



Issue Date: 01 April 2014

Case No.: **2012-ACA-00003**

In the Matter of:

MATTHEW DEWOLFE,
Complainant,

v.

HAIR CLUB FOR MEN,
Respondent.

DECISION AND ORDER DENYING COMPLAINT

I. INTRODUCTION

This case arises under the whistleblower protection provisions of the Patient Protection and Affordable Care Act (“ACA”), 29 U.S.C. § 218c, and the implementing regulations found at 29 C.F.R. Part 1984.

Complainant Matthew DeWolfe (“DeWolfe” or “Complainant”) filed an ACA whistleblower complaint with the Occupational Safety and Health Administration (“OSHA”) on February 21, 2012 against Respondent Hair Club for Men (“HCM” or “Respondent”). Complainant alleged that Respondent fired him on January 31, 2012 in retaliation for reporting a perceived violation of the ACA.

OSHA investigated this matter and issued its findings in a letter on behalf of the Secretary of Labor on August 10, 2012. OSHA dismissed Complainant’s complaint because he failed to show by a preponderance of the evidence that he engaged in protected activity under the ACA.

On September 13, 2012, Complainant filed an appeal to OSHA’s findings with the Office of Administrative Law Judges (“OALJ” or “Office”), U.S. Department of Labor. This case was thereafter docketed and assigned to the undersigned as presiding judge.

On October 5, 2012, I issued a Pre-Hearing Order directing the parties to file and exchange certain information prior to the hearing. On December 18, 2012, I issued a Notice of Hearing, setting the formal hearing in this matter to commence at 9:00am on January 29, 2013 in Kansas City, Missouri.

I held a formal hearing in this matter on January 29, 2013. Therein, I ordered the parties to file post-hearing briefs no later than 60 days from the date of the hearing. Respondent filed its closing brief on April 1, 2013. Complainant filed his post-hearing brief on April 9, 2013.

After reviewing the entire evidentiary record in this case, I find that Complainant has failed to establish by a preponderance of the evidence that his termination was a violation of the whistleblower provision of the ACA.

II. FINDINGS OF FACT¹

Matthew DeWolfe worked at Hair Club for Men's center in Kansas City as Managing Director from August 2008 to January 2012. Tr. 134. He was responsible for overall center operations, including the "wellbeing of all the employees" and "some sales aspects." *Ibid.*

The Kansas City center also had several other employees working in 2010 to 2011. HCM's Kansas City center's new business consultant ("NB 1 consultant"), Julie Jones ("Jones"), was the best salesperson in the company, but was fired in June 2011 as a result of an argument with a fellow employee. *Id.* at 48, 211. Kelly Hagen ("Hagen") replaced Jones as NB 1 consultant in October 2011, and actually started in the office in early November 2011. *Id.* at 222-23. The Kansas City center also employed a surgical coordinator, Sharron Khan ("Khan"), who was, *inter alia*, in charge of keeping and managing the customers' medical files. *Id.* at 108, 119. Also working at the center in 2011 were a recurring business consultant, a center administrator, a few stylists (including Tierra Byrd), a surgeon (Dr. Duncan Simmons), and a few medical technicians. *Id.* at 207.

DeWolfe's boss was Adam Wotherspoon ("Wotherspoon"), regional vice president in charge of HCM's central region. *Id.* at 27. As vice president, Wotherspoon was in charge of the 17 HCM centers that constitute the central region, including the Kansas City center. *Ibid.* Lauren Barnes ("Barnes"), as regional sales manager, was also a member of HCM's "senior management." *Id.* at 62, 64. She was tasked with helping consultants sign up new customers. *Id.* at 63. Although Barnes was senior to DeWolfe and operated out of the Kansas City center, it does not appear that DeWolfe reported to Barnes. *Id.* at 62.

Tierra Byrd Incident

In October of 2011, HCM fired stylist Tierra Byrd ("Byrd") for alleged violations of the non-compete provision in her employment contract. *Id.* at 70; CX 5 at 202. Byrd worked in the Kansas City center under DeWolfe, and allegedly solicited HCM's customers and administered hair treatment solutions in her private capacity. Tr. 70. DeWolfe initially informed HCM's management that he believed Byrd was taking the center's customers. *Id.* at 83, 151.

¹ The findings of fact which follow are based on a complete review of the testimony and exhibits admitted into evidence. Although not all of the testimony and exhibits are discussed below, they were carefully considered in my findings of fact. See "Attachment 1" to this Order for a complete summary of the testimony in this case.

Wotherspoon thought DeWolfe was responsible for the Byrd problem because “[t]hese are things that could’ve been seen a lot earlier if there was a strong communication with your staff on a day-to-day basis.” *Id.* at 70-71. DeWolfe however did not feel that he was responsible. He reported his suspicions about Byrd to HCM corporate immediately, and they took over the situation. *Id.* at 151, 167-69.

After Byrd’s terminations, Wotherspoon’s impression was that DeWolfe had “missed focus.” *Id.* at 180. Wotherspoon had “information” that DeWolfe “was sharing confidential information about this case with employees and peers and possibly clients.” *Ibid.* Wotherspoon, however, never told DeWolfe to discuss the information with the staff at the center. *Id.* at 192.

Wotherspoon also believed that DeWolfe’s “missed focus” contributed to his being unable to effectively manage the center, which had an effect on the high attrition rate and loss of clients at the Kansas City center. *Id.* at 193, 194. Although DeWolfe agreed with the decision to fire Byrd, he also believed that Byrd’s termination hurt the office because some employees were friends with her. *Id.* at 150-151.

After the Byrd incident, DeWolfe was tasked with the “Win Back” program – a campaign to “win back” the clients lost to Byrd. *Id.* at 193. Wotherspoon felt that DeWolfe was “very slow” in completing his responsibilities under this program. *Ibid.*

Julie Jones Incident

In June 2011, NB 1 consultant Julie Jones and Christa Dickey (“Dickey”) engaged in a verbal and physical altercation at the HCM Kansas City center. *Id.* at 48, 66-67. DeWolfe witnessed the beginning of the verbal argument, and asked the two employees to move it into his office while he tried to mediate. *Id.* at 148-49.

During the argument, Jones became excited and slapped papers down on Dickey’s leg. *Ibid.* Jones walked out of DeWolfe’s office, and then Dickey walked out. *Id.* at 148-49. Dickey called a senior technical manager. *Ibid.* DeWolfe called Wotherspoon and told him he was going to discuss the situation with Human Resources in the morning. *Ibid.* DeWolfe called Michelle Graves (“Graves”) in Human Resources the next morning. *Ibid.* Jones was fired the next month. *Id.* at 211. He did not think that Jones should have been fired, but he was told by Graves that it was the only thing that HCM could do. *Id.* at 170.

Wotherspoon believed that DeWolfe was partly responsible because he did not effectively manage the situation. *Id.* at 67, 69. DeWolfe did not understand why or how HCM could have viewed his handling of the situation a failure by him. *Id.* at 149.

Disposal of Initial Client Intake Forms on November 5, 2011

The events giving rise to the complaint in this case surround the disposal of a box of documents allegedly containing client health information at the Kansas City center on November 5, 2011. Although the testimony in this case conflicts as to whether this box of documents

contained client “health information” or “medical history” information, it is clear that the box contained initial client intake forms.²

The initial client intake forms are the standard documents filled out by customers (or by consultants on behalf of customers) during their first consultation with an NB 1 consultant. *Id.* at 26. The forms are filled with the client’s information regardless of whether the customers purchase one of HCM’s solutions. *Ibid.* The purpose of the forms is to help identify what solution to give customers. *Id.* at 98. It is also used as a “lead sheet,” so that during slow periods, consultants may call back customers who had not yet purchased anything. *Id.* at 26-27. If a customer decided not to purchase anything during his or her first consult, but then came back to HCM at another time to purchase a solution, then the forms were known as a “Be Back.” *Id.* at 26, 36.

The initial client intake forms consist of 3 or 4 separate forms. The first form is the Personal Consultation form for males or females. *See* CX 14 at 1-2. The top of the Personal Consultation page asks customers for information such as name, address, and email. *See, e.g., id.* at 1. The bottom portion has a section that asks potential clients about his or her history of baldness, severity, and the purpose(s) for going to HCM. *See ibid.*

The second form is the Consent to Consultation form. *See* CX 14 at 3. The purpose of the consent form is to obtain permission to discuss different treatment options with the client. *Ibid.* The Consent to Consultation form does not ask the client for any information. *Ibid.*

The third form is the Medical History form. *See* CX 14 at 4-5. The Medical History form asks the customer for such information as medications, allergies to medications, and history of medical conditions like hypertension, kidney disease, and scalp disease. *Id.* at 4-5. The Medical History form is filled out only if the client decides to have surgery or is a prospect for surgery. *Id.* at 75. The Medical History form was stored with the surgical coordinator, Sharron Khan, in her office under lock and key. *Ibid;* 119-20.

It is clear from the testimony in this case that a “lead sheet,” or the Personal Consultation and Consent to Consultation form, was stored in the NB 1 consultant’s office if the customer did not choose surgery. *Id.* at 37. If the customer did choose surgery, a Medical History form was filled out, and it was stored in the surgical coordinator’s office. *Id.* at 75, 119-20.

A customer would attend a surgical consultation with Dr. Simmons and Sharron Khan if he or she chose to have surgery. The surgical consultation was a separate visit with HCM’s doctor after the initial consultation. *Id.* at 38. Khan would either hand or send the doctor pictures of the client and photos of their scalp. *Id.* at 110. She did not give the doctor any other information, including the Medical History form.³ *Ibid.* Sometimes the doctor would prescribe

² “Initial client intake forms” is the name I have given to the documents contained in CX 14 and RX 1-4. CX 14 and RX 1-4 include the Personal Consultation forms for men and women, the Consent to Consultation form, and the Medical History forms. These sheets collectively and individually were given multiple names throughout the hearing.

³ I note that Wotherspoon believed that Khan would give the doctor the client’s Medical History form prior to the surgical consultation. *Id.* at 77-78. However, Khan and Barnes testified that the Medical History form was not given

medications during the surgical consultation, such as Propecia, Finasteride, or Avedart. *Id.* at 110, 39. If a client decided to have surgery, the Medical History form would be filled out the day of the actual surgery. *Id.* at 123.

On Saturday, November 5, 2011, Barnes and Hagen cleaned out and set up Hagen's soon-to-be office. *Id.* at 90, 101, 123, 225. DeWolfe was not in the office that day, but he knew that the two were going to be in the office. *Id.* at 107, 138. Barnes stated:

Anything that was like old brochures, just things that we weren't using anymore, things that were out of date, I put in a trash bag. Anything that were past leads or dead leads, ones that we have had on file for a long time that were never used or we've worked them, . . . we couldn't contact them anymore, I would put them in box, which the box was already in the office.

Id. at 101. Hagen similarly remembered putting documents like the Personal Consultation forms in a banker's box for disposal. *Id.* at 226-27, 231; *see* CX 14 at 1-2. Both agreed that they did not place any Medical History documents in the box. Tr. 104-05, 226-227, 230. Neither one saw any health information or Medical History forms in the box. *Ibid.*

Khan was also at the Kansas City office sometime on November 5, 2011. *Id.* at 123. Before Barnes and Hagen began, Khan told Barnes that "there could be sensitive material" in the office before it was even cleaned. *Id.* at 109, 124. At some point that day, Khan saw a box of documents by the "back door." *Id.* at 123. She believed that the box was meant to be put in the trash, not the shred box, because it was placed where the office normally places the trash. *Id.* at 227. She opened up the box and pulled out one of the documents because she did not know what was inside. *Id.* at 124. The document had a Social Security number and driver's license on it. *Ibid.* She then explained to Hagen what she found and said, "We might not have gone through that enough. Please check it before it goes out." *Id.* at 124, 227. Khan however did not state that she found any health information or Medical History forms. *Id.* at 227. She also never mentioned the documents to Barnes. *Id.* at 109, 124. Hagen moved the box from the back door to "Chang's office," which may have operated as a storage room of a sort, so that it would not be thrown in the trash. *Id.* at 229; *see id.* at 103.⁴

After talking with Hagen, Khan alleged that she wrote an email to DeWolfe on November 5, 2011. *Id.* at 125. The email explained that "there were documents removed from Kelly's office" and that she was "concerned about those documents." *Id.* at 108, 125. She said she found a driver's license and Social Security card in the box. *Id.* at 125. She did not tell DeWolfe that the box contained health information or surgical files. *Id.* at 125-26. She wouldn't have told DeWolfe that the box contained health information because "I don't take any health

to the doctor before or during the surgical consultation. *Id.* at 110, 94. As Khan is the surgical coordinator and actually present during the surgical consultations, I find her testimony more reliable than Wotherspoon's on this specific issue.

⁴ Barnes testified that after cleaning out Hagen's office, she placed the box in Chang's office, which was a storage room. *Id.* at 103. I believe, however, that Barnes was mistaken. Khan testified that she found the box by the back door and informed Hagen. *Id.* at 123-24. Hagen similarly recalled that she moved the box from the back door to Chang's office. *Id.* at 229.

information until the day of the surgical procedure, in which case, it would be locked in a medical file in the doctor's office in a locked cabinet." *Id.* at 125-26. DeWolfe emailed her back that day saying, "Thanks for letting me know. Don't worry, you won't be held responsible for that." *Id.* at 126, 236. DeWolfe never said to her afterwards that the documents contained health information. *Id.* at 127. She would have expected DeWolfe to have said something to her if so because it was "one of my primary responsibilities." *Ibid.* DeWolfe never told her after the box was thrown away that it contained HIPAA protected information. *Id.* at 235.

DeWolfe believed that he did not receive Khan's email until Tuesday, November 8, 2011 – the day he returned to the office. *Id.* at 138-39. The email stated that the box contained personal information and that it had been discarded. *Id.* at 139. DeWolfe believed that the box contained Medical History sheets because the box was originally in his office kept under security. *Id.* at 140, 153. However, he moved the box to Hagen's office prior to the first day of work. *Id.* at 140, 156.

On that same Tuesday, November 8, DeWolfe approached Hagen and told her that the box had been thrown away. *Id.* at 229. According to Hagen, he did not say to her that the box contained any health information though. *Ibid.* She "asked [DeWolfe] some questions, you know, what does this mean? He referred to the fact that there was personal information, possible driver's license, Social Security card, financial information, but not to worry, I would not be held accountable, that definitely he'd be holding Lauren Barnes accountable." *Id.* at 230.

DeWolfe contacted HCM assistant regional manager A.J. Clinkbeard ("Clinkbeard") about the box, although it is unclear exactly when he did so. *Id.* at 142; *see also id.* at 180. DeWolfe informed him that the "all of the past Be Backs and all that information was thrown out," and Clinkbeard responded saying that he should tell Wotherspoon. *Id.* at 142.

DeWolfe did not inform Wotherspoon that the Be Backs had been thrown away until January 12, 2012 – two months after the incident and only in passing. On January 12, Wotherspoon sent an email to DeWolfe, Barnes, and Clinkbeard saying that Hagen needed to increase her sales volume. *Id.* at 143. The correspondence was as follows:

Wotherspoon: "Has [Hagen] not been working the phones from when you were covering and JJ's no buys? May be opportunity here especially with the lack of volume right now. . ."

DeWolfe: "They were all thrown away!!"

Wotherspoon: "I'm not following? Your profiles and JJs profiles were thrown away?"

DeWolfe: "When I was gone in November Kelly's office was cleaned out to give her a fresh start."

Wotherspoon: "Tough to work phones with no prospects. I wish I would have known this."

CX 9; *see also* Tr. 144. Wotherspoon did not believe from this exchange that DeWolfe was referring to health information. *Id.* at 197-98. Lead sheets do not contain health information and any such information was locked in the doctor's office. *Id.* at 197-98.

After the email exchange, Wotherspoon called DeWolfe to talk about the loss of the lead sheets. *Id.* at 200-01. In that conversation, DeWolfe did not say that the box contained health information, and instead focused on the "loss of opportunity." *Id.* at 201. He did not hear anything else from DeWolfe about the boxes. *Id.* at 202. The first time that he heard that DeWolfe believed there was health information in the boxes was after DeWolfe filed his OSHA complaint. *Id.* at 202.

DeWolfe did not tell Barnes, Khan, or Hagen that the box contained health or HIPAA information. *See id.* at 103, 229, 235.

Reasons for DeWolfe's Termination

HCM terminated DeWolfe on January 31, 2012. *Id.* at 134. In the termination letter, HCM briefly stated the reasons for his termination. "The loss of PCP clients, dramatic drop in PCP revenue and membership attrition not showing the improvement necessary to stabilize PCP count has provided our company reduced confidence in your ability to manage the center." RX 10. Wotherspoon made the decision to terminate DeWolfe in consultation with other HCM managers and drafted DeWolfe's termination letter. *Id.* at 182, 184. Wotherspoon also testified at length regarding HCM's reasons for terminating DeWolfe.

In order to understand the issues surrounding DeWolfe's termination, however, it is necessary to explain HCM's product "solutions." HCM offers three different hair-loss treatment solutions to customers: (1) Bio-Matrix program or "Bio" (non-surgical hair restoration); (2) Extreme hairy therapy or "EXT" (non-surgical topical solutions such as shampoos); and (3) surgery. Customers who are enrolled in the "preferred client program" or PCP, pay monthly maintenance fees to HCM. Customers that signed up for the PCP were considered "members." *Id.* at 53.

As the termination letter noted, the Kansas City center under DeWolfe had a low PCP count. The Kansas City center lost members at rate of 10% or 11% higher than the rest of the region in 2010 and 2011. *Id.* at 176. Wotherspoon referred to this as the membership "attrition rate."⁵ HCM's goal was to have a 75% conversion rate for 2011, and the central region's goal was to have 68%. *Id.* at 187. Each branch aimed for a rate no more than 10% off the 75% goal. *Id.* at 187. As the Kansas City center had a conversion rate of about 20%, it was a "red flag." *Ibid.*

⁵ Wotherspoon's explanation of what constituted a "conversion rate" was a bit convoluted. *See id.* at 72. To the best of my understanding from his testimony, the conversion rate consisted of the percentage of customers that were "converted" to the PCP as a member *after* receiving the surgical, or even possibly a non-surgical hair replacement. The conversion "rate" therefore was the rate at which a center was able to move customers using these non-PCP solutions into the PCP. This understanding would make sense as it would help to increase PCP revenue, which is what Wotherspoon intended with the Kansas City center when he became regional vice president.

DeWolfe explained that the reason for the higher membership attrition rate was that many of the members decided on surgery after the Kansas City center was outfitted with surgical capabilities. *Id.* at 137. Thus, once the member decided on surgery, he or she would no longer be a member. Surgery was a one-time source of revenue. *Id.* at 138.

Moreover, DeWolfe believed that HCM did not lose revenue region-wide, even though the Kansas City center may have lost revenue. *Id.* at 145-46. Around the time that DeWolfe managed the Kansas City center, three other HCM branches opened up in the region that took clients away: Springfield, Omaha, and Des Moines. *See id.* at 188. He explained:

. . . the company had not lost revenue . . . because the clients migrated to surgical or they migrated over to the other locations over the past three years, especially the Omaha office that opened. My general knowledge of everything, and it's pretty good knowledge, was that over 60 clients left due to the three offices. That's a minimum of 60 clients moved over due to the three competing offices. There are different amounts to each location.

I also know that we lost well over 100 patients – didn't lose them, sorry, we moved them to surgery. They purchased surgery in the first year and a half.

Id. at 146. So, although there was a loss of revenue in the Kansas City center, DeWolfe believed that there was not an overall loss within the region – the customers simply moved over to these other, more convenient, locations. *Ibid.*

Wotherspoon conceded that initially there would be a drop in members as a result of other regional branches opening at that time. *Id.* at 188, 53. However:

If you look over a four-year span, even taking out the Des Moines losses. . . [it] was roughly 60 PCP clients. We had 131 new memberships started over that period of time – actually, 176 memberships started over that period of time. The last two years, 2010, 2011, of Matt's management, we averaged 55% conversion rate in 2010; 56% conversion rate in 2011.

We weren't taking advantage of opportunity to even fill the 60 that would have been lost. . . [W]e dropped from 576 clients down to 408 over a four-year period of time. In the last year alone, we dropped from 476 PCP clients down to 408. Now, we opened up Omaha that year, but that was only 19 clients that were taken from the Kansas City center when we opened up Omaha.

Id. at 185-86. More plainly, DeWolfe failed to increase PCP membership after clients left the Kansas City center for one reason or another.

Wotherspoon moreover stated that he made it clear to all centers in his region that they should “not be poaching our preferred client base for surgery sales.” *Id.* at 186. If members left

the PCP for surgery, then he expected the centers to make up for the loss through non-surgical sales. *Id.* at 177.

The termination letter cited a “drop in PCP revenue” as a reason for DeWolfe’s termination, as well. RX 10. Wotherspoon explained that this meant that:

[DeWolfe was] not optimizing opportunity to refill any losses via client transfers or PCP clients that transfer to surgery. Again, those transfers were relatively early in our surgery opening. The reason being is we had clients that were – clients for years that were ready to go into surgery and they were candidates.

Id. at 186.

The amount of PCP clients and PCP revenue are tied, but the one does not necessarily depend on the other. *Id.* at 177. So, a center could increase PCP revenue without adding more clients by, *e.g.*, having existing members pay more for better treatment packages. *Ibid.*

DeWolfe again defended himself stating that HCM did not lose revenue overall within the region and that other newly-opened branches poached the Kansas City center’s clients. *Id.* at 146.

Wotherspoon also pointed out that the Kansas City center was not selling enough of the Bio-Matrix solution to customers. *Id.* at 80-82. HCM expected its centers to sell the Bio-Matrix solution to about 45-50% of clients, EXT to 25%, and surgery to 25%. *Id.* at 80-82. The Kansas City center under DeWolfe was selling Bio to only 4% of its customers; EXT to 62%; and surgery to 34%. *Id.* at 81-82; CX 4. The skewed numbers showed that there was an issue with the center. *See id.* at 41. Wotherspoon stated that 60-70% of sales going to EXT is never appropriate. *Id.* at 44.

Wotherspoon also had concerns about the overall operations at the Kansas City center under DeWolfe. *Id.* at 174. There was “very little communication within the center.” *Id.* at 174-75. DeWolfe did not provide much feedback in conference calls and Wotherspoon felt that the employees were running the center. *Id.* at 175. He also felt that DeWolfe was partly responsible for the Jones and Byrd incidents, as explained above. *See supra* at 2-3.

For these reasons, Wotherspoon decided to terminate DeWolfe in early December 2011. *Id.* at 181. He drafted DeWolfe’s termination statement in early January 2012, but DeWolfe was not informed until January 31, 2012. *Id.* at 182, 184; RX 8. The reason for the delay was that he “wanted to put my ducks in a row and put together logistically a plan where we had proper people in place to – kind of a recon unit to go in and make sure that the staff was going to be properly taken care of and managed after Matt was released.” *Id.* at 185. He also did not want to fire DeWolfe right before the Christmas holiday. *Id.* at 199.

DeWolfe testified that he was never written up for a drop in PCP numbers or for any problems with his management of the Kansas City center. *Id.* at 135, 138, 147. He kept his clients and staff happy and he even received a management bonus for January 2012. *Id.* at 147.

Wotherspoon conceded that he never “wrote up” DeWolfe for any wrongdoing, but he “may have entered some review snaps” on him. *Id.* at 45. A “review snap” is “just a documentation of an occurrence inside of a center that was concerning. That could be good and it could be bad as well. So we have positive reviews on our employees as well.” *Ibid.*

Wotherspoon also conceded that DeWolfe was paid a bonus for January 2012 – the month that he was fired. *Id.* at 57. However, a manager is paid a bonus depending on how much the manager brings into the company based on daily operations, new business sales, referring sales, membership sales, and retail sales. *Id.* at 56, 71. The fact that DeWolfe received a bonus does not necessarily mean that he was a good manager. *Id.* at 71. In DeWolfe’s case, DeWolfe was not taking full advantage of the potential for sales in his location. *Ibid.*

The Kansas City center has now “stabilized” its attrition rate at 8.3%. *Id.* at 190. Its PCP count has grown over the six months prior to January 2013. *Ibid.* Its PCP revenue is also up. *Ibid.* The attrition rate at the Kansas City center when DeWolfe was manager was 26%. *Ibid.*

Wotherspoon testified that DeWolfe’s report about the disposal of the lead sheets did not contribute to his termination. *Id.* at 202. Wotherspoon had already made the decision to terminate him in early December for the reasons listed in his termination letter. *Id.* at 202-03. The termination letter was drafted on January 11, 2012, and he had the discussion over email with DeWolfe on January 12, 2012. *Id.* at 203. Even if DeWolfe would have told him that the box contained health information, Wotherspoon said it would not have affected his decision to terminate DeWolfe. *Ibid.*

III. CONCLUSIONS OF LAW

A. Law

The ACA’s whistleblower provision states:

(a) Prohibition

No employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee) has –

(1) received a credit under section 36B of title 26 or a subsidy under section 18071 of title 42;

(2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or an amendment made by this title);

- (3) testified or is about to testify in a proceeding concerning such violation;
- (4) assisted or participated, or is about to participate, in such a proceeding; or
- (5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this title (or amendment), or any order, rule, regulation, standard, or ban under this title (or amendment).

29 U.S.C. § 218c(a).

Section 218c(a)(1) provides protection to eligible lower income employees who receive a premium tax credit or cost-sharing reductions while enrolled in a qualified health plan through a health-care exchange.⁶ If an employer fails to offer an affordable health plan that meets certain minimum qualifications, as defined by statute and regulation, then the employee may be eligible to purchase a sufficient health plan on an exchange administered by the Federal or state government. *See* Affordable Care Act, Tit. I, Subtitles D and F; *see also* 78 Fed. Reg. 13223 (Feb. 27, 2014). The employer is, in turn, assessed a penalty if one of its employee's receives a premium tax credit. *Id.*, Tit. I, Subtitle F, Sec. 1513 (codified at 26 U.S.C. § 4980H). As a result, the potential for employer retaliation is apparent and the ACA therefore provides protection to these employees. 78 Fed. Reg. 13223 (Feb. 27, 2014).

Sections 218c(a)(2)-(5) involve the more traditional type of whistleblower protection. That is, §§ 218c(a)(2)-(5) protect employees that report violations of the ACA to their employer or the Federal or state government.⁷ 29 U.S.C. § 218c(a). The employee's report must be of a violation of "this title." § 218c(a)(2). Although "this title" is not defined in the statute itself, the Department of Labor's regulations clarified that the report must relate to a violation of "any provision of title I of the Affordable Care Act (or an amendment made by title I of the Affordable Care Act). 29 C.F.R. § 1984.102(2); *see accord Rosenfield v. GlobalTranz Enterprises, et al.*, No. CV 11-02327-PHX-NVW, 2012 WL 2572984 (D. Ariz. July 2, 2012) (holding "this title" to refer to title I of the ACA).

On February 27, 2013, OSHA issued an interim final rule establishing the procedures for whistleblower complaints filed under the ACA. 78 Fed. Reg. 13222 (Feb. 27, 2013). The procedures, found at 29 C.F.R. Part 1984, provide, *inter alia*, that a successful complainant must demonstrate "by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint." 29 C.F.R. § 1984.109(a).

Although the ACA's regulations do not define "contributing factor," the Administrative Review Board ("ARB") has issued substantial interpretations of its meaning in the context of

⁶ The premium tax credit and cost-sharing provisions are found in Subtitle E of the ACA, Pub L. 111-148; 124 Stat. 119, 213 *et seq.* (codified at 26 U.S.C. § 36B and 42 U.S.C. § 18071).

⁷ I note that as of 2014, the employee is protected for such reports regardless of whether the health insurance issuer is the employer of the employee retaliated against. *See* § 2706(b) of the Public Health Service Act, 42 U.S.C. § 300gg *et seq.*; *see also* 78 Fed. Reg. 13223.

similar standards of proof in whistleblower cases administered by the Department of Labor. Contributing factor means “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Blackie v. Smith Transp., Inc., et al.*, ARB No. 11-054, ALJ No. 2009-STA-43, at 9 (ARB Nov. 29, 2012) (quoting *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, at 6 (ARB Jan 31, 2011)); *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, 2012 WL 4714686 (ARB Sept. 26, 2012). “[A]ny weight given to the protected disclosure, either alone or in combination with other factors, can satisfy the ‘contributing factor’ test.” *Smith v. Duke Energy Carolinas, LLC, et al.*, ARB No. 11-003 (ARB June 20, 2012) (quoting *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). The complainant may establish that the employer’s adverse action was a contributing factor either directly or indirectly through circumstantial evidence. *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-6, at 9 (ARB Sept. 24, 2009). Circumstantial evidence may include, *inter alia*, temporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, or the falsity of an employer’s explanation for taking adverse action. *Blackie*, ARB No. 11-054 at 9; *see also Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 at 11-12 (ARB June 24, 2011); *and Chen v. Dana-Farber Cancer Inst.*, ARB No. 09-058, ALJ No. 2006-ERA-9, at 10-11 (ARB Mar. 31, 2011) (dissenting opinion).

If the complainant has satisfied the burden, then the respondent may still escape liability if it “demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.” 29 C.F.R. § 1984.109(b). “Clear and convincing evidence” means evidence “indicating that the thing to be proved is highly probably or reasonably certain.” *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004).

B. Analysis

1. Complainant did not engage in protected activity.

Complainant alleges that he reported that client medical information was improperly discarded. Compl.’s Post-Hearing Brief (“CPHB”) 1. “No remedy was taken to notify those patients or talk to those patients or get anything rectified.” Tr. 8.

Complainant however has failed to show by a preponderance of the evidence that he engaged in protected activity. He fails to point to any statute, regulation, or case law which supports his claim that disposal of patient medical history is a violation of the ACA’s whistleblower provision. As Complainant proceeded *pro se* in this matter, I am mindful that his complaint and papers must be construed “‘liberally in deference to [his] lack of training in the law’ and with a degree of adjudicative latitude.” *Trachman v. Orkin Exterminating Co.*, ARB No. 01-067, ALJ No. 2000-TSC-3, at 6 (ARB Apr. 25, 2003) (internal citations omitted). But that does not mean that he no longer has the burden of litigating and explaining each element of his case. *Ibid.* In short, Complainant has not pointed to anything that shows that the ACA protects reports of improper disposal of patient medical information.

After reviewing the statute and regulations, I find that the ACA whistleblower provision does not protect employees who report that patient medical files were improperly disposed. Section 218c(a), 29 U.S.C., protects, *inter alia*, employees that “provided. . . to the employer. . . information relating to any violation of” Title I of the ACA. 29 U.S.C. § 218c(a)(2); *see* 29 C.F.R. § 1984.102(2) (defining “this title” to mean “Title I” of the ACA). Title I of the ACA, however, does not mention any protections for patient medical information. It does not define what patient medical information is nor does it mention how such information should be disposed. Title I rather focuses on the signature elements of the ACA, such as the prohibition on denials of insurance due to pre-existing conditions; access to health insurance premium tax credits; establishment of state and Federal “exchanges” for qualified health plans; mandatory individual enrollment in a qualified plan; and mandatory employee coverage requirements for qualified employers. As such, a report of improperly disposed patient medical records is not protected activity under the ACA.

Assuming *arguendo* that the ACA protects patient medical records from improper disposal, I find that Complainant failed to show that the box in question even contained any medical information. DeWolfe testified that he believed the box contained Medical History sheets. *Id.* at 140, 153. He believed this because the box was originally locked up in his office, but he moved it to Hagen’s office prior to November 5, 2011. *Id.* at 140, 153, 156.

DeWolfe however was mistaken in his belief that the box contained Medical History sheets. First, DeWolfe claimed the box contained “Be Backs.” Be Backs, however, do not include Medical History sheets. Be Backs consist of the first three pages of the initial client intake forms. *Id.* at 141; *see also id.* at 26, 36.

Second, DeWolfe seemed confused as to where exactly the Medical History sheets were kept. He stated that the box, which included Medical History sheets, was locked in his office, but also stated that the Medical History forms were stored in the NB 1 consultant’s office. *Compare id.* at 140, 153 *with id.* at 166. On the other hand, Wotherspoon and Khan both testified that they were stored in the surgical coordinator’s office. *See id.* at 75, 119-20. Moreover, I give greater weight to Khan’s testimony on this issue because one of her job responsibilities was to manage client medical files and the Medical History forms. *Id.* at 119.

In addition, Hagen, Khan, and Barnes verified that the box did not contain Medical History sheets. *Id.* at 104-05, 126, 230. Hagen and Barnes actually filled the box with files from Hagen’s office, and Khan and Hagen each went through the contents to check for confidential information. DeWolfe however did not put anything in the box or even examine its contents. As such, Hagen, Khan, and Barnes are more credible witnesses as to whether the box contained Medical History forms.

Finally, I find that DeWolfe did not have an actual belief that the forms contained any type of medical information. Although he discussed the discarded forms with a number of employees and supervisors, he never told any of them that he thought they contained medical information. Indeed, he did not make such an allegation until he filed his complaint with OSHA. If he had actually believed that the discarded forms contained medical information, he clearly would have said so: as the center manager, he was well aware of the need for medical

confidentiality, and was well aware of the practices used at the center to keep medical information secure. It is inconceivable that he would not have alerted his supervisor, or at least someone else in the company, if he actually believed that the security of health information had been compromised.

2. Complainant's alleged protected activity did not contribute to his termination.

Although Complainant's complaint is denied for failing to show that he engaged in protected activity under the ACA, I find that denial is also warranted in this case because his alleged protected activity did not contribute in any way to his termination. DeWolfe argues that he was retaliated against for reporting the improper disposal of the box containing "patient/client records." CPHB 1. DeWolfe however has failed to show that Respondent's decision to terminate him was influenced by his report in any way.

As the responsible HCM manager, Wotherspoon articulated numerous reasons for DeWolfe's termination that undermine a claim of retaliation. As cited in DeWolfe's termination letter, the Kansas City center under his management had a low PCP count. RX 10. In 2011 alone, the PCP count dropped around 60-70 PCP members. Tr. 185-86. Although DeWolfe argued that these clients migrated to other offices or went to surgery, Wotherspoon responded that it was still the duty of the Kansas City center to make up for the lost members and it should not have been moving PCP members to surgery. *Id.* at 146, 186. Moreover, the center had a low conversion rate - approximately 10% lower than any of the other offices in the region. *Id.* at 176, 187. The inability of the Kansas City center's to convert the non-surgical hair replacement clients to PCP clients surely contributed to DeWolfe's termination.

The Kansas City center under DeWolfe also showed low PCP revenue. RX 10. Although higher PCP revenue is often the result of more PCP clients, the latter is not always the necessary condition of the former. Tr. 177. The Kansas City center was unable to increase PCP revenue by increasing PCP clients or selling better treatment solutions to existing clients, and therefore HCM blamed DeWolfe as branch manager. *Id.* at 145-46.

DeWolfe failed to sell the proper mix of solutions to its customers. The Kansas City center was not selling enough of the Bio-Matrix solution. *Id.* at 40-43; 80-82. The Kansas City center should have been selling Bio solution to about 45-50%, EXT to 25%, and surgery to 25% of its customers. *Ibid.* However, the center under DeWolfe was selling Bio to 4%, EXT to 62%; and surgery to 34%. *Id.* at 81-82; CX 4. Wotherspoon explained that this sales ratio was not appropriate. *Id.* at 9.

Wotherspoon had several other problems with the way DeWolfe managed his center. Wotherspoon believed that there was "very little communication within the center," that DeWolfe did not provide much feedback in conference calls, and that he let the employees run the center. *Id.* at 174-75. He held DeWolfe partly accountable for the Byrd and Jones incidents, believing that he should have managed the situations better. *Id.* at 67, 69, 70-71. He thought DeWolfe was improperly sharing confidential information about the Byrd case with his

employees. *Id.* at 180. And he felt that DeWolfe was sluggish in carrying out the “Win Back” campaign. *Id.* at 193.

In all, Wotherspoon articulated numerous legitimate reasons for HCM’s decision to terminate DeWolfe. More importantly, he testified credibly that DeWolfe’s report that certain papers were improperly discarded played no role in his decision to terminate DeWolfe, and that if DeWolfe had told him that there was health information on the discarded documents, it would not have affected his decision either way. Even if I were to disagree with Wotherspoon’s opinion of DeWolfe’s management of the Kansas City center, my role is “not to second guess an employer’s business judgment” and act as a “super-personnel department[.]” *Suitt v. Honeywell Consumer Prod. Group*, 562 F.Supp.2d. 1355, 1364 (D. Utah 2008) (quoting *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004) (citation omitted) and *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999), *abrogated on other grounds by Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)). My role is solely to determine whether HCM’s decision to terminate DeWolfe was influenced in any way by his protected activity. Put simply, DeWolfe has not established that he was terminated because he reported that a box of medical documents was improperly disposed.

IV. CONCLUSION

I find that Complainant Matthew DeWolfe did not engage in protected activity under the whistleblower provision of the ACA, 29 U.S.C. § 218c(a). Reporting the improper disposal of patient medical information is not a violation of Subtitle I of the ACA, and even if it were, the documents discarded did not contain client Medical History sheets. Furthermore, even assuming that § 218c(a) protected such a report, Complainant failed to show that his report to Respondent contributed in any way to Respondent’s decision to terminate him. Therefore, Complainant’s complaint must be denied.

V. ORDER

For the foregoing reasons, it is hereby **ORDERED** that the complaint filed under the ACA whistleblower provision by Complainant Matthew DeWolfe is **DENIED**.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1984.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1984.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-N, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1984.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1984.109(e) and 1984.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1984.110(b).

ATTACHMENT 1

ADAM WOTHERSPOON

Adam Wotherspoon is regional vice president of HCM's central region. Tr. 27. He began working for HCM in 1998 as a sales consultant. *Id.* at 28. He then became a regional sales consultant, managing director of the Louisville center in 2000, regional sales manager in Cincinnati in 2002, and then regional vice president in August 2011 (in that order). *Ibid.* As regional vice president for the central region, he is responsible for 17 HCM centers, including the Kansas City center. *Id.* at 27. DeWolfe reported directly to him. *Id.* at 173.

The Kansas City center employed a "directing manager"⁸ (Matthew DeWolfe), a new business consultant, a recurring business consultant, a few stylists, a center administrator, a surgical coordinator, a doctor, and some medical technicians. *Id.* at 207. Above the Kansas City center in HCM's hierarchy was a regional vice president (Wotherspoon), new business regional sales manager, recurring customer sales manager, and styling technical regional manager. *Ibid.*

Lauren Barnes is Wotherspoon's regional sales manager. *Id.* at 62. She now has the job that Wotherspoon had before being promoted to regional vice president. *Ibid.* She is based out of Kansas City. *Ibid.* As part of her job, Barnes has a direct line of communication to Melissa Oaks, vice president of sales. *Ibid.* Barnes' daily responsibilities are to help managers and sales consultants "hit their [membership] numbers." *Id.* at 63. Barnes is not an executive with HCM, although Wotherspoon referred to her as part of "senior management." *Id.* at 64.

*Initial Client Intake Forms*⁹

Wotherspoon reviewed a copy of a blank initial client intake form – which he referred to as a "Be Back." *Id.* 26; see CX 14 and RX 1-4. The initial client intake form was filled out by all customers (or filled out by the consultants on behalf of customers) that came in the store regardless of whether they purchased something or not. Wotherspoon stated that the initial client intake form became a "Be Back" when the customer came back to purchase something from the center. See Tr. 26, 36. But if the customer came in, filled out the profile sheet, but did not come back, it was considered only a "lead." *Id.* at 36. So, ostensibly, the only difference between a "Be Back" form and a "lead" would be whether the customer returned for treatment.

The initial client intake form is considered a lead sheet to get customers to return and purchase a product. *Id.* at 26-27. The Personal Consultation page has a section at the top asking for information such as name, address, and email. See, e.g., CX 14 at 1. The bottom portion has a

⁸ DeWolfe characterized his position as "operations manager." *Id.* at 134.

⁹ As mentioned above, "initial client intake form" is the name I have given to the documents contained in CX 14 and RX 1-4. CX 14 and RX 1-4 include the Personal Consultation forms for men and women, the Consent to Consultation form, and the Medical History forms.

section that asks potential clients about his or her history of baldness, severity, and the purpose(s) for going to HCM. *See ibid.* Wotherspoon said that some consultants fill out the intake forms more fully than others. Tr. 27.

If a patient decided to have surgery or were a prospect for surgery, he or she would fill out a Medical History form. *Id.* at 75; *see* CX 14 at 4-5. Once the customer filled out the Medical History form, it would be sent to the “surgical coordinator to be put in a surgical file and then put under lock and key.” *Ibid.* Sharron Khan was the surgical coordinator at the Kansas City center, and she was the only one with the key to the files. *Id.* at 75-76. Dr. Duncan Simmons however would perform the actual surgeries for the Kansas City center. *Id.* at 76.

If the customer did not purchase anything in his or her initial visit, the Personal Consultation sheet would be considered a lead, and it would be put into a “tickler file” which “would offer consultants opportunity to go back and during slow times of the year give consistent follow-up because things change for people.” *Id.* at 37. The “tickler file” would be in a locked door within the consultants’ room.” *Ibid.* The tickler file would be used to “stir up more business. But the medical profile, anything medical documentation is then passed to the surgical coordinator, goes in the surgical file, and then that’s then locked underneath – within the surgical side of our business.” *Ibid.*

Wotherspoon also testified about a typical surgical consultation with HCM’s doctor, which occurred after the initial consultation if a patient was interested in surgery. Wotherspoon stated that he did not remember ever seeing a doctor prescribe a patient any medications during a surgical consultation. *Id.* at 38. He said that the doctor typically prescribed the patient Propecia or Avedart. *Id.* at 39. The doctor was sent the Medical History pages and photos of the patient’s hair loss for the surgical consultation. *Id.* at 77-78. If the patient decided against surgery, the Medical History pages were sent back to the surgical coordinator. *Id.* at 79.

Disposal of Initial Client Intake Forms on November 5, 2011

Wotherspoon first heard about the box of documents that were allegedly improperly disposed of in an email on January 12, 2012. *Id.* at 194; *see* RX 9. DeWolfe sent him an employee action form (“EAF”) for approval of Kelly Hagen’s 90-day base-pay adjustment. *Id.* at 195. Wotherspoon stated in response that Hagen’s closings were a bit low. *Ibid.* DeWolfe replied that Hagen only had the clients that had come into the center since she was hired. *Id.* at 196. Wotherspoon then asked DeWolfe about the leads that were there prior to her arrival. *Ibid.* DeWolfe exclaimed, “They were all thrown away!” *Ibid.* Wotherspoon understood this to mean that “the [follow up] profiles, our leads, had been thrown away.” DeWolfe explained that Hagen’s office had been cleaned out. *Id.* at 196-97. Wotherspoon ended by saying he wish he would have known about it, and that it will be tough for her to find leads without them. *Id.* at 197. Wotherspoon never considered that DeWolfe was referring to health information because lead sheets do not contain health information – all the health information is locked up in the doctor’s office. *Id.* at 197-98.

The loss of the lead sheets cost the Kansas City center potential revenue. *Id.* at 198. At the time, the Kansas City center had few prospects. *Ibid.* Those lead sheets would have helped

provide leads and potentially bring in new revenue. *Ibid.* The files thrown away were lost opportunities. *Id.* at 198-99.

After the email exchange, Wotherspoon called DeWolfe to talk about the loss of the lead sheets. *Id.* at 200-01. In that conversation, DeWolfe did not say that the box contained health information, and instead focused on the “loss of opportunity.” *Id.* at 201. He did not hear anything else from DeWolfe about the boxes. *Id.* at 202. The first time that he heard that DeWolfe believed there was health information in the boxes was after DeWolfe filed his OSHA complaint. *Id.* at 202.

Julie Jones Incident

The new business consultant at the HCM Kansas City center in June 2011 was Julie Jones. *Id.* at 48. She was one of the best salespeople in the company because she had a “strong passion for helping people” with hair loss. *Id.* at 211. She would handle the consultation documents. *Ibid.* She was discharged in August 2011. *Ibid.* She was terminated for a verbal and physical altercation with another employee during business hours. *Id.* at 66-67. DeWolfe witnessed the altercation, and in Wotherspoon’s opinion, believed that DeWolfe ineffectively managed the situation. *Id.* at 67, 69.

Tierra Byrd Incident

Tierra Byrd was a stylist working under DeWolfe at the Kansas City center. *Id.* at 69-70. Byrd was terminated for taking HCM clients and servicing them in her private capacity. *Id.* at 70. She was violating HCM’s non-complete clause within her employment agreement. *Ibid.* Wotherspoon believed that when an employee is unhappy with the center’s work environment, he or she is more likely to take clients for personal gain. *Ibid.*

Wotherspoon thought DeWolfe was responsible for the Byrd problem because “[t]hese are things that could’ve been seen a lot earlier if there was a strong communication with your staff on a day-to-day basis.” *Id.* 70-71. Wotherspoon admitted that DeWolfe told him about the Byrd situation sometime in early July 2011. *Id.* at 83. He also admitted that an issue with a non-complete clause happened to him while he was a regional sales manager. *Ibid.*

In the months leading up to DeWolfe’s termination, he felt that DeWolfe had “missed focus.” *Id.* at 180. He felt that DeWolfe’s focus was on the Byrd incident. *Ibid.* Wotherspoon asserted he had “information” that DeWolfe “was sharing confidential information about this case with employees and peers and possibly clients.” *Ibid.* Wotherspoon never told him to discuss the information with the staff at the center. *Id.* at 192. Wotherspoon felt that DeWolfe was partly responsible for the Byrd incident as manager because he was not effectively managing the center, which had an effect on the high attrition rate and loss of clients. *Id.* at 193, 194.

After the Byrd incident, DeWolfe was tasked with the “Win Back” program – a campaign to “win back” the clients lost to Byrd. *Id.* at 193. He was “very slow” in completing his responsibilities. *Ibid.*

Kansas City Center's Performance under DeWolfe

Wotherspoon testified that HCM has a requirement that a certain percentage of the hair-loss treatment solutions are sold. *Id.* at 39-40. That is, for purchasing clients, HCM expects that 50% of clients use the non-surgical solution; 25% or less use the extreme hair therapy ("EXT") mix; and surgical solutions make up the remainder at 25%. *Id.* at 40-41, 42. If the percentages are skewed then "we may have a consulting issue within that center" – the consultant may be "selling too much of that solution." *Id.* at 41. For example, if the center was selling the EXT to 60-70% of the clients, then HCM would work with the center "to make sure that we are selling the right solution within that center." *Id.* at 43. Wotherspoon has never seen that 60% or 70% of EXT sales was appropriate. *Id.* at 44.

The Kansas City center was not selling enough of the Bio-Matrix solution (non-surgical) to customers – that is, the Kansas City center was selling it to about 4% of customers, even though the company expected all centers to sell it to about 45-50% of the customers that walk through the door. *Id.* at 80-82. The expected sales number for the EXT is 25% (Kansas City had 62%) and surgery is the difference between the Bio-Matrix and EXT (Kansas City had 34%) for August-October 2011. *See id.* at 81-82; CX 4.

The big problem with DeWolfe's management of the Kansas City center was the attrition rate of membership. *Id.* at 176. The loss of members was about 10% or 11% higher than the rest of the region in 2010 and 2011. *Ibid.* Even though the Kansas City center had one of the best salespeople in the company (Jones), it still had a high attrition rate. *Id.* at 176. This showed that the center was not taking advantage of opportunities. *Ibid.* Wotherspoon also replaced managers in the Detroit office for similar attrition rates. *Ibid.*

Wotherspoon conceded that initially there would be a drop in "members" (which Wotherspoon described as a drop in the number of people enrolled in the preferred client program or "PCP") as a result of other regional branches opening at that time in Springfield, Omaha, and Des Moines. *Id.* at 188, 53. However, only about 19 clients left the Kansas City center when the Omaha center opened. *Id.* at 189. Even taking into account the transfer of clients to Omaha, the Kansas City center went from 476 to 408 clients in 2011. *Ibid.* It was still a large percentage drop, according to Wotherspoon. *Ibid.*

DeWolfe's termination letter, which was given to him on January 31, 2012, lists loss of membership (or a low PCP count) as a reason for his termination. *Id.* at 185; CX 2. Wotherspoon explained:

If you look over a four-year span, even taking out the Des Moines losses. . . [it] was roughly 60 PCP clients. We had 131 new memberships started over that period of time – actually, 176 memberships started over that period of time. The last two years, 2010, 2011, of Matt's management, we averaged 55% conversion rate in 2010; 56% conversion rate in 2011.

We weren't taking advantage of opportunity to even fill the 60 that would have been lost. . . . [W]e dropped from 576 clients down to 408 over a four-year period of time. In the last year alone, we dropped from 476 PCP clients down to 408. Now, we opened up

Omaha that year, but that was only 19 clients that were taken from the Kansas City center when we opened up Omaha.

Id. at 185-86. HCM's goal was to have a 75% conversion rate for 2011, and the central region's goal was to have 68%. *Id.* at 187. Each branch aimed for a rate no more than 10% off the 75% goal. *Ibid.* As the Kansas City center had a conversion rate about 20% lower, it was a "red flag." *Ibid.*

The termination letter also stated that the Kansas City center under DeWolfe had low PCP revenue. *See* CX 2. Wotherspoon said this meant:

[DeWolfe was] not optimizing opportunity to refill any losses via client transfers or PCP clients that transfer to surgery. Again, those transfers were relatively early in our surgery opening. The reason being is we had clients that were – clients for years that were ready to go into surgery and they were candidates.

We had a . . . company-wide initiative that . . . we should not be poaching our preferred client base for surgery sales. All managers, including Mr. DeWolfe, weren't of that. It became a management problem, not managing the consultant to make sure that didn't occur.

Id. at 186.

The amount of PCP clients and PCP revenue are tied, by the one does not necessarily depend on the other. *Id.* at 177. So, a center could increase PCP revenue without adding more clients by, *e.g.*, having existing members pay more for better treatment packages. *Ibid.*

Wotherspoon spoke with DeWolfe about the loss of clients, and DeWolfe defended himself by saying that the regional centers in Des Moines, Omaha, and Springfield were taking customers (and therefore there was not a loss to the company as a whole). *Id.* at 176-77. But Wotherspoon said that the Kansas City center should have been able to buffer those losses through non-surgical sales. *Id.* at 177.

Wotherspoon also had concerns about the overall operations at the Kansas City center as a regional sales manager and regional vice president. *Id.* at 174. There was "very little communication within the center." *Id.* at 174-75. DeWolfe did not provide much feedback in conference calls and Wotherspoon felt that the employees were running the center. *Id.* at 175.

As a result of the loss of "focus," declining PCP clients and PCP revenue, Wotherspoon spoke with his boss and decided to terminate DeWolfe in early December 2011. *Id.* at 181. He drafted DeWolfe's termination statement in early January 2012, but DeWolfe was not informed until January 31, 2012. *Id.* at 182, 184; RX 8. The reason for the delay was that he "wanted to put my ducks in a row and put together logistically a plan where we had proper people in place to – kind of a recon unit to go in and make sure that the staff was going to be properly taken care of and managed after Matt was released." *Id.* at 185.

Wotherspoon said he did not want to fire DeWolfe in December out of concern for DeWolfe and his family over the Christmas holiday. *Id.* at 199. He wanted to fire him earlier than January because of the loss of front end and back end business, but he waited. *Ibid.* DeWolfe had every opportunity to turn around the Kansas City center's numbers over the six months since Wotherspoon became regional vice president, but he was unable to lower the attrition rate to 10%. *Id.* at 200.

Wotherspoon stated that he never "wrote up" DeWolfe for any wrongdoing, but he "may have entered some review snaps" on him. *Id.* at 45. A "review snap" is "just a documentation of an occurrence inside of a center that was concerning. That could be good and it could be bad as well. So we have positive reviews on our employees as well." *Ibid.* Wotherspoon has known DeWolfe for several years and he likes him personally. *Id.* at 173.

Wotherspoon stated that DeWolfe was paid a bonus for January 2012 – the month that he was fired. *Id.* at 57. A manager is paid a bonus depending on how much the manager brings into the company based on daily operations, new business sales, referring sales, membership sales, and retail sales. *Id.* at 56, 71. He was paid a bonus for many months before that, as well. *Id.* at 58-59. It was normal for managers working in Wotherspoon's region to receive a bonus every month, although not all the managers received bonuses every month. *Id.* at 71. The fact that DeWolfe received a bonus does not necessarily mean that he was a good manager though. *Ibid.* He stated that in DeWolfe's case, DeWolfe was not taking full advantage of the potential for sales in his location. *Ibid.* CX 4 is an email from the vice president of sales to a large number of recipients, including all regional sales divisions, showing closing percentages and new business consultant performance. *Id.* at 60. It shows that the Kansas City center ranked 53 out of 68 centers, with 1 being the worst, and 60 being the best. *Ibid.*; see CX 4 at 1-3.

The Kansas City center has now "stabilized" its attrition rate at 8.3%. *Id.* at 190. Its PCP count has grown over the last six months. *Ibid.* Its PCP revenue is also up. *Ibid.* The attrition rate at the Kansas City center when DeWolfe was manager was 26%. *Ibid.*

Wotherspoon testified that the DeWolfe's report about the disposal of the lead sheets did not contribute to his termination. *Id.* at 202. Wotherspoon had already made the decision to terminate him in early December for the reasons listed in his termination letter. *Id.* at 202-03. The termination letter was drafted on January 11, 2012, and he had the discussion over email with DeWolfe on January 12, 2012. *Id.* at 203. Even if DeWolfe would have told him that the box contained health information, it would not have affected his decision to terminate DeWolfe. *Ibid.*

LAUREN BARNES

Lauren Barnes has worked for HCM for seven years. *Id.* at 88. She started as a center administrator, then moved to membership advisor, San Diego center manager, and is now a regional sales manager. *Id.* at 88-89.

Initial Client Intake Forms

The purpose of the initial client intake forms is to help identify what solution to give customers during the consultation process. *Id.* at 98; *see* CX 14. She discussed the forms at length in her testimony. She stated that the first two pages of the initial client intake forms are known as the Personal Consultation forms for males and females. *Id.* at 99; CX 14 at 1-2. The consultant keeps the Personal Consultation forms after the initial consultation in order to “potentially call them back to purchase.” *Ibid.* Pages 1 and 2 of the initial client consultation forms do not contain any health information. *Ibid.*

The third page of the initial client intake form is the “Consent to Consultation” form. *See id.* at 100; CX 14 at 3. The purpose of the consent form is to obtain permission to discuss solutions with the client. *Ibid.*

The fourth and fifth pages of the initial client intake form are the Medical History forms. *Id.* at 100; CX 14 at 4-5. Dr. Simmons and Sharron Khan use them, and they are stored in the surgical coordinator’s office. *Id.* at 100.

Barnes stated that she has experience doing consultations for customers at HCM. *Id.* at 93. The consultant decides whether to give the client Bio or EXT, and the doctor decides whether to give the client surgery. *Ibid.* Barnes stated that a good sales mix for the company is 50% non-surgical, 30% surgical, and “probably the rest, EXT.” *Id.* at 93. The doctor does not direct the consultant to use EXT. *Id.* at 94. The doctor is not given any documents for a surgical consultation. *Ibid.*

Disposal of Initial Client Intake Forms on November 5, 2011

Barnes helped set up and clean out Hagen’s office on November 5, 2011. *Id.* at 90, 101.

Anything that was like old brochures, just things that we weren’t using anymore, things that were out of date, I put in a trash bag. Anything that were past leads or dead leads, ones that we have had on file for a long time that were never used or we’ve worked them, . . . we couldn’t contact them anymore, I would put them in box, which the box was already in the office.

Id. at 101. She said that there were no surgical files or health information in the box. *Id.* at 104-05. DeWolfe put the box in the office before she began. *Id.* at 101. He did not give her any directions as to how to clean out the office. *Id.* at 101-02.

Barnes pulled the initial client intake forms from Hagen’s office and put them in a box for DeWolfe. *Id.* at 102. She thought that DeWolfe knew she was cleaning out the office because the two had talked about it beforehand. *Id.* at 107. When she was done, she moved the box to “Chang’s office,” which is “kind of like a storage room.” *Id.* at 103.

DeWolfe never said anything to her about improperly disposing of the documents. *Id.* at 103. Sharron Khan did not tell her that there were improper documents in the box. *Id.* at 107. She did not become aware that DeWolfe believed that the box contained health information until she

received a call from HCM's legal department after DeWolfe filed this case telling her about it. *Id.* at 103.

Barnes did not have the authority to dispose of patient files. *Id.* at 105. She has never disposed of patient files. *Ibid.* She was never written up or disciplined regarding the disposal of health information. *Ibid.* Wotherspoon never mentioned the box disposal issue. *Ibid.* She believed that Wotherspoon would have notified her if he had been notified that the box contained health information. *Ibid.*

SHARRON KHAN

Sharron Khan is the surgical coordinator at HCM's Kansas City center. *Id.* at 108. Part of her job responsibilities is to keep and manage "the medical file." *Id.* at 119. The medical file is in a locked cabinet inside of the doctor's office. *Id.* at 119-20. The medical file contains sales information, financial information, surgery consent forms, Medical History forms, medical procedure details, and medication information. *Id.* at 120. The Medical History form is filled out the day the customer has surgery. *Id.* at 123.

Khan stated that every customer would fill out a male or female Personal Consultation form and a Consent form. *Id.* at 110, 130-31; CX 14 at 1-3. If the customer did not purchase anything, the sheets would be stored so that they could call the customer back to sell something. *Id.* at 130.

On a tele-medicine consult with a doctor, she said that she would send an "email to him, scope and a certain set of pictures." *Id.* at 110. No other information, including the Medical History, was required to be sent to the doctor. *Ibid.* She did not know if it was common practice for other offices to send the doctor a customer's Medical History form. *Ibid.* She recalled that the doctor sometimes would prescribe Finasteride or Propecia to patients. *Ibid.*

Khan testified as to the process for disposing of documents. She had "working knowledge of how to dispose of documents." *Id.* at 112. Documents were supposed to be put in the "shred box" for disposal. *Id.* at 120. The Kansas City center had three bins in which documents set for shredding were placed. *Id.* at 112. The bins were locked, but they had a small opening at the top where the documents were inserted. *Ibid.* "[A]nything as simple as something with a client's name on it goes in that bin to shred." *Id.* at 112-13; *id.* at 118. A shredding company then picked up these bins periodically and shredded them on premises. *Id.* at 113. Khan pointed out however that the Kansas City never throws away a medical file if the client has had surgery. *Id.* at 122. But if the client elects not to have surgery, then the information is just sales information, and it would not be put into the shred box. *Ibid.*

Disposal of Initial Client Intake Forms on November 5, 2011

On November 5, 2011, Barnes and Hagen were cleaning out Hagen's office, and Khan saw a box of documents by the back door. *Id.* at 123. She pulled out one of the documents in the box because she did not know what was inside, and the document had a Social Security number

and driver's license on it. *Id.* at 124. She then showed it to Hagen and said, "We might not have gone through that enough. Please check it before it goes out." *Id.* at 124. Khan believed that the box was meant to be put in the trash, not the shred box, because it was placed where the office normally places the trash. *Id.* at 124. She did not mention the documents she found to Barnes, but she did tell Barnes that "there could be sensitive material" before the office was even cleaned. *Id.* at 109, 124.

Khan wrote an email to DeWolfe on November 5, 2011 stating that "there were documents removed from Kelly's office" and that she was "concerned about those documents." *Id.* at 108, 125. She said she found a driver's license and Social Security card in the box. *Id.* at 125. She did not tell DeWolfe that the box contained health information. *Ibid.* She wouldn't have told DeWolfe that the box contained health information because "I don't take any health information until the day of the surgical procedure, in which case, it would be locked in a medical file in the doctor's office in a locked cabinet." *Id.* at 125-26. She stated that she did not see any surgical files in the box. *Id.* at 126. DeWolfe emailed her back that day saying, "Thanks for letting me know. Don't worry, you won't be held responsible for that." *Id.* at 126, 236. DeWolfe never said to her afterwards that the documents contained health information. *Id.* at 127. She would have expected DeWolfe to have said something to her if so because it was "one of my primary responsibilities." *Ibid.* DeWolfe never told her after the box was thrown away that it contained HIPAA protected information. *Id.* at 235.

MATTHEW A. DEWOLFE

DeWolfe became operations manager of HCM's Kansas City center in August 2008. *Id.* at 134. He was responsible for overall center operations, including the "wellbeing of all the employees" and "some sales aspects." *Ibid.* He worked in that position until he was involuntarily discharged on January 31, 2012. *Id.* at 134. DeWolfe's direct supervisor was Wotherspoon. *Id.* at 151. Wotherspoon made the decision to terminate him. *Id.* at 151-52.

DeWolfe implemented the Shred-It policy. *Id.* at 152. He believed that as manager of the Kansas City center, he was responsible for the proper handling and disposal of documents. *Id.* at 155. He also created the document handling policies for the Kansas City center. *Id.* at 165; CX 1. The policy stated that "ALL member/patient files must be secured prior to closing every night." CX 1. He explained that:

Current surgical patients, clients, when they purchased, they were locked up in the doctor's office and secured. All other documents that were required by our company to have them filled out, including the surgical and some of them the health history patient records as far as their credit apps for credit cards, their intake forms, Item No. 14, those were secured in the NB 1's offices, yes.

Id. at 166.

DeWolfe first believed that the disposal of the boxes violated the ACA after speaking with OSHA. *Id.* at 157. He believed that something should have been done about the disposal of the health information. *Id.* at 161

Julie Jones and Tierra Byrd Incidents

DeWolfe testified about the incident with Julie Jones. There was an argument between Jones and “Christa” and he moved the argument into his office. *Id.* at 148-49. He stayed in the office the whole time. *Id.* at 149. Jones became excited and slapped papers down on Christa’s leg. *Ibid.* Jones walked out of his office, and then Christa walked out. *Ibid.* Christa immediately called a senior technical manager. *Ibid.* He immediately called Wotherspoon and told him he was going to Human Resources in the morning (as the incident occurred at the end of the day). *Ibid.* DeWolfe called Michelle Graves in Human Resources the next morning. *Ibid.* He did not think that Jones should have been fired, but he was told by Graves that it was the only thing that HCM could do. *Id.* at 170. He does not understand why or how HCM could view his handling of the situation a failure by him. *Id.* at 149.

DeWolfe agreed with the decision to fire Byrd. He informed HCM’s management about her taking HCM’s clients, and they took over the situation and fired her. *Id.* at 151. He does not feel that he was responsible for Byrd’s actions because he did not know about it and as soon as he had a suspicion he reported it up to Steve Stickney, and they tried to handle it within the Kansas City center. *Id.* at 167-69. Byrd filed several complaints against HCM, including DeWolfe, after her termination. *Id.* at 169.

DeWolfe believed that Byrd’s termination hurt the office because some employees were friends with her. *Id.* at 150. However, he did not believe that the termination hurt the office’s revenue. *Id.* at 150-51.

Disposal of Initial Client Intake Forms on November 5, 2011

DeWolfe was not in the office on Saturday, November 5, 2011. *Id.* at 138. The center had a new NB 1 consultant (Hagen), and Barnes was going to work with her to set up her office. *Id.* at 139, 156. When he returned to work on Tuesday, November 8, 2011, he received an email from Khan. *Id.* at 139. He learned that the two boxes that contained personal information had been discarded. *Ibid.* Khan said that she found Social Security and driver’s license information in the box. *Id.* at 140.

DeWolfe believed that there was also health-related information in the box, even though he did not personally review the contents of the box. *Id.* at 140, 153. He based this “on the fact that – again, I don’t know what’s changed, but when a client was getting tele-medicine, we filled out the medical history or wrote an email to the doctor a quick synopsis of the client’s health.” *Id.* at 140. When a doctor did a consultation, the first two pages of the initial client forms (the male and female profiles) would have health-related information on them. *Id.* at 141; CX 14 at 1-2. The doctor would commonly talk to the patient and the consultant would write notes on the profiles sheets, such as what medications the patient was taking and what might attribute to the hair loss. *Id.* at 141. The consultant would take a lot of notes. *Ibid.*

DeWolfe believed that the box contained this information because it was originally in his office and kept under security. *Id.* at 140, 153. But he moved them to Hagen’s office prior to his

first day of work. *Id.* at 140, 156. He said that it contained “Be Backs.” *Id.* at 141; *see, e.g.*, CX 14.

Barnes, Hagen, and Khan did not tell him that the box contained health information. *Id.* at 154. He did however remember the word “HIPAA” coming up in a conversation with Hagen. *Ibid.* He was unable to secure the box because by the time he came back to work it was already disposed of. *Id.* at 156.

DeWolfe first told A.J. Clinkbeard that “all of the past Be Backs and all that information was thrown out.” *Id.* at 142. Clinkbeard told him to speak with Wotherspoon. *Ibid.* DeWolfe did not contact Wotherspoon “right away,” but contacted him in January. *Ibid.* DeWolfe mentioned “it” to him in “early January,”¹⁰ and then he told Wotherspoon that the profiles had been thrown out on January 12, 2012. *Id.* at 142-43, 157.

Wotherspoon and DeWolfe exchanged emails on January 12, 2012 after Wotherspoon sent an email to DeWolfe, Barnes, and Clinkbeard saying that Hagen needed to increase her sales volume. *Id.* at 143. The correspondence was as follows:

Wotherspoon: “Has [Hagen] not been working the phones from when you were covering and JJ’s no buys? May be opportunity here especially with the lack of volume right now. . .”

DeWolfe: “They were all thrown away!!”

Wotherspoon: “I’m not following? Your profiles and JJs profiles were thrown away?”

DeWolfe: “When I was gone in November Kelly’s office was cleaned out to give her a fresh start.”

Wotherspoon: “Tough to work phones with no prospects. I wish I would have known this.”

CX 9; *see also* Tr. 144.

DeWolfe was asked why he waited two months after the documents had been disposed of to inform HCM if he felt something should have been done about it. *Id.* at 161. He replied that he “did eventually.” *Id.* at 162.

DeWolfe felt like “something should have been taken care of since it was brought up.” *Id.* at 161.

¹⁰ DeWolfe mentioned twice that he spoke to Wotherspoon about the documents “in passing” prior to his email exchange with Wotherspoon on January 12, 2012. *See id.* at 142-43, 157. However, DeWolfe provided no details about this report, such as where or how it occurred, what was said, or who was present. *See ibid.*

DeWolfe's Termination

DeWolfe was told that he was terminated because of “the drop in PCP count and revenue. PCP is the preferred client, the clients that are in the Bio-Matrix system that then go on to a maintenance program where they pay monthly for that maintenance program.” *Id.* at 135; *see* CX 2. PCP clients are the only ones that use the Bio-Matrix program. *Id.* at 137. So, since there was a drop in the people using the Bio-Matrix program, there was a drop in PCP revenue at the HCM Kansas City center. *Ibid.*

DeWolfe explained that the reason that HCM fired him for “membership attrition” was that many of the members decided on surgery after the Kansas City center was outfitted with the capabilities to do surgeries.¹¹ *Id.* at 137. Surgery was a one-time source of revenue. *Id.* at 138. The only way to increase PCP revenue was to sign up new customers for the Bio-Matrix program or possibly EXT clients on a month-to-month basis. *Id.* at 138.

DeWolfe believed that HCM’s decision to terminate him for a loss of PCP clients was false, as the company did not lose revenue in the region. *Id.* at 145-46. He explained:

. . . the company had not lost revenue . . . because the clients migrated to surgical or they migrated over to the other locations over the past three years, especially the Omaha office that opened. My general knowledge of everything, and it’s pretty good knowledge, was that over 60 clients left due to the three offices. That’s a minimum of 60 clients moved over due to the three competing offices. There are different amounts to each location.

I also know that we lost well over 100 patients – didn’t lose them, sorry, we moved them to surgery. They purchased surgery in the first year and a half.

Id. at 146. So, although there was a loss of revenue in the Kansas City center, there was not an overall loss within the region. *Ibid.* DeWolfe further pointed out that Tierra Byrd may have pulled away another 65 clients. *Ibid.* And the loss of Julie Jones may have further hurt the number of new clients coming in the door. *Id.* at 148.

DeWolfe further believed that the reasons for his termination were false because he was never written up for a drop in the PCP numbers prior to his termination. *Id.* at 135. Nor was he ever notified that there were concerns about the decline in revenue at the Kansas City center. *Ibid.*; *id.* at 138. Finally, he believed that he had received a management bonus, that his clients were happy, and that his staff was happy. *Id.* at 147. He said these were the goals of a manager. *Ibid.*

¹¹ Although the surgery facility was not owned by HCM and HCM did not perform the operations, HCM still managed it. *Id.* at 163.

KELLY HAGEN

Kelly Hagen is a NB 1 sales consultant in HCM's Kansas City center. *Id.* at 222. She replaced Julie Jones. *Ibid.* She was hired on October 10, 2011 by DeWolfe, Wotherspoon, Barnes, and Melissa Oaks. *Id.* at 222-23.

Hagen testified about the client intake forms. She said that the male and female consultation forms, as well as the consent forms, are used primarily by her, and are kept in a filing cabinet in her office. *Id.* at 223. The first three pages do not contain any health or medical history information. *Id.* at 223-24.

Hagen said she has never seen or used the Medical History form. *Id.* at 224. She would not fill out the Medical History form if a client decided to have surgery. *Ibid.* Rather, Khan, the surgical coordinator, would fill out the Medical History forms and create a surgery folder for the customer. *Id.* at 225. The Medical History forms are not kept in Hagen's office. *Id.* at 225.

Hagen keeps copies of client prescriptions in her office. *Id.* at 231. She does not keep any other medical or health information in the files in her office. *Ibid.*

In her short time working with DeWolfe, Hagen said he was very unorganized and consumed with the Byrd incident. *Id.* at 231.

Disposal of Initial Client Intake Forms on November 5, 2011

Hagen was involved with the disposal of the box of documents at issue in this case on November 5, 2011. *Id.* at 225. Hagen and Barnes were setting up her office for her first week of work. *Ibid.* She and Barnes put in the box client intake forms (Personal Consultation forms). *Id.* at 226-27, 231. She did not see any medical or health information in the forms. *Id.* at 230. She did not do anything with the box after that. *Id.* at 227.

Khan then came to her that same day and told her that the box by the back door contained client financial information such as Social Security numbers and driver's licenses. *Id.* at 227. Khan did not mention health, medical history, or surgery information though. *Ibid.* Hagen afterwards went to the back door, briefly looked through the box, and moved it to outside of "Chang's office" so that it would not be thrown in the trash. *Id.* at 229. She did not talk to Khan again about the box. *Ibid.*

DeWolfe told Hagen on Tuesday, November 8, 2011 that the box she had moved to Chang's office was thrown away. *Id.* at 229. DeWolfe did not say to her that the box contained health information or prescriptions information. *Ibid.* She "asked [DeWolfe] some questions, you know, what does this mean? He referred to the fact that there was personal information, possible driver's license, Social Security card, financial information, but not to worry, I would not be held accountable, that definitely he'd be holding Lauren Barnes accountable." *Id.* at 230. Hagen did know why Barnes would be held accountable. *Ibid.*