

**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 AT WALMART (OUR WALMART)		32-CA-096506
		32-CA-111715

WAL-MART STORES, INC.	Case	13-CA-114222
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and

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

**WAL-MART STORES, INC.'S
MOTION TO SEVER AND CONSOLIDATE RELATED CASES**

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INTRODUCTION

Walmart moves to consolidate two cases currently pending before the Board. Counsel for the Charging Party does not oppose this motion.¹

The two cases are pending before the Board and involve the same employer, the same charging party, and identical policy language – a dress code rule limiting employees to only “small, non-distracting” logos, graphics, and other clothing insignia. In both cases, the General Counsel alleges that Walmart violated the Act by simply *maintaining* the “small, non-distracting” insignia rule – there are no alleged discriminatees involved. And in both cases, Walmart defends that its rule is justified by the same special circumstances – easy identification of associates and non-distraction of customers and working associates.

Given that the cases involve identical issues, Respondent Wal-Mart Stores, Inc. requests that the Board sever Case 32-CA-111715 (the “2013 California Dress Code” case) from the seven other cases with which it is currently consolidated, and hear that case with Case 13-CA-114222 (the “National Dress Code” case). Considering the two dress code cases together will ensure efficient use of the Board’s resources and avoid the need to litigate identical issues twice.

Factual and Procedural Background

On May 16, 2014, Region 32 issued a complaint alleging that Walmart’s 2013 California Dress Code violated the Act because it permitted only “small, non-distracting” insignia on associate clothing. [Ex. 1, Order Further Consolidating Cases, Second Amended Consolidated Complaint, ¶ 6(f), Case 32-CA-111715.] Region 32 consolidated the 2013 California Dress

¹ Walmart requested that the Counsel for the General Counsel in both cases agree to the request but has not received a response as of this filing.

Code case with seven other cases involving unrelated events at Walmart stores in Northern California (*e.g.*, a sit-in demonstration, alleged threats). [*Id.*]²

On December 9, 2014, ALJ Geoffrey Carter found the 2013 California Dress Code unlawful “because it require[d] logos to be ‘small’ and ‘non-distracting.’” [Ex. 2, JD-69-14 at 29.] The ALJ found that Walmart’s dress code rule was not justified by special circumstances and that it was not narrowly tailored because the rule applied to associates “working in nonpublic areas of the store and when the store is closed to the public.” [*Id.*]

Meanwhile, on October 20, 2014, Region 13 issued a complaint challenging the identical “small, non-distracting” language in Walmart’s 2013 Dress Code that applied in all states except those with a state-specific dress code (the “2013 National Dress Code”). [Ex. 3, Order Consolidating Cases and Consolidated Complaint, ¶ 5(a), Case 13-CA-114222.]³ On June 4, 2015, ALJ Carter found the 2013 National Dress Code unlawful because it “requir[ed] logos to be ‘small’ and ‘non-distracting.’” [Ex. 4, JD-32-15 at at 10-11.] The ALJ noted that “this is not the first time that the parties have litigated the lawfulness of Walmart’s dress code language concerning logos.” [*Id.* at 2.] He then found, as he found before, that Walmart failed to show special circumstances and that its rule was not narrowly tailored because the dress code rule applied to associates “working in nonpublic areas of the store or when the store is closed to the public altogether.” [*Id.* at 9-10.]

² The Consolidated Complaint also included two allegations relating to Walmart’s 2012 California Dress Code, Case 32-CA-090116. That policy contained entirely different language from the language at issue in the 2013 California Dress Code case and the National Dress Code case. [See Exhibit 1, ¶ 6(d) (challenging the following 2012 policy language: “Logos or graphics . . . are not permitted, except the following . . . logos allowed under federal or state law.”).] Walmart does not move to sever and consolidate Case 32-CA-090116.

³ Region 13 consolidated the National Dress Code case with Case 13-CA-110452. The ALJ then accepted a settlement in that Case and severed it. [Exhibit 4, JD-32-15 at 2.]

Walmart filed exceptions to the ALJ's ruling on the 2013 California Dress Code on January 20, 2015. Walmart has filed exceptions to the ALJ's ruling on the 2013 National Dress Code concurrently with this Motion.

Argument

The Board will consolidate cases that "raise the same issues" to promote administrative efficiency and avoid piecemeal litigation. *Malcom X Ctr. for Mental Health*, 222 NLRB 944, 944 n.2 (1976); *Connecticut Light & Power Co.*, 222 NLRB 1243, 1243 (1976); *see also Frontier Hotel & Casino*, 324 NLRB 1225, 1225-26 (1997); NLRB Rules and Regulations § 102.33 (consolidation "avoid[s] unnecessary costs"); NLRB Bench Book § 3-420 ("[T]he Board generally disfavors piecemeal litigation."). The Board considers "the risk that matters litigated in the first proceeding will have to be relitigated in the second." *Frontier Hotel*, 324 NLRB at 1226. Similarly, the Board will grant motions to sever if doing so would conserve Board resources. *Dow Chem. Co.*, 349 NLRB 104, 104 (2007).

Here, the two dress code cases involve identical policy language: "Walmart logos of any size are permitted. Other *small, non-distracting* logos or graphics on shirts, pants, skirts, hats, jackets or coats are also permitted, subject to the following" [Ex. 1, ¶ 6(f); Ex. 3, ¶ 5(a) (emphasis added).] In both cases, the General Counsel and OUR Walmart challenge the maintenance of the rule itself – not its application. In both cases, Walmart's business justification for the dress code rule is the same. The sole difference relevant to the case is that one dress code applies only in California, and the other dress code applies in numerous states throughout the country. But that difference will not affect the ultimate resolution of whether Walmart's "small, non-distracting" language violates the Act. Thus, if the Board does not sever and consolidate the two cases, it will have to decide the exact same issue twice.

But if the Board grants Walmart's motion, it will not only preserve the Board's resources but also the General Counsel's future resources on appeal. If the Board decides the two dress code cases separately, any appeals or petitions for enforcement will go to the Circuit Courts of Appeal separately, requiring two sets of briefs and two oral arguments, and resulting in potentially conflicting appellate decisions.

Moreover, no party will be prejudiced by the consolidation. OUR Walmart is the charging party in both cases and does not oppose this request. Both cases are currently pending before the Board on exceptions, thus consolidating them would not delay either proceeding. In fact, given the seven other complex issues in the Northern California case, severing the 2013 California Dress Code case and consolidating it with the National Dress Code case may prompt quicker resolution of the dress code cases while permitting the other Northern California cases to continue at their own pace.

CONCLUSION

For all the foregoing reasons, Respondent Wal-Mart Stores, Inc., respectfully moves the Board to sever Case 32-CA-111715 from Case 32-CA-090116, et al., and consolidate it with Case 13-CA-114222.

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:

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The undersigned certifies that I served a copy of the foregoing via U.S. Mail and Email on July 16, 2015 to:

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