

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: January 26, 2007

TO : Ronald K. Hooks, Regional Director  
Region 26

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Wal-Mart Stores, Inc. 177-8520-0800  
Cases 26-CA-22526 177-8520-1600  
26-CA-22551 177-8540-8050  
26-CA-22563 177-8580-8050  
512-5036-6720-7500  
512-5072-2000  
512-5072-3700

The Region submitted these cases, pursuant to Memoranda OM 00-24, OM 06-85, and OM 07-04, for advice as to whether the Charging Party is a supervisor as defined in Section 2(11) of the Act. Assuming employee status, the Region has also requested advice as to whether the Employer 1) unlawfully terminated the Charging Party for discussing wages, 2) unlawfully directed employees to report to management all union activity, and 3) unlawfully maintained a rule that directed employees to report to management all inquiries by government agents.

We agree with the Region that the Employer has failed to present, and the investigation has not otherwise disclosed, evidence sufficient to establish that the Charging Party possessed any indicia of supervisory authority, or exercised such authority using independent judgment. We further agree with the Region that, because the Charging Party is a statutory employee, the Employer unlawfully terminated her for discussing and disseminating wage information among her co-workers, and unlawfully directed employees to report union activity. We also agree with the Region that the Employer's "government inquiries" rule is not facially unlawful.

Wal-Mart-Stores, Inc. ("the Employer") operates retail stores across the country, including a facility in Algood, TN. The Charging Party worked in the Algood store as the Tire and Lube Express (TLE) department manager until the Employer terminated her for discussing and disseminating certain wage information among her co-workers. The Employer defends the termination by arguing that the Charging Party was a statutory supervisor because she participated in the Employer's hiring process, and because

she "assigned" and "responsibly directed" employees.<sup>1</sup> The Employer further defends the termination by arguing that, even if the Charging Party is a statutory employee, her discussion of wages violated the Employer's policy prohibiting the disclosure of "confidential information." We agree with the Region that these defenses have no merit.

1. The Employer Has Failed to Establish that the Charging Party was a Supervisor as Defined in Section 2(11)

Individuals are statutory supervisors if (1) they hold the authority to engage in any one of the 12 supervisory functions (e.g., "assign" or "responsibly to direct") listed in Section 2(11); (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and (3) their authority is held "in the interest of the employer."<sup>2</sup> The party asserting supervisory status has the burden of proving it by a preponderance of the evidence.<sup>3</sup> A lack of evidence is construed against the party asserting supervisory status.<sup>4</sup>

A. The Employer failed to establish that the Charging Party exercised 2(11) authority when screening applicants

We agree with the Region that the Employer has failed to prove that the Charging Party exercised independent judgment when performing her very limited role in the Employer's tightly controlled application process. The evidence shows that the Charging Party merely screened applicants following an Employer-drafted script, and

---

<sup>1</sup> The Employer has also made a number of conclusory assertions regarding the Charging Party's authority to reward and discipline employees, but has failed to provide any evidence to support those claims.

<sup>2</sup> Oakwood Healthcare, Inc., 348 NLRB No. 37, slip op. at 2 (September 29, 2006), citing NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001); Croft Metals, Inc., 348 NLRB No. 38, slip op. at 5 (September 29, 2006) (same).

<sup>3</sup> Oakwood, above, slip op. at 3; Croft Metals, above, slip op. at 5.

<sup>4</sup> Kentucky River, above, 532 U.S. at 710-712.

recording the applicants' answers using an Employer-created matrix. If the applicants' answers met the Employer-established criteria, the applicants advanced to interviews with salaried managers, who decided—without input from the Charging Party—whether to offer the applicants employment. Thus, the Charging Party performed a largely ministerial function with respect to hiring, had no authority to make hiring decisions, and did not effectively recommend that the Employer hire anyone.<sup>5</sup>

B. The Employer failed to establish that the Charging Party "assigned" any employees

In Oakwood, the Board defined the term "assign" as the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee."<sup>6</sup> The Board specifically excluded from its definition "ad hoc instruction that [an] employee perform a discrete task."<sup>7</sup>

We agree with the Region that the Employer has not met its burden of showing that the Charging Party "assigned" employees. The Employer merely claims that the Charging Party or the appropriate division manager assigned TLE employees to various tasks based on the Charging Party's assessment of need. However, an employee's instruction to a co-worker to perform a discrete task is not evidence of authority to assign.<sup>8</sup> Moreover, the Employer has provided no evidence that the Charging Party assigned any employees to the TLE department, or assigned to TLE employees their overall duties. Rather, the Region's investigation disclosed that local division managers were solely responsible for those assignments. Indeed, the Charging Party's lack of authority was specifically demonstrated by her inability to "lend" or "borrow" employees to or from other departments as need dictated. If the TLE department

---

<sup>5</sup> See, e.g., J.C. Penney, Corp., 347 NLRB No. 11, slip op. at 3 (2006) and cases cited there (employee's limited role in hiring process insufficient to establish supervisory status).

<sup>6</sup> 348 NLRB No. 37 slip op. at 4.

<sup>7</sup> Ibid.

<sup>8</sup> Oakwood, above, 348 NLRB No. 37 slip op. at 4.

was shorthanded, the Charging Party and the other TLE employees simply made do.<sup>9</sup>

C. The Employer failed to establish that the Charging Party "responsibly directed" employees

The Board has held that the authority "responsibly to direct" arises if rank and file employees report to "a person on the shop floor" and "that person decides 'what job shall be undertaken next or who shall do it,' . . . provided that the direction is both 'responsible' . . . and carried out with independent judgment."<sup>10</sup> The Board further held that the element of direction that is "responsible" involves a finding of accountability, such that the "employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary" and that "there is a prospect of adverse consequences for the putative supervisor" arising from his/her direction of other employees.<sup>11</sup>

To establish that an individual possesses supervisory authority to responsibly direct employees, the party asserting an employee's supervisory status must also show that the individual directs other employees using independent judgment. "Independent judgment" means that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data."<sup>12</sup> "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement."<sup>13</sup> Above all, the degree of

---

<sup>9</sup> Croft Metals, above, 348 NLRB No. 38, slip op. at 5 (purported supervisors did not schedule employees; assign them to production lines, departments, shifts, or overtime; nor did they assign to employees their overall duties).

<sup>10</sup> Oakwood, above, 348 NLRB No. 37, slip op. at 6.

<sup>11</sup> Id., slip op. at 7.

<sup>12</sup> Id., slip op. at 8.

<sup>13</sup> Ibid. (citations omitted). The Board stated, however, that "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." Ibid. (citations omitted).

discretion exercised must rise above the "routine or clerical."<sup>14</sup>

Given the routine and tightly controlled nature of the work in the TLE department, we agree with the Region that the Charging Party did not "direct" employees. TLE department work varied little—if at all—from day to day. TLE employees were required to complete discrete tasks that might have varied from day to day, or perhaps even within the course of a day, but there is no evidence that the Charging Party ever told any employee what to do. To the contrary, because the Employer dictates virtually every aspect of the TLE employees' work, including how and when they should shelve stock, greet customers, arrange displays, and price or promote particular items, the Charging Party and other TLE employees chose among themselves what they wanted to do during a given shift, without direction. The evidence suggests that the Charging Party occasionally asked for assistance completing a particular task (such as stocking inventory or changing shelving configurations), but there is no evidence that she had any authority to require that her co-workers complete a particular task.<sup>15</sup>

Even if the Charging Party's role in the TLE department constituted "direction" of other employees, there is no evidence that such direction was "responsible," or that it was carried out using independent judgment. The Charging Party denies that she was ever held accountable for another employee's shortcomings or any deficiency

---

<sup>14</sup> Ibid. See also Croft Metals, Inc., 348 NLRB No. 38, slip op. at 5-6 (2006) (applying this definition of "independent judgment" to lead persons and concluding that the employer failed to establish that the degree of discretion involved did not rise above the routine or clerical).

<sup>15</sup> See, e.g., Wal-Mart Stores, Inc., 340 NLRB 220, 224 (2003) (employees were not supervisors despite fact that they provided direction to other employees through "to-do" lists; directions were related to routine tasks, were irregularly carried out, and at no time involved the exercise of independent judgment). Compare Croft Metals, above, 348 NLRB No. 38, slip op. at 3 (leads "directed" employees by prioritizing the work to be done and deciding who would perform which task).

related to the TLE department. The Employer has presented no evidence to contradict her.

Evidence regarding other Algood department managers indicates that the Charging Party's lack of responsibility was typical. One department manager believes he is accountable for the failures of his co-workers or the shortcomings in his department, but he has never actually been held accountable, so there is no evidence to support his assertions. Another department manager unequivocally denied that he was accountable for the performance of his co-workers.

Finally, there is no evidence that any direction the Charging Party provided to other employees involved the use of independent judgment. As discussed above, the work at issue was so routine and tightly controlled that it afforded no opportunity for her to exercise meaningful discretion in overseeing its performance.<sup>16</sup>

2. The Employer Unlawfully Terminated the Charging Party for Discussing Wages

Given our conclusion that the Charging Party is a statutory employee, we agree with the Region that the Employer unlawfully terminated her for engaging in the protected concerted activity of discussing and disseminating wage information among her co-workers.<sup>17</sup> The Employer has attempted to justify the termination by arguing that the Charging Party violated its ethics policy by distributing "confidential" wage information. The Employer's own evidence, and extant Board law, however, belie those arguments.

The Employer relies on its unlawfully overbroad interpretation of its ethics policy to justify its

---

<sup>16</sup> See Croft Metals, above, 348 NLRB No. 38, slip op. at 6.

<sup>17</sup> See, e.g., Reynolds Electric, Inc., 342 NLRB 156, 166 (2004) (discussion of wages constitutes protected concerted activity), quoting Aroostook County Regional Ophthalmology Center, 317 NLRB 218, 220 (1995). See also, Champion Home Builders, 343 NLRB 671, 671, 680 (2004), enfd. in rel. part 2006 WL 3487113 (9<sup>th</sup> Cir. 2006) (employer violated Section 8(a)(1) by terminating employee for discussing employees' bonuses with his co-workers); Williams Contracting, 309 NLRB 433, 438 (1992) (employer unlawfully terminated employees for complaining about wages).

termination of the Charging Party. Although its ethics policy does not explicitly refer to employees' wage information as "confidential," the Employer claims in its various position statements that the broad wording of the policy, advising employees that they "should consider all information gained through [their] employment as confidential Wal-Mart information," extends to wage information like that at issue here. However, since rules that restrict employees from discussing earnings among themselves are unlawful,<sup>18</sup> the Employer's interpretation of its ethics policy—and its enforcement here—is clearly unlawful.<sup>19</sup> Accordingly, the Employer's illogical argument, i.e., that it lawfully terminated the Charging Party for violating its unlawfully enforced policy, is without merit.<sup>20</sup>

We also agree with the Region that the Employer's reliance on International Business Machines (IBM)<sup>21</sup> is without merit. In that case, the Board found that the employer had advanced a "substantial and legitimate business justification" for classifying certain employee wage information "confidential," and therefore lawfully terminated an employee who knowingly violated the policy by surreptitiously distributing information he knew he was not

---

<sup>18</sup> Custom Cut, Inc., 340 NLRB 120, 123 (2003), citing Fredericksburg Glass & Mirror, Inc., 323 NLRB 165 (1997).

<sup>19</sup> See, e.g., Iris USA, Inc., 336 NLRB 1013, 1013 (2001) holding that broadly worded confidentiality rules violate Section 8(a)(1) if they can reasonably be construed to prohibit employees from discussing their terms and conditions of employment, including wages. See also, Double Eagle Hotel & Casino, 341 NLRB 112, 115 (2004), enfd. 414 F.3d 1249 (10<sup>th</sup> Cir. 2005), cert. denied \_\_\_ U.S. \_\_\_, 126 S.Ct. 1331 (2006) (employer's express prohibition of discussions regarding wages unlawful).

<sup>20</sup> [FOIA Exemption 5

.]

<sup>21</sup> 265 NLRB 638, 638 (1982).

privileged to possess.<sup>22</sup> In contrast, the Employer in this case has not presented any basis for its asserted policy classifying any unit employees' wage information as confidential. Moreover, there is no evidence that the Charging Party should have known the Employer regarded the wage information as confidential. Nor would she have any reason to suspect that discussing the information with co-workers would breach the Employer's policy since the policy focused on disclosure to parties outside the company. The Charging Party found the information by following the Algood manager's instructions to all employees to access wage information on the Employer's intranet, and a "computer glitch," not subterfuge by the Charging Party, led to her access to the wage information. Significantly, nothing related to the content or format of the information, or the Charging Party's subsequent meetings with her manager, suggested that the information was obviously confidential, or that she should not talk about it with others.

3. The Employer Unlawfully Directed Employees to Report Union Activities

It is well settled that an employer's instructions to employees that they report union activity to management reasonably tends to coerce, restrain and interfere with employees' free exercise of their Section 7 rights. Given our conclusion that the Charging Party was a statutory employee, we agree with the Region that the Employer's instructions to employees to report any union activity by their co-workers violated the Act.<sup>23</sup>

4. The "government inquiries" rule is not unlawful

We agree with the Region that the Employer's "government inquiries" rule is not facially unlawful. The rule does not explicitly refer to Section 7 rights, nor can we conclude that employees would reasonably construe the rule to prohibit the exercise of their Section 7 rights. Moreover, there is no evidence that the Employer promulgated the rule in response to any Section 7 activity

---

<sup>22</sup> Id. at 638.

<sup>23</sup> Wal-Mart, above, 340 NLRB at 220 and 224 (employer's instructions to employees that they should report union activity to management violated 8(a)(1)); Puerto Rican Family Institute, 311 NLRB 929, 931 (1993) (asking employees to report any union activity violated the Act).

by its employees, or that the Employer applies the rule generally to restrict Section 7 activity.

5. An electronic posting of the Board's Notice to Employees may be appropriate

Finally, we conclude—in agreement with the Region—that the current evidence regarding the Employer's reliance on its intranet to communicate with employees strongly suggests that an electronic posting of the Board's Notice to Employees may be appropriate. [FOIA Exemption 5

.]24

### **CONCLUSION**

In sum, the Employer has failed to establish that the Charging Party was a supervisor as defined in Section 2(11) of the Act. As such, the Employer violated Section 8(a)(1) by terminating the Charging Party for discussing wage information with her co-workers, and telling her to report employees' union activity. The Region should issue complaint, absent settlement, regarding these allegations and solicit a charge regarding the Employer's unlawful interpretation and enforcement of its confidentiality rule at this facility. The Region should dismiss, absent withdrawal, the allegation related to the Employer's government inquiries rule.

B.J.K.

---

24 [FOIA Exemption 5

.]