The Region submitted this case for advice as to whether an “in-store” demonstration by off-duty employees concerning management practices lost the protection of the Act and whether this case is an appropriate vehicle for the Board to reconsider Wal-Mart Stores, Inc., 364 NLRB No. 118 (Aug. 27, 2016). Initially, we conclude that this case is not an appropriate vehicle for reconsidering Wal-Mart because the instant case is properly analyzed under a different legal framework the Board has long applied to determine whether off-duty employees’ conduct inside retail or restaurant establishments is protected. We conclude, under this standard, that the conduct here in question is not protected.

We agree with the Region’s recommendation that this case is not an appropriate vehicle for reconsideration of Wal-Mart. There, the involved employees were on-duty when they instituted a work stoppage and occupied a customer service area for about an hour and a half. Applying the ten-factor test for determining whether on-site work stoppages are protected, set forth in Quietflex, 344 NLRB 1055 (2005), the Board found that the work stoppage remained protected. Here, the involved employees were off duty when they and a group of non-employee supporters entered the store, briefly assembled before the store manager, read aloud a demand letter previously submitted to management, and left while chanting a slogan demanding that the store manager “must go.” No work stoppage occurred. Accordingly, this case is distinguishable from Wal-Mart and does not present an appropriate vehicle for reconsidering that decision.

Rather, we conclude that this case is more properly analyzed under Restaurant Horikawa, 260 NLRB 197 (1982), and its progeny. Under this line of cases, the Board finds that off-duty employees who enter an employer’s restaurant or retail establishment to engage in Section 7 activity retain the Act’s protection only if, under the totality of the circumstances, their conduct in doing so does not disrupt the employer’s operations. Id. at 198.

Applying these cases, we conclude that the conduct here at issue was not protected, even assuming that the statements made by management after the demonstration would have otherwise unlawfully coerced or restrained the conduct. Video footage of the demonstration presents a clear picture: approximately 15 demonstrators, including three to four off-duty employees, crowded into a relatively small store and congregated near the counter toward the back. Many customers appear to have been engaged in conversation with one another or working on their laptops when the crowd entered. While the demonstration was brief (lasting about 4-5 minutes), the public reading of the demand letter, coupled with the loud and boisterous chanting, undoubtedly caused a significant disruption for the patrons. See Restaurant Horikawa, 260 NLRB at 198 (conduct that involved passing through restaurant’s crowded reception area while chanting slogans “interfered with Respondent’s ability to serve its patrons in an atmosphere free of interruption and unwanted intrusion”). Cf. Thalassa Restaurant, 356 NLRB 1000, 1000 n.3 (2011) (conduct in restaurant protected where no evidence was presented that it disrupted the few customers present); Goya Foods, 347 NLRB 1118, 1134 (2006) (finding conduct in grocery store protected, distinguishing Horikawa and other cases

(b) (6), (b) (7)(C)
involving restaurant settings, “where patrons have a normal expectation of quiet enjoyment”), enforced, 525 F.3d 1117 (11th Cir. 2008). Although a coffee shop is a different sort of environment than the table-service restaurants in Horikawa and Thalassa, we conclude that the Employer’s customers have similar expectations of “quiet enjoyment,” unlike customers of the grocery store in Goya Foods. This is particularly evident given the Employer’s “Third Place Policy,” which promotes a “warm and welcoming environment” for customers to “gather and connect” and provides employees guidance for addressing behavior that disrupts “the third place environment” and “interferes with the Starbucks Experience for others.” Under these circumstances, we conclude that the demonstration was not protected.

This email closes this matter in Advice. Please feel free to contact us with questions or concerns.