

**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
REPLY IN SUPPORT OF ITS EXCEPTIONS TO THE ALJ DECISION**

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

The Counsel for General Counsel (“CGC”) and the Charging Party (the “Union”) largely regurgitate the ALJ’s findings and reasoning without addressing Walmart’s arguments or case law. To the extent that the CGC and the Union actually address Walmart’s arguments, they misconstrue the record and fail to support their contentions with applicable case law. In addition, the CGC and the Union attack Walmart’s Dress Code and evidence for the first time on grounds that the parties did not litigate, the ALJ did not rule on, and to which they did not except; the Board cannot now consider those arguments.

ARGUMENT

I. THE ACT DOES NOT PROTECT LARGE, DISTRACTING INSIGNIA.

The CGC and the Union do not defend the ALJ’s failure to analyze whether Walmart’s Dress Code restricts Section 7 activity on its face – the first step under the Board’s dress code jurisprudence. *E.g.*, *Lily Transp. Corp.*, 362 NLRB No. 54 (2015); *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25 (2011); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The CGC merely asserts that she “does not find fault with Judge Carter’s reliance on *Boch Honda*.” (CGC Ans. Br. 3.) But Walmart did not argue that *Boch Honda* set forth the wrong analysis; Walmart argued that the ALJ wrongly applied the Board’s dress code precedent (including *Boch Honda*) because he failed to analyze whether the insignia rule facially limited Section 7 activity before requiring Walmart to show special circumstances.

Applying the proper standard, the Act does not protect a retail employee’s right to wear large, distracting insignia while working; therefore, Walmart’s insignia rule (which prohibits only large, distracting insignia) does not restrict Section 7 activity on its face. The inquiry stops there and Walmart need not prove special circumstances.

In fact, the CGC and the Union agree that “no one is arguing in support of an employee’s right to wear large[,] distracting union insignia while working in a retail environment.” (CGC Ans. Br. 5; Union Ans. Br. 1.) Given that the Act does not grant any right to wear large, distracting union insignia, Walmart’s Dress Code does not facially restrict Section 7 activity and the inquiry stops there; no one asserts disparate enforcement or discriminatory promulgation, and Walmart need not show special circumstances for a rule that does not facially limit Section 7 activity.¹ *See, e.g., Burndy, LLC*, Case 34-CA-65746, 2013 WL 3964785, *36 & n.65 (NLRB Div. of Judges); *Hosp. Coop. Laundry*, G.C. Mem. Case 27-CA-19349-1, 2005 WL 545235.

For its part, the Union instead offers alternative reasons that the Dress Code purportedly facially restricts Section 7 activity (Union Ans. Br. 1-2) – reasons which the CGC did not litigate and the ALJ did not rule on. The Board should reject those arguments. *Raley’s*, 337 NLRB 719, 719 (2002) (“It is well established that the General Counsel’s theory of the case is controlling, and that a charging party cannot enlarge upon or change that theory.”); *Paul Mueller Co.*, 332 NLRB 1350, 1350-51 (2000) (reversing the judge on due process grounds where the judge found a violation on a theory effectively disclaimed by the CGC); *Zurn/N.E.P.C.O.*, 329 NLRB 484, 484 (1999) (declining to consider charging party’s alternative theories); *Kimtruss Corp.*, 305 NLRB 710, 711 (1991) (Board held that “the judge improperly considered the Union’s theory”).

In any event, the Union’s arguments do not actually address whether Walmart’s Dress Code – on its face – explicitly restricts union activity. Its arguments instead go to whether someone could *interpret* the Dress Code to restrict union insignia. (Union’s Ans. Br. 1-2.) That

¹ The ALJ simply ignored the threshold “facial validity” inquiry and seemed to justify that analytical omission based on his view that Walmart could simply “craft a revised dress code that addresses its concerns and complies with the Act.” (ALJ Dec. 8, n.8.) But Walmart need not craft a new policy if the old one does not limit Section 7 activity.

is not the proper inquiry at the first stage, and, as addressed below, any such interpretation would require a strained, unreasonable reading of the Dress Code.

II. ASSOCIATES WOULD NOT REASONABLY CONSTRUE THE LOGO RULE TO PROHIBIT SECTION 7 ACTIVITY.

Both the CGC and the Union assert in their Answering Briefs that associates could reasonably construe Walmart's Dress Code to prohibit union insignia. (CGC Ans. Br. 4-5; Union Ans. Br. 3-4.) But the ALJ did not find the Dress Code unlawful on those grounds, and the CGC and the Union did not except to his failure to do so. Moreover, at trial, the CGC repeatedly asserted her very narrow theory of the case – that Walmart could not maintain the “small, non-distracting” language because “[o]n its face it’s unlawful.” (Tr. 186-87; *see also* Tr. 30-31, 46, 64-65, 76-77, 233, 245.) In fact, the CGC *repeatedly objected* to Walmart's evidence of how associates and management interpreted the rule as *irrelevant*. (*See, e.g.*, Tr. 33, 64-65, 76, 77, 186-87, 233, 245, 246.) Despite the CGC's narrow theory at trial, the CGC and the Union do not explain how the Board can now consider a *new* theory. The Board should reject those arguments as improperly raised. *See, e.g., Desert Aggregates*, 340 NLRB 289, 292-93 (2003), *modified on other grounds*, 340 NLRB 1389 (2003); *Raley's*, 337 NLRB at 719; NLRB R&R 102.46(b)(2) (“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.”)

The Board should also reject those arguments on the merits. The CGC argues that “employees would reasonably construe the requirement that logos be small and non-distracting to preclude the wearing of all union-identify[ing] insignia on their clothes.” (CGC Ans. Br. 4.) The CGC cites only *Chinese Daily News*, 353 NLRB 613 (2008), to support that argument. But in that case (decided by a two-member Board, not reaffirmed), the ALJ found the dress code rule “ambiguous as to whom, when, and where it would apply,” noting that the rule made conflicting

statements about whether it applied only to employees with public contact or to all employees in the workplace. *Id.* at 622-23. The ALJ also found evidence of discriminatory purpose and enforcement. *Id.* at 618, 622. In this case, there is no dispute that associates knew to whom, when, and where the dress code applied, and there is no evidence of discriminatory purpose or enforcement.

The Union argues that employees would reasonably read the prohibition on “distracting” insignia to prohibit angry, disrespectful messages. (Union Ans. Br. 3.) But no evidence whatsoever indicates that anyone would interpret “non-distracting” to refer to the *content* of insignia given the clear textual juxtaposition of “small” with “non-distracting.” In fact, the *undisputed* evidence shows that management uniformly applied the “small, non-distracting” language as a single clause referring to the size and physical appearance of the insignia, not the content. And the *undisputed* evidence shows that management permitted messages that were disrespectful to management. (R. 3; Tr. 62-64.) Indeed, the ALJ expressly found that Walmart’s insignia rule applies “irrespective of the content . . . of the insignia,” and the Union did not except to that finding. (*See* ALJ Dec. 9.)

Moreover, the structure of the 2013 Dress Code confirms that “small, non-distracting” refers textually to a single concept: the physical appearance of the insignia, not the messaging. The rule first states that “small, non-distracting logos or graphics . . . are also permitted, subject to the following” (Jt. Exs. 1-9.) Four bullet points follow. Those bullet points list all content-related limitations (*e.g.*, no violent messaging, no images representing commercial products), which (unlike the provision containing the “small, non-distracting” language) refer specifically to “messaging” and what a “logo or graphic must not represent.” (Jt. Exs. 1-9.) The structure of the policy thus demonstrates that the “small, non-distracting” provision relates to

appearance. *See Cmty. Hosps. of Cent. Calif. v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003) (noting that employees use common sense when reading work rules and finding that “‘any arguable ambiguity’ in the rule ‘arises only through parsing the language of the rule, viewing the phrase . . . in isolation, and attributing to the [employer] an intent to interfere with employee rights’” (quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998))).

III. THE UNION AND THE CGC MISCONSTRUE THE ALJ’S RULING AND THE RECORD EVIDENCE ON WALMART’S EXPERT.

First, both the CGC and the Union improperly attack the expert’s qualifications. (CGC Ans. Br. 9; Union Ans. Br. 6-7.) The ALJ expressly found Dwight Hill “qualified as an expert witness in the areas of retail strategy and the customer experience” based on his “extensive experience as a retailer and consultant to retailers.” (ALJ Dec. 6.) Neither the CGC nor the Union excepted to that finding; thus, they cannot now attack Hill’s qualifications. *See* NLRB R&R 102.46(b)(2) (“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.”).

The Union next claims that Hill based his opinions and conclusions on his “personal experience as a Walmart shopper.” (Union Ans. Br. 6.) The ALJ made no such finding, and the Union’s argument grossly misconstrues Hill’s testimony. Hill based his expert report and testimony on his 25 years of experience as a retailer and retail consultant, including experience working for “mass merchants” that “are similar in nature to Walmart.” (*E.g.*, Tr. 136, 138-39, 151 (“Q. [by the CGC] And so this conclusion is based on your own shopping experience at Walmart? A. No. That’s part of it. That certainly is part of it. But it’s also based on the other work that I’ve done across, again, 50 different retailers.”).) To the extent that the Union takes issue with the fact that Hill used the word “I” in his testimony, Hill made clear that he was referring to customers generally. (*E.g.*, Tr. 140 (explaining what retailers do “to make it simple

for me to shop as a customer”), 145 (explaining that the nametag “gives me, as a customer, some insight into how they can help me if I’[ve] got a particular question”).)

The Union further asserts that Hill did not find that large insignia “prevent[s]” customers from shopping or asset protection from identifying associates. (Union Ans. Br. 7.) But, as explained in Walmart’s Brief in Support of Exceptions, that is not the evidentiary standard required to establish special circumstances (if Walmart must show such circumstances). Instead, as discussed in Walmart’s Exceptions, the Board requires employers to produce evidence of a reasonable belief that insignia will risk disruption to its business.

Notably, Hill gave expert testimony that minimizing distractions and ensuring easy associate identification were legitimate and substantial retailer strategies. He gave expert testimony that ensuring easy associate identification results in more sales. (R. 4; Tr. 143.) He gave expert testimony that large, distracting clothing adornments make it harder for customers to identify associates and more likely that customers will be distracted from purchases. (R. Ex. 4 at 1, 3-5; Tr. 144-46.) Such testimony provides valuable insight into the nuances of the salesperson-customer relationship and retailer strategies – core issues in Walmart’s special circumstances argument (assuming, again, that special circumstances even applies). *See Medco Health Solutions of Las Vegas, Inc. v. NLRB*, 701 F.3d 710, 717 (D.C. Cir. 2012) (The Board’s “expertise is surely not at its peak in the realm of employer-customer relations” (emphasis in original)).

Both the CGC and the Union regurgitate the ALJ’s conclusion that Hill’s testimony was cumulative, but neither identifies any place in the record where Walmart’s managers made the same points – because they did not. Walmart manager’s testified to *Walmart’s specific* goals whereas Hill testified to *retailers’ goals generally*. Hill further provided expert opinions and

conclusions as to how those goals *in fact* translate into more sales. The ALJ thus erred by ignoring Hill's expert testimony and report.

IV. THE CGC'S AND UNION'S ARGUMENTS THAT WALMART DID NOT SHOW SPECIAL CIRCUMSTANCES DEFY COMMON SENSE AND BOARD LAW.

If special circumstances apply, both the Union and the CGC claim that the ALJ did not ignore one of Walmart's three special circumstances (preventing co-worker distraction). (CGC Ans. Br. 5-6; Union Ans. Br. 5.) Tellingly though, neither cites anywhere in the ALJ's decision where he even mentions that justification or evidence. The ALJ erred in failing to address that evidence. *See Encino Hosp. Med. Ctr.*, 359 NLRB No. 78, at *2 (2013).

The Union's primary argument is that potential interference with customers or productivity is insufficient to establish special circumstances. But the Union fails to mention – much less distinguish – the Board, Court of Appeals, and Supreme Court cases holding that an employer establishes special circumstances by showing a *reasonable belief* that particular clothing items *could risk* disruption to its business. (Walmart's Exceptions Br. 23-25.) *See, e.g., S. New England Tele. Co. v. NLRB*, No. 11-1099, 2015 WL 4153873, *3 (D.C. Cir. 2015) (“[T]he appropriate test for ‘special circumstances’ is not whether AT & T's customers *would confuse* the ‘Inmate/Prisoner’ shirt with actual prison garb, but whether AT & T *could reasonably believe* that the message *may harm* its relationship with its customers.” (emphasis added)).

The cases that the Union cites in support of its argument do not hold otherwise. In *Fabri-Tek, Inc.*, 352 F.2d 577, 584-85 (8th Cir. 1965), the court stated: “We find no justification whatsoever for the conclusion that Fabri-Tek had to wait until its production records dropped and the efficiency of its employees went down before concluding that [the button wearing] of a few employees . . . would have a tendency to distract.” The court held that employers are “not

required to wait until an *actual* diminution of efficiency [can] be objectively shown before finding, in fact, that *harmful distraction* was present.” *Id.* at 584 (emphasis added).

The Union also cites *Wal-Mart Stores, Inc.*, 340 NLRB 637 (2003). But that case involved an entirely different issue – whether an *off duty* associate’s T-shirt message and his on-duty union meeting invitations constituted improper solicitation under the employer’s solicitation policy and Board law. Indeed, the Board made clear that its analysis was distinct from the special circumstances analysis reserved for dress codes. *Id.* at 639 & n.10.

The Union next sets forth an imaginative list of evidence that it says Walmart had to present to establish special circumstances, including evidence that customers became “*so despondent*” that they “[*gave*] up *entirely* on checking out instead of, for example, seeking out another employee” and that insignia “render[ed] asset protection employees *useless* to stop theft.” (Union Ans. Br. 14-15 (emphasis added).) The CGC similarly claims Walmart had to show evidence that “customers were confused . . . or distracted to a point where they forgot to conclude their sales transactions.” (CGC Ans. Br. 10.) Those arguments throw common sense out the window. Indeed, both the Union and the CGC fail to cite a single case requiring such evidence in order to justify a limitation on union insignia (because no case has ever required such evidence).

Significantly, those arguments also ignore the substantial case law establishing (1) the common sense notion that extraneous insignia on clothing carries the potential to distract from name badges and other business-related messaging, and (2) that avoiding those distractions constitutes a special circumstance. *See Albis Plastics*, 335 NLRB 923, 924 (2011); *Sam’s Club*, 349 NLRB 1007, 1011 (2007); *see also Starbucks Corp. v. NLRB*, 679 F.3d 70, 78 (2d Cir. 2012).

Finally, the Union and the CGC cite cases that stand for the proposition that customer exposure to union insignia, alone, is not a special circumstance sufficient to justify a ban on union insignia. Those cases are inapplicable. Walmart does not assert that its logo rule is justified by the sole fact that its associates interact with customers. Nor does Walmart ban all union insignia. In fact, the undisputed evidence showed that Walmart associates routinely wear (and management routinely permits) a wide variety of union insignia. (Walmart's Exceptions Br. 10.)

V. THE CGC AND THE UNION COMPLETELY FAIL TO ADDRESS WALMART'S ARGUMENTS THAT ITS RULE IS NARROWLY TAILORED.

The Union completely ignores Walmart's argument that its insignia rule is narrowly tailored. Indeed, the Union concedes that the Board finds lawful dress codes which prohibit some union insignia but permit others. (Union Ans. Br. 16.) For her part, the CGC flatly maintains that rules which do not distinguish between public and non-public areas are overbroad. But the CGC's argument and supporting case law fail to address the fact that (1) management and asset protection need to quickly identify associates by their name badge in secured, non-public areas of the store, (2) associates in all areas of the store need to avoid distractions to focus on productivity, (3) associates' work schedules make donning and doffing insignia impractical.

VI. THE CGC DID NOT LITIGATE THE SEPTEMBER 2014 DRESS CODE.

The CGC and the Union maintain that the ALJ properly ruled on the September 2014 Dress Code because that version of the Dress Code contained the same "small, non-distracting" language. Those arguments miss the point. Walmart does not dispute that the two versions of the Dress Code contain that same language or that for years management has utilized the "small, non-distracting" concept for clothing adornments. Walmart maintains that the lawfulness of the September 2014 Dress Code was not fully litigated. *Desert Aggregates*, 340 NLRB at 292-93

(2003) (Board may not find violations of the Act that were not fully and fairly litigated); *see also Indep. Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 554 (5th Cir. 2013) (same, finding due process violation); *Arkema Inc.*, 357 NLRB No. 103, *1 n.1, *31 (2011) (same), *enf. denied*, 710 F.3d 308 (7th Cir. 2014).

The CGC points to a stipulation that she argues shows that Walmart knew the September 2014 Dress Code was at issue. (CGC Ans. Br. 11.) But the CGC misleadingly cites only one sentence of that stipulation. The next sentence states that “the allegations do not go on to attack the concept that the logos must not be violent, discriminatory, abusive, et cetera” – words which appear *only* in the 2013 Dress Code. (Tr. 30. *Compare* Jt. Exs. 1-9, *with* Jt. Exs. 10-10-11.) The stipulation thus was about limiting the CGC’s arguments as to which part of the 2013 Dress Code she challenged. It clearly does not have anything to do with the September 2014 policy.

The Union claims that the phrase “at all material times” in the Complaint and Answer firmly establishes that the September 2014 Dress Code was at issue. (Union Ans. Br. 17-18.) But the Complaint used that phrase in connection with the specific language from the 2013 Dress Code’s insignia rule. The September 2014 Dress Code’s insignia rule contains substantial revisions not reflected in the Complaint, that were not litigated, and thus was not maintained at any “material time.”

The CGC never challenged the September 2014 Dress Code. To the contrary, the CGC *repeatedly* made *exclusive* reference to the 2013 Dress Code’s specific language – in the Complaint and at trial. The ALJ’s decision to invalidate a different dress code not subject to litigation violates Walmart’s due process rights as discussed in its Exceptions.

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 11th day of August, 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 August 11, 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 and Email on August 11, 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