Wal-Mart Stores, Inc. *and* The Organization United For Respect At Walmart (OUR Walmart). Cases 32–CA–090116, 32–CA–092512, 32–CA–092858, 32–CA–094004, and 32–CA–094011, 32–CA–094381, and 32–CA–096506

August 27, 2016

DECISION AND ORDER[1]

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The primary issue in this case is whether the Respondent unlawfully disciplined six of its Richmond, California employees because they stopped work and engaged in a small, early morning, in-store protest to bring to the attention of management their mistreatment by a supervisor and to secure permanent jobs for temporary employees.[2] Applying the well-settled legal principles in *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056–1057 (2005), the judge found that the employee work stoppage was protected and that the discipline therefore violated Section 8(a)(1) of the Act. Specifically, the judge found that the employees did not lose the protection of the Act because their protest was peaceful and largely confined to a small, partially enclosed customer waiting area near the front of the large, multi-story department store, and that they promptly complied with directions to return to the customer waiting area or to clock out and leave the store. In all, the small group of employees protested for less than an hour and a half in the store, less than an hour of which followed the store's 6 a.m. opening. We agree with the judge,[3] for the reasons he states, and as further set forth below that the employees did not lose the Act's protection.[4]

Facts

As stated, on November 2, 2012,[5] six employees, Raymond Bravo, Semetra Lee, Demario Hammond, Misty Tanner, Markeith Washington, and Timothy Whitney, engaged in a work stoppage to protest mistreatment by their supervisor and to secure permanent employment. Each of the employees (with the exception of Bravo) was a temporary remodeling associate hired to assist the Respondent in renovating and updating the Richmond store. Of particular importance to those employees was the Respondent's apparent condonation of the statements and actions of Field Project Supervisor Art Van Riper. Since the beginning of the remodeling project, employees complained that Van Riper repeatedly called them lazy, yelled at them, and said to an African-American employee as he placed a rope around a counter, "if it was up to me, I would put that rope around your neck." Additionally, Van Riper told employees that he did not want to hear about unions and, as set forth below, expressed his dislike for unions directly to employees.

In reaction to Van Riper's treatment of the remodeling employees, on October 9 and 10, three of the six employees (Hammond, Tanner, and Washington) joined other Richmond associates in a strike to raise awareness of the Respondent's mistreatment of employees. When the employees presented a letter offering to return to work on October 11, Van Riper stated, in the employees' presence, "If it were up to me, I'd shoot the union."[6]

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[1] On November 12, 2015, the Board granted the Respondent's motion to sever Case 32–CA–111715 and to consolidate it with Case 13–CA–114222, a related case that is also before the Board. The attached modified order and notice reflect that change.

[2] On December 9, 2014, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party filed answering briefs to the Respondent's exceptions and the Respondent filed reply briefs to the General Counsel's and the Charging Party's answering briefs. The Charging Party also filed cross-exceptions and a supporting brief and the Respondent filed an answering brief to the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

[3] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We also adopt the judge's additional 8(a)(1) findings. In particular, we agree with the judge that the Respondent violated Sec. 8(a)(1) of the Act by its Placerville, CA Assistant Manager Susan Stafford's suggestion to an employee that the Respondent would close its store in response to concerted employee activity. Following employee Barbara Collins' absence to attend an OUR Walmart rally, Stafford asked her if Collins worried that the Respondent would close down the Placerville store if OUR Walmart got too big. Collins said she did not believe the Respondent would do so, as it had had such a store closure only once before, in Canada. We agree with the judge that this is a violation and not merely an "honest question" or "conversational and innocuous" as characterized by the Respondent and our dissenting colleague, respectively. Such queries, when carried out by supervisors, are coercive. See, e.g., *Swingline Co.*, 256 NLRB 704, 710 (1981).

[5] All dates are in 2012.

[6] The judge found that this statement, as well as Van Riper's statements, described below, that the Richmond store would never be union, telling employees that strikers would be looking for new jobs, and prohibiting employees from speaking to employees returning from strike violated Sec. 8(a)(1) of the Act. We adopt the judge's findings of these violations. We disagree with the dissent that Van Riper's com-

Later during that same shift, Van Riper and another manager called an employee meeting. At that meeting, Van Riper stated that the striking employees would not work with the rest of the remodeling crew and that employees should not talk to the returning strikers. Van Riper then stated that OUR Walmart was attempting to unionize the store but that "was never going to happen" and that the returning strikers "would be looking for new jobs."

On October 17, the six employees submitted a written statement to the Respondent complaining about Van Riper's use of "racist remarks and threats of physical violence towards Associates" and creation of "a work environment that is threatening, harassing and intimidating." The statement requested that the Respondent remove Van Riper, offer temporary employees permanent positions at the store after remodeling was completed, and meet with members of OUR Walmart to discuss the issues. The Respondent did not reply to this statement.

Also in mid-October, OUR Walmart members met with United Food and Commercial Workers ("UFCW") staff to discuss a work stoppage to protest Van Riper's treatment of the remodeling associates. On November 1, the night before the work stoppage was set to begin, employee Tanner told Store Manager Tenille Tune that she planned to organize a work stoppage the next morning but might be able to call it off if Tune would promise that remodeling associates would receive permanent positions after the store's remodel was complete. Tune notified the Respondent's labor relations department of the planned protest.

Shortly after 3 a.m., on November 2, Human Resource Manager Janet Lilly and Market Asset Protection Manager Paul Jankowski arrived to assist in the store reopening and to interview employees about their complaints. Lilly and Jankowski met with one employee, Washington, prior to the beginning of the work stoppage.[7]

The work stoppage began inside the store at approximately 5:24 a.m., prior to the store's scheduled opening at 6 a.m. Initially, the six employees stopped working and walked to the customer service area, which is to the right of the store's front entrance and physically separated by a chest-high wall. Five minutes later, Lilly and Jankowski approached the employees and offered to meet with them individually. The employees requested to meet as a group but Lilly refused, citing the open door policy and confidentiality concerns. Lilly requested that the employees return to work but they declined. At 6 a.m. Lilly repeated her request that the employees meet with her individually and return to work but again the employees refused.

When the store opened, four non-employee protestors entered and joined the six employees in the customer service area. Although the customer service area is not normally open until 7 a.m., the Respondent opened it at 6 a.m. for the grand reopening. The group of 10 protestors displayed a banner, approximately 8–10 feet long, reading: "Stand up, Live Better, ForRespect.org, OUR Walmart, Organization United for Respect at Walmart." The protestors initially held the banner in front of the customer service area for a few minutes. During this brief period, video footage shows that no customers were in the customer service area, and one non-protesting employee walked behind the customer service counter without any difficulty. And, after 6:05 a.m., the banner was moved behind the customer service desk, leaving the service desk unobstructed for customers. Video footage indicates that, thereafter, none of the limited number of customers who entered the store during the protest sought assistance at the open and accessible service desk, nor were other employees impeded in any way from freely accessing the work station behind the customer service desk throughout the work stoppage. Some time after 6:15 a.m., additional nonemployee protestors entered and exited the store, joining the six employees in the customer service area, taking photographs, wearing green OUR Walmart t-shirts, and holding signs. Jankowski told the assembled group that they were trespassing and should leave the store but they did not do so. At its largest point, the group in the customer service area numbered between 15 –19 protesters (including the six employees).[8]

ment that "I'd shoot the union" was merely an intemperate remark that would not be interpreted as a threat. Van Riper made this statement during an angry outburst at returning strikers and other employees, and the employees present were understandably shocked by Van Riper's comments and level of hostility. See *Jax Mold & Machine, Inc*., 255 NLRB 942, 946–947 (1981) (supervisor's statement made in anger that he would shoot union supporters constituted an unlawful threat), enfd. 683 F.2d 418 (11th Cir. 1982) (Table). Such expressed hostility in response to protected concerted activity, even if not interpreted as a specific threat of violence, would reasonably tend to coerce employees in the exercise of their Sec. 7 rights.

[7] The Respondent has an "open door" policy, as updated in August 2012, that welcomes employees to discuss concerns with their supervisors and managers. However, Wal-Mart's November 23, 2011 guidelines on sit-ins or sick-outs advises store managers to inform groups that they are welcome to meet in one-on-one meetings but not in a group. Jt. Exs. 10, 44.

[8] Our dissenting colleague inaccurately claims that "there were six strikers and between 10 and 14 nonemployees participating in the protest in the customer service area from 6 a.m. to 6:52 a.m." As described below, the total number of protestors was smaller for much of that time period, particularly after 6:38 a.m., when the six employees left the customer service area to clock out.

At 6:29 a.m., the six employees moved to an area called "Action Alley," in an aisle leading from the first floor store entrance. They stood in front of a display approximately 20 feet from the entrance doors, and were joined by two non-employee protestors. The employees wore green OUR Walmart t-shirts and one held a 3 by 2 foot sign reading "ULP Strike." Lilly and Jankowski approached the employees and told them that they should either return to the customer service area or leave the store because they were blocking customers entering the store. Lilly added that she would prefer the employees to leave the store. In response—three minutes after entering Action Alley (at 6:32 a.m.)—the protestors left and returned to the customer service area.

Five minutes later, at 6:37 a.m., two uniformed police officers arrived and spoke with Lilly and Jankowski and a non-employee representative of the protestors. At 6:38 a.m., the six employees immediately left the customer service area to clock out and the non-employee protestors began to leave the store. The record shows that by 6:52 a.m., the six employees had clocked out and all protestors (employees and non-employees) had left the store.[9]

Following the protest, Bravo gave the Respondent a letter offering to return to work. Bravo and Lee returned to work at 11 p.m. that same evening. On November 4, Hammond, Lee, Tanner, and Washington also submitted letters offering to return to work. Between November 5 and 8, the Respondent issued second written coachings to Hammond, Lee, Tanner, Washington, and Whitney. Bravo, who had an active prior infraction, received a third written coaching.[10] These coachings are governed by the Respondent's disciplinary policy; first, second, and third level coachings stay "active" for a year and are progressive, i.e., an employee who has a first level coaching on file will receive a second level if he is disciplined again for a similar infraction within 12 months. Employees with active third level coachings on file may be subject to termination for subsequent disciplinary infractions.

[9] Two of the employee protestors, Bravo and Lee, remained outside the store to circulate a petition. The protestors remained outside with a large banner distributing leaflets until approximately 9:01 a.m. when the protest ended and the participants left. Neither the Respondent nor our dissenting colleague takes issue with the protest occurring outside the store.

[10] The coaching documents for each employee state the reason for the coaching as "Inappropriate Conduct, Unauthorized Use of Company Time." The form then lists "Observations of Associate's Behavior and Performance" stating, "Abandoned work immediately befor[e] Grand Opening event and refused to return to work after being told to do so. [T]hen engaged in a sit-in on the sales floor and physically occupied a central work area. [T]hen joined with pre-coordinated flash mod 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."

Analysis

Section 7 of the Act protects employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." It is well established that work stoppages are protected by Section 7, as are activities engaged in for the purpose of applying economic pressure on employers. *Atlantic Scaffolding Co*., 356 NLRB 835, 836–837 (2011). See *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 15 (1962). Courts have recognized that "[i]nconvenience or even some dislocation of property rights may be necessary in order to safeguard" Section 7 rights. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 fn. 8. (1945). These rights are not unfettered. As we explained in *Quietflex Mfg. Co.*, in striking "an appropriate balance" between the employee Section 7 rights and the employer's property rights, the Board is to accommodate both rights "with as little destruction of one as is consistent with the maintenance of the other." 344 NLRB at 1058 (quoting *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956)). To strike this proper balance, the Board in *Quietflex* set forth a 10-factor test that was expressly formulated to balance employees' protected right to engage in work stoppages with an employer's property rights. Since its issuance, the Board has applied the *Quietflex* factors to work stoppages occurring in a variety of settings, including a hotel,[11] an oil refinery,[12] and the streets of Las Vegas,[13] to determine whether those work stoppages were protected. In each setting, the Board utilized the *Quietflex* test to evaluate the unique circumstances presented, including the type of business involved and the location of the work stoppage itself.

Consistent with this settled precedent, we apply the *Quietflex* analysis to the instant work stoppage. The *Quietflex* factors are:

(1) the reason the employees have stopped working;

(2) whether the work stoppage was peaceful;

(3) whether the work stoppage interfered with production, or deprived the employer access to its property;

(4) whether employees had adequate opportunity to present grievances to management;

(5) whether employees were given any warning that they must leave the premises or face discharge;

[11] *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB No. 128, slip op. at 4–8 (2014), enforced sub nom. *Fortuna Enterprises, LP v. NLRB*, 789 F.3d 154 (D.C. Cir. 2015).

[12] *Atlantic Scaffolding,* supra 356 NLRB at 836–837.

[13] *Nellis Cab Co.*, 362 NLRB No. 185, slip op. at 3 (2015).

(6) the duration of the work stoppage;

(7) whether employees were represented or had an established grievance procedure;

(8) whether employees remained on the premises beyond their shift;

(9) whether employees attempted to seize the employer's property; and

(10) the reason for which employees were ultimately discharged [disciplined].

The judge concluded that factors 1, 2, 3, 5, 6, 8, 9, and 10 each favored a finding that the six employees were engaged in protected conduct when they participated in the in-store work stoppage to protest Van Riper's treatment of remodeling employees. As set forth below, we agree with the judge's conclusions and affirm his findings on these factors. As to the judge's findings that factors 4 and 7 were "neutral, at best," we agree with the judge as to factor 4, but find that factor 7 further supports a finding that the protest was protected.

Factor 1: We agree with the judge, and find that the employees' work stoppage was concerted activity for the purpose of mutual aid or protection. The employees clearly stated that they were engaged in a collective protest to draw attention to what they viewed as abusive treatment by supervisor Van Riper, and to seek permanent positions for the temporary renovation staff. In the weeks leading up to the work stoppage, employees repeatedly raised their concerns about Van Riper to management with no response. As the renovation was drawing to a close, employees had an immediate need to press their concerns to management about Van Riper's ongoing treatment and to ensure the continued employment of renovation staff.[14] Leading up to the protest, employees provided management with opportunities to avoid the work stoppage to no avail. Indeed, on the evening before the work stoppage, employee Tanner informed a representative of the Respondent that a work stoppage was to occur the next morning but could be avoided if the Respondent promised to continue to employ renovation staff. Accordingly, we find that employees clearly had protected concerns as their core justification for their concerted work stoppage. We further find that those concerns were pressing, particularly given the end of the renovation project, and the fact that employees' prior attempts to communicate with management were largely ignored.

Factor 2: We agree with the judge that the work stoppage was peaceful. There is no evidence that the protest was in any way violent, unruly, or even confrontational. Indeed, as discussed further below, the employees involved immediately responded to the Respondent's request to move out of a busy area so as not to impede entering customers.

Factor 3: We also agree, for the reasons stated by the judge, that the work stoppage neither interfered with the provision of services to customers nor prevented the Respondent from accessing its property. As set forth more fully in *The Los Angeles Airport Hilton Hotel & Towers*, supra 360 NLRB No. 128, slip op. at 5, "[i]t is not considered interference of production where the employees do no more than withhold their own services." (quoting *Quietflex*, 344 NLRB at 1057, fn. 6). The relevant inquiry instead is whether the striking employees interfered with or prevented non-striking employees from performing their work.

As the judge found, there was no interference with either the Respondent's access to its property or the work of employees who were not involved in the work stoppage. We note that the Respondent's Richmond store is a large, multidepartment store with multiple entrances and exits. The protest at issue involves a small group of employees and a roughly equivalent number of nonemployee supporters who largely confined themselves to a small enclosed customer service area to the side of the front store entrance. There is no evidence that the small protest prevented other employees from serving customers or prevented the customers themselves from entering, leaving, or shopping in any part of the two-story department store.[15] The work stoppage, which occurred prior to and within the first hour of the store's opening had little to no impact on the Respondent's ability to serve its customers. While the employees may have positioned themselves in front of the customer service desk with their banner for approximately 2 minutes at the beginning of the work stoppage, they then moved themselves and their banner behind the desk to allow movement on both sides. Video footage shows that no customers attempted to access the customer service area during the brief time that employees were engaged in protest there.

[14] *Peck, Inc.*, 226 NLRB 1174, 1174 fn. 1 (1976), a pre-*Quietflex* case cited by our colleague, is distinguishable. In *Peck*, the Board distinguished between a protest in response to an immediately pressing concern and one protesting a less time-sensitive matter, finding that the former circumstance presented a mitigating factor favoring protection. Here, the employees were seeking immediate hiring of renovation personnel and protesting ongoing abusive treatment that had gone unaddressed by management. We note, contrary to the dissent's suggestion, that the *Quietflex* test does not require a showing that employees acted in response to an urgent safety matter or imminent threat.

[15] See *Goya Foods of Florida*, 347 NLRB 1118, 1134 (2006) (peaceful union demonstration inside supermarket protected as it "had minimal adverse impact on operations. . ."), enfd. 525 F.3d 1117 (11th Cir. 2008).

In fact, employees were easily able to go behind the customer service desk during the entirety of the protest, and one employee did so during the brief period when the banner was positioned in front of the desk. Beyond that, the six employees and the non-employee protestors remained in the customer service area, except for a brief, 3-minute presence in Action Alley at the front of the store. There is no evidence that the work stoppage disturbed any other part of the store or in any way prevented other employees from performing their duties.[16] Nor is there evidence that any customer complained about a disruption or was in any way impeded in their ability to shop in the store during the brief time that it occurred.[17]

Factor 4: We agree with the judge that the adequacy of employees' opportunity to present their grievances to management is an arguably neutral factor on these facts. As the judge found, the six employees communicated their grievances about Van Riper in a written statement to management 2 weeks prior to the work stoppage, but they received no response. Although immediately prior to and during the work stoppage, Respondent's managers offered to meet with employees, it was only on an individual basis pursuant to Respondent's open door policy. The Respondent refused employee requests to meet as a group (as the policy does not allow for group meetings). The Respondent's managers met individually with one employee prior to the work stoppage and separately with other employees, afterward, to discuss their concerns. Thus, as the judge correctly found, the Respondent, through its open door policy, provided employees with a forum to discuss their grievances. However, to the extent that this factor weighs against protection, we accord it less weight because that open door policy was limited to individual discussions and barred group grievances.

Factor 5: We agree with the judge that at no point during the work stoppage were employees warned that they would face discipline for failing to leave the premises. As set forth above, Lilly requested that the six employees return to work both prior to and shortly after the store's opening. Lilly did not, however, inform employees that they would be disciplined if they refused. Some time after 6:15 a.m., nonemployee supporters entered the store and delivered signs and T-shirts to the protesters in the customer service area. Jankowski then told the assembled group that they were trespassing and should leave the store. Again, however, there was no threat of discipline. Later, when the six employees moved their protest to Action Alley at 6:29 a.m., Lilly and Jankowski told those assembled to *return to the customer service* area or leave the store. The employees complied with their request and returned to the customer service area. Finally, when police officers arrived in the store at 6:37 a.m., Lilly and Jankowski told the employees to leave the store. The employees immediately complied and left the customer service area to clock out.

We agree that this factor supports a finding that the work stoppage was protected. The Respondent's representatives, Lilly and Jankowski, sent mixed messages to the group, alternately telling them to leave the store or return to the customer service area.[18] The work stoppage itself lasted only a short period of time while the store was open, with employees leaving the customer service area at 6:38 a.m. to clock out. At no point during this protest did the Respondent inform employees that they would be disciplined for failing to comply with these

[16] That the Respondent may have had to use other employees to prepare for the store's reopening does not weigh against protection. Noting that a purpose of work stoppages is to exert pressure on the employer, the court in *Fortuna Enterprises, LP v. NLRB*, 789 F.3d 154, 161 (D.C. Cir. 2015), observed that by reassigning employees who did not participate in the work stoppage to cover for the protesting employees, the economic impact on the hotel would be "because employees withheld their own services, not because employees interfered with the ability of other employees to do their job." See also *The Los Angeles Airport Hilton Hotel & Towers*, slip op. at 5.

[17] Citing his own concurrence in *Starbucks Coffee Co.*, 360 NLRB No. 134, slip op. at 7 (2014), the dissent appears to assert that any disruption to customers by employees engaged in a concerted work stoppage renders that protest unprotected by assigning a heavy negative weight to this factor. Indeed, in lieu of the *Quietflex* factors, he would apply a "disruption or interference" standard that entails a broad proscription against any activity occurring on a retail sales floor. As explained below, our colleague's view runs counter to well-established Board precedent in which the Board carefully balances, on a case-by-case basis, employees' Sec. 7 right to engage in a concerted protest with an employer's property rights, and takes account of the degree, if any, to which an employer was actually impeded in its ability to do business. The Board also follows this approach in non-work stoppage contexts. See *Thalassa Restaurant*, 356 NLRB 1000, 1000 fn. 3 (2011) (finding that a protest in a restaurant by an employee with nonemployee participants was protected, noting that the protestors did not disturb diners, block their movement, or interfere with employees performing their duties); *Crown Plaza LaGuardia*, 357 NLRB 1097, 1100 (2011) (finding a protest involving 13–15 employees in a public hotel corridor to be protected because there was no evidence that it disturbed hotel guests); and *Saddle West Restaurant*, 269 NLRB 1027, 1041–1043 (1984) (finding that an employee's statement to coworkers that they should boycott the casino's restaurant was protected where there was no evidence that it caused a disturbance or interfered with operations).

[18] The dissent asserts that we should find that a threat of discipline was implicit in these requests to return to work or leave the store. We disagree. Lilly and Jankowski's request that employees leave Action Alley and return to the customer service area implies that, to some degree, the Respondent may have condoned the limited protest in the customer service area. More importantly, we would not infer a threat of discipline from a request that employees leave the premises. The analytical factor itself is clear: "whether employees were given any warning that they must leave the premises or face discharge." *Quietflex*, supra, 344 NLRB at 1056. To infer a threat of discipline or discharge from a request to leave would render this factor meaningless.

instructions. See *Nellis Cab Co.*, supra 362 NLRB slip op. at 3.

Factor 6: The work stoppage was short in duration, and thus we agree with the judge that it favors protection. The entirety of the work stoppage lasted less than an hour and a half. The store had been open for less than an hour when the stoppage ended. The Board has found work stoppages of longer durations to be protected.[19]

Factor 7: We find that this factor—whether employees were represented or had an established grievance procedure—favors protection. The judge, analyzing this factor simultaneously with factor 4, found both to be neutral because the Respondent invited employees to voice their concerns about Van Riper on an individual basis. Despite our agreement with the judge as to the neutrality of factor 4, we find that factor 7 favors protection as it is undisputed that the employees were unrepresented for collective bargaining purposes and enjoyed no procedure for group grievances. See *HMY Roomstore, Inc.*, 344 NLRB 963, 963 fn. 2 (2005) ("[T]he existence of an established mechanism for presenting group grievances" is a factor in determining whether the work stoppage is protected). The ability of employees to address their complaints collectively, where they can mutually aid and support one another, provides a distinctly more effective way for them to engage with management. The record shows that the Respondent's open door policy allowed only for individual meetings with the Respondent and provided no forum for hearing group complaints. Accordingly, we find that this factor favors protection because the parties had no established procedure for resolving group grievances.

Factor 8: We agree with the judge's finding that employees did not remain on the premises after their shift. The six employees left the store just minutes prior to the end of their shift at 7 a.m. (five of the employees) or 8 a.m. (Bravo). Under these circumstances, we agree that this factor favors protection.

Factor 9: We agree with the judge that there is no evidence that employees seized or in any way impeded access to the store during the work stoppage. As set forth above, the group of six protesting employees confined themselves to a small section of a very large store for less than an hour after its 6 a.m. opening. Employees and customers enjoyed continuous access to the customer service desk throughout the work stoppage.[20] Thus, we find that this factor, too, favors protection.

Factor 10: The judge correctly found that the reason for which employees were ultimately disciplined favors a finding that their work stoppage was protected. The Respondent issued disciplinary coachings against the six employees for abandoning work, refusing to return to work, and unauthorized use of company time, which are directly related to the work stoppage. The other "observations" listed on the coaching form, i.e., engaging in a sit-in and disrupting business and customer service operations, are either baseless[21] or part and parcel of the work stoppage itself. For these reasons, we find that this factor favors a finding that the work stoppage was protected.

In sum, we find that employees were engaged in a protected work stoppage. We specifically find that 9 of the 10 *Quietflex* factors favors the work stoppage's protection, and factor 4, whether employees had an adequate opportunity to present their grievances to management is equivocal. The work stoppage sought to resolve pressing problems concerning the continued employment of renovation staff and ongoing mistreatment by a supervisor. The work stoppage itself was peaceful, lasted for a short duration, was largely confined to the customer service area of the Respondent's store, and resulted in little to no disruption of the Respondent's ability to serve its customers. Employees did not stay past the expiration of their shifts or seize the Respondent's property, they promptly left Action Alley when requested to do so by managers, and they immediately left the customer service area when directed to do so by police. While the employees involved in the work stoppage had a limited method for presenting their grievances individually through the Respondent's open door policy, they had no representation or ability to concertedly present group concerns, and the Respondent failed to acknowledge or

[19] Our colleague would find that the 88-minute protest constituted a "long time," citing cases involving large and boisterous protests in a small restaurant (*Restaurant Horikawa*, 260 NLRB 197, 198 (1982)) and a protest lasting (contrary to our colleague) over 4 hours with employees refusing to leave after being provided with the opportunity to present their grievances to management later that morning. *Cambro Mfg*, 312 NLRB 624, 635 (1993). There is no bright line delineating how long a protest can last before it loses the protection of the Act. Rather, the Board evaluates this factor in context, examining the length of the work stoppage, and the circumstances in which the stoppage occurs. See e.g., *Los Angeles Airport Hilton Hotel & Towers*, supra, 360 NLRB No. 128, slip. op. at 4 fn. 16, and cases cited therein. We note that the Board has found that work stoppages ranging from a few minutes to many hours to be protected when the entire context in which the work stoppage occurred is considered.

[20] Indeed, the Respondent's response to the protest did not indicate that it believed that employees impeded access to its property. For most of the duration of the work stoppage, it only requested that the employees return to work (or return to the customer service area when they went to Action Alley). Further, it refused the employees' modest request that the managers who were present at the store meet with the six employees as a group. Had management agreed to this request, the work stoppage may have been avoided entirely or quickly terminated.

[21] As explained above, there is no evidence that the work stoppage interfered with the Respondent's business.

respond to employees' previous attempts to communicate their concerns. We therefore conclude that the Respondent violated Section 8(a)(1) of the Act by disciplining employees for their participation in the work stoppage.

In reaching this conclusion, we have considered, and rejected, our dissenting colleague's contention that because this case occurs in a retail setting, we should eschew the *Quietflex* analysis. The dissent argues that *Quietflex* is inapplicable to retail businesses, restaurants and "any workplace where employees routinely mingle with and furnish services to customers and patrons." Instead, finding his own set of facts, he would employ a "disruption or interference" standard, plucked from his concurring opinion in *Starbucks Coffee Co.*, 360 NLRB No. 134 (2014), in which he relied on a nonwork stoppage case, *Restaurant Horikawa*, 260 NLRB 197, 198 (1982), decided well before *Quietflex***.** There, the Board found that the employer lawfully disciplined an off-duty employee when he joined 30 nonemployee demonstrators who "seriously disrupted" the employer's business by jamming into a crowded restaurant and boisterously parading through the restaurant during peak restaurant hours. Unlike the *Quietflex* cases, *Restaurant Horikawa* was not a case where employees joined together and withheld their labor by engaging in a work stoppage.[22]

The dissent's rejection of the *Quietflex* test is essentially grounded on the economic harm that the work stoppage inflicted on the Respondent.[23] As we explained in *Los Angeles Airport Hilton Hotel & Towers*, "this argument is antithetical to the basic principles underlying the statutory scheme, i.e., the right of employees to withhold their labor in seeking to improve their terms of employment, and the use of economic weapons such as work stoppages as part of the 'free play of economic forces' that should control collective bargaining." 360 NLRB No. 128, slip op. at 5, quoting *Atlantic Scaffolding Co.*, 356 NLRB at 837 (quoting *NLRB v. Nash-Finch Co*., 404 U.S. 138, 144 (1971)).[24] Indeed, Hilton Hotel, which was the employer in *Fortuna Enterprises v. NLRB*, unsuccessfully urged the court to adopt a service industry exception, similar to that urged by our dissenting colleague. Stating that the Board was not obligated to create special rules for the service industry, the court explained, that "[o]ne possible purpose of a work stoppage, whether at a factory or at a hotel, is to exert economic pressure on the employer." 789 F.3d 161. The court further explained that in evaluating whether the work stoppage interfered with operations (*Quietflex* factor 3), the fact that "the work stoppage did disrupt some of the hotel's operations, does not compel a finding that the work stoppage interfered with the provision of services by other employees in the relevant sense." Id. at 162.

In sum, as is clear from our *Quietflex* decisions, the factors considered under that test take into account the concerns that the dissent has raised pertaining to customer relations in retail and service industries. Having considered all the factors, we conclude that the relatively small, brief, peaceful and confined work stoppage during the early morning hours of a multi-story department store's opening did not lose the protection of the Act.

Accordingly, we affirm the judge's finding that the Respondent's discipline of the six employees engaged in the work stoppage violated Section 8(a)(1) of the Act.

ORDER

Respondent, Walmart Stores, Inc., Bentonville, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening associates by asking them if they are afraid Walmart might close the Placerville, California store 2418 if too many associates join OUR Walmart.

(b) Maintaining a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

(c) Selectively and disparately applying its July 2010 dress code for California associates to Richmond, California store 3455 associates when they wear clothing with OUR Walmart or UFCW logos, but not when they wear other clothing that does not comply with the dress code.

(d) Threatening store associates that it would "shoot the union."

(e) Threatening store associates that Walmart would never be union and thereby informing associates that it would be futile for them to select OUR Walmart as their collective-bargaining representative.

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[22] Moreover, even in non-work stoppage cases, the Board has declined to extend its holding in *Restaurant Horikawa* to other retail settings. See *Goya Foods of Florida*, supra, 347 NLRB at 1134 (noting that restaurant patrons "have a normal expectation of quiet enjoyment as opposed to a busy supermarket involved here"). We find the judge's rationale in *Goya Foods* particularly applicable to this case which also involves a large, busy superstore.

[23] That the employees chose to engage in their protest on the store's re-opening day does not militate against protection. "The protected nature of the work stoppage … [is] not vitiated by the effectiveness of its timing." *Atlantic Scaffolding Co.*, supra, 356 NLRB at 837.

[24] Our colleague argues that by employing the *Quietflex* factors, we "give employees carte blanche to do whatever they want, whenever they want." We could not disagree more. By applying the *Quietflex* factors, we seek to balance the fundamental employee right to exert economic pressure with an employer's right to maintain the integrity of its property. The factors set forth above address those concerns.

(f) Threatening store associates by telling them that associates returning from strike would be looking for new jobs.

(g) Prohibiting store associates from speaking to associates returning from strike about the returning strikers' activities on behalf of OUR Walmart.

(h) Issuing disciplinary coachings to associates because they engaged in a protected work stoppage, and to discourage associates from engaging in those or other protected activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overbroad policy in its July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

(b) Furnish all current employees in its California stores with inserts for its California employee dress code that (1) advise that the unlawful July 2010 policy has been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) publish and distribute to employees at its California stores revised copies of its California employee dress code that (1) do not contain the unlawful policy, or (2) provide the language of a lawful policy.

(c) Within 14 days from the date of the Board's Order, remove from its files any references to the November 2012 two-level disciplinary coachings that Respondent issued to Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney because those associates engaged in a protected work stoppage on November 2, and to discourage associates from engaging in those or other protected activities, and within 3 days thereafter notify Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney in writing that this has been done and that the disciplinary coachings will not be used against them in any way.

(d) Within 14 days after service by the Region: post at store 2418 in Placerville, California, copies of the attached notice marked "Appendix A"; post at store 3455 in Richmond, California, copies of the attached notice marked "Appendix B"; and post at all other California stores copies of the attached notice marked "Appendix C."[25] Copies of the notices, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed one or more of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the appropriate notice (Appendix A, B, or C) to all current associates and former associates employed by the Respondent at the closed facilities at any time since July 8, 2012.

(e) Within 14 days after service by the Region, hold a meeting or meetings at the Respondent's Richmond Store 3455, scheduled to have the widest possible attendance, at which the attached notice marked "Appendix B" shall be read to employees in both English and Spanish, by the Respondent's store 3455 manager or, at the Respondent's option, by a Board agent in the Respondent's store manager's presence.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 27, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

This case involves a modern day sit-down strike and on-premises protest by employees inside a Walmart retail store before and during the store's grand reopening after

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

remodeling. My colleagues find that the employees had a protected right to engage in these activities under the National Labor Relations Act (NLRA or Act) and that the Respondent, Walmart Stores, Inc., violated the Act when it issued "coachings" to the employees who participated in these activities. I disagree. I believe the Act clearly renders unprotected the employees' in-store sit-down strike/protest, and I respectfully dissent from my colleagues' findings to the contrary. The majority also finds that the Respondent committed certain other violations of the Act. I agree with some of these and disagree with others as described below.[1]

BACKGROUND

A. General

Walmart's Richmond, California store had been closed for some time for remodeling. On October 17, 2012,[2] five temporary employees sent a letter to the Respondent addressing several matters, including a complaint about Field Project Supervisor Van Riper.[3] Also in October, members of OUR Walmart[4] and UFCW staff met on two occasions to plan a work stoppage/demonstration at the Respondent's Richmond store to protest Van Riper's treatment of the "remodeling associates" (employees temporarily employed at the Richmond store to assist with the remodeling). The meeting participants selected November 2 for the work stoppage because the Richmond store's grand reopening was scheduled that day, thus providing maximum impact for their planned actions.

B. The Work Stoppage and Demonstration

At 11 p.m. on November 1, Remodeling Associate Misty Tanner told the Richmond store's assistant manager about the planned work stoppage and said that she might be able to call off the work stoppage if the assistant manager could promise that the remodeling associates would be offered permanent positions with the Respondent after the remodeling project concluded. The assistant manager notified the Respondent's labor relations department of the work stoppage/protest plans.

Early on the morning of November 2, Richmond store personnel were in the process of completing their remodeling work and readying the store for its grand reopening to the public, which was scheduled to begin at 6 a.m. To celebrate the reopening, vendors and costumed characters were to interact with customers and their families outside the store. Shortly after 3 a.m., Human Resources Manager Janet Lilly and Market Asset Protection Manager Paul Jankowski arrived at the Richmond store to assist with the grand reopening and also to talk to employees about their issues with Van Riper. Lilly and Jankowski had a discussion with one of the remodeling associates on November 2. Lilly met with other employees on subsequent days.

At approximately 5:24 a.m., five remodeling associates—Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington, and Timothy Whitney—and maintenance employee Raymond Bravo stopped working and walked to the customer service area of the store to begin a work stoppage/protest. The customer service

[1] I join my colleagues in affirming the judge's finding that the Respondent's 2010–2012 California dress code policy, which restricted the kinds of logos employees were permitted to wear, violated Sec. 8(a)(1), notwithstanding the policy's "savings clause." The policy's restrictions were overbroad, and the "savings clause," under which logos "allowed under federal or state law" were permitted, improperly placed the burden on employees to determine their legal rights. I also agree with my colleagues that field project supervisor Art Van Riper is an apparent agent of the Respondent and that his October 12 statements concerning the futility of choosing a union, his threat against returning strikers, and his order to employees not to talk to returning strikers each violated Sec. 8(a)(1) of the Act.

In contrast, I disagree with my colleagues that Assistant Manager Susan Stafford's query to employee Barbara Collins about whether, if the Organization United for Respect at Walmart (OUR Walmart) became too big, the Respondent might "close down the [Placerville, California] store" violated Sec. 8(a)(1). I believe the exchange was essentially conversational and innocuous, and I would find that the statement by Stafford, a low-level manager who obviously lacked power to close any store, was not an unlawful threat.

I likewise disagree with my colleagues' adoption of the judge's finding that Van Riper's comment, "I'd shoot the union," was an unlawful threat. The evidence, including a video that captured this incident, shows that the context of Van Riper's remark was an encounter with several strikers who had returned to the Richmond store to read and deliver a "return to work" letter. Van Riper expressed frustration and stated that he didn't really want to hear about it, that they should get back to work and leave him alone, that he was in the Union so he knows the Union, and that if it were up to him he would "shoot the union." I believe such a remark was hyperbole (a union obviously cannot be shot) and would not reasonably be interpreted as a threat. See *F. Strauss & Son*, 200 NLRB 812, 822 (1972) (comment by supervisor that he would like to "blow up" union supporters with dynamite the sort of hyperbole unlikely to be viewed as a genuine threat). Contrary to the majority's contention that Van Riper's statement was part of an "angry outburst," the video evidence of the encounter shows that Van Riper was not angry, although he was annoyed and intent on getting the employees back to work; and none of the employees appeared to take the remark as a threat at the time it was made. This supports a conclusion that the statement was not objectively threatening, and the statement reflected personal frustration with the Union ("if it were up to me . . .") that did not violate the Act.

[2] All dates are 2012 unless otherwise noted.

[3] The letter sought the removal of Van Riper, permanent positions for temporary employees, and a meeting between the store manager and members of OUR Walmart to discuss the employees' concerns. The letter was received by Human Resources Manager Janet Lilly on or about October 31.

[4] OUR Walmart is a group of current and former employees of Walmart who advocate for various working conditions, benefits, and workplace policies at Walmart. OUR Walmart is closely aligned with the United Food and Commercial Workers International Union (UFCW).

area is located immediately to the right of the first-floor store entrance. It contains a long counter with three computers/cash registers and a few seats for customers. A chest-high wall separates most of the customer service area from the rest of the store, including immediately adjacent product-display areas. The protesters were all still on the clock when they began their work stoppage.

At around 5:29 a.m., Lilly and Jankowski entered the customer service area. Lilly asked the protesters what they wanted and offered to meet with them individually to discuss their concerns in accordance with the Respondent's open-door policy. The protesters refused Lilly's offer of one-on-one meetings, stating that they wanted to discuss their concerns with a Walmart representative as a group, not individually. Lilly stated she was not willing to conduct group meetings because the Respondent's practice is to hold individual meetings and also because it was Lilly's belief that associates' confidential information should not be shared in a group setting. Lilly asked the employees to return to work. They refused to do so and remained in the customer service area. At around 6 a.m., Lilly repeated her requests that the participants in the work stoppage meet with her individually to discuss their concerns and that they return to work. The protesters again refused to meet unless Lilly agreed to meet with them all as a group and again refused to return to work.

Shortly after the store opened at 6 a.m., four nonemployee supporters of the OUR Walmart campaign entered the store and joined the protest in the customer service area. After their arrival, the nonemployees and employee protesters displayed a green, 8-to-10-foot-long banner inscribed with various messages.[5] For about 2 minutes, the protesters held the banner in a way that blocked most of the customer service counter. During this time, there were no customers in the customer service area. An employee briefly walked behind the customer service counter without difficulty or incident. At 6:05 a.m., the protesters moved the banner to the back of the customer service area, thereby unblocking the counter, although a substantial number of individuals continued to congregate and make a moderate amount of noise (mostly the result of conversations among several people in a small area) near the customer service counter, making it more difficult and forbidding for customers to approach the counter.

Over the next several minutes, protesters periodically left the customer service area, exited the store, and then returned. For example, at approximately 6:10 a.m., Lee left the customer service area for approximately 5 minutes to conduct a media interview in the parking lot. At approximately 6:16 a.m., UFCW staff delivered signs and OUR Walmart t-shirts to the protesters in the customer service area, and they took photographs of the protest inside the store. Jankowski warned the protesters not to take photographs or hold signs, and he also told them they were trespassing and should leave the store. At times, as many as 15–19 protesters (both nonemployees and the six employees who were continuing their work stoppage) were present in the customer service area.

Meanwhile, some of the UFCW staff and community members held signs and distributed leaflets outside the store in support of the work stoppage inside the store. These individuals were standing near a storage area for shopping carts, and customers who wanted to get a cart would have to walk around the protesters. The Respondent assigned one of its greeters to assist customers with getting carts from the storage area**.**

At approximately 6:29 a.m., employees Bravo, Hammond, Lee, Tanner, Washington, and Whitney, joined by two nonemployees, left the customer service area, stood in front of a display located in the main store aisle about 20 feet from the first-floor store entrance and posed for photos. The Respondent calls this aisle "Action Alley" because the store displays advertisements in this aisle. Bravo, Tanner, and Lee had donned bright green "OUR Walmart" t-shirts, and Bravo displayed a 3-by-2-foot sign that stated "ULP Strike." Several other protesters remained in the customer service area, where they continued to display the large green banner.

Upon seeing the protesters move to Action Alley, Lilly and Jankowski approached and told them that they were blocking customers from entering and shopping in the store and that they should either return to the customer service area or leave the store. Lilly added that she would prefer that the protesters simply leave the store. At 6:32 a.m., the protesters left Action Alley and returned to the customer service area (to some brief applause from one of the protesters who had stayed behind in that area). On at least one other occasion during the customer service area protest, Jankowski told them they were trespassing and asked them to leave the store.

At approximately 6:37 a.m., two uniformed police officers entered the store and spoke with Lilly and Jankowski and then to a representative of the protesters. After

[5] The banner read:

Stand Up
Live Better
ForRespect.org
OUR Walmart
Organization United for Respect at Walmart

some discussion, the protesters agreed that they would leave the store after the six employees clocked out. The Respondent informed them that they could continue to protest outside the store. The six employees left the customer service area at 6:38 a.m. to clock out, while UFCW staff and community supporters remained in and around the customer service area. All protesters (including the six employees) left the store by 6:52 a.m. (before the end of the employees' scheduled shifts, which ran until 7 a.m. for the remodeling associates and 8 a.m. for Bravo). Some employees, including Bravo and Lee, joined in leafleting and related activities outside the first-floor store entrance.

In the 52 minutes during which the protesters occupied the customer service area while the store was open, approximately 53 customers entered through the store entrance immediately adjacent to customer service, and 21 customers exited through those doors. The store has multiple entrances, so it is unclear exactly how many customers were affected by the protest in addition to customers who used the entrance directly adjacent to the customer service area.

At approximately 7:29 a.m., OUR Walmart members (including employee Bravo), UFCW staff, and community supporters began protesting in an area outside the store's second-floor entrance, where they displayed a banner and distributed leaflets.

C. The Discipline

Between November 5 and 8, the Respondent issued disciplinary warnings known as "coachings" to each of the six employees who participated in the November 2 work stoppage. Under "Reasons" for the coachings, the coachings listed "Inappropriate Conduct, Unauthorized Use of Company Time." Under "Observations of Associate's Behavior and/or Performance," the coachings stated that the employees "[a]bandoned work . . . and refused to return to work," "engaged in a sit-in on the sales floor and physically occupied a central work space," "joined with a pre-coordinated flash mob . . . to take over, occupy and deny access to the main customer pathway through the front of the store," and "[r]efused to stop/leave when told to do so." Under "Impact of Associate's Behavior," the coachings stated that the employees' conduct "[d]isrupted business and customer service operations during key Grand Opening event and interfered with . . . co-workers' ability to do their jobs," "[c]reated a confrontational environment in our store," and "likely lost customers as a result."

DISCUSSION

The Board has recognized that retail establishments are governed by special rules that permit employers to prohibit actions that disrupt or interfere with the employer's operations in the presence of customers inside the retail establishment. In *Restaurant Horikawa*,[6] an employee's conduct was found unprotected by the Act when the employee and a group of nonemployees entered a restaurant and "paraded boisterously about" during the dinner hour for 10 to 15 minutes. The Board reiterated that "'different rules" apply to retail establishments . . . based on the unique challenges associated with their business":

> The Board has traditionally acknowledged the necessity for applying different rules to retail enterprises from those to manufacturing plants with respect to the right of employees to engage in union activity on their employer's premises. Specifically, the Board has recognized that *the nature of retail establishments, including restaurants, requires that an atmosphere be maintained in which customers' needs can be effectively attended to and that, consequently, a broad proscription of union activity in areas where customers are present is not unlawful*. As a result, the Board has allowed retail establishments to impose no-solicitation rules which preclude soliciting in areas frequented by customers so as to prevent disruption of the customer-salesperson relationship. See *Marshall Field & Company*, 98 NLRB 88, 92 (1952), enfd. as modified 200 F.2d 375 (7th Cir. 1952). . . . [W]e conclude that this uninvited invasion of Respondent's restaurant premises transgressed the boundaries by which concerted activity, even that which, as here, was nonviolent, and in protest of Respondent's unlawful conduct, is deemed protected by the Act. Consequently, the demonstrators inside the restaurant did not enjoy the Act's protection.[7]

The Board in *Restaurant Horikawa* recognized that, in retail settings, creating a pleasant in-store environment is a foundational component of production. This is the primary means by which retail stores encourage customers to make purchases, to stay longer and to return again. For this reason, on-premises conduct that disrupts such an environment, especially in the presence of customers, is more than a distraction: until the participants leave, they prevent the store from being used for the sole reason it exists, which is to provide customers a positive, carefully cultivated in-store experience.[8]

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[6] 260 NLRB 197 (1982).

[7] 260 NLRB at 198 (emphasis added; footnotes omitted).

[8] Conventional retail stores—often called "bricks-and-mortar" stores—literally exist for the sole purpose of providing a positive in-store experience for customers. Otherwise, customers have ample opportunities to shop elsewhere, including an ever-increasing proliferation of online retailers. See, e.g., K. Pauwels & S. Neslin, *Building With Bricks and Mortar: The Revenue Impact of Opening Physical Stores in a Multichannel Environment*, 91 J. Retailing 182–197 (2015);

Subsequent to *Restaurant Horikawa*, therefore, the Board has continued to apply a "disruption or interference" standard to Section 7 activities in retail establishments. See, e.g., *Saddle West Restaurant*, 269 NLRB 1027, 1042–1043 (1984) (single comment in front of a customer about boycotting the restaurant not so disruptive as to lose the protection of the Act); *Thalassa Restaurant,* 356 NLRB 1000, slip op. at 1 fn. 3 (2011) (Board majority, with Member Hayes dissenting, finds that an employee who "briefly" entered restaurant with group of nonemployees during off-peak time to deliver a letter protesting alleged labor law violations did not lose the protection of the Act, where there was no evidence that the group disturbed the handful of patrons present, blocked ingress or egress of any individual, was violent or caused damage, or prevented any employee from performing his work); cf. *Starbucks Coffee Co.*, 360 NLRB No. 134, slip op. at 7 (2014) (Member Miscimarra, concurring) ("[A]s the Board previously held in *Restaurant Horikawa*, . . . retail employees lose the Act's protection if their conduct causes disruption of or interference with the business.")

In industrial settings such as manufacturing facilities, it is also well established that at a certain point, employees lose the Act's protection when they engage in an on-premises work stoppage. In *Quietflex Mfg. Co.,* 344 NLRB 1055 (2005), the Board set forth a multifactor balancing test for "determining which party's rights should prevail in the context of an on-site work stoppage."[9] Even though a work stoppage commencing on the employer's property may enjoy the Act's protection, the Board recognized that "'[a]t some point, an employer is entitled to exert its private property rights and demand its premises back.'" *Quietflex*, 344 NLRB at 1056 (quoting *Cambro Mfg. Co.*, 312 NLRB 634, 635 (1993)). The *Quietflex* factors include the following:

> (1) the reason the employees stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered with production or deprived the employer access to its property; (4) whether employees had adequate opportunity to present grievances to management; (5) whether employees were given any warning that they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether employees remained on the premises beyond their shift; (9) whether employees attempted to seize the employer's property; and (10) the reason for which employees were ultimately disciplined or discharged.[10]

In *Hudgens v. NLRB,* 424 U.S. 507, 522 (1976), the Supreme Court stated that "[t]he locus of [the] accommodation [between employer and employee rights] . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." Therefore, the *Quietflex* factors, when applicable, do not involve merely adding up how many factors favor protection and how many factors do not. Rather, "[t]o determine at what point a lawful on-site work stoppage loses its protection, a number of factors must be considered, and the nature and strength of competing employee and employer interests must be assessed."[11]

Applying the factors set forth in *Quietflex*, the judge found that eight of the ten factors "clearly favor" finding that the employees' conduct remained protected. My colleagues agree with the judge, except they find that a ninth factor also favors protection.[12] I disagree with the judge and my colleagues.

To begin with, the situation presented in this case—involving a retail setting where employees engaged in an on-premises work stoppage within active retail space in the presence of customers—is governed by the "disruption or interference" standard applied in *Restaurant Horikawa* and similar cases described above. As the Board held in *Restaurant Horikawa*, "a broad proscription of union activity in areas where customers are present is not unlawful."[13] Here, as in *Restaurant Horikawa*, employees' activities "interfered with Respondent's ability to serve its patrons in an atmosphere free of interruption and unwanted intrusion. . . . Such an invasion of an employer's premises might be hard to find warranted even in an industrial setting. In a restaurant or other retail establishment it is wholly unwarranted and cannot be justified regardless of purpose or origin."[14]

F. Bernstein, J.S. Song, X. Zheng, "*Bricks-and-Mortar" vs. "Clicks-and-Mortar": An Equilibrium Analysis*, 187 European J. Operational Res. 671–690 (2008).

[9] Id. at 1056.

[10] 344 NLRB at 1056–1057.

[11] Id. at 1056. See also *Cambro*, supra ("'The 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.'") (quoting *Molon Motor & Coil Corp. v. NLRB*, 965 F.2d 523, 525 (7th Cir. 1992)).

[12] The judge found that factors 4 and 7—whether employees had an adequate opportunity to present their grievance to management, and whether employees were represented or had an established grievance procedure—were neutral at best and did not favor a finding either way. My colleagues adopt the judge's finding that eight *Quietflex* factors favor protection, and they find that factor seven (whether employees were represented or had an established grievance procedure) also favors protection.

[13] 260 NLRB at 198 (emphasis added; footnotes omitted).

[14] 260 NLRB at 198 (footnote omitted).

See also *Starbucks Coffee Company*, 360 NLRB No. 134, slip op. at 7 (Member Miscimarra, concurring) ("[T]he Act does not confer protection upon employees, whether or not they are on duty, to occupy an employer's premises and disrupt or interfere with normal operations."). Applying the "disruption or interference" standard, it is clear that the employee actions here were unprotected. The employees did not merely refuse to work—which in and of itself is protected activity—they conducted their work stoppage inside the Respondent's store, in the presence of the Respondent's customers, occupying the physical space in the customer service area, all with the obvious, central objective of disrupting the Respondent's operations on the day of the store's grand reopening.

Equally clear, in my view, is the inapplicability of *Quietflex* in any case where employees stage a work stoppage in a restaurant or on a retail sales floor in the presence of customers, as well as in a hospital or other healthcare facilities in the presence of patients or their families, or indeed in the presence of customers or patrons in any workplace where employees routinely mingle with and furnish services to customers or patrons (such as, but not limited to, the lobby of a hotel or the floor of a casino).[15] In *Hudgens v. NLRB*, the Supreme Court held that when the rights of employees under the Act and the property rights of employers are in conflict, the Board must "accommodate[e]" both rights "'with as *little destruction of one as is consistent with maintenance of the other*.'"[16] Here, it is abundantly clear that the employees had the option of engaging in a work stoppage and conveying their message to other employees, customers and the public on public property, or at least outside the store. Indeed, after the in-store work stoppage, employees displayed a banner and distributed leaflets outside the store's second-floor entrance, and during the in-store work stoppage, one of the participants (Lee) went outside the store to conduct a media interview. The record compels a conclusion that the employees engaged in their on-premises work stoppage on the morning of the store's grand reopening, obstructing customer access to the customer service area and taking their demonstration for a time to "Action Alley," in order to disrupt the store's operations.

These facts stand in stark contrast to those in *Quietflex*, which involved a manufacturing facility and where the employees' activities were conducted *outside* the workplace. The conduct at issue in *Quietflex* was described as follows by former Chairman (then-Member) Liebman, who dissented in *Quietflex*:

> This case involves a *peaceful* work stoppage, by employees, *outside (not inside) the facility* where they worked. *Access to the facility was not blocked*, *operations were not disrupted*, and *other employees were not interfered with*. The aim of the assembled employees, who had no union and no access to a formal grievance procedure, was to present work-related complaints to their employer, *not to deprive the employer of the use of its property*.[17]

Taking account of the above facts, former Chairman Liebman described the employer's property rights in *Quietflex* as "*entirely abstract*."[18] This bears no resemblance to the instant case. The careful balancing conducted in *Quietflex* has no application or justification where, as here, the employee-participants engaged in a work stoppage in a retail setting, inside the store, in the presence of customers, with an obvious intention of interfering with operations on the day of the store's grand reopening.

There is no merit in my colleagues' claim that I dispute "the right of employees to withhold their labor in seeking to improve their terms of employment, and the use of economic weapons such as work stoppages as part of the free play of economic forces that should control collective bargaining."[19] Obviously, our statute protects concerted work stoppages engaged in by employees for mutual aid or protection.[20] The problem here is that the employees did not merely "withhold their labor." Rather, they occupied the workplace and prevented customers from shopping in an atmosphere that was free from

[15] The majority cites no case—not one—in which the Board has applied *Quietflex* to a work stoppage on a retail-sales floor in the presence of customers. Indeed, my colleagues cite no case in which the Board has applied *Quietflex* to a work stoppage in a retail setting, period.

[16] 424 U.S. at 522 (emphasis added) (quoting *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956)).

[17] 344 NLRB at 1060 (Member Liebman, dissenting) (emphasis added).

[18] Id. (emphasis added).

[19] Majority opinion, slip op. at 7 (quoting *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB No. 128, slip op. at 5 (2014) (internal quotations omitted)).

[20] As I have stated elsewhere: "The *statute* protects these types of economic weapons. Their availability, combined with their actual exercise on occasion by the parties, . . . has produced virtually all of the agreements reached in the Act's 80-year history." *Piedmont Gardens*, 364 NLRB No. 13, slip op. at 11 (2016) (Member Miscimarra, dissenting in part) (internal quotations and citation omitted). Nor is it correct, as my colleagues suggest, that I believe the employee activities here are unprotected because of the "economic harm that the work stoppage inflicted" (Majority's opinion, slip op. at 7) or the "effectiveness of its timing" (i.e., coinciding with the grand reopening of the store). Id., slip op. at 7 fn. 23. The unprotected nature of the employee activities here results from the employees' decision to *occupy the premises in a retail work setting, when customers were present*, which is qualitatively different than a mere work stoppage without regard to its effectiveness or its timing.

disruption and interference. Indeed, the employees even blocked the customer service counter while the store was open and customers were present. This type of employee conduct is clearly *not* protected by our statute. *Restaurant Horikawa*, supra. As the Supreme Court held in *NLRB v. Fansteel Metallurgical Corp.*,[21] the Act's "recognition of 'the right to strike' plainly contemplates a lawful strike—the exercise of the unquestioned right *to quit work*," and the Act does not protect employees who occupy an employer's premises "to *prevent their use by the employer in a lawful manner*."[22]

Our statute confers important employee rights, but it does not give employees carte blanche to do whatever they want, wherever they want. This is especially true when it comes to on-premises disruptive conduct in retail settings in the presence of customers. Moreover, the Board is charged with recognizing the rights of employees *and* employers. This includes, as the Supreme Court held in *Hudgens*, the property rights of employers, which must be reasonably accommodated by the Board.[23] By treating this case as if the employees merely decided "to withhold their labor," it is my colleagues who have adopted a position that is "antithetical to the basic principles underlying the statutory scheme."[24] Although my colleagues rely on *Quietflex* (which involved a manufacturing setting, and which I believe has no application here), the employees in that case—unlike the employees here—were positioned "*outside* (not inside) the facility," and the employer's "operations were *not disrupted*"[25]—and the Board in *Quietflex* still found that the employee conduct was *unprotected*.

Moreover, if *Quietflex* were applicable, I would conclude that the employee actions in the instant case were unprotected. The most important factor in a *Quietflex* analysis—factor 3, whether the work stoppage interfered with production or deprived the employer access to its property—must be accorded substantial weight on the basis that the work stoppage/protest took place on a retail sales floor in the presence of customers. In my opinion, four of the ten factors weigh against a finding that the employees retained the Act's protection, and three other factors are neutral. Balancing the *Quietflex* factors, I would find that the employees lost the protection of the Act, and therefore the Respondent did not violate Section 8(a)(1) of the Act when it disciplined them for their conduct on the morning of November 2.

To the extent that the *Quietflex* factors provide colorable support for my colleagues' conclusion that the employees retained the Act's protection, this reinforces my view that *Quietflex* should not be deemed applicable to work stoppages in the presence of customers on a retail sales floor (or in the presence of customers or patrons in any workplace where employees routinely mingle with and furnish services to customers or patrons). However, even assuming *Quietflex* is applicable here, I would analyze the facts of this case under the *Quietflex* factors as follows.

Factor 1—the reason the employees stopped working. The majority adopts the judge's finding that the employees stopped working to protest Van Riper's treatment of the remodeling associates, to advocate that Walmart hire the temporary remodeling associates as permanent employees, and to promote OUR Walmart and its campaign for changes in Walmart employees' terms and conditions of employment. While the employees acted concertedly for the purpose of mutual aid or protection, the work stoppage was not in response to an urgent safety matter or imminent threat such as might impel immediate action inside the store. See *Peck, Inc.,* 226 NLRB 1174, 1174 fn. 1 (1976) (noting relevance of whether in-plant protest was "predicated on any necessary immediacy of action"). Although the majority claims that the "employees had an immediate need to press their concerns to management," the facts do not support their claim or condone the employees' actions on the retail floor. To the contrary, the work stoppage was planned weeks in advance to address ongoing concerns,[26] and the employees could have lawfully conducted their protest outside the store, as they did after clocking out and leaving the store. I would find that this factor is neutral at best: the employees' concerns involved terms and conditions of employment, but the in-store work stoppage was not based on any "necessary immediacy of action," *Peck*, supra, but rather addressed ongoing concerns and was strategically timed to coincide with the grand reopening of the Richmond store.

Factor 2—whether the work stoppage was peaceful. Although the protest may have been noisy and boisterous

[21] 306 U.S. 240 (1939).

[22] Id. at 256 (emphasis added) (quoting Sec. 13, which states: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right").

[23] 424 U.S. at 522 (citing *NLRB v. Babcock & Wilcox Co*., 351 U.S. at 112).

[24] Majority opinion, slip op. at 7. Although I believe the *Quietflex* factors do not apply in the instant case, it is important to know that—even in *Quietflex*—the inquiries include "whether employees attempted to seize the employer's property" and "whether the work stoppage interfered with production or deprived the employer access to its property." 344 NLRB at 1056–1057.

[25] 344 NLRB at 1060 (Member Liebman, dissenting).

[26] In addition, the evidence shows that HR Manager Lilly only became aware of the associates' concerns a day or two before the day of the protest. Her response to employees on the morning of November 2 was therefore timely.

at times, there was no evidence of violence or threatening conduct.

Factor 3—whether the work stoppage interfered with production or deprived the employer access to its property. The majority finds that this factor favors protection, based on the judge's finding that the strikers' actions did not interfere with the ability of nonstriking employees to do their jobs and therefore did not interfere with production or the efficiency of the store's operations.[27] Contrary to the judge and my colleagues, I believe this factor weighs against protection and does so heavily. Because the Respondent is in the business of selling goods and services to customers in a retail setting, and because the work stoppage/protest took place in a retail store with customers present, the extent to which the protesters may have disrupted or interfered with customers' shopping experience is highly relevant to whether the work stoppage "interfered with production." See *Restaurant Horikawa*, 260 NLRB at 198 (finding demonstration in employer's restaurant unprotected on the basis that it "interfered with [r]espondent's ability to serve its patrons in an atmosphere free of interruption and unwanted intrusion" and the likelihood that the demonstration "infringed on the customers' dining enjoyment"); see also *Davison Paxon Co. v. NLRB*, 462 F.2d 364, 370 (5th Cir. 1972) ("The possibility of offending customers and, as a result, losing customers is an immediate and pressing concern to retail and service establishments and must be considered by the Board."). Neither the judge nor my colleagues have given adequate consideration to the fact that the protest was carried out in a retail sales setting.

As a result of the work stoppage, the Respondent was forced to reassign employees to different store areas in order to accomplish the tasks the strikers left unfinished, such as preparing the store aisles and shelves for the grand reopening scheduled for the morning of the planned work stoppage. One employee assigned to the customer service counter chose to work elsewhere to avoid the protesters. After the store opened, there were six strikers and between 10 and 14 nonemployees participating in the protest in the customer service area from 6 a.m. to 6:52 a.m. The customer service area, located adjacent to the first-floor entrance and only steps from the sales floor, is clearly visible to customers. During this time period, approximately 53 customers entered through the entrance directly adjacent to the customer service desk.[28] The protesters donned bright "OUR Walmart" t-shirts, were somewhat noisy, and flaunted a large banner with which they briefly blocked access to the customer service area. In addition, the strikers and other protesters briefly moved their protest—including the banner, bright t-shirts and a sign announcing a "ULP Strike"—to Action Alley, the main aisle of the store.

I have previously stated that retail employees lose the Act's protection, to the extent it is "otherwise available," if they enter a retail establishment and engage in disruptive conduct in the presence of customers. *Starbucks Coffee Co.*, 360 NLRB No. 134, slip op. at 7 (Member Miscimarra, concurring). I believe the Board cannot properly treat an on-premises work stoppage in a retail establishment the same as an on-premises work stoppage in, for example, a manufacturing facility. At a minimum, the *Quietflex* analysis—even if deemed applicable here—must accord weight to the retail setting by taking into consideration the extent to which the work stoppage may have disrupted or interfered with customers' shopping experience. The record clearly establishes that the employees' actions caused substantial disruption and interference, including an adverse impact on customers. I would therefore find that this factor weighs heavily against protection.

Factor 4—whether employees had adequate opportunity to present grievances to management. The judge found that this factor was neutral at best and weighed neither for nor against protection. I disagree. Although employees did not have access to a formal grievance procedure, the Respondent maintained a well-advertised open-door policy, and it encouraged employees to bring their concerns to management. On the morning of the work stoppage, Lilly and Jankowski arrived at 3 a.m. and offered to meet with the associates individually regarding their grievances concerning Van Riper in accordance with the Respondent's open-door policy. Citing concerns about confidentiality, Lilly declined to meet with the employees as a group, but she did meet with one employee before the work stoppage and several more afterwards. Thus, before the work stoppage began, the employees were on notice that the Respondent was aware of their grievances about Van Riper and that a forum was available to them for further discussion. In addition, shortly after the work stoppage began but well before the store opened and customers began entering the store, Lilly asked the protesters what they wanted and offered to meet with them individually to discuss their concerns

[27] The judge also noted that, other than for a brief period of time when the strikers were in Action Alley, the strikers did not affirmatively block access to the customer service area. The judge therefore found that the strikers did not deny the Respondent access to its property. But this finding does not address the protesters' effect on customers, which is the relevant consideration here.

[28] As noted above, there are several other entrances to the store, so additional customers could have been affected by the work stoppage/protest.

in accordance with the Respondent's open-door policy. The employees also could have conducted their protest activities outside the store and effectively made the Respondent's management (and the public) aware of their concerns in that way. The employees thus had more than adequate opportunity to present their grievances to management, but they chose instead to disrupt the grand reopening of the Respondent's store by stopping work, occupying the customer service area, continuing their work stoppage for 52 minutes after the store opened, and taking their protest to the store's main aisle. I would find that this factor weighs against protection. *Quietflex*, 344 NLRB at 1059 (finding that, although the employer did not have a formal grievance procedure, it provided employees multiple opportunities to present their complaints to management; the employees' refusal to do so weighed against protection).

Factor 5—whether employees were given any warning that they must leave the premises or face discipline. It is undisputed that the Respondent never specifically warned the six associates that they must leave the store *or face discipline*. However, Jankowski and Lilly instructed the protesters on several occasions to return to work or leave the store. At 6:16 a.m., Jankowski told the protesters that they were trespassing and should leave the premises. At 6:29, after the protesters moved from the customer service counter to Action Alley, both Jankowski and Lilly told them they were blocking customers from entering and shopping in the store and that they should return to the customer service area or leave. It was not until Lilly, accompanied by two police officers, asked the protesters to leave that the employees agreed to leave the store after clocking out.[29]

The judge found that this factor "clearly favored" protection, but he failed to mention or consider that both Lilly and Jankowski asked the employees to return to work or leave the store several times, and the employees refused to comply. Although Jankowski and Lilly did not specifically threaten discipline when they instructed the protesters to return to work or leave the store, the Board has not required a threat of discipline in every case where it found a work stoppage unprotected. See *Cambro*, supra, 312 NLRB at 634–636.[30] Some things are too obvious to require an explicit statement. Here, two of the Respondent's managers repeatedly ordered the employees to either return to work or leave the store; and contrary to the majority's assertion, Lilly and Jankowski did not send "mixed messages" to the protesters. Any reasonable employee would understand that implicit in such an order is a threat of discipline, and that a refusal to comply with management's orders would result in discipline. Contrary to the judge and my colleagues, I would find that this factor favors loss of protection.

Factor 6—the duration of the work stoppage. The work stoppage lasted a total of 88 minutes. Over half of those minutes, 52 to be precise, were spent in areas in which customers are invited to enter, i.e., the customer service area and, briefly, the store's main aisle, "Action Alley." The judge found the duration of the stoppage "strongly favored" protection. I disagree with this analysis. In *Restaurant Horikawa*, supra, 30 individuals, including one employee, engaged in a protected demonstration outside the restaurant. They then entered the restaurant and "paraded boisterously about" during the dinner hour for 10 to 15 minutes. In that case, the Board found the employee who participated in the demonstration lost the protection of the Act and was lawfully discharged. In *Cambro*, supra, the Board found that a 1-to-2-hour work stoppage in a plant—with no customers present—became unprotected when the employees refused their supervisor's second order to return to work or clock out. Here, 52 of the 88 minutes during which the work stoppage and protest continued took place on a retail sales floor with customers present. Especially in light of precedent involving disruptive activities in retail settings in the presence of customers, e.g., *Restaurant Horikawa*, supra, I believe this factor weighs strongly in favor of loss of protection.

Factor 7—whether employees were represented or had an established grievance procedure. As the judge observed, the employees who participated in the work stoppage were members of OUR Walmart, but they were not represented in a formal sense by any organization. In addition, the Respondent does not have an established procedure to entertain "group" complaints, and potential "concerted" activity is a central focus of our statute. On the other hand, the Respondent did offer employees the opportunity to voice their concerns about Van Riper individually through the Respondent's open-door policy. Moreover, it is significant that Section 9(a) of the Act expressly protects the right of "any individual employee

[29] The Respondent made clear that the employees were welcome to continue the protest outside the store.

[30] In *Cambro,* 12 employees on the night shift engaged in a work stoppage beginning at approximately 2:30 or 3 a.m. and demanded to meet with General Manager Thompson. Their supervisor ordered them to either clock out or go back to work and said that they could talk to Thompson when he came into work in the morning. The employees refused and continued the work stoppage. At approximately 4 a.m., the supervisor called Thompson, and Thompson agreed to meet with the strikers at 7:30 that morning. The supervisor informed the strikers of the meeting and again told them to clock out or go back to work. The strikers again refused. The Board found that at that point, the work stoppage lost protection, and thus the strikers' subsequent discharge was lawful. At no time did the supervisor threaten discipline.

or a group of employees" to present and adjust grievances. Based on the absence of a procedure that permits the presentation of grievances by a group of employees, this *Quietflex* factor favors protection, although this conclusion is substantially offset, in my view, by the Respondent's open-door policy and the fact that the employees were reminded of its availability before the work stoppage commenced and twice more after it commenced.

Factor 8—whether employees remained on the premises beyond their shift. The evidence shows that all six associates clocked out and left the inside of the store by 6:52 a.m., before the end of their shifts.

Factor 9—whether employees attempted to seize the employer's property. The protesters engaged in on-premises activities and occupied the store, including (at different times) the customer service area and Action Alley, the store's main aisle, for a total of 88 minutes, including 52 minutes while customers were present. This does not constitute "seizing" private property comparable to what the Board alluded to in *Quietflex*, which referenced *NLRB v. Fansteel Metallurgical Corp.*,[31] where 95 employees took over and held possession of two buildings for nine days.[32] At the same time, I believe the Board cannot appropriately conclude that, when employees intentionally occupy the workplace in a retail setting when customers are present, it "favors" the Act's protection that their occupation did not last longer and was not more complete. Again, it is relevant that even in *Quietflex*, the employees were positioned "*outside* (not inside) the facility," and the employer's "operations were *not disrupted*."[33] Although the conduct here may not have constituted "seizing" the property within the meaning of *Quietflex*, I do not believe this favors protection, and this reinforces my view that the *Quietflex* standards are inapplicable in retail work settings.

Factor 10—the reason for which the employees were ultimately disciplined. The Respondent's "coaching" notices to the employee protesters listed several reasons for the discipline, including "Unauthorized Use of Company Time," "Abandon[ing] work," and "refus[ing] to return to work." Leaving work and refusing to return to work during a lawful work stoppage are protected acts. *Quietflex*, 344 NLRB at 1055 fn. 1; *Molon Motor & Coil Corp.,* 302 NLRB 138, 139 (1991) (employer violated Act by discharging employees for refusing to work), enfd. 965 F.2d 523 (7th Cir. 1992). The coaching notices also stated that the employees were disciplined for engaging in a sit-in on the sales floor, physically occupying a central work area, denying access to the main customer pathway through the front of the store, and disrupting business and customer service operations. As noted above, I would find that these actions resulted in loss of protection. The Respondent, therefore, cited both protected and unprotected reasons for the discipline. Accordingly, I would find that this factor is equivocal and supports neither protection nor loss of protection.

CONCLUSION

The concerns motivating the employees' work stoppage and protest in this case were ongoing. They did not arise spontaneously on the morning of November 2, and there was no "necessary immediacy of action" driving the work stoppage. *Peck*, 226 NLRB at 1174 fn. 1. The employees here had ample opportunity to present their concerns to the Respondent individually through the open-door policy, and they were invited to do so on the morning of the work stoppage. They could have conducted their protest outside the store at any time, as they did after they finally left the store after being repeatedly ordered to return to work or leave the store. The protesters certainly had a protected right to engage in a work stoppage, but their choice to conduct their work stoppage and engage in protest activities (i) inside the Richmond store, (ii) in the customer service area and (iii) briefly, in "Action Alley," the store's main aisle, (iv) in the presence of customers, and (v) for a significant length of time was, in my view, unwarranted and unprotected.

In these circumstances, I believe the employees' activities were unprotected by the Act. As noted above, I believe this issue is governed by *Restaurant Horikawa* and similar cases. I believe the *Quietflex* factors do not appropriately apply here. But even assuming otherwise, I believe application of the *Quietflex* factors warrants a conclusion that the employees' activities were unprotected by the Act. As a result, under either standard I would find that the Respondent's decision to discipline these employees did not violate the Act, and I respectfully dissent from my colleagues' contrary finding.

As noted previously, I agree with some of my colleagues' findings and disagree with certain others.[34] However, as to the treatment of the employees' on-premises work stoppage and protest and my colleagues' conclusion that the resulting discipline violated Section 8(a)(1) of the Act, I respectfully dissent.

Dated, Washington, D.C. August 27, 2016

Philip A. Miscimarra, Member

[31] 306 U.S. 240, 256 (1939) (cited in *Quietflex*, 344 NLRB at 1057 fn. 12).

[32] I do not reach or pass on what type of private property occupation constitutes a seizure for purposes of *Quietflex*.

[33] 344 NLRB at 1060 (Member Liebman, dissenting).

[34] See fn. 1, supra.

NATIONAL LABOR RELATIONS BOARD

APPENDIX A
(PLACERVILLE, CALIFORNIA STORE 2418)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten associates by asking them if they are afraid Walmart might close Placerville, California store 2418 if too many associates join OUR Walmart.

WE WILL NOT maintain a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind the overbroad policy in our July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL furnish all current associates in our California stores with inserts for our California employee dress code that (1) advise that the unlawful July 2010 policy has been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) WE WILL publish and distribute to employees at our California stores revised copies of our California employee dress code that (1) do not contain the unlawful policy, or (2) provide the language of a lawful policy.

WALMART STORES, INC.

The Board's decision can be found at www.nlrb.gov/case/32-CA-090116 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B
(RICHMOND, CALIFORNIA STORE 3455)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT selectively and disparately apply our July 2010 dress code for California associates to Richmond, California store associates when they wear clothing with OUR Walmart or UFCW logos, but not when they wear other clothing that does not comply with the dress code.

WE WILL NOT threaten store associates that we will "shoot the union."

WE WILL NOT threaten store associates that Walmart will never be union and thereby inform associates that it would be futile for them to select OUR Walmart as their collective-bargaining representative.

WE WILL NOT threaten store associates by telling them that associates returning from strike will be looking for new jobs.

WE WILL NOT prohibit store associates from speaking to associates returning from strike about the returning strikers' activities on behalf of OUR Walmart.

WE WILL NOT issue disciplinary coachings to associates because they engage in protected work stoppages, and to discourage associates from engaging in those or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce associates in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL remove from our files any references to the unlawful November 2012 two-level disciplinary coachings that we issued to associates Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney because they engaged in a protected work stoppage on November 2, 2012, and to discourage associates from engaging in those or other protected activities, and WE WILL notify Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney in writing that this has been done and that the unlawful disciplinary coachings will not be used against them in any way.

WE WILL rescind the overbroad policy in our July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL furnish all current associates in our California stores with inserts for our California employee dress code that (1) advise that the unlawful July 2010 policy has been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) WE WILL publish and distribute to employees at our California stores revised copies of our California employee dress code that (1) do not contain the unlawful policy, or (2) provide the language of a lawful policy.

WALMART STORES, INC.

The Board's decision can be found at www.nlrb.gov/case/32-CA-090116 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX C
(CALIFORNIA STORES)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind the overbroad policy in our July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL furnish all current associates in our California stores with inserts for our California employee dress code that (1) advise that the unlawful July 2010 policy has been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) WE WILL publish and distribute to employees at our California stores revised copies of our California employee dress code that (1) do not contain the unlawful policy, or (2) provide the language of a lawful policy.

WALMART STORES, INC.

The Board's decision can be found at www.nlrb.gov/case/32-CA-090116 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE., Washington, D.C. 20570, or by calling (202) 273–1940.

Catherine Ventola and *David Foley, Esqs.*, for the General Counsel.
Lawrence Katz and *Erin Bass, Esqs.*, for the Respondent.
Deborah Gaydos and *Joey Hipolito, Esqs.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Oakland, California on September 8–11, 2014. The Organization United for Respect Walmart (OUR Walmart) filed the charges at issue here on the following dates:

Case	*Charge Filing Date*
32–CA–090116	September 26, 2012 (amended on November 19, 2013)
32–CA–092512	November 2, 2012
32–CA–092858	November 8, 2012
32–CA–094004	November 30, 2012
32–CA–094011	November 30, 2012
32–CA–094381	December 6, 2012
32–CA–096506	January 16, 2013
32–CA–111715	August 21, 2013[1]

On February 25, 2014, the General Counsel issued two complaints, one covering cases 32–CA–094004 and 32–CA–094011, and the other covering cases 32–CA–092512, 32–CA–092858 and 32–CA–094381. In an amended consolidated complaint filed on April 15, 2014, the General Counsel combined the two original complaints and added case 32–CA–090116. Finally, on May 16, 2014, the General Counsel issued a second amended consolidated complaint covering all eight cases listed above.

In the second amended consolidated complaint, the General Counsel alleged that Wal-Mart Stores, Inc. (Respondent or Walmart) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by taking the following actions in 2012, at Walmart store 2418 in Placerville, California, and/or at Walmart store 3455 in Richmond, California: enforcing its California dress code policy selectively and disparately against an employee who formed, joined or assisted OUR Walmart and/or the United Food and Commercial Workers union; engaging in surveillance and/or creating the impression of surveillance of employees' protected activities in connection with an OUR Walmart protest; making various statements that had a reasonable tendency to coerce employees in the exercise of their rights under Section 7 of the Act; and unlawfully disciplining six employees because they engaged in a work stoppage on November 2, 2012, and to discourage employees from engaging in those or other protected concerted activities. The General Counsel also alleged that Walmart violated Section 8(a)(1) of the Act by maintaining two overly broad dress code policies (one that was in effect in 2012, and the other that took effect in 2013) for its California employees.[2] Respondent filed a timely answer denying the violations alleged in the second amended consolidated complaint.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, OUR Walmart and Respondent, I make the following

FINDINGS OF FACT[4]

I. JURISDICTION

Respondent, a corporation with an office and place of business in Bentonville, Arkansas, as well as various stores throughout the United States (including Placerville and Richmond, California), engages in the retail sale and distribution of consumer goods, groceries and related products and services. In the twelve-month period ending December 31, 2012, Respondent derived gross revenues in excess of $500,000. During the same time period, Respondent purchased and received products, goods and materials at its Richmond, California facility that were valued in excess of $5,000 and came directly from points outside of the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within

[1] All events in this case occurred in 2012, unless otherwise indicated.

[2] The General Counsel withdrew the allegations in pars. 6(c)(1)–(2) and 7(a) of the complaint. (Transcript (Tr.) 7, 469–470.) Since the allegations in pars .6(c)(1)–(2) of the complaint are the only allegations in the charge filed in Case 32–CA–096506, the General Counsel moved that I sever Case 32–CA–096506 from this proceeding. (GC Posttrial Br. at 1.) I hereby grant the General Counsel's motion to sever, which was unopposed.

[3] The transcripts in this case generally are accurate, but I hereby make the following corrections to the record: page 149, l. 24: Respondent's attorney Lawrence Katz (Katz) was the speaker; page 150, l. 1: Katz was the speaker; page 204, l. 20: "out" should be "ought"; page 250, l. 18: the Administrative Law Judge was the speaker; page 330, l. 17: should say "Sustained as to form."; page 363, l. 9: "3" should be "30"; page 397, l. 4: "objective" should be "subjective"; page 602, l. 14: should say "it's not something" instead of "it's something"; page 656, l. 23: should say "Sustained as to form."; page 667, l. 20: "sleeping" should be "sweeping"; and page 729, l. 8: "should not" should say "should."

I also note that on October 17, 2014, I issued an order directing the parties to file corrected versions of certain exhibits to redact personal identifiable information and other confidential information. Pursuant to that order, Respondent submitted the following corrected exhibits: Joint (Jt.) Exhs. 24, 28. I have replaced the original copies of those exhibits in my exhibit file with the corrected versions. Since the electronic file still contains both the original and corrected exhibits, I recommend that the Board take appropriate steps to ensure that the original exhibits are handled in a way that will ensure they (and the personal identifiable and/or confidential information they contain) remain confidential.

[4] Although I have included several citations in the findings of fact to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since in or about 2010 or 2011, a group of current and former Walmart employees has participated in the Organization United for Respect at Walmart (OUR Walmart) to advocate for various changes in working conditions, benefits and workplace policies at Walmart. (Tr. 44–45, 80–81.) In connection with this effort, OUR Walmart has received extensive advice and support from the United Food and Commercial Workers union (UFCW), even though OUR Walmart is not itself a union and does not "represent" employees for collective-bargaining purposes. UFCW's support for OUR Walmart has included, but is not limited to: assistance with creating OUR Walmart; financial support; staffing support, such as UFCW employees who are assigned to work with OUR Walmart on the "Making Change at Walmart" campaign; advice on strategy; and networking support, including contacting community groups to support or join OUR Walmart members when they engage in strikes, protests or other "actions" as part of the Making Change at Walmart campaign. (Joint (Jt.) Exh. 22; see also Tr. 118.)

Although Walmart has over 4,000 stores, the events in this case generally relate to two stores in northern California: Walmart store 2418, located in Placerville, California; and Walmart store 3455, located in Richmond, California.

B. Placerville, California – June/July 2012

1. The June 1, 2012 protest at store 2418

On June 1, a group of approximately 24–30 OUR Walmart members and community supporters met on the sidewalk in front of Walmart store 2418 in Placerville, California to protest, carry signs, distribute leaflets and advocate for Walmart to provide its associates[5] with better working conditions, wages and healthcare. (Tr. 81–83, 594, 596, 651–652.) While at the protest, associate Lawrence Carpenter observed store manager Tammy Hileman, along with a few assistant managers, exit the store and use their cell phones to text and make telephone calls. (Tr. 87–90, 93–94, 109, 598.) Approximately 45 minutes later, Carpenter observed Hileman return to the sidewalk. Carpenter testified that Hileman appeared to hold a black, shiny item that looked like a cell phone and use it to scan the protesters (as if she were taking a picture). (Tr. 90–91, 93, 109–114.) Carpenter made his observations from the opposite end of the sidewalk from where Hileman was positioned (from a distance of up to 30 feet), and while both he and Hileman stood in front of the protesters who were also present on the sidewalk. (Tr. 97–98, 111; see also Jt. Exh. 1(a) (photograph of the sidewalk in front of the store); GC Exh. 2(a) (same).)

Hileman denied taking any photographs or video recordings of the protest, and also denied stretching her arms in front of her body (as if to scan for a photograph or video) during the protest. Hileman added that, at that time, she carried her cell phone in a pink cover. (Tr. 597–599.) Similarly, assistant manager Lance Snodgrass, who spent most of the day monitoring the protest, did not observe Hileman take any videos or photographs of the protest, and did not see Hileman hold her arms out in front of her with something in her hand at the protest. (Tr. 650, 652, 655, 659–660, 664–665.)

2. Late June 2012 – Barbara Collins attends protest in Los Angeles

In late June, Barbara Collins traveled to Los Angeles to participate in a march/rally with OUR Walmart members and community supporters. Collins, who was working as an electronic sales associate in Walmart's store 2418 in Placerville, California, did not tell anyone in management about her plans to attend the rally. (Tr. 44–45, 49.) However, Collins did ask approximately ten other OUR Walmart members at the Placerville store if they would also like to attend the rally, and was generally an open and vocal supporter of OUR Walmart. (Tr. 51–52, 73.) In addition, another OUR Walmart member who was attending the Los Angeles rally told various (unidentified) people in the Placerville store that she and Collins would be attending the rally.[6] (Tr. 66.)

3. Early July 2012 – Collins' interactions with supervisor Susan Stafford

At the end of one of Collins' shifts in the second week of July, overnight assistant manager Susan Stafford asked Collins how her trip to Los Angeles was. Collins was surprised by Stafford's question (since she had not told Stafford or anyone else in management that she was going to the Los Angeles rally), but responded that the trip was great. When Collins and Stafford went to the assistant manager's office to turn in Collins' keys to the electronics area, Stafford asked Collins if she was worried that Walmart would close the Placerville store if OUR Walmart became too big. Collins responded that she did not believe Walmart would close the store, since such a store closure had only happened once before at a store in Canada. No one else was present during this conversation, which lasted less than one minute.[7] (Tr. 45–47, 54–55, 57, 410; see also Tr. 412 (noting that if Stafford was the assistant manager on duty when Collins finished her shift, Stafford would be the one to take Collins' keys to the electronics area).)

[5] Walmart calls its employees "associates." I have used the same terminology in this decision.

[6] I decline Respondent's request that I take judicial notice of newspaper articles that were published about the Los Angeles protest. (See R. Posttrial Br. at 11 & fn. 3) The newspaper articles are not probative of any material issues that relate to the Los Angeles protest, and the record establishes that many associates at the Placerville store knew about the Los Angeles protest.

[7] Stafford denied making these remarks to Collins, but I did not find the material portions of Stafford's testimony to be credible. For example, when asked if she had ever heard anything about the June 1 OUR Walmart protest, Stafford denied hearing anything about it even though the protest was a significant event at the Placerville store. (Tr. 419.) Further, Stafford gave varied responses when asked whether Collins met with her to turn in keys to the electronics area in July 2012, stating initially that she did not remember any occasions where Collins was leaving and gave Stafford keys, but later stating that if she did meet with Collins in July 2012, their interactions would have been limited to returning keys, asking about electronics, or saying goodnight. (Compare Tr. 412 with Tr. 418–419.) Based on these inconsistencies, I did not find Stafford's memory of the events of July 2012 (including her interactions with Collins) to be reliable.

C. Walmart's Dress Code Policies

1. Overview

Since at least July 19, 2010, Walmart has maintained that the purpose of its dress code "is to provide the parameters for an atmosphere that is professional but at the same time relaxed." (Jt. Exhs. 30, p. 1; 31, p. 1.) Explaining further, Walmart's dress code policies state as follows:

> Dressing for the work environment not only allows us to demonstrate pride in ourselves, but influences how our company is perceived by others, whether they are customers or fellow associates. It has an impact on our performance as well as on the performance of those around us. Our emphasis is that each associate should be neat and clean and take pride in their appearance.
>
> Walmart requires its associates to dress in a manner that is professional, relaxed, and appropriate to the facility[.]

(Id.; see also Jt. Exh. 33, p. 1 (Walmart's workplace standards policy, which states that Walmart strives "to provide a work environment that is clean, safe and allows associates to focus on being productive and providing excellent customer/member satisfaction. All associates are expected to present themselves in a professional manner that promotes respect and trust in the workplace, enhances customer/member loyalty and avoids the appearance of impropriety"); Tr. 537, 632 (noting that Walmart aims to provide excellent customer service and maintain a family friendly environment).)

2. The July 2010 dress code for Walmart's California employees

On July 19, 2010, Walmart issued the following dress code guidelines for hourly associates in its stores located in California:

> **Dress Code**
>
> **Walmart facilities**
>
> 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.
>
> - Sleeveless shirts/blouses are not allowed.
> - Examples of acceptable shirt/blouse styles include, but are not limited to, t-shirts, sweaters, sweatshirts, polo-style shirts and button down shirts.
> - You may wear white long sleeve shirts/blouses under short sleeve solid blue or green shirts/blouses
> - You are not required to tuck in your shirt/blouse.
>
> Solid tan, in any shade, and solid brown, in any shade, pants, skirts, or skorts of your choosing in good condition. Skirt or skort length must be no shorter than three (3) inches above the knee.
>
> - Examples of acceptable pants styles and fabrics include, but are not limited to, cargos, capris, denim, and corduroy.
>
> If your position requires you to go outside while on the clock, you may wear any hat, jacket or coat of your choosing in good condition; no color or style restrictions apply.
>
> If your position, which includes, but is not limited to Front-End Cashier, People Greeter, Garden Center Cashier, requires you to wear a sweater or jacket inside the building for warmth reasons, you may wear any sweater or jacket of your choosing in good condition; no color or style restrictions apply.
>
> 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.
>
> You are not required to purchase or wear any clothing from Walmart or the online catalog. Clothing can be purchased from any merchant of your choosing. If you feel you are under pressure from management to purchase or wear clothing from Walmart or the online catalog, you are obligated to immediately contact the company's Ethics Hotline, your Market Human Resource Manager, or your Regional Human Resource Director.

(Jt. Exh. 30, pp. 2–3; see also Jt. Exh. 30, p. 6 (setting forth a dress code exception that allowed "Maintenance, Cart Attendant/Courtesy associates, Overnight Receiving, Unloader, In-Stock/ICS Team and Assembler positions" to wear blue denim jeans).)

The July 19, 2010 dress code remained in effect at all material times until February 7, 2013, when Walmart issued an updated dress code. (See Jt. Exh. 31; see also Tr. 12 (Walmart agreed that the July 19, 2010 dress code remained in effect at all material times until at least September 14, 2012).) In practice, Walmart permitted associates to have logos on clothing (including OUR Walmart and UFCW pins and lanyards) as long as the logo was smaller than the Walmart name tag (2 x 3 inches). (Tr. 566–568, 629–630.)

3. August/September 2012 – Raymond Bravo's alleged dress code violations at the Richmond, California Walmart (store 3455)

In 2012, Raymond Bravo was employed as an overnight maintenance associate in Walmart's Richmond, California store. Bravo became an OUR Walmart member on January 23, 2012. (Tr. 333, 335.)

When Bravo began working at Walmart in 2011, he initially complied with the dress code, which he understood required khaki pants and a blue shirt.[8] However, after completing his probationary period and noticing that his coworkers were not complying with the dress code, Bravo began wearing clothes to work that did not comply with the dress code (such as a black thermal shirt, instead of a blue or green shirt as required by the dress code). Generally, Bravo wore noncompliant clothing to

[8] Multiple witnesses agreed that the Richmond store only permitted blue shirts (notwithstanding the July 2010 dress code, which also permitted green shirts). (Tr. 270, 336, 629, 668; compare Jt. Exh. 30, p. 3.)

work for three out of his four weekly shifts at the store. (Tr. 335–337; Jt. Exh. 30, pp. 2–3.)

At approximately 11 p.m.[9] on August 21, Bravo arrived at work wearing khaki pants, and a green OUR Walmart t-shirt on top of a black thermal shirt. (Tr. 338; Jt. Exh. 27 (August 21, clip 1).) After clocking in, Bravo attended a pre-shift meeting led by assistant manager Peggy Licina. Licina did not comment about Bravo's attire, nor did any other member of Walmart management. (Tr. 340.) Bravo accordingly began his shift and worked for two hours without incident, and then went to the front entrance of the store (at approximately 1:04 a.m. on August 22) because it was time for his break. At approximately 1:07 a.m., Licina arrived at the front entrance and unlocked the door to allow Bravo and other associates to go outside. Licina did not comment about Bravo's attire. (Tr. 339–341, 369, 371; Jt. Exh. 27 (August 22, clip 2).) However, when Bravo reentered the store at approximately 1:11 a.m. to resume working, Licina directed Bravo to take off his OUR Walmart shirt. (Tr. 341–342; Jt. Exh. 27, clip 2.) Bravo complied, and completed his shift wearing his black thermal shirt without further comment from Licina. (Tr. 342; Jt. Exh. 27 (August 22, clip 1).)

On September 14, Bravo arrived at work wearing grey khaki shorts, and a white shirt that had a Mexican flag and the words "UFCW, Un Voice, Un Vision, Un Union" written on the back, and that had an emblem on the left hand side of the front of the shirt. (Tr. 343; Jt. Exh. 27 (September 14, clip 1 (10:51 p.m.) and clip 2 (10:59 p.m.).) While clocking in, Bravo encountered overnight maintenance associate S., who was wearing a black shirt, and overnight maintenance associate D., who was wearing sweatpants. (At trial, Bravo could not recall the color of D.'s shirt.) When Bravo, S. and D. attended a safety meeting led by Licina at the start of their shift, Licina told Bravo to take his white shirt off, or she'd be speaking to him "in a different tone." Licina did not say anything about S.'s or D.'s attire. (Tr. 343–345, 369; Jt. Exh. 27 (September 14, clip 2).) Bravo complied by removing his white UFCW shirt and putting on a blue shirt, and completed his shift with no one in management commenting about the fact that he was wearing shorts while on duty.[10] (Tr. 346; Jt. Exh. 27 (September 15, clip 1 (1:01 a.m.).) Meanwhile, a Walmart official reported as follows to Walmart's Labor Relations department: "[Overnight] maintenance associate wore anti-Walmart t-shirt to work." (Jt. Exh. 56, p. 4.)

4. Dress code violations by other employees

The evidentiary record shows that Walmart was generally inconsistent with enforcing its dress code policy at the Richmond, California store. On occasion, Walmart managers did: speak to individual employees about wearing the wrong color shirt; or ask certain employees to turn their shirts inside-out to obscure logos that did not comply with the dress code. (Tr. 323, 668–669.) On the other hand, there were occasions where employees wore shirts or other items that did not comply with the dress code, and did so without objection or comment by managers who observed the noncompliant clothing.[11] (Tr. 346 (Bravo's khaki shorts), 702 (Victor Mendoza's blue and white checkerboard flannel shirt); GC Exh. 6.) And, on at least one occasion, two assistant managers at the Richmond Walmart were observed wearing clothing that did not comply with the dress code. (Jt. Exh. 50, p. 1; see also Tr. 570–572.)

Mendoza habitually violated the dress code on his Tuesday night to Wednesday morning shift, because for that shift he always wore a blue shirt with the words "Free Hugs" written on the front in large letters. A manager did ask Mendoza about the Free Hugs shirt when Mendoza first began his practice of wearing that shirt, but thereafter Mendoza continued to wear his shirt on a weekly basis without further inquiry or comment. (Tr. 701–703, 719–720; GC Exh. 6.) Similarly, Mendoza frequently violated the dress code on his Thursday night to Friday morning shift, as he often wore a blue and white checkerboard-patterned flannel shirt to work for that shift. Although a manager (Momlesh "Atlas" Chandra) once told Mendoza to remove the flannel shirt because of the checkerboard pattern, Mendoza resumed wearing the shirt on future days without comment from any supervisors (including Chandra). (Tr. 702, 714; GC Exh. 6; see also Tr. 703 (noting that Mendoza also wore a San Francisco 49ers shirt at work a few times).)

5. The February 2013 dress code for Walmart's California employees

On February 7, 2013, Walmart issued the following updated dress code guidelines for hourly employees in its stores located in California:

> **Dress Code**
>
> **Walmart facilities**
>
> Any short sleeve or long sleeve solid blue shirt/blouse or solid white shirt/blouse of your choosing, in any shade of blue or white, and in good condition. This blouse/shirt should be the outermost customer facing garment.
>
> - Sleeveless shirts/blouses are not allowed.
> - Examples of acceptable shirt/blouse styles include, but are not limited to, t-shirts, sweaters, sweatshirts, polo-style shirts and button-down shirts.
> - You may wear white long sleeve shirts/blouses under short sleeve solid blue or white shirts/blouses
> - You are not required to tuck in your shirt/blouse.

[9] The times that I reference in this section correspond to the times stated on the surveillance videos that the parties submitted as Joint Exhibit 27.

[10] Walmart allowed certain employees to wear shorts during the summer months, but overnight maintenance associates were not included in the list of employees covered by this exception. (Jt. Exh. 30, p. 6 (noting that the store manager may authorize the following employees to wear shorts in the summer months: "Cart Attendant/Courtesy associates, Garden Center associates, Receiving associates who unload trucks, ICS Team members who do not work on the sales floor, Overnight Stockers in a non-24 hour facility, [Tire, Lube and Express (TLE)] Service Writers and TLE associates who work in the shop area").)

[11] The evidentiary record establishes that at around 11 pm, Walmart dims the lights at its Richmond, California store. (Tr. 368, 670.) There is no evidence that assistant manager Peggy Licina (who did not testify), or any other manager, had difficulty seeing what color or type of clothing that employees were wearing during times when the lights were dimmed.

> Solid tan, in any shade, solid brown, in any shade, and solid black pants, skirts, or skorts of your choosing in good condition. Skirt or skort length must be no shorter than knee length.
>
> - Examples of acceptable pants styles and fabrics include, but are not limited to, cargos, capris and corduroy.
> - Examples of unacceptable pant styles and fabrics include, but are not limited to, jeans, sweatpants, denim and fleece.
>
> While working outside the building (the building includes the garden center), you may wear any hat, jacket or coat of your choice in good condition; no color or style restrictions apply.
>
> If you work in a position such as Front-End Cashier, People Greeter, Garden Center Cashier, you may wear a sweater or jacket inside the building for warmth reasons. Your sweater or jacket must be in good condition and, if it is your outermost garment, it must be solid blue or solid white. You may also wear a sweater or jacket in good condition of any color if you wear it underneath a solid blue or solid white garment otherwise permitted by this dress code (blouse/shirt/sweater/jacket). Your outermost garment must always be solid blue or solid white in any shade.
>
> Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts/blouses, pants, skirts, hats, jackets or coats are also permitted, subject to the following:
>
> – The logo or graphic must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional messaging.
> – Except for a clothing manufacturer's company emblem no larger than the size of your company name badge, the logo or graphic must not represent
> – Any business engaged in the commercial sale of products or services to the public, including but not limited to a competitor or supplier; or
> – Any product or service offered for commercial sale to the public, whether in Walmart or elsewhere
>
> You are not required to purchase or wear any clothing from Walmart or the online catalog. Clothing can be purchased from any merchant of your choosing. If you feel you are under pressure from management to purchase or wear clothing from Walmart or the online catalog, you are obligated to immediately contact the company's Ethics Hotline, your Market Human Resource Manager, or your Regional Human Resource Director.

(Jt. Exh. 31, p. 2; see also Jt. Exh. 60 (summarizing the 2013 update to Walmart's California dress code, and noting that exceptions to the dress code may be considered for medical or religious reasons).) The February 7, 2013 dress code has been in effect at all material times since at least February 21, 2013. (Tr. 13.) As with the July 2010 dress code, Walmart permitted associates to have logos on clothing (including OUR Walmart and UFCW pins and lanyards) as long as the logo was smaller than the Walmart name tag (2 x 3 inches). (Tr. 566–568, 629–630.)

D. Overview of the Summer/Fall 2012 Richmond, CA Store Remodeling Project

In August 2012, Walmart began a remodeling project at its Richmond, California store to give the store an upgrade (e.g., installing new floor tiling, rearranging counters, cleaning). Following its customary framework for such projects, Walmart assigned a field project manager (Malcolm Hutchins) to oversee the remodeling work, and also assigned a team of five field project supervisors (including Art Van Riper) to supervise (and also participate in) the remodeling at the store on a daily basis. (Tr. 230, 351, 472–477, 482; see also R. Exhs. 6–7; Jt. Exh. 24.)

In practice, Hutchins created the remodeling schedule (i.e., the schedule for when remodeling work would be done in the various store departments), prepared and communicated daily work plans to the field project supervisors, and visited the Richmond store periodically to ensure that the project ran smoothly, stayed on schedule and stayed within budget. (Tr. 474–475, 478–479, 481–485; R. Exhs. 6–7.) Field project supervisors such as Van Riper were responsible for working with remodeling team associates to systematically complete the tasks on the daily work plans that Hutchins prepared. Accordingly, field project supervisors: led daily meetings to tell associates about the work that was scheduled; trained associates on how to do certain tasks; decided which remodeling associates to assign to each task; and patrolled the store to supervise associates and ensure that the remodeling team was working effectively.[12] Periodically, field project supervisors also worked alongside associates to carry out the assigned work.[13] (Tr. 231–232, 280–282, 328–331, 485–490, 503, 509–510, 620–621; Jt. Exh. 37.)

Although the remodeling team managers had an active role in planning and completing the remodeling project, the Richmond store managers were responsible for handling personnel matters that related to remodeling associates. Accordingly, Richmond store management hired associates to work on the remodeling project (based on the pre-established remodeling project budget), with all of the remodeling associates having temporary status.[14] In addition, Richmond store management handled all matters relating to employee orientation, compensation and discipline (with input from field project supervisors

[12] I decline Walmart's request that I draw an adverse inference against the General Counsel for not calling an associate who worked directly with Van Riper to testify about Van Riper's job responsibilities. (See R. Posttrial Br. at 20.) The parties presented ample evidence about that issue through other witnesses, including Hutchins, who was Van Riper's supervisor, and Semetra Lee, who worked on the remodeling team and was familiar with the work that field project supervisors performed at the Richmond store.

[13] When not assigned to a field project, field project supervisors return to their "home store" where they supervise associates as instructed by the store manager. (Tr. 495–496; see also Jt. Exh. 38, pp. 1, 3, 11.)

[14] Temporary associates on remodeling projects typically end their employment with Walmart at the conclusion of the remodeling project. Store managers retain the option, however, to offer store-based jobs to remodeling associates, and may consider the opinions of field project supervisors in making those hiring decisions. (Tr. 493–494.)

and/or the field project manager as appropriate), and store managers also had the authority to assign non-remodeling work to remodeling associates if those associates completed their remodeling assignments before the end of their shift. (Tr. 282, 474–481, 488, 491–494, 614–619, 677–678; Jt. Exh. 24.)

Hutchins and Richmond store management worked together to set the schedules for remodeling associates. Remodeling associates worked on two shifts: one during the day (from 7 or 8 a.m. to 4 or 5 p.m.); and one overnight (from 10 p.m. to 7 a.m.). (Tr. 480–483.) Van Riper worked the overnight shift. (Tr. 497.)

E. September/October 2012 – Remodeling Associate Conflicts with Field Project Supervisor Van Riper

1. Initial conflicts

Early in the Richmond store remodeling project, remodeling associates became unhappy with how they were being treated by field project supervisor Van Riper. Specifically, associates noted that Van Riper yelled at them, called them "lazy," and told them that they were the worst remodeling crew that he had ever worked with. (Tr. 233–234, 330; Jt. Exh. 57(c), pp. 8–9, 11–12 (assistant manager heard Van Riper yell at the remodeling crew and state that the crew was lazy and the worst he had ever worked with); Jt. Exh. 57(e), pp. 10–11 (field project supervisor heard Van Riper yell at the remodeling crew, and also heard him tell the remodeling crew that they were a bunch of "lazy ass workers"); Jt. Exh. 57(g), pp. 7–8.) In addition, some associates were offended when Van Riper stated "if it was up to me, I would put that rope around your neck" when associate Markeith Washington put a rope around his (Washington's) waist to assist with moving a heavy counter.[15] Washington laughed Van Riper's comment off, but also told Van Riper that what he (Van Riper) said was not right. (Tr. 234–235, 285; Jt. Exh. 57(a), p. 9; Jt. Exh. 57(b), p. 12.)

2. October 11–12, 2012—Van Riper's remarks when associates returned from strike

On October 9–10, remodeling associates Demario Hammond, Misty Tanner and Markeith Washington joined other Richmond store associates (including Raymond Bravo) in an OUR Walmart sponsored strike "to protest Walmart's attempts to silence Associates who have spoken out against things like Walmart's low take home pay, unpredictable work schedules, unaffordable health benefits and Walmart's retaliation against those Associates who have spoken out." (Jt. Exh. 14; see also Tr. 156–157, 348, 382; Jt. Exh. 40.)

At approximately 10 p.m. on October 11, Bravo, Hammond, Tanner and Washington returned to the Richmond Walmart to read and deliver a "return to work letter" that communicated their "unconditional offers to return to our positions with Walmart for our next scheduled shifts." (Jt. Exh. 15; see also Tr. 118–119, 156–157, 186–187, 197, 201, 349; Jt. Exh. 61.) The returning associates were accompanied by a delegation of approximately seven UFCW employees (including Mabel Tsang and Ellouise Patton) and community supporters. Initially, the associates handed their letter to assistant manager Atlas Chandra. Presumably because many of the associates were part of the remodeling crew, Chandra called Van Riper over to speak to the associates. (Tr. 11–12, 119, 158–159, 349, 393; Jt. Exh. 61.) When Van Riper became agitated, UFCW employee Mabel Tsang recorded the following exchange with her cell phone:

> Van Riper (VR):I don't want to hear it. It concerns union activities. I'm sorry, I'm out of it. You go talk to the store manager or public information.
>
> Unknown (UK):It's really about the law and not unions. It's about the law – California law.
>
> VR:I don't really want to hear about it.
>
> UK:You don't want to hear about California law?
>
> VR:I don't want to hear about unions.
>
> Misty Tanner: Here Atlas. Here's our return to work [letter]. [Chandra subsequently handed the letter to Van Riper.]
>
> UK:It's not about unions.
>
> VR:I know what California law is. I know it probably better than you do sir.
>
> Ellouise Patton (EP): Right. Finish reading the letter to him so he can start work on time.
>
> M. Tanner:[Reading from a script.] I'm ready to return to my position on my next scheduled shift. If Walmart does not allow me to return to work on my next scheduled shift or retaliates against me for walking off my job its [an] unfair labor practice and I will be filing a charge with the National Labor Relations Board.
>
> . . .
>
> The Board will require Walmart to reinstate me with full pay . . . and benefits from today, the day I offered to return to work until the day Walmart reinstates me . . .
>
> VR: I don't really . . . I don't even want to hear it. You've been told to come back to work so get out of here – leave me alone.
>
> M. Tanner:[Continuing to read from script.] I struck in response to Walmart's unlawful attempts to silence and retaliate against associates who spoke up against Walmart's low wages, unpredictable schedules and unaffordable benefits. Therefore I'm entitled to reinstate my position beginning . . .
>
> . . .
>
> VR:I have a job to do.
>
> UK:Yes sir. I appreciate that. We understand. You've got a

[15] Van Riper denied making this statement when he was interviewed by market human resources manager Janet Lilly. (Tr. 554–555; Jt. Exh. 57(f), p. 13.) I have given little weight to Van Riper's denial because multiple employees corroborated Washington's report about the incident, and because Walmart did not call Van Riper to testify at trial, despite Van Riper still being one of Walmart's employees. In this connection, I note that I take no position on whether Van Riper's statement was racist in nature (as some associates maintained), since I need not resolve that issue to address the National Labor Relations Act violations that are alleged in the complaint in this case.

job to do.

M. Tanner: I'll be back to work tonight. . . . Thank you.

EP: [Sarcastically] Thank you sir, you have been most gracious.

(Jt. Exhs. 7(a)–(b); see also Tr. 119–122, 159–161, 166, 179; Jt. Exh. 61.)[16]

At this point, Tsang stopped her cell phone recording because she believed that the return to work delegation had concluded. However, Van Riper was not finished, and responded to Patton's remark by saying "Don't thank me. If it were up to me, I'd shoot the union."[17] (Tr. 123, 190–192, 350; Jt. Exh. 57(b), p. 13.) Tsang resumed recording the events and recorded the following remarks:

EP: Really? Okay, did everyone hear that? Okay, so let's let these people go to work.

. . .

VR: If I had my way the union would be . . . I used to work for a union.

Mabel Tsang: I was recording and I stopped it right at . . .

(Jt. Exh. 8(b); see also Tr. 177–178 (noting that at some point, Patton asked Van Riper if his remark about unions was a threat, and that Van Riper responded "no"), 187–188, 190–193.) Notwithstanding this confrontation, the four returning strikers returned to work on their next scheduled shifts and were not disciplined for participating in the October 2012 strike. (Tr. 157–158, 202, 382–383.)

At approximately 2 a.m. on October 12 (during the same overnight shift that began on October 11), Van Riper and field project supervisor Carlita Jackson called all remodeling associates to a meeting. At the meeting, Van Riper announced that the remodeling associates were back from their strike, but would not be working with the remodeling crew and instead would be working with the store.[18] Van Riper added that although OUR Walmart was trying to unionize Walmart, that (unionization) was never going to happen. Next, Van Riper told the remodeling associates that they should not talk to the returning strikers. When Jackson and associate Semitra Lee asked Van Riper what he meant by that, Van Riper said that remodeling associates should not talk to returning strikers "about the situation." Finally, Lee asked what was going to happen to the returning strikers. Van Riper responded that they would be looking for new jobs.[19] (Tr. 237–240, 286, 288–289.)

3. October 17, 2012 – associates submit written complaint about Van Riper

On October 17, six associates (Bravo, Hammond, Tanner, L.S., Washington and Timothy Whitney) signed and submitted a letter to Walmart to complain about Van Riper. The letter stated as follows:

> We the Associates at Store #3455 in Richmond, California, are outraged at the behavior of Art Van Riper, a manager from Home Office. By using racist remarks and threats of physical violence towards Associates he has created a work environment that is threatening, harassing and intimidating.
>
> Because he is a manager from Home Office his behavior is either condoned by Walmart, or Walmart is unaware they have a manager representing them who uses racist comments and threatens associates with physical violence. Neither is acceptable. Because this behavior is outrageous and unacceptable, we call on Walmart to do the following:
>
> 1. Walmart remove Home Office remodel manager Art Van Riper. We also want a public apology from him to all associates in the store and want all managers of this store to attend a cultural competency training.
>
> 2. Because much of his behavior was directed at temporary associates helping us remodel and improve our store, and because Walmart will be staffing up Store #3455 for the holiday season, we want any temporary Associate who is ready and willing to take a position at Store #3455, be given first option for any available positions at the store after the completion of the remodel. If no positions are available, a list of current temporary associates will be created and called when new positions are available before the job is open to the public.
>
> 3. Store manager Robert Wainaina meets with members of OUR Walmart to discuss the above issues.

(Jt. Exh. 9; see also Tr. 354, 391, 400, 407.) For reasons that are not clear, market human resources manager Janet Lilly did not receive a copy of the October 17 letter until on or about October 31. Lilly forwarded the letter to Walmart's labor relations department, which in turn forwarded it to Hutchins for review and comment (since Hutchins was Van Riper's supervisor). (Tr. 519–520; see also R. Exh. 8; Jt. Exh. 42.)

November 2, 2012 – Associate Work Stoppage at the Richmond, CA Store

1. Preparation for work stoppage

In mid-October, OUR Walmart members and UFCW staff met on two occasions to discuss and prepare for a work stoppage/protest that they planned to hold at the Richmond, California Walmart on November 2. The principal reason for the

[16] The transcript of this conversation in the record (Jt. Exh. 7(b)) is generally accurate. The conversation provided here generally tracks that transcript, except for a few non-substantive corrections that I made based on the video recordings in the record (Jt. Exhs. 7(a), 63).

[17] I have credited Tsang's account of Van Riper's remark because Tsang presented detailed and credible testimony, and because she was already in the role of monitoring Van Riper's conduct when he made the remark about shooting the union (and thus was tuned in to precisely what Van Riper was saying). In addition, Tsang's account was largely corroborated by Hammond's report and Bravo's testimony. (See Jt. Exh. 57(b), p. 13 (Hammond); Tr. 350 (Bravo).) I have given less weight to Patton's testimony that Van Riper said "You people ought to be shot," because she demonstrated difficulty with recalling some of the details about the interaction with Van Riper. (Tr. 204–207.)

[18] In future shifts, the remodeling associates who participated in the October 2012 strike rejoined the remodeling crew. (Tr. 289.)

[19] Lee's account of Van Riper's remarks at the October 12, 2012 meeting was not rebutted by any other evidence.

work stoppage was to protest Van Riper's treatment of the remodeling associates, and the meeting participants selected November 2 for the work stoppage because the Richmond store's grand reopening was scheduled that day (and thus the work stoppage/protest would also provide a good opportunity for OUR Walmart to state its cause). (Tr. 240–242, 291–293, 354–355; see also R. Exh. 3 (UFCW staff email dated October 29, 2012, listing the protest at the Richmond store as an upcoming event).)

At approximately 11 p.m. on November 1, Tanner approached assistant manager Tennille Tune asked Tune to send her home. Tanner explained that if she remained at the Richmond store, she would organize the work stoppage planned for the early morning of November 2. Tanner added that she might be able to call off the work stoppage if Tune could promise that the remodeling associates would be offered permanent positions with Walmart after the remodeling project concluded. Tune declined Tanner's request to be sent home, and notified Walmart's labor relations department of the work stoppage/protest plans. In addition, Tune altered her plans for the staff that night, to have them prioritize removing boxes and other obstacles from the floor before the work stoppage began. (Tr. 624–627; Jt. Exhs. 44–45.)

2. The grand reopening

In the early morning on November 2, Richmond store personnel were in the process of completing their remodeling work and readying the store for its grand reopening, which was scheduled to begin that day at 6 a.m. when the store opened to the public. (Tr. 124, 142, 240, 351; see also Tr. 270, 501–502 (noting that the remodeling project did not fully conclude until around November 7.) Walmart personnel characterized the grand reopening as a "big deal" for the store, with new meat and produce departments available for the first time, and vendors and costumed characters present to interact with customers and their families. (Tr. 541, 631–632.)

3. Lilly begins open door meetings concerning Van Riper

Shortly after 3 a.m. on November 2, Lilly and market asset protection manager Paul Jankowski arrived at the Richmond store to support the store in its grand reopening, and also to interview associates (under Walmart's open door policy) about their complaints and concerns about Van Riper. (Tr. 520–522, 574–575, 624, 681–682, 694; Jt. Exh. 58.) Lilly and Jankowski's first interview was with associate Washington. During that interview, Tanner knocked on the door and announced that she wanted to check on Washington. Tanner left after Washington confirmed that he was okay and wished to continue the meeting. (Tr. 525–527, 683–684; Jt. Exh. 58; see also Jt. Exh. 57(a) (notes from open door session with Washington).)[20]

4. Work stoppage activities inside the Richmond Walmart[21]

At approximately 5:24 a.m., Bravo, Hammond, Lee, Tanner, Washington and Whitney stopped the work that they were doing at the Richmond Walmart and walked to the customer service waiting area of the store (located immediately to the right of the first floor store entrance) to begin a work stoppage/protest.[22] The store was not yet open to the public (opening hours began at 6 a.m.), and the customer service area was empty, save for one individual who was sitting in the customer service area and left shortly after the work stoppage began. Bravo, Hammond, Lee, Tanner, Washington and Whitney were all still on the clock when they began their work stoppage. Meanwhile, the remodeling associates that did not participate in the work stoppage continued to stock and clean the store for the grand reopening. (Tr. 125, 244–245, 300, 351, 378, 562, 627–628, 672–674; Jt. Exhs. 26(a) (clip 3), 26(b) (clips 2–3, 5); see also Jt. Exh. 16 (indicating that at some point on November 2, the work stoppage participants resubmitted their letter to Walmart regarding Van Riper's conduct).)[23]

At around 5:29 a.m., Lilly and Jankowski entered the customer service area and greeted the associates who were participating in the work stoppage. Lilly asked the work stoppage participants what they wanted, and offered to meet with them individually under Walmart's open door policy to discuss their concerns. The work stoppage participants refused Lilly's offer because they wanted to discuss their concerns as a group, and Lilly was not willing to do so because of Walmart's practices with its open door policy and her belief that associates' confidential information should not be shared in a group setting. The work stoppage participants also refused Lilly's request that they return to work, and continued to wait in the customer service area. (Tr. 252–253, 298–300, 358, 387–388, 534–537; Jt. Exhs. 26(a) (clip 3), 26(b) (clips 2–3, 5), 58–59; see also Tr. 516–518, 631 (agreeing that Walmart handles open door meetings on an individual basis); Tr. 326–327.) At around 6 a.m., Lilly repeated her requests that the work stoppage participants meet with her individually to discuss their concerns, and that they return to work – the work stoppage participants again refused to meet with Lilly unless she agreed to meet with them as a group, and again refused to return to work. (Tr. 537–538.)

Shortly after the store opened at 6 a.m., four non-associates (a mixture of UFCW staff and community members) entered the store and joined the work stoppage participants in the customer service area. After arriving, the non-associates and work

[20] Due to other events that required her attention on November 2, Lilly did not finish investigating the associates' complaints about Van Riper until November 16. As part of her investigation, Lilly met with associates Hammond and Whitney in open door meetings on November 7 (Bravo, Lee, Stewart and Tanner declined Lilly's requests to meet). Lilly also met with Hutchins, Jackson, Tune and Van Riper. (Tr. 269, 296, 498, 545–546; 557–558; Jt. Exhs. 51, 57(b)–(g).) The results of Lilly's investigation are not relevant to the complaint allegations in this case.

[21] The times that I reference in this section correspond to the times stated on the surveillance videos that the parties submitted as Joint Exhibit 26(a)–(b).

[22] The customer service area has a long counter with three computers/cash registers, and a few seats for customers. A chest-high wall across and to the right of the customer service counter separates most of the customer service waiting area from the rest of the store. (Tr. 437–438; Jt. Exh. 12(b).)

[23] Although Van Riper's time at the Richmond store was coming to an end because the remodeling project was nearly concluded, associates were concerned that Van Riper might mistreat associates in other stores where he might be assigned in the future. (Tr. 243, 354.)

stoppage participants displayed an 8–10 foot long green banner that stated:

> Stand Up
> Live Better
> ForRespect.org
> OUR Walmart
> Organization United for Respect at Walmart

(Jt. Exhs. 13(e)–(f).) Initially (at approximately 6:03 a.m.), the protesters held the banner in such a way that much of the front of the customer service counter was blocked.[24] However, at 6:05 a.m., the protesters moved the banner to the back of the customer service area, thereby leaving most of the customer service counter unblocked. (Tr. 256, 305–306, 355–356, 539–540, 563, 685; Jt. Exhs. 26(a) (clip 3), 26(b) (clips 2–3, 5), 58.)

Over the next several minutes, protesters periodically left the customer service area to exit the store, and then later returned. For example, at approximately 6:10 a.m., Lee left the customer service area for approximately five minutes to conduct a media interview in the parking lot.[25] Similarly, at approximately 6:16 a.m., UFCW staff delivered signs and OUR Walmart t-shirts to the protesters in the customer service area, and took photographs of the protest inside the store (notwithstanding Jankowski's warnings that the protesters could not take photos or hold signs, and that the protesters were trespassing and should leave the store). At times, up to 15–19 protesters (including the six associates who were continuing their work stoppage) were present in the customer service area. (Tr. 127–129, 146–152, 163–165, 258–259, 303–304, 311, 539, 688–689; Jt. Exhs. 12(a)–(b), 13(d)–(f), 26(a) (clips 1–3), 26(b) (clips 2–3, 5), 58–59.) Some of the UFCW staff and community members held signs and distributed leaflets outside of the store, as a protest conducted in support of (and in conjunction with) the work stoppage/protest that was in progress inside the store. Since the protesters outside the store were near a storage area for shopping carts (such that someone wanting to retrieve a cart would have to walk around the protesters), Walmart asked one of its greeters to assist customers with getting carts.[26] (Tr. 180–185, 321, 325, 540–542, 629, 685–687; Jt. Exhs. 13(a)–(c), 29, 58; R. Exh. 4.)

At approximately 6:29 a.m., Bravo, Hammond, Lee, Tanner, Washington, Whitney and two community members left the customer service area and stood in front of a display located in the store aisle leading from the first floor store entrance (Walmart refers to this aisle as "Action Alley" because the store features advertisements in that area – the display was approximately 20 feet from the entrance doors).[27] By this point, Bravo, Tanner and Lee had donned green OUR Walmart t-shirts, and Bravo was displaying a 3–by–2–foot sign that stated "ULP Strike." Three other protesters remained in the customer service area, where they continued to display the green banner. Upon seeing the protesters move to Action Alley, Lilly and Jankowski approached and told them that they were blocking customers from entering and shopping in the store, and asserted that the protesters should either return to the customer service area or leave the store. Lilly added that she would prefer that the protesters simply leave the store. In response, at 6:32 a.m., the protesters left Action Alley and returned to the customer service area (to some brief applause from one of the protesters who had stayed behind in that area). (Tr. 260–262, 308–309, 316, 318–319, 357–358, 374–376, 542–545, 687–688; Jt. Exhs. 13(g), 26(a) (clip 3), 26(b) (clips 2–3, 5), 58–59.)

At approximately 6:37 a.m., two uniformed police officers entered the store and spoke with Lilly and Jankowski, and later, a representative of the protesters. After some discussion, the protesters agreed that they would leave the store after the six associates clocked out. Accordingly, the six associates left the customer service area at 6:38 a.m. to clock out, while UFCW staff and community supporters remained in and around the customer service area. All protesters (including the six associates) left the store by 6:52 a.m. (slightly before the end of the associates' scheduled shifts, which ran until 7 a.m. for remodeling associates, and 8 a.m. for Bravo). Some associates (e.g., Bravo, Lee) joined in circulating petitions, leafleting and protesting outside of the first floor store entrance. (Tr. 263, 265, 320–321, 325–326, 355, 376, 378, 691–692; Jt. Exhs. 26(a) (clip 3), 26(b) (clips 2–5), 29, 58–59.) At no point during the work stoppage did Walmart (through Lilly, Jankowski or another manager) warn the six associates that they must leave the store or face being disciplined. (Tr. 265, 361.)

From 6 a.m. onward, Maria Della Maggiora was the Walmart associate assigned to work at the customer service desk.[28] Although the customer service counter was open and accessible, Maggiora did her work elsewhere in the store during

[24] During this timeframe, there were no customers in the customer service area. A Walmart associate briefly walked behind the customer service counter without difficulty or incident. (Jt. Exh. 26(a), clip 3 (6:04 a.m.).)

[25] Coincidentally, while Lee was standing behind a parked news vehicle doing her interview, Van Riper left the store and entered his car, which was parked next to the news vehicle. Van Riper yelled at Lee to move as he backed out his car, and then left the parking lot. (Tr. 264–265, 304–305; Jt. Exh. 26(a) (clip 1).)

[26] Customer service desk associate Maria Della Maggiora also testified about retrieving carts from the cart storage area outside of the front of the store. Specifically, Maggiora testified that although no one prevented her from retrieving shopping carts, she did not feel comfortable retrieving carts because protesters tried to speak to her about OUR Walmart. (Tr. 431–433.) I have given little weight to Maggiora's subjective reactions to the protest because they are not relevant to my analysis of the issues in this case.

[27] Lee estimated that the display was only 10 feet from the main entrance (Tr. 318.), but I have not credited her testimony on that point because the video footage in the record shows that there was no display located within ten feet of the main entrance.

[28] Normally, the customer service desk does not open until 7 a.m., and thus customers are rarely in the customer service area between 6 and 7 a.m. (Tr. 266, 361–362; GC Exhs. 3, 5; see also Tr. 633 (noting that the customer service area is not that busy between 6 a.m. and 8 a.m.).) Walmart opened the customer service desk earlier on November 2 because of the grand reopening. (Tr. 443–444.) I have given little weight to Maggiora's testimony that she normally sees 8 or 9 customers in the customer service area between 6:30 a.m. and 9 a.m. (See Tr. 429.) Much of Maggiora's testimony was vague and therefore unreliable, and in any event, her testimony on this point is not probative because the estimate that she provided for the amount of customer traffic at the customer service desk covers a time period that extends well beyond the time (6:52 a.m.) that the work stoppage ended.

the protest. Maggiora testified that she avoided the customer service area because the area was noisy while the protesters were present. Other associates, however, periodically walked behind the customer service desk without apparent difficulty, and only a limited number of customers entered the store during the protest (and the video footage does not show that any of those customers sought assistance at the customer service desk). (Tr. 266, 311–312, 358, 377, 422, 425, 430; Jt. Exhs. 26(a) (clip 3), 26(b) (clips 2–3, 5); see also Tr. 310 (Lee acknowledged that with 15 or more people in a small enclosed area such as the customer service area, "voices carry a little bit").)

5. Protest continues outside the Richmond Walmart second floor entrance[29]

As part of the Richmond Walmart's November 2 grand reopening, the store had arranged for a few vendors to set up tables in a large concrete walking area to the left of the second floor store entrance. Consistent with that plan, vendors began arriving and setting up tables at around 7:23 a.m.. (Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1), 58–59.)

At approximately 7:29 a.m., OUR Walmart members, UFCW staff and community supporters (including Bravo and other protesters who participated in the protest activities near the first floor entrance) began protesting in the same concrete walking area.[30] Initially, the demonstrators formed a line facing the parking lot, stretching a 15–foot long white banner (also used in the protest outside the first floor entrance) and a smaller green banner (also used during the work stoppage) across the protest line. The long white banner stated:

On Strike
Walmart: End the Retaliation

When they were facing the parking lot, the protesters were standing in the concrete walking area approximately 30 feet in front of where the vendors were setting up their tables. (Tr. 401–403, 406, 542, 689–690; Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1), 58.)

After changing their alignment a couple of times (alternating between facing the parking lot and turning the line perpendicular to the parking lot), at approximately 7:39 a.m. the protesters moved their banners to stretch perpendicular to the parking lot, with the ends of the line curved slightly to make a long, flat "U"-shaped formation. With this alignment, the protesters left room for one or two people to walk between them and the first vendor table, and left approximately five feet for people to pass between the protesters and the parking lot. Because the protesters were located well to the left of the store entrance, it was also possible for pedestrians coming from the parking lot to walk through a lined crosswalk area in the driveway and directly to the store entrance, thereby passing the protest line altogether. (Tr. 401–405; R. Exh. 5; Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1).)

At approximately 8:02 a.m., one or two protesters began distributing leaflets to individuals who passed through the concrete walking area. At around the same time (at 8:04 a.m.), the protesters holding the green banner moved to a different area of the concrete walkway, opening up 10–12 feet between the remaining line of protesters and the first vendor table. And, by 8:08 am, the protesters had put away the green banner and concentrated the protest line behind the longer white banner, thereby leaving half of the concrete walkway clear. (Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1).)

At around 8:15 a.m., several protesters left the area, and the protesters that remained began to wrap up their activities. Specifically, at around 8:23 a.m., the remaining protesters put away the long white banner and simply stood together in small groups (leaving 80% of the concrete walkway clear). All protest activity ended by 9:01 a.m., and at approximately 9:07 a.m., the protesters loaded their banners and signs into a sports utility vehicle. (Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1), 58.)

Throughout the exterior protest, a light load of customer traffic proceeded in and out of the second floor store entrance without incident. The vendor tables were also up and running and open for visitors, but saw limited traffic. One news vehicle parked at the end of the concrete walking area to cover the event, and then left the area once the protesters began to disperse. (Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1).)

G. Developments after the November 2 Work Stoppage

1. Work stoppage participants offer to return to work

On November 2, Bravo gave Walmart personnel a letter communicating his unconditional offer to return to work. Bravo and Lee returned to work at 11 p.m. on November 2 without incident.[31] On November 4, Hammond, Lee, Tanner and Washington also gave Walmart a letter communicating their unconditional offers to return to work (Whitney did not sign the letter). (Tr. 268–269, 390; Jt. Exhs. 17–18.)

2. Walmart disciplines the six associates who participated in the work stoppage

Under Walmart's disciplinary policy, a coaching is a tool that Walmart uses to "provide instruction and assistance to [associates] if [their] job performance fails to meet the reasonable expectations and standards for all associates in the same or similar position or if [the associates'] conduct violates a company policy or interferes or creates a risk of interfering with the safe, orderly and efficient operation of [Walmart's] business." Although Walmart has three levels of coaching (first, second

[29] The times that I reference in this section are taken from the time clock provided at the top of the video feed in Joint Exhibit 26(a), clip 4. I note that Joint Exhibit 26(b), clip 1 shows many of the same events, but its time clock lags four minutes behind (such that an event at 9 a.m. on Joint 26(a), clip 4 would appear at 9:04 a.m. on Joint Exhibit 26(b), clip 1).

[30] Mall security personnel informed Jankowski that it was permissible for the protesters to protest outside of the first and second floor entrances to the Richmond Walmart store. (Tr. 695; Jt. Exh. 58; see also Tr. 321 (a Walmart manager informed the associates that they had to leave the store, but did not have to leave the mall property outside).

[31] Bravo did attempt to complete his shift in the morning on November 2 (after the work stoppage concluded), but was told he could not do so without first participating in an open door meeting. Bravo declined, and instead returned to work on his next scheduled shift (in the evening on November 2). (Tr. 390.)

and third written coachings) that associates typically progress through if they are coached on multiple occasions (i.e., an associate who has an active first written coaching will normally receive a second written coaching if the need for another coaching arises), supervisors have the discretion to skip levels of coaching if they determine a higher level of coaching is warranted based on the particular circumstances. (Jt. Exh. 6, p. 1.)

Between November 5 and 8, Walmart disciplined each of the work stoppage participants with a two-level coaching, such that Hammond, Lee, Tanner, Washington and Whitney received a second written coaching (because they had no active coachings at the time), while Bravo received a third written coaching (because he had an active first written coaching at the time). Before deciding to issue two-level coachings, Lilly searched Walmart's online coaching records and performed a "consistency search" to review what level of coaching Walmart used when associates committed similar infractions in the past. Based on that search, Lilly found that multiple associates in the Richmond store had either skipped levels or had been coached for similar infractions, and therefore determined that the proposed two-level coaching would be appropriate for the associates who participated in the work stoppage. (Tr. 560–561.) Each associate's coaching document stated as follows:

> **Reason(s) [for coaching]:**
>
> Inappropriate Conduct, Unauthorized Use of Company Time
>
> **Observations of Associate's Behavior and/or Performance:**
>
> Abandoned work immediately befor[e] Grand Opening event and refused to return to work after being told to do so. [T]hen engaged in a sit-in on the sales floor and physically occupied a central work area. [T]hen 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 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 Walmarts 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.

(Jt. Exh. 19; see also Tr. 266–268, 322, 359–361, 558–565, 587; Jt. Exh. 20 (Bravo's pre-existing first written coaching, given on August 19, 2012 for attendance/punctuality problems).) Walmart emphasized that it disciplined the associates for unauthorized use of company time (not using their time on the clock to do productive work), and not because of the work stoppage. (Tr. 268, 322, 565.)

Walmart's coaching paperwork includes an "Action Plan" that associates may complete to respond to the coaching, or articulate how they will correct the problems or concerns set forth in the coaching. (See Jt. Exh. 6.) Bravo, Lee, and Whitney left their action plans blank, while Tanner did not report for work after November 2, and thus was not present to enter an action plan when her coaching was issued. Washington wrote: "just get back to work and stay [focused]." And Hammond stated: "I only participated in the sit-in because I was tired of the verbal abuse and other unfair labor practices made by Art [Van Riper] from Store Planning. With that being said, I will continue to work hard as I move forward here at Walmart. I have always done my best and more since I started here and I love working here. I hope this doesn't reflect negatively on my work ethic because I will still be knocking out pallets like crazy. I apologize for my inappropriate behavior and this will not happen again." (Jt. Exh. 19; see also Tr. 558, 561, 563.)

3. November 7 – remodeling project concludes

On November 7, Walmart informed the remodeling associates at the Richmond store that the remodeling project had concluded and that the associates would receive their last checks in the mail. Accordingly, Hammond, Washington and Whitney worked their final day on November 8, while Tanner and Lee worked their final days on November 2 and 7, respectively. Of the 27 associates who worked on the remodeling project between August 13 and November 8, only one associate (associate C.R.) was placed directly into a permanent position at the store. (Tr. 270, 279–280, 283; Jt. Exhs. 23, 25 pp. 56–60.)

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Relco Locomotives, Inc.*, 358 NLRB 298, 309; see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Relco Locomotives,* 358 NLRB 298, 309. My credibility findings are set forth above in the findings of fact for this decision.

B. The Placerville Store

1. Complaint allegations and applicable legal standard

The General Counsel alleges that, on or about June 1, 2012, Walmart unlawfully engaged in surveillance and/or created the

impression of surveillance by photographing or videotaping associates (or appearing to do so) while the associates engaged in a protest at the Placerville store. (GC Exh. 1(bb), par. 6(a)(1).)

The General Counsel also alleges that, in or about the second week of July 2012, Walmart implicitly threatened an associate by asking the associate if she was afraid Walmart might close its Placerville store if too many associates joined OUR Walmart. (GC Exh. 1(bb), par. 6(a)(2).)

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Relco Locomotives,* 358 NLRB 298, 309 (2012), enfd. 734 F. 3d. 764 (8th Cir. 2013).

In general, the test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. Id. Apart from a few narrow exceptions (none of which apply in this case), an employer's subjective motivation for its conduct or statements is irrelevant to the question of whether those actions violate Section 8(a)(1) of the Act. See *Station Casinos, LLC*, 358 NLRB 1556, 1573–1574 (2012).

2. Did Walmart violate the Act by engaging in surveillance or creating the impression of surveillance on June 1, 2012?

A supervisor's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. However, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is out of the ordinary and thereby coercive. Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 18–19.

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, under all the relevant circumstances, reasonable employees would assume from the statement or conduct in question that their union or other protected activities have been placed under surveillance. Id.; see also *New Vista Nursing & Rehabilitation*, 358 NLRB 473, 482 (2012) (noting that the standard for creating an unlawful impression of surveillance is met "when an employer reveals specific information about a union activity that is not generally known, and does not reveal its source"); *Flexsteel Industries,* 311 NLRB 257, 257 (1993) (noting that an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement). The standard is an objective one, based on the rationale that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. *Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 18–19.

In this case, the General Counsel fell short of establishing facts demonstrating that Walmart unlawfully engaged in surveillance or created the impression of surveillance at the June 1 protest. Although several people participated in the protest, the General Counsel relied solely on the testimony of associate Carpenter, who testified that from a distance of up to 30 feet, he saw store manager Hileman hold a black, shiny object in her hands and make a scanning motion as if she was photographing or videotaping the protesters. (Findings of Fact (FOF) Section II(B)(1).)

Although Carpenter was a candid witness, I find that the General Counsel did not present enough evidence to establish that Hileman videotaped, photographed, or made a scanning motion towards protesters as alleged on June 1.[32] First, Carpenter's account was tentative and uncorroborated. Carpenter admitted to being up to 30 feet away from Hileman when he made his observations, and also admitted that he was uncertain about exactly what he saw Hileman holding in her hands when she allegedly made the scanning motion. And, although several other protesters were present on the sidewalk when the alleged surveillance occurred, the General Counsel did not call any other witnesses to corroborate Carpenter's account. Second, Hileman credibly denied videotaping, photographing or scanning the protesters as alleged, and drew support in her denial from Snodgrass, who was present for the majority of the protest and did not see Hileman take photographs or videos, and did not see her make any scanning motions. (FOF, Section II(B)(1).)

In light of the weaknesses in Carpenter's testimony, and Hileman's credible denial, I cannot find that Hileman unlawfully engaged in surveillance, nor can I find that Hileman engaged in conduct that would reasonably create the impression of surveillance as the General Counsel alleges.[33] Accordingly, I recommend that the allegation in paragraph 6(a)(1) be dismissed.

3. Did Walmart violate the Act when Stafford asked Collins if she was concerned that the Placerville store might close if too many associates joined OUR Walmart?

The Board has explained that an employer may lawfully communicate to its employees carefully phrased predictions about "demonstrably probable consequences beyond [the employer's] control" that unionization will have on the company, provided that the predictions are based on objective facts. However, if the employer implies that it may or may not take

[32] The General Counsel does not claim that Hileman or other Walmart managers engaged in unlawful surveillance when they were merely present at the protest and speaking on their cell phones.

[33] I note that even if Carpenter's and Hileman's testimony were equally credible, Walmart would prevail on this issue because the General Counsel bears the burden of proving the allegations in the complaint by a preponderance of the evidence. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

action solely on its own initiative for reasons unrelated to economic necessities and known only by the employer, then the employer's prediction is a threat of retaliation that violates Section 8(a)(1) of the Act. *Daikichi Sushi*, 335 NLRB 622, 623–624 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Thus, if an employer predicts, without any supporting objective facts, that its company could close if employees unionize, the employer violates Section 8(a)(1) because its prediction communicates an unlawful message that the employer might decide on its own initiative to shut down operations if its employees unionize. Id. at 624 (noting that it is not a defense if the employer's prediction of plant closure is couched as a possibility instead of a certainty); see also *Dlubak Corp*, 307 NLRB 1138, 1151–1152 (1992) (finding that the employer violated Section 8(a)(1) by warning employees, without a basis in objective fact, that the plant could close if employees selected the union as their collective-bargaining representative), enfd. 5 F.3d 1488 (3d Cir. 1993).

As set forth in the findings of fact, in early July 2012, assistant store manager Stafford asked associate (and OUR Walmart supporter) Collins if she (Collins) was concerned that Walmart might close the Placerville store if OUR Walmart grew too large. (FOF, Section II(B)(3).) Although Stafford's raised the prospect of plant closure in the form of a question, Stafford's question implicitly communicated that plant closure might be a risk if OUR Walmart grew too large. More important, the asserted risk of plant closure was not based on any objective facts – instead, the implication was that Walmart might close the Placerville store if Walmart believed OUR Walmart was gaining too much traction. A reasonable employee confronted with such a risk would be more likely to avoid supporting OUR Walmart. Accordingly, I find that Stafford's statement to Collins violated Section 8(a)(1) of the Act because Stafford's statement about the risk of plant closure had reasonable tendency to interfere with, restrain or coerce associates in their union or protected activities.[34]

C. Dress Code Allegations

1. Complaint allegations and applicable legal standards

The General Counsel alleges that Walmart violated Section 8(a)(1) of the Act by:

> (a) maintaining its July 2010 dress code for California associates until at least September 14, 2012 (GC Exh. 1(bb), par. 6(d));
>
> (b) maintaining its February 2013 dress code for California associates (GC Exh. 1(bb), par. 6(f)); and
>
> (c) applying its July 2010 dress code for California associates selectively and disparately insofar as Walmart applied it to an employee (Raymond Bravo) who formed, joined or assisted OUR Walmart and/or the United Food and Commercial Workers, while not enforcing it against other associates (GC Exh. 1(bb), par. 6(e)).

Regarding the General Counsel's allegations that Walmart's dress code policies were facially unlawful (GC Exh. 1(bb), pars. 6(d), (f)), it is well established that employees have a statutorily protected right to wear union insignia on their employer's premises, including buttons, t-shirts and other articles of clothing. *Stabilus, Inc.*, 355 NLRB 866, 868 (2010); *W San Diego*, 348 NLRB 372, 373 (2006). However, an employer may lawfully restrict the wearing of union insignia where "special circumstances" justify the restriction. Special circumstances justify restrictions on union insignia or apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees. The employer bears the burden of proving such special circumstances. *Stabilus*, 355 NLRB at 868; *W San Diego*, 348 NLRB at 373; see also *Nordstrom, Inc.*, 264 NLRB 698, 701–702 (1982) (noting that customer exposure to union insignia, standing alone, is not a special circumstance that permits an employer to prohibit employees from displaying union insignia).

2. Did Walmart violate Section 8(a)(1) by maintaining its July 2010 California dress code?

As indicated in the complaint, the General Counsel asserts that the following language in Walmart's July 2010 dress code for California associates is facially unlawful:

> 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.

(FOF, Section II(C)(2); see also GC Exh. 1(bb), par. 6(d).)

Based on the applicable case law, I find that Walmart's July 2010 dress code is facially unlawful because it is overbroad and unduly infringes on the rights of associates to wear union insignia. The July 2010 dress code explicitly prohibits associates from wearing all logos except for Walmart logos, clothing manufacturer logos, and "logos allowed under federal or state law." The exception for "logos allowed under federal or state law," however, does not save the dress code from violating Section 8(a)(1) of the Act, because the Board has explained that an employer may not validate an overbroad work rule by placing the burden on employees to determine their legal rights. *Trailmobile, Division of Pullman*, 221 NLRB 1088, 1089 (1975) (holding that an employer's work rule that prohibited solicitation and distribution on company premises "except as provided by law" was unlawfully overbroad because the rule

[34] The cases that Walmart cited about warnings of plant closure are distinguishable. In the cases that Walmart cited, the Board did not find that predictions of plant closure violated the Act because the employee initiated the discussion, and the supervisors explicitly stated that they were providing their personal opinions about the risks of unionization. See *Selkirk Metalbastos*, 321 NLRB 44, 52 (1996), enf. denied on other grounds, 116 F.3d 782 (5th Cir. 1997) ; *Standard Products Co.*, 281 NLRB 141, 151 (1986), enf. denied in part on other grounds, 824 F.2d 291 (4th Cir. 1987). Those factors are not present here, as Stafford initiated the discussion with Collins, and Stafford did not qualify her remarks as merely opinion.

prohibited solicitation and distribution in nonwork areas during nonwork time, and the employer could not place the burden on employees to determine their rights under the rule).

In its posttrial brief, Walmart maintains that the logo restrictions in its dress code are justified because the dress code, together with Walmart's workplace standards policy, ensures that associates are professional, neat and clean in their appearance, and thus dress in a manner that supports Walmart's public image of providing excellent customer service in a family-friendly environment. (See R. Posttrial Br. at 33.) In support of its argument, Walmart relies on case law that supports the proposition that an employer may demonstrate special circumstances by proving that union insignia would unreasonably interfere with an employer's established public image. See, e.g., *W San Diego*, 348 NLRB at 372–373 & fn. 4 (finding that the employer lawfully restricted hotel personnel from wearing any uniform adornments, including union buttons and other insignia, in public areas of the hotel, and noting that the employer invested between $88,000 and $100,000 in 2004 and 2005 on uniforms aimed at achieving a "trendy, distinct and chic look"); *United Parcel Service*, 195 NLRB 441, 441 & fn. 2, 449 (finding that the employer lawfully restricted its drivers from wearing a union button while exposed to customers and the general public, noting that the employer invested $3.75 million per year to provide and maintain uniforms to preserve its public image of a neatly uniformed driver).

Although "public image" may be a valid justification for restricting union insignia, I find that Walmart fell short of establishing the "public image" special circumstances defense in this case. First, the evidentiary record shows that Walmart was generally loose with enforcing its dress code policy. (FOF, Section II(C)(2).) Where that is the case, the "public image" justification fails because the Board has held that an employer may not use an inconsistently applied uniform policy to establish special circumstances. *Airport 2000 Concessions, LLC*, 346 NLRB 958, 960 (2006).

Second, the evidentiary record does not show that Walmart's July 2010 dress code is sufficiently strict, standardized and formal to be covered by the case law (noted above) in which the Board has found that an employer is justified in restricting employees' right to wear union insignia to protect the employer's public image when employees work in areas where they may come in contact with the public. Under Walmart's policy, employees select the clothing they will wear to comply with Walmart's broad-brush dress code – the record does not show that Walmart has invested considerable resources in developing (much less providing uniforms for) an employee "look" to portray to the public. As a result, Walmart's public image justification simply falls short, because its July 2010 dress code is not part of a comprehensive public image business plan akin to what the Board has required when finding that union insignia would unreasonably interfere with an employer's public image. See *Raley's Inc.*, 311 NLRB 1244, 1250 (1993) (explaining that public image concerns did not justify a large retail grocery store's dress code because "[t]he aprons and smocks of [the grocery store's] cashiers, clerks, and meatcutters worn over employee selected white shirts, dark slacks, and shoes are simply not the equivalent of traditional uniforms in the sense of distinctive clothing intended to identify the wearer as member of a certain organization or group. Thus, the employee appearance produced by conformity to [the grocery store's] dress code does not rise to the level of the liveries and uniforms of the world class restaurants or United Parcel Services drivers either in appearance or in tradition."); see also FOF, Section II(C).)

And third, Walmart's July 2010 dress code is overbroad because it not only prohibits union insignia for associates who work in public areas of the store, but also prohibits union insignia for associates in situations where any public image concern is limited or nonexistent (e.g., when associates work in nonpublic areas of the store, or when associates work while the store is closed to the public altogether, such as from midnight to 6 a.m. at the Richmond store). *Target Corp.*, 359 NLRB 953, 974 (2013) (rejecting the employer's argument that its ban on all buttons was justified to preserve its public image and business plan, and noting that the ban was overbroad because it applied to overnight employees who worked when the store was closed to the public); *W San Diego*, 348 NLRB at 374 (finding that the hotel did not demonstrate that its prohibition on wearing union insignia was justified by special circumstances in nonpublic areas of the hotel, where employees would not be seen by the public and thus the hotel's public image was not at issue).[35]

Accordingly, for the foregoing reasons, I find that Walmart violated Section 8(a)(1) by maintaining its July 2010 dress code, a facially overbroad policy that unduly restricted associates' right to wear union insignia.

3. Did Walmart violate Section 8(a)(1) by maintaining its February 2013 California dress code?

As indicated in the complaint, the General Counsel asserts that the following language in Walmart's February 2013 dress code for California associates is facially unlawful:

> Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts/blouses, pants, skirts, hats, jackets or coats are also permitted, subject to the following . . .

(FOF, Section II(C)(4) (noting that the February 2013 dress code goes on to say that "[t]he logo or graphic must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional messaging"); see also GC Exh. 1(bb), par. 6(f).)

Like the July 2010 dress code discussed above, I find that Walmart's February 2013 dress code is facially unlawful because it is overbroad and unduly infringes on the rights of associates to wear union insignia. Although the February 2013 dress code differs from the July 2010 version in that the February 2013 dress code does not explicitly prohibit union insignia or other logos, it remains overbroad because it requires logos to be "small" and "non-distracting." Those restrictions do not

[35] In this connection, I note that Walmart did not show that it would be impractical for associates to don or doff union insignia when moving between the public and nonpublic areas of the store (or when the store opened or closed). A mere hypothetical impracticality with removing union insignia does not justify a blanket, property-wide prohibition on union insignia. See *W San Diego*, 348 NLRB at 374.

find sufficient support in the Board's case law[36] – to the contrary, the Board has upheld the right of employees to wear union insignia of a variety of sizes, including insignia sizes much larger than Walmart's limitation that any logos must be smaller than associates' 2 x 3 inch name tags. See, e.g., *Serv-Air, Inc.*, 161 NLRB 382, 401–402, 416–417 (1966) (finding that the employer violated the Act by prohibiting assorted union insignia that included: an improvised, crudely printed, paper badge that was 3 inches in diameter; a 2.25 inch red button; and 14-inch signs that two employees taped to their backs), enfd. 395 F. 2d 557 (10th Cir. 1968), cert. denied, 393 U.S. 840 (1968).

Furthermore, for the same reasons noted above regarding the July 2010 dress code, Walmart fell short of demonstrating that the logo restrictions in its February 2013 dress code are justified by Walmart's desire to foster a public image of providing excellent customer service in a family-friendly environment. Specifically, Walmart did not establish its "public image" justification because Walmart: has not applied its February 2013 dress code consistently; did not show that its February 2013 dress code is part of a comprehensive public image business plan similar to those that the Board has recognized in prior cases; and applies its dress code not only to associates when they are in public areas of the store, but also to associates when they are working in nonpublic areas and when the store is closed to the public. (See Discussion and Analysis, Section (C)(2), supra.) Therefore, I find that Walmart violated Section 8(a)(1) by maintaining its February 2013 dress code, a facially overbroad policy that unduly restricted associates' right to wear union insignia.[37]

4. Did Walmart violate Section 8(a)(1) by disparately and selectively applying it to associate Raymond Bravo in August and September 2012?

Separate and apart from its arguments that Walmart's July 2010 and February 2013 California dress codes were facially unlawful, the General Counsel asserts that Walmart violated Section 8(a)(1) of the Act by applying the July 2010 dress code selectively and disparately against Raymond Bravo to restrict Bravo's protected activities. See *Stabilus, Inc.*, 355 NLRB 836, 837–840 (2010) (employer violated Section 8(a)(1) of the Act by enforcing its uniform policy in selective and overbroad manner against union supporters, and in a disparate manner against Section 7 activity).

I find that the evidentiary record supports the General Counsel's argument. Walmart generally did not object to associates' attire (including Bravo's attire) in 2012 when they wore noncompliant clothing such as black shirts, khaki shorts or sweat pants. Similarly, Walmart supervisors generally did not object when associate Victor Mendoza wore (in 2012): a blue shirt with the words "Free Hugs" written in large white letters on the front of the shirt; or a blue and white checkerboard flannel shirt.[38] However, when Walmart supervisor Peggy Licina saw Bravo wearing a green OUR Walmart t-shirt (on August 21, 2012) and saw Bravo wearing a white t-shirt with UFCW logos (on September 14, 2012), she suddenly became more strict with the dress code and directed Bravo to remove the shirts. Notably, in each instance, Licina did not object to Bravo continuing to wear other clothing (a black thermal shirt, and khaki shorts) that did not comply with the dress code. (FOF, Section II(C)(3).) By applying the July 2010 dress code in this disparate manner (i.e., by invoking the dress code when Bravo wore noncompliant clothing with OUR Walmart or UFCW logos, but not when Bravo or other associates wore other noncompliant clothing), Walmart violated Section 8(a)(1) of the Act as alleged in paragraph 6(e) of the complaint.

D. The Richmond Store—Alleged Unlawful Threats

1. Complaint allegations and applicable legal standard

The General Counsel alleges that Walmart (through field project supervisor Van Riper) violated Section 8(a)(1) of the Act by:

> (a) on or about October 11, threatening associates that he (Van Riper) would shoot the union when some associates returned from striking at Walmart's Bentonville, Arkansas headquarters (GC Exh. 1(bb), par. 6(b)(1));
>
> (b) on or about October 12, threatening associates that: Walmart would never be union and thereby informing associates that it would be futile for them to select OUR Walmart as their collective-bargaining representative (GC Exh. 1(bb), par. 6(b)(2)(A));[39]

[36] The Board has observed in the past that certain union insignia do not interfere with a company's public image because the union insignia are small, neat and inconspicuous. See *Nordstrom, Inc.*, 264 NLRB 698, 701 (1982) (noting that the union pin at issue was "muted in tone, discrete in size and free from provocative slogans or mottos"); see also *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). It does not follow, however, that union insignia **must** be small, neat or inconspicuous to be protected, particularly in workplaces where (as here) the employer has not implemented a comprehensive public image business plan.

[37] The General Counsel also argued that Walmart's February 2013 dress California code is a facially unlawful work rule that reasonably tends to chill employees' exercise of their Section 7 rights. See GC Posttrial Br. at 48–50; see also *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 1, fn. 1 (2014) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), and describing the legal standard that applies when such challenges to work rules are at issue); *Hitachi Capital America Corp.*, 361 NLRB No. 19, slip op. at 2–3 (2014) (same, and noting that "the Board gives the rule a reasonable reading and refrains from reading particular phrases in isolation"). Since I have found that the February 2013 dress code is facially unlawful because it improperly restricts employees' Section 7 right to wear union insignia, I decline to rule on the General Counsel's alternate (work rule) theory for why the February 2013 dress code is unlawful.

[38] When Walmart supervisors did object upon seeing an associate wearing a shirt with a noncompliant logo, Walmart's addressed the issue by permitting the associate to continue wearing the shirt, but with the shirt turned inside out to hide the logo. (FOF, Section II(C)(2).)

[39] I am not persuaded by Respondent's argument that I should dismiss this futility allegation on the ground that it is not closely related to the allegations in an underlying unfair labor practice charge. (See R. Posttrial Br. at 31.) To decide whether complaint allegations are closely related to the allegations in a timely filed charge, the Board evaluates whether the complaint allegations are factually and legally related to the charge. *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988).

(c) on or about October 12, threatening associates by telling them that the associates returning from strike would be looking for new jobs (GC Exh. 1(bb), par. 6(b)(2)(B)); and

(d) on or about October 12, prohibiting associates from speaking to associates returning from strike about the returning strikers' activities on behalf of OUR Walmart (GC Exh. 1(bb), par. 6(b)(2)(C)).

As previously noted, the test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 14

5. Was Van Riper one of Walmart's agents?

As an initial matter, Walmart denies that Van Riper was one of its supervisors or agents, as those terms are defined in Board precedent. On the question of whether Van Riper was Walmart's agent, "[t]he Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action." *Pan Oston Co.*, 336 NLRB 305, 305 (2001) (collecting cases and other supporting authority). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question." Id. at 305–306. "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief." Id. at 306. "The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management," taking into account "the position and duties of the employee in addition to the context in which the behavior occurred." Id. "The Board may find agency where the type of conduct that is alleged to be unlawful is related to the duties of the employee. . . . In contrast, the Board may decline to find agency where an employee acts outside the scope of his or her usual duties." Id. "Although not dispositive, the Board will consider whether the statements or actions of an alleged employee agent were consistent with statements or actions of the employer. The Board has found that such consistencies support a finding of apparent authority." Id. And finally, the Board has emphasized that "an employee may be an agent of the employer for one purpose but not another." Id.

Applying that standard, I find that Van Riper was one of Walmart's agents.[40] Walmart gave Van Riper the responsibility to manage the work that the remodeling crew performed, and the responsibility to keep the remodeling project moving forward. Consistent with those responsibilities, Van Riper held daily meetings with remodeling associates, at which he announced the tasks that they would be working on for the day. Van Riper also trained associates on how to carry out various assignments, and had the discretion to assign particular associates to daily tasks as he deemed necessary to complete the work as efficiently as possible. In addition, although Richmond store managers generally had authority over remodeling associates in personnel matters, when members of the remodeling team returned from strike and made their unconditional offer to return to work on October 11, Richmond store assistant manager Atlas Chandra called Van Riper over to handle the matter, thereby indicating that Van Riper was the proper recipient of the associates' offers to return to work.[41] (FOF, Section II(D), (E)(2).) Given the extent of Van Riper's responsibilities, associates would reasonably believe that Van Riper had the authority to speak and act as Walmart's agent regarding the associates assigned to the remodeling project. See *SAIA Motor Freight, Inc.*, 334 NLRB 979, 979 (2001) (finding that a foreman was an agent vested with apparent authority, and noting that the foreman, *inter alia*, assigned and directed the employees' work, and conducted employee meetings at which he discussed employment-related matters); *Cooper Industries*, 328 NLRB 145, 146 (1999) (finding that three hourly paid "facilitators" were agents who had actual and apparent authority to act on the employer's behalf because the employer vested the facilitators with au-

In an unfair labor practice charge that was timely filed on November 2, OUR Walmart asserted that Walmart violated the Act by: threatening associates on or about October 9 that it would fire all OUR Walmart members who walked off the job in a workplace action; and, on or about October 11, telling associates not to speak to associates who participated in a strike. (See GC Exh. 1(c).) I find that the futility allegation in the complaint is factually related to the November 2 charge because the complaint alleges (and clarifies) that Van Riper made statements about futility in the same October 12 meeting in which he threatened that associates returning from strike would be looking for new jobs, and prohibited associates from speaking to the returning strikers about their activities on behalf of OUR Walmart.

I also find that the futility allegation in the complaint is legally related to the November 2 charge because it was part of the remarks that Van Riper made to associates on October 12, essentially in response to the buzz in the workplace that arose when associates returned from a strike and announced their unconditional offer to return to work a few hours before the October 12 meeting. As the Board has explained, the "legally related" prong of the *Redd-I* test is satisfied "where the two sets of allegations demonstrate similar conduct, usually within the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity." *SKC Electric, Inc.*, 350 NLRB 857, 858 (2007) (citing *Carney Hospital*, 350 NLRB 627, 630 (2007).) Since the futility allegation in the complaint satisfies both prongs of the *Redd-I* test (as it demonstrates conduct that is similar to the other alleged coercive statements that Van Riper made at the October 12 meeting), I will consider the merits of that allegation.

[40] Since I find that Van Riper was one of Walmart's agents during the relevant time period, I need not address the parties' arguments about whether Van Riper was a supervisor under Section 2(11) of the Act.

[41] I have considered the fact that Van Riper also tried to pass the buck when Chandra directed the returning strikers to speak to Van Riper. The fact remains, however, that when Chandra instructed associates to speak to Van Riper when the associates offered to return to work, a reasonable associate would have concluded that Van Riper had the authority to handle the matter (based on Chandra's actions, and based on Van Riper's general authority over the remodeling team).

thority to implement the employer's policies on the production floor, and because the employer held out the facilitators as the "primary conduits for communications between management and team employees on a wide variety of employment and production matters"), enfd. 8 Fed. Appx. 610 (9th Cir. 2001).)

6. Did Walmart (through Van Riper) make statements or engage in conduct that violated Section 8(a)(1)?

Having established that Van Riper was Walmart's agent, I now turn to the merits of the allegations that Van Riper made four statements that violate Section 8(a)(1). At the outset, I note that Walmart did not call Van Riper to testify at trial, even though he remained one of Walmart's associates at the time. Furthermore, although the record includes a written statement that Van Riper provided when Lilly interviewed him about his interactions with the Richmond store remodeling crew, Van Riper's written statement does not address any of the statements at issue here. Thus, the only questions are whether the General Counsel's witnesses were credible in their testimony about what Van Riper said, and if so, whether Van Riper's statements violated the Act.

As indicated in the findings of fact, I credited witness Mabel Tsang's testimony about the specific words that Van Riper used when associates presented him with a return to work letter on October 11. Tsang was actively keeping track of Van Riper's behavior and comments when he told associates "If it were up to me, I'd shoot the union," and Tsang's testimony on that point was credible and was corroborated by Raymond Bravo's testimony and Demario Hammond's written statement (given during Walmart's investigation of Van Riper's interactions with associates). Although Walmart points out that other witnesses differed from Tsang about Van Riper's exact words, Tsang's account remains credible, and I note in any event that the other witnesses all agreed that Van Riper made a statement that threatened associates with physical violence because they supported a union.[42] (FOF, Section II(E)(2).) I therefore find that Walmart, through Van Riper's remarks on October 11, violated Section 8(a)(1) of the Act as alleged in the complaint. See *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 14 (explaining that an employer's statements or conduct violate Section 8(a)(1) if they have a reasonable tendency to interfere with, restrain or coerce union or protected activities).

Lee's testimony about Van Riper's statements at the October 12 meeting was credible and was not rebutted by any other evidence. As a result, the evidentiary record establishes that Van Riper told associates that: Walmart would never unionize; the remodeling crew should not talk to returning strikers about the situation; and that the returning strikers would be looking for new jobs. (FOF, Section II(E)(2).) Based on well established Board precedent, each of those statements violated Section 8(a)(1) of the Act. See *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 18 (explaining that an employer violates Section 8(a)(1) if it communicates to employees that they risk their job security if they support a union); *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1438–1439 (2010) (explaining that an employer violates Section 8(a)(1) when it permits employees to discuss nonwork-related subjects during worktime, but prohibits employees from discussing union-related matters); *Goya Foods*, 347 NLRB 1118, 1128–1129 (2006), enfd 525 F.3d 1117 (11th Cir. 2008) (explaining that an employer may not tell employees that it would be futile for them to support a union).

In sum, each of Van Riper's statements discussed here had a reasonable tendency to interfere with, restrain or coerce associates in the exercise of their Section 7 rights. Accordingly, I find that the General Counsel established that Walmart (through Van Riper) violated Section 8(a)(1) of the Act as alleged in paragraph 6(b)(1)–(2) of the complaint.

E. The Richmond Store—Alleged Unlawful Disciplinary Coachings

1. Complaint allegations and applicable legal standard

Last, the General Counsel alleges that from November 4–7, Walmart unlawfully issued two-level coachings to associates Raymond Bravo, Semetra Lee, Demario Hammond, Misty Tanner, Markeith Washington and Timothy Whitney because those associates engaged in a protected work stoppage on November 2, and to discourage associates from engaging in those or other protected activities. (GC Exh. 1(bb), pars. 7(b), (d)–(e).)

To establish that an adverse employment action violates Section 8(a)(1) of the Act, the General Counsel must demonstrate that: the employee engaged in activity that is "concerted" within the meaning of Section 7 of the Act; the respondent knew of the concerted nature of the employee's activity; the concerted activity was protected by the Act; and the respondent's decision to take adverse action against the employee was motivated by the employee's protected, concerted activity. *Relco Locomotives,* 358 NLRB 298, 309, 314; see also id. at 311 (observing that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation"). If the General Counsel succeeds

[42] Contrary to Walmart's argument in its posttrial brief, Van Riper's remark that "if it were up to me, I'd shoot the union" cannot be excused as a mere statement of opinion, a flip or intemperate remark, or hyperbole that no reasonable employee could have taken seriously. See R. Posttrial Br. at 23–27; see also, e.g., *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004) (noting that flip and intemperate remarks are protected as free speech by Section 8(c) of the Act); *Mid-State, Inc.*, 331 NLRB 1372, 1372 (2000) (supervisor's statements to employees about kicking a union representative's ass, or filling the union representative's butt with lead did not violate the Act, because the context for those statements was such that the statements would not reasonably tend to coerce employees in the exercise of their Section 7 rights). Instead, the evidentiary record shows that out of anger after having to deal with associates who were returning from a strike, Van Riper essentially communicated to associates that future protected activity could put associates at risk for unspecified reprisals (even if it was clear that he would not actually "shoot" OUR Walmart supporters). As such, Van Riper's statement violated Section 8(a)(1) of the Act. See *Jax Mold & Machine, Inc.*, 255 NLRB 942, 946 (1981) (supervisor's remarks about shooting union supporters were made in anger and were believable, and thus violated Section 8(a)(1) of the Act), enfd. 683 F.2d 418 (11th Cir. 1982).

in making an initial showing of discrimination, then the respondent has the opportunity to demonstrate, by a preponderance of the evidence, that it would have taken the adverse employment action against the employee even in the absence of the employee's protected concerted activities. Id. at 12.

The Board has held that while on-the-job work stoppages may be a form of economic pressure that is protected under Section 7 of the Act, not all work stoppages are protected because at some point "an employer is entitled to exert its private property rights and demand its premises back." *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056 (2005) (quoting *Cambro Mfg. Co.*, 312 NLRB 634, 635 (1993). "To determine at what point a lawful on-site work stoppage loses its protection, a number of factors must be considered, and the nature and strength of competing employee and employer interests must be assessed." *Quietflex*, 344 NLRB at 1056. Those factors include:

> (1) the reason the employees have stopped working;
> (2) whether the work stoppage was peaceful;
> (3) whether the work stoppage interfered with production, or deprived the employer access to its property;
> (4) whether employees had adequate opportunity to present grievances to management;
> (5) whether employees were given any warning that they must leave the premises or face discharge;
> (6) the duration of the work stoppage;
> (7) whether employees were represented or had an established grievance procedure;
> (8) whether employees remained on the premises beyond their shift;
> (9) whether employees attempted to seize the employer's property; and
> (10) the reason for which employees were ultimately discharged.

Id. at 1056–1057; see also *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB No. 128, slip op. at 2–4 (2014) (citing *Quietflex Mfg. Co.*).

2. Did Walmart violate the Act when it issued disciplinary coachings to the six associates who participated in the November 2 work stoppage?

The General Counsel and Charging Party maintain that since Bravo, Hammond, Lee, Tanner, Washington and Whitney engaged in a protected work stoppage on November 2, Walmart violated the Act when it disciplined them for "inappropriate conduct" and "unauthorized use of company time" based on their actions during the work stoppage. To address the merits of that claim, I now consider the ten *Quietflex* factors to assess whether the work stoppage was protected by the Act.[43]

Factor one (the reason the employees stopped working): The evidentiary record shows that the six associates stopped working because of their ongoing concerns about Van Riper and his treatment of associates. In that connection, I note that the associates did not receive a response from Walmart when they submitted a letter outlining their concerns about Van Riper on October 17, two weeks before the work stoppage. To be sure, as Walmart observes, associates also hoped to use the work stoppage to publicize OUR Walmart and its efforts to advocate for various changes in working conditions, benefits and workplace policies at Walmart. It is also clear that associates selected November 2, the day of the Richmond store grand reopening, as the day for the work stoppage because it would be a good day to publicize their concerns and OUR Walmart's goals to a large audience. (FOF, Section II(E)(3), (F)(1), (4).)

Factor two (whether the work stoppage was peaceful): Based on the evidentiary record, which includes extensive video footage of the work stoppage inside the Richmond Walmart and protest activities that occurred outside the store, I find that the work stoppage was peaceful. There is no evidence that associates or their supporters were violent or unruly in any manner. (FOF, Section II(F)(4)–(5).)

Factor three (whether the work stoppage interfered with production or deprived the employer access to its property): During the portion of the work stoppage that occurred before the store opened at 6 a.m., the work stoppage had a minimal effect on Walmart's operations. Walmart had access to all of its property (including the customer service area), and the production of other associates was only affected to the limited extent that Walmart had to streamline its remodeling crew work to focus on preparing store aisles and shelves for the grand reopening (e.g., by ensuring that all freight was removed from the floor and properly stored). (FOF, Section II(F)(4); see also *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB No. 128, slip op. at 5 (2014) (explaining that for purposes of factor 3 in the *Quietflex* analysis, the focus is on "whether striking employees interfere with production or the provision of services by preventing *other* employees who are working from performing their duties," since striking employees do not forfeit

[43] Walmart suggests that instead of considering this matter under *Quietflex*, I should consider this case under *Restaurant Horikawa*, 260 NLRB 197 (1982), and similar cases. (See R. Posttrial Br. at 61–63.) The Board's decision in *Restaurant Horikawa*, however, does not involve a work stoppage. Instead, *Restaurant Horikawa* involved a demonstration that began outside of a restaurant, and then lost the protection of the Act when thirty demonstrators (including one off duty employee) entered the restaurant for 10–15 minutes and "seriously disrupted" the business by "parading boisterously about during the dinner hour when patronage was at or near its peak" before confronting the restaurant manager in the restaurant's administrative offices. *Restaurant Horikawa*, 260 NLRB 197, 197–198 (1982); see also *Thalassa Restaurant*, 356 NLRB 1000, 1000 fn. 3 (2011) (agreeing that an off duty restaurant employee engaged in protected activity when he and a group of nonemployees entered the restaurant during evening dining hours to deliver a letter protesting the employer's alleged labor law violations; the Board noted that there was no evidence that the group: disturbed the handful of customers present, blocked the egress or ingress of anyone, was violent or caused damage, or prevented any other employees from performing their work).

Although I take Walmart's point that the work stoppage in this case was augmented from 6:00 to 6:52 a.m. by assorted non-associates who entered the Richmond Walmart to support the associates in their work stoppage, I find that facts of that nature are best considered within the *Quietflex* framework because it is undisputed that the six associates were on duty and were engaged in a work stoppage while in the store. Walmart's arguments about any disruption that the associates and their supporters caused relate to the *Quietflex* factors and the nature and strength of the associates' and Walmart's interests.

the Act's protection by withholding their own services) (emphasis in original).

Once the store opened, Walmart continued to have access to its property and maintain production even though 10–14 nonassociates entered the store to support the work stoppage periodically between 6:00 and 6:52 a.m. Apart from a 3–minute visit to Action Alley that did not cause disruption, the work stoppage remained confined to the customer service area, leaving the rest of the store unaffected. As for the customer service area, the record shows that Walmart associates had access to the customer service counter as needed during the work stoppage (notwithstanding customer service associate Maggiora's subjective decision to avoid the area, and the 2–minute period when protesters blocked the front of the customer service counter). Furthermore, the record does not show that any customers attempted to access, or were prevented from accessing (due to noise, crowding or otherwise), the customer service area, which is not surprising since the customer service area generally does not open until 7 a.m. and only has limited traffic at that early hour. (FOF, Section II(F)(4).)

Finally, I do not give weight to the fact that the work stoppage occurred on the same day as the Richmond store's grand reopening. Although Walmart maintains that the decision to hold the work stoppage during the grand reopening made the work stoppage more disruptive, the Board has held that "the protected nature of [a] work stoppage is not vitiated by the effectiveness of its timing." *Atlantic Scaffolding Co.*, 356 NLRB 835, 837 (2011) (explaining that the basic principles underlying the Act include the right of employees to withhold their labor in seeking to improve the terms of their employment, and the right to use economic weapons such as work stoppages as part of the free play of economic forces that should control collective bargaining).

Factor four (whether employees had adequate opportunity to present grievances to management): The six associates who participated in the work stoppage presented their grievances about Van Riper to Walmart on October 17, over two weeks before the work stoppage. They did not receive a response from Walmart, however, until the morning of the work stoppage, when Lilly and Jankowski (before and during the work stoppage) offered to meet with the associates individually under Walmart's open door policy to discuss the associates' concerns. It is undisputed that Lilly, citing Walmart's open door policy and concerns about employee confidentiality, refused the associates' requests to meet with her as a group. It is also undisputed, however, that Walmart ultimately used its open door policy to meet with willing associates on an individual basis from November 2–7 to hear their concerns about Van Riper.

For purposes of the *Quietflex* analysis, the Board has indicated that an open door policy may provide an adequate opportunity for employees to present grievances to management, particularly where the evidentiary record shows that the employer has an established past practice of using its open door policy to consider and resolve group grievances. See *HMY Roomstore*, 344 NLRB 963, 963 fn. 2 & 965 (2005) (citing *Cambro Mfg. Co.*, 312 NLRB at 636). However, the Board has also indicated that if an employer's open door policy has been used to address only individual complaints of employees, and not group complaints, then the open door policy carries less weight. See *HMY Roomstore*, 344 NLRB at 963 fn. 2 & 965. Here, I find that Walmart's open door policy carries less weight as an opportunity for the work stoppage participants to present their grievances to management because, as Walmart essentially admits, the open door policy does not allow for group action. (FOF, Section II(F)(3)–(4).)

Factor five (whether employees were given any warning that they must leave the premises or face discipline): It is undisputed that Walmart did not warn the six associates that they must leave the store or face discipline. Instead, the record shows that when Walmart, assisted by two police officers who were present, instructed the associates to leave the store, the associates agreed to do so, and left the store after clocking out. (FOF, Section II(F)(4).)

Factor six (the duration of the work stoppage): The work stoppage in this case began at 5:24 a.m. and ended at 6:52 a.m., and thus lasted for a total of 88 minutes. The store was open to the public for 52 minutes of the work stoppage (i.e., from 6:00 to 6:52 a.m.). (FOF, Section II(F)(4).)

Factor seven (whether employees were represented or had an established grievance procedure): The six associates that participated in the work stoppage were members of OUR Walmart, but were not represented in a formal sense (i.e., for collective-bargaining purposes) by OUR Walmart, the UFCW, or any other union. As noted above (in connection with factor four), while Walmart did offer associates the opportunity to voice their concerns about Van Riper individually to Lilly and Jankowski through Walmart's open door policy, Walmart does not have an established grievance procedure for group complaints. (FOF, Section II(A), (E)(2), (F)(1), (3)–(4).)

Factor eight (whether employees remained on the premises beyond their shift): It is undisputed that all six associates clocked out and left the inside of the store by 6:52 a.m., before the end of their shifts. Although at least two of the associates subsequently joined OUR Walmart protest activities that were ongoing outside of the Richmond store, the evidentiary record shows that both mall security personnel and Walmart managers accepted that the protesters had a right to continue their activities outside the store. (FOF, Section II(F)(4)–(5).)

Factor nine (whether employees attempted to seize the employer's property): There is no evidence that associates attempted to seize Walmart's property during the work stoppage. Walmart associates who did not participate in the work stoppage remained free to continue working throughout their shifts, and once the store opened, customers had full access to all areas of the store. (FOF, Section II(F)(4).)

Factor ten (the reason for which employees were ultimately disciplined): Walmart issued a two-level disciplinary coaching to each of the six associates who participated in the work stoppage, stating that each of the six associates engaged in inappropriate conduct and unauthorized use of company time. In support of the disciplinary coachings, Walmart explicitly referred to the associates' activities during the work stoppage, noting that the associates abandoned work, refused to return to work after being told to do so, and engaged in a sit-in on the sales floor that (in Walmart's view) disrupted business and customer service operations during the Richmond store

grand reopening event.[44] (FOF, Section II(G)(2).)

Considering the ten *Quietflex* factors as a whole, I find that the November 2 work stoppage is protected by the Act. Factors 1, 2, 3, 5, 6, 8, 9 and 10 clearly favor the six associates. The associates stopped working to protest Van Riper's treatment of associates on the remodeling crew, and also to protest alleged retaliation and unfair labor practices. All of those reasons were fair game for concerted action.[45] See *Cambro Mfg. Co.*, 312 NLRB at 636 (observing that employees were entitled to persist for a reasonable period of time in a peaceful in-plant work stoppage that focused on specific, job-related complaints and caused little disruption of production by those who continued to work). In addition, the work stoppage: was peaceful; had limited (if any) impact on Walmart's operations and access to its property; ended promptly when Walmart and the associates agreed that the associates would clock out and leave the store (before their shifts ended); and was limited in duration (88 minutes).[46] See *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB No. 128, slip op. at 4 & fn. 16 (noting that employees are entitled to engage in work stoppages for a reasonable period of time, and collecting cases where work stoppages of up to 5½ hours were protected by the Act); *HMY Roomstore*, 344 NLRB at 963 fn. 2, 965 (45–60 minute work stoppage was protected, in part because the employees complied immediately when the employer asserted its property rights and directed the employees to leave the store). It is also clear that Walmart disciplined associates because they participated in the work stoppage. Although Walmart asserted that the discipline was based on "inappropriate conduct" and "unauthorized use of company time," the discipline paperwork is clear that Walmart disciplined the six associates based on their protected work stoppage activities (e.g., abandoning work, refusing to return to work, and engaging in the work stoppage). (See FOF, Section II(G)(2); see also *Quietflex Mfg. Co.*, 344 NLRB at 1055 fn. 1 (noting that refusing to work during a work stoppage is protected activity); *Cambro Mfg. Co.*, 312 NLRB at 636–637 (same, but noting that after a reasonable period of time the employer may instruct employees to either return to work **or** clock out and leave the premises).)

The remaining *Quietflex* factors (factors 4 and 7, which both relate to grievance procedures) are neutral, at best. Although Walmart has an established open door policy that it offered to the associates during the work stoppage, that offer was somewhat belated since it came on the day of the work stoppage, more than two weeks after the associates submitted their October 17 letter calling for Walmart to take action to address Van Riper's conduct. In addition, consistent with Walmart's past practices with open door meetings, Lilly only offered to meet with associates on an individual basis – thus, Lilly's offer to meet under the open door policy was arguably inadequate, since the offer was predicated on the associates giving up their right to act as a group. Compare *HMY Roomstore*, 344 NLRB at 963 fn. 1, 965 (work stoppage was valid despite the employer's open door policy, which had been used to resolve individual problems, but not group problems) with *Cambro Mfg. Co.*, 312 NLRB 634, 636 (1993) (giving weight to the employer's open door policy because the employer had an established past practice of allowing employees to meet as a group with the company president). Viewing the 10 *Quietflex* factors as a whole, I find that the associates' right to participate in their (limited) work stoppage outweighs Walmart's rights as the property owner, and I accordingly find that the November 2 work stoppage was protected by the Act.

Since the November 2 work stoppage was protected by the Act, Walmart could not discipline associates for participating in the work stoppage without running afoul of Section 8(a)(1) of the Act. Walmart, however, did just that, because as noted above, the discipline paperwork demonstrates Walmart disciplined the six associates based on their protected work stoppage activities (e.g., abandoning work, refusing to return to work, and engaging in the work stoppage). In light of the strong prima facie case that Walmart unlawfully disciplined the six associates for engaging in the protected November 2 work stoppage, and the lack of any evidence that Walmart would have disciplined the six associates even in the absence of their participation in the work stoppage, I find that Walmart violated Section 8(a)(1) of the Act when it disciplined Bravo, Hammond, Lee, Tanner, Washington and Whitney. See *Molon Motor & Coil Corp.*, 302 NLRB 138, 139 (1991), enfd. 965 F. 2d 523 (7th Cir. 1992).

CONCLUSIONS OF LAW

1. By, in or about the second week of July 2012, implicitly threatening an associate by asking the associate if she was afraid Walmart might close its Placerville, California store if too many associates joined OUR Walmart, Walmart violated Section 8(a)(1) of the Act.

2. By at least until September 14, 2012, maintaining a July 2010 dress code for California associates that was facially overbroad because it unduly restricted associates' right to wear union insignia, Walmart violated Section 8(a)(1) of the Act.

3. By, since about February 2013, maintaining a February 2013 dress code for California associates that was facially overbroad because it unduly restricted associates' right to wear

[44] Walmart asserted that the work stoppage was particularly disruptive because once the store opened at 6 a.m., non-associates joined the six associates in protesting inside the store. (See R. Posttrial Br. at 61–62.) Although the non-associates added to the size of the protest inside the store (adding up to 10–13 people to the group at times), I do not find that the work stoppage/protest became unduly disruptive after the non-associates arrived. To the contrary, the non-associates remained in the customer service area (apart from two non-associates who joined the six associates for their 3–minute visit to Action Alley), and generally limited their activities to taking and posing for photographs, holding signs, and providing a representative to negotiate the agreement with Walmart that the six associates would clock out and leave the store (thereby ending the work stoppage). (FOF, Section II(F)(4).)

[45] I am not persuaded by Walmart's contention that the work stoppage/protest was merely a publicity vehicle for OUR Walmart. While publicity was certainly a bonus for OUR Walmart if it materialized, that does not change the fact that the work stoppage participants raised assorted concerns that relate to the terms and conditions of their employment (as noted above).

[46] Protest activities did continue outside of the store until 9:07 a.m. Those activities, however, occurred on mall property, and thus did not infringe on Walmart's private property rights. (See FOF, Section II(F)(4)–(5).)

union insignia, Walmart violated Section 8(a)(1) of the Act.

4. By, on or about August 21 and September 14, 2012, selectively and disparately applying its July 2010 dress code for California associates to Richmond, California store associate Raymond Bravo when he wore clothing with OUR Walmart or UFCW logos, but not when Bravo or other associates wore other clothing that did not comply with the dress code, Walmart violated Section 8(a)(1) of the Act.

5. By, or about October 11, threatening Richmond, California store associates (through Van Riper) that it would "shoot the union," Walmart violated Section 8(a)(1) of the Act.

6. By, on or about October 12, threatening Richmond, California store associates that Walmart would never be union and thereby informing associates that it would be futile for them to select OUR Walmart as their collective-bargaining representative, Walmart violated Section 8(a)(1) of the Act.

7. By, on or about October 12, threatening Richmond, California store associates by telling them that the associates returning from strike would be looking for new jobs, Walmart violated Section 8(a)(1) of the Act.

8. By, on or about October 12, prohibiting Richmond, California store associates from speaking to associates returning from strike about the returning strikers' activities on behalf of OUR Walmart, Walmart violated Section 8(a)(1) of the Act.

9. By, on or about November 4–7, unlawfully issuing two-level disciplinary coachings to associates Raymond Bravo, Semetra Lee, Demario Hammond, Misty Tanner, Markeith Washington and Timothy Whitney because those associates engaged in a protected work stoppage on November 2, and to discourage associates from engaging in those or other protected activities, Walmart violated Section 8(a)(1) of the Act.

10. By committing the unfair labor practices stated in conclusions of law 1–9 above, Walmart has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

11. I recommend dismissing the complaint allegations that are not addressed in the Conclusions of Law set forth above (to the extent that those allegations have not been severed from this consolidated case).

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Since certain unfair labor practices only apply to particular stores, I will require Respondent to post separate notices that apply to: Placerville, California store 2418; Richmond, California store 3455; and all California stores.

I will also require Respondent, to rescind its unlawful July 2010 and February 2013 California dress codes. Respondent may comply with this aspect of my order by rescinding the unlawful dress code provision(s) and republishing a California employee dress code at its California stores without the unlawful provision. Since republishing the California employee dress code for all California stores could be costly, Respondent may supply the associates at its California stores either with an insert to the California dress code stating that the unlawful policy has been rescinded, or with a new and lawfully worded policy on adhesive backing that will cover the unlawfully broad policy, until it republishes the California dress code either without the unlawful provision or with a lawfully-worded policy in its stead. Any copies of the California dress codes that are printed with the unlawful July 2010 and/or February 2013 language must include the insert before being distributed to associates at Respondent's California stores. *World Color (USA) Corp.*, 360 NLRB No. 37, slip op. at 2 (2014) (citing *2 Sisters Food Group*, 357 NLRB 1816, 1823 fn. 32 (2011); *Guardsmark, LLC*, 344 NLRB 809, 812 & fn. 8 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

In addition to the standard remedies that I described above, the General Counsel requested that I also order Respondent to have a representative read a copy of the notice to associates in each of its California stores during work time. The Board has required that a notice be read aloud to employees where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 21.

Applying that standard, I do not find that Respondent's misconduct in this case was sufficiently serious and widespread to warrant an order requiring the notice to be read aloud to employees by one of Respondent's representatives at each of its California stores. Although I have found that Respondent committed two unfair labor practices that affect all California stores (maintaining two facially overbroad dress codes), this case does not involve widespread misconduct at all of Respondent's California stores, and I find that a standard notice posting remedy will be sufficient to address those violations and ensure that associates are advised of their Section 7 rights.

I also find that a standard notice posting remedy will be sufficient to address the violations at Placerville, California store 2418. Only one additional unfair labor practice occurred at the Placerville store in this case – the unlawful threat of plant closure. That violation may also be addressed with a standard notice posting.

However, I do find that a notice reading remedy is warranted at Richmond, California store 3455 in this case. Respondent's misconduct at the Richmond, California store was sufficiently serious and widespread to warrant an order requiring the notice to be read aloud to associates in the presence of the manager of store 3455. The evidentiary record shows that in addition to maintaining two unlawfully overbroad dress codes, Respondent repeatedly took swift action against Richmond, California store associates who supported OUR Walmart, including: twice directing Bravo to remove union insignia in a disparate and selective manner; threatening associates who participated in a strike in October 2012; threatening other associates that the returning strikers would be looking for new jobs; directing associates not to speak to returning strikers about their activities in support of OUR Walmart; telling associates that it would be futile to select OUR Walmart as their collective-bargaining representative; and issuing unlawful two-level disciplinary coachings to six associ-

ates who participated in a protected work stoppage. In light of those serious and widespread actions, I agree that a notice reading is necessary to assure employees at Richmond, California store 3455 that they may exercise their Section 7 rights free of coercion. Accordingly, I will require that the remedial notice in this case be read aloud to employees in English and Spanish by Respondent's store 3455 manager or, at Respondent's option, by a Board agent in Respondent's store 3455 manager's presence. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 21.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

Respondent, Walmart Stores, Inc., Bentonville, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening associates by asking them if they are afraid Walmart might close Placerville, California store 2418 if too many associates join OUR Walmart.

(b) Maintaining a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

(c) Maintaining a February 2013 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

(d) Selectively and disparately applying its July 2010 dress code for California associates to Richmond, California store 3455 associates when they wear clothing with OUR Walmart or UFCW logos, but not when they wear other clothing that does not comply with the dress code.

(e) Threatening Richmond, California store associates that it would "shoot the union."

(f) Threatening Richmond, California store associates that Walmart would never be union and thereby informing associates that it would be futile for them to select OUR Walmart as their collective-bargaining representative.

(g) Threatening Richmond, California store associates by telling them that associates returning from strike would be looking for new jobs.

(h) Prohibiting Richmond, California store associates from speaking to associates returning from strike about the returning strikers' activities on behalf of OUR Walmart.

(i) Issuing disciplinary coachings to associates because they engaged in a protected work stoppage, and to discourage associates from engaging in those or other protected activities.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overbroad policy in its July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

(b) Rescind the overbroad policy in its February 2013 California employee dress code that unduly restricts associates' right to wear union insignia.

(c) Furnish all current employees in its California stores with inserts for its California employee dress code that (1) advise that the unlawful July 2010 and February 2013 policies have been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) publish and distribute to employees at its California stores revised copies of its California employee dress code that (1) do not contain the unlawful policies, or (2) provide the language of a lawful policy.

(d) Within 14 days from the date of the Board's Order, remove from its files any references to the November 2012 two-level disciplinary coachings that Respondent issued to Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney because those associates engaged in a protected work stoppage on November 2, and to discourage associates from engaging in those or other protected activities, and within 3 days thereafter notify Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney in writing that this has been done and that the disciplinary coachings will not be used against them in any way.

(e) Within 14 days after service by the Region: post at store 2418 in Placerville, California, copies of the attached notice marked "Appendix A"; post at store 3455 in Richmond, California, copies of the attached notice marked "Appendix B"; and post at all other California stores copies of the attached notice marked "Appendix C."[48] Copies of the notices, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed one or more of the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the appropriate notice (Appendix A, B or C) to all current associates and former associates employed by Respondent at the closed facilities at any time since July 8, 2012.

(f) Within 14 days after service by the Region, hold a meeting or meetings at Respondent's Richmond Store 3455, scheduled to have the widest possible attendance, at which the at-

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tached notice marked "Appendix B" shall be read to employees in both English and Spanish, by Respondent's store 3455 manager or, at Respondent's option, by a Board agent in Respondent's store manager's presence.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 9, 2014

APPENDIX A
(PLACERVILLE, CALIFORNIA STORE 2418)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten associates by asking them if they are afraid Walmart might close Placerville, California store 2418 if too many associates join OUR Walmart.

WE WILL NOT maintain a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT maintain a February 2013 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind the overbroad policy in our July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL rescind the overbroad policy in our February 2013 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL furnish all current associates in our California stores with inserts for our California employee dress code that (1) advise that the unlawful July 2010 and February 2013 policies have been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) WE WILL publish and distribute to employees at our California stores revised copies of our California employee dress code that (1) do not contain the unlawful policies, or (2) provide the language of a lawful policy.

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-090116 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B
(RICHMOND, CALIFORNIA STORE 3455)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT maintain a February 2013 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT selectively and disparately applying our July 2010 dress code for California associates to Richmond, California store associates when they wear clothing with OUR Walmart or UFCW logos, but not when they wear other clothing that does not comply with the dress code.

WE WILL NOT threaten Richmond, California store associates that we will "shoot the union."

WE WILL NOT threaten Richmond, California store associates that Walmart will never be union and thereby inform associates that it would be futile for them to select OUR Walmart as their collective-bargaining representative.

WE WILL NOT threaten Richmond, California store associates by telling them that associates returning from strike will be looking for new jobs.

WE WILL NOT prohibit Richmond, California store associates from speaking to associates returning from strike about the returning strikers' activities on behalf of OUR Walmart.

WE WILL NOT issue disciplinary coachings to associates because they engage in protected work stoppages, and to discourage associates from engaging in those or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce associates in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL remove from our files any references to the unlawful November 2012 two-level disciplinary coachings that we issued to associates Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney because they engaged in a protected work stoppage on November 2, 2012, and to discourage associates from engaging in those or other protected activities, and WE WILL notify Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney in writing that this has been done and that the unlawful disciplinary coachings will not be used against them in any way.

WE WILL rescind the overbroad policy in our July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL rescind the overbroad policy in our February 2013 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL furnish all current associates in our California stores with inserts for our California employee dress code that (1) advise that the unlawful July 2010 and February 2013 policies have been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) WE WILL publish and distribute to employees at our California stores revised copies of our California employee dress code that (1) do not contain the unlawful policies, or (2) provide the language of a lawful policy.

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-090116 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX C
(CALIFORNIA STORES)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT maintain a February 2013 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind the overbroad policy in our July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL rescind the overbroad policy in our February 2013 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL furnish all current associates in our California stores with inserts for our California employee dress code that (1) advise that the unlawful July 2010 and February 2013 policies have been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) WE WILL publish and distribute to employees at our California stores revised copies of our California employee dress code that (1) do not contain the unlawful policies, or (2) provide the language of a lawful policy.

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-090116 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.