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

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 ANSWERING BRIEF TO THE BOARD

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HITACHI CAPITAL AMERICA CORPORATION and VIRGINIA KISH, AN INDIVIDUAL	Case No. 34-CA-013011

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO THE BOARD

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Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the Acting General Counsel files the following Answering Brief in Response to the Exceptions and Brief in support thereof filed by Respondent.

I. STATEMENT OF THE CASE

On July 11, 2012, Administrative Law Judge Mindy Landow issued her 38-page Decision in the instant case, finding that Hitachi Capital America Corp. (herein called Respondent) violated Section 8(a)(1) by maintaining a work rule prohibiting "[I]nappropriate behavior while on Company property." (ALJD 36, lines 34-36).[1] Judge Landow also found that Respondent violated Section 8(a)(1) by terminating its employee Virginia Kish because of her concerted protected activities, and pursuant to the work rule at issue. (See ALJD 36, lines 38-40). The judge upheld Counsel for the Acting General Counsel's twin legal theories that Respondent terminated Kish for both her protected concerted conduct (complaining about a work policy on behalf of herself and others) and by applying the overbroad work rule against her.

Finally, the judge recommended dismissal of the sole remaining Complaint allegation that Respondent unlawfully maintained, in violation of Section 8(a)(1), an overly broad work 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." (ALJD 34-35).

On August 14, 2012, Respondent filed six exceptions to the judge's findings and recommended order, along with a supporting brief. For the reasons set forth below, and

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[1] References to Judge Landow's decision are cited as "ALJD - __," followed by the page and line number, where appropriate. References to Respondent's brief in support of its Exceptions are designated "R. Br. to Board at __," followed by the appropriate page number. References to the exhibits of the General Counsel and Respondent are cited herein as "GCX- __" and "RX- __," respectively, followed by the appropriate exhibit number or numbers. References to the official transcript of the hearing are cited as "Tr. __", followed by the appropriate page number.

based upon the record as a whole, Counsel for the Acting General Counsel respectfully urges the National Labor Relations Board (the Board) to reject all of Respondent's exceptions and to affirm the Administrative Law Judge's rulings, findings and conclusions, and to adopt her recommended Order in its entirety.[2]

II. OVERVIEW

This is a termination case in a non-union setting. Virginia Kish is an experienced and skilled employee who, after being promoted to her position and working extra hours for years, was discharged for daring to question a new work policy in a manner her employer simply could not accept. As revealed at hearing, Respondent claimed that Kish's conduct in questioning the new "Inclement Weather Day" policy was alternatively "inappropriate, rude or insubordinate" and that when being disciplined for the inappropriate emails she had written to management she walked out of the meeting, leaving Respondent no choice but to terminate her. Respondent continues to press that claim, rejected by the judge, on appeal.

Unfortunately for Respondent, the record revealed, and the judge correctly found, that in fact Respondent fired Kish for two separate but equally unlawful reasons: in retaliation for her concerted protected conduct of questioning the work policy's application, and by application of an unlawfully overbroad work rule. With respect to the concerted protected activity theory, the judge correctly found that Kish was fired because she had joined together with fellow employees to discuss a new policy that affected everyone, and then questioned management in a series of emails concerning how the policy was being implemented, on behalf of herself and her two coworkers. As

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[2] While otherwise in agreement with the judge's findings and recommended order, Counsel for the Acting General Counsel is not filing cross exceptions to Judge Landow's recommended dismissal of the Complaint allegation concerning Respondent's work 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". (ALJD 34-35).

evidenced at hearing, Respondent manufactured flimsy and unsubstantiated reasons to justify its conduct, presented a scattershot, incoherent, and shifting defense, and utterly failed to sustain a credible *Wright Line* defense. Based almost entirely upon the utter lack of credibility of the numerous witnesses presented by Respondent, Judge Landow simply rejected Respondent's defenses as unproven. Contrary to Respondent's claim in its brief to the Board, this is not a case of the General Counsel or the judge "substituting its judgment" for the employer, as Respondent predictably contends. Rather this is simply a case of an employer who, while admittedly unfamiliar with the Act, trampled on the Section 7 rights of an employee who dared to exercise her rights.

III. RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT

Respondent filed six broad-based Exceptions to the judge's decision. A common thread running throughout its brief to the Board is a running attack on the judge's credibility and factual findings and complaints that the judge considered the evidence from only one perspective. Although it strives to avoid this impression, Respondent's arguments reveal a fundamental disagreement with the judge's credibility findings. It is well established that the Board has a long-standing policy of acceding to the judge's credibility findings unless the preponderance of the evidence convinces the Board that they are wrong. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). Here, as detailed below, and as revealed by the thoughtful attention paid to credibility throughout her decision, Judge Landow's detailed credibility findings are fully supported by the record evidence. For all of the reasons that follow, Respondent's exceptions are utterly meritless.

A. The judge correctly found that Respondent's work rule prohibiting "Inappropriate behavior while on Company property" is overbroad and that Respondent unlawfully applied that rule in terminating Kish

1. Respondent's rule is overbroad on its face

Respondent continues to maintain that there is nothing unlawful about its "inappropriate behavior" rule. Respondent primarily cites *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), *Palms Hotel & Casino*, 344 NLRB 1363 (2005), and *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011) in support of its assertion that its rule does not violate the Act. (R. Br. to Board at 4-9). However, in those three cases, as well as others it cites (R. Br. at 7), the Board examined existing published work rules which were being challenged by their mere maintenance. This case, however, involves both the maintenance of the rule as well as its application to suppress activity protected by Section 7 of the Act.

Despite that fact, the rule is overbroad on its face, as the judge correctly found. Judge Landow conducted a thorough analysis of the existing case law in her well-reasoned decision. First, she set forth the governing standard enunciated in *Lutheran Heritage Village-Livonia,* supra, 343 NLRB at 647:

> ....our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. (ALJD 30, lines 36-44).

Next, the judge noted that while the rule at issue is contained within a set of rules which delineate a number of other specific infractions, Respondent offered no testimony specifying or suggesting what would be considered inappropriate behavior, "not was

any testimony adduced during the hearing regarding the application of this rule historically." (ALJD 31, lines 2-4).

The judge then cited the caveat from *Lutheran Heritage Village-Livonia,* 343 NLRB at 647, that the Board will not read a rule in isolation, and carefully noted Respondent's argument that the rule in question is similar to the rule found lawful in *Hyundai America Shipping Agency*, analyzing a rule prohibiting employees from "exhibiting a negative attitude." (ALJD 31, lines 32-34). However, as noted later by the judge, the rule in that case actually stated "exhibiting a negative attitude toward or losing interest in your work assignment" and explained that:

> the wording of the rule only applied to an employee's attitude toward his or her work assignment and did not expressly prohibit employee conversations, and *thus was less likely to be construed as prohibiting concerted activity*. 357 NLRB No. 80, slip op at 2-3. (ALJD 32, lines 35-38)(emphasis added)

Next, the judge aptly noted that "work rules which discourage protected conduct based upon whether it is subjectively offensive to other employees or managers are unlawful." (ALJD 33, lines 8-9)(citations omitted).

Contrary to Respondent's protestations, it is clear that Judge Landow applied the relevant standard in concluding that the rule is unlawful on its face. Primarily relying upon *2 Sisters Food Group*, 357 NLRB No. 168 (Dec. 29, 2011), the judge noted that the Board recently found unlawful a work rule subjecting employees to discipline for "an inability or unwillingness to work harmoniously with other employees" because "the rule was patently ambiguous and so imprecise that employees would reasonably construe the rule as prohibiting discussions and disagreements between employees that related to protected Section 7 activities." (See ALJD 33, lines 19-24). The judge carefully noted that in so holding, the Board distinguished the rules found lawful in *Palms Hotel &*

Casino and *Lutheran Heritage Village-Livonia*, relied upon by the Respondent, "because the rules there 'were more clearly directed at unprotected conduct.'" (ALJD 33, lines 24-26)[3]. The judge concluded that the rule at issue here is similar to the unlawful rule from *2 Sisters Food Group,* in that it is "sufficiently ambiguous, imprecise and subjective in nature that a reasonable employee would construe it as prohibiting protected conduct which might well be deemed 'inappropriate' by his or her superiors." (ALJD 33 lines 27-29).

Naturally, Respondent excepts to these findings. But its efforts to distinguish *2 Sisters Food Group* are entirely unconvincing and border on the disingenuous. (See R. Br. to Board at 9, note 3). At one point Respondent misquotes the Board majority in *Lutheran Heritage Village* when it states: "While employee interaction, be it harmonious or otherwise, is a staple of concerted activity, 'it is preposterous to conclude that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA *without resort to [inappropriate behavior while on Company property*]'" (R. Br. to Board at 9, note 3)(emphasis added). What the Board in *Lutheran Heritage Village* actually stated was "*without resort to abusive or threatening language.*" See 346 NLRB at 648. Setting aside the fact that in *2 Sisters Food Group* the Board seemingly

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[3] The rule at issue in *Palms Hotel & Casino*, supra, was conduct rule 10, which forbid employees "from engaging in 'any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team members.'" Id. at 1367. The Board noted that the employer "did not promulgate rule 10 in response to union activity nor has it applied rule 10 to restrict the exercise of Section 7 rights. *Indeed, there is no complaint allegation that the Respondent unlawfully enforced rule 10.*" Id. (emphasis added). The rule at issue in *Lutheran Heritage Village-Livonia*, supra, prohibited "abusive and profane language." 343 NLRB at 646-648. In all these cases, the Board upheld the validity of the respective rules, noting that the analysis in such cases begins with the assumption that "the rule must be given a reasonable reading, phrases should not be read in isolation, and improper interference with employees' rights is not to be presumed." *Palms Hotel & Casino*, supra, 344 NLRB at 1367. As noted above, the *Palms Hotel* majority specifically noted that the rule under challenge in that case did *not* restrict Section 7 activity, nor was there any such complaint allegation. Id. The Board majority in *Lutheran Heritage Village-Livonia* similarly noted that its conclusion that the rule was lawful "does not, of course, immunize from challenge specific instances *in which they are applied.*" 343 NLRB at 649. (emphasis added).

endorsed the *Flamingo Hilton-Laughlin* standard finding unlawful a rule prohibiting "using loud, abusive or foul language" (See *2 Sisters Food Group,* supra, 357 NLRB No. 168, slip op. at 2), the rule at issue in this case cannot pass muster under any of the relevant Board standards.

The other cases cited by Respondent are distinguishable for two reasons. First, as noted by Judge Landow, those rules were more clearly directed at unprotected conduct. Second, as noted herein, the cases relied upon by Respondent are all "mere maintenance of rules" cases. Here, of course, the rule at issue was alleged, and was properly found by the judge (ALJD 33-34) to have been applied to restrict activity protected by Section 7. In other words, the instant case is not only a "mere maintenance" challenge to the rule, as was the case in *Palms Hotel & Casino, Lutheran Heritage Village-Livonia*, and *Hyundai America Shipping Agency.* In claiming that the Board should validate its rule, Respondent appears undeterred by the factual landscape.

The judge properly found that, like the rule in *2 Sisters Food Group*, supra, the prohibition 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 easily be deemed by employees to be found "inappropriate" by management. Moreover, employees are particularly likely to interpret the policy to prohibit protected activity where, as here, Respondent applied the broad terms of its policy to restrict Kish's Section 7 rights.

The judge also correctly considered the context of the *application* of the rule in concluding that it runs afoul of the Act. (ALJD 34, lines 2-15). Respondent cannot finesse the fact that the weight of the credible evidence reveals that this rule was applied to activity protected by Section 7 of the Act: the right to protest, or at least raise questions about, a term and condition of employment -- without fear of reprisal. The judge correctly found that the "inappropriate behavior" rule has the clear tendency to suppress all manner of concerted protected conduct, and that it was applied in that manner in this case. The judge correctly found the violation.

2. Respondent applied the overbroad work rule against Kish

Once again, the judge applied the correct legal standard in finding that Respondent relied upon the overbroad work rule in deciding to discipline and/or terminate, and, related to that question, her finding that Kish did not forfeit reinstatement under the Board's recent analysis in *Continental Group, Inc.*, 357 NLRB No. 39 (2011). As noted below, the judge found that Kish's activity was concerted. The judge found further that even assuming arguendo that Kish's activity was *not* concerted, the facts here revealed 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.*, supra, slip op. at 4.

Respondent denies first, that its rule is overbroad (Exception 1), and second (Exception 6), that it applied such a rule in this case. Again, Respondent is mistaken on both counts.

a. The appropriate legal standard

Last year the Board reaffirmed and clarified the standard in this type of case. In *Continental Group*, supra, the Board clarified its application of the so-called *Double Eagle* rule concerning discipline imposed pursuant to an overbroad rule.[4] The Board examined the history of the policies underlying the *Double Eagle* rule, carefully noting that "the 'chilling effect' rationale for the *Double Eagle* rule applies *to a greater extent when an employee is disciplined for conduct that is 'protected' but not 'concerted'*." Id., supra, slip op. at 4 (emphasis added). As the Board explained in *Continental Group*:

> The *Double Eagle* rule provides that discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by **(1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act.** Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule *if it can establish* that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, *and the interference, rather than the violation of the rule, was the reason for the discipline*. (emphasis added)

Thus, in "overbroad rule" cases the inquiry shifts to whether the employee was in fact discharged for violation of the overbroad rule (unlawful) or "interference with production" unrelated to the rule (lawful). The judge correctly found that Kish's conduct was concerted, and that even if it was not concerted, her conduct in questioning the new "IWD" policy was clearly protected conduct, and that the weight of the evidence suggests that Respondent applied this unlawful rule to her conduct. (ALJD 29-34). Here, since Kish's conduct *was at the very least protected* (questioning or complaining about the implementation of the new IWD policy), the burden shifted to Respondent to

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[4] *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006).

convince that the application of the rule was not the real reason for her discharge. Judge Landow properly found that Respondent failed to meet its burden of proof.

b. The judge correctly found that the weight of the evidence reveals that Respondent applied this rule against Kish

The weight of the evidence reveals that Respondent applied the overbroad rule in justifying Kish's discipline. The judge properly noted the numerous pieces of evidence to support her finding. First, Kovac entitled the "final written warning" being given to Kish as "Inappropriate behavior." (GCX-13). Not insubordination, or profane or abusive behavior, but *inappropriate* behavior -- obviously the subject of the challenged rule. Second, Respondent's witnesses, from Kovac to Morlock, relied upon the word "inappropriate" throughout their testimony when describing their problems with Kish's emails. This fact is undisputed. Third, since Respondent chose not to give a reason, the best evidence is gleaned from the "totality of the record", which supports a finding that in fact Respondent applied this rule against Kish. And finally, the judge accurately noted that Kovac failed to testify that she did *not* apply this rule. (See ALJD 34, lines 2-15). Respondent simply never rebutted the Acting General Counsel's theory, announced at the outset of the hearing *in Kovac's presence*, that Respondent applied this rule in this case.

Additional evidence is found within Respondent's written reasons given post-termination. While Respondent never provided Kish a written discharge letter, in the Unemployment case Kovac cited *the violation of the handbook*, which clearly contains the overbroad rule. She also claimed that "Ms. Kish was given the 2nd written warning for using foul language and/or disrespectful behavior, including insubordination." However, Respondent's witnesses admitted that Kish never used "foul language" on February 10, 2011, meaning that Kovac exaggerated the nature of Kish's misconduct,

presumably to bolster its weak case. Kovac could just not help piling on allegations against Kish, even after she had fired her. The judge noted that the record is clear that Kish never used foul language in her emails or during the February 10 meeting, finding simply that "Kovac's after-the-fact explanation of the reasons for Kish's termination is questionable" (ALJD 29, lines 27-29), which is true.

Respondent's exceptions in this regard boil down to an attack on the judge's assessment of witness credibility. The judge simply found Kovac's testimony implausible. According to Kovac, Kish deserved harsh discipline because she used profane language. (JTX-2). Except that the sole documented use of profanity by Kish occurred in September 2010, which no one heard except VP Chris Petersen, who also played a key role in the termination decision. According to the February 8, 2011 written warning (GCX-9), Kish was "disrespectful and aggressive" towards fellow employees and managers, except that she wasn't. According to Petersen, Kish's emails were inappropriate as to admitted agent and non-supervisor Kate Morlock, who reports to Kovac. (Tr. 321). Yet while Morlock testified that she felt the emails (GCX-6, 7) were "a little accusatory and rude maybe," they were not insubordinate as to her, but "maybe insubordinate as to her managers." (Tr. 228). Morlock emphasized in her direct testimony that she found the emails inappropriate: "I just didn't think it was appropriate. I guess, yeah, I just didn't think it was appropriate." (Tr. 230). When asked by Respondent's counsel what bothered her about the email (GCX-7), Morlock replied, "It was definitely the tone of the email." (Tr. 230).

The weight of the record evidence thus fully supports the judge's finding that what most bothered Respondent's decision makers was not only the inappropriate tone

of the two emails, but their content as well. (See ALJD 18, lines 32-49; ALJD 19, lines 3-22). As the judge observed:

> it is apparent from Kish's emails, Kovac's testimony and the written warning issued to Kish by Respondent that Kish's emails were, at least in part, viewed as a general (albeit in Respondent's view *inappropriate*) protest that the decision to limit comp time to core office hours had not been previously or sufficiently explained to employees (ALJD 18, lines 32-35)(emphasis added) ... The record reveals that Respondent took umbrage at not only the tone by the content of Kish's emails (ALJD 18,lines 43-44).

The weight of the record evidence more than amply supports the judge's finding that Respondent relied upon the overbroad work rule in justifying the harsh discipline. Judge Landow correctly found that Respondent fell far short of convincing that Kish "interfered with production," as here there was no use of profanity, the 2:30 p.m. meeting of February 10, 2011 (all dates are in 2011 unelss noted otherwise) seems to have all but ended when she asked if the meeting was over, and in any event Kish credibly denied that she walked out of the meeting prematurely. Since Respondent failed to meet its burden of proof, the judge correctly found that it violated Section 8(a)(1) by discharging Kish pursuant to an unlawful rule. (ALJD 34, lines 23-25). In addition to the cases cited by the judge, see also *Switchcraft, Inc.*, 241 NLRB 985, 986 (1979); *Continental Group*, supra.

B. The judge correctly found that Respondent terminated Kish in retaliation for her concerted protected activity of questioning the IWD policy

As Judge Buxbaum aptly observed, assessment of the propriety of a company's decision to terminate an employee in a case like this:

> requires the application of core principles of labor law in a work setting dramatically different from the industrial context in which those principles were largely developed. Instead of a universe of factories and foundries,

> the events in controversy occurred in office suites and branch banks. While the outer trappings vary greatly, the legal framework remains constant.

Citizens Investment Services Corp., 342 NLRB 316, 324 (2004) (Board upheld judge's finding that employer violated Section 8(a)(1) by discharging financial consultant Hayward because of his protected concerted activities in complaining about problems with compensation).

As noted by Judge Marcionese in *Rogers Corporation*, 344 NLRB 504 (2005), the Board has held that where the conduct for which the employee is discharged is intertwined with protected concerted activity, the Board's *Wright Line*[5] analysis does not apply. Id. at 513-514, citing *Felix Industries*, 331 NLRB 144, 146 (2000). However, in numerous other cases of this nature the Board has applied a *Wright Line* standard. See, e.g., *Manimark Corp.*, 307 NLRB 1059 (1992)(discussed in detail, infra). In any event, the primary issue to resolve under this theory is whether or not Kish's conduct was *concerted*. The judge properly found that it was.

1. Applicable law

Section 8(a) (1) prohibits interference with activity protected by Section 7, which expressly protects employees' right to "self-organization ... and to engage in other concerted activity ... for mutual aid and protection." To fall within the ambit of this protection, an employee's statement must concern terms and conditions of employment and must be "concerted" in the sense that she seeks to initiate, induce, or prepare for group action, or is part of a group discussion of concerns regarding terms and conditions of employment that usually precedes group action. Though a speaker may articulate a grievance with reference only to herself, such an activity is protected under

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[5] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enf'd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982), approved in *Transportation Mgt.*, 462 U.S. 393 (1983).

the Act as long as the sought-after remedy would necessarily benefit other employees. See *Alston H. Peister, LLC v. NLRB*, 591 F.3d 332, 341 (4th Cir. 2010).

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). The Board has required that in order to constitute protected concerted activity the conduct "must seek to initiate or to induce or to prepare for group action." *Meyers II*, 281 NLRB 882, 887 (1986). This requirement may be met when the discussion does not include a current plan to act to address the employees' concerns. Thus the Board has long described concerted activity "in terms of interaction among employees." See *Meyers I*, 268 NLRB 493, 494 (1984); *Meyers II*, supra, 281 NLRB at 887, quoting *Root-Carlin*, 92 NLRB 1313, 1314 (1951). See also *Service Employees' Local 1*, 344 NLRB 1104, 1105-1106, 1108-1110 (2005) (employee's discussions with fellow employees suggesting that they confront their employer regarding shared concerns about working conditions "clearly constituted concerted activity protected by Section 7.")

Such conduct is protected even if the employee is unsuccessful in persuading other employees to join in group action. See *El Gran Combo*, 284 NLRB 1115, 1117 (1987), enfd. 853 F.2d 996 (1st Cir. 1988). In this regard, the Board has found unlawful discipline imposed on employees for their discussions of common concerns about wages or work schedules even when no specific group action was discussed, because "it is obvious that discussions of this kind usually precede group action." See *St. Margaret Mercy Health Care Centers*, 350 NLRB 203, 204, 212 (2007), enfd. 519 F.3d 373 (7th Cir. 2008) (employee discussions about the effect of a new performance evaluation policy held concerted, despite lack of evidence that employees contemplated

group action). In addition, Kish's conduct in protesting the new policy was similar to an employee objecting to a new policy at an open employee meeting, which is considered concerted activity under Board law. See, e.g., *Talsol Corp.*, 317 NLRB 290, 317 (1995).

In *KNTV, Inc.*, 319 NLRB 447, 450-452 (1995), the Board applied a *Wright Line* analysis in finding that employee Wayne's conduct "was a logical outgrowth of his discussion of the substitute anchor pay issue with (coworker Fladeboe) the day before" and thus was concerted activity. Id. at 450-451. In finding Wayne's activity concerted, the Board specifically noted that Wayne had mentioned Fladeboe's name when raising the issue with the employer. Id. at 451. The Board also found that Wayne's activity of asking the employer to look into the anchor-pay issue was *protected*, and that the employer failed to show that it would have discharged Wayne absent his protected concerted activities. Id. at 452.

In *Manimark Corp.*, 307 NLRB 1059 (1992), the Board, also applying *Wright Line*, found that employee Fields' termination for his "negative attitude towards criticism of that behavior" was motivated by unlawful considerations, where Fields had aired complaints about working conditions previously discussed and shared by other drivers, and the employer had reason to believe that Fields was not acting alone. Id. The Board noted that the employer had stretched for an excuse to fire Fields, who was "considered a good worker." Id.

In *Phillips Petroleum Co.*, 339 NLRB 916 (2003), probationary employee Ingram protested the company's charging him four days of vacation time when he had stayed out of work to be with his sick wife. Ingram protested this action in an email, which "prompted a flurry of emails among Respondent's officials." Id. at 917. The employer fired him a month later, citing in part his "argumentative discussions with Company

personnel and in writing to the labor relations superintendent." Id. at 917-918. The Board found that Ingram was "engaged in protected concerted activity to remedy a perceived inadequacy in working conditions, i.e., the inability of employees to use sick leave for family medical emergencies. Although Ingram's efforts to secure sick leave originated because of his need to care for his wife and children, *the record clearly establishes that Ingram's efforts embraced the larger purpose of obtaining this benefit for all of his fellow employees.*" Id. at 918. (emphasis added). Noting that some of Ingram's coworkers voiced their frustration with having been denied family leave in the past without being given a reason, the Board found that "Ingram was acting not only on his own behalf, but also on behalf of his coworkers." Id.

An employer's discharge or other action against an employee is also unlawful if it was undertaken to prevent future employee discussion of terms and conditions of employment. See *Parexel International*, 356 NLRB No. 82, slip op. at 4 (2011)(termination of employee for engaging in discussions about terms and conditions of employment was an unlawful "pre-emptive strike" designed to prevent the employee from discussing such matters with other employees).

In its brief, Respondent cites *Reynolds Electric, Inc.*, 342 NLRB 156, 157 (2004) to support its defense that Kish's conduct was not concerted. However, the judge properly considered and distinguished that case. In *Reynolds Electric, Inc.,* supra, the Board dismissed the complaint because it found that "the evidence is far too speculative to support a finding that the knowledge element of a prima facie case" was established. 342 NLRB at 157. That case also involved a unique fact pattern absent here: the employee discharged, an electrician, did not work in the same job classification as the employees he spoke to about "prevailing wage jobs" (carpenters), and the majority

found that his contacts with the carpenters "were simply informational." Id. Here, by contrast, Kish spoke to employees in her immediate area who worked the same job as her, and she used the words "us" and "we" in her written communications to Respondent, and she mentioned Cocchia's and Gaetano's names in both her February 4 conversation with Petersen *and* during the 2:30 p.m. disciplinary meeting on February 10. (Tr. 112, 115). Judge Landow properly declined to rely upon *Reynolds Electric*. (ALJD 20, lines 40-52; ALJD 21, lines 1-9), noting that even to the extent that Kish's emails reflected a concern with her own situation, "her protest also implicated the terms and conditions of her coworkers and inured to their benefit."

The judge also properly distinguished *Summit Regional Medical Center*, 357 NLRB No. 134 (2011), another case cited by Respondent. (See R. Br. to Board at 24-25). Judge Landow noted that the weight of the evidence revealed that here Respondent had to have been aware of the concerted nature of Kish's protest, and that, in any event, the managers' subjective beliefs as to the individual nature of Kish's emails "is insufficient to remove protected conduct from the ambit of the Act." (ALJD 20, lines 23-24).

In addition to the extensive analysis supplied by Judge Landow (See ALJD 17-21), the Board has also found an employee engaged in concerted activity when he sent an email to other employees concerning the employer's vacation policy proposal, noting that the General Counsel argued that just before sending the email message that the employer found disrespectful, the employee had discussed the issue with fellow employees. *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997). The Board found it unnecessary to rely upon that piece of evidence, finding instead that the Charging Party's sending of the email itself was concerted activity and the Respondent was

aware of the concerted activity when it discharged the Charging Party." Id. The Board found the email itself protected concerted activity, and, applying *Wright Line*[6], that the employer "failed to demonstrate that it would have discharged the Charging Party absent his protected activity." 323 NLRB at 244.

2. The judge's finding that Kish's conduct was concerted is largely based upon her assessment of the credibility of the witnesses

Applying the above principles to the facts in this case, Kish's conduct, which got her in hot water initially, was protected concerted activity within the meaning of the Act. The judge carefully noted that, while it is not disputed that Kish acted alone in composing the first of several critical emails, "Kish's decision to email Morlock, Kovac and Petersen stemmed from a discussion affecting several employees regarding what they all believed to be promised compensation and/or benefits. Kish announced to her coworker that she would ask about this. Their discussion, albeit brief, clearly constitutes concerted and protected activity." (ALJD 18, lines 15-19). The judge credited Kish's uncontradicted testimony that she discussed the subject of the comp time with coworker Cocchia before she wrote and sent her fateful emails. (ALJD 4, lines 10-15; ALJD 18, lines 15-19). Kish also testified that the group shared concerns about the lack of comp time they belatedly discovered on February 3 that they would *not* receive for having worked the early morning hours of February 2, 2011. Her conversations with her coworkers the morning of February 2nd were immediately followed by her emails to Respondent protesting its failure to grant them comp time from 7:30 a.m. 9:00 a.m. -- clearly a term and condition of employment. Moreover, Kish's unrebutted testimony establishes that she mentioned Cocchia's and Gaetano's names in both her February 4

[6] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enf'd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982), approved in *Transportation Mgt.*, 462 U.S. 393 (1983).

conversation with Petersen *and* during the 2:30 p.m. disciplinary meeting on February 10, thus providing Respondent with knowledge that she was acting on behalf of others and not solely on her own behalf. The judge noted further that supervisor Mary Neclerio (whom Respondent failed to call to testify on its behalf) "had inquired about the amount of comp time that certain collections department employees would receive for the prior morning: thus Neclerio, Kovac and Morlock were all aware that two other employees in that department found themselves in comparable circumstances." (ALJD 18, lines 24-27)(see also GCX-3). Between the documentary evidence and the unrebutted testimony of Kish, there is thus ample support in the record for the judge's findings.

Respondent, not surprisingly, takes a much different view of Kish's emails, arguing once again that they did *not* constitute concerted activity. Respondent argues 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." (R. Br. to Board at 19). However, despite Respondent's protestations, the record reveals additional evidence suggesting that Respondent knew that Kish was acting on behalf of others. When asked by Respondent's counsel on day one of the hearing why she found Kish's emails "to be disrespectful and rude", Kovac quickly cited the portion of the email (GCX-6) in which Kish used the word "us":

> The whole idea -- the whole section about I'm not here to work for free and to come to work for nothing. *I think this should have been explained to us earlier than after the fact.* I don't have an issue with the fact that she's questioning the policy, because a number of people had questions and asked for clarification. *It's just the way she went about it.* (Tr. 71)(emphasis added).

Moments later, Kovac expounded:

> I don't know where anybody gets an assumption that they would be given comp hours when our policy on our schedule has always been there's only three days a year that you get comp time, until this new policy came

> along. And it wasn't clear and I take responsibility for the fact that it wasn't clear. And I welcomed questions and I was glad people came with questions, but we didn't have everything ironed out. And so, to attack us, and to be condescending, and rude and aggressive in an email is not going to help the matter. (Tr. 72)

These two citations to Kovac's testimony revealed several undisputed facts: (1) a number of employees had questions about the policy; (2) Respondent knew this; and (3) Kovac was upset in part by Kish's use of the word "us." While Kovac denied knowing that Cocchia or Gaetano shared Kish's concerns (Tr. 278), her denial is unconvincing because her testimony above (elicited from Respondent) reveals that *she knew employees were questioning the policy*, thus lending weight to the finding that she knew Cocchia or Gaetano were part of that group. She also knew this because their supervisor, Neclerio, had emailed a question about that group of employees that very afternoon, so she knew or had to have known that these employees had questions too. (See GCX-3). She and Petersen also failed to rebut Kish's testimony concerning her naming Cocchia and Gaetano, another fact noted by the judge.(See ALJD 20, lines 10-12; ALJD 24, lines 21-23: "I credit Kish's unrebutted testimony that she raised, or attempted to raise, the issue of her coworkers during this meeting and note that she was prevented from doing so.")

Although Respondent understandably takes issue with the end result, the decision reveals that Judge Landow weighed a number of factors in carefully considering the concerted protected nature of the emails. Again, as with so much of Respondent's appeal, its argument is based upon its differences with the judge's credibility findings.

The judge also properly rejected Respondent's "insubordination" defense, resurrected in its brief to the Board. Essentially, Respondent argues that what *really*

caused the harsh termination action was Kish's conduct in walking out on Respondent's top managers during the 2:30 p.m. disciplinary meeting on February 10, and that this was the real reason for the termination decision. (R. Br. to Board at 38-42). Judge Landow properly rejected this strained and illogical argument, rejecting it both on credibility grounds and under an *Atlantic Steel* analysis.[7] (See ALJD 21-26).

Respondent patches together an impossibly strained argument: Kish admittedly would not have been in the February 10 meeting but for her "disrespectful" emails, but she acted so poorly (her "misbehavior") when given the discipline by walking out of the meeting that she was guilty of insubordination. Respondent hopes to convince the Board or a reviewing court that such a defense satisfies it heavy burden of persuasion under *Wright Line.* The main flaw in this mildly creative but ultimately unavailing contention is that, sadly for Respondent, it utterly failed to prove Kish's "misbehavior", as noted by the judge. Since the record reveals that, as Judge Landow aptly found, the 2:30 p.m. meeting was all but over, Kish could not have been guilty of insubordination when she exited the closed door meeting after receiving her written warning. Moreover, Respondent's efforts to distinguish the many examples in the record of disparate treatment are entirely unconvincing. Respondent simply did not treat Kish even-handedly, so its defense fails for that reason as well.

In terms of credibility, Kovac was an unimpressive witness. Her self-serving musing that "I don't know where anybody gets an assumption that they would be given comp hours when our policy ..." (Tr. 72), indicated her displeasure with being challenged. Kish and her coworkers -- even their supervisor Neclerio -- likely got their "assumption" because Respondent's comp time policy was, until February 3, 2011,

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7 *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

quite generous (in theory at least), as Kovac and Morlock revealed by their testimony that an employee working on a closed office day would receive a full seven hours of comp time, *even if she only worked four hours that day*! Given that the practice was, in Kovac's words, to "give people additional time off *commensurate with the time worked*" (Tr. 30; emphasis added) it was entirely reasonable for employees to "assume" that comp time would start at the time one started working on February 2, 2011, rather than at 9:00 a.m.

Kovac's lack of focus displayed throughout her testimony also called into question her overall reliability. Her answers were at times so non-responsive that she had to be admonished by the judge to just answer the questions posed to her. (Tr. 50-51). Even when being cautioned by the judge, Kovac managed to interrupt her (Tr. 51, lines 17-20). At other times she answered questions before they were even asked (Tr. 57-58), avoided a direct answer (Tr. 59-60, 295-296), or offered answers entirely self-serving or non-responsive (Tr. 38, 43-44, 47-48, 58-59, 64). But her credibility truly suffered when she offered testimony that was simply unsupported by the record, as seen by her testimony early in the hearing when she was asked to explain how Kish had ever been previously written up for showing aggressive behavior towards fellow employees, and answered by referring to Kish's September 2010 warning. (Tr. 58-59; GCX-11). Ignoring the fact that the 2010 warning clearly says nothing about Kish's supposed "aggressive behavior towards fellow employees," Kovac shifted course and stated that that line (found in GCX-9) in Kish's February 2011 warning referred to Kish's behavior toward Kate Morlock (Tr. 59), who, in Kovac's topsy-turvy universe, conversely was the subject of Kish's supposed "insubordination." Kovac was then asked if Kish had ever been written up for being "disrespectful and rude to a fellow employee", prompting

this response: "Gosh, you know I'm not sure." (Tr. 59-60). When pressed, Respondent's top HR official fell back on the September 2010 warning, which of course is simply inaccurate. (Tr. 60). Kovac just made up testimony as she went along, which was likely one reason the judge was unable to credit her testimony.

Kovac also failed to explain or rebut Kish's testimony that at the February 10 meeting at 2:30 p.m. Kovac told her, "No one had a problem with this except for you!" (Tr. 115, lines 22-23). This is important, because this means that Kovac either lied to Kish at the meeting or in her testimony when she claimed that a lot of other employees had questions about the new policy (See Tr. 39, 52, 72), presumably to build an argument that only Kish went out of bounds in questioning the IWD policy.

Petersen also was an especially unimpressive witness. Try as he might, Petersen could not keep his version consistent with Kovac's, as revealed when he was asked on cross examination if he understood how the IWD policy would work in a "delayed opening." Petersen claimed, contrary to Kovac, that he *did* understand how it would work, and then quickly added that he "really didn't give it any thought, you know, in terms of how it worked. I had no reason to." (Tr. 360, lines 16-18). When asked if there had been some confusion when the policy initially came out, Petersen answered, "Not that I'm aware of" (Tr. 360, line 21), thereby again contradicting both Kovac and Morlock, who repeatedly emphasized the initial confusion that reigned in the first few months of the IWD policy.

But Petersen's credibility suffered a fatal blow when he tried to explain his thinking in February 2011 concerning Kish's fate. On direct examination, Respondent's counsel asked him: "Was there any intention, even before the first meeting, to terminate Ms. Kish's employment?" Petersen answered "no." (Tr. 332). Yet on cross examination,

it was revealed that in fact this was untrue. When specifically asked on cross examination if he thought that Kish should have been fired over the emails themselves, Petersen repeatedly answered "no." (See Tr. 351, lines 9, 11, 14). Moments later, he was asked *if termination was even considered at that point*, prompting him to answer "not that I'm aware of." (Tr. 351, line 23). When shown an email trail dated February 3 that clearly contradicted this testimony (GCX-18), Petersen stubbornly refused to concede the obvious. (Tr. 352). In this February 3 email, Petersen clearly wrote that he "brought Ryan (Collison) in the loop as well *and after considering all of the history with Virginia (Kish) I support the termination action.*" (GCX-18)(emphasis added). Thus it is crystal clear that Petersen was so bothered by the tone of the emails *as of February 3* that he was looking to terminate Kish because of them. He simply could not admit it on the stand, which is why his testimony concerning what motivated the termination decision *on February 10* was so utterly unworthy of belief. The judge had more than enough reason to find that Kovac's and Petersen's version of the February 10 meeting "is overstated, and, in some respects, false." (ALJD 28, line 40).

Petersen had trouble not only keeping the big things straight, but was clueless on seemingly minor matters, indicated by his bizarre inability to even properly name Morlock's job title, insisting against all of the evidence that she is Respondent's "manager of benefits." (Tr. 341). This was yet one more example of the lack of command of the facts evidenced by Respondent's key witnesses in this matter. Petersen also hedged on the seemingly innocuous subject of whether he or Kovac led the February 10 meeting (at 2:30 p.m.), claiming on both direct and cross examination that *he* did. (Tr. 323-325, 354). Then on further cross examination, when asked to explain the discrepancy between that claim and Kovac's notes of that meeting (which

credit *her* for explaining the warning to Kish; see RX-7), Petersen lamely offered that "we obviously explained it together," (Tr. 355), blithely contradicting his earlier testimony. Petersen, like Kovac, was simply not a reliable witness. These facts did not escape the judge's attention. (See ALJD 23-24, ALJD 25, lines 31-33).

In stark contrast to the testimony of Respondent's two officials, Kish's testimony suffered no such inconsistencies or outright internal contradictions. The judge rejected Respondent's attacks on her credibility, noting that "Kish invoked the names of her coworkers in real time by arguing that she was not alone in her concerns", a matter that should have been apparent to Respondent at the time. (ALJD 20, lines 14-16). The judge reasoned that, "had (Kish) chosen to create such an account out of whole cloth, she easily could have constructed a more elaborate evocation of her coworkers' sentiments and their interactions. Her account is inherently plausible because it is not overstated." (ALJD 20, lines 17-20).

Respondent now relies upon a single omission contained within Kish's 11-page affidavit to argue that her entire testimony is unworthy of belief. (See R. Br. to Board at 41). Kish's admitted failure to mention in her affidavit that, near the end of the 2:30 p.m. meeting on February 10, Kovac said, "We're finished" -- is the sole discrepancy in her lengthy cross examination of any importance. However, the judge properly weighed the evidence in the record as a whole in deciding to credit Kish's version of this meeting over Respondent's. Thus the judge considered the matter carefully, noting the omission but crediting Kish's explanation that she had overlooked it in her affidavit, noting further that Kovac, the trained HR professional, also failed to mention in *her* statement her claim at hearing that Kish had walked out of the meeting before it was over. (ALJD 24,

note 16; ALJD 23, lines 37-41: "I also note that there is no specific mention in Kovac's account of Kish abruptly walking out of the meeting prior to its conclusion.")

In its latest brief, Respondent blithely ignores the record evidence while accusing the judge of ignoring its version of events. Setting aside the fact that Counsel for the Acting General Counsel highlighted Kish's affidavit inconsistency both on the record and later in his post-hearing brief to the judge, Respondent brazenly claims that the judge "treated conflicting evidence here with an almost breathtaking lack of evenhandedness. The employer's witnesses saw their testimony completely disregarded for the slightest of immaterial inconsistencies, while [Kish] survived even material contradictions." (R. Br. to Board at 41). What is "breathtaking" is Respondent's willingness to try to compare an honest omission by a low level employee in an NLRB-prepared statement to a parade of demonstrated falsehoods and documented contradictions by top trained managers *under oath*. The most glaring (of many) occurred when Petersen claimed that he did not consider termination until after the 2:30 meeting on February 10 – when his email message of February 3 (GCX-18) directly contradicted his sworn testimony. This being a termination case, after all, one might consider such a contradiction by a top employer decision-maker hardly "immaterial." The judge was not fooled by such misrepresentations of the record, properly finding that "Kovac and Petersen's account of Kish's conduct at the February 10 meeting is overstated. In reaching this conclusion, I rely not only upon Kish's testimony, which I credit in several significant respects, but on Kovac's written description of the meeting ..." (ALJD 23, lines 6-8).

As the judge explained (ALJD 24, lines 6-12):

> With regard to Respondent's contention that Kish walked out of the meeting before it was over, I note that neither Kovak nor Petersen offered any testimony whatsoever about why the meeting was not over at the

> point when Kish left the room. As they both testified, the warning had been presented and explained to Kish. What else was there to accomplish? If there was anything unsaid or left open, neither Petersen nor Kovak provided any indication of what that might be. Going by Kovak's written account, it seems entirely reasonable for Kish to have concluded the meeting was over at that point.

The judge had ample reason to credit Kish's version of the 2:30 p.m. meeting on February 19, 2011, supporting her finding that Kish's "testimony generally had the ring of truth." (ALJD 24, line 33).

C. The judge properly rejected Respondent's *Wright Line* defense

Kish's protected concerted conduct was intertwined with the IWD policy, which was a big deal. Kovac had to speak to Respondent's president to answer a simple inquiry from a lowly collection specialist. She must have been more than a little embarrassed that all of the top minds in the company had not thought through the contingency that quickly arose under the new policy, and so Respondent (revealed by Petersen's email of February 3; GCX-18) set out to terminate Kish right from the start over the "tone" of her "inappropriate" emails.

The central problem with Respondent's defense is that, even assuming *arguendo* that Kish walked out of the February 10 meeting and was thus fired for insubordination (the judge found no credible proof of this), Respondent cannot escape the fact that it was Kish's protected conduct of challenging the IWD policy that caused Respondent to write the February 8 warning -- which led to the February 10 meeting. As the judge properly divined, but for her protected conduct, Kish would not have even been targeted for discipline. (See ALJD 28, lines 37-39). Respondent's defense was further undercut by the lack of Kovac's and Petersen's credibility (detailed above and contained within the judge's decision), concerning the claim that Kish stormed out of the 2:30 p.m. meeting. Then there is the problem of disparate treatment, and the unexplained harsh

rationale for giving Kish a "final written warning" for inappropriate behavior when two other employees were given much more leeway. Not to mention the shifting reasons for the discipline and the utter inability of Kovac or Petersen to keep their stories straight on the critical matter of just what was decided, when, and why. Respondent simply did not present a coherent or credible defense.

The judge properly applied a *Wright Line* analysis in this case. (ALJD 26-27). She found that "whatever difficulties Kish may have exhibited in the workplace prior to February 3, 2011, Respondent demonstrated no intent to discharge her until she sent her emails to Morlock, Kovac and Petersen. After that occurred, members of management communicated among themselves and a discussion about whether to terminate her employment ensued." (ALJD 28, lines 13-17). These are undisputed facts.

Kish also testified without contradiction that she never received a written reason for her termination, and Respondent offered no written reason into the record. The Board has long recognized that an employer's failure to provide an explanation to an employee for an adverse action raises the inference of an unlawful motive. *LeSaint Logistics, Inc.*, 324 NLRB 1051, 1060 (1997). Respondent's "loading the gun" at the Unemployment case by accusing Kish of having used "foul language" (JTX-2), coupled with its proffer at the ULP hearing of wholly unsubstantiated and exaggerated reasons for the decision, confirms such unlawful motive. Thus Respondent continued to pile on the accusations against Kish at hearing, introducing past warnings for attendance which were not at issue, blaming her for all of the profanity at work, and questioning her at length on cross examination about her admitted refusal to sign her September 2010 warning: conduct suggesting that all of these items were added to bolster a weak case.

The introduction of unsubstantiated matters that did not warrant discipline standing alone is a further indicator of unlawful motive. *Nor-Cal Security*, 270 NLRB 543, 552 (1984). Respondent's desperation to pin everything on Kish further revealed the weaknesses in its case. Thus, while Respondent made Kish out to be some sort of non-team player, chronically causing problems, the record belies such claims. Petersen even admitted that Kish was a good worker who had a good work ethic. (Tr. 356).

Moreover, the disparate treatment of Kish noted by the judge supports the judge's finding that the real motive for Kish's discipline was an unlawful one. (ALJD 29, lines 7-22). See also *Citizens Investment Services Corp.*, supra, 342 NLRB at 330; *Med West Health Care Mgt.*, 276 NLRB 1300, 1302 (1985). As the judge properly observed, "Respondent's decision to treat her (Kish) more harshly than others with more tarnished employment histories evinces a discriminatory motive." (ALJD 29, lines 19-20).

Respondent's arguments in support of its Exception 4 (R. Br. to Board at 31-35) reveal a fundamental misunderstanding, or failure to grasp, the import of the record evidence. Although Respondent's top HR official, Kovac, admitted that Respondent tries to treat employees fairly (Tr. 54), the record reveals no comparable case to the one at hand. The record revealed that in the last three years Respondent had only terminated one other employee, Lockhart Johnson, but only after he had received a plethora of written discipline in the months leading to the discharge. Johnson had lied on his resume, which didn't seem to bother Respondent when it discovered this fact in 2009. (GCX-16; Tr. 207). Evidently dishonesty is not grounds for written discipline, since Johnson received no discipline at that time. On February 22, 2011, when Johnson received a "final written warning" for "not following processes," he became "very argumentative and told Chris (Petersen) he was wrong and lying." (GCX-16, page 3).

Kovac admitted that Johnson was not fired, even after telling Petersen, a senior vice president, that he was a liar. (Tr. 209). Petersen confirmed this fact. (Tr. 367-368). In stark contrast to Kish's slender disciplinary record, Johnson had a lengthy, thoroughly documented record of past problems. (See GCX-15). And unlike Kish, after Johnson received his "final written warning" in February 2011 he received yet another lengthy "written warning" two months later. (See GCX-15, 1st two pages). Evidently even this long record was not enough to warrant his termination. Finally, on May 10, 2011, Respondent discharged Johnson, noting the two previous warnings for his numerous performance deficiencies. (See GCX-16, 3rd page; Tr. 206). Respondent explains all this away in its latest brief by accusing the judge of overlooking the "extenuating circumstances that prompted HCA to show restrain in the face of Johnson's 'liar' remark", that Lockart had a "very thick accent" and deserved "the benefit of the doubt." (R. Br. at 32). The short answer to this is that the judge evidently simply did not find Kovac's explanation credible, since it is so patently absurd.

The record also revealed that employee Diane Pils was allowed to remain employed despite a thoroughly documented record of misconduct and disrespectful behavior to management. Kovac noted that on October 22, 2010, Pils deserved a written warning because Pils had been "disrespectful of people in more senior positions, especially Mary Neclerio, Mary Wynn and myself – there have been written and verbal notes on her behavior." (GCX-16, 2nd page; Tr. 207-208). Kovac would not issue this warning to Pils for another two weeks. In the November 2, 2010 written warning to Pils, Respondent criticized her "recent insubordinate communications toward three HCA managers, low call volume, and excessive personal calls." (GCX-14). Respondent also

noted that she had received previous counseling, and documented in this warning these previous efforts. (GCX-14). Pils remained employed until she resigned from the company several weeks before the instant hearing. (Tr. 203-204). Respondent explains away the Pils case by claiming that "Pils, unlike Kish, toed the line after being warned and therefore, HCA did not have occasion to discipline her further." (R. Br. to Board at 34). This argument fails on two levels. First, Pils was not engaged in concerted protected activity and was not disciplined for doing so (as was Kish). Second, this claim reveals that Respondent apparently continues to expect its employees to "toe the line" and avoid asking hard questions of its management about workplace policies. Respondent's eleventh hour attempts to downplay the significance of the glaring disparate treatment are utterly meritless.

Finally, the judge correctly found that Kish did not lose the Act's protections because the weight of the credible evidence reveals that she left the 2:30 p.m. meeting only when it appeared it was over, and it is undisputed that the meeting involved no profanity or threatening language, a fact also noted by the judge. (See ALJD 23, lines 50-51). There simply is no *credible* evidence that she "walked out of the meeting." And even if she had, this act alone would have been insufficient to cause her to lose the Act's protections under well settled case law interpreting *Atlantic Steel*. The Board generally finds that employee behavior remains protected if the discussion occurs in a location unlikely to interfere with operations, the discussion concerns protected issues such as union matters or working conditions, and the conversation does not involve profanity or threats. See, e.g., *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006)(employee's statements and behavior occurred in presence of other employees

but did not disrupt work, raised collective-bargaining issue, and did not involve any profanity or threats).

In sum, Respondent failed to rebut the General Counsel's prima facie case, under either legal theory, under any relevant analysis. Respondent offered various after-the fact reasons for discharging Kish, yet, as shown above, none of them can withstand scrutiny. The Board has long observed that relevant in determining motivation is an employer's "use of a multiplicity of alleged reasons for disciplinary action." *Nor-Cal Security*, supra. "This lack of clarity and consistency regarding the manner in which the Company has explained its reasons for (the employee's) termination is an important factor in evaluating the proffered justifications." And, as the Board has noted, "[w]here an employer's stated motive for discharging an employee is false, the inference is justified that the employer desires to conceal the true motive and that the true motive is unlawful, at least where, as here, the surrounding facts tend to reinforce the inference." *Triple H Electric Co.*, 323 NLRB 549, n. 2 (1997). Here, the surrounding facts and circumstances more than adequately reinforced the inference of unlawful motive.

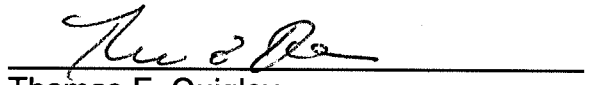
Based upon all of the above, the evidence is overwhelming that Respondent terminated Kish both in retaliation for her protected concerted activities and based upon the application of an unlawfully overbroad work rule, in violation of Section 8(a)(1). For all of the above reasons and those contained within Judge Landow's well-reasoned decision, there is no merit to any of Respondent's Exceptions.

IV. CONCLUSION

For all of the above reasons, Counsel for the Acting General Counsel submits that Respondent's exceptions are without merit, and respectfully urges the Board to affirm Judge Landow's decision in its entirety.

Dated at Hartford, Connecticut, this 24th day of August, 2012.

Respectfully submitted,



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