UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WAL-MART STORES, INC.	**Cases**	**32-CA-090116**
		32-CA-092512
		32-CA-092858
and		**32-CA-094004**
		32-CA-094011
		32-CA-094381
ORGANIZATION UNITED FOR RESPECT		**32-CA-096506**
AT WALMART (OUR WALMART)		**32-CA-111715**

WAL-MART STORES, INC.'S REPLY TO THE COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

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INTRODUCTION

The Counsel for General Counsel devotes most of her Answering Brief to the sales-floor demonstration issue. The Charging Party devotes its entire Answering Brief to the same issue. Given that focus, Walmart sets forth its further analysis of the sales-floor demonstration issue in its Reply to the Charging Party's Answering Brief, and incorporates that further analysis here. In this Reply, Walmart addresses the other issues raised in its Exceptions: the out-of-date dress codes, the Stafford question, Van Riper agency and statements, and the Notice reading issue.

On those issues, the CGC does little more than restate the ALJ's conclusions and reasoning. To the extent the CGC separately addresses Walmart's arguments, Walmart replies to those arguments here.

ARGUMENT

I. WALMART CAN LAWFULLY PROHIBIT DISTRACTING LOGOS AND INSIGNIA.

Walmart limits the size of logos and graphics that associates may wear to ensure that customers and co-workers can identify Walmart associates by their name tags and that messaging on clothing does not distract co-workers from work or customers from shopping. Neither the Union nor the CGC argues that Walmart cannot lawfully limit distracting union insignia. Instead, the CGC claims that Walmart did not raise this justification before the ALJ and that no evidence supports it. (CGC Ans. Br. 38-39 & n.86.) Those arguments fail.

First, Walmart emphasized in its Post-Trial Brief that its dress code ensures that "customers can easily identify associates by their name badge" and that logos or graphics do not "distract from the associates' name badge, interfering with Walmart's efforts to provide customer service . . . ." (Walmart's Post-Trial Brief 39-40 (attached as Reply Ex. 1).) Indeed, Walmart cited to *Sam's Club*, 349 NLRB 1007, 1011 (2007), where the Board found that "the

need for employees' names to be clearly visible to customers" justified Sam's Club's rule against putting buttons or pins on the name badge. (*Id.*)

Second, the record contains ample evidence of Walmart's no-distraction rationale. The 2013 Dress Code itself specifically states that the limitation on logos ensures that such paraphernalia is "non-distracting." (Jt. Ex. 31 at 2.) The Dress Code explains that work attire "has an impact on our performance as well as on the performance of those around us." (*Id.* at 1.) An associate's focus (*e.g.*, lack of distraction because of his and others' clothing) directly affects performance. Further, Walmart's Workplace Standards Policy repeats Walmart's goal of "provid[ing] a work environment that is clean, safe and *allows associates to focus on being productive and providing excellent customer/member satisfaction*." (Jt. Exs. 33-36 at 1 (emphasis added).) Moreover, Market HR Manager Janet Lilly explained that the limitation on logos and graphics prevents distraction so that customers can easily identify who is a Walmart associate. (Tr. 567.)

The CGC's argument that Lilly lacked "competence" to testify about the purpose of Walmart's limitation on logos and graphics also fails. As Walmart's Market HR Manager, Lilly ensured "HR compliance in all of our stores," oversaw the personnel departments, and served as a consultant to store managers "on issues that are relevant to human resources," in 15 stores. (Tr. 514-16.) Just as that role provided Lilly personal knowledge about the purpose behind other Walmart policies (*e.g.*, holding Open Door meetings on an individual basis), Lilly's market-level position made her competent to testify about the purpose behind Walmart's limitation on logos. Notably, the CGC did not object at trial to Lilly's testimony on the dress code.

The CGC further argues that "a true 'no distraction rationale' would prohibit <u>all</u> non-Walmart logos or graphics, not just 'large and distracting' ones." (CGC Ans. Br. 39 n.86.) That

argument fails because it starts from the false premise that the Board does not comprehend the "distraction" difference between sizes of union logos. As noted in Walmart's Exceptions Brief (51-53), the Board understands that "distraction" is a matter of degree, and that employees may wear small, "inconspicuous," and "*non*-distracting" union insignia, but not large or gaudy ones that would likely distract working employees and shopping customers.

II. THE 2010 DRESS CODE EXPRESSLY PERMITTED UNION INSIGNIA AND ASSOCIATES REGULARLY WORE SUCH INSIGNIA.

The CGC argues that the 2010 dress code's exception for protected logos and graphics is ineffective, citing three cases where the Board found unlawful policies that specifically prohibited protected activity and had savings clauses that directly conflicted with the rest of the policy. *See, e.g., Allied Mech.*, 349 NLRB 1077, 1084 (2007) ("The plain language of the first portion *directly prohibits* [protected activity]; the second portion cancels the first but only if the signatory employee is knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion.") (emphasis added). But those cases do not apply here where the allegedly overbroad language does not directly conflict with the Act's protections. Moreover, the CGC does not attempt to reconcile those cases with the six Board cases, General Counsel Memoranda, and Advice Memoranda Walmart cited directly supporting the proposition that employers can clarify potentially overbroad policies by informing employees that the policy does not prohibit protected activities. (*See* Walmart Exceptions Br. 59-60.)

The CGC merely argues that *Baltimore Sun*, G.C. Mem., 2005 WL 1668458 (June 27, 2005, Kearney) is factually distinguishable. (CGC Ans. Br. 41 n.89.) Not so. The policy at issue in *Baltimore Sun* prohibited employees from disclosing proprietary information including salary information. The policy then said that "[t]his provision does not preclude discussion of wages and working conditions among employees or with the Guild *pursuant to Section 7 of the*

[NLRA]." *Id.* at *5 (emphasis added; alteration in original). The clause thus informed employees that the policy did not prohibit *protected* discussions of wages and working conditions, but it certainly did not explain the Board's jurisprudence on when such discussions qualify as protected. Likewise, Walmart's 2010 dress code's savings clause provides that associates may wear "logos allowed under federal and state law"; that is, the clause informed employees that the policy does not prohibit the wearing of protected insignia.[1]

The CGC also mischaracterizes the ALJ's finding that "Walmart permitted associates to have logos on clothing (including OUR Walmart and UFCW pins and lanyards)" by claiming that the "finding is limited to [the] Richmond store." (CGC Ans. Br. 40 n. 88; *see also* ALJ Dec. 7.) The ALJ based his conclusion on uncontradicted evidence that Walmart managers nationwide permit associates to wear union insignia smaller than the name tag. (ALJ Dec. 7 (citing Tr. 566-68, 629-30).) That evidence is not limited to the Richmond store, as the CGC suggests; rather, the evidence came from Market HR Manager Lilly, who covered 15 stores in California, and Assistant Manager Tennille Tune, who worked at more than 20 Walmart stores in her career. (*See* Tr. 613, 615; *see also* Tr. 70-71 (Placerville store associate Barbara Collins wore union insignia daily).) Moreover, the CGC did not except to this factual finding.

III. ASSISTANT MANAGER STAFFORD'S QUESTION DID NOT CONSTITUTE A THREAT.

Assistant Manager Susan Stafford, in the midst of a private, casual one-minute conversation, asked long-time store associate and known OUR Walmart supporter Barbara

[1]The CGC also tries unsuccessfully to distinguish *Bellinger Shipyards*, 227 NLRB 620, 620 (1976). Walmart cited that case for the proposition that the Board does not order moot remedies for out of date, inapplicable policies. (Walmart Exceptions Br. 64.) In that case, the Board did not find "that the employer had put itself into voluntary compliance with the Act." (CGC Ans. Br. 41 n. 90.) Instead, the Board found that the employer revoked the unlawful rule and that the General Counsel did not challenge the validity of the new rule. *Bellinger Shipyards*, 227 NLRB at 620. As a result, and as applicable here, the Board held that "the entire situation is one of little significance and there is no real need for a Board remedy." *Id.*

Collins: "Aren't you afraid that if you guys get too big, that they're going to come and close down the store?" (Tr. 47.) The question – seeking Collins's opinion, not making a prediction – was so innocuous that Collins never reported it to another associate or union organizer until the ULP Charge was filed. Indeed, she instantly dismissed the question by pointing out to Stafford that Walmart had never closed a store in the United States due to union activity. (ALJ Dec. 4-5.)

The CGC argues that Stafford's question "implies" a "threat" to close the store if unionized. (CGC Ans. Br. 41-42.) The CGC argues that "there is no contention that Stafford based her threat upon objective facts" (*id*. at 42), acknowledging that an employer can lawfully make a factual presentation regarding facility closure, even if highly suggestive. *See Stanadyne Auto. Corp*., 345 NLRB 85, at *6-8 (2005), *vacated on other grounds*, 520 F.2d 192 (3d Cir. 2008) (showing photos of closed plants where union used to represent employees was lawful, not a prediction or threat). Actually, in the present case, the lack of "objective facts," and the low-level position of the speaker, just emphasize Walmart's point: no reasonable person would interpret that Stafford was representing Walmart policy, that she was trying to threaten Collins, or that she was doing anything besides asking an honest question. If the Board does not find an unlawful threat when a supervisor shows photos of closed plants where unions used to represent employees (clearly suggesting that the same could happen to the employees' plant if they vote for a union), then the same result should obtain even more so when a supervisor asks an innocuous question about the possibility of a facility closing. Although *Stanadyne* involved the presentation of "objective facts," that makes the situation *more* threatening than the casual question by a first-level supervisor in this case. Collins's and Stafford's exchange was truly *de minimis* and should have been treated that way by the ALJ, rather than requiring remedial action by the NLRB.

IV. ART VAN RIPER WAS NOT WALMART'S AGENT.

The ALJ did not rule on whether Field Project Supervisor Art Van Riper qualified as a 2(11) supervisor. (ALJ Dec. 32, n.40.) However, he did find that "associates would reasonably believe that Van Riper had the authority to speak and act as Walmart's agent . . . ." (*Id*. at 33.) The CGC attempts to support that finding by highlighting Van Riper's duties and responsibilities. (CGC Ans. Br. 43.) But the ALJ and CGC omit the essential evidence of what was "apparent" to the associates and what the "associates would reasonably believe" – ***their own direct testimony on this issue***. Not a single associate from Van Riper's crew testified that he or she viewed Van Riper as having been vested with authority to represent management or to convey labor relations policies to them. The CGC challenges this assertion as "factually flawed," noting that "remodel associate Lee testified." (CGC Ans. Br. 44, n.95.) But Lee worked on ***another*** remodeling crew, not Van Riper's, so her perception of his "apparent authority" was not based on close contact. (Tr. 239, 284.) Indeed, the contact that Lee did have with Van Riper led her to conclude that his opinion did not matter, that much of what he said was contrary to Walmart policy, and that there was no reason for her to "care what he thought." (Tr. 287-91.) In view of Lee's testimony, which certainly undermined any basis for finding that Van Riper had "apparent authority" to speak as Walmart's agent, it was incumbent upon the CGC to cite testimony of how Van Riper's authority was perceived by associates from Van Riper's own remodeling crew, but she did not do so because not a single such associate testified in this case.

The CGC finds evidence that associates would perceive Van Riper's apparent authority for dealing with labor relations matters from an incident that occurred as the striking remodeling associates returned to work on October 11, 2012: Assistant Manager Atlas Chandra "called Van Riper over to speak to the associates" when they tried to hand Chandra their return to work letter. (ALJ Dec. 12.) In the CGC's (and ALJ's) view, that "calling over" somehow morphed into

Chandra "specifically instruct[ing] the remodel associates to read their return to work letter to Van Riper . . . thereby vesting Van Riper with apparent authority regarding such encounter . . . ." (ALJ Dec. 32, n.41; CGC Ans. Br. 46.). Both the CGC and ALJ ignore the lack of evidence for that speculative leap (the record establishes no more than that Chandra called Van Riper over; Van Riper was, after all, responsible for coordinating the associates' tasks and needed to know about their availability). They also ignore Van Riper's own very telling response to the associates reading the letter: Van Riper told the associates that he did not "want to hear" anything that "concerns union activities," because he was "out of it," and that associates should "talk to the store manager or public information" about such matters. (ALJ Dec. 12.) That was a very clear and unmistakable declaration by Van Riper *directly to the associates* that Van Riper had no authority or intention of dealing with or transmitting management's views to associates regarding union activities. And the fact that the associates took their letter to Chandra in the first instance establishes unequivocally who they viewed as the person with labor relations authority: Chandra. Therefore, Van Riper's statements a few hours later in the impromptu 2 a.m. associate meeting – that the returning strikers would not remain with the remodeling crew, that crew members should not "talk to the returning strikers 'about the situation,'" and that Walmart would "never" become unionized (ALJ Dec. 14) – could not possibly be viewed as spoken with any kind of agency or authority, apparent or otherwise.

The CGC argues that Van Riper's own supervisor, Field Project Manager Malcolm Hutchins, testified that Van Riper held a "managerial position." (CGC Ans. Br. 43.) However, the CGC ignores Hutchins explanation that Van Riper's "managerial" responsibilities were limited to his crew's remodeling tasks, not their terms and conditions of employment, which resided in the hands of store managers. (Tr. 488.) Indeed, Van Riper's ***lack*** of responsibility

when it came to employment issues was all-inclusive: he had no authority – and never exercised any authority – over their hiring, orientation, schedules, compensation, evaluations, coaching, discipline, or future job prospects at the store. (Tr. 477-81, 490-94). Those responsibilities remained fully and solely in the hands of store management. (ALJ Dec. 11.) With regard to the remodelers, it was Hutchins' job to "oversee day to day operations" (Tr. 473), and it was Hutchins who "created the remodeling schedule" and "prepared and communicated daily work plans." (ALJ Dec. 10). Van Riper merely read those plans to the associates when they arrived for work and trained them to perform their tasks. (ALJ Dec. 10.)

As the ALJ correctly stated, an individual can be an employer's agent for some matters, but not others. (ALJ Dec. 32.) Clearly, Van Riper was Hutchins' agent for routine assignments and assisting the remodelers with their tasks. But just as clearly, he was not anyone's agent when it came to personnel and labor relations matters, including union activities. The CGC relies on an NLRB case in which two individuals were found to be agents of the employer because they served as "conduits between management and the employees." (CGC Ans. Br. 43, n.93.) But the remodeling associates were hired by, and worked for, the store itself: "Richmond store managers were responsible for handling personnel matters related to remodeling associates." (ALJ Dec. 11.) There is no evidence in the record, and the CGC makes no claim, that Van Riper served as a "conduit" in any way for store management. Accordingly, Walmart should not have been held liable under the Act for statements Van Riper made on personnel or labor relations issues.

V. VAN RIPER'S STATEMENTS TO ASSOCIATES ABOUT UNIONS DID NOT VIOLATE THE ACT.

The ALJ found that Art Van Riper stated, in front of several Walmart associates, that, "if it were up to me, I'd shoot the union." (ALJ Dec. 33.) The CGC argues, and Walmart accepts,

that the employer "cannot challenge that factual finding." (CGC Ans. Br. 47.) However, Walmart certainly can, and does, challenge any suggestion that Van Riper's hyperbolic statement caused any dismay among the listeners, or, indeed, that it was even taken seriously. Van Riper himself immediately denied any intent to be taken seriously. (ALJ Dec. 14.) The CGC contends that Van Riper's comment should be viewed as more than a "flip or intemperate remark" considering Van Riper "demonstrated hostility and history of abusive treatment." (CGC Ans. Br. 47 & n.99.) But that "hostility" and "abusive treatment," as reported by associates to management during the open door process, had nothing whatsoever to do with union activity. (*See* Jt. Exs. 57(a), 57(b), and 57(g).) The CGC cites *L'Hermitage Hotel*, 268 NLRB 744, 749 (1984), for the proposition that "generalized threats of violence" can violate Section 8(a)(1), but in that case, unlike the present case, the employee took the supervisor's remarks seriously and believed the implied threat. (CGC Ans. Br. 48.) In most of the other Board cases cited by the CGC, the alleged threats were made by high-level managers and company executives, not leads, like Van Riper, with no authority over personnel matters.

The CGC totally ignores the ***context*** in which Van Riper made the "shoot the union" comment, but the Board should not: Van Riper, on the Walmart sales floor during business hours, was trying to do his work when he was confronted by a crowd of associates, local labor activists, and community supporters trying to debate with him and read a script prepared by the Union; he told the crowd that he had "a job to do," and asked them to "leave me alone." (ALJ Dec. 13.) When they persisted in baiting him, he reacted strongly. Van Riper's "shoot the union" comment, viewed in proper context, should be treated as an understandable – albeit intemperate – and not unlawful reaction to a confrontational retail sales floor demonstration *instigated by the Union. Compare Plaza Auto Ctr., Inc*., 360 NLRB No. 117 (2014) (violation of

Act to fire employee who lost temper, raised voice to berate manager, and used profanities, when employee was provoked by manager and outburst was not premeditated).

The CGC says little about Van Riper's alleged anti-union comments at the impromptu 2 a.m. meeting on October 12, 2012, except to note that the ALJ credited Lee's recollection of the comments. Again, context is key. The CGC and ALJ completely ignored the fact that none of the associates on Van Riper's own crew testified about the comments and how they were received – or even that they were present at the meeting. Also ignored was the fact that Lee totally dismissed the comments because she "did not care what his opinion was," and that she knew that he was speaking contrary to Walmart policy. (Tr. 289-90.) In such circumstances, where no employee reporting to the alleged supervisor hears, accepts, or credits the challenged statements, they cannot be called coercive, threatening, or restraining under 8(a)(1).

VI. A NOTICE READING IS NOT APPROPRIATE OR NECESSARY.

The CGC contends that the ALJ appropriately required a store-wide notice reading because of the number of violations at the Richmond store. (CGC Ans. Br. 49-50.) But as explained in Walmart's Answering Brief to the Charging Party's Exceptions (2-4), the record does not support that conclusion. The CGC erroneously claims that Van Riper made his October 12, 2012 statements to "the entire remodel crew" and that "other associates were contemporaneously aware" that management asked Raymond Bravo to remove his union insignia. (CGC Ans. Br. 50.) The record does not support those factual assertions, and the ALJ made no such findings. The record shows that only a handful of temporary overnight associates heard the allegedly unlawful statements. (Walmart's Brief 80-81; Walmart's Ans. Br. 3-4.)

CONCLUSION

For the foregoing reasons, Wal-Mart Stores, Inc. respectfully requests that the Board dismiss the Complaint allegations as described above and in its Brief in Support of Exceptions.

DATED this 19th day of March, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies that I filed an electronic copy of the foregoing via the Board's electronic filing service on March 19, 2015, to:

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The undersigned certifies that I served a copy of the foregoing via U.S. Mail and Email on March 19, 2015, to:

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