

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

# Advice Memorandum

DATE: July 10, 2003

TO : Curtis A. Wells, Regional Director  
Martha E. Kinard, Regional Attorney  
Ralph D. Gomez, Assistant to Regional Director  
Region 16

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

SUBJECT: Wal-Mart Stores, Inc. (San Angelo, TX)  
Case 16-CA-22731

This case involving a Section 8(a)(1) allegation was submitted for advice pursuant to Memorandum OM 00-24 for review and possible coordination with other cases seeking a nationwide remedy against Wal-Mart.

We conclude that the Region may dismiss the allegation that on March 22, 2003, Wal-Mart unlawfully caused the criminal trespass arrest of nonemployee Bob Funderburk.

Since one of the picket signs displayed by Funderburk urged Wal-Mart employees to "go union", Funderburk arguably was engaged in Section 7 activity without regard to whether Funderburk's wife, an actual Wal-Mart employee, was acting in concert with him. However, the Board views a criminal trespass complaint under the same standard it uses to consider whether a civil lawsuit violates the Act.<sup>1</sup> Wal-Mart's criminal trespass complaint therefore was lawful if it was reasonably based unless it was filed "to impose the costs of the litigation process, regardless of the outcome."<sup>2</sup> The complaint was reasonably based because Wal-Mart factually asserts that despite a prior trespass warning, Funderburk deliberately trespassed on Wal-Mart's property. We also find that there is insufficient evidence to establish that Wal-Mart filed its complaint with no concern for its private property rights but rather only to impose litigation costs. We therefore conclude that the Region may dismiss this allegation.

B.J.K.

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<sup>1</sup> See Johnson & Hardin Co., 305 NLRB 690 (1991) enf'd in rel. part 49 F.3d 237 (6<sup>th</sup> Cir. 1995).

<sup>2</sup> BE&K Const. Co. v. NLRB, 122 S.Ct. 2390, 2402 (2002).