

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

S.A.M.

DATE: August 1, 2013

TO: William A. Baudler, Regional Director  
Region 32

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Wal-Mart Stores, Inc. 506-6050-0167-5000  
Cases 32-CA-090116 and 32-CA-092858 506-6050-2500-0000  
512-5012-6787-0000  
512-5012-6787-3300  
512-5036-6720-5600  
512-5036-6720-2000  
512-5072-7775-0000  
524-8387-3650-0000

The Region submitted this case for advice as to (1) whether the Employer's dress code policy unlawfully prohibits its night-shift employees from wearing shirts bearing union insignia and (2) whether the Employer violated the Act by disciplining six employees who engaged in a work stoppage inside one of the Employer's stores. We agree with the Region that the Employer's dress code is unlawfully overbroad. We also conclude that the Employer unlawfully disciplined the employees because their in-store work stoppage did not lose the protection of the Act.

### FACTS

#### The Employer's Dress Code

Wal-Mart Stores, Inc., the Employer, operates a store in Richmond, California, which is open between the hours of 6:00 AM and 12:00 AM. The Employer maintains a dress code for its California stores which prohibits all "[l]ogos or graphics on shirts/blouses, pants, skirts, hats, jackets or coats," with three exceptions. "[S]o long as the logo or graphic is not offensive or distracting," the policy allows "a Walmart logo of any size," "a clothing manufacturer's company emblem no larger than the size of the [employee's] name badge," and "logos allowed under federal or state law."

Although the Employer's California-wide dress code policy also provides that most employees may wear solid-colored shirts in any shade of blue or green, management at the Richmond store permits only blue shirts. The Employer generally requires employees to wear tan or brown pants or skirts. Maintenance employees and certain night-shift employees may, however, wear blue jeans instead. As needed for warmth, employees may wear any style or color of sweater or jacket.

The (b) (6), (b) (7)(C) at issue in this case works overnight at the Richmond store from 11:00 PM to 8:00 AM. In August 2012,<sup>1</sup> he wore a green shirt with an OUR Walmart logo.<sup>2</sup> An (b) (6), (b) (7)(C) approached him several hours into his shift and told him to take off the shirt. The (b) (6), (b) (7)(C) changed into a black thermal shirt which he regularly wears at work.

In mid September, he wore a white shirt bearing a UFCW slogan. During a safety meeting at the beginning of the (b) (6), (b) (7)(C)'s shift, the (b) (6), (b) (7)(C) told him to take off the UFCW shirt and said that if they had the same conversation again, they would be "talking in a different tone." She stated that he had to wear a solid color shirt. The (b) (6), (b) (7)(C) took off the T-shirt. Underneath, he was again wearing a black thermal shirt, and several other employees at the meeting were also wearing black shirts. The (b) (6), (b) (7)(C) said nothing further about any of their clothes.

### The Strike

In July or August 2012, the Employer hired a crew of temporary "remodel associates" to work overnight, from 10:00 PM to 7:00 AM, remodeling its Richmond store. The Employer dispatched two supervisors from their home stores elsewhere in California to oversee the remodel project. According to the remodel employees, one of the supervisors (the (b) (6), (b) (7)(C)) repeatedly berated them for their work performance and once made a comment they considered racist. A group of remodel employees became members of OUR Walmart in part as a result of their frustrations with the (b) (6), (b) (7)(C).

On October 9 and 10, three remodel employees and the (b) (6), (b) (7)(C) went on strike to attend a protest at the Employer's home office in Bentonville, Arkansas. When they reported to work on October 11, the (b) (6), (b) (7)(C) yelled at and threatened them. He also directed other employees not to talk to the returning strikers about their activities relating to the Union and stated that the Employer

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<sup>1</sup> All subsequent dates are in 2012.

<sup>2</sup> The UFCW, through its subsidiaries Making Change for Wal-Mart and OUR Walmart (collectively "the Union"), has been involved in various campaigns against the Employer and has conducted numerous actions at its stores throughout the country. The Union maintains that its intention is to help the Employer's employees as individuals or groups in their dealings with the Employer over labor rights and standards, and in employees' efforts to have the Employer publically commit to adhering to labor rights and standards.

would never be union. Several of the striking employees were temporarily reassigned within the store.<sup>3</sup>

The Employer planned to celebrate the completion of its remodel project with a “Grand Opening” on November 2. Five remodel employees and the (b) (6), (b) (7)(C) engaged in a second strike that day.<sup>4</sup> The strikers informed the Employer’s (b) (6), (b) (7)(C) that they wanted to do a peaceful protest in the store, but did not want to disrupt business. She told them they could go to the customer service desk area because it did not open until about 9:00 AM.

The strikers gathered in the customer service area at some time between 4:30 AM and 5:30 AM to stage a “sit-in” protest.<sup>5</sup> They held several small signs, and one of them read a letter to the Employer’s (b) (6), (b) (7)(C) stating that the employees were going on strike.<sup>6</sup> The (b) (6), (b) (7)(C) then came to speak with the strikers. They asked to have an “open door” meeting as a group to discuss the problems the employees were having with the Project Supervisor. The (b) (6), (b) (7)(C) said that the Employer’s “open door” policy did not allow her to speak with them as a group, but she offered to have one-on-one meetings with the strikers individually. They declined, insisting on a group meeting. The (b) (6), (b) (7)(C) also instructed the strikers to return to work, which they refused to do. The strikers refused several more orders to return to work before the store opened at 6:00 AM. During this time, several employees who were not striking approached the (b) (6), (b) (7)(C) to ask what the strikers were doing.

At around 6:00 AM, the six strikers moved from the customer service area to a part of the store in front of the main entrance known as “action alley.” The Employer opened a side door but left the main doors closed. A few customers entered the store,

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<sup>3</sup> The Region has concluded that the Employer reassigned these employees in retaliation for their strike activity.

<sup>4</sup> Three of the strikers were remodel employees who had also participated in the October strike.

<sup>5</sup> It is not clear whether the employees spoke with the (b) (6), (b) (7)(C) before or after they began gathering in the customer service area.

<sup>6</sup> The strikers used a form letter identical to one they had read prior to striking in October. The letter stated, in part, that the strikers were “not working today to protest Walmart’s attempts to silence and retaliation against Associates who have spoken out about things like Walmart’s low take home pay, unpredictable work schedules, and unaffordable health benefits.” The Employer asserts that striking employees at other stores across the country have used the same letter.

along with five to ten protesters who were not employed by the Employer. The nonemployee protesters joined the strikers in “action alley,” bringing additional signs and banners. The protesters did not chant, shout, or attempt to confront customers.

At some point between 6:00 and 6:30 AM, the (b) (6), (b) (7)(C) approached the group and, for the first time, asked them to leave the store. The group instead returned to the customer service area.<sup>7</sup> The strikers clocked out and the group left the store between 6:30 and 7:00 AM after police came in to escort them out.<sup>8</sup> Two of the employees remained outside the store with nonemployee protesters and protested for several more hours; the other four employees left.

Five of the six strikers returned to work for their next scheduled shift and gave the Employer a letter which contained their unconditional offer to return to work and reiterated the general reasons for striking they had stated in the November 2 letter. Within the next several days, the Employer issued disciplinary letters to each of the strikers.<sup>9</sup> The Employer’s disciplinary policy provides for three levels of “written coachings” for employee misconduct; an employee who engages in punishable conduct within twelve months of having received a “third written coaching” is subject to termination. The Employer’s policy states that its supervisors or managers may skip levels of discipline. In this case, the Employer considered the strikers’ conduct to be serious enough to warrant two levels of discipline. It issued “second written coachings” to the five remodel employees and a “third written coaching” to the Maintenance Employee, who had a previous, unrelated coaching in his file. The identically worded coachings read as follows:

**Level**

Second Written (Third Written for the Maintenance Employee)

**Reason(s)**

Unauthorized Use of Company Time, Inappropriate Conduct

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<sup>7</sup> According to two of the strikers, the (b) (6), (b) (7)(C) told the strikers to return to the customer service area or leave. When they said they would go back to the customer service area, she said “no, I really want you to leave.”

<sup>8</sup> While the precise timing of the employees’ movements is not clear, surveillance camera photographs submitted by the Employer from 5:26, 6:16, and 6:37 AM show a growing group of protesters gathered in the customer service area. The three customer service workstations which appear in the photographs are unstaffed at all times.

<sup>9</sup> A letter was prepared for, but not delivered to, the remodel employee who did not return after the strike.

**Observations of Associate's Behavior and/or Performance:**

Abandoned work immediately before Grand Opening event and refused to return to work after being told to do so. Then engaged in a sit-in on the sales floor and physically occupied a central work area. Then joined with a pre-coordinated flash mob during Grand Opening to further take over, occupy, and deny access to the main customer pathway through the front of the store. Refused to stop/leave when told to do so.

**Impact of Associate's Behavior:**

Disrupted business and customer service operations during key Grand Opening event and interfered with your co-workers' ability to do their jobs. Created a confrontational environment in our store with our customers and co-workers at a time when we were trying to make a crucial first impression with potential long term customers; likely lost customers as a result.

**Behavior Expected of Associate:**

Work as directed and do not attempt to occupy Walmart's property, disrupt operations, or interfere with customer service or co-workers' job tasks. You are encouraged, but not required, to use the Company's Open Door to address any issues you want to share.

**Next Level of Action:**

The next level of action if behavior continues is: Third Written up to and including Termination (Termination for the Maintenance Employee)

During his "coaching" meeting, the Maintenance Employee denied that he had participated in a flash mob in the store, that the strikers had blocked access to the main customer pathway through the front of the store, or that they had refused to leave when asked. Similarly, one of the remodel employees objected during his meeting that the strikers had not created a confrontational environment, that the protest had been peaceful, and that they had not misused company time because the (b) (6), (b) (7)(C) had given them a designated spot for the protest.

On November 8, upon completion of the remodeling project, the Employer terminated all of the approximately thirty-five temporary remodel employees it had hired to prepare for the Grand Opening, including the five remodel employees who struck on November 2. The Employer informed them all that they were eligible for rehire.

**ACTION**

We conclude, first, that the Employer's dress code unlawfully restricts the Section 7 right of its night-shift employees to wear union insignia.<sup>10</sup> We also conclude that the employees' work stoppage on November 2 did not lose the protection of the Act. The Employer therefore violated Section 8(a)(1) by disciplining the strikers for their conduct that day. Accordingly, the Region should issue complaint, absent settlement.

**The Employer's Dress Code**

The Board and the courts have long held that employees have a Section 7 right to wear union insignia at work, unless their employer can demonstrate "special circumstances" justifying a restriction.<sup>11</sup> This right "ha[s] always extended to articles of clothing, including pronoun T-shirts."<sup>12</sup>

An employer violates Section 8(a)(1) of the Act by maintaining a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights."<sup>13</sup> The Board has developed a two-step inquiry to determine whether a work rule would have such an effect.<sup>14</sup> First, a rule is unlawful if it explicitly restricts Section 7

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<sup>10</sup> The Region has found merit to the allegation that the Employer disparately enforced its dress code by ordering the (b) (6), (b) (7)(C) to remove shirts bearing the Union's insignia while allowing other shirts that were not in compliance with the Employer's solid blue shirt policy. Our analysis here is thus restricted to the question of whether the Employer's dress code is unlawful on its face. We note, however, that the charge at present alleges only that the Employer prevented an employee from wearing a union shirt during his break. The Region should solicit an appropriate charge or amendment to the existing charge to reflect all the relevant facts and our analysis here.

<sup>11</sup> See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-04 (1945); *W San Diego*, 348 NLRB 372, 373 (2006).

<sup>12</sup> *Stabilus, Inc.*, 355 NLRB 836, 838 (2010); see *id.* ("There is no basis in precedent for treating clothes displaying union insignia as categorically different from other union insignia, such as buttons." (citing *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 515 (1993))).

<sup>13</sup> *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

<sup>14</sup> *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

activities.<sup>15</sup> Second, if the rule does not explicitly restrict protected activities, it will nonetheless violate the Act if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.<sup>16</sup>

On its face, the Employer's requirement that employees wear solid blue shirts free of any logos or graphics restricts employees' ability to wear union insignia at work.<sup>17</sup> This broad prohibition, however, is followed by several exceptions, one of which specifies that employees may wear "logos allowed under federal or state law." The Employer may intend for this exception to cover Section 7 logos. But even so, it is well established that an overbroad restriction "is not validated by the qualification, 'except as provided by law,' as an employer is not entitled to place upon its employees the burden of determining their legal rights in this manner."<sup>18</sup> Thus, the Employer's disclaimer is insufficient to save the rule.

Restrictions on union insignia may be valid where an employer demonstrates, as a special circumstance, that the display of such insignia would unreasonably interfere with a public image the employer has established as part of its business plan.<sup>19</sup> In *W San Diego*, for instance, a high-end hotel chain's business model involved providing a

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *Stabilus, Inc.*, 355 NLRB at 838 ("An employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia.").

<sup>18</sup> *Trailmobile, Div. of Pullman*, 221 NLRB 1088, 1089 (1975). See also *Allied Mechanical*, 349 NLRB 1077, 1084 (2007) ("An employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law."); *McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979) ("[I]t can reasonably be foreseen that employees would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act.").

<sup>19</sup> See, e.g., *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007) (finding no special circumstances, even though employer's prohibition on buttons was nondiscriminatory, and employees had customer contact and were required to wear uniforms).

unique “trendy, distinct, and chic” “Wonderland” experience to customers.<sup>20</sup> The Board concluded that the hotel chain could lawfully prohibit its in-room delivery servers from wearing union-related buttons in public areas of the hotel, in accordance with its strictly enforced rule prohibiting all adornments on its employee uniforms other than one small employer-provided pin.<sup>21</sup>

Here, no similar considerations justify the Employer’s rule, at least as applied to its night-shift employees.<sup>22</sup> In this regard, the Board has made it clear that mere exposure to customers in a retail setting, without more, does not constitute a special circumstance.<sup>23</sup> Here, there is no evidence that the Employer’s night-shift employees have substantial contact with customers—much less that union insignia on their clothes would unreasonably interfere with the Employer’s public image. During most of each shift, the overnight employees at the Employer’s Richmond store have no customer contact whatsoever. They work from 10:00 PM to 7:00 AM or from 11:00

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<sup>20</sup> *W San Diego*, 348 NLRB at 372.

<sup>21</sup> *Id.* at 373.

<sup>22</sup> Indeed, although the Employer asserts that its blue shirt rule furthers “a business-based plan to project a neat, professional, uniform, and easily identifiable appearance for the store’s customers,” it does not argue that special circumstances allow it to ban union insignia entirely. Instead, it asserts that its dress code does not restrict employees’ ability to wear union logos or buttons at all—as long as the shirts they wear are blue. For the reasons explained above, we reject this argument because employees would reasonably understand the Employer’s ban on logos and graphics (except as permitted by “federal or state law”) to prohibit the wearing of union insignia.

<sup>23</sup> See *P.S.K. Supermarkets*, 349 NLRB at 35 (“The Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia.” (citing *Meijer, Inc.*, 318 NLRB 50 (1995), *enforced*, 130 F.3d 1209 (6th Cir. 1997))); *Howard Johnson Motor Lodge*, 261 NLRB 866, 868 n.6 (1982) (employer not justified in prohibiting union buttons in order to avoid potentially adverse reaction by customers because employees’ rights do not depend on “the pleasure or displeasure of an employer’s customers”), *enforced*, 702 F.2d 1 (1st Cir. 1983); *Nordstrom, Inc.*, 264 NLRB 698, 701-02 (1982) (employer’s desire to avoid creating controversy among customers insufficient justification for ban on union insignia); *Floridan Hotel of Tampa, Inc.*, 137 NLRB 1484, 1486 (1962) (fact that employees “come in contact with . . . customers does not constitute such ‘special circumstances’ as to deprive them of their right, under the Act, to wear union buttons at work”), *enforced*, 318 F.2d 545 (5th Cir. 1963).

PM to 8:00 AM; the store is closed to the public for six hours of that time. And the Employer has offered no indication that these workers interact with customers in the hour or two at the beginning and end of the store's daily business hours.

Furthermore, to the extent the night-shift employees do interact with the public, the Employer's dress code plainly does not cultivate the sort of carefully coordinated atmosphere which could be unduly harmed by the presence of union insignia. Unlike the hotel chain in *W San Diego*, which utilized identical, professionally designed uniforms, the Employer here permits employees to wear a wide variety of shirts—t-shirts, sweatshirts, polo-style shirts, or button-down shirts, with short or long sleeves—in “any shade of blue.”<sup>24</sup> The Employer allows employees to wear tan or brown pants or skirts in a number of different styles, and overnight workers have the option of wearing blue jeans as well. Employees may wear sweaters or jackets in any color or style. Moreover, the Employer permits logos from clothing manufacturers on any item of clothing. Considering the Employer's dress code as a whole, we do not think that the public image it seeks to create is so inflexible that it would be endangered by the addition of union logos or graphics.<sup>25</sup>

Finally, even if the employees had more customer contact and even if the Employer's official dress code were considerably stricter, we note that the Region has concluded that the policy is not consistently enforced in practice. Indeed, while the Employer argues that it was only enforcing its blue shirt rule when it ordered the Maintenance Employee to remove his union shirts, on both occasions he was then permitted to wear a black shirt which did not bear a Section 7 message. The Board has held that a dress code which is applied inconsistently cannot form the basis for a finding of special circumstances.<sup>26</sup> For all of these reasons, we conclude that the

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<sup>24</sup> As noted above, the Employer's company-wide dress code is even more permissive, allowing shirts in any shade of blue or green.

<sup>25</sup> *Cf. United Parcel Service*, 195 NLRB 441, 448-50 (1972) (where the public image of employer's neatly uniformed drivers was “an integral part of its business and a substantial business asset,” employer could lawfully prohibit delivery drivers from wearing a large, conspicuous button while on their routes).

<sup>26</sup> *Airport 2000 Concessions, LLC*, 346 NLRB 958, 960 (2006) (“[T]he record shows that the Respondent permitted employees to wear other kinds of pins and buttons, [while prohibiting union insignia] . . . . Thus, the Respondent inconsistently applied its uniform policy and, therefore, cannot use that policy to establish special circumstances.”).

Employer's rule regarding logos and graphics on employees' clothing violates the Act.<sup>27</sup>

### **Discipline for the November 2 Strike**

#### ***The Work Stoppage Did Not Become an Unprotected Sit-Down Strike***

The Employer disciplined six employees for engaging in a work stoppage inside its store on the morning of November 2. An on-the-job work stoppage like the one at issue in this case “can be a form of economic pressure protected under Section 7.”<sup>28</sup> If such a protest goes too far, however, it is considered a sit-down strike for which employees may lawfully be disciplined.<sup>29</sup> To determine at what point a lawful on-site work stoppage becomes an unprotected occupation of the employer's premises, the Board balances employees' Section 7 rights against the private property rights of their employer.<sup>30</sup> The Board has emphasized that “[t]he line between a protected work stoppage and an illegal trespass is not clear-cut, and varies from case to case depending on the nature and strength of the competing interests at stake.”<sup>31</sup>

In *Quietflex Mfg. Co.*, the Board set forth a framework to guide this inquiry, consisting of the following ten factors: (1) the reason the employees stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered

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<sup>27</sup> If the Region concludes that the Employer disciplined the (b) (6), (b) (7)(C) for wearing union logos or graphics in violation of its overbroad dress code, such discipline would have violated the Act. See *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 3-4 (Aug. 11, 2011) (outlining the circumstances under which discipline imposed pursuant to an unlawfully overbroad rule will violate Section 8(a)(1)).

<sup>28</sup> *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056 (2005).

<sup>29</sup> See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939) (employees' seizure and multi-day, violent occupation of their employer's plant was unprotected).

<sup>30</sup> *Quietflex Mfg. Co.*, 344 NLRB at 1056.

<sup>31</sup> *Cambro Mfg. Co.*, 312 NLRB 634, 635 (1993) (quoting *Molon Motor & Coil Corp. v. NLRB*, 965 F.2d 523 (7th Cir. 1992), enforcing 302 NLRB 138 (1991)) (internal quotation marks omitted). See also *Quietflex Mfg. Co.*, 344 NLRB at 1056 (“[T]he precise contours within which such a work stoppage is protected cannot be defined by hard-and-fast rules. Instead, each case requires that many relevant factors be weighed.” (quoting *Waco, Inc.*, 273 NLRB 746, 746 (1984) (brackets omitted))).

with production or deprived the employer of access to its property; (4) whether employees had an adequate opportunity to present their grievances to management; (5) whether employees were given any warning that they must leave or face discipline; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether the employees remained on the premises beyond their shift; (9) whether the employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately disciplined.<sup>32</sup> Applying these factors to the present case, we conclude that all of them favor protection.

First, as the employees explained in the letter they delivered to management, they struck to protest the Employer's alleged unlawful retaliation against employees who had engaged in Section 7 activity. In addition, they stated that they were stopping work in support of an immediate demand for a group meeting with the [REDACTED]. They wanted to discuss their complaints about the (b) (6), (b) (7)(C), who had engaged in conduct they considered offensive and unjust, and who had made comments after their last strike which the Region has determined were unfair labor practices. Thus, the employees went on strike for reasons that "clearly [are] protected by Section 7,"<sup>33</sup> and one "reason for [their] remaining on the premises was to present work-related complaints to the [Employer]."<sup>34</sup> And while the employees' written complaints were broadly phrased, the employees orally "communicate[d] to the [Employer] the particulars of their grievances so as to facilitate a discussion or

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<sup>32</sup> *Quietflex Mfg. Co.*, 344 NLRB at 1056-57.

<sup>33</sup> *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 4 (Mar. 18, 2011). See, e.g., *Arrow Electric Company, Inc.*, 323 NLRB 968, 970 (1997) ("It is well settled that a concerted employee protest of supervisory conduct is protected activity under Section 7 of the Act." (quoting *Millcraft Furniture Co.*, 282 NLRB 593, 595 (1987))), enforced, 155 F.3d 762 (6th Cir. 1998); *United States Service Industries*, 319 NLRB 231, 253 (1995) ("[T]he . . . strike activity was caused at least in part by the Employer's continuing unlawful coercive conduct and, consequently, constituted an unfair labor practice strike."), enforced, 107 F.3d 923 (D.C. Cir. 1997); *Wilkinson Mfg. Co.*, 187 NLRB 791, 796 (1971) ("[T]he work stoppage called to protest Respondent's action was an unfair labor practice strike and, as such, a protected activity."), enforced, 456 F.2d 298 (8th Cir. 1972).

<sup>34</sup> *Quietflex Mfg. Co.*, 344 NLRB at 1058 (discussing a work stoppage held to be protected in *City Dodge Center, Inc.*, 289 NLRB 194 (1988), enforced sub nom. *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989)).

possible resolution of their concerns.”<sup>35</sup> Although the employees delayed their demand for a meeting until the Grand Opening, when they could exert more pressure than usual on the Employer by withholding their labor, the Board has explained that “[t]he protected nature of [a] work stoppage . . . [i]s not vitiated by the effectiveness of its timing.”<sup>36</sup> Thus, the employees’ reason for striking on November 2 weighs in favor of protection.

Turning to the second factor, we find that the work stoppage here was entirely peaceful. Although the Employer asserts that the strike became “disruptive,” neither the strikers nor any other protesters engaged in any violence, sabotage, or threatening conduct whatsoever.<sup>37</sup> Indeed, there is no evidence even of shouting, noise-making, or other disruption in the store beyond the presence of approximately fifteen strikers and nonemployee protesters with signs and a banner.

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<sup>35</sup> *Waco, Inc.*, 273 NLRB at 747. The Employer may argue that the employees could not genuinely have been seeking to talk about the (b) (6), (b) (7)(C) because he was no longer going to be working at the Richmond store following the Grand Opening. Indeed, the remodel employees themselves anticipated being terminated shortly after November 2. They knew, however, that the (b) (6), (b) (7)(C) would be returning to his home store elsewhere in California, where he would continue to supervise other employees of the Employer. In addition, the remodel employees were eligible to be rehired for permanent positions after their temporary jobs ended. The threats made by the (b) (6), (b) (7)(C) which the Region has found to have violated the Act—including a statement that the Employer would never be union—could have been cause for concern among remodel employees who hoped to return to work for the Employer, as well as for the (b) (6), (b) (7)(C), whose job was not temporary.

<sup>36</sup> *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 3; see also *Benesight*, 337 NLRB 282, 282 (2001) (“The fact that some lesser means of protest could have been used is immaterial. We would not second-guess the employees’ choice of means of protest.” (quoting *Trompler, Inc.*, 335 NLRB 478, 480 (2001), enforced, 338 F.3d 747 (7th Cir. 2003))).

<sup>37</sup> Compare *Golay & Co.*, 156 NLRB 1252, 1262 (1966) (“There is no evidence of any violence and no resort to, or threat of, physical force by the strikers to enforce their demands.”), enforced, 371 F.2d 259 (7th Cir. 1966), cert. denied, 387 U.S. 944 (1967), with *Fansteel Metallurgical Corp.*, 306 U.S. at 249 (sit-down strike was unprotected where “pitched battle” occurred between employees and police who sought to evict them from employer’s premises).

The third and ninth *Quietflex* factors, which are both concerned with the extent of any employee takeover of the premises, are best considered together here.<sup>38</sup> We conclude that they support protection. The in-store protest in this case was almost entirely confined to the customer service area—a small, unstaffed area of a large, multifloor store.<sup>39</sup> Even during the brief period when employees were congregated in “action alley” and the Employer’s main doors were closed, customers could—and did—freely enter through a side door. And the employees vacated the “action alley” area in a relatively prompt manner following the Employer’s request to do so.<sup>40</sup>

After the employees returned to the customer service area, we find no evidence that their presence there actually prevented the Employer from serving any customer. On the contrary, the employees chose the customer service area as their protest site—initially with the Employer’s approval—because they thought it would not be in use until later in the morning. The photographs submitted by the Employer, which show a customer service desk that was not staffed during the protest, appear to corroborate the employees’ understanding. And while the in-store protest did not go wholly unnoticed by the Employer’s nonstriking employees, the Employer has provided nothing to suggest that the protest had more than a de minimis impact on their ability to do their work.<sup>41</sup> In sum, there is no evidence that the strikers’ presence inside the store interfered with the Employer’s sales on the morning of November 2,

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<sup>38</sup> See *Fortuna Enters., LP v. NLRB*, 665 F.3d 1295, 1300 (D.C. Cir. 2011) (“[S]everal of [the *Quietflex* factors] appear to overlap . . . . [T]he seizure question may amount to the same thing as whether the employees deprived the employer of access to its property.” (quotation omitted)), *enforcing in part* 355 NLRB 602 (2010).

<sup>39</sup> We do not consider here whether the nonemployees who protested outside the store had an impact on the Employer’s business. The Employer has provided no evidence in that regard, and in any event, it never purported to discipline the employees for the Union’s actions outside its doors.

<sup>40</sup> Cf. *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 3 (“The employees complied with each request to move the location of their concerted protest. . . . Because there was no meaningful impairment of property rights, there is nothing to balance against the employees’ rights under the Act.”).

<sup>41</sup> See *Goya Foods of Florida*, 347 NLRB 1118, 1134 (2006), *enforced*, 525 F.3d 1117 (11th Cir. 2008) (“The demonstration by the Union inside the store . . . had only a minimal adverse impact on operations as customers and employees looked up and then continued to carry out their business.”).

or that the strikers attempted to seize the Employer's store or deprive it of access to its property in any meaningful way.<sup>42</sup>

The fourth factor, whether the employees had an adequate opportunity to present their grievances to management, also weighs in favor of protection here. Once employees have had "a sufficient opportunity to express their complaints concerning their terms and conditions of employment," their justification for staying on their employer's property is diminished.<sup>43</sup> In *Quietflex*, for example, this factor weighed against protection because the employer had given protesting employees "multiple opportunities to present their complaints to management[,] . . . offer[ing] to meet with representatives from the group or with all of them by shift," and had already "made a reasonable effort to respond to the issues raised" in a letter from the employees.<sup>44</sup> The employees, meanwhile, had "made it clear that they would not leave the premises until all of their demands were met, including a wage increase that [the employer] informed them [it] could not grant at that time."<sup>45</sup> Under these circumstances, the employees had been fully heard, and the employer had fully responded.<sup>46</sup>

This case is different. After the employees here delivered their letter and requested a meeting, they had no opportunity to discuss the substance of their grievances with the Employer, which refused to talk with them in any sort of group setting. The Employer instead offered to meet with employees on a strictly individual basis in accordance with its "open door" policy. But the Board has held that an employer's policy of meeting individually with employees may not provide a sufficient mechanism for resolving "group complaints."<sup>47</sup> After all, there is an "inequality of

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<sup>42</sup> See *Golay & Co.*, 156 NLRB at 1262 ("The fact that the striking employees loitered or wandered about the plant for 1 1/2 to 2 hours . . . does not, in our considered judgment, constitute a plant seizure. . . . [The employer] was not denied access to the property. . . .").

<sup>43</sup> *Quietflex Mfg. Co.*, 344 NLRB at 1059.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *HMY Roomstore, Inc.*, 344 NLRB 963, 963 n.2 (2005); *Los Angeles Airport Hilton Hotel & Tower*, 354 NLRB 202, 212 (2009) (employer's "open door policy" was insufficient), *incorporated by reference*, 355 NLRB 602 (2010), *enforcement denied in relevant part sub nom. Fortuna Enters., LP v. NLRB*, 665 F.3d 1295 (D.C. Cir. 2011); *see also Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 5 (Sept. 30, 2011)

bargaining power” between individual employees and their employer; the Act seeks to remedy this imbalance by protecting certain concerted activities.<sup>48</sup> Accordingly, we conclude that this factor weighs in favor of protection.

The fifth factor—whether employees were warned that they would be disciplined for failure to leave the store—favors protection as well. The Employer did not indicate that there would be any discipline for participating in the in-store protest. And, although the Employer repeatedly asked the employees to return to work, it is well established that they could not lawfully be disciplined for declining a request to return to work (rather than to leave the premises).<sup>49</sup> Ultimately, the Employer approached the employees to ask them to leave only once. When it did so, it provided no deadline by which the employees could vacate the premises and avoid incurring

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(during an on-the-job work stoppage, “neither [the leader of an employee delegation] nor any other employee was required to abandon his coworkers and meet one on one with [the employer’s representative]”); *but see Waco, Inc.*, 273 NLRB at 746 (protest was unprotected even though employer’s manager “told the employees that he would meet with any of them individually in his office but would not participate in a mass meeting”).

<sup>48</sup> See Section 1 (noting the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association”); *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 3 (Jan. 3, 2012) (“[C]ollective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7.”).

<sup>49</sup> See, e.g., *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 4 (“Typically, when an employer asserts that employees were discharged because they would not return to work after commencing a work stoppage, the assertion suggests that the discharge was for engaging in the work stoppage itself.”); compare *Molon Motor & Coil Corp.*, 302 NLRB 138, 138 (1991) (finding that “discharges were unlawful [where] the Respondent’s actions were motivated by the employees’ refusal to work,” rather than their refusal to leave its premises during an on-site work stoppage), *enforced*, 965 F.2d 523 (7th Cir. 1992), with *Quietflex Mfg. Co.*, 344 NLRB at 1059 (concluding that the employees “were discharged for their refusal to leave the property after 12 hours of protest,” not “for engaging in protected activity on the [employer’s] premises”) and *Cambro Mfg. Co.*, 312 NLRB at 637 (employer lawfully “discharged employees only for refusing to leave the plant if they chose to exercise their protected right to refuse to work in support of their grievances”).

discipline.<sup>50</sup> This failure to apprise the employees of the consequences of persisting in their protest weighs against the Employer.<sup>51</sup>

We find that the sixth factor, the duration of the work stoppage, likewise favors protection. As a general matter, in distinguishing between protected and unprotected on-site work stoppages, the Board is guided by the principle that “employees’ right to engage in Section 7 activity on the[ir] [employer’s] property diminishe[s] over time.”<sup>52</sup> In other words, there comes a point in any protest when the employer “is entitled to exert its private property rights and demand its premises back.”<sup>53</sup>

Regardless of how long a group of employees has protested, however, if the protesters promptly follow directions to vacate the employer’s premises, the Board has found that “there [i]s no meaningful impairment of property rights, [and] there is nothing to balance against the employees’ rights under the Act.”<sup>54</sup> Accordingly, we focus here on how long the employees remained in the store *after* being asked to leave.<sup>55</sup> The varying time estimates supplied by employees and the Employer

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<sup>50</sup> Cf. *Quietflex Mfg. Co.*, 344 NLRB at 1059 & n.16 (noting that even though some employees did not understand the employer’s warning regarding discharge, “the employees understood that the [employer] was demanding control of its premises by the 7 p.m. deadline and failed to comply with that demand”). Even when she did tell them to leave, several employees state that the (b) (6), (b) (7)(C) equivocated, initially telling them they could return to the customer service area instead.

<sup>51</sup> See, e.g., *NLRB v. Pepsi-Cola Bottling Co. of Miami*, 449 F.2d 824, 827-30 (5th Cir. 1971) (employees’ on-the-job work stoppage retained the protection of the Act even though they refused their employer’s single request to leave its premises and only left when the police asked them to), *enforcing* 186 NLRB 477 (1972), *cert. denied* 92 S. Ct. 2434 (1972).

<sup>52</sup> *Quietflex Mfg. Co.*, 344 NLRB at 1059.

<sup>53</sup> *Id.* at 1056 (quoting *Cambro Mfg. Co.*, 312 NLRB at 635).

<sup>54</sup> *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 3.

<sup>55</sup> See, e.g., *id.* at 3 n.9 (noting that in *Quietflex*, “employees who remained on the employer’s property for more than 8 hours after being asked to leave . . . lost the protection of the Act”); *Waco, Inc.*, 273 NLRB at 746 (“[T]he employees remained in the lunchroom for a period of at least 3-1/2 hours, most of which came after [the employer] had told them . . . either to get up and go back to work . . . or to punch out and leave the premises.”); *City Dodge Center*, 289 NLRB at 194 n.2 (employees

indicate that the employees delayed for between thirty minutes and one hour after the Employer's request to vacate the store. This is well within the temporal range the Board has typically considered reasonable.<sup>56</sup> Indeed, even if we were to focus on the entire period of the protest here—somewhere between one-and-a-half and two-and-a-half hours—that duration would not necessarily weigh against protection.

The seventh *Quietflex* factor addresses two issues: whether employees had a collective bargaining representative and whether an established grievance procedure was in place to address their concerns. Where these official channels are available to resolve differences in the workplace, employees have a less weighty interest in demanding the employer's immediate attention through an on-the-job work stoppage. By contrast, the Supreme Court has stated that when employees have “no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer,” they must “speak for themselves as best they c[an].”<sup>57</sup> Here, the employees were unrepresented. And as discussed above, there is no evidence that the Employer's “open door” policy was, for purposes of this inquiry, an adequate alternative to a collectively bargained grievance procedure.<sup>58</sup> Accordingly, this factor supports a finding of protection.

Regarding the eighth factor, the Employer does not dispute that the striking employees all vacated the store around 7:00 AM, at or before the time when their shifts ended. Two striking employees did remain on the Employer's exterior property for a few hours thereafter. But they had the right to publicize the labor dispute

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retained the Act's protection when they remained in a plant for about two hours after being directed to leave).

<sup>56</sup> See *Quietflex Mfg. Co.*, 344 NLRB at 1057 n.9 (citing, as an example of the application of factor six, *Golay & Co., Inc.*, 156 NLRB 1252 (1966), where a “1-1/2 to 2-hour work stoppage, during which time the employees were nondisruptive, and were waiting for a response to their demands from management, was protected”); *id.* at 1058 n.15 (citing, inter alia, *Cambro Mfg. Co.*, 312 NLRB 634 (1993) and *Waco, Inc.*, 273 NLRB 746 (1976), where 4 hour and 3-1/2 hour stoppages, respectively, were found unprotected).

<sup>57</sup> *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

<sup>58</sup> See *supra* notes 48-49 and accompanying text (citing, inter alia, *HMY Roomstore, Inc.*, 344 NLRB at 963; *Los Angeles Airport Hilton Hotel & Tower*, 354 NLRB at 212; *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 5).

there.<sup>59</sup> In addition, we note that the Employer never asked them to leave the area outside its store, and it issued identical disciplinary coachings to all of the employees, without regard to whether they protested outside or left entirely. Thus, unlike the employees in *Quietflex* who were discharged for refusing to end a twelve-hour occupation of their employer's parking lot, it is clear that the employees here were disciplined for their protest inside the Employer's store. They did not persist in that activity beyond the end of their shifts.

The final *Quietflex* factor is concerned with the reasons for the employees' discipline.<sup>60</sup> An employer may be entitled to use discipline or discharge as a means of enforcing its property rights against employees engaged in a prolonged on-site work stoppage.<sup>61</sup> As noted above, however, an employer cannot lawfully discipline strikers merely for going on strike and disobeying commands to return to work.<sup>62</sup>

Here, we conclude that the Employer disciplined the strikers for their failure to clock out before striking and for their refusal to work. These are not lawful bases for discipline.<sup>63</sup> Although the Employer's coachings also refer to the employees' refusal to leave when told to do so, we have already noted that no discipline was administered—or even mentioned—during the actual work stoppage.<sup>64</sup> Instead, the employees were

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<sup>59</sup> See *Rite Aid of Ohio*, Case 8-CA-039376, Advice Memorandum dated June 2, 2011, at 6-7 (applying *Tri-County Medical Center*, 222 NLRB 1089 (1976), rather than *Quietflex*, to find that striking employees were entitled to picket on a private sidewalk adjacent to the employer's store in order to communicate their message to customers).

<sup>60</sup> The ninth factor, whether the employees attempted to seize the employer's property, is discussed above.

<sup>61</sup> In *Quietflex*, for example, the Board determined that the employer could lawfully discharge striking employees for failing to comply with its ultimatum that they leave the premises by a certain time. *Quietflex Mfg. Co.*, 344 NLRB at 1059.

<sup>62</sup> See *supra* note 50 (citing, inter alia, *Molon Motor & Coil Corp.*, 302 NLRB at 138).

<sup>63</sup> See *Golay & Co., Inc.*, 156 NLRB at 1263 (“With respect to other alleged misconduct occurring on the day of the strike, i.e., punching in without intending to work and standing mute when polled as to work, these merely constitute the means by which an employee may strike and, if the strike is lawful, do not warrant his discharge or bar his reinstatement.”); *Molon Motor & Coil Corp.*, 302 NLRB at 138 (discharges motivated by employees' refusal to return to work were unlawful).

<sup>64</sup> See, e.g., *Quietflex Mfg. Co.*, 344 NLRB at 1055 (employer attempted to use threat of discharge to compel employees to end unreasonably long occupation, and it did not

disciplined days later, *after* they had unconditionally offered to return to work. At that point, the discipline “no longer served an immediate [Employer] interest” in securing its private property.<sup>65</sup> In light of the Employer’s delay in this regard, we conclude that this factor clearly favors protection.

In addition to the factors just discussed, we note one further consideration that should be taken into account. Unlike the employers in *Quietflex* and the cases cited therein, the Employer here operates a retail establishment. The Board has suggested in several cases that a stricter standard applies to employee protests inside stores and restaurants.<sup>66</sup> In *Honda of Mineola*, for instance, a group of employees engaged in an extended assembly in their employer’s showroom, blocking customer access and refusing many requests to leave.<sup>67</sup> In finding this activity unprotected, the Board cited “the special interest of an employer operating a retail enterprise in avoiding disruption to [its] business in areas where customers are normally present.”<sup>68</sup>

More recently, however, the Board has made it clear that concerted protests in public areas of retail establishments are not unprotected per se. In *Thalassa Restaurant*,<sup>69</sup> the Board found a protest by an employee and a group of nonemployee supporters to be protected even though it occurred in a restaurant during dining

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violate the Act by following through on that threat); *Cambro Mfg. Co.*, 312 NLRB at 635 (no violation where, after employees had persisted in their protest for an unreasonable period, employer announced that they were suspended, and decided to terminate them later that morning); *Waco, Inc.*, 273 NLRB at 746 (no violation where protesting employees “refused to work or leave the premises” and “remained in the lunchroom until they were presented with their paychecks and were discharged”).

<sup>65</sup> *Quietflex Mfg. Co.*, 344 NLRB at 1059.

<sup>66</sup> See *Honda of Mineola*, 218 NLRB 486, 486 n.3 (1975) (“The Board traditionally has applied somewhat different rules to retail enterprises than to manufacturing plants with respect to the right of employees to engage in union activity on their employer’s premises.”), *enforced mem.*, 542 F.2d 1165 (2d Cir. 1976).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* See also *Restaurant Horikawa*, 260 NLRB 197, 198 (1982) (protest was unprotected where, “[b]y invading the [employer’s] restaurant en masse and parading boisterously about during the dinner hour when patronage was at or near its peak, the demonstrators seriously disrupted [the employer’s] business”).

<sup>69</sup> 356 NLRB No. 129 (Mar. 31, 2011).

hours.<sup>70</sup> The Board emphasized that the protesters did not disturb patrons, block their movements, or interfere with employees who were working.<sup>71</sup> Similarly, in *Goya Foods of Florida*, the Board affirmed an ALJ's finding that three employees did not lose the protection of the Act when they entered a supermarket to deliver a letter with a larger group during a union rally.<sup>72</sup> Even though some members of the group shouted inside the store, the disruption they created was brief and "did not appreciably interfere with the activities of the store as customers continued to shop in the store aisles and cash registers continued to ring as they were checked out."<sup>73</sup> Moreover, the protest happened in a "busy supermarket," not a smaller establishment "where patrons have a normal expectation of quiet enjoyment."<sup>74</sup>

As these cases demonstrate, the Board's ultimate concern in cases like this one is the degree of disruption that employees cause within a retail business. As explained above, the in-store protest here "had only a minimal adverse impact on operations."<sup>75</sup> The Employer has cited no evidence that the striking employees "disturbed the handful of patrons present" after the store opened, "blocked the ingress or egress of any individual, w[ere] violent or caused damage, or prevented any employee from performing his [or her] work."<sup>76</sup> Thus, we conclude that even if the nature of the Employer's business requires special consideration, the in-store work stoppage did not lose the protection of the Act.<sup>77</sup>

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<sup>70</sup> *Id.*, slip op. at 1 n.3.

<sup>71</sup> *Id.* The Board distinguished a prior case where a restaurant protest was unprotected on the basis that the protest there "seriously disrupted' the employer's business." *See id.* (discussing *Restaurant Horikawa*, 260 NLRB 197 (1982)).

<sup>72</sup> *Goya Foods of Florida*, 347 NLRB at 1134.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Thalassa Restaurant*, slip op. at 1 n.3.

<sup>77</sup> For the same reasons, we reject the Employer's separate but related argument that the employees lost the protection of the Act because they "aided and abetted" a "mass demonstration/flash mob invasion." Even assuming that the striking employees could be disciplined for acts of misconduct committed by nonemployee protesters, the protest was not so disruptive as to deprive the employees of the protection of the Act.

To sum up our analysis, we conclude that each of the *Quietflex* factors weigh in favor of protection. In weighing these factors, we emphasize the Board's overarching purpose in cases like this one: to strike a balance between the Section 7 rights of employees on the one hand, and their employer's private property rights on the other, "with as little destruction of one as is consistent with the maintenance of the other."<sup>78</sup> The employees here were entitled to stop work and demand a meeting with their employer at a time when they thought they could most effectively command its attention. The Employer, in response, was entitled to demand that the employees take their protest outside. Within a reasonable time, they did so. Under these circumstances, the employees' actions "simply d[id] not rise to the level of the disregard of property rights and defiance of law associated with an unprotected sitdown strike."<sup>79</sup> Accordingly, we conclude that the November 2 strike did not constitute an unprotected occupation of the Employer's premises.

***The Employer Did Not Discipline the Employees for Engaging in an Intermittent Strike***

The Employer now argues that the strike was unprotected not only because of the employees' conduct inside the store, but also because it was part of a pattern of intermittent strike activity, including the work stoppage that occurred on October 9 and another one that the Union planned for Black Friday (November 23).<sup>80</sup> A refusal to work constitutes an unprotected intermittent strike "when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the Employer."<sup>81</sup>

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*See Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 4 n.11 (discussing the circumstances under which an employee may be lawfully disciplined for engaging in misconduct in concert with others).

<sup>78</sup> *Quietflex Mfg. Co.*, 344 NLRB at 1058 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

<sup>79</sup> *City Dodge Center, Inc.*, 289 NLRB at 194 n.2.

<sup>80</sup> The Employer also appears to suggest that the protest may have violated Sections 8(b)(1)(A), 8(b)(4)(ii)(B), and 8(b)(7)(C). With regard to the 8(b)(7)(C) allegation, the Employer has produced no evidence of "picketing" that had continued for more than thirty days as of November 2. Nor has the Employer pointed to evidence supporting a violation of the other sections it cites.

The Employer is correct that employees may be lawfully disciplined for engaging in such conduct. In this case, however, it is clear that the Employer *did not* in fact discipline the employees for intermittent strike activity. Rather, as the detailed written coachings it issued explain, the Employer disciplined the employees exclusively for their conduct on November 2.

The Board has repeatedly rejected attempts to justify unlawful discipline with post hoc rationales like the one the Employer advances here.<sup>82</sup> In *Molon Motor & Coil Corp.*, for instance, the employer terminated strikers who had remained in its breakroom for over five hours in support of their demand for a wage increase.<sup>83</sup> Ultimately, based on the employer's testimony as to what it told the strikers, the Board concluded that they "were terminated for refusing to work and not for

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<sup>81</sup> *Polytech, Inc.*, 195 NLRB 695, 696 (1972). See also, e.g., *United States Service Industries*, 315 NLRB 285, 291 (1994) (activity is unprotected if it was intended to "bring about a condition that was neither a strike nor work"); *John S. Swift Co., Inc.*, 124 NLRB 394, 396-97 (1959), *enforced in relevant part*, 277 F.2d 641 (7th Cir. 1960); *Embossing Printers, Inc.*, 268 NLRB 710, 722-23 (1984), *enforced mem.*, 742 F.2d 1456 (6th Cir. 1984).

<sup>82</sup> See, e.g., *Santa Barbara News-Press*, 357 NLRB No. 51, slip op. at 3-4 (Aug. 11, 2011) ("Contrary to the Respondent's representations in its brief, it did not even purport to discipline any of the employees for disparaging its product. The Board has long rejected such post hoc reasoning."), *enforcement denied on other grounds*, 702 F.3d 51 (D.C. Cir. 2012); *Hahner, Foreman, & Harness, Inc.*, 343 NLRB 1423, 1425 (2004) (employer's shifting explanations for its discharge of employees suggested that it was not motivated by an alleged slowdown threat, as it ultimately claimed, but rather by the employees' protest which occurred in the same interaction as the purported threat). See also *University of Southern California*, Case 31-CA-023538, Advice Memorandum dated April 27, 1999, at 10-11 (concluding that even if employees' first four strikes were unprotected, they were suspended solely for their participation in the fifth strike, rather than for engaging in a pattern of intermittent strike activity); *Yoshi's Nitespot*, Case 32-CA-016646, Advice Memorandum dated June 30, 1998, at 6-7 ("The Employer asserts that another reason for the warnings was because [the employees] had led a group of employees into areas not open to the public . . . . However, the Employer's warning letter makes no mention of this reason and instead focuses only on the protected conduct. Therefore, we would argue that this is a post-discharge justification for the Employer's unlawful actions.").

<sup>83</sup> *Molon Motor & Coil Corp.*, 302 NLRB at 138.

remaining in the breakroom.”<sup>84</sup> Because the employer’s admitted basis for the terminations was unlawful, the Board did not determine whether the protest became an unprotected sitdown strike which the employer could have lawfully punished for that reason.<sup>85</sup>

In this case, similarly, we have concluded that the reasons the Employer provided at the time for disciplining the employees—their protected protest and refusal to work on November 2—violate the Act. The coachings the Employer issued make no reference to the October 9 work stoppage or to the Union’s announced plans to strike on November 23, even though both were known to the Employer at the time. Although the Employer argues in its position statement that the Union was orchestrating a series of work stoppages at the Richmond store, the coachings made no mention of any outside organization. Moreover, two of the six employees who struck on November 2 had not participated in the October 9 work stoppage, while the Employer knew that it would be discharging the five temporary remodel employees well before they would have the opportunity to strike again on November 23. Yet all six employees received coachings with identical language. All of these considerations merely confirm what each coaching stated on its face: that the employees were disciplined not for engaging in a series of work stoppages, but for going on strike “immediately before [the] Grand Opening event” and then protesting “during [the] Grand Opening.” We consider it unnecessary to determine whether the Employer *could have* lawfully issued discipline for a different reason it has raised only after the fact.<sup>86</sup>

Accordingly, the Region should issue complaint, absent settlement, consistent with the foregoing analysis.

/s/  
B.J.K.

H:ADV.32-CA-090116.Response.WalmartRichmondStore. (b) (6), (c)

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<sup>84</sup> *Id.*

<sup>85</sup> *See id.* at 138 & n.1 (“Accordingly, we need not pass on whether the Respondent could have lawfully discharged the employees for staying in the breakroom.”).

<sup>86</sup> If, at trial, the Employer continues to rely on and introduces evidence in support of its intermittent strike activity defense, the Region should consult with the Division of Advice on how to respond.