

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH
DIVISION OF JUDGES**

MAT-SU REGIONAL MEDICAL CENTER

and

Case 19-CA-180385

DEBORAH A. SWAN, AN INDIVIDUAL

Ryan Connolly, Esq.,
for the General Counsel.

Bryan T. Carmody, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. Deborah A. Swan, an individual, (Charging Party or Swan), filed the original charge in Case 19-CA-180385 on July 18, 2016. The General Counsel issued the consolidated complaint on December 2, 2016 (complaint), and the Respondent Mat-Su Regional Medical Center (Respondent or Employer) answered the complaint on March 14, 2016, generally denying the critical allegations of the complaint.

This case involves the Respondent's discharge of the Charging Party on March 23, 2016,¹ soon after the Charging Party was investigated and disciplined for inappropriately accessing the medical records of two patients to whom the Charging Party was not assigned. The Charging Party alleges that she was unlawfully terminated in retaliation for several incidents of protected concerted activity that took place between November 2015 and March 2016.

This case was tried in Anchorage, Alaska. Closing briefs were submitted by the General Counsel and the Respondent on April 26, 2017. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the business of operating an acute care hospital and clinic as an affiliate and/or subsidiary of Community Health Care, Inc. (CHS) at its facility

¹ All dates are 2016 unless otherwise indicated.

in Palmer, Alaska, where it annually receives gross revenues in excess of \$250,000, and purchases and receives goods valued in excess of \$50,000 directly from suppliers outside the State of Alaska. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(c).)²

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II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Respondent's Operations*

10 Respondent operates a short-term acute care hospital and clinic in Palmer, Alaska. (GC Exh. 1(c); Tr. 20.) Respondent breaks down its operations into four departments: a medical and surgical department (referred to as Med-Surg), an emergency department (ER), an intensive care unit (ICU), and an obstetrics department (OB). (Tr. 24, 30.)

15 In order to support and manage patient care within the hospital, Respondent employs case managers within its case management department. Case managers are responsible for monitoring their assigned patients, assessing patient admission and care for medical necessity (referred to as utilization review), and planning patient discharge. (R. Exh. 2; see Tr. 100–101.) Occasionally, a case manager's duties require that they communicate with third parties, such as insurers and hospital vendors, about patient needs. (Tr. 29, 32–33.) Case managers track patient status by monitoring physician documentation through the hospital's various electronic resources and paper charts.³ (Tr. 26–27.) Case managers are assigned patients according to the different wings of the departments within the hospital, depending on the number of patients and available staff. Typically, the Med-Surg floor's four halls are divided amongst two case managers (two halls per case manager). One case manager is assigned to OB, and one case manager to ICU. (Tr. 23–24.)

Case managers attend at least two meetings each day. The first is a “department huddle,” held at 8 a.m. every morning, and is the process by which important information, such as safety updates, is circulated throughout the case management department. (See Tr. 107–109.) The second is a multidisciplinary meeting held at 1 p.m. Monday through Friday, where the different professionals involved in a particular patient's care (physicians, nurses, pharmacists, social workers, therapists, etc.) discuss the patient's situation and make appropriate recommendations. (Tr. 29.)

35 In 2015 and 2016, the normal operating hours for the Case Management Department were approximately 7 a.m. to 5 p.m. (Tr. 101.) At this time, there were 10 total case managers, including the Charging Party: five registered nurses (RN's) (Deborah Swan, Mary Alden, Pat

² Abbreviations used in this decision are as follows: “Tr.” for transcript; “R. Exh.” for Respondent's exhibit; “GC Exh.” for General Counsel's exhibit; “GC Br.” for the General Counsel's brief; and “R. Br.” for the Respondent's brief. Although I have included numerous citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

³ The electronic systems consist of an electronic health record, Med-Host, and a software program for tracking utilization review, Morrisey. (Tr. 103.) The paper record contains the same medical information as the electronic system, and is tabbed to separate the different kinds of records (such as lab work, doctors' orders, etc.). (Tr. 27.)

Patzke, Lesli Brandt, and Nancy Fox) and five social workers (Eileen, Kirsten, Melinda, Stacy Krenzieskie, and Stacy).⁴ (Tr. 21–22, 106–107.) Typically, three case managers would work Monday through Friday, and one case manager would work on the weekend. (Tr. 103–104.)

5 In 2015 and 2016, the case managers shared a room called the case management office, which was located on the second floor of the hospital. The case management office was a large, open space containing shared desks that were separated by half-pony walls. (Tr. 22.) The case management office also contained a central phone system, which accepted all incoming calls to the case management department. (Tr. 39–40.) Case managers would typically perform their
10 duties either in the case management office, or on the Med-Surg floor with laptops. At some point,⁵ Respondent expressed a preference for case managers to perform their duties on the Med-Surg floor, ICU floor, or OB floor rather than in the case management office. (Tr. 39–40.)

The case managers reported to the director of case management. Until the spring of 2015, Pauline Burrell (Burrell) had served in this position. (Tr. 35.) In May or June 2015, Burrell left her position with Respondent. Approximately 3 months later, in September 2015, Respondent hired Denise Plano (Plano) to take over as director of case management. Plano’s role as such was to oversee the case management processes and to manage the staff of nurses and social workers within the case management department. (Tr. 100.) Plano reported directly to Harvey Torres
20 (Torres), Respondent’s chief financial officer. (Tr. 100, 130.)

At this time, Alice Wood (Wood) was Respondent’s privacy officer. (Tr. 111.) Wood was hired in 2014 as a financial counselor, became the admissions supervisor in May 2015, and began serving as the facility privacy officer in October 2015. (Tr. 153–155.) As facility privacy
25 officer, Wood was responsible for investigating potential Health Insurance Portability and Accountability Act (“HIPAA”) violations. (Tr. 155.) Wood also reported directly to Torres. (Tr. 154.)

Also in 2016, Kathy Babuschio (Babuschio) served as the human resources (HR) director and
30 facility compliance officer for Respondent. (Tr. 173–174.) Babuschio had worked with Respondent for the past 16 years, and had held the dual positions of HR director and facility compliance officer since 2010. (Tr. 173–174.) As facility compliance officer, Babuschio was responsible for monitoring compliance with all federal healthcare regulations, including HIPAA. (Tr. 174.) Babuschio reported directly to John Lee (Lee or the CEO), Respondent’s chief
35 executive officer. (Tr. 174.)

1. Respondent’s disciplinary and investigative procedures

Respondent’s disciplinary policy notes that “[t]he disciplinary action that is appropriate for
40 any particular act or misconduct depends upon many factors including . . . the seriousness of the

⁴ Plano testified that, at the time of her hire in September 2015, the RN case managers were Deborah Swan, Lesli Brandt, Mary Alden, Cherie Tomlinson, and Sheila Hunt. From the point of Plano’s hire to Swan’s termination, the case management department also added Stacy Krenzieskie (social worker), Nancy Fox (RN), and Pat Patzke (RN). (Tr. 104–105.)

⁵ The record does not specify as to when.

misconduct.” (R. Exh. 8 (1).) Further, an employee “may be terminated immediately for a serious policy violation.” (R. Exh. 8 (3).)

5 The policy, in pertinent part, also explains the process for investigating an alleged conduct violation:

10 When an employee has engaged in conduct that may lead to disciplinary action, the Facility HR Director should ask the employee to explain the offense(s) and/or conduct and describe the context. Then, in collaboration with Division HR Director, the Facility HR Director shall consider the employee’s conduct and the information provided to assess whether the employee is unsuitable, unqualified, or unavailable for employment. The employee may be placed on investigative suspension until information has been provided and assessed by the Facility. (R. Exh. 8 (5).)

15 2. Respondent’s HIPAA and patient confidentiality compliance procedures

20 Babuschio described Respondent’s CEO as being “very compliance-driven.” (Tr. 180.) New employees were given HIPAA information in their orientation materials and were required to observe the Privacy Officer’s HIPAA PowerPoint presentation. (Tr. 176–177; R. Exh. 5.) Additionally, all employees were required to complete annual two-hour computer modules regarding HIPAA compliance. (Tr. 176–177; R. Exh. 6.) Both the orientation PowerPoint and the annual module training materials defined protected health information (PHI) to include “any information that can be used to identify the patient”⁶ and “anything about a patient’s medical condition and treatment.” (R. Exh. 5 (5); R. Exh. 6 (3).) Additionally, both the orientation PowerPoint and the annual module training materials discussed the concept of “Minimum Necessity,” defined as “accessing only the minimum [amount of information] necessary to complete [a] job, no more and no less.” (R. Exh. 5 (10); R. Exh. 6 (4).) Both the orientation PowerPoint and the annual module training materials noted that the unauthorized access of any PHI,⁷ even if the PHI is not printed or shared with anyone else, constitutes a “breach” and violators “may be subject to disciplinary action up to and including termination.” (R. Exh. 5 (13); R. Exh. 6 (10).) Finally, both the orientation PowerPoint and the annual module training materials highlighted the risk posed by “snooping and casual disregard” of patient information.⁸ The first example of “snooping and casual disregard,” on both documents, was “[a]ccessing the medical records of family members, friends, ex-spouses, neighbors, celebrities, etc.” (R. Exh. 5 (13); R. Exh. 6 (10).)

During this time, when Respondent would admit patients for whom there were additional privacy concerns,⁹ the CEO would emphasize the importance of HIPAA compliance at management meetings. (Tr. 179–180.) The CEO would additionally request daily audits of the

⁶ Such as a patient’s name, address, social security number, medical record number, telephone number, patient account number, etc. (R. Exh. 5 (5); R. Exh. 6 (3).)

⁷ Excluding “unintentional acquisition, access, use or disclosure made in good faith and done within the course and scope of [one’s] job.” (R. Exh. 5 (13); R. Exh. 6 (10).)

⁸ The annual module training materials specifically referred to snooping and casual disregard as “our greatest risk.” (R. Exh. 6 (7).) (Emphasis added.)

⁹ In trial, these individuals were referred to as “celebrity” or “VIP” patients. (Tr. 180.)

celebrity patient file, to ensure that the employees who were accessing the patient’s information had been properly authorized to do so. (Tr. 179–180.) Any suspected HIPAA violation would result in an investigation coordinated by Wood and the HR department. (Tr. 155–156.) The complexity of the investigation would depend on the complexity of the alleged violation, but would typically involve Wood interviewing both the reporting parties and the accused parties. (Tr. 155–156.)

Further, Respondent’s “Statement of Beliefs” within the code of conduct states that “we are dedicated to compliance with all federal, state, and local laws, rules, and regulations, including privacy and security of patient health information.” (R. Exh. 9 (2).) Under the “Confidentiality of Patient Information” section of the code of conduct, the policy further states, in relevant part:

We consider patient information highly confidential. Colleagues are expected to take care to protect the privacy of individually identifiable health information at all times . . . patient information may only be discussed or released in accordance with our HIPAA policies . . . colleagues should not access or use any patient information, including that of themselves, their family members or friends, or of subordinates or co-workers, unless it is necessary to perform his/her job. (R. Exh. 9 (10).)

Respondent’s disciplinary policy lists “violation of patient confidentiality or privacy” as an example of “conduct that may result in immediate termination.” (R. Exh. 8 (4).)

B. *The Charging Party*

Deborah Swan was employed with Respondent from May 2002 to March 23, 2016. (Tr. 20.) Initially, Swan worked as an RN in a pool position on the Med-Surg floor. After a couple of years, Swan worked in a dual capacity as a pool Med-Surg nurse and a pool nurse in the Case Management Office. (Tr. 20.) By 2015, Swan was working solely as a case manager mostly assigned to patients in the Med-Surg floor of the east and south wings of the hospital. (See Tr. 20–21.)

At this time, Swan primarily worked four 10-hour shifts a week, Monday through Thursday. (Tr. 21.) While most case managers arrived at the hospital around 7 or 7:30 a.m., Swan would arrive at 6 a.m., about an hour earlier than her colleagues. (Tr. 23.) Swan first began coming in early “shortly before [Burrell] left,” in the spring of 2015. (Tr. 38.) Swan initially began arriving early because “it was thought that that might help initiate the department getting a better start in the morning.” (Tr. 38.) While all case managers were responsible for the job duties described previously, Swan’s early hour was dedicated to performing the additional task of pulling a census of all the patients in the hospital. (Tr. 23.) The census included the name of each admitted patient and basic identifying information, such as patient number, diagnosis, and insurance information. (Tr. 23.) After pulling the census, Swan would separate the list into the likely case manager assignments for the day and would do a “quick overview” of each patient on the census. (Tr. 23.) During this overview, Swan would check for obvious inaccuracies or inconsistencies

regarding patient level of care, and would make any corrections that she could find with the limited information available in the census.^{10 11} (See Tr. 24–25.)

5 During the approximately 3-month window between Burrell’s departure and Plano’s arrival, between May/June 2015 and September 2015, Swan took on additional duties to fill the gap left by the Director of case management. (Tr. 35–36.) Swan’s new duties included: attending the 9 a.m. “huddle meeting” between the hospital administration and department heads, completing a series of reports for the hospital, training other nurses, and reporting staffing levels to Emily Stevens (Stevens), a ranking hospital administrator, who would then ensure that there were
10 always enough staff on deck.¹² (Tr. 35–38.)

At some point prior to Plano’s arrival in September 2015, Plano and Swan had a conversation in which Swan asked whether she should continue to come in at 6 a.m. Plano responded “that’s fine,” and as a result “everybody just kept doing what they were doing.” (Tr. 39.) Swan
15 continued to arrive early until her termination in March 2016.

1. Plano’s arrival and the alleged Protected Concerted Activities

20 Upon Plano’s arrival in September 2015, Swan initially did not bring up any concerns with the department: “we were just trying to help her, you know, figure out our processes, and then as things would come up, you know, then the discussion would take place about whatever that issue was.” (See Tr. 39.) However, over the course of the next several months, Swan brought a number of matters to Plano’s attention.

25 *a. The accumulation of phone messages*

At some point,¹³ Respondent eliminated the case management secretary position. As a result, the case managers absorbed much of the secretary’s work, including answering the telephone and

¹⁰ Swan further testified that her other morning duties included: gathering all the paper discharge charts from the various hospital floors, double-checking that the discharges were correct, approving correct discharges and following up on incorrect discharges, and entering the relevant data into Respondent’s computer system. (Tr. 25.) However, Swan also testified that these particular duties were not unique to her; they were shared amongst all case managers, and Swan would typically perform them when she came in early. (Tr. 25.)

¹¹ At some point, at least two of Swan’s colleagues, Mary Alden (Alden) and Lesli Brandt (Brandt), asked that Swan stop reviewing the information for their patients. (See Tr. 116, 139–140.) Alden testified that she felt Swan’s morning census work conflicted with her “process” as a case manager. (Tr. 140.) Additionally, Plano credibly testified that Alden and Brandt began approaching Plano approximately 2 months after she started working at Respondent to request that Swan not “do any of their work.” (Tr. 116, 123.) Plano also credibly testified that she and Swan had multiple conversations wherein Plano had asked Swan not to perform the work of her colleagues. (Tr. 116.)

¹² There was a dispute among witnesses as to the nature of Swan’s additional duties. Swan testified that she was in an “interim position” acting as Case Management Director during this time. (Tr. 34–35.) Plano testified that, to her knowledge, Swan was not elevated to an interim position, but was instead merely asked to “provide support and supervise.” (Tr. 126.) Swan admitted that she never formally applied for the vacant position.

¹³ The record does not specify as to when.

responding to messages. (Tr. 39–40.) However, at some later point, Respondent expressed the preference that case managers perform their duties on the Med-Surg, ICU, and OB floors, rather than in the case management office. (Tr. 39–40.) As a result, with no secretary and fewer case managers in the office to mitigate that loss of personnel, the phone messages began to pile up. (Tr. 40.) Swan testified that the case managers would occasionally discuss the pileup amongst themselves. (Tr. 41–42.)

At some point after November and before March (Tr. 58), Plano entered the case management office, noticed that there were 50 unanswered messages on the phone, and said to the room,¹⁴ “you’ve got to get these messages off.” (Tr. 40.) Swan explained to Plano that the lack of a secretary, coupled with the Respondent’s preference that case managers not be in the office, was causing the build-up. In response, Plano repeated, “you have to get the messages off.” (Tr. 41.) Swan responded, “okay.” (Tr. 41.) Swan later testified that, by the time she left Respondent, the message pileup no longer posed a problem for the office, because “not just me but all the case managers, we just did our best to try and get in the office and get the messages off.” (Tr. 58.)

b. Privacy and discussions in the hallway

Swan testified that another issue with discouraging case managers from working in their office was the lack of privacy on the floor. (Tr. 43.) Swan believed that the case managers felt uncomfortable having phone conversations about patients in the public hallways. (Tr. 43–44.) On one occasion, Swan recalled Plano asking Swan why she was working in the Case Management Office, rather than working on the floor. Swan responded, “I’m in here doing work because I don’t want to talk in the hallway about this issue.” (Tr. 44.) Swan did not testify as to a response from Plano, and could not recall any further conversations about the subject. (Tr. 44.)

c. Wi-Fi

Swan testified that the case managers occasionally worked from laptops, and that the hospital’s Wi-Fi connection was oftentimes unreliable. (Tr. 43–44.) Swan did not testify as to a specific conversation with management about this issue. (Tr. 45.) But when asked about whether she discussed the Wi-Fi with Plano, Swan noted, “I think, you know, people mentioned it, not just myself but you know, in the course of the day of conversation, you know, they would say something like, ‘I’m having to redo my work because I lost the Wi-Fi connection, and so now I’m behind.’” (Tr. 45.)

d. Morrisey and the volume of work

Swan testified that, after Respondent introduced the Morrisey system,¹⁵ a recordkeeping issue arose for the case managers with regard to “double documentation.” (Tr. 45.) Case managers had to document information in both the new system and the old system, which added approximately five to ten minutes of work to each patient. (Tr. 45.) Swan could not recall a particular

¹⁴ Swan could not recall precisely which case managers were in the room at this point, but testified that Alden and Brandt were likely present. (Tr. 40.)

¹⁵ Morrisey was the software program that Respondent used for utilization review. (Tr. 103.)

conversation where the case managers discussed their volume of work, but indicated that she likely discussed it with Alden. (Tr. 59.)

Swan testified that, on one occasion, Plano asked why work wasn't getting done. Swan responded, "well, it's taking us more time now that we're doing the Morrissey stuff," and that "I'm trying to get all of it done, and I'm failing." (Tr. 45–46.) Swan did not testify as to a response from Plano.

2. Plano's alleged hostility toward Swan

a. *The hospice patient*

In November 2015 (Tr. 55), Swan informed the hospice director that a particular patient would not be needing hospice services, because the patient had refused hospice previously and was instead willing to accept home health services. (Tr. 46.) The hospice director became frustrated, so Swan brought the matter to the patient's attending physician. (Tr. 47.) The physician called hospice and sharply told the hospice director not to "badger" the patient. (Tr. 48.) Approximately 30 minutes later, Plano came into the case management office and claimed that Swan had "thrown hospice under the bus." Swan testified that Plano then said, "that's number one," and walked out the door. (Tr. 48.) Swan further testified that there were other case managers in the room at this time, and that after Plano left the office, the case managers shook their heads to mean, "oh my." (Tr. 48.)

b. *The oxygen patient*

Swan described an instance in which she responded to a durable medical equipment (DME) company call. (Tr. 49–50.) The company indicated that they had received an oxygen request for a particular patient, but that the form had not been properly filled out. Swan fixed the form and faxed it to the company. It was Swan's understanding that the attending physician, who was frustrated that the form needed to be sent in again, later called the DME company and "chewed them out." (Tr. 50–51.) In response, Plano came to the case management office and told Swan that she had "[thrown] another vendor under the bus" by "sic[cing]" a doctor on the DME company. Swan denied that she had done so, and explained that she had merely filled out the requested form and faxed it in. (Tr. 51–52.) In response, it was Swan's unrefuted testimony that Plano said, "well, the DME company complained that the physician called over there and gripe[d]." (Tr. 52.)¹⁶

¹⁶ Swan's account of the doctor's interaction with the DME company detailed, over Respondent's hearsay objection, a discussion between a medical assistant and a doctor that took place while Swan was not present. (See Tr. 50.) However, I find that Plano corroborated this account by making the following unrefuted admission to Swan: "well, the DME company complained that the physician called over there and gripe[d]." (Tr. 52.) (See *Midland Hilton & Towers*, 324 NLRB 1141 fn. 1 (1997), citing *RJR Communications, Inc.*, 248 NLRB 920, 921 (1970) (finding that hearsay evidence is admissible in Board proceedings "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence.") Plano is an admitted supervisor under § 2(11) of the Act. (GC Exh. 1(d); GC Exh. 1(e).) As such, Swan's un rebutted account of Plano's admission above constitutes a supervisor statement admissible under FRE 801(d)(2). (See *Ferguson Enterprises, Inc.*, 355 NLRB 1121 fn. 2

Swan additionally testified that there were other case managers present for this conversation between herself and Plano, and that during the conversation the other case managers muttered “oh my” under their breaths. (Tr. 55.) After the interaction, Swan went to Plano’s office and told her that she did not appreciate being yelled at in front of coworkers. Swan testified to saying, “if I’ve done something wrong, please tell me. I want to, you know, be able to make solutions here.”¹⁷ Plano then denied having yelled at Swan. (Tr. 53–54.) Swan testified that this incident happened “weeks” before she was terminated. (Tr. 54.)

C. *The Charging Party’s HIPAA Violations*

1. Snooping into celebrity patient’s personal medical records - Monday March 14

On the night of Sunday, March 13, 2016, Respondent admitted a patient who happened to be a known celebrity.¹⁸ The following Monday morning, Respondent’s CEO informed Babuschio that there were already news crews waiting in the hospital parking lot. (Tr. 179.) The CEO then said, “I want to make sure that we do everything right, that we do daily audits [of the VIP patient record], that people are reminded about HIPAA and how important it is, and that nobody should go into the [celebrity patient’s] chart without absolute need.” (Tr. 179.) Wood testified that, on the same morning at the 9 a.m. manager safety huddle, the CEO “let us know what the situation was and wanted all the managers to refresh their staff on proper HIPAA procedure.”¹⁹ (Tr. 157.) Following the safety huddle, Wood met personally with the CEO and CFO, who requested that Wood run a daily audit on access to the celebrity patient’s medical record. While Wood was unable to run the audit that day due to technical difficulties, with the IT director’s help she succeeded in pulling the first record audit the following Wednesday, March 16. (Tr. 157.)

Meanwhile, on Monday, March 14, Swan had come into work at her usual time of 6am, approximately an hour before her colleagues arrived. (Tr. 61.) Swan would only be working for a couple of hours that day, because she needed to leave for jury duty around 8 a.m. (Tr. 63.) Swan,

(2010.)

¹⁷ Swan’s entire testimony to her statement was as follows: “So I walked over to her office. I went in. She was sitting at her desk. And I said, ‘[y]ou know’—I said, ‘[t]his isn’t good.’ I said, ‘[w]e need to have a conversation.’ I said, ‘I don’t appreciate being yelled at and you becoming physically and verbally aggressive toward me in front of my coworkers. You know, I’m sitting at my desk, you’re standing over me with your finger out and you’re yelling at me. And, you know, you’re—[i]t doesn’t feel like you’re listening to what the situation is.’ And I told her, I said, ‘I’m happy to do what—whatever I need for my job and—but I like to be treated in a professional manner. You can, you know, call me in your office, you can, you know, talk to me in a professional way. If I’ve done something wrong, please tell me. I want to, you know, be able to make solutions here.’”

¹⁸ In an effort to protect this patient’s privacy, all participants in the hearing referred to this individual as “the patient” and all relevant exhibits were redacted accordingly. (See Tr. 8–11.) Because this decision references multiple patients, I refer to this particular individual as “the celebrity patient” or the “VIP patient.”

¹⁹ Swan confirmed at trial that she had attended Respondent’s yearly HIPAA trainings and was familiar with HIPAA and with Respondent’s HIPAA policy, including the concept of “minimum necessity” and the severe penalties for violating patient confidentiality. (See Tr. 75–76, 89–91.)

on that morning, pulled the census as she normally did. Swan further testified that, in reviewing the census, she noted that the celebrity patient—who was not assigned to Swan—had incorrect insurance information. Swan testified that she knew that the insurance information was incorrect because she had taken care of the patient and his family before. (Tr. 62.) The celebrity patient’s insurance was listed as “self-pay,” and Swan later claimed that she knew that the patient probably had commercial insurance.²⁰ (Tr. 162.) Swan then testified to the following: “I looked through the chart trying to find a place where that insurance might have been written down. It was not in the correct place and it—it could have been anywhere. While I was in the chart, I also decided to [conduct a utilization review] for [InterQual] Criteria.”²¹ (Tr. 62.) Swan testified that she did not find the insurance information anywhere in the electronic record, so she went down to the ICU and checked the paper chart. She did find the insurance information in the paper chart, on the ambulance report. Swan testified that, by this point, she had reviewed the celebrity patient’s file for InterQual Criteria and had determined that the patient’s care was at the appropriate level. (Tr. 63.) Swan later testified that she could not recall whether she similarly conducted a utilization review for any other patient that day.²² (Tr. 79.)

Later that morning, after other case managers had begun to arrive, Swan walked into the Case Management Office, where Plano, Alden, and a social worker were seated. Alden was assigned to the celebrity patient, so Swan informed Alden that the celebrity was a patient at the hospital and that his insurance information was incorrect.²³ (Tr. 63–64.) Plano testified that when

²⁰ There was a great deal of testimony about the degree to which case managers interact with a patient’s insurance information. After reviewing this testimony, I find that knowing a patient’s insurance information is helpful in forming a discharge plan, which is one of the case manager’s main duties. (See R. Exh. 2; Tr. 148–149.) However, there was un rebutted testimony to the fact that insurance verification is the responsibility of the admission staff, not the case management staff, and on the entire record I find that case managers do not generally assist Admission staff with insurance information for newly-admitted patients. (Tr. 164.)

²¹ This claim seems to have made its first appearance at trial. Babuschio and Wood’s un rebutted testimony was that Swan at no time, throughout the subsequent disciplinary process, claimed that she needed to access the patient’s medical information because she was conducting a utilization review. (See Tr. 162, 182–183, 185.)

²² Swan was not credible when she testified that, on March 14, she reviewed various medical records of a high-profile celebrity patient for the sole purpose of correcting his incorrect insurance information in the demographics records. A systems audit later revealed that the first record Swan opened was the celebrity patient’s “vitals” record, which had nothing to do with demographics or insurance information, but instead related solely to the patient’s personal medical history, and would include such salacious information as blood alcohol content and narcotic use. (R. Exh. 21; see Tr. 92–93.) The systems audit additionally revealed that Swan had not performed an intraqualitative assessment or utilization review, as she alleged at hearing, on the celebrity patient. (See Tr. 111–112; R. Exh. 21.) Finally, after being asked multiple times during the disciplinary process why Swan was accessing this celebrity patient’s “vitals” record, if all she needed was insurance information, Swan had no comment. (Tr. 161–162, 182, 185.) As such, I find that Swan improperly accessed the celebrity patient’s personal medical records on March 14, 2016.

²³ Swan characterized this conversation as a “report” to Alden on the status of the celebrity patient. (Tr. 64.) Plano, credibly, rebutted this testimony. Plano said that she would “absolutely not” characterize the conversation as a report: a report “would be talking about the status of the patient, the needs of the patient, what’s currently being done for that patient and perhaps a discharge plan depending on where the patient is in the stay. . . [with this conversation,] there was no sharing of a plan for the patient. It was very

Swan entered the office, she announced that the celebrity had been in an accident and was “extremely loud, excited, and demonstrative.” Plano told Swan to “stop,” and said that all their patients were celebrities. (Tr. 106.) Alden confirmed Plano’s observations at this time, opining that Swan “acted a little escalated, excited that she was able to find an insurance verification by going into another patient’s chart.” (Tr. 149.)

2. Snooping into the celebrity patient’s and the Respondent physician’s wife’s personal medical records—Tuesday March 15

The next day, on March 15, Swan was approached by an ER nurse in the hospital hall. (Tr. 66.) According to Swan, the nurse allegedly told her that the hospital was “pretty full,” and asked if there was anybody that could be discharged or moved so the nurse could take the empty bed for a waiting patient. Swan told her that she did not know, but would find out. (Tr. 66.)

Swan, who was not assigned to the ICU that day, then opened the ICU records. (See Tr. 66, 8687.) Swan testified that she checked “several patients” to see if anyone could be moved, one of whom was the celebrity patient. Specifically, Swan stated under oath that she checked fewer than ten patients’ beds, but could not remember the exact number of records she opened. (See Tr. 66–67.) Swan did recall, however, that none of the patients she checked were able to give up their beds. (Tr. 66.)

On cross-examination, Respondent’s counsel confirmed that Swan claimed to have accessed “fewer than ten” ICU patients that day.²⁴ Swan responded, “I think so.” (Tr. 87.) Counsel then asked whether Swan would have any reason to disagree with the statement that Swan had actually accessed only one other ICU record that day, aside from that of the celebrity patient, and that the only other record had belonged to a patient “who happened to be the wife of a physician.”²⁵ (See Tr. 87; R. Exh. 22 (10–11).) Swan responded that she could not recall.²⁶ (Tr. 87.)

quick, it was very emotional, and not the normal conversation that two professionals would have with each other.” (Tr. 107.)

²⁴ On March 15, there were only twelve total patients in the ICU. (R. Exh. 21.)

²⁵ The records audit does not indicate that Swan accessed the “vitals” record of the physician’s wife on March 15, but does indicate that on this day Swan once again accessed the “vitals” record of the celebrity patient. (R. Exh. 22 (10–11).)

²⁶ I do not credit Swan’s testimony as to the events of March 15. On cross examination, Swan could not remember the name of the nurse she spoke to, nor could she describe her physically (other than to answer “yeah, she was Caucasian” in response to counsel’s prompt), and claimed to have never seen the ER nurse before. (Tr. 73.) Swan never mentioned the appearance of a nurse during her subsequent investigatory interview or termination meeting, despite being given multiple opportunities to do so. (Tr. 74–75, 172.) Further, the fact that Swan materially changed her testimony with regard to the number of ICU records she accessed that day—“fewer than ten” as opposed to “two”—coupled with the fact that Swan had not been assigned to the ICU on March 15, undermined Swan’s credibility when she testified to the reasons for accessing the records of the celebrity patient and to those of the physician’s wife. (See Tr. 87; R. Exh. 21; R. Exh. 22 (10–11).) As such, I find that Swan improperly accessed the two patients’ personal medical records on March 15, 2016.

D. The Investigation and Termination

On Wednesday, March 16,²⁷ Plano received a call from Natalie Porter (Porter), Interim Director of the ICU. (Tr. 110.) Porter wanted to know whether case managers Alden and Pat Patzke (Patzke) were assigned to the celebrity patient, as Respondent’s audit had revealed that they had accessed the celebrity patient’s records. (See Tr. 110–111.) Plano confirmed that Alden and Patzke had authorization to access the celebrity patient’s medical records. (Tr. 110.) Plano then credibly recalled that the conversation with Porter made her remember the events of March 14, specifically Swan’s excitement when she mentioned the celebrity patient. (See Tr. 111.) Plano grew concerned that Swan may have inappropriately accessed the celebrity patient’s information, and so took her concerns to Respondent’s privacy officer, Wood, that same day. (Tr. 111.) Wood granted Plano permission to open Swan’s history to see whether Swan had accessed the celebrity patient’s record. (Tr. 111.)

Upon opening the history and finding that Swan had, in fact, accessed the celebrity patient’s record, Plano then cross-checked Morrissey to determine whether Swan had performed a utilization review, which would have explained Swan’s access. (See Tr. 111–112.) Plano did not see anything documented in Morrissey, so she sent an email to Wood describing what she had found. (Tr. 112–113.) Wood confirmed, over an email with the subject line “HIPAA,” that Swan did not have the authorization to access the celebrity patient’s file, and Wood stated that she was taking the matter to the CEO. (Tr. 160; R Exh. 3.) Wood and Babuschio then went to meet with the CEO, who agreed with Babuschio’s suggestion that, consistent with Respondent’s policy, Swan be placed on suspension pending investigation of a potential HIPAA violation. (See Tr. 160, 181; R. Exh. 8(5).)

That same day, Swan was called into Babuschio’s office to meet with Babuschio, Plano, and Wood. (See Tr. 113–114, 160, 180–181.) At this meeting, Swan claimed that she had accessed the celebrity patient’s record because she had been trying to find insurance information in order to help a colleague. (See Tr. 114, 161, 182.) In response, Babuschio asked why Swan had needed to access the “vitals” section of the celebrity patient record, if all she had wanted was the insurance information. (Tr. 115, 161, 182.) Swan had no response to this question. (Tr. 115, 161, 182.) Swan was placed on suspension pending investigation that day. (Tr. 160; R. Exh. 7.)

The following Friday, March 18, Swan was called back into Babuschio’s office for an investigatory interview. Only Babuschio, Swan, and Wood were present (Plano was not). (Tr. 161, 184.) At this interview, Wood asked Swan about the relationship between her job-specific duties and this particular patient’s medical record. Swan claimed that she recognized, during her census, that this patient’s insurance was noted as “self-pay,” when she knew that he probably had commercial insurance. Swan reiterated that she opened the record to find the correct insurance information to help her coworker. (See Tr. 162, 185.) Babuschio then asked Swan the same question she had asked previously: why Swan had entered the “vitals” record when all she needed was insurance information. (Tr. 162, 185.) Once again, Swan had no response. (Tr. 162, 185.) Additionally, Babuschio and Wood’s un rebutted testimony was that Swan at no time throughout this process claimed that she needed to access the patient’s medical information

²⁷ Plano mistakenly testified that this Wednesday was March 17, but the correct date, as confirmed by Wood and a 2016 calendar, was March 16. (Tr. 110, 159.)

because she was conducting a utilization review, which had been Swan’s claim at trial. (See Tr. 162, 182–183, 185.) After this meeting, Wood, Plano, and Babuschio conferred about the investigation.²⁸ (Tr. 117, 164–165, 185–186.) Wood confirmed that insurance information was actually validated by admissions, and not by case management. (Tr. 186.) Wood determined that there had been a HIPAA breach, and she relayed this information to Babuschio. (Tr. 162.) Babuschio then recommended that Swan be terminated. (Tr. 186.) Plano and Wood agreed. (Tr. 186.) Babuschio, Plano, and Wood then met with the CEO. (Tr. 186.) The CEO reviewed the materials and agreed with Babuschio’s recommendation that Swan be terminated. (Tr. 186.) Consistent with company policy, Babuschio then called her Regional HR Director to review the recommendation with her. The Regional HR Director agreed that Swan’s termination was warranted. (Tr. 186–187; see R. Exh. 8 (5).)

On Wednesday, March 23, Swan was called back to Babuschio’s office to meet with Babuschio and Plano (Wood was not present). (Tr. 189.) Babuschio informed Swan that Respondent was going to terminate her, and Babuschio read Swan her termination paragraph. (Tr. 189.) Babuschio informed Swan that she would have an opportunity to write a rebuttal, and gave Swan the form and instructions for filing a grievance along with her termination notice.²⁹ (Tr. 189–190; see R. Exh. 10; GC Exh. 2.) Respondent terminated Swan that day, and reported Swan to the Alaska State Nursing Board for violating HIPAA. (Tr. 194; R. Exh. 11.) Respondent also notified the celebrity patient, via certified mail and a call from the CEO, that his information had been inappropriately accessed and that the hospital had taken subsequent steps to protect the celebrity patient’s identity, including offering the celebrity patient complimentary Fraud Resolution support. (See Tr. 195–196; R. Exh. 12.)³⁰

²⁸ Swan confirmed at trial that during the investigatory suspension meeting and termination meeting, Swan never stated to anyone that she believed she was being disciplined in retaliation for complaining to Plano. (Tr. 87–89.)

²⁹ There was some confusion about whether Swan’s termination notice indicates that Swan was fired for “Disruptive Behavior” along with “Failure to comply with Hospital Policy.” (Tr. 191–193; See R. Exh. 10; GC Exh. 2.) Both of these boxes stand out on Swan’s termination notice by virtue of being in their own row on the form. (GC Exh. 2.) However, Babuschio’s credible and un rebutted testimony indicates, and I find, that Respondent’s computer system pushed those two boxes to their own row after Respondent clicked the boxes preceding them, “Violation of Confidentiality” and “Other [Code of Conduct].” (See Tr. 191–193; R. Exh. 10; GC Exh. 2.) This is evident from the identical blank termination notice indicating that “Disruptive Behavior” and “Failure to comply with Hospital Policy” are indeed the last boxes in the row, (R. Exh. 10), and also from the fact that those two boxes were not selected, or “exed,” on Swan’s termination notice - merely pushed to the bottom. (GC Exh. 2.) I find Babuschio credible in her testimony that the termination notice intended to indicate that Swan was being terminated for violating Respondent’s HIPAA policy, and not for disruptive behavior. (See Tr. 191–193.)

³⁰ Respondent presented extensive evidence to the effect, and I find, that Respondent’s discipline and termination proceedings as to Swan were consistent with the discipline and termination proceedings for similar prior HIPAA violations: David Elliot was terminated in January 2016 for attempting to access a patient’s medical records. He was not reported to the State because he was not in a licensed position, and the patient was not notified because Elliot did not succeed in actually accessing the patient’s records. (See Tr. 197–199; R. Exh. 13.) Jennifer Hoadley was terminated in August 2013 for inappropriately accessing a patient record and inappropriately discussing patient information. Respondent sent a letter explaining the HIPAA violation to the patient. (See Tr. 199–202; R. Exh. 14; R. Exh. 15.) Linda Bingham was terminated in February 2010 for violating patient privacy by exposing an unconscious patient’s anatomy

ANALYSIS

I. CREDIBILITY

5

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra at 622.

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Plano and Wood spoke professionally, consistently, and with little hesitation throughout their testimony, which raises few doubts in my mind as to the events that occurred particularly from March 14 through Swan's termination on March 23, 2016.

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Swan was generally a credible witness who appeared quite dedicated in 2015–2016 to her work as a case management registered nurse with Respondent, stationed most often in the east and south wings of Respondent's Med-Surg floors at the hospital. Swan was not credible as evidenced by the almost total lack of supporting witness testimony from past and present Respondent employees. Contrary to the General Counsel's overall theme of this case, Swan went out of her way to snoop on two VIP patients' medical records and accessed more than the necessary records that are part of her job.

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Swan was also not credible when she testified to the following: "I looked through the [celebrity patient's] chart trying to find a place where that insurance might have been written down. It was not in the correct place and it—it could have been anywhere. While I was in the chart, I also decided to [conduct a utilization review] for [InterQual] Criteria." (Tr. 62.) This claim was in fact first made by Swan at trial and therefore I find it is not truthful. Moreover, Babuschio and Wood's un rebutted testimony was that Swan at no time, throughout the subsequent disciplinary process, claimed that she needed to access the patient's medical information because she was conducting a utilization review. (See Tr. 162, 182–183, 185.) In response, Babuschio asked why Swan had needed to access the "vitals" section of the celebrity patient record, if all she had wanted was the insurance information. (Tr. 115, 161, 182.) Swan had no response to this question. (Tr. 115, 161, 182.) Later in March, Babuschio once again asked Swan the same question she had asked previously: why Swan had entered the "vitals" record when all she needed was insurance information. (Tr. 162, 185.) Once again, Swan had no response. (Tr. 162, 185.)

to other staff members. Respondent reported Bingham to the State but did not notify the patient of the violation, as HIPAA did not require patient notification at that time. (See Tr. 202–204; R. Exh. 16.) Maija Hayes was terminated in September 2009 for inappropriately accessing patient records. Hayes was not reported to the State, as she was not in a licensed position, and Respondent did not notify the patients of the violation, as HIPAA did not require it at the time. (See Tr. 204–205; R. Exh. 17.)

In addition, Swan could not recall whether she similarly conducted a utilization review for any other patient that day. (Tr. 79.) Swan was not credible when she testified that, on March 14, she reviewed various medical records of a high-profile celebrity patient for the sole purpose of correcting his incorrect insurance information in the demographics records. A systems audit later revealed that the first record Swan opened was the celebrity patient’s “vitals” record, which had nothing to do with demographics or insurance information, but instead related solely to the patient’s personal medical history, and would include such salacious information as blood alcohol content and narcotic use. (R. Exh. 21; see Tr. 92–93.) The systems audit additionally revealed as referenced above that Swan had not performed an intraqualitative assessment or utilization review, as she alleged at hearing, on the celebrity patient. (See Tr. 111–112; R. Exh. 21.) Finally, after later being asked more than once why Swan was accessing this celebrity patient’s “vitals” record, if all she needed was insurance information, Swan had no comment. (Tr. 161–162, 182, 185.) Swan also confirmed at trial that during the investigatory suspension meeting and termination meeting, Swan never stated to anyone that she believed she was being disciplined in retaliation for complaining to Plano. (Tr. 87–89.)

I further find that Swan was not truthful as to the events of March 15. Swan stated under oath that she checked fewer than ten patients’ beds, but could not remember the exact number of records she opened to see if there was a bed available for some other patient moving away from ER. (See Tr. 66–67.) On March 15, there were only twelve total patients in the ICU. (R. Exh. 21.) When asked whether Swan would have any reason to disagree with the statement that she had actually accessed only one other ICU record that day, aside from that of the celebrity patient, and that the only other record had belonged to a patient “who happened to be the wife of a physician” (See Tr. 87; R. Exh. 22 (10–11)), Swan responded that she could not recall. (Tr. 87.)

Furthermore, Swan could not remember the name of the nurse she spoke to on March 15, nor could she describe her physically (other than to answer “yeah, she was Caucasian” in response to counsel’s prompt), and claimed to have never seen the ER nurse before. (Tr. 73.) Swan never mentioned the appearance of a nurse during her subsequent investigatory interview or termination meeting, despite being given multiple opportunities to do so. (Tr. 74–75, 172.) Further, the fact that Swan materially changed her testimony with regard to the number of ICU records she accessed that day—“fewer than ten” as opposed to “two”—coupled with the fact that Swan had not been assigned on March 15 to either the ICU or to the celebrity patient, undermines Swan’s credibility when she tried to explain the reasons for accessing the records of the celebrity patient and to those of the Respondent physician’s wife. (See Tr. 87; R. Exh. 21; R. Exh. 22 (10–11).) As such, I concur with the outcome and find that Swan improperly accessed the two patients’ personal medical records on March 15, 2016.

II. ALLEGED UNLAWFUL DISCHARGE OF SWAN

The question is whether the Respondent terminated Swan in violation of § 8(a)(1) of the Act. Under § 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. 29 U.S.C. § 157. Employees with no bargaining representative or established procedure for presenting their grievances may take collective action to spotlight their complaints regarding the terms and conditions of their employment. *NLRB v. Washington*

Aluminum Co., 370 U.S. 9, 12–15 (1962). Adverse actions, such as termination, taken against an employee because of this protected activity, violate § 8(a)(1) of the Act. *Id.*

5 In the mixed-motive context of this case, the Board applies the burden-shifting analysis set forth in *Wright Line* to determine whether an employee’s discharge is unlawful. 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, the General Counsel must prove by a preponderance of the evidence that the employee’s protected activity was a motivating factor in discharging the employee. The General Counsel’s evidence 10 must show that the employee engaged in protected activity, that the employer knew about the protected activity, and that the employer had harbored animus toward the protected activity. *Club Monte Carlo Corp.*, 280 NLRB 257, 261–262 (1986), *enfd.* 821 F.2d 354 (6th Cir. 1987). If the General Counsel meets this burden, the burden then shifts to the employer to show that it would have discharged the employee even absent the employee’s protected activity. *Wright Line*, 251 15 NLRB at 1089. An employer does not meet its burden merely by showing that it had a legitimate reason for its action. Rather, it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct. See *Boothwyn Fire Company No. 1*, 363 NLRB No. 191, slip op. 7 (2016), citing authorities.

20 The Charging Party alleges that since approximately November 2015 through approximately March 2016, Swan engaged in several instances of concerted activity for the purpose of mutual employee aid and protection. (GC Exh. 1(c) (5).) Specifically, the Charging Party alleges that Swan engaged in concerted activities by complaining to Respondent regarding “core tenets of her working conditions and issues central to the work of the case managers,” and 25 by discussing workplace concerns with other employees. (GC Br. 12.) Respondent denies that Swan was involved in protected concerted activity related to her termination. Further, Respondent argues that it would have terminated Swan regardless of any protected concerted activity, because Swan violated both HIPAA and Respondent’s Code of Conduct. (See R. Br. 17.)

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A. *Swan’s Prima Facie Case*

1. Protected concerted activity

35 To be protected under § 7, employee conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 slip op. at 3 (2014). Both the “concertedness” element and the “mutual aid or protection” element are analyzed objectively. That is, an employee’s subjective motive for taking action is not relevant to whether the action was concerted. *Id.* The question of whether an employee has 40 engaged in concerted activity is a factual one based on the totality of record evidence. See, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2nd Cir. 1988). The concept of “mutual aid or protection” focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

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Whether an employee’s activity is “concerted” depends on the manner in which the employee’s actions may be linked to those of her coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985),
 5 supplemented by *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). While some employees’ motivations for protected concerted activity may be selfish, *Fresh & Easy Neighborhood Market*, supra at 5, the Board has found that “ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the
 10 benefits of fellow employees.” *Anco Insulations, Inc.*, 247 NLRB 612, 613 (1980). Similarly, an individual employee’s complaint is concerted if it is a “logical outgrowth” of the concerns of the group. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995), citing *Every Woman’s Place*, 282 NLRB 413 (1986), enfd. 833 F.2d 1012 (6th Cir. 1987). However, concerted activity does not include activities of a
 15 purely personal nature that do not envision group action. See *Plumbers Local 412*, 328 NLRB 1079 (1999) (determining that an employee’s discussion of her own pension eligibility with coworkers and with members of the Union’s executive board did not constitute protected concerted activity); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984) (holding that an employee’s challenge of a written warning directed at herself alone was not protected concerted
 20 activity, and finding that “the Board will no longer presume that an individual employee’s activity is concerted simply because the matter complained about is of interest to other employees”).

On the entire record, I find that the General Counsel did not demonstrate that Swan
 25 engaged in protected, concerted activity between the dates of November 2015 and March 2016. I analyze each instance of alleged concerted activity below.

a. *The conversation about accumulation of phone messages was not concerted activity*

30 It was Swan’s un rebutted testimony that the elimination of the case management secretary position created more work amongst the case managers. (Tr. 39–40; see GC Br. 12.) It was also Swan’s un rebutted testimony that the case managers had discussed the new workload prior to Swan’s interaction with Plano (“they would just say things like, I don’t know how we’re going to do that if we’re out on the floor . . . we’ll have to figure out how to take care of the work
 35 that generates”). (Tr. 41–42.)

While an employee’s conduct is concerted when it seeks to bring “truly group complaints to management’s attention,” *Meyers II*, 281 NLRB at 887, it is not clear from Swan’s testimony that a truly group complaint even existed regarding the phones, let alone whether Swan’s answer
 40 constituted a complaint in and of itself. When Plano told the case managers that they needed to “get these messages off,” Swan’s response was not a complaint about the new workload, but was instead an explanation regarding why the lack of a secretary—coupled with Respondent’s preference that case managers not be in the office – was causing the message build-up.³¹ (Tr. 39–

³¹ Swan testified that her response was, in full, “I said, ‘I’d be happy to get the messages off, but, you know, there’s going to be 50 messages on the phone if we wait till [*sic*] the end of the day to be in here to get them off. Usually, if there’s somebody in here, they answer the phone and the messages don’t pile up.”

41.) This is evident from Swan’s later characterization of her response to Plano as a “suggestion” about how to handle the phone messages (Tr. 58), and from Swan’s testimony that the case managers had not had a conversation about developing a “plan of action” regarding the problem. (Tr. 57.) Nor did Swan personally “feel like it was [her] job to initiate a plan of action.” (Tr. 57.)
 5 See *Plumbers Local 412*, 328 NLRB at 1083 (finding that, even though it is not necessary that the object of inducing group action be specifically expressed during a conversation, an employee negated the object of group action when she later testified that she was not seeking to have fellow clericals join with her to get her pension).

10 After careful consideration, I find that “suggestion” is precisely the right word to describe Swan’s interaction with Plano on this matter. It appears that, while the elimination of the secretary did indeed create more work for the case managers, neither Swan nor the case managers conceptualized this change as a problem requiring group action; rather, they conceptualized it as a problem that did not yet have a solution. Swan’s answer to Plano conveyed
 15 exactly this sentiment: “I said, ‘I’d be happy to get the messages off, but . . . nobody is in here [to do it].’” (Tr. 41.) Indeed, by the time that Swan left Respondent, the case managers seemed to have found the solution to their problem. In response to Respondent’s question about whether the case managers did anything differently after Swan’s conversation with Plano, Swan answered,
 20 “[n]o . . . not just me but all the case managers, we just did our best to try and get in the office and get the messages off. It wasn’t still a problem when I left there.” (Tr. 58.) Accordingly, I find that the General Counsel has failed to show that Swan was engaged in concerted activity in this instance.

25 b. *The conversation about privacy and discussions in the hallway was not concerted activity*

It was Swan’s un rebutted testimony that case managers felt uncomfortable having phone conversations about patients in the public hallways. (Tr. 43–44.) However, the only conversation that Swan could recall having with Plano on the subject was the result of Plano, at some point,³² asking Swan why *Swan* was in the Case Management Office. In response, Swan said, “I’m in
 30 here doing work because I don’t want to talk in the hallway about this issue.” (Tr. 44.)

While it is established that a conversation may constitute a concerted activity although it involves only a speaker and a listener, to qualify as such, the conversation must at the very least have been engaged in with the object of initiating, or inducing, or preparing for group action.
 35 *Daly Park Nursing Home*, 287 NLRB 710, 710–711 (1987), quoting *Meyers II*, 281 NLRB at 887. Activity which is “mere talk” must be looking toward action. *Id.* In this instance, Swan was not bringing a complaint to Plano, even if a related concern may have existed among the case managers. Instead, Swan was answering Plano’s direct question regarding why she, Swan, was currently in the case management office. (Tr. 43–44.) See *Hospital of St. Raphael*, 273 NLRB at
 40 47. Swan offered Plano no information other than that which was directly asked of her, and did not take the opportunity to turn her answer into a complaint—though it seems that such an opportunity existed. (See Tr. 44.) Indeed, Swan explicitly corrected the General Counsel when he tried to categorize this particular interaction with Plano as a “conversation.” Swan noted, “[i]t

But you know, they eliminated our secretary and the, you know, you guys told us to go out to the floor, and so nobody is here to get the messages off.” (Tr. 41.)

³² The record did not specify as to when.

wasn't like a formal conversation. It was just like in reply to her question, why you're not in the hallway. Because I'm in here doing work and because I don't want to talk in the hallway about this issue." (Tr. 44.) Swan did not testify as to a response from Plano, and could not recall any subsequent conversations about phone calls in the hallway.

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Particularly in light of the fact that Swan herself declined to elevate her interaction with Plano to the level of a conversation, it would uncharitably stretch Swan's testimony to argue that the response "I don't want to talk in the hallway about this issue" could even amount to a *complaint*, let alone a concerted complaint. Accordingly, I find that the General Counsel has failed to show that Swan was engaged in concerted activity in this instance.

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c. There were no conversations about Wi-Fi that constituted concerted activity

Swan testified that there was group frustration about the hospital's Wi-Fi connection, but could not recall a single conversation with management—or indeed, a specific conversation with other employees—about the problem.³³ (Tr. 45.) As such, I do not find an activity here to analyze for concertedness.

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d. The conversation about Morrissey and the volume of work was not concerted activity

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It was Swan's unrebutted testimony that Respondent's introduction of the Morrissey system added "five, ten minutes to each patient," in paperwork, to the case managers' workday. (Tr. 45.) However, it is unclear from the testimony whether Swan recalled a particular conversation with other case managers about the new system. Swan first definitively stated that she never had a specific conversation with other case managers about Morrissey, but then proceeded to imply, without elaboration and after much prompting from the General Counsel, that she in fact did speak about the matter with Alden. The exchange was as follows:

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General Counsel: But do you recall actually having that conversation with an individual case manager?

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Swan: No. It was – I didn't – I didn't have a specific conversation with a particular case manager. I just – it was just in – in the course of getting your work done during the day that, you know – and – and then, you know, either I would say or they would say, '[y]eah I know. I know what you mean. It's taking me more time too.' You know, that sort of thing.

35

General Counsel: But you can't recall attaching that to any specific name?

Swan: Well, I know [Alden] was in the office and she worked with me pretty regularly. [Patzke], she was doing it, but she was new, so I don't recall having a specific conversation with her, just, you know, when you are trying to get your work done, you would say something.

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General Counsel: But you recall having that conversation with [Alden]?

Swan: Yeah.[]

³³ When asked whether Swan had ever discussed the Wi-Fi with Plano, Swan answered, "[y]eah, I think, you know, people mentioned it, not just myself but you know, in the course of the day of conversation, you know, they would say something like, 'I'm having to redo all my work because I lost the Wi-Fi connection, and so now I'm behind.'" (Tr. 45.)

(Tr. 59.)

This testimony was, vexingly, both self-contradictory and unrebutted. Though Alden was herself present at the trial as Respondent’s witness, neither the General Counsel nor the Respondent questioned Alden about the above incident. (See Tr. 138–152.) In any event, even if such a conversation did take place between Swan and Alden, I am reticent, without more information, to find the conversation indicative of concerted activity by the preponderance of evidence. While it is likely that the addition of new paperwork understandably caused annoyance amongst the case managers, it is not clear from Swan’s testimony that this annoyance amounted to the kind of “group concern” from which Swan’s subsequent actions would then constitute a “logical outgrowth.” See *Mike Yurosek & Son, Inc.*, 306 NLRB at 1038–1039. Further, as with the conversations about phone messages and hallway privacy, it is not even clear that Swan’s interaction with Plano could reasonably be called a “complaint.” Swan’s testimony as to her conversation with Plano was as follows:

“[a]nd so, you know, when she would come in and say, you know, ‘[h]ey, why are all these papers on this table over here?’ You know, we haven’t done this work. Nobody else would say anything, so I would say, ‘[w]ell, it’s taking us more time now that we’re doing this Morrissey stuff, this documentation and, you know, you said this is important and, you know, I’m happy to stop doing that and go do that, but you know, *I’m* trying to get all of it done, and *I’m* failing.’” (Tr. 45-46.) (Emphasis added.)

Concerted activity does not include activities of a purely personal nature that do not envision group action. See *Plumbers Local 412*, 328 NLRB at 1079. Particularly coupled with the contradictory testimony regarding a specific conversation amongst the caseworkers, it is unclear that Swan intended to convey—or succeeded in conveying—to Plano anything more than a statement about her own ability to keep up with the new paperwork processes. As with Swan’s prior response to Plano’s question about the phone message buildup, Swan here seemed to have offered an explanation as to why an identified problem exists, along with an expressed desire to solve that problem.³⁴ Swan did not testify as to a response from Plano or to any further conversations on the subject, with either management or fellow employees. Accordingly, I find that the General Counsel has failed to show that Swan was engaged in concerted activity in this instance.

e. *The hospice patient and oxygen patient incidents did not constitute concerted activity*

While General Counsel did not attempt to argue that Swan’s actions regarding the hospice and oxygen patients constituted protected concerted activity, these accounts were mixed into the testimony about other incidents of alleged concerted activity. I therefore analyze them here.

Swan’s unrebutted testimony was that, on two occasions, she was involved in a patient-care decision that led to a doctor becoming angry with one of Respondent’s vendors. (See Tr.

³⁴ Compare “I’m happy to stop doing that . . .but . . . I’m trying to get all of it done, and I’m failing” (Tr. 46, Swan to Plano about the paperwork build-up) with “I’d be happy to get the messages off, but . . . nobody is in here [to do it]” (Tr. 41, Swan to Plano about the phone message build-up).

46–55.) Though Swan did not specifically testify as to her motives in making the patient-care decisions, it is apparent that in both instances, Swan believed she was acting in her patients’ best interests.³⁵ However, “[t]he Board has held repeatedly that employee concerns for the quality of care and the welfare of their patients are not interests encompassed by the mutual aid or protection clause [of the Act].” *Waters of Orchard Park*, 341 NLRB 642, 643 (2004), quoting *Lutheran Social Service of Minnesota*, 250 NLRB 35, 42 (1980) (internal quotations omitted). In *Waters of Orchard Park*, the Board found concerted activity where two nurses conspired to call the Patient Care Hotline to inform the State about unsafe heating and hydration conditions in the facility. *Id.* As with Swan here, the nurses in *Waters of Orchard Park* were concerned about the welfare of their patients, and at the time of the activity did not profess to be concerned about employee working conditions. While the Board commended the nurses’ actions, it did not find them entitled to relief under the Act: “we adhere to the Supreme Court’s teaching in [*Eastex*], that at some point the relationship between concerted activity and employees’ interests as employees becomes so attenuated that an activity cannot fairly be deemed to come within the mutual aid or protection clause.” *Id.* at 644, quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–568 (1978) (internal quotations omitted).

Further, unlike the nurses in *Orchard Park*, there is no evidence here to indicate that Swan’s actions were concerted. There is nothing in the record to suggest that Swan acted on behalf of or alongside any other case managers in a manner that would constitute a “logical outgrowth” of other employee concerns. See *Mike Yurosek & Son, Inc.*, 306 NLRB at 1038–1039. While a medical assistant was also involved in the oxygen patient incident, it is clear that the medical assistant was merely following Swan’s instructions, not making decisions or acting in concert with Swan.³⁶ Accordingly, I find that the General Counsel has failed to show that Swan was engaged in concerted activity in these instances.

2. Knowledge of protected concerted activity

Assuming, arguendo, that the General Counsel presented sufficient evidence of protected concerted activity, I reject the Respondent’s argument that it was unaware of such activity at the time of Swan’s termination. Plano is an admitted supervisor under § 2(11) of the Act. (GC Exhs. 1(d); 1(e).) It is well established that a supervisor’s knowledge of protected concerted activities is imputed to an employer in the absence of credible evidence to the contrary. See *State Plaza, Inc.*, 347 NLRB 755, 757 (2006); *Dobbs Int’l Services*, 335 NLRB 972, 973 (2001).

Babuscio testified that the decision to terminate an employee belongs solely to Babuscio and to the CEO. (Tr. 194.) Babuscio further testified that, at the time of Swan’s termination, Babuscio had no knowledge of any complaints that Swan may have previously brought to Plano. (See Tr. 193.) Swan corroborated this testimony by confirming that she never complained

³⁵ See Tr. 46 regarding the hospice patient (“I knew the patient needed hospice, but they refused it, and since I could offer them home health services and they were willing to accept those home health services, [I knew] that [the hospice vendor] could discuss the hospice information with [the patient] as an outpatient”) and Tr. 49–50 regarding the oxygen patient (“[the vendor] had faxed back the form and said it wasn’t filled out completely, correctly . . . so I fixed the form”).

³⁶ See Tr. 49–50 (Swan): “I happened to see the physician’s medical assistant in the hallway, so I stopped her . . . [s]he was happy to accommodate me.”

about Plano to Babuschio, and at no time throughout her termination process did Swan mention to Babuschio that she believed she was being disciplined for protected activity. (Tr. 88–89.) However, Plano was aware of Swan’s alleged protected activity, and Plano played a critical role in Swan’s termination process. Plano brought the initial concern about Swan’s HIPAA violation to Respondent’s attention, and Plano was present for the initial March 16 meeting with Swan. (Tr. 113–116.) Plano was additionally present during the meeting where Respondent decided to terminate Swan, and by her own testimony, Plano played a key role in that determination: “[i]t was up to me to say if [Swan] should be terminated or if they were looking for my input regarding hearing that information.” (Tr. 117.) Plano was also present during the meeting where Babuschio informed Swan that she was being terminated for violating HIPAA. (Tr. 119.)

It is not inconsistent that Respondent had knowledge of Swan’s alleged protected activities while Babuschio did not. Given the rebuttable presumption that a supervisor’s knowledge of protected activities is imputed to the employer, and given Plano’s active role in Swan’s termination process, I find that the General Counsel has carried its burden in demonstrating that Respondent had knowledge of Swan’s alleged protected activities. See *Club Monte Carlo Corp.*, 280 NLRB 257 at 261.

3. Animus to protected concerted activity

“The General Counsel must make a showing sufficient to support a conclusion that [animus toward] the protected conduct was a motivating factor in the employer’s decision to suspend or discharge.” *Id.* at 261–262. In *ManorCare Health Services—Easton*, the Board relied on the following five factors to divine the employer’s animus: (1) the proximity of ManorCare’s discipline to the employee’s alleged protected activities; (2) ManorCare’s unlawful interrogation and threats toward the employee; (3) ManorCare’s failure to repudiate the employee’s assertion that her discipline was motivated by animus; (4) ManorCare’s failure to investigate the employee’s alleged conduct; and (5) ManorCare’s deviation from its typical policy in disciplining the employee. 356 NLRB 202, 204 (2010). Assuming, arguendo, that the General Counsel presented sufficient evidence of protected concerted activity, I find that the General Counsel has not met its additional burden of demonstrating that such activity was a motivating factor in the decision to terminate Swan.

First, unlike the employer in *ManorCare*, the gap between Swan’s alleged protected activity and the termination was attenuated, while the gap between Swan’s misconduct and the termination was tight. See *id.* at 225. Here, the General Counsel’s case generally struggles in its inability to date the majority of the alleged protected concerted activity. Swan recalled that the hospice patient incident took place in November 2015 (Tr. 55) and that the phone messages incident took place “sometime after [November] [a]nd before March.” (Tr. 58.) Swan also recalled that the oxygen patient incident took place “weeks before I was terminated.” (Tr. 54.) However, the record does not specify when the hallway discussion took place, when the Wi-Fi conversations took place, or when the Morrissey conversations took place. The General Counsel contends that a temporal thread links all of these incidents to the March 23 termination, arguing that Swan was terminated “almost immediately after” the oxygen patient incident. (GC Br. 15.) However, this characterization of the timeline strains credulity. In *ManorCare*, the discipline occurred days after the employee’s protected activity. 356 NLRB at 225. Here, Swan’s initial

discipline (the investigatory suspension) took place “weeks” after a heated vendor discussion, months after a series of nebulously-dated conversations with Plano, but only *one day* after a serious code of conduct violation. Swan accessed the patient’s data on March 14 and 15, was placed on suspension on March 16, took part in an investigatory interview on March 18, and was terminated on March 23. (See Tr. 54–55, 58, 113–114, 160–161, 180–181, 184, 186–187.) I therefore find that the proximity of the alleged protected activity to the adverse action is not indicative of animus.

Second, unlike the employer in *ManorCare*, Respondent did not threaten Swan for her protected conduct. See 356 NLRB at 226. While the General Counsel argues that Plano’s annoyance was a common thread in response to Swan’s alleged acts of protected activity, the record simply does not support such a finding. Indeed, it seems that throughout much of the alleged protected activity, Plano’s attitude could best be described as “confused.” According to Swan, Plano began the hallway conversation and Morrissey conversation, respectively, by inquiring about something Swan was doing: “why aren’t you in the hallway?” (Tr. 44) and “hey, why are all these papers on this table over here?” (Tr. 45.) Also according to Swan, the only thing that Plano said during the entire phone message interaction was, “you have to get these messages off.” (Tr. 40–41.) Additionally, while the General Counsel alleges that the hospice/oxygen patient incidents are replete with Plano’s animus (see GC Br. 14–15), I find this allegation unsupported. By Swan’s own testimony, Plano was first clued in to these incidents when she received calls from extremely angry vendors. (See Tr. 48, 51–52.) It is therefore unsurprising—if not, admittedly, somewhat uncharitable—that Plano was herself angry when she then confronted Swan. (See Tr. 48, 51–52.) That Plano at no time told Swan to stop complaining (Tr. 87–88) and that Swan never brought any concerns about Plano to Babuschio (Tr. 88) further undermine the notion that Plano was demonstrating animus toward Swan.

Though General Counsel contends that Plano’s “that’s number one” comment constituted a threat indicative of animus (GC Br. 14), Swan never indicated that she took Plano’s comment as such. Indeed, Swan had an opportunity to confront Plano about the supposed “three strikes” countdown (see GC Br. 14–15) when she followed Plano to her office after the oxygen patient incident. (See Tr. 52–53.) However, by Swan’s own testimony, her only concern during that meeting was with “being yelled at” in front of her coworkers.³⁷ (Tr. 53.) Swan at no point testified to feeling threatened in her employment as a result of any alleged protected activity.

Third, unlike the employer in *ManorCare*, Respondent did not fail to repudiate an assertion that Swan’s discipline was motivated by animus. See 356 NLRB at 226. Swan testified that, during the suspension and termination process, Swan at no point mentioned that she believed she was being disciplined for protected activity. (See Tr. 88.) There was therefore no pertinent allegation of improper discipline for the Respondent to repudiate.

Fourth and fifth, unlike the employer in *ManorCare*, Respondent here extensively investigated Swan’s misconduct and conducted the investigation and discipline procedures in strict accordance with Respondent’s policy. See 356 NLRB at 227. After becoming aware of Swan’s potentially-unauthorized access, Plano first cross-checked Swan’s record with Respondent’s internal system to rule out the possibility that Swan conducted a utilization review.

³⁷ See *supra* footnote 17.

(See Tr. 111–112.) Plano then notified the Privacy Officer and the Human Resources Officer of the suspected violation. (Tr. 112–113.) The Privacy Officer then conducted her own preliminary investigation and obtained the CEO’s recommendation and approval. (Tr. 160, 181.) After deciding to proceed with a formal investigation, Respondent scheduled an opportunity for Swan to respond three times: immediately on March 16; as part of a formal interview on March 18; and through written protest and a grievance procedure on March 23. (Tr. 161, 184, 189–190; see R. Exh. 10; GC Exh. 2.) After making the decision to terminate Swan, Respondent’s HR Director submitted the decision to the Regional HR Director for approval, and received it. (Tr. 186–187; see R. Exh. 8(5).) After Swan was terminated, Respondent informed the patient of the privacy violation and reported Swan to the Alaska Board of Nursing.^{38 39} (Tr. 194–197; R. Exh. 11; R. Exh. 12.) Finally, consistent with Respondent’s policy, the hospital continued to perform daily audits on the celebrity patient’s record up until the point he was discharged. (See Tr. 167.) Throughout this week-long process, Respondent comported with its own disciplinary and patient confidentiality compliance procedures, as outlined in Respondent’s discipline policy and code of conduct. (See R. Exh. 8; R. Exh. 9.) I therefore find that Respondent’s investigative and disciplinary actions in Swan’s case are not indicative of animus.

Thus, in summary, the record does not support a finding that Swan engaged in protected, concerted activity. Assuming such activity, while the record supports a finding that Respondent knew Swan was engaged in protected, concerted activity, the record does not support a finding that Respondent harbored animus toward Swan’s activity. The General Counsel has failed to show by a preponderance of the credible evidence that any protected activity engaged in by Swan was a motivating factor in her discharge. It is therefore recommended that the complaint allegation regarding Swan’s discharge be dismissed.

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³⁸ Respondent submitted extensive evidence to the effect that it regularly terminates employees who violate HIPAA and that it regularly reports registered nurses to the Alaska Board of Nursing for such violations. (See *infra* fn. 30; Tr. 197–203; R. Exh. 13–17.)

³⁹ General Counsel notes that there are many “mitigating factors” distinguishing Swan’s circumstances from those of the previously-terminated employees. (GC Br. 18–19.) I disagree. Respondent submitted examples of employees who were terminated for privacy violations that were both arguably “less egregious” and arguably “more egregious” than Swan’s. For example, David Elliot was terminated in 2016 for *unsuccessfully* attempting to access a patient’s medical records (see 197–199; R. Exh. 13), while Linda Bingham was terminated in 2010 for lifting an unconscious patient’s gown and exposing his anatomy to other people. (See Tr. 202–204; R. Exh. 16.) While Swan, Elliot, and Bingham’s infractions differ in extremes, the common thread is that all three employees were terminated because they violated HIPAA and Respondent’s code of conduct in either abusing, or attempting to abuse, patient privacy. (See Tr. 197–203; R. Exhs. 5; 6; 8–9; 13; 16.)

Finally, General Counsel notes that the only other employee who lost their nursing license was Bingham, and argues “that Respondent found Swan’s conduct to be equivalent of Bingham’s defies belief.” (GC Br. 18.) However, Babuschio noted during her testimony that Elliot and Hayes were not in licensed positions, and as such had no licenses to report to the State. (See Tr. 198, 205.) Contrast Elliot and Hayes with Bingham and Swan, who were both registered nurses, and who therefore *did* have licenses to report to the State. (See Tr. 202.) Babuschio’s testimony did not specify as to whether Hoadley was in a licensed position. (Tr. 199–202.)

B. Respondent’s showing that it would have discharged Swan in any event

Assuming, arguendo, that General Counsel carried its burden in showing by a preponderance of the evidence that Swan’s protected activity played a motivating role in her termination, the burden would then shift to Respondent to show that it would have terminated Swan in the absence of such conduct. See *Boothwyn Fire Company No. 1*, supra at 7. I find that Respondent would have terminated Swan in absence of any protected activity.

1. Swan’s March 14 and March 15 conduct clearly violated Respondent’s policy

Respondent’s disciplinary policy notes that an employee “may be terminated immediately for a serious policy violation,” and lists “violation of patient confidentiality or privacy” as an example of “conduct that may result in immediate termination.” (R. Exh. 8 (3), (4).) Respondent’s yearly 2-hour HIPAA training notes that employees must always access only the minimum amount of information necessary to complete a job, and highlights “snooping and casual disregard” of patient information as a major security risk. (R. Exh. 5 (10), (13); R. Exh. 6 (4), (10).) Both the orientation PowerPoint and the annual module training materials clearly note that the unauthorized access of any patient health information, *even if the information is not printed or shared with anyone else*, constitutes a “breach” and violators “may be subject to disciplinary action up to and including termination.” (R. Exh. 5 (13); R. Exh. 6 (10).)

On March 14 and 15, Swan inappropriately accessed the private medical records of a celebrity patient to whom she was not assigned. Swan’s unauthorized access was precisely the kind of “snooping and casual disregard” forbidden by Respondent’s policy, as demonstrated by the list of misconduct examples on Respondent’s orientation PowerPoint and annual module training materials: “[a]ccessing the medical records of family members, friends, ex-spouses, neighbors, celebrities, etc.” (R. Exh. 5 (13); R. Exh. 6 (10).)

During trial, Swan confirmed that she had received the yearly HIPAA training, was familiar with the doctrine of “minimum necessity,” and understood that violating HIPAA could result in termination (Tr. 7576–, 90.) Swan’s unauthorized access was a clear violation of Respondent’s policy, as well as an offense serious enough to warrant “immediate termination.”⁴⁰ (R. Exh. 8 (3), (4).)

⁴⁰ The General Counsel contends that Swan’s unique census-printing duty should grant her additional discretion: “Respondent does not explain why . . . it allowed Swan to print out a census every single morning and make notes regarding all the patients on the census; her assigned patients *as well as those of others* . . . Respondent does not meet its burden to persuade by a preponderance of the evidence by simply showing it discharges employees for HIPAA violations. Instead, it must show it would have terminated Swan for her access consistent with what she did every day.” (GC Br. 16, 19.) I find that Respondent has indeed demonstrated that Swan violated Respondent’s policy, despite Swan’s unique morning census review. Swan’s proffered reasons for accessing the celebrity patient’s medical records was untrue as referenced above to simply review the patient’s insurance information. (Tr. 114, 161, 182.) However, Swan later admitted that it was unnecessary to look up a patient’s insurance information until 24-48 hours after a patient had been admitted (Tr. 93), and Swan further admitted that ascertaining insurance information was not her job (See Tr. 76–77.) Additionally, even if ascertaining insurance information *had* been one of Swan’s bona fide responsibilities, it is established that Swan still exceeded her authorization in accessing the celebrity patient’s “vitals” record, which would not have housed the non-HIPAA

2. Swan’s termination was typical of Respondent’s response to patient privacy violations, and Respondent followed its own procedures in investigating and then disciplining Swan

5 As previously discussed, Respondent investigated and disciplined Swan in accordance with its discipline policy, code of conduct, and prior termination practices. (See supra I(A)(3); Tr. 197–203; R. Exhs. 8; 9; 13–17.)

10 Thus, in summary, the record supports a finding that Respondent would have terminated Swan even absent evidence of protected, concerted activity. Assuming such activity, the record demonstrates that Respondent had a legitimate, nonpretextual reason for discharge, that Respondent followed its own practices and policies during Swan’s discharge procedure, and that Swan was terminated in a similar manner to former employees who were similarly-situated to Swan. I therefore find that the General Counsel failed to prove that Respondent discharged Swan
15 for unlawful reasons, and that Respondent did not violate § 8(a)(1) of the Act.

CONCLUSIONS OF LAW

- 20 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, as alleged in the complaint.

25 On the basis of the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended

ORDER

30 The complaint is dismissed.

Dated: Washington D.C. July 7, 2017

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Gerald Michael Etchingham,
Administrative Law Judge

insurance information. (Tr. 115, 161, 182.) Finally, while performing utilization reviews was a bona fide case manager duty (Tr. 100–101; R. Exh. 2), Respondent ruled out the possibility that Swan had performed an authorized utilization review on the celebrity patient. (Tr. 111–112.) Plano testified that her first move, after bringing the suspected HIPAA violation to Wood, was to check Morrissey to determine whether Swan had performed a utilization review. Swan had done no such thing. (Tr. 111–112.)