

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

Advice Memorandum

DATE: March 31, 2014

TO: Wanda Pate Jones, Regional Director
Region 27

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

SUBJECT: Wal-Mart Stores, Inc.
Case 27-CA-105693

512-0125
512-5012-8300
512-5012-8700

This case was submitted to Advice as to whether the Employer violated Section 8(a)(1) by telling offsite employees, who were at the Employer's store speaking to on-duty employees about OUR Walmart, to leave, and by threatening to call the police if they did not. We conclude that the Employer did not violate the Act because it was merely enforcing its lawful no-solicitation policy and there is insufficient evidence to conclude that the Employer had a past practice of permitting offsite employees on the retail floor to talk to on-duty employees.

FACTS

Since at least 2011, the Charging Party, OUR Walmart, has been involved in various campaigns against Wal-Mart Stores, Inc., the Employer, and has conducted numerous actions at its stores throughout the country. The Charging Party 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. Employees who become members of the Charging Party in turn seek to educate their coworkers about their rights as workers.

The Employer maintains a Solicitation and Distribution of Literature Policy that permits employees "to participate in solicitation and/or distribution of literature outside [its] facilities during non-working time." The Policy prohibits employees, non-employees, groups, and organizations from "solicit[ing] and/or distribut[ing] literature in any working area of a facility during working time."

According to the Charging Party, despite the above Solicitation and Distribution policy, for at least two years prior to the instant events, the Employer freely allowed off-duty and offsite employee access to the sales floor to talk to on-duty employees

about OUR Walmart and other protected activities.¹ The Union, however, has provided no specific evidence to support its assertion. Additionally, there is no evidence indicating whether the Employer, either at a local or corporate level, even knew about, or approved of, this access.

On April 18, 2013, three offsite employees who are OUR Walmart members and three non-Wal-Mart-employee organizers drove to the Employer's Commerce City, Colorado store. Upon entering the store, the OUR Walmart members split up and talked to on-duty employees about OUR Walmart, describing the organization and its purpose. If the employees expressed interest, the organizers and offsite employees invited them to a meeting and provided a website address to go to for more information.

After a short period of time, the Employer approached a group of two organizers and two offsite employees and told them that they needed to leave the store. The offsite employees informed the Employer that they were current employees but the Employer told them that they were soliciting and needed to leave. The group attempted to explain to the Employer that it was the Employer's policy to allow employees to be inside the store pursuant to a protocol and asked the Employer to call its headquarters office. The Employer declined to do so and stated that it would call the police if the organizers and offsite employees did not leave the interior of the store. The group exited the store. Shortly after that group left the store, the Employer walked up to the remaining organizer and offsite employee. The Employer told them that they needed to leave and they promptly did.

On or about May 28, five of the six individuals from the April 18 incident (three organizers and two of the three offsite employees) returned to the Commerce City store to present the Employer with a copy of the instant unfair labor practice charge. After the Employer initially told them that they needed to leave, one of the offsite employees handed the charge to the Employer. The Employer then allowed the group to speak to on-duty employees inside the store and even told one employee that she was permitted to speak to them as long as she kept working. The group remained in the store approximately 45 minutes before leaving on their own accord. There is no evidence as to whether any offsite employees were denied access or told to leave the Employer's retail floor at any time after the April 18 incident.²

¹ OUR Walmart asserts that this type of talking is different from the Board's definition of solicitation.

² The Employer asserts that in directing the offsite employees to leave on April 18, it was applying the policy set out in its no-solicitation rule, above, and that pursuant to that legitimate rule, offsite employees have no right to access the interior of the store.

ACTION

We conclude that the Region should not issue complaint alleging that the Employer violated Section 8(a)(1) by ordering offsite employees off the retail floor of the store in April because the Employer was merely enforcing its lawful no-solicitation policy and there is insufficient evidence to show that the Employer had a past practice of allowing offsite employee access at its stores. Accordingly, the Region should dismiss the charge, absent withdrawal.

Under Board law, offsite employees have a nonderivative right to access their employer's facilities to engage in Section 7 activities.³ This right of access entitles offsite employees to the outside, nonworking areas of the employer's property, unless business reasons justify an employer's denial of access to those areas.⁴ However, even with respect to off-duty, onsite employees, an employer may bar access to the interior of its facility and other working areas so long as the rule "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity."⁵ Moreover, a retail store employer may lawfully prohibit its employees,

Both parties agree that the non-Wal-Mart employee organizers did not have a right of access to the interior of the stores.

³ *Hillhaven Highland House*, 336 NLRB 646, 648 (2001); *ITT Industries, Inc.*, 341 NLRB 937, 938-41 (2004).

⁴ *Hillhaven Highland House*, 336 NLRB at 648 (balancing the property interests of the employer and the Section 7 organizational rights of offsite employees, Board found that employer unlawfully deprived offsite employees from access to outdoor areas of its facilities, including outdoor break areas, outdoor employee entrance, and parking lot); *ITT Industries, Inc.*, 341 NLRB at 938-41 (finding that employer unlawfully evicted offsite employees from its parking lot); *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136, slip op. at 1 (2011) (finding that employer unlawfully ordered offsite employees engaged in the distribution of literature in outside areas of the facility to leave premises).

⁵ *Tri-County Medical Center, Inc.*, 222 NLRB 1089, 1090 (1976). The Board has noted that to the extent an employer's business reason for denying offsite employee access to outside, nonworking areas involves considerations not applicable to access by off-duty, onsite employees, the test for determining offsite visiting employees' right to access differs, at least in practical effect, from the *Tri-County* test for off-duty, onsite employees. *Hillhaven Highland House*, 336 NLRB at 648.

either on-duty or off-duty, from soliciting other employees at all times on the selling floor.⁶

Here, there is no dispute that the Employer's policy, which prohibits its employees (both off-duty and offsite) from engaging in soliciting or distributing in working areas of a facility during working time, is lawful on its face.⁷

OUR Walmart acknowledges that the Employer maintains that policy, but contends that, on a nationwide basis, the Employer permits offsite employees to talk to on-duty employees on the retail floor regardless of whether they are "soliciting." The Employer denies this claim and asserts that it enforces its no-solicitation policy, which states that no employees may solicit or talk to other employees on the retail floor.

Putting aside the parties' assertions, the only evidence provided demonstrates that the store manager enforced the Employer's policy in April, and then knowingly allowed offsite employees access to the retail floor to talk with on-duty employees in May. Other than that one instance in May, the investigation failed to reveal any instances where the Employer knew about and permitted such access.

The store manager's action in April, directing the offsite employees to leave the store, was consistent with the Employer's policy. Further, even if the manager subsequently allowed access to off-site employees in May, that alone would not demonstrate the existence of an actual practice where the evidence indicates that it only occurred once, and thus at most on an ad-hoc basis. In these circumstances, we cannot conclude that the Employer had a past practice of allowing offsite employee access to the retail floor to talk to on-duty employees.

Accordingly, because there is insufficient evidence that the Employer had a past practice of allowing access to offsite employees to talk to on-duty employees on the retail floor, such that it discriminatorily deviated from that practice in April when it

⁶See *Our Way*, 268 NLRB 394, 394-95 (1983) (employer may lawfully prohibit solicitation during working time); *Sam's Club*, 249 NLRB 1007, 1009 n.11 (2007) (retail employers may lawfully prohibit employees from soliciting on the selling floor—even during the non-worktime of employees— because active solicitation in a sales area may disrupt a retail store's business) citing *J.C. Penney Co.*, 266 NLRB 1223 (1983); *Marshall Field & Co.*, 98 NLRB 88 (1952), modified on other grounds and enforced 200 F.2d 375 (7th Cir. 1958).

⁷ See *Tri-County Medical Center*, 222 NLRB at 1090.

denied off-site employees access to the retail floor, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.