard union literature.

WE WILL NOT take union literature away from employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WAL-MART STORES, INC., HENDERSON, NEVADA