

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**In the matter of**

**K-VA-T FOOD STORES, INC.  
D/B/A FOOD CITY**

**and**

**RETAIL, WHOLESALE & DEPARTMENT  
STORE UNION, UFCW, CLC**

**Case 9-CA-46125  
9-CA-46126  
9-CA-46127  
9-CA-46152  
9-CA-46153**

**K-VA-T FOOD STORES, INC. D/B/A FOOD CITY'S  
ANSWERING BRIEF TO CROSS-EXCEPTIONS**

Respondent K-VA-T Food Stores, Inc. d/b/a Food City ("Food City") files its Answering Brief to Counsel for the Acting General Counsel's Cross-Exceptions and Supporting Citations and Argument in the above-referenced unfair labor practice proceeding.

Counsel for the Acting General Counsel ("General Counsel") has cross-excepted to the only finding that the ALJ made in Food City's favor. On November 12, 2010, Ms. Burton was disciplined for violating company policy with respect to checking in a vendor by permitting unauthorized product, orange cupcakes, to enter the store. The ALJ determined that Food City, by disciplining Ms. Burton for this clear violation of company policy, did not discriminate against her in violation of Section 8(a)(3). Yet, the General Counsel disputes this single finding. Specifically, the General Counsel believes that the ALJ erred by 1) finding that the Respondent met its burden of showing that it would have disciplined Glenda Burton in the absence of its discriminatory motive; 2) by failing to apply the correct standard in his analysis; 3) by failing to accord proper consideration to the finding that the vendor was not disciplined; and 4) by concluding that the record failed to establish that Respondent discriminated against Burton in

violation of Section 8(a)(3). Counsel for the Acting General Counsel's Cross-Exceptions, p. 1-2. None of these cross-exceptions have any basis whatsoever in fact or law.

**1. The General Counsel's first and fourth exceptions have no basis in the record.**

First, contrary to the General Counsel's argument, Food City fully met its burden of showing that it would have disciplined Ms. Burton in the absence of any discriminatory motive, and thus the ALJ's finding and conclusion of law concerning the November 12, 2010 discipline should be sustained. The General Counsel notably does not dispute that Ms. Burton was aware of and had received training on the company policy concerning the prohibition against unauthorized product coming into the store. (Resp. Ex. 1; Tr. 431, 704). Nor does it dispute that Ms. Burton conceded that she violated company policy. (Tr. 393, 704, 785). What the record clearly establishes is that Food City's decision to discipline Ms. Burton was not unreasonable, especially in light of the recent problem with shrink in the Louisa store. Therefore, the ALJ properly found that Food City had met its burden of showing that it would have disciplined Ms. Burton on November 12, 2010 in the absence of any discriminatory motive.

**2. The ALJ applied the correct legal burden.**

Second, the General Counsel argues that the ALJ, in this one instance where he found that Food City had met its burden, applied the wrong legal standard, essentially a "lower" burden. Food City satisfied its burden by a preponderance of the evidence standard. *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999). Thus, what is quickly apparent is that the ALJ applied the correct legal standard, but the General Counsel simply did not like the result. And, in applying the appropriate legal standard, the ALJ correctly found that Food City had met this burden with respect to Ms. Burton's November 12, 2010 discipline.

**3. Ms. Burton and the Hostess vendor are not valid comparators.**

Finally, the General Counsel argues that Ms. Burton's discipline is evidence of "shameless" disparate treatment—that the vendor was "no less 'guilty'" than Burton, and she was disciplined. Counsel for the Acting General Counsel's Cross-Exceptions, p. 3-4. In doing so, the General Counsel completely ignores the fact that the vendor and Ms. Burton are not valid comparators.

Comparators must be similar in *all* relevant aspects. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (*quoting Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994)) (emphasis added). Accordingly, comparators must have the same job description. *Ajayi v. Aramark Bus. Servs. Inc.*, 336 F.3d 520, 532 (7th Cir. 2003). In addition, the comparators must have dealt with the same supervisor, been subject to the same standards, and engaged in acts of comparable seriousness. *Ercegovich*, 154 F.3d at 352; *Anders v. Waste Mgmt. of Wis., Inc.*, 463 F.3d 670, 676 (7th Cir. 2006) (*quoting Byrd v. Ronayne*, 61 F.3d 1026, 1032 (1st Cir. 1995)); *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 710 (6th Cir. 2006) (*quoting Clayton v. Meijer, Inc.*, 281 F.3d 605, 611 (6th Cir. 2002)). Moreover, employment status as an employee of the company "differs fundamentally" from that of an independent contractor or vendor. *Muse v. Utili-Comm South, Inc.*, 2007 U.S. Dist LEXIS 78584 at \*15 (S.D. Ind. 2007); *Taylor v. ADS, Inc.*, 327 F.3d 579, 581 (7th Cir. 2003).

In the present matter, Ms. Burton was an employee of Food City. The evidence of record amply demonstrates that Ms. Burton was aware of the company policy concerning unauthorized product; that she disregarded this policy and permitted unauthorized product into the store; that she ignored her supervisor's directive concerning the cupcakes; and failed to act as the gatekeeper of the store to prohibit unauthorized product from entering the store. (Resp. Ex. 1;

Tr. 393, 431, 699, 701, 704, 785, 820-21). For this, she was disciplined. Although vendors are bound to follow Food City's procedures for checking in product, including bringing in only authorized products, it was Ms. Burton's job responsibility to act as the gatekeeper for unauthorized product. (Resp. Ex. 1). She was aware of this policy, and disregarded it. (Resp. Ex. 1; Tr. 704). The vendor was not subpoenaed, and did not testify at the trial.

In sum, the clear evidence of record is that, even if there was protected activity on the part of Ms. Burton, of which Food City was aware, it would have taken the same actions against her on November 12, 2010. Therefore, the ALJ properly found that Food City met its burden of showing that it would have disciplined Ms. Burton on November 12, 2010 in the absence of discriminatory motive. (ALJD p. 28, 11. 1-3). Therefore, Food City asks the Board to overrule General Counsel's Cross-Exceptions.

Respectfully submitted,

K-VA-T FOOD STORES, INC.  
D/B/A FOOD CITY  
By counsel



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**CERTIFICATE OF SERVICE**

I, Ashley C. Pack, counsel for K-VA-T Food Stores, Inc. d/b/a Food City, do hereby certify that the foregoing **K-VA-T Food Stores, Inc. d/b/a Food City's Answering Brief to Cross-Exceptions** was filed via the National Labor Relations Board's electronic filing system on the following this 21<sup>st</sup> day of September, 2011:

Lester A. Heltzer, Executive Secretary  
Board's Office of the Executive Secretary  
1099 14th Street N.W.  
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and that a true and exact copy of the same was served on the following via electronic mail this the 21<sup>st</sup> day of September, 2011:

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