

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

WAL-MART STORES, INC.

Respondent,

Case: 13-CA-114222

and

**THE ORGANIZATION UNITED FOR RESPECT
AT WALMART (OUR WALMART),**

Charging Party.

**WAL-MART STORES, INC.'S EXCEPTIONS
TO THE JUNE 4, 2015 DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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Attorneys for Wal-Mart Stores, Inc.

Wal-Mart Stores, Inc. (“Walmart”) states the following exceptions to the June 4, 2015 Decision of Administrative Law Judge Geoffrey Carter (ALJ) (JD-32-15) in the above-captioned cases.¹ Walmart contemporaneously files its Brief in Support of Exceptions.

1. Walmart excepts to the ALJ’s findings and conclusions that “Walmart’s dress code language regarding logos violates Section 8(a)(1) of the Act because it is overly broad, is not justified by special circumstances, and places unlawful restrictions on associates’ Section 7 right to wear union insignia” as contrary to record evidence, the ALJ’s findings, and controlling Board precedent. (ALJ Dec. 1; *see also* ALJ Dec. 6, 8-10; Jt. Exs. 1-11; GC Ex. 1(e), (j); R. Ex. 4-8; Tr. 27-31, 34, 37, 59, 70, 79-80, 85-92, 94-96, 98-99, 104-05, 117-56, 161-62, 164-66, 169-71, 177, 183, 195-203, 206-08, 213, 215, 217-20, 226, 228-30, 232, 243-44, 249-51.)

2. Walmart excepts to the ALJ’s finding that “In February 2013, Walmart adopted a revised dress code for all hourly associates in its stores in all states (except for seven states that had state-specific policies)” as unsupported by record evidence (there is no evidence that Walmart adopted that version of the dress code in February 2013). (ALJ Dec. 2; *see* Jt. Ex. 1.)

3. Walmart excepts to the ALJ’s finding that “In the interest of ensuring that customers, coworkers and loss prevention personnel can easily identify Walmart associates, Walmart requires its associates to wear nametags while on duty, and requires that any non-Walmart logos be ‘small’ and ‘non-distracting’” as omitting key record evidence. (ALJ Dec. 3; *see* Jt. Exs. 1-9; Tr. 94, 99.)

¹ Walmart’s exceptions are based on the entire record in this matter, and Walmart does not waive its right to request leave to supplement the specific evidentiary cites below.

4. Walmart excepts to the ALJ's finding that "There is no evidence that Walmart has an established definition for what logos qualify as 'non-distracting'" as contrary to the record evidence and the ALJ's findings. (ALJ Dec. 4; *see* ALJ Dec. 5; Tr. 55-56, 59-60.)

5. Walmart excepts to the ALJ's findings that "Walmart does have general goals of providing great customer service and keeping its customers focused on shopping, but when questions have arisen about whether an associate's appearance or attire is distracting to the customer experience, Walmart managers have handled those requests on an ad-hoc basis (with the assistance of Walmart's labor relations department if requested)" as omitting key record evidence. (ALJ Dec. 4; *see* ALJ Dec. 5; R. Ex. 6-7; Tr. 55-56, 59-60, 183-85, 198-204, 206-07, 212-14, 222, 232-37, 243-44.)

6. Walmart excepts to the ALJ's finding that "Although some of Walmart's witnesses testified that it would not be possible for associates to don or doff items (such as buttons, clothing or other items with union insignia) while on duty because of time constraints, I have given that testimony little weight because the witnesses made no distinction between items that could easily be removed (such as a hat or other item worn on the surface of other clothing), and items that might require more privacy (and thus more time) to remove" as contrary to record evidence, the ALJ's findings, and controlling Board precedent. (ALJ Dec. 4 n.7; *see* Tr. 219-20, 228-29, 250-51.)

7. Walmart excepts to the ALJ's finding that "Walmart applies its dress code to associates who are assigned to work in non-public areas of the store because those associates periodically may be required to go to the sales floor as part of their job duties, and may interact with customers at those times" as omitting key record evidence. (ALJ Dec. 4; *see* Jt. Exs. 1-9; Tr. 94, 99, 169-71, 195-97, 207-08, 215, 218-20, 228-30, 249-51.)

8. Walmart excepts to the ALJ's finding that "As for associates who work overnight shifts that span times when the store is closed to the public, Walmart applies its dress code to those associates because they may interact with customers during the portions of their shift when the store is open, and because the dress code and nametag requirement assists managers in identifying associates at all times, including when the store is closed" as omitting key record evidence. (ALJ Dec. 4; *see* Jt. Exs. 1-9; Tr. 94, 99, 169-71, 195-97, 207-08, 215, 218-20, 229-30, 249-51.)

9. Walmart excepts to the ALJ's findings that "Walmart provided examples of how it has applied its dress code to various logos since February 2013" and the subsequent list of examples as omitting key record evidence. (ALJ Dec. 5-6; *see* Tr. 59-60.)

10. Walmart excepts to the ALJ's findings and conclusions that "Mr. Hill's testimony and report should be excluded under FRE 702 because the specialized knowledge that he offered does not assist me, as the trier of fact, with understanding the evidence or determining any facts in issue in this case" as inconsistent with the record evidence, the ALJ's findings, and controlling Board precedent. (ALJ Dec. 6; *see* ALJ Dec. 9; R. Ex. 4; Tr. 117-56.)

11. Walmart excepts to the ALJ's findings that "In essence, Mr. Hill asserted in his testimony and report that retailers seek to minimize customer distractions and keep their customers focused on shopping, and hopefully, buying. In connection with that goal, retailers have their employees follow dress codes and wear name tags to: make the employees easily identifiable to customers who need assistance (as well as to coworkers and loss prevention personnel); and to avoid inciting conversations between customers and employees that are not relevant to the customer's shopping activities" as omitting key record evidence. (ALJ Dec. 6; *see* R. Ex. 4; Tr. 144-46.)

12. Walmart excepts to the ALJ's findings and conclusion that "None of [the expert's] points are so complex that they require explanation by an expert witness; indeed, Walmart's managerial witnesses made the same points effectively in their own testimony (a fact that also makes Mr. Hill's testimony and report cumulative and therefore inadmissible)" as contrary to the record evidence, the ALJ's findings, and controlling Board precedent. (ALJ Dec. 6; *see* ALJ Dec. 9; R. Ex. 4; Tr. 117-56.)

13. Walmart excepts to the ALJ's finding and conclusion that "In its posttrial brief, Walmart argued that I should apply a hybrid legal standard that the Board applies when considering work rules (see *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004)) with the legal standard that the Board applies when considering restrictions on employees' Section 7 right to wear union insignia (see *Boch Honda*, *supra*)" as inconsistent with controlling Board precedent. (ALJ Dec. 8.)

14. Walmart excepts to the ALJ's conclusion that "There is no support in Board law for Walmart's proposed hybrid standard. To the extent that the D.C. Circuit applied a hybrid standard when analyzing questions about union insignia in *World Color*, I respectfully submit that the D.C. Circuit did so in error" as inconsistent with controlling Board precedent. (ALJ Dec. 8.)

15. Walmart excepts to the ALJ's finding and conclusion that "If the General Counsel and Charging Party prevail on that point, such a result does not mean that anything goes when it comes to union insignia. To the contrary, Walmart would remain free to craft a revised dress code that addresses its concerns and complies with the Act" as inconsistent with the ALJ's other findings. (ALJ Dec. 8 n.8; *see* ALJ Dec. 1, 7-11.)

16. Walmart excepts to the ALJ's finding and conclusion that "Walmart's dress code imposes limits on its associates' Section 7 right to wear union insignia" as contrary to the record evidence and inconsistent with controlling Board precedent. (ALJ Dec. 8; *see* R. Ex. 1; Tr. 75-76, 242, 244, 247-48.)

17. Walmart excepts to the ALJ's findings that "Walmart asserts that its dress code language about logos meets the special circumstances requirement because Walmart has an interest in ensuring: that its associates can easily be identified through their nametags by customers, coworkers and loss prevention personnel; and that noncompliant logos do not distract the customer from his or her shopping experience" as omitting key record evidence. (ALJ Dec. 9; *see* Jt. Exs. 1-9; Tr. 94, 99.)

18. Walmart excepts to the ALJ's findings and conclusion that "Walmart failed to show that the limitations that it places on logos (including union insignia) are justified by special circumstances" as contrary to the record evidence, the ALJ's findings, and controlling Board precedent. (ALJ Dec. 9; *see* ALJ Dec. 6; Jt. Exs. 1-11; R. Ex. 4; Tr. 70, 79-80, 85-92, 94-96, 98-99, 104-05, 117-46, 161-62, 164-66, 177, 198, 217-18, 226.)

19. Walmart excepts to the ALJ's findings and conclusion that "Walmart did not show that its concerns about logos impacting nametag visibility and the customer experience constitute special circumstances. Specifically, Walmart did not present any evidence of a significant or widespread problem with associates wearing union insignia or other logos that actually made it difficult or impossible for others to see their Walmart nametags. Nor did Walmart present evidence of a significant or widespread problem with customers being distracted by logos worn by associates" as contrary to controlling Board precedent. (ALJ Dec. 9.)

20. Walmart excepts to the ALJ's conclusion that the Board has not recognized special circumstances such as those Walmart argued that it presented as contrary to controlling Board precedent. (ALJ Dec. 9 (“Given the lack of such evidence, much less evidence that would justify the limitations on union insignia based on special circumstances that the Board has recognized in other cases (e.g., the need to protect employee safety, avoid damage to machinery or products, avoid exacerbating employee dissension, or protect a public image that the employer established as part of its business plan), Walmart’s concerns about nametag visibility and the customer experience fall flat.”).)

21. Walmart excepts to the ALJ's findings and conclusions that “it is not hard to envision a wide variety of union insignia that associates could wear that would be larger than their Walmart nametag, but yet pose little or no risk of obscuring or distracting attention from their Walmart nametags (union insignia on hats, arms bands, leg bands, shirt sleeves, and medium-sized buttons come to mind, among other possibilities)” as contrary to the record evidence and controlling Board precedent. (ALJ Dec. 9 n.9; *see* R. Ex. 4; Tr. 144-46.)

22. Walmart excepts to the ALJ's finding and conclusion that “Walmart’s dress code language regarding logos is not narrowly tailored to those concerns” as contrary to the record evidence and controlling Board precedent. (ALJ Dec. 9; *see* Jt. Exs. 1-9; R. Ex. 4; Tr. 59, 70, 80, 95-96, 104-05, 144, 146, 161-62, 164-66, 169-71, 195-98, 206-08, 215, 218-20, 228-30, 249-51.)

23. Walmart excepts to the ALJ's findings and conclusions that “Walmart requires all union insignia to be smaller than or equal to the size of Walmart’s 2.25-inch by 3.5-inch nametag, irrespective of the content or nature of the insignia” as contrary to the record evidence. (ALJ Dec. 9-10; *see* Jt. Exs. 1-9; Tr. 55-56, 59-60.)

24. Walmart excepts to the ALJ's conclusion that "By imposing such a strict size limitation on union insignia, Walmart runs afoul of multiple Board cases in which the Board has upheld the right of employees to wear union insignia of a variety of types and sizes, including insignia sizes much larger than Walmart's nametags" as contrary to controlling Board precedent. (ALJ Dec. 9-10.)

25. Walmart excepts to the ALJ's finding and conclusion that "When associates are on duty but not in contact with customers, Walmart's concerns about the customer experience are moot, and Walmart's concerns about the associate being identifiable to coworkers and loss prevention personnel are addressed by the fact that the associate would still be wearing the customer khaki pants, blue shirt and Walmart nametag" as contrary to the record evidence and controlling Board precedent. (ALJ Dec. 10; *see* Tr. 70, 80, 95-96, 104-05, 161-62, 164-66, 198, 218.)

26. Walmart excepts to the ALJ's finding that "Walmart did not show that it would be impractical for those associates to simply remove or cover their union insignia while interacting with the public" as contrary to the record evidence and controlling Board precedent. (ALJ Dec. 10; *see* Tr. 169-71, 195-97, 206-08, 215, 218-20, 228-30, 249-51.)

27. Walmart excepts to the ALJ's conclusion that "Walmart's concerns about logos are outweighed by the associates' Section 7 right to wear union insignia in the workplace" as contrary to the record evidence, the ALJ's findings, and controlling Board precedent. (ALJ Dec. 10; *see* ALJ Dec. 1, 6, 8-9; Jt. Exs. 1-11; GC Ex. 1(e), (j); R. Ex. 4-8; Tr. 27-31, 34, 37, 59, 70, 79-80, 85-92, 94-96, 98-99, 104-05, 117-56, 161-62, 164-66, 169-71, 177, 183, 195-203, 206-08, 213, 215, 217-20, 226, 228-30, 232, 243-44, 249-51.)

28. Walmart excepts to the ALJ's conclusion that "Walmart violated Section 8(a)(1) by maintaining its February 2013, May 2014 and September 2014 dress code language requiring logos to be 'small' and 'non-distracting'" as contrary to the record evidence, the ALJ's findings, and controlling Board precedent, and outside the scope of the Complaint. (ALJ Dec. 10-11; *see* ALJ Dec. 1, 6, 8-9; Jt. Exs. 1-11; GC Ex. 1(e), (j); R. Ex. 4-8; Tr. 27-31, 34, 37, 59, 70, 79-80, 85-92, 94-96, 98-99, 104-05, 117-56, 161-62, 164-66, 169-71, 177, 183, 195-203, 206-08, 213, 215, 217-20, 226, 228-30, 232, 243-44, 249-51.)

29. Walmart excepts to the ALJ's Conclusions of Law 1 and 2, Cease and Desist provisions (a) and (b), and the other remedial directions for the reasons stated in the foregoing exceptions. (ALJ Dec. 11-13.)

30. Walmart excepts to the ALJ's remedy order requiring Walmart to rescind its September 2014 dress code as that dress code was not alleged to be unlawful in the Complaint. (ALJ Dec. 11; *see* Jt. Exs. 10-11; GC Ex. 1(e), (j); Tr. 27-31, 34, 37, 85-88.)

31. Walmart excepts to the ALJ's finding that "At least one version of the dress code was applicable in every state and the District of Columbia" as contrary to the record evidence and because the September 2014 dress code was not alleged to be unlawful in the Complaint. (ALJ Dec. 11 & n.11; Jt. Exs. 10-11; GC Ex. 1(e), (j); Tr. 27-31, 34, 37, 85-88.)

32. Walmart excepts to the ALJ's remedy order requiring Walmart to rescind and republish a dress code in all stores in the United States because the September 2014 dress code was not alleged to be unlawful in the Complaint. (ALJ Dec. 11; Jt. Exs. 10-11; GC Ex. 1(e), (j); Tr. 27-31, 34, 37, 85-88.)

33. Walmart excepts to the ALJ's order requiring Walmart to "post at all stores in the United States copies of the attached notice" for the reasons stated in the foregoing exceptions. (ALJ Dec. 14.)

DATED this 16th day of July 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 July 16, 2015, to:

Gary Shinnars
Executive Secretary
National Labor Relations Board
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The undersigned certifies that I served a copy of the foregoing via U.S. Mail on July 16, 2015, to:

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