

**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.**

**RESPONDENT ALBERTSON'S LLC'S REPLY TO  
ACTING GENERAL COUNSEL'S ANSWERING BRIEF**

**I.    INTRODUCTION**

Respondent Albertson's LLC ("Albertson's" or "Company") respectfully submits this reply to the Acting General Counsel's ("AGC") answering brief regarding Albertson's exceptions to the ALJ's decision. The AGC's arguments do not establish a basis in fact or law for the ALJ's erroneous findings that the Company violated the Act.

**II.   ARGUMENT AND AUTHORITY**

**A.    DISCHARGE OF YVONNE MARTINEZ**

The record is clear that Yvonne Martinez would not have been terminated but for Angel Seydel's recommendations "up and down the chain of command." (See Decision at 41:16-21.) Store Directors theoretically have "discretion" to overrule Seydel but have never exercised it. (Tr. 443, 1518.) Seydel effectively made the decision and Don Merritt merely carried it out. Like the ALJ, the AGC in her response brief makes a conclusory statement, without any citation

to the record, that “all the supervisors participating in the decision knew Martinez engaged in protected activity” as a result of Merritt’s reports on the Union organizing campaign. (AGC’s Resp. at 5.) This assertion is completely unsupported by the evidence, particularly as to Seydel. Seydel worked in Denver and testified that she had no knowledge Martinez was involved in Union activities at any time before her discharge. (Tr. 94-96, 1521.) There was absolutely no evidence to the contrary. As detailed in Albertson’s initial brief, Merritt’s reports to Seydel before Martinez’s termination had nothing to do with Union activity by Martinez; they concerned only organizing activity by non-employee Union representatives. (Resp.’s Brf. at 10.) The AGC’s response does not identify any evidence that Merritt reported Union activity by any employee, let alone Martinez, in 2010. Thus, to the extent that the ALJ made a credibility determination in dismissing Seydel’s testimony, the clear preponderance of all the relevant evidence warrants overturning it. See Standard Drywall Prods., 91 NLRB 544 (1950). The AGC failed to prove that the decision-maker had any knowledge of protected activity specifically by the alleged discriminatee and therefore failed to meet her burden under Wright Line.

With respect to Albertson’s affirmative defense, the AGC regurgitates the ALJ’s findings of “flaws” in the investigation of Martinez but fails, as the ALJ did, to recognize that the Company need only show it had a reasonable belief that Martinez violated policy. DTR Indus., Inc., 350 NLRB 1132, 1135 (2007), enf’d, 297 Fed. Appx. 487 (6<sup>th</sup> Cir. 2008). The evidence conclusively established that Albertson’s had such a reasonable belief whether or not its investigation was worthy of the FBI. The Catalina Coupon was found in a drawer where it did not belong, at a register to which only Martinez had access during the relevant time period. Even if the video did not clearly show Martinez placing the coupon in her drawer, it and the electronic

sales records confirmed that no one but Martinez could have done it. Martinez ultimately admitted at the hearing that she generated the coupon, failed to give it to the customer, kept it on the counter instead of destroying it and put it in the drawer (albeit accidentally by her account) along with her donut. The Company's belief that she violated the policy was not only eminently reasonable but entirely correct despite any imperfections in the investigation. And neither the ALJ nor the AGC explained why Mark Zbylut in Loss Prevention would be motivated to conduct a pretextual investigation of an employee he knew nothing about.

The AGC continues to make the nonsensical argument that Martinez's discharge constituted "disparate treatment" or "deviated from past practice" because her violation was "unprecedented." This theory stands the concept of disparate treatment on its head. Disparate treatment must be found by comparing similarly situated employees. See Mesker Door, Inc., 357 NLRB No. 59 (2011). A deviation from past practice would exist if other employees committed similar violations and were treated more leniently. Id. Admittedly the Company had never before faced a scenario where a cashier was caught keeping a Catalina Coupon in a drawer before she tried to use it. But the uniqueness of Martinez's violation does not make her termination "disparate treatment" unless someone else had been treated less harshly in the same situation. There was no such evidence. That Martinez's violation was unprecedented means, almost by definition, that there were no similarly situated employees for purposes of a meaningful disparate treatment analysis. See St. George Warehouse, Inc., 349 NLRB 870, 879 (2007) (because alleged discriminatee's conduct was unprecedented, there were no similarly situated employees with whom to compare him). The only relevant evidence of past practice was that Albertson's terminated employees who violated the Catalina Coupon policy in every case but one, where the employee (Adrian Garrett) had never signed a policy acknowledgment

form. Martinez's discharge was consistent with this practice. The AGC refers to other incidents described in the testimony that are simply useless in assessing consistency of disciplinary actions. (AGC's Resp. at 8.) Catalina Coupons found on the floor or on counters were often dropped by customers and would not have been a basis for investigating or disciplining cashiers. (See Tr. 345-46.) Forgetting a Catalina Coupon on the printer and having to be reminded to tear it off is not comparable to tearing it off and then secreting it in a drawer rather than destroying it. Perea admittedly did not know whether or not management conducted an investigation when she supposedly turned in a coupon found in an unattended supply drawer. (Tr. 866.) The AGC never proved actual disparate treatment, and the ALJ found none except in his clearly erroneous conclusion that Albertson's failed to discipline the courtesy clerk in Martinez's case. (See Resp.'s Brf. at 18.) The ALJ therefore erred in finding that the Company failed to establish its Wright Line defense.

**B. ALLEGED SURVEILLANCE**

The AGC cites no evidence that Merritt ever observed employees' Union activities through any extraordinary "surveillance" measure. As discussed in Albertson's brief, Merritt's reports to Seydel were perfectly legal and did not reflect any unusual surveillance. (Resp.'s Brf. at 10-12.) To the contrary, employees voluntarily approached Merritt to relay most of the information he passed on. (Id. at 10.) The Partylite Worldwide and Loudon Steel cases cited by the AGC, much like the cases relied on by the ALJ, only serve to emphasize the point that unlawful surveillance occurs when a supervisor actually monitors protected activity by unprecedented means. The AGC has no such evidence here and is simply obfuscating the issue by relying on Merritt's reports of information that was volunteered to him or obtained in the regular course of business. The AGC did not show that Merritt saw a single employee engaging

in Union activity when he was allegedly collecting carts or policing the parking lot. The ALJ's finding of unlawful surveillance should not be adopted.

**C. DANNY MA'S ALLEGED SOLICITATION OF GRIEVANCES**

The ALJ found an unlawful solicitation of grievances based solely on Danny Ma's alleged one-on-one meeting with Talie Perea. (Decision at 16:14-17:11.) Albertson's exception does not depend on overturning a credibility determination regarding Perea, as the AGC contends. Indeed, the Company is accepting Perea's testimony that Ma asked her no questions that were unrelated to benefits or open enrollment, that she believed this was the sole purpose of the meeting, and that she and Ma merely had a "casual conversation" about "gas prices and things like that." (Tr. 940.)

More importantly, even if Ma had never been to Store 917 before and even if he did ask Perea whether she had any "concerns," this would only establish the solicitation element of a violation. There must also be an explicit or implicit promise to remedy grievances. Wal-Mart Stores, 340 NLRB 637, 640 (2003). There has never been any contention that Ma made an express promise to remedy Perea's grievances, and the AGC's response does not explain how he made an implied promise. The previously cited Wm. T. Burnett case recognizes that in the absence of an express promise, there must be a further exchange beyond the initial solicitation to give rise to an implied promise. "The absence of any responses in itself reveals that the employees did not perceive [the supervisor's] remarks as implying that any complaints would be remedied." 273 NLRB at 1086. The AGC makes an immaterial distinction in pointing out that Wm. T. Burnett involved an invitation for the employees to respond in individual meetings separate from the meeting where the solicitation was occurred. Even if the invitation is to respond in the same meeting, the absence of a response still shows that the employee does not

infer a promise. Again, Perea could not possibly have anticipated that her conditions of employment would be improved following her meeting with Ma if she did not tell him she had any concerns. The ALJ erred in finding that Ma impliedly promised to remedy Perea's grievances.

**D. ALICE ANDRICK'S AGENCY STATUS**

In attempting to defend the ALJ's finding that Alice Andrick acted as Albertson's apparent agent in her conversation with Perea, the AGC wholly ignores the specific facts regarding the context of that conversation. This was not one of Andrick's routine meetings with Merritt where he provided her "guidance and direction in carrying out store policies." (AGC's Resp. at 24.) Rather, according to the ALJ's findings based on the testimony of Perea, Merritt summoned Andrick to a meeting in which he reprimanded her for "gossiping" too much with Perea. Andrick then went downstairs and confided in her "good friend" Perea that she had just been instructed not to talk to Perea, thereby disobeying that very instruction. Perea could only have understood that the conversation was not authorized by management. Even based solely on the immediate context of this discussion, Perea could not reasonably have believed that Andrick was "reflecting company and speaking and acting for management" when in the same conversation she repeated Merritt's alleged comments about "union stuff" and speculated that "they're trying to make you quit." Furthermore, contrary to the AGC's argument, Perea's off-the-clock phone conversation with Andrick is absolutely relevant in analyzing context, given that the Board's test for apparent agency considers "all of the circumstances." Waterbed World, 286 NLRB 425, 426-27 (1987). That evidence confirms that Perea and Andrick were friends and allies who commiserated about their shared dislike of Merritt. In this context, the ALJ erred in

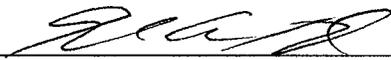
finding that Andrick acted as the Company's apparent agent when repeating Merritt's comments to Perea.

**III. CONCLUSION**

For the foregoing reasons, and for those set forth in its initial brief, 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,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Respondent Albertson's LLC's Reply to Acting General Counsel's Answering Brief was served on this 19<sup>th</sup> day of July, 2012 as follows:

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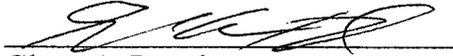
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