

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

ALBERTSON'S, LLC

and

Case 28-CA-023387

YVONNE MARTINEZ, an Individual

and

Case 28-CA-023538

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1564**

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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ACTING GENERAL COUNSEL’S ANSWERING BRIEF

Respondent’s Exceptions to the Decision of Administrative Law Judge William L. Schmidt (ALJD) are without merit and unsupported by the evidence.¹ The ALJ’s findings that Respondent violated Section 8(a)(1) of the National Labor Relations Act by engaging in surveillance of its employees; threatening employee with discharge; creating an impression that their union activities were under surveillance; and soliciting grievances from employees to dissuade them from supporting a union, are fully supported by the record evidence. Similarly, the record also supports the ALJ’s findings that Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging Yvonne Martinez because of her support, and protected activities on behalf of, United Food and Commercial Workers, Local 1564 (the Union). Accordingly, the Board should adopt the ALJ’s findings of fact, conclusions of law, and recommended order as they relate to Respondent’s Exceptions.

¹ Albertson’s, LLC is referred to as “Respondent.” United Food and Commercial Workers, Local 1564 is referred to as “Union.” References to the transcript are designated as (Tr.) with the appropriate page citations. References to the General Counsel and Respondent Exhibits are referred to as (GCX) and (RX) respectively, with the appropriate number or numbers for those exhibits. References to the ALJ decision are designated as “ALJD” followed by the applicable page number.

I. QUESTIONS PRESENTED

- A. Whether the ALJ erred in finding that Respondent violated Section 8(a)(3) by suspending and terminating Yvonne Martinez. (Resp't Exception D) (ALJD at 35-45);
- B. Whether the ALJ erred in finding that Respondent violated Section 8(a)(1) by engaging in surveillance of its employees' union activities. (Resp't Exceptions C) (ALJD at 22 - 26);
- C. Whether the ALJ erred in finding that Respondent violated Section 8(a)(1) by soliciting employee grievances and promising to remedy them. (Resp't Exception A) (ALJD at 16-17); and
- D. Whether the ALJ erred in finding that Respondent violated Section 8(a)(1) by finding that Alice Andrick acted as Respondent's agent when Andrick threatened to discharge employees and created an impression that the employees' union activities were under surveillance. (Resp't Exception B) (ALJD at 7 - 8, 25 - 27).

II. ARGUMENT

A. There is overwhelming evidence supporting the ALJ's conclusion that Respondent suspended and terminated senior cashier Yvonne Martinez in violation Section 8(a)(1) and (3)

In Exception D, Respondent argues the ALJ erred in finding its termination of Martinez was unlawful on two grounds. First, Respondent argues the ALJ erred in finding the Acting General Counsel (General Counsel) proved its burden. (Resp't Brf at 13) Intertwined with this argument, Respondent argues the General Counsel failed to prove that the "decision maker" responsible for Martinez's termination knew of her union activity; therefore Respondent claims the General Counsel failed to prove Martinez's union activity motivated Respondent's decision to suspend and terminate her. (Resp't Brf at 14) Second, Respondent claims the ALJ disregarded evidence establishing its affirmative defense. Both assertions are without merit. The ALJ properly found that the General Counsel proved that Martinez was suspended and discharged because of her protected conduct, and that

Respondent's affirmative defense was pretext, to cover Respondent's true motive in suspending and terminating Martinez, her Union activity.

1. *Legal Framework*

To sustain a violation, the General Counsel must prove that the employee's protected conduct was a substantial or motivating factor in the adverse employment action. *Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir.1981). It is well established that the General Counsel may offer direct or circumstantial evidence that the employer had knowledge of the employee's protected activities to prove an employer violated Section 8(a)(3). *Ready Mixed Concrete Co. v. N.L.R.B.*, 81 F.3d 1546, 1551 (10th Cir.1996) In fact, an employer's illegal motive may be established only by circumstantial evidence. *N.L.R.B. v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir. 2003) (“[A]n employer's antiunion motivation often may be proven only by circumstantial evidence.”); *Presbyterian/St. Luke's Medical Ctr. v. NLRB*, 723 F.2d 1468, 1476 (10th Cir.1983) (proof of an employer's specific intent to discriminate is unnecessary). An employer violates the Act by firing “an employee for having engaged in protected activities when there is no legitimate reason for the discharge, or the reasons offered are only pretexts.” *Ready Mixed Concrete Co. v. N.L.R.B.*, 81 F.3d 1546, 1550 (10th Cir.1996).

2. *Facts*

a. Martinez's Union and Protected Activities.

Yvonne Martinez worked as a front-end cashier for Respondent twenty-five years before being fired. (Tr. 554 - 555). Martinez had a nearly unblemished disciplinary record until late July 2010, when she voiced scheduling complaints to Front End Manger Lucinda Andablo (Andablo) and Store Director Don Merritt (Merritt); in response, Merritt silenced

Martinez with a write up for insubordination. (Tr. 557 - 558; GCX 27, 28) Martinez protested the discipline, and took her complaints up the chain of command to District Manager Tom Houston. (Tr. 558 – 559, 578) She complained to Houston that the schedule was not posted on time, and that all the cashiers had their hours cut except for Senior Cashier Gloria Padilla. (Tr. 559, 579, 580)

Around this time, Yvonne Martinez had also been discussing the Union with Ivan Perea, an employee working in the store’s meat department (whose employees are represented by the Union), and his wife Talie Perea (Perea), a cashier who worked at the front end with Martinez. (Tr. 500, 562, 772) Then, in August or September 2010, Union representative Juan Vasquez (Vasquez) approached Martinez in the parking lot at Store 917, and asked Martinez if she was interested in the union. (Tr. 560–62)

The day after Martinez spoke with Vasquez in the parking lot, she and Perea organized a Union meeting at a local Pizza Hut restaurant where several employees from Store 917 gathered and spoke with Union organizer Vasquez. (Tr. 562–64, 773 – 74) At the meeting, Martinez signed a union authorization card and obtained a stack of union cards from Vasquez to distribute to other Albertson’s employees at Store 917. (Tr. 564) After the meeting, Martinez and Perea asked other employees if they were interested in the Union, and distributed and collected union cards at work. When the two worked the same shift, they discussed the progress of the union drive while they “stepped out” of their register stations, to the aisle at the front end of the store. (Tr. 566 – 567, 775) At other times, Martinez talked to coworkers in the store parking lot and in the employee break room about the Union. (Tr. 565–66, 568, 775)

b. Respondent's Knowledge of Martinez's Union Activity

Both corporate division management and local management were involved in Martinez's suspension and termination. District Manager Tom Houston (Houston), HR Director Mark Blankenship (Blankenship), and Associates Relations Manager Angel Seydel (Seydel) deliberated over Martinez's case, and discussed the fact that her alleged conduct differed from other Catalina Coupon violations where Respondent had terminated employees. (GCX 7) Seydel later recommended that Store Director Merritt terminate Martinez. Merritt testified he had the discretion to accept or decline Seydel's recommendation for the disciplinary action, and that he made the ultimate decision to fire Martinez. (Tr. 400 - 401, 459 - 460) Seydel confirmed that Merritt had discretion to accept her recommendation, and that ultimately it was Merritt's decision to terminate Martinez. (Tr. 78) At hearing, Merritt specifically testified that he relied on the surveillance video to determine Martinez violated the coupon policy. (Tr. 408 - 412)

All the supervisors participating in the decision knew Martinez engaged in protected activity, as Merritt acknowledged that he kept Ma, Seydel and Houston apprised of nearly everything he learned about the Union's organizing campaign. (ALJD at 43) After Martinez voiced her group complaints to Houston, he wrote a summary of Martinez's complaints, and sent it to Blankenship. (GCX 38) Approximately a week later, Houston sent an e-mail to several store directors instructing them to "Be on the look out for [disgruntled x associate Juan Vasquez]" seen soliciting employees to join the Union at Respondent's facilities in Albuquerque. (Tr. 558 - 559; GCX 26) About two weeks later, Merritt informed Houston, Ma, and Seydel that Union organizer Vasquez was seen at Store 917 soliciting employees. (GCX 26)

That same day, Seydel, the Associates Relation Manager, working from an office in Colorado, instructed Store Director Merritt to “monitor” the parking lot and departments at the store and have his subordinates substitute for him when he was unavailable to do so. (GCX 26) She also visited store 917 after learning that the organizing campaign had began, and served as the first responder to the union organizing drive, conducting captive audience meetings with employees in August 2010. (ALJD at 8) Merritt admitted he had been following Seydel’s directions (Tr. 374, 380), and Seydel testified that she received Merritt’s reports about union activity at store 917 by e-mail and telephone. (Tr. 43) Merritt admitted that he had a good sense of the developments of the union drive based on reports he received from several employees. (Tr. 382) And at hearing, Merritt admitted that he knew Martinez was a union activist when he suspended and fired her. (ALJD at 43; Tr. 450) Notwithstanding, throughout the underlying investigation of the unfair labor practice charge in this matter, Respondent insisted that it did not know Martinez supported the Union. (GCX 10 at 4, 41)

c. Respondent Suspends Martinez on December 1, 2010

On December 1, 2010, Martinez worked a morning shift, and experienced a rush of customers at approximately 9:00 a.m. (Tr. 584; GCX 29) During a lull between customers, she saw a coupon had printed from the Catalina Coupon machine. (Tr. 585) She removed the coupon from the printer and set it on the counter at her cash register station, then continued to assist other customers. (Tr. 585–86) Around this time, a customer gave Martinez a donut. (Tr. 586) She placed the donut on an unopened plastic grocery bag on the counter at her cash register station and began taking bites of the donut between customers.

(Tr. 586–87) Martinez later placed the donut and the unopened grocery bag inside the supply drawer at her cash register station. (Tr. 587)

At approximately 10:00 a.m., while Martinez was ringing up a customer, Andrick arrived and told Martinez she was looking for tape. Martinez looked through the supply drawer, and told Andrick she didn't have any tape. (Tr. 587-88) Andrick also looked through the drawer, and then sent Martinez on a break. (Tr. 587) When Martinez returned from her break a coworker told her that Merritt wanted to see her; however when Martinez asked Merritt if he wanted to speak to her, Merritt said that everything had been taken care of, and to return to her register. (Tr. 587 – 588) Martinez continued to work at the same register station until Andrick arrived once again, asking Martinez to sign a Catalina coupon policy. (Tr. 588 – 589)

Shortly after Martinez signed the policy, Andrick returned, escorting Martinez to the office where Merritt, District Loss Prevention Manager Mark Zbylut, and Alice Andrick held an interview with Martinez. (Tr. 590–91) Throughout the interview, and in a written statement Martinez prepared during the interview, Martinez denied knowing there was a Catalina coupon in the supply drawer at her cash register station. (Tr. 591; RX 27) At the conclusion of the interview, Merritt suspended Martinez pending an investigation into the Catalina coupon found in the supply drawer. (Tr. 591–92) Respondent did not identify any eyewitnesses who saw Martinez remove the coupon from the printer or place it in the supply drawer.

d. Andrick's Handling of the Coupon Found in the Supply Drawer Deviates from Respondent's Past Practice

Andrick testified that she found a \$10 Catalina coupon in the supply drawer of the cash register station where Martinez was working at about 10:00 a.m. while she was

searching for tape. (Tr. 603 – 604, GCX 29) However, Andrick abandoned her search for tape immediately after visiting Martinez’s register. (ALJD at 39) Andrick testified she found the coupon tucked underneath an unopened plastic grocery bag. (Tr. 244–47) Andrick claims she took the coupon out of the supply drawer, and put it in a safe in the managers’ office. (Tr. 311) In the process of securing the coupon, Andrick instructed Lobby Clerk Vangie Chavez to witness Andrick securing the coupon in the store safe, and instructed Chavez to write a witness statement. (Tr. 253 - 54, 311, RX 12) Andrick wrote a statement on the back of a coupon, then later wrote another statement about finding the coupon. (Tr. 309 – 311, RX 28, RX 12) While Andrick went to great lengths to secure this coupon, when she had previously found unredeemed Catalina coupons on the floor, she simply threw them in the trash, without a second thought, rather than placing them in the store safe. (Tr. 248–52)

Similarly, other managers at Store 917 found unredeemed coupons on the Catalina coupon printers, the floor, or in cash register supply drawers in the past. Instead of securing the coupons in the safe, launching an investigation, or disciplining any employees, the managers merely reminded the cashiers to destroy the coupons. (Tr. 345–346, 495)

e. Respondent Recognizes Martinez’s Termination is Unprecedented

Seydel consulted with other senior managers, including Director of Human Resources Mark Blankenship and District Manager Tom Houston about Martinez’s termination. (Tr. 61–62) In an e-mail exchanged between management representatives, Human Resources Director Blankenship acknowledged, “The concern is that [Martinez] did not physically possess the coupon or use it. I believe we agree that *we do not have a precedent for that specific circumstance.*” (GCX 7) (emphasis added) Seydel went on to note that other

violations of the Coupon Policy “were clear because the associate admitted to it or used the coupon.” (GCX 7)

At hearing, Blankenship admitted all prior Catalina coupon policy violations consisted of employees actually using the coupon, attempting to use the coupon, or admitting that they took the coupon. (Tr. 11107 – 08, 1125 - 26) Seydel also concluded that Martinez’s case was unusual because she did not try to redeem the coupon, did not physically possess the coupon, and admitted she was trying to keep the coupon for personal use. (Tr. 60–62) To the contrary, Martinez denied even knowing that the coupon was in her drawer. (Tr. 591; RX 27) Blankenship and Seydel relied upon surveillance video in concluding that Martinez’s alleged handling of the coupon violated the Respondent’s policy; however, instead of actually watching the video, they relied on a report by Loss Prevention Manager Mark Zbylut. (Tr. 66–67, 1131-32; RX 29)

Despite Respondent recognizing that it lacked precedent to fire Martinez, and without actually watching the video, Seydel concluded Martinez committed three violations of the Catalina Coupon policy by: (1) failing to give a coupon to a customer, (2) failing to destroy the coupon; and (3) failing to discard the coupon after she realized she had not given it to the customer, and keeping the coupon for personal use. (ALJD at 41; Tr. 49, GCX 10, 41)

f. Respondent Conducted a Flawed Investigation

No eyewitness claimed that Martinez placed the coupon in the drawer. Instead, as part of the investigation, on December 21, 2010, Loss Prevention Manger Mark Zbylut (Zbylut) viewed a video recording from a surveillance camera located at the front end of store 917. (ALJD at 44) Zbylut prepared a written report stating that the video showed Martinez removing the \$10 coupon from the coupon printer, turning around, and placing the

coupon on the counter or in the drawer behind her. (Tr. 1338 - 44, RX 29) However, the video shows no such thing.

At the administrative hearing Zbylut admitted that, although the video shows Martinez placing the coupon on the counter, it does not show Yvonne Martinez placing the coupon in the supply drawer. Zbylut also admitted that he could not actually see Martinez's hands in the portion of the video where she allegedly removed the coupon from the printer and placed the coupon on the counter. (Tr. 1344) Similarly, at hearing, Merritt was incapable of identifying the images on the video he claimed existed in justifying his decision. (Tr. 430-37)

g. Respondent Does Not Discipline Other Employees Who Forget to Destroy Catalina Coupons

Before the organizing drive, Perea had found similar Catalina coupons in the supply drawer of the register station, and gave them to the Front End Manager Cindy Andablo. But these instances were never investigated, and nobody was ever fired over the coupons. (Tr. 833-837) Similarly cashier Albert Sanchez testified about a few instances where he forgot to destroy a Catalina coupon, a manager reminded him to destroy the coupon, and no consequences followed. (Tr. 1010-1013) Even more telling, Respondent admits that it has never documented the finding of a coupon in such great detail, as it did with Martinez, nor had it ever stored a single coupon in the safe at the store, as it did with Martinez. (Tr. 311, 253, RX12, RX 28)

3. *Respondent's Exception Seeks to Overturn the ALJ's Credibility Determination*

Respondent's exception to the ALJ's findings with respect to Martinez's suspension and discharge challenges the ALJ's credibility determinations. In this regard, Respondent can prevail on its numerous, duplicative, and unsupported exceptions, only if the clear

preponderance of all the relevant evidence convinces the Board that the credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. 1951). Such is not the case here.

Respondent's numerous arguments are not supported by the record and provide absolutely no basis for reversing the findings of the ALJ. In rendering his Decision, the ALJ carefully addressed the credibility of the Ma, Seydel, and Merritt, weighed the evidence, and, where appropriate, addressed any issues that affected his credibility resolutions. Respondent's attempt to parse out the ALJ's decision, while ignoring his reasoning and the basis for his findings, demonstrates the weakness in Respondent's arguments.

Respondent disputes the ALJ's conclusion that the company knew about Martinez's role in the organizing effort. In support of its argument, Respondent relies on facts that do not exist. Respondent's argument that Seydel was the "responsible decision maker" is a fiction, and contradicts both Seydel's and Merritt's testimony that Merritt had the final say in deciding whether to fire Martinez. (Tr. 78, 401) Second, Respondent fails to cite any evidence to warrant overturning the ALJ's credibility determination regarding Seydel and Merritt. The ALJ specifically found Seydel to be disingenuous when she denied she knowing Martinez was involved in the organizing drive. (ALJD at 38, 43) The entire record contains overwhelming evidence to support the ALJ's determination that Seydel's testimony was false. Although Respondent argues that Merritt only reported two instances of union activity, Seydel testified Merritt regularly called her to report his observations, but she never created a record of those calls.

4. *The ALJ Relied on Substantial Evidence in Finding that Martinez's Union Activity Motivated her Suspension and Termination*

The Board will infer an unlawful motive or animus where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive." *J.S. Troup Elec.*, 344 NLRB 1009 (2005) citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995); *ADS Elec. Co.*, 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). See also *N.L.R.B. v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir. 2003) ("[A]n employer's antiunion motivation often may be proven only by circumstantial evidence.") Disparate treatment is also evidence of unlawful motive. *Milum Textile Services, Inc.*, 357 NLRB No. 169 slip op. at 28 (2011), as is a flawed investigation. *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 (2004).

Here, Respondent admitted to the existence of the disparate treatment with respect to Martinez. Seydel and Blankenship confirmed at trial that Martinez never admitted to guilt, never redeemed the coupon, and never attempted to redeem the coupon. Her conduct was unlike all violations of the Catalina coupon policy. Moreover, the consistent testimony of all witnesses, including Andrick, shows that whenever Respondent previously found unused Catalina coupons lying around, managers simply reminded cashiers to destroy the coupons, or threw them in the trash themselves. Never had such an inquisition been launched, as in the case of Martinez.

The Board has long held that disparate treatment is unequivocal evidence of Respondent's unlawful intent. *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 264, (DC Cir. 1993) (disparity in the employer's treatment between union adherents and other employees can be evidence of discriminatory motive); see also *American Thread Co. v. NLRB*, 631 F.2d 316, 322 (4th Cir. 1980) (disparate treatment is evidence of employer's

unlawful intent). The record contains ample evidence of disparate treatment, and the ALJ properly found that Respondent harbored an unlawful motive when it suspended and then terminated Martinez.

Respondent's next argument, that the ALJ overanalyzed the surveillance video, is a dire attempt to cover up its meager defense, and its woefully flawed investigation. (Resp't Brf at 17) It is well established that conducting an inadequate investigation of the incident upon which the employer relies on as grounds for a discharge can support a finding of discriminatory motive. *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 163 (1st Cir. 2005) Throughout the underlying unfair labor practice investigation, and at trial, Respondent consistently claimed the video showed that Martinez had deceptively handled the coupon. But Blankenship and Seydel admitted they never watched the video. Moreover, as the ALJ found, the surveillance video does not support Respondent's conclusion about Martinez's conduct. Instead, the ALJ properly found that Martinez's account and testimonial demeanor, and the nearly conclusive video evidence, shows that Martinez "never really gave the coupon much thought at all in view of the customer traffic at the time." (ALJD at 44) Respondent's admissions, the video evidence, and Respondent's failure to even identify or attempt to interview the courtesy clerk present at the time of the incident, shows that Respondent's investigation into the matter was contrived, and an attempt to disguise Respondent's real motive, Martinez's union activities. As such, the overwhelming evidence supports the ALJ's findings.

As the ALJ concluded, a review of the other unfair labor practices committed by Respondent are also revealing of its unlawful motive. See *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 251 N.2, 260 (2000), enforced mem., 169 LRRM 2448 (4th Cir. 2001);

Richardson Bros. South, 312 NLRB 534, 534 (1993). Similarly, the timing of Martinez's termination, in relation to the date she led the grocery employees' efforts to organize, and the ongoing organizing effort, is another indication that Respondent was anxiously seeking a reason to terminate her. By the time Respondent terminated Martinez, Merritt had been unlawfully spying on its employees to gather information about the Union organizing drive, at the direction of Seydel. Also, Martinez, a twenty-five year employee, was discharged just a few months after becoming a leader in the Union's organizing efforts at store 917, and was fired while the organizing drive was ongoing and Respondent was actively trying to defeat the employees' efforts.

Finally, Respondent's claim that the ALJ ignored evidence of its affirmative defense is unsubstantiated by the record. In support of its argument Respondent claims the ALJ found that Martinez's conduct "in itself clearly violated the policy." (Resp't Brf at 16) This argument is an absurd mischaracterization of the ALJ decision. First, there is no evidence that Martinez's conduct even constituted a violation of the policy. Respondent's argument that it terminated Martinez consistent with its past practice collapses by admissions from Seydel and Blankenship. All prior violations of the policy consisted of employees who attempted to redeem the coupon, possessed the coupon, or admitted to taking the coupon. Respondent failed to prove that it would have, or has since, terminated other employees who forget to tear a coupon from the Catalina machine. And, the overwhelming evidence shows otherwise; in other such circumstances, managers only reminded cashiers to destroy the coupons.

Respondent's argument that the General Counsel failed to point to specific employees disciplined more lightly is a glaring oversight of the facts in the record. The above cited facts

show that Respondent imposed a harsher action on Martinez, when in other situations, Respondent did not investigate unused coupons and merely reminded employees to destroy them. Furthermore, in at least one instance, Adrian Garrett clearly violated the coupon policy, but his violation did not result in termination. However, in Martinez's case, Respondent trumped up charges claiming that Martinez committed three violations of the coupon policy based upon conduct which, in the past, would not give rise to even a single violation. Accordingly, the ALJ properly found that Respondent violated Section 8(a)(3) by suspending and terminating Martinez, and Respondent's exceptions should be denied.

B. The ALJ properly found Respondent violated Section 8(a)(1) by engaging in surveillance of its employees' union activities.

In Exception C, Respondent argues the ALJ made a finding of unlawful surveillance without evidence that management actually witnessed protected activities through out-of-the-ordinary monitoring measures. Contrary to Respondent's argument, the ALJ relied on testimony from the General Counsel's witnesses, Respondent's admissions, and the record exhibits, as a basis for finding that Merritt and his subordinates monitored employees union activity.

1. Facts

Merritt admitted that he implemented Seydel's August 2010 directive to monitor the store, and walk the parking lots, to watch out for union activity. (ALJD at 23; Tr. 373 - 374, 379 - 380, 382, GCX 26) Merritt complied with the directive, and communicated his observations to Seydel by e-mail and by phone. (Tr. 40 - 43) Seydel confirmed that Merritt reported union activity to her starting in early 2010. (Tr. 151 -152)

Several employees testified they noticed a change in Merritt's behavior after Union Representative Vasquez was seen at the store soliciting employees; Merritt began spending

more time in the parking lot collecting carts, a duty which is normally carried out by courtesy clerks. (Tr. 566, 659-660, 705, 1003, 1004) Employees testified that, before the Union drive, Merritt did not collect shopping carts in the parking lot. (Tr. 566, 660, 1003) Also, some employees saw Merritt spending more time at the front end of the store, pacing the area and looking out the front window, which was a change from his previous practices. (Tr. 781-783) Receiving Manager Karry Jolly testified that she also noticed Merritt policing the back end of the store during this same time period. (Tr. 705) At the hearing Merritt confirmed that he spent approximately half of his 12-hour work shift in the front end assisting with carry outs. (Tr. 320, 323, 324).

Along with witness testimony, the various e-mails authored by Respondent show specific instances where Merritt complied with Seydel's directive to monitor union activities. (GCX 24, 25, 26, 30, 40) Sometime after March 2011, Labor Relations Director Ma again reminded Merritt to keep Respondent informed as to what was occurring at Store 917 with respect to the Union's organizing drive. (Tr. 41 - 42, GCX 1(a), 1(b)) Thereafter, on April 24, 2011, Merritt sent corporate officials a detailed description of specific employees engaged in union activities, noting that "Tallie and Ivan Perea, Ken Chavez and Joseph Chavez and Zack. (sic) All are pushing real hard on the sackers. They keep trying to corner the sackers and Tallie was seen by Jeromy handing one of the sackers Vincent something." (ALJD at 30; GCX 30) Merritt also instructed Grocery Manager Jeromy Garcia to inform Seydel when Union agents were in the store parking lot, after Garcia spotted them parked there. (GCX 40, Tr. 1240)

2. *Argument*

“It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.” *American Tissue Corp.*, 336 NLRB 435, 441 (2001) citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). Here, the evidence shows that, once management at Store 917 received Seydel’s directive to monitor the store for union activity, they did so, watching the parking lot, pacing along the front end of the store, and assuming the role of courtesy clerk, bagging groceries and collecting shopping carts, in order to keep an eye out for union activities. Once management observed any such activities, they immediately reported back to Respondent’s corporate officials.

Merritt and Garcia’s conduct is analogous to the supervisors’ conduct in *Partylite Worldwide, Inc.*, 344 NLRB 1342, 1342 fn. 5 (2005) where the Board held that the supervisors engaged in unlawful surveillance by stationing themselves at entrances to the employee parking lot to watch union representatives give literature to employees as they entered and exited the parking lot during shift changes. See also *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003). Merritt’s conduct also mimics the supervisor’s conduct in *Epic Sec. Corp.*, 325 NLRB 772 (1998). There, the employer posted its supervisors in front of its offices where they observed employees as they reported to work, and the supervisors watched to see which employees talked to union representatives. The Board found a violation, noting that the conduct interfered with employees contacting the union representatives, and constituted unlawful surveillance. *Id.* at 776.

The ALJ's finding of surveillance is supported by the overwhelming testimony from employees who saw the high ranking store supervisors position themselves at the windows near the entrance of the store, and walking the parking lot, after the employees began discussing the Union, distributing Union cards in these areas, and as the Union representatives had made themselves available for employees in the parking lot. The timing of Seydel's directive to monitor the store and parking lot, along with Merritt's admission that he complied with the directive, supports the employees' uncontradicted testimony. Respondent proffers no business justification to justify why the store managers, charged with running the operations of a grocery store, anxiously fulfilled the work of a courtesy clerks, bagging groceries and collecting shopping carts.

Therefore, the ALJ properly found that Merritt's conduct, gawking out the front-end windows, walking the parking lot, pacing the front-end, and bagging groceries, and reporting his findings back to his superiors, inhibited employees' ability to freely visit with the Union agents, and to discuss the Union. *Epic Sec. Corp.*, 325 NLRB at 776. As such, Respondent's conduct intimidated and interfered with employees' ability to freely exercise their Section 7 rights, constituted unlawful surveillance, and the ALJ decision should be adopted.

C. The ALJ's finding that Director of Labor Relations Danny Ma unlawfully solicited employee grievances and implicitly promised to remedy them is warranted by the record evidence.

In Exception A, Respondent again asks that the Board reexamine the ALJ's credibility determination and overturn the ALJ's finding that a violation occurred. However, the record evidence fully supports the ALJ's conclusion, and reveals that Respondent's frantic attempt to identify inconsistent testimony is unconvincing.

I. Facts

Director of Labor Relations Danny Ma visited store 917 in April 2011 to conduct several captive audience meetings. (Tr. 1624) Ma began a meeting that Karry Jolly attended by introducing himself as the person who sits across the table with the Union and makes up the union contracts. (Tr. 713 – 14) Dean Olivas testified he saw Ma pace between the office and the employee break room. (Tr. 740) Along that line, Ma admitted that, when he was in the employee break room between meetings, he spoke directly with employees. (Tr. 1625-27) It is undisputed that Front End Manager Andablo told the employees “H&R is up there [in the store offices]; they’re your friends, not ours. If you have problems with your schedule or if you want to complain, now is the time.” (ALJD at 16; Tr. 790) Employees testified that Ma held one-on-one sessions with them in the break room, asked them if they liked their job, if they had any questions pertaining to benefits, and asked them if they had any questions in general. (Tr. 790, 1008 -09) Dean Olivas has worked at store 917 for 4 years had never seen Ma at the store before April 2011 (Tr. 740) Perea, who has worked at store 917 the last four years similarly had never saw Ma at store 917 in the past; moreover this was the first time Respondent held one-on-one sessions with employees to answer employee questions about their benefits. (Tr. 761, 790–791, 968–970) Finally, Albert Sanchez, who has worked at store 917 for sixteen years, testified that he had never previously seen Ma at the store. (Tr. 1009) Moreover, Sanchez testified that Respondent had never previously held one-on-one meetings with employees, let alone meetings where management officials specifically asked employees what work issues they had. (Tr. 1065-66) In the past, discussions about benefits were done with the store bookkeeper. (Tr. 1065-66)

2. *Argument*

By asking the Board to overturn the ALJ's finding, Respondent in essence is asking the Board to overturn the ALJ's credibility resolutions, and discredit Perea's testimony as to what occurred during her meeting with Ma. This is something the Board will not do absent a clear preponderance of all the relevant evidence showing the ALJ's credibility resolution is incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d. 1951).

Here, the clear preponderance of all relevant evidence supports the ALJ's finding of a violation. The record evidence does not contradict Perea's version of events, as Ma did not contradict Perea's testimony of what Ma asked her, but instead testified that he did specifically remember speaking to Perea. (Tr. 1625) Also, as noted by the ALJ, Ma "exhibited considerable evasiveness about any conversations he had with particular employees while visiting store 917" and could not recall any a visit to store 917 before April 2011, despite his testimony that "might have" done so. (ALJD at 16; Tr. 1626)

The fact that Ma had never visited store 917 in the past is established by testimony from numerous employees who worked at this particular store for an extensive period. These employees testified that Ma had never previously visited store 917, and that before the organizing drive Respondent's management had never previously held one-on-one meetings with employees. Respondent does not dispute Andablo's comment to employees that "now is the time" to go upstairs and meet with Ma if they had problems or wanted to complain, and Respondent cannot show that Ma had previous practice of meeting with employees at store 917, as the evidence showed that he did not.

“Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act.” *Laboratory Corp. of America Holdings*, 333 NLRB 284, 284 (2001), quoting *Maple Grove Health Care Center*, 330 NLRB 775 (2000). See also *V & S Schuler Engineering, Inc.*, 309 F.3d 362, 370-371 (6th Cir. 2002). The ALJ’s finding that a violation occurred is supported by record evidence that Ma, the Director of the Labor Relations, Respondent’s the highest ranking labor relations official, who works from an office in Arizona, had never previously met with employees at store 917 to discuss their concerns, ask them if they liked their job, or if they had questions about benefits. Furthermore, employees at store 917 had never even had any previous one-on-one meetings with Respondent’s management officials. As such, the ALJ’s finding that high level management was making new and unusual efforts to resolve complaints so that union representation would not be necessary is warranted by the entire record. (ALJD at 17)

In large part, Respondent takes exception to the ALJ’s conclusion because Perea did not express any complaints to Ma. (Resp’t Brf at 3, 4) In support of its argument, Respondent attempts to create requirements under Board law where none exist. For example, Respondent’s relies on *Wm T. Burnett & Co.*, 273 NLRB 1084 (1984) for the proposition that employees must tender complaints to a supervisor before the employer can imply any corrective action. However, the case does not stand for the holding proffered by Respondent. Although the Board adopted the ALJ’s dismissal of solicitation of grievances in *Wm T. Burnett, Co.*, the case is factually different to the matter at hand. In *Wm. T. Burnett, Co.*, the employer’s supervisor offered to talk to employees about their problems *during* group meetings. *Id.* at 186. In dismissing the allegation, the ALJ found no independent evidence or

suggestion that Respondent would act on the grievances because the employees did not seek to speak with the supervisor individually. *Id.* While employees testified they had never previously heard this specific supervisor invite employees to speak with him on an individual basis, there was no evidence presented that the supervisor's group meeting was anything out of the ordinary. *Id.*

Unlike those facts, here, Andablo explicitly encouraged employees to meet with the human resources to voice their complaints. Perea and Sanchez accepted the offer and met with Ma, individually. Ma, who works from an office in Arizona, had never been seen at store 917 in the past, and Respondent had never previously held one-on-one meetings with employees, let alone ones where employees were asked how they liked their job. Moreover, Ma made himself available for the employees in between the group meetings where he explained his role in the bargaining process and explicitly dissuaded employees from unionization. The inference that the director of labor relations, who had never before been to store 917, was available to remedy their concerns could not be missed. The Board has long recognized that a statements and actions by high level management during organizational campaigns have a highly coercive effect on employees. *Electro-Voice, Inc.*, 320 NLRB 1094, 1096 (1996) (“when the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten.”); *Adam Wholesalers, Inc.*, 322 NLRB 313, 314 (1996) (severity of misconduct is compounded by the fact most violations were committed by high ranking official “[t]his served to strengthen and amplify in the minds of employees the seriousness of the unfair labor practices.”); *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000) (solicitation of grievances made during the midst of a union campaign inherently constitute

an implied promise to remedy the grievances, which is rebuttable by showing that the employer had a past practice of soliciting complaints). Therefore, Respondent's exception is baseless, and the Board should affirm the ALJ's conclusion.

D. The context of Andrick's conversation with Perea warrants the ALJ's conclusion that Andrick was a statutory agent.

Respondent further takes exception to the ALJ's legal conclusion that Andrick was a statutory agent when Andrick had a specific conversations with Perea, which the ALJ found violated Section 8(a)(1), directly after Andrick spoke with Merritt. (ALJD at 26, 27; Tr. 794 - 796) In it exception, Respondent does not dispute the coercive nature and effects of Andrick's statement. Rather, Respondent disputes the ALJ's conclusion that Andrick was an agent of Respondent during the specific conversation.

As stated in Section 2(13) of the Act, when making an agency determination, "the question of whether the specific acts were actually authorized or subsequently ratified shall not be controlling." *GM Electrics*, 323 NLRB 125 (1997) In *Pan-Oston Co.*, 336 NLRB 305, 306 (2001) citing *Waterbed World*, 286 NLRB 426, 427 (1987) (and cases cited therein), the Board explained the test for determining agency status: the Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. Another factor considered by the Board is the position and duties of the employee in question, in addition to the context in which the behavior occurred. *Jules v. Lane*, 262 NLRB 118, 119 (1982).

As Respondent concedes, the ALJ properly found that Andrick worked as the Assistant Front End Manager, carrying out company policies while she worked. (ALJD at 6

– 7) Specifically, Respondent accepts the ALJ’s finding that, as part of effectuating company objectives, Andrick meets with Store Director Merritt several times a day where he provides her guidance and direction in carrying out store policies.²

It is unavailing for Respondent to argue that the context of Andrick’s conversation with Perea precludes a finding that Andrick was an agent by relying upon other, casual conversations between the two, that occurred outside their regular work hours. (Resp’t Br. at 8) Here, the conversation in question took place at the front end of the store, while Andrick was carrying out her duties as the Assistant Front End Manager. Respondent offered no evidence to the contrary. Significantly, in the context of the conversation, it was reasonable for Perea to think that Andrick spoke on the company’s behalf, as the conversation occurred immediately after Andrick walked out of Merritt’s office, and Andrick regularly met with Merritt for guidance on carrying out store policies. The fact that Andrick participated in the termination of another union activist supports a finding that Andrick spoke on behalf of management when she warned Perea that the company was trying to make her quit. Also supporting the ALJ’s finding, and that Perea would have attributed Andrick’s statement to the company, is the fact that Andrick repeated Merritt’s words to Perea.

Respondent’s reliance in its exception on an unrelated off-work telephone conversation between Andrick and Perea, a conversation that occurred well outside the time frame of the conversation at issue, and in a different setting is unavailing. Here, the ALJ properly found that Andrick was Respondent’s agent, where the conversation occurred in the store, during work hours, directly after Andrick met with Merritt, and where Andrick

² In a previous case involving one of Albertson’s Arizona stores, the parties stipulated that front-end managers were statutory supervisors. *Albertson’s Inc.*, 344 NLRB 1172, 1180 (2005).

repeated Merritt's words to Perea. Accordingly, Respondent's exceptions should be dismissed, and the Board should adopt the ALJ's findings.

III. CONCLUSION

It is respectfully requested that the Board find that Respondent's exceptions are without merit and affirm the ALJ's decision, and adopt his findings of fact, conclusions of law, and recommended Order, save for those matters to which the General Counsel has filed in his exceptions.

Dated at Albuquerque, New Mexico this 5th day of July 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in ALBERTSON'S, LLC, Cases 28-CA-023387 et al. was served by E-Gov, E-Filing, E-Mail, and overnight delivery service on this 5th day of July 2012, on the following:

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