Walmart Stores, Inc. *and* The Organization United for Respect at Walmart (Our Walmart). Cases 16–CA–096240, 16–CA–105873, 16–CA–108394, 16–CA–113087, 16–CA–122578, 16–CA–124099, 21–CA–105401, 26–CA–093558, and 13–CA–107343

July 25, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On January 21, 2016, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed reply briefs. In addition, the General Counsel and the Charging Party each filed cross-exceptions and a supporting brief, the Respondent filed answering briefs, and the General Counsel and the Charging Party each filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions only to the extent consistent with this Decision and Order.[3]

The central issue in this case is whether a May-June 2013 work stoppage, called the "Ride for Respect," was an intermittent strike unprotected by the National Labor Relations Act. If it was, the Respondent did not violate Section 8(a)(1) by disciplining and discharging employees who participated in the stoppage. The judge found that it was not an intermittent strike and accordingly held that the Respondent violated Section 8(a)(1). We find that the Ride for Respect was an intermittent strike and reverse the judge's finding.

I. FACTS

OUR Walmart is a group for Walmart employees that the United Food and Commercial Workers Union (UFCW) supported and helped form. OUR Walmart initially employed various tactics to publicize its broad message of improving Walmart employees' wages, hours, benefits, and other working conditions, but it ultimately turned to work stoppages. There were four sets of strikes in the record. First, in October 2012, more than 58 Walmart employees at certain locations in the Los Angeles area went on strike. Second, on Black Friday in November 2012, there was a nationwide strike involving about 100 employees. Third, the Ride for Respect in late May to early June 2013 involved 100 to 130 employees striking for 5 to 6 days so that strikers could travel to the Respondent's annual shareholders' meeting to demonstrate. Fourth, on Black Friday in November 2013, there was a nationwide strike involving an unspecified number of employees. At issue here, the Respondent disciplined or discharged 54 employees who participated in the May-June 2013 Ride for Respect for violating its attendance policy.

II. ANALYSIS

The Board has consistently held since the Supreme Court's decision in *Auto Workers Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245 (1949), that intermittent strikes are unprotected by the Act. In other words, intermittent strikes are not unlawful, but employers do not contravene the Act by disciplining participants in such strikes.

Simply put, an intermittent strike unprotected by the Act is a strike pursuant to "a plan to strike, return to work, and strike again." *Farley Candy Co.,* 300 NLRB 849, 849 (1990). In the rare case where there is direct evidence of a strategy to use a series of strikes in support of the same goal, it is a straightforward matter to find the work stoppages unprotected. See *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1807–1811 (1954) (unprotected where union admittedly designed scheme to strike only on weekends); *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547, 1548–1550 (1954) (unprotected where "[CWA's] announced strategy consisted of a multiplicity of little 'hit and run' work stoppages deliberately calculated, in CWA's own words, to 'harass the company into a state of confusion'").

This is one of those rare straightforward cases. There is direct evidence of a plan to strike, return to work, and strike again, repeatedly. All of the strikes here were in support of the same goal of broadly improving Walmart employees' wages, hours, benefits, and other working conditions. The UFCW and OUR Walmart stipulated on the record in this case that "[t]he UFCW and OUR

[1] In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by threatening employee Josue Mata on November 19, 2012, at its Wheatland, Texas store that employees who went on strike on Black Friday would be fired and that the Respondent did not violate Sec. 8(a)(1) by discharging employee Louis Callahan. We include an Order and notice limited to remedying the unexcepted to violation at the Wheatland store.

[2] We agree with the judge's decision to grant the Respondent's motion to enforce the terms of the parties' protective order ensuring the confidentiality of certain documents produced at the hearing.

[3] For the reasons stated in the judge's decision, we adopt the judge's findings that the Respondent did not violate Sec. 8(a)(1) by telling employees that their strike activity was "under review" or by discussing employees' participation in strike activities during two televised interviews.

Walmart intend to continue planning and assisting Walmart workers in striking in a manner consistent with the strikes that the UFCW and OUR Walmart helped plan and assist Walmart workers hold in October and November 2012, June 2013, and November 2013," effectively admitting a strategy to use a series of strikes in support of the same goal. The Ride for Respect, the third strike undertaken pursuant to this strategy, was thus an unprotected intermittent strike, and the Respondent's disciplining and discharging some of the participants pursuant to its attendance policy was lawful.[4]

In finding the Ride for Respect was not an intermittent strike, the judge incorrectly employed a multifactor analysis. The judge failed to recognize that the ultimate inquiry in every Board case on the subject, either explicitly or implicitly, has been whether the work stoppage was pursuant to a strategy to use a series of strikes in support of the same goal. *In the absence of direct evidence*, the Board has examined the surrounding circumstances to determine whether work stoppages were pursuant to a plan to strike, return to work, and strike again. For example, work stoppages that are frequent and short in duration are more likely to be part of a strategy of intermittent stoppages. Compare, e.g., *Polytech, Inc.*, 195 NLRB 695, 696 (1972) ("[The] presumption that a single concerted refusal to work overtime is a protected strike activity . . . should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.") and *Robertson Industries*, 216 NLRB 361, 362 (1975) (two work stoppages, one in November and one in February, were not a pattern of intermittent stoppages),[5] with *Embossing Printers, Inc.*, 268 NLRB 710, 722–724 (1984) (employer lawfully locked out employees who walked out to attend the third union meeting in about a week).[6] Also, work stoppages responding to distinct employer actions or issues, even if close in time, are simply not pursuant to a plan to strike intermittently for the same goal and are therefore protected. Compare, e.g., *WestPac Electric, Inc.*, 321 NLRB 1322, 1360 (1996) (three separate strikes within 2 weeks were protected because strikes were not "intentionally planned and coordinated"; "each strike had its distinct origins and motivating antecedent features"), *Chelsea Homes, Inc.*, 298 NLRB 813, 831 (1990) (protected where two stoppages were "unique to [their] facts and circumstances"),[7] and *City Dodge Center, Inc.*, 289 NLRB 194, 194 fn. 2 (1988) (protected because actions were "a series of reactions to steps taken by the Respondent," not "a plan to strike, return to work, and strike again"),[8] with *Swope Ridge Geriatric Center*, 350 NLRB 64, 64 fn. 3 (2007) (two work stoppages a few weeks apart were unprotected where "the parties were unable to reach agreement on a wage increase . . . [and] the Union proffered no alternative reason for its conduct. Thus, we find that the strikes were part of the Union's bargaining strategy and, because the bargaining dispute continued with no evident changed purpose, there was a reasonable basis for finding that the pattern would continue"). The judge here misinterpreted the Board's examination of such facts to be introducing factors of independent significance. It did not. If, as here, there is direct evidence that a strike was pursuant to a strategy to use a series of strikes in support of the same goal, additional inquiry is simply unnecessary.[9]

[4] Some of the employees who participated in the Ride for Respect had not participated in the earlier strikes. Although it was their first strike, employees who participated in only the Ride for Respect associated themselves with the plan of intermittent action and also lost protection. See *Embossing Printers, Inc.*, 268 NLRB 710, 723 (1984) ("[B]y participating in only one of several walkouts he associated himself with the intermittent activity. Thus, the Respondent could lawfully discipline him as the others."), enfd. 742 F.2d 1456 (6th Cir. 1984); *Pacific Telephone*, 107 NLRB at 1550 ("Because they joined in the unprotected strike of the traffic employees with knowledge of its planned intermittent and hit-and-run aspects, the tollmen also removed themselves from the protection of the Act.").

[5] Enfd. 560 F.2d 396 (9th Cir. 1976).

[6] Enfd. 742 F.2d 1456 (6th Cir. 1984).

[7] Enfd. 962 F.2d 2 (2d Cir. 1992).

[8] Enfd. sub nom. *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989).

[9] We therefore do not rely on the judge's assessment of whether any of the individual factors he reviewed weighed for or against finding the Ride for Respect to be an unprotected intermittent strike. We also reverse the judge's finding that the Respondent violated Sec. 8(a)(1) when it read a set of prepared talking points to known strikers stating that the Respondent did not believe "these hit-and-run work stoppages are protected" and that if employees "participate[d] in future union-orchestrated intermittent work stoppages," the Respondent would treat their absences from work as unexcused. The talking points accurately described Board law on intermittent strikes and correctly called the October and November 2012 strikes unprotected intermittent work stoppages.

The judge found the Respondent also unlawfully disciplined employees twice before the Ride for Respect. We reverse these findings, too. First, the judge found that the Respondent violated Sec. 8(a)(1) by discriminatorily having a "personal discussion," the lowest level warning, with employee Victoria Martinez about her unexcused absences that included, in part, November 20, 2012—a day that she participated in strike activity when she was not scheduled to work. The Respondent's inclusion of November 20 was plainly a mistake, without discriminatory intent, caused by Martinez calling out that day through the automated "IVR system" even though she was not scheduled to work. The Respondent as much as showed Martinez it was relying on the IVR report. Second, the judge found that the Respondent violated Sec. 8(a)(1) by issuing disciplinary coachings to Marc Bowers and Colby Harris for absences during their two-person strike during May 6–9, 2013, a few weeks before the Ride for Respect. The Respondent's discipline was lawful because Bowers' and Harris' May 6–9 strike was also an unprotected intermittent strike. They went on strike and returned to work with the plan to strike

Our dissenting colleague wrongly accuses us of expanding the intermittent-strike doctrine with an unprecedented new standard. To the contrary, we apply exactly what has always animated our precedent, the principle that plans to strike, return to work, and strike again are not protected genuine strikes. Our discussion above illustrates this principle. We do not read any of the cases our colleague cites—largely the same cases we cite—to contradict our reading of precedent.

Our colleague claims that precedent requires more than just a strategy of repeated strikes to be unprotected. The strikes, she claims, must be intended to "harass the company into a state of confusion." We expect she means that plans of repeated strikes must be intended to reach some undefined threshold of disruption, but our precedent contains no such rule. The "state of confusion" phrase comes from *Pacific Telephone & Telegraph Co.,* 107 NLRB 1547 (1954), where the Board remarked that the union's own publication touted its strategy of "hit and run" strikes as promising to, quoting the publication, "harass the company into a state of confusion." Id. at 1548 & fn. 3. The *Pacific Telephone* Board was quoting the union's publication to show the plan of repeated strikes and not setting a threshold of disruption.

The Board repeated the "state of confusion" language in just one later case, *United States Service Industries, Inc.*, 315 NLRB 285 (1994).[10] There, the Board parroted agreement with the judge's inartful *Pacific Telephone* formulation that "'hit and run' strikes engaged in as part of a planned strategy intended 'to harass the company into a state of confusion' are not protected activity" and concluded, "we also agree with the judge that in the instant case there is no evidence that any such strategy was in place, and that the mere fact that some employee may have struck more than once does not render their conduct intermittent striking." In *United States Service Industries*, there was no evidence that the strikes were part of *any* plan to strike more than once, so we do not view the Board there to be setting a heightened threshold of disruption before a plan of repeated strikes loses protection, and it would be dicta if it were. Here, unlike *United States Service Industries*, there is direct evidence of UFCW and Our Walmart admitting their plan to strike repeatedly—the critical fact to our disposition here that our colleague unpersuasively denies.[11]

Contrary to what our colleague claims, a strategy to return to work from a strike only to strike again for the same purpose is inconsistent with a genuine strike and has no protection in the Act. See *Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245 (1949) ("Congress [has not] confer[red an] absolute right to engage in every kind of strike or other concerted activity" including "intermittent stoppages"). Our colleague takes a novel position in asserting for the first time in the Board's history that plans to strike, return to work, and strike again can be legitimate economic warfare, continuing indefinitely. Congress never contemplated such hit-and-run work stoppages in preserving the right to strike (and the concomitant lockout) as the engine for parties to resolve their differences and ultimately eliminate obstructions to commerce and promote overall labor peace. See *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 487–489 (1960) ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."). In situations like we have here, employees are acting on a plan to strike at times that would most negatively impact the employer (such as Black Friday and the annual shareholders' meeting) and, fully intending to strike again, quickly return to work before they could realistically lose their jobs to permanent replacements. This random economic warfare deprives employers of their responsive defense of permanently replacing strikers. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938). The nature of these stoppages also makes it extremely difficult to address any of the employees' specific demands to prevent future economic harm in future surprise strikes. We are far from a genuine strike.

Broadly stated, a genuine economic strike involves employees fully withholding their labor in support of demands regarding their terms and conditions of employment until their demands are satisfied or they decide to abandon the strike. At the end, employees make an unconditional offer to return to work and generally must be reinstated unless they have been permanently replaced. See, e.g., *Supervalu, Inc.*, 347 NLRB 404, 404–406 (2006). Striking and then returning to work with the intention of striking again is simply not the same. Notably, employees are not making *unconditional* offers to return

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again a few weeks later for the Ride for Respect (which they did), all in support of the same goals.

[10] Enfd. mem. 72 F.3d 920 (D.C. Cir. 1995). Following *United States Service Industries*, three administrative law judges quoted the state-of-confusion phrase, but it played no discernible role in their disposition of those cases. See *Allied Mechanical Services*, 332 NLRB 1600, 1608 (2001); *National Steel & Shipbuilding Co.*, 324 NLRB 499, 510 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998); *WestPac Electric*, 321 NLRB at 1360. One of the judges even identified the Board's use of the phrase in *United States Service Industries* to be "dicta." See *National Steel*, supra at 510.

[11] Notwithstanding the stipulated intent to continue striking in a manner "consistent with" past strikes that UFCW and OUR Walmart "helped plan and assist," our dissenting colleague contends that this stipulation somehow relates only to future intentions rather than an admission of past practice. This is, to borrow her words, unsupported factfinding.

to work. See *Indiana Ready Mix Corp.*, 141 NLRB 651, 652 (1963) (offer to return to work that included a guarantee that employees would not strike again for 30 days was not unconditional).[12] We are certainly not suggesting that employees who go on strike cannot go on strike again based on even the same demands as the first. Deciding later that circumstances warrant going on another strike is fundamentally different than planning a strategy to strike, return to work, and strike again for a more damaging effect with less risk.

ORDER

The National Labor Relations Board orders that the Respondent, Walmart Stores, Inc., Bentonville, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that they will be fired if they go on strike.

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

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

(a) Within 14 days after service by the Region, post at its Wheatland, Texas facility (Store 949) copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 the Wheatland, Texas facility any time since November 19, 2012.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 16 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.

Dated, Washington, D.C. July 25, 2019

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.[1]

As the Supreme Court has explained, the National Labor Relations Act "protect[s] the right of workers to act together to better their working conditions,"—often this means that unrepresented workers must "speak for themselves as best they" can.[2] Breaking with long-established precedent, the majority today sharply cuts back on the right of American workers—including those who lack unions—to protest their job conditions by striking. To be sure, the National Labor Relations Board has long treated certain strike tactics that straddle the line between striking and working as outside the protection of the Act; the "inherent character" of that kind of economic warfare goes "entirely beyond the pale of proper strike activities."[3] But this case does not involve such tactics. Today's decision, rather, takes a legitimate protest by unrepresented workers, dissatisfied with the working conditions dictated by a giant in the retail industry, and classifies it as an unprotected "intermittent" strike—even though it was buffered by months of strike inactivity, a tiny percentage of the

[12] The Board in *Indiana Ready Mix* construed the union's offer as effectively promising to strike again in 30 days unless the parties could reach an acceptable agreement. This is not comparable to our colleague's citation to *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 (1995), in which the Board found an offer to return unconditional where the union reserved the right, if bargaining proved unfruitful, to possibly strike again in 6 months. In only the latter case, the union had not resolved to strike again.

[1 3] If this Order is enforced by a judgment of a 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."

[1] I agree with my colleagues' adoption of the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening an employee who participated in an October 2012 work stoppage with discharge. I also agree that the judge correctly dismissed the allegations that the Respondent violated Sec. 8(a)(1) by telling employees that their strike activity was "under review" and by discussing employees' participation in strike activities during two televised interviews. Finally, I agree with the judge's decision to grant the Respondent's motion to enforce the terms of the parties' protective order.

[2] *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

[3] *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547, 1548–1550 (1954).

work force participated, and no serious difficulties for store operations resulted.

Because this protest is held unprotected, the majority finds that the employer was free to discipline and discharge the workers who participated. That includes 29 employees who only struck *once*, not intermittently. The majority's decision ensures that future protests at this retail giant will run the risk of being deemed unprotected under its newly-expanded view of the intermittent-strike doctrine. It will also hamstring other nonunion workers who might seek to use work stoppages to raise awareness about their wages and working conditions. But the majority's view has no basis in Board precedent. Worse, it undermines what the Supreme Court has called the "strong interest of federal policy in the legitimate use of the strike."[4]

I.

The Respondent is the largest private employer in the United States. It employs about 1.3 million employees at its more than 4000 discount retail stores, thus employing, on average, over 300 employees at each location. None of its U.S. stores are unionized.

In 2010, a group of the Respondent's employees, with the assistance of the United Food and Commercial Workers Union (UFCW), formed the Organization United for Respect at Walmart (OUR Walmart). OUR Walmart's founding document, the "Declaration of Respect," set forth the organization's goals, which included securing increased wages, more predictable scheduling, expanded health care access, and freedom from retaliation for the Respondent's employees.

OUR Walmart members initially engaged in demonstrations during nonworking time to raise awareness of the organization's goal of improving employees' terms and conditions of employment. The first OUR Walmart work stoppages occurred at various locations in October and November 2012.[5] OUR Walmart's first major nationwide strike occurred the day after Thanksgiving ("Black Friday"), one of the Respondent's busiest shopping days of the year. The Respondent did not discipline or discharge employees who participated in the October and November work stoppages.[6] However, the Respondent instructed its managers to hold one-on-one meetings with known strikers and to read a set of prepared talking points stating that the Respondent did not believe "these hit-and-run work stoppages are protected" and that if employees "participate[d] in future union-orchestrated intermittent work stoppages," the Respondent would treat their absences from work as unexcused.

Six months later, in May 2013,[7] between 100 and 130 OUR Walmart members from about 50 stores engaged in a work stoppage known as the "Ride for Respect."[8] At least 29 of the employees who participated in the Ride for Respect had not engaged in any prior work stoppages. Beginning on May 27, employees handed in strike letters which, similar to those in the past, listed as the reason for the strike the Respondent's attempts to silence and retaliate against employees who protested their pay, schedules, and health benefits. They reported their absences to the

[4] *NLRB v. Erie Resistor Corp.*, 373 US. 221, 235 (1963). As the *Erie Resistor* Court explained:

> Section 7 [of the National Labor Relations Act] guarantees, and [Section] 8(a)(1) protects from employer interference the rights of employees to engage in concerted activities, which, as Congress has indicated, . . . include the right to strike.
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> * * *
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> Section 13 makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress….
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> This repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.
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> While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant. Thus when Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgement in exacting detail . . . by indicating the precise procedures to be followed in effecting the interference . . . and by preserving the positive command of [Section] 13 that the right to strike is to be given a generous interpretation within the scope of the labor Act.

373 U.S. at 233–235 (citations and footnotes omitted). Section 13 of the Act, cited by the *Erie Resistor* Court, provides that: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163.

[5] Around 58 employees in the Los Angeles area participated in a brief work stoppage on October 4. Other OUR Walmart members struck on October 9 and 10 and traveled to the Respondent's home office in Bentonville, Arkansas to demonstrate during the annual financial analysts' meeting. Several employees at store 471 in Lancaster, Texas participated in a spontaneous 1-day strike on November 16.

[6] After the Black Friday strike, the Respondent filed an unfair labor practice charge alleging that the UFCW, through its subsidiary OUR Walmart, was engaging in unlawful recognitional picketing. In January 2013, the parties settled the charges and agreed to a 60-day "cooling off" period during which neither UFCW nor OUR Walmart would engage in any picketing or demonstrations.

[7] Subsequent dates are in 2013 unless otherwise indicated.

[8] In early May, two employees at the Lancaster, Texas store participated in a spontaneous strike that lasted for two shifts in protest over a manager's derogatory remarks about OUR Walmart.

Respondent and boarded buses to Bentonville, Arkansas, where the Respondent's annual shareholders' meeting was taking place. The buses followed caravan routes that included stops to pick up employees at various Walmart stores.

Once the employees arrived in Bentonville, they engaged in a variety of actions to raise awareness of their efforts to secure more favorable terms and conditions of employment, including demonstrations, canvassing sessions, and attendance at the shareholders' meeting. Most strikers remained in Bentonville for 5 or 6 days and then flew back to their respective homes. During the work stoppage, strikers completely ceased work and received no compensation from the Respondent. No stores were forced to close as a result of the work stoppage. At most, eight employees at any given store struck and, in many cases, only one or two employees from a particular store missed work to attend the Ride for Respect. The Respondent generally handled the situation by reassigning other store employees to cover the work of those on strike.

By late June, the Respondent began holding one-on-one disciplinary meetings with employees who missed their scheduled shifts due to their participation in the Ride for Respect. At the meetings, managers read verbatim from scripts prepared by the Respondent's corporate labor relations team and informed employees that they were being disciplined or discharged for violating the Respondent's attendance policy.[9]

After the Ride for Respect, the next OUR Walmart-coordinated strike did not occur until about 6 months later, in November 2013.

On these facts, the judge concluded that the Respondent unlawfully discharged or disciplined employees for absences stemming from their participation in the Ride for Respect. As I will explain, the judge's conclusion was correct, notwithstanding his use of a novel multi-factor test to determine whether the Ride for Respect was protected.

II.

Employees may not be discharged or otherwise discriminated against for engaging in protected work stoppages to protest working conditions.[10] Of course, not all forms of strike activity are protected. A refusal to work will be considered unprotected intermittent strike activity "when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action *which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer*."[11] That is, repetitive strikes that intentionally bring about a condition that is "neither strike nor work" are unprotected because they go "beyond the pale" of proper economic weaponry.[12] But such a condition arises in only two circumstances: (1) when recurring strikes are deliberately calculated to "harass the company into a state of confusion," *Pacific Telephone*, supra, 107 NLRB at 1548,[13] and (2) when employees repeatedly strike, yet avoid assuming the status of strikers—which means losing pay and risking replacement—such as by remaining on the job, while refusing to abide by the established work schedule.[14] Board precedent makes clear that the mere fact that employees have engaged in multiple strikes is insufficient to condemn their activity as unprotected.[15]

Here, the record shows that the "inherent character" of the OUR Walmart work stoppages was fully consistent with a genuine strike.[16] This case does not involve job actions that were "neither strike nor work," but rather a

[9] Under the Respondent's attendance policy, employees who incurred unexcused absences were subject to discipline or discharge, depending on how many shifts they missed and their disciplinary history.

[10] *Washington Aluminum*, supra; *McEver Engineering*, 275 NLRB 921 (1985), enfd. 784 F.2d 634 (5th Cir. 1986).

[11] *Polytech, Inc*., 195 NLRB 695, 696 (1972) (emphasis added).

[12] *Pacific Telephone,* supra, 107 NLRB at 1548–1549; *Honolulu Rapid Transit Co*., 110 NLRB 1806, 1811 (1954) (quoting *Valley City Furniture Co.*, 110 NLRB 1589 (1954), enfd. 230 F.2d 947 (6th Cir. 1956)).

[13] Compare *Swope Ridge Geriatric Center*, 350 NLRB 64, 64 fn. 3 (2007) (unprotected intermittent work stoppage found where a "union issued three strike notices and engaged in two work stoppages, the third strike notice following only 1 day after the conclusion of the first strike") with *United States Service Industries*, 315 NLRB 285, 285 (1994) (multiple strikes months apart as part of nationwide union campaign found protected where they were not "'hit and run' strikes" that were part of a "planned strategy intended to 'harass the company into a state of confusion'"), enfd. mem. 72 F.3d 920 (D.C. Cir. 1995).

[14] See *Polytech*, supra, 195 NLRB at 696 ("when employees engage in repeated work stoppages limited to a portion of the working day, they are plainly unwilling to assume the status of strikers—a status contemplating a risk of replacement and a loss of pay"); *First National Bank of Omaha*, 171 NLRB 1145, 1151 (1968) ("Employees who choose to withhold their services because of a dispute over scheduled hours may properly be required to do so by striking unequivocally," that is, by "assum[ing] the status of strikers, with its consequent loss of pay and risk of being replaced," and cannot "simultaneously walk off their jobs but retain the benefits of working."), enfd. 413 F.2d 921 (8th Cir. 1969); *Honolulu Rapid Transit*, supra, at 1809–1811 (regular weekend strike unprotected because, just like a daily hour-long strike, it created a condition that was neither strike nor work and was an "arrogation of the [employer's] right to determine their schedules and hours of work").

[15] See *United States Service Industries*, supra, at 285–286 ("[T]he mere fact that some employees struck more than one time is not sufficient evidence on which to base a finding of unprotected intermittent striking."); *Robertson Industries*, 216 NLRB 361, 362 (1975) (two work stoppages several months apart, where employees were "merely continuing their earlier efforts to have their work-related problems resolved," did not constitute the "type of pattern of recurring stoppages which would deprive the employees of their Section 7 rights"), enfd. 560 F.2d 396 (9th Cir. 1976).

[16] *Pacific Telephone*, supra, at 1549–1550.

strike, plain and simple. The evidence does not support the conclusion that the work stoppages were intended to "harass the company into a state of confusion." It makes clear, rather, that workers struck—and were prepared to lose pay and risk replacement as a result. The work stoppages did not occur "for any purpose other than to protest and seek redress for what employees considered to be unjust working conditions." *United States Service Industries*, supra, 315 NLRB at 291.

Like the work stoppages in fall 2012, the Ride for Respect was driven by surrounding events (i.e., the Respondent's annual shareholders' meeting), and it continued OUR Walmart's campaign to pressure the Respondent to make changes to its working conditions and workplace policies. Unlike cases involving true intermittent strikes, the employees here did not strike in short succession so as to blur the line between strike and work, thereby avoiding the risks of being on strike.[17] In this respect, the employees engaged in relatively brief—but clear and complete—work stoppages, during which they lost wages and risked replacement by the Respondent.[18]

No evidence suggests that the Ride for Respect was intended to or created a "state of confusion." The contrast with cases in which the Board has found work stoppages unprotected is clear. In *Pacific Telephone*, the union's surprise "hit and run" strikes over the course of 9 days were designed to force the employer to arrange staffing coverage on short notice, only to have strikers return just as replacements arrived and then walk off the job again after a day or two in many cases.[19] Here the timing of the strikes, which coincided with significant dates or events, was not designed to hamstring the Respondent's operational response; rather, it was consistent with OUR Walmart's goal of raising public awareness of its campaign to improve employees' working conditions. Moreover, the Ride for Respect was not close in time to any other strike; about 6 months had passed since the last strike coordinated by OUR Walmart—and almost another 6 months passed before the next strike occurred. Only a small percentage of the Respondent's employees participated.[20] Each store lost a marginal number of staff (between one and eight employees out of more than 300 in-store employees, on average), and the Respondent did not have to close any stores. Indeed, although the judge correctly found that there is no requirement that employees provide prior notice before going on strike,[21] it bears emphasis that the Respondent did have advance notice of the work stoppage, giving it sufficient time to prepare for any interruption to its operation.

What is left is the fact that some, but not all, of the discriminatees in this case engaged in several work stoppages over the course of approximately 1 year. But, as explained above, the sole fact that the OUR Walmart work stoppages were repeated is not enough to strip employees of the Act's protection.[22] This simply was not a situation where a union engaged in a series of hit and run work stoppages in a relatively short timeframe, much less a situation where employees effectively tried to remain on the job *and* strike, by refusing to work the hours expected of them.[23] Indeed, this case is strikingly similar to *United States Service Industries*, supra, which involved unrepresented employees who engaged in multiple strikes coordinated by a union-led nationwide campaign. Like the strikes here, the work stoppages—three in total, over 5 months—involved some overlapping worksites and employees.[24] There, the Board found that the strikes remained protected because

[17] Cf. *NLRB v. Blades Manufacturing Corp.*, 344 F.2d 998, 1001–1002, 1005 (8th Cir. 1965) (observing that the "repetitiousness of the intermittent walkouts within a short span of time"—three walkouts within about 2 weeks—rendered the strikes unprotected).

[18] See *WestPac Electric*, 321 NLRB 1322, 1359–1360 (1996) (no evidence that three work stoppages over a two-week period were planned so employees would have the benefit of a continuous strike action without assuming the economic risks); compare *John S. Swift Co.*, 124 NLRB 394, 396–397 (1959) (employees refused to work overtime but continued to get paid for their work), enfd. in part 277 F.2d 641 (7th Cir. 1960).

[19] 107 NLRB at 1548, 1559. Compare *WestPac Electric*, supra, 321 NLRB at 1359–1360 (three strikes within a 2-week period were protected where they were not part of "hit and run" scheme nor intentionally planned to reap the benefit of a continuous strike).

[20] In *Pacific Telephone and Telegraph*, supra, 107 NLRB at 1548 & fn. 3, the strikes were deliberately designed so that employees at more than 200 offices walked off their jobs on different days, instead of all at the same time, so as to minimize the financial hardship on employees while still hampering employer operations nationwide. Here there is no suggestion that OUR Walmart deliberately selected a subset of employees to strike, knowing and intending that their absence would cause a disproportionate disruption to Walmart's operations.

[21] See, e.g., *Iowa Packing Co.*, 338 NLRB 1140, 1144 (2003) ("The Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice.").

[22] See *United States Service Industries*, supra, 315 NLRB at 285–286; *Robertson Industries*, supra, 216 NLRB at 362 (without more, two work stoppages several months apart remained protected).

[23] There is no merit to the Respondent's exaggerated claim that the OUR Walmart strikes somehow amounted to employees setting their own terms and conditions of employment by "com[ing] and go[ing] as they pleased." *Embossing Printers*, 268 NLRB 710, 723 (1984), enfd. 742 F.2d 1456 (6th Cir. 1984). Inherent in the right to strike is the right to disregard an employer's established work schedule during a genuine strike. The employees' actions here stand in stark contrast to those in *Embossing Printers*, where the union purposefully and unnecessarily scheduled meetings in the middle of the work day, causing at least three walkouts over the course of about a week.

[24] The first strike was a 1-day strike at two worksites. The second strike occurred about 2 months later, lasted about a week, and involved the same sites as the first strike plus two additional buildings. Finally, the third strike occurred about 3 months after the second strike, lasted over a month, and involved distinct worksites and employees. 315 NLRB at 289–290, 292.

there was no strategy to harass the company into a state of confusion. Accordingly, *United States Service Industries* stands for the proposition that union-coordinated strikes that occur months apart, in general protest over working conditions, do *not* constitute unprotected intermittent strikes, absent evidence of an intent to harass the employer into a state of confusion. There is no reason why the Board should not follow *United States Service Industries* here. The majority's attempt to construe its central holding as mere "inartful" dicta is unpersuasive. Moreover, contrary to the majority's assertion otherwise, *United States Service Industries* is not the only case to apply the "state of confusion" standard from *Pacific Telephone*.[25]

In short, under Board precedent, the employees who engaged in the OUR Walmart work stoppages in connection with the Ride for Respect were entitled to the protection of the Act. Their disciplines and discharges violated Section 8(a)(1) as alleged.[26] This is most emphatically true for the 29 employees who joined the Ride for Respect, but who had not participated in any prior work stoppages. A single work stoppage is presumptively protected.[27] The Respondent has not rebutted that presumption. It has not shown, for example, that there was a plan to participate in additional work stoppages in short succession that would amount to unprotected intermittent striking.[28] Indeed, given that no strikes occurred for almost 6 months following the Ride for Respect, the Respondent would be hard-pressed to show that these employees harbored such an intention.

III.

Instead of following Board precedent, the majority announces a new standard for when repetitive strikes cross the line and become unprotected, redefining an intermittent strike as one that is pursuant to a "plan to strike, return to work, and strike again." This new standard may be easy to apply, but it has no real support in our case law. And it violates a clear, consistent, and longstanding policy of federal labor law, recognized by the Supreme Court in *Erie Resistor*, supra: to preserve the effective right to strike. This subjugation of employee rights to protect employer interests is not what Congress intended.

To begin, the majority's "plan to strike, return to work, and strike again" formulation cannot serve as the proper standard for identifying an unprotected intermittent strike because it has never been applied before. Indeed, the majority derives this novel formulation from cases where repetitive strikes were found *protected.* While the *absence* of a "plan to strike, return to work, and strike again" may be enough to establish that a strike was protected, the *presence* of such a plan—without more—does not make a strike *unprotected.*

The majority's shorthand description of an intermittent strike appears in two notable cases, *Farley Candy Co.*[29] and *City Dodge Center*.[30] In *Farley Candy*, the Board found that three strikes over a 2-day period did *not* constitute partial or intermittent strikes where there was no intent to engage in an impermissible strike and, as to one set of employees, their decision to strike a second time was a mere reaction to the employer's disparate handling of identical employee complaints the day before.[31] Likewise, in *City Dodge Center*, employees were found to have engaged in protected activity when they struck, returned for a single day, then struck again the next day because the strikes amounted to a series of reactions to steps taken by the employer.[32] In both cases, it was the lack of any evidence suggesting a plan to strike multiple times in short succession over the same issue, or any other evidence inconsistent with genuine strike activity, that led the Board to reject the argument that the strikes were unprotected. The majority's reading of those cases confuses what is minimally necessary for an intermittent strike to be potentially unprotected (i.e., a plan to strike, return to work, and strike again) with what is sufficient for such a strike to actually lose the Act's protection.

Other Board decisions, meanwhile, make plain that the majority's "plan to strike, return to work, and strike again" standard is, at best, incomplete. Even the majority appears to concede that in order for strikes to be classified as intermittent, there generally must be evidence that a series of strikes was "in support of the same goal" (in the words

[25] See *Allied Mechanical Services*, 332 NLRB 1600, 1608 (2001); *National Steel & Shipbuilding Co.*, 324 NLRB 499, 510 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998); *WestPac Electric*, supra, 321 NLRB at 1360.

[26] I would adopt the judge's finding that the Respondent violated Section 8(a)(1) in February 2013 when it read talking points to employees stating that the Respondent did not believe that "these hit-and-run work stoppages are protected" and that if employees engaged in "future union-orchestrated intermittent work stoppages," their absences would be unexcused. The Respondent did not merely warn employees about the consequences of engaging in unprotected conduct, but instead mischaracterized the employees' past work stoppages as unprotected. The judge correctly found that employees reasonably would construe the talking points as prohibiting them from engaging in protected strike activity.

[27] See, e.g., *Polytech*, supra, 195 NLRB at 696.

[28] Because the series of strikes described herein was protected, the stipulation that UFCW and OUR Walmart intend to continue planning and assisting Walmart workers in striking in a manner consistent with such strikes does nothing to establish an intent to utilize unprotected tactics.

[29] 300 NLRB 849, 849 (1990).

[30] 289 NLRB 194, 194 fn. 2 (1988), enfd. sub nom. *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989).

[31] 300 NLRB at 849.

[32] 289 NLRB at 194 fn. 2, 197.

of the majority),[33] rather than reactions to intervening events or protests over distinct issues.[34] And yet, even when multiple actions with the "same goal" is present, that still does not categorically exclude the possibility that the strikes will retain the Act's protection—the Board has often found that still more is required.[35] The majority labels this a "novel position," but it is the majority that mischaracterizes the relevant case law, which speaks for itself.

The most fundamental element that the majority's reformulation fails to account for is the decades-old rationale underpinning the intermittent strike doctrine: that employees only forfeit the Act's protection when they engage in unfair economic warfare by failing to choose between striking and working. Ironically, this "neither strike nor work" rationale is found in both *Pacific Telephone* and *Honolulu Rapid Transit*—seminal cases upon which the majority heavily relies—yet it does not factor into the analysis. Instead, the majority unpersuasively asserts that any protest wherein employees strike, return to work, and strike again is not a genuine strike because it does not involve employees striking "until their demands are satisfied or they decide to abandon the strike." Tellingly, the majority cites no precedent in support of its definition of a genuine strike, and that definition is in tension with precedent that does exist.[36] As explained, the employees who participated in the Ride for Respect were not unfairly straddling the line between striking and working. They waited 6 months after the 2012 Black Friday strike to take

[33] The fact that the short strike in Lancaster, Texas in early May 2013 was spontaneous in nature distinguishes this work stoppage and entitles it to protection, even if the Ride for Respect amounted to an unprotected intermittent strike. For this additional reason, I would adopt the judge's finding that the resultant coachings issued to employees Marc Bowers and Colby Harris violated Sec. 8(a)(1). The majority's failure to acknowledge that this spontaneous strike was triggered by different concerns from those animating the series of OUR Walmart strikes and was organized independently of those strikes amounts to unsupported fact-finding. Furthermore, even if the November 2012 work stoppages were unprotected, I would uphold the finding that the Respondent violated Sec. 8(a)(1) by basing Victoria Martinez's personal discussion, in part, on her protected strike-support activities on November 20, given that the Respondent specifically cited that day as foundation for the discipline. The fact that the Respondent mistakenly believed she missed an assigned shift, and lacked discriminatory intent, does nothing to undercut the deterrent effect of its actions on employees' willingness to engage in protected activities. See *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 172–173 (1964).

[34] See *Farley Candy*, supra, 300 NLRB at 849; *City Dodge Center*, supra, 289 NLRB at 194 fn. 2; *WestPac Electric*, supra, 321 NLRB at 1359–1360 (three strikes in a 2-week period protected where "each strike had its distinct origins and motivating antecedent features"); *Chelsea Homes*, 298 NLRB 813, 831 (1990) (two refusals to work overtime about a week apart protected where second strike was "unique to its facts and circumstances"), enfd. mem. 962 F.2d 2 (2d Cir. 1992); *Robertson Industries*, supra, 216 NLRB at 361–362 (two strikes several months apart were not intermittent under alternative theory that second strike was motivated by same workload concern as the first strike but also involved "other issues").

[35] See *Chelsea Homes*, supra, 298 NLRB at 831 (even if the two strikes arose from the same dispute, protected in light of the Board's determination that "two stoppages, even of like nature, are insufficient to constitute evidence of a pattern of recurring, and therefore unprotected, stoppages"); *Robertson Industries*, supra, 216 NLRB at 362 (two work stoppages protected notwithstanding that employees were "merely continuing their earlier efforts to have their work-related problems resolved"); see also *Crenlo, Division of GF Business Equipment*, 215 NLRB 872, 879 (1974) (two work stoppages on two successive days protected), enfd. in relevant part, 529 F.2d 201 (8th Cir. 1975).

[36] For example, an employer is prohibited from conditioning strikers' return to work on a no-strike guarantee. See *Brooks, Inc.*, 228 NLRB 1365, 1368 (1977) (conditioning strikers' reinstatement on agreement not to strike for 60 days violated Sec. 8(a)(3)), enfd. in relevant part sub nom. *NLRB v. Albion Corp.*, 593 F.2d 936 (10th Cir. 1979). Likewise, a union's reservation of the right to strike in the future does not render an offer to return to work conditional, at least in so far as the offer does not amount to a mere promise of a short respite from striking. Compare *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145, 1146 (1995) (construing offer to return to work as unconditional notwithstanding reservation of right to strike if additional bargaining failed to produce agreement within 6 months), enfd. mem. 77 F.3d 461 (3d Cir. 1996), with *Indiana Ready Mix Corp.*, 141 NLRB 651, 652 (1963) (construing application for reinstatement as conditional where it only offered a 30-day respite in the strike). Indeed, the fact that a 6-month no-strike guarantee is treated as unconditional, whereas a 30-day guarantee is not, further supports the notion that a strike occurring 6 months apart from any other strike is not objectionably close in time to warrant losing the Act's protection.

Furthermore, the majority's definition of a strike is in tension with the Board's understanding of a strike at the time the intermittent strike doctrine was first developed. Two months after deciding *Pacific Telephone*, supra, the Board observed that "a strike, 'in the commonly understood sense of the word'" involves a disruption where, "after the initial surprise of an unannounced walkout, the company knows what it has to do and plans accordingly." *Textile Workers Union of America (Personal Products Corp.)*, 108 NLRB 743, 745–746 & fn. 9 (1954), enf. denied in part on other grounds, 227 F.2d 409 (D.C. Cir. 1955). In contrast, harassing tactics—including slowdowns and 25 walkouts over the course of about 6 months—that "disabled [the employer] from making any dependable production plans or delivery commitments" caused a type of disruption that was "not a concomitant of a strike." Id. at 746 fn. 9, 764.

As explained, the strikes at issue here were not designed to interfere with the Respondent's ability to maintain orderly operations over the course of the strikes, and it easily kept stores running during the Ride for Respect. It is in this sense that the Ride for Respect did not deliberately harass the Respondent into a "state of confusion." The majority misconstrues my analysis as suggesting that the protectedness of recurrent strikes depends on the level of general disruption they cause. I do not advocate such an approach, which would be contrary to fundamental principles governing strikes. See *Allied Mechanical Services*, 341 NLRB 1084, 1102 (2004) (rejecting intermittent strike defense and observing that "a requirement that a strike not be disruptive of an employer's operations, or harassing to it, is a requirement that the strike not be conducted"), enfd. 668 F.3d 758 (D.C. Cir. 2012); see also *Swope Ridge Geriatric Center*, supra, 350 NLRB at 67 (finding weekend strikes to be unprotected intermittent strikes, but rejecting argument that they were unprotected "because they were calculated to cause the most disruption to the [employer's] operations while providing employees the most advantageous incentives for striking"; "[i]t is "axiomatic that the very purpose of a strike is to cause disruption, both operationally and economically, to an employer's business operations").

further action, completely ceased working for 5 to 6 days, lost wages, risked replacement, and waited almost another 6 months to strike again. This conduct reflects genuine strike activity, not an attempt to reap the benefit of a continuous strike without the attendant risks.[37] Certainly, our precedent supports making that finding, as demonstrated by the Board's holding in the *United States Service Industries* case, discussed above, that three strikes over 5 months retained the Act's protection absent evidence of a strategy or intent to harass the employer into a state of confusion.[38]

The majority intimates that the nature of the strike was impermissible because employees reaped a disproportionate benefit with reduced risk, but that position is wrong on the facts and the law. There is nothing in the record suggesting that the series of short strikes spaced months apart was "more damaging" than a conventional strike would have been. And the fact that employees timed their strikes to coincide with significant business events, such as Black Friday and the annual shareholders' meeting, does not undermine their protected nature.[39] Furthermore, it cannot be said that the relatively short nature of the Ride for Respect effectively *eliminated* the strikers' risk of replacement—the applicable standard—rather than somewhat *reducing* that risk; nor can it be said that the Respondent was deprived of its conventional defense of replacing the strikers temporarily or permanently.[40] The Act does not require that employees maintain a strike for any particular length of time.[41] Certainly, it does not require strikers to remain on strike long enough for their employer to find replacements; such a requirement would make every strike a fool's errand.

The majority's analysis, and the result it reaches, runs contrary to precedent and the rationale behind the intermittent strike doctrine. The result is an unwarranted expansion of that doctrine—and an unjustified curtailment of the right to strike. Never has the Board held that so few strikes, so isolated in time, constituted unprotected intermittent strikes.[42] Yet the majority offers no justification for its move. Even if the majority's new standard were justified, it is not even clear that it is met here. Plans for the Ride for Respect began forming in the spring of 2013, not before, during, or even immediately after the 2012 Black Friday action. The majority construes the stipulation as an effective admission that there was a preconceived plan to strike, return to work, and strike again in support of the same goal. But this stipulation actually relates to UFCW and OUR Walmart's *future* intentions, not its past designs, and is more naturally interpreted as a "later [decision] that circumstances warrant going on

[37] See *WestPac Electric*, supra, 321 NLRB at 1360.

[38] The majority attempts to distinguish *United States Service Industries* on the basis that it does not discuss whether the strikes, which were all part of the same union campaign, as here, involved a premeditated plan to strike repeatedly. But the absence of analysis on this supposedly critical factual point merely exposes the hollowness of the majority's assertion that its novel standard has always been an animating principle in the intermittent strike doctrine. The Respondent attempts to distinguish this case on the basis that the employees' goal or purpose shifted from strike to strike. But this interpretation of the case is unwarranted, given that the first strike involved a general protest of working conditions, the second strike charged the employer with being "unfair," and the third strike involved "signs protesting unfair working conditions." 315 NLRB at 289–290, 292. Moreover, the General Counsel litigated that case under the theory that all of the strikes were economic in nature, and so the Respondent's attempt to cast the second strike as an unfair labor practice strike falls flat. See id. at 290.

[39] See *Atlantic Scaffolding Co.*, 356 NLRB 835, 837 (2011) (rejecting argument that an "extremely disruptive" work stoppage that was "timed to maximize its effect" on operations lost the Act's protection "because of the economic harm inflicted"; such a finding would be "antithetical to the basic principles underlying the statutory scheme, i.e., the right of employees to withhold their labor in seeking to improve their terms of employment, and the use of economic weapons such as work stoppages as part of the 'free play of economic forces' that should control collective bargaining").

[40] See *Swope Ridge Geriatric Center*, supra, 350 NLRB at 67 (rejecting argument that employer was "effectively deprived of its right to permanently replace employees engaged in periodic 2-day economic strikes" because there was "no legal impediment to permanently replacing such economic strikers regardless of the length of each strike"); *Jasper Seating Co.*, 285 NLRB 550, 550–551 (1987) (observing that employer faced with mid-morning walkout to protest cold and drafty conditions "could have exercised its lawful option to replace [the strikers] without significant delay or disruption to business operations"), enfd. 857 F.2d 419 (7th Cir. 1988); *First Nat'l Bank of Omaha v. NLRB*, 413 F.2d 921, 925 (8th Cir. 1969) ("If the bank had acted immediately after the walkout to replace the striking employees with other employees, it could have done so legally.").

[41] See, e.g., *Farley Candy*, supra, 300 NLRB at 849 (work stoppages lasting less than a single shift protected); *First Nat'l Bank of Omaha*, 413 F.2d at 925 (employees "are not required to institute the strike at any particular time of the day or to maintain it for any particular period of time to be entitled to the protection of the Act").

[42] See *Swope Ridge Geriatric Center*, supra, 350 NLRB at 64 fn. 3, 65 (weekend strikes 3 weeks apart with intent to continue unprotected); *Embossing Printers*, supra, 268 NLRB at 711, 723 (at least three walkouts within about a week unprotected); *New Fairview Hall Convalescent Home*, 206 NLRB 688, 746–747 (1973) (three short walkouts, each about 3 weeks apart, unprotected), enfd. sub nom. *Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975); *John S. Swift*, supra, 124 NLRB at 396–397, 412 (overtime strike that occurred 2 weeks after announcement of vote not to work overtime unprotected); *Honolulu Rapid Transit*, supra, 110 NLRB at 1808–1809 (weekend strikes nearly every week for 7 weeks unprotected); *Valley City Furniture*, supra, 110 NLRB at 1593–1595 (single refusal to work overtime with intent to regularly continue such tactics unprotected); *Kohler Co.*, 108 NLRB 207, 208 fn. 3, 218 (1954) (walkouts spanning 2 consecutive days with intent to continue unprotected), enfd. 220 F.2d 3 (7th Cir. 1955); *Pacific Telephone*, supra, 107 NLRB at 1548, 1559 ("hit and run" strikes over a 9-day period unprotected). See also *Auto Workers Local 232 v. Wis. Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245, 249, 264 (1949) (27 walkouts to attend midday union meetings over the course of about 20 weeks unprotected), overruled on other grounds by *Machinists Lodge 76 v. Wis. Employment Relations Commission*, 427 U.S. 132 (1976).

another strike," which the majority concedes would deserve protection.

This case unfortunately foreshadows the real-world consequences the majority's approach will have on employee rights in the future. The majority concludes that *none* of the strikers who participated in the May 2013 Ride for Respect engaged in protected activity (whether or not they had struck previously), because: (1) that strike was a continuation of work stoppages conducted by no more than a couple hundred employees in October and November 2012; and (2) because the strikers sought the same broad goal of improving wages, hours, benefits, and other working conditions. The clear implication of today's ruling is that further work stoppages toward those same ends would be treated as unprotected—at least insofar as they are planned and coordinated by OUR Walmart (rather than being spontaneous) and insofar as the strikes pursue the same stated goal (rather than reflect an evolving purpose or a reaction to intervening events). Thus, the strong implication of the majority's decision is that the Respondent's 1.3 million employees cannot stop work to protest the most basic of employment issues (wages, scheduling, health care), based on the prior activities of a tiny fraction of the Respondent's total work force. Whether employees' rights are forfeited for a year, 2 years, or indefinitely remains to be seen. In any event, such a result should be unfathomable, given the Act's "repeated solicitude for the right to strike," the "generous interpretation" to be accorded that right, and the "deference paid the strike weapon by the federal labor laws."[43]

As explained, the result here is especially unjust with respect to the 29 employees who only struck *once*. It is well-settled that culpability for striker misconduct is evaluated based on an individual's own actions.[44] Intermittent strike precedents, in turn, establish that the identity of the strikers matters when deciding whether repetitive strikes exceed the bounds of permissible strike activity.[45] The majority relies on *Embossing Printers* and *Pacific Telephone* to strip these one-time strikers of their statutory protections, but those cases do not compel this result.[46] In the present circumstances, even assuming there was potentially unprotected intermittent strike activity, it was incumbent upon the Respondent to determine whether the one-time strikers were aware that the Ride for Respect was part of a series of unprotected strikes before disciplining or discharging them.[47]

IV.

The Ride for Respect had a wholly different character than the kinds of intermittent strikes found unprotected in the past. Rather than acknowledge that the traditional intermittent-strike doctrine simply does not reach the employee conduct at issue here, the majority arbitrarily dispenses with the established "neither strike nor work" framework. It imposes a new standard that sharply reduces the scope of protected strike conduct. The majority does not acknowledge its departure from prior precedent,[48] much less offer a reasoned explanation for it. Nor

[43] *Erie Resistor*, supra, 373 U.S. at 233–235. The majority's suggestion that Congress did not envision that repetitive strikes would be protected is a perverse reading of congressional intent given the deference accorded the strike weapon generally. Moreover, it can be said definitively that intermittent strikes were not in Congress's mind when it recognized certain "limitations or qualifications" on the right to strike in Section 13 in 1947, since the case establishing the intermittent strike doctrine, *Briggs & Stratton*, supra, was decided in 1949. See also S. Rep. No. 80-105, at 28 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 434 (1948) (indicating that the amendment to Section 13 was not intended to change existing law establishing that certain strikes are unprotected, namely, those for illegal objectives, in breach of contract, in breach of other federal law, or involving illegal sit-down tactics; omitting mention of intermittent strike activity).

[44] See, e.g., *Beaird Industries*, 311 NLRB 768, 769–770 (1993).

[45] See *Farley Candy*, supra, 300 NLRB at 849 (separately analyzing whether employees who struck once versus twice intended to engage in a partial or intermittent strike); *Robertson Industries*, supra, 216 NLRB at 362 (two strikes involving "different situations and different people" were not intermittent strikes; to hold otherwise would "disallow employees to engage in more than once instance of concerted protected activity during an indefinite period of time regardless of the variety and number of conditions or occurrences protested and the *identity of the individuals* involved") (emphasis added).

[46] *Embossing Printers* concerned mid-shift walkouts that were not only intermittent but also unprotected partial strikes that impermissibly usurped company time for union meetings. 268 NLRB at 722–723 (citing *Gulf Coast Oil Co.*, 97 NLRB 1513 (1952)). Since each strike was unprotected on its own, without respect to its intermittent nature, the Board appropriately held that the employee who attended only one union meeting engaged in unprotected activity because he "associated himself" with the unlawful tactics. Id. at 723.

In *Pacific Telephone*, the Board withheld protection from employees who engaged in only one "hit and run" strike, notwithstanding that they "might have had no personal knowledge" of the overall tactics. 107 NLRB at 1551. In so doing, the Board emphasized the fact that the employer merely laid them off for the remainder of the day (when they unexpectedly returned to work midday) in order to maintain continuity of operations—a response the Board viewed as reasonable given that the employer "had a right to know whether the operation was to continue for the day or not" and the strikers were "unwilling to give this assurance." Id. In these circumstances, the Board concluded that the employer was not "required to pause during the heat of the strike to examine into the degree of knowledge of each [striker]." Id. at 1551–1552.

[47] Compare *Time Warner Cable New York City, LLC*, 366 NLRB No. 116, slip op. at 3–4 (2018) (suspension of participants in unprotected union demonstration lawful where employees were aware of blocking that rendered the gathering a violation of the no-strike clause).

[48] As the District of Columbia Circuit has explained, "[a]n agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'" *NLRB v. CNN America, Inc*., 865 F.3d 740, 751 (D.C. Cir. 2017).

does the majority provide any coherent rationale for why a mere "plan to strike, return to work, and strike again" should be held illegitimate, in the face of the strong federal labor policy protecting the right to strike. Instead, the majority tramples the statutory rights of workers who participated in the Ride for Respect—along with the rights of nearly 1.3 million Walmart employees who never struck, but who now face the real risk of discipline if they do. Because this result is untenable under the National Labor Relations Act, and because it was reached without reasoned decision-making, I dissent.[49]

Dated, Washington, D.C. July 25, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten that you will be fired if you go on strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WALMART STORES, INC.

[49] Based on the violations described here, I would affirm the notice-reading remedy ordered by the judge and would modify the remedy to require a nationwide notice posting.

The Board's decision can be found at www.nlrb.gov/case/16-CA-096240 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Roberto Perez and *David Foley, Esqs.,* for the General Counsel.
Steven Wheeless, Alan Feldman, Martina Gast, Erin Bass and *Mark Freeze, Esqs.,* for the Respondent.
Deborah Gaydos and *Joey Hipolito, Esqs.,* for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The allegations in this case arise out of an ongoing effort by the Organization United for Respect at Walmart (OUR Walmart or charging party) to use strikes and other actions to induce Walmart Stores, Inc. (Walmart or Respondent) to change the way that Walmart interacts with and manages its associates.[1] Most of the allegations in this case relate to a coordinated set of strikes at various Walmart stores in May and June 2013. Collectively, the strikes were referred to as the "Ride for Respect" because most of the strikers traveled by bus to Bentonville, Arkansas, where they participated in actions and protests at and around Walmart's headquarters during Walmart's annual shareholders meeting. Walmart maintains that it was lawful to discipline associates who incurred unexcused absences to participate in the strikes because the strikes were hit-and-run, intermittent work stoppages, and thus were not protected by the National Labor Relations Act (the Act). The General Counsel, on the other hand, maintains that the strikes were protected by the Act, and asserts that Walmart violated the Act when Walmart invoked its attendance policy to discipline associates who incurred unexcused absences while they were participating in the strikes.

As set forth below, I have determined that the May and June 2013 strikes at issue in this case were protected by the Act. I have also determined (among other findings) that Walmart violated Section 8(a)(1) of the Act by disciplining or discharging several associates because they were absent from work while on strike.

[1] Walmart uses the term "associate" instead of "employee." (Transcript (Tr.) 4575, 4678–4679.)

STATEMENT OF THE CASE

A. Procedural History

This case was tried in multiple locations from May 19, 2014, to September 25, 2015.[2] The Organization United for Respect at Walmart (OUR Walmart) filed the charges at issue here on the following dates:

Case	Charge Filing Date
16–CA–096240	January 11, 2013
16–CA–105873	May 22, 2013 (amended on June 10, 2013)
16–CA–108394	July 2, 2013
16–CA–113087	September 10, 2013
16–CA–122578	February 14, 2014
16–CA–124099	March 7, 2014
21–CA–105401	May 17, 2013
26–CA–093558	November 20, 2012
13–CA–107343	June 17, 2013[3]

On January 14, 2014, the General Counsel issued a consolidated complaint covering cases 16–CA–096240, 16–CA–105873, 16–CA–108394, 16–CA–113087 and 26–CA–093558. In an amended consolidated complaint filed on March 31, 2014, the General Counsel added Cases 13–CA–107343 and 21–CA–105401. Finally, on May 5, 2014, the General Counsel issued a second amended consolidated complaint covering all nine cases listed above.

In the May 5, 2014 consolidated complaint, the General Counsel alleged that Walmart violated Section 8(a)(1) of the Act by making various statements in 2012 and 2013 that had a reasonable tendency to coerce employees in the exercise of their rights under Section 7 of the Act. The General Counsel also alleged that Walmart violated Section 8(a)(1) of the Act by, since May 2013, promulgating and maintaining a policy that treats absences to participate in protected strikes as unexcused absences, and by disciplining or terminating 55 associates for absences that primarily occurred in May and June 2013, while the associates were on strike during the Ride for Respect.[4] Respondent filed a timely answer denying the violations alleged in the second amended consolidated complaint.

B. Walmart's Motion to Dismiss Complaint Allegations due to Alleged Violation of the Federal Vacancies Reform Act

As part of its defense, Respondent asserts that several complaint allegations should be dismissed because they are tainted by the involvement of former Acting General Counsel Lafe Solomon, who Respondent alleges served as Acting General Counsel in violation of the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 et seq. (See Tr. 6770–6779; Respondent (R.) Exhibit (Exh.) 308.) In particular, Respondent relies on the decision in *SW General, Inc. v. NLRB*, in which the court held that Solomon was serving in violation of the FVRA when the complaint issued against SW General, thereby rendering the complaint invalid and requiring the court to vacate the Board's order against SW General. 796 F.3d 67, 72, 82 (D.C. Cir. 2015) (finding that Solomon served as Acting General Counsel in violation of the FVRA from January 5, 2011, to November 4, 2013).[5]

Respondent's FVRA arguments in this case miss the mark. First, as indicated above, all three consolidated complaints (the first, amended, and second amended) issued in 2014, after Richard Griffin was validly serving as the General Counsel.[6] Thus, regardless of whatever Solomon's involvement may have been in this case during his tenure as Acting General Counsel (see R. Exh. 308 and Tab A to Walmart's December 15 motion to supplement the record (indicating that while serving as Acting General Counsel, Solomon authorized the initial complaint in case 16–CA–96240, and consulted with his staff about other complaint allegations in this case as those allegations were being investigated),[7] Solomon's actions are not relevant to Respondent's

[2] The trial dates and locations were: May 19, June 2–5 and 16–20, and August 25–28, 2014 (Oakland, CA); September 28—October 1, 2014 (Fort Worth, TX); November 17–20, 2014 (Seattle, WA); December 8–9, 2014 (New Orleans, LA); January 26–29, 2015 (Los Angeles, CA); February 23, 2015 (Miami, FL); April 14–17 and 20, 2015 (Chicago, IL); May 4, 2015 (Washington, DC); July 20, 2015 (Fort Worth, TX); August 25, 2015 (Fort Worth, TX); and September 25, 2015 (Teleconference).

[3] All events in this case occurred in 2012 and 2013, unless otherwise indicated.

[4] The General Counsel withdrew its allegations that Walmart violated the Act by disciplining associates DeWitt Pollard, III (a/k/a Golden Lebel), Maria Madrigal, Jamaad Reed, Janet Sparks, and Paul Toussaint. (See GC Posttrial Br. at 2 fn. 3.) Accordingly, I have not included those associates in the number of associates that the General Counsel asserted was unlawfully disciplined or terminated because of unexcused absences that occurred while on strike.

[5] In general, the FVRA sets forth rules that establish who may serve as an acting officer in an Executive agency if the agency officer is normally appointed by the President with the advice and consent of the Senate. The court in *SW General* held that under the FVRA, Solomon was permitted to serve as Acting General Counsel until January 2011, when the President nominated him for the position of General Counsel. See *SW General*, 796 F.3d at 72–74 (citing and discussing 5 U.S.C. § 3345, and explaining that Solomon's nomination for the position of General Counsel disqualified him from continuing to serve as Acting General Counsel).

[6] Richard Griffin was sworn in as General Counsel on November 4, 2013.

[7] In an October 22, 2015 email, the parties and I discussed Walmart's Freedom of Information Act (FOIA) request concerning Acting General Counsel Lafe Solomon's involvement in processing or deciding to issue the complaint allegations at issue in this case. At the time, record only included an August 21, 2015 letter denying Walmart's FOIA request. (R. Exh. 308.) Since Walmart's appeal of that FOIA decision was still pending, the parties and I agreed that once the agency ruled on Walmart's FOIA appeal, the agency's decision on Walmart FOIA appeal decision would also be admitted into the evidentiary record (with the parties reserving their rights to argue about the weight and relevance of such a FOIA decision).

On December 15, 2015, Walmart filed a motion to supplement the evidentiary record with the agency's December 4, 2015 FOIA appeal decision and accompanying documents. Based on the parties' October 22 agreement, and for good cause shown, I hereby grant Walmart's motion to supplement the evidentiary record and add Tab A of Walmart's motion (the agency's FOIA appeal decision and accompanying documents) to the evidentiary record for this case.

FVRA defense because Griffin ultimately authorized and issued the consolidated complaints.

Second, although the Board has not adopted the D.C. Circuit's reasoning in *SW General*, on October 5, 2015, Griffin took the precautionary step of ratifying the issuance and continued prosecution of the complaint in this case.[8] By taking that step, Griffin resolved any FVRA concerns by making it clear that the General Counsel has duly authorized the complaint allegations in this case. See *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 2 (2015) (finding that Griffin's decision to ratify the issuance and continued prosecution of the complaint rendered moot any argument that the D.C. Circuit's decision in *SW General* precluded further litigation); *Boeing Co.*, 362 NLRB 1789, 1789–1790 fn. 1 (2015) (same).

In sum, I find that General Counsel Griffin authorized and ratified the consolidated complaints and all allegations therein, and thus cured any defects in this case that relate to Solomon's service as Acting General Counsel before Griffin was appointed. Accordingly, I deny Walmart's motion to dismiss certain complaint allegations on FVRA grounds.[9]

C. Confidential and Redacted Documents

At the beginning of trial, the parties negotiated and agreed to the terms of two protective orders in this case. The protective orders set limits on how documents that Walmart marked or designated as confidential may be used before, during and after the trial proceedings in this case, and also limit the disclosure of those documents to the administrative law judge, court reporter, General Counsel, Charging Party, related staff, and witnesses testifying under oath about the confidential documents. (Tr. 12–13; General Counsel (GC) Exhibit (Exh.) 1(ii)–(jj).)

To ensure that confidential documents are not improperly disclosed to the public, I hereby order that the protective orders in this case shall continue in full force and effect. See *National Football League*, 309 NLRB 78, 88 (1992). To assist in identifying the exhibits that have been marked or designated as confidential, I have attached a list of confidential exhibits to this decision as Appendix J.

I also note that over the course of the trial, the parties filed corrected versions of several exhibits to redact personal identifiable information and other confidential information. I have replaced the original copies of those exhibits in my exhibit file with the corrected versions, with the exception of the following corrected materials that should be disregarded because they were not admitted into evidence (and thus were submitted in error): Joint (Jt.) Exhibits 825, 826, 828; General Counsel Exhibit 2418–32.

To the extent that the electronic file still contains both the original and corrected exhibits, I recommend that the Board take appropriate steps to ensure that the original exhibits are handled in a way that will ensure they (and the personal identifiable and/or confidential information they contain) remain confidential. To assist agency personnel in that effort, a list of exhibits that the parties corrected is included in the record as Joint Exhibit 1330.

On the entire record,[10] including my observation of the demeanor of the witnesses, and after considering the briefs filed by

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[8] In the same October 22, 2015 email discussed above (see fn. 7), the parties and I agreed that the General Counsel's October 5, 2015 "Notice of Ratification" would be admitted into the evidentiary record, with the parties reserving their right to argue about the weight and relevance of that document.

Regarding the merits of Griffin's ratification, Walmart does assert that the ratification is limited to Case 16–CA–96240 and does not extend to the other cases included in the consolidated complaint. (See Walmart Posttrial Br. at 182–186) In my view, any ambiguity about the scope of the notice of ratification (i.e., whether it covers only Case 16–CA–96240, or instead covers all cases in the consolidated complaint) is moot because as noted above, Griffin authorized litigation in the consolidated complaint (including all cases identified therein).

[9] I also hereby deny Walmart's motion to reopen the record (filed December 24, 2015) for the purpose of taking testimony from Lafe Solomon about his involvement in decisions concerning the unfair labor practice charges underlying this case. (See Walmart Posttrial Br. at 187; Walmart Motion to Reopen the Record.) Walmart cited no authority to support its novel request, and since the relevant question for purposes of Walmart's FVRA defense (assuming the reasoning in *SW General* applies here) is whether the General Counsel was properly serving when the complaint issued, there is no need to reopen the record to explore Solomon's role while unfair labor practice charges were still being investigated. See *SW General*, 796 F.3d at 72 (vacating the Board's order because "Solomon was serving in violation of the FVRA when the complaint issued").

[10] The transcripts and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: Page 44, ll. 1, 7: "Right" should be "Ride"; Page 257, l. 24: "visual" should be "vigil"; Page 258, ll. 11, 18, 23: "visual" should be "vigil"; Page 259, l. 5: "visual" should be "vigil"; Page 263, ll. 13, 16: "visual" should be "vigil"; Page 338, ll. 10, 23: "Right" should be "Ride"; Page 357, l. 17: "DMS" should be "ZMS"; Page 729, l. 3: "98" should be "9a"; Page 852, l. 7: "accident" should be "action"; Page 867, l. 12: "collation" should be "coalition"; Page 1070, l. 4: "of" should be "off"; Page 1113, l. 8: "police" should be "policy"; Page 1441, l. 24: "ask you eluded" should be "as you alluded"; Page 1525, l. 16: "do" should be "due"; Page 1527, l. 22: "IBR" should be "IVR"; Page 1533, l. 11: "considered" should be "concerted"; Page 1772, l. 2: "skit" should be "script"; Page 1886, l. 8: "digesting" should be "suggesting"; Page 2068, l. 9: "to seem practical" should be "to the extent practicable"; Page 2068, l. 12: "petition" should be "position"; Page 2731, l. 11: "298" should be "290(a)"; Page 3870, l. 16: "out" should be "without"; Page 4008, l. 5: "bid" should be "vid"; Page 4330, l. 21: Mr. Feldman was the speaker; Page 4330, l. 23: ALJ Carter was the speaker; Page 4330, l. 25: Mr. Feldman was the speaker; Page 4389, ll. 6, 8: "hours" should be "aisles"; Page 4564, l. 11: ALJ Carter was the speaker; Page 4623, l. 7: "swear" should be "share"; Page 4628, ll. 3–4: Mr. Wheeless was the speaker; Page 4837, l. 22: "house" should be "hours"; Page 5177, l. 6: "GC 82" should be "GC 81"; Page 5232, l. 12: "now I want" should be "now I don't want"; Page 5268, l. 23: "I have" should be "you might have"; Page 5319, l. 14: "FAL" should be "FOE"; Page 5648, l. 17: "Gunther LaBelle" should be "Golden Lebel"; Page 5721, l. 22: "abscesses" should be "absences"; Pages 5891–6015 (throughout) "right for respect" should be "ride for respect"; Page 6027, l. 11: ALJ Carter was the speaker; Page 6450, l. 18: "black" should be "back"; Page 6513, l. 24: "right" should be "ride"; Page 6808, l. 19: "department" should be "documents"; Page 6810, l. 3: "citizen" should be "sit-in"; Page 6855, l. 5: "took" should be "tool"; and R. Exh. 5647 Photo 1: I admitted this exhibit into evidence (see Tr. 6455–6456), and thus the court reporter's cover sheet indicating that the exhibit was never offered into evidence was created in error and should be disregarded.

the General Counsel, OUR Walmart and Respondent, I make the following

FINDINGS OF FACT[11]

I. JURISDICTION

Respondent, a corporation with an office and place of business in Bentonville, Arkansas, as well as various stores throughout the United States, engages in the retail sale and distribution of consumer goods, groceries and related products and services. In the twelve-month period ending November 30, 2013, Respondent derived gross revenues in excess of $500,000. During the same time period, Respondent purchased and received products, goods and materials at its Ennis, Texas facility that were valued in excess of $5000 and came directly from points outside of the State of Texas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Walmart - Background

1. General description

Walmart opened its doors in 1962 as a small discount retailer in Arkansas. Walmart has grown considerably since that time, such that by 2014, Walmart operated over 4,000 stores in the United States, and employed over 1.3 million associates. During the time period relevant to this case (approximately June 2011 through December 2013), Walmart associates in the United States have not had a certified or recognized collective-bargaining representative. (Jt. Exh. 28(a)–(b); Tr. 1025–1029, 1114, 1355, 5059, 5075–5076, 5080, 5980–5981.)

2. Management structure

As one would expect given its size, Walmart employs several managers at various levels to handle store operations and manage associates. In an individual store, Walmart typically will employ associates in the following roles (among others) to handle store operations:[12]

1. Store manager – salaried associate responsible for overseeing the entire store
2. Shift manager (also referred to as a co-manager) – salaried associates who manage the entire store during their shifts
3. Assistant manager – salaried associates who manage specific areas of the store while on duty
4. Zone merchandise supervisor (ZMS) – hourly associates who manage specific areas of the store while on duty
5. Customer service manager – hourly associates who direct and train cashiers, and handle customer complaints
6. Department manager – hourly associates responsible for sales floor presentation, in-stock, pricing, accuracy, and customer service within their assigned departments
7. Sales associates – hourly associates who help customers find and purchase items
8. Front end associates – hourly associates who help customers check out at registers, service desk and money center
9. Inventory management team – hourly associates who handle inventory in the back room and ensure that products are organized and available to customers

(GC Exh. 20(a); Tr. 641, 1024–1025, 1038–1040, 1043–1044, 1061–1062, 1327, 1406–1408, 1436–1438, 1585–1590, 1822–1823, 3398, 3531–3534, 3601–3603, 4573–4578, 4676, 4679, 5451–5452, 5663–5664, 5862–5865, 5947–5948.) Above the store level, Walmart relies on "market" level managers to monitor groups of stores, "regional" managers to monitor groups of markets, division managers to cover groups of states, and "business unit" personnel to monitor the east, central and west regions of the United States. (Tr. 1062–1064, 1601–1603, 3413–3416, 5066, 5077–5078.)

3. Labor relations

In addition to the managerial levels discussed above, Walmart has a labor relations department that is staffed by a group of labor relations managers. Walmart's labor relations managers can be reached on a telephone "hotline" or by email, and generally advise salaried managers on how to proceed when labor activity (such as union talk, union literature, or visits from union organizers) or low associate morale arises at their store. (Tr. 1065, 1356–1358, 1413–1414, 1604, 1802, 1848–1851, 1920–1921, 1972–1976, 3227–3228, 3419–3420, 3442, 3545, 3608–3609, 3672, 4233–4234, 4615–4617, 4716–4718, 5065–5066, 5084–5086, 5092, 5115–5117, 5313, 5319, 5675, 5677, 5745, 5888, 5917–5919, 5960–5962, 6587–6589; see also GC Exhs. 21(a)–(b), 32.) In addition, to maintain the union-free status of Walmart's facilities, labor relations managers monitor stores for labor activity, notify store-based salaried level managers about anticipated labor activity, and train store-based managers on how to respond to such activity in the workplace. Among other things, labor relations managers train store managers that while they may not threaten, interrogate, make promises to or spy on associates, store managers may respond to labor activity with facts, opinions and experiences (the acronyms "TIPS" and "FOE" are used for these aspects of the training). (Tr. 1121, 1142, 1163–1164, 1179–1180, 1412, 1630, 2044, 3225–3226, 3437, 3560–3561, 3622–3623, 4210–4211, 4233, 4594–4595, 4611–4612, 4651, 4695, 4713, 5058–5059, 5062, 5090–5091, 5100–5101, 5110; see also GC Exhs. 27(a), 27(c), 29(a), 29(c), 31(a)–(e), 32, 35(a)–(b), 71–76, 78, 108 p. 4, 2418–8, 2418–9(a)–(b), 2609-2, 3455-9; Charging Party (CP) Exh. 7.)

4. The open door policy

Under its open door policy, Walmart "offers each associate an opportunity to bring suggestions, observations or concerns to the attention of any supervisor or manager without fear of retaliation," including upper level managers if (for example) lower level managers are the subject of the associate's concern or the associate is dissatisfied with the outcome of the initial open door session. Walmart has promised to "take[] all open door communications seriously," and also has promised to promptly and

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

[12] Additional associates work in the areas of loss prevention and asset protection and have their own chain of command. (Tr. 3418–3419.)

thoroughly "investigate any complaints or concerns that [associates] raise." Walmart emphasizes that it will "treat concerns, comments and complaints raised through the open door with confidentiality and respect." Accordingly, managers involved in the open door "may not disclose any specific information to anyone not directly involved in resolving the [associate's] concern." However, Walmart may advise or consult with individuals who have a need to know about the situation, including witnesses who may have knowledge of the circumstances surrounding the concern and thus may be interviewed as part of the review. (Jt. Exh. 5; see also Tr. 77–78, 646, 1093–1095, 1454, 1614, 1616, 1856–1857, 3239–3230, 3438–3439, 3624, 4229, 5159, 5402.)

In connection with its confidentiality rules, Walmart generally allows only individual associates to participate in open door sessions. Groups of associates who share the same concern(s) typically must nonetheless meet with management individually. Consistent with those limitations, an associate may not bring a witness to his or her open door session (for substantive input, moral support or otherwise), even if the associate is willing to waive any confidentiality issues. By contrast, Walmart customarily will have at least two members of management present for open door sessions, though those managers are of course bound to follow Walmart's policies regarding the confidentiality of open door sessions. (Tr. 1095, 1454–1455, 1615, 3439–3440, 3625, 4230, 4597–4598, 5159, 5328, 5402–5403, 5757–5758, 5979–5980.)

5. Associate staffing and shift scheduling policies

In general, Walmart staffs its retail stores leanly, with an eye towards providing just enough staffing to cover the various departments in the store while avoiding overstaffing. Staffing levels fluctuate to account for peak shopping days/times at each store, such as the day after Thanksgiving (a.k.a. Black Friday). (Tr. 1260, 1464, 1472, 1620–1621, 1798, 3536, 4607–4608, 5229–5230; see also Tr. 3535–3536, 4708 (noting that Walmart stores may hire temporary associates to work during peak shopping seasons).)

To create its weekly work schedules for associates, Walmart uses a computer system (called the SMART system) that generates a tentative schedule based on historic and projected sales, store wage budgets, associate availability forms, associate full-time or part-time status[13] and other factors. Once the tentative schedule is created (approximately four weeks in advance), assistant managers in each store have the ability to make changes to the schedule before it is finalized and posted electronically on Walmart's intranet site (the Wire) and associate website (Walmartone.com) approximately three weeks in advance for associates to review. Associates may request schedule changes after the final schedule is posted, but such requests must be approved by a salaried manager. (Tr. 301, 520–521, 523, 1067–1068, 1102–1103, 1105–1108, 1349–1352, 1464–1470, 1616–1623, 1796–1798, 3273–3276, 3432, 3557–3558, 3617–3620, 4223–4224, 4227, 4602–4603, 4605–4606, 4706–4707, 5228–5230, 5386–5387, 5480–5481, 5690–5691, 5693, 5752–5753, 5756, 5973–5977; see also Tr. 1488 (noting that for busy shopping days like Black Friday, the final schedule may be posted less than 3 weeks in advance).)[14]

Walmart expects its associates to be reliable and work their assigned shifts, request time off at least three weeks in advance where feasible, and when necessary, call in to notify Walmart when they are unable to work their scheduled shifts. When an associate does miss a scheduled shift, Walmart generally covers for that associate on an ad hoc basis, which can include reassigning associates from other areas of the store, having associates work past the end of their scheduled shifts, or simply running the store short-handed. Walmart stores generally do not have an established practice of maintaining a list of associates who are on-call to work on short notice, but managers may call individual associates to ask if they are available to come in and work.[15] (Tr. 1260–1261, 1473–1474, 5388–5389.)

The "call in" (a.k.a. "call out") procedure for associates who are unable to work their scheduled shifts requires associates to first dial an 800 number (also referred to as the Interactive Voice Response (IVR) system) that directs associates to enter their store number, and then specify the reason for their absence from the following choices:

> Code 1 – Personal injury or illness or an injury or illness affecting an immediate family member;
> Code 2 – Bereavement;
> Code 3 – Jury duty or legal proceedings;[16]
> Code 5 – Emergency community volunteer work;
> Code 6 – Severe weather, or a natural disaster such as a hurricane, tornado, or earthquake; and
> Code 7 – None of the above.

The automated system provides the associate with a confirmation number, and then transfers the telephone call to the associate's store, where the operator (usually an associate assigned to the fitting room) will answer the call and then attempt to bring a manager to the telephone. If a manager is not available (a common circumstance), the associate who will be absent ends the telephone call and simply relies on the automated system and confirmation number. Walmart typically does not discipline associates for failing to speak to a manager after completing their entries on the automated system. (Jt. Exh. 2(b); Tr. 1070–1077, 1344–1346, 1458–1460, 1610–1613, 3554–3556, 3615–3617, 4214–4216, 4599–4600, 4604, 4703–4705, 4819–4820, 5469–5470, 5478–5479, 5545, 5688–5690, 5751–5752, 5881–5883, 5964–5966; see also Jt. Exh. 0(a)(1)–(2) (describing the IVR

[13] In the relevant time period, an associate who worked 34 hours or above per week was full-time, while an associate who worked less than 34 hours per week was part-time. (Tr. 1100–1101, 1794, 4607–4608, 4707, 5977; Jt. Exh. 4 (p. 1.).)

[14] In January 2013, Walmart announced that it planned to modify its scheduling policy to allow associates to request and receive additional hours more easily. (Tr. 1010–1011, 2256–2257.)

[15] On rare occasions, one Walmart store may borrow associates from another Walmart store, but because of the administrative hurdles and delay associated with sharing associates (a market human resources manager must coordinate the process), associate sharing typically occurs when the store requesting additional associates has a special project, such as annual inventory. (Tr. 300, 1433–1434, 2039, 5014, 5033–5034, 5390–5392.)

[16] The record does not specify a "Code 4."

system); GC Exh. 2418–18 (daily call-in logs from store 2418, showing multiple entries that do not identify a manager who spoke to the associate when the associate called to report that he or she would be absent); GC Exh. 127(a) (p. 13) (noting that one of the benefits of the IVR system is that it eliminates confusion that can result if associates call the store directly and report that no one would answer the phone or that they left a message with a coworker).)

6. Discipline policy

In general, Walmart follows a progressive discipline policy, under which an associate who commits a workplace infraction receive a written "coaching" that becomes part of the associate's disciplinary record. In most instances, a first infraction will result in a "first written coaching" that will remain active for twelve months from the date of the coaching. If the associate commits another infraction while their previous coaching remains active, they will receive the next level of coaching (second written coaching, and so on), and the new coaching will remain active for twelve months from the date of the new coaching. Associates who receive a third written coaching face termination if they commit another infraction while the third written coaching is active.[17] Notably, Walmart reserves the right to skip levels of coaching and/or terminate associates if warranted by the seriousness of the infraction. (Jt. Exhs. 3(a)–(b); see also Tr. 165, 261–262, 1089–1091, 2003, 3550–3551, 3613, 4699–4700.)

When associates commit attendance-related infractions, such as missing shifts or working incomplete shifts (e.g., due to unauthorized tardy arrival or early departure),[18] Walmart addresses those infractions through its progressive discipline policy. Walmart explains its method for handling attendance-related infractions as follows:

> Unauthorized absences
>
> An unauthorized absence means any time you are away from scheduled work . . . that is not approved by your supervisor or manager[.][19] . . .
>
> Occurrences
>
> Unauthorized absences and incomplete shifts are monitored and may result in disciplinary action, as outlined in the chart below. A full day absence is one occurrence. If you are absent for up to three consecutive workdays for the same reason, we will count it as one occurrence. Three incomplete shifts in a rolling six-month period, through any combination of being tardy and/or leaving work early, will equal one occurrence . . . If you have three occurrences in a rolling six-month period, you will have the opportunity to have a personal discussion with management regarding your attendance. If you have more than three occurrences in a rolling six-month period, you will be subject to disciplinary action. If you have an active coaching for any reason (not just attendance/punctuality) you will advance to the next coaching level if you have four occurrences in a rolling six-month period. You will continue to advance to the next coaching level for *each* subsequent occurrence that results in more than three occurrences in a rolling six-month period.

Event	**Result**
One to three consecutive unexcused absences (for the same reason)	One Occurrence
Three Incomplete Shifts (tardy or leave early in a rolling-six month period)	One Occurrence
Three Occurrences (in a rolling six-month period)	Personal Discussion
Four or More Occurrences (in a rolling six-month period)	Coaching for Improvement (advancement to next coaching level if active coaching exists)

> No call/no show
>
> If you are absent from a scheduled shift and do not report your absence by calling the Associate Information Line, you will be subject to disciplinary action beginning at the Second Written coaching level if you have no other active coachings, or at the next available coaching level if you have an active coaching. For each additional absence for which you do not call, you will be advanced to the next coaching level. If you are absent for three workdays (consecutive or nonconsecutive) in a rolling six-month period and do not report your absences by calling the Associate Information Line, we will consider you to have abandoned your job, which will result in your voluntary termination of employment.

(Jt. Exh. 0(a)(1); see also Jt. Exhs. 0(a)(2)–(k), 2(a), 702–712; Tr. 1082–1086, 3241–3242, 3422–3424, 3508–3509, 4599, 4602, 4697, 5470–5474, 5680–5682, 5746, 5875–5878, 5966–5970.)[20]

[17] Before April 19, 2012, Walmart referred to the third written coaching as a "D-Day" or "Decision Day" coaching. As part of the D-day procedure, Walmart would have the associate remain at home (with pay) for their next scheduled shift, to think about whether they wished to continue pursuing a career at Walmart. Walmart no longer uses the D-day procedure. (Tr. 1091–1092, 3241, 4700, 5685; see also Jt. Exhs. 782–783, 1072, 1297; Tr. 5475–5476.)

[18] Under Walmart's attendance/punctuality policy, an incomplete shift occurs if an associate begins work "15 or more minutes after [the associate's] scheduled start time (tardy)" or leaves work "10 or more minutes before the end of [the associate's] scheduled shift (left early)." (Jt. Exh. 0(a)(1), p. 1.)

[19] Depending on the state where the store is located, Walmart recognizes certain exceptions to what constitutes an unauthorized absence. Those exceptions, as well as other state by state differences in Walmart's attendance and punctuality policies, are not at issue in this case.

[20] The following examples illustrate how Walmart's policy applies to unauthorized absences. If an associate missed scheduled shifts on January 1–3, that associate would receive one occurrence. If the same associate missed scheduled shifts on February 2–4 and February 22, the associate would receive two more occurrences, and should receive a

In practice, Walmart does not always invoke its attendance policy in a timely manner. As a result, some associates have accumulated ten, fifteen, or even twenty-nine occurrences in a 6-month period before Walmart administers a coaching.[21] Walmart typically does not skip coaching levels when presented with such a circumstance; instead, in recognition of its failure to invoke its attendance policy earlier, Walmart imposes a single coaching to cover the entire group of occurrences. Indeed, Walmart management guidelines state that rule explicitly, explaining that "if a Coaching for four or more occurrences is not issued before the associate incurs additional occurrences within the same rolling six-month period, then [the manager] must start with a First Written Coaching, regardless of the number of occurrences the associate has incurred." (Jt. Exhs. 2(a), 2(c), 702–712 (page 2 of each exhibit); GC Exh. 127(a) (pp. 14–15); Tr. 1083, 3509–3510, 3590–3591; see also GC Exh. 3455–8 (listing associates in store 3455 with as many as 29 active occurrences).)

B. The United Food & Commercial Workers (UFCW)[22]

1. The UFCW and Walmart

The UFCW is a union that represents workers in a variety of settings, but primarily in grocery stores, meatpacking and poultry plants, food processing and manufacturing plants, and retail stores. While the UFCW does not represent any Walmart associates and since January 2013, has disavowed any intent to have Walmart recognize or bargain with the UFCW as the representative of Walmart's associates,[23] the UFCW has an interest in Walmart's workplace policies and practices because Walmart is the largest private employer in the United States, and "[w]hen big companies like Walmart slash benefits and wages, it has a negative effect on job standards not only within the company, [but also] throughout the entire global retail industry." (R. Exh. 29; see also Tr. 870–871, 891, 971–972; R. Exhs. 279, ID22.) Accordingly, the UFCW maintains that there is not a path forward for the labor movement unless the labor movement deals with Walmart. (R. Exh. 22.)

2. The "Making Change at Walmart" campaign

In light of its interest in Walmart, the UFCW anchors the "Making Change at Walmart" campaign, which describes its purpose as "challenging Walmart to help rebuild our economy and strengthen families." Although the UFCW anchors the campaign, the campaign is "a coalition of Walmart associates, union members, small business owners, religious leaders, community organizations, women's advocacy groups, multi-ethnic coalitions, elected officials and ordinary citizens who believe that changing Walmart is vital for the future of our country" and seek to educate the public about that issue. (R. Exhs. 24, 104 p. 25; Tr. 867, 891–892, 895–896, 927–930, 940–941.) The UFCW intended for the Making Change at Walmart campaign to be led by Walmart associates who wanted to see change at Walmart, and supported by community stakeholders who would join in calling on Walmart to be a "better employer" since what happens at Walmart sets the tone for what happens across every aspect of private sector employment in the United States. (R. Exh. 45, pp. 61–62; see also R. Exh. 99(c), pp. 3–4; R. Exh. 104, p. 106; Tr. 871, 927–930, 972, 2346–2347.)

In practice, the UFCW maintains an active role within the Making Change at Walmart campaign. For example, the UFCW provides most of the staff for the campaign, including Dan Schlademan, who has served as the campaign director since January 2010, and Andrea Dehlendorf, who has served as the assistant director for the campaign. (Tr. 781, 793–794, 867–869, 915–916, 921–923, 2064–2065; R. Exhs. 45 (p. 54), 260, 306; Jt. Exh. 1325; see also Tr. 2375–2376 (noting that while the UFCW provide the bulk of the staff for the Making Change at Walmart campaign, other organizations contribute staff as well).) In addition, the UFCW is active with social media, and has staff that specializes in communicating with Walmart associates and other interested individuals and groups online, and then assisting those associates, individuals and groups with planning and participating in campaign events at Walmart stores in their communities. (Jt. Exhs. 95–101, 105, 114–115, 118–119, 123, 129(a)–(b); R. Exh. 104, pp. 43–47, 52–53, 92–95; Tr. 878–879, 891, 893–894, 902, 941, 2175–2176, 2195–2196, 2711.)

C. OUR Walmart – Background

1. OUR Walmart's beginning

In late 2010, a group of workers in Maryland, assisted by the UFCW, founded OUR Walmart to further the workers' efforts to engage with Walmart about making changes in the workplace. Once OUR Walmart was founded, the UFCW offered extensive support to OUR Walmart by, among other things, providing staff to assist with conducting house calls and meetings to speak to Walmart associates about the organization. (Tr. 875, 896–897, 963; Jt. Exh. 1; R. Exh. 48, p. 2; see also R. Exh. 45, pp. 105–106.)

Since at least 2011, the UFCW has identified OUR Walmart as one of the UFCW's subsidiaries. As part of that relationship,

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personal discussion for having three occurrences in a 6-month period. If the associate also missed a scheduled shift on March 15, then that associate should receive a first written coaching for having four occurrences in a 6-month period (assuming the associate has no active coachings). An additional missed shift on April 3 should result in a second written coaching. However, a missed shift on September 1 should only result in an occurrence (and another personal discussion), because the associate would only have three occurrences in the preceding six months (March 15, April 3 and September 1). The second written coaching, issued on April 3, would still be active since it remains active for 1 year.

[21] Similarly, Walmart managers may not always give associates personal discussions in a timely manner (i.e., when the associate incurs 3 occurrences in a six-month period). In those situations, Walmart managers have the discretion to either have the personal discussion with the associate even though the associate has more than three occurrences, or alternatively skip the personal discussion and impose the applicable coaching (particularly if it is apparent that the associate understands Walmart's attendance rules based on the associate's longevity with the company or prior discipline for attendance). (GC Exh. 127(a), p. 14.)

[22] In the interest of brevity, I use the term UFCW to refer to both the UFCW International and UFCW local chapters (unless I specify otherwise).

[23] In a June 2012 speech, UFCW president Joseph Hansen stated that Walmart associates' and the UFCW's effort to stand up to Walmart "doesn't end until we change Walmart where it's a decent place to work, with a union contract, union wages and union benefits." (R. Exhs. 275, ID14.)

the UFCW provides OUR Walmart with a wide range of support, including: staffing and financial support; developing and setting up OUR Walmart's website, Facebook page and Twitter account; providing legal support on how to conduct strikes; assisting with publicity; financial accounting services; transportation and lodging (e.g., when OUR Walmart associates travel to Bentonville, Arkansas or other locations for campaign events or training); and a Dodge Nitro van that is used at demonstrations at Walmart stores to broadcast and display OUR Walmart messaging. (Tr. 80–81, 528, 681, 874–876, 888–889, 951–953, 965–968, 988, 2711, 2832; Jt. Exh. 1; R. Exh. 45, pp. 101, 118–120; R. Exh. 100 (a)–(c) (annual reports in which the UFCW identifies OUR Walmart as a subsidiary); R. 250.) The Making Change at Walmart campaign, meanwhile, supports OUR Walmart by raising awareness and lending support to OUR Walmart's demands (e.g., by connecting community supporters with OUR Walmart). (R. Exh. 131, pp. 73–74; R. Exh. 149, pp. 97–98; see also Tr. 488, 680–682, 938–940, 2710–2711.)

2. Organizational structure

In general, OUR Walmart membership is limited to current and former Walmart associates who complete the necessary membership paperwork and pay $5 each month for membership dues (customarily by personal check, credit card, debit card or money order). The UFCW takes the lead on collecting and processing monthly dues payments, which go into OUR Walmart's bank account. (Tr. 243–244, 773, 871, 873, 963–965, 2423, 4799, 4803, 6038; R. Exh. 126.)

Although they have never been Walmart associates, UFCW officials Dan Schlademan and Andrea Dehlendorf have held positions on OUR Walmart's nine member executive board, including president (Schlademan) and secretary/treasurer (Dehlendorf). Current and former Walmart associates are elected to the remaining executive board positions. (Tr. 871–873, 898, 962, 2065, 2368, 2664, 2709–2710, 2818–2819, 4801–4803; R. Exh. 45, pp. 84, 86–87, 101; see also R. Exh. 45, pp. 57–58 (noting that Dehlendorf is in charge of the OUR Walmart aspects of the Making Change at Walmart campaign).) As executive board members who have prior experience with "engagement campaigns" directed towards employers (i.e., campaigns designed to induce employers to make changes in their policies), Schlademan and Dehlendorf frequently provide advice and proposals to OUR Walmart's executive board about planning, strategy and how to execute plans that the board agrees to initiate. The entire executive board, however, works together to develop and vote on specific plans of action for engaging with Walmart. (Tr. 171–172, 672–673, 782, 923–925, 942–944, 957–958, 2368–2369, 4864; R. Exh. 45, pp. 91–94, 137–138.)

Below the executive board, various UFCW organizers who are assigned to the Making Change at Walmart campaign interact with Walmart associates and coordinate OUR Walmart actions in their assigned regions (including coordinating demonstrations, handling the media, providing flyers and other demonstration materials, and being on site during demonstrations to communicate with police if that need arises). (Tr. 335–336, 915–916, 1006, 2503–2504, 2555–2556; R. Exh. 45, pp. 98–99; R. Exh. 104, pp. 25–26, 42; R. Exh. 131, pp. 34–37; R. Exh. 183, pp. 92–95; R. Exh. 210, p. 48).) Current and former Walmart associates may become OUR Walmart "leaders" if they become active in developing OUR Walmart's presence in their store or geographic area. (Tr. 897–898.)

3. OUR Walmart's engagement strategy for Walmart

Consistent with other corporate engagement campaigns, OUR Walmart's engagement strategy for Walmart is to arrange a series campaign events, or "compression points," that will draw attention to Walmart in a way that will induce Walmart to change its policies and/or working conditions. (Tr. 586, 972–976, 1012; R. Exhs. 30–31, 46, 79; R. Exh. 45, pp. 34–36, 76, 79–81, 135; see also R. Exh. 45, pp. 154–155 (noting that a major national campaign event may take three to four months to plan).) Campaign events, or "actions," include, but are not limited to: demonstrations at Walmart stores; civil disobedience; flash mobs (such as singing a song in a store with the goal of educating the public or Walmart associates); associate strikes, with community members present to support the strike; sending delegations of community supporters and OUR Walmart members to Walmart stores to distribute leaflets and speak to associates and/or store managers; and coordinated demonstrations at Walmart's Bentonville, Arkansas home office during Walmart's annual shareholders' meeting in June or during Walmart's annual financial analysts' meeting in October. (Tr. 787, 898–899, 1015–1017, 2714, 4805; Jt. Exhs. 87, 95–101, 104(a), 117; R. Exhs. 13, 15, 17–21, 25, 59.) Schlademan and Dehlendorf each recognized early in OUR Walmart's efforts that it would take a number of sustained compression points over time to induce Walmart to make changes, and thus OUR Walmart has conducted a variety of actions since its inception, and intends to continue that strategy going forward (including assisting Walmart associates in conducting strikes consistent with the strikes that associates held in October and November 2012, and in June and November 2013). (R. Exh. 45, pp. 82–83; Jt. Exh. 1.)

D. June 2011—OUR Walmart Activities in Bentonville, Arkansas

1. Meeting purpose

In June 2011, OUR Walmart organized leadership meetings in Bentonville, Arkansas. The OUR Walmart events, which were scheduled to coincide with Walmart's annual shareholders' meeting at Walmart's home office, served as the public launch of OUR Walmart's and the Making Change at Walmart campaign's efforts to induce Walmart to make various changes in the workplace. (Tr. 797; GC Exh. 3(a); R. Exh. 45, pp. 128–129, 147–148; see also Jt. Exh. 95.) Associates who attended the OUR Walmart meetings did not go on strike to do so – instead, they simply took time off or attended when they were not scheduled to work. (Tr. 817.)

2. The declaration of respect

As part of the June 2011 Bentonville meetings, approximately 100 OUR Walmart leaders discussed and developed a declaration setting forth OUR Walmart's goals and demands. (R. Exh. 45, pp. 106–109; see also R. Exh. 48.) Through those discussions, OUR Walmart leaders drafted and signed the following declaration, which they presented to Walmart officials at Walmart's home office on June 16, 2011:

OUR Walmart Declaration of Respect

We, the hourly Associates, are the life-blood of Walmart. Our company is stronger because of the values we embrace—a strong work ethic, compassion for one another and honesty. Yet we are not treated with the respect we deserve.

The fundamental desire to be shown respect is what led us to join together as OUR Walmart—an organization of Walmart Associates, by Walmart Associates, for Walmart Associates. We are one Organization United for Respect at Walmart.

- One of Sam Walton's rules for building a successful business was, "Listen to everyone in your company and figure out ways to get them talking." We are following that winning philosophy. However, too many of us do not have a true voice at our stores. Our concerns about providing the highest quality customer care and about making our jobs quality jobs are ignored. Walmart should listen to OUR Walmart, celebrate our initiative, and follow our recommendations.
- We are the foundation of the quality service and value Walmart provides its customers. Walmart should honor the hard work and humanity of Associates by living up to Mr. Sam's promise of "respect for the individual."
- Associates who assert their freedom of association frequently face retribution from the company. Walmart should allow Associates to freely join OUR Walmart without fear of negative company action.
- Associates who have tried to utilize Walmart's Open Door have found that their issues are not resolved and confidentiality is not respected. Walmart should ensure confidentiality in the Open Door and provide in writing resolution to issues that are brought up and always allow associates to bring a co-worker as a witness.
- Walmart publicly claims that pay for full-time Associates averages more than $13 per hour in some communities, when in truth most of us work for less than $10 per hour and are only scheduled for part-time hours, making it difficult to support our families. Walmart should follow through on its public statements and pay at least $13 per hour and expand the percentage of full-time workers.
- Our schedules are often irregular and inflexible making it difficult to care for our families. Walmart should make scheduling more predictable and dependable.
- Too many of us are unable to access Walmart's health care because it is too expensive or we lack the hours to qualify. Walmart should expand health care coverage and continue to work to expand coverage when health reform goes into effect, rather than taking advantage of loopholes in the law to deny coverage.
- Too often Associates are faced with retaliation when speaking out about issues at work. Walmart should honor our constitutional right to freedom of speech and adhere to company policies that support dialogue and resolution.
- Walmart's management often chooses to enforce written policies only when it is in their own interest, leaving Associates guessing proper protocol. Walmart should do more to ensure managers are properly trained on how to evenly and equitably enforce Walmart's written policies at all times and to provide all Associates with a policy manual.
- Too many of us have been denied equal treatment. Walmart should adopt affirmative policies that secure full access to opportunity and equal treatment to all Associates regardless of gender, race, sexual orientation, gender identity, disability or age.
- Many former Walmart Associates have been terminated unfairly and Walmart has a high turnover rate. Walmart should create an Associate liaison at corporate headquarters in Bentonville, Arkansas to hear Associates' side of the story in matters related to termination and take action as appropriate.
- We know our company has an impact around the globe in terms of its standards and practices. Walmart should require that suppliers and stores around the globe operate with the highest standards and ensure that workers' freedom to associate is respected.

We envision a future in which our company treats us, the Associates of Walmart, with respect. We envision a world where we succeed in our careers, our company succeeds in business, our customers receive great service and value, and Walmart and Associates share all of these goals.

And finally, we close with one more rule from Mr. Sam: "Share your profits with all your Associates, and treat them as partners."

(GC Exh. 3(a); see also Tr. 189, 760–761, 797, 938–940, 2362–2363, 5153–5155, 5158; GC Exh. 4; R. Exhs. 2, 17; R Exh. 45, pp. 122–125; see also Tr. 939–940, 4919–4920, 5038–5040, 6753, 6762 (noting that OUR Walmart has remained consistent with these goals throughout the campaign).)

E. Fall 2011 through Summer 2012—Ongoing Efforts to Publicize OUR Walmart's Message

In September 2011, Making Change at Walmart called for a "National Day of Action" for OUR Walmart, on which small groups of people from UFCW locals and community ally groups would visit Walmart stores in their neighborhoods with the aims of: speaking to Walmart associates about OUR Walmart and about issues related to scheduling and hours; distributing OUR

Walmart literature; and encouraging associates to visit OUR Walmart's website. (Jt. Exh. 95; R. Exh. 59.) OUR Walmart supporters and allies spoke to over 1,400 associates at 25 different stores across the country, but overall the day of action produced mixed results insofar as Walmart personnel at some stores turned OUR Walmart supporters away before they could speak to associates, and at certain other stores, OUR Walmart supporters encountered associates who were not willing to talk. (R. Exh. 59.)

In early October 2011, financial analysts gathered in Bentonville for an annual meeting about Walmart's financial health and the value of Walmart stock. As part of the effort to encourage Walmart to change its workplace policies, OUR Walmart arranged a meeting between financial analysts and Walmart associates to present OUR Walmart's perspective on Walmart's relationship with its workforce. OUR Walmart also held another demonstration at Walmart's home office, at which around 50 OUR Walmart supporters displayed signs calling for Walmart to (among other things) stop cutting hours and offer more opportunities for associates to work full time. (R. Exhs. 18, 20, 45, pp. 129–135; Tr. 791–792; see also Tr. 793 (noting that the UFCW paid for OUR Walmart supporters' travel, lodging and food expenses).) After reviewing an article describing OUR Walmart's efforts during the financial analysts' visit, Walmart officials David Tovar and Lee Culpepper indicated that they were "not too worried" about OUR Walmart's efforts. (GC Exh. 79; see also Tr. 5165.)[24]

In late May 2012, a group of approximately 100 OUR Walmart members traveled to Bentonville, Arkansas to conduct various actions during Walmart's annual shareholders' meeting. As part of their activities during shareholders' week, OUR Walmart members spoke to Walmart associates about OUR Walmart, signed up new OUR Walmart members, and had a representative speak at Walmart's shareholders' meeting. (R. Exh. 31.) In addition, on May 31, approximately 25 OUR Walmart members went to Walmart's home office, where they delivered 23 signed letters to Walmart labor relations official Karen Casey. (Tr. 798–799; GC Exhs. 80–81; R. Exhs. 19, 31; R. Exh. 45 pp. 139–141; R. Exh. 49; see also R. Exh. 45 p. 152 (noting that by February 2012, OUR Walmart was planning actions for Walmart's May/June 2012 annual shareholders' meeting).) Each letter stated as follows:

> Dear Ms. Casey:
>
> I am here as an individual Associate and a member of [OUR Walmart]. I am asking for an Open Door Meeting as laid out by the company policy.
>
> Last June many members of OUR Walmart had the opportunity to meet with you and hear your commitment to ensure that there would be no retaliation against Associates who participate in OUR Walmart and that our freedom to associate will be respected by Walmart and Walmart managers.
>
> However, I wanted to let you know that I have experienced or witnessed retaliation in my store. Many other members of OUR Walmart report the same.
>
> I am here to ask that you work with me on the following solutions:
>
> 1) That Walmart reinstates the employment of Angela Williamson and Wessa Milien, leaders of OUR Walmart.
>
> 2) That Walmart remove the disciplines of any and all Associates who have spoken out, including Janet Sparks, Carlton Smith, and Venanzi Luna.
>
> 3) That Walmart stop conducting anti-OUR Walmart meetings and [having] anti-OUR Walmart slides on regular rotation on TV screens in Associate-only areas of the store.
>
> 4) That you provide me with a copy of the Associate Policy in written form.

(GC Exh. 81.) Casey accepted the letters, and later on May 31, Walmart officials conducted 19 individual open door meetings with OUR Walmart members to hear their concerns, which included the concerns listed in the May 31 letter, as well as concerns about safety, workers compensation claims that were denied, scheduling, and reductions to work hours. The associates who accepted open door meetings "conducted themselves respectfully," and at least one associate was impressed with how quickly Walmart arranged the open door meetings. (Tr. 5169–5177; GC Exh. 80.)

F. Fall 2012—OUR Walmart Begins Using Strikes

1. The decision to begin using strikes

At an OUR Walmart leadership meeting held on August 22–23, 2012, OUR Walmart decided to begin using associate strikes as an additional tactic in its efforts to induce Walmart to change its policies. OUR Walmart made that decision because its members did not believe that other tactics (e.g., using open door meetings, and sending delegations of OUR Walmart leaders to speak with Walmart officials) were sufficiently effective in addressing OUR Walmart's concerns about retaliation against OUR Walmart members. (Tr. 4806–4808, 4884, 4886–4887, 4930–4931; see also Tr. 817 (noting that before OUR Walmart decided to use strikes, associates attended OUR Walmart actions when they were not scheduled to work).)

2. OUR Walmart prepares for strikes

In connection with its decision to begin using associate strikes, OUR Walmart made a point of training its members that when they went on strike, they were doing so to protest Walmart's alleged unfair labor practices (primarily, Walmart's alleged retaliation against OUR Walmart members and other associates who spoke out about Walmart's employment practices). OUR Walmart characterized its strikes as unfair labor practice (ULP) strikes because, as it asserted in its "ULP Striker's Toolkit" handout, "ULP strikes protect Associates more than other strikes because companies must put ULP strikers on the schedule after they offer to return to work. In comparison, companies can hire

[24] Although Black Friday (the Friday after Thanksgiving) would later become a focal point for OUR Walmart actions, OUR Walmart did not engage in any actions on Black Friday in 2011. (R. Exh. 45, p. 157.)

others to replace Associates who strike for [economic reasons such as] better wages or working conditions and keep them off the schedule after they strike." (R. Exh. 4, p. 2; see also Tr. 2110, 2207–2212.)

To ensure that its members consistently adhered to the ULP strike strategy, OUR Walmart provided potential strikers with: a form letter to sign and deliver to Walmart when they went on strike; a script to read when they advised their store manager that they were going on strike; a form letter to sign and deliver to Walmart when strikers were ready to return to work; and a script to read when strikers advised their store manager that they were ready to return to work. Each of those documents emphasized OUR Walmart's ULP strike strategy by stating that the associates went on strike "to protest Walmart's attempts to silence Associates who have spoken out against things like Walmart's low take home pay, unpredictable work schedules, unaffordable health benefits, and Walmart's retaliation against those who have spoken out." (R. Exh. 4, pp. 5–8; see also Tr. 215–218, 612–613.)

Similarly, OUR Walmart advised strikers that if they made signs to carry during a demonstration while on strike, the associates should write "Unfair Labor Practice Strike" on their sign, and select one of the following six slogans:

> I spoke out about _____ (example: understaffing or not getting enough hours) and Walmart tried to silence me. End the retaliation.
>
> Stand up live better. Stop the retaliation.
>
> Respect our freedom to speak out.
>
> Stop silencing workers who speak out.
>
> Walmart associates on strike against retaliation.
>
> On strike for the freedom to speak out.

(R. Exh. 5; see also R. Exh. 4 (p. 12); R. Exh. 3782 VID1 (at the 2:00 minute mark, a UFCW organizer advises associate protesters at a November 2012 action to carry signs that mention "no retaliation," "ULP strike" or "stop silencing us"); R. Exh. ID6; Tr. 220–224, 615.) By contrast, associates who attended OUR Walmart demonstrations while off-duty (as well as community supporters) remained free to carry signs with a broader range of economic and other messages. (See, e.g., R. Exhs. 4(a), 21, 64(c) (showing ULP strike signs and signs with economic messages); Tr. 2209–2230, 2826–2827).)

3. October 4, 2012 – Pico Rivera strike

On October 4, 2012, OUR Walmart held its first associate strike. Specifically, approximately 58 associates from various Walmart stores in Los Angeles went on strike and traveled to Walmart Pico Rivera store 2886, where they were joined by a large group of community supporters, off-duty Walmart associates (some of whom were OUR Walmart leaders flown in at the UFCW's expense), and members of organizations affiliated with the Making Change at Walmart campaign. Once assembled, the group formed a long picket line and marched on the sidewalk in front of the store while chanting various slogans (e.g., "Who's got the power? We've got the power! What kind of power? People power!"), blowing airhorns, and carrying assorted signs. (Tr. 803–806, 891, 925, 2147–2149, 2153–2154, 2715, 2819, 4888–4890, 4946; R. Exhs. 21, 64–65, 471 CH1, 2886 EC1; see also R. Exh. 250 (discussing a charter bus that the UFCW planned to rent to transport OUR Walmart members to and from events in Los Angeles).)

As part of its outreach to the media, OUR Walmart issued a press release about the strike (including some quotes that community supporters adopted after OUR Walmart drafted the language) and put news reporters in touch with OUR Walmart members and supporters for interviews if requested. OUR Walmart also prepared email "blasts," tweets and Facebook posts to distribute about the October 4 strikes. (Tr. 2157–2161; Jt. Exhs. 104(a)–(b), 105; R. Exh. 251.) Walmart officials also spoke to members of the media and drew praise from within the company for taking the position that the October 4 strikes had no impact on Walmart's business operations. (GC Exh. 82; Tr. 5186–5187.)

Later in the day on October 4, a delegation of approximately 30 demonstrators entered the Pico Rivera store and delivered a letter advising the store manager that the strikers from that store were making unconditional offers to return to work for their next scheduled shifts. (Tr. 4889–4890, 4946–4947.) Strikers from other stores also submitted "return to work" letters to Walmart. The return to work letters stated the following rationale for the strike:

> On October 4, 2012, we did not work to protest Walmart in response to the retaliatory unfair labor practices that Walmart committed against its Associates in violation of the National Labor Relations Act ("NLRA"). We are also not working to protest Walmart's refusal to meet with groups of Associates to address their mutual concerns about certain conditions at the company that affect all of them, a violation of the NLRA. These unfair labor practices include Walmart's attempts to silence Associates who spoke out for better wages, hours, and other working conditions, and its retaliation against those who did speak out. As a result of Walmart's illegal behavior, unfair labor practice charges have been filed with the [NLRB]. We walked off the job in protest over Walmart's illegal actions and in support of the unfair labor practice charges that have been filed.

((Jt. Exhs. 94(a) (tabs 1–9), 765; see also Tr. 4805–4806.)

4. October 9–10, 2012—actions and strikes during Walmart's annual financial analysts' meeting

Following the strikes in Los Angeles, OUR Walmart planned a two-pronged strategy for engaging Walmart during Walmart's annual financial analysts' meeting. First, several OUR Walmart members went on strike at multiple store locations across the country on or about October 9, 2012. Instead of remaining at their home store, however, many of the strikers traveled to Bentonville, Arkansas to participate in demonstrations and other events while Walmart conducted its financial analysts' meeting on October 10. (See, e.g., R. Exhs. 190, 286 VID1 (clips 1-2), 292; GC Exhs. 70, 286–3; Tr. 925–926, 2573–2574, 2836–2837, 2997–2998.) The demonstrations in Bentonville took a variety of forms, including:

- Gathering on a public street corner near Walmart's

home office and chanting slogans such as "Whose Walmart? OUR Walmart!" and "We're on strike, we want to speak to Mike!"[25] (R. Exh. 3 (clip 1); Tr. 192–193.)

- Picketing on a public sidewalk near the location of Walmart's financial analysts' meeting, while chanting "We fired up, can't take it no more!" (R. Exh. 3 (clip 2); Tr. 683.)
- Visiting Walmart Stores 1 and 100, where demonstrators entered the store and chanted "Coach me, work me, you will never break me. Stand up, listen up, now it's time to speak up. OUR Walmart's here to say, that Walmart's got to listen to us!" while playing a rhythm on assorted items from the store.[26] (R. Exhs. 3 (clip 4), 69; see also R. Exhs. 3 (clip 4) (showing that protesters left the interior of Walmart Store 1 and resumed chanting on a sidewalk outside the front of the store); 1 VID1, ID15; Tr. 199, 202, 684–685, 2837, 5037.)

OUR Walmart members and UFCW personnel planned, scheduled and facilitated most, if not all, of the activities at Walmart stores on October 9, as well as the activities in and around Bentonville on October 10. (R. Exhs. 3 (clips 1–4), 60, 69; Tr. 925–926, 2134–2135, 2837–2838, 2997–2998, 5037–5038.)

For the most part, the associates who went on strike gave Walmart strike letters that stated, in pertinent part:

> We, the Walmart Associates whose signatures appear below, are not working today to protest Walmart's attempts to silence Associates who have spoken out against things like Walmart's low take home pay, unpredictable work schedules, unaffordable health benefits and Walmart's retaliation against those Associates who have spoken out. These Associates are members of OUR Walmart and they will not be silenced. It is illegal for Walmart to attempt to silence and retaliate against them and unfair labor [practice charges] have been filed with the [NLRB] in protest.

(Jt. Exh. 94(a) (tabs 10–19, 21–24); see also R. Exh. 230.) Similarly, when the strike ended and the associates were prepared to return to work after being out for approximately one to three days, they generally gave Walmart return to work letters that reiterated their rationale for going on strike and communicated their unconditional offers to return to work their next scheduled shifts. (Jt. Exh. 94(a) (tabs 10–11, 13, 18–20, 22–25).)

Second, OUR Walmart coordinated a "National Day of Action" on October 10, for which OUR Walmart, the UFCW and other organizations held demonstrations or other actions at stores across the country in support of OUR Walmart and the associates on strike. Using email and other lines of communication, UFCW personnel outlined the framework for local actions (generally, gathering at Walmart stores for approximately one hour to leaflet, take photographs, and deliver a petition or letter to store management), provided downloadable demonstration materials and instructions, and publicized the schedule for store actions. (Jt. Exh. 97; R. Exhs. 231–232, ID3, ID4, 1985 VID1, 1985 VID2, 2516 VID1, 2516 VID2, 4383 VID1, 5647 Photo 1; Tr. 2177–2178, 6447–6448, 6452–6454, 6486; see also GC Exh. 70 (Walmart summary of National Day of Action events that occurred on October 8–9); R. Exh. 273 (OUR Walmart summary of National Day of Action events that occurred on October 10).)

Walmart was somewhat prepared for the events of October 9–10, since it learned of the upcoming strikes and actions a few days in advance. Accordingly, Walmart encouraged its store managers to make contingency plans for covering the work of any associates who went on strike (e.g., by simply reassigning associates from other parts of the store, and having managers fill in as needed), and developed talking points for Walmart officials and store managers to use to respond to questions (from the media or financial analysts) about OUR Walmart and/or the strikes. (GC Exhs. 21(a), 54, 83, 2571–2; see also Tr. 5700.)

As with prior events, OUR Walmart made a concerted effort to communicate with the media about the October 9–10 strikes and demonstrations. Accordingly, OUR Walmart issued press releases, sent out emails and tweets, and arranged opportunities for strikers and community supporters to speak to the media and other interested parties about the changes they sought at Walmart. (Jt. Exhs. 104(c), 105–106, 109; GC Exh. 286–3, p. 2; R. Exhs. 6, 67–68; Tr. 224–226, 2156–2163, 2177–2178.) Walmart, meanwhile, also kept tabs on media reports, and made a point of emphasizing to its associates and to the media that only a small number of associates participated in the strikes and actions that OUR Walmart coordinated, and that Walmart store operations were not impacted by the strikes and actions. (GC Exhs. 84–86; Tr. 5209.)

5. November 2012 – Black Friday strikes and demonstrations

Throughout November 2012, OUR Walmart continued with its plan to hold additional actions and strikes at various Walmart stores, including multiple actions and strikes that occurred on Black Friday 2012, one of Walmart's busiest shopping days. (R. Exhs. 50, 70–76, 135, 233; Tr. 926, 2378, 2452–2457, 5229.) OUR Walmart's continuing efforts did not take Walmart by surprise. To the contrary, Walmart was aware that more actions and strikes were on the horizon because it continued to monitor OUR Walmart's activities (e.g., by sending market human resources managers to visit "priority" stores,[27] receiving and responding to calls to the labor relations hotline, and tracking OUR Walmart announcements about upcoming events), and responded by making contingency plans for forthcoming strikes and distributing talking points for store managers to use when speaking to associates about the strikes. (GC Exhs. 65–66, 68, 87–92, 94–96, 111–112, 117, 286–4; Jt. Exhs. 7(a)–(c); CP Exhs. 3, 10; Tr. 5191–5192, 5227–5228, 5294–5296.)

[25] "Mike" was a reference to Mike Duke, who was Walmart's CEO at the time. (Tr. 201–202.).

[26] OUR Walmart assigned certain demonstrators to "straighten things up" in the store after the demonstration. (Tr. 200, 280.)

[27] In preparing for Black Friday labor activity, Walmart defined "Priority One" stores as those that "have sizeable or active clusters of self-identified OUR Walmart supporters" and/or "have experienced OUR Walmart/sizeable labor demonstrations." Walmart defined "Priority Two" stores as those for which Walmart has "received Labor Hotline calls about associates contemplating walking out or likely to have associates contemplating walking out (based on past involvement in labor activity)." (GC Exh. 89, pp. 1–2.)

Associates who participated in November 2012 strikes generally turned in strike letters that stated as follows (or words to similar effect):

> Today, we, the Walmart associates whose signatures appear below, are calling out.
> We are not reporting to work today to protest Walmart's attempts to silence Associates who have spoken out against things like Walmart's low take home pay, unpredictable work schedules, unaffordable health benefits and Walmart's retaliation against those Associates who have spoken out. These associates are members of OUR Walmart and they will not be silenced. It is illegal for Walmart to attempt to silence and retaliate against them and unfair labor [practice charges] have been filed with the National Labor Relations Board in protest.

(See, e.g., Jt. Exh. 94(a) (tab 28); see also Jt. Exhs. 94(a) (tabs 29–37, 39, 41–47, 49–51), 211, 309 (indicating that some associates gave verbal notice to their manager that they would be going on strike); Tr. 2725–2726, 2756–2758.) The ensuing strikes and actions took a variety of forms, including (separately, or in combination with other strategies):[28]

- Picketing or chanting with posterboard signs on a sidewalk or in the parking lot near a Walmart store entrance (with the number of picketers ranging from 5–10 to well over 100 people) (R. Exhs. 3 (clips 5–7), 77(a)–(b), 140, 200–201, 293, 2110 VID2, 2125 Photo 1, 2125 VID1, 2204 VID1, 2452 VID1,[29] 3782 VID1 (and R. ID6), 4383 VID2, 4383 VID3, 5129 VID1, 5129 VID2, 5404 VID1, 5417 VID1,[30] 5434 VID1, 5437 VID1, 5647 VID1, 5781 CG1, 5781 VID1, 5781 VID2, 5891 VID1, ID8, ID9, ID11; Tr. 204–207, 2223–2224, 2579–2581, 6365–6373, 6427–6431, 6438, 6456–6460, 6487, 6517–6520);
- Holding a silent prayer vigil or other action (e.g., chanting, picketing and/or leafleting) outside of a Walmart store, and then relocating to public property to continue the action (GC Exh. 471–6; R. Exhs. 141, 242, 5402 VID1; Tr. 2725–2735, 3200–3203, 6542–6547; see also Jt. Exh. 290(a)–(f) (showing demonstrators leaving the sidewalk in front of Walmart store 471 and walking through the parking lot to exit Walmart's property); R. Exhs. 3397 VID1, 3397 MR1, 3397 MR2; Tr. 5584–5586, 5595–5604 (demonstrators conducted their entire action on a public sidewalk and street outside of Walmart store 3397);
- Having a delegation of OUR Walmart members and community allies support associates when they go on strike, return to work, and/or speak to store managers about their reasons for protesting (with some delegations entering the store to meet with managers, and other delegations meeting with managers outside the store) (R. Exhs. 77(c)–(d), 109, 149 (pp. 218–222), 150, 177, 2110 VID 1, 3455 Photo 1; Tr. 2556–2560) and/or
- Entering the store to chant about OUR Walmart and its goals (R. Exhs. 271, 1875 VID1, 1875 VID2, 2452 VID1, 2828 VID1, 2828 Photos 1–3, 4383 VID2, 4383 VID3, 4588 VID1, ID5, ID7, ID8.)

In total for Black Friday 2012, OUR Walmart, the UFCW and community allies coordinated over 1,100 actions, and approximately 100 associates went on strike. As with previous OUR Walmart actions and strikes, the UFCW provided staffing and logistical support to facilitate the events, while Making Change at Walmart assisted by notifying community supporters about events and encouraging them to participate. (GC Exh. 471–6; Jt. Exhs. 98, 112–114, 118; R. Exhs. 26–27, 45 (p. 189), 75, 104 (pp. 73–75, 85), 108, 117, 136, 138, 198, 235–239, 252–255; Tr. 953–956, 2202–2203, 2214–2215, 2226–2228, 2396–2399, 2836–2837, 3200, 5236.)

The associates who participated in the strikes leading up to and on Black Friday 2012 generally maintained their strikes for 1 or 2 days before making unconditional offers to return to work their next scheduled shifts. (Jt. Exh. 94(a) (tabs 26–27, 29, 31–33, 35, 37–38, 40–54).) To offset the wages that strikers lost while on strike, OUR Walmart provided strikers with a $50 grocery gift card purchased with money raised by OUR Walmart and the UFCW. (R. Exhs. 70, 242; Tr. 611, 998, 2182, 3141.)

During the strikes, Walmart addressed the absence of strikers by assigning other associates in the store to cover the strikers' work (with overtime provided as needed). (GC Exh. 471–6; Tr. 3194–3195, 3258.) In both its internal communications and its communications with the media, Walmart maintained that its Black Friday events were a success, and that OUR Walmart's Black Friday strikes and actions had little or no impact on Walmart's sales and operations. (GC Exhs. 39, 48, 50, 97(b), 99, 100, 118; see also GC Exh. 43(a) (David Tovar media interview, at video times 0:37, 4:45 and 5:44, in which he predicted that the Black Friday 2012 strikes would have no impact on Walmart's sales or business).)

G. November 2012 to January 2013—Walmart's ULP Charge against OUR Walmart

Around the time of OUR Walmart's string of November strikes, Walmart filed an unfair labor practice charge with the

[28] For the most part, customers remained free to enter and exit the store notwithstanding the ongoing protest activities. However, at some Walmart locations there were brief periods of time (from as little as a couple of minutes to approximately 1 hour) where protesters caused congestion at store entrances, store exits or parking lot lanes due to their sheer numbers (e.g., by congregating in front of a store entrance/exit or walking in a parking lot driving lane). During those times, customers on foot generally could still move freely, but had to weave around the protesters to reach their destination. Customers in cars occasionally had to wait briefly for protesters to clear the driving pathway.

[29] I excluded the customer remarks on Respondent Exhibit 2452 VID1 as hearsay. (Tr. 6717–6720 (also noting that I would disregard Section D of R. Exh. ID16 on hearsay grounds).)

[30] In an action held in Louisville, Kentucky (coordinated by Teamsters Local 89), demonstrators participated in a call-and-response chant, stating: "Show me what a union looks like" (call); "This is what a union looks like" (response). R. Exh. 5417 VID1; see also R. ID1 (noting that discriminatee Aaron Lawson was present during this action).

Board to allege that the UFCW (through OUR Walmart) was engaging in unlawful recognitional picketing because OUR Walmart picketed for longer than 30 days without filing a representation petition.[31]

In January 2013, the UFCW (through OUR Walmart) reached a settlement with the Board on Walmart's unlawful recognitional picketing charge. As part of that settlement, the UFCW agreed to a sixty-day "cooling off" period during which it and OUR Walmart would not engage in any picketing or demonstrations. (GC Exhs. 102 (p. 1), 127(a) (p. 13); R. Exh. 294; see also Jt. Exh. 1319 (video clip in which David Tovar describes, from 1:02 to 2:38 on the clip, Walmart's rationale for asserting that the UFCW was engaging in unlawful recognitional picketing).) The UFCW and OUR Walmart also agreed to refrain from engaging in any recognitional picketing without first having filed a valid representation petition. (R. Exh. 294.) Consistent with that agreement, OUR Walmart and Making Change at Walmart began including the following disclaimer in their literature: "UFCW and OUR Walmart have the purpose of helping Walmart employees as individuals or groups in their dealings with Walmart over labor rights and standards in their efforts to have Walmart publically commit to adhering to labor rights and standards. UFCW and OUR Walmart have no intent to have Walmart recognize or bargain with UFCW or OUR Walmart as the representative of Walmart employees." (See, e.g., Jt. Exh. 87; see also R. Exh. 294 (pp. 1–2).)

Notwithstanding the settlement, Walmart expected that OUR Walmart and the UFCW would continue with their efforts to engage with Walmart about its employment practices and policies. (See, e.g., GC Exh. 101; Tr. 6607–6613; R. Exh. 270 (pp. 25880–25882); see also R. Exh. 142 (OUR Walmart email discussing early plans for associates to go on strike during Walmart's June 2013 shareholders' meeting).)

H. February 2013—Walmart Warns Associates That it Will Apply its Attendance Policy to Certain Types of Future Strikes

In February 2013, Walmart decided (after consulting with its labor relations and legal teams) that the strikes that OUR Walmart members held in October and November 2012, were not protected by the National Labor Relations Act. Walmart also decided that it would not discipline any associates for participating in those strikes, but would apply its attendance policy to any future strikes. To communicate these decisions, Walmart had its store managers contact each striker individually during one of their shifts and read the following talking points verbatim:

> 1. Thanks for visiting with us _____ .
> 2. I need to talk with you about an attendance issue from this past [October and/or November]. As you can see, I will be using my notes.
> 3. You may remember that the United Food and Commercial Workers union and its subsidiary OUR Walmart orchestrated a series of hit-and-run work stoppages last October and November.
> 4. As you know, you participated in ____ of those work stoppages on ____ .
> 5. It is [that/those] work stoppage[s] that I need to talk to you about.
> 6. The Company believes that those union-orchestrated hit-and-run work stoppages are not protected by federal labor law.
> 7. Given that, the Company would normally give you [an occurrence or ___ occurrences] under the attendance/punctuality policy for the unprotected absence[s].
> 8. However, because of the numerous places and times that the union orchestrated its intermittent work stoppages during October and November, it took the company several weeks to collect all the information from [] across the country about the work stoppages and several more weeks to analyze all the legal issues involved in that activity.
> 9. All that adds up to about ____ weeks since your last intermittent work stoppage.
> 10. And that creates a concern because the Company works very hard to give associates timely feedback on time and attendance issues that could affect their work record.
> 11. So in this case, the Company has decided that it will not apply the attendance policy to your work absence(s) because of the time it took to collect and analyze all this information from across the country.
> 12. But it is very important for you to understand that the Company does not agree that these hit-and-run work stoppages are protected, and now that it has done the legal thinking on the subject, it will not excuse them in the future.
> 13. Should you participate in further union-orchestrated intermittent work stoppages that are part of a common plan or design to disrupt and confuse the Company's business operations, you should expect that the Company will treat any such absence as it would any other unexcused absence.
> 14. Having said that, let me emphasize that the Company respects your right to support a union and to engage in other protected, concerted activity. It also respects your right to not engage in such activity.
> 15. But the Company does not believe that these union-orchestrated hit-and-run work stoppages are protected activity.
> 16. Please remember that you can use the Open Door policy at any time to address questions, concerns, and ideas. I cannot guarantee you that you will get exactly what you want, but I can guarantee that you will get a thoughtful, well-researched, and timely response.
> 17. OK? Any questions?

(Jt. Exh. 6(a) (including instructions for reading the talking

[31] Recognitional picketing includes picketing with the objective of inducing an employer to recognize or bargain with a labor organization as the representative of the employer's workers. "Sec. 8(b)(7) [of the National Labor Relations Act] proscribes recognitional picketing by a union under any of the following conditions: where the employer has lawfully recognized another union; where the picketing union has lost a valid election in the preceding 12 months; and—subject to a proviso for informational picketing—where the picketing has been conducted without a representation petition being filed within a reasonable period of time, not to exceed 30 days from the commencement of the picketing." *Southwest Regional Council of Carpenters*, 356 NLRB 21, 21 fn. 5 (2010); see also *Local No. 3, International Brotherhood of Electrical Workers, AFL–CIO*, 325 NLRB 527, 527 fn. 1 (1998) (finding that the union violated Section 8(b)(7)(C) by engaging in at least 30 days of intermittent picketing over a 12–month period without filing a petition for an election within a reasonable time after commencing picketing).

points, and responses that managers should give to certain questions that associates might ask after hearing the talking points); see also Tr. 1219–1223, 1374–1375, 1491–1493, 1534–1536, 2762–2764, 2883–2884, 2907, 2937–2940, 2966–2967, 3109–3111, 3143, 3214–3216, 3290–3294, 3299–3309, 3473–3478, 3521, 4133, 5242–5247, 5769–5772, 5775, 5825–5832, 6004–6008, 6027, 6048–6050, 6591, 6613, 6623–6625; GC Exhs. 49, 57, 128 (regarding associates Jose Herrera, Darius Poston and Carlton Smith, who are referenced in Jt. Exh. 1328 (par. I)), 471–7, 5781–1; Jt. Exhs. 6(b), 144, 180, 193, 217, 307, 447, 975, 993, 1328 (par. I); R. Exh. 272 (pp. 1, 9, 12, 16, 22).)[32]

I. Spring 2013—OUR Walmart Plans for the Ride for Respect

In April 2013, the 60–day "cooling off" period for OUR Walmart and UFCW coordinated demonstrations ended. In that same timeframe, Making Change at Walmart and OUR Walmart coordinated a national day of action on April 24, 2013, for which they called on OUR Walmart members and community supporters to visit their local stores to speak with Walmart managers, leaflet customers, and speak to Walmart associates about scheduling issues and ensuring that workers receive enough hours to make ends meet. (R. Exhs. 13, 45 (pp. 168–170); GC Exhs. 102, 127(a) (pp. 13, 18); Jt. Exh. 121; Tr. 937–938, 2257–2258.) OUR Walmart also began refining its plans for future actions, including a plan to transport OUR Walmart members by bus caravan to Bentonville for actions in late May 2013 that would coincide with Walmart's annual shareholders' meeting. (GC Exh. 102; R. Exhs. 157, 162, 256–257, 274, ID12; Tr. 269–272, 711, 2487–2490, 5248–5251; see also Tr. 2490 (noting that OUR Walmart and Making Change at Walmart began planning the bus caravan to Bentonville in early 2013).)

OUR Walmart's plans for Walmart's shareholders' meeting took a significant step forward in early May 2013, when Making Change at Walmart paid for approximately 50 OUR Walmart leaders and 12 UFCW staff to convene in Birmingham, Alabama for a "national leadership bootcamp" from May 1–6, 2013.[33] At the conclusion of the meeting, OUR Walmart announced that its members "would caravan from across the country to Bentonville to call on [Walmart] to raise wages and increase access to full time hours so that no worker at Walmart makes less than $25,000 per year."[34] OUR Walmart planned to conduct not only actions, but also strikes lasting up to 1 week or longer as part of the Bentonville caravan (with "strike pay" of $150 per week available to strikers, paid from OUR Walmart funds). For associates who would be going on strike, UFCW officials reiterated that associates should describe their strike as a "ULP strike" to ensure they had the additional legal protection that comes with being on such a strike (as opposed to an economic strike). (Jt. Exhs. 87–88; GC Exhs. 5(b), 24(f); R. Exhs. 45 (pp. 170–172, 176–177), 52, 82, 149 (pp. 183–184), 157, 274, 276 (at 7:55–9:05), 277 (at 0:00–0:20, 2:09–2:33 and 3:33–4:04), ID18, ID19; Tr. 88–91, 713, 879–885, 2252–2253, 2259–2264, 2357–2359, 2785–2786, 4823–4825, 4923–4924, 6054.)

J. May 28—June 10, 2013: The Ride for Respect

1. Coordination and planning

OUR Walmart named its caravan to Bentonville the "Ride for Respect," and after formally announcing the caravan, set about making arrangements to pull the caravan together. First, OUR Walmart organizers and associates took a variety of steps to assemble and prepare the team that would participate in the Ride for Respect, including: circulating a strike pledge to identify associates who would be willing to go on strike and participate in the caravan;[35] distributing talking points about the Ride for Respect; developing media advisories about the Ride for Respect; communicating guidelines to caravan participants about how they should conduct themselves; and training OUR Walmart leaders and UFCW staff to serve as "marshals" with the responsibility of managing demonstrators at actions during the caravan and serving as buffer between the demonstrators and individuals they might encounter (e.g., Walmart personnel, police officers, hecklers). (GC Exh. 8; Jt. Exh. 120; R. Exhs. 33, 83–88, 121, 167, 297; see also Tr. 238, 721 (noting that additional marshal training occurred in Bentonville), 2526–2527.)

Second, OUR Walmart planned the itineraries for the buses in the Ride for Respect. Specifically, OUR Walmart set forth seven primary routes for the buses to travel to Bentonville (arriving on or about June 1, 2013), with each route including prearranged stops where the buses would pick up additional strikers and/or join local community supporters for a meeting, rally or other action. The seven routes were:

1. Richmond, CA → San Leandro, CA → Fremont, CA →Palo Alto, CA → Atherton, CA → San Francisco, CA →

[32] Walmart used a modified version of these talking points for associates who used approved "replacement time" to participate in the October and November 2012 strikes. Walmart's message about applying its attendance policy to certain types of future strikes, however, remained the same. (Jt. Exh. 307.)

[33] Through publicly available social media sources, Walmart was aware of which associates and UFCW staff participated in the Birmingham meeting. Walmart also developed a sense of which associates were likely to participate in actions and/or strikes related to Walmart's upcoming shareholders' meeting. (GC Exh. 24(f).)

[34] In deciding to do the proposed bus caravan, OUR Walmart members drew inspiration from the Freedom Rides that the Congress of Racial Equality (and subsequently, the Student Nonviolent Coordinating Committee) organized in 1961 to protest racial segregation in interstate bus and train stations during the civil rights movement. (See Jt. Exh. 88 (from 5:52–8:57 on the video clip), 120, 124; R. Exhs. 45 (pp. 170–171), 278 (at 0:28–0:38), 1985 VID1CM (at 0:25–0:40), 297; GC Exh. 8; Tr. 88–90, 884–885, 2785, 4824, 4838, 6050.)

The 1961 Freedom Rides are described in "Freedom Riders," a documentary produced by PBS' American Experience. (http://www.pbs.org/wgbh/americanexperience/freedomriders/) Although the point is perhaps obvious, I emphasize that I have included this information about the Freedom Rides only to provide historical background, and not as any evidence or commentary on the merits of the allegations in this case or the merits of either side of the dispute between Walmart and OUR Walmart.

[35] The strike pledge stated: "I will not be intimidated by Walmart's threats and retaliation against Associates who speak out for better pay, more hours and respect at work. I'm ready to put an end to Walmart's unfair labor practices. I refuse to work during the week of Walmart's shareholders meeting and instead will join hundreds of Associates across the country in the Ride for Respect to Bentonville, Arkansas for Walmart's Annual Meeting." (GC Exh. 8 (p. 2).)

Sacramento, CA → Denver, CO → Wichita, KS → Bentonville, AR

2. Pico Rivera, CA → La Quinta, CA → Phoenix, AZ → Albuquerque, NM → Clovis, NM → Bentonville, AR

3. Washington, DC → Atlanta, GA → Jackson, MS → Baton Rouge, LA → Little Rock, AR → Conway, AR → Bentonville, AR

4. Miami, FL → Orlando, FL → Atlanta, GA (to join with the Washington, DC caravan) → Jackson, MS → Baton Rouge, LA → Little Rock, AR → Conway, AR → Bentonville, AR

5. Chicago, IL → Cincinnati, OH → Louisville, KY → St. Louis, MO → Bentonville, AR

6. Dallas, TX → Bentonville, AR

7. Seattle, WA → Salt Lake City, UT → Denver, CO (to join with the Richmond, CA caravan) → Wichita, KS → Bentonville, AR

(Jt. Exh. 124; see also R. Exhs. 118, 167, 243; Tr. 889, 2360 (noting that the UFCW paid for the transportation, meals and hotel stays needed for the Ride for Respect).)

Meanwhile, Making Change at Walmart publicized the Ride for Respect to UFCW locals and community supporters, and called upon those groups to support the caravan and participate in a "National Week of Action" by holding actions at Walmart stores in their area during Walmart's annual shareholders' meeting. (Jt. Exh. 100; R. Exhs. 25, 295.) As an example action, Making Change at Walmart suggested that community supporters could spend 30 minutes at a local Walmart store, during which time demonstrators could: distribute leaflets to Walmart associates; ask customers to support OUR Walmart (and sign cards to that effect); and have a delegation of demonstrators enter the store, ask to meet with the store manager, and explain why the demonstrators believe Walmart needs to change. (Jt. Exhs. 100–101, 123.) Making Change at Walmart also encouraged UFCW locals to host events (such as meals, meetings and fundraisers) when caravan buses stopped in their communities. (Jt. Exh. 124.)

Through a variety of sources, Walmart was aware by at least mid-May 2013, that OUR Walmart was planning the Ride for Respect. Accordingly, Walmart began making its own contingency plans for the anticipated strikes and actions, including developing a list of associates who were likely to participate in the Ride for Respect; preparing talking points for salaried managers to present to associates about potential demonstrations that OUR Walmart might stage at Walmart store locations; and instructing Walmart personnel on how to prepare for potential demonstrations and respond when encountering groups of protesters. (GC Exhs. 24(a), 24(f) (pp. 58–59), 36, 58, 108 (pp. 3–5), 125; Tr. 1251–1252, 4620–4623.)

2. Late May 2013—strikes and caravans begin

Beginning on May 27, 2013, associates began notifying Walmart that they were going on strike by: reading a strike script to one of the managers at their store; delivering a strike letter to Walmart; and/or calling the IVR system and indicating that they would miss work (typically by selecting "other" in the automated system as the reason for their absence, and obtaining a confirmation number from the IVR system).[36] The strike letters generally stated as follows (or words to similar effect):

> Today, we, the Walmart associates whose signatures appear below, are calling out.
> We are not reporting to work to protest Walmart's attempts to silence Associates who have spoken out against things like Walmart's low take home pay, unpredictable work schedules, unaffordable health benefits and Walmart's retaliation against those Associates who have spoken out.
>
> It is illegal for Walmart to attempt to silence and retaliate against them. Unfair Labor Practice[] Charges have been filed with the National Labor Relations Board (the "NLRB") for Walmart's violations of the National Labor Relations Act, 29 U.S.C. Sec. 151 (the "NLRA"). Today, we say no to Walmart's retaliation and attempts to silence members of OUR Walmart who have spoken out for change. . . .

(Jt. Exhs. 94(a) (tabs 55–86, 88–100), 1327; see also GC Exh. 9 (strike script).) In many instances, the UFCW assisted associates with their strike letters by faxing the letters to Walmart (either at the home office or at the associate's store). (See R. Exh. 240 (instructing UFCW personnel to make copies of strike letters in case they were needed when associates returned from strike).)

While most strikers boarded buses to join the Ride for Respect, a few strikers remained in their home areas to participate in local actions and/or attend to personal matters. For the strikers that did join in the caravan, their walkouts from their Walmart stores were often events in and of themselves, since OUR Walmart frequently sent delegations of associates and community supporters to stores to support strikers when they walked out. (R. Exhs. 110, 112, 119, 131 (pp. 130–133), 132, 165, 168, 183 (pp. 89–95), 184–185, 202–203, 244, 296, 298; Tr. 114–118, 452–454; see also R. Exhs. 119, 131 (pp. 130–133), 132, 183 (p. 92–94) (each indicating that OUR Walmart arranges store delegations in part to create opportunities for media coverage).) The store delegations generally involved associates and supporters:

- Assembling on the sidewalk in front of a Walmart store and using a microphone or bullhorn to declare that they are going on strike (followed by group chants like "Whose Walmart, OUR Walmart!") (R. Exhs. 112, 202, 2694 CG1, 2694 CG2, 2694 CG3, 5417 CG1 (p. 2, second photo); Tr. 6135–6138, 6144, 6298–6300, 6307);
- Entering and walking around inside a Walmart store to pick up strikers while (for certain protests) periodically blowing an air horn and chanting (R. Exhs. 168–169; Tr. 2535–2537; see also R. Exh. 168(a); Tr. 2530–2531 (same, but with no chanting or air horn);

[36] As previously noted, the IVR system transfers associates to their home store after providing the associate with a confirmation number for their absence. Only a handful of the associates who called the IVR system during the Ride for Respect were able to speak to a salaried manager (as opposed to the fitting room associate) after being transferred to their home store.

- Speaking to a manager inside the store to read a strike letter and/or express concern about Walmart policies and retaliation against associates (R. Exhs. 184, 202; Tr. 2788–2789, 5607–5620, 6294–6295, 6305–6306);
- Speaking to associates inside the store about OUR Walmart (Tr. 6136–6137, 6296–6297);
- Linking arms and walking silently through the store to locate a manager, using a microphone to read a strike letter to the manager, and then exiting the store and chanting upon reaching the sidewalk in front of the store (e.g., "We're on strike, because we have rights!") (R. Exhs. 168(b), 185, 1805 VID1; Tr. 2523–2524, 4906–4907); and/or
- Reading a strike letter to a manager in the store parking lot (after having been turned away from entering the store by Walmart personnel and police officers citing state trespass laws) (R. Exh. 203).

For each of these encounters, both Walmart personnel and OUR Walmart strikers and supporters remained calm when interacting with each other. Walmart managers did, on some occasions, ask protesters to stop filming and/or leave the store. (See, e.g., R. Exhs. 184, 185.)

Using a variety of resources (e.g., strike letters or reports from Walmart stores), Walmart kept track of which associates participated in the Ride for Respect, and also kept track of the routes of the buses in the caravan until the buses arrived in Bentonville. (GC Exhs. 24(c), 107, 2418–8, 2418–9(a)–(b), 3601–3; Tr. 5273–5274, 5801–5804.)

3. June 1–7, 2013: actions in Bentonville

After arriving in Bentonville, strikers, OUR Walmart members and community supporters engaged in a variety of actions to highlight and draw attention to their concerns about Walmart. Those actions included:

- Meeting to prepare for the events that OUR Walmart planned for the week in Bentonville (R. Exh. 45 (pp. 203–204).)
- Holding a silent protest on the sidewalk in front of outside of Walmart's home office (with protesters wearing tape with the words "on strike" over their mouths), followed by a call-and-response "mic check" to state that "Walmart's attempts to silence [OUR Walmart and its supporters] have failed," as well as singing and chanting (R. Exh. 3 (clip 8); Tr. 209–211);
- Canvassing local neighborhoods, businesses and Walmart stores to speak about OUR Walmart and its goals (R. Exh. 32; Tr. 984–985);
- Joining a protest concerning safety conditions in Bangladeshi garment factories (Tr. 257–259);
- Traveling to Jim Walton's home for a protest (R. Exh. 9; Tr. 126–127);
- Holding a "speak out" in front of Sam Walton's original 5–10 store (R. Exh. 10; Tr. 127, 344–345);
- Visiting Alice Walton's Crystal Bridges Museum (R. Exhs. 11, 45 (p. 205); Tr. 128, 3726);
- Attending Walmart's shareholders' meeting[37] on June 7, where OUR Walmart member Janet Sparks spoke to the audience about Walmart associates and a proposal that Walmart senior executives be required to hold on to a large portion of their Walmart stock until retirement (Jt. Exh. 125(a)–(b); R. Exh. 45 (pp. 179–180, 205–206); Tr. 2290–2292, 2813, 3760); and
- Conducting media interviews (Tr. 129–130, 260–261, 501.)

(See also Jt. Exh. 86 (pp. 9–13); GC Exh. 6(a); R. Exhs. 14, 32–33; Tr. 121–130, 232–236, 341–342, 501–502, 2791–2792, 4755–4756, 4829.)[38] OUR Walmart posted on social media and issued media advisories throughout the week to notify supporters and the media about the various actions occurring in Bentonville. (Jt. Exh. 122; R. Exhs. 87–88, 120; see also GC Exh. 123 (indicating that Walmart kept track of media reports about Walmart's shareholders' week, including media reports that mentioned OUR Walmart's events/actions.)

4. June 7–12, 2013: strikers return to work

From June 7–12, 2013, associates who went on strike during the Ride for Respect returned home and notified their Walmart store managers of their unconditional offers to return to work for their next scheduled shifts.[39] Making Change at Walmart staff and/or community supporters often accompanied associates when the associates notified Walmart of their offers to return to work. When interacting with management, most associates turned in return to work letters that stated, in pertinent part:

> This letter hereby constitutes our unconditional offers to return to our jobs from our ULP strike beginning our next scheduled shifts or if the schedule is not out yet, what would be our next normal shifts. We were out on a ULP strike to protest Walmart's attempts to silence Associates who spoke out for better wages, hours, and other working conditions, and Walmart's retaliation against those who did speak out, and to support the ULP Charges that have been filed on their behalf. Walmart's actions are Unfair Labor Practices under the NLRA. . . . We look forward to returning to work at the start of our next shifts.

[37] To attend Walmart's shareholders' meeting, associates either had to own Walmart stock or be present as a proxy for another shareholder. (Tr. 2293–2294, 4829.)

[38] Making Change at Walmart and community supporters held local actions in solidarity with the OUR Walmart strikers and supporters who traveled to Bentonville. Most of the local actions focused on leafleting, picketing and speaking to Walmart associates and customers about OUR Walmart (both inside and outside of Walmart stores). (See Jt. Exh. 123; R. Exhs. 241, 258, 271, 1893 VID1, 1893 VID2, 1893 VID3, 1893 VID4, 5647 Photo 2, 5647 VID2; Tr. 2790, 2957–2959, 6461–6470, 6491–6492.)

[39] Associates who traveled to Bentonville from distant locations generally returned home by airplane using tickets paid for by the UFCW. (Tr. 131–132, 341, 1002, 2360.)

(Jt. Exh. 94(a) (tabs 55–57, 63, 65–68, 70, 72–79, 81–82, 84–87, 89, 91–105); R. Exh. 299; Tr. 2277–2278; see also Jt. Exh. 94(a) (tab 62: return to work letter dated May 28, 2013).) OUR Walmart, with the UFCW's assistance, made strike pay and/or gift cards available to associates who went on strike. (R. Exhs. 82, 216, 245; Tr. 2960.)

Overall, approximately 100–130 associates and 36 Making Change at Walmart staff members participated in the Ride for Respect and related actions/strikes. (GC Exh. 109; Tr. 119–120, 888, 2359–2360, 5278; see also Jt. Exh. 94(a) (tabs 55–105).) The impact on Walmart's store operations generally involved having to reassign associates within the store to cover the work of associates who were on strike (and the effects that such reassignments had on customer service).[40] (GC Exh. 2609–3; see also Tr. 5282 (acknowledging that no Walmart store was forced to close because it could not operate without associates who were on strike during the Ride for Respect), 5933–5934, 6213–6218, 6281–6282, 6326–6328, 6330–6332.)

K. Walmart Disciplines Associates for Missing Shifts While on Strike

1. Early June 2013—Walmart's initial response to returning strikers

Walmart did not replace any associates (e.g., by filling their positions with new hires) while they were away on strike, and the strikers generally returned to work for their next scheduled shifts in early/mid–June without incident. Indeed, Walmart made a point of allowing strikers to return to work as scheduled and instructed its managers to answer "I don't know" if a returning striker asked if he or she would face discipline. (GC Exhs. 2609–2, 2609–3; R. Exh. 216.)

2. Late June 2013—Walmart applies its discipline policy to strike-related absences

After considering the matter, on or about June 21, 2013, Walmart decided that it would apply its discipline policy to associates who went on strike and missed shifts during the Ride for Respect. (See, e.g., GC Exh. 51; see also GC Exhs. 109 (noting, on June 12, 2013, that Walmart's labor relations, human resources and operations teams were "partnering with store management to determine appropriate disciplinary action, where applicable"), 110; Tr. 5279–5280, 6623, 6626–6627.)

If Walmart determined that an associate did not provide any notice that they would be absent (e.g., by submitting a strike letter or calling in to the IVR system), then Walmart generally treated each missed shift as a "no call/no show," and terminated any associate with three or more no call/no shows.[41] Walmart managers communicated this information to associates with the following talking points:

> 1. Thanks for coming back.
>
> 2. I need to take a few minutes to talk to you about your attendance.
>
> 3. I am going to be using my notes so that I cover this information with you accurately:
>
> a. Since [date of first missed shift], you missed [number] scheduled shifts without reporting your absences in advance or at all to management as required by the time and attendance policy.
>
> b. As a result, the Company considers your failure to report your absences to management as a no call/no show.
>
> c. Based on the number of your absences, you will receive a [level of discipline] for your no call/no show.
>
> d. I have filled out the coaching form here, and want to give you a chance to review it and ask any questions. . . .

(Jt. Exh. 93 (pp. 1–2); see also Jt. Exh. 89; Tr. 1210–1211, 1215.)

By contrast, if Walmart determined that an associate did provide notice that they would be absent during the Ride for Respect (e.g., by submitting a strike letter, speaking to a manager, or calling the IVR system), then Walmart treated the missed shifts as occurrences, and administered a personal discussion or coaching under Walmart's attendance policy. Walmart managers communicated this information to associates with the following talking points:

> 1. Thanks for coming back.
>
> 2. I need to take a few minutes to talk to you about your attendance.
>
> 3. I am going to be using my notes so that I cover this information with you accurately:
>
> a. Since [date of first missed shift], you have missed [number] scheduled shifts.
>
> b. As a result, the Company has counted your absence(s) as [number of occurrences] under the attendance policy.
>
> c. Based on your prior attendance and punctuality occurrences and your current coaching, you will receive [level of coaching] for your time and attendance issues.
>
> d. I have filled out the coaching form here, and want to give you a chance to review it and ask any questions. . . .

(Jt. Exh. 93 (pp. 1, 4); see also Jt. Exh. 89; Tr. 1210–1211, 1215.)

Walmart provided managers with a list of "frequently asked questions" that associates might pose in disciplinary meetings, coupled with the responses that managers should give in response to those questions. Notably, if an associate asserted that their strike was protected by law, Walmart managers were

[40] In a few stores, Walmart had to close one or two departments for certain shifts because it did not have associates available who were trained to handle those departments in place of the associates who were on strike (e.g., the photo department, which requires training to operate the photo developing machines). (See, e.g., Tr. 5355–5357.)

[41] Under Walmart's attendance policy, associates with one no call/no show receive a two-level coaching that adds on to the associate's existing level of discipline, and associates with two no call/no shows receive a three-level coaching. Thus, for example, if an associate had an active first written coaching, and then had a no call/no show, Walmart would issue that associate a third written coaching. (Findings of Fact (FOF), Sec. II(A)(6), supra.)

instructed to respond: "I can't comment on anything that would happen in the future; just that we don't believe labor law protects what happened during the period covered by this [coaching/termination]." (Jt. Exh. 93 (pp. 3, 5).)

Ultimately, in or about late June 2013, Walmart took the following action with the associates that are now claimants in this case:

> Personal discussion: Aubrietia Edick; Barbara Gertz; Charmaine Givens-Thomas; Linda Haluska; Vanzell Johnson; John Juanitas; Aaron Lawson;[42] Patricia Locks; Cynthia Murray; Cheryl Plowe; Anna Pritchett; Vivian Sherman; Betty Shove; Lawrence Slowey; Esmeralda (Mandy) Uvalle; Ronnie Vandell; Trina Vetato;[43] Debra Williams;
>
> Coaching: Michael Ahles; Rose Campbell; Andrea Carr; David Coulombe; Evelin Cruz; Matthew Gauer; Sara Gilbert; Cecilia Gurule; Colby Harris;[44] Margaret Hooten; Marie Kanger-Born; Victoria Martinez;[45] Shawnadia Mixon; Michael McKeown; Liai Pefua; Patricia Scott; Cody Shimmel; Jeanna Slate-Creach;[46] John Smith; Amy Stinnett; Mariah Williams;
>
> Termination (for three or more no call/no shows or because the associate had an active third written coaching): Javon Adams; Marc Bowers;[47] Raymond Bravo; Yvette Brown; Barbara Collins; Christopher Collins; Pamela Davis; Norma Dobyns; Brandon Garrett; Jovani Gomez; Pooshan Kapil; Marie Roberty; Dominic Ware; Tavarus Yates; and
>
> Other (the parties dispute the nature of the action taken): Louis Callahan; Shana Stonehouse.

(GC Exhs. 1(bb), (ff); see also GC Exh. 1(ff) (noting Walmart's position that personal discussions are nondisciplinary).) Upon request, OUR Walmart (with the UFCW's fundraising help) provided temporary hardship funds to eligible associates who were discharged based on absences they incurred while on strike during the Ride for Respect. (Tr. 155, 279, 571–572, 2253–2254, 2809–2810, 2956–2957, 3063–3064, 3145–3146, 3996, 3998–3999, 4400–4401, 4450, 4767, 5559–5560.)

L. Summer/Fall 2013: OUR Walmart Continues its Efforts

1. August 2013—Summer for Respect

During the summer of 2013, Making Change at Walmart coordinated the "Summer for Respect," which called for "a deeply committed group of labor, student and community supporters [to] spend the summer building local OUR Walmart and Making Change at Walmart (MCAW) support teams across the country." (R. Exh. 53; see also R. Exh. 157 (p. 3).) Making Change at Walmart and OUR Walmart also organized a civil disobedience action that was held on August 22, 2013, in Washington, D.C. (R. Exh. 45 (pp. 180–182).)

2. November 2013—Black Friday actions and strikes[48]

In November 2013, OUR Walmart and Making Change at Walmart coordinated another round of actions and strikes at Walmart stores for Black Friday (an idea that developed immediately after the Black Friday 2012 strikes). Regarding strikes, OUR Walmart used strike pledges and "strike raps" (talking points to encourage associates to join the strike) to identify associates who would go on strike in the days leading up to, and on, Black Friday (November 29, 2013). (Jt. Exhs. 131–132; R. Exhs. 94, 104 (pp. 182–183), 128, 134, 147, 171 (p. 2), 173, 247, 5437 Photo 2; Tr. 2307–2309, 2334–2335.) As for actions, OUR Walmart and Making Change at Walmart encouraged community supporters to select a Walmart store and devote time (usually one hour, including preparation time) to: send a delegation of protesters inside the store to speak to a Walmart manager about their concerns (and support associates if they were going on strike during the action); distribute leaflets; and/or protest outside the store with signs and chanting. To build up interest over a period of time, and to address associate concerns about the challenges of having events on Black Friday, OUR Walmart and Making Change at Walmart scheduled actions and strikes to occur on various days leading up to Black Friday (instead of scheduling all of the actions to occur on Black Friday itself). (Jt. Exhs. 129(a)–(b); R. Exhs. 89, 91–93, 114, 172, 205, 300, 302; Tr. 2295–2299, 2305–2306, 2310–2312.) Making Change at Walmart also envisioned having community supporters engage in civil disobedience in selected cities throughout the month of November. (R. Exhs. 93, 95, 97; Tr. 2332–2333.)

From November 6–28, 2013, Walmart associates in various stores turned in strike letters and went on strike, typically for one or two days. The strike letters generally conveyed the following message, in pertinent part:

> Today, we, the Associates whose signatures appear below, are calling out. We are not reporting to work to protest Walmart's attempts to silence Associates who have spoken out against things like Walmart's low take home pay, unpredictable work schedules, unaffordable health benefits and Walmart's retaliation against those Associates who have spoken out. These Associates are members of OUR Walmart and they will not be silenced.
>
> It is illegal for Walmart to attempt to silence and retaliate against them. Unfair Labor Practice[] Charges have been filed with the National Labor Relations Board (the "NLRB") for Walmart's violations of the National Labor Relations Act, 29 U.S.C. Sec. 151 (the "NLRA"). Today, we say no to Walmart's retaliation and attempts to silence members of OUR Walmart who have spoken out for change. . . .

(Jt. Exhs. 94(a) (tabs 106–128, 130–132, 134–136), 1322; see

[42] Walmart later issued Lawson a coaching that relied in part on the absences covered by the personal discussion.

[43] Walmart later issued Vetato a coaching that relied in part on the absences covered by the personal discussion.

[44] Walmart also issued Harris a second written coaching for absences that occurred during a strike from May 6–9, 2013, and terminated Harris in September 2013, based in part on coachings that resulted from strike-related absences.

[45] Walmart also had Martinez sign a personal discussion for absences that occurred during strikes on November 20 and November 23, 2012.

[46] Walmart terminated Slate-Creach in August 2013, based in part on a coaching that resulted from strike-related absences.

[47] Walmart also issued Bowers a third written coaching for absences that occurred during a strike from May 6–9, 2013.

[48] OUR Walmart did not hold any actions or strikes during Walmart's financial analysts' week in October 2013. (R. Exh. 45 (pp. 156–157).)

also R. Exhs. 246 (pp. 1, 3–4, 8), 280–283 (discussing plans for strikes in Maryland, and noting that the strikers would miss one shift and could join the strike by telling their manager they were going on a ULP strike); 284 (showing an associate calling the IVR system and signing a strike letter), 5228 VID2 (showing associates receiving instructions on how to turn in their strike letters), ID23, ID24.)

As with previous events, strikers focused on expressing concern about alleged bullying, threats and retaliation by Walmart, while other participants communicated economic messages, with a particular focus on the wages that Walmart pays its associates. (See, e.g., R. Exh. 94 (asserting that most Walmart associates earn less than $25,000 per year); R. Exh. 3086 VID1 (showing protesters holding signs stating "Walmart wages hurt America"); R. Exh. 301; Tr. 2306–2307, 2324, 4918–4919; see also R. Exh. 285 (at 1:04, UFCW organizer reminds a striker to tell a reporter that one of the reasons the associate is going on strike is to protest retaliation by Walmart), ID25.) The strikes and actions included the following activities (among others):[49]

- Picketing, chanting and leafleting inside and/or outside of Walmart stores, as an independent action or to support strikers when they walked off the job (R. Exhs. 115, 172, 271, 896 VID1, 1118 VID1, 1118 VID2, 2110 VID3, 2571 VID5, 2571 VID6, 2571 VID7, 2609 VID1, 2667 VID1, 2683 VID1, 3749 Photo 1, 3749 Photo 2, 5129 VID3, 5228 VID1, 5228 VID2, 5228 Photo 1, 5228 Photo 2, 5437 Photo 1, 5437 VID2, 5645 VID1, 5781 Photos 1–4, 5939 VID1, ID10, ID24; Tr. 6338–6343, 6413–6418, 6504–6505, 6514–6515);
- Holding food drives for Walmart associates (R. Exhs. 115, 5939 VID1);
- Engaging in civil disobedience, such as blocking certain streets and car traffic near a Walmart store until arrested by law enforcement (R. Exhs. 95, 98, 159 (p. 2), 1118 VID2, 5645 VID1, 5939 Photo 1, ID10; Tr. 2336, 2339, 4916, 6505); and/or
- Having entertainers present (e.g., break dancers, musicians) to energize protesters (R. Exh. 2110 VID 3, 3086 VID1)

Most associates who went on strike leading up to Black Friday 2013, submitted "return to work" letters one to three days after they went on strike (with some even submitting return to work letters on the same day as their strike). The return to work letters generally stated as follows:

> This letter hereby constitutes our unconditional offers to return to our jobs from our ULP Strike beginning our next scheduled shifts or if the schedule is not out yet, what would be our next normal shifts. We were out on a ULP strike to protest Walmart's attempts to silence Associates who spoke out for better wages, hours, and other working conditions, and Walmart's retaliation against those who did speak out, and to support the ULP Charges that have been filed on their behalf. Walmart's actions are Unfair Labor Practices under the NLRA. . . . We look forward to returning to work at the start of our next shifts.

(Jt. Exh. 94(a) (tabs 106–109, 114, 118–121, 123–129, 133–136).) Overall, OUR Walmart, Making Change at Walmart and community supporters' organized nearly 1,500 actions at Walmart stores leading up to Black Friday 2013. (R. Exh. 159.)

3. Future strikes and actions

The UFCW and OUR Walmart have stipulated that they "intend to continue planning and assisting Walmart workers in striking in a manner consistent with the strikes that the UFCW and OUR Walmart helped plan and assist Walmart workers hold in October and November 2012, June 2013, and November 2013." (Jt. Exh. 1; see also R. Exh. 5485 VID1 CG(a)–(b) (UFCW convention speeches in August 2013, in which the UFCW promised to continue supporting OUR Walmart); R. Exh. ID2 (November 2012 news article including quotes from OUR Walmart leader Elaine Rozier and UFCW official Dan Schlademan indicating that protests and strikes would continue until Walmart gave protesters what they wanted).)

DISCUSSION AND ANALYSIS

The allegations in this case fall into two categories. First, the General Counsel alleges that Walmart violated Section 8(a)(1) by making a handful of statements in 2012 and 2013 that have a reasonable tendency to chill associates in the exercise of their Section 7 rights. I address those allegations in Section I, below.

Second, the General Counsel alleges that Walmart violated Section 8(a)(1) by disciplining or discharging associates for missing work time while on strike, primarily in connection with the Ride for Respect in late May and early June 2013. I discuss the legal issues related to those allegations and Walmart's defenses in Section II; provide additional findings of fact for individual associates in Section III; and address the merits of each discipline and discharge allegation in Section IV.

I. ANALYSIS OF ALLEGED UNLAWFUL STATEMENTS

A. November 2012 Warnings to Associates that Their Strike Activity was "Under Review"

1. Additional findings of fact

On November 16, 2012, Willie Bell, Mark Bowers, Colby Harris, Joeray Peoples and other associates at Walmart store 471 in Lancaster, Texas participated in a 1-day strike/protest. At the beginning of the protest, Walmart requested that the protesters leave Walmart's property. The protesters (with the support of a UFCW organizer) agreed to do so, but only after they conducted a prayer vigil near the front of the store. After the prayer vigil, associates picketed and chanted outside the store, and then moved to a "grassy area" near Walmart's property where they continued picketing and chanting. The protest activities lasted approximately one hour (with the prayer vigil lasting for

[49] As with prior demonstrations, for the most part Walmart customers remained free to enter and exit the store during protest activities. There were brief periods of time (up to 45 minutes), however, during which protesters caused congestion (by virtue of their sheer numbers) at particular store entrances, store exits or parking lot lanes. (See, e.g., R. Exh. 5437 VID2 (showing protester congestion in parking lot driving lane).)

approximately 5 minutes of that time). (Tr. 2725–2733, 3094–3101, 3193–3194, 3200–3203, 3255–3257; Jt. Exhs. 173, 290(a)–(f) (showing protesters walking away from the store and through the parking lot towards the grassy area); R. Exh. 242; see also FOF, Section II(F)(5); GC Exh. 471–6 (noting that Bowers was not scheduled to work on November 16); Tr. 3266–3267 (same).)

At the direction of Walmart home office official Jaime Durand, on November 17–19, 2012, shift manager LaJuan Stewart met separately with associates Bell, Bowers, Harris and Peoples in her office. During those brief meetings, Stewart advised Bell, Bowers, Harris and Peoples that their conduct on November 16 was "under review." The associates subsequently resumed work without incident. (Tr. 2737–2739, 3101–3103, 3204, 3268–3273; see also Tr. 3103 (noting that Walmart ultimately did not discipline the associates based on their conduct at the November 16 strike/protest); FOF, Section II(H) (same).)

2. Complaint allegation and applicable legal standard

The General Counsel alleges that Walmart violated Section 8(a)(1) of the Act when, from November 17–19, 2012, Walmart threatened and coerced associates at store 471 by telling them that their strike and picketing activities were under review. (GC Exh. 1(bb), par. 4(A)(1)–(3).)

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB 848, 861 (2014) (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

3. Analysis

The Board has recognized that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct. See *Fresenius USA Mfg., Inc.*, 362 NLRB 1065, 1065 (2015) (discussing an investigation of alleged employee harassment); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528 (2007) (interrogation of employee was lawful where it occurred as part of a legitimate investigation into whether the employee engaged in misconduct); *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) (noting that the employer's initial investigation of harassment charges was permissible). That basic premise is understandable, since the alleged employee misconduct may not implicate the employee's Section 7 rights. Moreover, even if the alleged misconduct does relate to the accused employee's Section 7 rights, Board law establishes that an employer nonetheless may discipline or discharge an employee if the employee engages in conduct that could have qualified as protected activity but involved misconduct that was sufficiently egregious to remove the employee's activities from the Act's protection. See *Stanford Hotel*, 344 NLRB 558 (2005) (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)). In light of those possibilities, it makes sense to afford employers some leeway to conduct an initial investigation and make an informed decision about whether the employee's alleged misconduct warrants disciplinary or other action, taking into account the employee's right to engage in Section 7 activity and other factors. On the other hand, the employer's right to investigate is not unlimited. Where it is apparent from an initial investigation that the employee engaged in activity that is protected by the Act, the employer may not disregard that fact and forge ahead with the investigation as a precursor to possible discipline. See *Consolidated Diesel Co.*, 350 NLRB at 1020 (finding that an employer's initial investigation of alleged employee misconduct while distributing union literature was permissible, but once that initial investigation showed that the alleged misconduct was protected by the Act, it was unlawful for the employer to continue the investigation before a committee that had the power to impose discipline).

Based on the guidance drawn from the Board's case law, I find that Walmart did not violate the Act when it informed Bell, Bowers, Harris and Peoples that their November 2012 strike and picketing activities were "under review." Although there is no evidence that Walmart began its review in response to a specific complaint that the associates engaged in misconduct while on strike, the November 16, 2012 strike was one of the first strikes that Walmart encountered, and involved a brief disagreement about whether the protesters could engage in their activities on Walmart's property. Given the unfamiliar circumstances, it was reasonable for Walmart to make an initial assessment of how it should respond to the associates' activities, and Walmart did not violate the Act by notifying the associates that it was conducting such an assessment. Furthermore, Walmart did not suggest in any way that its review would lead to adverse consequences for the associates. Instead, Walmart simply notified associates of the review. I do not find that Walmart's decision to notify associates of its review was the type of statement that had a reasonable tendency to interfere with, restrain or coerce associates in their union or protected activities. Accordingly, I recommend that the allegations in paragraph 4(A)(1)–(3) of the complaint be dismissed.[50]

[50] Having ruled that Walmart did not violate the Act because Stewart's statement to associates did not have a reasonable tendency to interfere with, restrain or coerce associates in their union or protected activities, I need not address Walmart's alternative argument that Stewart's statement was permissible because it related to certain picketing activity that is not protected by the Act. See Walmart Posttrial Br. at 142–148 (asserting that Stewart's statement referred to unprotected picketing that blocked access to Walmart's facility and/or was confrontational and occurred on Walmart's private property).

B. November 2012 Media Broadcasts of Excerpts from Interviews of Walmart Official

1. Additional findings of fact

a. The NBC interview and news segment

On November 16, 2012, Walmart vice president of media relations David Tovar conducted an interview with a representative of the NBC[51] television network. During that interview, Tovar made the following statements about Black Friday and how Walmart might respond to Black Friday strikes (the interview questions are not available because the video recording does not include the interviewer's voice):

> [W]e think our workers are getting some really bad advice from the unions because while they do have rights and we respect those rights, you know, there are some actions that we will take if people don't follow our company policies. Just like if you didn't show up for work one day, I think your bosses would want to have a conversation with you about why. Now, of course, if you have an excused absence, if you're sick or something like that, of course we understand that. But that's not what's going on here.
>
> . . .
>
> We want to listen to them and we want to hear whatever their concerns are, but, you know, not with a union representative there. They've been to our home offices. We want to sit down with them and listen to them but they don't want to do that. You know, every circumstance is going to be different on Black Friday and we're going to take those on a case-by-case basis.

(Jt. Exh. 1318(a)–(b); see also Tr. 5108.)

On November 20, 2012, NBC broadcast its news segment about Walmart and the Black Friday 2012 strikes and protests. As part of the NBC news segment, NBC broadcast the following excerpt from Tovar's NBC interview:

> [W]e think our workers are getting some really bad advice from the unions because while they do have rights and we respect those rights, you know, there are some actions that we will take if people don't follow our company policies.

(GC Exh. 44 (beginning at the 1:31 minute mark of the video).) Associate Colby Harris saw the NBC news segment that included Tovar's excerpted statement, both when it originally aired and when the clip went "viral" on Facebook. (Tr. 2746–2747.) There is no evidence that Walmart had any control over how NBC excerpted or used Tovar's original interview.

b. The CBS interview and news segment

On November 19, 2012, Tovar conducted an interview with a representative of the CBS television network. In that interview, Tovar made the following statements about Black Friday and how Walmart might respond to Black Friday strikes (once again, the interview questions are not available because the video recording does not include the interviewer's voice):

> [T]his is a big week for retailers and you know some have said it's called the Super Bowl of retail. We're really excited about Black Friday. We're going to have a great event in our stores. And we're ready to serve our customers.
>
> . . .
>
> Yeah, I think this is just another union publicity stunt and the numbers that they're talking about are grossly exaggerated. We think that the super majority of our 1.3 million associates in the United States are going to be working on Black Friday and they are excited to serve our customers. We don't expect any impact whatsoever from any of these union tactics.
>
> . . .
>
> [W]e have strict policies that prohibit retaliation in any way and if any associates have any concerns about things like that, we want to hear about them so we can look into them and take appropriate action. But look, if associates are scheduled to work on Black Friday, we expect them to show up and to do their job. And if they don't, depending on the circumstances, there could be consequences.
>
> . . .
>
> It's going to depend on each individual circumstance like I said. We don't think anything is going to impact our Black Friday sales or anything like that. We're prepared to have the best Black Friday we've ever had. We think there may be a few stores where there may be some actions orchestrated by the unions and at those stores we'll take those on a case-by-case basis and handle them depending on the actions.

(Jt. Exh. 1319(a)–(b); see also Tr. 5108.)

On November 19, CBS broadcast a news segment about Walmart and the Black Friday 2012 strikes and protests. As part of its new segment, CBS broadcast the following excerpt from Tovar's CBS interview:

> I think this is just another union publicity stunt and the numbers that they're talking about are grossly exaggerated.
>
> . . .
>
> [I]f associates are scheduled to work on Black Friday, we expect them to show up and to do their job. And if they don't, depending on the circumstances, there could be consequences.

(GC Exh. 43 (beginning at the 1:30 minute mark of the video).) Associate Dan Hindman and five coworkers saw the CBS news segment when (or the day after) the segment aired, and associate Colby Harris saw the CBS news segment when it was posted on Facebook shortly after the original broadcast. (Tr. 2746–2747, 5027–5029.)

2. Complaint allegation and applicable legal standard

The General Counsel alleges that Walmart violated Section 8(a)(1) of the Act by, on November 19 and 20, 2012, threatening associates (through Tovar's televised remarks) with unspecified reprisals if they engaged in concerted activities and/or engaged

[51] Tovar actually conducted his interview with CNBC, but NBC broadcast the news segment. For the sake of clarity, I use the term "NBC" to refer to both CNBC and NBC.

in activities for mutual aid and protection. (GC Exh. 1(bb), par. 4(B)(1)–(2).)

An employer violates Section 8(a)(1) if it communicates to employees that they will jeopardize their job security, wages or other working conditions if they support the union. That principle holds true even if the employer does not specify the specific nature of the reprisal—the mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8(a)(1). *Farm Fresh Company, Target One, LLC*, 361 NLRB 848, 865 (2014).

3. Analysis

In prior decisions, the Board has indicated that an employer or union violates the Act if it makes threatening or coercive statements that are publicized by the media, particularly if the speaker had reason to know that the statements would be reported and that employees would hear (or read) the statements. *Graphic Arts International Union, Local 32B*, 250 NLRB 850, 861 (1980) (finding that the union violated Section 8(b)(1)(A) of the Act by making statements to the media that threatened former union members with fines if they crossed picket lines or returned to work during a strike), overruled in part on other grounds, *Typographical Union*, 270 NLRB 1386, 1386–1387 (1984); *TRW-United, Greenfield Division*, 245 NLRB 1135, 1135 fn. 1, 1145 (1979) (finding that the employer's statement, made in a television interview that employees heard on the night before a representation election, was coercive and objectionable because the statement gave the false impression that the union was responsible for two plant closings); see also *Monroe Auto Equipment Co.*, 159 NLRB 613, 614 (1966) (finding that an employer's press release that was read by a local radio station did not violate the Act because the press release "was in the permissible area of fair comment"), enfd. 392 F.2d 559 (5th Cir. 1968), cert. denied, 393 US 934 (1968).

In this case, there is no dispute that Walmart, through Tovar, made the statements that NBC and CBS included in their news segments. There is also no dispute that Walmart associates heard the portions of Tovar's remarks in the news segments. Walmart maintains, however, that by publishing only excerpts of Tovar's remarks, NBC and CBS omitted important context that has some bearing on whether Tovar's complete remarks had a reasonable tendency to deter associates from engaging in protected activity.

I find that Walmart's argument on this issue has merit concerning both the NBC and CBS news segments. In his extended remarks to both NBC and CBS, Tovar explained that associates could face consequences for missing work but emphasized that Walmart would evaluate those issues on a case-by-case basis and based on the relevant circumstances. Further, in his CBS interview, Tovar added that Walmart does not tolerate retaliation against associates who engage in protected activity. Because the NBC and CBS news segments omitted those portions of Tovar's remarks, the news segments gave a potentially misleading impression of how Walmart planned to respond to the anticipated Black Friday strikes. Therefore, this is not a case where the news reports fully conveyed the meaning and context of Tovar's remarks.[52] And, since Walmart did not exercise any control over which portions of Tovar's remarks that NBC and CBS chose to include in their news segments, I do not find that Walmart is liable for any misunderstandings of Walmart's position that flow from the editing decisions made by NBC and CBS. Cf. *U.S. Electrical Motors*, 261 NLRB 1343, 1344 (1982) (employer not liable under the Act for statements in a newspaper editorial and article that were not based on any remarks made by the employer, and the evidence did not show that the newspaper was acting as the employer's agent), enfd. 722 F.2d 315 (6th Cir. 1983), cert. denied 467 US 1216 (1984); *Raytheon Co.*, 179 NLRB 678, 678–679 (1969) (same, regarding statements made in a radio broadcast that was based on information obtained from non-company sources). Accordingly, I recommend that the allegations in paragraph 4(B)(1)–(2) of the complaint be dismissed.[53]

C. November 2012 Warning that Associates Who Went on Strike Would Be Fired

1. Additional findings of fact

From July 2011 to May 2013, Josue Mata worked as an overnight maintenance associate in Walmart store 949, located in Wheatland, Texas. In December 2011, Mata became a member of OUR Walmart, and remained a member throughout his employment at Walmart. (Tr. 2972, 2976, 2978.)

On October 9, 2012, Mata joined other OUR Walmart members in going on strike for 2 or 3 days in connection with Walmart's annual financial analysts' meeting. (Tr. 2979–2983; Jt. Exh. 94(a) (tab 14); see also FOF, Section II(F)(4).) When Mata returned to work after the strike, he asked store manager Colin Warren if he (Warren) would be willing to discuss and try to resolve some of the issues in the store. Mata added that if they did not resolve the issues in the store, then Mata would go on strike on Black Friday 2012. Warren promised that he and Mata would talk about the issues in the store and told Mata that he was welcome to return to work. (Tr. 2983–2984, 3010.)

On or about November 19, 2012, Mata was in the store's maintenance supply closet getting ready for his shift when assistant manager Nick Yokum passed by and asked Mata to walk

[52] In this connection, I note that when viewed from an objective standard, Tovar's complete remarks to NBC and CBS (which, based on the evidentiary record, were not communicated to associates) do not violate Sec. 8(a)(1) of the Act. Since Tovar's complete remarks make it clear that Walmart planned to evaluate any strike-related absences on a case-by-case basis based on the attendant circumstances, his complete remarks do not have a reasonable tendency to deter associates from engaging in protected activity. Cf. *Pennsylvania American Water Co.*, 362 NLRB 123 (2015), adopting 359 NLRB 1286, 1297 (2013) (employer did not violate the Act when it warned employees that if they "repeatedly refuse to cross picket lines manned by Local 537 members, such refusal may constitute an intermittent work stoppage").

[53] In its posttrial brief, Walmart renewed its argument that the NBC and CBS news segments with excerpts of Tovar's interviews were not admissible. See Walmart's Posttrial Br. at 148–158 (arguing that the video clips were not admissible on various grounds, including authenticity, probative value, and Walmart's rights under the First Amendment to the U.S. Constitution and Sec. 8(c) of the Act). I stand by my decision to admit the news segments and Tovar's full interviews into evidence (see Tr. 3380–3381), and only add that Walmart's objections go to the weight of the evidence, and not to admissibility. As noted above, I agree that some of Walmart's objections to the weight of the evidence have merit and warrant dismissing the allegations in the complaint concerning Tovar's interviews.

with him. Mata agreed, and as they walked, Yokum told Mata that he (Yokum) had orders from Walmart's corporate office that whoever was going to go on strike for Black Friday was going to be fired. Mata responded that he was not afraid, and that he would go on strike anyway. No one else was present for this conversation.[54] (Tr. 2985–2987, 3005, 3007–3008.)

2. Complaint allegation and applicable legal standard

The General Counsel alleges that Walmart violated Section 8(a)(1) of the Act when, on or about November 19, 2012, it (through Yokum) threatened and coerced associates by stating that associates who went on strike would be fired. (GC Exh. 1(bb), par. 4(D).)

An employer violates Section 8(a)(1) if it communicates to employees that they will jeopardize their job security, wages or other working conditions if they support the union. That principle holds true even if the employer does not specify the specific nature of the reprisal—the mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8(a)(1). *Farm Fresh Company, Target One, LLC*, 361 NLRB 848, slip op. at 18.

3. Analysis

Based on Mata's credible and unrebutted testimony, I find that Walmart violated Section 8(a)(1) of the Act when Yokum told Mata that associates who went on strike for Black Friday would be fired. Although Mata told Yokum that he was not afraid, Mata's subjective reaction does not resolve the question of whether Yokum's statement had a reasonable tendency to coerce associates in the exercise of their Section 7 rights. I find that when viewed from an objective perspective, Yokum's warning that associates would be terminated if they went on strike for Black Friday had a reasonable tendency to chill associates from exercising their Section 7 rights, and thus ran afoul of Section 8(a)(1) of the Act. Furthermore, contrary to Walmart's contention (see Walmart's Posttrial Br. at 165–166), I do not agree that Yokum's unlawful statement was an isolated incident that was de minimis. Yokum's unlawful statement was a warning shot that had a reasonable tendency to deter associates from engaging in protected activities and occurred in the context of an ongoing conflict between Walmart and OUR Walmart in which Walmart committed additional unfair labor practices discussed in this decision.

D. February 2013 Talking Points about Associates Participating in Future "Intermittent Work Stoppages"

1. Additional findings of fact

As previously noted, in February 2013, Walmart managers read a prepared set of talking points to associates who participated in the October 2012 and/or November 2012 strikes coordinated by OUR Walmart. The talking points stated, in pertinent part:

> 3. You may remember that the United Food and Commercial Workers union and its subsidiary OUR Walmart orchestrated a series of hit-and-run work stoppages last October and November.
>
> . . .
>
> 6. The Company believes that those union-orchestrated hit-and-run work stoppages are not protected by federal labor law.
>
> . . .
>
> 11. [T]he Company has decided that it will not apply the attendance policy to your work absence(s) [in October and/or November 2012] because of the time it took to collect and analyze all this information from across the country.
>
> 12. But it is very important for you to understand that the Company does not agree that these hit-and-run work stoppages are protected, and now that it has done the legal thinking on the subject, it will not excuse them in the future.
>
> 13. Should you participate in further union-orchestrated intermittent work stoppages that are part of a common plan or design to disrupt and confuse the Company's business operations, you should expect that the Company will treat any such absence as it would any other unexcused absence.
>
> 14. Having said that, let me emphasize that the Company respects your right to support a union and to engage in other protected, concerted activity. It also respects your right to not engage in such activity.
>
> 15. But the Company does not believe that these union-orchestrated hit-and-run work stoppages are protected activity.
>
> 16. Please remember that you can use the Open Door policy at any time to address questions, concerns, and ideas. I cannot guarantee you that you will get exactly what you want, but I can guarantee that you will get a thoughtful, well-researched, and timely response.

(Jt. Exh. 6(a) (including instructions for reading the talking points, and responses that managers should give to certain questions that associates might ask after hearing the talking points); see also FOF, Section II(H) (citing Tr. 1219–1223, 1374–1375, 1491–1493, 1534–1536, 2762–2764, 2883–2884, 2907, 2937–2940, 2966–2967, 3109–3111, 3143, 3214–3216, 3290–3294, 3299–3309, 3473–3478, 3521, 4133, 5242–5247, 5769–5772, 5775, 5825–5832, 6004–6008, 6027, 6048–6050; GC Exhs. 49, 57, 128 (regarding associates Jose Herrera, Darius Poston and Carlton Smith, who are referenced in Jt. Exh. 1328 (par. I)), 471–7, 5781–1; Jt. Exhs. 6(b), 144, 180, 193, 217, 307, 447, 975, 993, 1328 (pars. I, VII(13)); R. Exh. 272 (pp. 1, 9, 12, 16, 22).)[55]

[54] Mata provided the only testimony about his conversation with Yokum. Yokum's employment with Walmart ended in October 2013, and Walmart's counsel represented that their efforts to locate Yokum and call him as a witness were unsuccessful. (R. Exh. 248; Tr. 4184–4185.)

[55] T he evidentiary record establishes that Walmart managers read the talking points at the following eleven stores: Fremont, CA (store 2989); Paramount, CA (store 2110); Placerville, CA (store 2418); Richmond, CA (store 3455); Chicago, IL (store 5781); Evergreen Park, IL (store 5485); Glenwood, IL (store 5404); Laurel, MD (store 1985); Lancaster, TX (store 471); Federal Way, WA (store 2571); and Port Angeles, WA (store 2196). (Tr. 1218–1220, 1374, 1491–1492, 2762–2763, 2907, 2937–2940, 3109–3111, 3214–3216, 3472–3477, 4133, 5769–5771, 5826, 6004–6008, 6027; Jt. Exh. 1328 (pars. I, VII(13)); R. Exh. 272 (par. I(C)).)

2. Complaint allegation and applicable legal standard

The General Counsel alleges that Walmart violated Section 8(a)(1) of the Act by, in or about February 2013, reading the February 2013 talking points to associates at eleven stores, and thereby announcing a policy and interfering with associates' rights to strike. (GC Exh. 1(bb), par. 4(E) (identifying Walmart store numbers 471, 1985, 2110, 2418, 2571, 2989, 3455, 5404, 5485 and 5781 as places where Walmart managers read the February 2013 talking points); see also Tr. 3701 (verbal amendment to the complaint, adding store 2196 to paragraph 4(E) of the complaint).)

The Board has articulated the following standard that applies when it is alleged that an employer's work rule violates Section 8(a)(1):

> If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

Hills & Dales General Hospital, 360 NLRB 611, 611, 616 (2014) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004)). As with all alleged Section 8(a)(1) violations, the judge's task is to "determine how a reasonable employee would interpret the action or statement of her employer . . . , and such a determination appropriately takes account of the surrounding circumstances." *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011).

3. Analysis

As a general matter, an employer in the midst of a union organizing campaign (or a worker empowerment campaign, as the Making Change at Walmart campaign might be characterized) permissibly may respond with its own legitimate campaign propaganda, as long as the campaign propaganda is not linked to comments that cross the line set by Section 8(a)(1) and become coercive (from the objective standpoint of the employees, over whom the employer has a measure of economic power). See *Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 18 (collecting cases); see also Section 8(c) of the Act (stating that the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . , if such expression contains no threat of reprisal or force or promise of benefit"). Further, under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), an employer may make lawful predictions of the effects of unionization if the predictions are based on objective facts and address consequences beyond an employer's control. *Farm Fresh Company, Target One, LLC*, 361 NLRB 848, 865 (citing *DHL Express*, 355 NLRB 1399, 1400 (2010)).

With those basic premises stated, the question presented here is whether Walmart, through its February 2013 talking points, crossed the line between permissible propaganda and coercive statements that violate Section 8(a)(1). Although the question is a close one, I find that Walmart did cross the line with its February 2013 talking points, because Walmart associates would reasonably construe the language of the talking points as prohibiting protected Section 7 activity.

The administrative law judge's analysis in *Pennsylvania American Water Co.*, 359 NLRB 1286 (2013), adopted in 362 NLRB 123 (2015), is instructive. In *Pennsylvania American Water Co.*, the employer sent a letter to the union to warn that it reserved the right to take disciplinary action against employees who refused to cross union picket lines. In connection with that warning, the employer asserted, in pertinent part: "[I]f Local 357 employees repeatedly refuse to cross picket lines manned by Local 357 members, such refusal may constitute an intermittent work stoppage." 359 NLRB 246, slip op. at 5, 12. The administrative law judge did not find that aspect of the employer's letter to be unlawful, because the employer's statement about intermittent work stoppages was "an accurate statement, one that the union might consider."[56] Id. at 12.

In my assessment, the equivocal language that the employer used about intermittent work stoppages in *Pennsylvania American Water Co.* is what made that aspect of the employer's warning lawful. Specifically, the employer in *Pennsylvania American Water Co.* merely stated that employees who repeatedly refused to cross picket lines and report for work ran a risk that those activities might be deemed unprotected, intermittent work stoppages. By contrast, Walmart did not use equivocal language in its February 2013 talking points. Instead, Walmart stated unequivocally that it believed that the October and November 2012 strikes were unprotected intermittent work stoppages, and added that it would not excuse absences for such activity in the future (and instead would treat the absences like any other unexcused absence).[57] A reasonable associate confronted with that warning would understandably construe the February talking points as prohibiting future strikes associated with the Making Change at Walmart campaign, irrespective of whether those strikes could accurately be characterized as unprotected intermittent work stoppages or (alternatively) protected strikes or work stoppages. Accordingly, I find that through the February 2013 talking points, Walmart violated Section 8(a)(1) of the Act by announcing an unlawful work rule/policy that could reasonably be construed as prohibiting Section 7 activity.

[56] No exceptions were taken from the administrative law judge's ruling on this issue. *Pennsylvania American Water Co.*, 359 NLRB 1286, 1286 fn. 2.

[57] In this connection, I note that Walmart managers also found the February 2013 talking points to be unequivocal. For example, when associate Joeray Peoples heard the talking points and asked if his absence would be approved if he were to call in to strike, store manager Bobby Delicino (store 471) responded "no," with no further explanation noted. (GC Exh. 471–7, p. 12.)

II. DISCIPLINE AND DISCHARGE ALLEGATIONS—ANALYSIS OF LEGAL ISSUES

A. Was the May/June 2013 "Ride for Respect" a Strike Protected by the Act?

For most of the claims in this case, the central question is whether Walmart violated Section 8(a)(1) of the Act when it disciplined or terminated associates for missing work shifts while they were on strike during the Ride for Respect. The answer to that question in large part turns on whether the Ride for Respect was protected by the Act (as the General Counsel and the Charging Party contend), or instead was not protected by the Act because the Ride for Respect was an intermittent work stoppage that was part of a UFCW-orchestrated plan to pressure Walmart to change its workplace policies and conditions (as Walmart contends). Compare *Robertson Industries*, 216 NLRB 361, 361–363 (1975) (finding that it was unlawful for the employer to discharge employees because they engaged in a protected strike), enfd. 560 F.2d 396 (9th Cir. 1976) with *National Steel & Shipbuilding Co.*, 324 NLRB 499, 523–524 (1997) (explaining that if an employee participates in an unprotected work stoppage, the employer may discipline the employee for any misconduct associated with the work stoppage, as long as the discipline is consistent with the employer's established policies and disciplinary practices); see also *Swope Ridge Geriatric Center*, 350 NLRB 64, 68 & fn. 8 (2007) (explaining that the employer did not violate the Act by issuing warnings to employees who did not comply with the employer's 2-hour call-in policy before missing work for an unprotected strike, but noting that the warnings would have been unlawful if the strike was protected by the Act). Walmart bears the burden of showing that the strikes are unprotected. *Swope Ridge Geriatric Center*, 350 NLRB at 64 fn. 3.

To establish which category best fits the Ride for Respect, a brief review of the applicable case law is warranted and is set forth below.

1. The protected strike or work stoppage

It is well established that, in general, the National Labor Relations Act protects employees' right to go on strike. Protected strikes may include "conventional" strikes that a labor organization calls to: exert economic pressure on an employer regarding collective-bargaining demands (an economic strike); and/or protest alleged unfair labor practices that an employer has committed (an unfair labor practice strike).[58] *National Steel & Shipbuilding Co.*, 324 NLRB at 509. In addition, protected strikes may include work stoppages that employees organize by themselves (i.e., without assistance from a union) to bring attention to their objections to certain terms and conditions of employment. Id. For example, in *NLRB v. Washington Aluminum Co.*, a group of seven unrepresented machine shop employees decided to leave work when the company failed to address their concerns about working in unusually cold weather. The Supreme Court recognized that the employees had the right to act together as best they could to better their working conditions (particularly where they did not have a bargaining representative to present their grievances to their employer) and could not be terminated for engaging in concerted activities that are protected by the Act. 370 U.S. 9, 14–17 (1962).

2. The (unprotected) intermittent work stoppage

In contrast to protected strikes, the Board has held that intermittent work stoppages are not protected by the Act because they seek to create a "condition that would be neither strike nor work."[59] *Pacific Telephone and Telegraph Co.*, 107 NLRB 1547, 1549 (1954). Consistent with that basic premise, when determining whether strikes or work stoppages are unprotected intermittent work stoppages, the Board evaluates whether "the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer."[60] *Polytech, Inc.*, 195 NLRB 695, 696 (1972). The following factors are relevant to that inquiry:

- Whether the employees engaged in a pattern of recurring work stoppages, and/or demonstrated their intent to engage in future recurring work stoppages (see *Swope Ridge Geriatric Center*, 350 NLRB at 64 fn. 3, 68; *New Fairview Hall Convalescent Home*, 206 NLRB 688, 747 (1973) (explaining that "it is only when employees adopt a continuing strategy of work stoppages . . . that their activity may become 'indefensible' and lose its protected status"));
- Whether the work stoppages were short in duration (i.e., the work stoppages last for portions of days, or one or two days), such that employees minimized the

[58] Workers who engage in unfair labor practices strikes have more protection against being permanently replaced while on strike than do workers who engage in economic strikes. *See Spurlino Materials, LLC*, 357 NLRB 1510, 1519 (2011) (explaining that unfair labor practice strikers are entitled to immediate reinstatement to their former positions even if replacements have been hired, while economic strikers who have been replaced are not entitled to immediate reinstatement), enfd. 805 F.3d 1131 (D.C. Cir. 2015). In this case, the distinction between economic and unfair labor practice strikers is not directly at issue because Walmart did not replace any associates while they were on strike during the Ride for Respect, and generally allowed all Ride for Respect strikers to return to work before disciplining or terminating them.

[59] Partial strikes, where an employee reports for work but refuses to perform certain mandatory aspects of his or her job, are also not protected by the Act. Like intermittent work stoppages, partial strikes are unprotected because they bring about a condition that is "neither strike nor work." *National Steel & Shipbuilding Co.*, 324 NLRB at 509; *Audubon Health Care Center*, 268 NLRB 135, 136 (1983) ("A partial strike, in which employees refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises is a method of striking which is not condoned by the Board.").

[60] In some cases, the Board has referred to unprotected intermittent work stoppages as "hit and run" strikes engaged in as part of a planned strategy intended to "harass the company into a state of confusion." See, e.g., *United States Service Industries*, 315 NLRB 285, 285 (1994). In my view, that phrasing is merely an alternate description of an unprotected intermittent work stoppage and does not articulate a different legal standard. See *Pacific Telephone & Telegraph Co.*, 107 NLRB at 1548 & fn. 3 (noting that the union described its strategy of multiple work stoppages as a "hit and run" tactic that would succeed because it enabled workers to maintain their financial take home pay while "harassing the company into a state of confusion").

risks associated with being out on strike for longer periods of time (see *Swope Ridge Geriatric Center*, 350 NLRB at 65 (1–day strikes used); *Honolulu Rapid Transit Co., Limited*, 110 NLRB 1806, 1807–1811 (1954) (to minimize their economic losses, employees chose to work for 5 days each week, and strike only on weekends));[61]

- Whether the work stoppages occurred over a short period of time (i.e., multiple work stoppages that occurred in the span of a few weeks) (see *Swope Ridge Geriatric Center*, 350 NLRB at 65 (union announced three 1–day strikes over a span of six weeks, and held two of those strikes); *New Fairview Hall Convalescent Home*, 206 NLRB at 747 (citing *NLRB v. Blades Manufacturing Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965) for the proposition that the repetition of intermittent 1-day walkouts within a short span of time (three walkouts in less than two weeks) rendered the walkouts unprotected));[62]
- Whether the work stoppages arose in response to separate and distinct concerns that employees had about the terms and conditions of their employment (see *Westpac Electric*, 321 NLRB 1322, 1359–1360 (1996) (finding that three strikes held between August 30 and September 16 were not intermittent work stoppages, in part because "each strike had its distinct origins and motivating antecedent features"); *Robertson Industries*, 216 NLRB at 362 (finding that two strikes were not intermittent work stoppages, in part because the strikes "involved different situations and different people");[63] and
- Whether the work stoppages arose from a union strategy to exert additional economic pressure on the employer during collective-bargaining negotiations (see *Swope Ridge Geriatric Center*, 350 NLRB at 64 fn. 3, 68; *Honolulu Rapid Transit Co., Limited*, 110 NLRB at 1807–1811).

Although there is ample legal support for this list of factors, I hasten to add that each factor comes with a host of exceptions and caveats. See *National Steel & Shipbuilding Co.*, 324 NLRB at 509–510 (noting that "the precise location of the line between 'protected' concerted work stoppages and unprotected stoppages, no matter how 'concerted,' remains a notoriously elusive and difficult one to discern and divine," and that "'there is more than enough scripture upon the subject to enable any devil to cite some of it for his purpose'").

First, the Board has resisted finding a pattern of recurrent, intermittent work stoppages where the work stoppages occur over an indefinite period of time, involve different employees and/or involve different concerns. In *Robertson Industries*, the Board explained that while there was no "magic number as to how many work stoppages must be reached before we can say that they are of a recurring nature," two 1–day work stoppages (on November 9, 1973 and February 1, 1974) did not establish a pattern of intermittent work stoppages that would deprive employees of their Section 7 rights. In addition, after noting that the two work stoppages involved different employees and different issues, the Board explained that it would not be appropriate to preclude employees from engaging in "more than one instance of concerted protected activity during an indefinite period of time regardless of the variety and number of conditions or occurrences protested and the identity of the individuals involved." 216 NLRB 361, 361–362 (1975); *United States Service Industries*, 315 NLRB at 285 (noting that "the mere fact that some employees may have struck more than once does not render their conduct intermittent striking").

Second, although many cases discuss the impact that intermittent strikes have on company operations, the Board has indicated that the impact of such strikes is not probative of whether the strikes are protected by the Act. "It is axiomatic that the very purpose of a strike is to cause disruption, both operationally and economically, to an employer's business operations" in order to

[61] Walmart asserts that it is not the length of the work stoppages that matters, but rather whether the work stoppages are pre-planned for a self-selected duration (e.g., strikes planned for every weekend, or one day each week). (Walmart Posttrial Br. at 132–133.) I disagree. The length of the work stoppages is relevant because employees who go on strike for brief periods of time minimize the risks of being out on strike for longer periods, and thus come closer to creating a condition that is neither strike nor work. Conversely, employees who go on strike for longer periods of time take on more of the risks associated with being on strike.

[62] Walmart contends that the strikes do not have to "occur in close proximity" for the intermittent work stoppage defense to apply. (Walmart's Posttrial Br. at 131–132.) While I agree that there certainly is no fixed rule about how close in time the work stoppages must be grouped to qualify as intermittent work stoppages, the extent that the work stoppages are grouped together is certainly relevant, because it is the grouping of work stoppages (along with their recurring nature) that makes them intermittent, and thus closer to the line of creating a condition that is neither strike nor work.

[63] In connection with this factor, Walmart contends that when employees make an unconditional offer to return to work after a strike, the employees make an implied promise that they will not go on strike again based on the same issues. (Walmart Posttrial Br. at 90–95.) I disagree. Employees who choose to end a strike and return to work may still advocate about the issues that led them to strike in the first instance and may also choose to go on strike in the future to "continu[e] their earlier efforts to have their work-related problems resolved." *Robertson Industries*, 216 NLRB at 362; see also *Texas Gas Corp.*, 136 NLRB 355, 364–365 (1962) (finding that the union made a sincere unconditional offer to return to work, even though the union representative acknowledged that employees might go on strike again if negotiations about employee concerns failed to produce an agreement). To be sure, employers may argue that the strikes are unprotected intermittent work stoppages, but it is by no means a foregone conclusion that the employer will prevail in that argument after all relevant factors have been considered. See, e.g., *United States Service Industries*, 315 NLRB at 289–291 (finding that two strikes about unjust working conditions were protected by the Act); *Chelsea Homes*, 298 NLRB 813, 831 (1990) (finding that two strikes were protected by the Act even if it could be said that the employees in each strike objected to anticipated lengthy overtime assignments), enfd. 962 F.2d 2 (2d Cir. 1992); *Crenlo, Division of GF Business Equipment, Inc.*, 215 NLRB 872, 878–879 (finding that two strikes about the amount of a wage increase were protected by the Act), enfd. in pertinent part, 529 F.2d 201 (8th Cir. 1975).

cause the employer to accede to the strikers' demands. Accordingly, it would make little sense to deem a strike unprotected simply because the strike was effective. *Swope Ridge Geriatric Center*, 350 NLRB at 67; see also *Atlantic Scaffolding Co.*, 356 NLRB 835, 837 (2011) (holding that the protected nature of the work stoppage in question was not vitiated by the effective timing of the work stoppage). And conversely, an unprotected intermittent work stoppage does not become protected simply because the employer made sufficient preparations to continue its business operations without the employees who went on strike. See *Pacific Telephone & Telegraph Co.*, 107 NLRB at 1549–1550 (explaining that "regardless of the success or failure of the Respondent in its efforts to defend against the intermittent and unpredictable strike and picket attacks, the inherent character of the method used sets this [hit-and-run] strike apart from the concept of protected union activity envisaged by the Act").[64]

And third, although the Board has indicated that the Act does not protect intermittent work stoppages that are part of a union's strategy to exert additional economic pressure on an employer during collective-bargaining negotiations, there must be evidence that such a strategy was in place (as opposed to merely evidence that the employees were represented by and/or consulted with a union). *United States Service Industries*, 315 NLRB at 285, 291. In *United States Service Industries*, employees represented by the Service Employees International Union (SEIU) held a 1–day strike (on May 30, 1990) at two worksites to protest their working conditions. After a series of union meetings and a strike vote, employees at four work sites (the two sites where the 1–day strike occurred, plus two new ones) held a 7–day strike from July 26 through August 2, 1990. Notwithstanding the union's involvement with the strikes (which included providing union t-shirts, buttons and picket signs to the employees for the 7–day strike, and having its organizing director notify the employer of the strikers' unconditional offer to return to work), the Board held that there was no evidence that the union had a strategy of using intermittent work stoppages to harass the employer during ongoing collective-bargaining negotiations. Id. at 285, 289–291; see also id. at 292 (noting that the union assisted employees at three different locations when they went on strike from October 30 to December 5, 1990); *Westpac Electric*, 321 NLRB at 1360–1361, 1368–1370, 1372 (although the strikers consulted with a union representative before going on three different strikes over an 18–day period, the evidentiary record did not show that the strikes were conducted in furtherance of a single, underlying plan or scheme by the unions or the strikers to use hit and run tactics intended to harass the company into a state of confusion).

By contrast, in *Swope Ridge Geriatric Center*, the Board did find that the work stoppages at issue were part of the union's bargaining strategy. 350 NLRB 64, 64 fn. 3, 68. Specifically, in *Swope Ridge*, the union and employer were negotiating a successor collective-bargaining agreement but could not reach an agreement on a wage increase. As a result of that disagreement, the union announced that employees would hold a 1–day strike on August 4 but canceled that strike (by letter dated August 2), ostensibly to "give the [employer] and its agents 'the opportunity to bargain in good faith and settle the CBA between both parties.'" When the disagreement about the wage increase persisted, employees held 1–day strikes on August 26 and September 13. Id. at 64 fn. 3, 65. Viewing the evidence as a whole, the Board agreed with the ALJ that the union arranged the intermittent work stoppages as part of its underlying bargaining strategy until the parties agreed on a contract. Because of that bargaining strategy, and because the evidence showed that the pattern of intermittent strikes would continue into the future, the Board agreed that the intermittent strikes were not protected by the Act, and agreed that the employer did not violate the Act when it issued warnings to employees for failing to comply with the employer's call-in policy for absences. Id. at 64 fn. 3, 68; see also *National Steel & Shipbuilding Co.*, 324 NLRB at 507–510 (explaining that after the employer implemented the terms of its last offer during contract negotiations, the unions adopted an "inside game" strategy that called for various activities designed to pressure the employer to make concessions at the bargaining table, including two mid-shift work stoppages that were part of the "inside game" strategy and were not protected by the Act); *Honolulu Rapid Transit Co., Ltd.*, 110 NLRB at 1807–1809, 1811 (finding that the union had a strategy of holding recurring strikes on weekends during negotiations for a new contract, and finding that those weekend strikes were not protected by the Act); *Pacific Telephone & Telegraph Co.*, 107 NLRB at 1547–1550 (finding that, during contract negotiations, the union used a strategy of holding a series of "hit and run" intermittent work stoppages that were not protected by the Act).

[64] Throughout the investigation and litigation of this case, Walmart has maintained that "Board law . . . does not require a showing of 'disruption' to establish [an] unprotected [intermittent work stoppage]." (GC Exh. 127(b) (p. 10) (Walmart's September 3, 2013 position statement); see also Walmart's posttrial Br. at 128–130.) Nevertheless, since the General Counsel and OUR Walmart maintained that Walmart could only establish its intermittent work stoppage defense if Walmart demonstrated that OUR Walmart's strikes had an adverse impact on store operations, Walmart presented impact evidence at trial. (See Tr. 6779–6780; see also, e.g., R. Exhs. 1 VID1 (video containing footage at 3:35 of a customer yelling in response to an OUR Walmart action inside a Walmart store), 309 (orders from state courts that granted Walmart injunctive relief against OUR Walmart and noted that certain OUR Walmart actions disrupted store operations).)

As indicated above, I agree that Walmart does not have to show that the strikes were disruptive or adversely impacted store operations as an element of its defense that the strikes were unprotected intermittent work stoppages. The General Counsel and OUR Walmart each conceded this point in their posttrial briefs. (See GC Posttrial Br. at 102 fn. 60; CP Posttrial Br. at 33.) For that reason, I decline Walmart's renewed request that I admit a video excerpt in which a customer offered her views on the impact of an OUR Walmart demonstration that she saw. (See Walmart's Posttrial Br. at 43.) The customer's statement is inadmissible hearsay and is also irrelevant since the customer's statement only provides evidence about the impact of the demonstration. (See Tr. 6716–6720 (discussing R. Exhs. ID16 and 2452 VID1).) The other evidence in the record that shows the impact of strikes (primarily photographs, video or testimony about OUR Walmart strikes or actions) remains admissible, however, if only to provide background about the nature of the strikes in question.

3. Was the Ride for Respect protected by the Act?

I now turn to perhaps the central question in this case, concerning whether the Ride for Respect was a protected strike, or rather was an unprotected, intermittent work stoppage. To analyze that question, I will consider the factors outlined above to evaluate whether the Ride for Respect has the customary characteristics of an unprotected, intermittent work stoppage.

In this case, it is fair to say that OUR Walmart members have engaged in a pattern of recurring strikes and have demonstrated their intent to engage in recurring strikes in the future. Indeed, in 2012–2013, OUR Walmart held multiple strikes in conjunction with the Making Change at Walmart campaign, including: a 1 day strike on October 4, 2012 (Pico Rivera strike); 1–3 day strikes on or about October 9–12, 2012 (strikes during Walmart's financial analysts' week); 1 day strikes on or about November 23, 2012 (Black Friday 2012 strikes); 7–10 day strikes in late May and early June 2013 (Ride for Respect strikes); and 1 day strikes in November 2013 (Black Friday 2013 strikes). OUR Walmart and the UFCW have stipulated that they intend to continue planning similar strikes in the future. (FOF, Section II(F)(3)–(5), J, L(2)–(3).)

As the list of 2012–2013 strikes indicates, many of OUR Walmart's strikes have been short in duration, enabling associates to limit the amount of time that they are away from work, and thereby avoid some of the costs of being out of work during a longer strike. The Ride for Respect strikes, however, were different, because associates who participated in those strikes typically were on strike for at least a full week. Ride for Respect strikers therefore took on more risk as strikers, since they forewent wages for a longer period of time and faced a higher risk of being replaced due to their extended absences from the workplace (putting aside the question of what protections against replacement the strikers might have had as ULP strikers versus economic strikers).

The Ride for Respect strike also stood apart from other OUR Walmart strikes in that the Ride for Respect strikes were not grouped with other strikes in a short period of time. As the evidentiary record shows, OUR Walmart's first round of strikes (in October and November 2012) was arguably grouped in a short period of time. After November 2012, however, OUR Walmart did not hold any additional strikes for approximately six months, until the discriminatees and certain other associates went on strike in connection with the Ride for Respect in late May 2013.[65] Furthermore, after the Ride for Respect, OUR Walmart did not hold any additional strikes until November 2013 (approximately 5 months after the Ride for Respect).

The evidentiary record does not show that the Ride for Respect strike arose from separate and distinct concerns that associates may have had about the terms and conditions of employment. Instead, the associates submitted strike letters and return to work letters that generally raised the same concerns that OUR Walmart set forth in the Declaration of Respect that it presented to Walmart in June 2011 (i.e., concerns about retaliation against associates who speak out about wages, healthcare benefits, and work schedules). The Ride for Respect and associated strikes therefore continued OUR Walmart's campaign to induce Walmart to make changes to its working conditions and workplace policies.

Finally, there is no evidence that OUR Walmart or the UFCW organized the Ride for Respect strikes (or any other strikes during the Making Change at Walmart Campaign) as a strategy to exert additional economic pressure on Walmart during collective-bargaining negotiations. It is certainly clear in the record that the UFCW provided extensive logistic, strategic and financial support to OUR Walmart and the Making Change at Walmart campaign. As UFCW officials have stated, the UFCW has an interest in encouraging Walmart to change its workplace policies because Walmart is the largest private employer in the United States, and thus acts as a trend setter for other retail employers concerning workplace wages and standards. (FOF, Section II(B), (C)(1)–(2).) It is also clear, however, that neither OUR Walmart nor the UFCW represent Walmart associates for purposes of collective bargaining. In fact, since January 2013, the UFCW and OUR Walmart have expressly disavowed having any intent to have Walmart recognize or bargain with UFCW or OUR Walmart as the representative of Walmart employees. (FOF, Section II(A)(1), (G).) Thus, although the UFCW and OUR Walmart supported the Ride for Respect, the evidentiary record does not show that the Ride for Respect strikes (or any other OUR Walmart strikes in 2012–2013) were part of a strategy to further contract demands during collective-bargaining negotiations. See Analysis Section II(A)(2) (discussing *United States Service Industries*, 315 NLRB at 285, 289–292, where a union supported brief strikes, but did not do so pursuant to a collective-bargaining strategy).

In light of the foregoing analysis, I find that the Ride for Respect strikes are protected by the Act. Although the Ride for Respect strikes were part of a recurring set of strikes that OUR Walmart coordinated to draw attention to an established list of concerns about Walmart's policies and working conditions (factors 1 and 4, above), the similarities to unprotected intermittent work stoppages end there. Specifically, the Ride for Respect strike was not a brief strike that enabled associates to minimize the risks of being on strike, nor was it scheduled close in time with a group of other strikes, such that the strikes could be viewed as intermittent (factors 2 and 3). In addition, the evidentiary record also does not show that OUR Walmart or the UFCW used the Ride for Respect strike or any other strike as a strategy to exert additional economic pressure on Walmart during collective-bargaining negotiations (factor 5). Considering all five factors, I find that the Ride for Respect strikes were materially different from strikes that the Board has identified as unprotected intermittent work stoppages. I therefore find that Walmart failed to prove that the Ride for Respect strikes were unprotected intermittent work stoppages, and I find that the Ride for Respect strikes are protected by the Act.

[65] Associates Colby Harris and Marc Bowers did go on strike from May 6–9, 2013, but they chose to go on that strike spontaneously after Harris took offense to remarks that a manager in his store made about OUR Walmart. (See Analysis, Sec. III(W), infra.)

B. Do Any of the Alleged Discriminatees Qualify as Statutory Supervisors?

1. Applicable legal standard

Individuals are statutory supervisors if (1) they hold the authority to engage in any one of the supervisory functions listed in Section 2(11) of the Act (i.e., the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust grievances of other employees); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. To exercise independent judgment, an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. A judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement. The party asserting supervisory status has the burden of establishing such status by a preponderance of the evidence. Conclusory evidence does not satisfy that burden. *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 888–889 (2014); see also *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687, 693 (2006).[66]

In this case, Walmart asserts that the following alleged discriminatees were supervisors under Section 2(11) of the Act during the relevant time period and thus are not covered as "employees" under the Act: Sara Gilbert; Cecelia Gurule; Michael McKeown; and John Smith.[67] Each of those individuals held the job title of "department manager" in his or her Walmart store during the relevant time period.

2. Findings of Fact—all department managers

a. Job description

In all Walmart stores, department managers are hourly associates who assist in operating one or more store departments. The job descriptions for department managers list a broad array of responsibilities, including "[s]upervis[ing] associates in the area of responsibility by assigning duties, communicating goals, providing feedback and followup, monitoring performance, teaching and supporting Company policies and procedures, ensuring compliance, and participating in the hiring, promotion, coaching, teaching and evaluation of associates." (See Jt. Exhs. 291, 337, 511, 739 (p. 2); see also Tr. 329–332, 3743–3745 (Gurule and McKeown agreeing that they performed most, if not all, of the job duties listed in the job description).)

b. Role in Walmart's hiring process

Regarding hiring, Walmart follows a three step process. At the first round of the process, typically an hourly manager (i.e., a zone merchandise supervisor, customer service manager or department manager) interviews the job applicant. The hourly manager asks the job applicant a set of predetermined questions, and then rates the applicant's responses on a five-level scale that ranges from "below expectations" to "role model." Based on the first round interview ratings, Walmart's computer system eliminates job applicants with low scores, and forwards the remaining applicants on for a second round interview with a salaried manager. Walmart does not ask any salaried managers to review first round interview ratings to determine if job applicants with low ratings appropriately have been eliminated. At the third round, either the store manager or shift manager decides whether to make a job offer to the applicant. There is no evidence that hourly managers who conduct first round interviews join in making the final hiring decision (or join in any other step of the application process). However, when making hiring decisions, the shift manager or store manager may consider the interview ratings from the applicant's first and second round interviews. (Tr. 325–328, 1591–1593, 1697–1699, 3404–3409, 3712–3713, 3742, 3795, 3797–3800, 3883–3886; see also Tr. 3405 (describing managers' interview ratings as "recommendations").)

c. Performance evaluations for department managers

Walmart evaluates the performance of its department managers on an annual basis by assigning ratings (ranging from "below expectations" to "role model") in various "competencies," including:

> **Planning and Improvement: Plan for and Improve Team Performance**
> Plans work based on business priorities and explains to others what is needed to get work done. Identifies and oversees the tasks needed to reach goals. Looks for and suggests ways to improve performance and results.
>
> **Talent: Provide Information and Feedback**
> Guides and teaches Associates on how to perform their work. Assigns tasks to Associates and provides the tools they need to carry them out. Gives clear, constructive feedback on performance to Associates and leaders. Recognizes Associates for their positive contributions. Shows concern for Associates and is available to meet with them. Looks for and follows up on developmental opportunities.

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[66] The Board has recognized that certain "secondary indicia" may support a finding of supervisory status if the evidentiary record shows that the alleged supervisor possesses at least one of the primary indicia of supervisory status set forth in Section 2(11) of the Act. *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 10 (2006); *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Secondary indicia of supervisory status include, but are not limited to, the individual's: designation as a supervisor; attendance at supervisory meetings; responsibility for a shift or phase of the employer's operation; authority to grant time off to other employees; responsibility for inspecting the work of others; responsibility for reporting rule infractions; receipt of privileges exclusive to members of management; and compensation at a rate higher than the employees supervised. The ratio of supervisors to employees is also a secondary indicator of supervisory status. See *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007); *Flexi-Van Service Center*, 228 NLRB 956, 960 (1977).

[67] At the beginning of trial, Walmart also alleged that Evelin Cruz was a supervisor during the relevant time period. (Tr. 10–12.) However, in its posttrial brief, Walmart did not argue that Cruz was a supervisor, and thus has abandoned that argument. (See Walmart Posttrial Br. at 73–78, 175–177 (identifying Gilbert, Gurule, McKeown, and Smith as alleged supervisors, but omitting Cruz).) In any event, I find that Cruz is not a supervisor under Section 2(11) of the Act for the same reasons that I set forth below as to Gilbert, Gurule, McKeown, and Smith.

(Jt. Exhs. 338, 515–516, 741–742; see also Tr. 321, 3745–3748, 3890, 4079.) There is no evidence that department managers suffer any specific adverse consequences to the terms and conditions of their employment if the associates in their departments do not perform well, or if they (the department managers) receive poor ratings on the competencies in their performance evaluations (including those noted above).[68] (Tr. 3711, 4795–4796, 4873.)

3. Findings of fact—Sara Gilbert's job duties

From approximately late 2012 to August 2013, Sara Gilbert worked in Walmart store 2571 in Federal Way, Washington as the department manager for the home lines department (i.e., bedding, housewares, furniture, Tupperware, paint and tools). On a typical day in that position, Gilbert would start by taking care of returns, and then would begin working on any notes or tasks assigned by the store manager, assistant manager or zone merchandise supervisor. Gilbert also would order and stock freight for the sales floor. Although three other associates were technically beneath Gilbert in the home lines department, Gilbert's responsibility for those associates was limited to: communicating the assignments that the store manager or assistant manager set forth for each associate; ensuring that the associates carried out those assignments; and, if necessary, notifying the assistant manager of any problems that the associates were having with their assignments. Gilbert did not have the authority to discipline, fire, promote, recall (from layoff), transfer or schedule the associates in her department. (Tr. 3451, 3787, 3789–3791, 3795–3797, 3887–3890, 4060, 4078–4079.)

Occasionally, Gilbert conducted first round interviews of Walmart job applicants when other managers were not available to do them. Gilbert conducted eleven such interviews in 2013 when she was a department manager and conducted four interviews in 2011 and two interviews in 2012 when she was a customer service manager.[69] (Tr. 3795, 3799–3800, 3882–3883; Jt. Exh. 293.)

4. Findings of fact—Cecelia Gurule's job duties

Since December 2012, Cecelia Gurule has worked as the department manager for the lawn and garden department in Walmart store 5434, located in San Leandro, California. On a typical day in that position, Gurule received a list of tasks from her manager, and worked on completing those tasks, along with her customary tasks of doing price changes, handling returns, keeping the department clean and organized, running the cash register, and watering the plants. Gurule might ask one of the six associates that works in her department to carry out tasks, but if a problem or disagreement arose (e.g., the associate did not comply with Gurule's request), the associate and/or Gurule turned to the assistant manager for guidance. (Tr. 299, 302–303, 318–322, 357–359, 366–369, 1599.)

As a department manager, Gurule interviewed approximately six job applicants in the first round of the interview process from approximately late 2012 to mid–2013. Gurule received her interview assignments sporadically, depending on which hourly managers were available. (Tr. 304, 324–328.)

5. Findings of fact—Michael McKeown's job duties

From approximately October 2012 to August 2013, Michael McKeown worked as the department manager for the foods department in Walmart store 2571, located in Federal Way, Washington. In that capacity, McKeown handled price changes, ordering, stocking, feature planning, setting up modular displays, returns, and freight. McKeown also assigned tasks to the two (and occasionally three) additional associates who worked in foods, with the assignments including routine tasks, as well as tasks that McKeown's supervisor identified for the day. Although McKeown made an effort to assign tasks to the associate who had the ability to complete the work, his assignment options were limited because on most shifts, only McKeown and perhaps one other associate were on duty. McKeown did not have the authority to hire, fire, recall (from layoff), promote, transfer or discipline associates, and did not have the authority to resolve associate grievances. (Tr. 3703, 3705–3706, 3709–3712, 3739, 4062, 4077–4078.)

On one or two occasions in 2012 and 2013, Walmart asked McKeown to interview a job applicant for the first round interview of the application process. (Tr. 3712–3713, 3742, 3785.)

6. Findings of fact—John Smith's job duties

During the relevant time period, John Smith worked in Federal Way, Washington store 2571 as the department manager for the automotive, fabrics and crafts departments. As department manager in those areas, Smith handled price changes and orders. In addition, each day, an assistant manager provided Smith with a list of tasks to complete, and Smith either completed the tasks himself, or delegated the task to one of the associates in his department. (Tr. 3504–3505, 3812, 4062, 4076–4077.) There is no evidence that Smith had the authority to hire, fire, recall (from layoff), promote, transfer or discipline associates, nor is there evidence that Smith had the authority to resolve associate grievances. Somewhat frequently (12 times in 2013, and 5 times in 2012), Smith did interview job applicants in the first round of the application process. (Jt. Exh. 513; R. Exh. 272; Tr. 3404–3409.)

7. Analysis of supervisory status

Of the 12 supervisory functions set forth in Section 2(11) of the Act, Walmart maintains that the four department managers discussed in this section held the authority to assign, hire and/or responsibly direct other associates. As described below, I do not find that Gilbert, Gurule, McKeown, or Smith held such authority, and thus I find that Gilbert, Gurule, McKeown and Smith are not supervisors within the meaning of Section 2(11) of the Act.[70]

[68] Although two witnesses (Gilbert and McKeown) testified that performance evaluations affect the amount of pay raises that they may receive (see Tr. 3746, 3889–3890), Walmart did not present any specific examples of department managers receiving adverse consequences if the associates in their departments did not perform their duties well.

[69] Gilbert explained that she conducted a higher number of first round interviews in 2013 because her store was understaffed. (Tr. 3799.)

[70] In analyzing whether the department managers are supervisors under Sec. 2(11), I have given little weight to the job descriptions that are in the evidentiary record. It is well established that conclusory evidence and evidence of mere "paper authority" does not establish that an individual is a statutory supervisor. *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, slip op. at 2 (discussing conclusory evidence); *Lucky Cab Co.*, 360 NLRB 271, 272 (2014) (discussing "paper authority").

a. Authority to assign

The Board has explained that the term "assign" refers to the "act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee." Notably, while assigning an employee to a certain department, shift or significant set of overall tasks would generally qualify as examples of the authority to assign under Section 2(11), ad hoc instructions that employees perform discrete tasks (e.g., telling an employee to stock bananas before stocking oranges) do not constitute examples of the authority to assign for purposes of Section 2(11). *Oakwood Healthcare*, 348 NLRB at 689; see also *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2156 (2011).

Walmart failed to show that the department managers have the authority to assign for purposes of Section 2(11). There is no evidence that department managers can designate associates to a place or time for their work. The evidentiary record also does not establish that department managers have the authority to assign significant overall duties to associates. To be sure, department managers may give instructions to the associates in their departments, but Walmart did not show that those instructions were anything beyond either ad hoc instructions to perform discrete tasks or instructions that the department managers were merely relaying from salaried managers. (See Analysis Section II(B)(3)–(6), supra.)

In that connection, I also find that Walmart failed to show that the department managers use independent judgment when making assignments. Instead, the evidentiary record shows that department managers essentially act as a conduit for instructions from higher level managers who create daily task lists for each department. Indeed, Walmart did not present any evidence that Gilbert, Gurule or Smith engaged in any analysis before passing along tasks from the list to associates in their departments. (See Analysis Section II(B)(3)–(4), (6), supra.) As for McKeown, while he did testify that he considers which associates would be best suited to complete the tasks set forth by salaried managers, McKeown's authority was limited to essentially deciding between whether to do the task himself, or delegate it to one of the two other associates who would be working in the department each day. Walmart did not develop the record regarding McKeown's judgment beyond those basic facts, thus leaving the impression (based on McKeown's testimony) that McKeown's judgment in making assignments was limited and straightforward. (See Analysis Section II(B)(5), supra.) Since independent judgment must involve "forming an opinion or evaluation by discerning and comparing data" and must involve a "degree of discretion that rises above 'routine or clerical,'" I find that Walmart fell short of demonstrating that any of the four department managers (including McKeown) exercised independent judgment when making assignments in their departments. See *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006); see also *Cook Inlet Tug & Barge, Inc.*, 362 NLRB 1153, 1153 (2015) (citing *Oakwood Healthcare, Inc.*, 348 NLRB at 693 and explaining that if there is only one obvious and self-evident choice, then the assignment is routine or clerical in nature and does not implicate independent judgment); *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, slip op. at 3–4 (declining to find that an alleged supervisor used independent judgment when reassigning work to cover absent employees because the union did not present evidence about the procedures the alleged supervisor used or the factors she considered when making those reassignments).

b. Authority to hire

Section 2(11) of the Act also identifies the authority to hire job applicants as one of the twelve established supervisory functions. The Board has held, however, that the authority to effectively recommend against hiring a job applicant also can establish supervisory authority. *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007); *HS Lordships*, 274 NLRB 1167, 1173 (1985). The authority to effectively recommend action (in hiring, or otherwise) generally means that the recommended action is taken without independent investigation by superiors, and not simply that the recommendation is ultimately followed. *Republican Co.*, 361 NLRB 93, 97 (2014) (noting that "[a]bsent additional evidence, an individual does not effectively recommend hiring where acknowledged supervisors also interview the candidates").

Walmart contends that the department managers at issue here are supervisors because they have the authority to effectively recommend that Walmart eliminate certain job applicants from the hiring process by giving those applicants low ratings in their first round interviews. I do not find that argument to be persuasive. First, I note that the department managers do not actually make any recommendations about job applicants. To the contrary, the department managers merely evaluate the candidates' responses to interview questions. Walmart controls which job applicants move on to second round interviews, because Walmart sets the computer formula that determines what first round interview ratings qualify applicants to continue with the job application process. (See Analysis Section II(B)(2)(b), supra.) Thus, the department managers here merely provide data for Walmart's computer system, which in turn makes the "recommendation" that certain job applicants be eliminated from further consideration.

Second, even if we assume arguendo that the department managers essentially recommend against hiring certain job applicants when they assign them low ratings based on the first round interview, Walmart failed to show that the department managers exercise independent judgment in making those recommendations. As noted above, to exercise independent judgment, the department managers must, at a minimum, act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data. That standard is not satisfied here, because the evidentiary record shows that Walmart uses its computer system (rather than its department managers) to determine which job applicants should be eliminated from the hiring process based on first round interview ratings. (See Section II(B)(2), supra.) Accordingly, I find that Gilbert, Gurule, McKeown, and Smith do not possess sufficient authority to hire, or sufficient authority to effectively recommend for or against hiring Walmart job applicants.

c. Authority to responsibly to direct

To have the authority to responsibly direct, "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that

some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Oakwood Healthcare*, 348 NLRB at 691–692. "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id.; see also *Cook Inlet Tug & Barge, Inc.*, 362 NLRB 1153, slip op. at 2–3.

Overall, Walmart did not present a strong case that the department managers here have the authority to responsibly direct. While the department managers are delegated some basic authority to direct the work of associates in their departments, Walmart's evidence about any authority that department managers have to take corrective action was limited to Gilbert and Gurule stating that they might notify a supervisor if one of the associates in their areas was not completing their work tasks appropriately. (See Analysis, Section II(B)(3)–(6), supra.)

Beyond those shortcomings in Walmart's proof on this issue, Walmart did not show that department managers are accountable for purposes of responsible direction. Specifically, there is no evidence that department managers face a prospect of adverse consequences if they do not take appropriate steps to direct the associates in their departments. To be sure, Walmart presented evidence that department manager performance evaluations include ratings on "competencies" that relate to directing and overseeing the work of other associates. Walmart also established that in general, performance evaluations affect pay raises that department managers may receive each year. (See Analysis, Section II(B)(2), supra.) Those tenuous connections, however, are simply not enough to satisfy Walmart's burden of proof.

The Board's decision in *Golden Crest Healthcare Center* is instructive. In that case, the Board noted that the respondent did not present any evidence that any charge nurses experienced material consequences to the terms and conditions of employment (positive or negative) based on their performance in directing the work of certified nurse assistants (CNAs). Nor did the respondent present evidence that it informed charge nurses that any material consequences might result from their performance in directing CNAs. And, although the respondent pointed out that its performance evaluation forms rated charge nurses on their performance in directing CNAs, that evidence fell short because the respondent did not show that any action might be taken as a result of the charge nurses' ratings on that aspect of the performance evaluation forms (either by itself, or in combination with ratings in other areas). Accordingly, the Board found that the respondent did not show that its charge nurses had the authority to responsibly direct CNAs or other employees. 348 NLRB 727, 731 (2006).

I find that Walmart's evidence concerning department managers' authority to responsibly direct other associates falls short for the same reasons that the Board articulated in *Golden Crest Healthcare Center*. Walmart did not show that department managers face material consequences to the terms and conditions of their employment based on the performance of other associates in their departments, and did not show that it might take action against any department managers based on their performance evaluation ratings concerning directing the work of other associates, either by itself or in combination with other ratings. I therefore find that Walmart did not establish that department managers have authority to responsibly direct other associates for purposes of Section 2(11) of the Act.

C. Did Any Associates Provide Insufficient Notice that They Were on Strike?

In its posttrial brief, Walmart maintained that it did not receive adequate notice that certain discriminatees were going on strike during the Ride for Respect. Walmart also maintained that it did not receive adequate notice about how long certain other discriminatees would be on strike beyond the day they submitted their strike letter. (See Walmart Posttrial Br. at 84–88, 180–182.) Both of those defenses fail, however, because the Board has explained that "the act of going on strike is protected concerted activity, regardless of whether the employer had been given notice of the strike or presented with a prior demand for a change in working conditions." *Americorp*, 337 NLRB 657, 657, 659 (2002); see also *Iowa Packaging Co.*, 338 NLRB 1140, 1144 (2003) (noting that the Act "protects the right of employees to engage in concerted activities, including the right to strike without prior notice"). Thus, an employee's strike activity is protected even if the employee provides no prior notice to the employer about the strike or the strike's length, and simply withholds his or her services from the employer by not reporting for work.[71] See, e.g., *Savage Gateway Supermarket*, 286 NLRB 180, 181, 183 (1987) (finding that an employee who missed two shifts of work because she did not want to cross a picket line was protected by the Act, even though she did not notify her employer of her reason for missing work until after she ended her strike and learned that the employer had removed her from the payroll), enfd. 865 F.2d 1269 (6th Cir. 1989).

With that being stated, I would be remiss if I did not also point out that the evidentiary record shows that the discriminatees in this case clearly notified Walmart that they were on strike (during the Ride for Respect, and during the other strikes at issue in

[71] In circumstances where the employees do not have an established work schedule (e.g., because the employees are on layoff), the Board has held that it is reasonable to require the General Counsel to show that the employees "engaged in some overt action giving [the employer] reasonable notice of their strike support." *Brinkerhoff Signal Drilling Co.*, 264 NLRB 348, 349 fn. 5 (1982); see also *Rockwood & Co.*, 281 NLRB 862, 876 (1986), enfd. 834 F.2d 837 (9th Cir. 1987). The overt action requirement in this line of cases is not onerous, however, as the Board has deemed it to be satisfied when an employee (among other possibilities) openly participates in picketing activities (see *Rockwood & Co.*, 281 NLRB at 876) or does not report for work despite a past practice of doing so under a casual work schedule (see *Connecticut Distributors, Inc.*, 255 NLRB 1255, 1266–1267 (1981), enforcement denied on other grounds, 681 F.2d 127 (2d Cir. 1982)).

In any event, Walmart does not contend that this exception applies to any of the discriminatees in this case. Furthermore, as noted below the evidentiary record shows that the discriminatees notified Walmart of their strike activities in a variety of ways (thereby satisfying the overt action requirement even if that requirement applied here).

this case). The alleged discriminatees each withheld their labor from Walmart by not reporting for scheduled work shifts, and also notified Walmart of their strike activities through (among other methods) face-to-face communication; calls to the IVR system to report that they would be absent from work; strike letters; picketing; and/or return to work letters. (See Analysis, Section III(A)–(CC), infra (describing the ways that the discriminatees in this case notified Walmart that they were on strike).) Thus, even if some form of strike notice were required under Board law (and I reiterate that there is no such requirement), Walmart received sufficient notice that the discriminatees were absent from work because they were on strike.

C. Are "Personal Discussions" about Attendance a Form of Discipline?

The Board has held that verbal warnings, coachings and reprimands are forms of discipline if they are part of a disciplinary process (e.g., a progressive disciplinary system) and lay a foundation for future disciplinary action against the employee. See *Alter Care of Wadsworth Center for Rehabilitation*, 355 NLRB 565, 565–566 (2010); *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007); *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), enfd. in pertinent part 206 Fed. Appx. 405 (6th Cir. 2006), cert denied 127 S.Ct. 2033 (2007). The tell-tale sign regarding whether a warning, coaching or reprimand lays a foundation for future discipline is that the employer may consider it at a later date when the employer is deciding whether to impose discipline and/or what kind of discipline it should impose. *Promedica Health Systems*, 343 NLRB at 1351–1352. Although it is clear that a warning, coaching or reprimand is a form of discipline if it automatically leads to discipline in the event of a future infraction, an automatic link to future discipline is not required. Instead, warnings, coachings and reprimands may qualify as forms of discipline if they lay a foundation for future discipline, even if the employer retains the discretion regarding whether to actually take disciplinary action. *Promedica Health Systems*, 343 NLRB at 1351 (explaining that warnings and reprimands qualify as forms of discipline if they are "taken into consideration in determining whether further discipline is warranted").

Applying the Board's legal guidelines, I find that the personal discussions that Walmart conducts with associates about their absences are a form of discipline. Walmart has a progressive disciplinary system, and regarding absences, Walmart's disciplinary policy specifically calls for its managers to have a personal discussion with an associate when the associate accumulates three occurrences in a rolling 6-month period. Further, Walmart managers document personal discussions that they have with associates, and may consider whether an associate is familiar with the company's attendance rules (e.g., based on prior personal discussions, the associate's longevity with the company, or the associate's overall track record with attendance) when deciding whether to issue a written coaching or instead have a personal discussion with the associate for absenteeism under the progressive disciplinary system. (FOF, Section II(A)(6); see also Tr. 1912, 3486–3487, 3455, 3501, 4602; Jt. Exhs. 237–239, 483–484, 616, 978, 996, 1011, 1033, 1044, 1094–1096, 1132, 1150, 1258, 1308–1309 (examples of personal discussion logs); Jt. Exhs. 12(a), 13(a), 14(a), 14(e), 22(a), 64, 204, 1071, 1139–1140, 1323 (par. 6) (examples of coachings and terminations that refer to prior personal discussions); GC Exh. 127(a) (pp. 35–36) (same); R. Exh. 263 (same).) Since Walmart uses personal discussions about absenteeism in this manner, I find that the personal discussions constitute a form of disciplinary action because they are part of Walmart's disciplinary process and lay a foundation for future discipline. See *Good Hope Refineries*, 245 NLRB 380, 384 (1979) (finding that counseling sessions about absences were a form of discipline because counseling sessions were memorialized in the employee's personnel file, and because the employer considered past counseling sessions as a factor when deciding whether to take more serious disciplinary measures), enfd. 620 F.2d 57 (5th Cir. 1980), cert. denied 449 US 1012 (1980).[72]

E. Were the Discriminatees Bona Fide Strikers?

Walmart asserts that most of the discriminatees in this case were not bona fide strikers because, while on strike, they participated in educational, media and other nonwork related events coordinated by the UFCW (e.g., attending community rallies, publicity events, speeches, or organizational planning meetings) instead of simply being on a picket line to protest a work-related complaint. On the other hand, Walmart asserts that other discriminatees were not bona fide strikers because they attended to personal matters while on strike (e.g., by "chilling" at home, watching television, or assisting family members). (See Walmart Posttrial Br. at 78–84, 167, 177–180.) In short, Walmart faults some discriminatees for doing too much while on strike, and faults other discriminatees for doing too little.

In support of its argument that some discriminatees were not bona fide strikers because they attended OUR Walmart and/or UFCW events while on strike, Walmart relies on a line of cases in which the Board has held that employers may discipline employees who walk off the job simply to attend a union meeting or union rally during work time. See, e.g., *Merrillat Industries, Inc.*, 307 NLRB 1301, 1305 (1992) (finding that an employer did not violate the Act when it warned employees that they could be disciplined if they engaged in an unprotected sickout for the purpose of enabling the employees to attend a union publicity event, but noting that a sickout to protest pending grievances against the employer would have been protected); *GK Trucking Corp.*, 262 NLRB 570, 572–574 (1982) (finding that an employer did not violate the Act when it discharged employees who missed

[72] Having found that personal discussions are a form of discipline, I add that the personal discussions in this case could support an additional, related violation of Sec. 8(a)(1). Specifically, by conducting personal discussions that warned associates that their absences during the Ride for Respect would "count" as occurrences on their attendance record (and thus could support future discipline for absenteeism), Walmart arguably unlawfully threatened associates with unspecified reprisals for engaging in protected activity. See *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403 (1993) (explaining that a nondisciplinary "conference report" that directed an employee to stop expressing complaints about employment conditions violated Sec. 8(a)(1) because it constituted a threat of future reprisal for protected activity). I need not consider that alternate theory (which the General Counsel did not assert) because I have found that personal discussions are a form of discipline.

work time to attend a union meeting that was unrelated to their concerns). That line of cases does not apply here because the evidentiary record shows that each of the discriminatees made it clear that they were going on strike to protest alleged retaliation and poor working conditions at Walmart. The fact that some of the discriminatees chose to attend OUR Walmart events while out on strike does not change the fact that the purpose of their strike was to protest working conditions at Walmart. (See FOF, Section II(J)(2)–(4), supra; Analysis Section III(A)–(CC), infra.)

As for Walmart's argument that certain strikers were not bona fide strikers because they did too little while on strike, I am not aware that the Board has announced any required activities that a striker must engage in while on strike, apart from withholding his or her labor, and later making an unconditional offer to return to work. Each of the discriminatees in this case met those basic requirements. To the extent that Walmart asserts that employees must engage in additional activities (such as joining a picket line) to prove that they are bona fide strikers, I reject that argument because the Board implicitly has deemed employees to be bona fide strikers even though they did very little while on strike besides satisfy the basic requirements noted above. See, e.g., *Savage Gateway Supermarket*, 286 NLRB at 181, 183 (finding that an employee engaged in protected activity when she decided to return home and miss work because she did not want to cross a picket line); *Connecticut Distributors, Inc.*, 255 NLRB 1255, 1266–1267 (1981) (finding that an employee engaged in protected activity when he did not report to work because of a picket line, and even though the employee was on vacation for part of the strike), enforcement denied on other grounds, 681 F.2d 127 (2d Cir. 1982).

III. DISCIPLINE AND DISCHARGE ALLEGATIONS —ADDITIONAL FINDINGS OF FACT

In this section, I describe the strike activity of each discriminatee during the Ride for Respect.[73] Most of the operative facts are not in dispute. However, I note that I generally refrained from addressing two areas. First, I generally did not deem it necessary to discuss the individual reasons that certain alleged discriminatees articulated for participating in the Ride for Respect. Such a discussion was not necessary because all of the alleged discriminatees endorsed the goals articulated in the OUR Walmart strike letters and return to work letters that are in the record. Second, I generally did not deem it necessary to resolve the occasional disputes in the record about who said what when managers met with alleged discriminatees to: receive strike letters; receive return to work letters; or notify discriminatees that they would be disciplined or discharged. The merits of the discipline and discharge allegations in this case generally do not hinge on those conversations, but rather hinge on whether the discriminatees were engaged in a protected or unprotected strike when they incurred the unexcused absences that led to the disputed discipline or discharge. To the extent, however, that a particular conversation is probative, I have discussed it below.

A. Fremont, CA—Store 2989 (Juan Juanitas)

Juan (John) Juanitas began working for Walmart in 2007, and in 2009 began working as a cart pusher in store 2989, located in Fremont, California. (Tr. 1323, 1335–1338; R. Exh. 272.)

On May 27–28, 2013, Juanitas notified store management that he was going on strike by submitting a strike letter and calling the IVR system to report his absence.[74] Juanitas participated in Ride for Respect events in Bentonville, Arkansas, and missed five scheduled shifts while he was on strike. (Jt. Exhs. 15(a), 16(a), 16(d); R. Exh. 272; Tr. 1367–1369, 1381, 1385–1386.)

On June 7, Juanitas returned to work for his scheduled shift. (Jt. Exh. 16(b)–(c); Tr. 1388.)

On or about June 9, Walmart issued Juanitas a personal discussion for attendance, citing Juanitas' Ride for Respect strike-related absences as part of the basis for the personal discussion. (Jt. Exh. 29;[75] GC Exh. 127(a), p. 22; see also GC Exh. 1(ff)(par. 50(B)) (Respondent admitted that it "reminded [Juanitas] verbally about the attendance policy"); R. Exh. 272 (same).)

B. Lakewood, CA—Store 2609 (Jovani Gomez)

In 2012–2013, Jovani Gomez worked for Walmart as a meat department sales associate in store 2609, located in Lakewood, California. (Tr. 4630, 4737, 4742–4743, 5382–5384.)

On May 30, 2013, Gomez signed a strike letter that notified store management that he was going on strike. Walmart later received a copy of the strike letter. Gomez also called Walmart's IVR system on May 31 to report his absence. While on strike, Gomez participated in Ride for Respect events in: Pico Rivera, California; Paramount, California and Bentonville, Arkansas. In total, Gomez missed seven scheduled shifts while he was on strike. (Jt. Exhs. 788, 791, 792; Tr. 4638, 4642–4644, 4750–4756, 5378–5379, 5395.)

On June 9, Gomez presented store management with a letter that reiterated that he had been on strike and communicated his unconditional offer to return to work. That same day, Gomez returned to work for his scheduled shift. (Jt. Exhs. 786, 789; Tr. 4636, 4642–4643, 4758–4760, 5379.)

On June 21, Walmart discharged Gomez because he had an active third written coaching, and Gomez's strike-related

[73] In discussing the facts that relate to individual associates, I occasionally note certain occasions where the associates went on strike before the Ride for Respect in 2013 (e.g., strikes in October and/or November 2012). I have noted the prior strike activity primarily for background purposes. To the extent that the record may show that individual associates engaged in other activities in support of the Making Change at Walmart campaign (e.g., joining in rallies, actions, or other activities on their own time), I do not mention those activities below. I describe the Making Change at Walmart campaign in detail above (see FOF, Section B–F, supra), and additional evidence about which associates joined particular campaign events is, at best, cumulative. In addition, there is no suggestion that any of the discriminatees engaged in misconduct during the Making Change at Walmart campaign that rendered their participation in the Ride for Respect (or other strikes at issue here) unprotected.

[74] Juanitas also went on strike on November 23, 2012. On that occasion, Juanitas called the IVR system to report his absence, and also submitted a return to work letter dated November 23 that noted he had been out on strike. (Jt. Exhs. 15(b), 16(d); R. Exh. 272.)

[75] Jt. Exh. 29 bears a handwritten "communication" date of June 24, 2013, and states that Juanitas received a personal discussion for time and attendance. (Jt. Exh. 29.) Store Manager Kapiolani Faiaipau did not dispute the authenticity or accuracy of Joint Exhibit 29 but indicated that he was not the one who spoke with Juanitas for the June 2013 personal discussion. (Tr. 1370–1373.)

absences during the Ride for Respect (along with other absences) constituted additional unexcused absences that called for termination under Walmart's disciplinary policy. (Jt. Exhs. 29, 772, 778, 790; GC Exh. 2609–4; Tr. 4630–4631, 4635–4641, 4762–4766, 5393–5401.)

C. Pico Rivera, CA—Store 2886 (Evelin Cruz and Victoria Martinez)

In 2012–2013, Evelin Cruz and Victoria Martinez worked in store 2886, located in Pico Rivera, California. Cruz worked as a department manager in the photo center,[76] while Martinez worked as a photo sales associate. (Tr. 4720, 4730, 4781–4782, 4784, 4880, 4900, 4933–4936, 5341, 5353, 5356.)

On October 4, November 20 and November 23, 2012, Cruz and Martinez joined other OUR Walmart supporters in going on strike. Cruz and Martinez notified Walmart that they were going on strike by: calling the IVR system to report that they would be absent for each strike; submitting a strike letter for November 20; and submitting return to work letters for October 5 and November 20. (Jt. Exhs. 762, 765–766, 768, 854–855; GC Exh. 2886–5; R. Exh. 2886 EC1; Tr. 4805–4806, 4815–4820, 4852, 4889–4893, 4942–4958.) Cruz and Martinez also signed strike letters and return to work letters for the November 23, 2012 strike and gave those letters to an OUR Walmart organizer to send to Walmart (as had been done with prior strikes), but it is not clear that the organizer forwarded those letters to Walmart. (See GC Exhs. 2886–2, 2886–3; Tr. 4817, 4821–4822.)

A few weeks later, on December 12, 2012, assistant manager Craig Pasillas called Martinez to the office for a meeting. In that meeting, Pasillas notified Martinez that she had four active occurrences on her attendance record, and had Martinez sign the following statement:

> **For Associates with Four (4) or More Occurrences in the Previous Six (6) Months**
>
> On [December 17, 2012] my manager reminded me that I have 4 active occurrences under the time and attendance policy. My manager also told me that my next occurrence could result in discipline and that I could receive formal discipline under that policy right now, but that the management team decided to give me an extra, one-time reminder notice instead. My manager gave me a copy of the time and attendance policy and asked me to read it and ask any questions I have. I will do that.

(Jt. Exh. 860; Tr. 4958–4963.) When Martinez asked Pasillas if he was sure that she (Martinez) had four absences, Pasillas said "yes." In confirming that Martinez had four absences, Pasillas gave Martinez a printout showing that Martinez called the IVR system to report absences on November 20 and 23, thereby indicating that those two absences resulted in two of the four active occurrences on Martinez's attendance record (the remaining occurrences resulted from accumulated tardies).[77] (GC Exh. 2886–5; Tr. 4958–4963, 4980–4981.) There is no evidence that Cruz was called in for a similar meeting.

On May 30, 2013, Cruz and Martinez notified Walmart that they were going on strike by submitting a strike letter and calling the IVR system to report their absence.[78] Martinez also called the IVR system each day from May 31 to June 9 (including days on which she was not scheduled to work) to report her continued absences during the strike. (Jt. Exhs. 763, 768, 853, 855; Tr. 4727–4728, 4823, 4825–4828, 4965–4969.)

Cruz joined other OUR Walmart supporters in riding on one of the Ride for Respect buses and participated in Ride for Respect events in: La Quinta, California; Tempe, Arizona; Clovis, New Mexico; Oklahoma City, Oklahoma; and Bentonville, Arkansas. Martinez, meanwhile, attended to some personal matters, and then flew to Bentonville on June 2 to join in Ride for Respect activities until June 7. Cruz missed seven scheduled shifts while on strike, while Martinez missed eight scheduled shifts. (Jt. Exhs. 769, 856; R. Exh. 1805 VID1; Tr. 4828–4830, 4832, 4847–4852, 4903–4904, 4906, 4964–4965, 4969–4970, 4973, 4984–4987.)

On or about June 10, Cruz and Martinez (with the assistance of an OUR Walmart organizer) presented store management with a letter that reiterated that they had been on strike and communicated their unconditional offer to return to work. Cruz and Martinez worked their scheduled shifts on June 10. (Jt. Exhs. 760, 767, 852; Tr. 4830–4831, 4854–4855, 4965–4966, 4971–4973, 4986–4987, 5006–5007.)

On June 21, Walmart issued first written coachings to Cruz and Martinez, citing their strike-related absences as part of the basis for the coachings. (Jt. Exhs. 752, 844; Tr. 4721–4724, 4727, 4730–4731, 4833–4835, 4974–4977, 5342, 5349–5350.)

D. Placerville, CA—Store 2418 (Yvette Brown, Barbara Collins, Norma Dobyns, Matthew Gauer, Margaret Hooten and Amy Stinnett)

In 2012–2013, Yvette Brown, Barbara Collins (a.k.a. Barbara Andridge—hereafter referred to as B. Collins), Norma Dobyns, Matthew Gauer, Margaret Hooten, and Amy Stinnett each worked in Walmart store 2418, located in Placerville, California. During that timeframe, they held the following positions: Brown—fabrics and crafts sales associate; B. Collins—electronics sales associate; Dobyns—cashier; Gauer—sales associate; Hooten—lawn and garden sales associate; and Stinnett—customer service desk associate/cashier. (Tr. 372, 374–375, 466–467, 514–515, 574, 635, 692–693, 1053–1059, 1770, 1780, 1958; R. Exh. 272.)

On May 28, 2013, Brown, B. Collins, Dobyns, Gauer, Hooten and Stinnett signed a strike letter to notify store management that they were going on strike (an OUR Walmart organizer faxed the letter to Walmart on or about June 1, and again on June 8 – it is not clear whether Walmart received the June 1 fax). Gauer, Hooten and Stinnett also verbally notified (e.g., by reading a

[76] Although Cruz was a department manager, Walmart abandoned its argument that Cruz was a statutory supervisor under Section 2(11) of the Act during the relevant time period. (See Analysis, Section II(B), supra.)

[77] Although Martinez did call the IVR system to report that she would be absent on November 20, Martinez was not scheduled to work that day and was not charged with an unexcused absence. Walmart did charge Martinez with an unexcused absence on November 23. (Jt. Exhs. 853, 855–856.)

[78] On May 21, Cruz told an assistant manager that she was not going to come to work for a couple of weeks but stated that the reasons for her forthcoming absence were personal. (Tr. 4846–4847.)

strike script) one of the managers in the store that they were going on strike, and Brown, B. Collins, Dobyns, Gauer, Hooten, and Stinnett called the IVR system to report that they would be absent on May 28 (or May 27 and 29, as to Stinnett and Hooten, respectively, since they were not scheduled to work on May 28). (Jt. Exhs. 9(d), 10(d), 12(d), 13(c)–(d), 14(c)–(d), 52; GC Exhs. 9, 2418–4(a), 2418–8, 2418–9(a),[79] 2418–18 (p. 26); R. Exh. 272; Tr. 386–391, 472–473, 475–478, 497–499, 533–536, 539–540, 619–623, 649–656, 686–689, 715–720, 1161, 1165–1166, 1194–1197, 1253–1254, 1271–1272, 1791, 1888–1890, 1957–1964, 1985–1986; see also Jt. Exh. 9(d) and GC Exh. 2418–18 (p. 22) (indicating that B. Collins also called the IVR system to report that she would be absent on May 31); Jt. Exh. 11(d) (same, regarding Dobyns' calls to IVR system on June 2 and 9.)[80] In connection with telling store management that she was going on strike, Stinnett also notified management that she was giving two weeks' notice and did not plan to return to work after traveling to Bentonville. (Tr. 1268, 1960–1962.)

While on strike, Brown, B. Collins, Dobyns, Gauer, Hooten and Stinnett participated in Ride for Respect events in: Salt Lake City, Utah; Denver, Colorado; and Bentonville, Arkansas. Gauer remained in California to take care of a family situation. Brown, Collins, Dobyns, Gauer, Hooten, and Stinnett each missed between eight and ten scheduled shifts while on strike.[81] (Jt. Exhs. 9(b)–(c), 10(b)–(c), 11(b)–(c), 12(a), 13(a), 14(b)–(c), 86 (p. 3) (photo of Brown and Stinnett in Denver); R. Exhs. 9, 14 (photo of Dobyns in Bentonville), 272, 2125 VID2, ID21; Tr. 388–389, 394–395, 478–479, 500–502, 532, 538–539, 545–546, 548–550, 616, 625, 647–648, 651, 653–654, 656–657, 714, 720, 724.)

On or about June 10, Brown, B. Collins, Dobyns, Gauer, Hooten and Stinnett read and presented store management with a letter that reiterated that they had been on strike and communicated their unconditional offer to return to work. Stinnett also notified management that she was rescinding her two-week's notice. Brown, B. Collins, Dobyns, Gauer, Hooten, and Stinnett then reported to work their scheduled shifts on June 11. (Jt. Exhs. 8(a), 9(b), 10(b), 11(b), 12(b), 13(b), 14(b); R. Exh. 272; Tr. 391–392, 479–480, 546–549, 607, 658–659, 721–727, 1226–1227, 1962–1963.)

On June 22, Walmart issued first written coachings to Gauer and Hooten and a second written coaching to Stinnett, citing their strike-related absences as part of the basis for the coachings. Walmart did not charge Gauer, Hooten and Stinnett with any "no-call/no-show" absences because they each spoke with a manager before going on strike. (Jt. Exhs. 12(a), 13(a), 14(a), 29; R. Exhs. 36, 38, 272; Tr. 393–395, 660–662, 1206–1208, 1215, 1226, 1279–1281, 1294–1298, 1817–1818, 1892–1893, 1962–1963, 2000–2001.)

From June 22–29, Walmart discharged Brown, B. Collins and Dobyns for "job abandonment/three days unreported absence," citing their strike-related absences as part of the basis for the discharges. Specifically, Walmart determined discharge was appropriate under its disciplinary policy because Brown, B. Collins and Dobyns did not speak to a manager before going on strike and thus accumulated three or more "no-call/no-show" absences on dates during the Ride for Respect. (Jt. Exhs. 9(a), 10(a), 11(a), 29, 90; GC Exh. 2418–5(b); R. Exhs. 35, 37; Tr. 480–482, 551–557, 623–625, 728–733, 1137–1140, 1206–1207, 1214–1215, 1271–1277, 1285–1288, 1300–1305, 1307–1309, 1771–1778, 1780–1789, 1805–1807, 1809–1810, 1817–1818, 1891–1893, 1951–1954.)

E. Richmond, CA—Store 3455 (Raymond Bravo, Louis Callahan and Pamela Davis)

1. Raymond Bravo and Pamela Davis

In 2012–2013, Raymond Bravo and Pamela Davis worked in store 3455, located in Richmond, California. Bravo worked as an overnight maintenance associate, while Davis worked as an overnight stocker. (Tr. 822–823, 1440–1442, 1490, 1520, 1546, 1569; R. Exh. 272.)

On May 29, Bravo notified Walmart that he was going on strike by reading a strike script to one of the managers at his store and faxing in a strike letter. Davis called Walmart's IVR system on June 2 to report her absence. (Jt. Exhs. 17(b), 22(d), 94(a) (tab 94); GC Exhs. 9, 3455–7; R. Exh. 272; Tr. 833–835, 837–838, 840, 1500.)[82] Bravo joined other OUR Walmart supporters in riding on one of the Ride for Respect buses and participated in Ride for Respect events in: Placerville, California; Colorado; and Bentonville, Arkansas. Davis flew to Bentonville to join in the Ride for Respect events at that location. Bravo and Davis respectively missed ten and two scheduled shifts while on strike.[83] (Jt. Exhs. 18(b)–(c), 22(b)–(c); R. Exhs. 272, 2125 VID2, ID21;

[79] Shift Manager Aaron Bornhoft clarified that contrary to his assertion in GC 2418–9(a), Brown did not work on May 30. (Tr. 1225–1226; see also Jt. Exh. 10(b).)

[80] B. Collins and Hooten previously went on strike on October 8, 201, and joined Brown and Gauer in going on strike on November 23, 2012. B. Collins and Hooten submitted a strike letter for the October 8 strike, and all of the associates listed here submitted return to work letters for the October 8 and November 23 strikes. In addition, Brown, B. Collins, Gauer and Hooten read a strike script to management and called the IVR system for the November 23 strike. (Jt. Exhs. 8(b)–(c), 9(d), 10(d), 51, 70; Tr. 379–383, 531–532, 559–562, 587–597, 607–608, 663–665, 733–738, 770–771, 807–808, 812, 1824; see also R. Exh. 3 (clips 6–7) (showing the November 23, 2012 action).)

[81] After returning to the Placerville area on June 8, Brown, B. Collins, Dobyns and Stinnett attended a Women of Labor convention in Sacramento on June 9. (Tr. 813–816, 819–820.)

[82] Bravo and Davis also went on strike on October 9, 2012. In connection with that strike, Bravo and Davis submitted a strike letter dated October 9 and a return to work letter dated October 12. Bravo also called the IVR system on October 9 to report his absence and attempted to read a strike script to one of the managers in his store but was not successful because the manager refused to listen. (Jt. Exhs. 17(d)–(e), 18(d), 94 (tab 10); R. Exh. 219; Tr. 846–851, 2620–2621; see also R. Exhs. 1 VID1, ID15.) In addition, Bravo participated in a work stoppage on or about November 2 (submitting a return to work letter dated November 2), and Bravo and Davis participated in a strike on or about November 23 (Bravo and Davis each called the IVR system, and Bravo also submitted a strike letter and read strike scripts to notify Walmart of his absence and of his unconditional offer to return to work). (Jt. Exhs. 17(c), 18(d), 22(d); GC Exhs. 28(c), 29(c); R. Exhs. 77(a)–(d), 220, 272; Tr. 846–847, 852–853, 1488, 2622–2625.)

[83] Davis had limited availability on her schedule, and thus at most worked 2 days a week. (Tr. 1520–1521.)

Tr. 308, 340, 831, 835–837, 839–840, 1495–1497, 1568; see also GC Exhs. 3455–6, 3455–7, 3455–12.)

On June 9, Davis presented store management with a letter that reiterated that she had been on strike and communicated her unconditional offer to return to work. Bravo submitted a similar return to work letter on June 12, and read a script explaining that he was returning to work. Davis worked her scheduled shift on June 9, and Bravo worked his scheduled shift on June 12. (Jt. Exhs. 17(a), 18(b), 21(a), 22(b), 94(a) (tab 94); GC Exh. 9; R. Exh. 272; Tr. 840–843, 1500.)

On June 24, Walmart decided that it would hold both Bravo and Davis accountable for their strike-related absences by discharging Bravo and issuing a coaching to Davis.[84] (Jt. Exh. 29.)

On June 27, Walmart discharged Bravo because he had an active third written coaching,[85] and his strike-related absences during the Ride for Respect constituted additional unexcused absences that called for termination under Walmart's disciplinary policy. (Jt. Exhs. 18(a), 29, 33; Tr. 844–846, 1526, 1528–1529, 1571.)

On July 30, Walmart discharged Davis because she had an active third written coaching, and had accrued thirteen additional unexcused absences (including two strike-related absences during the Ride for Respect) that called for termination under Walmart's disciplinary policy.[86] Of the thirteen unexcused absences listed on Davis' exit interview/termination paperwork, nine unexcused absences occurred after Davis ended her strike and returned to work on June 9. (Jt. Exhs. 22(a), 22(e), 29; GC Exh. 3455–4; R. Exh. 272; Tr. 1500–1502, 1524–1526, 1576–1577.)

2. Louis Callahan

Like Bravo and Davis, Louis Callahan also worked in store 3455, located in Richmond, California during the relevant time period. Callahan worked as an overnight stocker while employed by Walmart. (Tr. 1425, 1442, 1508, 1520, 1569; R. Exh. 272.)

On February 15, Walmart management at store 3455 issued a third written coaching to Callahan, citing Callahan's poor attendance/punctuality. Callahan acknowledged receiving the coaching. On the coaching paperwork, Walmart stated as follows about Callahan's attendance and performance:

> Management has to assign extra task[s] to associates to get Louis Callahan's task[s] done when he does not report to work when scheduled. He also gets behind in [completing] his own task[s] when [he] reports to work late. This behavior of Louis brings morale down in associates. The department does not get stocked . . . which results in poor instock and loss of sales, which affects my share for the associates.

(Jt. Exh. 20(b).)

As previously noted, on May 1–6, certain OUR Walmart associates traveled to Birmingham, Alabama to participate in a national leadership bootcamp and develop the concept for the Ride for Respect. (FOF, Section II(I), supra.) On an undated document that compiled photographs of the Birmingham meeting participants, Walmart identified one of the participants as Louis Callahan. (GC Exh. 24(f) at p. 5.) The record does not establish whether Callahan in fact attended the meeting or was correctly identified in the photograph. The record also does not establish that any members of Walmart management at store 3455 were aware that Walmart identified Callahan as one of the Birmingham meeting participants.

On May 28, Walmart management at store 3455 prepared an exit interview form for Callahan. On that form, Walmart stated that it was discharging Callahan effective May 28 because his job performance was below company expectations. Specifically, Callahan's store manager did not believe that Callahan was stocking and zoning his areas at an acceptable level. However, Walmart did not inform Callahan that he was discharged before Callahan left work on May 28 (the last day that Callahan worked for Walmart). (Jt. Exhs 20(a), 20(d); R. Exh. 272; Tr. 1509, 1511–1515, 1555.)

On May 30, Callahan submitted a strike letter to Walmart. There is no evidence that anyone at Walmart notified (or had an opportunity to notify) Callahan at that time that he was discharged. Callahan joined other OUR Walmart supporters in traveling to Bentonville, Arkansas for the Ride for Respect, and in participating in Ride for Respect events in Bentonville. (Jt. Exhs. 94(a) (tab 94); R. Exhs. 272, 3455 LC1, ID13; Tr. 1515, 1555, 2636.)

On June 12, Callahan presented store management with a letter that reiterated that he had been on strike and communicated his unconditional offer to return to work. There is no evidence, however, that Walmart allowed Callahan to return to work at that time. A few weeks later, Callahan asked to meet with the store manager about getting his job back. Callahan's attempts to return to work were not successful. (Jt. Exh. 19(a); R. Exh. 272; Tr. 1515–1517.)

F. San Leandro, CA—Store 5434 (Andrea Carr, Cecelia Gurule and Dominic Ware)

In 2012–2013, Andrea Carr, Cecelia Gurule, and Dominic Ware worked in store 5434, located in San Leandro, California. Carr worked as an associate in the photo center, while Gurule worked as a department manager in the lawn and garden department[87] and Ware worked as a cart pusher. (Tr. 64–66, 302, 318, 400–402, 1599, 1694, 1699, 1701, 1703.)

[84] It is not clear why Walmart indicated on June 24 that Davis would receive a coaching (instead of being discharged), since Davis had an active third written coaching on her disciplinary record as of June 24. (See Jt. Exh. 22(e); see also Jt. Exh. 29 (including a handwritten note that Davis had a third written coaching).)

[85] In a separate case, I found Bravo's third written coaching (issued on November 7, 2012) to be unlawful. *Walmart Stores, Inc.*, Case 32–CA–090116, slip op. at 40–41 (2014).

[86] In February 2013, Davis applied for a leave of absence for medical reasons and missed several shifts before and after the Ride for Respect while she was waiting for Walmart's human resources office to respond to her leave request. At the same time that Davis was missing shifts with Walmart, however, she worked periodically as a stocker for an outside vendor that did business at Walmart. (Tr. 1521–1523, 1556–1558; GC Exh. 3455–8 (noting that as of May 15, Davis had 29 "active" absences on her attendance record).)

[87] Although Gurule was a department manager, Walmart failed to show that she was a statutory supervisor under Sec. 2(11) of the Act during the relevant time period. (See Discussion and Analysis, Section II(B), supra.)

On May 26, 2013, Ware called the IVR system to report his absence, and read a strike script to one of the customer service managers in his store (who, in turn, reported Ware's strike to an assistant manager). Carr notified Walmart on May 27 that she was going on strike by calling the IVR system to report her absence and joined Ware in submitting a strike letter dated May 28. Gurule called Walmart's IVR system each day from June 3–7 to report her absence. (Jt. Exhs. 23(b), 24(d), 27(d); GC Exhs. 9, 5434–1(a)–(b), 5434–20, 5434–21, 5434–22, 5434–23, 5434–24; Tr. 100–104, 111–113, 307–308, 333, 364, 407–413, 447, 1685, 1687, 1695–1696, 1699, 1762–1763, 1927–1929.)[88]

Carr and Ware joined other OUR Walmart supporters in riding on one of the Ride for Respect buses, and participated in Ride for Respect events in: Fremont, California; Richmond, California; San Jose, California; San Francisco, California; Sacramento, California; Denver, Colorado; Wichita, Kansas; and Bentonville, Arkansas.[89] Gurule flew directly to Bentonville to join in Ride for Respect events there, in part because she did not want to miss additional work time by riding on the bus. Gurule missed five scheduled shifts while on strike, while Carr missed six scheduled shifts and Ware missed eight scheduled shifts. (Jt. Exhs. 24(b)–(c), 26(b)–(c), 27(b)–(c); R. Exhs. 3 (clip 8), 2125 VID2, ID21; Tr. 88, 113–130, 209–211, 255, 308–309, 338–342, 413–414, 448–455, 1661, 1684, 1686, 1702, 1704–1705.)

On or about June 9, Carr and Ware read a script and presented store management with a letter that reiterated that they had been on strike and communicated their unconditional offer to return to work. Gurule read and presented a similar return to work letter on June 10. Carr and Ware worked their scheduled shifts on June 9, and Gurule worked her scheduled shift on June 10. (Jt. Exhs. 23(a), 24(b), 25(a), 26(b), 27(c), 94(a) (tab 57); Tr. 132–135, 309–310, 364–365, 415–417.)

On June 23 and 24, Walmart issued a third written coachings to Carr and Gurule, respectively, citing their strike-related absences as part of the basis for the coachings. (Jt. Exhs. 24(a), 26(a), 29; Tr. 310–311, 417–421, 459–460, 1685–1687, 1707–1712, 1719–1723, 1909–1917, 1922–1924.)

On July 3, Walmart discharged Ware because he had an active third written coaching and had additional unexcused absences (including strike-related absences during the Ride for Respect) that called for termination under Walmart's disciplinary policy. (Jt. Exhs. 27(a), 27(e), 29; Tr. 136–140, 274, 1685–1686.)

G. Aurora, CO—Store 5334 (Barbara Gertz)

During the relevant time period, Barbara Gertz worked for Walmart as an overnight stocker in store 5334, located in Aurora, Colorado. (Jt. Exh. 1328.)

On May 31, 2013, Gertz notified store management that she was going on strike by calling the IVR system to report her absence, and by notifying a manager by telephone that she was going on strike. Gertz missed seven scheduled shifts while she was on strike. (Jt. Exhs. 884–885, 1328.)

On June 9, Gertz presented store management with a letter that reiterated that she had been on strike and communicated her unconditional offer to return to work. That same day, Gertz returned to work for her scheduled shift. (Jt. Exhs. 880, 882, 1328.)

On June 18, Gertz met with an assistant manager and a support manager in her store. The managers advised Gertz that she had more absences on her record than were allowed under Walmart's attendance policy, and cited Gertz' Ride for Respect strike-related absences as part of the basis for their remarks. (Jt. Exh. 1328; see also Jt. Exh. 887 (personal discussion log that lists June 18, 2013 as a date that Gertz received a personal discussion).)

In September 2013, managers from Gertz's store advised Gertz that while Walmart did not believe that Gertz's absences on May 31 and June 1, 2, 3, 4, 7 ,and 8 (i.e., absences during the Ride for Respect) were protected, Walmart would not hold those absences against her because Gertz' store had not been consistent in enforcing the attendance policy and "wanted to be sure that [it] didn't treat [Gertz] differently than how some others have been treated." (Jt. Exh. 883; see also Jt. Exh. 1328.)

H. Hialeah, FL—Store 1590 (Marie Roberty)

In 2012–2013, Marie Roberty worked for Walmart as a cashier in store 1590, located in Hialeah, Florida. (Jt. Exh. 1185; Tr. 5502, 5532–5533, 5540, 5624.)

On May 28, 2013, Roberty notified store management that she was going on strike by turning in a strike letter. Roberty also called the IVR system on May 29 to report her absence. While on strike, Roberty participated in Ride for Respect events in: her home store; Orlando, Florida; Baker, Louisiana; Conway, Arkansas; and Bentonville, Arkansas. Roberty missed eight scheduled shifts while she was on strike (and one additional shift on May 27, for reasons unrelated to the strike). (Jt. Exhs. 1197, 1199–1200, 1320–1321; R. Exhs. 184, 202; Tr. 5490, 5505, 5541, 5544–5546, 5562–5564, 5580, 5607, 5615, 5619–5620.)

On June 10, Roberty presented store management with a letter that reiterated that she had been on strike and communicated her unconditional offer to return to work. That same day, Roberty returned to work for her scheduled shift. (Jt. Exhs. 1195, 1198; Tr. 5548–5551.)

On June 22, Walmart discharged Roberty because she had an active third written coaching, and Roberty's strike-related absences during the Ride for Respect constituted additional unexcused absences that called for termination under Walmart's disciplinary policy. (Jt. Exhs. 1186, 1189, 1320–1321; CP Exh. 8; Tr. 5502–5506, 5510–5512, 5517–5518, 5552.)

I. Chicago, IL—Store 5781 (Anna Pritchett and Ronnie Vandell)

In 2012–2013, Anna Pritchett and Ronnie Vandell each worked in store 5781, located in Chicago, Illinois. Pritchett worked as a maintenance associate, while Vandell worked as a

[88] Ware also went on strike on October 9, 2012, and notified Walmart of that fact by submitting a strike letter dated October 9, 2012, and a return to work letter dated October 12, 2012. In addition, on November 14, 2012, Gurule and Ware submitted a strike letter and conducted a one-hour work stoppage in memory of a deceased coworker. Finally, Ware went on strike on November 23, 2012, and notified Walmart by telling his manager that he was going on strike, and by submitting a return to work letter dated November 24, 2012. (Jt. Exhs. 23(c)–(e), 94 (tab 51); R. Exhs. 3 (clips 1, 3, 4, 5), 5434 VID1, ID11; Tr. 142–149, 192–193, 197–199, 203–204, 241–242, 263.)

[89] Carr left Bentonville early and returned home due to a family emergency. (Tr. 454–455, 458.)

sales associate in the dairy department. (Tr. 5984–5985, 5992, 6315–6316, 6324, 6328; R. Exh. 272.)

On May 31, 2013, Pritchett and Vandell called Walmart's IVR system to report that they would be absent. (Jt. Exh. 1031, 1042; R. Exh. 272; see also Tr. 5984, 6320.) Pritchett and Vandell also signed a "petition to Walmart manager" that went to Walmart and stated:

> We call on you to not intimidate, threaten or retaliate against Walmart associates and warehouse workers who speak out for better pay, more hours and respect at work. We are signing this petition because we are ready to put an end to Walmart's unfair labor practices. We support those associates who are refusing to work to protest Walmart's illegal retaliation and call upon Walmart to publicly commit to better working conditions such as increasing flexibility and availability of hours in scheduling, respect for the individual, and increasing pay for every associate to at least $25,000 per year.

(GC Exh. 126, pp. 2–3; see also GC Exh. 124; Tr. 5996–5998, 6051–6053, 6055.)

Pritchett and Vandell traveled to Bentonville, Arkansas for the Ride for Respect, with each participating in a Ride for Respect event in Chicago, Illinois, and with Vandell also participating in a Ride for Respect event in Kirkwood, Missouri. Pritchett and Vandell respectively missed five and seven scheduled shifts while they were on strike. (Jt. Exhs. 1032, 1043; R. Exh. 272; Tr. 6060; see also R. Exh. 112; Tr. 6127–6128.) Based on Pritchett and Vandell's absences, their store manager "put two and two together" and deduced that Pritchett and Vandell were participating in the Ride for Respect. (Tr. 5991–5992.)

On June 9, Vandell presented store management with a letter that reiterated that she had been on strike and communicated her unconditional offer to return to work. Pritchett provided a similar return to work notice to Walmart on June 11. Vandell then worked her scheduled shift on June 9, and Pritchett worked her scheduled shift on June 11. (Jt. Exhs. 1028, 1039, 1041; R. Exh. 272; Tr. 5990–5991, 6321.)

On June 22, Walmart issued Pritchett and Vandell personal discussions for attendance, citing their strike-related absences as part of the basis for the personal discussions. (Jt. Exhs. 1033, 1044; R. Exh. 272; Tr. 5985–5990, 5992–5994.)

J. Crestwood, IL—Store 3601 (Marie Kanger-Born)

During the relevant time period, Marie Kanger-Born worked for Walmart as an overnight stocker in the stationery, fabrics and celebrations department in store 3601, located in Crestwood, Illinois. (Tr. 5804–5805, 6062, 6243–6245; R. Exh. 272.)

On May 31, 2013, Kanger-Born notified store management that she was going on strike by calling the IVR system to report her absence and by turning in a strike letter. While on strike, Kanger-Born participated in Ride for Respect events in: Louisville, Kentucky; Kirkwood, Missouri; and Bentonville, Arkansas. Kanger-Born missed seven scheduled shifts while she was on strike. (Jt. Exhs. 1008–1010; R. Exhs. 272, 5417 CG1(a); Tr. 5798, 5805, 6060–6062, 6129, 6239–6242; see also GC Exh. 3601–1 and Tr. 5793 (stating that Walmart was not surprised by Kanger-Born's strike notice).)

On June 9, Kanger-Born returned to work for her scheduled shift. (Jt. Exh. 1006.)

On June 26, Walmart issued Kanger-Born a personal discussion for attendance, citing Kanger-Born's Ride for Respect strike-related absences as part of the basis for the personal discussion. (Jt. Exh. 1011; R. Exh. 272; Tr. 5806–5810.)

K. Evergreen Park, IL – Store 5485 (Charmaine Givens-Thomas)

Charmaine Givens-Thomas began working for Walmart in 2005, and during the relevant time period worked as an electronics sales associate for Walmart in store 5485, located in Evergreen Park, Illinois. (Tr. 5707, 6029–6031, 6186.)

On May 30, 2013, Givens-Thomas notified store management that she was going on strike by calling the IVR system to report her absence.[90] Walmart was aware that Givens-Thomas was absent because she was on strike. (Jt. Exh. 976; GC Exh. 5485–2; Tr. 5713–5714, 6050, 6056–6057.) Givens-Thomas also signed a "petition to Walmart manager" that went to Walmart and stated:

> We call on you to not intimidate, threaten or retaliate against Walmart associates and warehouse workers who speak out for better pay, more hours and respect at work. We are signing this petition because we are ready to put an end to Walmart's unfair labor practices. We support those associates who are refusing to work to protest Walmart's illegal retaliation and call upon Walmart to publicly commit to better working conditions such as increasing flexibility and availability of hours in scheduling, respect for the individual, and increasing pay for every associate to at least $25,000 per year.

(GC Exh. 126, p. 3; see also GC Exh. 124; Tr. 5996–5998, 6051–6053, 6055.)[91] While on strike, Givens-Thomas participated in Ride for Respect events in: Chicago, Illinois; Cincinnati, Ohio; Louisville, Kentucky; Kirkwood, Missouri; and Bentonville, Arkansas. Givens-Thomas missed eight scheduled shifts while she was on strike. (Jt. Exh. 977; R. Exhs. 112, 2694 CG1, 2694 CG2, 2694 CG3, 5417 CG1 (p. 2); Tr. 5712, 6057–6059, 6066–6067, 6073–6074, 6118–6119, 6121, 6131–6138, 6140, 6144.)

On June 9, Givens-Thomas read and provided a letter to store management that reiterated that she had been on strike and communicated her unconditional offer to return to work. That same day, Givens-Thomas returned to work for her scheduled shift. (Jt. Exhs. 972, 974; GC Exh. 5485–2; Tr. 6064–6066, 6144–6145.)

On June 24, Walmart issued Givens-Thomas a personal discussion for attendance based at least in part on Givens-Thomas' Ride for Respect strike-related absences. (Jt. Exh. 978; GC Exh. 5485–3; Tr. 5677–5678, 5708–5713, 5715, 5721–5722, 6067–6068.)

[90] Givens-Thomas also went on strike on November 22–23, 2012, calling the IVR system each of those days to report her absence. (Jt. Exh. 976; R. 5781 VID1; Tr. 6039–6040, 6045, 6079, 6182–6183, 6193; see also Jt. Exh. 975 (par. 4).)

[91] Givens-Thomas also signed a strike letter and gave it to a UFCW organizer. The record does not show what the organizer did with the strike letter and does not show that Walmart later received the letter. (Tr. 6056.)

L. Glenwood, IL—Store 5404 (Linda Haluska)

Since October 2005, Linda Haluska has worked for Walmart in store 5404, located in Glenwood, Illinois, most recently as an overnight stocker in the health and beauty department. (Tr. 5772–5773, 5777, 5823, 6254, 6259–6260, 6279; R. Exh. 272.)

On May 30, 2013, Haluska notified store management that she was going on strike by calling the IVR system to report her absence, and by speaking on the phone with an assistant store manager to read a statement explaining that she was going on strike "to demand that Walmart offer better wages, better hours for associates, and stop retaliation against associates that are involved in organized activity."[92] (Jt. Exh. 994; GC Exh. 5404–1; R. Exh. 272 (par. I(D)); Tr. 5780–5783, 5790–5791, 5834–5835, 5843, 6254, 6276, 6277–6278.) Haluska also signed a "petition to Walmart manager" that went to Walmart and stated:

> We call on you to not intimidate, threaten or retaliate against Walmart associates and warehouse workers who speak out for better pay, more hours and respect at work. We are signing this petition because we are ready to put an end to Walmart's unfair labor practices. We support those associates who are refusing to work to protest Walmart's illegal retaliation and call upon Walmart to publicly commit to better working conditions such as increasing flexibility and availability of hours in scheduling, respect for the individual, and increasing pay for every associate to at least $25,000 per year.

(GC Exh. 126, p. 3; see also GC Exh. 124; Tr. 5996–5998.) While on strike, Haluska participated in Ride for Respect events in Chicago, Illinois and Bentonville, Arkansas. Haluska missed eight scheduled shifts while she was on strike. (Jt. Exh. 995; R. Exhs. 112, 272; GC Exh. 5404–2; Tr. 5840, 6060–6061, 6121–6123, 6129.)

On or about June 10, Haluska presented store management with a letter that reiterated that she had been on strike and communicated her unconditional offer to return to work. That same evening, Haluska returned to work for her scheduled shift. (Jt. Exhs. 989, 992; GC Exh. 5404–2; R. Exh. 272; Tr. 5791, 5843.)

On June 27, Walmart issued Haluska a personal discussion for attendance based at least in part on Haluska's Ride for Respect strike-related absences. (Jt. Exh. 996; R. Exh. 272; Tr. 5779, 5836–5837, 5840–5841.)

M. Wheeling, IL—Store 1735 (Rose Campbell and Pooshan Kapil)

In 2012–2013, Rose Campbell and Pooshan Kapil each worked in store 1735, located in Wheeling, Illinois. Campbell worked as a maintenance associate, while Kapil worked as an electronics sales associate. (Tr. 5891, 5922, 6207, 6212, 6215; R. Exh. 272.)

On May 30, 2013, Campbell and Kapil notified Walmart that they were going on strike by calling Walmart's IVR system to report that they would be absent. Campbell also read a strike script by telephone to her store manager. (Jt. Exhs. 955, 1021; GC Exhs. 1735–1, 1735–3; R. Exh. 272; Tr. 5981–5892, 5895, 5899, 5901, 5921, 5926, 6229–6230.) In addition, Campbell and Kapil signed a "petition to Walmart manager" that went to Walmart and stated:

> We call on you to not intimidate, threaten or retaliate against Walmart associates and warehouse workers who speak out for better pay, more hours and respect at work. We are signing this petition because we are ready to put an end to Walmart's unfair labor practices. We support those associates who are refusing to work to protest Walmart's illegal retaliation and call upon Walmart to publicly commit to better working conditions such as increasing flexibility and availability of hours in scheduling, respect for the individual, and increasing pay for every associate to at least $25,000 per year.

(GC Exh. 126, pp. 3–4 (including a statement from Campbell explaining why she went on strike); see also GC Exh. 124; Tr. 5996–5998, 6051–6053, 6055.)[93]

Campbell and Kapil traveled to Bentonville, Arkansas for the Ride for Respect, and on the way participated in Ride for Respect events in Chicago, Illinois and Kirkwood, Missouri. Campbell and Kapil missed eight and nine scheduled shifts, respectively, while on strike. (Jt. Exhs. 956, 1022; R. Exh. 272; Tr. 6060–6061; see also R. Exhs. 112, 2694 CG(a), 2694 CG2(a), 2694 CG3(a); Tr. 6126.)

On June 9, Campbell and Kapil presented store management with letters that reiterated that they had been on strike and communicated their unconditional offer to return to work. Kapil then worked his scheduled shift on June 9, and Campbell worked her scheduled shift on June 11. (Jt. Exhs. 951, 953, 1018, 1020; R. Exh. 272; Tr. 5902.)

On June 24, Walmart discharged Kapil because he had an active third written coaching, and Kapil's strike-related absences during the Ride for Respect constituted additional unexcused absences that called for termination under Walmart's disciplinary policy. (Jt. Exhs. 1013–1014; R. Exh. 272; Tr. 5892–5893, 5902, 5922–5925, 5927–5930.)

On June 25, Walmart issued Campbell a third written coaching for attendance and punctuality, citing Campbell's strike-related absences as part of the basis for the coaching. (Jt. Exh. 944; R. Exh. 272; Tr. 5892–5895, 5900, 5931.)

N. Paducah, KY—Store 431 (Trina Vetato)

During the relevant time period, Trina Vetato worked for Walmart as an IMS (inventory) associate in store 431, located in Paducah, Kentucky. (Jt. Exh. 1323.)

On May 29, 2013, Vetato notified store management that she was going on strike by calling the IVR system to report her absence and by turning in a strike letter. While on strike, Vetato participated in Ride for Respect events in Louisville, Kentucky

[92] Haluska also went on strike on November 22, 2012, after calling the IVR system and also speaking to an assistant manager to report her absence. (Jt. Exh. 994; R. Exh. 272; Tr. 5833, 6255; see also Jt. Exh. 993 (par. 4).)

[93] Campbell also went on strike on or about November 22, 2012. Campbell called the IVR system and indicated that she would be absent from work due to "illness/injury." Campbell also called her store before going on strike, but the manager that she spoke to hung up the phone before Campbell explained that she was going on strike. Campbell did not attempt to call the store again. (Jt. Exh. 955; GC Exh. 129 (MVI_7570 at 0:30–1:00); see also R. Exhs. 1735 VID1RC, ID17.)

and Kirkwood, Missouri. Vetato missed seven scheduled shifts while she was on strike. (Jt. Exhs. 1145, 1148–1149, 1323; R. Exh. 244.)

On June 9, Vetato presented store management with a letter that reiterated that she had been on strike and communicated her unconditional offer to return to work. That same day, Vetato returned to work for her scheduled shift. (Jt. Exhs. 1143, 1146, 1323.)

On June 23, Walmart issued Vetato a personal discussion for attendance, citing Vetato's Ride for Respect strike-related absences as part of the basis for the personal discussion. (Jt. Exhs. 1147, 1150, 1323.)

On July 21, Walmart issued Vetato a second written coaching for attendance and punctuality. Although the coaching was based on three "unexcused absence occurrences" that occurred after June 23, Walmart also issued the coaching because Vetato received a personal discussion on June 23 for her absences during the Ride for Respect. (Jt. Exhs. 1140, 1323.)

O. Stanford, KY—Store 825 (Aaron Lawson)

During the relevant time period, Aaron Lawson worked for Walmart as an overnight general merchandise stocker in store 825, located in Stanford, Kentucky. (Jt. Exh. 1328.)

On May 31, 2013, Lawson notified store management that he was going on strike by calling the IVR system to report his absence, reading his strike letter to a manager by telephone, and submitting his strike letter by facsimile.[94] While on strike, Lawson participated in Ride for Respect events in Louisville, Kentucky and Kirkwood, Missouri. Lawson missed six scheduled shifts while he was on strike but called the store to report that he would be absent on each of those days (except for June 8). (Jt. Exhs. 1083–1087, 1093, 1326–1328; R. Exh. 244.)

On June 10, Lawson presented store management with a letter that reiterated that he had been on strike and communicated his unconditional offer to return to work. That same day, Lawson returned to work for his scheduled shift. (Jt. Exhs. 1076, 1080, 1328.)

On June 21, Walmart issued Lawson a personal discussion for attendance, citing Lawson's Ride for Respect strike-related absences as part of the basis for the personal discussion. In addition, on August 16, Walmart issued Lawson a first written coaching for attendance and punctuality, relying in part on Lawson's Ride for Respect strike-related absences. (Jt. Exhs. 1071, 1081, 1094, 1328.)

P. Baker, LA—Store 1102 (Brandon Garrett, Shawnadia Mixon, Mariah Williams & Tavarus Yates)

In 2012–2013, Brandon Garrett, Shawnadia Mixon, Mariah Williams, and Tavarus Yates each worked in Walmart store 1102, located in Baker, Louisiana. Garrett and Yates worked as overnight stockers in the frozen foods department, while Mixon worked as a lawn and garden sales associate and Williams worked as a cashier in the smoke shop. (Tr. 4249, 4264, 4274, 4277, 4295–4296, 4358–4360, 4362, 4387, 4397, 4409–4412, 4493–4496; R. Exh. 272.)

Between May 30 and June 1, 2013, Garrett, Mixon, Williams, and Yates notified store management that they were going on strike by calling the IVR system to report that they would be absent.[95] Garrett also told a manager in store 1102 by telephone that he was going on strike. (Tr. 4420–4422, 4305–4307, 4310, 4367–4368; Jt. Exhs. 639, 650, 679, 695; R. Exh. 272; see also Jt. Exh. 636 (listing confirmation numbers from the IVR system).)

In addition, on May 31, Garrett, Mixon, Williams, and Yates entered store 1102 with approximately 50 OUR Walmart supporters and silently walked through the store until they located a manager. A representative of the protesters then used a microphone to read a strike letter in the manager's presence. Garrett, Mixon, Williams, and Yates also turned in a strike letter on May 31, and also faxed a copy of the letter to Walmart. (Jt. Exh. 636; R. Exhs. 185, 244, 272; Tr. 4238–4239, 4254–4255, 4267, 4274, 4277, 4303–4304, 4307–4309, 4333–4334, 4339, 4347–4348, 4355, 4364–4370, 4396–4397, 4402–4404, 4419–4420, 4422–4427, 4458–4459, 4472–4473, 4490.)

While on strike, Garrett, Mixon, Williams, and Yates participated in Ride for Respect events in: Baker, Louisiana; Conway, Arkansas; and Bentonville, Arkansas. Garrett, Mixon, Williams, and Yates each missed between seven and nine scheduled shifts while on strike. (Jt. Exhs. 640, 651, 680, 696; R. Exhs. 203, 272, 1102 BG1; Tr. 4311–4313, 4335–4336, 4350–4351, 4356, 4371, 4373, 4399, 4405–4406, 4428–4430, 4435–4436, 4460, 4475–4478.)

On June 10, Garrett, Mixon, Williams, and Yates read and presented store management with a letter that reiterated that they had been on strike and communicated their unconditional offer to return to work. Mixon and Williams then worked their scheduled shifts on June 10, and Garrett and Yates worked their scheduled shifts on June 11. (Jt. Exhs. 634, 637, 647, 676, 688; R. Exh. 272; Tr. 4256, 4267, 4274, 4315–4317, 4337–4339, 4372, 4431–4435.)

On June 27 and 28, Walmart issued a first written coaching to Williams and a third written coaching to Mixon,[96] citing their strike-related absences as part of the basis for the coachings. (Jt. Exhs. 643, 649, 674, 678; R. Exh. 272; Tr. 4249–4254, 4257–4258, 4278–4281, 4319–4322.)

Similarly, on June 28, Walmart discharged Garrett and Yates for excessive absences and/or tardies, citing their strike-related absences as part of the basis for their discharges. (Jt. Exhs. 626, 638, 682, 694; Tr. 4263–4264, 4266–4267, 4274–4277, 4358, 4363, 4377, 4379–4382, 4397, 4437–4438, 4441–4444, 4497–

[94] Lawson also went on strike on October 12 and November 19, 21 and 23, 2012. Lawson called the IVR system to report his absences on those dates, and also submitted a return to work letter on November 24, 2012 that noted he had been out on strike. (Jt. Exhs. 1078, 1082, 1088–1089, 1091, 1326, 1328; see also R. Exhs. 1 VID1, ID15.)

[95] On November 22, 2012, Yates planned to go on strike, and thus submitted a strike letter and return to work letter. Yates decided not to go through with that strike, however, and worked his scheduled shift. (Tr. 4382–4384; Jt. Exhs. 690, 692.)

[96] Walmart decided to issue the coaching to Mixon on June 28. There is some ambiguity, however, about whether Walmart notified Mixon of the coaching on June 28, or instead on August 27 when Mixon returned from a leave of absence. (Tr. 4278–4282; R. Exh. 272.) The ambiguity concerning when Walmart notified Mixon about the June 28 coaching is not material to my analysis.

4498; see also Jt. Exhs. 627, 684 (showing that Garrett and Yates had active third written coachings on their disciplinary records).)

Q. Laurel, MD—Store 1985 (Cynthia Murray)

During the relevant time period, Cynthia Murray worked for Walmart as a fitting room associate in store 1985, located in Laurel, Maryland. (Jt. Exh. 1328.)

On May 28, 2013, Murray notified store management that she was going on strike by calling the IVR system to report her absence and by turning in a strike letter.[97] While on strike, Murray participated in Ride for Respect events in Baker, Louisiana and Conway, Arkansas. Murray missed eight scheduled shifts while she was on strike. (Jt. Exhs. 1253, 1255, 1257, 1328; see also 1985 VID1 CM.)

On June 12, Murray returned to work for her scheduled shift. (Jt. Exhs. 1250, 1328.)

On June 26, Walmart issued Murray a personal discussion for attendance, citing Murray's Ride for Respect strike-related absences as part of the basis for the personal discussion. (Jt. Exh. 1328; see also Jt. Exh. 1258.)

R. Chelmsford, MA—Store 2903 (David Coulombe)

During the relevant time period, David Coulombe worked for Walmart as a cart pusher in store 2903, located in Chelmsford, Massachusetts. (Jt. Exh. 1328.)

On May 28, 2013, Coulombe notified store management that he was going on strike by turning in a strike letter, and also calling the IVR system to report his absence. While on strike, Coulombe participated in Ride for Respect events in Baker, Louisiana, and in Conway, Arkansas. Coulombe missed seven scheduled shifts while he was on strike. (Jt. Exhs. 1275, 1277, 1278, 1328; see also R. Exhs. 278, ID20.)

On June 9, Coulombe presented store management with a letter that reiterated that he had been on strike and communicated his unconditional offer to return to work. That same day, Coulombe worked his scheduled shift. (Jt. Exhs. 1273, 1276, 1328.)

On June 21, Walmart issued Coulombe a first written coaching for attendance and punctuality, citing Coulombe's strike-related absences as part of the basis for the coaching. (Jt. Exhs. 1271, 1328.)

S. Chicopee, MA—Store 5278 (Aubretia Edick)

During the relevant time period, Aubretia Edick worked for Walmart as a cashier in store 5278, located in Chicopee, Massachusetts. (Jt. Exh. 1328.)

On May 28, 2013, Edick notified store management that she was going on strike by turning in a strike letter and calling the IVR system to report her absence. While on strike, Edick participated in Ride for Respect events in Chicopee, Massachusetts, Baker, Louisiana and Conway, Arkansas. Edick missed nine scheduled shifts while she was on strike. (Jt. Exhs. 1305–1307, 1328; see also R. Exhs. 278, ID20.)

On June 9, Edick returned to work for her scheduled shift. (Jt. Exhs. 1303, 1328.)

On June 26, Walmart issued Edick a personal discussion for attendance, citing Edick's strike-related absences as part of the basis for the personal discussion. (Jt. Exhs. 1309, 1328.)

T. Sauk Centre, MN—Store 4253 (Michael Ahles)

During the relevant time period, Michael Ahles worked for Walmart as a deli sales associate in store 4253, located in Sauk Centre, Minnesota. (Jt. Exh. 1324.)

On May 30, 2013, Ahles notified store management that he was going on strike by turning in a strike letter, and also calling the IVR system to report his absence.[98] While on strike, Ahles participated in Ride for Respect events in: Chicago, Illinois; Louisville, Kentucky, and Kirkwood, Missouri. Ahles missed nine scheduled shifts while he was on strike. (Jt. Exhs. 927, 929–931, 1324; R. Exhs. 112, 2694 CG1, 5417 CG1 (p. 2); Tr. 6127.)

On June 11, Ahles presented store management with a letter that reiterated that he had been on strike and communicated his unconditional offer to return to work. Ahles worked his next scheduled shift on June 12. (Jt. Exhs. 925–926, 928, 1324.)

On June 22, Walmart issued Ahles a first written coaching for attendance and punctuality, in part because of Ahles' strike-related absences during the Ride for Respect. (Jt. Exhs. 29, 922, 1324.)

U. Elizabeth City, NC—Store 1527 (Cheryl Plowe)

During the relevant time period, Cheryl Plowe worked for Walmart as a bakery associate in store 1527, located in Elizabeth City, North Carolina. (Jt. Exh. 1328.)

Plowe notified store management that she was going on strike by calling the IVR system on May 29, 2013, to report that she would be absent from work, and by turning in a strike letter on May 30. While on strike, Plowe participated in Ride for Respect events in Baker, Louisiana, and Conway, Arkansas. Plowe missed seven scheduled shifts while she was on strike. (Jt. Exhs. 1127, 1130–1131, 1328.)

On June 10, Plowe presented store management with a letter that reiterated that she had been on strike and communicated her unconditional offer to return to work. That same day, Plowe worked her scheduled shift. (Jt. Exhs. 1125, 1128; see also Jt. Exh. 1328 (stipulation that Plowe submitted a return to work letter but indicating that she did so on June 8).)

On June 21, Walmart issued Plowe a personal discussion for attendance, citing Plowe's strike-related absences as part of the basis for the personal discussion. (Jt. Exhs. 1129, 1132, 1328.)

V. Ennis, TX—Store 286 (Cody Shimmel)

During the relevant time period, Cody Shimmel worked for Walmart as a meat sales associate in store 286, located in Ennis, Texas. (Tr. 3156, 3171.)

On June 1, 2013, Shimmel notified store management that he

[97] In 2012, Murray joined other OUR Walmart supporters and went on strike on or about October 10 and November 23. Murray called the IVR system to report her absences on those dates, and also submitted a return to work letter on October 11, and a strike letter on November 23. (Jt. Exhs. 1252, 1254–1256, 1328; see also R. Exhs. 271, 1 VID1 (and ID15), 1985 VID1, 1985 VID2, 5129 VID2.)

[98] On November 23, 2012, Ahles went on strike and joined other OUR Walmart supporters in an action at another Walmart store (store 5437 in St. Paul, Minnesota). Ahles called the IVR system to report his absence on that date and returned to work on November 24. (Jt. Exhs. 929, 1324; R. Exh. 5437 VID 1.)

was going on strike during the Ride for Respect by calling the IVR system to report his absence. Shimmel also gave the shift manager at his store a piece of paper that stated he was going on strike. While on strike, Shimmel participated in Ride for Respect events in Bentonville, Arkansas. Shimmel missed seven scheduled shifts while he was on strike. (Jt. Exhs. 254–255; Tr. 2871, 3161–3165, 3172, 3174–3175, 3178–3179.)

On or about June 10, Shimmel (or someone acting on his behalf) presented store management with a letter that reiterated that Shimmel had been on strike and communicated his unconditional offer to return to work. Shimmel worked his next scheduled shift on June 10. (Jt. Exhs. 252, 256; Tr. 3165–3166.)

On June 24, Walmart issued Shimmel a third written coaching for attendance and punctuality, in part because of Shimmel's strike-related absences during the Ride for Respect. (Jt. Exh. 251; Tr. 3167–3169, 3175–3176; see also Jt. Exh. 250 (second written coaching that was "active" when Shimmel was disciplined on June 22).)

W. Lancaster, TX—Store 471 (Javon Adams, Marc Bowers, Christopher Collins, Colby Harris and Vanzell Johnson)

In 2012–2013, Javon Adams, Marc Bowers, Christopher Collins (C. Collins), Colby Harris, and Vanzell Johnson worked in store 471, located in Lancaster, Texas. During that timeframe, they held the following positions: Adams, Bowers and Collins—cart pushers; Harris and Johnson—produce sales associates. (Tr. 2682, 2875, 2920, 3081–3082, 3133, 3183, 3186; R. Exh. 272.)

While at work on May 6, 2013, Harris heard his store manager make what Harris believed were derogatory remarks to another manager about OUR Walmart. Because of that incident, Harris told his store manager that he was leaving his shift early to go on strike. Harris asked Bowers to join him, and Bowers agreed. Accordingly, both Bowers and Harris submitted strike letters and began their strike, with Harris spending some of his time working on an online petition titled "Walmart: Stop silencing Associates who speak out," and Bowers spending his time "chilling" at home and taking care of personal matters. Bowers and Harris each missed two shifts while on strike. (Jt. Exhs. 170–172, 176, 207–208, 212; Tr. 2764–2772, 2848–2849, 3111–3114, 3143–3144, 3197; see also GC Exh. 471–1 (excerpt of Harris' online petition).)

On May 9, Bowers and Harris present return to work letters to their store manager. Harris then worked his scheduled shift on May 9, and Bowers worked his scheduled shift on May 10. Walmart issued a third written coaching to Bowers and a second written coaching to Harris when they returned to work, citing their strike-related absences as part of the basis for the coachings. (Jt. Exhs. 169–170, 177, 205, 207, 214; Tr. 2772–2776, 2866–2867, 3114–3119, 3142, 3329–3330.)

From May 30 to June 1, Bowers, Harris and Johnson notified Walmart that they were going on strike during the Ride for Respect by submitting strike letters. In fact, Johnson was at work on June 1, but left his shift to go on strike after a group of OUR Walmart members (including Bowers and Harris) and supporters entered the store, held a brief prayer vigil, and then walked Johnson out on strike while chanting slogans such as "Stand Up! Live Better!" and "We are the 99 percent!" Adams and C. Collins signed strike letters dated June 1 and gave them to an OUR Walmart organizer, but the record does not establish that Walmart received Adams' and C. Collins' letters.[99] Adams, Bowers, C. Collins and Harris also called the IVR system to report that they would be absent from work, and Bowers verbally notified a manager that he was going on strike. (Jt. Exhs. 145, 179, 192, 213, 216, 232; GC Exhs. 471–2, 471–3, 471–4; Tr. 2786–2789, 2833, 2850–2856, 2906, 2940–2943, 2947–2948, 3120–3122, 3144, 3191, 3216; R. Exhs. 272, 471 VID1; see also GC Exh. 67 (Walmart store manager admitting that he received strike letters from Bowers, Harris and Johnson).)[100]

Bowers, Harris and Johnson joined other OUR Walmart supporters in traveling to Bentonville, Arkansas, for the Ride for Respect, and participated in Ride for Respect events in Lancaster, Texas and Bentonville, Arkansas. Adams and C. Collins remained in the Dallas/Fort Worth area, where Adams joined an OUR Walmart organizer in visiting nearby Walmart stores to talk to associates about OUR Walmart, and C. Collins spoke with Walmart associates about OUR Walmart and attended to some personal matters. Adams, Bowers, C. Collins, Harris, and Johnson missed between four and eight scheduled shifts while on strike during the Ride for Respect. (Jt. Exhs. 146, 172, 190, 209, 230; R. Exhs. 245, 272, 471 VID1; Tr. 2788–2792, 2833, 2886–2887, 2908–2909, 2943–2944, 2957–2959, 2966, 3119–3120, 3123, 3126.)

On June 10, Adams, Bowers, C. Collins, Harris and Johnson read and presented store management with letters that reiterated

[99] C. Collins initially testified that he delivered his June 1 strike letter to the store manager, but later testified that he gave his June 1 strike letter to an OUR Walmart organizer. (Compare Tr. 2885–2887 with Tr. 2905.) Since I have no reason to credit one aspect of C. Collins' testimony on this point over the other, I have given the benefit of the doubt on this point to Walmart as the Respondent.

I also note that on August 25, 2015, the parties offered Joint Exhibit 94(a) as an exhibit that summarized all strike and return to work letters. I admitted Jt. Exh. 94(a) into evidence. Although Joint Exhibit 94(a) includes Adams' and C. Collins' strike letters, there is not a sufficient basis for me to conclude that Walmart conceded that it received those letters. (See Tr. 6674–6675; Jt. Exh. 94(a) (tab 99).)

[100] On October 9, 2012, Harris went on strike after submitting a strike letter to Walmart and calling the IVR system to report his absence. In addition, Bowers and Harris went on strike on November 16, 2012, and notified Walmart of that fact by: submitting a strike letter (signed by Bowers, as well as Johnson, who was on a leave of absence); submitting and a return to work letter (signed by Bowers, Harris and Johnson); and calling the IVR system to report that they would be absent (Harris). Last (in 2012), on or about November 21, Adams, Bowers, C. Collins and Harris went on strike and notified Walmart by: submitting strike letters (Adams, Bowers, C. Collins, and Harris); calling the IVR system (Bowers, C. Collins and Harris); and verbally telling a manager that they were going on strike (Bowers). (Jt. Exhs. 142, 173–175, 179, 192, 210–211, 216, 290(a)–(f); GC Exhs. 56, 471–6, 471–11; R. Exhs. 1 VID1, ID15; Tr. 2716–2719, 2725–2736, 2756–2761, 2759–2761, 2827–2828, 2832–2836, 2843–2845, 2872, 2880–2883, 2903, 2930–2936, 3094–3108, 3136, 3189, 3191–3196, 3290, 3319–3322; see also GC Exh. 471–9 (requesting information about associates who participated in the Black Friday 2012 strike, and thus prompting the responsive information provided in GC Exh. 471–11); Tr. 3194, 3246–3247, 3268 (explaining that although Johnson participated in the November 16 strike, he was on a leave of absence that extended from November 2012 to January 2013).)

that they had been on strike and communicated their unconditional offers to return to work. Adams, Bowers, and Johnson worked their scheduled shifts on June 10, and C. Collins and Harris worked their scheduled shifts on June 11. (Jt. Exhs. 140, 143, 170, 178, 188, 191, 207, 215, 228, 234; GC Exh. 67; R. Exhs. 245, 272; Tr. 2792–2794, 2888–2889, 2944–2946, 3120, 3124–3127, 3192.)

On June 21, Walmart issued third written coaching to Harris and a personal discussion to Johnson, citing their strike-related absences as part of the basis for taking those actions. (Jt. Exhs. 206, 237; R. Exh. 272; Tr. 2795–2797, 3247–3251.)

On June 22, Walmart discharged Adams and C. Collins for "job abandonment/three days unreported absence," citing their strike-related absences as part of the basis for the discharges. Specifically, Walmart determined discharge was appropriate under its disciplinary policy because Adams and C. Collins had active third written coachings and accumulated three or more "no-call/no-show" absences on dates during the Ride for Respect. (Jt. Exhs. 148, 183; Tr. 2890–2892, 2910, 2949–2953, 2969; see also Jt. Exh. 139 (Adams' active third written coaching); Jt. Exh. 187 (C. Collins' active third written coaching).)

Similarly, on June 22, Walmart discharged Bowers because he had an active third written coaching, and his strike-related absences during the Ride for Respect constituted additional unexcused absences that called for termination under Walmart's disciplinary policy. (Jt. Exh. 182; Tr. 3127–3130; see also Jt. Exh. 169 (Bowers' active third written coaching that was based on his strike-related absences on May 6–9).)

On September 30, Walmart discharged Harris for "excessive absences and/or tardies." In support of that decision, Walmart asserted that Harris did not work his scheduled shifts on August 12 and September 6, and thus had nine attendance occurrences on his record in the preceding 6 months.[101] Walmart accordingly determined that it should discharge Harris because Harris had an active third written coaching, and discharge was the next level of discipline available under Walmart's disciplinary policy. (Jt. Exh. 201; Tr. 2797–2800, 3331–3332, 3341–3342.)

X. Quinlan, TX—Store 4215 (Jeanna Slate-Creach)

In 2010, Jeanna Slate-Creach began working for Walmart as a cashier in store 4215, located in Quinlan, Texas. Slate-Creach later received a promotion to the position of general merchandise receiver, but after a dispute with store management about her performance, Slate-Creach was demoted in April 2013 to the position of part-time cashier. (Jt. Exh. 268; GC Exh. 4215–4; R. Exh. 4215 JC6; Tr. 3012–3018, 3024, 3067–3068.)

On May 30, 2013, Slate-Creach notified store management that she was going on strike by calling the IVR system to report that she would be absent on May 31, and telling an assistant manager that she was going on a ULP strike for a week. Slate-Creach also went to Store 4215 on May 31 with a group of OUR Walmart supporters, where she turned in a strike letter to a Walmart human resources manager who met her at one of the store entrances. While on strike, Slate-Creach participated in Ride for Respect events in: a parking lot near her home store; Lancaster, Texas; Walmart store 17 in Arkansas; and Bentonville, Arkansas. Slate-Creach missed seven scheduled shifts while she was on strike. (Jt. Exhs. 272–274; R. Exh. 244; Tr. 2856, 3033–3044, 3074, 3077–3078; GC Exh. 4215–2 (copy of a flyer that Slate-Creach distributed at one of the Ride for Respect events).)

On June 9, Slate-Creach presented store management with a letter that reiterated that she had been on strike and communicated her unconditional offer to return to work. That same day, Slate-Creach returned to work for her scheduled shift. (Jt. Exhs. 270, 275; Tr. 3045–3047.)

On June 26, Walmart issued Slate-Creach a third written coaching for attendance and punctuality, citing her strike-related absences during the Ride for Respect as the basis for the coaching. (Jt. Exh. 269; Tr. 3052–3055, 3071.)

On August 21, Walmart notified Slate-Creach that she was being discharged because of her problems with attendance, including her strike-related absences.[102] (Jt. Exhs. 259 (p. 2), 259(a); Tr. 3012, 3056–3059.)

Y. Bellevue, WA—Store 3098 (Shana Stonehouse)

In 2013, Shana Stonehouse worked for Walmart as an inventory management specialist and price coordinator in store 3098, a Walmart neighborhood market (i.e., grocery store) located in Bellevue, Washington. (Tr. 3956–3959, 3961–3962.)

On May 28, 2013, Stonehouse notified store management that she was going on strike during the Ride for Respect by meeting with her store manager and presenting a strike letter dated May 29. Stonehouse also called the IVR system on May 30 to report her absence. While on strike, Stonehouse participated in Ride for Respect events in: eastern Washington; Boise, Idaho; Salt

[101] The record is not clear on whether Walmart counted Harris' absences during his May 6–9 strike or the Ride for Respect when Walmart determined that Harris had nine attendance occurrences in the 6 months before September 30. (See Jt. Exh. 209 (Harris' attendance record).) It is clear, however, that Harris' discharge was predicated on him having received second and third written coachings for strike-related absences (which made discharge the next level of discipline under Walmart's discipline policy). (Jt. Exh. 201; Tr. 3331–3332.)

[102] Shift manager Randy St. Clair filled out Slate-Creach's exit interview form, which states that Walmart terminated Slate-Creach involuntarily because she violated Walmart's attendance policy. (Jt. Exh. 259.) However, St. Clair also wrote a memo asserting that Slate-Creach quit before the termination was complete because she did not want to allow Walmart to put a "black mark" on her by firing her. Slate-Creach denies stating that she quit and asserted that it was St. Clair that attempted to prod her to quit instead of being terminated. (Jt. Exh. 259(a); Tr. 3058–3059.)

I have given little weight to the assertion in St. Clair's memo that Slate-Creach voluntarily quit her job. First, Walmart did not call St. Clair as a witness to testify about his conversation with Slate-Creach. Since St. Clair did not testify to the accuracy and truthfulness of his memo, an adverse inference that his testimony would have been unfavorable to Walmart is warranted, and the credibility of St. Clair's memo is weakened. Second, even if I were to credit the description of Slate-Creach's termination set forth in St. Clair's memo, the facts still would support a finding that Slate-Creach was involuntarily terminated. Indeed, St. Clair admitted in his memo that he informed Slate-Creach that she was being terminated for attendance, and he further admitted that he did so before any alleged discussion about Slate-Creach quitting. Thus, there was no question that Walmart was showing Slate-Creach the door when any subsequent discussion about quitting arose.

Lake City, Utah; and Bentonville, Arkansas. Stonehouse missed eight scheduled shifts while she was on strike. (Jt. Exhs. 537–539; GC Exhs. 3098–1, 3098–2; Tr. 3973–3982, 4000, 4006.)

On or about June 9, Stonehouse returned to her store and worked her next scheduled shift. During her shift, an associate (title unspecified) told Stonehouse that the entire store suffered while she was gone and that everyone had to cover for her absence. The associate also told Stonehouse that she should expect to have a conversation with the store manager once he was back at work (from his day off). (Jt. Exhs. 535; Tr. 3983–3985.)

A few days later (on or about June 12), store manager Shane McNeil called Stonehouse to his office via intercom. McNeil stated that the entire store suffered while Stonehouse was away and asserted that it was not fair to anyone else who had to cover for Stonehouse while she was gone. McNeil then stated that Stonehouse would be charged with one unexcused absence (instead of eight) because she was absent for a strike and made computer entries that recorded Stonehouse's Ride for Respect strike as an unexcused absence. (Tr. 3985–3987; see also Jt. Exh. 539 (attendance record that lists all eight of Stonehouse's absences during the Ride for Respect as "unauthorized absence[s]").)

In a memo dated June 24, Walmart indicated that it planned to give Stonehouse a personal discussion for time and attendance based on her absences during the Ride for Respect. At the time that the memo was written, however, Stonehouse had not yet received the personal discussion because she was out sick from June 20–22. (Jt. Exhs. 29; 539, 624; Tr. 3988, 3990–3991; see also Jt. Exh. 538 (showing that Stonehouse called the IVR system to notify Walmart that she was out sick on June 20, 21 and 22).)

On July 1, Walmart issued Stonehouse a third written coaching for attendance and punctuality. Walmart identified Stonehouse's illness-related absences on June 20–22 as the basis for the coaching. (Jt. Exhs. 531, 539; Tr. 3987–3991; see also Jt. Exh. 532 (second written coaching for attendance that was still active in July 2013); FOF, Section II(A)(6) (explaining that unauthorized absences include any time that an associate is away from scheduled work where the absence was not approved by a manager or supervisor).)

Z. Bellingham, WA—Store 2450 (Vivian Sherman)

During the relevant time period, Vivian Sherman worked for Walmart as an order fulfillment sales associate in the site-to-store pickup area of store 2450, located in Bellingham, Washington. (Tr. 3681; R. Exh. 272.)

On May 29, 2013, Sherman submitted a strike letter to her store manager. Sherman also called the IVR system on May 30 to report that she would be absent on May 31. Sherman participated in Ride for Respect events in Boise, Idaho and Bentonville, Arkansas, and missed at least seven scheduled shifts while she was on strike. (Jt. Exhs. 475, 479–482; R. Exhs. 272, 2508 Photo 1; Tr. 3680–3685, 3690.)

On or about June 9, Sherman presented store management with a letter that reiterated that she had been on strike and communicated her unconditional offer to return to work. On June 9, Sherman worked her scheduled shift. (Jt. Exhs. 473, 477; R. Exh. 272; Tr. 3685.)

On June 24, Walmart issued Sherman a personal discussion for attendance, citing her strike-related absences as part of the basis for the personal discussion. (Jt. Exhs. 479, 483; R. Exh. 272; Tr. 3686–3688, 3690; GC Exh. 2450–1; see also Jt. Exhs. 29, 624 (noting Walmart's plan to have a personal discussion with Sherman).)

AA. Federal Way, WA—Store 2571 (Sara Gilbert, Patricia Locks, Michael McKeown, Liai Pefua, Patricia Scott and John Smith)

In 2012–2013, Sara Gilbert, Patricia Locks, Michael McKeown, Liai Pefua, Patricia Scott and John Smith worked in Walmart store 2571, located in Federal Way, Washington. During that timeframe, they held the following positions: Gilbert, McKeown and Smith – department managers;[103] Locks – sport goods sales associate; Pefua and Scott – cashiers. (Tr. 3451, 3493, 3500, 3504, 3513, 3703–3704, 3789–3790, 3812–3813, 3818–3819, 3894–3895, 4060, 4062–4065, 4076–4078; R. Exh. 272.)

On May 29–30, Gilbert, Locks, McKeown, Pefua, Scott, and Smith notified Walmart that they were going on strike during the Ride for Respect by submitting strike letters. In particular, on May 30, Gilbert, Pefua, and Smith walked off their shifts after they and a group of approximately 20 OUR Walmart members and supporters (including Locks, McKeown and Scott) approached their store manager and told him that they (Gilbert, Pefua and Smith) were going on strike. Gilbert, Locks, McKeown, Pefua, Scott, and Smith also called the IVR system on or about May 29–30 to report that they would be absent from work, after which Gilbert, Locks, McKeown, and Scott told an assistant manager by telephone that they were going on strike. (Jt. Exhs. 304, 308, 332, 335, 357, 359, 383, 385, 411, 414, 524, 526; GC Exh. 2571–3; R. Exhs. 272, 2571 VID2, 2571 VID3, 2571–MM2, 2571–MM3, 2571–PS5, 2571–SG3; Tr. 3460–3462, 3488, 3495–3496, 3502, 3512, 3514–3515, 3720–3724, 3762–3763, 3771–3784, 3810–3813, 3870–3872, 3901–3906, 3935–3937, 4073–4075, 4095.)[104]

Gilbert, Locks, McKeown, Pefua, Scott, and Smith joined other OUR Walmart supporters in traveling to Bentonville,

[103] As noted above, although Gilbert, McKeown, and Smith were department managers, Walmart failed to show that they were statutory supervisors under Sec. 2(11) of the Act. (See Analysis, Sec. II(B).)

[104] On or about November 14–15, 2012, Gilbert, Locks, McKeown, Scott and Smith went on strike and notified Walmart of that fact by: calling the IVR system to report that they would be absent (Gilbert, Locks, McKeown, Scott, and Smith); telling an assistant manager by telephone that they were going on strike (Gilbert, Scott, and Smith); and submitting and a return to work letter (Gilbert, Locks, Scott, and Smith). (Jt. Exhs. 305, 308–309, 335, 359, 414, 526; R. Exh. 272; Tr. 3466–3470, 3764, 3830–3833, 3919, 3921, 4058, 4066; see also Jt. Exh. 115 (email from Gilbert about her November 14, 2012 strike); R. Exhs. 2571–PS1, 2571–PS2, 2571–PS3, 2571–PS4, 2571– SG1, 2571–SG2, 2571 VID1, 2571 VID4, 2571 VID8, 2571 VID9 (photos and video of portions of the November 15, 2012 strike/demonstration in Federal Way); Tr. 3859–3863, 3925–3930, 3933–3934 (descriptions of November 15, 2012 strike/demonstration in Federal Way).) Gilbert and Smith also went on strike in October 2012, during Walmart's annual financial analysts' meeting. (Tr. 3829, 3832, 3848–3850; R. Exhs. 3 (clip 4 SG), 1 VID1, ID15, 272.)

Arkansas for the Ride for Respect, and participated in Ride for Respect events in: Federal Way, Washington; eastern Washington; Boise, Idaho; Salt Lake City, Utah; Denver, Colorado; Kansas; and Bentonville, Arkansas. Gilbert, Locks, McKeown, Pefua, Scott, and Smith missed between four and eight scheduled shifts while on strike during the Ride for Respect. (Jt. Exhs. 303, 336, 360, 386, 415, 527; R. Exhs. 272, 2508 Photo 1 (photo of Pefua and other OUR Walmart supporters at a Walmart store in Boise, Idaho), 2571–MM1 (same, showing Gilbert and McKeown), 2571–MM1(a) (same, showing Locks and Smith), 2571–SG4 (same, showing Gilbert); Tr. 3724–3728, 3730, 3748–3754, 3814–3820, 3824, 3844, 3872–3874, 3890–3892, 3906–3910, 3912.)

On June 9–10, Gilbert, Locks, McKeown, Pefua, Scott, and Smith presented store management with letters that reiterated that they had been on strike and communicated their unconditional offer to return to work. Locks and Pefua worked their scheduled shifts on June 9, and Gilbert, McKeown, Scott, and Smith worked their scheduled shifts on June 10. (Jt. Exhs. 301, 306, 330, 334, 355, 358, 381, 384, 409, 412, 522, 525; R. Exh. 272; Tr. 3462–3464, 3488, 3495–3496, 3502, 3511–3512, 3514, 3728–3730, 3822–3824, 3910–3912.)

On or about June 21, Walmart issued: a personal discussion to Locks; first written coachings to Gilbert, McKeown, Pefua, and Scott; and a second written coaching to Smith. Walmart cited those associates' strike-related absences as part of the basis for issuing the discussion and coachings. (Jt. Exhs. 29, 298, 348, 375, 407, 519, 624; R. Exh. 272; Tr. 3452–3458, 3464–3465, 3485–3488, 3489, 3492–3496, 3500–3502, 3506–3508, 3510–3511, 3515–3517, 3731–3734, 3825–3828, 3912–3915, 3947, 4079–4080; see also Jt. Exh. 520 (first written coaching for Smith that was active in June 2013).)

BB. Mount Vernon, WA—Store 2596 (Betty Shove, Esmeralda Uvalle & Debra Williams)

In 2012–2013, Betty Shove, Esmeralda (Mandy) Uvalle and Debra Williams each worked in store 2596, located in Mount Vernon, Washington. Williams worked as a sales associate in the toy department, while Shove and Uvalle worked as cashiers. (Tr. 3572–3573, 3581–3582, 4014–4015; R. Exh. 272.)

On May 29, 2013, Shove, Uvalle and Williams each submitted a strike letter to their store manager. Shove, Uvalle and Williams also called the IVR system on May 29 (Shove) and May 30 (Uvalle and Williams) to report that they would be absent, and Williams informed shift manager Vicki Graham by telephone that she was on strike and would miss her shift. (Jt. Exhs. 502, 506, 566, 568, 590, 592; R. Exh. 272; Tr. 4023, 4025–4030, 4036, 4051–4052.) [105]

Uvalle and Williams traveled by bus to Bentonville, Arkansas during the Ride for Respect, and participated in Ride for Respect events in Boise, Idaho while en route to Bentonville. Shove, meanwhile, stayed home due to a prior commitment and then flew to Bentonville a few days later. Shove, Uvalle, and Williams each participated in Ride for Respect events while in Bentonville and missed between five and seven scheduled shifts while on strike. (Jt. Exhs. 507, 569, 593; R. Exhs. 272, 2508 Photo 1; Tr. 4023, 4026–4027, 4030–4032, 4041–4042, 4052, 4054; see also GC Exh. 2571–4 (p. 3) (photograph showing Shove, Uvalle and Williams during the Ride for Respect).)

From June 9–11, Shove, Uvalle, and Williams presented store management with letters that reiterated that they had been on strike and communicated their unconditional offer to return to work. Shove, Uvalle, and Williams then worked their scheduled shifts on June 9 (Williams) and June 11 (Shove and Uvalle). (Jt. Exhs. 500, 504, 564, 567, 588, 591; R. Exh. 272; Tr. 4034–4037, 4053.)

On June 21, Walmart issued Uvalle and Williams personal discussions for attendance, citing their strike-related absences as part of the basis for the personal discussions. Similarly, on June 26, Walmart issued Shove a personal discussion for attendance, citing her strike-related absences as part of the basis for the personal discussion. (Jt. Exhs. 508–509, 570–571, 594–595, 624; R. Exh. 272; Tr. 3567–3569, 3571, 3574–3578, 3584–3585, 4038–4039; see also Jt. Exh. 29 (noting Walmart's plan to issue personal discussions to Shove, Uvalle ,and Williams.)

CC. Port Angeles, WA—Store 2196 (Lawrence Slowey)

Lawrence (Larry) Slowey began working for Walmart in 1995. In 2012–2013, Slowey worked for Walmart as a hardware sales associate in store 2196, located in Port Angeles, Washington. (Jt. Exh. 442; R. Exh. 272; Tr. 3635–3636, 4113.)

On May 29, 2013, Slowey notified store management that he was going on strike by calling the IVR system to report that he would be absent on May 30, and telling an assistant manager by telephone that he was going on strike. On June 6, Slowey also faxed in a strike letter dated May 30.[106] Slowey participated in Ride for Respect events in Boise, Idaho and Bentonville, Arkansas, and missed eight scheduled shifts while he was on strike. (Jt. Exhs. 445, 449–451; R. Exhs. 272, 2508 Photo 1; Tr. 3638–3641, 3646–3647, 4113–4114; see also 4144–4146; GC Exh. 2571–4 (p. 3) (photograph of Slowey during the Ride for Respect).)

On June 10, Slowey presented store management with a letter that reiterated that he had been on strike and communicated his unconditional offer to return to work. That same day, Slowey worked his scheduled shift. (Jt. Exhs. 443, 446; R. Exh. 272; Tr. 3641.)

On June 24, store manager Kimberly Carson issued Slowey a personal discussion for attendance, citing Slowey's strike-related absences and an absence on March 29, 2013, as the basis for the personal discussion. During the personal discussion, Slowey asserted that the March 29 absence should have been an approved absence because he took time off. After verifying that Slowey used time off on March 29, Carson told Slowey that she had taken the personal discussion away. Carson also noted on the personal discussion form that Slowey's discussion was

[105] From October 9–11, 2012, Shove joined other OUR Walmart supporters and went on strike. Shove called the IVR system to report her absence. (Jt. Exh. 506; R. Exhs. 1 VID1, ID15, 272.)

[106] In 2012, Slowey joined other OUR Walmart supporters and went on strike on November 23. Slowey called the IVR system to report his absence on that date. (Jt. Exhs. 447 (par. 4), 449; R. Exhs. 228, 229, 229(a), 272; GC Exh. 2196–1 (pp. 2–3); Tr. 3638, 3647, 4121–4122, 4127–4128.)

"canceled" and "taken away." Slowey therefore received two occurrences for unexcused absences while on strike. (Jt. Exhs. 448, 452; R. Exh. 272; Tr. 3642–3645, 4115, 4131–4132; see also Jt. Exh. 29 (noting Walmart's plans to have a personal discussion with Slowey).)

IV. DISCIPLINE AND DISCHARGE ALLEGATIONS —ANALYSIS OF INDIVIDUAL CLAIMS

A. Complaint Allegations and Applicable Legal Standard

The General Counsel alleges that Walmart violated Section 8(a)(1) of the Act when it disciplined and/or discharged the 55 associates discussed above for missing work time while on strike.

To prove those alleged violations, the General Counsel must demonstrate that: the associate engaged in activity that is "concerted" within the meaning of Section 7 of the Act; Walmart knew of the concerted nature of the associate's activity; the concerted activity was protected by the Act; and Walmart's adverse action against the associate was motivated by the associate's protected, concerted activity. *Lou's Transport, Inc.*, 361 NLRB 1446, 1447 (2014); *Correctional Medical Services*, 356 NLRB 277, 278 (2010); see also *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (noting that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation"). If the General Counsel makes such an initial showing of discrimination, then Walmart may present evidence, as an affirmative defense, demonstrating that it would have taken the same action even in the absence of the associate's protected activity. See *Timekeeping Systems, Inc.*, 323 NLRB 244, 244 (1997).

B. Analysis

1. Analysis of associate claims with no additional issues

For most of the 55 associates covered by this case, the findings of fact and analysis in the earlier portions of this decision demonstrate that the General Counsel made an initial showing of discrimination. Each of the associates engaged in concerted activity by going on strike during the Ride for Respect and/or during another time specified in the complaint. Walmart knew of the concerted nature of the strike activity, as it received at least one form of notice that each associate was on strike (e.g., a strike letter, a call to the IVR system, verbal notice, notice from other sources such as social media postings, and/or a return to work letter). The strikes were protected by the Act. And, Walmart was motivated to discipline or discharge the associates because they were absent while engaging in protected, concerted strike activity. Indeed, in February 2013, Walmart warned several associates that it might treat future strike-related absences as unexcused absences under its attendance policy. Walmart then made good on its warning in June 2013, when it decided to either discipline or discharge associates under its attendance policy based (at least in part) on strike-related absences.[107] Since Walmart did not present evidence that it would have taken the same action even in the absence of the associates' protected activities (with the exception of Louis Callahan, who I discuss separately below), I find that Walmart violated Section 8(a)(1) of the Act when it took the following actions against the following associates:

Name	Store	Unlawful Adverse Employment Action(s)
Juan (John) Juanitas	Fremont, CA	Personal discussion on or about June 9, 2013[108]
Jovani Gomez	Lakewood, CA	Discharge on or about June 21, 2013
Evelin Cruz	Pico Rivera, CA	First written coaching on or about June 21, 2013
Victoria Martinez	Pico Rivera, CA	First written coaching on or about June 21, 2013
Yvette Brown	Placerville, CA	Discharge on or about June 23, 2013
Barbara Collins	Placerville, CA	Discharge on or about June 29, 2013
Norma Dobyns	Placerville, CA	Discharge on or about June 22, 2013
Matthew Gauer	Placerville, CA	First written coaching on or about June 22, 2013
Margaret Hooten	Placerville, CA	First written coaching on or about June 22, 2013

[107] In addition to the animus shown by these actions (which applies to each of Walmart's stores discussed herein), Walmart also demonstrated animus in the Placerville and Richmond, California stores when it committed various 8(a)(1) violations that I found in *Walmart Stores, Inc.*, Case 32–CA–090116, slip op. at 40–41 (2014) (finding, among other 8(a)(1) violations, that Walmart: made an unlawful statement in July 2012 to Barbara Collins in Placerville store 2418; selectively applied its dress code to Raymond Bravo in August and September 2012, when he wore clothing with UFCW or OUR Walmart logos while working at Richmond store 3455; made unlawful statements to Richmond store 3455 associates in response to their protected activities in October 2012; and unlawfully disciplined Richmond store 3455 associates in November 2012, including Raymond Bravo, because they participated in a protected work stoppage).

[108] Walmart argues that it did not give Juanitas a personal discussion, but instead gave him a verbal reminder about the attendance policy. (See Walmart Posttrial Br. at 170.) The evidentiary record, however, establishes that Walmart gave Juanitas a personal discussion. (See Analysis, Section III(A).) Walmart also argues that it would have given Juanitas a verbal reminder even absent Juanitas' strike-related absences, but that argument has no merit because it is predicated on absences that Juanitas incurred after Walmart unlawfully gave Juanitas a personal discussion on June 9 based on Juanitas' strike-related absences. (See Walmart Posttrial Br. at 170.)

Name	Store	Unlawful Adverse Employment Action(s)
Amy Stinnett	Placerville, CA	Second written coaching on or about June 22, 2013
Raymond Bravo	Richmond, CA	Discharge on or about June 27, 2013
Pamela Davis	Richmond, CA	Discharge on or about July 30, 2013[109]
Andrea Carr	San Leandro, CA	Third written coaching on or about June 23, 2013
Cecelia Gurule	San Leandro, CA	Third written coaching on or about June 24, 2013
Dominic Ware	San Leandro, CA	Discharge on or about July 3, 2013
Marie Roberty	Hialeah, FL	Discharge on or about June 22, 2013
Anna Pritchett	Chicago, IL	Personal discussion on or about June 22, 2013
Ronnie Vandell	Chicago, IL	Personal discussion on or about June 22, 2013
Marie Kanger-Born	Crestwood, IL	Personal discussion on or about June 26, 2013
Charmaine Givens-Thomas	Evergreen Park, IL	Personal discussion on or about June 24, 2013
Linda Haluska	Glenwood, IL	Personal discussion on or about June 27, 2013
Rose Campbell	Wheeling, IL	Third written coaching on or about June 25, 2013
Pooshan Kapil	Wheeling, IL	Discharge on or about June 24, 2013
Trina Vetato	Paducah, KY	Personal discussion on or about June 23, 2013 and Second written coaching on or about July 21, 2013 (relying in part on the June 23 personal discussion)
Aaron Lawson	Stanford, KY	Personal discussion on or about June 21, 2013 and First written coaching on or about August 16, 2013 (both relying on strike-related absences)
Brandon Garrett	Baker, LA	Discharge on or about June 28, 2013
Shawnadia Mixon	Baker, LA	Third written coaching on or about June 28, 2013
Mariah Williams	Baker, LA	First written coaching on or about June 27, 2013
Tavarus Yates	Baker, LA	Discharge on or about June 28, 2013
Cynthia Murray	Laurel, MD	Personal discussion on or about June 26, 2013
David Coulombe	Chelmsford, MA	First written coaching on or about June 21, 2013

[109] Walmart argues that it would have terminated Davis even absent her strike-related absences because Davis incurred additional unexcused absences after ending her strike. (See Walmart Posttrial Br. at 171–172.) The evidentiary record does show that Davis accrued nine unexcused absences (between June 30 and July 28) after she returned to work on June 9. Walmart, however, had a track record of tolerating Davis' absences, as (for example) Davis had 29 unexcused active absences on her attendance record on May 15, 2013, but was not discharged. In addition, the evidentiary record shows that Walmart decided on June 24 that it would hold Davis accountable absences (i.e., impose discipline) for strike-related, **before** Davis accrued the nine additional unexcused absences. Walmart followed through with its June 24 plan when it discharged Davis, because Walmart explicitly identified Davis' strike-related absences as part of the reason for her July 30 termination. (See Analysis, Section III(E)(1).) Accordingly, I find that Walmart failed to prove that it would have discharged Davis even if she had refrained from engaging in protected strike activities.

Name	Store	Unlawful Adverse Employment Action(s)
Aubretia Edick	Chicopee, MA	Personal discussion on or about June 26, 2013
Michael Ahles	Sauk Centre, MN	First written coaching on or about June 22, 2013
Cheryl Plowe	Elizabeth City, NC	Personal discussion on or about June 21, 2013
Cody Shimmel	Ennis, TX	Third written coaching on or about June 24, 2013
Javon Adams	Lancaster, TX	Discharge on or about June 22, 2013
Marc Bowers	Lancaster, TX	Third written coaching on or about May 10, 2013 (based on absences while on May 6–9 strike with Harris) and Discharge on or about June 22, 2013 (tainted because it relied on the unlawful May 10 third written coaching, and because it relied on strike-related absences during the Ride for Respect)
Christopher Collins	Lancaster, TX	Discharge on or about June 22, 2013
Vanzell Johnson	Lancaster, TX	Personal discussion on or about June 21, 2013
Colby Harris	Lancaster, TX	Second written coaching on or about May 9, 2013 (based on absences while on May 6–9 strike with Bowers) and Third written coaching on or about June 21, 2013 (based on absences during the Ride for Respect) and Discharge on or about September 30, 2013 (tainted because it relied on the unlawful May 9 and June 21 coachings)
Jeanna Slate-Creach	Quinlan, TX	Third written coaching on or about June 26, 2013 and Discharge on or about August 21, 2013 (tainted because it relied on the unlawful June 26 third written coaching, and because it relied on strike-related absences during the Ride for Respect)
Vivian Sherman	Bellingham, WA	Personal discussion on or about June 24, 2013
Sara Gilbert	Federal Way, WA	First written coaching on or about June 21, 2013
Patricia Locks	Federal Way, WA	Personal discussion on or about June 21, 2013
Michael McKeown	Federal Way, WA	First written coaching on or about June 21, 2013
Liai Pefua	Federal Way, WA	First written coaching on or about June 21, 2013
Patricia Scott	Federal Way, WA	First written coaching on or about June 21, 2013
John Smith	Federal Way, WA	Second written coaching on or about June 21, 2013
Betty Shove	Mt. Vernon, WA	Personal discussion on or about June 26, 2013
Esmeralda (Mandy) Uvalle	Mt. Vernon, WA	Personal discussion on or about June 21, 2013
Debra Williams	Mt. Vernon, WA	Personal discussion on or about June 21, 2013

See Analysis Section III(A)–(F), (H)–(X), (Z)–(BB) (additional findings of fact for each associate listed above); see also *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995) (explaining that a decision to discipline or discharge an employee is tainted if the decision relies on prior discipline that was unlawful); *Dynamics Corp.*, 296 NLRB 1252, 1253–1254 (1989) (same), enfd. 928 F.2d 609 (2d Cir. 1991).

With that initial set of allegations resolved, the allegations that relate to Louis Callahan, Barbara Gertz, Victoria Martinez (December 2012 discipline only), Shana Stonehouse, and Lawrence Slowey are all that remain. I now turn to the issues with those allegations that require further discussion.

2. Did Walmart mount a viable defense to the allegation that it unlawfully discriminated against Barbara Gertz and Lawrence Slowey?

For the same reasons that it did with the 51 associates discussed above, the General Counsel made an initial showing that Walmart discriminated against Barbara Gertz and Lawrence Slowey when it issued personal discussions to them on June 18 (Gertz) and June 24 (Slowey). (See Analysis Section III(G), (CC); Section IV(B)(2).) Instead of mounting a defense around the theory that it would have taken the same action against Gertz and Slowey even in the absence of their protected activity (a common defense when an employer is charged with discriminating against an employee), Walmart asserted that I should apply a "totality of circumstances" analysis to Walmart's conduct towards Gertz and Slowey, and conclude that Walmart did not interfere with, restrain, or coerce Gertz or Slowey in the exercise of protected activities. (See Walmart Posttrial Br. at 167–169.)

Walmart misses the mark with its proffered defense, because the totality of the circumstances analysis applies when the question is whether an employer violated Section 8(a)(1) of the Act by making a statement or engaging in conduct that would have a reasonable tendency to interfere with, restrain or coerce employees in the exercise of union or protected activities. See, e.g., *Farm Fresh Company, Target One, LLC*, 361 NLRB 848, slip op. at 14. The Section 8(a)(1) allegations here regarding Gertz and Slowey raise a different question—whether Walmart unlawfully discriminated against them when it issued disciplinary personal discussions based on their strike-related absences. See, e.g., *Correctional Medical Services*, 356 NLRB 2767, slip op. at 2. Since Walmart did not offer a valid defense to the allegations that it unlawfully disciplined Gertz and Slowey, Walmart failed to rebut the General Counsel's initial showing of discrimination, and I accordingly find that Walmart violated Section 8(a)(1) of the Act when it issued personal discussions to Gertz and Slowey (on June 18 and 24, respectively) for strike-related absences.[110]

3. Did the General Counsel show that Walmart discharged Callahan unlawfully?

In contrast to the other associates involved in this case, the General Counsel did not make an initial showing that Walmart discriminated against Callahan. First, the General Counsel did not show that the managers at store 3455 had any knowledge of Callahan's protected concerted activities when they decided to discharge Callahan on May 28. At that point, Callahan had not yet announced that he was going on strike (he did so on May 30),[111] and there is no evidence that the managers at store 3455 were aware of or believed that Callahan engaged in any other protected concerted activities.[112] (See Analysis Section III(E)(2).)

Second, the General Counsel did not show that Walmart's decision to discharge Callahan was motivated by Callahan's protected, concerted activities. Walmart presented unrebutted evidence that it discharged Callahan on May 28 because of poor performance, specifically because Callahan was not properly stocking and zoning his department. Furthermore, the General Counsel did not show that Walmart's performance rationale for Callahan's discharge was a pretext for discrimination. Instead, the evidentiary record shows that Walmart noted its concerns about Callahan's performance (particularly as to stocking and zoning) when it issued Callahan a third written coaching in February 2013, months before Callahan engaged in any protected concerted activities. Thus, Walmart's decision to discharge Callahan on May 28 for poor performance was consistent with the concerns that Walmart expressed about Callahan's performance months earlier.[113] (See Analysis Section III(E)(2).)

Third, even if I assumed that the General Counsel made an initial showing of discrimination, I would find that Walmart

[110] I note that Walmart did not assert a repudiation defense to the allegations regarding Gertz and Slowey. As the Board has explained, an employer may avoid liability for unlawful conduct in some circumstances by repudiating the conduct, provided that the repudiation is: timely; unambiguous; specific in nature to the coercive conduct; adequately publicized to the employees involved; free from other proscribed illegal conduct; and accompanied by assurances that the employer will not interfere with employees' Sec. 7 rights in the future. The employer also must not engage in proscribed conduct after the repudiation. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978); see also *Danite Sign Co.*, 356 NLRB 975, 981 (2011) (explaining that that "by its terms the *Passavant* decision indicates that what an employer must do to cure a violation may depend on the nature of the violation").

Since Walmart did not assert a repudiation defense, the defense is waived. Even if I were to consider the merits of such a defense, however, I would find that the repudiation defense is not viable here because Walmart did not take appropriate steps to cure the violations that it committed when it disciplined Gertz and Slowey. See Analysis Sec. III(G), (CC) (indicating that Walmart, among other things, did not make any attempt to advise Gertz and Slowey in unambiguous terms that their strike-related absences were protected activity, or assure Gertz and Slowey that Walmart would not interfere with their Section 7 rights in the future).

[111] In the complaint, the General Counsel alleged that Callahan engaged in protected, concerted activity by agreeing on May 15 to participate in the Ride for Respect (which, of course, was scheduled for later in the month). (GC Exh. 1(bb) (par. 53(A).) The General Counsel did not present any evidence to support that assertion, nor did it present any evidence that Walmart was aware that Callahan made such an agreement.

[112] To be sure, an unknown Walmart official identified Callahan as a participant in the May 1–6 leadership meeting that OUR Walmart held in Birmingham. There is no evidence, however, that anyone communicated that belief to the managers at store 3455 before they decided to discharge Callahan.

[113] I am not persuaded by the General Counsel's argument that I should find animus, and therefore unlawful motivation for Callahan's discharge, based on the violations of the Act that I found in *Walmart Stores, Inc.*, Case 32–CA–090116 (2014). Although many of the

succeeded in proving (as an affirmative defense) that it would have discharged Callahan on May 28 for poor performance even if Callahan had not engaged in protected concerted activity. As noted above, Walmart's performance explanation for discharging Callahan was well documented, and was unrebutted. Accordingly, I find that the General Counsel failed to meet its burden of proving that Walmart violated the Act when it discharged Callahan, and I recommend that the allegations in paragraph 53 of the complaint be dismissed.

Did Walmart take unlawful disciplinary action against Victoria Martinez in December 2012 or against Shana Stonehouse in June 2013?

As previously noted, it is clear from the evidentiary record that written coachings are an integral part of Walmart's progressive discipline system. I have also found that the personal discussions that Walmart issues are a form of discipline. (See Analysis Section II(D).) The alleged disciplinary actions that Walmart took against Victoria Martinez in December 2012, and Shana Stonehouse in June 2013, require further discussion, however, because there are questions about whether those actions fall into one of the established categories of discipline under Walmart's framework.

a. Victoria Martinez—December 17, 2012 meeting and written statement

The General Counsel alleges that Walmart unlawfully disciplined Victoria Martinez on December 17, 2012, when Walmart had Martinez sign a statement to acknowledge that she had four active occurrences on her attendance record (at least one of which was for a strike-related absence), and to acknowledge that her next occurrence could result in discipline. (See Analysis Sec. III(C).)

As a preliminary matter, I find that Walmart's December 17, 2012 meeting with Martinez was a personal discussion, and therefore a form of discipline. Although Walmart did not use a personal discussion log when it met with Martinez, the statement that Walmart had Martinez sign had all of the elements of a personal discussion insofar as the statement: warned Martinez about the number of active attendance occurrences on her record; warned Martinez that her next attendance occurrence could result in discipline; and became part of Martinez's attendance record and would be available for Walmart to refer to and rely on if it needed to decide whether to issue a coaching to Martinez based on future attendance problems.[114]

I also find that Walmart ran afoul of Section 8(a)(1) of the Act when it gave Martinez the personal discussion on December 17, 2012, and indicated that the personal discussion was based, in part, on her protected activities on November 20, 2012. Although Martinez was not scheduled to work on November 20, she notified Walmart that she was going "on strike" that day by submitting a strike letter and a return to work letter, and also by calling the IVR system to report that she would be absent. Walmart was therefore aware that Martinez engaged in protected activity on November 20, 2012, when Martinez supported the OUR Walmart strike on her own time. When Pasillas subsequently gave Martinez a personal discussion on December 17, 2012, and erroneously indicated that the personal discussion was based on Martinez' "absence" on November 20, Walmart improperly linked the personal discussion to Martinez's protected strike-support activity.

Accordingly, I find that the General Counsel made an initial showing that the December 17, 2012 personal discussion that Walmart gave to Martinez was discriminatory. Since Walmart did not rebut that showing with sufficient evidence that it would have given Martinez the personal discussion even in the absence of Martinez's protected concerted activity,[115] I find that Walmart violated Section 8(a)(1) of the Act by issuing the December 17, 2012 personal discussion to Martinez based in part on her November 20, 2012 protected activities.[116]

b. Shana Stonehouse—discipline in June 12, 2013 meeting

In the consolidated complaint, the General Counsel alleged that Walmart unlawfully disciplined Stonehouse on or about June 18, 2013, by issuing her a warning for absences. (GC Exh. 1(bb) (par. 51).) In its posttrial brief, the General Counsel attempted to prove that allegation by asserting that: (a) on July 1, 2013, Walmart issued Stonehouse a third written coaching for attendance that was "based on unexcused absences that included her unexcused strike absences"; and (b) Walmart listed Stonehouse as receiving a personal discussion on an internal memo about holding associates accountable for intermittent work stoppage activity. (See GC Posttrial Br. at 71 (citing Jt. Exhs. 29 (Walmart memo), 531 (Third Written Coaching)).)

The facts do no bear out either of the General Counsel's theories. The record is clear that Walmart issued Stonehouse a third written coaching on July 1 because Stonehouse incurred unexcused absences on June 20, 21 and 22, after she had already returned to work after the Ride for Respect. The General Counsel did not show that the third written coaching relied on any of Stonehouse's strike-related absences. As for the General Counsel's suggestion that Stonehouse received a personal discussion, the evidentiary record shows that Walmart did not go through with its plan to issue Stonehouse a personal discussion because Stonehouse was sick and absent from work on June 20–22, and thus was not available for the discussion (though she did incur

violations that I found in that case occurred in store 3455, the violations did not involve Callahan, and do not undermine the credibility of Walmart's explanation for Callahan's discharge.

[114] Walmart itself referred to the December 17, 2012 statement as a personal discussion in its posttrial brief. (Walmart Posttrial Br. at 169–170.)

[115] Walmart suggests that Martinez had other occurrences on her attendance record that could have supported the personal discussion, irrespective of her strike and strike-support activities on November 20 and 23, 2012. (Walmart Posttrial Br. at 169–170.) That argument misses the mark because the fact remains that Walmart explicitly identified November 20, 2012, (the day that Martinez supported an OUR Walmart strike/action on her own time) as part of the basis for the personal discussion.

[116] Since I have found that Walmart violated the Act when it relied on Martinez's November 20 protected activities as the basis for the personal discussion, I need not address whether Walmart's reference to Martinez's November 23 strike-related absence also tainted the personal discussion.

the third written coaching noted above). (See Discussion and Analysis, Section III(Y).)

With that being stated, the evidentiary record does show that on or about June 12, a Walmart manager: verbally informed Stonehouse that Walmart would treat her strike-related absences during the Ride for Respect as a single unexcused absence; and made computer entries that designated Stonehouse's strike-related absences as unexcused on Stonehouse's attendance record. Although this conversation was not a formal personal discussion, I find that Walmart's June 12 decision to treat Stonehouse's strike-related absence as an unexcused absence was a form of discipline because it laid a foundation for future discipline. Indeed, as the Board has indicated, it does not matter that an associate must accumulate a certain number of unexcused absences before Walmart will issue a written coaching—the fact remains that the unexcused absence itself can lead to future discipline. See *Ohmite Manufacturing Co.*, 290 NLRB 1036, 1037 (1988) (explaining that an unexcused absence was a form of meaningful discipline because it could lead to a written disciplinary warning, even though three unexcused absences in a month were required before the employer would issue such a written warning); see also *Mid-Mountain Foods*, 332 NLRB 251, 271 (2000) (finding that an employer violated Section 8(a)(4) and (1) of the Act when it told an employee that he would receive an unexcused absence because he did not give sufficient notice that he would miss work to attend an NLRB hearing pursuant to subpoena, where an unexcused absence may result in disciplinary action), enfd. 11 Fed. App. 372 (4th Cir. 2001).

Having resolved the nature of the discipline that Stonehouse received, the allegation concerning Stonehouse falls in line with the other allegations in this case that Walmart unlawfully disciplined or discharged associates for incurring strike-related absences during the Ride for Respect. As stated above, the General Counsel made an initial showing that Walmart discriminated against Stonehouse, and Walmart did not show that it would have taken action against Stonehouse's in the absence of her protected strike activity. See Analysis Section IV(B)(1); see also Analysis, Section III(Y). I therefore find that Walmart violated Section 8(a)(1) of the Act when it announced on June 12, 2013, that it would treat Stonehouse's strike-related absences during the Ride for Respect as unexcused absences under Walmart's attendance policy.[117]

CONCLUSIONS OF LAW

1. By, on or about November 19, 2012, threatening an associate in Wheatland, Texas store 949 that associates who went on strike would be fired, Walmart violated Section 8(a)(1) of the Act.

2. By issuing a personal discussion to Victoria Martinez on or about December 17, 2012, because Martinez participated in an OUR Walmart action while on her own time on November 20, 2012, Walmart imposed discipline that violated Section 8(a)(1) of the Act.

3. By, in or about February 2013, in eleven stores, reading talking points to associates that could be reasonably construed as prohibiting protected strike activity, Walmart announced an unlawful work rule that violated Section 8(a)(1) of the Act.

4. By issuing coachings to Marc Bowers and Colby Harris on or about May 9–10, 2013, because they were absent from work while on strike from May 6–9, 2013, Walmart imposed discipline that violated Section 8(a)(1) of the Act.

5. By deciding, on or about June 12, 2013, to treat Shana Stonehouse's absences from work while on strike during the Ride for Respect as one unexcused absence (and notifying Stonehouse of that decision), Walmart imposed discipline that violated Section 8(a)(1) of the Act.

6. By issuing personal discussions to the following employees in June 2013, because they were absent from work while on strike during the Ride for Respect, Walmart imposed discipline that violated Section 8(a)(1) of the Act:

Aubrietia Edick;
Barbara Gertz;
Charmaine Givens-Thomas;
Linda Haluska;
Vanzell Johnson;
Juan (John) Juanitas;
Aaron Lawson;
Patricia Locks;
Cynthia Murray;
Cheryl Plowe;
Anna Pritchett;
Vivian Sherman;
Betty Shove;
Lawrence Slowey;
Esmeralda (Mandy) Uvalle;
Ronnie Vandell;
Trina Vetato; and
Debra Williams.

7. By issuing coachings to the following employees between June and August 2013, because they were absent from work while on strike during the Ride for Respect, Walmart imposed discipline that violated Section 8(a)(1) of the Act:

Michael Ahles;
Rose Campbell;
Andrea Carr;
David Coulombe;
Evelin Cruz;
Matthew Gauer;
Sara Gilbert;
Cecilia Gurule;

[117] To the extent that the violation that I have found concerning Stonehouse differs somewhat from what the General Counsel alleged in the complaint, I note that it is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. See *Pergament United Sales*, 296 NLRB 333, 335 (1989), enfd. 920 F.2d 130 (2d Cir. 1990)). That standard has been satisfied here, since the parties fully litigated how Walmart handled Stonehouse's strike-related absences after she returned to work in June 2013, and the disciplinary action that Walmart took against Stonehouse on June 12 is closely related to (if not squarely within) the complaint allegation that Walmart unlawfully disciplined Stonehouse for being absent from work while on strike during the Ride for Respect.

Colby Harris;
Margaret Hooten;
Marie Kanger-Born;
Aaron Lawson;
Victoria Martinez;
Shawnadia Mixon;
Michael McKeown;
Liai Pefua;
Patricia Scott;
Cody Shimmel;
Jeanna Slate-Creach;
John Smith;
Amy Stinnett;
Trina Vetato; and
Mariah Williams.

8. By discharging the following employees between June and September 2013, because they were absent from work while on strike during the Ride for Respect and/or because they had coachings on their records that arose from protected concerted activity (i.e., unlawful coachings based on prior strike-related absences), Walmart violated Section 8(a)(1) of the Act:

Javon Adams;
Marc Bowers;
Raymond Bravo;
Yvette Brown;
Barbara Collins;
Christopher Collins;
Pamela Davis;
Norma Dobyns;
Brandon Garrett;
Jovani Gomez;
Colby Harris;
Pooshan Kapil;
Marie Roberty;
Jeanna Slate-Creach;
Dominic Ware; and
Tavarus Yates.

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

REMEDY

A. Traditional Remedies

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

Respondent, having discriminatorily discharged Javon Adams, Marc Bowers, Raymond Bravo, Yvette Brown, Barbara Collins, Christopher Collins, Pamela Davis, Norma Dobyns, Brandon Garrett, Jovani Gomez, Colby Harris, Pooshan Kapil, Marie Roberty, Jeanna Slate-Creach, Dominic Ware, and Tavarus Yates, must offer them reinstatement and make them whole for any loss of earnings and other benefits.[118] Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lumpsum backpay awards covering periods longer than 1 year. *Don Chavas LLC, d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014).

In addition, Respondent shall rescind, and expunge from its files any and all references to, the unlawful disciplines and discharges issued to the following associates: Javon Adams, Michael Ahles, Marc Bowers, Raymond Bravo, Yvette Brown, Rose Campbell, Andrea Carr, Barbara Collins, Christopher Collins, David Coulombe, Evelin Cruz, Pamela Davis, Norma Dobyns, Aubretia Edick, Brandon Garrett, Matthew Gauer, Barbara Gertz, Sara Gilbert, Charmaine Givens-Thomas, Jovani Gomez, Cecelia Gurule, Linda Haluska, Colby Harris, Margaret Hooten, Vanzell Johnson, John (Juan) Juanitas, Marie Kanger-Born, Pooshan Kapil, Aaron Lawson, Patricia Locks, Victoria Martinez, Shawnadia Mixon, Michael McKeown, Cynthia Murray, Liai Pefua, Cheryl Plowe, Anna Pritchett, Marie Roberty, Patricia Scott, Vivian Sherman, Cody Shimmel, Betty Shove, Jeanna Slate-Creach, Lawrence Slowey, John Smith, Amy Stinnett, Shana Stonehouse, Esmeralda (Mandy) Uvalle, Ronnie Vandell, Trina Vetato, Dominic Ware, Debra Williams, Mariah Williams, and Tavarus Yates. Respondent shall notify these associates in writing that it has complied with this remedy and that

[118] As part of its request for make whole relief, the General Counsel asked that I order Respondent to reimburse the discriminatees who were unlawfully discharged for all search-for-work and work-related expenses, regardless of whether the discriminatee received interim earnings that exceed those expenses during any particular calendar quarter or during the overall backpay period. Thus, under the General Counsel's proposal, a discriminatee who had no interim earnings for the first quarter of 2014 (for example) but spent $100 searching for work would be entitled to reimbursement for their $100 search-for- work expenses. (Tr. 6814–6816.)

I cannot accept the General Counsel's requested remedy on this issue because it is contrary to established Board law. As things currently stand, a discriminatee is entitled to expenses incurred while seeking or maintaining interim employment, but those expenses are deducted from the discriminatee's interim earnings in the appropriate calendar quarters. See, e.g., *Webco Industries*, 340 NLRB 10, 10 fn. 4, 16 (2003); *Flannery Motors, Inc.*, 330 NLRB 994, 995 (2000). Thus, if a discriminatee has no interim earnings in a particular quarter, the discriminatee is precluded from recovering any search-for-work or work-related expenses for that quarter. I am bound to follow established Board precedent.

I note that I do not find that it was improper for the General Counsel to amend the complaint (admittedly, at the end of trial) to request a revised formula for calculating search-for-work and work-related expenses. The General Counsel's request did not violate Walmart's due process rights because Walmart (like the other parties) had the opportunity to present its arguments in its posttrial brief about the appropriate legal standard for search-for-work and work-related expenses (see Walmart Posttrial Br. at 187–190; GC Posttrial Br. at 123–126), and the parties remain free to contest this issue further should this case be appealed to the Board.

the unlawful disciplines and/or discharges will not be used against them in any way.

B. Extraordinary Remedies

In addition to the standard remedies described above, the General Counsel requested that I also order Respondent to: (1) post a notice at each of its facilities in the United States (instead of simply at the stores where violations occurred); and (2) have a representative read a copy of the notice to associates in each of its stores during work time, with the notice read in English and Spanish or any other language deemed appropriate.

1. Should Walmart be required to post a notice in each of its stores in the United States?

Customarily, the Board confines the notice-posting requirements of its orders "to the facilities at which the violations were committed." *Consolidated Edison Co. of New York*, 323 NLRB 910, 911–912 (1997). Thus, if a respondent commits unfair labor practices at ten of its facilities, the remedy should include a notice posting only at those ten facilities.

With that basic framework in mind, the General Counsel has two options if it seeks to establish a predicate for a nationwide notice posting. First, the General Counsel may argue that a nationwide notice posting is necessary because the respondent implemented an unlawful work rule or policy at each of its facilities nationwide. See *Guardsmark, LLC*, 344 NLRB 809, 812 (2005) (noting that "we have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect," and ordering a nationwide notice posting because the respondent's work rules applied to all of its employees nationwide), enfd. in pertinent part, 475 F.3d 369 (D.C. Cir. 2007); see also *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 160–161 (2014) (ordering a nationwide notice posting to address an unlawful confidentiality work rule that had been or was in effect at each of the respondent's facilities); *Labor Ready, Inc.*, 327 NLRB 1055, 1055 fn. 2, 1060 (1999) (same, regarding a respondent's unlawful decision to ban a job applicant from all of respondent's offices because he solicited other job applicants to sign a work-related petition), enfd. 253 F.3d 195 (4th Cir. 2001). And second, the General Counsel may argue that the respondent has a record of committing unfair labor practices in multiple facilities (but not necessarily all of its facilities), such that the Board should invoke its authority to issue a broad, corporate-wide order that would include a notice posting requirement beyond the facilities directly involved in the unfair labor practices. See, e.g., *Albertson's, Inc.*, 351 NLRB 254, 384 (2007) (collecting cases).

In this case, the General Counsel only invoked the first theory, asserting that Walmart (through its labor relations department) implemented a national policy to treat all strike-related absences as unexcused absences, and that policy led to the unlawful disciplines and discharges that occurred in this case. (See GC Posttrial Br. at 122.) The General Counsel's argument falls short because this is not a case where Walmart announced that policy to all of its associates nationwide (e.g., in an associate handbook). Instead, the evidentiary record shows that in February 2013, Walmart advised select associates at 11 stores about Walmart's position that the strikes OUR Walmart was organizing were unprotected. Then, in June 2013, Walmart disciplined or discharged associates at 29 stores (10 of which were stores where Walmart read the unlawful February 2013 talking points to associates) based on its view that the OUR Walmart strikes were unprotected. Notably, although the parties presented extensive evidence about how Walmart communicates to associates, there is no evidence that Walmart communicated the February 2013 talking points to associates nationwide. We are therefore left with a record that establishes that Walmart's "policy" concerning OUR Walmart's strikes only affected 30 stores. Accordingly, I do not find a sufficient basis for me to recommend that Walmart post a notice at each of its 4,300+ stores, instead of at the 31 stores[119] where the unfair labor practices occurred. See *Albertson's, Inc.*, 351 NLRB at 384–386 (requiring a notice posting for facilities in the respondent's Rocky Mountain division, and not for facilities in a larger geographic region, because the bulk of the unfair labor practices occurred in the Rocky Mountain division).

2. Is a Notice Reading Warranted?

The Board has required that a notice be read aloud to employees where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, slip op. at 21.

Applying that standard, I do not find that Respondent's misconduct in this case was sufficiently serious and widespread to warrant an order requiring the notice to be read aloud to associates in each of its stores. As a preliminary matter, since I found (above) that a nationwide notice posting is unwarranted in this case, it follows that a nationwide notice reading remedy is also unwarranted. The question remains, however, as to whether a notice reading is warranted in the stores where I found Respondent violated the Act.

In stores 949 (Wheatland, Texas) and 2110 (Paramount, California), I find that a standard notice posting remedy will be sufficient to address the violations in this case. Walmart did not discipline or discharge any associates at those two stores based on strike-related absences, and the unlawfully coercive statements that Walmart made at those stores were not sufficiently serious or widespread to warrant a notice reading.

However, I do find that a notice reading remedy is warranted at each store where Respondent disciplined or discharged

[119] Walmart unlawfully disciplined or discharged associates at twenty-nine stores in this case. In addition, at one additional store (store 2110 in Paramount, California), Walmart read its unlawful February 2013 talking points to associates, but did not subsequently discipline or discharge any associates based on strike-related absences during the Ride for Respect. (See Discussion and Analysis, Section I(D).) Finally, at store 949 in Wheatland, Texas, a Walmart manager made a statement to an associate that violated the Act. (See Discussion and Analysis, Section I(C) (regarding store 949 in Wheatland, Texas).)

associates for incurring strike-related absences, because Respondent's misconduct at those stores was sufficiently serious and widespread to warrant an order requiring the applicable notice to be read aloud to associates in the presence of the store's manager. The evidentiary record shows that Respondent took swift action against associates after they returned from strike, and thereby sent message to all associates at the store that similar protected activity would lead to disciplinary action. In light of those serious and widespread actions, I agree that a notice reading is necessary to assure associates at the following stores that they may exercise their Section 7 rights free of coercion:

Fremont, CA (store 2989)
Lakewood, CA (store 2609)
Pico Rivera, CA (store 2886)
Placerville, CA (store 2418)
Richmond, CA (store 3455)
San Leandro, CA (store 5434)
Aurora, CO (store 5334)
Hialeah, FL (store 1590)
Chicago, IL (store 5781)
Crestwood, IL (store 3601)
Evergreen Park, IL (store 5485)
Glenwood, IL (store 5404)
Wheeling, IL (store 1735)
Paducah, KY (store 431)
Stanford, KY (store 825)
Baker, LA (store 1102)
Laurel, MD (store 1985)
Chelmsford, MA (store 2903)
Chicopee, MA (store 5278)
Sauk Centre, MN (store 4253)
Elizabeth City, NC (store 1527)
Ennis, TX (store 286)
Lancaster, TX (store 471)
Quinlan, TX (store 4215)
Bellevue, WA (store 3098)
Bellingham, WA (store 2450)
Federal Way, WA (store 2571)
Mt. Vernon, WA (store 2596)
Port Angeles, WA (store 2196)

Accordingly, in the stores listed above, I will require that the applicable remedial notice in this case be read aloud to associates in English and Spanish by each store's manager or, at Respondent's option, by a Board agent in Respondent's store manager's presence.[120] *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, slip op. at 21.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[121]

ORDER

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

1. Cease and desist from

(a) Threatening associates that they will be fired if they go on strike.

(b) Issuing disciplinary personal discussions to associates because they participate in labor activity on their own time.

(c) Reading talking points to associates that associates reasonably could construe as announcing a work rule that prohibits them from engaging in protected strike activity.

(d) Disciplining associates (e.g., by giving associates unexcused absences, personal discussions, and/or written coachings) because they miss work while participating in a strike that is protected by Section 7 of the Act.

(e) Discharging associates because they miss work while participating in a strike that is protected by Section 7 of the Act, and/or because they had coachings on their records that arose from protected concerted activity (i.e., unlawful coachings based on prior strike-related absences).

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

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

(a) Within 14 days from the date of the Board's Order, offer Javon Adams, Marc Bowers, Raymond Bravo, Yvette Brown, Barbara Collins, Christopher Collins, Pamela Davis, Norma Dobyns, Brandon Garrett, Jovani Gomez, Colby Harris, Pooshan Kapil, Marie Roberty, Jeanna Slate-Creach, Dominic Ware, and Tavarus Yates full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Javon Adams, Marc Bowers, Raymond Bravo, Yvette Brown, Barbara Collins, Christopher Collins, Pamela Davis, Norma Dobyns, Brandon Garrett, Jovani Gomez, Colby Harris, Pooshan Kapil, Marie Roberty, Jeanna Slate-Creach, Dominic Ware, and Tavarus Yates whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Javon Adams, Marc Bowers, Raymond Bravo, Yvette Brown, Barbara Collins, Christopher Collins, Pamela Davis, Norma Dobyns, Brandon Garrett, Jovani Gomez, Colby Harris, Pooshan Kapil, Marie Roberty, Jeanna Slate-Creach, Dominic Ware, and Tavarus Yates in writing that this has been done and that the disciplines and/or discharges will not be used against them in any way.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplines

[120] Consistent with the fact that the unlawful disciplines and discharges in this case generally arose out of similar circumstances and occurred in multiple stores, the remedial notices that address disciplines and/or discharges in this case list all associates that Respondent unlawfully disciplined and/or discharged, instead of just the associates in the particular store where the notice will be posted.

[121] 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.

(including unexcused absences, personal discussions and written coachings), and within 3 days thereafter notify Michael Ahles, Marc Bowers, Rose Campbell, Andrea Carr, David Coulombe, Evelin Cruz, Aubretia Edick, Matthew Gauer, Barbara Gertz, Sara Gilbert, Charmaine Givens-Thomas, Cecelia Gurule, Linda Haluska, Colby Harris, Margaret Hooten, Vanzell Johnson, John (Juan) Juanitas, Marie Kanger-Born, Aaron Lawson, Patricia Locks, Victoria Martinez, Shawnadia Mixon, Michael McKeown, Cynthia Murray, Liai Pefua, Cheryl Plowe, Anna Pritchett, Patricia Scott, Vivian Sherman, Cody Shimmel, Betty Shove, Jeanna Slate-Creach, Lawrence Slowey, John Smith, Amy Stinnett, Shana Stonehouse, Esmeralda (Mandy) Uvalle, Ronnie Vandell, Trina Vetato, Debra Williams, and Mariah Williams in writing that this has been done and that the disciplines will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post copies of the appropriate attached notices,[122] in both English and Spanish, at the following facilities:

Appendix A: Wheatland, TX (store 949);

Appendix B: Pico Rivera, CA (store 2886);

Appendix C:Aurora, CO (store 5334), Crestwood, IL (store 3601), Paducah, KY (store 431), Stanford, KY (store 825), Chelmsford, MA (store 2903), Chicopee, MA (store 5278), Sauk Centre, MN (store 4253), Elizabeth City, NC (store 1527), Ennis, TX (store 286), Bellevue, WA (store 3098), Bellingham, WA (store 2450) and Mt. Vernon, WA (store 2596);

Appendix D: Paramount, CA (store 2110);

Appendix E: Fremont, CA (store 2989), Chicago, IL (store 5781), Evergreen Park, IL (store 5485), Glenwood, IL (store 5404), Laurel, MD (store 1985), Federal Way, WA (store 2571) and Port Angeles, WA (store 2196);

Appendix F: Lakewood, CA (store 2609) and Hialeah, FL (store 1590);

Appendix G: Richmond, CA (store 3455);

Appendix H: San Leandro, CA (store 5434), Wheeling, IL (store 1735), Baker, LA (store 1102), and Quinlan, TX (store 4215); and

Appendix I: Placerville, CA (store 2418) and Lancaster, TX (store 471).

Copies of the notices, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed one or more of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the affected facilities any time since November 19, 2012.

(g) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to have the widest possible attendance, at which the appropriate notice (as listed above in section (f)) shall be read to associates in both English and Spanish, by Respondent's store manager or, at Respondent's option, by a Board agent in Respondent's store manager's presence in the following facilities:

Fremont, CA (store 2989)
Lakewood, CA (store 2609)
Pico Rivera, CA (store 2886)
Placerville, CA (store 2418)
Richmond, CA (store 3455)
San Leandro, CA (store 5434)
Aurora, CO (store 5334)
Hialeah, FL (store 1590)
Chicago, IL (store 5781)
Crestwood, IL (store 3601)
Evergreen Park, IL (store 5485)
Glenwood, IL (store 5404)
Wheeling, IL (store 1735)
Paducah, KY (store 431)
Stanford, KY (store 825)
Baker, LA (store 1102)
Laurel, MD (store 1985)
Chelmsford, MA (store 2903)
Chicopee, MA (store 5278)
Sauk Centre, MN (store 4253)
Elizabeth City, NC (store 1527)
Ennis, TX (store 286)
Lancaster, TX (store 471)
Quinlan, TX (store 4215)
Bellevue, WA (store 3098)
Bellingham, WA (store 2450)

[122] If this Order is enforced by a judgment of a 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."

Federal Way, WA (store 2571)
Mt. Vernon, WA (store 2596)
Port Angeles, WA (store 2196).

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

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

IT IS FURTHER ORDERED that the protective orders entered into during the hearing prohibiting the parties from disclosing certain confidential information and confidential exhibits (except as permitted by the terms of the protective orders) shall be continued in full force and effect.

Dated, Washington, D.C. January 21, 2016

APPENDIX A

Wheatland, TX (Store 949)

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten associates that they will be fired if they go on strike.

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

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-096240 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

Pico Rivera, CA (Store 2886)

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT issue disciplinary personal discussions to associates because they participate in labor activity on their own time.

WE WILL NOT discipline associates (e.g., by giving associates unexcused absences, personal discussions, and/or written coachings) because they miss work while participating in a strike that is protected by Section 7 of the Act.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplines (including unexcused absences, disciplinary attendance statements, personal discussions and written coachings) issued to the following associates:

John (Juan) Juanitas (Fremont, CA—store 2989)
Evelin Cruz and Victoria Martinez (Pico Rivera, CA—store 2886)
Matthew Gauer, Margaret Hooten and Amy Stinnett (Placerville, CA—store 2418)
Andrea Carr and Cecelia Gurule (San Leandro, CA—store 5434)
Barbara Gertz (Aurora, CO—store 5334)
Anna Pritchett and Ronnie Vandell (Chicago, IL—store 5781)
Marie Kanger-Born (Crestwood, IL—store 3601)
Charmaine Givens-Thomas (Evergreen Park, IL—store 5485)
Linda Haluska (Glenwood, IL—store 5404)
Rose Campbell (Wheeling, IL—store 1735)

Trina Vetato (Paducah, KY—store 431)
Aaron Lawson (Stanford, KY—store 825)
Shawnadia Mixon and Mariah Williams (Baker, LA—store 1102)
Cynthia Murray (Laurel, MD—store 1985)
David Coulombe (Chelmsford, MA—store 2903)
Aubretia Edick (Chicopee, MA—store 5278)
Michael Ahles (Sauk Centre, MN—store 4253)
Cheryl Plowe (Elizabeth City, NC—store 1527)
Cody Shimmel (Ennis, TX—store 286)
Marc Bowers, Colby Harris and Vanzell Johnson (Lancaster, TX—store 471)
Jeanna Slate-Creach (Quinlan, TX—store 4215)
Shana Stonehouse (Bellevue, WA—store 3098)
Vivian Sherman (Bellingham, WA—store 2450)
Sara Gilbert, Patricia Locks, Michael McKeown, Liai Pefua, Patricia Scott and John Smith (Federal Way, WA—store 2571)
Betty Shove, Esmeralda (Mandy) Uvalle and Debra Williams (Mt. Vernon, WA—store 2596)
Lawrence Slowey (Port Angeles, WA—store 2196)

Within 3 days thereafter, WE WILL notify the associates listed above in writing that this has been done and that the disciplines will not be used against them in any way.

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-096240 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX C

(Aurora, CO (Store 5334), Crestwood, IL (Store 3601), Paducah, KY (Store 431), Stanford, KY (Store 825), Chelmsford, MA (Store 2903), Chicopee, MA (Store 5278), Sauk Centre, MN (Store 4253), Elizabeth City, NC (Store 1527), Ennis, TX (Store 286), Bellevue, WA (Store 3098), Bellingham, WA (Store 2450), MT. Vernon, WA (Store 2596))

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discipline associates (e.g., by giving associates unexcused absences, personal discussions, and/or written coachings) because they miss work while participating in a strike that is protected by Section 7 of the Act.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplines (including unexcused absences, disciplinary attendance statements, personal discussions and written coachings) issued to the following associates:

John (Juan) Juanitas (Fremont, CA – store 2989)
Evelin Cruz and Victoria Martinez (Pico Rivera, CA – store 2886)
Matthew Gauer, Margaret Hooten and Amy Stinnett (Placerville, CA – store 2418)
Andrea Carr and Cecelia Gurule (San Leandro, CA – store 5434)
Barbara Gertz (Aurora, CO – store 5334)
Anna Pritchett and Ronnie Vandell (Chicago, IL – store 5781)
Marie Kanger-Born (Crestwood, IL – store 3601)
Charmaine Givens-Thomas (Evergreen Park, IL – store 5485)
Linda Haluska (Glenwood, IL – store 5404)
Rose Campbell (Wheeling, IL – store 1735)
Trina Vetato (Paducah, KY – store 431)
Aaron Lawson (Stanford, KY – store 825)
Shawnadia Mixon and Mariah Williams (Baker, LA – store 1102)
Cynthia Murray (Laurel, MD – store 1985)
David Coulombe (Chelmsford, MA – store 2903)
Aubretia Edick (Chicopee, MA – store 5278)
Michael Ahles (Sauk Centre, MN – store 4253)
Cheryl Plowe (Elizabeth City, NC – store 1527)
Cody Shimmel (Ennis, TX – store 286)
Marc Bowers, Colby Harris and Vanzell Johnson (Lancaster, TX – store 471)
Jeanna Slate-Creach (Quinlan, TX – store 4215)
Shana Stonehouse (Bellevue, WA – store 3098)
Vivian Sherman (Bellingham, WA – store 2450)
Sara Gilbert, Patricia Locks, Michael McKeown, Liai Pefua, Patricia Scott and John Smith (Federal Way, WA – store 2571)
Betty Shove, Esmeralda (Mandy) Uvalle and Debra Williams (Mt. Vernon, WA – store 2596)
Lawrence Slowey (Port Angeles, WA – store 2196)

Within 3 days thereafter, WE WILL notify the associates listed above in writing that this has been done and that the disciplines will not be used against them in any way.

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-096240 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX D

Paramount, CA (Store 2110)

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT read talking points to associates that associates reasonably could construe as announcing a work rule that prohibits them from engaging in protected strike activity.

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

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-096240 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX E

(Fremont, CA (Store 2989), Chicago, IL (Store 5781), Evergreen Park, IL (Store 5485), Glenwood, IL (Store 5404), Laurel, MD (Store 1985), Federal Way, WA (Store 2571) and Port Angeles, WA (Store 2196))

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT read talking points to associates that associates reasonably could construe as announcing a work rule that prohibits them from engaging in protected strike activity.

WE WILL NOT discipline associates (e.g., by giving associates unexcused absences, personal discussions, and/or written coachings) because they miss work while participating in a strike that is protected by Section 7 of the Act.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplines (including unexcused absences, disciplinary attendance statements, personal discussions and written coachings) issued to the following associates:

John (Juan) Juanitas (Fremont, CA – store 2989)
Evelin Cruz and Victoria Martinez (Pico Rivera, CA – store 2886)
Matthew Gauer, Margaret Hooten and Amy Stinnett (Placerville, CA – store 2418)
Andrea Carr and Cecelia Gurule (San Leandro, CA – store 5434)
Barbara Gertz (Aurora, CO – store 5334)
Anna Pritchett and Ronnie Vandell (Chicago, IL – store 5781)
Marie Kanger-Born (Crestwood, IL – store 3601)

Charmaine Givens-Thomas (Evergreen Park, IL – store 5485)
Linda Haluska (Glenwood, IL – store 5404)
Rose Campbell (Wheeling, IL – store 1735)
Trina Vetato (Paducah, KY – store 431)
Aaron Lawson (Stanford, KY – store 825)
Shawnadia Mixon and Mariah Williams (Baker, LA – store 1102)
Cynthia Murray (Laurel, MD – store 1985)
David Coulombe (Chelmsford, MA – store 2903)
Aubretia Edick (Chicopee, MA – store 5278)
Michael Ahles (Sauk Centre, MN – store 4253)
Cheryl Plowe (Elizabeth City, NC – store 1527)
Cody Shimmel (Ennis, TX – store 286)
Marc Bowers, Colby Harris and Vanzell Johnson (Lancaster, TX – store 471)
Jeanna Slate-Creach (Quinlan, TX – store 4215)
Shana Stonehouse (Bellevue, WA – store 3098)
Vivian Sherman (Bellingham, WA – store 2450)
Sara Gilbert, Patricia Locks, Michael McKeown, Liai Pefua, Patricia Scott and John Smith (Federal Way, WA – store 2571)
Betty Shove, Esmeralda (Mandy) Uvalle and Debra Williams (Mt. Vernon, WA – store 2596)
Lawrence Slowey (Port Angeles, WA – store 2196)

Within 3 days thereafter, WE WILL notify the associates listed above in writing that this has been done and that the disciplines will not be used against them in any way.

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-096240 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX F

(Lakewood, CA (Store 2609) and Hialeah, FL (Store 1590))

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge associates because they miss work while participating in a strike that is protected by Section 7 of the Act, and/or because they had coachings on their records that arose from protected concerted activity (i.e., unlawful coachings based on prior strike-related absences).

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

WE WILL, within 14 days from the date of the Board's Order, offer the following associates full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Jovani Gomez (Lakewood, CA – store 2609)
Yvette Brown, Barbara Collins and Norma Dobyns (Placerville, CA – store 2418)
Raymond Bravo and Pamela Davis (Richmond, CA – store 3455)
Dominic Ware (San Leandro, CA – store 5434)
Marie Roberty (Hialeah, FL – store 1590)
Pooshan Kapil (Wheeling, IL – store 1735)
Brandon Garrett and Tavarus Yates (Baker, LA – store 1102)
Javon Adams, Marc Bowers, Christopher Collins and Colby Harris (Lancaster, TX – store 471)
Jeanna Slate-Creach (Quinlan, TX – store 4215).

WE WILL make the associates listed above whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the associates listed above, and within 3 days thereafter notify those associates in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate the associates listed above for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-096240 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX G

(Richmond, CA (Store 3455))

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT read talking points to associates that associates reasonably could construe as announcing a work rule that prohibits them from engaging in protected strike activity.

WE WILL NOT discharge associates because they miss work while participating in a strike that is protected by Section 7 of the Act, and/or because they had coachings on their records that arose from protected concerted activity (i.e., unlawful coachings based on prior strike-related absences).

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

WE WILL, within 14 days from the date of the Board's Order, offer the following associates full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Jovani Gomez (Lakewood, CA – store 2609)
Yvette Brown, Barbara Collins and Norma Dobyns (Placerville, CA – store 2418)
Raymond Bravo and Pamela Davis (Richmond, CA – store 3455)
Dominic Ware (San Leandro, CA – store 5434)
Marie Roberty (Hialeah, FL – store 1590)
Pooshan Kapil (Wheeling, IL – store 1735)
Brandon Garrett and Tavarus Yates (Baker, LA – store 1102)
Javon Adams, Marc Bowers, Christopher Collins and Colby Harris (Lancaster, TX – store 471)
Jeanna Slate-Creach (Quinlan, TX – store 4215).

WE WILL make the associates listed above whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the associates listed above, and within 3 days thereafter notify those associates in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate the associates listed above for the adverse tax consequences, if any, of receiving one or more lumpsum backpay awards covering periods longer than 1 year.

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-096240 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX H

(San Leandro, CA (Store 5434), Wheeling, IL (Store 1735), Baker, LA (Store 1102) and Quinlan, TX (Store 4215))

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline associates (e.g., by giving associates unexcused absences, personal discussions, and/or written coachings) because they miss work while participating in a strike that is protected by Section 7 of the Act.

WE WILL NOT discharge associates because they miss work while participating in a strike that is protected by Section 7 of the Act, and/or because they had coachings on their records that arose from protected concerted activity (i.e., unlawful coachings based on prior strike-related absences).

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplines (including unexcused absences, disciplinary attendance statements, personal discussions and written coachings) issued to the following associates:

John (Juan) Juanitas (Fremont, CA – store 2989)
Evelin Cruz and Victoria Martinez (Pico Rivera, CA – store 2886)
Matthew Gauer, Margaret Hooten and Amy Stinnett (Placerville, CA – store 2418)
Andrea Carr and Cecelia Gurule (San Leandro, CA – store 5434)
Barbara Gertz (Aurora, CO – store 5334)
Anna Pritchett and Ronnie Vandell (Chicago, IL – store 5781)
Marie Kanger-Born (Crestwood, IL – store 3601)
Charmaine Givens-Thomas (Evergreen Park, IL – store 5485)
Linda Haluska (Glenwood, IL – store 5404)
Rose Campbell (Wheeling, IL – store 1735)
Trina Vetato (Paducah, KY – store 431)
Aaron Lawson (Stanford, KY – store 825)
Shawnadia Mixon and Mariah Williams (Baker, LA – store 1102)
Cynthia Murray (Laurel, MD – store 1985)
David Coulombe (Chelmsford, MA – store 2903)
Aubretia Edick (Chicopee, MA – store 5278)
Michael Ahles (Sauk Centre, MN – store 4253)
Cheryl Plowe (Elizabeth City, NC – store 1527)
Cody Shimmel (Ennis, TX – store 286)
Marc Bowers, Colby Harris and Vanzell Johnson (Lancaster, TX – store 471)
Jeanna Slate-Creach (Quinlan, TX – store 4215)
Shana Stonehouse (Bellevue, WA – store 3098)
Vivian Sherman (Bellingham, WA – store 2450)
Sara Gilbert, Patricia Locks, Michael McKeown, Liai Pefua, Patricia Scott and John Smith (Federal Way, WA – store 2571)
Betty Shove, Esmeralda (Mandy) Uvalle and Debra Williams (Mt. Vernon, WA – store 2596)
Lawrence Slowey (Port Angeles, WA – store 2196)

Within 3 days thereafter, WE WILL notify the unlawfully disciplined associates in writing that this has been done and that the disciplines will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer the following associates full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Jovani Gomez (Lakewood, CA – store 2609)
Yvette Brown, Barbara Collins and Norma Dobyns (Placerville, CA – store 2418)
Raymond Bravo and Pamela Davis (Richmond, CA – store 3455)
Dominic Ware (San Leandro, CA – store 5434)
Marie Roberty (Hialeah, FL – store 1590)
Pooshan Kapil (Wheeling, IL – store 1735)
Brandon Garrett and Tavarus Yates (Baker, LA – store 1102)
Javon Adams, Marc Bowers, Christopher Collins and Colby Harris (Lancaster, TX – store 471)
Jeanna Slate-Creach (Quinlan, TX – store 4215).

WE WILL make the unlawfully discharged associates whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the associates listed above, and within 3 days thereafter notify those associates in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate the unlawfully discharged associates for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-096240 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX I

(Placerville, CA (Store 2418) and Lancaster, TX (Store 471))

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT read talking points to associates that associates reasonably could construe as announcing a work rule that prohibits them from engaging in protected strike activity.

WE WILL NOT discipline associates (e.g., by giving associates unexcused absences, personal discussions, and/or written coachings) because they miss work while participating in a strike that is protected by Section 7 of the Act.

WE WILL NOT discharge associates because they miss work while participating in a strike that is protected by Section 7 of the Act, and/or because they had coachings on their records that arose from protected concerted activity (i.e., unlawful coachings based on prior strike-related absences).

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplines (including unexcused absences, disciplinary attendance statements, personal discussions and written coachings) issued to the following associates:

John (Juan) Juanitas (Fremont, CA – store 2989)
Evelin Cruz and Victoria Martinez (Pico Rivera, CA – store 2886)
Matthew Gauer, Margaret Hooten and Amy Stinnett (Placerville, CA – store 2418)
Andrea Carr and Cecelia Gurule (San Leandro, CA – store 5434)
Barbara Gertz (Aurora, CO – store 5334)
Anna Pritchett and Ronnie Vandell (Chicago, IL – store 5781)
Marie Kanger-Born (Crestwood, IL – store 3601)
Charmaine Givens-Thomas (Evergreen Park, IL – store 5485)
Linda Haluska (Glenwood, IL – store 5404)
Rose Campbell (Wheeling, IL – store 1735)
Trina Vetato (Paducah, KY – store 431)
Aaron Lawson (Stanford, KY – store 825)
Shawnadia Mixon and Mariah Williams (Baker, LA – store 1102)
Cynthia Murray (Laurel, MD – store 1985)
David Coulombe (Chelmsford, MA – store 2903)
Aubretia Edick (Chicopee, MA – store 5278)
Michael Ahles (Sauk Centre, MN – store 4253)
Cheryl Plowe (Elizabeth City, NC – store 1527)
Cody Shimmel (Ennis, TX – store 286)
Marc Bowers, Colby Harris and Vanzell Johnson (Lancaster, TX – store 471)
Jeanna Slate-Creach (Quinlan, TX – store 4215)
Shana Stonehouse (Bellevue, WA – store 3098)
Vivian Sherman (Bellingham, WA – store 2450)
Sara Gilbert, Patricia Locks, Michael McKeown, Liai Pefua, Patricia Scott and John Smith (Federal Way, WA – store 2571)
Betty Shove, Esmeralda (Mandy) Uvalle and Debra Williams (Mt. Vernon, WA – store 2596)
Lawrence Slowey (Port Angeles, WA – store 2196)

Within 3 days thereafter, WE WILL notify the unlawfully disciplined associates in writing that this has been done and that the disciplines will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer the following associates full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Jovani Gomez (Lakewood, CA – store 2609)
Yvette Brown, Barbara Collins and Norma Dobyns (Placerville, CA – store 2418)
Raymond Bravo and Pamela Davis (Richmond, CA – store 3455)
Dominic Ware (San Leandro, CA – store 5434)
Marie Roberty (Hialeah, FL – store 1590)
Pooshan Kapil (Wheeling, IL – store 1735)
Brandon Garrett and Tavarus Yates (Baker, LA – store 1102)
Javon Adams, Marc Bowers, Christopher Collins and Colby Harris (Lancaster, TX – store 471)
Jeanna Slate-Creach (Quinlan, TX – store 4215).

WE WILL make the unlawfully discharged associates whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the associates listed above, and within 3 days thereafter notify those associates in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate the unlawfully discharged associates for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WALMART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-096240 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX J

List of Confidential Exhibits Covered by the Protective Orders

Confidential Exhibit #	Description	Date Offered	Date Admitted
JT EX 6(a)	Facility Manager Instructions Resolving Attendance Occurrences Related to Intermittent Work Stoppage ("IWS") Activity: Talking Points (Blank) (pages numbered, six in total)	06/02/14	06/02/14
JT EX 6(b)	Facility Manager Instructions Resolving Attendance Occurrences Related to Intermittent Work Stoppage ("IWS") Activity: Talking Points (Aaron Bornhoft- Hooten)	06/02/14	06/02/14
JT EX 7(a)	Store Manager Talking Points (11/17/12)	06/02/14	06/02/14
JT EX 7(b)	Frequently Asked Questions (11/17/12)	06/02/14	06/02/14
JT EX 7(c)	Supplemental Store Manager Talking Points for Priority Stores (11/17/12)	06/02/14	06/02/14
JT EX 618	Exception Report for Store 286 2012-2013 on CD	11/17/14	11/17/14
JT EX 619	Exception Report for Store 471 2012-2013 on CD	11/17/14	11/17/14
JT EX 620	Exception Report for Store 4215 2012-2013 on CD	11/17/14	11/17/14
R. 266(a)	Department Manager Job Offer	07/20/15	07/20/15
R. 267	Customer Service Manager Job Offer	07/20/15	07/20/15
R. 268	Jewelry Sales Associate Job Offer	07/20/15	07/20/15
R. 269	Customer Service Manager Job Offer	07/20/15	07/20/15
R. 4215 JC6	Slate-Creach Change in Position (DSD – Cashier)	10/01/14	10/01/14
GC 21(a)	WM Confidential Memo: "Response to Walkout/ Work Stoppage – Salaried Management Talking Points" (10/8/12)	06/18/14	06/18/14
GC 21(b)	Week #42 Labor Activity and Trends (11/10/12 – 11/16/12)	01/28/15	01/28/15
GC 27(a)	Week #14 Labor Activity and Trends (04/27/13 – 05/03/13)	01/28/15	01/28/15
GC 27(c)	Week #16 Labor Activity and Trends (05/11/13 – 05/17/13)	01/28/15	01/28/15
GC 28(a)	CD of Excel spreadsheet documenting R4R associate information	01/28/15	01/28/15
GC 28(b)	Hardcopy screenshot of Excel spreadsheet in 28(a)	01/28/15	01/28/15
GC 28(c)	Hardcopy screenshot of Excel spreadsheet in 28(a) showing R4R discipline information	01/28/15	01/28/15
GC 29(a)	CD of Excel Spreadsheet of BF 2012 associate participation	01/28/15	01/28/15
GC 29(c)	Hardcopy screenshot of CD 29(a) – Raymond Bravo	01/28/15	01/28/15
GC 31(a)	CD of APIS Excel spreadsheet – union activity (May – June 2013)	06/17/14	06/17/14
GC 31(b)	Hardcopy printout out of APIS Excel spreadsheet of union activity from 31(a) (May-June 2013)	06/17/14	06/17/14
GC 31(c)	Screenshot of (31)(a) union activity	01/28/15	01/28/15
GC 31(d)	Screenshot of Excel spreadsheet from CD 31(a)	01/28/15	01/28/15
GC 31(e)	Screenshot of Excel spreadsheet from CD 31(a) of San Leandro, CA Store 5434	01/28/15	01/28/15
GC 36	Memo – June Shareholder's Potential Disruptions or Demonstrations (5/21/13)	06/17/14	06/17/14
GC 46	11/2/12 Email re Texas Priority Store Visits Recap	11/17/14	11/17/14
GC 58	5/23/13 Email re UFCW/OURWalmart Shareholders Activity	11/17/14	11/17/14
GC 70	Situation Report #2: National Day of Action	11/17/14	11/17/14
GC 71	(On Disc) Labor Relations Spreadsheet (WMESI-017291_confidential)	11/17/14	11/17/14
GC 72	(On Disc) First Responder Stuff w/ Priority Stores (WMESI-005159_confidential)	11/17/14	11/17/14
GC 73	(On Disc) Labor Relations Spreadsheet (WMESI-006327_confidential)	11/17/14	11/17/14
GC 74	(On Disc) Spreadsheet for dates: 9/13, 9/14, 9/17 and 9/19/12	11/17/14	11/17/14

Confidential Exhibit #	Description	Date Offered	Date Admitted
	(WMESI- 000743_confidential)		
GC 75	(On Disc) WMESI-006326_confidential	11/17/14	11/17/14
GC 76	(On Disc) WMESI-001688_confidential	11/17/14	11/17/14
GC 78	West Business Unit September 2013 Labor Relations' Goals (WMESI- 004609-12)	01/28/15	01/28/15
GC 90(c)	Salaried Management Message Points – Flash Mob Activity.pdf Attachment to 90(a) (WMESI-000340-1)	01/28/15	01/28/15
GC 91	11/10/12 Email re Black Friday Prep Webinar Deck (WMESI-009463-71)	01/28/15	01/28/15
GC 97(a)	11/22/12 Email Chain re Breakout 11222012 932am.xlsx	01/28/15	01/28/15
GC 97(b)	Excel Spreadsheet Attached to 97(a) Email Titled "Breakout 11222012 932am.xlsx"	01/28/15	01/28/15
GC 100	Walmart Analytical Research Center – ARC Information Report - December 12, 2012 (WMESI-000570-4)	01/28/15	01/28/15
GC 102	April 16 2013 – Walmart U.S. Field HR Leadership Meeting PowerPoint	01/28/15	01/28/15
GC 113(b)	West Business Unit December 2012 Labor Relations' Goals Attachment to 113(a) email (WMESI-009457-9)	01/29/15	01/29/15
GC 113(c)	West Business Unit November 2012 Labor Relations' Goals Attachment to 113(a) (WMESI-009460-2)	01/29/15	01/29/15
GC 286-1(b)	0286 List as of 7/13/12 (WMESI-022350)	11/17/14	11/17/14
GC 2418(8)	Email (5/30/13) - Re: 2418 Call Ins	06/17/14	06/17/14
GC 2418(9)(a)	Email (6/2/13) – Re: 2418 Call Ins	06/17/14	06/17/14
GC 2571-1	Sara Gilbert Redbook Investigation (Redacted)	11/17/14	11/17/14
GC 3601-3	5/30/13 Email re OUR Walmart Caravan	04/14/15	04/14/15
CP 1	West BU Labor Relations' Conference Call (January 30, 2013)(WMUFCWESI-004469-70)	01/28/15	01/28/15
CP 2	WEST BU Labor Relations' Conference Call (September 11, 2013) (WMUFCWESI-004476)	01/28/15	01/28/15
CP 3	11/12/12 APIS Report Printout (WMUFCWESI-017160_Confidential)	01/28/15	01/28/15
CP 4	South Florida Store Visits – August 20 – 23, 2012 (WMUFCWESI-002308-10)	01/28/15	01/28/15
CP 7	Walmart Labor Relations Newsletter –Qtr 4 Jan. 2013 (WMUFCWESI- 003142-4)	01/28/15	01/28/15
CP 8	Prep Call with Aida Alvarez (WMUFCWESI-004577-8)	01/28/15	01/28/15
CP 9	Targeting Discussion -Monday, August 5, 2013, 10am PST-(WMUFCWESI-003092-4)	01/28/15	01/28/15
CP 10	Labor Relations Blitz/Black Friday 2012 Plan (WMUFCWESI-000697-8)	01/28/15	01/28/15