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

Advice Memorandum

DATE: April 30, 2013

TO: William A. Baudler, Regional Director
Region 32

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

SUBJECT: Wal-Mart Stores, Inc.
Case 32-CA-096506

506-6090-3200
512-5006-5000
512-5006-5020-3300
512-5006-5075
512-5006-6710
512-5012-6787
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The Region submitted this case for advice as to whether the Employer has established "special circumstances" sufficient to justify its prohibiting an undercover store security employee from wearing a union t-shirt while on duty.[1] The Region also sought advice as to whether statements made to the employee about why he could not wear the union t-shirt were coercive and violated the Act. We conclude that, regardless of whether the Employer can establish "special circumstances" justifying its prohibition, the Employer violated Section 8(a)(1) when it told the employee that he could not wear his union t-shirt because it was "offensive."

FACTS

The affected employee worked for the Employer as an undercover "asset protection associate" (APA) at its San Leandro, California store.[2] The APA's job description indicates that one of the position's essential functions is to assist with "securing the assets of the Facility and surrounding areas by observing and communicating suspicious activity." According to the Employer, the ability of APAs to successfully secure assets and observe suspicious activity requires that they "blend in" with customers as they walk around stores so as to identify and, if necessary,

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[1] The charge does not allege the Employer's overall dress code policy for California employees to be unlawful.

[2] The affected employee worked for the Employer from (b) (6), (b) (7)(C) 2012 until he resigned on (b) (6), (b) (7)(C) 2012.

apprehend customers and employees stealing merchandise. The company dress code therefore exempts APAs from the blue or green shirt and tan pants required for other employees. According to the affected employee, APAs at the San Leandro store can wear any plain clothing. When he became an undercover APA, management told him only that he could not wear sagging pants, tank tops, or clothes with profanity.

The affected employee was one of the employees at the Employer's San Leandro store who was a member and open supporter of the Charging Party, OUR Walmart. He participated in a strike event organized by OUR Walmart around October 9, 2012, in Bentonville, Arkansas, and in the Black Friday store protests held on November 23, 2012. He also wore an OUR Walmart bracelet on several occasions before and after the Bentonville strike, but there is no direct evidence that any of the Employer's supervisors or managers noticed him wearing it.

On November 19, 2012, the Employer held meetings with employees in preparation for Black Friday and discussed the protests that OUR Walmart advertised would occur. That same day, the affected employee, for the first time, wore an OUR Walmart t-shirt during his shift and while attending the Black Friday preparation meetings. The front of the bright lime green shirt included the words "OUR Walmart" in bold black letters as well as the OUR Walmart logo of a hand giving the "OK" sign. Beneath those words and the logo, the t-shirt bore the words "Organization United for Respect at Walmart," and beneath these words it read: "forrespect.org." The writing was about 8-10 inches across the chest area and about 4 inches tall. The affected employee attended half of one Employer-held meeting and stayed for the entirety of the roughly hour-long second meeting.

According to the affected employee, as he was walking out of the meeting, an assistant manager asked him to go to the assistant managers' office. Present in the managers' office were three other assistant managers. The affected employee was asked if he knew the dress code, and he replied that he did. He was then told that he was in violation of the Employer's dress code. One of the assistant managers next read the employer's dress code policy for regular employees.[3] The affected employee was then told that he had to wear tan pants, a blue shirt, and could not wear any

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[3] The Employer's dress code policy, which covers all employees except those specifically exempted, such as APAs, provides that employees are required to wear: "Any short sleeve or long sleeve solid blue shirt/blouse or solid green shirt/blouse of your choosing, in any shade of blue or green, and in good condition." The policy further provides: "Logos or graphics on shirts/blouses, pants, skirts, hats, jackets or coats are not permitted, except the following, so long as the logo or graphic is not offensive or distracting: 1. a Walmart logo of any size; 2. a clothing manufacturer's company emblem no larger than the size of the associate's name badge; or 3. logos allowed under federal or state law."

shirts with logos, or any clothing that was offensive or demeaning. The affected employee replied that he previously had worn shirts with logos and that the dress code policy did not apply to APAs.[4] An assistant manager insisted that the policy applied. Two assistant managers then told the affected employee that his t-shirt was "offensive." When he asked why the shirt was offensive to Wal-Mart, an assistant manager said that it could hurt the company and hurt sales.

The affected employee next asked whether he could just zip up his jacket so that the t-shirt would be covered, but was told no, because he could simply unzip it at any point during his shift. An assistant manager then instructed the affected employee to take the t-shirt off and indicated that he could not change on company time, so he would have to clock out to change his t-shirt. The affected employee then clocked out, went outside to his car, and phoned an OUR Walmart organizer, who suggested that he turn his t-shirt inside out. He did so and then put his gray jacket on, zipped up. No assistant managers told him during the meeting that he could simply turn his t-shirt inside out. Once the affected employee clocked out, he could not clock in again until 30 minutes elapsed because of the way the time clock is set up.

According to the affected employee, the assistant managers never told him that he was being prohibited from wearing the OUR Walmart t-shirt because it could reveal his identity as a Wal-Mart employee and compromise his effectiveness as an undercover employee.

ACTION

We conclude that the Region should issue complaint, absent settlement, because the statements made by the assistant managers that the affected employee could not wear his OUR Walmart t-shirt because it was "offensive" interfered with his Section 7 rights and therefore violated Section 8(a)(1).

The Board and courts have long recognized that employees have a right protected by Section 7 to wear union paraphernalia, such as t-shirts, while at work.[5] Employers violate Section 8(a)(1) of the Act if they "interfere with, restrain, or coerce

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[4] The Employer's dress code policy contains department-specific provisions, including one pertaining to APAs that provides: "To the extent the Market Asset Protection Manager (MAPM) deems appropriate, [APAs] may be exempted from the facility specific dress code, in order to carry out the duties and responsibilities of their respective positions. The APA must follow the directions for the Personal Hygiene, Clothing, and Jewelry/Tattoos sections of the Appearance section."

[5] *See, e.g.*, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-04 (1945); *W San Diego*, 348 NLRB 372, 373 (2006).

employees in the exercise of the rights guaranteed in section 7." In finding that an employer's conduct violates Section 8(a)(1), the Board utilizes an objective test to determine whether the conduct reasonably tends to coerce an employee in his or her free exercise of those rights guaranteed by Section 7.[6]

In the present case, statements by both assistant managers that the affected employee could not wear the OUR Walmart t-shirt because it was "offensive" as well as the additional statement that the t-shirt was offensive because "it could hurt the company and hurt sales," were coercive of the employee's Section 7 rights and therefore violated Section 8(a)(1). Specifically, the statements unmistakably show that the Employer prohibited the employee from wearing the t-shirt solely because it viewed a shirt promoting OUR Walmart and unionism as "offensive." The shirt had no other message. *See Center Constr. Co., Inc.*, 345 NLRB 729, 747 (2005) (unlawful prohibition of shirt, deemed "inappropriate" by employer, bearing only a union's insignia; shirt did not violate company policy against clothing with religious, political, or offensive sayings or offensive pictures), *enforced in relevant part*, 482 F.3d 425, 435 (6th Cir. 2007). This case is thus stronger than those in which employees' t-shirts had elements, other than general union advocacy, that arguably may be seen as offensive in context.[7] Accordingly, the message that the employee would have reasonably understood from the assistant managers' statements was that union t-shirts were categorically offensive and prohibited by his employer.[8] Thus the employee was chilled in exercising his Section 7 right to wear union paraphernalia to work.

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[6] *See, e.g.*, *Affiliated Foods, Inc.*, 328 NLRB 1107, 1109 (1999) (under objective test, employer's motivation for a statement or act is irrelevant, as is whether or not a particular employee was actually coerced or considered himself to be coerced).

[7] *Cf. Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at 2 & n.8 (July 26, 2011) (finding t-shirt with union logo and slogan "I don't need a WOW to do my job" protesting employer's incentive program not "immediately offensive" or harmful to customer relationship, as employer claimed), *enforcement denied in relevant part and remanded*, 701 F.3d 710 (D.C. Cir. 2012); *AT&T Conn.*, 356 NLRB No. 118, slip op. at 10-11 (Mar. 24, 2011) (union t-shirts that stated "Prisoner of AT$T" and "Inmate" were unlawfully deemed "offensive" or "inappropriate" by employer), *petition for review pending* (D.C. Cir. Nos. 11-1099, 11-1143).

[8] Although the assistant managers also mentioned the dress code policy's logo prohibition, their response to the affected employee's claim that he had worn other shirts with logos was, again, that his OUR Walmart t-shirt was "offensive." The mere presence of a logo, regardless of its union content, was therefore not the operative reason why the Employer found this t-shirt offensive.

The Employer claims that "special circumstances" justify its prohibiting the affected employee from wearing the OUR Walmart t-shirt, namely, that the t-shirt could reveal his identity as a Wal-Mart employee and compromise his undercover status.[9] Assuming, for the sake of argument, that this concern constitutes sufficient special circumstances to prohibit APAs from wearing this t-shirt while on duty, the Employer never gave that as a reason. Instead, two separate assistant managers said that the affected employee could not wear the OUR Walmart t-shirt because it was "offensive" and "it could hurt the company and hurt sales." Therefore, because the Employer never conveyed this assertedly valid reason to the employee, it never dispelled the chill of his Section 7 rights caused by the Employer's coercive statements that his union shirt was offensive. The Employer thus violated Section 8(a)(1). In sum, the prohibition on wearing the t-shirt is not the violation. The violation instead lies in the assistant managers' statements that the t-shirt was "offensive" and could "hurt" Wal-Mart where the statements lacked any context related to the affected employee's special circumstances as an undercover APA.

Accordingly, we conclude that the Region should issue complaint, absent settlement on the basis of the assistant managers' coercive statements.

/s/
B.J.K.

ADV. 32-CA-096506.Response.Wal-MartStores (b) (6), (b) (7) [redacted]

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[9] An employer may lawfully prohibit the wearing of union paraphernalia when it carries its burden of proving "special circumstances." *See W San Diego*, 348 NLRB at 373. The Board has found special circumstances "when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Id.* (quoting *Komatsu America Corp.*, 342 NLRB 649, 650 (2004)).