UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

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

and

RETAIL, WHOLESALE & DEPARTMENT
STORE UNION, UFCW, CLC

Cases 9-CA-46125
9-CA-46126
9-CA-46127
9-CA-46152
9-CA-46153

COUNSEL FOR THE ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS
AND
SUPPORTING CITATIONS AND ARGUMENT

On July 11, 2011, Administrative Law Judge Paul Bogas issued a Decision in the above-captioned matter and, on August 24, Respondent filed timely exceptions to the Judge's Decision. Pursuant to the Board's Rules and Regulations Section 102.46(b)(1), Counsel for the Acting General Counsel herein submits its cross-exceptions to the Decision as follows, followed by supporting citations and arguments:

1. To the Administrative Law Judge's finding that Respondent met its burden of showing that it would have disciplined Glenda Burton on November 12, 2010 in the absence of its discriminatory motive. (ALJD p. 28, ll. 1-3)

2. To the Administrative Law Judge's failure to apply the correct legal standard to Respondent's responsive burden to Counsel for the Acting General Counsel's showing of a discriminatory motive for Glenda Burton's November 12 discipline. The Judge found that Respondent only had the burden of proving that it "more likely than not" would have issued the discipline rather than showing that it *would* have issued the discipline. (ALJD p. 28, ll. 1-3)

3. To the Administrative Law Judge's failure, contrary to Board law, to accord any consideration to his findings that Respondent failed to discipline the vendor who engaged in the same alleged misconduct arising out of the same incident for which

Respondent disciplined Burton. (See generally the Judge's discussion of November 12 discipline at ALJD p. 27, ll. 49-52 and p. 28, ll. 1-27)

4. To the Administrative Law Judge's conclusion of law that the record failed to establish that Respondent discriminated against Burton in violation of Section 8(a)(3) on November 12, 2010, when it issued a written correction to her for allowing the delivery of unauthorized product to the store. (ALJD p. 28, ll. 29-32 and p. 35, ll. 5-7)

ARGUMENT AND CITATION OF AUTHORITIES

As a matter of law, once Counsel for the Acting Counsel met its initial burden of showing that Burton's protected activities were a motivating factor in her discipline, Respondent had the burden of showing "not just that it *could have* taken the challenged disciplinary action but that it *would have* done so even in the absence of union activities." *Structural Composites Industries*, 304 NLRB 729, 730 (1991) (emphasis original); *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999). Respondent could not meet its burden given its failure, without any explanation, to discipline the vendor who was allegedly complicit with Burton in bringing unauthorized product into the store. The Judge correctly found that Counsel for the Acting General Counsel met its initial burden of showing a discriminatory motive for Glenda Burton's November 12 discipline. However, the Judge surprisingly, and incorrectly, concluded that Respondent met its burden of showing that it would have disciplined Burton in the absence of her protected activities.

On about November 12, Baldridge, in the presence of district supervisor Jamie Vaughn and grocery supervisor Deborah Chapman, gave Burton a written warning for alleged "insubordination" and breaking "receiving procedure." (Tr. 389-390; GC Exh. 10(b)) About a week prior to November 12, Chapman had been present at the store while Burton was "checking-in" a Hostess vendor. (Tr. 391) The vendor's products included orange cupcakes, which, according to Burton, never scanned in although they had been sold out of the store in the past. (Tr. 391-392; 640) Burton asked Chapman what they could do about getting the orange cupcakes scanned in because she believed that they were on the planogram, i.e. the diagram

containing the product UPC codes and the location on the various shelves in the store. (Tr. 392; 394; 533) According to Burton, Chapman told her that she could call the K-VA-T office about it and she also told the vendor that he could also check with K-VA-T and "see what they could do about making sure it was in [Respondent's] system to be checked in." (Tr. 392-393) Chapman testified that she told both Burton and the vendor, who knew that she was a grocery supervisor (Tr. 710), not to bring the cupcakes into the store because they were unauthorized. (Tr. 699) Burton testified that she didn't hear Chapman give such instructions because she would not have checked them in against Chapman's directions. (Tr. 390; 432) In any event, Burton proceeded to "check-in" the vendor by scanning the orange cupcakes as chocolate cupcakes, as she had been instructed to do in the past, and the vendor placed the cupcakes on the shelf. (Tr. 393-394; 396; 432) She wasn't aware that the orange cupcakes had been taken off the planogram. [1]/ (Tr. 394; 432) Respondent never talked to or disciplined the vendor for disobeying Chapman. (Tr. 649; 699; 710-711; 823-824) The vendor had been servicing the store for at least a year. (Tr. 646-647) Vendors are bound to follow Respondent's procedures for checking in product, including bringing in only products that are authorized. (Tr. 648; 822-823) They can be penalized and issued a correction for violating procedures and policies. (Tr. 648; 823)

The November 12 discipline was no exception to the compelling evidence, fully laid out in the Judge's findings, that Respondent engaged in an overall pattern of swift and blatant discriminatory conduct in response to union organizing, and particularly toward Burton. Indeed, the November 12 discipline was marked by shameless disparate treatment. In this regard, the Judge found, and the record demonstrates, that Respondent had the authority to discipline not only Burton for receiving unauthorized product but also the vendor who delivered the product -

[1]/ Chapman admitted that there are some instances in which products carried by a store do not scan in. (Tr. 715)

yet it failed to do so much as notify the vendor that its representative had made the unauthorized delivery, let alone to discipline him. (ALJD p. 16, ll. 32-35; Tr. 646-649, 699, 710-711, 823-824) The vendor was no less "guilty" than Burton. The Judge found, and the record demonstrates, that he also allegedly ignored manager Deborah Chapman's instruction to not deliver the product in question until it was approved by Respondent. (ALJD p. 15, ll. 19-20; Tr. 699, 710)

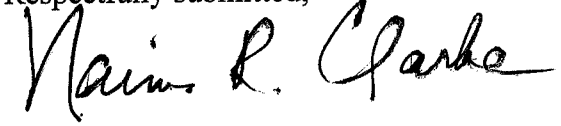
Notwithstanding Respondent's admission that the vendor was bound by the same procedures as Burton (Tr. 648; 822-823) and could be disciplined for violating such procedures (Tr. 648; 823), Respondent failed to offer any explanation for why it failed to take such action. The Board has specifically recognized that "the value of [] disparate treatment evidence lies principally in its tendency to rebut the employer's own attempt to carry its now-shifted burden under *Wright Line* of demonstrating that it would have taken the same action against the [union] activist even absent his or her union activities." *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999), citing *New Otani Hotel & Garden*, 325 NLRB 928, 941 (1998). Simply articulating a rule and showing that the union activist broke such rule is insufficient to meet this burden in the face of countervailing evidence showing that an employer failed to discipline others for the same violations. Cf. *Merillat Industries*, 307 NLRB 1301, 1303 (1992). Contrary to these principles, the Judge ignored the recognized value of the disparate treatment evidence in concluding that Respondent acted lawfully toward Burton, failing to even mention it in his analysis (see, ALJD p. 28, ll. 1-32), while acknowledging that the legality of Burton's November 12 discipline was a "close one." (ALJD p. 28, ll. 15-16) Moreover, he incorrectly held Respondent to a lower burden of needing to prove only that "it more likely than not would have" disciplined Burton. (ALJD p. 28, ll. 1-3) He apparently accorded significant weight to Respondent's purported business justification for disciplining Burton, noting that it would be

"surprising" to him if Respondent failed to take disciplinary action upon discovering the receipt of unauthorized product (ALJD p. 28, ll. 10-13), then he inexplicably ignored Respondent's failure to take such action toward the vendor (or even bring the matter to the vendor's attention) and its fatal failure to explain such inaction in the record. The evidence of Respondent's unexplained disparate reaction to the violation of its receiving procedure very strongly rebuts Respondent's purported non-discriminatory reasons for disciplining Burton.

To the extent that the Judge found the legality of the November 12 discipline to be a "close one," his findings showing disparate treatment, along with his findings clearly showing that such discipline was part of an orchestrated attempt to get rid of Burton (see, e.g., ALJD p. 16, ll. 2-5 and ll. 26-30), are sufficient to tip the scale in favor of concluding that Respondent would not have disciplined Burton on November 12 in the absence of her protected activities. For these reasons, and based on the foregoing, the Board should reverse the portions of the Administrative Law Judge's finding that the record failed to establish that Respondent discriminated against Burton on November 12 when it issued a written correction to her for allowing the delivery of unauthorized product.

Dated at Cincinnati, Ohio this 7th day of September 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

September 7, 2011

The undersigned hereby certifies that the foregoing Counsel for the Acting General Counsel's Cross-Exceptions and Supporting Citations and Argument was served by electronic mail to the following persons:

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