UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

IN THE MATTER OF:

ALBERTSON'S, LLC,

Respondent,

YVONNE MARTINEZ, an Individual,

and **Case Nos. 28-CA-023387**
28-CA-023538

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1564,

Charging Parties.

BRIEF IN SUPPORT OF RESPONDENT ALBERTSON'S, LLC'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

I. STATEMENT OF THE CASE

Respondent Albertson's, LLC ("Albertson's" or "Company") submits this brief in support of its exceptions to the Administrative Law Judge's May 24, 2012 Decision ("Decision") in the above-captioned case involving a consolidated unfair labor practices complaint issued on charges filed by Yvonne Martinez and United Food and Commercial Workers Union, Local 1564 ("Union").

Albertson's is a grocery store chain operating mostly in the western United States. This case involves Albertson's Store 917 in Albuquerque, New Mexico. The Union represents the meat department at Store 917; otherwise the store is not unionized. Store 917 has approximately eighty employees. The complaint alleged that Albertson's committed numerous violations of Section 8(a)(1) and 8(a)(3) of the Act at Store 917 between August 2010 and May 2011, a period of time when the Union was engaged in a pre-petition organizing effort at the store.

The Administrative Law Judge ("ALJ") heard this consolidated proceeding over the course of eight days between September 27 and December 6, 2011. His Decision found that the Company solicited employee grievances, conducted surveillance of employees' protected activities, created the impression of surveillance, and threatened an employee with discharge for her union activities, all in violation of Section 8(a)(1), and that the Company suspended and discharged Yvonne Martinez because of her protected activities in violation of Section 8(a)(1) and (3). For the reasons discussed below, Albertson's takes exceptions to these findings by the ALJ and submits that they should not be adopted by the Board.

II. EXCEPTIONS, ARGUMENT AND AUTHORITY

A. Danny Ma's Alleged Solicitation of Grievances

Albertson's takes exception to the ALJ's finding that Danny Ma unlawfully solicited and promised to remedy employee grievances in violation of Section 8(a)(1).

The ALJ found that Albertson's Labor Relations Director Danny Ma unlawfully solicited employee grievances in meetings with individual employees at Store 917 in early April 2011. (Decision at 16:19-17:11.) This determination rested entirely on cashier Talie Perea's brief testimony regarding her alleged one-on-one encounter with Ma in April. (Id.; see generally Tr. 789-91.)

The ALJ began with an erroneous finding that Perea "declined the initial invitation by Ma to meet." (Decision at 16:20 (emphasis added).) In fact, while Perea's testimony on direct (or the transcription thereof) was somewhat garbled, she clarified on cross-examination that it was lobby clerk Evangeline Chavez, not Ma, who asked if she wanted to "go upstairs":

> [Direct] I was approached by Evangeline Chavez, who works in the lobby, asking – her and Cindy Andablo were in the safe room at the time, and Danny had stepped out of the safe room and asked me, Do you want to go upstairs.

> [Cross] Cindy and Vangie Chavez were inside the safe room, and that's when I had said earlier that Vangie stepped out and asked me if I wanted to go upstairs.

(Tr. 789, 938 (emphasis added).) Also erroneous was the ALJ's finding that this was the first time Ma had visited Store 917. (Decision at 16:10-11.) Ma testified only that he could not recall visiting Store 917 specifically in 2010 or in 2011 before April. (Tr. 1626.) He did not say he had never been there before. These two errors were critical because the ALJ's belief that Ma attempted personally to initiate the meeting and had never before visited Store 917 clearly fed into his conclusion that "high level management was making new and unusual efforts to resolve employee complaints." (Decision at 17:5-9.)

The ALJ also erred in finding that Ma asked Perea, once she came to see him, whether she had "any concerns in the store." (Decision at 16:23-25.) Perea did make that claim during her direct examination, but only as an afterthought in response to blatant prompting by Counsel for the Acting General Counsel ("AGC"). (Tr. 791.) When pressed for further details regarding this alleged meeting on cross-examination, Perea effectively retracted her previous answer and testified that Ma asked her no questions that were unrelated to benefits or open enrollment. (Tr. 940.) Perea admittedly understood and believed that Ma was there to talk about open enrollment in benefits. (Id.) She regarded the meeting as a "casual conversation" and testified that it ended after they chatted about "gas prices and things like that." (Id.) Thus, the evidence does not support the ALJ's conclusion that Ma solicited Perea's "concerns."

Most importantly, however, it is not the solicitation of grievances itself that violates the Act, but rather an employer's explicit or implicit promise to remedy the grievances that suggests to employees that union representation is unnecessary. Wal-Mart Stores, 340 NLRB 637, 640 (2003). No evidence was presented, and the ALJ did not find, that Ma made any explicit

promise to remedy Perea's grievances. Instead, the ALJ concluded, apparently based solely on Perea's testimony, that Ma impliedly promised to remedy her and other employees' grievances – "that Ma's individual meetings could easily be perceived by employees as for the purpose of listening to their complaints and grievances in circumstances that implied remedies would follow." (Decision at 16:48-17:3.) This was clear error because Perea by her own account never raised any "concerns" in response to Ma's alleged invitation. (Tr. 791.)

Board precedent purportedly followed by the ALJ holds that implied promises occur when an employer responds to grievances raised by employees in response to a solicitation:

> [T]he solicitation of grievances at preelection meetings carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries. Thus, the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary.

Uarco Inc., 216 NLRB 1, at 1-2 (1974) (emphasis added) (cited in Decision at 14:7-8). Consistent with this language, in the three cases cited by the ALJ in which violations were found, the Board identified an unlawful promise implicit in the employer's response to concerns actually voiced by the employees. See Majestic Star Casino, LLC, 335 NLRB 407, 407-08 (2001) (manager took note of employees' stated concerns and told them she was going to look into them the best she could); Maple Grove Health Care Ctr., 330 NLRB 775, 2000 NLRB LEXIS 135, at *78-*79 (2000) (supervisor implicitly promised to remedy grievances by attempting to answer employees' questions); Reliance Elec. Co., 191 NLRB 44, 46 (1971) (management officials undertook to "look into" or "review" employees' complaints). In the fourth case, Uarco, supra, the Board found that the inference of an unlawful promise was

rebutted where the employer responded to employees' complaints but repeatedly stated that it could make "no promises." 216 NLRB at 2.

Here, Ma's conversation with Perea never reached the stage where the Company could be required to give a "no promises" disclaimer or the like, because Perea did not raise a single concern that could have generated an implied promise in the first place. In Wm. T. Burnett & Co., 273 NLRB 1084 (1984), the Board found that, even assuming that the company president's offer to talk to employees was a solicitation of grievances, there was no evidence that any employee responded to his offer. Id. at 1086. The Board concluded that no unlawful promise occurred because "[t]he absence of any responses in itself reveals that the employees did not perceive Townsend's remarks as implying that any complaints would be remedied." Id.; see also NLRB v. K & K Gourmet Meats, Inc., 640 F.2d 460, 467 (3d Cir. 1981) (record did not support finding that employer impliedly promised to remedy grievances where no complaints were actually tendered). The same conclusion is required in this case. Ma could not have impliedly promised to remedy Perea's grievances when she raised none and he did not even have an opportunity to hint that any problems would be corrected. Put differently, Perea had no reason to "anticipate improved conditions of employment" following a conversation with Ma in which she did not complain about her conditions at all. The record does not support the ALJ's finding that Ma unlawfully solicited and promised to remedy employees' grievances.

B. Alice Andrick's Alleged Threat and Implication of Surveillance

Albertson's takes exception to the ALJ's finding that Alice Andrick acted as the Company's apparent agent in creating the impression of surveillance and threatening Perea with discharge in violation of Section 8(a)(1).

The ALJ found merit in two of the AGC's allegations regarding conduct by Service Operations Assistant (a/k/a "Assistant Front End Manager") Alice Andrick: that she gave Perea the impression that Union activities were under surveillance by the Company and that she implicitly threatened Perea with discharge because of her Union activities. (Decision at 26:14-17, 27:18-37.) Albertson's takes exception not to the ALJ's findings regarding what Andrick said, but rather to his determination concerning the capacity in which she said them. A necessary prerequisite to the ALJ's finding of violations in both instances was his conclusion that Andrick was an agent of Albertson's whose statements could be attributed to the Company. (See Decision at 27:27-28.) Specifically, the ALJ made a blanket determination near the beginning of his decision that Andrick was Albertson's apparent agent who employees "would reasonably believe . . . was reflecting company policy and speaking and acting for management." (Decision at 7:21-31.) This finding was plainly wrong with respect to Andrick's allegedly unlawful statements to Perea.

It was the AGC's burden to prove that Andrick was an agent of Albertson's under Section 2(13) of the Act.[1] Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006). The ALJ accurately noted that "the Board applies the common law principles of agency to determine whether an individual is acting with the apparent authority of her/his employer when evaluating a particular statement or action by the putative agent." (Decision at 5:27-30) (citing Cooper Indus., 328 NLRB 145 (1999) (emphasis added).) As this statement implies, "an employee may be an agent for one purpose but not another." Pan-Oston Co., 336 NLRB 305, 306 (2001). "The party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct that is alleged to be unlawful." Id. (emphasis added). Apparent agency

[1] The ALJ correctly found a "paucity of evidence" that Andrick was a supervisor under Section 2(11) of the Act. (Decision at 5 n. 3.)

exists only if, "under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." Waterbed World, 286 NLRB 425, 426-27 (1987). The context in which the alleged behavior occurred is a critical factor in this analysis. Jules v. Lane, 262 NLRB 118, 119 (1982).

Here, the ALJ in his agency finding erroneously ignored and failed to analyze the specific context of Andrick's alleged comments to Perea regarding "surveillance" and "discharge." Indeed, the ALJ's three-page discourse on Andrick's "apparent agent" status contains only one sentence regarding the Perea conversations: that Andrick "told cashier Talie Perea about aspects of the Respondent's close oversight of the Local 1564's activities learned from her routine meetings with [Store Director] Merritt." (Decision at 7:18-19.) This is not a fair characterization of those conversations as described by Perea. In fact, the ALJ captured the context of Andrick's comments much more accurately later in his Decision:

> Perea said she had several conversations with Andrick in the spring of 2011 about management's claim that there was too much [gossiping] at the front end. Purportedly, Merritt called Andrick to his office on several occasions to warn her about gossiping with the cashiers, in particular Perea. Perea recalled a conversation with Andrick in early May 2011 shortly after Andrick came back from a meeting with Merritt in his office. Purportedly Merritt had admonished Andrick because there was too much "gossiping" around the checkout area.

(Decision at 25:34-39 (citing Tr. 794-96) (emphasis added).) According to Perea, it was on one of these occasions, when Andrick had just been "called upstairs" for a "personal conversation" with Merritt, that Andrick made the statements to her that the ALJ found created the "impression of surveillance":

> [A]nd she came down and told me that Don had told her, We have one down there that thinks that she's going to get her way. And he says, I know about all this union stuff. And she says, Well, I've been in the union also, she goes, so I know about the union stuff,

> too. They had had a pretty intense conversation upstairs, and it's because she was talking to me prior to the time that Don had called her up there.

(Tr. 794-95.) After prompting by the AGC, Perea testified that the purported "threat of discharge" occurred in the same conversation:

> She had said, Well, you know what they're trying to do up there; they're trying to make you quit. They're trying to make you walk away from your job. And I said, Well, I'm not going to walk away from my job. And at that time, Alice had also asked Don up there, Are you trying to make me quit or get me fired, she goes, because I'm not walking away from my job either.

(Tr. 795-96.) Perea shed further light on her relationship with Andrick in describing another conversation the two of them had on the phone, when they were both at home and off the clock. (Tr. 793-94, 913-14.) Perea was clearly reluctant to provide details but testified that "we were talking about things going on with Don [Merritt], because she feels pretty much the same way that I do, and then I told her, like I always say to everybody, I said, This is why we need the union." (Tr. 793 (emphasis added).) Perea was more blunt on cross-examination: "It was a private conversation, . . . and we were mostly talking about what a jerk Don was." (Tr. 914 (emphasis added).) Perea went on to testify that she and Andrick are "good friends." (Tr. 915.)

Considering the specific context of these conversations as required by Board law, it is impossible to conclude that Perea reasonably could have believed Andrick was "reflecting company policy and speaking and acting for management" in her comments regarding Merritt. Both of the remarks at issue occurred when Andrick talked to Perea after Merritt privately reprimanded Andrick for "gossiping" with Perea. By Perea's account, there was no suggestion that Merritt authorized Andrick to tell Perea anything; to the contrary, he specifically instructed Andrick "[t]hat she can't be talking to me [Perea], because it's gossiping." (Tr. 792.) Andrick's account of being admonished by Merritt could not have conveyed the impression she was

speaking for management in describing it to Perea. Furthermore, Perea described the Merritt/Andrick meeting as an "intense" and antagonistic encounter in which Andrick argued with Merritt and accused him of trying to get rid of her (Andrick) as well. Under the circumstances, nothing about Andrick's conversation with Perea created the appearance of a manager issuing instructions or imparting Company policy to a subordinate, as the ALJ found. Rather, Andrick clearly was confiding in, and commiserating with, Perea on a personal and equal level regarding perceived mistreatment by Merritt, and in the process directly disobeying his order not to "gossip" with Perea. Particularly in light of the "private" telephone call in which they discussed "what a jerk Don was," these conversations between Andrick and Perea were nothing more than mutual gripe sessions between "good friends" and peers.

Thus, while the ALJ may have had a reasonable basis for concluding that Andrick was clothed with apparent authority in her day-to-day oversight of the front end or in her handling of Yvonne Martinez's Catalina Coupon, he erred in finding that she acted as Albertson's agent in complaining to Perea about Merritt. See Cooper, 328 NLRB at 145 (holding that employer's facilitator was apparent agent in making statements to employees on the production floor and in team meetings, but not in attending union organizational meeting "as a regular worker"). Accordingly, the ALJ also erred in holding the Company liable for Andrick's comments in those conversations that supposedly created an impression of surveillance and threatened Perea with discharge for her Union activities.

C. Don Merritt's Alleged Surveillance of Union Activities

Albertson's takes exception to the ALJ's finding that the Company conducted unlawful surveillance of Union activities in violation of Section 8(a)(1).

The ALJ found that the Company unlawfully engaged in surveillance of employees' Union activities at Store 917 beginning around September 2010. (Decision at 26:6-14.) In reaching this conclusion, the ALJ relied extensively on evidence of communications between Store Director Merritt and Company managers at the district and division level, particularly District Manager Tom Houston and Associate Relations Manager Angel Seydel. (Decision at 22:41-23:25.) This correspondence began with a July 28, 2010 e-mail from Houston to Albuquerque-area store directors asking them to be on the lookout for a former meat manager, later identified as Juan Vasquez, who was soliciting for the Union and to contact Houston or Danny Ma if they saw or heard anything about this non-employee organizer's activities. (GC Ex. 26.) In August 2010, Merritt e-mailed Houston and Seydel twice reporting that Vasquez had made overtures to various employees at Store 917. (GC Exs. 24, 26.) Importantly, Merritt gave uncontroverted testimony that these reports were based on information that store employees volunteered to him and Grocery Manager Jeromy Garcia. (Tr. 358-62, 375-79.) Merritt testified that he continued to receive voluntary reports from multiple employees regarding activity by non-employee Union representatives, including complaints that they were following employees home. (Tr. 382, 385-92.)

The ALJ erred in using these communications as support for his conclusion that Albertson's engaged in unlawful surveillance. It is perfectly lawful for an employer to instruct supervisors to report union activity to management. Wal-Mart Stores, Inc., 340 NLRB 220, 223 (2003). Furthermore, "there is nothing in the Act which makes it unlawful for employees to voluntarily report to an employer on the union activities of their fellow employees." Offner Elecs., Inc., 134 NLRB 1064, 1072 (1961). Thus, Houston's instructions to store directors and Merritt's ensuing reports to him – based exclusively on information voluntarily provided by

employees – were completely legal and no basis for a finding that improper surveillance occurred.

Merritt's vigilance regarding the activities of non-employee Union representatives, such as Vasquez, was lawful even if it extended to following them around the store. In a case cited by the ALJ, the Board held that no unlawful surveillance or impression thereof arose from "the practice of management in following the nonemployee Union organizers through the sales areas of the store when they entered the store during the course of the organizing campaign." Broadway, 267 NLRB 385, 400 (1983). "Employers are free to observe activities taking place on their premises when the scrutiny of those activities . . . is not concerned with the union activities of employees as distinguished from impermissible conduct of nonemployee union organizers." Id. at 401. Albertson's maintained a facially valid no-solicitation policy that strictly prohibited solicitation by non-employees on Company premises. (Resp. Ex. 4.) Merritt was entitled to enforce that policy. The ALJ therefore erred in finding unlawful surveillance based on Merritt's looking for the "Union rep in the plaid shirt" and the employees' joke that Merritt was "always looking for the Union guy." (Decision at 24:33-25:3, 26:6-9.)

An employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Fred'k Wallace & Son, Inc., 331 NLRB 914, 915 (2000). Unlawful surveillance occurs if the employer observes employees in a way that is "out of the ordinary" and thereby monitors their protected activities. Partylite Worldwide, Inc., 344 NLRB 1342, 1342 (2005). The testimony regarding any extraordinary monitoring activity by store management in this case was sparse and exceedingly vague. A few employees testified that, after the organizing campaign began, Merritt and to some extent Garcia "watched" or "policed" the store and were "very observant" regarding what employees were doing on the front

end. (See Decision at 23:30-24:31.) However, a store director and assistant store director charged with running a grocery store are inevitably going to be walking around the store and supervising their employees whether or not a union campaign is underway. The AGC did not present evidence that store managers never "watched" or "policed" the store before. Absent some way to definitively quantify the alleged change, employees' vague and subjective perceptions that management became "more observant" or "more watchful" are not sufficient to establish that unlawful surveillance actually occurred. Indeed, it is virtually impossible for Albertson's or any similar employer to defend against such nebulous allegations.

Moreover, the AGC did not present a shred of evidence that management ever actually witnessed employees engaging in protected activity through any "out-of-the-ordinary" surveillance measure. As discussed above, employees voluntarily approached Merritt and Garcia to report the information Merritt e-mailed to his corporate superiors in August 2010. The ALJ relied on two more e-mails from Merritt to Seydel in April 2011, (GC Exs. 25 & 30), but there was no proof that Merritt acquired that information via "surveillance" either.[2] Cashier Gloria Padilla voluntarily told Merritt that the Union representatives had not bothered her recently, as reported in his April 18 e-mail. (Tr. 372; GC Ex. 25.) The information that Merritt relayed on April 24 regarding activities on the front end easily could have been observed by any manager during the ordinary course of business, and the AGC did not show otherwise. (GC Ex. 30.)

In contrast, the cases cited by the ALJ involved employers whose extraordinary surveillance measures actually resulted in the observation of protected union conduct by

[2] Contrary to the ALJ's finding, four e-mails from Merritt over the course of eight months do not support an inference that he was "carefully monitoring" Union activities. (Decision at 25:14-16.)

employees.[3] See Albertson's Inc. v. NLRB, 161 F.3d 1231, 1235 (10th Cir. 1998) (company supervisors witnessed and participated in solicitation for decertification petition and confiscated petition); Broadway, 267 NLRB at 402 (manager stood for 30 minutes watching employees converse with union representative outside store). In the absence of such evidence here, the ALJ erred in finding that any unlawful surveillance occurred.

D. Suspension and Discharge of Yvonne Martinez

Albertson's takes exception to the ALJ's finding that the Company suspended and discharged Yvonne Martinez because of her Union activities in violation of Section 8(a)(1) and (3).

The ALJ found that Albertson's suspended and discharged cashier Yvonne Martinez based on her protected activities in violation of Section 8(a)(1) and (3) of the Act. (Decision at 42:10-45:31.) This finding was erroneous under the Board's Wright Line test because the AGC failed to prove causation and the ALJ disregarded conclusive evidence establishing the Company's affirmative defense.

To show an unlawful discharge (or suspension) under Wright Line, the General Counsel must prove that the employee's protected conduct was a substantial or motivating factor in the adverse employment action. Ready Mixed Concrete Co. v. NLRB, 81 F.3d 1546, 1550 (10th Cir. 1996). "The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer." Weldon, Williams & Lick, Inc., 348 NLRB 822, 825 (2006), enf'd, 255 Fed. Appx. 535 (D.C. Cir. 2007). Most importantly for purposes of this case, the General Counsel is

[3] The ALJ also inexplicably cited International Paper Co., 313 NLRB 280 (1993) (ALJ decision reported at 1992 NLRB LEXIS 1296), a "monitoring" case involving overt harassment of union supporters, as opposed to "surveillance" such as that alleged here. (Decision at 26:13-14.) The ALJ's reliance on plainly inapposite case law further illustrates the flaws in his analysis.

required to establish that the decision-maker responsible for taking the action knew of protected union activity by the employee. Sears, Roebuck & Co. v. NLRB, 349 F.3d 493, 503 (7th Cir. 2003). "'Before an employer can be said to have discriminated against its employees for their protected activity, the Board must show that the supervisor responsible for the alleged discriminatory action knew about the' union activity." Id. at 504 (quoting NLRB v. McEver Eng'g, Inc., 784 F.2d 634, 640 (5th Cir. 1986)). Board precedent makes clear that no discrimination can be found absent proof that the decision-maker had knowledge of union activity specifically by the alleged discriminatee. See Mission Foods, 350 NLRB 336, 338 (2007); Register Guard, 344 NLRB 1142, 1144-45 (2005); Amber Foods, 338 NLRB 712, 714 & n. 11 (2002).

Here, the ALJ recognized that Angel Seydel identified Martinez's violations of Company policy and drove the decision to discharge her:

> After Associate Relations Manager Seydel reviewed [District Loss Prevention Manager Mark] Zbylut's investigation report, she recommended up and down the chain of command that the Company discharge Martinez for violating the Catalina coupon policy. The violations, as detailed by Seydel, included: (1) failing to give the coupon to the customer who earned it; (2) failing to destroy or discard the coupon after she realiz[ed] it had not been given to the customer; and (3) keeping "the coupon for personal use instead of discarding it."

(Decision at 41:16-21.) In fact, uncontroverted evidence at the hearing established that Seydel effectively made the decision to terminate Martinez without any knowledge that Martinez was involved in protected activity. When Seydel learned of the investigation from Zbylut, she had never heard of Martinez and had no knowledge that Martinez supported the Union or was involved in Union activities. (Tr. 94-95.) At the time of her recommendation that Martinez be discharged, Seydel still had no information regarding Martinez's Union sympathies or activities.

(Tr. 96, 1521.) Merritt relied on Seydel's recommendation and did not attempt to conduct his own investigation or policy evaluation. (Tr. 443.) He has never disregarded a recommendation by Associate Relations to terminate an employee. (Id.) No Store Director has ever rejected Seydel's recommendation to discharge an employee. (Tr. 1518.)

Despite acknowledging Seydel's pivotal role in the decision-making, the ALJ erroneously failed to identify any evidence that she specifically had knowledge of protected activity by Martinez. Instead, he made an improper, broad brush finding that "the Company knew about Martinez' participation in the organizing effort." (Decision at 43:16-17.) The ALJ found Seydel's denial that she knew of Martinez's Union involvement "disingenuous" but failed to articulate any evidentiary basis for this conclusion. (Decision at 43:23-26.) According to the ALJ, "Merritt acknowledged without any significant qualification that he kept Ma, Seydel and Houston apprised of nearly everything he learned about the organizing campaign" from his alleged surveillance and "cadre of employee informers." (Decision at 43:17-19, 43:23-25.) However, Merritt gave no such testimony and the facts do not support this assertion. As discussed above, Merritt's reports to corporate management before Martinez's discharge consisted of two e-mails passing on employees' voluntary reports of activity by non-employee Union representatives. Seydel worked in Denver and had no opportunity to observe Martinez's behavior herself. (Tr. 35.) There simply is no basis in the record for an inference that Seydel, the de facto decision-maker, knew of protected activity by Martinez at any time before her discharge. The ALJ therefore erred in finding that the AGC proved a prima facie case under Wright Line.

Even assuming for purposes of argument that there were evidence to meet the General Counsel's initial burden of proof, Albertson's affirmative defense under Wright Line was to

show that it would have reached the same decision absent the protected conduct. Ready Mixed Concrete, 81 F.3d at 1550. The Company conclusively proved that Martinez's violation of the Catalina Coupon policy was an independently legitimate basis for her discharge. The policy prohibits cashiers from keeping Catalina Coupons and requires that they immediately destroy and discard coupons that are not accepted by the customer. (Resp. Exs. 18-20.) It expressly provides that "[a]ll associates violating the Company's Checkout Coupon Policy will be subject to termination without further warning." (Id.) Indeed, the ALJ made a factual finding that Albertson's proved the existence of the controlling policy: "If for any reason the qualifying customer is not provided with the coupon or does not want it, the store employees have strict instructions to destroy it." (Decision at 38:23-25.)

The ALJ also found the facts establishing that Martinez violated the Catalina Coupon policy on December 1, 2010:

> Around 9 a.m. Martinez noticed that she had failed to give a customer the $10-Catalina discount coupon she earned by making a $100+ purchase. After she noticed the coupon she tore it off and set it on the counter to her right just above the supply drawers and continued with her work.

(Decision at 38:42-44.) The ALJ went on to credit Martinez's testimony that she inadvertently put the coupon into her drawer along with a donut she was eating and the shopping bag she was using as a placemat. (Decision at 38:46-39:5.) Thus, it was established that Martinez failed to give the Catalina Coupon to the customer, placed it on the counter rather than destroying it, then somehow put it into her drawer whether intentionally or not. This conduct in itself clearly violated the policy. It was not possible to prove conclusively that Martinez intended to keep and use the coupon, but neither the policy nor the law required this level of proof. The Company was only required to show it had a reasonable belief that Martinez committed the alleged offense.

DTR Indus., Inc., 350 NLRB 1132, 1135 (2007), enf'd, 297 Fed. Appx. 487 (6th Cir. 2008). Albertson's had more than a reasonable belief that Martinez violated the policy by failing to give the coupon to the customer and keeping it rather than immediately destroying it – those facts were undisputed. Although another violation was not necessary to support termination, the Company also reached the reasonable conclusion that Martinez deliberately secreted the coupon in her drawer intending to use it as the equivalent of cash for herself. Several witnesses, including Perea, testified that there is no legitimate reason for a cashier to put a Catalina Coupon in the supply drawer. (Tr. 114, 288, 867, 1159.) And Martinez never provided an adequate explanation when given the opportunity. The ALJ failed to recognize that she did not tell her donut story to the Company at any time during the investigation and interviews that preceded her termination. (Tr. 593, 644.)

Instead of assessing the reasonableness of Albertson's belief that Martinez had violated policy from the perspective of a decision-maker such as Seydel, the ALJ overanalyzed the security video and investigation and subjectively disagreed that Martinez in fact intended to keep the coupon for herself. His analysis required the Company to prove too much and ignored undisputed evidence, independent of the video, that Martinez violated the policy regardless of her intent. In particular, the ALJ found that alleged defects in Zbylut's investigation report, as compared to the security video, undermined Albertson's nondiscriminatory explanation for Martinez's discharge. (Decision at 44:5-43.) However, if the termination decision was based on an imperfect report by Zbylut, this does not in any way support a conclusion that she was discharged on the basis of her protected activity. It was undisputed that Zbylut had no idea Martinez was a Union supporter or engaged in Union activity, and the ALJ did not find

otherwise. (Tr. 1326.) Thus, no evidence supported his conclusion that Zbylut's investigation was a "cover for the managers seeking to discharge Martinez." (Decision at 44:5-6.)

The ALJ's other rationales for rejecting Albertson's affirmative defense were equally flawed. Merritt and Ma's alleged untruthfulness regarding their knowledge of Martinez's protected activities is not relevant to determining whether the Company would have discharged her absent her protected activity. (Decision at 43:45-44:3.)

The ALJ strayed particularly far from the evidence in finding that Albertson's ignored a violation of the Catalina Coupon policy by the courtesy clerk who was standing at Martinez's register during the critical transaction. (Decision at 44:48-45:14.) The policy plainly does not apply to all employees. It states that "[a]ll associates who check [i.e., cashiers] must read the above message and sign below." (Resp. Ex. 18 (emphasis added).) Another iteration of the same policy is found in the Coupon Acceptance Cashier Training directed only to cashiers. (Resp. Ex. 21.) No evidence was presented that courtesy clerks were subject to the Catalina Coupon policy or that the Company had any past practice of disciplining bystander witnesses to Catalina Coupon violations. The ALJ seemingly went out of his way to manufacture a reason to second-guess management here.

Meanwhile, the ALJ ignored undisputed evidence that the Company's decision to terminate Martinez was consistent with past practice. Albertson's previously had terminated twenty of twenty-one employees who were found to have violated the Catalina Coupon Policy. (Tr. 154; Resp. Ex. 25.) One employee found to have violated the policy was not discharged because he was a fairly new cashier and had not signed a Catalina Coupon Policy acknowledgment. (Tr. 112; Resp. Ex. 25.) Zbylut, who has performed thirty to fifty investigations into Catalina Coupon violations, testified that he was not aware of any case where

an employee failed to give a Catalina Coupon to a customer, kept it instead of destroying it, but was not discharged. (Tr. 1326-27.) Although this was the first time that the Company terminated a cashier who did not keep a Catalina Coupon on her person or attempt to redeem it, this does not show an inconsistency or pretext. No two policy violations are exactly alike, and an employer cannot be limited to terminations only in cases where there is an identical precedent. Evidence of disparate treatment exists only if the General Counsel points to a specific employee who was disciplined more lightly for infractions similar to the misconduct of the alleged discriminatee. Sears, Roebuck, 349 F.3d at 506. The AGC here presented no evidence that another employee committed a violation comparable to Martinez's and was treated more leniently.

The ALJ therefore erred in finding that Albertson's failed to carry its burden under Wright Line and that it suspended and discharged Martinez because of her union activities.

III. CONCLUSION

For the foregoing reasons, Albertson's respectfully requests that the Board decline to adopt the Administrative Law Judge's Decision and recommended order with respect to the findings to which Albertson's has taken exception.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief in Support of Respondent Albertson's, LLC's Exceptions to Administrative Law Judge's Decision was served on this 21st day of June, 2012 as follows:

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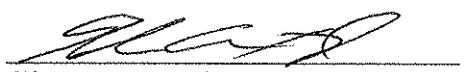

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