

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

WAL-MART STORES, INC.

and

THE ORGANIZATION UNITED FOR  
RESPECT AT WAL-MART (OUR WALMART)

Cases: 12-CA-121109  
12-CA-124847  
16-CA-124905  
20-CA-126824

and

UNITED FOOD & COMMERCIAL WORKERS  
INTERNATIONAL UNION, AFL-CIO AND  
THE ORGANIZATION UNITED FOR RESPECT AT  
WALMART (OUR WALMART)

20-CA-138553  
32-CA-153782

**GENERAL COUNSEL’S OPPOSITION TO RESPONDENT’S  
PARTIAL MOTION TO DISMISS “UNKNOWN EMPLOYEES”**

Respondent’s Partial Motion to Dismiss “Unknown Employees” Allegation/Remedy Request (Motion to Dismiss) should be denied because the “Unknown Employees” make up a “defined and easily identified class” of Respondent’s employees, specifically, all of Respondent’s employees who:

1. Provided Respondent notice of their intent to strike during one of the strikes alleged in paragraph 7 of the Complaint;
2. Received an unexcused absence for missing work during the time period they indicated that they would be on strike; and

3. Did not notify Respondent of their intent to deviate from their stated intention of going on strike during the time period for which they received an unexcused absence.

The General Counsel agrees with Respondent that the merits of the case turn largely on the intricacies of the intermittent work stoppage doctrine on which Respondent relies in its defense that the strikes were unprotected. However, there are no complex “intricacies” in determining the identities of the unknown class of potential discriminatees who participated in the strikes, whether they were protected or not: they either gave Respondent notice that they were going on strike or they didn’t, they either notified Respondent that they had changed their minds or they didn’t, and they received an unexcused absence for missing work when they said they would be on strike or they didn’t. The line for determining who is in or out of that class here is “crisp and clear.”

Respondent provides a misleading list of “a host of particularized and individual-specific questions” that it asserts Your Honor must answer to determine the complex intermittent work stoppage issues in this case. Motion to Dismiss at 10. The list is misleading because although many of the questions presented in Respondent’s list go to the overarching legal issue in this case, which is whether the strikes were protected or not, there is no need to answer the questions calling for for a subjective evaluation of each striking employee, beyond answering the three class-defining questions, to determine whether the “unknown employees” fall into that class of potential but unknown discriminatees.

There will be ample evidence presented regarding the nature, purpose, concerted nature, timing, and duration of the strikes presented at the hearing, but it is not necessary to obtain testimony from each striker to establish those underlying facts. As with the named discriminatees, the potential discriminatees’ subjective knowledge or understanding of the

organizations or coordination behind the strikes, the purposes of the strikes, the overall plan or scheme behind the strikes, or whether they participated in protests or demonstrations in furtherance of the strikes while they were on strike or just stayed home and watched cartoons are completely irrelevant to identifying the class of potential discriminatees. Rather, only the three class-defining questions are relevant to determine whether a current or former employee of Respondent is a potential discriminatee, and Respondent's business records alone are sufficient to make that determination. The following analysis is under the assumption that the strikes are found to be protected.

The first question goes to establishing both that the potential discriminatee engaged in protected activity and that Respondent was aware of it. Any employee who notifies their employer of their intent to engage in a strike engages in protected activity and establishes Respondent's knowledge of that protected activity. Here, if an employee did not notify Respondent of their intent to go on strike, they are not in the class.

The second question similarly goes to establishing both that the potential discriminatee engaged in protected activity and that Respondent was aware of it. An employee who has given an employer notice of an intent to strike, and who then withholds their labor when they were scheduled to work consistent with that notice, has engaged in protected activity and establishes Respondent's knowledge of that activity. If Respondent issued them an unexcused absence for doing so, it establishes an adverse employment action (the evidence will show that many of these unexcused absences subsequently led to discipline, up to termination). If they showed up to work when they said they were going to be on strike, they are not in the class. If they did not receive an unexcused absence for not showing up to work, they are not part of the class.

Finally, the third question goes to eliminating from the class of potential discriminatees any employee who received an unexcused absence for missing work when they indicated they would be on strike, but subsequently notified Respondent that they had missed work for reasons other than being on strike (such as illness). In those cases, Respondent was on notice that the employee was not withholding his or her labor for a reason protected by the Act, thus the issuance of the unexcused absence would not fall under the Act's purview, and the employee would not fall within the class.

In conclusion, and based on the foregoing, the General Counsel respectfully requests that Your Honor deny Respondent's Motion to Dismiss the "Unknown Employee Allegation/Remedy Request."<sup>1</sup>

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of January, 2017.

*/s/ Matthew C. Peterson*

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<sup>1</sup> As Respondent's Motion to Dismiss was filed on December 22, 2016, one day after the parties received the Order from Your Honor ordering the parties to respond to Respondent's previous Motion to Dismiss dated December 14, 2015, and during the winter holidays while Counsel for the General Counsel were taking vacation, Counsel for the General Counsel requests leave to supplement this Opposition with case law.