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

WHOLE FOODS MARKETS, INC.	
and	**Cases 01–CA–263079; 01–CA–263108; 01–CA–264917; 01–CA–265183; 01–CA–266440; 01–CA–273840; 04–CA–262738; 04–CA–263142; 04–CA–264240; 04–CA-264841; 05–CA–264906; 05–CA–266403; 10–CA–264875; 19-CA–263263; 20–CA–264834; 25-CA–264904; 32–CA–263226; 32–CA–266442**
SAVANNAH KINZER, SUVERINO FRITH, LYLAH STYLES, ABDULAI BARRY, KIRBY BURT, KAYLEB CANDRILLI, LEEA MARY KELLY, TRUMAN READ, HALEY EVANS, JUSTINE O'NEILL, JOLINA CHRISTIE, SARITA WILSON, CAMILLE TUCKER-TOLBERT, CASSIDY VISCO, YURI LONDON, ANA BELÉN DEL RIO RAMIREZ, AND CHRISTOPHER MICHNO, as Individuals	

Matthew C. Peterson, Esq., for the General Counsel.

Jeremy M. Brown, Esq., Adam S. Forman, Esq., Michael S. Ferrell, Esq., and *Erin E. Schaefer, Esq. (Epstein Becker & Green P.C.),* for the Respondent.

Shannon Liss-Riordan, Esq., and Anastasia Doherty, Esq. (Lichten & Liss-Riordan, P.C.), for Charging Party Individuals: Savannah Kinzer, Suverino Frith, Lyla Styles, Abdulai Barry, Kirby Burt, Haley Evans, Justine O'Neill, Jolina Christie, Sarita Wilson, Camile Tucker-Colbert, Cassidy Visco, Yuri London, Ana Belen Del Rio Ramirez, and Christopher Michno.

Samuel H. Ritterman, Esq. (Ahmad Zaffarese LLC), for the Charging Party Individuals, Kayleb Candrilli and Truman Read.

DECISION

STATEMENT OF THE CASE[1]

ARIEL L. SOTOLONGO. Administrative Law Judge. This case presents the novel—and complex—issue of whether employees wearing "Black Lives Matter" messaging on their work uniforms during working time, be it on face masks, pins or buttons, tee-shirts or other wearable paraphernalia, constitutes protected activity under Section 7 of the Act.[2] Subsumed under that issue is also the question of whether employer rules or dress codes enforced or implemented to prohibit such activity violates the Act, and whether disciplinary actions that resulted from violating those rules were unlawful.

I. PROCEDURAL BACKGROUND

About 28 charges and amended charges were filed by the various individual charging parties herein in Regions 1, 4, 5, 10, 19, 20, 25, and 32 of the Board. Pursuant to these charges and amended charges, an Order consolidating cases, consolidated complaint and notice of hearing was issued by the Regional Director for Region 20 of the Board on December 3, 2021. The complaint alleges that the Respondent Employer(s) violated Section 8(a)(1) of the Act, inter alia, by prohibiting employees from wearing "Black Lives Matter" messaging during working time; by disciplining, discharging, or constructively discharging employees for doing so; and by implementing and enforcing rules or dress codes that prohibited the wearing of such messaging during working time.[3] The hearing in this case opened via Zoom video teleconference (Zoom) on March 1, 2022. On that date no evidence or testimony was adduced, but rather discussions were held as to how best to proceed with the case, which involved multiple witnesses in various locations or venues across the country. The parties agreed to submit a joint motion with a proposed schedule for the hearing. Thereafter, on April 4, 2022, the parties filed a joint scheduling motion, setting forth the proposed dates and locations for the hearing, which were to be conducted in person, in light of the improving situation related to the Covid-19 pandemic.[4] On April 11, 2022, I issued an Order approving the Joint Scheduling Motion, which as described above established a schedule for the hearing(s) in this case. Pursuant to that Order, the hearing resumed in person in Boston on May 3 through May 10, 2022, followed by a Zoom (video) hearing on May 18, 2022, for witnesses who were unavailable in Boston the prior week(s). The hearing resumed in Philadelphia on June 7 9, and again on June 21–22, 2022. On July 14, 2022, the hearing was continued via Zoom for the Atlanta portion of the case, pursuant to an agreement

[1] The Locations of alleged unfair labor practices: Bedford, New Hampshire; Columbia, Maryland; Mishawaka, Indiana; Cambridge, Massachusetts; Philadelphia, Pennsylvania; Marlton, New Jersey; Glenn Allen, Virginia; Atlanta, Georgia; Seattle, Washington; and Berkeley and Petaluma, California

[2] I use the term "novel" in the sense that neither the Board nor the courts have yet ruled on this precise issue, although at least 3 other Board Administrative Law Judges have issued decisions in the last 18 months bearing on this issue, as discussed below.

[3] As described in more detail below, in the Jurisdiction section of this decision, the parties stipulated that Respondent is composed of various corporate subsidiaries of Whole Foods Market, Inc., which operate the retail stores in various locations throughout the country where the conduct alleged in the complaint took place.

[4] As described below, some exceptions were later made for reasons of efficiency or because of unforeseen circumstances, and in those instances the hearing was held via Zoom video teleconference ("Zoom").

among the parties, in light of the relative brevity of the testimony expected in that portion of the case.[5] The hearing continued in Washington D.C. on July 19–20, 2022, although this portion of the case ended up being a "hybrid," with part of the testimony being presented via Zoom and the rest via in-person testimony.[6] The hearing resumed on July 26, 2022, via Zoom, for the Indiana portion of the case. Thereafter, the hearing reconvened in Seattle, Washington, on August 2, 2022, and finally, in Oakland, California, on August 8–11, and August 16, 2022, at which time the hearing was closed.

II. JURISDICTION

The parties stipulated to the following facts:

1. Whole Foods Market, Inc. is a corporate holding company whose address is 550 Bowie Street in Austin, Texas. Whole Foods Market, Inc., through and with its various operating subsidiaries (collectively referred to herein as "WFM"), is engaged in the business of operating Whole Foods Market brand retail grocery stores at locations throughout the United States. Hourly employed Team Members working in W.

2. Whole Foods Market brand stores throughout the United States (including the alleged discriminatees named in the Complaint) were and/or are directly employed by various operating subsidiaries of Whole Foods Market, Inc. WFM has the authority to direct the business operations of all the Whole Foods Market brand stores in the United States.

3. Whole Foods Market California, Inc. is a subsidiary of Whole Foods Market, Inc. and operates retail grocery stores in Northern California and northern Nevada, including stores in Berkeley and Petaluma, California. During the calendar year ending December 31, 2020, in conducting its business operations described in subparagraph2(a) of the complaint, Whole Foods Market California, Inc., derived gross revenues in excess of $500,000. During the period of time described in subparagraph 2(b) of the complaint, in conducting its business operations described in subparagraph 2(a), Whole Foods Market California, Inc. purchased and received at its Berkeley, California store goods valued in excess of $5000 directly from outside the State of California.

4. Whole Foods Market Group Inc. is a subsidiary of Whole Foods Market, Inc. and operates retail grocery stores throughout the United States, including in Cambridge, Massachusetts, Philadelphia, Pennsylvania, Marlton, New Jersey, Mishawaka, Indiana, Glenn Allen, Virginia, Bedford, New Hampshire, Atlanta, Georgia, and Columbia, Maryland. During the calendar year ending December 31,2020, in conducting its business operations described in subparagraph2(a) of the complaint, Whole Foods Market Group Inc., derived gross revenues in excess of $500,000. During the period of time described in subparagraph 2(b) of the complaint, in conducting its business operations described in subparagraph 2(a), Whole Foods Market

[5] Indeed, only one witness, testifying for Respondent, testified in that portion of the case.

[6] On July 12, 2022, 1 week prior to the portion of the hearing scheduled in Washington D.C., counsel for Charging Parties Justine O'Neill and Jolina Christie filed a motion to allow their testimony to be heard remotely, via Zoom, because neither of them was currently living in the area; O'Neill was then living in Washington State, and Christie in Hawaii. I granted the motion on July 15, 2022, for the reasons stated in that Order.

Group Inc. purchased and received at its Cambridge, Massachusetts store goods valued in excess of $5000 directly from outside the State of Massachusetts.

5. Whole Foods Market Pacific Northwest Inc. is a subsidiary of Whole Foods Market, Inc., and operates retail grocery stores throughout the United States, including in Seattle, Washington. During the calendar year ending December 31, 2020, in conducting its business operations described in subparagraph 2(a) of the complaint, Whole Foods Market Pacific Northwest Inc, derived gross revenues in excess of $500,000. During the period of time described in subparagraph 2(b) of the complaint, in conducting its business operations described in subparagraph 2(a), Whole Foods Market Pacific Northwest, Inc., purchased and received at Seattle, Washington store goods valued in excess of $5000 directly from outside the State of Washington.[7]

Accordingly, and in light of the above, I find that at all material times, Whole Foods Market, Inc., including its subsidiaries named above, collectively called "Respondent" or "WFM" herein, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

III. FINDINGS OF FACTS

A. Background Facts

As briefly outlined above, Respondent owns and operates over 500 retail grocery stores across the country, employing thousands of (non-supervisory) employees, who are referred to as "Team Members," in WFM jargon. Store managers are called "Store Team Leaders" (STLs) and they are assisted by assistant store managers called "Assistant Store Team Leaders" (ASTLs). Departments are designated as "Teams," and department heads are thus called "Team Leaders" (TLs).[8] As discussed below regarding each of the individual stores alleged in the complaint, all STLs, ASTLs, and TLs were stipulated by the parties to be Section 2(11) supervisors.[9] Additionally, what is typically known as the "human resources department" is called "Team Member Services" (TMS) at WFM, which provides guidance to regional and store leadership on team members' employment issues, and which is also in charge of making sure that rules and policies in Respondent's "handbook," called the "General Information Guidebook" (GIG) are followed. I outline these titles and terms at the outset because they will often be mentioned in the testimony of witnesses discussed below.

Many—and perhaps most—of the facts in this case are not truly in dispute. The dispute in this case stems from the events during the late spring and summer of 2020, when the country was convulsed with massive "Black Lives Matter" (BLM) demonstrations and protests in hundreds of cities and towns in the wake of the murder of George Floyd (Floyd) by the

[7] Joint Exhibit 1 (JX1). Hereafter, the General Counsel's exhibits will be designated as "GCX," followed by the exhibit number; Respondent's exhibits will be designated as "RX," followed by the exhibit number; and Charging Party exhibits will be designated as "CPX," followed by the exhibit number. JX1 is the only Joint Exhibit.

[8] Typically, there are 9 "Teams" in stores: Front End (customer service and cashiers); grocery; produce; meat; seafood; bakery; specialty foods; prepared foods; and whole foods.

[9] Collectively, STLs, ASTLs, and TLs, are the "store leadership."

Minneapolis police on May 25, 2020. It would be no exaggeration to state that these protests, in which an estimated 15 to 26 million persons participated, were probably the largest demonstrations in the history of the United States.[10] It is undisputed that in the days and weeks that followed the death of Floyd, beginning in early June and until sometime in August, 2020, WFM team members at various stores throughout the country started wearing BLM messaging, primarily on face masks, but also on buttons or pins, or printed on tee-shirts or other clothing items.[11] It also undisputed that soon after team members started wearing BLM messaging, Respondent informed them that wearing such messaging during working time was in violation of the WFM dress code (contained in the GIG).[12] In many (but not all) instances, as the testimony will bear out, Respondent gave team members the option of removing the BLM messaging or "clocking out" and going home. Some members chose to clock out; some removed the BLM messaging and continued to work. Those who chose to go home incurred time and attendance or dress policy violations (or "points"), which in some cases led to the team member's discharge—or, allegedly, to their resignations. In some instances, team members sporadically continued to wear BLM messaging without incurring discipline—other than being instructed to remove such messaging.

As will be detailed below, the first instance of team members' wearing BLM messaging, appears to have occurred at Respondent's Bedford, New Hampshire store in early June 2020. About the same time, employees at Respondent's Columbia, Maryland and Mishawaka, Indiana stores also started donning BLM messaging. Similar conduct occurred soon thereafter at Respondent's River Street and Fresh Pond stores in Cambridge, Massachusetts, as well as South Street in Philadelphia; at Respondent's stores in Marlton, New Jersey; Glenn Allen, Virginia; Atlanta, Georgia; Seattle, Washington; and Berkeley and Petaluma, California.[13] For the most part, it is not disputed that team members wearing BLM messaging were acting concertedly, with a couple of exceptions, since more than one employee engaged in this conduct around the same time at any given location, often after consultation with one another or in support and solidarity with others doing the same. What is disputed, as discussed at length later on, is whether this conduct was *protected*. Likewise, there is no dispute about the existence, or wording, of the GIG dress code in place in June 2020, nor the dress code later amended and implemented in November 2020.[14] What is in dispute is whether these dress codes unlawfully restricted Section 7 protected activity.

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[10] See, *Black Lives Matter May Be the Largest Movement in U.S. History*, New York Times article, July 3, 2020. Attached link: https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html. I would further note that this article, which cited several studies and polls conducted at the time, was published several weeks before these protests completely subsided—so that the actual number of eventual participants is likely larger.

[11] The wearing of face masks had been mandatory since about March 2020, in light of the Covid-19 pandemic at the time.

[12] There is no dispute-or evidence—that Respondent enforced its dress code when team members were not on "working time," that is, when team members were on break, lunch or coming in or out of work.

[13] This sequence is not necessarily in chronological fashion, as similar conduct at different locations occurred about the same time. Indeed, as detailed below, it appears that the conduct at the Bedford, New Hampshire; Mishawaka, Indiana; and Columbia, Maryland stores occurred around the same in early June.

[14] The language/wording of these dress codes will be discussed below. Likewise, Respondent's motion to dismiss some of the allegations regarding the dress code language, on the grounds that such language was approved by the General Counsel as part of a 2013 settlement agreement, will be addressed below.

B. Respondent's Team Members at Various Stores Don BLM Messaging

As briefly discussed above, starting in early June 2020, team members at various stores throughout the country started donning BLM messaging displayed on their face masks, buttons or pins, tee-shirts, or jewelry, during working time. Below is a store-by-store narrative of these events, on an approximately chronological basis:

1. The events at the Bedford, New Hampshire Store

Kayla Greene testified she begun to work at WFM in April of 2020[15] at the Bedford, New Hampshire location, where she is still employed (Tr. 918). Greene worked as a "Prime Shopper" in the e-commerce department, and her duties consisted of filling grocery orders made from the "Amazon app" and readying them for at-the-store pick up. Greene worked the 'overnight' shift. During summer 2020, Greene reported to Ashley Palek, an assistant team leader in the e-commerce department, who in turn reported to Phil Devito, the STL.

From June 4 to June 30, Greene wore a black mask to work at the store which said "Black Lives Matter" on left side and "I Can't Breathe" on the right side, using ironed-on letters. Green also made a similar mask, reading only "I Can't Breathe," for her mother, Sharie Robinson, who was also employed at the same WFM store. Greene explained she wore the mask to show solidarity with the movement and because she believed WFM "stood with the Black Lives Matter movement" (Tr. 920–922; 925).[16]

The first day Greene wore the above-described mask, June 4, she was the only one doing so. During her next shift, on June 6, however, Greene noticed another employee in the e-commerce department, Lyla Styles, wearing blue surgical masks with the massage "BLM" or "I Can't Breathe," which she would alternate wearing. Greene was not surprised to see Styles wearing either mask since they had spoken before about wearing some symbol of solidarity with the Black Lives Matter movement (Tr. 930–931).[17]

On June 6, the second day she wore her "Black Lives Matter"/"I Can't Breathe" mask, Greene was asked by Ashley Palek, her supervisor, to speak privately about her mask. Greene asked if Styles could join the conversation, and Palek agreed. Shortly thereafter, Greene, Styles, Palek, and Store Team Leader (STL) Devito met in the office upstairs. During the meeting, which lasted about 20 minutes, Devito informed Greene and Styles that the masks were in violation of the dress code, which prohibited the wearing of slogans or logos. Greene and Styles were offered the option to remove the masks and remain at work or keep wearing the masks and be sent home. Greene and Styles opted to go home. Greene testified that prior to the meeting she did not believe the mask was a violation of the dress code (Tr. 934–936).

[15] All dates are in 2020, unless otherwise stated.

[16] During cross-examination, Greene admitted that in her Board affidavit, she had stated that she had written "Black Lives Matter" and "I can't breathe" on her mask in response to the death of George Floyd and the increased publicity of the BLM movement. She further stated that both her own protesting and that of others she viewed on social media was in response to the death of black Americans by the police and systemic racism (Tr. 996; 998). A photo of Greene wearing the mask was introduced as GCX 37. Greene's affidavit was introduced as RX 37.

[17] Styles, a Charging Party, did not appear or testify in this case, nor was she responsive to a subpoena served by Respondent.

After being dismissed from their shifts on June 6, Greene and Styles stationed themselves on the sidewalk out front of the Whole Foods store and protested WFM's action by holding placards which they had made the night before.[18] While protesting, Greene and Styles were joined by customers, strangers, and fellow employees on their breaks.

After the protest, on June 8, Greene returned to work wearing a blue surgical mask with the 'BLM' written on it with a "Sharpie." She was instructed by Palek to remove it, and she complied, then continued her shift as usual. Changing their approach, Greene and Styles instead drew the "BLM" acronym on their shoes, over the pre-printed logo. For example, Greene's shoes were Vans brand, so she drew 'BLM' on her shoes over the Vans logo. On June 10, Greene and Styles returned to work wearing the shoes and were informed by Devito that the shoes were in violation of Whole Foods' dress code. Greene asked why it would be acceptable to display the Vans logo instead of the "BLM" acronym if logos were against the Whole Foods dress code. Devito responded that he didn't know and would ask someone, but, in the meantime, Greene and Styles were required to remove "BLM" from their shoes. Greene and Styles removed the "BLM" acronym, finished their shift, and, after, protested outside the Whole Foods again in the same fashion as before. A couple days later, Devito informed Greene and Styles that he had spoken to someone higher-up and they had said wearing the 'BLM' abbreviation on their shoes would not be allowed (Tr. 946–947).

About a week later, from June 16 to June 19, Greene testified that she and Styles wore henna tattoos, about 2-3 inches in height and 5-6 inches in width, with the letters "BLM" on their left forearms. Greene noted that while she believed her tattoos had been seen by supervisors or others, they did not say anything to her about it (Tr. 948; 952).

DeVito, called as a witness by Respondent, testified that as STL during the summer of 2020, he directly supervised the different departments within the Beford store. He understood that the dress code did not allow the wearing of visible logos, slogans, advertising, or messaging while working. Additionally, once masks became required, he considered them subject to the dress code as according to the Standard Operating Procedure (SOP) released by WFM in April (Tr. 1298–1299).

After the murder of George Floyd, Devito testified, some Team Members started wearing masks that said, "I can't breathe," or "BLM," or "Black Lives Matter." These team members Kayla Green, Lyla Styles, and Sharie Robinson. The day this was brought to DeVito's attention, he sent a supervisor to bring Green and Styles to the upstairs office to discuss the dress code. Green and Styles initially refused to go to the office, but DeVito then went down to the sales floor and explained that he needed to speak with them about the dress code in the office. Green and Styles agreed on the condition that the office door be left open. DeVito and another supervisor, Palek, explained to Green and Styles that slogans, logos, or anything written on their

[18] The placards are shown in GCX 37. The placards said "Whole Foods won't let me work because of my mask even though it's not against policy! Call (603) 218-1900 Honk=Support BLM. I Matter;" and other nearly identical messages. The phone number displayed is the WFM store in Bedford. The fact that they had already prepared signs with such messages, the day before their meeting with Devito and Palek, suggests that they knew the message on their masks violated the dress code, contrary to Greene's testimony.

masks was a violation of the dress code. DeVito offered Green and Styles the choice to stay and replace their mask with a compliant mask or to clock out and not complete their shifts. Green and Styles did not change their masks and elected to clock out early (Tr. 1307). DeVito testified that he believed Green and Styles violated the dress code between three to five times by wearing Black Lives Matter masks (Tr. 1302–1304; 1307).

DeVito testified that he consulted with Team Member Services via phone on whether the Black Lives Matter masks were a dress code violation. He was informed by Jamie Zito, with Team Member Services at the regional office, that the Black Lives Matter masks were not permitted pursuant to the dress code (Tr. 1308).

Later, DeVito learned that Green and Styles had drawn BLM messaging on their arms in henna, a temporary tattoo medium. DeVito was not in the Bedford store when this occurred, however, and was informed of it once he returned from vacation. No action was taken over this incident (Tr. 1308-1309).

DeVito remembered having "very limited" conversations with Sharie Robinson about face masks, but did not recall specifics.[19] While DeVito did not specifically recall, he testified might have made analogies between the wearing of BLM masks and wearing other political symbols such as a confederate flag, a MAGA hat, or a swastika to explain that, if he allowed one Team Member to wear whatever they wanted, he would have to allow all Team Members that freedom. DeVito clarified that he did not compare the Black Lives Matter movement to other movements or symbols, but used it as an example that an effective dress code required consistent and even enforcement (Tr. 1310).

2. The Events at the Columbia, Maryland store

Jolina Christie testified she worked as a cashier (front end department) at Respondent's Columbia, Maryland store, from August 2019 to October 2020.[20] The Store Team Leader (STL) at this time was Chad Woodmancy; the Assistant Store Team Leaders (ASTLs) were Melisa Niane and Deng Manaseh; and Christie's Team Leader (TL) at the front end was Reyna Patzan.[21]

According to Christie, starting the first week of June 2020, she wore attire with BLM messaging on at least 3 occasions. This attire consisted of tee shirts that had "Black Lives

[19] Sharie Robinson, who is Kayla Greene's mother, was also employed at the WFM store in Bedford during this time. Robinson, who is African-American like Greene, testified that she wore a facemask that said "I Can't Breathe" during working time on June 4 and 5, to show her support for the BLM movement and solidarity with their community. She was never told by a supervisor to take off her mask, however, and only learned about the policy against wearing this type of messaging from her daughter (Greene), who had been directed to remove her mask around this time. Robinson testified she asked DeVito why other employees were allowed to display other messaging, such as sports teams' logos, or in support of the LGBTQ movement. According to her, DeVito replied that BLM messaging made some people uncomfortable, and that allowing such messaging would open the door for others to wear pro-Nazi messages and the like . (Tr. 1247–1250; 1257–1262; 1273; 1275–1279). I note that Robinson is not a charging party or alleged discriminate in this case, and thus I have opted to summarize her testimony rather than describe it in detail, as it does not add to the relevant narrative herein.

[20] The Columbia store is also known as the "Kittamaqundi" (or "KMQ") store, the name of an adjacent lake (Tr. 2386).

[21] The parties stipulated that Woodmancy is a Sec. 2(11) supervisor (JX 1).

Matter" and "I Can't Breathe" printed on them, as well as a tee shirt that had the message "All Lives Can't Matter Until Black Lives Matter" printed on it, and a face mask with the message "Black Lives Matter."[22] Although the tee shirts had the above messages printed on their front, Christie wore the tee shirts backwards, so that the messages were visible on her back, which wasn't covered by the work apron she had to wear. A day or two after wearing these t-shirts, she wore a face mask that said "Black Lives Matter" during working time.[23] Christie explained that she wore these items because of everything that was going on in the wake of the death of George Floyd, and because she wanted to show her support for the movement. She added that she did not believe she was violating the WFM dress code by wearing such messaging, both because she thought WFM supported the BLM cause, and because she had seen other Team members wear messaging in support of LGTBQ rights and wear other messaging such as team sport logos, Pink Floyd and Jimi Hendrix shirts, etc.

On June 5, 2020, Christie was wearing her "BLM" mask while watching a training video in the (upstairs) conference room, when Woodmancy approached her and said she could not wear such messaging. Woodmancy added that the WFM dress code did not allow team members to display messaging or graphics, because it did not want to make customers uncomfortable. Christie, who admittedly became very upset and had to go to the restroom to compose herself, complied with Woodmancy's directive and replaced her mask.

A few days later, according to Christie, after she had expressed her disappointment with WFM's policy regarding BLM messaging, Woodmancy encouraged her to write a letter to WFM's upper (Regional) management to express her views. Christie followed suit, and wrote two emails to upper management, using an internal email system/posting board used for communications between employees and management.[24] Following the second communication, Christie met with WFM (Mid Atlantic) Regional President Scott Allshouse and Regional Vice President Michelle Payne, who informed Christie that WFM did not want to make customers "uncomfortable." According to Christie, they added that WFM considered distributing pins that said "Racism has no place here" for its team members to wear but elected not to. When Christie asked about WFM's (public) support for LGBTQ rights, they responded that WFM was no longer going to do that. (Tr. 2312–2315; 2322; 2325–2328).

[22] Christie admitted during cross examination that the phrase "I can't breathe" related to police brutality, and had nothing to do with WFM, and that the phrase " All lives can't matter until Black Lives Matter" is in response to those who say that "all lives matter." She wore tee shirts with those messages at a BLM protest held near the store around the same time. She also wore a tee shirt at this protest that said, "I am next." (Tr.2358-2360; 2371-2374)

[23] A photo of Christie wearing this mask, a "selfie" she took in the bathroom of the store, appears in the record as GCX 72. The photo shows the words "Black Lives Matter" surrounding the image of a raised fist (Tr. 2297; GCX 72)

[24] The two emails sent by Christie to upper management appear on the record as GCXs 73 and 75, and are identical, sent at different times. The first one was sent on June 29, 2020 (GCX 73), the second one, apparently after she received no response to the first, sent on August 17, 2020 (GCX 75). Briefly, in these communications Christie eloquently and passionately expresses her extreme disappointment with WFM's policy regarding BLM messaging by team members, particularly given the fact that WMF had released a statement saying that "Racism and discrimination of any kind have no place at Whole Foods Market," and that they "supported the Black community and want to make a meaningful change in the world." Christie also takes WFM to task for its apparent inconsistency, given its history of publicly supporting LGBTQ rights and encouraging and allowing team members to express their support for these rights.

Regarding the above-described events, Woodmancy's testimony is essentially consistent with Christie's, with the main difference being that Woodmancy recalled that the event at the conference room, when he directed Christie to remove her BLM mask, occurred on June 12 instead of June 5.[25] Woodmancy testified that he never saw Christie wear the BLM mask after June 12, and never saw her wearing the "I can't Breathe" or "Black Lives Matter" tee shirts during working time (i.e., while "on the clock"), but did see her wearing those tee shirts at the store while visiting her boyfriend, who also worked the store, when she was off duty.[26] Woodmancy also testified that sometime after he had informed Christie that wearing the BLM mask was violated the dress code, he also explained that he had safety concerns about her wearing such mask, because it might trigger a confrontation with a customer at the register. He also confirmed encouraging Christie to write a letter to upper management to express her views concerning the BLM matter (Tr. 2391–2398).

Christie continued to work at the Columbia store until October 2020. On October 6, 2020, she submitted, via email, a letter of resignation effective on October 20, 2020. Christie testified that she resigned because she felt "uncomfortable" with WFM's stance regarding BLM messaging.[27] Shortly after leaving WFM's employ, Christie started working for another company, Jenny Craig. She worked there only a week, however, and then accepted an offer to resume working for WFM at one of its stores in Honolulu, Hawaii, on November 1, 2020.[28] During cross-examination, Christie admitted she had applied for jobs at WMF stores in Honolulu on three separate occasions in September, prior to her resignation letter of October 6. She also admitted that she was aware that WFM's dress code—which prohibited BLM messaging—was the same at its Hawaii stores.[29]

[25] Accordingly, I find no need to make credibility findings in this regard, since their testimony is consistent on all the salient points. Whether the directive to remove the BLM mask occurred on June 5 or 12 makes no difference regarding the lawfulness of such directive.

[26] According to Woodmancy, wearing these items or messaging while off duty was not in violation of WMF policy. Woodmancy also testified that around the same time he directed Christie to remove her BLM mask, he also saw a team member in the Bakery department wearing a BLM headband, and he directed her to remove it, telling her it was against policy. Neither Christie nor the other employee were disciplined for these incidents. (Tr. 2400–2401)

[27] The email, addressed to Woodmancy, reads as follows, in relevant part:
"Working at Whole Foods used to be a positive experience, however, I am sad that the company didn't find it important enough to support their black employees and the black community within stores. As a woman of color, I feel unsafe working for a company that is "uncomfortable" with condemning racists in-store and allowing us to wear anti-racist, and Black Lives Matter attire when Whole Foods has an avid history of happily supporting the LGTBQ+ community and Gay Pride Events in and out of stores . . . I have found a company that aligns more with my anti-racist values, and showing full support of Black lives." (GCX 74)

[28] During direct examination, Christie testified she went to work for WFM in Honolulu 2-1/2 months after her resignation letter (Tr. 2332). This is inaccurate—she started to work at the WFM Honolulu store a little over 3 weeks later, as she admitted during cross-examination. Christie admitted she had planned to move to Hawaii because her sister, who lived there, had invited her to join her there. Christie's boyfriend, who also worked at Columbia WFM store, moved to Hawaii with her. (Tr. 2342.)

[29] In light of this testimony, I do not find Christie's justification for her resignation from the Columbia store—her avowed disapproval of WFM's stance on the BLM messaging by team members—to be credible. Rather, it is apparent that she just wanted to move to Hawaii, where she resumed working for WFM despite the fact that BLM messaging was not allowed there either. I conclude these facts completely undermine the General Counsel's constructive termination allegation, as alleged in the complaint and amended charge.

3. The events at the Mishawaka, Indiana store

Yuri London worked as a cashier at WFM's Mishawaka store, located in the South Bend area, from 2018 to November 2020. Seth Carlson was the store team leader (STL), and Jill Smith worked at the store as part of the team member services (TMS) (Tr. 2476–2479).[30]

Sometime around June 8, 2020, London testified, she had conversations with other employees about wearing BLM masks, explaining that in the wake of the George Floyd (and Breanna Taylor) killings she felt uncomfortable because she was "having, like, issues with racist customers."[31] She testified she decided to wear a BLM mask at work hoping to "start a conversation with people" about equality for black people in society.[32] On that day, June 8, she wrote the name of George Floyd on her WFM employee nametag.[33] She testified that the murder of Floyd had been weighing heavily on her, as a black woman who had herself been abused by the police, and that it was her way of showing support for her community. STL Carlson informed her that same day that she could not write any other names on her nametag and directed her to remove it. London complied and replaced her nametag with one just bearing her name, but then clocked out and went home before her shift had ended—something she was not disciplined for.[34] The following day, on June 9, London wore a facemask to work that said "BLM," and was asked to meet with Carlson in his office. At that meeting, Carlson informed London that wearing a mask with such message during working time violated WFM's dress code, adding that she was free to wear such mask during her breaks or while otherwise "off the clock." In response to Carlson's directive, London flipped her mask inside out, so that the message was no longer visible. London testified she was not disciplined for this incident and did not wear such a mask at work again (Tr. 2481–2493; 2496–2502).[35]

[30] As briefly explained earlier, TMS is WFM's version of human resources. Carlson was stipulated by the parties to be a Sec. 2(11) supervisor (JX 1).

[31] London did not elaborate, nor was she asked, about what kind of issues she was having with allegedly racist customers, nor who they were (Tr. 2481–2482).

[32] During cross examination, London clarified that she was hoping to start a conversation with fellow employees about the killing of George Floyd and the mistreatment of black people by police (Tr. 2540–2541)

[33] London wrote "George" on top of the name tag, and "Floyd" in the bottom, and her name appeared in the middle.(Tr. 2488). During cross-examination, London testified that that the name George Floyd was "part and parcel" of the BLM movement (Tr. 2525).

[34] That evening, London posted a video on social media discussing her wearing of the nametag with George Floyd's name on it, and her reasons for wearing such nametag, as briefly described above. A transcript of that recording was introduced as RX 78.

[35] Jill Smith, the TMS representative at the store, was called as a witness by Respondent to testify about the June 8 meeting between London and Carlson regarding the nametag, in which she was present. I have opted not to detail her testimony, because it does not contradict London's testimony regarding that event in any significant way, but primarily because that incident is not alleged in the complaint. Nonetheless, I have opted to describe that event here, as discussed later, because it may provide context as to the objectively understood purpose of the conduct in question.

4. The events at the River Street, Cambridge, Massachusetts store[36]

(a) Savannah Kinzer

Savannah Kinzer testified that she worked for WFM from April to July 2020 at the River Street location in Cambridge, Massachusetts.[37] Kinzer was employed as a "Designated Prime Shopper" within the Amazon Prime department. Her duties consisted of gathering groceries, packing them in bags, and delivering the orders to people's cars. Kinzer regularly worked 40 hours a week, but her shift times varied from early morning start times to afternoon start times. Kinzer reported to her team leader, Shea, who reported to store team leader (STL), Scott Duncan, and Store Support Team Leader Marisa Abotchie, and Assistant Store Team Leader Danny Langley (Tr. 122–123; 125).[38]

Kinzer wore face masks that said, "Black Lives Matter" (BLM) at work around 20 times starting on June 24 until about July 8, 2020.[39] Kinzer testified that she decided to wear BLM messaging at work because WFM had made various efforts to support the movement, including matching employee donations to BLM organizations, and because she had read an articles about WFM employees being sent home for wearing BLM masks in New Hampshire, and about Starbucks reversing their policy on BLM messaging.[40] After reading the articles, Kinzer had conversations with around 12 of her coworkers about what was happening in the world socially and politically and how they thought WFM was making a mistake by not outwardly supporting the (BLM) movement like Starbucks did, given WFM's values. Kinzer identified those values as being "anti-racist" and maintaining/prioritizing a safe work environment for their employees and community members (Tr. 127; 129–130; 133–135).

Kinzer testified that she and about 15–20 coworkers discussed wearing BLM face masks to work and that they were confused by what happened to Lyla Styles and Kayla Green in New Hampshire because of WFM values. Kinzer said she and her coworkers believed wearing BLM face masks was not being against the dress code policy because it was up to the store manager and their store manager let employees wear whatever they wanted to within reason.[41] In light of these discussions, Kinzer ordered several dozen BLM masks to be made, which she distributed

[36] The complaint also alleges conduct that occurred at WFM's "Fresh Pond" store in Cambridge, a separate store from the River Street store (see complaint pars. 7(c)(i)(ii)). No evidence was introduced in support of these allegations, however, so I will recommend their dismissal.

[37] Kinzer is a Charging Party and alleged discriminate in this case.

[38] Duncan, Abotchie, and Langley are admitted Sec. 2(11) supervisors (JX 1).

[39] A photo of Kinzer wearing the BLM mask was introduced as GCX 10. Kinzer admitted during cross-examination, however, that she and other team members on occasion also donned masks at work that depicted the faces of individuals killed by police or white vigilantes. (Tr. 539–540; 542–543) A photo of Kinzer wearing this mask was introduced in the record as RX 22.

[40] These articles which Kinzer read were introduced as GCXs 8 and 9.

[41] In a group chat text with her coworkers prior to their wearing the BLM masks, however, Kinzer quoted the dress code verbatim and wrote "If you refuse to take off the mask you are at risk of being asked to leave work . . . The longer we protest the dress code with this, the stronger our statement." (RX 1; TR. 315–317). Accordingly, I do not credit Kinzer's testimony that she (and the others) did not believe their BLM masks violated WFM's dress code, since her communications with her coworkers revealed that they knew, or at least suspected, that it did.

not only to employees at the River Street location, but to other WFM employees at another store in the area as well (Tr. 140–141).[42]

On June 24, starting at 2 p.m., about 13 employees at the River Street store donned the BLM face masks Kinzer had provided. After the morning shift workers left work, the remaining 4–5 employees wearing the BLM face masks were called to a meeting at STL's Scott Duncan's office (Tr. 156–157). The meeting lasted for around 30 minutes and included SSTL Abotchie and TL Shea, and employees Lavar, Suverino, Fred, Burt, and Kinzer (Tr. 159). Scott told the employees that their face masks violated the dress code and that they would have to take them off or leave (Tr. 160). Duncan said it was not his decision but rather that of upper management (Tr. 160). Kinzer and the others did not take off the BLM face masks and were sent home. Kinzer still had a few hours left in her shift at this point (Tr. 156–161).[43]

Kinzer learned that 13 team members had walked out the morning of June 25 after refusing to take off their BLM masks. Kinzer reported for her afternoon shift that day wearing her BLM mask and was called into the office by Duncan and Abotchie (Tr. 171). They again informed her that wearing the BLM mask was a dress code policy violation and gave her the option of wearing a mask provided by WFM or clock out. Kinzer chose to leave rather than remove her BLM mask. When Kinzer walked out of the store, there were news organizations outside with whom she and her coworkers spoke to about what was happening at their store (Tr. 171–172; 176).

On June 26, the story was repeated again: Kinzer wore her BLM mask to work, Duncan and Abotchie told her she was violating dress code policy and would have to remove the mask or leave, and Kinzer chose to leave (Tr. 177). Later that day, Kinzer attended a protest occurring outside the store, where people in the community were holding signs and the mayor, and a city council member were in attendance (Tr. 177). Kinzer learned that people were calling WFM to tell them to allow their employees to wear the BLM masks (Tr. 177).[44]

On June 30, at 6 p.m., Kinzer and 30 other employees put on their BLM masks, and shortly thereafter they were called into the office. Again, they were given the choice of removing their BLM masks or leaving work for violating the dress code, and they chose the

[42] Explaining why they chose to wear BLM masks as opposed to pins, during discussions with other employees via Facebook (and other on-line platforms), Kinzer explained that their "goal" was to "normalize BLM" so that people "get used to it," and that wearing masks "in the faces" of the intended audience (customers) would be more effective, since pins would not be as noticeable. In other words, the goal was to confront customers with the BLM message, in order to get them to accept it—or perhaps go elsewhere (RX 6; Tr. 372–374; 439–440).

[43] Kinzer spoke with a journalist from The Boston Globe about what had happened at her WFM store that day, and the story was published the next day, on August 25. A copy of the newspaper article was introduced in the record as GCX 11. Kinzer testified that she did this because she wanted to spread the message that "your life matters in the workplace" and to specifically support her Black coworkers and community members in the workplace (Tr. 165).

[44] Over the next few days, Kinzer was organizing wearing BLM mask protests in the workplace via Facebook and Instagram, and biking to other Whole Food stores. Kinzer and other organizers were planning for a large walkout on June 30th across multiple WFM stores where employees would put on their BLM masks and then leave at 6 p.m.[44] June 30th was selected as the day of this protest because it was inventory day across Whole Food stores and there would be upwards of 200 people working to count items (Tr. 188–189).

latter option (Tr. 192). After Kinzer and the employees walked out, Kinzer gave a speech before the protestors and news outlets outside of the Whole Foods tore (Tr. 192–193).[45]

On July 2, Kinzer and many of her coworkers attended a series of meetings with WFM North Atlantic Region managers, Rick Bonin and Eliza Brown, who had come to the store to discuss WFM's policy regarding BLM messaging. During the meeting, Kinzer presented Bonin and Brown with a list of demands from those supporting the BLM movement within the River Street store, which she also read to them. The demands were as follows:

1. The freedom for all Whole Foods Market employees to explicitly support Black Lives in accordance with the company's shared opinion that Black Lives Matter.
2. The removal of all disciplinary points accrued by team members for participation in the protest.
3. Back pay for all team members to account for the wages lost from participation in the protest.
4. The collection and public release of the company-wide racial demographics data pf Whole Foods Market employees, in order to begin a dialogue on diversity and Black Empowerment within the company's leadership structure. (GCX 15).

There does not appear to have been any significant discussions about these demands with Bonin and Brown during the meeting. Rather, the discussions centered on why WFM was not allowing its employees to openly support a movement that the Company had publicly endorsed, while allowing employees to display other types of messaging in the past such as support for LGTBQ rights, as well as logos for sports teams, etc. Bonin and Brown generally demurred, stating that the decision had been made by the executive team, but pointing out that that BLM was a political statement that made some (employees and customers) uncomfortable, and that allowing such would open the door to other political messaging. Team members disagreed with this notion, asserting that saying, "Black Lives Matter was "not a political statement," but rather a "fact," a universal pronouncement of human rights that was not (or should not be) controversial.[46]

Following June 30, Kinzer and other employees continued wearing the BLM masks and continued being asked to leave when they refused to remove said masks (Tr. 197). On July 8 Kinzer received a "corrective action" warning from Duncan and Abotchie because she had been accumulating disciplinary points (called "attendance points") for missing work in light of her clocking out of work early on several occasions as the result of her refusal to remove her BLM

[45] A demonstration outside the store had been planned on that day to protest WFM's actions with regard to its employees wearing BLM masks. Present at this protest were WFM employees and members of the community, many of whom carried signs and placards, and representatives of the news media. The signs and placards carried or held by the protesters varied in their theme. Many displayed the faces or names of black individuals that had been killed by the police or white vigilantes or said, "Say his/her Name" in reference to them; others said, "Support Whole Foods Workers (or "Support Essential Workers Don't Silence Them"), or "Boycott Whole Foods." Photographs of these demonstrators and their signs were admitted in the record as GCX 17 (Tr. 494–496; 499–515). Kinzer's speech outside of Whole Foods on June 30th is General Counsel's Exhibit 14.

[46] This testimony that BLM is not a "political" statement or cause, but rather a "fact," was repeated by several of the employees who testified. The pronouncement that BLM is not "political" however, is not only one that many reasonable persons may disagree with, but, ironically, is one that is arguably a political statement itself.

mask.[47] Also on July 8, Kinzer additionally received a "Corrective Counseling Notice," noted to be a final written warning, for excessive absenteeism after she failed to show up for work on July 5.[48] (GCX 16/3–4; Tr. 200–2001; 1159–1160.)

On July 18, Kinzer was late to work because the back wheel of her bicycle, which was her mode of transportation to and from work, was stolen, and she was unable to secure transportation to get there on time. As a result of this late arrival, she exceeded the amount of attendance points allowed under WFM's rules, and she was terminated from her employment at WFM. The "Team Member Separation Form" issued to her, which Kinzer declined to sign, notes that she had incurred additional attendance points (on July 18) after her final warning on July 8, thus triggering her termination.[49] After her termination, Kinzer remained active in support of the BLM movement and in support of her WFM workers and their BLM-related activities.

(b) Suverino Frith

Suverino Frith, who like Kinzer is a Charging Party and alleged discriminatee, testified that he was employed by WFM from May 2018 until the spring of 2021 at their River Street location in Cambridge. He testified that the leadership hierarchy at the store in 2020 started at the top with Scott Duncan (the store team leader), then Danny Langley (the associate store team leader), and then each department or "team" of the store has its own team leader. Frith worked in the customer service team as a cashier where Merisa Abotchie was the team leader and either Luke DeMorris or Shae Morgan was his assistant team leader. (Tr. 629–631; 723–725.)

Frith testified he became more familiar with BLM during the summer of 2020 after the death of George Floyd. Beginning June 24th, Frith began to wear a black mask with white lettering spelling "Black Lives Matter" (BLM) to work every day for around 2-3 weeks (Tr. 632).[50] Frith got the idea for wearing a BLM mask to work from his coworker Savannah Kinzer who approached him 2 weeks earlier about wearing BLM masks in support of the Bedford, New Hampshire WFM workers being sent home for wearing BLM masks (Tr. 633634). Frith liked Kinzer's idea, but he was initially very hesitant because he was worried about losing his job; He changed his mind and went through with wearing the masks because he believed in their purpose for it, which was to stop the censorship of the BLM message and be able to say that Black lives, like his and his family's, are valuable.[51] (Tr. 631–637).

[47] This written warning (called "Corrective Process" in WFM jargon), and the ones that followed, are part of the record as GCX 16.

[48] The July 5 infraction was thus not for leaving work early as a result of refusing to remove her BLM mask, as in the prior occasions.

[49] It is undisputed that the last two attendance infractions incurred by Kinzer were "legitimate" in that she was absent or late without proper justification, and that altogether she had accumulated sufficient attendance points to justify her termination—assuming all the previously accumulated points were valid. What is in dispute is whether all the attendance points incurred for being sent home on account of her wearing a BLM mask at work were unlawful and thus invalid, because she was arguably engaged in protected activity, and thus whether she had validly accumulated sufficient attendance points to justify her termination.

[50] A photo of Frith wearing this mask was admitted in the record as GCX 24 (Tr. 633).

[51] Frith identifies as Black (Tr. 635). Thus, Frith admitted that when he started to wear the BLM mask, it was not about back pay or rescinding points for those disciplined, or demographic data about WFM management, as was later demanded by the protesters (Tr. 805).

On June 24 at 2 p.m., Frith and other employees put on their BLM masks. Frith stated that most people wore masks similar to his, but there was a shortage of these type of masks, so some people wrote "BLM" on whatever mask they had. Around 2:30p.m. Frith and a few other cashiers who were wearing BLM masks were approached by their assistant team leader (ATL), who said they were not allowed to wear political messaging as part of the dress code so they would need to remove their masks. Frith initially took his mask off after this conversation, but he and two others put their masks back on after the ATL left. Frith continued wearing his BLM mask until 4 p.m., when he and the remaining seven employees wearing BLM masks were told they had to speak with the store leader, Duncan. Frith and a few other employees (including Kinzer) met with Duncan and an assistant team leader in Duncan's office. During the meeting, Duncan said that the masks were against dress code and that it was not his decision but of someone above his rank. Frith said it should not be against dress code because they were not saying anything political.[52] The meeting ended with Scott telling Frith and others that if they wanted to keep their BLM masks on, they would need to punch out and leave. Frith and his coworkers immediately punched out, left, and met at the front of the store to discuss the next steps. Frith and his coworkers discussed a Facebook messenger group where people were planning the disbursal of more masks and the next time employees would all put on their BLM masks. One of Frith's coworkers offered to make BLM masks for them to distribute (Tr. 649). On this same day in the parking lot outside of the store, Frith and his coworkers discussed: creating a petition, creating a GoFundMe to buy more masks and reimburse employees who lost paid hours, reaching out to other stores about joining the protest, and looping the media in (Tr. 639; 640–641; 643–645; 647–649; 651–652).

The following day, June 25, Frith reported to work for his shift wearing his BLM mask. A few minutes into his shift, Frith was told by a supervisor that he would need to go meet with Duncan.[53] Duncan told Frith he was violating the dress code and would need have to leave if he did not remove his BLM mask; Frith kept his mask on and left the store (Tr. 653–654). Later that same day, Frith returned to the parking lot of the store because his coworkers were preparing to speak with the news media about what was going on. Frith was initially hesitant to go on camera and speak out of fear for losing his job, but once they moved across the street from Whole Foods, he went on camera and spoke (Tr. 652–654).[54]

On June 26, Frith again reported to work wearing his BLM mask and was told to go speak to Duncan, who again told him was violating the dress code. Duncan told Frith he needed to remove the BLM mask to stay; Frith kept his mask on and punched out. During his conversation with Duncan, Frith argued that the point of the mask was not to make a political

[52] The assistant team leader told Frith and others that the masks were a violation of the dress code because they were a political statement; Duncan just said they were a violation of the dress code (Tr. 645).
[53] Frith could not recall if it was STL Scott or the assistant store leader, Danny Langley (Tr. 653).
[54] This story was broadcasted by MSNBC News on June 25th around 10-11 p.m.; Frith's portion was not broadcasted, but many of his coworkers were (Tr. 654–655). On July 3, during another protest outside the store, Frith gave a speech during which he said that the protests would continue until WFM allowed its employees to support the Black community, because his life and all Black lives mattered—and that they would keep at it until the message BLM was "normalized," and until Black people "can walk down the street without fear" (Tr. 787). Thus, Frith's testimony about their goals appears to echo those expressed by Kinzer—to force WFM and its customers to accept—and adopt—the BLM message.

statement, but rather just to say that Black people's lives mattered. After leaving this day, Frith and one of his coworkers went to another WFM store in Cambridge (the Fresh Pond store) and spoke to other employees, explained their movement, distributed BLM masks, got employee contact information from interested people at this store, and explained why they chose June 30th as the day for their big walkout (Tr. 656–659).

Frith testified that on June 30, which was inventory day, as had previously been agreed upon among the team members, Frith and other coworkers put on their BLM masks. There was between ten and twenty employees who put on BLM masks, and they all left the store together when management told them to remove their masks or clock out. When Frith and his coworkers left their store, they were met by a crowd of protestors cheering for them. At this protest, Kinzer gave a speech about how they wanted backpay for wages lost and the removal of disciplinary points accrued. Frith testified that he knew Kinzer was going to mention those demands (Tr. 663; 666–668).

About 2 or 3 weeks after he started to wear the BLM mask on June 23, Frith became more careful about wearing his BLM mask to work because he had accrued 13 attendance points as the result of being directed to clock out for refusing to take the mask off, and did not want to risk incurring further disciplinary action. Thus, on July 8 Frith had received a disciplinary action, called an "Unsatisfactory Work Warning" for having accumulated excessive attendance points, and another one on July 14 for the same reason.[55] At the July 14 meeting with management when he was given the written warning, Frith expressed his frustrations with the policy, namely that he should be allowed to wear his BLM mask and that Whole Foods was being hypocritical for claiming online to support BLM but not allowing their employees to show that support in their stores. Frith left a comment on this written warning that he was showing up willing and able to work but was being forced to leave over his mask (GCX 25; Tr. 684–688).

After the July 14 warning, Frith began to wear his BLM mask more selectively, in order to avoid incurring additional disciplinary actions, and rather than refuse to take the mask off when asked and being sent home, he complied with the directives (Tr. 688).

(c) Kirby Burt

Kirby Burt testified she has been an WFM employee at its River Street store since February 2018. During the summer of 2020, Burt worked in the specialty department and reported to team leader Brianna Clark, to assistant team leader (Allison), and the store team leader Duncan Scott and associate store team leader Daniel Langley (Tr. 813–815).

Burt testified she first became aware of the BLM movement from the news, social media, and word of mouth after the Ferguson (Missouri) protests. Burt wore BLM messaging at work around a dozen times between June and July of 2020 . Burt wore only one type of BLM mask at work, and it was a Black mask that was handmade with the words "Black Lives Matter" in white print on it . Burt and her coworkers heard about what happened to the New Hampshire Whole Foods team members for wearing BLM slogans and were inspired to follow in their footsteps, so Burt bought pins and Kinzer bought masks to distribute. Kinzer ordered 200 or so plain black

[55] These disciplinary warnings were admitted in the record as GCX 25.

masks and Burt painted "BLM" on them. Burt distributed the BLM masks to her coworkers that expressed interest but recalled that other people distributed the masks to various WFM locations (Tr. 815–818).

According to Burt, the first time she wore a BLM mask at work was on June 25. On that day, Burt arrived at work wearing her BLM mask and began performing her normal duties openly in the store on the floor and in the back. Two hours into her shift, her assistant team leader, Allison, told her she had to go to the office to speak with ASTL Langley. Langley told Burt that she was out of dress code and would need to remove the mask or she would not be allowed to continue working. Burt asked why the BLM mask was not in dress code, adding that for quite a while she had been wearing pins with other messaging on her uniform (apron) without any blowback. These included a pin with the message "Lock Him Up" (representing her views about President Trump) as well as "Pride" (LGBTQ) pins, which she happened to be wearing on the day she met with Langley.[56] When Burt pointed to these pins on her apron, Langley told her he had never seen those before, and that she would have to remove them because they were also out of dress code. Burt removed these pins but refused to remove her BLM mask, so Langley directed her to clock out (Tr. 820–825; 827–828).

On June 26, Burt arrived to work for her shift wearing the BLM mask and was again called into the office and then sent home when she refused to remove her mask. This pattern continued several more times between the end of June and beginning of July.[57] Each time Burt was sent home, she was accumulating attendance points for missing work. On July 14, Burt was called into a meeting with Duncan and Clarke, who gave her a written warning for her accumulated attendance points. Eight of the nine attendance points described on this warning were derived from Burt leaving work for refusing to remove her BLM mask.[58] At this meeting, Burt restated her opinion that she expected the attendance points to be rescinded and for WFM to allow its employees to support BLM. (Tr. 828; 853–854).[59]

(d) Respondent—Scott Duncan

Duncan was the only witness for Respondent with regard to the events at the River Street store in Cambridge. Duncan testified that he has been employed at WFM since 2003, and during the summer of 2020 was the store team leader (STL) at the River Street store. Duncan's responsibilities were to oversee the day-to-day operations of the store, team member safety, facility safety, mentoring team members, managing store financials, quality assurance, and general management tasks. When at the River Street location, Duncan had two associate store team leaders who reported directly to him, Danny Langley and Jennifer Desrossiers. Langley

[56] A photo of Burt wearing these pins was admitted as GCX 35. (Tr. 847.)
[57] This included June 30, when Burt and other colleagues in the specialty team were sent home after refusing to remove their BLM masks, and they joined the protests outside the store earlier described in Kinzer's and Frith's testimony (Tr. 830–831.) Burt testified that she had a conversation in the end of June with her shift leader, Liz Brownell, about what the protest's demands were after Liz asked what she hoped to get out of this protest. Burt told Brownell that they wanted WFM to openly support BLM, wanted points retracted for being sent home, an apology from John Mackey and Scott Duncan, and that the dress code be altered to allow BLM messaging (Tr. 829).
[58] The July 14 warning was admitted in the record as GCX 34/1-2.
[59] On December 10, Burt received a final warning, but for reasons not having anything to do with the wearing of a BLM mask.

and Desrossiers would have had various team leaders, similar to department heads, who would report to them, but ultimately wouldn't have the final say on everything. These team leaders had personal and independent discretion in taking disciplinary action, although they would often notify Duncan or one of the associate store team leaders reporting to him (Tr. 1113–1117).

Duncan testified WFM has a dress code policy that is enforced by all employees in a leadership role. In the majority of dress code violations that Duncan observed, the violator was simply unaware of the policy and would be given the opportunity to change into dress code compliant clothes provided by Whole Foods to continue their shift. Shoes were the exception, since WFM stores couldn't keep spare shoes in all sizes on hand. Employees whose shoes were found in violation of the dress code would have to clock out of their shift early. During the COVID-19 pandemic, WFM would also keep extra masks on hand to provide to employees in case that their mask was in violation of the dress code. If employees chose to not change into a dress code compliant outfit, they would have to clock out of their shift early and were expected to return to their next shift in a dress code compliant outfit. When team members left early, they would receive an attendance point. If a certain number of points were accumulated within a given time, disciplinary action would be taken.[60] An accumulation of 17 attendance total points will result in termination of employment. While the attendance point system was relaxed early in 2020 due to COVID-19, an announcement was posted inside the WMF stores on June 22, 2020, informing employees that the standard policy was now in effect again (Tr. 1133–1139; 1147).[61]

Duncan first learned that some employees were wearing BLM masks when Luc (De Marrais), an assistant team leader for the customer service team, came to his office and asked if employees were allowed to wear BLM masks while working.[62] Duncan said he wasn't sure, and contacted Jamie Zito, the executive leader for team member services for the North Atlantic Region, to check. Zito informed Duncan that the wearing of BLM masks was against the dress code, but that Duncan should have conversations with the employees while being sensitive to subject (Tr. 1148–1149). In that regard, Duncan pointed out that WFM had issued a "Mandatory Face Mask SOP" on April 13 stating masks " must adhere to Whole Foods dress code as outlined in the GIG."[63] Duncan met with all the team leaders to inform them of this policy, and they in turn met with the team members in their respective teams to so inform them (Tr. 1147–1152).[64]

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[60] The point system, including amounts, accumulation, and disciplinary action is contained in Respondent's GIG, admitted as GCX 3/p. 94.

[61] This announcement was admitted into evidence as GCX 6.

[62] The evidence clearly establishes that this first occurred on June 24, in accordance with the uncontradicted testimony of Kinzer, Frith and Burt.

[63] The Mandatory Face Mask SOP was admitted into evidence as GCX 4.

[64] The record shows that there had been a series of (email) communications between the store leadership team and the (North Atlantic) region leadership team concerning BLM messaging and Respondent's policy in that regard. The first communication occurred on June 7, when ASTL Danny Langley emailed Regional Manager Eliza Brown to inquire if employees were allowed to wear BLM *pins* (not masks), because a couple of team members had asked. Brown's reply: "We can't. It is a similar issue to other organizations and opening the door for union activity" (Tr. 1195; GCX 45). Brown did not testify, and although her answer suggests a possible unlawful motive for not allowing the wearing of BLM messaging, it is puzzling in light of WFM's policy, as reflected in its (revised) dress code, allowing for union pins and buttons. Indeed, in light of the over-all record, I am not persuaded that Brown's email represents Respondent's motive for disallowing BLM messaging, but instead reflects the isolated viewpoint by one Regional manager. Additionally, the record reflects communications dated on June 25 between the store and

Duncan met with employees wearing Black Lives Matter face masks one-on-one in an effort to be sensitive to the topic, although some employees opted instead to meet in groups of up to three. When Duncan met with the employees, he explained that the Black Lives Matter masks were not dress code compliant and instead offered them a change of mask so they could be in dress code. He also explained that they were needed, he wanted them to work, and he didn't want them to have to go home. Each employee was offered 30 minutes to think about the decision to change their mask or go home, but all employees that first day—about 12 to 15 in total—chose to clock out and go home. Many of the team members he spoke to expressed that they wore the mask to support the BLM movement (Tr. 1154), but no team members expressed any frustration or complaint about employment practices at WFM (Tr. 1152–1155).

After that first day, several employees returned on their next shift still wearing the BLM masks. In these instances, the employees would be called to the office where they received the same talk as the first day. Some team members elected to change their mask and received no disciplinary action. Others refused to change their masks, were sent home, and received an attendance point for leaving early. These dress code incidents continued for weeks. After an employee had incurred several violations, the meetings would be shorter, simply consisting of asking them if they would be in dress code today and sending them home if not. During this time, there were also community protests going on outside of the store. Some WFM employees would participate, but only when they were clocked out. WFM employees were not reprimanded for protesting, nor reprimanded for wearing a BLM mask when they were on break or otherwise off the clock. Around the same time, there was an incident with a security guard stationed at the store, who was not directly a WFM employee, wearing a "Blue Lives Matter" patch on her shirt.[65] A team member reported that it made her feel uncomfortable, so Duncan asked the security guard to change or cover the patch. The security guard covered it with her sweater and returned to work (Tr. 1156–1158; 1160–1161; 1164–1165).

According to Duncan, when it became public that WFM was not allowing its team members to wear BLM masks, community protests occurred outside of the store, protests which oftentimes were covered by the news media. During the first 3 weeks of protesting, starting in late June 2020, the River Front store received phone calls from community members upset that WFM employees weren't being allowed to wear BLM masks, or upset that an employee (Kinzer) had been fired for wearing the BLM masks. These calls were often very emotionally charged, and Duncan would respond by explaining that they were misinformed. Some calls, however, were also threating or verbally abusive, with callers telling him "I wish I could punch you in your fucking face," and "I know you drive a blue car; I'll see you soon." Another WFM

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regional leadership regarding news media articles being published regarding WFM not allowing its employees to wear BLM masks at several locations throughout the country, including the River Front store. Finally, there is a lengthy email sent by Langley to regional (and store) leadership, dated June 28, wherein he informs that 14 employees were sent home because they were wearing BLM masks. In that communication, Langley reports about the complaints team members voiced about what they perceived to be inconsistent and/or hypocritical conduct by WFM regarding its BLM mask policy. Notably, he reports that the stated goal of the employees in question was to get WFM to "support" the BLM movement, including creating providing BLM-related merchandise, and reports their demands that WFM rescind the attendance points of those sent home, and reimburse them for their lost wages (backpay) (GCX 43).

[65] "Blue Lives Matter" is a well-known slogan used by those who support the police.

employee, Terry Marcone, who was in charge of store safety, called the police on Duncan's behalf after these threats were made (Tr. 1165–1171).

Duncan acknowledged the disciplinary actions taken with regard to Kinzer, Frith, and Burt, which are not truly in dispute.

5. The events at the South Street, Philadelphia (PA) store

Five witnesses testified about the events at the WFM store in South Street: Charging Parties Kayleb Candrilli and Leea Kelly, as well fellow employee Truman Read, for the General Counsel; and Supervisors James Kotmair and Valerie Johnson for Respondent. Before delving into the testimony of these witnesses, I believe it useful to provide some undisputed background information, because it will provide some context to the events as they unfolded.

Along with the WFM store in Cambridge discussed above, there is no question that the Philadelphia store was one of the "hotbeds" of employee activism regarding BLM messaging. There were some circumstances that contributed to this activism, the evidence clearly indicates. First, the store was physically adjacent to a police station, and shared a parking structure with it.[66] Secondly, the city of Philadelphia was buffeted with BLM demonstrations and protests in late May and early June 2020 in the wake of the killing of George Floyd in Minneapolis. There were repeated clashes between the police and protesters, with significant property damage ensuing, resulting in curfews being imposed by the city's Mayor.[67] As a result of these curfews, the Philadelphia store had limited hours of operation during early June, often having to close early. Additionally, because of property damage sustained by nearby businesses during the protests, and its proximity to the police station, the store had its windows boarded up to prevent similar damage. Finally, an incident occurred at the store that angered and motivated many employees to become active in BLM-related activities. Sometime in early June, as the events described immediately above were occurring, store team leader (STL) Joe Burton was observed by employees handing out free food and water (or beverage) to the police, inside the store. Word spread fast among the employees, who expressed fear and anger as a result of Burton's action, because of concerns that his conduct was going to be perceived as a signal that the store—and its employees—was taking the side of the police in the ongoing controversies. In light of this background information, I will summarize the testimony of the witnesses named above.

(a) Kayleb Candrilli[68]

Candrilli testified that (they) worked at the South Street store in Philadelphia during 2020, in its seafoods team. According to Candrilli, (their) supervisors during this time were STL

[66] A printed Google Maps image of the immediate area, showing the location of the WFM store and the police station adjacent to it, was admitted as RX 48.

[67] The executive orders/emergency declarations issued by the Mayor of Philadelphia, James F. Kenney, establishing a curfew in late May and early June due to the civil disturbances taking place at the time appear in the record as RX 47.

[68] Candrilli indicated a preference for the use of the pronouns they/them/theirs. In order to avoid confusion with the standard English use of these pronouns, which suggest the plural, such pronouns will encased in a parenthesis, i.e., (they). Candrilli is a Charging Party and alleged discriminatee in this case.

Joe Burton, and assistant store team leaders (ASTLs) Matt (Kowalski) and Jamie (Kotmair), and team leader Robert (last name uncertain).[69]

Candrilli's testimony indicates that in the immediate aftermath of STL Burton's actions in providing food and water to the police in the midst of BLM protests occurring at the time, as described above, a group of employees of the Philadelphia store, which named itself the "WFM Employees Coalition," started an online discussion using the "Telegram" platform to discuss these events. This group sent a series of emails to numerous WMF managers (as well other employees) demanding that certain actions be taken with regard to Burton, and adding additional demands, most of which were added in subsequent emails.[70] These included, inter alia, demands that Burton be held accountable for his actions and that he stop having one on one meetings with team members; that the store leadership use the Store Wide Text Alert System to keep team members better informed of emergency closures, changes in hour of operations, store meetings and similar notifications; and that a detailed action plan establishing tangible protections against verbally abusive customers be set up. In the last email of the series, the "coalition," (in reality, Candrilli, the author) now calling itself the "workers of Whole Foods Markets SOS," writes the following:

> **"Most importantly. Tomorrow, Friday the 19th (Juneteeth (**sic), **we encourage all team members to wear Black Lives Matter pins, masks, shirts, etc. in solidarity with the Lives Black Matter Movement.** WE have been actively following our fellow team member's peaceful protest in Bedford, New Hampshire, where Lylah Styles and Kayla Greene were sent home for wearing BLM masks. . . ." (emphasis in original).[71]

Candrilli testified that the above-described call for employees to start wearing BLM messaging at work was meant to show solidarity with, and in response to, other WFM employees being sent home for wearing BLM, particularly Green and Styles (Tr. 1263; 1282).[72] In the next day or two, some employees of the Philadelphia store (although not yet Candrilli) began wearing BLM messaging, primarily pins, on their work uniforms during working time—and were sent

[69] Candrilli also noted that during this time the management team was in flux, primarily due to the departure of Burton sometime in late June or early July, as discussed below.

[70] The emails were admitted in the record as GCX 50. Candrilli admitted being the author of these emails (Tr. 1271), although (they) clarified that it involved a few other employees that were part of the chat. Candrilli testified that the original purpose of the platform was to communicate concerns about Covid-19 infections within the store, but then evolved into a platform to discuss "collective actions to improve the conditions of the store" (Tr. 1265). I note there is little or no evidence of the latter claim, however, and that Candrilli admitted that the event that "triggered" these communications and the demands attached to them were Burton's actions with regard to the police (Tr. 1265)—as the plain language of the original email, sent on June 12, 2020, makes clear.

[71] GCX 50/6.

[72] Candrilli also testified that on June 19, 16 team members had voted to wear BLM messaging at work in solidarity with the BLM movement (Tr. 1407–1408). I note that Candrilli appears to contradict this testimony when later testifying that during a meeting in late June with Regional Manager Allshouse, Candrilli "completely" attributed their wearing of BLM pins to how black employees were being treated in the store (Tr. 1338), only to contradict this testimony again by then testifying that this was "part" of the reason (Tr. 1339). I find this unpersuasive and not credible, and although Candrilli may have actually said this to Allshouse, I conclude that this was a post hoc rationalization, rather than an objective accounting of the true purpose for the wearing of BLM messaging—as shown by (their) other testimony, the testimony of other witnesses (such as Kelly, discussed below) and other evidence discussed herein.

home for doing so (or for refusing to remove those pins when asked to do so). As a result, a protest outside the store was organized to take place on June 21. Online graphics were distributed announcing this protest, which was attended by employees (including Candrilli) as well as members of the general public. The main message of one of the publicized graphics inviting employees and members of the public to participate in the protest stated as follows:

> "Meet us outside Whole Foods on South Steet to protest Whole Foods Store Leadership sending home team members for wearing Black Lives Matter pins and masks. In addition to store leadership sending team members home for outwardly supporting BLM, Whole Foods South Street provided the Philadelphia Police Department with $120 in merchandise, amidst global protests against police brutality. We demand WFM South Street acknowledge Black Lives Matter." (GCX 51/1.)

Candrilli testified that at the June 21 protest one of the employees sent home for wearing BLM messaging over the past 2 days gave a speech which addressed not only being sent home for wearing BLM messaging, but also systemic issues involving black employees, who were allegedly given fewer desirable shifts and promoted less frequently (Tr. 1303).[73]

In late June, Candrilli attended 2 "town hall" meetings held at the store, attended by employees and members of WFM (Mid Atlantic) regional management. The first meeting was conducted by one of the regional managers, Travis Phaup,[74] during which employees, including Candrilli, voiced their grievances and frustrations—including their vehement disagreement regrading WFM's policy toward BLM messaging.[75] Phaup stated that there was a current "lull" in the enforcement of the dress code regarding BLM messaging, but suggested that WMF would start "cracking down" again soon. The second meeting took place soon thereafter, on June 29, this time led by WFM Mid Atlantic corporate president, Scott Allshouse.[76] Candrilli testified that at this meeting—where he and employees again voiced similar complaints as in the first meeting—Allshouse stated that he was going to take a "firm stance" on the BLM pins issue soon, and that everyone had to adhere to the dress code. (Tr. 1322–1328.)

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[73] I do not credit this testimony or give it any weight, not only because it is hearsay as to the purpose or objective of the protests, but because it is contradicted by the other evidence described above, particularly the notices announcing the protest. In that regard, I note that while the speech may have revealed the subjective motive of the (unidentified) speaker for protesting or wearing BLM messaging, it is of little relevance for demonstrating the objective purpose of such conduct. Moreover, there is simply no evidence that in fact there were any "systemic issues" involving the assigning of shifts to black employees at WFM.

[74] There were no stipulations, nor was any evidence introduced, regarding Phaup's supervisory status.

[75] Candrilli testified that (they) he stated during this meeting (and the second meeting a few days later) that there were problems with "the structure" of WFM, specifically mentioning that some people were being passed for promotion, and that it wasn't an equitable workplace. After being prompted by the General Counsel with a leading question about what "systemic" problem and which group of employees was being referred to, Candrilli obliged and stated that it was black coworkers, who mostly worked the "less desirable" overnight shift (Tr. 1324; 1328). This was a less-than-subtle attempt to tie the wearing of the BLM pins to working conditions at the store—particularly the working conditions of black employees. I do not find this testimony credible. Not only does it directly contradict (their) own testimony that the wearing of the pins was prompted and inspired by what occurred with the New Hampshire employees (Tr. 1263), but there is no evidence whatsoever that Candrilli or any other employees had raised these issues before. While it may be that Candrilli actually said these things during these meetings, it represents a post hoc explanation (or rationalization) for the conduct, or as discussed later, Candrilli's own subjective motive for the wearing of the BLM—and thus not relevant.

[76] The parties stipulated that Allshouse was a Sec. 2(11) supervisor. (JX 1.)

Candrilli first began wearing a BLM pin at work, about the size of a half-dollar coin, on (their) hat on June 22. Nothing was said by management to Candrilli at first, even though the BLM pin was readily visible. On July 6, Jenny Ross, an interim STL taking the place of Joe Burton, who had departed in late June, told Candrilli that the pin was in violation of the dress code.[77] Candrilli, who had by this time admittedly become informed of rights conferred under Section 7 of the Act, told Ross that (they) (were) engaged in "collective action" and "protected activity," and did not intend to remove the pin. Ross did not instruct Candrilli to remove the pin, and (they) continued to work wearing it. The next day, however, Matt Kowalski, an ASTL (and admitted Sec. 2(11) supervisor), asked Candrilli to remove the pin, but (they) refused. Later in the day, Candrilli was called into a meeting at the conference room with Kowalski and Lamin Humma, also an ASTL, but who was the acting STL in the wake of Burton's departure. Humma instructed Candrilli to remove the BLM pin, saying it was in violation of the dress code. Candrilli refused to do so, explaining that this was protected activity (because it was being done to support better working conditions). Kowalski and Humma issued Candrilli a verbal warning in light of (their) refusal to remove the BLM pin. Candrilli continued to wear the BLM pin for a while, but eventually switched to wearing a less-noticeable BLM necklace, which apparently drew no warnings from management.

(b) Leea Kelly

Leea Kelly testified that she worked full time as a store support team member at the WFM South Street, Philadelphia location from August 2019 to July 2020, at which time she left to pursue other job opportunities (Tr. 1598–1599).

Kelly wore the phrase "Black Lives Matter" or the acronym "BLM" to work at the store approximately two dozen times from early June to her final day working in mid-July. She started by wearing a button which said, "Black Lives Matter," but eventually switched to wearing different jewelry pieces with the same messaging. Kelly also stitched the letters "BLM" onto a WFM mask that she wore for a while.[78] Kelly also made polymer clay pendants with the acronym "BLM" and would wear and distribute them to other interested employees. Kelly further testified that she began wearing BLM buttons in response to hearing about other WFM employees at a variety of locations who had been sent home for wearing BLM messaging to work, explaining that she wanted to "stand against" these actions by WFM. Additionally, Kelly testified that she wore BLM messaging to speak out against Joe Burton's (the store team leader) giving of free food and water to the Philadelphia police, which had gassed BLM protesters. Kelly explained that some store employees were angered by Burton's actions in this regard (Tr. 1600–1605).

Kelly participated in a group chat where several employees discussed general workplace issues, as well as wearing BLM messaging to work. Kelly also offered input for three emails

[77] There is no stipulation or evidence regarding Ross' Sec. 2(11) supervisory status, but based on other stipulations that store team leaders are indeed statutory supervisors, there is little doubt that Ross possessed this authority.
[78] Photos of these items were admitted as GCX 48.

sent and intended to reach WFM management, although she was not the main author.[79] One of the demands made in these emails was to host a store meeting to discuss Burton's actions with regard to the police. One of the other demands was that management establish a protocol or procedure to deal with verbally abusive customers.[80] Included in these emails sent to management and employees, there was a call for all to wear BLM messaging on June 19. According to Kelly, this was meant to make the employees support for the BLM Movement visible to customers and perhaps even engage customers in conversation about the topic. The email explained that the wearing of Black Lives Matter messaging was to convey solidarity with the Black Lives Matter Movement (Tr. 1616; 1686–1687;1691).[81]

On June 19, Kelly, along with other employees, wore BLM messaging to work at the store, just as the email had called for. That day, two employees were asked by management to remove their BLM masks and pins and were forced to clock out when they refused (Tr. 1697–1699). In response, some WFM employees, including Kelly, organized a protest to be held on June 21 (Tr. 1639). A graphic was created and distributed asking customers to call into WFM and voice their displeasure at employees being sent home for wearing BLM pins, and to attend the June 21 protest outside the store (Tr. 17011702).[82] This graphic was shared in the Telegram group chat and by some employees on social media for wider consumption (Tr. 1702.) The graphic also called attention to Burton's gifting of food and water to the police (Tr. 1703). Kelly participated in the protest on June 21, along with other WFM employees and members of the general public.[83]

On June 29, Kelly attended a meeting lead by regional managers lead by Scott Allshouse, Travis Phaup, and Michelle Payne. During the meeting, Allshouse stated that BLM masks were not allowed, although BLM pins were permissible, so long as they were not worn on WFM-provided clothing, such as aprons. When Kelly asked why BLM messaging (on masks) was not allowed, Allshouse said that it was not a WFM-approved slogan and later added that the wearing of BLM messaging came across as political. Kelly asked if wearing a tee shirt that said

[79] The author was Candrilli, as described earlier.

[80] Kelly clarified, however, that this demand covered "verbally violent" conduct directed at employees by customers upset at Covid-19 protocols, customers engaged in sexual harassment, and customers being "violent" toward employees regardless of the employee's identified race or sexual orientation. She also added that this type of uncivil conduct was directed at employees of all races, not just black employees (Tr. 1681; 1729–1730).

[81] Before that email was sent, Kelly was already wearing BM messaging to work, as described earlier (Tr. 1616). After June 19, Kelly noticed employees wearing Black Lives Matter messaging to work with greater frequency (Tr. 1616).

[82] A copy of the graphic can be seen on GCX 52. Photos of the protest are viewable in GCX 53.

[83] At the tail end of Kelly's testimony, the General Counsel, employing either leading or suggestive questions, sought to establish that the protest(s) that occurred outside the WFM store were not only about police brutality against black persons, or about WFM disallowing of BLM messaging by its employees during worktime, but about systemic racism that touched on a wide spectrum of issues-including discrimination in employment. Kelly obliged, testifying that the protest(s) involved "the overreaching marginalization of the Black community," and other systemic issues, such as job inequality, historical redlining, general racism, and other discriminatory acts (Tr. 1726–1727). I note, however, that Kelly never explained what this testimony was based on, other that her own opinion, or the opinions of speakers at the protest. More pointedly, the objective evidence on the record—including the online graphics and notices inviting employees and members of the public to join the protest—indicate that the focus was on (store manager) Burton's giving free food and water to the police (the perceived opponents, if not enemies, of the movement), and on WFM not allowing employees to wear BLM messaging in support of the movement—and nothing about systemic racism. Accordingly, I do not credit Kelly's testimony in this regard.

"no racism has no place here" would be allowed, and Allshouse said no. Kelly was wearing her BLM mask, as well as a BLM necklace, during this meeting, but was not told to remove them, most likely because she was "off the clock" and not on duty at the time. Before the June 29 meeting, Kelly had not been personally spoken to by any manager but had been told by other employees that they had been informed wearing BLM messaging to work was not allowed (Tr. 1618–1624; 1626–1630).

Kelly had given notice of her intention to resign her employment with WFM—for reasons not connected with the BLM controversy—and her last day at work was July 12.[84] During the final week of her employment, Kelly had a conversation with ASTL Jamie Kotmair, during which Kelly was wearing her BLM pin, and Kotmair told her that WFM would be "cracking down" on the wearing of BLM messaging (Tr. 1630–1631).[85] Later, at the end of Kelly's shift, Kotmair brought her into the office with Valerie Johnson, Kelly's direct supervisor. Kelly was then issued a corrective action, for refusing to take off her Black Lives Matter pin.[86] She was asked if there was anything further, she wanted to talk about, but she declined in favor of going home and not staying past the end of her shift (Tr. 1634). Kelly explained that she already put in her resignation notice earlier, unrelated to the incident, so the corrective action was unnecessarily being issued to someone who was already leaving employment at WFM (Tr. 1630–1634).

(c) Truman Read

Read, a Charging Party in this case, testified that he was employed at the WFM South Street location in Philadelphia from 2019 to 2021. During the summer of 2020, Read worked as a cashier's assistant working part time, usually 24 to 28 hours a week (Tr. 1458–1459).

During the summer or 2020, Read wore a BLM pin or necklace about two dozen times.[87] (Tr. 1460). When wearing the pin, Read would place it on the front of his work-issued apron, where it was clearly visible (Tr. 1460). When wearing the necklace, Read would also wear it in a way that it was visible (Tr. 1460–1461). Before Read began wearing the pin, two other fellow team members, Alexis and Chris, were sent home for wearing BLM masks at work (Tr. 1464–65). This event prompted Read to begin wearing the BLM pin to work in solidarity with Chris, who is an African American woman. (Tr. 1465). Read explained that the dress code had never been strictly enforced prior to employee's wearing of BLM messaging, and he found this sudden enforcement "alarming" (Tr. 1460–1461; 1465–1466).[88]

[84] A copy of Kelly's resignation notice was admitted in the record as RX 63.
[85] Kelly implied that Kotmair never asked her to remove the BLM pin, but I do not credit this testimony, for reasons I will discuss below.
[86] A copy of the corrective action was introduced as GCX 55, although Kelly was not certain this was the actual corrective notice since it was not signed by her. The fact that she was issued a corrective action notice, however, is not in dispute.
[87] A photo of this pin was admitted as GCX 49.
[88] Read testified that he had conversations with Chris about this disparate enforcement, which they viewed as an example of "systemic racism" existing at WFM (Tr. 1468). He admitted during cross-examination, however, that the *purpose* of his wearing of BLM messaging, in deliberate violation of the dress code, was to get WFM to change its interpretation of the dress code to allow for the wearing of BLM messaging by employees while working (Tr. 1507–1508; 1564).

Once Read started wearing the pin, he wore it for most all of his shifts. He would wear it visibly pinned to his apron, near the left breast pocket. At first, Read was not spoken to by management about his wearing of the pin, but this changed later. Read's first interaction with management about the pin was initiated by him, when he emailed his team/department leader, Valerie Johnson, and asked whether wearing Black Lives Matter messaging would be permissible. Johnson responded that she didn't have an answer. The second time Read interacted with management, on July 8, he was asked to come to the customer service desk to talk (Tr. 1472). Read was informed by a group of store leadership, including ASTL Lamin Humma, that his BLM pin violated dress policy (Tr. 1473). Read explained his reasons for wearing the pin-- that he had been "looking into" racism present at WFM. Humma told Read that he respected what Read was doing, but that he was required to remove the pin when he was working (Tr. 1469–1474).

After the conversation at customer service, Read elected to remove the pin from his apron, but continue wearing it pinned to a necklace. The next day, July 9, while wearing his newly crafted BLM necklace, Read was approached by Humma, who informed Read that the necklaces weren't going to be allowed either. Humma explained that he was in talks with upper management to see if a compromise could be reached. Read reiterated his disappointment in the rule, saying that he thought there were "issues" at the store. Although Humma informed Read that the necklace would not be permissible, he did not directly tell Read to remove it. Accordingly, Read continued to wear the BLM necklace. Later that same day, however, he had a conversation with the ASTL Jaime Kotmair, who informed him necklaces with BLM messaging weren't permitted. Kotmair added, however, that since he had already clocked out and was off duty, he would not ask Read to remove the necklace (Tr. 1477–1480).

Read testified that he had several conversations with his team leader, Valerie Johnson, who is African American, about his wearing of BLM messaging (Tr. 1480). During one of these conversations, the date of which he was uncertain, he told her that he was wearing BLM to protest racism (or racial discrimination) at WFM, and also as a show of support for his wife, who is African American, and his biracial children (Tr. 1480–1481).[89]

A couple weeks after the July 8 conversation with Humma, Read stopped wearing the necklace or any form of BLM messaging to work . He did so because he learned that other team members had received corrective actions for wearing BLM messaging and did not want to suffer the same fate (Tr. 1486–1487).

(d) Respondent—James Kotmair

Kotmair testified that he was the assistant store team leader (ASTL) at the South Street, Philadelphia WFM store from April 2019 to April 2021.[90] During the summer of 2020—when the events at issue here took place—Albana Baci and Matt Kowalski shared ASTL duties with him at the store, and Joe Burton was the store team leader (STL) through June, at the end of

[89] As noted below, in her testimony Johnson vehemently denied that Read said anything about racial discrimination at WFM, and I credited her testimony.

[90] The parties stipulated that Kotmair is a Sec. 2(11) supervisor (JX 1).

which he left. After Burton left, rotating (acting) STL's were brought in, including Jenny Ross, Lamin Humma, and Shana Jordan, who eventually replaced Burton as STL.

Kotmair described the atmosphere at the store in late May and June as one where "tensions were running high," in light of the events taking place at the time. These events included the massive BLM protests occurring in Philadelphia, which involved repeated clashes between demonstrators at the police, the imposition of curfews by the authorities, and the boarding-up of the windows at the store as a precaution, given property damage and looting that occurred in the vicinity of the store. As a result, the store had to close early on numerous occasions at the time, either because of the curfew or as a precaution because of nearby protests. Additionally, the store was adjacent to a police station, and police were often present, sometimes in in riot gear, in the vicinity of the store. One incident that contributed to the atmosphere of tension was that STL Burton was observed giving free food and water to the police inside the store, which greatly upset employees, who believed this created the impression that the store (and WFM) was siding with the police in the ongoing dispute.[91]

According to Kotmair, on June 19 two employees, Amber Crothers and Alexis Hunte, wore BLM face masks at the store during working time, and were asked to remove the masks. They refused and were sent home. During the next 3 weeks or so, Kotmair spoke to about 10–15 employees about the wearing of BLM jewelry or pins, which were permitted at the time—unless they were pinned to their facemasks. On July 6, this policy changed, and BLM pins and jewelry were deemed in violation of the dress code if worn while "on the clock."[92] Kotmair had "huddles" with team members during this time to inform them of the policy change.

On July 8, Kotmair informed Leea Kelly that the BLM pin she was wearing was in violation of the dress code and asked that she remove it. Kelly declined, saying that her last day of work was Sunday (she had resigned), adding "do as you want." Kotmair left, letting Kelly think about it. He came back 45 minutes later and again asked Kelly to remove her BLM pin. According to Kotmair, Kelly replied, "Whose side of history are you on? Are you on the side of the police and their actions or are you on the side of black Americans and minorities who are being targeted by them?"[93] Kotmair replied that this was not personal, that he was only doing his job, and that her refusal could result in a corrective action. Kotmair then contacted regional management for guidance and was advised to issue Kelly a corrective action. Kelly was asked to come to the office, where Valerie Johnson, Kelly's team leader, was also present. Kotmair informed Kelly that he was issuing her a corrective action, and Kelly replied that she had not been warned. Kotmair told her that he had indeed warned her.[94] According to Kotmair, Kelley refused to sign the corrective action, writing "BLM" on it instead.

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[91] An employee—whose name I need not reveal—made an online threat against Burton as a result of his action with regard to the police, and was terminated as a result. Both Candrilli and Kelly made reference to this employee's termination in their testimony, testifying that some believed this termination was "retaliatory."

[92] During this time a team member arrived at the store with a backpack that had a message saying "Fuck the Police" on it. Nothing was said to her at the time since she was "off the clock." (Tr. 2093–2094).

[93] Kelly never denied saying this, so I credit Kotmair's testimony in this regard.

[94] In her testimony, Kelly implied that Kotmair had never instructed to remove her pin. I do not credit this testimony, in light of all the circumstances. Kelly had already submitted her resignation and likely did not care if her refusal resulted I disciplinary action Moreover, I credited Kotmair's testimony that Kelly accused him of siding with the police when he asked her to remove her BLM pin, which Kelly did not deny. In the final analysis, however, the

Kotmair admitted that during this time period, WFM employees wore other types of pins, such as vendor pins (relating to the name or product of items sold by vendors) LGQBT pins and pronoun pins. After July 6, only nametags and pronoun pins were allowed.

(e) Respondent—Valerie Johnson

Johnson testified that during the summer of 2020 she was the store support (akin to customer service) team leader, who supervised cashiers and maintenance employees, and was the direct supervisor of Leea Kelly and Truman Read.

In late June or early July, Johnson spoke to Read, near the customer service booth at the front of the store, about the BLM pin he was wearing. Read told Johnson that it was important for him to take a stand on this issue, because his wife was black, and his children were biracial.[95] Johnson testified that Read never said to her that (by wearing BLM messaging) he was protesting race discrimination at WFM—and that to the extent that he so testified, such testimony would be false (Tr. 2126–2128).[96] She also added that Read told her he had filed a charge with the NLRB and asked if she could be reached out to, and she said no. With regard to Read's testimony that by wearing BLM messaging we was hoping to encourage dialog with customers about it, Johnson testified that it would be improper for a cashier to engage with customers in conversations about "political" messages such as BLM.

6. The Events at the Marlton, New Jersey, store

Two witnesses, Haley Evans (for the General Counsel) and Carol Kingsmore (for Respondent), testified as to the events at the Marlton store, which is located in New Jersey about 20 miles from Philadelphia.[97] I would note that the facts regarding the events at this location are not truly in dispute.

(a) Haley Evans

Evans testified that she worked at the prepared foods (Deli) counter at the WFM store in Marlton from April 2017 to August 2020, although she was temporarily on leave from March until June 16, 2020. When she returned to work in June, employees were required to wear face masks due to the Covid-19 pandemic. On the day she returned from leave, June 16, she wore a black mask with white lettering that said, "No Justice No Peace." Evans testified that such message in response to events in the wake of the murder of George Floyd by the Minneapolis

legality of the corrective action, as discussed later, does not depend on whether Kelly was warned to remove her pin or not before the action was issued.

[95] Kotmair similarly testified that Read told him the same thing (Tr. 2102).

[96] I credit Johnson's testimony. In that regard, I note that Johnson, who is African American, also testified that she has never experienced racial discrimination at WFM, and that she was satisfied being a team leader and wasn't interested in upper management. In his testimony, Read had suggested that Johnson had been discriminated against by WFM because she had not been promoted.

[97] Kingsmore, the store team leader (STL), was stipulated by the parties to be a Sec. 2(11) supervisor (JX 1).

police. She wore that mask on June 17 as well, and observed wearing that mask by supervisors and managers, who said nothing to her about it (Tr. 1742–1748).[98]

Over the next few days, Evans learned through the online Facebook platform that WFM employees at the (South Street) Philadelphia store were being sent home for wearing "Black Lives Matter" (BLM) masks, and decided she wanted to wear one to work herself. On June 22, Evans showed up to work wearing a black mask with white lettering that said, "Black Lives Matter" on one side, and had a "black power" (upraised) fist on the other.[99] She was told by her team leader Michael (last name uncertain),and assistant team leader, Daniella (last name uncertain) that the mask was in violation of the dress code. Evans complained that her first Amendment rights were being violated, and that the prior week she had worn her "No Justice, No Peace" mask without any problems. Evans refused to remove her mask and continued to work for about another 30 minutes. She was then called into a meeting with Nick Polidore, the assistant store team leader (ASTL), who informed her that the mask violated WFM's dress code.[100] Evans again raised some of the same objections that she had previously raised with her team leaders, which did not sway Polidore. He gave Evans the option to replace her mask or leave work, and Evans chose to clock out and went home (Tr. 1749-1762).

Evans had a day off on June 23, and on June 24 she was scheduled to work the mid-day shift, either 10 am to 6PM or 11am to 7 pm. She did not show up to work for her shift, since she figured that she would be sent home again if she insisted on wearing her BLM mask—which she intended to do. Instead, she phoned ASTL Gersi Mollaj around noon, and explained the situation.[101] Mollaj asked her to come to the store to meet with him, and she went there around 1p.m. During their meeting, Evans again made her arguments as to why she should be allowed to wear her BLM mask at work, but Mollaj reiterated that she could not wear her BLM while working, and Evans went home (Tr. 1762–1770).[102]

This pattern of Evans not showing up to work, based on the correct assumption that she would be sent home if she refused to remove her BLM mask (which she intended to wear), or reporting to work wearing her BLM mask and being told to go home when she refused to remove it, repeated itself over the course of several days. Thus, this occurred again on June 27, 29, July 1, 4, and 6. On July 8, Evans received a corrective action (unsatisfactory work) warning signed by STL Kingsmore, which pointed out that Evans had missed work, or left early, on June 22, 24, 27, 29 as well as July 1, 4, and 6. The corrective action form also noted that additional disciplinary actions, including termination, could result if additional violation of attendance policies occurred.[103] Evans again left work early, for the same reasons, on July 8, 11, 15 and 22,

[98] Evans testified that Daniella (last name unknown), who was the assistant team leader in her team, told her she liked the mask. It is not clear if Daniella is a statutory supervisor.
[99] A photo of the mask was admitted in the record as GCX 58.
[100] The parties stipulated that Polidore is a Sec. 2(11) supervisor (JX 1). At the time, he and the other ASTL's were in charge of the store, since STL Kingsmore was on vacation at the time.
[101] The parties stipulated that Mollaj is a Sec. 2(11) supervisor (JX 1).
[102] During her meeting with Mollaj, while she was "off the clock" because she never clocked in, Evans wore a black facemask with the message "All Power to the People" in white lettering, which also had the image of with a raised fist. A photo of the mask was admitted in the record as GCX 59.
[103] The July 8 corrective action form was admitted as GCX 56. It should be noted that the absences as documented by the warning are not in dispute, nor is it disputed that the reason for these absences was always the same—either

and as result received on July 25 a corrective action disciplinary warning for excessive absenteeism signed by Kingsmore. When Kingsmore handed Evans this corrective action, she told Evans that on her next shift they would discuss Evans' separation from WFM (Tr. 1771-1787; GCX 56).

On August 1, Evans reported to work, again wearing her BLM mask, but the BLM message wasn't visible, because she was wearing the mask inside out. Shortly after arriving at work, Evans was called into a meeting with STL Kingsmore and ASTL Mollaj. Kingsmore informed Evans that she was being terminated and handed her a form to sign. This form, the "Team Member Separation Form," indicated that Evans had again been absent from work on July 25, 27, and 29, following her "final warning" on July 25.[104] Evans handed Kingsmore copies of a federal district court lawsuit that had been filed against WFM by a number of current and former employees, including Evans, for its actions with regard to BLM masks and messaging.

(b) Respondent—Carol Kingsmore

Kingsmore, the store team leader (STL) at Marlton store, essentially confirmed the sequence of events and actions taken with regard to Evans as described above but added some details. She testified, for example, that after she returned from vacation on June 29, she met with Evans in the office, along with ASTL Nick Polidore, because Evans was wearing a BLM face mask, which also had a raised fist symbol.[105] She explained to Evans that such facemask was not compliant with the dress code (as had been previously explained to her by other managers in Kingsmore's absence). Evans replied that she wanted to wear the mask because of the murder of George Floyd, and because she wanted to show her support for the BLM movement, and explained how her grandfather had been the subject of discrimination in his younger years.[106] Evans also mentioned alleged inconsistencies in the enforcement of the dress code, noting that she often wore leggings, which were not allowed by the dress code, but was never called on it, let alone sent home for such infraction (Tr. 2158–2161).[107]

Kingsmore testified that prior to the summer of 2020, no team member had ever worn any BLM-related items, nor had there been any complaints about racial discrimination at (or by) WFM—other than a complaint made by Evans in 2019 about a racially insensitive remark made

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Evans insisted on wearing a BLM mask while at work, and was sent home for refusing to replace that mask, or she did not come to work in the first place because she knew she was going to be sent home for that reason. Likewise, it is not disputed that on those occasions when she did not come to work she phoned in, and was told by a supervisor that she would be sent home if she was wearing a BLM mask and refused to remove it.

[104] The August 1 form was admitted as RX 65. It should be noted that while the July 25 corrective action form (GCX 56) did not actually say it was a "final warning," it did indicate that any additional violations could result in termination.

[105] The facemask is the one depicted on GCX 58.

[106] Evans testified that to her, BLM was "human rights" issue as demonstrated by the murder of Geroge Floyd and others who had been killed by racist police and other people, and which signified "the right to life itself" (tr. 1821).

[107] One of the perceived inconsistencies that Evans pointed out, for example, is that she had worn—or told that she could wear—tee shirts with BLM messaging. She admitted, however, that such BLM messaging was about 90% covered by the apron she had to wear during work, and thus mostly not visible (Tr. 1766–1767).

by a fellow team member.[108] Kingsmore confirmed the progression of corrective action disciplinary warnings given to Evans which ultimately resulted in her termination for excessive absenteeism, as described above (Tr. 2156–2161; 2165–2167; GCX 56; 58)

7. The Events at the Glenn Allen, Virginia, Store

The WFM store at Glenn Allen, also known as the "Short Pump" store, is located about 10 miles from downtown Richmond, on West Broad Street. Two witnesses testified about the events at this store, Justine O'Neill for the General Counsel, and Nick Stegeman, the Assistant store team leader (ASTL), for Respondent. Below is a summary of their testimony.

(a) Justine O'Neill

O'Neill, a Charging Party in this case, testified that she worked for WFM from September 2010 to February 2021.[109] During the summer of 2020 she worked at the Glenn Allen store, in the specialty department team. Her duties required her to wear either an apron or a chef coat. The store team leader at the time was Donna Stulken; the ASTLs were Nick Stegeman and Julius Wormley; the specialty department team leader was Daniel Yacher, and the assistant team leader was Connie Jones.[110]

O'Neill testified that she was familiar with the Black Lives Matter (BLM) movement in light of the events that were happening in the summer of 2020, but had become familiar with the movement earlier, in the wake of the killing of Michael Brown by police (in 2014).[111] She was inspired and motivated to wear a BLM mask when she observed a couple of other team members at the store wearing such masks, the first one on the second week of June, the other in late June

[108] Evans testified that during her meetings with various managers regarding her wearing of the BLM facemask, she had mentioned the irony of her being asked to remove a mask with such messaging in light of the fact that an employee who had made a racially offensive remark to her months earlier was still around—i.e., he had not been terminated, contrary to WFM's often repeated claims that no racism was tolerated at its stores. Evans admitted not knowing, however, what disciplinary action had been taken, if any, against this employee; she only knew that he had obviously not been terminated. (Tr. 1755–1757). To the extent that this testimony is proffered to support the argument that by wearing her BLM mask Evans was protesting working conditions at WFM, I reject such argument as contrary to the objective evidence and contrary to Evans' own remarks regarding the purpose of her wearing such messaging. Thus, to the extent that Evans' testimony suggests that this was part of the reason she wore her BLM mask, I would find such testimony not credible.

[109] O'Neill testified via Zoom video conference (Zoom) from her then current location in Washington State, while I and counsel were at the Washington D.C. trial venue. As described earlier, I granted the Charging Party's motion to allow for such remote testimony, in view of the circumstances at the time.

[110] The parties stipulated that STL Stulken and ASTL Stegeman were Sec. 2(11) supervisors (JX 1).

[111] The killing of Michael Brown by police in Ferguson, , in August 2014 was one of the events that inspired and catapulted the BLM movement, as will be discussed later. Asked by the General Counsel what her understanding of BLM was, O'Neill obliged by stating that it its purpose was to call attention to "systemic racism," which she defined as violence or barriers that people of color experience in all facets of their lives—such as jobs, housing and, once again, employment. During cross-examination she conceded that the protests in 2020 erupted because of the killing of George Floyd and similar police brutality—but immediately circled back to "systemic racism" as the ultimate cause (Tr. 2198–2199; 2258).

or early July 2020.[112] She discussed wearing BLM masks with other employees, and engaged in an on-line chat discussion with other employees to encourage them to wear BLM masks.[113]

O'Neill ordered a BLM mask from an internet vendor, and first wore it at the store during working time on July 14.[114] She put on the BLM mask a few hours into her shift, and about an hour later ASTL Nick Stegeman asked her to remove it. She complied and replaced her mask with one with no messaging. Later that day, O'Neill sent an email to WFM leadership on an internal WFM email platform.[115] In her email, copied to all her coworkers, O'Neill demands that WFM change its uniform policy (dress code) to allow for the wearing of BLM messaging by team members, consistent with WFM's professed support for the BLM movement and promotion of a "culture of inclusivity and shared fate." She repeated the following demands made by other groups of employees at other WFM stores:

1. A company-wide commitment to hiring more BIPOC for leadership positions, including specific resources for BIPOC advancement in the company.
2. Black Lives Matter apparel (allowed and) normalized company-wide.
3. Back-pay for all protesting employees, and related points (disciplinary tool) revoked.

O'Neill sent follow-up emails, requesting a response from management, finally prompting a final response from Scott Allshouse, Mid-Atlantic Corporate Regional President, to the effect that she would be notified if anything changed, and that otherwise "everything remained as is."[116] At some later point in time, the exact date not certain, O'Neill help distribute a flyer, in front of the store, calling for an employee "walk-out and picket" on August 14 from 4pm to 6pm in support of the BLM movement.[117] The walk-out, however, never occurred,

[112] I note that on June 11, 2020, O'Neill wrote an internal email to WFM management in response to management's solicitation of views regarding a proposed "Inclusion Taskforce." In her email, O'Neill (who is white) lambasts WFM for what she claims to be a lack of diversity in its upper echelons, noting that WFM has been sued for alleged discrimination, and declares that there should be no white persons in any such panel. She concludes by stating that diversity, inclusion and multiculturalism should not be an endgame in itself, but rather the goal should be to "dissolve and disband the power that disproportionally and often exclusively benefits white folks . . ." The General Counsel apparently proffered this evidence to show a nexus between the employees' working conditions (alleged racial discrimination, or at least disparities) and their BLM activities that occurred thereafter. Over the objections of Respondent, I admitted the email into evidence (GCX 68), stating that I would evaluate the evidence and decide how much weight to give it (Tr. 2210). I give it little weight. I note, first of all, that no other employees joined O'Neill in her assertions, and that there is no objective evidence that her assertions are true or accurate. Nor is there any objective evidence that O'Neill's concerns were a factor other employees' BLM-related activities, much less that her stated goal of "disbanding the power structure" was a purpose for their conduct. Indeed, if I were to conclude that this was their purpose, such conclusion would be fatal to the credibility of the often-repeated mantra, voiced by many of General Counsel's witnesses, that BLM was not a "political" statement, but rather either a "fact," or a statement of human rights. At most, I conclude that the views expressed by O'Neill in her email represent solely her own, and do not represent the views—much less the goals—of others.

[113] A copy of on-line "Tweets" postings promoting the wearing of BLM masks by O'Neill and others—and about joining a June 30 walkout promoted by team members in other WFM stores—was admitted into evidence as GCX 70 (Tr. 2225).

[114] A photo of the mask (the first one of three, on the top) was admitted into evidence as GCX 67.

[115] A copy of the email, dated July 14, was admitted as GCX 69/3. (Tr. 2231)

[116] The response was dated July 30. (GCX 69/1).

[117] A copy of the flyer was admitted as GCX 71.

apparently drawing no support. On that same date, August 14, O'Neill again wore her BLM mask to work, starting around 6 a.m. About 7 a.m., ASTL Stegeman asked her to remove her BLM mask, but O'Neill refused. Accordingly, Stegeman directed her to clock out, and she did not work the rest of her shift. Neither she, nor any of her coworkers, wore BLM messaging at work again after August 14.

O'Neill testified that before she wore her BLM mask at work, she was well aware that WFM's uniform policy did not allow for massaging other than approved vendor provided. She added, however, that she often saw other team members wearing sports team logos and other similar messaging, such as "pride" buttons, at work without consequences, and that she wore a pin that said, "Nasty Woman" on her uniform and was never told to remove it.[118] She acknowledged, however, that beginning in early June 2020, the store began to enforce the dress code more strictly, disallowing for such messaging.

(b) Respondent—Nick Stegeman

Stegeman testified that during the summer of 2020 the dress code for employees did not permit any advertising or slogans other than those of approved vendors and their products. The protocol for noncompliant employees called for allowing them to change (their clothing item) to become compliant, otherwise they were sent home.

According to Stegeman, the Glenn Allen store is about ten miles from Richmond city center, where a sister WFM store is located, a store that was looted and vandalized during BLM related protests in early June, which became violent. Online threats were directed at the Glenn Allen store at the time, which was boarded-up as a precaution. The first time a team member was observed wearing a BLM mask at work was on June 25, when Keeron Scott wore one. STL Stulken spoke to Scott and asked him to remove his BLM mask. Later that day, Stulken sent an email to her management team at the store, reminding them of the dress code and asking them to discuss it with their team members. This was followed up by another email on July 3 on the same topic.[119]

Another team member, Francisco Rollins was observed wearing a BLM mask sometime around this time and he was asked to remove it. On July 14, Justine O'Neill wore a BLM mask and Stegeman asked her to remove it, and she complied. Later that day, Stegemann sent store management an email recounting this incident.[120] O'Neill again wore a BLM mask at work a month later, on August 14, and Stegeman asked her to remove it. O'Neill refused to do so, so Stegeman instructed her to clock out and leave, which she did. Stegeman sent store management an email later in the day, recounting the incident with O'Neill.[121]

[118] The term "nasty woman" refers to Donald Trump's reference to Hillary Clinton.
[119] These emails were admitted into evidence as RX 74.
[120] This email was admitted into evidence as RX 75. Stegeman remembered reading the email sent to management by O'Neill on this date (GCX 69), and testified he was not aware that WFM had made any statements in support of BLM, although he said on its electronic boards in the store, WFM expressed its support for the black community (Tr. 2447; 2450–2451),
[121] This email was admitted into evidence as RX 76.

Stegeman did not recall ever seeing O'Neill wearing a button (or pin) which said, "Nasty Woman," but did see her wearing a button sometime later in August which said, "Unions Protect Workers."[122] Stegeman testified that O'Neill, who wore this button for a few days, was never told to remove it, since union pins are allowed under WFM's dress code (Tr. 2455–2457).

8. The Events at the Atlanta, Georgia, store

Regarding the events at the Atlanta store, also known as the "Ponce De Leon" store on account of its location, only one witness testified—for Respondent.[123] Charging party and alleged discriminatee Sarita (also known as "Justice") Wilson did not appear or testify. In Wilson's absence, the General Counsel introduced a document, obtained pursuant to subpoena, which showed a string of email communications between store managers that, on their face, indicated that on July 24, 2020, Wilson was sent home after she refused to remove a BLM t-shirt she was wearing at work.[124]

Jessica Sims, during the summer of 2020 the associate team leader for store support, testified for Respondent. In her role as ATL for store support, Sims supervised cashiers, including Wilson. On July 24, she and store team leader (STL) Claire Banks met with Wilson to hand her two (2) corrective action disciplinary forms. One was for her behavior during an interaction with a customer; the other, for attendance. During their meeting, Banks noticed that Wilson was wearing a t-shirt that said, "Black Lives Matter" (BLM) and Banks informed Wilson that could not wear that t-shirt at work, because it was in violation of the dress code—and offered her a replacement. Sims added that they were not picking on Wilson, that the dress code did not allow any messaging other than WFM or vendor branding. According to Sims, Wilson became very upset, started crying and asked if she could call her wife—and stepped out of the office. Banks asked to come back to the office, because she did not want her looking upset on the (store) floor. Wilson then started raising her voice, saying she didn't care, that she was personally affected by the (BLM) movement, mentioning that Oscar Grant was her friend, and that she was standing up for all Black and Brown men and women senselessly being killed by the police.[125] Wilson then left the office to go to the restroom to call her wife, and when she returned, informed Banks and Sim that she was not going to remove her (BLM) t-shirt. Banks asked her politely to go home, and Wilson asked if she could take a "personal day" off, and Banks aid she could. Wilson then went home and was paid for the day—and did not incur disciplinary action for leaving work early that day (Tr. 2210; 2214–2220).[126]

Sims testified that she wrote emails describing what had occurred—and those emails are contained in the exhibit introduced earlier by the General Counsel (GCX 66; Tr. 2213–2214) .

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[122] A photo of this button was admitted into evidence as RX 76.

[123] This portion of the hearing, by mutual agreement of all the parties, was held via Zoom.

[124] The exhibit was marked as GCX 66. I admitted it provisionally, awaiting further corroborating evidence before it was finally received. Such corroboration was provided by Respondent's witness, Jessica Sims, as discussed below (Tr. 2213–2214).

[125] Oscar Grant was an African American man shot and killed by BART (Bay Area Rapid Transit) police in Oakland.

[126] It should be noted that certain transcript pages are repeated in the "hardcopy" version. The page numbers cited above correspond to *Volume 13*, for the hearing held on July 14, 2022. Pages 2185 to 2283 are repeated on Transcript *Volume 14*, for the hearing held on July 19, 2022.

On August 18, 2020, Wilson submitted her resignation in an email sent to Sims and Banks. In her email, Wilson stated that she was resigning because of repeated Covid-19 cases at the store, including in the past 2 weeks, and her resulting unwillingness to put her family at risk.[127] It is unclear if Wilson worked again after July 24, the day she left work early after refusing to take off her BLM t-shirt.

9. The Events at the Seattle, Washington store

The Seattle store at issue is located near Lake Union, in the downtown area, and is known as the Westlake store because its address on Westlake Avenue. The store team leader (STL) during the summer of 2020 was Scott Williford, and the assistant store team leader (ASTL) was Larissa Downer. Two witnesses testified about the events at this store, Charging Party and alleged discriminatee Camille Tucker-Tolbert; and for Respondent, ASTL Downer.

(a) Camille Tucker-Tolbert[128]

Tolbert testified that she worked at the Westlake store from March to July 2020 as a food preparer, working on the salad and hot food bar. Her immediate supervisor was team leader Mike Harris. [129] In early June 2020, Tolbert testified, Seattle experienced demonstrations and protests associated with the Black Lives Matter (BLM) movement in the wake of the murder of George Floyd by the Minneapolis police. Some of these protests became violent, with looting, mayhem and fires set, and the Mayor of Seattle declared a curfew from 9 pm to 5 am. (Tr. 2616–2617; 2715; 2721–2723).

The first time Tolbert wore BLM messaging at work was on June 19, when she and about 8–12 other employees started wearing BLM masks in an act of "solidarity" to protest another employee being ordered to remove his BLM-related mask.[130] This employee, Charles Thompson, on June 13 or 14, had worn a mask that said, "I Can't Breathe," and was directed by management to remove it because it violated the dress code.[131] Tolbert testified that the purpose of their wearing the masks was to get WFM to allow employees to wear such messaging at work—to show their support for the movement.[132] Later that day, on June 19, ASTL Downer

[127] The email was admitted into evidence as RX 70. I would note that this exhibit completely undermines the General Counsel's allegation, as reflected in complaint par. 7(h)(iii), that Wilson was constructively discharged because Respondent forced her to choose between continued employment and wearing BLM messaging at work. The letter unambiguously and unequivocally states that she resigned because of Covid, and Wilson did not testify to the contrary.

[128] For brevity and convenience, I shall refer to Tucker-Tolbert as "Tolbert."

[129] The parties stipulated that ASTL Downer and Harris are statutory supervisors (JX 1).

[130] A photo of the BLM mask Tolbert wore was admitted into the record as GCX 81.

[131] The phrase "I Can't Breathe" is a direct quote of Floyd George's dying words as a policeman knelt on his neck. At first Tolbert suggested the mask Thompson was wearing might have said BLM, but then admitted that it said the former, which she saw him wear a work, the same mask depicted by a photograph introduced in the record. As discussed below, Downer also confirmed that the mask Thompson wore said "I Can't Breathe." (RX 85; Tr. 2626; 2725–2726; 2833–2834).

[132] On multiple on-line posts, Tolbert also suggests that at least part of the purpose for the wearing of BLM masks (and the protests by employees and others that followed, as discussed below) was to force WFM to abandon its "neutrality," and adopt the BLM movement (which she referred to as a "human rights' issue), because such

told Tolbert that she could not wear a BLM mask at work. Downer explained that it was in violation of the dress code to wear face masks with any writing, messages, or logos, adding that customers had called to complain that such face masks made them uncomfortable. According to Tolbert, Downer told her to go home, without offering her an alternative (Tr. 2621–2622; 2625–2626; 2641–2646).

On the following day, June 20, Tolbert again wore her BLM mask to work, and was again told by Downer that it was in violation of the dress code. This time Downer offered her a replacement mask, which Tolbert declined. Downer advised Tolbert that this would be considered a verbal warning, and that further violations would result in "corrective actions," which Tolbert was not familiar with, being a new employee. Downer counseled her to become familiar with the handbook, and allowed her to continue working that day, with the BLM mask in place (Tr. 2650–2651).

During this time, protests were held outside the store by employees of WFM, who were joined by some members of the community. The purpose of the protests, according to Tolbert, was to let people know that WFM was "censoring us, or censoring the BLM messaging . . . saying no to Black Lives Matter in the workplace." At these protests, beside signs that said BLM, employees carried signs that said, "No Justice No Peace," "Defund the Police," and "White Silence=Violence," among others, and chanted "No Justice, No Peace, No Racist Police." Around this time employees at the store, including Tolbert, also started an on-line petition, described as "an act of solidarity with the black community against racial injustice, police brutality, and anti-black violence," and which included three demands: Freedom of Speech—the right to show solidarity with BLM without retaliation; backpay of the lost wages for workers who missed shifts for supporting BLM; and ridding the store of armed guards (who were seen as extensions, or allies of, the police). Likewise, on June 25, store employees presented WFM Regional Manager Jorge Sosa with an open letter demanding that the dress code be changed to permit BLM messaging, and making similar demands as outlined above (Tr. 2646; 2653; 2663–2665; 2782; RX 89).[133]

Tolbert thereafter continued to wear her BLM mask at work on multiple occasions, drawing a succession of disciplinary warnings that culminated with her resignation on July 6, resulting in her separation from WFM effective July 11, 2020. Thus, she received disciplinary notices on June 22, 29, and July 4, 2020, for dress code infractions for wearing the BLM mask. On July 6, Tolbert submitted her resignation, writing that it was the direct result of the "retaliation" by WFM in the form of "corrective actions" issued to her, and protesting the "reprehensible" policy of not allowing employees to express their opposition to "racial injustice, systemic racism and police violence." (GCX 84/1-5; Tr. 2685–2694).

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neutrality in the face of black people being killed by the police (and others) was to be complicit (Tr. 2798; RX 87/4). I would also note that Tolbert acknowledged that she would have never worn a BLM mask at work but for the killing of George Floyd by the police (Tr. 2776)

[133] It should be noted, however, that none of these demands preceded the wearing of BLM messaging, but rather followed its suppression, and that thus no witness testified that these demands were the purpose for their wearing of BLM messaging. (Tr. 2804.)

(b) Respondent—Larissa Downer

Downer, the store's assistant store team leader (ASTL), in essence corroborated much of the testimony by Tolbert regarding the sequence of events described by her, but provided additional details—and perspective—regarding these events, which are worth noting.[134]

Thus, Downer testified that the first instance of an employee wearing BLM-related messaging occurred about 1 week prior to June 19 (the date when Tolbert and others displayed such messaging), when team member Charles Thompson wore a mask that said, "I Can't Breathe." Thompson was advised remove this mask, because it was in violation of the dress code, and he complied. On June 19 several employees, including Tolbert, wore BLM masks while working. Downer spoke to them, informing them that such masks were in violation of the dress code—but she did not inform them that they had to punch out and go home. According to Downer, Tolbert became very emotional and had tears in her eyes when she was told she would have to remove her BLM mask. Tolbert then asked if she could go home rather than remove her BLM mask, and Downer said she could—and Tolbert clocked out (Tr. 2833-2840).

Shortly after this, Downer noticed that some of the employees who had clocked out were holding protests just outside the store, protests that continued for several days.[135] On the next day, the same thing happened again, and several employees clocked out that day, including Tolbert. They were not disciplined or docked pay for clocking out on either June 19 or 20, according to Downer. Starting on June 22, however, employees who refused to remove their BLM masks—and were first offered replacement masks—started receiving disciplinary warnings.[136] Before being sent home or being disciplined, according to Downer, the protocol was the same—they were allowed a 30-minute grace period to change their masks, after which they were sent home if still noncompliant. They were not told to remove their BLM masks while they were on break, which was allowed, only if they wore such masks on the floor (not break rooms) during working time. Downer testified that employees were disciplined on the basis of dress code violations, not for time and attendance violations (Tr. 2840–2849).[137]

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[134] Downer additionally provided some background information that helps to understand the context of what was generally occurring in Seattle and specifically in the area around the store. Seattle, like other cities throughout the United States experienced rioting and violent clashes between BLM demonstrators and police, which led to the imposition of curfews in early June. Indeed, the store had to close early on one occasion because of a nearby riot. A police precinct station was located 2 blocks from the store, and there was much vandalism and anti-police graffiti (i.e., "Defund the Police," "All Cops Are Bastards" or its abbreviation "ACAB") in the immediate vicinity of the store—which itself had suffered broken windows. According to Downer, the situation at the time was "very tense." (Tr. 2826–2832).

[135] At these protests, employees were holding signs that said, Black Lives Matter" (or "BLM"), or "Defund the Police," "No Justice, No peace," and "White Silence is Violence." (Tr. 2851.) Downer testified that at no time did Tolbert ever say that she was wearing the BLM mask to protest working conditions at WFM, or that WFM was a racially discriminatory work environment (Tr. 2840; 2850).

[136] These employees included Thompson and Tolbert (who were Black) as well as Mia Alessandro and Cody Roush, who were Caucasian. This refutes Tolbert's assertion that African American employees were singled out for enforcement of dress code violations due to the wearing of BLM messaging (Tr. 2845–2846). Indeed, the vast majority of employees who were disciplined for displaying BLM messaging in the multiple locations throughout the country, including some of the most ardent advocates, were white.

[137] Downer acknowledged that "pronoun" pins were allowed, because they were not in violation of the dress code at the time. She did not recall employees wearing BLM pins or buttons, only masks (Tr. 2862).

10. The Events at the Petaluma, California store

The Petaluma store is located in Sonoma County, north of San Francisco. Two witnesses testified at hearing about the events at this store: Charging Party and alleged discriminatee Cassidy Visco; and for Respondent, Frank Avila, who was the store team leader (STL).[138]

(a) Cassidy Visco

Visco testified that she worked at WFM from August 2014 to April 2021, and that in the summer of 2020 she worked at the Petaluma store in the cheese and deli team. Her job in that position required her to wear a kitchen jacket and button-up black shirt with side pockets, which covered anything worn underneath, as well as a mask (during that period of time, due to Covid-19). As part of her uniform, she wore a nametag, covered in plastic and about the size of a credit card, pinned to her kitchen jacket.

Sometime in early June 2020, "right after the Geoge Floyd thing," Visco inserted a paper slip inside her name tag, in black relief with white lettering, that said "Black Lives Matter."[139] Visco testified that she did this in support of Black coworkers and customers, to show that WFM "was a safe place to be."[140] She did not believe that the inserts on her nametag were in violation of WFM policy, in light of its (professed) support for the BLM and LGTBQ movements, which were in line with the company's "ideology." In that regard, she had also observed that WFM's enforcement of its dress code was pretty lenient, in light of its permitting team members to wear sports logos and the like during playoffs. Visco testified that prior to her displaying the BLM messaging, she did not discuss this with any other coworkers, nor did any other coworker join her is displaying such messaging. She added, however, that soon after she displayed the BLM messaging, she had discussions about it with other employees, who told her they really appreciated it.

On July 7, according to Visco, she was approached by STL Frank Avila, who told her she would have to remove her BLM message from her nametag because it was in violation of the dress code. Visco replied that she did not feel comfortable doing so, and Avila said he would consult with the HR representative and circle back. A while later, Visco was asked to come to the office, where she met with Avila and Ricki McCarthy, the associate team member support generalist (the WFM equivalent of HR).[141] They told Visco that she could not wear the BLM message because it was controversial, and if they allowed such messaging other controversial (and political) messaging would have to be allowed, such as "Blue Lives Matter." They told her she would not be allowed to work on the floor if she insisted on displaying such message and

[138] The parties stipulated that Avila is a statutory supervisor, and that Associate Store Team Leaders (ASTLs) Alvina Hayden and Sean McNiff are as well (JX 1).
[139] A photo of Visco's nametag with the BLM insert was admitted into evidence as GCX 94. The photo also shows a series of "pride" flags also inserted inside the nametag, which Visco had done a few days earlier.
[140] She also testified that what she was hoping to accomplish by wearing the BLM messaging was "for my Black co-workers and customers to feel like there was a safe place" (Tr. 3009; 3011). Visco did not specify, nor was asked, from whom or what were WFM workers or customers meant to be safe from. It would be reasonable to infer, however, in light of its timing, that the perceived threat was the police.
[141] The parties stipulated that McCarthy was a statutory supervisor (JX1).

would be sent home. Visco decided not to remove the BLM message and went home. This occurred again on July 10, when she was sent home after refusing to remove the BLM message from her nametag.

On July 16, Visco posted a message on Instagram, challenging WFM purported view that BLM was a "political" message, and quoted BLM founder Alicia Garza about the meaning of BLM.[142] A few days later, on July 23, Visco communicated with Savannah Kinzer, one of the WFM employees and BLM activists at the Cambridge, MA store, via a messaging app, and inquired about joining a petition being filed with WFM about being allowed to wear BLM messaging—and about joining a lawsuit that Kinzer was part of.[143]

On July 25, ASTL Alvina Layden asked Visco to come to the office and told her to remove the BLM message on her nametag or be sent home, incurring disciplinary "points" for being absent from work. Visco declined to remove the BLM message, saying she didn't feel comfortable doing so, and was accordingly sent home. On that same day, Visco was issued a "Corrective Counseling Notice" by Layden for absenteeism after having been sent home on July 7, 10 and 25 on account of wearing BLM messaging. On August 2, Visco was again sent home early for wearing a BLM massage on her nametag, and was issued another Corrective Counseling Notice on August 15 by Layden, for her absence on August 2 as well as earlier on July 26.[144]

Visco admitted during cross-examination that neither she, nor any other employee at the store, ever wore a BLM facemask. She only wore BLM messaging in the form of a slip of paper inserted in her nametag, as described above, and was the only employee at the store to do so.[145]

(b) Respondent—Frank Avila

Avila essentially confirmed much of Visco's testimony but provided additional details and context about the events. He also made an important correction regarding the disciplinary warnings issued to Visco, as discussed below.

Avila confirmed that no employee wore or displayed BLM messaging at the Petaluma store other than Visco. He authenticated internal emails between store managers confirming that Visco was sent home on July 7, 10 and 25, as well as August 2, for refusing to remove the BLM messaging from her nametag.[146] He testified, however, that the Corrective Counseling Notice issued to Visco on July 25 was later rescinded, at the direction of the WFM's regional office,

[142] The posting, including the Garza quote, was received in evidence as GCX 96.
[143] The messages between Visco and Kinzer were admitted as GCX 96.
[144] A copy of the July 25 and August 15 Corrective Counseling Notices was admitted as GCX 97/1-4.
[145] I would note that this contradicts the allegations of both the Board charge she filed, and par. 7(j) of the complaint, which alleges that Respondent warned employees not to wear BLM *masks*, and issued Visco disciplinary warnings for doing so. The General Counsel made no attempt to amend the complaint, despite the unequivocal evidence from its own witness that such allegations were not accurate.
[146] These emails were admitted into evidence as RXs 94 and 95. I would note that while they provide some more details about the interactions between Visco and management regarding her wearing of BLM messaging, the content of the emails in no significant or truly relevant way contradicts the basic story of the events as testified to by Visco.

because it should not have been a "time and attendance" violation, as it stated, but rather a *dress code* violation.[147] Thus, the only disciplinary action issued to Visco which is still in effect is the Corrective Counseling Notice issued to her on August 15, 2020.[148]

Avila, who has worked for WFM for 13 years and at the Petaluma store for 8 years, testified that he is not aware of any complaints or allegations of racial discrimination or bias at the Petaluma store.

11. The Events at the Berkeley, California store

Three witnesses testified about the events at the Berkeley store, located on Telegraph Avenue: Ana Belén Del Rio Ramirez and Christopher (AKA "Maddy") Michno, both Charging Parties and alleged discriminatees, for the General Counsel; and Jessica Rodriguez for Respondent.

(a) Ana Belén Del Rio Ramirez ("Ramirez")[149]

Ramirez testified that she worked for WFM at three locations from June 2016 to July 2020, and in the summer of 2020 was working at the Berkeley store. At the time, she was working as a "Whole Body buyer," tasked with checking product tags and replenishing merchandise, and spent about 90% of her time "on the floor" at the front (or public) portion of the store. At the time, the store team leader (STL) was Kelly Fox; the associate store team leaders (ASTLs) were Jessica Rodriguez and Tanda Brown; and the whole body team leader (TL), Ramirez' direct supervisor, was Angel Ruiz.[150] (Tr. 2886—2887.)

Ramirez testified that she first became aware of the BLM movement in the wake of the killing of Geroge Floyd and the ensuing national protests, which she followed on the news and national media. Sometime around June 19, 2020, the exact date being unclear, Ramirez began to wear both a mask that said, "Black Lives Matter" as well as a pin with the same message.[151] Ramirez testified that she wore the BLM messaging to "show support for some of the things that happened at the store." By way of explanation, she testified that sometime in June (date uncertain) she received a text from a coworker named Bella, who informed her that a team leader named Darnelle, who is African American, had been directed by management to remove a Black Lives Matter that he had on his desk (in the office).[152] Apparently, this offended Bella and

[147] The July 25 counseling notice was admitted in the record as GCX 97/1-–2, and also as RX 96/1–2.

[148] It isn't clear if Visco was ever informed of this, however.

[149] For purposes of brevity, I will refer to Del Rio Ramirez as "Ramirez," with no disrespect intended. I note that while the parties referred to her by using "Belen," that is typically a middle name in Latino (or Latinx) culture, not a last name. I also note that the complaint also refers to her as Ramirez.

[150] The parties stipulated all of them to be statutory supervisors (JX1).

[151] For some unexplained reason, Ramirez was never specifically asked on what date she started to wear BLM messaging but based on her over-all testimony and the surrounding circumstances, it appears that the date was on June 19 ("Juneteenth"), a date chosen by the employees at the store to wear black clothing and BLM messaging. A photo of the mask and pin that Ramirez with BLM messaging that Ramirez wore was admitted into evidence as GCX 89/1; 3.

[152] It should be noted that team leaders such as Darnelle were stipulated to be statutory supervisors by the parties. Ramirez testified that she and Bella objected to the fact that nothing in the GIG (rules), in their view, allowed management to direct (a supervisor . . .) to remove a BLM sign, particularly given the fact that the BLM sign, which

Ramirez. Bella then started donning a BLM mask on (or about June 14), and she told Ramirez that on that date she was sent home by STL Kelly Fox because she refused to remove such mask.[153]

Sometime later on the same day, STL Fox came to their department and met with Ramirez and a couple of other employees and said to them that she had sent Bella home because she refused to remove her BLM mask. Ramirez asked Fox where in the GIG (rules) was there a prohibition on such messaging, which Ramirez testified she believed was not covered by the GIG.[154] but Fox did not reply, only stating that BLM was a "political" message—which Ramirez refuted, saying it wasn't. Fox then said it was a safety issue, since such messaging might lead to confrontations with those that disagreed with it.

As a result of these events, a group of employees, including Ramirez, created an on-line chat and decided to hold a protest on June 19 ("Juneteenth), which included the wearing of black clothing items and BLM masks, patches and pins to work. A flyer was created for the occasion, which was distributed online.[155] On June 17, Fox (along with TL Angel Ruiz), held a meeting with Ramirez and other team members, during which she announced that after consulting with (WFM) regional management, the (GIG) dress code prohibiting messaging would not be enforced. Thereafter, beginning on June 19 (as previously planned) about 15 to 20 employees, including Ramirez, started wearing BLM messaging on masks, t-shirts, and pins at work, without interference from management. Ramirez testified that she wore these items with BLM messaging to work about 3–4 times per week during the following 3–4 weeks or so.

On July 7, 2020, while the "no-enforcement" policy was still in effect, Ramirez submitted her resignation from WFM, effective July 18, because she had found another job in the non-profit field.[156]

The non-enforcement policy was in effect from June 17 through July 14, during which employees were allowed to wear BLM masks and other such items. On July 14, Fox announced at a meeting that henceforth WFM would be enforcing the policy against any type of messaging on clothing, including masks. On July 15, Ramirez wore a BLM pin to work, and was directed

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was about "race," was something that went "to the core of his identity" as a black man. (Tr. 2901.) How Ramirez (and Bella) came to these conclusions is quite the mystery, given that neither Bella nor Ramirez witnessed this incident nor spoke to Darnelle, but learned this information second—or third hand. It strains credulity, to say the least.

[153] According to Ramirez, another reason that she (and Bella) was prompted to wear BLM messaging was that she learned from an employee named Gee that he had been directed by his team leader to remove his mask because it had a Mexican flag on it. It is difficult to understand the connection between wearing BLM messaging and wearing a mask with a Mexican flag, but it appears that Ramirez believed that minority groups should be allowed to display messaging related to their race or heritage. Ramirez testimony was very convoluted and difficult to follow at times.

[154] Ramirez contradicted herself during cross-examination, however, admitting that she knew, prior to the BLM incidents, that masks had to conform to the dress code, which prohibited messaging or political statements (Tr. 2952). This negatively reflects on her credibility, I conclude.

[155] A copy of the flyer was admitted int evidence as GCX 92/1.

[156] Ramirez's resignation letter, which she signed and submitted to WFM on July 7, was admitted into evidence as GCX/2. Ramirez admitted during cross-examination that she had accepted a job offer and would begin working for the new employer on July 20 (Tr. 2958). As discussed below, this admission and sequence of events has a bearing on Ramirez's credibility regarding her reasons for resigning.

by her team leader, Angel Ruiz, to take it off. Ramirez refused and was directed to meet with ASTL Jessica Rodriguez. Ramirez told Rodriguez during their meeting that she would not take her BLM pin off, and Rodriguez told her she would be sent home if she didn't. Rodriguez asked Ramirez, whom she knew had resigned and was last scheduled to work on June 18, if she intended to continue to wear the BLM pin in the next 3 days. Ramirez told her she intended to wear that pin until her last day, and Rodriguez then informed her that she would be sent home if she did. In light of this, they both decided to make that day (July 15) Ramirez' official last day at work.

I would note that the complaint alleges that Ramirez was discharged, at least in part, because she insisted on wearing BLM messaging, and in the alternative, pleads that she was constructively discharged by forcing her to choose between continued employment with Respondent and wearing BLM messaging at work.[157] In that regard, I note that during cross-examination, Ramirez admitted that in her original Board affidavit, dated August 3, 2020 (about 3 weeks after she stopped working at WFM), provided in support of the charge she had filed, she only noted she had submitted her resignation and given 2 weeks' notice—without providing a reason. Yet, in her supplemental affidavit, provided almost a year later, on June 10, 2021,she states, for the first time, that she resigned because of WMF's discriminatory and retaliatory response to its employees' wearing BLM messaging (Tr. 2962–2965). I do not find Ramirez credible, to the extent that her testimony suggests that she resigned for this reason, as the General Counsel implies. In that regard, I note that her resignation letter says nothing of the kind, and to the contrary states that she resigned to pursue different opportunities. Moreover, her contemporary on-line commentaries at the time, as reflected in GCX 89/3–4, do not suggest that she resigned for this reason—only that she had to cut last days at WFM short because she refused to remove her BLM pin. Thus, I conclude that this alleged reason for her resignation was a post-hoc rationalization that does not conform to the factual record.

(b) Christopher ("Maddy") Michno

Christopher Michno, also known as "Maddy," is a Charging Party and alleged discriminatee in this case. He testified that worked for WFM from October 2017 until September 13, 2020. At the time of the events at issue herein, he was working at the Telegraph Avenue store in Berkeley, in the Specialty team.

According to Michno, he is familiar with the BLM movement from living in Oakland, where there is a lot of activism and protests, a movement that he said was about systemic oppression and police brutality. He started to wear masks and t-shirts with BLM messaging at work in early June 2020, in the wake of the killing of George Floyd, after he saw other employees wearing such masks.[158] He testified that he wore such messaging to show

[157] Complaint par. 7(l)(iii)(iv).

[158] Michno admitted that the employees at the Berkeley store started wearing BLM messaging in response to learning that a Black supervisor (Darnelle) had been asked by his superiors to remove the BLM sign from his desk (Tr. 3225.)

"solidarity" with Black coworkers, as a visual representation that he was available to "listen," to "hold them" and make them feel "safe." (Tr. 3110–3111; 3115–3118; 3175.)[159]

Michno testified that he had his first conversation with management about his BLM mask sometime in June, shortly after he first started to wear the mask. According to Michno, at the time he had a conversation with Store Team Leader Kelly Fox in the office, during which she told him that he should remove the mask, because it might offend someone. Michno declined to do so, stating that he was wearing the mask in response to police brutality, but also adding that it was about "systemic oppression" and honoring Black customers and coworkers.[160] He continued to wear the BLM mask at this time, without incurring disciplinary action. The second time he had a conversation with management about the BLM mask occurred on July 16, when ASTLs Jessica Rodriguez and Tanda Brown told him the mask was in violation of WFM's dress code and directed him to replace it (with a mask with no message). Michno refused to remove or replace his mask but was not directed to clock out and continued to work. On July 22, Michno was issued a "Corrective Counseling Notice" for violating the dress code (GIG) by refusing to replace his BLM mask on July 16.[161] In the space provided in the form for comments by the team member, Michno wrote, inter alia, that directing team members to remove BLM messaging was a "racist policy," and that he would continue "to strive for an anti-racist work environment"[162] (Tr. 3128–3135; GCX 100/1–2).

According to Michno, he stopped wearing the BLM mask for a while following the July 22 disciplinary action, after speaking to Black coworkers who advised him to do so to avoid possible termination. He resumed wearing the BLM mask later, however, and on September 7, Michno was issued another Corrective Counseling Notice by Rodriguez, for refusing to remove and replace his BLM mask on September 6.[163] On September 9 he was issued another Corrective Counseling Notice, this time for violating the dress code on two occasions, September 7 and 8, by refusing to remove his BLM mask. This Notice indicated that it was a "Final Corrective Counseling," and that further similar violations of the dress code could result in termination.[164]

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[159] Several photos of the BLM masks that Michno wore were admitted into evidence as GCX 99/1–4. Michno testified that he wore a full WFM apron over his clothing at work, which may have covered the BLM messaging on a t-shirt.

[160] At this juncture I must note that Michno was a poor witness, who often had to have his memory refreshed with his affidavit or prodded with leading or suggestive questions—which still failed to evoke a cogent response, and often repeated that he did not recall the details of a conversation or event. This started early, with the description of this conversation with Fox, and continued throughout his testimony, making his testimony extremely difficult to follow or fully understand. In short, he was not a credible or reliable witness.

[161] This corrective action was admitted into evidence as GCX 100/1–2. This exhibit, as described below, also contains several other corrective actions later issued to Michno.

[162] During cross-examination Michno explained that he believed that by not allowing BLM messaging WFM was creating a "space that was safe for racists," and was hence a "racist work environment." He clarified, however, that he was not accusing anyone at WFM of being racist (Tr. 3180–3183).

[163] This disciplinary action is contained in GCX 100/5-6. The prior day, on September 6, Michno was issued a Corrective Counseling Notice for allowing expired foods to remain on the shelves—something completely unconnected to his BLM activity (GCX 100/3–4)

[164] GCX 100/7–8. In the space provided for comments by the team member Michno wrote that he would continue to wear BLM messaging, and that he would use his (White) "privilege" to advocate for his fellow Black coworkers "who are systematically oppressed and face discrimination in our workplace for expressing that their lives matter…"

On September 9 and 10 Michno again refused to remove his BLM mask at work and was therefore issued a "Team member Separation Form" on September 13 advising him that he was being discharged for his repeated violations of the dress code.[165]

(c) Respondent—Jessica Rodriguez

Rodriguez, the assistant store team leader at the Berkeley store during these events, generally confirmed the disciplinary actions taken against Ramirez and Michno, as described in their testimony. She provided, however, some additional information about these events that was missing from their testimony, that helped provide context.

Rodriguez testified that Store Team Leader Fox instituted a store rule, somewhat at variance with the GIG dress code, allowing team members to wear sport team logos on game days. According to Rodriguez, Fox also instructed the managers and supervisors to take no (disciplinary) action against team members regarding their wearing of BLM messaging until they got word from member services (the HR equivalent at WFM). In mid-July 2020, they received word, and announced during team member "huddles" that BLM messaging was not in compliance with the dress code.[166]

Pursuant to this policy, she informed Ramirez on July 15 that she needed to remove her BLM pin, but she refused and was accordingly instructed to clock out and go home. Since Rodriguez was aware that Ramirez had already resigned, with her last day scheduled for July 18, she asked Ramirez whether she intended to again wear her BLM pin over the next 3 days, which would again result in her being sent home if she refused to remove it. Ramirez told her that is what she intended to do, so they agreed to make that day (July 15) her official last day at work. Later that day, Rodriguez called Jessica Charney at member services to report what had occurred with Ramirez. Charney informed Rodriguez that the revised policy was *not* to send home team members who refused to remove their BLM messaging, contrary to what had been done regarding Ramirez. Accordingly, Rodrigues asked the other ASTL at the store, Tanda Brown, to call Ramirez and inform her that she could come back (and work her last 3 days). Brown did so, and reported back to Rodriguez that Ramirez had declined the offer to come back.

Rodriguez confirmed the sequence of events and disciplinary actions regarding Michno that culminated in his discharge on September 13.

C. The "Dress Code" Rules at Issue

As briefly described above, in is undisputed that WFM's General Information Guidebook ("GIG")—its handbook for employees—since at least May of 2020, and perhaps as early as 2014, as discussed below, contained the following language:

> Following are the basic, minimum guidelines for all Whole Foods Market retail stores. The Regional Policies section of this guide may contain additional guidelines. You should also

[165] GCX 100/9–10.

[166] A copy of the updated dress code was introduced as RX 98.

> refer to your store or team's individual guidelines for additional requirements. Team Members who work in Whole Foods Market support facilities or offices should consult their location's specific guidelines.
>
> . . .
>
> - You must wear Whole Foods Market shirts/tops (or those from the Whole Foods Market family, for example Allegro Coffee; vendors/suppliers; or industry related organizations with which we are affiliated) or shirts/tops without any visible slogan, message, logo or advertising on them. Where required, only store hats may be worn. Hats from other companies, including Whole Foods Market vendors, are not permitted. Aprons will be provided to Team Members working in a department that requires an apron to be worn.
> - No visible offensive tattoos.
>
> Please refer to your region or location for additional requirements, including guidelines for shorts, jewelry/piercings, and team-specific requirements. Your local Health Department may have additional dress code requirements for Team Members working in food preparation; your Team Leader will let you know of any such requirements. Remember, the final determination on the acceptability of your appearance at work is up to the leadership of the location where you work;[167]

It is also undisputed that since at least November 7, 2020, the following update to WFM's dress code policy has been part of the GIG and has been in effect:

> "This policy applies to "apparel", [sic] which is defined as anything worn by or decorating Team Members, including all clothing, shoes, gloves, accessories (including eyewear), jewelry, piercings, belts, hats, and head coverings or other items worn in the hair. Except for Company-provided [Employer] uniforms, Company Logo Shirts, and the Exceptions and Variations identified below, apparel worn by Team Members must be without any visible symbol, flag, slogan, message, logo or advertising.. . .
>
> Nothing in this Dress Code policy shall prohibit a Team Member who works on the sales floor or when encountering customers during their working time from wearing a union-affiliated pin, button, or insignia for the purpose of supporting or opposing a labor organization or otherwise legally protected activity, provided that it is no larger than the [Employer-]provided name badge, non-distracting and otherwise adheres to the Dress Code."

Finally, it is undisputed that the language of the May 2020 dress policy in the GIG, as described above, was the product and direct result of the 2013 Settlement Agreement(s) between Respondent WFM and the General Counsel of the Board, except for one word which was

[167] It is also undisputed that since at least April 2020, in light of the requirement that employees wear masks in the wake of the Covid-19 pandemic, the following rule was also in effect:

> "[H]omemade or reusable cloth masks must adhere to [Respondent's] dress code as outlined in the GIG; any mask or protective equipment must be without any visible slogan, message, logo or advertising;"

omitted from the language contained in such agreement(s), as described below.[168] Thus, the agreed-upon language regarding the dress code to be used in Respondent's GIG pursuant to the 2013 settlement agreement(s) was a follows:

- You must wear Whole Foods Market shirts/tops (or those from the Whole Foods Market family, for example Allegro Coffee; vendors/suppliers; or industry related organizations with which we are affiliated) or shirts/tops without any visible slogan, message, logo or advertising *printed* on them. Where required, only store hats may be worn. Hats from other companies, including Whole Foods Market vendors, are not permitted. Aprons will be provided to Team Members working in a department that requires an apron to be worn. (emphasis provided)
- No visible offensive tattoos.

The record is silent as to how, why, and exactly when, the word "printed," as emphasized immediately above, as agreed upon, was omitted from the GIG, but it appears that this omission was present as early as the 2014 version of the GIG.[169] In any event, there is no dispute that the 2020 version of the GIG, as alleged in the complaint, was identical to the version in the 2013 Settlement Agreement(s), as described above, except for the word "printed," which was omitted.[170]

Regarding the application and implementation of its dress code rules under the GIG, among other things, Respondent proffered the testimony of Barbara Smith, its vice president of team member services, as discussed previously, WFM's name for its HR department. Smith testified, for example, that while the "national GIG" dress policies applied to all the WFM regions throughout the country, each region had the prerogative of setting different (stricter) standards.[171] This national dress code policy allowed for the wearing of union pins, buttons and other insignia, according to Smith.[172] Smith also explained that face masks, which had been made mandatory on April 13, 2020, pursuant to the "mandatory Facemask SOP (GCX 4), were subject to the dress code because they are considered "personal protective equipment (PPE)" which is covered by the dress code.

Sometime around early June 2020, Smith started receiving reports that team members were very upset in the wake of the killing of Geroge Floyd and the ensuing unrest that resulted,

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[168] The Regional Directors for Regions 1 and 13, in their capacity as representatives of the General Counsel, approved these Settlement Agreements. These agreements, including the certification of compliance regarding the posting of the required Notices, were introduced into evidence As Rx 99/4–36.

[169] Respondent asserts that it was an inadvertent error, but there is no evidence in the record, however, as to how or why this occurred. Whether it was an inadvertent or intentional act, it was a consequential one, as discussed below.

[170] On April 27, 2022, Respondent filed a motion to partially dismiss [par. 6(a)(ii)] of the complaint on the basis of the settlement agreement, as well as a motion *in limine* to prevent the General Counsel from amending the complaint to allege that par. 6(a)(ii) violated Sec. 8(a)(1) of the Act-which the original complaint had failed to do. I reserved my ruling regarding Respondent's motion to dismiss, which I will address below, but allowed the General Counsel during the first day of the in-person hearing in Boston on May 3, 2022, to orally amend the complaint to allege that the conduct alleged in par. 6 of the complaint violated Sec. 8(a)(1) of the Act (Tr. 33–36).

[171] The national dress code is contained in the first 80 pages of the National GIG (GCX3/ bates stamp 37-194)

[172] I would note that at least one manager confirmed in his testimony that this was the policy, and that at least one team member, Justine O'Neill, as described earlier, was allowed to wear a union pin without hinderance, prior to the November 2020 codification of such policy.

and that some of them started to wear messaging that said, "BLM," or "No Justice No Peace," or "I Can't Breathe." As a result, Smith and her team member services team started to hold discussions with regional presidents and executive leaders about this issue. The discussions were not about whether such messaging violated the dress code, because it did—but on how to approach informing team members of this, in light of the sensitive and "volatile" nature of the subject and given that team members were "impassioned" about it. The goal, Smith testified, was to enforce the dress policy while being "understanding and respectful" of team members opinions, and to give them a choice (of complying with the dress code or being sent home).

As a result of these discussions, Smith became aware that the dress code was not being applied and enforced consistently throughout the country. Her team thus prepared a presentation via a series of "slides" about how to enforce the dress codes, sent to regional presidents by email.[173] The presentation directed the regions to give team members a choice of complying with the dress code or being sent home, with applicable time and attendance infractions.[174] Smith testified that the dress code did not apply to team members on break or lunch, or before/after they clocked in/out. Likewise, the dress code (at this time), did not apply to temporary body tattoos or jewelry. Smith acknowledged that WFM "pulled back" on supporting (or even sponsoring) LGTBQ ("pride") messaging during the summer of 2020, after team members pointed out the apparent inconsistency in allowing such messaging while banning BLM messaging.

Finally, Smith testified that the revisions/update of the dress code (in the GIG) in the fall of 2020, as described above, started being implemented in October 2020.[175]

D. The Testimony of Expert Witnesses

Both the General Counsel and Respondent proffered the testimony of expert witnesses, arguably to establish what is the "objectively understood" meaning of the Black Lives Matter movement and its goals. The General Counsel proffered the testimony of Dr. Keeanga-Yamahtta Taylor, a professor of African American studies at Princeton University in New Jersey. Respondent proffered the testimony of Dr. Donald Davison, a professor of political science at Rollins College in Florida. Their testimony is summarized below.

1. Dr. Keeanga-Yamahtta Taylor

Dr. Taylor's credentials as an expert in African American studies, particularly with regards to African American history in the 20th century, are well established. As reflected by

[173] A copy of this presentation was introduced into evidence as RX 118.

[174] According to Smith, this directive was issued not only because team members were wearing BLM messaging, but also other messaging, such as Make America Great Again (MAGA) hats and masks, which also violated the dress code. Indeed, Smith testified that WFM was concerned that allowing BLM messaging would open the door to other political messaging or other "volatile issues."

[175] This dress code, which the complaint alleges to have been implemented since at least November 7, 2020, is contained in GCX 5/17–18.

her Curriculum Vitae, she has written and lectured extensively on the Black Lives Matter (BLM) movement and its history.[176]

According to Dr. Taylor, the BLM movement first arose as a "social movement" in response to the killing of Travor Martin in 2012 and the acquittal of his killer (George Zimmerman) in 2013 and gained additional momentum in 2014 in the wake of the killing of Mike Brown by police in Ferguson, Missouri, in 2014. Its cofounders, who came up with the slogan "Black Lives Matter," were Alicia Garza and Patrice Cullors. She testified that the founders' saw it as an "expansive" movement, not just about police brutality, but one to "attend to" all the issues that undermined black lives. She admitted that the movement had reached its nadir, having become "dormant," in early 2020, before resurging in the wake of the murder of George Floyd in May 2020. She explained that movements such as BLM, need a "catalyst," and the killing of Floyd was the catalyst in 2020, just as the killing of Brown had been in 2014.

Dr. Taylor was specifically asked by the General Counsel to provide her expert opinion on three (3) issues:

1. The historic relationship between civil rights movement(s) and the labor movement for people of color;
2. What Black Lives Matter (BLM) is broadly understood to mean both in the field of academic study as well as within the public realm; and
3. To what extent BLM has evolved through time and history, and particularly through the summer of 2020, to be understood in academia and the public realm to include the object of seeking racial justice in the workplace.[177]

Regarding the first question, Dr. Taylor testified that since the 1920's, there has been a historical pattern of connection between civil rights movements and labor or employment issues, because economic injustice and inequality, fueled by discrimination, made African Americans disproportionately impoverished—which in turn lead to protests to raise living standards. Dr. Talor thus explained that while police brutality was always the spark for protests, their duration and intensity was partly driven by inequality, which has been a theme for protests throughout the 20th and now 21st Centuries.

With regard to the second question, as to what was BLM "broadly" understood to mean, Dr. Taylor answered by saying that she did not know that there was a "common understanding" of the meaning of BLM, but reiterated that the founders of the movement saw it as an expansive movement.[178] She later testified that she "would say," based on the discussions and portrayal of

[176] Dr. Taylor's CV was admitted into evidence as GCX 61. Respondent does not dispute Dr. Taylor's expertise on African American studies and history (Tr. 2013) but does object to the relevance of her testimony. I will address such issue below.

[177] This question, as posed, if not leading, is definitely suggestive—in other words, Dr. Taylor's answer was not going to be a mystery, and certainly not a surprise to the General Counsel—or anyone else. Indeed, she admitted that she had formed her opinion(s) before she was asked to testify by the General Counsel (Tr. 1998.)

[178] Dr. Taylor gave this answer both on direct examination as well as cross-examination (Tr. 2021–2022; 2047–2048.). This appears to contradict her earlier testimony that BLM, "from its inception," has "always been understood" to be a wide-ranging movement intended not just to respond to issues of police brutality, but to deal with a much wider spectrum of inequality in black life (Tr. 2002). I note, however, that Dr. Taylor did not explain

the protests in the media, that the public came to have a broader understanding of BLM being not just about police brutality, but about "systemic racism," which would include racial discrimination in the workplace, among others.[179]

Finally, with regard to the third question posed by the General Counsel, Dr. Taylor testified that the pattern of Black protests throughout history has been the link between racial discrimination and economic inequality, and about changing these economic conditions that make Black people vulnerable to abusive policing. In her view, there was no deviation in this pattern in the summer of 2020, opining that the pandemic heightened Black inequality, inasmuch Blacks disproportionally worked in public-facing essential jobs, which made them more vulnerable—and hence the "systemic racism" rallying cry of the 2020 protests.[180]

2. Dr. Donald Davison

Dr. Davison is professor of political science at Rollins College, whose expertise is related to the formulation and methodology of conducting public surveys.[181] He testified he works on a daily basis preparing surveys and performing research on these.

Dr. Davison was commissioned by Respondent to investigate and explore the following issue: What does the public identify to be the goal of the Black Lives Matter movement? Accordingly, he performed research into what the BLM movement is objectively understood to

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by whom it had "always been understood" what BLM was about, other than its founders or, if by others, how she arrived at this conclusion.

[179] In support of this testimony, the General Counsel sought to introduce into evidence a poll conducted by the Pew Research Center, as described by Dr. Taylor, showing the public's support for, or popularity of, BLM during the summers of 2020 as well as 2021. I rejected the proffered exhibit (GCX 62), because the "popularity" of BLM doesn't establish what the public understood it to mean or that it understood what its objectives were, let alone show that there was a nexus of BLM to issues related to the workplace (Tr. 2032). I would also note that an article that appeared on the Associated Press website on July 12, 2023, would appear to contradict Dr. Taylor's opinion that the BLM movement is primarily seen as one that opposes systemic racism. The article, appearing under the headline "Black Lives Matter movement marks 10 years of activism and renews its call to defund the police," describes how the Black Lives Matter Global Network Foundation, one of the two main organizations related to the BLM movement, planned to celebrate the 10-year anniversary of the movement by renewing its call to defund the police. As part of this effort, it was launching a campaign called "Defund the Police Week of Action," and releasing digital ads "renewing the 2020 rallying cries" for defunding police departments. Attached is a link to the article: https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fapnews.com%2Farticle%2Fblack-lives-matter-10th-anniversary-trayvon-martin-c2d79ae4639934ca1eb77d6b54c16f8b&data=05%7C01%7Cariel.sotolongo%40nlrb.gov%7C874ab174165e4588ad1b08dbeb9e25e6%7C5e453ed8e33843bb90754ed5b8a8caa4%7C0%7C0%7C638362836712217224%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=fi8gCFR2vsChlo4Ylj8Nr%2FPyIODXwXF9ub9BkUE0Y34%3D&reserved=0

[180] Again, Dr. Tayor did not explain how she had arrived at this conclusion, other than basing it on her own writings. Her opinion that nothing had changed in 2020 is curious, particularly in view of her observation that the 2020 BLM protests were different than those that had preceded it, in that in 2020 the participants included (large) numbers of Whites, Asians, and Latinos (Tr. 2043–2044).

[181] Dr. Davison's Curriculum Vitae (CV) is in evidence as RX 100. He obtained his PhD from Washington University on formal theory and methodology.

mean to the (general) public, including the primary goals and/or purpose the public associates with BLM. To that end, he formulated and prepared a public survey to answer that question.[182]

Prior to constructing his survey, Dr. Davison testified, he researched whether there were any current or contemporary surveys that addressed that same issue. He found that there were none. The only surveys that had been conducted about the BLM movement did not address in any way what its perceived goals were, but rather addressed whether the public had favorable or unfavorable views of the movement, whether they public supported the movement or not, and whether the public viewed the movement as helping or harming racial issues in the country.

In constructing the survey, Dr. Davison started with an "open-ended" question, considered by pollsters to be the most reliable. The question asked was: "In a few words, describe what you believe or understand to be the goals or purpose of the Black Lives Matter movement." This question was followed by a series of closed-ended questions, which were narrower in scope, which were asked in random order, but the open-ended question always preceded the closed ones.[183] Dr. Davison chose YouGov to conduct the survey, a polling organization that he testified has a very good reputation for reliable, accurate surveys.[184] The polling was conducted online, among 2239 respondents, of whom 1785 chose to participate, using a random sample provided by American Community Survey, which uses census data, considered high quality data.[185] Dr. Davison testified that in his opinion the methodology used in the survey was very reliable. The survey was conducted between January 28 and February 7, 2022.

According to Dr. Davison, in answering the open-ended question, only 27 survey participants, representing 1.7 percent, out of 1785, mentioned employment, or employment-related issues, as being associated with Black Lives Matter. By contrast, a total of 782 respondents, amounting to 44 percent, mentioned the police, police brutality, or the criminal justice system as associated with the goals of Black Lives Matter—30 times the number of those that mentioned employment as an issue associated with BLM. The results of the answers to the closed-ended questions, which asked respondents to rank their association of BLM with certain selected issues on a scale of 1 to 10 (with 1–3 being the lowest and 8–10 being the highest), aligned with the results of the answers to the open-ended question, according to Dr. Davison.[186]

In light of these results, Dr. Davison opined that the "take away" is that the public overwhelmingly associated BLM with criminal (racial) justice, and particularly with the

[182] Dr. Davison testified that he was not provided any information about the instant case, nor looked at the pleadings. He also testified that he has not published any works related to the BLM movement. (Tr. 3383–3384.)

[183] The entire survey, including these questions, was admitted into evidence as RX 114.

[184] A ranking of polling organizations by FiveThirtyEight, which shows YouGov to be ranked among the top polling organizations was admitted in the record as RX 101.

[185] The exact methodology used in the survey is contained in an exhibit admitted in the record as RX 102.

[186] During cross-examination, the General Counsel attempted to show that Dr. Davison had misinterpreted the data regarding the answers to the closed-ended questions, in that the answers that fell within rankings of 4–7 in the scale of importance of certain issues were not given enough weight. Dr. Davison explained, however, that the answers that fell in those categories were considered (as shown in exhibits RX 105 and RX 106), and that in any event almost 90% of the answers fell in the 1–3 or 8–10 categories, which signifies that those answers in the 4–7 scale would not have a significant impact on the final analysis (Tr. 3522–3529). I credit Dr. Davison's explanation.

excessive use of force by police and vigilantes against African Americans. Correspondingly, he testified, a minority associated BLM with work-place issues.[187] According to Dr. Davison, the survey was consistent in these results across the gender, educational, and economic backgrounds of the respondents.

Below, I will discuss whether in light of all the circumstances, the allegations of the complaint, and the theories of violations of the Act proffered by the General Counsel in support of said allegations, the above-summarized testimony of the expert witnesses, Dr Taylor and Dr. Davison, are relevant to the issues before me—and if so, how much weight I will give such testimony.

IV. ANALYSIS

A. The Issues Presented

The central issue in this case, around which most of the other issues gravitate, is whether Respondent's employees who donned "Black Lives Matter" (BLM) messaging while at work were engaged in protected concerted activity within the meaning of Section 7 of the Act.[188] At the outset, it is clear—and there is no dispute—that except for several instances where an employee was the only individual who donned such messaging at his/her/their particular store, which will be addressed below, employees at most stores were acting in concert with others who similarly donned such messaging. Indeed, as discussed in the Facts section, in many instances employees started donning BLM messaging, by wearing masks, pins or jewelry, after learning that employees in other stores were doing so—and in response to learning that employees were being told by Respondent that they could not do so. Accordingly, for the most part this activity was clearly *concerted*; the central issue at hand is whether such conduct was *protected* by Section 7 of the Act. The answer to that question would in turn provide the answer to the question of whether, as alleged, Respondent acted unlawfully by prohibiting its employees from displaying BLM messaging, and whether it acted unlawfully by disciplining them for doing so. Also, at issue is whether Respondent's dress code, both in the version as it existed from 2013 to late 2020, as well as its revision in October/November 2020, was facially unlawful or unlawful because it was implemented in response to protected activity (in the case of the revision). Subsumed under that issue, is the question of whether the General Counsel is barred from alleging the unlawfulness of the pre-October 2020 version of the dress code pursuant to a Settlement Agreement it entered into with Respondent in 2013. Finally, assuming the answers to the above questions are favorable to the General Counsel, an issue exists as to the scope and reach of a proper remedy. I will address these issues and questions below.

[187] Indeed, according to Dr. Davison, a larger portion of the minority of respondents associated BLM with racial discrimination in areas such as voting rights, education, and health care than they did in the area of employment.
[188] By using the term "while at work," I mean while employees were on the floor of the stores during working time, not while they were on break or in break rooms, or before or after they clocked out. There is no evidence or allegations that employees were prohibited from donning BLM messaging other than during working time.

1. Was the wearing or donning of BLM messaging at work protected activity?

As touched upon above, this is the central issue in this case, and it's an issue of the first impression. Thus, while three of my administrative law judge colleagues have ruled on this precise issue, the Board has yet to do so, as their decisions are pending before the Board.[189] Boiled down to its essence, the General Counsel's argument is that the Black Lives Matter (BLM) movement, and the expression of the term BLM itself, has become synonymous with opposition to systemic racism in all of its various manifestations—and there are many. These would include, to name a few, systemic racism in the criminal justice system, particularly the unjustified killing of people of color by the police (or vigilantes); systemic racism in health care; systemic racism in voting rights; systemic racism in education; and of particular relevance to the instant case, systemic racism at work. Accordingly, its reasoning goes, it must be concluded that when WFM's employees donned BLM messaging at work during the summer of 2020, they were doing so in support of and in solidarity with WFM's Black employees (and perhaps Black employees everywhere), and in opposition to systemic racism—particularly systemic racism at work.[190] Moreover, the General Counsel also argues that because the enforcement by WFM of its dress code to prohibit BLM messaging at work was perceived by some employees as discriminatory and thus "racist," the defiance of such policy by them has protected activity. For the reasons discussed below, I conclude that neither the preponderance of the evidence, as is the General Counsel's burden, nor current legal precedent, supports the General Counsel's position.

First, a brief summary and discussion of legal precedent on these issues is called for. The Board and the courts have long recognized and held that Section 7 of the Act protects the rights of employees to wear and distribute items such as buttons, pins, stickers, t-shirts, flyers, or other items displaying a message relating to terms and conditions of employment, unionization, and other protected matters. Accordingly, an employer that maintains or enforces a rule restricting employees from wearing (or distributing) such items violates Section 8(a)(1) of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *Boise Cascade Corp.,* 300 NLRB 80 (1990)*; Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB 1687 (2016); *In-N-Out Burger, Inc.*, 365 NLRB No. 39 (2017), enfd. 894 F. 3d 707 (5th Cir. 2018); *Constellation Brands, U.S. Operations, Inc.*, 367 NLRB No. 79 (2019), enfd., 992 F.3d 642 (7th Cir. 2021). It matters not that the message conveyed by such insignia, paraphernalia, or flyers might be "political" in nature, so long as the message has a reasonable and direct nexus to the advancement of mutual aid and protection in the workplace, or as the Court put it, "impov[ing] terms and conditions of employment or otherwise improv[ing employees'] lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). In that case, for example, the Supreme Court held that the distribution during nonworking times and in the nonworking areas of a union newsletter advocating opposition to amending the State constitution to incorporate a right-to-work statute and, criticizing a presidential veto of a federal minimum wage bill, was protected

[189] See, *SFR, Inc.,* Case 10-CA- 268413, JD-16-–22, March 21, 2022 (Judge Amchan); *Home Depot*, Case 18–CA–273796, JD-34–22, June 10, 2022 (Judge Bogas); and *Fred Meyers Stores, Inc.*, Case 19–CA–272795, JD (SF)-12–23, May 3, 2023 (Judge Anzalone). Judges Amchan and Bogas found that displaying BLM messaging at work was not protected activity; Judge Anzalone concluded that it was.

[190] Thus, in its post hearing brief, at p. 53, Counsel for the General Counsel argues that employees donned BLM messaging "with the purpose of showing support for their Black and other co-workers of color, and to bring attention to racial issues and improve racial equality in the workplace."

activity. Thus, the nexus of the message at issue to the employee's Section 7 rights in that case was both direct and proximate; a right-to-work statue, if passed, might impact their collective bargaining representative's financial health, and thus its strength at the bargaining table. Similarly, even where no collective bargaining relationship was at issue, the Board and the courts have found that the requisite nexus to Section 7 rights exist when the message addresses issues that may impact the employees directly: In *In-N-Out Burger*, supra., it involved employees wearing pins calling for a minimum wage for fast food workers; In *AT&T*, 362 NLRB 885 (2015) and *American Medical Response*, 370 NLRB No. 58 (2020), it involved employees wearing pins in opposition to ballot propositions that would directly, and adversely, impact their working conditions; and in *Nellis Cab Co*, 362 NLRB 1587 (2015), it concerned messaging in opposition to regulatory change that would impact the drivers' wages. The common thread in these cases is the reasonable, direct and proximate nexus between the message conveyed and rights enshrined in Section 7 of the Act. In *Eastex*, the Court also warned, however, that at some point the nexus between the activity in question and the employees' interests as employees "becomes so attenuated that an activity cannot fairly be deemed to come within the mutual aid or protection clause." 437 U.S. at 567-568. That "attenuation," as discussed below, is present here.

In *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014), the Board, citing *Eastex*, explains that the concept of mutual aid and protection focuses on the *goal* of the concerted activity, that is, whether the employee(s) involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. The subjective m*otive* for their action(s), the Board stated, is thus not relevant in determining whether the activity is for mutual aid and protection; rather the analytical standard is an objective one, focusing on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees. In other words, what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of "mutual aid or protection" of employees. *Id.*

While this analytical formulation is both reasonable and elegant, it has one significant flaw--it assumes that there is always a significant distinction or difference between the motive(s) and the goal(s) of employee conduct, and that such distinction is always readily discernable. In *Fresh and Easy*, there was a readily discernable and significant distinction between the motivation of Elias, the woman who complained to management about sexual harassment, and her goal for doing so. As the Board pointed out, while her motivation may have been her disgust and offense with a message that she believed constituted sexual harassment directed at her, her goal in soliciting the assistance of other employees in complaining to management was one of mutual aid and protection, because her complaint might prevent similar conduct (directed at her or others) in the future. The same holds true for many of the cases cited by the Board in *Fresh and Easy* in support of its conclusion—while the motive of the employee complaining (to the employer or government agency) might have been his/her/their own personal grievance or annoyance, the goal was to remedy a situation that could or would ultimately benefit all, as *employees*. Thus, all the cases were grounded on the "solidarity" principle embedded in Section 7, since employee conduct that could directly result in a benefit to coworkers could be said to fall within the meaning of "mutual aid and protection." The common and necessary thread in all on these cases, however, is that the employee conduct in question constituted an appeal to action that would directly impact their working conditions, either by requesting or

imploring employer or governmental action on a grievance or concern, or by appealing for opposition to a proposed law or regulation that would have a direct and immediate impact their working conditions or their lot as employees. It is that thread or nexus—the clear goal of advancing their lot as employees–that is missing in this case, as discussed below.

In the present case, unlike in *Fresh and Easy* and the many cases cited therein, it is not easy to distinguish between the subjective motivations and the purpose or goal of the employees displaying BLM messaging—assuming there is a distinction at all.[191] It is abundantly clear and beyond dispute, however, that we would not be addressing this issue at this moment *but for* the murder of George Floyd by the Minneapolis police on May 25, 2020. It is that incident that "launched a thousand ships," to borrow from poet Christopher Marlowe, and led to the most massive demonstrations in the history of the United States during the late Spring and Summer of 2020, as I noted in the introduction. There is no reason to believe that any of the employees at issue here would have been donning "Black Lives Matter" (BLM) messaging or attire, let alone messages such as "I Can't Breathe," or displaying the names or images of Floyd or other victims of police brutality, in the absence of Floyd's killing.[192] Indeed, it is highly unlikely that BLM, whether the movement or the phrase itself, would have even crossed the minds of the employees in question—or anyone else, for that matter—at this particular time, but for the death of Floyd, and the incessant but justified media coverage that followed.[193] As noted in the Facts section, many of the employees in question testified that they were inspired and prompted to start donning BLM messaging in the wake of Floyd's death and the protests and demonstrations that ensued. Most others testified that they started donning such messaging as a reaction to, or to protest, WFM's prohibition of the displaying of such message on their uniforms.[194]

[191] Indeed, the absence of clarity in distinguishing between the two explains the vast amount of testimony elicited in this case, much of which may prove not to be relevant, as well as the perceived need by the parties to elicit the testimony of expert witnesses, whose testimony, as discussed below, I have ultimately found to be neither helpful nor relevant in helping me decide the central issue in this case.

[192] The General Counsel concedes that messaging such as "I Can't Breathe," "No Justice No Peace," "Say Their (or His/Her) Names," not to mention "Defund the Police," "Fuck the Police," or "All Cops are Bastards," and the like, are not protected, asserting that only "Black Lives Matter" or "BLM" are. Indeed, the General Counsel announced that it intended to amend the complaint to make this clarification, but never did. (Tr. 113; 712-714). It dismisses all these other displayed messages as both unimportant and infrequent, and thus irrelevant, which I find disingenuous. To the contrary, the record shows that these other messages were inseparable from and intertwined with BLM messaging, and were often front and center in most protests at or in the immediately vicinity of WFM stores in which employees participated—not to mention on the online chats and postings by employees. Indeed, I note that the very *first* employee who displayed BLM-related messaging at a WFM store, Kayla Greene, on June 4 at the Bedford New Hampshire store, wore a mask with the massage, "I Can't Breathe," in reference to George Floyd's dying words.

[193] As professor Taylor noted in her testimony, prior to the killing of Floyd the BLM movement had gone dormant, if not moribund, as it had during the periods between other killings of African Americans by the police. Although, as noted above and discussed below, Dr. Taylor's overall testimony proved not to be relevant in deciding the ultimate issue at stake herein, I believe it proper nonetheless to accept uncontroverted testimony on her part regarding the history of the BLM movement, in order to provide proper context to the events at issue herein.

[194] At the Philadelphia store, an additional motive was at play: the employees of the store were angered—indeed, became livid-- when they learned that the store team leader (manager) gave free food and water to the police, which they believed signaled that WFM (including its employees) was taking the "side" of the police in the dispute that was raging not only in Philadelphia (where curfews had to be imposed because of rioting and civil unrest), but nationwide. They thus started to wear BLM messaging to show they supported the BLM protesters.

Thus, both the circumstances and the testimony of the witnesses unquestionably establish that Floyd's death at the hands (or knees…) of the police, and the demonstrations that erupted thereafter, motivated, prompted and inspired them to start displaying or donning BLM messaging.

As described above, however, the Board in *Fresh and Easy* explained that the subjective motive for the conduct is not relevant in determining whether such conduct is for "mutual aid and protection" and thus protected; what matters is what the goal or purpose of such conduct is, as examined through an objective lens. Thus, that goal or purpose must objectively be shown to be one that advances the interests or lot of employees as such. It is here where the "rubber meets the road," and where the evidence in this case is at best vague, if at all discernable. I do not believe that the General Counsel has demonstrated, by the preponderance of the evidence as is its burden, that the objectively determined purpose of the conduct at issue herein was one of mutual aid and protection in the context of their employment or their lot as employees.

As described in the Facts section, many employees testified as to their reasons for donning BLM attire, and a few testified as to what they hoped to accomplish, in most instances expressing their particular viewpoints rather that shared or common goal among employees as a group. In an attempt to explain why that the donning of BLM messaging by employees was protected activity, the General Counsel throws in multiple reasons, as post hearing brief:

> The employees told management that they were wearing BLM attire to make their Black co-workers feel safe and supported in the workplace during this time of racial tension throughout the country. They told management they were wearing BLM to encourage Respondent to address and root out racial inequality within Whole Foods, and their perception that Black employees were disproportionately working in non-leadership positions, working less-desirable shifts, and lacking in promotional opportunities, and questioned the diversity of Respondent's leaders that were making these decisions about the appearance rules. They told management they were wearing BLM to discourage Respondent from allowing managers to invite police into the stores, and from using security guards who were also police officers, because the police presence in the stores made some employees, particularly employees of color, feel uncomfortable and unsafe. Employees told management they were wearing BLM to encourage Respondent to implement action plans for dealing with racist customers. Finally, the employees told management that they wanted to continue to wear BLM attire, despite being told that they could not, in the hopes that Respondent would meet a number of demands (which they also put in writing, as described below), including to explicitly allow them to wear BLM attire at work, to rescind all disciplinary actions and provide backpay to employees who were disciplined or lost work as a result of wearing BLM attire, to address the lack of Black representation in Respondent's management and leadership structure, to release demographic data pertaining to Respondent's workforce, and to engage with employees in a dialogue about racial equity at Whole Foods.[195]

[195] GC's Posttrial brief, pp. 40–41 (Transcript page numbers omitted). The often-repeated refrain about wearing BLM messaging to make "Black co-workers feel safe and supported" begs the question—safe and supported in relation to whom or what? Certainly not in relation to their employment, where nothing had occurred to cause concern, nor in relation to their employer, which had done nothing of the sort.

This represents a helter-skelter, throw-mud-at-the-wall attempt at objectively establishing the mutual aid and protection goal of employees wearing BLM messaging by impermissibly weaving in multiple subjective motivation statements from a few select individuals, contrary to the holding in *Fresh and Easy*. Moreover, there are multiple reasons why these provided rationales are defective and unsupported by the factual record. First, most, if not all, of these rationales were proffered post hoc, days or even weeks after the employees started donning BLM messaging and the employer had informed employees that it was in violation of the dress code—and had started imposing discipline for violations.[196] The over-all record supports the conclusion that the employees started donning BLM messaging in sympathy with the BLM demonstrations in the wake of Floyd's murder, without any apparent or objectively discernable goal connected with their employment or working conditions. As many of the on-line communications among employees contained in the record show, it wasn't until after the employer started cracking down on such conduct that they started searching for a nexus to their employment that might provide legal cover for their conduct.[197] For example, there is simply no evidence that there were any employee concerns, let alone complaints or grievances about "racial inequality," or any manner of racially-based discrimination by WFM prior to, or at the time they started donning BLM messaging. Rather, these rationales were proffered by two or three individuals whose testimony had no basis in fact.[198] The same holds true for the written demands made by some employee groups in the aftermath of the disciplinary action taken by WFM against employees who had been warned to remove BLM messaging but refused to do so. Thus, the demands primarily concerned conduct that had already occurred and incurred discipline: changing or interpreting the dress code so as to permit BLM messaging; rescinding disciplinary actions taken and making employees whole for lost wages.[199] These demands—and the protests that followed where these demands were repeated—were clearly protected activity.[200] These post-hoc demands, however,

[196] I thus reject the General Counsel's citing of *Xcel Protective Services*, 371 NLRB No. 134, slip op. at 21 (2022) and *Riverboat Services of Indiana, Inc.*, 454 NLRB 1286, 1294 (2005) for the proposition that a nexus between the activity in question and the goal of mutual aid and protection need not exist or be present when the conduct first occurs, but can be retroactively applied when later events provide context that establishes a nexus. To the contrary, those cases suggest that the nexus between the conduct and the goal of mutual aid and protection must be present from the start, although later events may provide additional clarity and context that further confirms the presence of such initially-existing nexus.

[197] Indeed, circumstantial evidence suggests that most of the employees in question, who are charging parties herein and who are represented by counsel, made many of their post-hoc demands after learning that a nexus between their BLM activity and their lot as employees had to be established in order for their BLM activity to be considered "protected." While there is nothing wrong or nefarious about seeking legal advice and acting accordingly, it suggests that a nexus was artificially sought to be created after the fact when one did not exist organically.

[198] While a good faith but erroneous assertion of a statutory or contractual right may be protected, it must be based on something factual and tangible, such as the language of a collective bargaining agreement or policy at issue —not on theoretical beliefs or suspicions fed by ideology. See. e.g., *Interborough Contractors, Inc.*, 157 NLRB 1295 (1966), enfd., 388 F.2d 495 (2d Cir. 1967).

[199] The other demands—regarding the racial composition of management or the work force and demands about dialogue to discuss racial issues were strictly post hoc and bore no relation to the goals—to the extent there were any—of wearing BLM messaging in the first place.

[200] There is no evidence or allegations, however, that WFM took any action against employes for making these demands of for participating in these protests. The only actions taken against employees were related to their wearing of BLM messaging at work.

cannot reach back in time to retroactively make the donning of BLM messaging itself protected—because that was never the goal for donning BLM messaging in the first place.

Likewise, the General Counsel's implied argument, that violating the rule against donning BLM messaging is permissible because the employees were concertedly protesting against a rule they considered invalid, or perhaps even racist, and is thus protected activity, is without merit. First of all, the implication of such argument is that employees could simply ignore any workplace rule, no matter how lawful, valid or justified, by concertedly breaching and protesting against the rule. This is a perfect example of "bootstrapping," circular logic, that is unsupported by Board precedent. As in cases involving the use of a grievance procedure under a collective bargaining agreement, the general rule is "comply (with the rule) then grieve," lest the employee(s) be found to be insubordinate. Acting in concert with one another does not give employees cart blanche to disobey an otherwise valid rule, nor makes such rule unenforceable. See, e.g., *Bird Engineering*, 270 NLRB 1415 (1984).[201] As noted above, the protests, letters and demands advocating for the employer to change its tune and its rule was clearly protected activity; the breaching of the rule itself was not.

Secondly, the record is devoid of any evidence that the rule was "racist" or enforced in a racially disparate manner—indeed, the vast majority of employees wearing BLM messaging and disciplined for doing so were not African-American or persons of color. The fact that BLM may be a movement of great significance to African Americans, and that its goals are valid, does not mean that a rule prohibiting the displaying of such message at work is "racist," as some employees implied. The fact that WFM in the past had permitted and even supported employees donning messages is support other social-political causes, such as the LGTBQ movement, does not support the implication that the banning of BLM messaging was racially motivated.[202] Context not only matters, but it is often crucial in analyzing the importance of events and conduct, and this is no exception. The significant, and arguably unprecedented, social and political unrest during the late Spring and the Summer of 2020 was intimately connected to the BLM movement and the phrase itself, arguably making the use of the term—at least in the

[201] Indeed, such position would appear to be contrary to what the Supreme Court cautioned us about in *Republic* Aviation, supra., where the Court declared that the Board must balance the "undisputed right of self-organization . . . and the equally undisputed right of employers to maintain discipline in their establishments." Id. at 797–798. Thus, needless to explain, if an employee is discharged for breaking a rule against punching out his supervisor, other employees who disagree with such a rule are not engaged in protected activity if they, in turn, concertedly punch out other supervisors to protest the rule. Concerted repetition of an otherwise unprotected activity does not convert such activity into a protected one.

[202] The fact that enforcement of an otherwise valid rule may have been "disparate" or inconsistent does not prevent an employer from enforcing its rules against unprotected messaging, nor does it elevate such messaging to protected status. Thus, if wearing or displaying BLM messaging is not protected, it does not matter that other similar types of messaging were allowed. By way of analogy, it is undisputable that an employer may, for example, prohibit any and all use of its bulletin boards by employees, including statutorily protected messaging. If an employer, however, allows solicitations by employees for any causes—the proverbial "Girl Scout cookies" being an example-- it must then allow for solicitations for protected activity, such as unions. That does not mean, however, that if an employer allows solicitations for the Girl Scouts, it must allow for solicitations for the Boy Scouts. Simply put, an employer is free to discriminate between unprotected messaging it is willing to allow. Such disparate treatment becomes relevant only if the prohibited messaging is protected and the employer then raises a "special circumstances" defense. Nor does the fact that Respondent may have made pronouncements about supporting the BLM movement allow employees to ignore Respondent's dress code. Respondent may be a hypocrite—but hypocrisy does not violate the Act, nor does it convert otherwise unprotected conduct into a protected one.

workplace—controversial and provocative, and perhaps even incendiary, something that cannot truly be said for LGQBT messaging, let alone sports-related messaging.[203] The evidence persuades me that the employer was merely trying to avoid controversy and conflict at its stores, which it believed BLM messaging would invite.[204] In short, there is no objective evidence supporting the allegation that the employer had racially discriminatory motives for its stance on BLM messaging, nor is there objective evidence that the employees' goal in displaying such message was to counter the employer's purposed racial discrimination.

In sum, the above-cited arguments proffered by the General Counsel in support of the proposition that the goal or purpose of the employees' concerted action of displaying BLM messaging was related to workplace or working conditions, or to their interests as employees, is not supported by the objective evidence.

Perhaps suspecting that might be the case, the General Counsel also tried a different, and far more sweeping, approach in its attempt to show that a nexus existed between BLM messaging and the employees' terms and conditions of employment or their interests as employees. Thus, the General Counsel proffered the testimony of an expert witness, Dr. Taylor, a professor of African American history, whose testimony I summarized in the Facts section. Briefly, Dr. Taylor testified that there has long been a historical connection between civil rights movements, such as the BLM movement, and employment issues, in that such groups have advocated against broad discriminatory practices that result in economic inequality and injustice, which in turn have sustained and driven the protests initially sparked by violence against people of color. While I acknowledge and accept Dr. Taylor's expertise in African American history, which is undisputed, as well her extensive knowledge concerning the BLM movement, about which she has written extensively, I conclude her testimony is not helpful or relevant in assisting me to decide the central issue herein: whether there is a nexus connecting the employees' display of BLM messaging to a goal related to their terms and conditions of employment or interest as employees. Thus, even accepting Dr. Taylor's description of the history of civil rights movements in general, and the Black Lives Matter movement in particular, as completely valid and accurate, the nexus her testimony attempts to establish to the issue at hand is too attenuated, too indirect, too intangible and aspirational to provide the requisite burden of proof required of the General Counsel. As noted above, boiled down to its essence, Dr. Taylor's (and the General Counsel's) thesis is that the Black Lives Matter movement, and the phrase itself, is all about opposition to "systemic racism," which presumably not only exists but is prevalent in every aspect of our society—and every institution, organization, association, or employer, including

[203] To be clear, I am in no way blaming or implicating the BLM movement, nor the phrase itself, for the significant amount of unrest and violence that occurred at the time. But such unrest and violence was nonetheless significant, widespread and impossible to ignore or deny, and it directly arose out of the protests that occurred in the wake of George Floyd's death. Thus, in this context and given the circumstances, it would be disingenuous to suggest that the any phrase associated with the BLM movement during this time, whether "BLM" itself, or "I Can't Breathe," or "No Justice No Peace," "Defund the Police," etc., were no different, and as benign and uncontroversial, as any of the other messaging that had been allowed or ignored by WFM at its stores. This issue, as noted above, would only be relevant in applying the special circumstances test—which may not be applicable herein.

[204] Indeed, the overly assertive attitude displayed by some of the employees, who wanted to confront management, fellow employees and customers with the massage "on their faces" (that is, face-level masks, as opposed to pins on aprons which were less noticeable) and who argued that anyone who disagreed with their BLM message was simply a "racist" whose views should be disregarded and whose presence—be they employees or customers—should not welcome at the stores, is a clear indication that, sooner or later, conflict in the stores was likely to arise.

Respondent, is presumed to be engaged in it. Thus, it must be assumed that when WFM employees donned BLM messaging (whether they knew it or expressed it or not, apparently), they were opposing systemic racism in employment, not only in general, but as presumably engaged in by WFM.[205] This argument turns the concepts of due process and burden of proof on their heads, with guilt being presumed and innocence requiring proof—assuming that it is even possible. From a factual and legal standpoint, this is not only a bridge too far—but several bridges too far.[206] It assumes many facts not established by the preponderance of the evidence—at least not in in the case over which I presided.

Accordingly, I find Dr. Taylor's testimony is, at best, marginally relevant, and it does not assist me in evaluating the facts nor in addressing the central issue in this case, as described above. I therefore reject her testimony and find it properly excluded under Federal Rule of Evidence 702 and reclassify it as an offer of proof.[207] I likewise reclassify the exhibits tendered in support of her testimony as rejected exhibits. For similar reasons, I also reject the testimony of Dr. Davison, the expert witness called by Respondent. In that regard, I note that Dr. Davison's testimony came from a totally different perspective than that of Dr. Taylor. Rather than testifying about the history or significance of the civil rights movements, including the Black Lives Matter movement—which Dr. Davison conceded he is not an expert about—his testimony addressed the public perception of the BLM movement and its goals, as shown by the results of a poll he commissioned. While I accept and acknowledge Dr. Davison's expertise in the field of commissioning and interpreting public polling, his testimony doesn't assist me in interpreting the facts and reaching a conclusion regarding the central issue in this case. Thus, even accepting the premise of his testimony—that the general public perceives the principal goals of the BLM movement as associated with the criminal justice system, particularly with the excessive use of force by the police and vigilantes against African-Americans and people of color, and not so much with work-place issues—I find that this is not relevant in determining what the "objectively understood" purpose of the employees in this case had in displaying BLM

[205] Thus, in its post-hearing brief, the General Counsel asserts as follows: "Given that the BLM message is associated with showing support for Black people and addressing racial issues in all aspects of society, including the workplace, wearing BLM attire at work is the functional equivalent of expressing the message, 'Black Lives Matter *here in the workplace*,' and demonstrates that at least part of their objective purpose was to use the BLM message to show support for Black employees and to call attention to and improve racial issues in the workplace. The employees display of BLM in the workplace, in-and-of-itself, demonstrated the necessary nexus to their interests as employees and should be deemed protected, even if the display could be understood to also address racial issues outside of the workplace." (GC brief, p. 82, emphasis in original; citation omitted). In essence, the General Counsel poses that the term "Black Lives Matter" has acquired a meaning far beyond the plain meaning of the phrase and far beyond its original meaning, and that it possesses chameleon-like properties that adapts to any situation or context, with its meaning changing according to the place where it is displayed—to the benefit of those displaying it. I am unaware of any phrase or words in American jurisprudence that possesses these extraordinary qualities, nor can I conceive of a reason why any should. Thus, I reject the General Counsel's assertion that it is a "given" that the BLM message is presumed to address racial issues in all aspects of society, including employment; it is not a "given"—it is the General Counsel's burden to so establish, which it failed to do.

[206] Although the General Counsel does not explicitly say so, the obvious, inescapable implication of its argument is that given its nature and history, BLM activity and messaging is inherently *protected* activity. Thus, the General Counsel apparently seeks to elevate BLM activity to the same privileged status exclusively conferred upon *union* activity by the Act—the only explicitly named and specifically described activity that enjoys such protection, under Section 8(a)(3). I would pose that to "interpret" the Act in such fashion would be tantamount to amending it—an authority that exclusively resides in Congress.

[207] See generally *Wal-Mart Stores, Inc.*, 368 NLRB No.146, slip op. at 69–71 (2019).

messaging.[208] Accordingly, I reject his testimony and find it properly excluded under Federal Rule of Evidence 702, and reclassify it as an offer of proof. Likewise, I reclassify the exhibits tendered in support of his testimony as rejected exhibits.[209]

In sum, I conclude that the General Counsel has failed to establish, by a preponderance of the evidence, the required nexus between the donning of BLM messaging by WFM employees and a goal related to their terms and conditions of employment or their lot as employees—a nexus that is necessary to bring such activity within the "mutual aid and protection" requirement under Section 7.[210] My colleague, Judge Bogas, succinctly summarized the heart of the issue in his decision in *Home Depot, Inc.*, Case 18–CA–273796, JD-34-–22, June 10, 2022, as follows:

> [T]he BLM messaging neither originated as, nor was shown to be reasonably perceived as, an effort to address the working conditions of employees. Rather the record shows that the message was primarily used, and generally understood, to address the unjustified killings of black individuals by law enforcement and vigilantes…A message about unjustified killings of black men, while a matter of profound societal importance, is not directly relevant to the terms, conditions, or lot of Home Depot's employees *as employees*. Id. at 16 *(*emphasis in original)

In his analysis, Judge Bogas further distinguished *Eastex* and *Nellis Cab Co.*, supra, as well as *Kaiser Engineers*, 213 NLRB 752, 755 (1974), enfd. 538 F.2d 1379 (9th Cir. 1976), cited by the General Counsel, from the facts in his case, a distinction that is also applicable in the present case:

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[208] Having said that, I would observe that Dr. Davison's testimony came closer to hitting the mark at establishing objective evidence that the phrase "Black Lives Matter," and the movement behind it, is not "generally" understood to address racial issues in all aspects of society, contrary to the General Counsel's assertion.

[209] The perceived need to have to proffer expert testimony by both the General Counsel and Respondent in this case, however, perfectly illustrates the inherent difficulty in attempting to apply the test formulated in *Fresh and Easy*, supra., in a case such as this, where it is difficult to ascertain and differentiate between the subjective motives and the objectively understood purposes of the employee conduct in question.

[210] There can be no question that protesting or raising the issue of racial inequality at work, or policies that would promote such inequalities, are activities clearly protected by Sec. 7 and 8(a)(1) of the Act. In all of the cases cited by the General Counsel in support of such proposition, however, the employees involved in the activities at issue were seeking to address *specific* policies, acts or conduct by the employer—not theoretical, generic, or presumed, let alone imagined, ones. See, e.g., *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 1, fn.2 and 11(2020); *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986); *Churchill's Restaurant*, 276 NLRB 775, 777 (1985); *General Teamsters Local Union No.* 528, 237 NLRB 258, 261 (1978). The conduct by the employees in each case was narrowly tailored to address the specific conduct that had occurred or policy at issue, something that cannot be said about the BLM messaging in this case. In that regard, it is notable that there is no evidence that prior to these events, employees had made any claims or demands regarding WFM's racial policies, nor evidence that Respondent had engaged in any type of racially discriminatory conduct. Likewise, after the demonstrations and protests triggered by the murder of Floyd subsided by the end of the Summer of 2020, there is no evidence that employees continued to make the aforementioned claims or demands from the employer, even though the "systemic racism" employees were ostensibly protesting against by wearing BLM messaging would presumably still be very much alive and prevalent. Indeed, even though employees were at all times permitted by Respondent to don BLM messaging during breaks and other non-working periods, it appears no employees donned such messaging again after August of 2020. These facts seriously undermine the General Counsel's assertion that BLM messaging had a goal related to the employees' work or their lot as employees. It did not; it was all about joining millions of others in protesting the murder of Floyd and a criminal justice system that permitted such abuses. When those protests subsided, so did employees' interest in displaying BLM messaging.

> Unlike the messages in those cases, the BLM message relates primarily to the unjustified killing of black individuals by police and vigilantes, not to any workplace concerns. To the extent that the message's broad, political, meaning addresses societal ills more generally, that meaning relates to employment only in the sense that the workplace is part of society, rather than to employee "concerns *qua employees."* Id. at 17, n. 20 (citations omitted).

This succinct explanation of the reason(s) the General Counsel's theory of a violation lacks merit perfectly fits the facts and circumstances in the present case. In light of the above, I conclude that employees who wore, donned or displayed "Black Lives Matter" or "BLM" messaging at work, during working time, at the various WFM stores throughout the country, as alleged in the complaint, were not engaged in protected activity as defined in Section 7 of the Act.[211] Accordingly, all of the verbal and/or written warnings issued to employees, directives to remove such messaging, and disciplinary actions imposed on employees stemming from or as a direct result of their displaying such messaging or their refusal to remove such, did not violate the Act, and all the allegations of the complaint which so allege will be dismissed.[212]

2. The 2013–2020 dress code

The General Counsel alleges, and argues in its post-hearing brief, that the dress code in effect from 2013 (or early 2014) until its revision in late 2020 was presumptively unlawful because it prohibited employees from displaying any visible slogan, message, logo or advertising on their workplace attire, which impliedly and necessarily included Section 7 protected messaging. *Tesla, Inc.*, 371 NLRB No. 131 (2022), enf. denied __F.4th__ (5th Cir. 2023), 2023 WL7528878;[213] *In-N-Out Burger, Inc.*, 365 NLRB No. 39 (2017), enf'd 894 F.3d 707 (5th Cir.

[211] To be clear, this conclusion in no way reflects on the validity, the justification, and the moral forthrightness of the BLM movement and its followers and sympathizers, particularly in light of the events that triggered the massive protests in the late spring and summer of 2020. The murder of George Floyd, and the culture of police brutality it revealed, was one of the most shocking events in recent American history, and the anger, frustration and activism it engendered was inevitable, understandable and justified. Nonetheless, my task is to determine, within the narrow confines of the National Labor Relations Act, whether the conduct of the employees in this instance was protected because it was directly related to their employment or their lot as employees. I have concluded it was not.

[212] Specifically, pars. 7(a) through 7(m) of the complaint, including the subparagraphs contained therein, will be dismissed. As noted earlier, no evidence was proffered in support of the allegations regarding the "Fresh Pond" store in Cambridge, Massachusetts, so complaint pars. 7(c)(i) & (ii) is independently dismissed on that basis alone. Additionally, as discussed in the Facts section, the evidence does not support the allegations that Jolina Christie at the Columbia, Maryland store, Sarita (Justice) Wilson at the Atanta, Georgia store, and Ana Belen Ramirez at the Berkeley, California store were constructively discharged because their resignations were the result of their inability to engage in allegedly protected activity—that is, wearing BLM messaging. Rather, the evidence shows that they resigned their positions for other reasons, such as getting better jobs, jobs at more favorable locations, or because of concerns about Covid-19, not because Respondent did not permit them to don BLM messaging. Accordingly, pars. 7(g)(2); 7(h)(iii); and 7(l)(iv) are independently dismissed for this reason.

[213] Curiously, the 5th Circuit not only denied enforcement of the Board's decision in *Tesla,* but *vacated* it, and reinstated *Wal-Mart*, 368 NLRB No. 146, which the Board had overruled in *Tesla*. With due respect to the Circuit Court, it is doubtful it has the authority to so vacate a Board's decision, let alone reinstate one that has been reversed. Pursuant to the Act, its authority is presumably limited to refuse enforcement and/or remand.

2018); *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).[214] Thus, the General Counsel argues, Respondent's dress code can only be found lawful if WFM meets its burden in establishing special circumstances to justify its interference with employees' Section 7 rights—a burden which the General Counsel asserts was not met, as discussed below. There is, however, one significant complication, as described in the Facts section: Respondent alleges, and the record shows, that the language of the dress code in Respondent's GIG—except for *one* word—was approved by the Board pursuant to a 2013 Settlement Agreement. The Board-approved wording bears repeating below:

> • You must wear Whole Foods Market shirts/tops (or those from the Whole Foods Market family, for example Allegro Coffee; vendors/suppliers; or industry related organizations with which we are affiliated) or shirts/tops without any visible slogan, message, logo or advertising ***printed*** on them. Where required, only store hats may be worn. Hats from other companies, including Whole Foods Market vendors, are not permitted. Aprons will be provided to Team Members working in a department that requires an apron to be worn. (emphasis provided)

For reasons that are not clear, when Respondent issued its new GIG in late 2013 or early 2014 pursuant to this Settlement Agreement, it omitted the above-emphasized word "printed" from the Board-approved language.[215] The General Counsel argues that the omitted word materially changed the impact—and legality—of the language, thus rendering the dress code unlawful. I agree. As correctly pointed out by the General Counsel, by omitting the word *printed* from the language at issue, Respondent significantly broadened the scope of the prohibited messaging. Thus, as it actually appeared on the 2013–2020 GIG, the rule can reasonably be read to prohibit union buttons or pins and other types of messages that are attached to their work clothes or other vestments, as opposed to messages actually printed "on" on their clothing or work garments, a prohibition allowed under the terms of the Settlement agreement.[216] This broadened and amplified prohibition was certainly not contemplated or approved by the General Counsel, and thus I conclude there is no settlement bar in this instance, as alleged by

[214] Because the rule in question appears to expressly apply to union insignia and other protected messaging, as opposed to a facially neutral rule that might reasonably be interpreted to restrict Sec. 7 protected messaging, the analytical approach adopted by the Board recent ruling in *Stericycle, Inc.*, 372 NLRB No. 113 (2023) is not applicable.

[215] Respondent asserts that this was an inadvertent omission. I am willing to give Respondent the benefit of the doubt and infer that such was the case, particularly since there is no evidence to the contrary. Indeed, it would hard to believe that Respondent went through all the efforts to settle the case only to intentionally go out of its way to immediately violate the terms of such settlement. Respondent goes on to argue, however, that the General Counsel acquiesced to this change when it later certified that Respondent had fully complied with the terms of the Settlement Agreement. I disagree. Rather, I am willing to give the General Counsel the same benefit of the doubt and conclude that it, too, had inadvertently failed to notice the omitted word ("printed") in the language of the dress code at issue. In other words, I believe this is a rare case where a bunch of lawyers, typically picayune and obsessive about the smallest of details, simply dropped the ball.

[216] For example, not only union pins would appear to be prohibited, but buttons or pins such as those at issue in *AT&T*, *American Medical Response*, and *In-N-Out Burger* supra, which expressed opposition to or support for ballot measures which would have directly impacted the wages, hours or working conditions of the employees at issue, and thus found protected by the Board. Although it is true, as pointed out by Respondent, that it had a policy allowing for the wearing of union pins, this policy was not in writing or formally part of the GIG until the revision in late 2020, as discussed below. Accordingly, an employee reading the rule would not know that there was an exception made for union pins. Moreover, that policy would not appear to cover the other types of buttons or pins described above.

Respondent.[217] In that regard, I note that the General Counsel, as I understand its position, is not requesting that the settlement agreement be set aside, but simply noting that Respondent did not comply with the precise terms of that agreement. Thus, the principles discussed by the Board in *St. Francis Hotel*, 260 NLRB 1259 (1982), and *Hollywood Roosvelt Hotel*, 235 NLRB 1397 (1978) would appear to be inapplicable in this instance.[218]

As discussed earlier, this deviation from the approved dress code under the terms of the settlement agreement could still be lawful if Respondent can meet its burden to establish that special circumstances existed so as to permit this impingement on employees' Section 7 rights. The Board has found "special circumstances" exist when the employer can demonstrate that the messaging in question, or how it is displayed, may jeopardize employee safety, damage machinery or products, exacerbate employee dissention, unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees. This special circumstances exception is to be interpreted narrowly because a presumption exists that rules that curtail employee Section 7 rights are invalid. *Tesla, Inc.*, supra; *Komatsu America Corp.*, 342 NLRB 649, 650 (2004); *USF Red Star, Inc.*, 339 NLRB 389, 391 (2003). Respondent has not met this burden, apparently believing that it had fully complied with the terms and the precise language of the settlement agreement---which it has not, for the reasons explained above.[219]

3. The November 7, 2020, revision to the GIG

As described in the Facts section, Respondent added the following language to its dress code on the above date:

> "This policy applies to "apparel", [sic] which is defined as anything worn by or decorating Team Members, including all clothing, shoes, gloves, accessories (including eyewear), jewelry, piercings, belts, hats, and head coverings or other items worn in the hair. Except for Company-provided [Employer] uniforms, Company Logo Shirts, and the Exceptions and Variations identified below, apparel worn by Team Members must be without any visible symbol, flag, slogan, message, logo or advertising . . .
>
> Nothing in this Dress Code policy shall prohibit a Team Member who works on the sales floor or when encountering customers during their working time from wearing a union—affiliated pin, button, or insignia for the purpose of supporting or opposing a labor organization or otherwise legally protected activity, provided that it is no larger than the

[217] Accordingly, Respondent's motion to dismiss this allegation of the complaint is denied.
[218] Presumably, in light of the General Counsel's arguments, restoration by Respondent of the dress code in its GIG to precisely match the language agreed to in the 2013 settlement agreement would be an appropriate remedy in this case. Ironically, I would observe, the rule as approved under the 2013 Settlement Agreement would have permitted Respondent to bar the BLM messages "printed" or written on face masks, as many in this case were, assuming the message wasn't otherwise protected.
[219] The "special circumstances" Respondent needed to establish to justify its deviation from the terms of the Settlement Agreement, are not connected or related to its prohibition of the BLM messaging at issue herein, inasmuch I have found such messaging was not protected activity. Rather, Respondent would need to show that special circumstances existed to justify its departure from the precise language for the dress code agreed to in the settlement agreement—something it did not do.

> [Employer-]provided name badge, non-distracting and otherwise adheres to the Dress Code."

In paragraph 6(b) of the complaint, the General Counsel alleges that Respondent has maintained and enforced this part of the GIG (as well as the preexisting language, as described above) to restrict employees from exercising their Section 7 rights, including the wearing of BLM messaging. Regarding the allegation that Respondent has "enforced" this revision of the dress code for such purpose, there is simply no evidence to support this allegation. There is no evidence that any employee wore BLM messaging after August 2020, before WFM implemented this revision of the GIG, and no evidence that employees engaged in any other type of protected activity after its implementation. Moreover, regarding the allegation that Respondent "maintained" this provision to restrict employees from exercising their Section 7 rights, I note the language specifically and expressly informs employees that the rule allows the wearing of union insignia and other types of protected messaging, in language that any employee could reasonably understand. Regarding the allegation, in paragraph 6(c) of the complaint, that this rule was implemented in response to employees' protected concerted activity, "including Black Lives Matter messaging," I have concluded that this type of activity was not protected, and there is no evidence that employees engaged in any other type of protected activity that this rule would have been implemented as a result of. Accordingly, I conclude that these allegations lack merit and should be dismissed.[220]

CONCLUSIONS OF LAW

1. Respondent Whole Foods Market, Inc., including its wholly-owned subsidiaries Whole Foods Market California, Inc.; Whole Foods Market Group, Inc.; and Whole Foods Market Pacific Northwest, Inc. (collectively called Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by maintaining, promulgating and enforcing an overly broad rule in its General Information Guidebook (GIG), starting in 2013 and continuing to the present, that expressly prohibited employees from donning or otherwise displaying messages protected by Section 7 of the Act.

3. The forgoing unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. Respondent did not violate the Act in any other manner.

[220] In light of my findings and conclusion that the donning of BLM messaging was not protected activity, I need not address the (First Amendment) constitutional issues that might exist in this case, as asserted by Respondent in its supplemental post-hearing brief, in light of the Supreme Court's recent decision in *303 Creative LLC v. Elenis*, 600 U.S. 570, 143 S.Ct. 2298 (2023). A word of caution, however. Several of the employees who were charging parties and alleged discriminatees in this case, as noted in the Facts section, testified that their goal in wearing BLM messaging was to force Respondent to adopt such cause, to make it part of *its* message and image, and even to carry BLM-related products on its shelves. Should the Board conclude that I erred in finding that the employees' BLM-related messaging was not protected, the issues discussed by the Court in *303 Creative* may very well come into play.

REMEDY

The appropriate remedy for the 8(a)(1) violation(s) I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Having found that Respondent violated Section 8(a)(1) of the Act by maintaining, promulgating and enforcing an overly-broad rule in its General Information Guidebook (GIG) that expressly prohibited employees from donning or otherwise displaying messages protected by Section 7 of the Act, Respondent will be required to cease and desist from maintaining a provision in its General Information Guidelines (GIG) that informs employees that they cannot "wear or shirts/tops without any visible slogan, message, logo or advertising on them." Respondent will be furthered ordered to abide by the precise terms of the August 2013 Settlement Agreement it entered into with the General Counsel of the Board in Cases 1–CA–096965, 13CA–103533, and 13–-CA-–103615, which set forth the appropriate language to be used in the aforementioned GIG. Moreover, Respondent will be required to post notice(s) to employees assuring them that it will not violate their rights in this or any other related matter in the future. Respondent will additionally be required to rescind the above-referenced language in its GIG at all locations throughout the United States where said GIG is in effect and distributed, and to notify its employees at all such locations, that such provision is rescinded and no longer in effect; Finally, to the extent Respondent communicates with its employees by email, it shall also be required to distribute the notice to employees in that manner, as well as any other electronic means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[221]

ORDER

Respondent Whole Foods Market, Inc., including its wholly-owned subsidiaries Whole Foods Market California, Inc.; Whole Foods Market Group, Inc.; and Whole Foods Market Pacific Northwest, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Maintaining, promulgating and enforcing a provision in its General Information Guidelines (GIG) that informs employees that they cannot "wear or shirts/tops without any visible slogan, message, logo or advertising on them."

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

[221] 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.

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

(a) Rescind the language in its GIG that informs employees that they cannot "wear or shirts/tops without any visible slogan, message, logo or advertising on them."

(b) Abide by the precise terms of the August 2013 Settlement Agreement it entered into with the General Counsel of the Board in Cases 1–CA–096965, 13–-CA–103533, and 13CA–103615, by substituting the language in the GIG quoted in subparagraph (a) above, with the following language: "wear or shirts/tops without any visible slogan, message, logo or advertising printed on them."

(c) Within 14 days after service by the Region, post at all its facilities throughout the United States, where notices to employees are normally posted, copies of the attached notice marked "Appendix A."[222] Copies of the notice, on forms provided by the Regional Director for Region 20, 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 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 any time since July 15, 2020.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 20, 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., December 20, 2023.

Ariel L. Sotolongo
Administrative Law Judge.

[222] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" SHALL READ "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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 mutual aid and protection
Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT maintain, promulgate or enforce the provision in our General Information Guidelines (GIG) that informs employees that they cannot "wear or shirts/tops without any visible slogan, message, logo or advertising on them."

WE WILL rescind such language from our employee handbook and notify employees that we have done so.

WE WILL substitute the above-cited language in our General Information Guidelines (GIG) with the following language instead, as we agreed to do in a 2013 Settlement Agreement with the National Labor Relations Board: "wear or shirts/tops without any visible slogan, message, logo or advertising *printed* on them." (Emphasis added.)

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

WHOLE FOODS MARKET, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Offices set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Region 1:
Thomas P. O'Neill Jr. Federal Building
10 Causeway St, Room 1002, Boston, MA 02222-1001
(617)565-6700 Hours: 8:30 a.m. to 5 p.m., ET.

Region 4
100 E Penn Square Suite 403, Philadelphia, PA 19107
(215)597-7601, Hours of Operation: 8:30.a.m to 5 p.m., ET.

Region 5
Bank of America, Tower II, 100 S. Charles Street, Suite 600, Baltimore, MD 21201-2700
Telephone: (410)962-2822, Hours: 8:15 a.m. to 4:45 p.m., ET.

Region 10
401 W. Peachtree Street NW, Suite 472 Atlanta, GA 30308
Telephone: (404)331-2896, Hours: 8:00 a.m. to 4:30 p.m., ET.

Region 19
915 2nd Avenue, Federal Building, Room 2948, Seattle, Washington 98174-1078
Telephone: (206)220-6300, Hours: 8:15 a.m. to 4:45 p.m., PT.

Region 20
450 Golden Gate Ave., 3rd Floor, Suite 3112, San Francisco, CA 94102
Telephone: (415)356-5130, Hours 8:30 a.m. to 5 p.m., PT.

Region 25
575 N Pennsylvania Street, Ste 238, Indianapolis, IN 46204-1520
Telephone: (317)226-7381, Hours of Operation: 8:30 a.m. to 5:00 p.m., ET.

Region 32
1301 Clay St Ste 1510N, Oakland, CA 94612-5224,
(510)637-3300, Hours 8 a.m. to 5:00 p.m., PT.

The Administrative Law Judge's decision can be found at https//:www.nlrb.gov/case/01-CA-263079 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.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6700.

REGION 4 COMPLIANCE OFFICER, (215) 597-5354.
REGION 5 COMPLIANCE OFFICER, (410) 962-2880.
REGION 10 COMPLIANCE OFFICER, (470) 343-7498.
REGION 19 COMPLIANCE OFFICER, (206) 220-6284.
REGION 20 COMPLIANCE OFFICER (628) 221-8875.
REGION 25 COMPLIANCE OFFICER, (313) 226-3200.
REGION 32 COMPLIANCE OFFICER, (510) 671-3034.