Wal-Mart Stores, Inc. *and* United Food and Commercial Workers International Union, AFL–CIO. Case 19–CA–27720

December 16, 2004

DECISION AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On November 8, 2002, Administrative Law Judge Burton Litvack issued his decision in this case, finding that the Respondent violated Section 8(a)(1) of the Act by (a) requiring employee Ken Stanhope to continue participating in an investigatory interview concerning a matter that Stanhope reasonably believed could lead to discipline, after his request for the presence of his own witness had been denied; and (b) discharging Stanhope for exercising his right to a witness at an investigatory interview that he reasonably believed could lead to discipline. The Respondent filed exceptions, a supporting brief and a reply brief, the General Counsel filed an answering brief, and the Charging Party filed exceptions, a supporting brief and an answering 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, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.[2]

The judge found that under *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant part 268 F.3d 1095 (D.C. Cir. 2001), cert. denied 536 U.S. 904 (2002), the Respondent violated Section 8(a)(1) by requiring employee Stanhope to continue an investigatory interview on March 16, 2001,[3] after Stanhope's request for a witness at the interview had been denied.[4] The judge further found that the Respondent violated Section 8(a)(1) by terminating Stanhope on March 17 after he refused to attend a subsequent investigatory interview without the presence of a witness. With respect to this latter finding, the judge stated in his conclusions of law that Stanhope was discharged because of his "request" for the presence of a witness at an investigatory interview. However, the judge thereafter stated in the remedy section of his decision that Stanhope was discharged "because he refused to participate in an investigatory interview . . . unless Respondent granted his request for the presence of his own witness." Thus, it is unclear from his decision whether the judge found that Stanhope was discharged because of his request for a witness at the investigatory interview on March 16 or for his refusal on March 17 to attend an investigatory interview without a witness present. Under *Epilepsy Foundation* this lack of clarity was not fatal because both the request for a witness and the refusal to attend the investigatory interview without the witness constituted protected activity, and therefore discharging Stanhope for either of these actions would be unlawful under that case.

After the issuance of the judge's decision, the Board issued its decision *IBM Corp.*, 341 NLRB 1288 (2004), overruling *Epilepsy Foundation* and holding that an employee not represented by a union does not have a statutory right to the presence of a coworker at an investigatory interview which the employee reasonably believes could lead to discipline.[5] While holding that an employer in a nonunion workplace need not accede to its employees' requests for the presence of a coworker, the Board also recognized that such employees retain the right under Section 7 of the Act to seek such representation, and cannot be disciplined for making such a request. *IBM*, supra at 1295.

It is clear that, under *IBM*, the Respondent was not obligated to grant Stanhope's March 16 request for a witness at the investigatory interview, and it could lawfully require Stanhope to continue that investigatory interview without the presence of his requested witness. Accordingly, we reverse the judge's finding, and shall dismiss the complaint allegation, that the Respondent violated Section 8(a)(1) by requiring Stanhope to continue an investigatory interview on March 16 after denying his request for a witness.

With respect to the judge's finding that the Respondent violated Section 8(a)(1) by discharging Stanhope on March 17, we find it necessary to remand this issue to the judge. As explained above, it is unclear from the judge's decision whether the judge found that Stanhope was discharged for requesting a witness on March 16 or for refusing to participate in an investigatory interview without a witness on March 17. Because the judge's findings are based on *Epilepsy Foundation*, which was overruled in *IBM*, and because under *IBM* the lawfulness of Stanhope's discharge depends on whether he was discharged for his March 16 request or his March 17 refusal, a remand is required. On remand, the judge will apply the

[1] No exceptions were filed to the judge's finding that the Respondent's discharge of Stanhope did not violate Sec. 8(a)(3) of the Act.

[2] The Respondent's motion for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] All dates hereafter are in 2001 unless stated otherwise.

[4] The judge found that although Stanhope requested the presence of a "witness," it was understood that he was, in fact, requesting the presence of an employee representative.

[5] Members Liebman and Walsh dissented from that decision.

principles of *IBM*, supra, and clarify whether Stanhope's request for the presence of a witness was a motivating factor in the Respondent's decision to discharge him and, if so, whether the Respondent would have discharged Stanhope even in the absence of that protected conduct.[6]

ORDER

IT IS ORDERED that the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by requiring Kevin Stanhope to participate in an investigatory interview after denying his request for a witness at the interview, and that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Kevin Stanhope for his union activity, are dismissed.

IT IS FURTHER ORDERED that the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by discharging Kevin Stanhope for his protected concerted activity is severed and remanded to Administrative Law Judge Burton Litvack for the purposes described above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules shall be applicable.

CHAIRMAN BATTISTA, dissenting in part.

I disagree with the majority that a remand is necessary with respect to the allegation concerning the Respondent's discharge of employee Kevin Stanhope. I find that dismissal of this 8(a)(1) allegation is warranted under *IBM Corp.*, 341 NLRB 1288 (2004).

The facts show that, on March 16, 2001,[1] after receiving an employee complaint about the workplace conduct of employee Ken Stanhope, the Respondent's manager, Bruce Manderson, asked Stanhope to come back into the training room, so that he and fellow manager, Marlene Munsell, could discuss something with Stanhope. Stanhope replied that he would go back with them, but warned them that if the conversation "turns into something I don't like" he would ask for an independent witness. Manderson replied that his request for a witness would be denied. The three of them walked back to the training room. Munsell began by informing Stanhope that a report had been filed stating that Stanhope had used foul language. Munsell asked Stanhope what he could tell her about it. Stanhope responded by stating that he wanted his own witness at the meeting. Munsell replied that although he had the right to ask for a witness, she had the right to deny his request. Manderson added that if Stanhope insisted on having a witness, they would send him home and they would continue the investigation without his input. Stanhope denied that he used foul language, and stood up to leave the room. Manderson told Stanhope to sit down, and Stanhope did so. Munsell then asked Stanhope if he had a heated conversation with an employee. Stanhope replied that he did not know what she was talking about. Manderson told Stanhope that he was being sent home for the day so that the Respondent could continue its investigation and so that Stanhope could be given the opportunity to prepare a written statement.

Following the meeting, the Respondent's officials decided that if Stanhope would not provide a written statement of the incident, the Respondent would make a decision on the information available to the Respondent.

The next day, Manderson approached Stanhope and asked that he follow him to his office. Stanhope refused to do so without a witness present. Manderson replied that Stanhope could not have a witness, and again asked that he come to his office to speak about the incident. Stanhope again refused to do so without a witness, and told Manderson to just fire him right now. Manderson replied that the investigation would be concluded without Stanhope's input. Manderson asked Stanhope if he had a written statement, and Stanhope replied that he would not write one. Manderson then told Stanhope he was terminated for creating a hostile work environment and using foul language.

Manderson credibly testified that Stanhope's refusal to cooperate in the investigation was a factor in the decision to discharge Stanhope, and that his statements concerning his insistence on a witness were part of his refusal to cooperate. In addition to the refusal to cooperate, Manderson testified to other factors that led to Stanhope's termination as well, specifically, his failure to supply a statement, his use of profanity, and the complaining employee's distress over the underlying incident which she reported to the Respondent. Significantly, Manderson also testified that Stanhope would not have been terminated on March 17 if he had submitted a written statement of position.

The judge found that under *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant

[6] At this stage, we need not address our dissenting colleague's contention that, even assuming Stanhope's request for a coworker/witness was a motivating factor in his discharge, the Respondent would have discharged Stanhope in any event for conduct not protected by the Act. Any findings of fact concerning the validity of the Respondent's assertions about other factors leading to Stanhope's discharge are completely premature in the absence of appropriate findings and analysis about the extent to which Stanhope's protected conduct under *IBM* was a factor in his discharge.

[1] All dates hereafter are in 2001 unless stated otherwise.

part 268 F.3d 1095 (D.C. Cir. 2001), cert. denied 536 U.S. 904 (2002), the Respondent's refusal of Stanhope's March 16 request for a witness violated Section 8(a)(1). However, as noted by the majority, the Board overruled *Epilepsy Foundation* in *IBM*, supra, which held that an employer in a nonunion workplace need not accede to an employee's request for a coworker at an investigatory interview. Thus, as the majority correctly finds, under *IBM*, the Respondent's denial of Stanhope's request for a witness on March 16, and its requirement that Stanhope continue the investigatory interview without the presence of his requested witness, were both lawful.

With respect to the discharge of Stanhope on March 17, however, the majority erroneously contends that a remand is necessary to determine whether, under *IBM*, Stanhope's *request* for a witness was a motivating factor in the Respondent's decision to discharge him and, if so, whether Stanhope would have been terminated in the absence of that protected conduct. Contrary to the majority's contention, the record clearly shows that even assuming Stanhope's request was a motivating factor in the decision to discharge, the Respondent would have discharged Stanhope even in the absence of the request.

There were at least three reasons for discharging Stanhope, all of which were unprotected activity. First, Stanhope refused to attend the meeting without a witness. Second, Stanhope refused to supply a statement. Third, absent any rebuttal from Stanhope, the Respondent found that Stanhope used profanity and caused distress to a complaining employee. Even assuming arguendo that a fourth reason for the discharge was Stanhope's request for a witness, I think it clear that Stanhope would have been fired for the three reasons (at least collectively). Accordingly, rather than further prolong this matter,[2] I would assess the evidence and dismiss the complaint now.

Stephanie Cottrell, Esq., for the General Counsel.
Paul M. Ostroff, Esq. (Lane, Powell, Spears & Lubersky), of Portland, Oregon, for the Respondent.
Christyne L. Neff, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in the above-captioned matter was filed by United Food and Commercial Workers International Union (the Charging Party), on September 6, 2001. Based on the filing, after an investigation, on April 29, 2002, the Regional Director of Region 19 of the National Labor Relations Board (the Board), issued a complaint, alleging that Wal-Mart Stores, Inc. (the Respondent), had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent timely filed an answer, denying the commission of the alleged unfair labor practices. Pursuant to a notice of hearing, a trial on the merits of the alleged unfair labor practices was held before the above-named administrative law judge on June 27 and 28, 2002, in Anchorage, Alaska. All parties were afforded the right to call witnesses on their behalf, to examine and to cross-examine witnesses, to offer into the record any relevant documentary evidence, to argue legal positions orally, and to file post-hearing briefs. The latter documents were filed by counsel for each of the parties and have been closely examined by the above administrative law judge. Accordingly, based upon the entire record in the case, including the posthearing briefs and my observation of the testimonial demeanor of each of the witnesses,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, maintains an office and place of business in Wasilla, Alaska, at which location it is engaged in the business of the retail sale of merchandise. During the 12-month period immediately preceding the issuance of the instant complaint, in the normal course and conduct of its business operations described above, Respondent had gross sales of goods and services valued in excess of $500,000 and purchased and caused to be transferred and delivered to its Wasilla, Alaska facility goods and materials, valued in excess of $5000, directly from sources located outside the State of Alaska. Respondent admits that it has been, at all times material herein, an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Charging Party is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

The complaint alleges that, prior to and during an investigatory interview, which employee Ken Stanhope had reason to believe would result in disciplinary action being taken against him, Respondent denied his request to have a witness present during said interview and engaged in acts and conduct violative of Section 8(a)(1) of the Act by conducting that interview of Stanhope notwithstanding his request. The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by terminating Stanhope because he asserted his right to have a witness present during the above investigatory interview and, alternatively, that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Stanhope because he engaged in union activity and to discourage other employees from doing so.

[1] Notwithstanding that he was present during the entire hearing, the alleged discriminatee, Kenneth Stanhope, did not testify at the hearing. Accordingly, there is no record evidence as to his version of the events herein.

[2] The events occurred almost 4 years ago.

Respondent denied the commission of the alleged unfair labor practices and alleges that it terminated Stanhope for cause.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent, a corporation with its national headquarters located in Bentonville, Arkansas, operates a nationwide chain of department stores at which it sells merchandise at retail, including one such retail store located in Wasilla, Alaska. Marlene Munsell is the store manager for Respondent at its Wasilla facility, and Bruce Manderson is the co-manager of the facility. Respondent's Wasilla facility is a typical Wal-Mart retail department store, and, depending upon the season, approximately 350 to 400 individuals, termed associates, are employed there. Finally, its employees at the Wasilla, Alaska store are not represented by any labor organization, and the events at issue herein occurred during the second week of March 2001.

Cynthia (Cindy) Adams, who is a sales representative at Respondent's Wasilla facility in the electronics department, testified that, prior to March 10, she had spoken to alleged discriminatee Stanhope on four or five occasions during which the latter inquired as to the health of her father, an employee at the Wasilla store, who was, at the time, on a workman's compensation leave-of-absence.[2] According to Adams, on the above date, she was working, and, at approximately 5 p.m., while walking to the employees' breakroom for her lunch,[3] she encountered Stanhope in the hallway near the claims and layaway departments.[4] Stanhope,[5] who was coming toward her apparently from the breakroom, approached and "asked how my dad was doing. I answered him. I said my father was doing fine. He then . . . asked about the workers comp case. I told him I could not really say much about it because I didn't know, that I hadn't talked to my dad recently about it. He [replied] . . . your dad should take advantage of it and enjoy workers comp and he should milk the system for all it's worth." As this was similar to what Stanhope had previously said to her, Adams "kind of laughed it off"; however, "then he started getting agitated, he proceeded to go off about a certain member of management . . . assistant manager Tony."[6] Adams testified, "he was angry and . . . saying that Tony was a f–king prick and that Tony would stab you in the back at any opportunity he got. . . . He then started talking generally about management and about how they all would stab you in the back and how they all were f–king pricks and just the same thing. He was just very angry at management." Then, "he said that . . . if the union were in charge that we wouldn't be having these problems, referring to management. . . . I was getting upset . . . and so he brought up my father and said that my father was pro-union and that I would be good to listen to him." As she was "shocked" by Stanhope's comment, Adams did not respond. At this point, observing a group of employees walking towards them, Adams moved away from Stanhope and joined the group, and the conversation abruptly ended. Adams further testified that she became extremely upset by her encounter with Stanhope, and, asked by counsel for the General Counsel what upset her, Adams explained, "I was upset about the conversation. I was scared. Because at one point during the conversation he got in my face and he kept swearing. And he would come towards me and I would step back. And that happened twice that he came toward, and I stepped back." She added that Stanhope moved closer to her "when he started talking about Tony." He "lowered down into my face. . . . And I stepped back because I felt he was violating my space . . . and he stepped towards me and . . . he was still talking about Tony and I stepped back into the wall right against claims right there."[7]

Adams reported for work on Sunday, March 11. At first, she said nothing about what had occurred with Stanhope the previous day, but, becoming "sicker and sicker" thinking about it, she approached her supervisor, Linda Morton, and described what had happened. While relating the incident, Adams cried and appeared to be "very upset," and Morton requested that Adams accompany her to speak to Co-manager Bruce Manderson.[8] They entered Manderson's office and, with the office door closed, Adams informed Manderson about her encounter with Stanhope. Manderson testified, "She said that Ken had asked her how her father was doing and . . . how she was doing. She told me that during the course of their conversation, Ken became very animated, very passionate, started to talk about management in the store and how he used foul language . . . she told me that the conversation was something that was very uncomfortable." According to Manderson, Adams said that, after asking how her father was doing, the conversation turned "strange" when Stanhope began speaking about management and "the union"; that Stanhope began using the "F word"; that he used the "F word" in reference to management and the employees' "need to have a union"; and that Stanhope told her to ask her father, who was prounion, about the union.[9] When

[2] According to Bruce Manderson, while at work one day, Adams' father had been the victim of an assault by a coworker's husband.

[3] Adams was off the clock at the time of the incident with Stanhope. There is no evidence as to whether Stanhope was on nonwork time.

[4] The claims and layaway departments are located off of a hallway in the rear of the store. Access to this hallway is through a door from the sales floor. This is clearly a public area of the store as, according to Adams, customers commonly are in the layaway department arranging to pay for items for which they cannot afford "right then."

[5] At the time Munsell became the store manager in December 2000, Stanhope was a department manager at the Wasilla facility. Shortly thereafter, he resigned from that position and became an associate in the food department.

[6] Apparently, everyone employed at one of Respondent's retail stores is referred to by his or her first name and title.

[7] In answer to a question from me, Adams asserted that, while speaking to her, Stanhope became red-faced and was "flinging his arms around."

According to Store Manager Munsell, Stanhope weighed significantly more at the time of the incident than at the time of the hearing.

[8] The meeting with Manderson was in accord with Respondent's so-called "open door policy." According to Munsell, pursuant to this policy, associates are permitted to seek out managers and confidentially discuss matters of concern to them. Issues, which may be raised, range from potential discipline matters, such as harassment, to employee benefits and merchandising problems, such as customers obtaining products, which are normally not carried by Respondent.

[9] Asked how Adams said the incident ended, Manderson testified "she told Mr. Stanhope that her lunch was getting cold and she needed

Adams completed her story, Manderson requested that she write a statement about her confrontation with Stanhope and told her he "would look into the incident. As to why he instructed Adams to draft a written statement, regarding the incident, Manderson testified that it was his intent to commence an investigation to ascertain whether Respondent's store policy had been violated[10] and that, for investigations of potential discipline problems, "the procedure is to ask for a written statement from the complainant, get all of the information you can from that . . . person . . . and then . . . investigate the complaint, interview . . . any potential witnesses and then interview the . . . person that the complaint is brought against."[11]

The next day, March 12, Adams and Morton returned to Manderson's office, and Adams submitted her written description of the Stanhope incident. In pertinent part, it reads as follows:

> Then on Saturday 3/10/01 I was on lunch. I was going up to get a drink from McDonalds I had started some pizza in the microwave and asked Carol to take it out for me when it was done. I was going around the corner by claims and layaway when Ken came around the other way from layaway back to where I was. He passed me then stopped. He said "Hey how is your dad?" I turned said "he is doing good he has his days but he is good today." He asked if my dad was coming back to work, how his appointment went and if he was coming back to work. All of which I answered. He then out of nowhere [asked] what I thought of the union? I was at first confused and just looked at him. I did answer by saying that I did not want a union. He said that my dad was pro-union and I should listen to my dad. I said with some surprise my dad told you he was pro-union. He changed the subject (sort of) by going on about me finding out for myself. He gave me some internet site to check out. I said I would cause I was feeling scared and not sure how to respond. He then started talking about how lousy Walmart [sic] management was. He said that Walmart was all [f–king] pricks and that they would [f–king] lie to your face without ever batting an eye. That all Walmart management was this way. And so we needed a union to stop management and to make it safe for associates. He during this got in my face. I stepped back 2 times feeling very uncomfortable. He never touched me but two times I tried to leave he followed me. I finally said I was missing my lunch and my pizza was getting cold. He went to the break room. I went to get my drink and go eat. He was still going off in the break room. I told Carol . . . what just happened. She said that it didn't surprise her that she knew he was pro union. Oh sorry. This happened around 5:45–6:00 pm that night. I just don't like feeling scared of what happened. He made me feel like he was going to talk to me about it again. I am scared of him and really just want him to leave me alone. I have nothing against him personally. I hope this is what you wanted . . . I have tried to blow him off on the past times. I just can't blow him off anymore. I am scared of him and the way he talks gets more intense and venomous each time we talk. I don't feel that's right.

According to Manderson,[12] he reviewed the statement that Cindy had written[13] and asked her if it was a full and accurate statement of the incident. "She said yes. I . . . asked how she was doing, if she was okay. She told me that she was still very upset about the incident. She told me that she felt . . . sick to her stomach in seeing Mr. Stanhope in the store. She was very nervous, she was afraid of having to talk with [him] again." Asked if Adams was specific with regard to what Stanhope said or did to upset her, Manderson said she mentioned "his use of foul language . . . during the course of the conversation" and "the way he got into her face."[14] Then, Manderson requested that Adams draft another statement regarding the incident "because when I asked her how she was feeling that day . . . she relayed her feelings to me and that was not written down in the first statement." Respondent's comanager averred that this was consistent with Respondent's coaching for improvement investigatory procedure—obtaining "a full account" of how the incident affected the complaining employee.

Later that day or the next morning, as instructed, accompanied by Morton, Adams came to Manderson's office and gave him her second statement regarding her encounter with Stanhope. After reading through the document, he asked Adams if she had mentioned everything regarding how the incident had affected her. Then, Manderson "discussed with her the investigation process and . . . that we would [then] . . . interview Mr. Stanhope, we would maintain confidentiality and when we got all of the information about the incident we would make a deci-

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to buy a soda. And she maneuvered past him." Further, while stating that Adams described Stanhope as hovering over her, he denied Adams said anything about Stanhope touching her or backing her against a wall.

[10] Respondent's associate handbook contains various workrules, the violation of which may result in discipline including termination. These include:

> 9. Profanity has no place at work, wherever your work location or whatever the circumstances. It will not be tolerated

Further, as set forth in the handbook, Respondent maintains a "Harassment/Inappropriate Conduct policy," which states that "associates who engage in any type of harassment or inappropriate conduct on Wal-Mart property, at Wal-Mart sponsored functions, or while traveling on behalf of the Company whether "on the clock" or not will be subject to disciplinary action up to and including termination."

[11] In investigating Adams' complaint against Stanhope, Manderson implemented Respondent's "Coaching for Improvement policy," which is a four-step progressive disciplinary procedure (step one is a verbal coaching, step two is a written coaching, step three is a decisionmaking day during which the associate is given a day off with pay to decide if he or she will make the required improvement in his or her job performance, and step four is termination. The policy also establishes an investigatory procedure for determining if discipline is warranted, and the procedure includes obtaining from the associate, who has engaged in the alleged misconduct, "his/her side of the story and any additional facts."

[12] Earlier in the day, Manderson had informed Store Manager Munsell of Adams' complaint against Stanhope and advised her he was treating it as a potential violation of Respondent's harassment/inappropriate conduct policy.

[13] Manderson testified that the written statement was generally consistent with what Adams had reported to him the day before and that he did not believe Adams had omitted anything pertinent.

[14] The foul language was the word "fuck."

sion and then . . . relay to her when the decision was made." Also, Manderson assured Adams he would not tell Stanhope who had made the complaint against him.[15]

After meeting with Adams, Manderson spoke to Munsell in the store's training room, which is located in the rear of the building, informed her he had obtained a second statement from Adams, and asked her to review both of Adams' statements regarding the incident with Stanhope. He added that they needed to schedule a meeting with Stanhope, and they decided to meet with him the next morning.[16] Later that day, Manderson and Munsell telephoned Respondent's district manager, Gary Harvey, and informed him of the investigation which they were conducting. Manderson testified that such is mandatory during an investigation into a possible violation of the harassment/inappropriate conduct policy.[17]

On Friday, March 16, Manderson next testified, he approached Stanhope[18] in the food department where the latter was stacking the cooler. "I told [him] there was something I needed to discuss with him and I asked him to come back to the training room and told him that myself and Marlene needed to . . . go over something with him." Stanhope responded, "I'll go back with you but if the conversation turns into something I don't like I'll ask for an independent witness. . . . I told him I didn't think that was necessary and asked him to come to the back with me." Manderson admitted that, at this point, he did say to Stanhope that his request for a witness would be denied "because of the open door policy."[19] Stanhope and Manderson walked back to the training room where they were met by Munsell. According to Manderson, the three of them spoke in the training room for no more than 10 minutes. Munsell began, informing Stanhope that Respondent had a report that he had been using foul language and asked him what he could tell her about it.[20] At this point, Stanhope stated that he wanted his own witness to be present at the meeting, and Munsell responded that he had the right to ask but she had the right to deny Stanhope's request. Munsell added that Respondent maintained an open door policy and desired to maintain confidentiality. Manderson interjected that if Stanhope insisted upon having a witness, they would send him home and "we would continue the investigation without his input." To this, Stanhope said he did not use foul language and stood up as if to leave the room. Manderson told him to sit down, and Stanhope did so. Munsell then asked if Stanhope recalled having a heated conversation with another associate the previous Saturday. Stanhope responded that he did not know what she was talking about and asked who Respondent had convinced to concoct something against him. At this point, "I told him that we were sending him home for the day so that we could continue our investigation and to give him a chance to . . . write a written statement [of his recollection of an incident the previous Saturday]. And we . . . could discuss it tomorrow."

Marlene Munsell's version of the meeting with Stanhope contradicts that of Manderson. According to her, Manderson accompanied the employee to the training room where she was waiting. She began the conversation, telling Stanhope that a coworker had reported his use of foul language and intimidating language toward Adams on Saturday. Stanhope replied that he wanted someone sitting with him during the meeting. Munsell responded, telling the employee "that you have the right to ask, I have the right to deny. If you decide not to talk to me . . . that's fine with me, you can go ahead and leave, I will continue this investigation without your input . . . he just laughed at me and said . . . what have you guys fabricated. . . . I told him . . . we have not fabricated anything. I'm just following up on an open door issue that was brought to my attention. I just need . . . your side of the story. . . . He said . . . why don't you just terminate me? And I said that's not the way I work. I like to listen to the other side of the story. But if you don't want to talk to us that's fine, you can leave. And Allen asked him to write a statement and that he could go home for the day." Stanhope had no response, and "he just kept on laughing at us," saying "terminate me . . . do it right now."[21] Asked initially if she had adhered to company policy during the above meeting with Stanhope, Munsell stated, "I was following our open door and our confidentiality policy,"[22] and then asked if Respondent had a policy when employees requested witnesses during investigatory interviews, she echoed Manderson, stating "what we do is just tell them that . . . they have the right to ask and we have the right to deny."[23]

[15] Manderson testified that Morton remained present at all times because a female was the complaining party, and he wanted a female present as a witness. Also, according to Manderson, in any harassment investigation, two managers must be present.

[16] At some point prior to meeting with Stanhope, Munsell met with Adams, Manderson, and Morton in the training room in order for Munsell herself to hear from Adams. According to Munsell, "she was very upset, shaking and crying, told me that on Saturday when she was going out to get a drink Ken . . . approached her by the claims department, started talking to her and got very upset, agitated, said . . . she needed to listen to her dad, she needed to form a union, something about . . . upper management. She . . . was very scared and . . . was trying to get away from . . . Stanhope and he kept after her. And he wouldn't let [her] get by."

[17] Asked if they must inform the district manager of other types of misconduct investigations, Manderson stated they must do so in matters of theft, workplace violence, sexual harassment, and other "serious" issues between associates.

[18] There is no record evidence that Stanhope had any prior disciplinary history.

[19] Manderson testified that he based his response upon a memo, which Respondent had distributed to managers, regarding employee requests for witnesses during investigatory interviews. In said memo, Respondent stated its policy is "They have the right to ask for one but we have the right to refuse."

[20] Respondent has a computer-based learning program, which all employees are required to view and to learn. Said program includes a detailed description of Respondent's harassment and inappropriate conduct policies. Stanhope took the required computer courses. In addition, of course, Stanhope received a copy of Respondent's handbook upon being hired.

[21] Munsell conceded that, in her pretrial affidavit, she failed to mention informing Stanhope he could leave after he requested a witness.

[22] Munsell explained the relationship between Respondent's confidentiality and open door policies as follows—"When an associate brings something to our attention [such as harassment] . . . we treat that very confidential and we only release information as needed."

[23] Munsell explained that, because individuals, who utilize the open door policy, are granted confidentiality, Respondent is obligated to

In the latter regard, Munsell believed she was adhering to Respondent's policy. Thus, in a document, dated August 24, 2000, Respondent explicated its policy and practice, regarding nonunion employees who request witnesses during investigatory interviews, in light of the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and the Board's decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant part 268 F.3d 1095 (D.C. Cir. 2001), cert. denied 122 S.Ct. 2356 (2002). The document states:

Wal-Mart's Position:

- At Wal-Mart, our associates have the benefit of using the open door policy
- This allows them the opportunity to talk one on one to any member of management regarding any situation while maintaining confidentiality
- As a result, it is not necessary for associates to have a co-worker present and a co-worker will not be allowed to attend

Management's Role:

1. If an associate requests to have a co-worker present tell the associate that we do not believe this would be appropriate.
2. If an associate will not attend the meeting without a co-worker, DO NOT force the associate to attend.
3. Inform the associate you will continue the investigation without their input , , ,

After Stanhope left the store, Munsell and Manderson together telephoned their regional personnel manager, Stacy Simon, whose office is at corporate headquarters in Bentonville, Arkansas. They informed Simon of what they were doing, the investigation of the incident between Adams and Stanhope, and what had just occurred that day and faxed copies of Adams' statements to her. According to Manderson, the three management officials decided that, if Stanhope failed to provide a written statement of his version of the incident, "we would have to make a decision based on the information we had at hand." After speaking to Simon, Munsell and Manderson telephoned Gary Harvey and informed him of what had occurred that day.

According to Manderson, the next morning, Saturday, March 17, after Stanhope reported for work, accompanied by an assistant manager and with, at his request, a police officer standing nearby, Manderson approached Stanhope in the food department and asked the latter to follow him to his office. Stanhope responded that he would not go anywhere to meet with Manderson unless he had a witness present. Respondent's comanager replied that Stanhope could not have a witness as this was a personal confidential matter and again asked him to come to his office to speak about the incident. Stanhope reiterated his refusal to do unless he had a witness present, and said "just go ahead and fire me right here, right now. And I said that's not how private and . . . confidential business is handled . . . . I asked him I'd like to discuss it with you in private, he said no. And I told him that, if that's what he wanted to do I would have to conclude the investigation without his input and then I asked him . . . if he had written a statement because . . . he did not want to talk to me or give me any verbal input. . . . He told me that he didn't have one and he told me I didn't ask him to write one and even if I had, he wasn't going to write one anyway. And, at that point . . . I told him I was terminating him for creating a hostile work environment and using foul language."[24]

There is record evidence that Stanhope's refusal to participate in the investigatory interview without the presence of his own witness constituted a factor in Respondent's decision to discharge him. Thus, Respondent considered Stanhope's conduct on Friday and Saturday as refusing to cooperate in its investigation of Adams' allegations, and, when asked to explain Respondent's rationale underlying this conclusion, Manderson stated "he gave us nothing to the contrary to refute Cindy's claim," and "he gave us no information when . . . we asked him questions . . . about Cindy's assertions." Asked if insisting upon having a witness present and not providing anything without one comprised Stanhope's refusal to cooperate, Manderson admitted "that was part of it." Asked what was the other part, he responded, "[Stanhope] did not supply us with a written statement."[25] Then, after initially denying that Stanhope's refusal to cooperate in the investigation without having his own witness present constituted a factor, Manderson listed the following as factors underlying Respondent's decision to terminate him—Stanhope's refusal to cooperate, Stanhope's failure to supply a statement, Adams becoming distraught over what occurred during her confrontation with Stanhope, and the latter's use of profanity during said incident.[26] Finally, Manderson conceded that he could not distinguish between the weight Respondent accorded each of the foregoing factors in deciding to terminate Stanhope. In contrast to Manderson, Store Manager Munsell specifically denied that Respondent's decision to discharge Stanhope at all concerned his demand for a witness during the investigatory interview.

adhere to a right to ask/right to deny policy when witnesses are requested. She could think of no instance when Respondent would grant a request for a witness in the above circumstances.

[24] According to Manderson, this was one of the scenarios, which he, Munsell, and Simon had discussed the day before.

Munsell testified that the three management officials reached two decisions during their telephone conversation—". . . one that if Mr. Stanhope brought the statement in that we were going to sit down and look at it. And . . . if he did not bring a statement, we were going to take what we already had and . . . terminate [him]." She further testified that the reason for the decision to terminate Stanhope was their belief he had engaged in "gross misconduct" as his actions toward Adams "intimidated" her, he used "severe foul language," and he "invaded" her space.

[25] Manderson conceded that, if Stanhope had cooperated in the investigation by providing a written statement of his position, he would not have been terminated on March 17.

[26] In contrast to Manderson, Munsell listed the following factors underlying Stanhope's "gross misconduct—" causing Adams to feel intimidated, invading her space, use of foul language, and causing emotional distress severe enough to interfere with Adams' ability to work. Significantly, Munsell conceded that Adams never said she demanded that Stanhope back off at any point during their confrontation.

Munsell further denied that Stanhope's alleged comments to Adams about the need for a union were a factor in Respondent's decision to discharge him. In this regard, according to Manderson, Respondent's management policy book instructs its store managers to telephone its so-called "union hotline" whenever union activity is uncovered at one of Respondent's retail stores. While agreeing that statements, such as those attributed to Stanhope should trigger such a response, Manderson could not recall if he called the hotline number after hearing Adams' version of events and was not aware if anyone else contacted the hotline. Also, while being aware of the above instructions upon the advent of union activity, Munsell specifically denied contacting the union hotline.

In support of its contention that Stanhope was discharged for legitimate reasons, Respondent offered evidence that other associates have been terminated for engaging in misconduct similar to that assertedly committed by Stanhope. In this regard, David Shepherd, who had been the Wasilla store manager for Respondent prior to Munsell, testified that associate, Lisa Reed, was terminated in February 1998 for "misconduct of inappropriate workplace behavior." The record establishes that, on the day of her discharge, Reed was given a final written coaching warning, concerning her use of the epithet "mother F" during a lunchtime conversation with an associate, and that she immediately went onto the sales floor and confronted the associate. According to Shepherd, Reed "used . . . the word fucking on the floor towards [the] associate she was mad at . . . and in the very same statement threatened . . . him that if he ever went to management again about her . . . she'd make sure she took care of herself." Reed was immediately terminated. Further, Respondent offered into the record documentary evidence that, besides Reed, six other associates also have been discharged for similar misconduct. Thus, on October 12, 2000, Jeannie Weir was discharged for using the "F" word on the sales floor immediately after receiving a decisionmaking day for her use of profanity; on July 24, 2000, Harold Starbird was discharged for "creating a hostile work environment by using the F word and by inappropriate touching of female associates"; on July 7, 1999, Brian Serjeant was terminated for "use of profanity toward an assistant manager;" on April 18, 1999, Steven Humphries was discharged after being "overheard using inappropriate language and suggestive remarks toward another person" on December 21, 1997, Dieter Schafer was discharged for "use of inappropriate language to another associate"; and, on September 6, 1996, Mike Daniels was terminated for use of "abusive language" and "disrespect for the individual."

During rebuttal, counsel for the General Counsel offered evidence that, in contrast to Respondent's treatment of Stanhope, prior to their respective terminations, all but two of the above associates had engaged in acts of misconduct, similar to that which resulted in their eventual terminations,[27] and received lesser degrees of discipline. Thus, prior to his discharge, within a 6-month period, associate Starbird received two written coaching for improvement warnings for saying to a supervisor, who assigned him to perform work, "F—k it, that's too much f—ken work." and for having "invaded associates space by showing physical attention to them." Three days before his discharge, Associate Schafer received a written coaching warning for having retorted "F—k you" to another associate, who had "teased" him. Six months prior to his discharge, Associate Daniels had been given a final written coaching warning for ". . . using direct and profane language toward his fellow associates, and, on the day before her discharge, Associate Weir received a decisionmaking day for "use of inappropriate language (foul language) on the sales floor and directed to other associates." Moreover, associate Donell Polk, who was terminated by Respondent on January 25, 1998, for threatening another associate "that he would kick his butt if he went to management again about him," previously had received a second written coaching for using profanity during an argument with another associate and a decisionmaking day for becoming "upset" and "using the F word" toward another associate. Further, during cross-examination, Munsell admitted that the use of profanity does not always precipitate discharge. Thus, Crystal Beatty, merely was given a written coaching for publicly berating another associate and using profanity. Finally, the record discloses that associate, Henry Estes, was disciplined, but not discharged, for speaking in a derogatory and threatening manner and that associate, Norma Young, was disciplined, but not terminated, for suggesting to another associate that they settle a heated dispute outside.[28]

B. Legal Analysis

The instant complaint initially alleges that Respondent violated Section 8(a)(1) of the Act by, after having denied his request for the presence of his own witness, conducting its investigatory interview with Stanhope in the Wasilla store training room on March 16. In this regard, the only record evidence of what occurred comes from the respective testimony of Store Manager Munsell and Co-manager Manderson; however, they contradicted each other particularly as to Munsell's response to Stanhope's demand for a witness and as to what occurred thereafter. While neither management official appeared to be an inherently incredible witness, Manderson's demeanor, while testifying, was that of a more candid witness, and I note that, while, Munsell's version of the meeting with Stanhope generally comported with Respondent's legal position, Manderson's testimony was inordinately deleterious to Respondent's legal position. Accordingly, I shall rely on Manderson's version of the meeting with Stanhope and find that, on March 16, after the former approached Stanhope and requested him to attend a meeting with Munsell, the employee demanded the presence of "an independent witness"; that Manderson denied his request based upon Respondent's "open door policy:" that Munsell began the meeting by informing Stanhope Respondent pos-

[27] While Associates Brian Serjeant and Steven Humphries were immediately terminated from their jobs, each was deemed eligible for rehire.

[28] If permitted counsel for Respondent would have called witnesses, who would have testified that Associate Estes' misconduct did not include invading the space of another associate, his misconduct was not repeated, and his misconduct did not impair the work of another associate; that Associate Beatty had used foul language but not the F word; and that Associate Young had used no foul language nor invaded the space of another employee.

sessed a "report" he had been using foul language and asking him about it"; and that Stanhope, who had studied Respondent's computer-based program on its harassment and inappropriate conduct policies and who had been given Respondent's handbook, in which the use of profanity is expressly prohibited, at the time of his hire, again demanded the presence of "his own witness" at the meeting. I further find that Munsell replied to Stanhope, stating he had the right to ask but she had the right to deny his request and adding that Respondent had an open door policy and desired to maintain confidentiality; that Manderson interjected, telling Stanhope, if he insisted upon having a witness, Respondent would send him home and continue the investigation without his input; that Stanhope then denied using foul language and stood as if to leave; that Manderson ordered the employee to sit down; that Munsell then asked if Stanhope recalled having a "heated conversation" with another associate the prior Saturday; that Stanhope specifically denied such an incident, said he did not know what Munsell was talking about, and asked who had made such an allegation against him; and that, at this point, the meeting ended with Manderson telling Stanhope to leave the store and go home to enable Respondent to continue its investigation and to give him a chance to draft a written statement of his recollection of the alleged incident.

In *NLRB v. J. Weingarten, Inc.*, supra, the Supreme Court held that an employer violates Section 8(a)(1) of the Act by denying an employee's request that his union representative be present during an investigatory interview, which the employee reasonably believes might result in disciplinary action against him. Subsequently, in *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board concluded that, in a nonunion setting, employees were entitled to the same rights, enunciated by the Supreme Court in *J. Weingarten, Inc.*, as employees, who are represented by a union; however, in *Sears, Roebuck & Co.*, 274 NLRB 230 (1974), the Board reversed itself, holding that the *Weingarten* principles do not apply in circumstances where there is no recognized or certified union. Then, in *Epilepsy Foundation of Northeast Ohio*, supra, the Board again reversed itself and returned to the rule set forth in *Materials Research*—"that *Weingarten* rights are applicable in the nonunionized workplace as well as the unionized workplace." Id. at 678. With regard to his or her *Weingarten* rights, an employee's right to the presence of a union representative or an employee representative arises only upon his or her request for such representation. *Alltell Pennsylvania, Inc.*, 316 NLRB 1155, 1158 (1995); *Seattle-First National Bank*, 268 NLRB 1479, 1480 (1984). Further, once the employee makes a valid request for representation, the burden is upon the employer to either (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a representative or having no interview at all. *Alltell of Pennsylvania*, supra; *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *General Motors Corp.*, 251 NLRB 850, 857 (1980).

Analysis of what occurred during the March 16 interview discloses that Respondent effectively eviscerated Stanhope's Section 7 rights and engaged in conduct violative of Section 8(a)(1) of the Act. Thus, Respondent does not dispute that its purpose for desiring to meet with Stanhope was to investigate the allegations of Cindy Adams against him. I have found that, after the commencement of the March 16 meeting and after Munsell explained that the purpose of the meeting was to seek his response to a report he had used foul language, Stanhope immediately requested the presence of his own witness. While Stanhope failed to specifically request the presence of an "employee representative," in his posthearing brief, counsel for Respondent concedes that "this request constituted a request for representation." Further, given that Stanhope was conversant with Respondent's policy, prohibiting the use of profanity at the workplace, and its harassment and inappropriate conduct policy, I have no doubt, and also find, that he was well aware of the implications of Munsell's statement, regarding the reason for the meeting—the distinct possibility discipline would be imposed against him by Respondent. Therefore, I believe that, at this point in the meeting, it was incumbent upon Respondent to have either granted Stanhope's request, terminated the meeting, or given the employee the choice of continuing the meeting without the presence of a witness or having no meeting at all. Munsell chose neither option, merely responding that Stanhope had the right to ask but she had the right to deny his request for the presence of his own representative. Contrary to counsel for Respondent, as Munsell failed to explicitly inform Stanhope of either of the foregoing options, her response was not an accurate statement of the law. Rather, nothing she said would have permitted Stanhope to understand she was terminating the meeting, and the more reasonable interpretation of her comment was that Munsell and Manderson intended to continue the meeting without permitting Stanhope to have his own witness present. Respondent's actions demonstrate that this view is correct. Thus, moments later, after Manderson threatened him with a decisionmaking day if he persisted in demanding the presence of his own witness,[29] when Stanhope stood as if to leave the room, Manderson ordered him to sit, and Munsell continued the interview, asking Stanhope if he recalled a heated conversation with another associate the previous Saturday. In these circumstances, by denying Stanhope's request for the presence of his own witness and continuing its investigatory interview with him, Respondent denied the employee his rights, pursuant to *J. Weingarten, Inc.*, supra, and, thereby, engaged in conduct violative of Section 8(a)(1) of the Act. *Epilepsy Foundation of Northeast Ohio*, supra; *Williams Pipeline Co.*, 315 NLRB 1, 5 (1994).

[29] Manderson immediately followed Munsell's comment, threatening Stanhope that, if he persisted in demanding a witness, they would send him home and continue the investigation without his input. I agree with counsel for the Charging Party that sending an employee home for the day is the last step in Respondent's progressive disciplinary policy. Thus, it appears that Manderson threatened Stanhope with discipline if he persisted in invoking his Sec. 7 right to have a representative present during the investigatory interview. While the General Counsel did not allege this as an unfair labor practice, I must express my agreement with counsel for the Charging Party that the "choice" presented to Stanhope eviscerated his Sec. 7 rights. I note that it was obviously in his best interest to cooperate in Respondent's investigation of Adams' allegations; however, he could not do so unless he waived his rights under *J. Weingarten, Inc.*

Turning to Respondent's discharge of Stanhope, counsel for the General Counsel posits alternatively that Respondent terminated Stanhope because he attempted to invoke his *Weingarten* rights in violation of Section 8(a)(1) of the Act and that Respondent terminated Stanhope because it believed he was engaged in union activities and in order to discourage other employees from likewise supporting a union in violation of Section 8(a)(1) and (3) of the Act. With regard to the alleged violation of Section 8(a)(1) of the Act, based on the credible testimony of Manderson, I find that, on March 16, after sending Stanhope home for the remainder of the day in order to prepare a statement concerning the allegations against him, Munsell and Manderson spoke to Respondent's Regional personnel manager, Simon and together determined that, if the alleged discriminatee failed to provide such a statement, Munsell and Manderson should consider Cindy Adams' version of her confrontation with Stanhope as fact and immediately discharge the latter. I further find that, on the following day (Saturday), Stanhope reported for work; that Manderson approached the employee and asked the latter to accompany him to the office; that Stanhope refused to do so unless he was afforded permission to have his own witness present; that Manderson denied his request, stating the subject was "a personal confidential matter"; that Stanhope reiterated his request for the presence of a witness and suggested Manderson should just go ahead and fire him; that the latter replied "if that's what he wanted, I would have to conclude the investigation without his input" and asked for the written statement, which he had requested Stanhope to prepare; that the latter responded he had no such statement and would not draft one; and that Manderson then abruptly terminated the alleged discriminatee.

Whether in a union or nonunion context, it is, of course, patently unlawful for an employer to terminate an employee because he/she invokes his/her *Weingarten* rights, which are guaranteed to employees by Section 7 of the Act. *Epilepsy Foundation of Northeast Ohio*, supra at 680; *Circuit-Wise, Inc.*, 308 NLRB 1091, 1109 (1992); *Salt River Valley Water Users Assn.*, 262 NLRB 970 (1982). In determining whether the discharge of an employee was, in fact, motivated by the employee's exercise of his/her *Weingarten* rights, the analytical test for assessing the employer's motivation is that which was enunciated by the Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *Safeway Stores*, 303 NLRB 989, 995 (1993). Under this approach, the General Counsel must establish, by a preponderance of the evidence, that the employee's invocation of his/her *Weingarten* rights was a motivating factor in the employer's conduct. Once such a showing has been made, the burden shifts to the employer to demonstrate that the same action would have been taken in the absence of or notwithstanding the employee's actions, protected by the Act. Id. In concluding that the General Counsel has established a prima facie showing of unlawful animus, the Board will not quantitatively analyze the effect of the unlawful motive, and the evidence of such is sufficient to make the acts and conduct, at issue, violative of the Act. *Wright Line*, supra at 1089 fn. 4. Finally, once the burden has shifted to the employer, the crucial inquiry is not whether the employer could have engaged in the alleged unlawful acts but, rather, whether the employer would have done so in the absence of the employee's invocation of his *Weingarten* rights. *Structural Composites Industries*, 304 NLRB 729 (1991). Herein, I have previously concluded that Stanhope exercised a right guaranteed by Section 7 of the Act when, after being informed of the purpose for the March 16 investigatory interview by Store Manager Munsell, he requested the presence of his own witness and that Respondent unlawfully denied his request and continued the interview. Further, Co-manager Manderson admitted that Stanhope's refusal to cooperate in the investigation of Adams' allegations was a factor in Respondent's discharge decision and that Stanhope's insistence upon the presence of a witness during the investigatory interview on March 16 "was a part of it." In these circumstances, I am persuaded that the General Counsel has made a prima facie showing that Respondent discharged Stanhope because he exercised his *Weingarten* rights.

In the above circumstances, the burden shifted to Respondent to establish that it would have discharged Stanhope notwithstanding his invocation of his *Weingarten* rights. In this regard, Respondent contends that it discharged Stanhope because he used foul language, intimidated Adams, and invaded Adams' space during his alleged confrontation with her on March 11 and that, in discharging Stanhope, it was adhering to an established past practice of terminating employees who engaged in similar misconduct. I note there is record evidence that, during the alleged incident between Stanhope and Adams, the former referred to Respondent's managers as "f—ken pricks," said managers would "f—ken lie," and twice moved close enough to Adams so as to force her to step back, and that Adams became upset over what had occurred.[30] Nevertheless, Manderson admitted that Stanhope's refusal to cooperate in the investigation was also a factor in Respondent's discharge decision; that the alleged discriminatee's invocation of his *Weingarten* rights was a "part" of his refusal to cooperate, and, most significantly, that he could not distinguish between the significance of each of the foregoing factors. Moreover, I note that Stanhope's alleged misconduct appears merely to have consisted of his two profane utterances[31] and his close proximity to Adams unaccompanied

[30] A comparison of Cindy Adams' testimony at trial and her written statement to Respondent, regarding the incident, reveals that the two accounts of her asserted confrontation with Stanhope are utterly inconsistent and contradictory. Thus, her two versions conflict as to how the conversation began, what was said, and how it concluded. Moreover, I note that, while she recalled Stanhope as being red-faced and flinging his arms about in answering a question from me, she failed to describe Stanhope's appearance in her account to Manderson. The foregoing convinces me that little credence may be placed in Adams' account of the alleged March 10 incident, including its occurrence. Nevertheless, there is no dispute that she provided a written account of what assertedly occurred to Respondent, and the record establishes that Munsell and Manderson took it seriously to the point of alerting higher management officials and seeking to obtain Stanhope's version of events. Accordingly, while not believing it to be reliable or truthful, as Respondent acted upon Adams' written version of events, I shall likewise rely on it as the precipitating document for what occurred herein.

[31] In contrast to the situation in *Aluminum Co. of America*, 338 NLRB 20 (2002), I do not believe Stanhope's two utterances, no matter

by any threats or physical gestures or contact. *Felix Industries,* 331 NLRB 144, 146 (2000). In this regard, I note that not even Manderson found Adams' account particularly iniquitous or vile and that he actually asked her to draft a second document more expressive of her feelings after the incident. As to Respondent's assertion that it acted in accord with its past practice, while there exists record evidence that Respondent had previously discharged, at least, eight employees for use of profanity, including the word "f—k," in the workplace and for other inappropriate conduct, only two associates were immediately terminated, the remainder of the associates, who were discharged, initially received lesser levels of discipline for similar misconduct, including use of the word "f—k," prior to termination, and other employees received discipline but were not terminated for engaging in similar misconduct. Respondent asserts that Stanhope's alleged misconduct was so severe as to warrant immediate discharge; however, while I recognize not all instances of misconduct are the same and deserve different levels of discipline, I cannot find that Stanhope's alleged misconduct differed in degree so substantially from similar acts of misconduct, which did not result in immediate discharge, to conclude that, rather than disciplining him with a lesser degree of discipline, Respondent would have immediately terminated the alleged discriminatee notwithstanding its unlawful motivation. In these circumstances, given Manderson's management position with Respondent, I believe that his admissions must be accorded significant weight as to Respondent's motivation for terminating Stanhope. Therefore, I believe, and find, that, on March 17, Respondent discharged Stanhope because he failed to cooperate in the investigation of Cindy Adams' allegation by invoking his *Weingarten* rights—a precipitating factor equal in weight to any other—and that, in such circumstances, Respondent engaged in conduct violative of Section 8(a)(1) of the Act. *Epilepsy Foundation of Northeast Ohio*, supra; *Circuit-Wise, Inc.*, supra.

The General Counsel's alternative allegation is that Respondent terminated Stanhope because of his union sympathies and to discourage other employees from supporting a union in violation of Section 8(a)(1) and (3) of the Act. With regard to this allegation, at the hearing, in answer to my question, counsel for the General Counsel stated that her underlying theory is in accord with the Supreme Court's decision in *Burnup & Sims, Inc.*, 379 U.S. 21 (1964)—when the alleged misconduct for which the employer terminates an employee occurs during the course of protected concerted activity. However, in her posthearing brief, counsel for the General Counsel inexplicably departed from this theory and, instead, urged as the appropriate theory the *Wright Line*, supra, approach, which is utilized in resolving cases in which the respondent's motivation for engaging in the alleged unlawful conduct is disputed—a so-called dual motive situation. Counsel for the Charging Party adhered to the General Counsel's theory, as stated at the hearing, and argued this allegation, utilizing the *Burnup & Sims* analysis. Perhaps anticipating counsel for the General Counsel's change of course, counsel for Respondent used both analytical approaches to assertedly debunk the alleged unfair labor practice; however, he urged use of a *Wright Line* analysis "as the most appropriate approach." I agree with counsel for the General Counsel and counsel for Respondent that this allegation is best analyzed using the *Wright Line* approach. Thus, unlike the factual situations in *Felix Industries*, supra,[32] and in *Aluminum Co. of America*, supra,[33] Respondent's motivation for discharging Stanhope is directly at issue and is disputed herein.[34] The General Counsel asserts that Respondent's discharge of Stanhope was motivated by its belief that the alleged discriminatee engaged in union activity and supported union representation, and, in contrast, Respondent contends that its discharge of Stanhope was motivated by his misconduct during the incident with Adams. In such a dual motive situation, the *Wright Line* analytical approach is appropriate and, indeed, mandated.[35]

Respondent contends that it discharged Stanhope for using foul language toward Cindy Adams and for intimidating and

how distasteful, may be viewed as a "profane outburst" or as "repeated, sustained, ad hominem profanity." Id. at 22.

[32] In *Felix Industries*, an employee's asserted misconduct (calling a supervisor a "f—king kid") occurred during a conversation, between the employee and the supervisor, regarding the former's rights under a collective-bargaining agreement. The issue, before the Board, was whether the employee engaged in such opprobrious misconduct so as to cause his activities to lose their protection under the Act. Id.

[33] In *Aluminum Corp. of America*, while in the process of initiating grievances against his supervisors, an employee uttered a "tirade" of expletives against the supervisors. The employee was terminated for misconduct. Recognizing that the filing of contractual grievances is protected concerted activity, in assessing the legality of the discharge, the Board was confronted with "a critical threshold issue about the relationship of his protected activity to their otherwise unprotected activity," and whether the use of profanity removed the Act's protection. Id. at 21 and 22.

[34] Put another way, in neither of the cited cases was the employer's motive for disciplining the alleged discriminatee at issue.

[35] I have previously explained the burden shifting analysis generally required under *Wright Line*, supra. As discussed by the Board in *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999), utilizing the *Wright Line* analysis in order to establish a violation under Sec. 8(a)(1) and (3) of the Act, the General Counsel must prove, by a preponderance of the evidence, that antiunion animus was a motivating factor in Respondent's discharge of Stanhope. Once the showing has been made, the burden shifts to Respondent to demonstrate that the same action would have taken place notwithstanding Stanhope's believed support for a union. To sustain its initial burden, that of persuading the Board that Respondent acted out of antiunion animus, the General Counsel must show (1) that Stanhope engaged in union activities, (2) that Respondent knew or suspected his involvement in activities in support of a union, and (3) that Stanhope's prounion sympathies and activities were a substantial or motivating factor underlying his discharge by Respondent. Such motive may be demonstrated by circumstantial evidence as well as by direct evidence and is a factual issue. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994). Further, pretextual discharge cases should be viewed as those in which "the defense of business justification is wholly without merit" (*Wright Line*, supra at 1089 fn. 5), and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Manderson and Co.*, 291 NLRB 39 (1989). In this regard, "it is . . . well settled . . . when a respondent's stated motive for its actions is found to be false, the circumstances warrant the inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

invading her space during their alleged March 11 confrontation. The record contains two accounts of this incident, Adams' testimony[36] during the trial and her written statement, which she drafted for Respondent and submitted to Co-manager Manderson 2 days after the asserted confrontation. As stated above, these accounts are utterly inconsistent and antithetical—in particular regarding how the confrontation began, what was said, and how she ended it. Given her demeanor and the record contradictions and inconsistencies, I find it difficult to give credence to whatever Adams wrote or said. However, as stated above, given Respondent's reliance on Adams' version of events in commencing its investigation of Stanhope's alleged misconduct, I shall credit her written statement in determining what occurred. Accordingly, I find that, on March 10, while in the lunchroom on her lunchbreak eating pizza, Adams decided to buy a soda at the McDonald's restaurant inside the store; that she left the lunchroom and was walking in the hallway near the claims and layaway departments when she encountered Stanhope, who appeared to be walking in the direction of the lunchroom; that, as he passed by Adams, Stanhope asked about her father; that Adams responded he was doing well that day; and that they continued speaking about her father. I further find that Stanhope then changed the subject, asking what she thought about the union; that, although feeling "confused" by his question, Adams replied she did not want a union; that Stanhope replied her father was prounion and she should listen to her father; that Adams responded "with some surprise my dad told you he was pro-union"; that Stanhope said she should find out for herself and mentioned an internet site to "check out"; that Adams said she would do so; and that Stanhope next mentioned how "lousy" Respondent's management was, saying "Respondent' was all f—ken pricks and . . . they would f—ken lie to your face without ever batting an eye. . . . And so we needed a union to stop management and to make it safe for associates." Further, I find that, as he talked, Stanhope moved closer to Adams; that, while he never touched her, she became uncomfortable and twice moved back from him; and that she ended the conversation saying she was missing her lunch, her pizza was becoming cold, and she wanted to purchase a soda. Finally, I find that Respondent utilized Adams's written version of the alleged incident between herself and Stanhope during its investigation of her allegations.

Clearly, after briefly discussing Adams' father's health, the entire exchange between Stanhope and Adams pertained to representation by a union. Thus, Stanhope asked what Adams thought about representation by a union; Adams said she did not want to represented by a union; Stanhope said her father was prounion and she should listen to him; Adams expressed surprise as to how Stanhope could be aware of her father's union sympathies; and, after he informed Adams about where on the internet she could learn about union representation, Stanhope inveighed against Respondent's management and then suggested such was the reason Respondent's associates required protection by a union. From the foregoing, I find that Stanhope was engaged in union activities—seeking to determine a coworker's union sympathies, informing her about his own union sympathies and his perception of the necessity of union representation for Respondent's associates, and attempting to conscribe her in a campaign for union representation. Inasmuch as Adams informed Munsell and Manderson regarding Stanhope's solicitation of her support for union representation, clearly Respondent became aware of his activities and could form a belief as to his union sympathies. In these circumstances, the critical issue is whether counsel for the General Counsel has established that Respondent was motivated by Stanhope's prounion sympathies and his apparent support for union representation in discharging him. In this regard, I note that there is no direct or explicit record evidence, establishing unlawful animus. Further, while I question what occurred during her alleged confrontation with Stanhope, there is no record evidence that Respondent solicited Adams to fabricate the occurrence of the incident or Stanhope's behavior during it. *BJ's Wholesale Club*, 318 NLRB 684 fn. 2 (1995). Moreover, one may legitimately question whether Respondent was at all concerned about Stanhope's union sympathies. Thus, apparently, neither Munsell nor Manderson telephoned Respondent's "union hotline" to report union activity at the Wasilla store. Also, Respondent does, in fact, maintain rules, about which Stanhope was well aware, prohibiting the use of profanity and harassment of other employees at its stores and has disciplined employees for violating them. Nevertheless, counsel for the General Counsel argues that one may infer Respondent's unlawful animus from its termination of Stanhope, which, "was a departure from its established past treatment of such incidents, as well as its progressive discipline practice" and "from its treatment of Stanhope in comparison to other employees Respondent disciplined for using profanity." In requesting that an inference of unlawful animus be drawn, I believe that, initially, counsel for the General Counsel must have established that the stated motive for Respondent's actions was "wholly without merit" and "false." *Fluor Daniel Corp.*, supra; *Wright Line*, supra. Herein, however, I have found that Stanhope twice uttered profane comments in speaking to Adams and twice moved close enough to Adams so as to force her to step back from him, that Respondent maintains rules, prohibiting such conduct, and that Respondent has regularly disciplined employees for use of profanity toward coworkers or supervisors. Moreover, besides discharging Stanhope without previously disciplining him for similar misconduct, Respondent also immediately terminated two other associates, Brian Serjeant and Steven Humphries, for use of profanity and inappropriate language and, as with Stanhope, there is no record evidence of previous discipline of either individual for similar misconduct. Thus, while I have difficulty accepting Respondent's defense that it would have immediately discharged Stanhope based on what Cindy Adams alleged, I cannot, and do not, find that it is a meretricious assertion, leading to the conclusion Respondent was concealing its actual, unlawful motivation. In these circumstances, as there is no direct record evidence establishing that Respondent was unlawfully motivated in discharging Stanhope or acts and conduct from which to infer unlawful animus, I do not believe that the General Counsel has met its burden of proof by establishing

[36] Adams failed to impress me as testifying in a candid manner. To the contrary, she seemed to be a mendacious witness, one who could not be trusted.

a prima facie showing that Respondent was unlawfully motivated in discharging Stanhope. Therefore, I find the General Counsel's alternative allegation, that Respondent terminated Stanhope in violation of Section 8(a)(1) and (3) of the Act, is without merit.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. By requiring that its employees, who have a reasonable belief that the matters to be discussed may result in their discipline, continue to participate in investigatory interviews after denying their request for the presence of their own witness, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

4. By discharging its employees because they request the presence of their own witness before participating in an investigatory interview, which they reasonably believe may result in discipline against them, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

5. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I have found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act. Accordingly, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. I have found that Respondent unlawfully discharged its employee, Ken Stanhope, because he refused to participate in an investigatory interview, which he reasonably believed might result in discipline against him, unless Respondent granted his request for the presence of his own witness. Accordingly, as in *Epilepsy Foundation of Northeast Ohio*, supra, and *Circuit-Wise, Inc.*, supra, I shall recommend that Respondent be ordered to offer Stanhope reinstatement to his former position or, if said position no longer exists, to a substantially equivalent position without impairing his seniority or any other rights and privileges. I shall further recommend that Respondent be ordered to make Stanhope whole for any loss of earnings and benefits resulting from his unlawful discharge on March 17, 2001, until the date he is offered reinstatement. Stanhope's backpay shall be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall further recommend that Respondent be ordered to expunge any records, regarding Stanhope's refusal to participate in an investigatory interview unless Respondent granted his request for the presence of his own witness and his discharge. Finally, I shall recommend that Respondent be ordered to post a notice, setting forth its obligations herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

ORDER

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

1. Cease and desist from

(a) Requiring that its employees, who have a reasonable belief that the matters to be discussed may result in their discipline, continue to participate in investigatory interviews after their request for the presence of their own witness has been denied.

(b) Discharging its employees because they request the presence of their own witness before participating in an investigatory interview, which they reasonably believe may result in discipline against them.

(c) 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 this offer, offer Ken Stanhope immediate reinstatement to his former position or, if said position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole, with interest, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any references to Ken Stanhope's refusal to participate in an investigatory interview without the presence of his own witness and to his unlawful discharge and, within 3 days thereafter, notify Stanhope, in writing, that this has been done and that neither his refusal to participate in an investigatory interview nor his discharge will be used against him in any way.

(c) 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.

(d) Within 14 days after service by the Region, post at its Wasilla, Alaska retail store copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for

[37] 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.

[38] 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."

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 17, 2001.

(e) 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.

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 require that our employees, who have a reasonable belief that the matters to be discussed may result in their discipline, continue to participate in investigatory interviews after their request for the presence of their own witness has been denied by us.

WE WILL NOT discharge our employees because they request the presence of their own witness before participating in an investigatory interview which they reasonably believe may result in discipline against them.

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

WE WILL, within 14 days from the date of the Board's Order, offer Ken Stanhope full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make Stanhope whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the date of the Board's Order, expunge from our files any references to Ken Stanhope's refusal to participate in an investigatory interview after we denied his request for the presence of his own witness and to his unlawful discharge and WE WILL, within 3 days thereafter, notify Stanhope, in writing, such has been done and that his discharge will not be used against him in any way.

WAL-MART STORES, INC.