

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

Advice Memorandum

DATE: February 7, 2014

TO: Margaret J. Diaz, Regional Director
Region 12

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

SUBJECT: Wal-Mart Stores, Inc. 512-5036-6720
Cases 12-CA-105798, 12-CA-105847, 12-CA- 512-7550-6000
109473

This case was submitted to Advice as to whether the Employer violated Section 8(a)(1) by unlawfully disciplining and discharging two employees for engaging in protected activity and by unlawfully surveilling OUR Walmart's in-store demonstration. We conclude that although a case can be made that the employees' protected activity was a motivating factor in the Employer's decision to take action against the employees, the Region should dismiss the allegations, absent withdrawal, because the Employer can establish a *Wright Line* defense that it would have disciplined and discharged them even in the absence of protected activity. Additionally, we conclude that the Employer did not engage in unlawful surveillance.

FACTS

This case involves two employees (Associate 1 and Associate 2) at two Wal-Mart Stores, Inc., (the Employer) stores in St. Cloud, Florida and Orlando, Florida. The Organization United for Respect at Walmart (OUR Walmart) is a national organization whose stated goal is to educate the Employer's employees about workplace rights and help them improve their working conditions at the Employer. It has held numerous rallies and demonstrations at the Employer's corporate headquarters and retail stores nationwide.

The Employer maintains a progressive discipline policy entitled "Coaching for Improvement Policy." Under that policy, an employee may only receive one of each of three written coaching levels (first, second, and third), in any 12-month period. If an employee's unacceptable job performance or conduct warrants a level of coaching and the employee has already received a third written level of coaching within the 12-month period, the employee is subject to termination. The policy also states that "if your unacceptable conduct is found to be serious, this may result in your immediate termination." Examples of "serious" misconduct include "intentional failure to follow Walmart policy and theft, fraud or abuse of an associate benefit or other action involving financial integrity issues."

Associate 1

Associate 1, an employee of the Employer's St. Cloud, Florida store, has been a member of OUR Walmart since early 2012, but the Employer did not become aware of her involvement until late November 2012, when, among other things, she struck and picketed outside her store.¹

On April 24, 2013, Associate 1 participated in a demonstration at the Employer's Kissimmee, Florida store with 20 or so other individuals. When Associate 1 returned to work a few days later, none of her supervisors or managers said anything to her about her participation at the Kissimmee store demonstration.

Shortly after the Kissimmee store demonstration, Associate 1 met with her store managers. They told her that during the course of another investigation of a different employee, the Employer noticed via the store security videotape that Associate 1 and a second employee were taking extended breaks. The Employer told her that her breaks were anywhere from 3 to 20 minutes beyond the 15 minute break time allowed, which added up to about 295 minutes over 12 shifts. Associate 1 acknowledged that she was only allowed to take 15 minute breaks, but claimed that she was not aware that she had taken longer ones. Following the meeting, a store manager spoke to an "Employer Advisory Service" advisor who handles time theft investigations for the Employer. The advisor recommended that the Employer terminate Associate 1 because she admitted knowing about the policy and repeatedly violated it without a reasonable explanation. Associate 1 was subsequently terminated on May 18, 2013.

The Employer provided the video surveillance tapes, which establish that on at least 19 occasions over the course of a month, Associate 1 remained in the break room for longer than 15 minutes. The Employer also provided evidence that it terminated the second employee on May 15, 2013. The Employer also provided copies of Exit Interview Forms of other employees showing they were discharged for various dishonest acts, most of which involve theft of paid time (i.e. falsifying time records) and theft of merchandise. These infractions did not require coaching prior to termination. Two additional employees from another Florida store were also discharged for taking extended breaks after Associate 1 and the second employee were discharged.

¹ The facts surrounding the strike can be found in Case 12-CA-94187.

Associate 2

Associate 2 worked at the Employer's Orlando, Florida store and joined OUR Walmart in October 2012. However, she did not engage in any activity in support of OUR Walmart until November 21, 2012, when she participated in a demonstration at Associate 1's store; and then again two days later, when she participated in a one-day strike at her own store.

In January 2012, Associate 2 cut her finger and received a first level coaching for failing to use proper safety procedures by unplugging a deli slicer before cleaning it. The Employer provided evidence that another employee was terminated for similar conduct.

On December 6, 2012, Associate 2 was issued a second level coaching for failure to complete her assigned tasks on December 5, which consisted of filling the deli service case and filling the sales floor. The Employer provided evidence that around the same time, another employee who failed to complete her work assignments was issued a third level of coaching and subsequently terminated.

On January 30, 2013, Associate 2 was issued a third level coaching for violating the Employer's dress code by wearing dangling earrings. Associate 2 later learned that on January 29, another employee was verbally warned to remove her dangling earrings but was not given a coaching or written warning. The Employer provided a copy of its dress code policy that restricts food-handling employees to single stud earrings.

On May 25, 2013, Associate 2 failed to comply with the Employer's policy on food contamination safety and its prohibition on personal belongings in the work space when she left her handbag on the shelf of a table where salads and sandwiches are prepared. Another employee who also had her bag on the shelf received a first level coaching because she had no prior discipline.

On or about May 28, 2013, Associate 2 notified the Employer that she was going on strike. From May 28 through June 11, she participated in OUR Walmart's "Ride for Respect" strike in Bentonville, Arkansas during the Employer's annual stockholders' meeting.

On June 21, Associate 2 was called into the store manager's office and told that she was being discharged over her May 25 violation. Her discharge form designated the reason for her discharge as "Misconduct With Coachings," because she engaged in misconduct while on the last step of the progressive disciplinary process. The Employer provided evidence of other employees who were discharged when they engaged in similar misconduct while on their last step of the disciplinary process.

Alleged surveillance at the April 24 demonstration

According to Associate 1, three employees from another store were also at the April 24 Kissimmee demonstration. The Employer admits that it learned that OUR Walmart was planning a demonstration at the Kissimmee store on April 24. Associate 1 stated that she recognized one of the Employer's regional managers at the store and that he used his cell phone to videotape the group's in-store demonstration. According to the Employer, it sent multiple cease-and-desist no trespass letters to OUR Walmart and its parent organization, the UFCW, instructing that non-employees of the Employer shall not enter onto or in Walmart property to engage in any demonstrations. The Employer claims that OUR Walmart, the UFCW, and their representatives disregarded the letters and trespassed more than 15 times in 2012 and early 2013, sometimes requiring police assistance before OUR Walmart left the property. In March 2013, the Employer filed a Florida state trespass lawsuit seeking injunctive relief against OUR Walmart and the UFCW for multiple in-store demonstrations, blocking ingress and egress, and other trespass actions.

The Employer contends that it did not see Associate 1 or any other current employees participating in the demonstration, that none of the demonstrators identified themselves as employees, and that none of the store managers knew Associate 1. The Employer also claims that the demonstrators blocked access to the grocery registers, and that customers stopped while the demonstrators huddled in a group and loudly chanted and shouted profanities. The Employer admits that its regional manager attempted to take a cell phone picture of the demonstration, but that the camera did not work so he put it away. The Employer asserts that the pictures were relevant to the ongoing state trespass litigation against OUR Walmart.

ACTION

We conclude that although a case can be made that the employees' protected activity was a motivating factor in the employer's decision to take action against them, the Region should dismiss the allegations, absent withdrawal, because the Employer can establish that it would have disciplined and discharged the employees even in the absence of protected activity. Additionally, we conclude that the Region should dismiss the unlawful surveillance allegation, absent withdrawal, because the Employer had a legitimate reason for photographing OUR Walmart's in-store demonstration.

In determining whether an employee's discipline or discharge was lawful, or unlawfully motivated because of an employee's protected concerted activity, the Board

applies a *Wright Line*² analysis in circumstances where the employer asserts that it discharged an employee because of activity unrelated to an employee's protected concerted activity. To establish that an employee's discharge or other discipline violates the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, the employer had knowledge of such activity, the employer exhibited animus or hostility toward that activity, and the employee's protected activity was a "motivating factor" in the employer's decision to take adverse action against the employee.³ An employer's discriminatory motive may be established through several means, including: (1) the timing of the adverse action in relationship to the employee's protected activity; (2) other unfair labor practices, statements and actions showing the employer's discriminatory motivation; and (3) evidence demonstrating that the employer's proffered explanation for the adverse action is pretextual.⁴ Once the General Counsel makes that showing, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity.⁵

Here, we initially find that the General Counsel can meet its initial burden under *Wright Line*. Associate 1 and Associate 2 repeatedly engaged in protected concerted activity throughout 2012 and 2013, including participating in the Black Friday and Ride for Respect strikes. Additionally, it is undisputed that the Employer knew about their protected activities since at least November 2012. The Employer's unlawful motivation is demonstrated by the timing of the disciplines and discharges as well as through the numerous Section 8(a)(1) complaints against the Employer pertaining to this campaign by OUR Walmart, some of which include these two employees.⁶

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

³ *Id.* at 1089.

⁴ *See id.* at 1090 (finding that the timing of the discharge, the anti-union animus of the employer, and the pretextual explanations offered for the discharge made a prima facie case that the employee was discriminatorily discharged).

⁵ *Id.* at 1089.

⁶ See, e.g., Case 12-CA-094187, where the Employer interrogated Associate 1, threatened employees with reprisal, caused the police to issue trespass citations to employees for engaging in protected activity, and created the impression of surveillance.

However, we conclude that the Employer has met its burden under *Wright Line* of showing that it would have taken the same adverse action even in the absence of the protected activity. In that regard, the Employer argues that the employees were disciplined and discharged for violating work rules, and that the same action would have been taken even in the absence of any protected activity. Most significantly, the Employer has produced evidence that similarly-situated employees were disciplined or discharged for engaging in the same conduct. As to Associate 1, for example, other employees were discharged for taking extended breaks without requiring coaching prior to termination. As to Associate 2, other employees who engaged in the same conduct were disciplined or discharged pursuant to the Employer's "Coaching for Improvement" policy.

Further, as to timing, although Associate 1 was discharged shortly after the Kissimmee store demonstration, the Employer provided evidence that it was already investigating her for taking excessive breaks before that demonstration. Similarly, while Associate 2 was discharged three weeks after her last incident and almost immediately after her return from engaging in the Ride for Respect strike, the Employer persuasively points out that she went on strike shortly after the incident and that it did not have a chance to schedule a meeting with her prior to that time. Additionally, the Employer has provided evidence that other employees who were discharged for engaging in misconduct while on their third level of coaching were also discharged about three weeks after their last incidents. We therefore conclude that the Employer has met its *Wright Line* burden to show that it would have disciplined and discharged Associate 1 and Associate 2 regardless of their protected concerted activity.

Lastly, we conclude that the Employer did not engage in unlawful surveillance on April 24 at its Kissimmee, Florida store when a manager attempted to use his cell phone to videotape OUR Walmart's in-store demonstration. Rather, the evidence suggests that the large group of demonstrators were blocking access while in the store. Given the circumstances, the Employer reasonably concluded that the demonstration constituted trespass by OUR Walmart.⁷ As the Employer had pending state trespass actions requesting injunctive relief against OUR Walmart, any evidence of additional trespassing would be relevant in those actions.⁸

⁷ While a few off-site employees participated, they did not identify themselves as employees and they were among a much larger group of non-employees and organizers that displayed the OUR Walmart logo and other identifying images.

⁸ See *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1217-18 (2004) (no violation where employer monitored protected activity because of a reasonable concern about the safety of its employees and equipment and a recurrence of trespassing); *Town & Country Supermarkets*, 340 NLRB 1410, 1415 (2004) (photographing of union activity

Accordingly, in the circumstances of this case, the Region should dismiss the charges, absent withdrawal.

/s/
B.J.K

lawful since it was in response to reasonable belief that trespass had occurred and could occur again). Compare *Snap-On Tools, Inc.*, 342 NLRB 5, 5 fn. 5 (2004) (employer failed to establish proper justification for videotaping its employees where there were no prior instances of trespassing or misconduct).