

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

Advice Memorandum

DATE: February 9, 2004

TO : Cornele A. Overstreet, Regional Director

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

SUBJECT: Wal-Mart Stores, Inc.
Case 28-CA-19156

512-5012-1737-2000
512-5012-1737-3300
512-5012-3317
512-5012-6712-6700
512-5012-8300
512-5012-8320
512-5012-8320-5077
512-5012-8380-3300
512-5012-8380-6700
512-5018-3300

This 8(a)(1) case raises the issues of 1) whether a Union organizer, who is alleged as a discriminatee is engaged in soliciting when he contacts on-duty employees on the selling floor of a retail employer to promote the Union's organizing drive and, if employees respond favorably, gives the employees Union contact information; 2) whether the Employer was privileged to eject the organizer from its stores for violating the Employer's no-solicitation policy; and 3) whether the Employer lawfully advised the organizer that the Employer would seek his arrest for trespass if he entered certain stores to solicit on-duty employees in working areas.

We conclude that the Union organizer did solicit on-duty employees in working areas, and that the Act does not protect such activity. Thus, the Employer was privileged to eject the organizer for violating its no-solicitation policy, and to prohibit the organizer from subsequently entering its stores to engage in similar conduct. The Region should dismiss the charge, absent withdrawal.

FACTS

United Food and Commercial Workers (the Union) has been engaged in an ongoing, nationwide campaign to organize Wal-Mart stores (the Employer). This case arises out of the Union's efforts in the Las Vegas, Nevada area.

Larry Allen was a produce clerk in one of the Employer's Las Vegas supercenters from May 2002 until the Employer terminated him in early August 2003. Since September 2002, Allen has been an ardent Union supporter. When employed by the Employer, Allen regularly distributed Union literature and solicited employees to support the Union.

As an employee, Allen handed out Union flyers during his breaks, after work, and on his days off. Inside the store, Allen gave flyers to employees in the breakroom and just outside the breakroom, but not on the sales floor. Allen also handbilled employees outside the store.

Allen also spoke on the sales floor with his co-workers about the Union and Union authorization cards and used bathroom breaks, regular breaks, and time after work to solicit employees to sign Union authorization cards. Allen also visited the store several times each week for a couple of hours each time to talk to and solicit employees. Allen solicited employees in bathrooms, breakrooms, and in a back hallway (a non-sales area) to sign authorization cards.

When engaged in Union activities, Allen often handed out Union "contact cards" to employees. Contact cards are similar in appearance to typical business cards, they are approximately two (2) inches high and three (3) inches wide. Printed on the card is the Union's logo and the following text:

*UNITED FOOD AND
COMMERCIAL WORKERS UNION
LOCAL 711 – AFL-CIO
WAL-MART ASSOCIATES CONTACT LINE
Phone: 648-5745
All calls are confidential*

Beneath the text are the Union's address, and local and toll-free telephone numbers.

About mid-2003¹ the Employer counseled Allen for his solicitation and distribution activities. During one counseling session, Allen's store manager asked Allen if he knew who had been handing out contact cards to employees. Allen told him that he did, intimating that he had left the contact cards in the breakroom. The manager instructed Allen to restrict his soliciting to non-work areas during non-working times. Allen agreed to abide by the manager's directions, and continued his Union soliciting during non-work periods.

The Employer terminated Allen on or about August 1, allegedly for soliciting.² After he was terminated, the Union hired Allen as a special project union representative ("spur") to organize Wal-Mart.

As a spur, Allen now visits seven to eight (7 - 8) Wal-Mart locations, and four (4) Sam's Club locations, visiting each store several times a week.³ Allen claims that he "often" buys something on his visits, but not always.⁴

Allen's in-store activities are the same at each store. During his visits, Allen walks the store and greets associates with a "good morning" or a "good afternoon." Allen tries to greet as many salespeople as he can, and addresses them by name whenever possible.⁵ If these conversations advance beyond "hello" or "good morning," Allen identifies himself and gives the employee his name and title with the Union.⁶ Allen leaves it up to the employee

¹ All dates are in 2003 unless noted otherwise.

² The Region has issued a consolidated complaint in cases 28-CA-18897, et al., alleging, inter alia, that the Employer unlawfully terminated Allen because of his Union activity.

³ The Union estimates the Allen makes 20 - 40 visits to Las Vegas area stores each week.

⁴ Allen does not state precisely how many times he has purchased something during an organizing visit, nor does he give any examples of what he has purchased. There is no indication that Allen's need for a particular item prompted him to visit any particular store on a given day.

⁵ Allen admittedly takes advantage of the Employer's "ten foot rule" to talk to employees. That rule requires employees working on the sales floor to greet and offer assistance to any customer within ten feet of the employee.

⁶ Allen does not suggest how far a conversation might "advance beyond 'hello' or 'good morning,'" whether he or

whether to talk to him further or not. If the employee does want to talk further, Allen gives him or her a contact card.

Allen estimates that he has given cards to at least five employees on the sales floors of the various stores he visits. By way of example, Allen stated that he once handed a card to a maintenance employee as they passed in an aisle on the sales floor, telling the employee to call him. During another visit, Allen gave a card to an employee in a sporting goods department after initiating a conversation with the employee about a particular product for sale. Allen and the employee spoke for about five minutes. After the employee turned away from Allen to do something else, Allen placed the card on the counter directly behind the employee, tapped the counter, and left the area. After each of these incidents, agents of the Employer immediately contacted Allen and directed him to leave the store;⁷ each time Allen left without incident.

The Employer maintains a no-solicitation policy that defines solicitation as "To request or seek, in writing or orally, donations, help, or the like for any cause." The Employer's policy "does not permit solicitation in any selling area of [any] facility during business hours or in working areas when [employees] are on working time." The policy also prohibits "solicitation and/or distribution of literature by non-[employees] . . . at all times in any area of [any] facility, including the vestibule."⁸

By letter dated November 14, the Employer advised the Union, that Allen, and a Union representative named Miller had "on repeated occasions . . . entered Wal-Mart stores and Sam's Clubs in Clark County Nevada for the purpose of distributing literature and/or engaging in impermissible solicitation." The letter stated that the Employer prohibits outside persons from engaging in improper solicitation within its facilities and that local police had

the employee "advances the conversation," or what either might do to "advance" such a conversation.

⁷ In the latter incident, after Allen put the contact card on the counter, another employee in the sporting goods department picked up a telephone and said "Code 88." Shortly thereafter, Allen was surrounded by two assistant managers and the woman who picked up the telephone. One of the assistant managers told Allen to leave. When Allen asked why, the manager allegedly said, "For talking."

⁸ The Union does not allege that the Employer's no-solicitation policy is facially unlawful.

been instructed to cite for prosecution non-employees engaged in improper solicitation or distribution inside the Employer's facilities. The letter further advised the Union that any license, invitation, or permission Allen or Miller may have had as members of the general public had been revoked and, therefore, they were are no longer allowed to enter any Employer facility anywhere in the United States.⁹ The letter also warned that if Allen or Miller entered any Clark County Nevada store to engage in impermissible solicitation or distribution of literature, and thereafter refused to leave immediately, they would be subject to arrest for trespass. The Employer has never summoned the police to escort Allen from any store, nor has the Employer pursued any complaint against Allen for trespass.

ACTION

We conclude that 1) Allen's conduct of contacting on-duty employees on the Employer's sales floors, providing receptive employees with Union contact information, and encouraging employees to contact the Union to support the organizing drive, all constitute solicitation; 2) Allen's conduct is unprotected and violates the Employer's no-solicitation policy; 3) there is no evidence that the Employer has discriminated against Allen, i.e., that it has engaged in disparate treatment by denying Allen the right to solicit on the sales floor while granting solicitation rights to other outside groups; and finally, 4) given Allen's proclivity for soliciting on-duty employees in working areas, and his expressed willingness to continue his conduct, the Employer has lawfully excluded Allen from its Las Vegas area stores. The Region should dismiss the charge, absent withdrawal.

The Board has held that solicitation is conduct that prompts a response from the individual or individuals being solicited,¹⁰ and often involves asking another to do something, such as sign a card, come to a meeting, or buy merchandise.¹¹ When the solicitation seeks responses from

⁹ In a letter to the Region, the Employer asserts that, although it has revoked Allen's license to do business with the Employer, and it has threatened Allen with arrest if he enters the store to solicit employees, Allen still retains the right to enter any Wal-Mart store for any other purpose.

¹⁰ Wal-Mart Stores, Inc., 340 NLRB No. 76, slip op. at 3 (2003).

¹¹ President Riverboat Casinos of Missouri, Inc., 329 NLRB 77, 82 (1999).

employees who are supposed to be working, it presents a greater potential for interference with employer productivity. Therefore, retail employers may limit solicitation to nonworking time and to non-selling areas.¹² An employer may also exclude union organizers from its retail stores if the employer reasonably believes that the organizer intends to ignore the employer's lawful no solicitation policy by repeatedly contacting on-duty employees in working areas.¹³

Consistent with this analytical framework, the Board found in Home Depot that union representatives solicited on-duty employees on the employer's sales floor by giving and attempting to give union business cards to on-duty employees who were working on the employer's selling floor. A union representative gave union business cards to one employee who asked if he could assist the union representative, and to another employee as he passed him on the sales floor. The union representative also attempted to give a card to the cashier who rung up his purchase.¹⁴ In one brief conversation, one of the union representatives asked an employee how he liked working for the employer. The union representatives did not hand out authorization cards, explicitly invite employees to union meetings, or explicitly tell employees to "call" them.

Allen's purpose for entering stores and his contact with on-duty employees¹⁵ at issue here is nearly identical to, if not more engaging and more frequent than, the conduct that the Board found to be solicitation by the union representatives in Home Depot. Allen's primary, if not exclusive purpose in contacting employees was to promote the Union's organizing campaign and encourage employees to join the Union.¹⁶ Allen uses his contact with employees to gauge

¹² Id. (emphasis added).

¹³ Home Depot U.S.A., Inc., 317 NLRB 732, 732 - 733 (1995).

¹⁴ The union representative pocketed the card when the cashier told him he could not accept it.

¹⁵ We assume, absent any evidence to the contrary, that the employees Allen contacted, by virtue of their presence on the sales floor and their attendance to work-related tasks, were all on-duty.

¹⁶ The union representatives in Home Depot went to the store for the "dual purpose" of shopping for needed items and to respond to an employee's call regarding possible union representation. 317 NLRB at 736, 742.

their willingness to support the campaign by prompting them to respond to his presence and message.¹⁷ When employees respond favorably, Allen engages them further, gives them contact cards, and directs them to contact the Union.¹⁸ Given the strong similarities between Allen's conduct and that of the union representatives in Home Depot, we conclude that Allen's conduct constitutes soliciting under extant Board law.

We further conclude that the Employer lawfully ejected and excluded Allen from its Las Vegas area stores. Solicitation of on-duty employees in selling areas is not protected by the Act.¹⁹ Like the union representatives in Home Depot, Allen intentionally and repeatedly engaged in unprotected solicitation of on-duty employees in selling areas, and indicated that he would continue to solicit on-duty employees. In these circumstances, the Employer reasonably expected that Allen would return to engage in unprotected activity and, therefore, was justified in banning Allen and advising him of the consequences if he were to trespass.²⁰

There is no evidence that the Employer has unlawfully discriminated against Allen or the Union by disparately enforcing its no-solicitation policy. There is no evidence that customers, vendors, or anyone else has engaged in solicitation conduct similar to Allen's, or that the Employer allowed any non-employer group access to on-duty employees to promote a particular cause while denying the Union the same opportunity.

The Union argues that the Employer violated the Act by ejecting and excluding Allen from its stores because 1) the

¹⁷ The union representatives in Home Depot engaged employees to "explore the possibilities of organizing the store - attempting to interest the employees in the union." Id. at 736, 742.

¹⁸ In Home Depot, the union representatives gave receptive employees business cards with union contact information; the agent's "stated . . . purpose of handing out the cards was to prompt a call to the union if the workers were interested." Id. at 736.

¹⁹ Lechmere Inc. v. NLRB, 502 U.S. 527 (1992), citing NLRB v. Babcock & Wilcox, 351 U.S. at 113. See also, Home Depot, U.S.A., Inc., 317 NLRB 732 732-733 (1995); Meier & Frank Co., 89 NLRB 1016, 1017-1018 (1950).

²⁰ Home Depot, 317 NLRB at 733.

Employer banned Allen for "talking" and not for soliciting/distributing, 2) Allen was not engaged in distribution because the Union contact cards are not the equivalent of flyers, leaflets, or other Union literature, 3) Home Depot is inapposite because the Board simply relied on Lechmere and did not fully examine whether the union representatives engaged in unprotected solicitation, 4) Wal-Mart²¹ overruled or superseded Home Depot, and 5) the Employer's exclusion of Allen from all stores nationwide was overbroad. We have considered and rejected each the Union's contentions.

The Employer excluded Allen from its stores in response to Allen's in-store soliciting and distributing activities and not because Allen was merely "talking" about the Union. The Union relies on the assistant manager's alleged extemporaneous remark that Allen was removed from the stores "for talking". As discussed above, Allen's in-store activities constitute solicitation and violated the Employer's no-solicitation policy. Moreover, prior to the Employer's November 14 revocation of Allen's license to enter any store, the Employer had not asked Allen to leave its stores when Allen "merely talked" to employees. Rather, the Employer asked Allen to leave immediately after he contacted on-duty employees and gave them contact cards. Finally, the Employer's express written reason for excluding Allen was that Allen had repeatedly engaged in impermissible solicitation and distribution of literature. Thus, even accepting Allen's characterization of the assistant manager's rationale for ejecting him, that statement, alone, is insufficient to contradict the facts surrounding each incident and the Employer's stated reason for excluding Allen.

We also reject the Union's contention that the Employer's stated reasons for excluding Allen are false because Allen did not "distribute union literature" in selling areas. The Union asserts that the contact cards that Allen handed out are not "literature" because they are not the equivalent of a larger flyer or leaflet. We conclude that the Employer reasonably considered Allen's handing out contact card to be distribution. Unlike business cards, the contact cards do not identify any particular person. Rather, they contain an explicit message to Wal-Mart employees, advising them of a hotline for their use, and that all calls are confidential. Finally, to the extent the Union relies on the difference in size between a contact card and a traditional leaflet or flyer, the Union

²¹ 340 NLRB No. 76, supra.

cites no case authority holding that the size of the distributed literature is dispositive.

We also disagree with the Union's contention that Home Depot is inapposite because the Board based its decision on Lechmere and did not adequately consider whether the union agents' actually engaged in unprotected solicitation. To the contrary, the Board adopted the administrative law judge's explicit findings that the union representatives "entered the store with the express purpose to 'explore the possibilities of organizing the store' and interesting the employees in the union," and that the union representatives' conduct, i.e., briefly speaking with employees and handing out business cards, was "obviously" solicitation of on-duty employees in selling areas²² and that the union agents' solicitation was unprotected.²³ Allen solicited on-duty employees in selling areas for the precisely the same purpose and in precisely the same manner as the union agents in Home Depot. In these circumstances, Lechmere and Allen's status as a discriminatee or off-site employee is irrelevant; his solicitation of on-duty employees in selling areas would violate the Employer's policy as to employees as well.

We also reject the Union's argument that Wal-Mart²⁴ overruled or "superseded" Home Depot. The Union relies on two incidents in that case which the Board majority found not to be solicitation. Those two incidents, however, involved mere statements that would not evoke any employee response and thus do not properly constitute "solicitation" under extant Board law.

We also disagree that the Employer's exclusion of Allen is unlawfully overbroad because it bans Allen from all Wal-Mart stores. The Union concedes that an employer, under Home Depot would be privileged to impose a limited ban in response to unprotected activity, but argues the Employer's ban of Allen goes too far. The employer in Home Depot banned the union agents from a single store because their solicitation activities, and threats to engage in future solicitation, were limited to that store. Here, Allen's conduct was not so limited, rather he solicited on-duty employees in almost every Las Vegas area Wal-Mart and Sam's Club store. Allen has also expressed his commitment to solicit employees in every Las Vegas area store as part of the Union's nationwide campaign. In these circumstances,

²² 317 NLRB at 736, 743.

²³ Id. at 732 - 733 (citations omitted), 743.

²⁴ 340 NLRB No. 76.

the Employer's exclusion of Allen was a reasonable response to the breadth of Allen's unprotected activity and is not unlawfully overbroad.

Finally, the Union argues that the Employer's ejection and exclusion of Allen constitutes disparate enforcement of its no-solicitation policy by denying Allen the opportunity to "just talk" to on-duty employees about the Union organizing campaign, while permitting customers to "talk" to on-duty employees about any other non-Employer related topic. The Union also contends that this disparate treatment is discriminatory and unlawful even though Allen's purpose in talking is different from a customer's purpose. In other words, the mere fact that Allen's primary or exclusive purpose for contacting on-duty employees was to promote the Union's organizing drive, as compared with customers' conversations with employees to get information about products or pass the time while shopping, is irrelevant. The Union relies on a number of disparate access cases to support its argument that Allen's different purpose does not preclude a finding of disparate treatment. We have carefully considered the Union's argument and conclude that it is without merit.

The Union's arguments fail because they ignore important facts in favor of unsupported speculation and conjecture. Allen was soliciting on-duty employees in the Employer's selling areas. Allen was not "merely talking" to employees. There is no evidence that the Employer has permitted any customer, or anyone else, access to on-duty employees in working areas for the purpose of soliciting or promoting a particular cause. It is not enough to suppose, as the Union does, that the Employer would likely allow customers to promote a business, or otherwise solicit business in selling areas, even as overtly and intentionally as Allen did, for the sake of keeping those individuals as customers. Thus there is no evidence for the Union's disparate access or treatment arguments. Finally, the Union's refusal to distinguish Allen's intentional interruption of employee's work from a customer's incidental conversation ignores perhaps a fundamental fact: Wal-Mart employees, indeed all retail sales employees, are required to promote sales; engaging customers is generally considered an important and effective sales technique. Thus, an employee's incidental conversation with a customer to discuss any non-Employer related topic is not an interruption of employees' work. It is the employees' work.

In sum, Allen's in-store conduct constitutes solicitation of on-duty employees in working areas of the Employer's stores. Such conduct is unprotected, and absent some evidence of discrimination or adverse impact on

employees' Section 7 rights, the Employer was privileged to eject and exclude Allen for violating the Employer's no-solicitation policy.

B.J.K.