

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH

**WAL-MART STORES, INC.**

**and**

**Case 28-CA-167277**

**RYAN COOK, an individual.**

*Lisa J. Dunn, Esq.*, for the General Counsel.

*Steven D. Wheelless, Esq. and Laura E. Antonuccio, Esq.*  
*(Step toe & Johnson, LLP)*, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

**Gerald M. Etchingham**, Administrative Law Judge. The record in this case opened on August 9, 2016, via telephone with the parties' legal counsel in Phoenix, Arizona, based on a January 7, 2016 charge which was later withdrawn on June 2, 2016, and upon the complaint, and notice of hearing issued on June 7, 2016, by the Regional Director for Region 28, and further amended on July 5, 2016 (complaint).

The complaint alleges that Respondent, Wal-Mart Stores, Inc. (Respondent or Employer), a nonunionized employer, violated Charging Party Ryan Cook's (Cook's or Charging Party's) *Weingarten*<sup>1</sup> rights on two separate occasions in 2015 in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), and that Respondent unlawfully maintains a national rule that prohibits its employees their *Weingarten* rights also in violation of Section 8(a)(1).

The Respondent denies these allegations in its answer to the complaint and raises as an affirmative defenses, among other things, that there is no related charge remaining in this case once Cook's Section 8(a)(3) charge allegation was withdrawn on June 2, 2016, that Section 10(b) of the Act bars the General Counsel's remaining allegations against Respondent, and that current Board law in *IBM Corporation, Inc.*, 341 NLRB 1288 (2004), is controlling and the complaint lacks merit because a nonunionized employer, like Respondent here, does not act unlawfully

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<sup>1</sup> *NLRB v. J. Weingarten*, 420 U.S. 251 (1975)(In a unionized setting, an employee is permitted to have a coworker present at an investigatory interview that the employee reasonably believes might result in discipline.). These are hereafter referred to as "*Weingarten* rights".

under the Act and current Board law, when denying its employees the same *Weingarten* rights that are available to employees in a unionized employer setting under *Weingarten*.

### FACTS AND PROCEDURAL RECORD

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Upon the entire official record herein amended at hearing<sup>2</sup>, including the legal briefs from counsel for the General Counsel and Respondent, I make the following rulings. (Tr. 23, 25; GC Exhs. 1(a)-(g), 1(i)-(z), as amended, and GC Exh. 2.)

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The lone charge filed in this case is dated January 7, 2016, (Jan. 7 charge) and was filed by the Charging Party against the Respondent at its Gilbert, Arizona address. (GC Exh. 1(a).)

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The form that Cook used to file his charge is the typical FORM NLRB-501 revised February, 2008. (GC Exh. 1(a).) Subparagraph 1(k) of the charge which lists what sections of the Act are alleged to be violated by the Employer is blank leaving only a boilerplate Section 8(a)(1) reference. Although other alleged Act violation sections could have been written in there, they were not. Id.

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Paragraph 2 of the Jan. 7 charge reads:

During the last six months, the above named Employer, which is Wal-Mart Stores, Inc., by its officers, agents, and supervisors have discriminated against its employees by, among other things, discharging its employee Ryan Cook because he engaged in protected concerted activities.

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(GC Exh. 1(a).)

The next paragraph reads:

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By the above and other acts, the Employer has interfered with, restrained and coerced employees in the exercise of their Section 7 rights under the National Labor Relations Act.

Id.

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During 2016, the Regional Director and the General Counsel at Region 28 investigated the Jan. 7 charge and it was never amended.

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After reviewing evidence produced by Respondent and concluding the charge investigation, on June 2, 2016, the Regional Director sent a letter to Respondent's counsel and Charging Party Cook that reads:

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This is to advise that I have approved the withdrawal of the Section 8(a)(1) portion of the charge which alleges that the Charging Party was discharged because he engaged in protected concerted activity. All other allegations

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<sup>2</sup> The transcript in this case is generally accurate, but I correct the transcript (Tr.) as follows: Tr. 21, line (l) 22: "relegated" should be "related."

investigated and related to the charge remain pending and are subject to further proceedings.<sup>3</sup>

(Ex. "B" to GC Exh. 1(i) at 14-15.)

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On June 7, 2016, the Regional Director issued the complaint and notice of hearing in this case. Nowhere in the complaint and the notice of hearing is there any reference to any alleged discriminatory discharge on the Respondent's part against the Charging Party. (GC Exh. 1 (c).)

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The complaint itself contains typical allegations of when the charge was served, jurisdiction over the Respondent, and agency/supervisor kind of capacity. Respondent is a nonunionized employer and consistent with this, the complaint is silent as to whether Respondent is represented by any specific union. (GC Exh. 1(c).)

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Paragraphs 4(a) through 4(f) of the complaint allege that Respondent acted unlawfully and violated Act Section 8(a)(1) by disallowing Cook his *Weingarten* rights on 2 occasions in late September and on December 21, 2015. (GC Exh. 1(c).)

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Specifically, complaint paragraph 4(a) alleges that about late September 2015, a more precise date being unknown to the General Counsel, Respondent, by Randall Lara, at Respondent's facility, denied the request of employee Cook to have a witness present during an interview. Next subparagraph 4(b) says Respondent's employee Cook had reasonable cause to believe that the interview described above in subparagraph 4(a) would result in disciplinary action being taken against him. Subparagraph 4(c) continues and states: "About late September 2015, a more precise date being unknown to the General Counsel, Respondent, by Lara, at Respondent's facility, conducted the interview described above in paragraph 4(a) with its employee Cook, even though Respondent denied the employee's request to have a witness present as described above in paragraph 4(a)." Id.

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Subparagraph 4(d) provides that in and about December 21, 2015, Respondent by Lara and Tara Chapman, at Respondent's facility, denied the request of its employee Cook to have a witness present during an interview. Subparagraph 4(e) reads: "Respondent's employee Cook had reasonable cause to believe that the interview described above in paragraph 4(d) would result in disciplinary action being taken against him." Id. Finally, subparagraph 4(f) provides that in or about December 21, 2015, Respondent, by Lara and Chapman, at Respondent's facility, conducted the interview described above in paragraph 4(d) with its employee Cook, even though Respondent denied the employee's request to have a witness present as described in paragraph 4(d) period. Id.

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Subparagraph 5 of the complaint alleges that by the conduct described above in paragraph 4, Respondent has been interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. Id.

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<sup>3</sup> The General Counsel stipulated that the June 2, 2016 letter was received by the Respondent and the General Counsel also confirmed that this June 2, 2016 letter was sent to the parties and that a similar but differently formatted identical letter dated June 16, 2016 (GC Exh. 1(h) was withdrawn at hearing) was also mailed to the parties by the Region 28 Regional Director. Transcript (TR) at 8, 12-16.

Subparagraph 6 alleges that the unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act. Id.

On June 14, 2016, the Regional Director granted Respondent's unopposed motion to reschedule hearing and the hearing was postponed from July 26, 2016 to August 9, 2016, in Phoenix, Arizona.

On June 21, 2016, the Respondent filed its answer to the complaint generally denying the allegations contained in paragraphs 4-6 of the complaint and providing affirmative defenses, among others, as follows:

1. The allegations in the Complaint fall wholly outside the scope of the pertinent Charge. The Charge alleged only that Walmart violated the Act by discharging Cook. [Exhibit A.] Cook never amended the Charge. [See Complaint ¶ 1.] After Walmart established that it discharged Cook for intentionally falsifying time clock records to get paid for work he did not do, Cook withdrew his discharge-related Charge, and the Region approved that withdrawal on June 2, 2016. [Exhibit B.] The Region did not issue a Complaint on that allegation; the only one in the Charge. Rather, the Region - solely on its own initiative - substituted a *Weingarten* "denial of witness" allegation; one never alleged in any Charge. As a matter of law, a *Weingarten* "denial of a witness" allegation does not "closely relate" to a *Wright Line* discharge allegation. *Ivy Steel & Wire Co.*, 346 NLRB 404, 421-22 (2006) (Board affirmed ALJ's refusal to add a *Weingarten* allegation to Complaint because it did not closely relate to the timely-filed unlawful suspension charge analyzed under *Wright Line*). Consequently, the Complaint here fails because the Board cannot originate complaints on its own initiative." *U. W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D.C. Cir. 1988) (Board exceeded its authority by issuing a complaint alleging that an employer threatened to terminate picketing employees where underlying charge alleged only that the employer discharged an employee for protected activities); *Nickles Bakery*, 296 NLRB 927, 928 (1989) (adopting *Galloway* reasoning and reaffirming the three-part closely-related *Redd-I, Inc.* test to determine whether complaint allegations not found in charge closely relate to timely-filed underlying charge).

2. NLRA § 10(b) bars the allegations in the Complaint.

3. The allegations in the Complaint fail because no union represents Walmart associates, and the Act does not confer any *Weingarten* right on non-union employees as set forth in *IBM Corp.*, 341 NLRB 1288, 1289 (2004).

(GC Exh. 1(i).)

On July 5, 2016, the Regional Director issued an amended complaint which added new paragraph 4(g) which reads as follows:

At all material times, at all of its offices and places of business nationwide, Respondent has maintained a nationwide policy denying its employees the right to be represented by a coworker in an investigatory interview [in violation of Section 8(a)(1) of the Act] (the post-discharge *Weingarten* rights allegations).

(GC Exh. 1(j).)

The amended complaint also contains amended remedial provisions. Id. Collectively, the pre-discharge and post-discharge *Weingarten* rights allegations are referred to hereafter simply as the new 3 *Weingarten* rights allegations.

5 On July 18, 2016, the Respondent filed an amended answer. (GC Exh. 1(l).)

On August 3, 2016, the Respondent filed a motion to dismiss and postpone hearing with the Board (the Motion).(GC Exh. 1(p).)

10 On August 4, 2016, the General Counsel filed its opposition to the Motion. (GC Exh. 1(q).)

On August 6, 2016, Respondent filed its reply to the General Counsel's opposition with the Board. (GC Exh. 1(u) and 1(w).)

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On August 8, 2016, the Board issued its order referring the Motion to me after hearing opens on August 9, 2016 and the order is without prejudice to any party seeking special permission to appeal my disposition of the Motion pursuant to Section 102.26 of the Board's Rules and Regulations and finally the Order denied Respondent's request for a continuance of the August 9 hearing. (GC Exh. 1(x).)

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On August 8, 2016, the Respondent filed its notice to counsel for General Counsel of additional authority for Section 102.35(a)(8) motion to dismiss (to the administrative law judge) for lack of jurisdiction. (GC Exh. 1(y).)

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On August 9, 2016, I conducted a telephonic hearing opening the record in this matter and admitting in evidence the official record, General Counsel's Exhibits 1(a)-(j) and 1(i)-(z) as amended, and General Counsel's Exhibit 2. (TR at 8, 12-16.)

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On August 10, 2016, I issued a scheduling order allowing the General Counsel to file a supplemental opposition brief to the Motion no later than August 19, 2016 and also allowing the Respondent to file one last reply brief no later than August 26, 2016 regarding its Motion.

On August 19, 2016, the General Counsel filed GC's supplemental brief (GC's Supplemental Brief).

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On August 26, 2016, the Respondent filed the final reply brief (Reply Brief).

## I. RESPONDENT'S MOTION TO DISMISS

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### A. RESPONDENT'S ARGUMENTS

Respondent argues that the withdrawn charge in this case that preceded the complaint issuance is inadequate as a matter of law to support the new 3 *Weingarten* allegations and that, instead, the withdrawn charge should have been amended by the Charging Party to add the new allegations before it was withdrawn on June 2, 2016.

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Respondent also argues that the sole charge in this case is unrelated to the new 3 *Weingarten* allegations and, instead, involves allegations that Respondent violated the Section

8(a)(3) of the Act when it discriminatorily discharged employee Cook on December 21, 2015, for engaging in protected concerted activities. Respondent further argues that the only other language in the now withdrawn charge beyond the Section 8(a)(3) discriminatory discharge claim is meaningless boilerplate verbiage that I should ignore when ruling on its Motion.

5 Finally, Respondent argues that the Act does not currently give Respondent's nonunionized employees *Weingarten* rights and the complaint in this case cannot properly allege that Respondent acted unlawfully even if it denied Cook *Weingarten* rights or maintained a national rule that prohibits *Weingarten* rights. See *IBM Corporation*, 341 NLRB 1288, 1289 (2004).

## 10 B. THE GENERAL COUNSEL'S ARGUMENTS

The General Counsel argues that each of the new 3 *Weingarten* right allegations grew out of the withdrawn discriminatory discharge allegation as a result of the General Counsel's investigation. Consequently, the new 3 *Weingarten* rights allegations are related to the discriminatory discharge allegation because each allegation grew out of the same facts and circumstances as the withdrawn discriminatory discharge claim.

The General Counsel also acknowledges that once the discriminatory discharge allegation was withdrawn from this case before the complaint issued, all that remains is the General Counsel's request that the Board once again consider the question whether the principles set forth by the Supreme Court in *NLRB v. Weingarten*, 420 U.S. 251 (1975) should be extended to employees in nonunionized workplaces, like Respondent in this case, to afford them the right to have a coworker present at an investigatory interview which the employee reasonably believes might result in disciplinary action (aka *Weingarten* rights). The General Counsel understands that the current Board law on this legal issue is controlled by the case styled *IBM Corporation*, 341 NLRB 1288 (2004), which held that charging parties employees in a nonunionized workplace were not entitled to *Weingarten* rights.<sup>4</sup> Thus, the General Counsel seeks to have the Board overturn the *IBM Corporation* case and have the new 3 *Weingarten* rights allegations against Respondent be deemed adequate to support its argument that the new 3 *Weingarten* rights allegations are related to the withdrawn discriminatory discharge allegation.

## ANALYSIS

### I. General Background

35 Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." 29 U.S.C. § 160. "Section 10(b) functions in part as a statute of limitations by prohibiting the issuance of a complaint based on conduct occurring more than 6 months prior to the filing of a charge." *Carney Hospital*, 350 NLRB 627, 628 (2007). In this case, Respondent argues that no charge was filed regarding any of the Section 8(a)(1) allegations that the General Counsel added at subparagraphs 4(a)-(g) and 5 of the complaint and therefore the complaint must be dismissed for lack of jurisdiction.

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<sup>4</sup> The Board in *IBM Corporation* overturned the precedent of *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant part 268 F.3d 1095 (D.C. Cir. 2001), cert. denied 536 U.S. 904 (2002), which in turn overturned the principles of *E.I. du Pont & Co.*, 289 NLRB 627 (1988).

The Supreme Court in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959), in discussing the Board's authority to discharge its duty of protecting public rights, held that a complaint alleging violations not specifically alleged in the charge is proper if the matters asserted in the complaint "are related to those alleged in the charge and . . . grow out of them while the proceeding is pending before the Board." Consistent with *Fant Milling*, the Board has long required a sufficient factual relationship between the specific allegations in the charge and the complaint allegations.

As the General Counsel points out in her supplemental brief, "[t]o attribute so tightly restricted a function to a Board complaint as Respondent seeks in its Motion is, as the Supreme Court held in *National Licorice Co.*, 309 U.S. 350, 357 (1940), not consonant with the basic scheme of the Act." (GC's Supplemental Brief at 5.) As further pointed out by the General Counsel, "One of the issues in that case was substantially identical to the issue presented here— 'whether the jurisdiction of the Board is limited to such unfair labor practices as are set up in the charge presented to the Board so as to preclude its determination that (certain actions on the part of the employer) involved unfair labor practices, since both occurred after the charge was lodged with the Board.' *Id.*"

The Supreme Court further states:

It is unnecessary for us to consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the court below correctly held that 'the Board was within its power in treating the whole sequence as one.'

*Id.* at 369, cited by *Fant Milling Co.*, 360 U.S. at 306-07.

The General Counsel also points out that "[t]he Supreme Court explained the compelling reasons for not precluding litigation of allegations growing out of allegations specifically raised in an unfair labor practice charge in *Fant Milling Co.*:

A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18, 63 S.Ct. 394, 400, 87 L.Ed. 579. The responsibility of making that inquiry, and of framing the issues in the case is one

that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce, as this Court has recognized from the beginning. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893.

Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.

360 U.S. at 307-08.

II. Without the Withdrawn Discriminatory Discharge Assertions, the Remaining Unspecific Boilerplate Charge Language Is Insufficient to Relate to the New 3 Weingarten Allegations

Respondent argues that the only other language in the charge beyond the Section 8(a)(3) discriminatory discharge claim is meaningless boilerplate verbiage filled in by the Charging Party referencing a nonspecific Section 8(a)(1) violation that I should ignore when ruling on its Motion. (Reply Brief at 17-27.) I agree with Respondent that there is a vague nonspecific general boilerplate 8(a)(1) allegation that the Employer “has interfered with, restrained, and coerced” employees in the exercise of their Section 7 rights. I find that there is no specific evidence that the lone withdrawn Section 8(a)(3) charge and the boilerplate language were intended to allege any of the new 3 *Weingarten* rights allegations the General Counsel seeks to litigate in the complaint, as amended. I also agree with Respondent and further find that the remaining charge language, after the Section 8(a)(3) discriminatory discharge allegation is withdrawn or ignored, fails to satisfy the Board’s requirement set forth in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), and *Redd-I*, 290 NLRB 1115 (1988), that “the complaint allegations be factually related to the allegations in the underlying charge.”

Here, ignoring the discriminatory discharge assertions, the complaint’s new 3 *Weingarten* allegations are based on nonspecific standard boilerplate language contained in the Charging Party’s Jan. 7 charge and not the specific factual assertions made by Cook in his withdrawn charge. As a result, I find that the remaining boilerplate allegations, after the withdrawal of the Section 8(a)(3) discriminatory discharge allegations, are insufficient to support the new 3 Section 8(a)(1) *Weingarten* allegations. See *Nickles Bakery*, 296 NLRB at 928 (using “boilerplate ‘other acts’ language to support uncharged 8(a)(1) complaint allegations contravenes Section 10(b)’s mandate that the Board ‘not originate complaints on its own initiative’”); See also *General Counsel Memorandum OM-07-74* (Board law has explicitly found that this same boilerplate language is meaningless.)

In sum, since I lack jurisdiction to find that the Respondent violated Section 8(a)(1) of the Act in connection to the new 3 *Weingarten* allegations, the Motion is granted with respect to the

nonspecific boilerplate allegations as I find that the remaining nonspecific boilerplate charge allegations are insufficient and unrelated to the new 3 *Weingarten* allegations.

III. The Discriminatory Discharge Allegations of the Withdrawn Charge Are Also Unrelated to the New 3 *Weingarten* Allegations

I begin by examining the language of the one and only filed charge in this case that was withdrawn as of June 2, 2016, before the complaint in this case issued. As stated above, Respondent argues that the sole charge involves allegations that Respondent violated Section 8(a)(3) of the Act when it discriminatorily discharged employee Cook for engaging in protected concerted activities. (GC Exh. 1(a).) Here, the Jan. 7 charge contains language specifically alleging that Respondent's unlawful discriminatory discharge of Cook resulted from his engaging in protected concerted activities. *Id.*

I further find that the new 3 *Weingarten* rights allegations are not specifically contained in the Jan. 7 charge in this case and they are untimely filed as part of the complaint dated June 7 and July 5, 2016, respectively. Unless the General Counsel can show that these 3 untimely Section 8(a)(1) allegations are related to the withdrawn, but timely, 8(a)(3) discriminatory discharge allegation, the complaint must be dismissed for lack of jurisdiction over the new 3 *Weingarten* allegations. See *Carney Hospital*, 350 NLRB at 630, fn 11 (The Board agrees with the D.C. Circuit's holding in *Drug Plastics & Glass Co. v. NLRB*, 44 F.3d 1017, 1020 (D.C. Circuit 1995), that an otherwise untimely allegation may be found timely under *Redd-I* even if the timely allegation to which it is closely related is ultimately held to be without merit).

Extending the Board's reliance on *Drug Plastics* further, I find that an otherwise untimely allegation may be found timely under *Redd-I* even if the timely allegation to which it is closely related is ultimately withdrawn after investigation as occurred in this case. Therefore, the analysis here is whether the discriminatory discharge allegation is closely related to the new 3 *Weingarten* allegations.

Stated differently, under longstanding Board precedent, new 8(a)(1) complaint allegations filed outside the Section 10(b) statute of limitations can be saved and attributed to a previously filed charge if they are closely related to a timely filed charge allegation or subject matter. *Nickles Bakery of Indiana*, 296 NLRB 927, 929 (1989).

In determining whether an otherwise untimely allegation is sufficiently related to a timely allegation to allow it to be added to the complaint, the Board applies the three-prong test set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988). Under that test, the Board (1) considers whether the timely and the untimely allegations involve the same legal theory; (2) considers whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) "may look" at whether a respondent would raise the same or similar defenses to both the timely and untimely allegations. *Carney Hospital*, 350 NLRB [627, 628] (2007); *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989).

*Earthgrains Co.*, 351 NLRB 733, 734 (2007).<sup>5</sup>

Comparing the discriminatory discharge allegations of the withdrawn charge to the new 3 *Weingarten* allegations, I note that the General Counsel argues that its theory of the case in late January 2016 included that:

- 5                   • About December 22, 2015, discharging its employee Ryan Cook (Cook) because he engaged in protected concerted activities, including by discussing with his coworkers and raising complaints at team meetings and with individual supervisors, issues relating to poor supervision, safety equipment, time requirements for services, work area conduct/maintenance, and other terms and conditions of employment; and
  - 10                   • About late September 2015 and/or early December 2015, prohibiting its employees, including Cook, from having a coworker present as a witness and/or representative during interview/meeting (sic) relating to a possible on the job accident involving employee Danya (LNU). t
- 15 (GC’s Supplemental Brief at 3-4; GC Exh. 1(p) at Tab 2, p. 1.)

The General Counsel also concedes that [a]fter Respondent presented its evidence, on June 2, Mr. Cook withdrew the portion of his charge alleging that he was unlawfully discharged. (GC’s Supplemental Brief at 5; GC Exh. 1(p) at Tab 3.) The General Counsel then argues that the remaining portions of the charge alleging that Respondent violated Section 8(a)(1) of the Act “remained, and still remain, pending.” (GC’s Supplemental Brief at 5.) For the reasons stated above, I find that once the discriminatory discharge allegation was withdrawn, the remaining boilerplate language is insufficient to support the unrelated new 3 *Weingarten* allegations.

In this case the required factual relationship between the new 3 *Weingarten* allegations and the withdrawn allegations in the discriminatory discharge claim is lacking. There is no “similar conduct” nor do they involve any “causal nexus” and there are no common Respondent decision makers between the 2 groups of allegations as the withdrawn discriminatory discharge is silent (other than Cook’s involvement) as to any Respondent supervisor(s) or manager(s) issuing the discharge. Cook did not claim that Respondent discharged him because he allegedly asked for a witness at the discharge meeting.

In addition, the January 7 charge alleged a different class of unfair labor practices, involving Cook’s discriminatory discharge under Section 8(a)(3) of the Act than the Section 8(a)(1) *Weingarten* allegations. There is also a boilerplate 8(a)(1) allegation that the employer “interfered with, restrained and coerced” employees in the exercise of their Section 7 rights. There is no evidence that the boilerplate verbiage was intended to allege any of the allegations the General Counsel has in the complaint or the amended complaint – the 3 *Weingarten* allegations against Respondent.

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<sup>5</sup> The *Redd-I* “closely related” test did not initially apply to complaint allegations of 8(a)(1) violations, which were deemed covered by any timely charge by virtue of the inclusion of general “catch-all” language in the Board’s preprinted charge form. As referenced in *Section II.* above, in *Nickles Bakery*, supra, the Board overruled this practice and held that the *Redd-I* test should also apply to 8(a)(1) allegations.

As discussed above, once the alleged Cook discharge due to his alleged protected activities was withdrawn after the Respondent presented its evidence, the factual relationship of the proposed new 3 *Weingarten* allegations to the withdrawn discharge allegations is remote. None of the allegations related to Cook's discharge allegedly due to his protected activities survived the June 2 withdrawal. There is no basis alleged in the complaint to conclude that Respondent's decision to discharge Cook was related at all to the new 3 *Weingarten* allegations.

Similarly, the late September 2015 and/or mid-December 2015, *Weingarten* allegations did not grow out of the December 22, 2015 Cook discharge, they preceded it. Although the new 3 *Weingarten* allegations are serious, there is no factual nexus between them and Cook's December 22, 2015 discharge. The withdrawn Section 8(a)(3) discharge claim is factually independent of the new 3 *Weingarten* allegations that are not part of any amended charge.

The General Counsel attempts to avoid the factual dissimilarity between the new and untimely 3 *Weingarten* allegations and the withdrawn discriminatory discharge claim (GC's Supplemental Brief at 5-7) by arguing that that "[t]he allegations that Respondent denied Mr. Cook's requests to have a witness present during two interviews closely preceding his discharge are encompassed by the broad language of Mr. Cook's charge and are closely related to the allegation related to his discharge." If so, this would satisfy the second prong, as explained by the Board in *Carney Hospital*, 350 NLRB 627, 630 (2007). The problem is they are not. As I find, these new 3 *Weingarten* allegations are essentially unrelated to Cook's withdrawn discriminatory discharge claim. Merely alleging their relationship to the discharge that was proven to be lawful cannot transform factually unrelated incidents into allegations related to the very different allegation in the withdrawn charge.

Having found that the second prong of *Redd-I* is not met, I do not believe, in this case, the claim of common legal theory can serve to protect the new allegations from a 10(b) defense. *Carney*, supra at 631. Respondent also cites to dicta that has not been tested before the Board when it cites to the *Ivy Steel & Wire, Inc.*<sup>6</sup> case and several Circuit Court decisions that are not controlling here as pointed out in the GC's Supplemental Brief at 14.<sup>7</sup>

I adopt the legal findings and conclusions of the administrative law judge in *Ivy Steel*, and further find that like in *Ivy Steel*, the legal theories of the *Wright Line* analysis for any discriminatory discharge claim under Section 8(a)(3) are unrelated to the Section 8(a)(1) legal theory needed to prove a *Weingarten* rights violation.<sup>8</sup>

The Respondent's Motion is granted under these very unique facts as I find that the new 3 *Weingarten* allegations are unrelated to the withdrawn discriminatory discharge claim and the new 3 *Weingarten* allegations are time barred.

<sup>6</sup> 346 NLRB 404, 421-422 (2006).

<sup>7</sup> While these cases do not require me to follow a specific holding, they are instructive in my analysis of the unique procedural path that this case comes to me.

<sup>8</sup> Nor do I believe that the new 3 *Weingarten* claims call on the Respondent to raise the same or similar defenses as required for the withdrawn discriminatory discharge claim, which is the 3rd prong of *Redd-I*. They require entirely different defenses, factually and legally. See *Ivy Steel*, 346 NLRB at 421-422.

IV. In the Alternative, the Motion Is also Granted Because the Complaint Does Not Allege Certain Actions on the Part of Respondent that Involve Unfair Labor Practices.

5           Alternatively, Respondent’s final argument is that “the Act does not give non-unionized employees *Weingarten* rights per *IBM Corporation*, 341 NLRB 1288, 1289 (2004).” Consequently, the General Counsel cannot legitimately argue that Respondent “broke the law” and acted unlawfully even if Respondent denied Cook permission to have a coworker present at an investigatory interview that Cook reasonably believed might result in discipline in late  
10   September and December 2015 or because Respondent maintains a national rule that prohibits all its nonunionized employees *Weingarten* rights. Unlike the cases cited by the General Counsel where the various unlawful acts sought to be added against employers for harassment, threats, interrogation, surveillance, the conduct here alleged against Respondent is not currently unlawful.

15           Any arguments regarding the legal integrity of Board precedent such as the *IBM Corporation* case, however, are properly addressed to the Board. I find that I am bound to follow the Board’s current holding in *IBM Corporation* that a nonunionized employer, like Respondent here, does not act unlawfully under the Act and current Board law, when denying its employees the same *Weingarten* rights that are available to employees in a unionized employer setting under  
20   *Weingarten*. Thus, I grant Respondent’s Motion to Dismiss as to the remaining new 3 *Weingarten* allegations because as a matter of law under the *IBM Corporation* case, the complaint does not allege facts that could prove that Respondent acted unlawfully in violation of the Act by denying Cook his *Weingarten* rights or by maintaining a national rule that prohibits its nonunionized employees their *Weingarten* rights.

25           The complaint is dismissed.

Dated, Washington, D.C. August 31, 2016




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Gerald M. Etchingham  
Administrative Law Judge

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