

**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
ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS**

STEPTOE & JOHNSON LLP
201 East Washington Street, Suite 1600
Phoenix, AZ 85004-2382
Telephone: (602) 257-5200
Facsimile: (602) 257-5299
Lawrence Allen Katz
Steven D. Wheelless
Erin Norris Bass
Email: lkatz@steptoe.com
swheelless@steptoe.com
ebass@steptoe.com

Attorneys for Wal-Mart Stores, Inc.

INTRODUCTION

In its Exceptions, the Charging Party (“the Union”) asks the Board to impose novel remedies that fall outside the bounds of Board law and authority and find no support in the record. It follows then that the Union does not cite one case or reference one record citation to support its “wish list” of remedies. Of course, the Union’s imaginative remedy requests become moot if the Board adheres to its longstanding precedent establishing Walmart’s right to lawfully prohibit large, distracting clothing adornments as discussed in Walmart’s Exceptions. The Board should not ignore decades of controlling precedent on either the underlying substantive or remedy-related issues.

ARGUMENT

I. BOARD LAW CONTRADICTS THE UNION’S REQUEST FOR A BROAD INJUNCTIVE ORDER.

The Union argues that the Board should require a broad “in any manner” injunctive order. As a threshold matter, the Union’s novel exception fails because the Union cites no authority or record evidence to support it. *See Bruce Packing Co.*, 357 NLRB No. 93, *1 n.4 (2011) (the charging party bears the burden of showing “that the Board’s traditional remedies are insufficient to remedy the violations committed by the Respondent”); *First Legal Support Servs., LLC*, 342 NLRB 350, 350 n.6 (2004) (burden on proving necessity of extraordinary remedies lies on party requesting such remedies); NLRB Rules and Regulations § 102.46(c).

The Union’s exception also fails because well-established Board law rejects it. The Board’s standard order proscribes that an employer found to have violated the Act must cease and desist from violating the Act “in any like or related manner.” *See, e.g., Las Palmas Med. Ctr.*, 358 NLRB No. 54, *1 n.4 (2012) (reversing the ALJ’s decision to issue a broad “in any manner” order in favor of the “traditional remedial provisions” prohibiting the respondent from

interfering with Section 7 rights “in any like or related manner”). The Union’s request for the broad “in any manner” language does not “simplify” the Order and Notices, make them “easier to understand,” or “clarif[y] Walmart’s burden,” as the Union misleadingly suggests. Instead, the Board holds that such a broad order “is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Hickmott Foods, Inc.*, 242 NLRB 1357, 1357 (1979). As the United States Supreme Court explained in *NLRB v. Express Publishing Co.*,

[T]he National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of *all the provisions of the statute merely because the violation of one has been found*. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.

312 U.S. 426, 437 (1941) (emphasis added).

The ALJ specifically found that Walmart did not engage in serious and widespread misconduct and that the sole, discrete violation in this case “is somewhat technical in nature.” (See ALJ Dec. at 12.) The evidence supports that decision, and the Union does not except to that finding. *Compare U.S. Postal Serv.*, 354 NLRB 412, 412 n.2 (2009) (substituting a narrow order in place of the ALJ’s broad order despite the ALJ’s finding of a decade-long history of similar violations, including at the same locations at issue in the case). Consequently, the Board should decline the Union’s novel and unsupported request.

II. BOARD LAW CONTRADICTS THE UNION’S OVERBROAD ELECTRONIC POSTING REQUEST.

The Union next argues that the Board should require Walmart to post any required Notice “on any communications systems it has and uses to communicate with workers regarding any workplace issues” regardless of whether Walmart customarily uses such alternative

communications systems. As noted above, the Union’s novel exception fails because the Union cites no authority or record evidence to support it. The Union’s exception also fails because well-established Board law rejects it. The Board holds that an employer must distribute a remedial notice through electronic means only when the employer *customarily* communicates with employees in that manner. *J. Picini Flooring, Inc.*, 356 NLRB No. 9, *3 (2010); NLRB Casehandling Manual § 10521.1 (notices should be posted through electronic means that the respondent “customarily” uses to communicate with employees). That limitation ensures that “use of the same means for communication of the Board’s notice does not entail an unreasonable burden for the respondent.” *J. Picini Flooring, Inc.*, 356 NLRB No. 9, at *3. The Union offers no record evidence on how or if Walmart communicates with its employees in any “non-customary” manner, and the Board cannot grant the Union a speculative remedy that lacks any evidentiary or legal support. Consequently, the Board should decline the Union’s novel and unsupported request.

III. BOARD LAW CONTRADICTS THE UNION’S REQUEST THAT WALMART TELL EMPLOYEES THEY MAY READ/DISCUSS A NOTICE ON PAID TIME.

The Union argues that the Board should require Walmart to tell employees via email or other electronic communication that they may read and discuss any required Notice on paid working time. The Union attempts to justify that particularly imaginative request with speculation that employees will fear reprisal for reading the Notices. As noted above, the Union’s novel exception fails because the Union cites no authority or record evidence to support it. The Union’s exception also fails because well-established Board law rejects it. In *J. Picini Flooring*, the Board expressly declined to impose that remedy. 356 NLRB No. 9, at *4. Consequently, the Board should decline the Union’s novel and unsupported request.

DATED this 29th day of July 2015.

STEPTOE & JOHNSON LLP

By /s/ Lawrence Allen Katz
Lawrence Allen Katz
Steven D. Wheelless
Erin Norris Bass
201 East Washington Street, Suite 1600
Phoenix, AZ 85004-2382

Attorneys for Wal-Mart Stores, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that I filed an electronic copy of the foregoing via the Board's electronic filing service on July 29, 2015, to:

Gary Shinnars
Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington D.C. 20570

The undersigned certifies that I served a copy of the foregoing via U.S. Mail on July 29, 2015, to:

Peter Sung Ohr
Regional Director
National Labor Relations Board
Region 13
209 South LaSalle Street, Suite 900
Chicago, IL 60604-1443

Vivian Robles
Counsel for the General Counsel
National Labor Relations Board
Region 13
209 South LaSalle Street, Suite 900
Chicago, IL 60604-1443

Joey Hipolito
Assistant General Counsel
United Food and Commercial Workers
International Union
1775 K Street, NW
Washington, DC 20006

/s/ Jackie Lynn Bell