

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO BRANCH OFFICE  
DIVISION OF JUDGES

**WAL-MART STORES, INC.**

and

**UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION, AFL-CIO, CLC**

**Cases 28-CA-18255  
28-CA-18257  
28-CA-18897**

Joel Schochet, Atty., Counsel for the General Counsel,  
Las Vegas, Nevada.

Steven Wheelless and Stefanie J. Evans, Attys.,  
Steptoe & Johnson, LLP, Counsel for Respondent,  
Phoenix, Arizona.

George Wiszynski, atty., Asst General Counsel, UFCW, for the  
Charging Party, Washington, DC.

**DECISION**

**I. Statement of the Case**

Lana H. Parke, Administrative Law Judge. This matter was tried in Las Vegas, Nevada on February 10 through 13, 2004 upon an Amended Second Consolidated Complaint (the Complaint) issued December 31, 2003<sup>1</sup> by the Regional Director of Region 28 of the National Labor Relations Board (the Board) based upon charges filed by the United Food and Commercial Workers International Union, AFL-CIO-CLC (the Union.) The Complaint, as amended, alleges Wal-Mart Stores, Inc. (Respondent) violated Sections 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).<sup>2</sup> Respondent essentially denied all allegations of unlawful conduct.<sup>3</sup>

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<sup>1</sup> All dates herein are 2003 unless otherwise specified.

<sup>2</sup> At the hearing, Counsel for the General Counsel amended the complaint to substitute the words "soliciting for" for "talking about" in paragraph 5(b)(1) and withdrew paragraph 5(c). Counsel for the General Counsel moved to amend the complaint by adding as paragraph 5(e) the following:

On or about June 6, 2003, the Respondent, by Aaron Rios, at Respondent's Serene Avenue facility, promulgated and enforced an overly broad and discriminatory no solicitation and no distribution rule by informing employees that they may not solicit in work areas. Respondent objected that the amendment was untimely. The objection is overruled.

<sup>3</sup> At the hearing Respondent amended its answer to include an affirmative defense that Section 10(b) of the Act prohibited litigation of the conduct alleged in paragraph 5(b)(4) of the Complaint.

## II. Issues

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1. Did Respondent orally promulgate and enforce an overly broad and discriminatory no-solicitation and no-distribution rule?
  2. Did Respondent create an impression of surveillance of employees' union activities?
  3. Did Respondent ask its employees to ascertain and disclose the union activities of other employees?
  4. Is complaint paragraph 5(b)(4), which alleged statement of futility, outside the 10(b) period, and if not, did Respondent inform employees it would be futile for them to select the Union as their collective bargaining representative?
  5. Did Respondent unlawfully prohibit union organizers from soliciting employees and distributing union literature on its property, confiscate union literature, threaten employees to prevent them from accepting union literature, and cause the Henderson, Nevada police to remove union organizers from its property?
  6. Did Respondent discharge employee Larry Allen because of his protected activities, his union activities and/or because he gave testimony to the Board?
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## III. Jurisdiction

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Respondent, a Delaware corporation, with places of business located, inter alia, at 2310 East Serene, Las Vegas, Nevada and 540 Marks Street, Henderson, Nevada (collectively the Stores) has been engaged in the retail sale of consumer products. During a 12-month period ending October 23, which period is representative, Respondent, in connection with its operation of the Stores, annually derived gross revenues in excess of \$500,000 and annually received at the Stores, goods and services valued in excess of \$50,000 directly from points outside the State of Nevada. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

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## IV. The Facts

### A. Respondent's Solicitation/Distribution Policies

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At all times relevant hereto, Respondent has maintained in its employee handbook, the following policy:

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[E]ngaging in non-work related activities during work time is not permitted. Associates<sup>4</sup> may not engage in solicitation or distribution of literature during work time. In addition, solicitation or distribution of literature is not permitted at any time in selling areas during the hours the store is open to the public. Distribution of literature is not permitted at any time in any work area. Non-Associates are prohibited from soliciting or distributing literature in any Company facility at any time.

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A similar policy statement posted in the Stores during the relevant period, in pertinent part, reads:

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<sup>4</sup> Associate is Respondent's term for an employee.

Associates may not engage in distribution of literature during working time [of either the solicitor/distributor and/or the solicitee/distributtee.] Distribution of literature is not permitted at any time in selling or working areas [defined as all areas except breakrooms, restrooms, lobbies, and Associate parking areas]. Associates may not engage in solicitation in any selling area of the facility during business hours or in working areas when Associates are on working time. This applies to activities on behalf of any cause or organization, with the exception of corporately sponsored charities [Children's Miracle Network and Corporate United Way Campaigns].

...  
Solicitation and/or distribution of literature by non-Associates is prohibited at all times in any area of the facility, including the vestibule.

...  
The Facility Manager may approve...solicitation and/or distribution of literature **outside** the facility for all other groups and organizations...

...  
An area must be designated for all organizations to use that is at least 15 feet from the entrances and exits...

...  
Any organization that requests to solicit or distribute literature should be provided two copies of the **Solicitation and Distribution of Literature Rules**. One copy of the rules should be signed by...the organization as an acknowledgement of having read and agreeing to abide by the rules.

#### B. Respondent's Discipline Policy

Respondent utilizes a disciplinary program called Coaching for Improvement, which provides the procedure for investigating employee misconduct and applying appropriate progressive discipline. The disciplinary progression provides for a verbal coaching at level one. If the verbal coaching is not successful in changing or correcting the unacceptable behavior or performance, an employee will receive a level two written coaching. Level three of the disciplinary progression is called "Decision Making Day" or "D-Day." At a D-Day, Respondent informs the employee concerned of deficiencies noted at earlier Coaching for Improvement levels and the specific improvement required. The employee must write and sign an acceptable detailed action plan for modifying behavior and is given a day off with pay to decide whether he or she will make the required improvement. The D-Day remains active in an employee's file for 12 months. Another rule or policy infraction occurring within that 12-month period may subject the employee to immediate termination.

#### C. Events at the East Serene, Las Vegas Store

The Stores are composed of both grocery and general merchandise sales areas. In the back and side hallways of the Stores, Respondent maintains product receiving, storage, and preparation areas where employees perform tasks relative to those functions.<sup>5</sup> Larry Allen (Mr. Allen) worked for Respondent at its 2310 East Serene, Las Vegas, Nevada facility (the LV store) from May 6, 2002 to August 1 as a produce sales clerk. At all relevant times, Aaron Rios (Mr. Rios), served as the LV store manager overseeing, *inter alia*, the work of about 700 employees.

<sup>5</sup> I find these constitute facility work areas.

During August 2002, Mr. Allen's wife, Jacqueline (Mrs. Allen), worked at the same store in the service deli. In late August, having observed another deli employee inappropriately touch his wife, Mr. Allen threatened to "bust a cap in [his] ass."<sup>6</sup> Consequent to the threat, Respondent issued Mr. Allen a D-Day dated August 30, 2002, and suspended him for a day with pay.<sup>7</sup> On September 2, 2002, Mr. Allen asked to meet with Mr. Rios about his D-Day, protesting the discipline was too severe in light of the provocation involved. Mr. Rios said he would look into it.

During the next ten days, the LV Store prepared for its annual one-day inventory of the entire store, a work-intensive procedure to be conducted September 12. During the same period, Mr. Rios observed and had reported to him a dramatic increase in the amount of union-related literature left in work areas, including the sales floor: business cards (left primarily on the sales floor), flyers, pamphlets, and small cards that invited employees, respectively, to contact the Union (contact cards) and to listen to a live "Worker Voice Radio" webcast where callers could "tune in [and] speak up" in order to "make Wal-Mart/Sams Club a better place to work" (radio cards). On September 2, 2002, management found more than 300 union business cards in various locations on the sales floor. LV Store management reported the situation to the Union Hotline, a telephone communication set up between Wal-Mart's labor relations team in the Bentonville, Arkansas corporate offices and its stores.

An associate told Mr. Rios that Mr. Allen was the driving force behind the literature distribution at the LV Store.<sup>8</sup> According to Mr. Allen, he did not become involved in union organizing efforts at the LV store until September 11, 2002, when he signed a union authorization card and accepted appointment as lead organizer. From that time forward, Mr. Allen openly passed out union literature to coworkers, including several forms of union literature enclosed in small brown paper bags (the union packet).

Sometime in the early afternoon of September 12, 2002, Mr. Rios got back to Mr. Allen on his earlier request for a meeting, apologizing for the delay. Mr. Rios said the D-Day would stand. Mr. Allen complained the suspension had prevented his working scheduled overtime, and his wife had missed work consequent to her coworker's harassment. Mr. Rios agreed to pay Mr. Allen for missed overtime and compensate his wife for work missed because of the incident.

After addressing Mr. Allen's D-Day concerns, Mr. Rios cautioned him about union solicitation. Initially, Mr. Allen testified Mr. Rios said, "By the way, you're not allowed to talk about the union, you're not allowed to distribute out the literature about the union."<sup>9</sup> Under cross-examination, Mr. Allen admitted Mr. Rios might have told him he was not allowed to solicit on the sales floor. Mr. Rios said he told Mr. Allen he wanted to make sure he understood Respondent's solicitation/distribution policy and asked if he needed a copy. Mr. Rios said Mr. Allen told him he had a copy of the policy and had read it. Mr. Allen was admittedly aware

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<sup>6</sup> This slang term is a threat to shoot someone.

<sup>7</sup> The offending deli employee did not return to work after the incident and voluntarily terminated employment.

<sup>8</sup> The associate's report was not received for the truth of the assertion but to explain Mr. Rios' state of mind and to set in context his later discussions with Mr. Allen.

<sup>9</sup> Mr. Allen's testimony forms the basis of the complaint allegation at paragraph 5(a) regarding unlawful promulgation of an overly broad and discriminatory no-solicitation and no distribution rule.

of Respondent's no solicitation/distribution policy and that he could distribute union literature in breakrooms, restrooms, lobbies, and associate parking areas but not in work areas. He understood Respondent's policy prohibited his soliciting employees on work time.

5 By his own account, Mr. Allen told Mr. Rios, "Aaron, I know what I can and cannot do. I will put the literature in the breakrooms, and I will do it outside." He assured Mr. Rios he would not solicit on the sales floor, which he understood to be sacred ground. Where Mr. Rios' testimony of what was said in that conversation differs from Mr. Allen's, I credit Mr. Rios. I cannot accept Mr. Allen's testimony that Mr. Rios told him he could not talk about the Union or  
10 distribute its literature. Not only did Mr. Allen retreat from his initial assertion to that effect during cross-examination, but also the tenor of his admitted responses to Mr. Rios justifies an inference that Mr. Rios merely reminded him of established solicitation/distribution policies, which Mr. Allen did not challenge.

15 Mr. Allen denied ever distributing union literature on the sales floor or in any work area or asking any coworker to sign a union authorization card while he or the coworker was working.<sup>10</sup> He left union literature in Respondent's restrooms and breakroom and on outside benches.

20 Respondent held regular morning meetings with employees in the breakroom, which it expected all employees not occupied with customers to attend. Respondent discussed store priorities, quarterly reports, store earnings, and work issues at the meetings. The employee meetings constituted work time for attending employees even though they were held in the breakroom. Although meeting discussion was generally restricted to work issues, in 2003,  
25 Respondent permitted an employee to announce in the meetings a blood drive for her nephew with leukemia. She was not permitted to distribute literature in sales or work areas.

On September 13, 2002, at a morning meeting with LV Store associates lasting nearly an hour, Mr. Rios told employees Wal-Mart had a no-solicitation policy, which applied to non-work material: Avon sales, the Girl Scouts, religious groups, or anyone else. According to  
30 Mr. Allen, Mr. Rios showed the group examples of union literature found in the sales floor and other work areas and encouraged employees to report any distribution of the literature to management. Mr. Allen testified that Mr. Rios said Respondent did not have to negotiate with the Union, and employees ran the risk of losing benefits.<sup>11</sup> Mr. Allen remembered nothing else  
35 that was discussed at the meeting.

Regarding the September 13, 2002 meeting, Mr. Rios testified he and other managers thanked employees for the inventory results of the preceding day and highlighted top performing divisions. At the end of the meeting, Mr. Rios reminded employees of Respondent's  
40 solicitation/distribution policy, which he had covered in the past and which was posted on Respondent's policy board in the break room. He showed the employees union-related literature that had been found in work areas, and told them they could distribute literature on their time in restrooms, the break room, or outside the store but not in sales or work areas. He told employees they were not to get involved in enforcing the policy but to report violations to  
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50 <sup>10</sup> Mr. Allen testified no supervisor had ever told him the back and side hallways of the LV Store were work areas, and he did not consider them to be such. He admitted the hallways were "work area[s] to some people," just not to him or to "lots of produce people."

<sup>11</sup> Mr. Allen's testimony forms the basis for complaint paragraphs 5(b)(1) through (4).

management who would take care of it.<sup>12</sup> Mr. Rios denied saying anything about negotiating with the Union or telling employees to report solicitation/distribution other than policy violations. I give weight to Mr. Rios' testimony. Emanuel Thomas Roth (Mr. Roth) and Lisa Washburn, assistant managers, corroborated Mr. Rios' version. Since Mr. Allen could recall nothing more  
 5 of the meeting than the brief comments he testified to, which he could not set in context, I do not feel justified in relying on his memory of what was said.

In late September 2002, Mr. Rios received a written note signed by several overnight stockers complaining that Mr. Allen was "constantly [in the break room] peddling his union wares [which is] not welcome." Mr. Rios did not speak to Mr. Allen about the matter, as  
 10 Mr. Allen had not violated Respondent's policy by soliciting/distributing in the breakroom. In early October, Mr. Rios received a written complaint from another employee that Mr. Allen had approached him on the sales floor about joining the Union. Mr. Rios took no action as Mr. Allen had merely been talking about the Union, which did not violate the policy. Mr. Rios received  
 15 other reports concerning Mr. Allen's talking to or handing out some kind of literature to employees in the work area but as the evidence did not, in his opinion, clearly show any policy violation, he declined to discipline Mr. Allen.

On October 23, 2002 and January 22, the Union filed original and amended charges,  
 20 respectively, alleging various violations of 8(a)(1) committed by Respondent at its LV Store. There is no evidence Respondent's managers or supervisors said anything about the charges to any employee.

On June 6, Mr. Allen left union cards on tables in the breakroom at the conclusion of the  
 25 morning employee meeting. After the meeting, Ellen Little (Ms. Little), Respondent's people manager, told Mr. Rios she had observed Mr. Allen handing out union radio cards during the meeting. Later that morning in his office, Mr. Rios spoke to Mr. Allen about his conduct, asking him not to leave union contact cards "during the morning meeting."<sup>13</sup> Mr. Allen agreed, telling  
 30 Mr. Rios he would respect Wal-Mart's policy. Mr. Rios told Mr. Allen he was free to solicit and leave contact cards in the breakroom during his non-work periods. Mr. Allen told Mr. Rios he knew Mr. Rios had to enforce Respondent's policy, but he (Mr. Allen) had to do what he had to do as well. Mr. Rios asked Mr. Allen if he understood the solicitation/distribution policy and if he understood that if he continued to violate the policy, he would be held accountable. Mr. Allen said he understood the policy, and he would not hand out cards during a meeting again. An  
 35 undated memorandum Mr. Rios prepared following this exchange states Mr. Allen placed radio cards on breakroom tables "as he was leaving the meeting" but while still on the clock. According to the memorandum, Mr. Rios told Mr. Allen he had "a right to solicit in non work areas on his own time but not while he was on the clock," and that he could not "solicit in any  
 40 work areas of the store nor was he allowed to solicit any associates while they are on the

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<sup>12</sup> Employees are also asked to report workplace injuries or accidents, inappropriate employee conduct, violations of personal or business ethic, and sexual harassment.

<sup>13</sup> Both Mr. Allen and Mr. Rios used the words "during the morning meeting" to describe Mr. Rios' June 6 restriction on literature distribution.

clock.”<sup>14</sup> Mr. Rios took no action against Mr. Allen because he wanted to give him the benefit of the doubt and because he did not want to terminate him, which another infraction during the 12-month D-Day period would have meant.<sup>15</sup>

5 At some time prior to June 20, Mr. Allen gave Sam Brown (Mr. Brown), meat department employee, a union packet in the back work area. On June 20, in the same area, Mr. Allen asked Mr. Brown why he had turned the union packet over to Mr. Rios. Directing obscenities to Mr. Allen, Mr. Brown gestured toward him with a box cutter. As Mr. Allen retreated, Mr. Brown said, “I’ll kill him; I’ll kill him.” Mr. Allen reported the incident to management.<sup>16</sup> Respondent  
10 conducted an investigation including taking Mr. Allen’s written statement. In the course of the investigation, Mr. Rios was informed that Mr. Allen had presented union literature to Mr. Brown in the back produce area. When asked about it, Mr. Allen told Mr. Rios that Mr. Brown had come to him and asked for the literature. He said he did not think it a violation of Respondent’s policy to accommodate Mr. Brown, and it would not happen again. Mr. Rios did not discipline  
15 Mr. Allen. The Union filed a charge with the Board concerning the incident, alleging Respondent had condoned threatening behavior toward Mr. Allen, a known union supporter. The charge was dismissed. I agree with Counsel for the General Counsel that Respondent must have known Mr. Allen provided information to the Board in support of the charge; none of Respondent’s managers or supervisors said anything about the charge to Mr. Allen.

20 On the morning of July 25, someone gave employee Miguel Zambrano, Jr. (Mr. Zambrano) a union packet while he loaded product in the back hallway of the store (the Zambrano incident.) The parties dispute the identity of the individual who gave Mr. Zambrano the union packet.

25 Anita Garcia (Ms. Garcia), grocery department manager at the LV Store in July, was well acquainted with Mr. Allen, having known him for about seven years. Sometime in July, she saw Mr. Allen and a produce employee named “Joe,” talking to Mr. Zambrano in the back grocery receiving area. A couple of minutes later, Mr. Zambrano came to Ms. Garcia with a brown  
30 paper bag, folded at the top and stapled. Mr. Zambrano told Ms. Garcia he did not know what to do, that “the short guy [he] was talking to over there” had given him the bag, and he did not know what to do with it.<sup>17</sup> Ms. Garcia advised him to give it to his team leader, Maggie Schad (Ms. Schad), whereupon Mr. Zambrano reported to Ms. Schad that “the guy in produce,” a short guy, had given him a brown paper bag while he worked.<sup>18</sup>

35 Ms. Schad, accompanied by Mr. Zambrano, took the packet to Sheleen Petty (Ms. Petty), assistant manager, saying Larry in produce had given the packet to Mr. Zambrano. Mr. Zambrano told Ms. Petty Larry had given him the packet as he was loading his cart in the back room. Ms. Petty opened the packet and found various forms of union literature in it.

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45 <sup>14</sup> Counsel for the General Counsel asserts Mr. Rios’ memorandum establishes the violation alleged in complaint paragraph 5(e) regarding unlawful promulgation of an overly broad and discriminatory no-solicitation and no distribution rule.

<sup>15</sup> Although Respondent’s policies permitted discretion in such terminations, Mr. Rios’ practice was to terminate any employee who committed a disciplinary offense during the 12-month D-Day period.

<sup>16</sup> Mr. Brown received a D-Day because of his threat.

<sup>17</sup> Mr. Allen is 5’ 2” tall. Joe Morse is taller than Mr. Zambrano who is 5’ 9”.

50 <sup>18</sup> Counsel for the General Counsel correctly points out that Mr. Zambrano’s statements to Ms. Schad are hearsay, and I do not consider them for the truth of the matter asserted.

Ms. Petty telephoned the Union Hotline and reported the incident.<sup>19</sup> Later that day, at the request of LV Store managers, Mr. Zambrano furnished two signed statements that identified “Larry” as the employee who gave him a union packet while he worked in the back hallway.

5           During the investigation of the charges herein, the Board obtained a sworn affidavit from Mr. Zambrano. In his affidavit, Mr. Zambrano denied Mr. Allen had given him the packet. Concerning the affidavit, Mr. Zambrano testified that when he gave the affidavit, he was “...panicking...not thinking right...had a headache...was losing his patience, and...wanted everything just to be on that paper.” At the hearing, Mr. Zambrano testified about having been  
10 given the packet. His memory was demonstrably poor. Moreover, although sincere and obviously anxious to testify accurately and fully, he was an extraordinarily suggestible witness, agreeing with nearly every proposition any examining counsel put to him, without regard to consistency. I cannot give any weight to his testimonial identification of the person who gave him the union packet. Since it is reasonable to infer Mr. Zambrano was as unreliable when he  
15 gave the affidavit as he was in testifying, I cannot give weight to his affidavit statements either. Further, as it is clear Mr. Zambrano had no independent knowledge of the identity of the person who had given him a union packet but named “Larry” in reliance on the suggestions or information of others, I cannot accept the written statements he gave on July 25 as evidence of who gave him the packet.

20           Since I cannot accept Mr. Zambrano’s July 25 written statements, his Board affidavit, or his testimony at the hearing as identification of Mr. Allen or, conversely, as exculpation of Mr. Allen, I must look to other evidence to determine what transpired when someone gave Mr. Zambrano a union packet on July 25.

25           Mr. Allen denied ever giving Mr. Zambrano any union literature or asking him to sign a union authorization card. In corroboration of Mr. Allen’s testimony, Ancel “Joe” Morse (Mr. Morse), LV Store Associate and active union supporter, testified he had given a union packet to Mr. Zambrano in July. Mr. Morse said he obtained the packet from Mr. Allen as  
30 Mr. Allen worked in the back hallway, telling him he was going to give it to Mr. Zambrano who was also working in the same hallway. At Mr. Allen’s request, Mr. Morse provided Mr. Allen a signed statement dated September 21, which reads:

35           On or about June or July of 2003, I Ancel Morse of the produce Dept. handed Miguel a union packet to look over and read and if he was interested to sign the union card and give it back to me later.

          This got Larry fired because they had thought that it was Larry that handed Miguel the packet.

40           Counsel for the General Counsel appropriately offered Mr. Morse’s written statement into evidence as a prior consistent statement. However, the circumstances surrounding its preparation and production make it of dubious evidentiary value. According to Mr. Morse, he gave his statement to Mr. Allen after writing it, which means Mr. Allen had it in his possession since about September 21. Inexplicably, Mr. Allen did not submit the statement to the Board  
45 during the investigation of the charges herein, and although it was encompassed by Respondent’s subpoena served on Mr. Allen prior to the hearing, he also failed to produce it for Respondent. The week prior to the hearing, after giving acceptable assurances, Counsel for

50           <sup>19</sup> The resulting investigation was complicated, involving numerous labor relation consultations over the course of several days. I do not find it necessary to recount all particulars of the investigation.

Respondent questioned Mr. Morse about the circumstances surrounding Mr. Zambrano's receipt of the union packet.<sup>20</sup> Mr. Morse told Respondent's counsel he had never given any union literature to Mr. Zambrano, assertedly dissembling because he "was in fear of losing [his] job." Mr. Morse's professed fear is at odds with his willingness to talk to Respondent's counsel  
 5 even after being assured he need not do so, and I cannot accept his explanation for the duplicity; I can only find it severely diminishes his credibility. At the hearing, Mr. Allen finally furnished Mr. Morse's written statement to Counsel for the General Counsel. The circumstances surrounding this statement are so questionable that I cannot find it bolsters  
 10 Mr. Morse's testimony; rather it detracts from it. In sum, I decline to give any weight to Mr. Morse's testimony beyond finding that he was, in fact, involved in giving a union packet to Mr. Zambrano as Mr. Zambrano worked. I specifically decline to infer from Mr. Morse's testimony that Mr. Allen was not present when the union packet was given to Mr. Zambrano.

After considering the above evidence, I find Ms. Garcia provided the most reliable  
 15 information as to what transpired on July 25 regarding Mr. Zambrano's being given union literature.<sup>21</sup> She knew Mr. Allen well and saw him and Mr. Morse talking with Mr. Zambrano as he worked. A couple of minutes later, Mr. Zambrano brought her the union packet, which he said the short guy he had been talking to had given him. From this credible testimony, it is reasonable to infer that whether he actually handed Mr. Zambrano the packet or not, Mr. Allen  
 20 was one of a duo that presented the packet to Mr. Zambrano during both Mr. Zambrano's and his work time.

After consultation with Respondent's corporate office labor team, Mr. Rios decided to discharge Mr. Allen and directed Ms. Little to handle the termination meeting with Mr. Roth in  
 25 Mr. Rios' absence from the LV Store. On August 1, Mr. Allen met with Ms. Little and Mr. Roth in the manager's office. Mr. Allen said he wanted to invoke his Weingarten rights and read aloud a summary of them. When he finished reading, Mr. Roth told him the investigation was complete, and he was terminated from Wal-Mart. Mr. Roth read aloud the words from the exit interview form that Mr. Allen's termination was due to "Insubordination, repeated violation of company  
 30 policy despite warning." In answer to Mr. Allen's request for clarification, Mr. Roth told him he had violated the company's solicitation policy. Mr. Allen protested the policy was illegal under federal law. After writing "soliciting" on the form, Mr. Allen signed it.<sup>22</sup>

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<sup>20</sup> Before Respondent's counsel questioned Mr. Morse in this pre-trial meeting, he read to him the following statement, which Mr. Morse thereafter signed:

40 ... your participation in this investigation is completely voluntary. You are not obligated to cooperate, nor to answer any of my questions. You are free to leave at any time, to refuse to answer any questions. If you choose not to participate in this investigation, you will not be punished in any way by the company.

45 <sup>21</sup> Counsel for the General Counsel argues I should not credit Ms. Garcia, as she could not recall the time of day her exchange with Mr. Zambrano occurred. I do not find that time and even date confusion, without more, impacts credibility.

50 <sup>22</sup> I have accepted Ms. Little and Mr. Roth's versions of the termination meeting. Mr. Allen testified Ms. Little initially told him he was under investigation and announced his termination only after he said he wanted to invoke his Weingarten rights. I find it inherently incongruous that Ms. Little would tell Mr. Allen he was under investigation when all other evidence shows the investigation was completed and the termination decision made before Ms. Little or Mr. Roth spoke to Mr. Allen that day.

At the hearing, Respondent presented the following evidence regarding Mr. Allen's solicitation/distribution activities, presumably obtained during preparation for the hearing. There is no explanation as to why manager observations or employee observations reported to management were not acted upon:

5 Mr. Allen gave then-employee Paul Walton (a Wal-Mart assistant manager since August) union literature in the Lay-Away area, a work area of the store.  
 Mr. Allen gave Pamela Eylens, cake decorator, union literature in the bakery area several times during the relevant period, and she saw him place union materials on the  
 10 bakery counter four to five times.  
 Michaela Wilson, jewelry department manager, saw Mr. Allen distribute union literature in a work area in February.  
 Mr. Allen gave union literature to employee Damon Webb in meat department.  
 Mr. Allen gave overnight stocker Mona Lisa Adams union literature in the produce back  
 15 area while she was working.  
 When Gloria Kieffer overnight stocker in garden center wouldn't accept union literature from Mr. Allen, he laid it on the pallets and the stack bases, which she reported to an assistant manger.  
 Department manager Monica Cirrone saw Mr. Allen put union cards in the backroom  
 20 bins of the boys and girls department.  
 Mr. Allen gave Melvin Enriquez a union packet as he worked in the grocery side hallway.  
 Mr. Allen gave overnight stocker Donell Havens a union authorization card in the produce sale areas, which she reported.  
 Mr. Allen gave Tim Moreno a Weingarten card in the back hallway when they were  
 25 returning to work from a morning meeting.<sup>23</sup>  
 Mr. Allen gave contact and radio cards to maintenance employee Harvey Garcia on the sales floor.  
 Mr. Allen gave union literature to Christina Ann Diaz Allen 15-20 times in the store's receiving area.<sup>24</sup>

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#### D. Events at the Marks Street, Henderson Store

On the morning of October 17, 2002, union representatives William Meyer (Mr. Meyer), Marice Miller (Mr. Miller), and Jacqueline Stacy (Ms. Stacy) handbilled at two Wal-Mart stores in  
 35 the Las Vegas Area (one on Cheyenne and one on Craig Road) for about an hour at each location. At the first store, a Wal-Mart manager initially protested the handbilling, but another manager told the trio as long as they stayed 15 feet from the entrance and did not interrupt flow of traffic, they could remain. At the second store, essentially the same interchange occurred between the union representatives and Wal-Mart management with the same consequences.  
 40 The two stores permitted the handbilling without the Union's having obtained prior permission, including signing Respondent's solicitation/distribution policy. At about 12:30 p.m. that same day, the union representatives commenced handbilling employees at the grocery entrance to

45 <sup>23</sup> Mr. Moreno admitted selling chances for a 2004 super bowl pool to employees and several managers in work areas. There is no evidence Mr. Moreno's activity was reported to upper management.

50 <sup>24</sup> As the Charging Party points out, this evidence tends to support its position that Respondent accepted Mr. Allen's conduct until some factor (intensified union activity, according to the Charging Party) rendered it intolerable. I cannot, however, find activity of which Mr. Rios was not made aware until after the discharge meaningfully bolsters either the Charging Party or Respondent's positions.

the Henderson Store. As with the earlier handbilling, the Union had not complied with Respondent's policy requiring advance notice and permission for such activity, although the representatives were aware of the policy.

5           When the union representatives began handbilling at the Henderson store, manager Shaun Mace told them they could not handbill there. Mr. Meyer said they were observing the 15-foot rule and intended to continue the activity. Scott Miller, co-manager of the Henderson Store, and manager Yvonne Garza (Ms. Garza), arrived at the store. As they approached the union representatives, Mr. Meyer observed Scott Miller take two handbills from employees sitting on a bench outside the store but did not hear what, if anything, was said.<sup>25</sup> Scott Miller said to the union representative, "You don't belong here; this is private property; you must leave." He told them they needed special permission to distribute literature there. Respondent owns the sidewalk and parking lot at the Henderson store. The General Counsel and the Charging Party argue easements so vitiated Respondent's property rights that the area in front of the store could not be considered private property. The evidence is insufficient to support such a conclusion, and I find the area where the handbilling occurred was Respondent's private property.<sup>26</sup> Store managers told Mr. Meyer at least four times that afternoon that the union representatives were on private property.

20           Mr. Meyer told Scott Miller the representatives had recently been to two other Wal-Mart stores where they had maintained the 15-foot separation between themselves and the store entrances and had had no problems with management. Mr. Meyer suggested the managers call the other stores. Scott Miller said what other stores did was their "deal," but the Henderson store would not permit the union representatives to distribute literature there without prior approval. Mr. Meyers said they did not intend to leave.

30           During the interchange between union and management, Mr. Miller heard Ms. Garza say to two employees who had received handbills, "You know what to do with that."<sup>27</sup> After she spoke to them, the two employees threw the handbills away. Mr. Meyer told her she couldn't do that. At some point, Ms. Garza said she smelled something. The union representatives took the comment as a personal insult, and Ms. Stacy called Ms. Garza an offensive name.<sup>28</sup>

35           Mr. Miller said he observed Scott Miller grab handbills from employees as the representatives distributed them. Scott Miller denied taking any union literature from anyone on October 17. Respondent called several witnesses who observed at least portions of the handbilling activity: Jim Randolph, community involvement coordinator for the Henderson store,

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<sup>25</sup> In the absence of knowing what may have been said between Scott Miller and the employees, I cannot infer unlawful conduct by Scott Miller.

<sup>26</sup> In light of my finding, I deny Respondent's post-hearing motion for leave to file notice of Nevada authority holding a property owner's grant of easement does not invalidate the right to exclude trespassers.

<sup>27</sup> Mr. Meyer testified Ms. Garza said, "You know what to do with those; you crumple them up and throw them away." I accept Mr. Miller's testimony. Ms. Garza is no longer employed by Respondent and lives out of state. She did not testify.

<sup>28</sup> Mr. Meyer testified Ms. Garza said the union representatives "stink." I have accepted Mr. Miller's testimony that Ms. Garza said she smelled something. According to Scott Miller, Ms. Garza referred to the odor of a septic tank behind the store, which occasionally created air quality problems. There is no evidence any employee heard the comment, and there is no complaint allegation regarding it. I do not find it necessary to determine whether the exchange was sufficient cause to summon police.

testified he did not see any member of management take any handbill from any employee. Customer support manager, Sabrina Allyn, and her sister, a store employee, received handbills as they walked into the store and threw them in a trash receptacle. Employees Laura Alvey and Jeff Hogan (Mr. Hogan) observed the handbilling while taking a 15-minute break together. They  
 5 saw no member of management take any literature from anyone. When Mr. Miller attempted to hand Mr. Hogan a handbill, Scott Miller told Mr. Hogan it was optional if he wanted to take the flyer or not, whereupon Mr. Hogan refused the flyer. I credit Mr. Miller's testimony. I found him a believable witness, forthright, sincere, and seemingly careful to testify accurately. None of  
 10 Respondent's corroborating employee witnesses saw the entirety of the incident, and I cannot find their testimonies preclude my acceptance of Mr. Miller's account of these events.

After some further and repetitive discussion between union and store representatives, Scott Miller directed another manager to call the police. The trio continued to handbill until a  
 15 police officer arrived about 15 minutes later. After discussing the situation with both the union representative and management and after consulting his supervisor by radio, the police officer told the representatives they had to leave because they were trespassing. The union representatives left the Henderson store without further incident, having handbilled there for about an hour. According to Mr. Meyer, after October 17, 2002, the Union handbilled at Wal-Mart locations including the Henderson Store without giving prior notice or being asked to leave.  
 20 He did not detail where the Union handbilled on those occasions or under what circumstances, and there is no evidence Respondent was aware of the union's handbilling activity after October 17, 2002.

### III. Discussion

#### A. Alleged Independent Violations of Section 8(a)(1) at the LV Store

The General Counsel alleges Respondent independently violated section 8(a)(1) of the  
 30 Act at the LV Store by the following:

1. On September 12, 2002, orally promulgating and enforcing an overly broad and discriminatory no-solicitation and no-distribution rule by prohibiting its employees from talking about the Union and distributing union literature. (Complaint paragraph  
 35 5(a)).<sup>29</sup>
2. On September 13, 2002, orally promulgating and enforcing an overly broad and discriminatory no-solicitation and no-distribution rule by prohibiting its employees from soliciting for the Union and distributing union literature. (Complaint paragraph  
 40 5(b)(1)).
3. On September 13, 2002, informing employees that it would be futile for them to select the Union as their bargaining representative. (Complaint paragraph 5(b)(4)).<sup>30</sup>

<sup>29</sup> No party contends Respondent's solicitation/distribution policies violate the Act. "[T]he Board has found that a rule prohibiting solicitation or distribution during 'working time' is presumptively valid...[citation omitted]." *United Services Auto Association*, 340 NLRB No. 90, slip op. 3 (2003). Similarly, distribution in work areas may be prohibited. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). No party contends enforcement of the policies was unlawfully timed. See *Dillon Companies, Inc.*, 340 NLRB No. 151 (2003).

<sup>30</sup> The allegation meets the three-factor timeliness test of *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). I deny Respondent's hearing motion to strike this allegation as untimely.

4. On September 13, 2002, creating an impression among employees that their union activities were under surveillance. (Complaint paragraph 5(b)(2)).
5. On September 13, asking employees to ascertain and disclose to management the union membership, activities, and sympathies of other employees. (Complaint paragraph 5(b)(3)).
6. On June 6, orally promulgating and enforcing an overly broad and discriminatory no-solicitation and no-distribution rule by informing employees they may not solicit in work areas. (Complaint paragraph 5(e)).

As to allegations 1 and 2, I have not found the General Counsel's supporting evidence to be credible, as explicated above. As to allegations 4 and 5 (impression of surveillance and improper request that employees report union activities), I find Mr. Rios' statements in the September 13 meeting lawful in view of Respondent's longstanding no-distribution, no-solicitation policy and ongoing reports to management about violations of that rule. An employer does not commit an unfair labor practice by lawfully enforcing a lawful plant rule or by reminding employees of the rule. Respondent regularly asked its employees to report violations of other company rules, and neither the content nor timing of Mr. Rios' statements could reasonably have created an impression of surveillance.

As to allegation 6 regarding the June 6 conversation between Mr. Rios and Mr. Allen, Counsel for the General Counsel and the Charging Party argue Mr. Rios admitted, in his memorandum of the conversation, that he told Mr. Allen he could not solicit in any work areas of the store or while he was on the clock, which restrictions are overbroad. The memorandum states Mr. Rios reminded Mr. Allen "he was not allowed to solicit in any work areas of the store nor was he allowed to solicit any associates while they are on the clock." If I were to accept Mr. Rios' memorialized account of his conversation with Mr. Allen as establishing what he actually said to Mr. Allen, I would have to conclude Mr. Rios unlawfully promulgated an overly broad and discriminatory no solicitation rule by unqualifiedly prohibiting solicitation in work areas and when employees are "on the clock."<sup>31</sup> However, I cannot view the memorandum as persuasive evidence of what Mr. Rios said in his and Mr. Allen's June 6 conversation and ignore the hearing testimony of what transpired. Neither Mr. Rios nor Mr. Allen testified that Mr. Rios told Mr. Allen he could not solicit in any work areas of the store, and neither of them testified he referred to any restriction against employees soliciting while "on the clock." I also note Mr. Allen did not protest Mr. Rios' directive although he would reasonably be expected to do so had Mr. Rios laid down the broad restrictions reflected by the memorandum. Rather, Mr. Allen told Mr. Rios, "That's fine. You know, I'll respect you...no problem." Mr. Allen admitted Mr. Rios had asked him not to leave the union cards on the tables during the store meeting and had told him he was free to solicit and leave contact cards in the breakroom during his non-work periods. Mr. Allen told Mr. Rios he knew Mr. Rios had to enforce Respondent's policy, but he (Mr. Allen) had to do what he had to do as well, which suggests Mr. Allen did not think Mr. Rios had

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<sup>31</sup> Respondent's policy does not prohibit solicitation in all work areas, but only in selling areas during hours when the store is open to the public and only during work time. If Mr. Rios expanded Respondent's policy to encompass Mr. Allen's protected union activity, it would be discriminatory. Restriction on solicitation while employees are "on the clock" is presumptively invalid as an absolute prohibition on solicitation. *Burger King*, 331 NLRB 1011 (2000).

deviated from established policy. Mr. Allen's testimony as a whole is consistent with Mr. Rios' asking him not to distribute literature during work time but inconsistent with any finding that Mr. Rios had, without qualification, asked Mr. Allen not to leave union contact cards in the breakroom or had told Mr. Allen he could not solicit in work areas or while "on the clock."

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Respondent held its morning meetings on work time; when the June 6 meeting concluded, Mr. Allen and other attending employees were still on work time. An admonition not to distribute literature or solicit at the morning meeting is consonant with an admonition not to distribute union material or solicit during work time whether either activity occurred during the meeting or at its conclusion. Therefore, I cannot find Mr. Rios communicated to Mr. Allen on June 6, any unlawful restriction on soliciting in any work area of the store during non-work time. As I have not found Respondent committed any violations of the Act as alleged in Complaint paragraphs 5(a), 5(b)(1) through (4), and 5(e), I will, dismiss those allegations of the Complaint.<sup>32</sup>

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#### B. The Discharge of Mr. Allen

Respondent discharged Mr. Allen for giving Mr. Zambrano a union packet while he worked on July 25, a clear violation of Respondent's no solicitation/no distribution policy. Both the Charging Party and the General Counsel argue Respondent was motivated to discharge Mr. Allen by its animus toward his protected union activities. In resolving the question of Respondent's motivation, I follow the Board's analytical guidelines in *Wright Line*.<sup>33</sup> If the General Counsel's evidence supports a reasonable inference that protected concerted activity was a catalyzing factor in Respondent's discharge of Mr. Allen, he has made a prima facie showing of unlawful conduct.<sup>34</sup> The burden of proof then shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have made the same decision, even in the absence of union activity.<sup>35</sup> *Avondale Industries, Inc.*, 329 NLRB 1064 (1999); *T&J Trucking Co.*, 316 NLRB 771 (1995). Respondent was well aware of Mr. Allen's prominent union organizational role, and Respondent opposed union organization of its employees. Finally, Respondent discharged Mr. Allen for conduct connected with his union activity. In these circumstances, I conclude the General Counsel has made "an initial 'showing sufficient to support the inference that protected conduct was a motivating factor'" in Respondent's decision

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<sup>32</sup> It is unnecessary to address Respondent's motion to strike complaint paragraph 5(b)(4) as untimely under Section 10(b) of the Act.

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<sup>33</sup> 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1<sup>st</sup> Cir. 1981), *cert. Denied* 455 U.S. 989 (1982).

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<sup>34</sup> "The General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. [citation omitted]." *American Gardens Management Company*, 338 NLRB No. 76 at slip op. 2 (2002).

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<sup>35</sup> A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1<sup>st</sup> ed. 1954).

to terminate Mr. Allen. *American Gardens Management Company*, at slip op. 2 (2002). The burden of proof therefore shifts to Respondent to show Mr. Allen's discharge would have (not just could have) occurred even in the absence of his vigorous participation in union organizing efforts. *Avondale Industries, Inc.*, at 1066.

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In assessing Respondent's evidence of lawful purpose in discharging Mr. Allen, I recognize that an employer's desire to curtail union activities does not, of itself, establish the illegality of a discharge. If an employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the employer's welcoming the opportunity does not render the discharge unlawful. *Avondale Industries, Inc.*, supra; *Klate Holt Company*, 161 NLRB 1606, 1612 (1966). Further, it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1171, fn. 6 (2000) and cases cited therein. Nonetheless, the Board's role is to ascertain whether an employer's proffered reasons for disciplinary action are the actual ones. *Ibid*

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Here, Respondent asserts that by giving union literature to Mr. Zambrano while he worked and in a work area, Mr. Allen breached Respondent's no solicitation/no distribution rule after repeated warnings and while in his 12-month D-Day period. There is no question Respondent could lawfully have discharged Mr. Allen had he engaged in such conduct. Respondent could also have discharged Mr. Allen if Respondent reasonably believed, albeit erroneously, that Mr. Allen had engaged in such conduct, as *Wright Line* is "premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation."<sup>36</sup> The question, under the *Wright Line* analysis, is whether Respondent reasonably believed Mr. Allen engaged in such conduct or whether it seized upon a plausible opportunity to rid itself of a prominent union supporter whom it would not otherwise have discharged. In short, the question of whether Respondent violated the Act in discharging Mr. Allen rests on its motivation.

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Motive is a question of fact, and the Board may infer discriminatory motivation from either direct or circumstantial evidence and the record as a whole. *Tubular Corporation of America*, 337 NLRB 99 (2001). Indications of discriminatory motive may include expressed hostility toward the protected activity,<sup>37</sup> abruptness of the adverse action,<sup>38</sup> timing,<sup>39</sup> pretextual reason,<sup>40</sup> disparate treatment,<sup>41</sup> departure from past practice,<sup>42</sup> and/or the employer's inability to adhere to a consistent explanation for the action.<sup>43</sup>

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Here, neither direct nor circumstantial evidence permits an inference of discriminatory motivation in Respondent's discharge of Mr. Allen. First, although Mr. Rios warned Mr. Allen on several occasions about the consequences of breaching Respondent's no solicitation/no distribution policy, Mr. Rios did not express animosity toward Mr. Allen's permissible union activities. Indeed, Mr. Rios allowed instances of Mr. Allen's noncompliance to pass without more than oral reminders.

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<sup>36</sup> *American Gardens Management Company*, at slip op. 2 (2002).

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<sup>37</sup> *In Re Orland Park Motor Cars, Inc.*, 333 NLRB 1017 (2001).

<sup>38</sup> *Dynabil Industries, Inc.*, 330 NLRB 360 (1999).

<sup>39</sup> *Bethlehem Temple Learning Center, Inc.*, 330 NLRB 1177 (2000).

<sup>40</sup> *Pacific FM, Inc*, 332 NLRB 771 (2000); *Fluor Daniel*, 311 NLRB 498 (1993).

<sup>41</sup> *In re NACCO*, 331 NLRB 1245 (2000).

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<sup>42</sup> *Sunbelt Enterprises*, 285 NLRB 1153 (1987).

<sup>43</sup> *Atlantic Limousine*, 316 NLRB 822 (1995).

5 Second, Respondent took no abrupt action toward Mr. Allen that might signal discriminatory intent. Mr. Rios reminded Mr. Allen of its policy restrictions for many months, during which time Mr. Allen openly promoted union organization among fellow employees without repercussion. Moreover, Respondent did not reach the discharge decision itself without a significant period of information gathering and reflection.

10 Third, the timing of Mr. Allen's discharge was unrelated to any action or event other than his ostensible violation of company policy. Although the Charging Party argues Mr. Allen's discharge was prompted by a significant increase in organizing interest, the evidence shows no nexus between purported increased interest and the discharge.

15 Fourth, no evidence was adduced of pretext in Respondent's decision. The Charging Party argues Respondent unreasonably and unlawfully claimed that all hallway areas of the LV Store were work areas; therefore, Mr. Allen was justified in disseminating literature in certain areas. I do not find it necessary to address that contention because there is no doubt Mr. Zambrano was given union literature as he worked, a clear violation of Respondent's policy under any circumstances. There is also no evidence Respondent conducted an inadequate or superficial investigation of the Zambrano incident or accepted biased information, either of which would point to animus. No reason has been shown why Mr. Rios should not have believed the information he received about the incident. See *American Thread Co.*, 270 NLRB 526 (1984). I find Mr. Rios, on whom the discharge decision rested, and the managers who reported the events to him all believed in good faith that Mr. Allen had violated Respondent's solicitation/distribution policy. While, as the Charging Party points out, the investigation did not include questioning Mr. Allen, interviewing the subject employee is not a requirement for an adequate investigation. *Frierson Building Supply Co.*, 328 NLRB 1023 (1999). Given its past cautions to Mr. Allen, it was not unreasonable for Mr. Rios to decide termination was an appropriate disciplinary measure without further discussion with Mr. Allen.

30 Fifth, the evidence does not justify a finding of disparate treatment, which must be supported by a showing that employees similarly circumstanced were treated differently than Mr. Allen. Although Mr. Moreno conducted a 2004 super bowl pool in work areas of the store, which violated Respondent's policy, there is no evidence Mr. Rios knew of Mr. Moreno's activity. Another employee was not permitted to distribute blood drive flyers for her nephew with cancer other than in the breakroom. Although she was allowed to announce the blood drive in some morning meetings, that does not show disparate treatment of Mr. Allen, whose conduct--distributing literature without permission during work time and in work areas--was entirely different. Finally, Respondent has consistently offered the same explanation of Mr. Allen's discharge that it presented at the hearing.

40 Accordingly, I conclude Respondent has met its burden of showing Mr. Allen's discharge would have occurred even in the absence of his union activities. More specifically, Respondent has shown it would have discharged Mr. Allen if it believed he persisted in disseminating literature, non-union or otherwise, in violation of Respondent's policies. As to the complaint allegation that Respondent discharged Mr. Allen in violation of Section 8(a)(4) of the Act, the same analysis described above applies. I find Respondent did not, therefore, violate Section 8(a)(3) or (4) of the Act by discharging Mr. Allen. I will, therefore, dismiss those allegations of the Complaint.

50 It remains to determine whether Respondent violated Section 8(a)(1) of the Act by discharging Mr. Allen. Under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), it is not sufficient for Respondent to show a good faith belief that misconduct occurred in defending a discharge

decision. In *Burnup & Sims*, the Supreme Court affirmed the Board's rule that an employer violates Section 8(a)(1) by discharging or disciplining an employee based on its good faith albeit mistaken belief the employee engaged in misconduct in the course of protected activity. *Id.* at 23-24. It is necessary, therefore, to decide whether Mr. Allen was, in fact, guilty of the conduct for which Respondent discharged him, i.e. giving union literature to Mr. Zambrano as he worked.

As explained above, I have accepted very little of the testimony regarding the Zambrano incident. I have found that of all the witnesses, only Ms. Garcia gave fully competent and credible evidence. From her evidence, I find it reasonable, indeed requisite, to infer that Mr. Morse and Mr. Allen together presented the union packet to Mr. Zambrano. While Mr. Morse may have been the one who actually handed the packet to Mr. Zambrano, Mr. Allen, acting in concert with him, was no less guilty of violating Respondent's solicitation/distribution policy. Accordingly, I find Respondent did not violate Section 8(a)(1) of the Act when it discharged Mr. Allen for misconduct he had, in fact, engaged in. I will, therefore, dismiss that allegation of the Complaint.

#### C. Alleged Violations of Section 8(a)(1) at the Henderson Store

The General Counsel alleges at paragraph 5(d)(1) that Respondent promulgated and enforced an overly broad and discriminatory no-solicitation and no-distribution rule by prohibiting union organizers from soliciting its employees and distributing union literature to its employees on its property at the Henderson Store. Respondent's solicitation/distribution policies provide that non-associates may request and receive permission from Respondent to solicit/distribute outside its facilities. The organization granted such permission is to sign a copy of Respondent's solicitation/distribution rules to signify agreement to abide by them. Having been granted permission to solicit/distribute, the organization is to conduct its activities at least 15 feet from the entrances and exits of Respondent's facilities. In its October 17, 2002 solicitation/distribution at the Henderson Store, the only one of the above requirements with which the Union complied was the 15-foot distance rule.

Respondent has a right to restrict nonemployees in soliciting/distributing on its property. As stated in *New York New York Hotel and Casino*, 334 NLRB 762 (2001),<sup>44</sup>

[I]ndividuals who do not work regularly and exclusively on the employer's property, such as nonemployee union organizers, may be treated as trespassers, and are entitled to access to the premises only if they have no reasonable non-trespassory means to communicate their message. *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)...Contrary to the Respondent, nothing in this decision or in those on which it is based suggests that the Respondent would be required to allow such individuals to solicit or distribute handbills on its property.<sup>45</sup>

<sup>44</sup> Review granted, enforcement denied on other grounds, 313 F.2d 585 (D.C. Cir. 2002).

<sup>45</sup> See also *Farm Fresh, Inc.*, 326 NLRB 997 (1998), rev. granted, enf. granted in part and otherwise remanded, 222 F.3d 1030 (D.C. Cir. 2000), rem. accepted 332 NLRB 1424 (2000) (accepting the remand as "law of the case" the Board reversed its prior decision that respondent possessed a sufficient property interest in sidewalks outside some of its stores to justify removal of nonemployee union-literature distributors); *Oakland Mall, Ltd.*, 316 NLRB 1160, 1164 (1995), rev. den. 74 F.3d 292 (D.C. Cir. 1996) (respondents did not act unlawfully by prohibiting, or imposing requirements on union handbilling on their properties).

Respondent has met its burden of showing a sufficient property interest in the Henderson Store entrance area to prohibit nonemployees who did not meet its solicitation/distribution prerequisites from soliciting/distributing on the property. Whether Respondent lawfully prohibited the Union's unapproved activity depends on whether, as alleged, Respondent discriminatorily applied its non-associate solicitation/distribution policies.

The General Counsel and the Charging Party contend Respondent either more strictly or inconsistently applied its non-associate solicitation/distribution policies to the union handbillers. The Charging Party points to the Union's having handbilled at the Henderson Store after October 17, 2002 as evidence of inconsistent policy enforcement, but there is no evidence Respondent was aware of the handbilling on that occasion. While the Charging Party points to occasions on which Respondent did not follow its internal policy requirements as to the number of days, organizations, or repeat appearances it permitted for solicitation/distribution activity, the Charging Party could point to no situation where Respondent did not require an organization to obtain prior approval.<sup>46</sup> The Charging Party also argues that seeking prior approval would have been futile but provides no supporting evidence. Accordingly, I find Respondent consistently and nondiscriminatorily applied its non-associate solicitation/distribution policies and did not violate the Act by refusing to permit noncompliant union representatives from soliciting or distributing handbills at the Henderson store on October 17, 2002. I will, therefore, dismiss that allegation of the Complaint.

The Complaint at paragraph 5(d)(4) further alleges Respondent violated the Act by causing the Henderson, Nevada police to remove the union organizers from its property on October 17, 2002. Inasmuch as the Union's conduct in handbilling on Respondent's property without permission and its persistent refusal to cease the activity were unprotected, it follows that Respondent did not violate Section 8(a)(1) of the Act when it summoned the police to enforce its lawful requests. *NYNEX Corp*, 338 NLRB No. 78, slip op. 4 (2002). I will, therefore, dismiss that allegation of the Complaint.

At paragraphs 5(d)(4) (2) and (3) of the Complaint, the General Counsel alleges that in the course of the confrontation between the Union and Henderson Store managers on October 17, 2002, Respondent violated Section 8(a)(1) of the Act by confiscating union literature from employees and threatening employees with unspecified reprisals to prevent them from accepting union literature.

Credible testimony establishes Respondent management engaged in the following conduct during the incident on October 17, 2002: Ms. Garza told two employees who had accepted handbills, "You know what to do with that," a clear directive to destroy or otherwise disregard the material. Scott Miller took handbills from employees as union representatives distributed them. In taking handbills away from employees and implicitly telling them to destroy them, Scott Miller and Ms. Garza, respectively, interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.<sup>47</sup>

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<sup>46</sup> The fact that the Cheyenne and Craig Road stores waived the policy requirements and permitted the Union to handbill on October 17, 2002 neither created a precedent the Henderson store was obliged to follow nor showed inconsistency or discrimination.

<sup>47</sup> While I cannot find Ms. Garza's telling employees they knew what to do with the union flyers constituted a threat of reprisal as alleged in the complaint, her statement was unquestionably coercive.

**Conclusions of Law**

1. Respondent violated Section 8(a)(1) of the Act by
  - (a) Impliedly telling employees to destroy or disregard union literature.
  - (b) Taking union literature away from employees.
2. Respondent has not violated the Act as otherwise alleged in the complaint.

**Remedy**

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>48</sup>

**ORDER**

The Respondent, Wal-Mart Stores, Inc., Henderson, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Impliedly telling employees to destroy or disregard union literature.
  - (b) Taking union literature away from employees.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
  - (a) Within 14 days after service by the Region, post at its facility in Henderson, Nevada, copies of the attached notice marked "Appendix."<sup>49</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 2002.

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<sup>48</sup> 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.

<sup>49</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice 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."

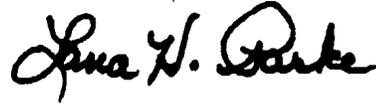
(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, at San Francisco, CA: April 26, 2004.

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Lana H. Parke  
Administrative Law Judge

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APPENDIX  
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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT impliedly tell employees to destroy or disregard union literature.

WE WILL NOT take union literature away from employees.

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

Wal-Mart Stores, Inc., Henderson, Nevada

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.