

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

HITACHI CAPITAL AMERICA CORP.

and

VIRGINIA KISH, AN INDIVIDUAL

Case No. 34-CA-13011

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

On October 3, 2011, the Regional Director for Region 34, NLRB, issued a Complaint and Notice of Hearing in the instant case, alleging that Hitachi Capital America Corp., herein called Respondent, committed various unfair labor practices under the Act, including the termination of its employee Virginia Kish in violation of Section 8(a)(1). (Exhibit A, attached hereto). The Complaint alleges two independent "rules" violations, and that Respondent terminated Kish only after she raised questions about a newly implemented work policy, and in reliance upon an overbroad work rule. A hearing date of January 24, 2012, was scheduled. Respondent filed a timely Answer and raised several affirmative defenses, including the defenses that (a) Kish did not engage in any form of protected concerted activity, and (b) that, even assuming that she was disciplined pursuant to an overbroad work rule, her conduct "actually interfered with Kish's own work, the work of her colleagues, and/or Respondent's operations, and this interference, rather than the violation of the rule, was the reason for the discipline." (See Exhibit B, p. 5). On December 8, 2011, Respondent filed a "Brief in Support of Respondent's Motion for Summary Judgment." Pursuant to Section 102.24 of the

Board's Rules and Regulations, Counsel for the Acting General Counsel submits this brief in opposition to the motion.

Respondent's motion should be rejected, for the following reasons. First, Respondent's contention that there are no material issues of fact to be decided is simply incorrect, as evidenced by its Answer to the Complaint. There is a clear factual dispute concerning what triggered the harsh discipline of a veteran employee, and whether, as raised by Respondent in its Answer, Kish's conduct "actually interfered with Kish's own work, the work of her colleagues, and/or Respondent's operations, and this interference, rather than the violation of the rule, was the reason for the discipline." These are factual disputes best resolved at hearing under oath before an ALJ of the Board.

Thus, contrary to its statement in its brief that "all facts essential to a final adjudication are uncontested and incontrovertible," the facts are not at all uncontested. To cite another example, in its recitation of the facts, Respondent claims that during the disciplinary meeting held on February 10, 2011, Kish "purposefully got up and walked out of the room, thereby prematurely terminating the meeting and again demonstrating her insolence and contempt for authority." This is Respondent's version of the facts; it certainly is not consistent with Kish's version (the only sworn version the Acting General Counsel is aware exists). Sensing the weakness of its argument, Respondent admits that while Kish "has a somewhat different version of what transpired" at this meeting, because, in Respondent's mind, she engaged in no protected concerted activity at that meeting there is "no need to resolve the factual dispute surrounding the circumstances surrounding Kish's discharge." (R. Br. at 4, note 2). Aside from begging the question as to whether her protected conduct landed her in Respondent's manager's office in the

first place, this is a most curious claim, considering that on the same page of its brief Respondent admits that Kish's conduct at that same meeting was the "proverbial straw that broke the camel's back." Clearly the conduct of that meeting is an important factual issue, and the key factual determination concerning the details of this February 10 meeting can only be made at a hearing before an ALJ. The facts are thus "contested", and establish the presence of a genuine issue. See Board's Rules and Regulations, Section 102.24. There are thus at least two key material issues of fact that need to be decided at hearing.

Second, as noted above, the Complaint alleges the theory that Respondent relied upon an overbroad work rule -- a rule prohibiting "inappropriate behavior while on Company property" -- which Respondent also denied in its Answer to the Complaint. Which leads to Respondent's related legal argument, that the rule itself is lawful. However, while properly citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), Respondent cites no case which supports the proposition that the rule *in this case* passes muster under well settled Board law. The rules in the cases cited in its brief are all quite different than the one at issue herein. Contrary to Respondent's contentions, the rule is unlawful on its face. See *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part, 335 F. 3d 1079 (D.C. Cir. 2003)(Board found a work rule prohibiting "'disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope.") Like the rule in *University Medical Center*, the prohibition here of "inappropriate behavior" proscribes a broad spectrum of conduct and contains no limiting language to remove the rule's ambiguity in prohibiting Section 7 activity.

Therefore, absent any language limiting the sweep of the rule or examples of what is covered, the rule is overbroad because employees would reasonably construe it to prohibit employees' right to complain, question or even discuss wages and other terms and conditions of employment, as such conduct could be deemed by employees to be "inappropriate." Moreover, employees are particularly likely to interpret the policy to prohibit protected activity where, as here, the Employer applied the broad terms of its policy to restrict Kish's Section 7 rights.

Aside from the legal argument of the rule's validity, there is yet another factual issue for resolution regarding the rule and its role in the discharge decision. The Acting General Counsel's theory is that Respondent terminated Kish for both her protected conduct (complaining about the new work policy) and by applying an overbroad work rule (two separate 8(a)(1) theories). The application of the overbroad rule (denied by Respondent in its Answer) is a factual issue.

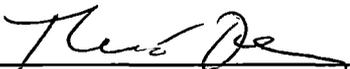
Third, Respondent claims that "Kish's emails do not come close to meeting the standard adopted and applied by the Board in *Meyers Industries*" and thus are not concerted, as she was not seeking to express a "group concern." This claim misses the mark, both factually and legally. Regarding the former, how does Respondent know for a "fact" that Kish had no support from her coworkers? Moreover, it is well settled that the "determination of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1423, 1424 (2004). However, even if Kish's activity is ultimately found *not* to be concerted, the facts in this case suggest that she was discharged pursuant to an unlawfully broad rule "for conduct that otherwise implicates the concerns underlying

Section 7", i.e., protesting a newly implemented employer policy that impacts everyone's terms and conditions of employment. See *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 4 (August 11, 2011).

Finally, with respect to the Complaint, the other rule pled as violative of Section 8(a)(1) (a rule prohibiting "Leaving the Company or assigned work place other than breaks and meal periods during working hours without permission from a supervisor or other person authorized to grant permission") would not be resolved by the relief sought by Respondent, thus leaving the Board to decide the case on a piecemeal basis. The Board strongly disfavors such an approach, which only causes delays and adds to litigation costs for all parties. See also Section 102.33 of the Board's Rules: consolidation of cases is done "to effectuate the purposes of the Act or to avoid unnecessary costs or delay".

For all of the above reasons, Counsel for the Acting General Counsel respectfully urges the Board to deny Respondent's Motion for Summary Judgment in its entirety.

Dated at Hartford, Connecticut, this 15th day of December, 2011.



Thomas E. Quigley
Senior Trial Attorney
National Labor Relations Board
Region 34

Attachments

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

HITACHI CAPITAL AMERICA CORP.

and

VIRGINIA KISH, AN INDIVIDUAL

Case No. 34-CA-13011

COMPLAINT AND NOTICE OF HEARING

Virginia Kish, an Individual, herein called Kish, has charged that Hitachi Capital America Corp., herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. Sec. 151, et seq., herein called the Act. The Acting General Counsel, by the undersigned, pursuant to 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, issues this Complaint and Notice of Hearing and alleges as follows:

1(a) The charge in this proceeding was filed by Kish on June 13, 2011, and a copy was served by facsimile transmission and regular mail on Respondent on June 14, 2011.

(b) The amended charge in this proceeding was filed by Kish on August 10, 2011, and a copy was served by facsimile transmission and regular mail on Respondent on August 12, 2011.

2. At all material times, Respondent has provided financing to companies in the commercial business industry from its facility located in Norwalk, Connecticut, herein called its facility.

3. During the 12-month period ending September 30, 2011, Respondent, in conducting its operations described above in paragraph 2, purchased and received at its facility goods valued in excess of \$50,000 directly from points located outside the State of Connecticut.

4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act:

Chris Petersen	---	Vice President, Collections
Joni Kovacs	---	Vice President, Human Resources
Mary Neclerio	---	Collections Manager

6. At all material times, Kate Morlock, Respondent's Compensation/Benefits Analyst, has acted as an agent of Respondent within the meaning of Section 2(13) of the Act.

7. At all material times, Respondent has maintained the following rules in its Employee Handbook:

Employee Conduct and Work Rules [prohibiting the following conduct]:

- Inappropriate behavior while on Company property
- Leaving the Company or assigned work place (other than breaks and meal periods) during working hours without permission from a supervisor or other person authorized to grant permission

8. On or about February 2 and 3, 2011, Kish engaged in protected concerted activities with other employees by questioning Respondent's recently implemented "Inclement Weather Day" policy.

9. On or about February 10, 2011, Respondent terminated Kish.

10. Respondent engaged in the conduct described above in paragraph 8 because of Kish's activities described above in paragraph 8, and to discourage employees from engaging in these or other protected concerted activities.

11. Respondent engaged in the conduct described above in paragraph 9 because Kish's activities described above in paragraph 8 violated the "inappropriate behavior while on Company property" rule described above in paragraph 7.

12. By the conduct described above in paragraphs 7, 9, 10, and 11, Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

13. The unfair labor practices of Respondent described above affect commerce within the meaning of the Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before November 14, 2011 or postmarked on or before November 10, 2011**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. A failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. When an answer is filed electronically, an original and four paper copies must be sent to this office so that it is received no later than three (3) business days after the date of electronic filing.

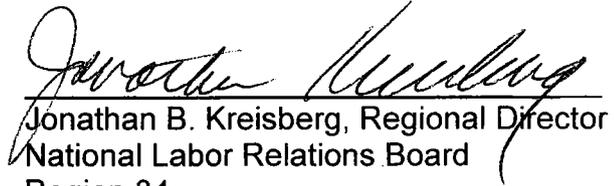
Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **January 24, 2012**, at the A.A. Ribicoff Federal Building, 450 Main Street, Suite 410, Hartford, Connecticut, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law

judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding has the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Hartford, Connecticut, this 31st day of October, 2011.


Jonathan B. Kreisberg, Regional Director
National Labor Relations Board
Region 34

Attachments

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

HITACHI CAPITAL AMERICA CORP.

and

VIRGINIA KISH, AN INDIVIDUAL

Case No. 34-CA-013011

ANSWER

Pursuant to Sections 102.20 and 102.21 of the Rules and Regulations of the National Labor Relations Board, Respondent Hitachi Capital America Corp. (“Respondent” or “HCA”) hereby answers the Complaint issued in the above-captioned case as follows:

Paragraph 1(a): The charge in this proceeding was filed by Kish on June 13, 2011, and a copy was served by facsimile transmission and regular mail on Respondent on June 14, 2011.

Answer 1(a): Respondent admits the allegations contained in Paragraph 1(a).

Paragraph 1(b): The amended charge in this proceeding was filed by Kish on August 10, 2011, and a copy was served by facsimile transmission and regular mail on Respondent on August 12, 2011.

Answer 1(b): Respondent admits the allegations contained in Paragraph 1(b).

Paragraph 2: At all material times, Respondent has provided financing to companies in the commercial business industry from its facility located in Norwalk, Connecticut, herein called its facility.

Answer 2: Respondent admits the allegations contained in Paragraph 2.

Paragraph 3: During the 12-month period ending September 30, 2011, Respondent, in conducting its operations described above in paragraph 2, purchased and received at its facility goods valued in excess of \$50,000 directly from points located outside the State of Connecticut.

Answer 3: Respondent admits the allegations contained in Paragraph 3.

Paragraph 4: At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Answer 4: Respondent admits the allegations contained in Paragraph 4.

Paragraph 5: At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act:

Chris Petersen	--	Vice President, Collections
Joni Kovacs [sic]	--	Vice President, Human Resources
Mary Neclerio	--	Collections Manager

Answer 5: Respondent admits the allegations contained in Paragraph 5.

Paragraph 6: At all material times, Kate Morlock, Respondent's Compensation/Benefits Analyst, has acted as an agent of Respondent within the meaning of Section 2(13) of the Act.

- Answer 6: Respondent admits the allegations contained in Paragraph 6.
- Paragraph 7: At all material times, Respondent has maintained the following rules in its Employee Handbook:
Employee Conduct and Work Rules [prohibiting the following conduct]:
- Inappropriate behavior while on Company property
 - Leaving the Company or assigned work place (other than breaks and meal periods) during working hours without permission from a supervisor or other person authorized to grant permission
- Answer 7: Respondent admits the allegations contained in Paragraph 7.
- Paragraph 8: On or about February 2 and 3, 2011, Kish engaged in protected concerted activities with other employees by questioning Respondent's recently implemented "Inclement Weather Day" policy.
- Answer 8: Respondent denies the allegations contained in Paragraph 8.
- Paragraph 9: On or about February 10, 2011, Respondent terminated Kish.
- Answer 9: Respondent admits the allegations contained in Paragraph 9.
- Paragraph 10: Respondent engaged in the conduct described above in paragraph 8 [sic] because of Kish's activities described above in paragraph 8, and to discourage employees from engaging in these or other protected concerted activities.
- Answer 10: Respondent denies the allegations contained in Paragraph 10.

Paragraph 11: Respondent engaged in the conduct described above in paragraph 9 because Kish's activities described above in paragraph 8 violated the "inappropriate behavior while on Company property" rule described above in paragraph 7.

Answer 11: Respondent denies the allegations contained in Paragraph 11, except to admit that it terminated Kish's employment on account of, *inter alia*, behavior that can be fairly characterized as "inappropriate" during the course of a meeting with representatives of management.

Paragraph 12: By the conduct described above in paragraphs 7, 9, 10, and 11, Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

Answer 12: Respondent denies the allegations contained in Paragraph 12.

Paragraph 13: The unfair labor practices of Respondent described above affect commerce within the meaning of the Section 2(6) and (7) of the Act.

Answer 13: Respondent denies the allegations contained in Paragraph 13.

AFFIRMATIVE DEFENSES

1. Assuming, *arguendo*, Kish engaged in any form of protected concerted activity—and Respondent expressly denies such was the case—Respondent would have taken the same disciplinary actions against Kish even had she not engaged in activity protected by the Act.

2. Assuming, *arguendo*, Respondent disciplined Kish pursuant to an overbroad work rule—and Respondent expressly denies such was the case—the conduct for which discipline was imposed actually interfered with Kish’s own work, the work of her colleagues and/or Respondent’s operations, and this interference, rather than the violation of the rule, was the reason for the discipline.

3. Kish has failed to mitigate her alleged damages, any entitlement to which is expressly denied.

Respectfully submitted by:



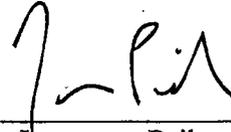
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Attorneys for Hitachi Capital America Corp.

CERTIFICATION

This is to certify that on this 10th day of November, 2011, a copy of the foregoing has been served via first-class U.S. mail, postage prepaid, on:

Ms. Virginia L. Kish
42 Silvermine Avenue
Norwalk, CT 06850

Margaret Sheahan, Esq.
Mitchell & Sheahan, P.C.
80 Ferry Blvd.
Stratford, CT 06615-6079



Lawrence Peikes

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HITACHI CAPITAL AMERICA CORP.

Charged Party

and

VIRGINIA KISH, AN INDIVIDUAL

Charging Party

Case 34-CA-013011

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S
OPPOSITION TO RESPONDENT'S MOTION FOR
SUMMARY JUDGMENT

I, the undersigned employee of the National Labor Relations Board, state under oath that on December 15, 2011, I served the above-entitled document(s) by email and post-paid regular mail upon the following persons, addressed to them at the following addresses:

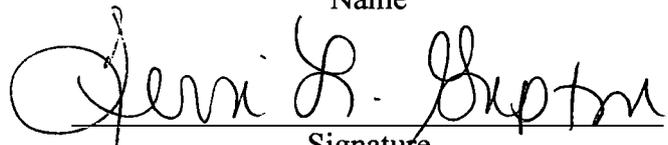
SEE ATTACHED

December 15, 2011

Date

Terri L. Gupton, Designated Agent of NLRE

Name


Signature

Chris Peterson, Vice President Of Collections
Hitachi Capital America Corp.
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Norwalk, CT 06854-1631
Regular Mail

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