

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 09 August 2018

ALJ NO.: 2015-ACA-00005

KITTY GALLAS,
Complainant,

v.

THE MEDICAL CENTER OF AURORA,
Respondent.

Before:

Colleen A. Geraghty, Administrative Law Judge

Appearances:

Kitty Gallas, *pro se* Complainant

Hannah Caplan, Esq. and Lisa Hogan, Esq., the Law Firm of Brownstein, Hyatt, Farber, Schreck, Denver, Colorado, for the Respondent

DECISION AND ORDER DENYING CLAIM

I. STATEMENT OF THE CASE

This matter arises from a complaint filed by Kitty Gallas (the “Complainant”) with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against The Medical Center of Aurora (the “Respondent” or “TMCA”) under the whistleblower provision of the Affordable Care Act (the “ACA”). *See* 29 U.S.C. § 218c and the implementing regulations at 29 C.F.R. Part 1984.

A hearing was held before me in Denver, Colorado, on December 6-7, 2017, at which time the parties were afforded the opportunity to present evidence and arguments. Complainant appeared *pro se/self-represented* and Respondent was represented by counsel. The hearing record will be cited herein as “TR.” Testimony was heard from the Complainant, Dawn O’Neal, Keith Krull, Susette Calvillo, Deborah Bowers, Paul Burgeson, Jennifer Meehan, Brent Longtin, and Carol Woodruff. The parties’ documentary evidence was admitted as Joint Exhibits (“JX”) 1-22, Complainant’s Exhibits (“CX”) 1, 3-15 & 17,¹ and Respondent’s Exhibits (“RX”) 1-91. Hr’g Tr. (“TR”) 495-497.

¹ Complainant withdrew CX 2 and CX 16. TR 494-95.

The parties submitted post-hearing briefs (“Compl. Br.” and “Resp. Br.” respectively).²
The record is now closed.

II. STIPULATIONS AND ISSUES PRESENTED

The parties have stipulated to the following facts in this matter:

1. During Complainant’s employment and currently, Respondent has been an “employer” subject to the whistleblower protection provision of the ACA;
2. Complainant was an “employee” of the Respondent, as that term is used in the whistleblower protection provision of the ACA;
3. Complainant received a B.S.N. from C.U. Health and Sciences Center in 1988 and a B.A. in Psychology from Metro State in 1990;
4. Complainant has practiced psychiatric nursing since 1988;
5. Complainant was employed by Respondent as a member of the TMCA Crisis Assessment Team (“HCAT”) Staff, where her primary job responsibility was performing behavioral health assessments (“BHAs”);
6. A BHA is not the beginning of any ongoing therapeutic or other relationship;
7. Complainant received training on the Emergency Medical Treatment and Labor Act (“EMTALA”) and the Health Insurance Portability and Accountability Act (“HIPAA”) during her employment;
8. In 2013, TMCA started using TeleMental Health as a method of conducting BHAs;
9. Respondent has never billed, charged, or bundled for BHAs conducted via TeleMental Health or face-to-face;
10. In November 2013, Ms. Gallas and all members of the HCAT staff were provided updated job descriptions to reflect both the narrow scope of their assessments and the requirement that they conduct assessments via TeleMental Health, when appropriate;
11. Complainant’s new job description provided that BHAs “may occur face to face or via [TMCA’s] TeleMental Health computer program”;
12. Complainant signed her new job description on November 20, 2013;

² Respondent attached to its post-hearing brief Exhibit A (Article entitled “Protection from Employer Retaliation” from www. Healthcare.gov), Exhibit B (Colorado Nursing Board Policy 30-09), and Exhibit C (Colorado Medical Board Policy 40-27). This evidence was not submitted at hearing, and the record is closed. Accordingly, the exhibits attached to Respondent’s brief are not admitted into the record and will not be discussed herein.

13. Prior to 2013 and the requirement that Complainant perform BHA via TeleMental Health, Complainant had generally positive performance evaluations;
14. When TeleMental Health was first introduced, Complainant objected to and refused to perform any BHAs via TeleMental Health;
15. During Complainant's employment with Respondent, Complainant objected to and refused to perform any BHAs via TeleMental Health;
16. On January 9, 2014, Human Resources professional Paul Bergeson wrote Complainant a letter, a true and accurate copy of which is at RX-68;
17. At an HCAT monthly staff meeting in February 2014, which Complainant attended, it was reported that the hospital was found to be in full compliance in its recent 27-65 regulatory review (conducted by the Colorado Office of Behavioral Health to evaluate compliance with Colorado laws on mental health treatment);
18. At an HCAT staff meeting in February 2014, which Complainant attended, TMCA informed HCAT staff that conducting TeleMental Health assessments was legitimate and that it did not place the staff's licenses at risk;
19. According to staff minutes dated March 12, 2014, scheduling changes 11(d) states "If you are called to do a eval at 'GoLive' location (SEED, NEER, CMP, SWER, SMC) and the patient can be served quicker with a face to face eval (meaning that you live closer to the facility than the office), please go to the hospital and do a face to face, and document reasons for no tele";
20. In April 2014, all HCAT staff members, including Ms. Gallas, were provided a document titled "Information for HCAT Staff," which included the following:
 - **Do any HealthONE hospitals bill Medicare or Medicaid for HCAT evaluations?** No. HealthONE facilities do not bill Medicare, Medicaid or any other insurance for any telemedicine or in person evaluations done by HCAT employees.
 - **Are telemental health evaluations illegal in Colorado?** No. Legal counsel is re-reviewing this issue. This was previously reviewed and determined not to be illegal.
21. The "Information for HCAT Staff" document also included an email exchange dated April 17, 2014 between Scott Williams (then AVP of TMCA Adult Behavior Services) and Jackie Arcelin (Program Director with Colorado DORA) where Ms. Arcelin confirmed: "[T]here is nothing

in the state standard that prohibits [TMCA] from providing initial assessments in our Emergency Departments,” although it is recommended when beginning “an ongoing therapeutic relationship rather than one time emergency assessments to determine disposition” the initial contact be face-to-face, and even then, the policy is only a recommendation, and are “not to be interpreted as legal requirements”;

22. Complainant acknowledged on April 9, 2014 that she received and understood TMCA’s TeleMental Health Guidelines and her job description;
23. Respondent stated that TeleMental Health and face-to-face evaluations were “not billed,” as a response to Complainant’s concerns during her employment;
24. During the July 9, 2014 HCAT Staff Meeting, it was announced that “any face-to-face evaluations (Monday through Friday during traditional business hours) would be completed by” a particular employee (not Complainant), unless other resources were required;
25. The July 2014 HCAT Staff Meeting further clarified that TMCA was the new TeleMental Health “hub” so that clinicians at TMCA can be utilized to complete TeleMental Health evaluations at other “Go Live” hospitals;
26. Respondent terminated Complainant’s employment on July 24, 2014;
27. Respondent’s stated reason for Complainant’s termination on July 24, 2014 was “for failure to follow management’s instructions concerning the performance of [her] job duties”;
28. Complainant was near the SMC location when the TeleMental Health evaluation was requested; and
29. Complainant elected to receive a Peer Review of her termination, and the TMCA Peer Review Panel affirmed Complainant’s termination.

Joint Pre-Trial Stmt. 1-4.

The issues before me are: (1) whether the Complainant engaged in protected activity under the Act; (2) if Complainant engaged in protected activity, whether that protected activity continued to be protected; (3) whether any alleged protected activity was a contributing factor in the adverse action alleged by the Complainant; (4) whether Respondent has proven by clear and convincing evidence that it would have taken the same action in the absence of any protected activity; and (5) whether Complainant is entitled to damages. Joint Pre-Trial Stmt. 8.

III. PROCEDURAL HISTORY

On March 5, 2015, the Regional Administrator for OSHA, acting as agent for the Secretary of Labor (“Secretary”), issued a letter dismissing Complainant’s claim. On April 6, 2015, Complainant objected to the Secretary’s preliminary order and requested a hearing pursuant to 29 C.F.R. § 1984.106. The case was then referred to the Office of Administrative Law Judges (“OALJ”) for a formal hearing before the undersigned administrative law judge.

Prior to the scheduled hearing, the Respondent filed a Motion to Dismiss. On July 15, 2015, I issued an Order Granting Respondent’s Motion to Dismiss, finding Complainant failed to state a claim upon which relief could be granted, as she failed to allege any protected activity under the ACA.

Complainant appealed my dismissal order to the Administrative Review Board (“ARB” or the “Board”). On May 8, 2017, the Board issued a Decision and Order vacating my order of dismissal. *Gallas v. The Medical Centers of Aurora*, ARB Nos. 16-012, 15-076, ALJ Nos. 2015-SOX-013,³ 2015-ACA-005 (ARB Apr. 28, 2017) (hereinafter “ARB Remand”). In vacating my order of dismissal, the Board found that Complainant’s complaint “clearly satisfies the low threshold for stating a claim that she engaged in ACA-protected activity.” ARB Remand at 9. The Board stated in order to state a claim, Complainant need only allege “some facts about the protected activity, showing some ‘relatedness’ to the laws and regulations of the statutes in our jurisdiction.” *Id.* at 10 (*quoting Evans v. U.S. EPA*, ARB No. 08-049, ALJ No. 2008-CAA-003 (ARB July 31, 2012)).

The Board held I erred in dismissing Complainant’s claims relating to EMTALA, HIPAA, and improper pre-authorization, stating the “subject matter of each of these statutes is not merely referenced in the ACA but explicitly addressed.” ARB Remand at 11. The Board cited to three specific provisions of the ACA to support its finding that “Gallas’ alleged protected activity relating to EMTALA, HIPAA, pre-authorization (by insurer of services) are sufficiently related to matters contained in ACA to invoke protection under the ACA’s whistleblower provisions and to satisfy the threshold requirements to survive a motion to dismiss under the *Evans* standard.” *Id.* at 13. The Board therefore vacated my findings and remanded Complainant’s claim for further consideration. *Id.*

A full evidentiary hearing was held on remand, and the case is now ready for disposition. Based on the parties’ stipulated facts, hearing testimony, and documentary evidence, I find the Complainant has not met her burden of establishing she engaged in protected activity under the ACA. Alternatively, assuming Complainant engaged in protected activity, I find her protected activity was not a contributing factor in Respondent’s adverse actions, and that Respondent has proven it would have taken the same adverse action in the absence of the protected activity. Accordingly, Complainant is not entitled to relief under the ACA.

³ Complainant initially brought a claim under the SOX whistleblower provision in addition to her ACA claim. The Board in its May 8, 2017 decision affirmed my order granting TMCA’s motion for summary decision on the SOX claim. ARB Remand at 8.

IV. EVIDENCE PRESENTED

A. Witness Testimony

1. Complainant

The Complainant has a Bachelor's Degree in Nursing and Psychology. TR 9. She started working for the Respondent in 1999 as a "Psychiatric Evaluator." TR 12. In 2013, the physical location of her team, then called "Support Line," moved from Presbyterian St. Luke's Hospital to The Medical Center of Aurora ("TMCA"), and at this time, Complainant's title changed from "Psychiatric Evaluator" to "Behavioral Health Assessment Clinician," and her team name changed from "Support Line" to the "Hospital Crisis Assessment Team" ("HCAT"), with no change in the job itself. TR 13, 16. Prior to working with Respondent, Complainant worked in patient psychiatric hospitals, children's hospitals, and drug and alcohol units for over 40 years. TR 17.

Complainant worked as an on-call psychiatric evaluator with Respondent; she carried a pager, and when a person would come into one of the 10 affiliated OneHealth Hospitals' Emergency Rooms ("ERs") with issues such as homicidal or suicidal ideation, drug and alcohol abuse, or psychosis, she would be dispatched to the hospital to perform a psychiatric evaluation.⁴ TR 15. She would also conduct psychiatric evaluations of patients already admitted to the hospital. TR 15. She typically worked the evening shift, from 2 p.m. to 10 p.m., three days a week, and during each shift, she would be on-call to go to whatever hospital needed a psychiatric evaluation. TR 16, 20. She did not treat patients and the initial psychiatric evaluation or behavioral health assessment was not the start of any ongoing therapeutic relationship; she would evaluate individuals to decide whether they needed in-patient care or could be seen on an outpatient basis. TR 83, 154-55, 162. She would then make a recommendation to the ER physician, and the ER physician would make the ultimate decision of whether to admit or discharge the patient. TR 93.

Complainant first learned that the Respondent intended to implement TeleMental Health during a staff meeting in July of 2013. TR 23. Management informed HCAT staff that they were to perform TeleMental Health evaluations remotely at TMCA using stroke monitors. TR 27. Complainant testified management stated psychiatric evaluations were taking, on average, two to three hours to perform,⁵ and the goal with TeleMental Health was to complete psychiatric assessments in twenty to forty minutes. TR 23-24. Complainant stated her then-supervisor, Keith Krull,⁶ was present at the meeting. TR 25. Initially, TMCA only had a few monitors, so the HCAT staff was told either to go to the hospital directly to perform a face-to-face evaluation,

⁴ Prior to the psychiatric evaluation, the ER physician and nurse would have seen the patient and performed a physical assessment. TR 90. The ER doctor then would determine whether a behavioral health assessment was appropriate. TR 91.

⁵ Complainant testified that an assessment involves not just interviewing the Complainant, but also talking to collateral contacts, which could include the police, family members, or school teachers. TR 24.

⁶ Keith Krull was Complainant's supervisor at the time of the physical change in location to TMCA and the title change to "Behavioral Health Assessment Clinician." TR 18. Complainant testified Mr. Krull remained her supervisor until he quit about three or four months after the location change. TR 18. Thereafter, Jennifer Meehan became her immediate supervisor. TR 18.

or to TMCA to remotely perform a TeleMental Health evaluation. TR 27. Complainant testified Respondent started rolling out TeleMental Health on a small scale and slowly expanded its use. TR 29-30.

Complainant first complained to management about TeleMental Health in August 2013. TR 30. She voiced ethical concerns about the process because she believed all of one's senses are required to perform a psychiatric assessment, in order to grasp body language, look directly in the patient's eyes, and observe subtle cues. TR 30, 36-37. She believed the use of TeleMental Health constituted a substandard practice and was concerned that she would lose her nursing license as a result of this substandard practice.⁷ TR 39. She testified that she consistently and continually complained that TeleMental Health violated the State Board of Psychology, the American Psychiatric Association,⁸ and the Centers for Medicare and Medicaid Services ("CMS"),⁹ all of which stated face-to-face evaluations are the best standard of care and that TeleMental Health should only be used in rural areas. TR 32-33, 41. Complainant also made complaints that the use and implementation of TeleMental Health violated EMTALA because it was not best practice. TR 44-45. She stated initially there was no written informed consent form for TeleMental Health, and this was also an EMTALA violation. TR 45.

Complainant testified that she also made several HIPAA complaints related to the consent form used for TeleMental Health. TR 54. She stated Respondent initially violated HIPAA because for over one month, there was no consent form for patients to sign to consent to TeleMental Health services. TR 56. Complainant testified Respondent created a consent form in response to her and her co-workers complaints. TR 56-57. Complainant stated that even after Respondent developed a consent form, the consent form itself violated HIPAA. TR 54-55. She stated the consent form states that TeleMental Health may not be as complete as face-to-face evaluations and you may not have the same privacy as face-to-face evaluations because it is performed electronically and can be accessed by unauthorized persons. TR 54-55. She stated this information is in small print and the patient only keeps the second page, which is just a basic explanation of the TeleMental Health process. TR 55. She also testified that if patients refused to do a TeleMental Health evaluation, they were told they had to wait for an evaluation, because there was no one available for a face-to-face evaluation. TR 45.

Complainant testified she made internal complaints to management, including to her supervisor, Jennifer Meehan,¹⁰ and Scott Williams, who was Ms. Meehan's supervisor and the Vice President of Behavioral Health. TR 32, 66, 128. She also made internal complaints to Carol Woodruff, the Respondent's Ethics and Compliance Officer, and Paul Burgeson in Human

⁷ Complainant stated that a co-worker contacted the Department of Regulatory Agencies ("DORA") in the State of Colorado, and the agency stated that their licenses were in jeopardy and that the co-worker should talk to her Human Resources person. TR 39, 42.

⁸ Complainant provide a copy of the American Psychiatric Association's guidelines for the psychiatric evaluation of adults, which states the "psychiatrist's primary assessment tool is the direct face-to-face interview of the patient." TR 168; CX 4; CX 5. Complainant acknowledged this document refers to psychiatrists and therapeutic treatment. TR 169.

⁹ Complainant provided a CMS Fact Sheet from 2015 which states that Medicare beneficiaries are eligible for telehealth services only if they are in a rural Health Professional Shortage Area located either outside of a Metropolitan Statistical Area ("MSA") or in a rural census tract, or a county outside of a MSA. CX 3.

¹⁰ Jennifer Meehan replaced Keith Krull as Complainant's supervisor after Mr. Krull left TMCA. TR 18.

Resources (“HR”). TR 37, 42, 48. In addition, she voiced complaints during monthly team meetings, during which either Jennifer Meehan or Scott Williams would be present. TR 32, 136. Complainant stated management and HR simply responded that she should not worry about it and their lawyers reviewed TeleMental Health and found it was not against the law. TR 34-35, 38, 43. She stated they would not address her and her co-workers concerns. TR 43, 59. She stated she asked Carol Woodruff to have their lawyers attend the monthly meetings, but they never did. TR 35. She stated they never received any documentation from the lawyers either; management only provided information on how to conduct TeleMental Health evaluations and did not provide information regarding its legality, despite her and her co-workers requests for such information. TR 36, 136. However, Complainant did acknowledge she received a FAQ from management, in which Jacqueline Arcelin, the Program Director for the Colorado Department of Regulatory Agencies (“DORA”) stated that TeleMental Health evaluations were legal; Complainant testified she disagreed with Ms. Arcelin. TR 156. Complainant also made complaints to Respondent’s Ethics Hotline. TR 66. She stated the Ethics Hotline did not conclude its investigation until after she was terminated. TR 134. She did not receive any information from the Ethics Hotline until they concluded the investigation and found her complaints were unsubstantiated. TR 134.

Complainant testified she had drafted a letter “To Whom It May Concern,” dated November 17, 2013, outlining all the complaints that she had made, and gave it to Ms. Meehan, Ms. Woodruff, and to the Centers for Medicare and Medicaid Services (“CMS”). TR 43, 80. She drafted a second, revised “To Whom It May Concern” letter that Complainant stated she gave to the Ethics Hotline after she was terminated because her case had not yet resolved. TR 79.

Complainant acknowledged that there was a Unit Practice Council (“UPC”) of her peers that also expressed concerns about TeleMental Health, and the committee gathered information and followed up on issues with the use of TeleMental Health. TR 137. She acknowledged that Ms. Woodruff and other management often attended the UPC meetings. TR 138. She also acknowledged that her colleague, Mike Tapp, was on the committee, and raised concerns about TeleMental Health to TMCA. TR 137-38.

In addition to her complaints about TeleMental Health, Complainant also testified she made complaints in connection with two specific incidents. In regard to the first instance, Complainant testified that she informed a physician, Dr. Krohn, that a patient needed to be admitted to the hospital, and he told her to call the insurance company to pre-authorize the admission before he would admit the patient. TR 47-48. Complainant told Dr. Krohn he had to admit the patient regardless of insurance. TR 48. She stated she did call the insurance company, but it was not open because it was after hours. TR 48. She informed Dr. Krohn, who ultimately did admit the patient. TR 48. Complainant testified that it was an EMTALA violation to require pre-authorization for emergency care, and she complained to Jennifer Meehan the following day. TR 49-50. Complainant stated after she complained about the pre-authorization, Respondent changed the “Doctor’s Presentation Form” to exclude information regarding insurance. TR 54.

The second instance Complainant complained of involved a pregnant woman who came to the hospital complaining of suicidal thoughts and requesting to be admitted. TR 50. Complainant performed a psychiatric evaluation, during which the woman stated she was feeling suicidal and that her husband was physically abusing her. TR 51. At the end of the conversation, the woman stated she felt better and no longer wished to be admitted. TR 51.

However, based on what the woman had stated, Complainant decided she needed to be admitted and put an involuntary hold on the woman. TR 51. Complainant informed the attending psychiatrist, Dr. Rogers, that she had placed a hold on the woman, and Dr. Rogers complained that she should not have held the patient because she is pregnant and cannot be medicated. TR 52.

Following these two incidents, Ms. Meehan requested a meeting with Complainant, stating that the two physicians had complained about her. TR 52. Complainant recalled that in the meeting, Ms. Meehan told Complainant that she should not have put the pregnant woman on a hold because she did not have a history of mental illness. TR 52. Complainant responded that prior mental illness was not a requirement for placing a hold. TR 53. As for the doctor who required pre-authorization, Ms. Meehan said there was no EMTALA violation because the patient was ultimately admitted. TR 53. Complainant testified that Ms. Meehan did not read her reports from either incident prior to the meeting.¹¹ TR 52.

In addition to the two physician complaints, Ms. Meehan also informed the Complainant that she had received a complaint that Complainant did not know how to do a three-way call; Complainant responded that no one knows how to do three-way calls and they actually voiced this complaint during a team meeting. TR 60. Ms. Meehan also told Complainant that the pregnant woman that Complainant had placed a hold on had also complained about how Complainant was dressed, that she sat too close to her, and that she revealed personal information that made her uncomfortable. TR 62.¹² Complainant stated Ms. Meehan had Susan Rinaldi, the head nurse who does in-house evaluations, sit in on the meeting where she discussed the various complaints with Complainant. TR 63, 126. Complainant said it was embarrassing and there was no reason for Ms. Rinaldi to be there. TR 64.¹³

Complainant testified Ms. Meehan directed Complainant not to talk to any doctors until she completed retraining. TR 61. Complainant requested someone from HR sit in on the meetings and ultimately the retraining only lasted for three shifts. TR 61. Complainant believed it only lasted a week because she had filed a formal complaint about the retraining with the Ethics Hotline, Ms. Meehan, and Mr. Williams. TR 72. She stated during that week, she had to ask someone else to talk to the doctor and present the case, and she would sit next to them to answer the doctor's questions. TR 123. Complainant testified that she believed her retraining and not being able to speak with doctors was in retaliation for her complaints. TR 81-82.

Complainant testified that on July 23, 2014, a dispatcher assigned her to a TeleMental Health evaluation. TR 68. She stated she was near the Swedish Hospital, where the two patients were located, but the dispatcher wanted her to drive a half hour or more to TMCA to evaluate the

¹¹ Complainant stated she had a follow up meeting with Ms. Meehan and Scott Williams, and Mr. Williams also did not read her reports from the two incidents. TR 128.

¹² Complainant also referred to an instance when Ms. Meehan had emailed her, and she had responded, but the response email never went through to Ms. Meehan. TR 82. After that, Ms. Meehan told Complainant she wanted Complainant to respond to every email she sent. TR 82-83. Complainant stated Ms. Meehan sent emails daily, and Complainant had to respond to each email, even when she was not scheduled to work. TR 82-83. She believed this was in retaliation for her complaints. TR 81-82.

¹³ Complainant testified in addition to her complaints about TeleMental Health, HIPAA violations and EMTALA violations, she also made complaints about Ms. Meehan's conduct. TR 59, 66.

patients via TeleMental Health. TR 68. Complainant told the dispatcher she does not conduct TeleMental Health evaluations and that she was near the Swedish Hospital. TR 68. She stated she would do a face-to-face evaluation. TR 69. The dispatcher checked with her supervisor, then told Ms. Gallas to proceed with the face-to-face evaluations. TR 69. Complainant did the first evaluation and then was called by somebody who was filling in for her supervisor at the time¹⁴ and told not to perform the second evaluation and to go home. TR 70. Five hours later, TMCA had another evaluator, Dawn O'Neal, perform the evaluation face-to-face. TR 70.

The following day, on July 24, 2014, Complainant was terminated by Paul Burgeson and Eric Artis in HR. TR 22, 71. She was directed to come to the office the next day to return her badge. TR 71. When she went to the office, she was given a termination letter. TR 71. She stated that Paul Burgeson asked her to quit during the conversation, but she told him she did not want to quit and she wanted to keep her job, without doing TeleMental Health evaluations. TR 177. She testified she knew that she would likely be terminated when she refused to do a TeleMental Health evaluation. TR 179. Complainant stated prior to her complaints in 2013 and 2014, she had worked for 14 years for Respondent without any issues. TR 81. Upon her request, Complainant went through a peer review of her termination. TR 176. She stated that the panel members were not her peers because they had no psychological training, and that the panel would not let her discuss her various alleged violations. TR 177.

2. Dawn O'Neal

Ms. O'Neal has been a clinical psychologist for 13 years, and worked with Complainant for 10 years. TR 182-83, 191.

Ms. O'Neal described the process of an initial emergency patient evaluation. TR 184. She testified that she reads the background history of the client, looks at risk factors, interviews "collaterals," meaning anyone associated with the client who has pertinent knowledge, and then interviews the client. TR 184. The goal is to determine the appropriate level of care, whether it be in-patient, intensive outpatient, or outpatient care. TR 184. She stated on average, it takes two hours to conduct a psychiatric evaluation, including the write-up, and can take up to four hours for more complicated cases. TR 184-85.

Ms. O'Neal testified with TeleMental Health, an evaluator loses certain elements of the communication process. TR 185. She stated there is an online chart to review, but it may be missing materials the client brought into the hospital. TR 185. She also stated a large part of the evaluation component includes what you can see about the client, including smells, which may indicate signs of being unkept or unwashed. TR 185. In addition, she stated that depending on how the equipment is working, the quality of what an evaluator can see varies. TR 186. Ms. O'Neal's opinion was that TeleMental Health is appropriate when it is the only option, such as in remote or rural areas, but face-to-face evaluations are best practice. TR 186-87.

Ms. O'Neal stated she was concerned about the use of TeleMental Health at TMCA because the quality of the evaluation was suffering and HCAT staff was not provided with proper training protocols. TR 188. She stated she looked into DORA and it seemed equivocal on whether TeleMental Health was proper. TR 188.

¹⁴ By this time, Ms. Meehan had left TMCA, and was replaced by Brent Longtin as her interim supervisor. TR 70, 86.

Ms. O’Neal made an anonymous complaint to the Ethics Hotline about TeleMental Health. TR 190. She stated that complaints by Complainant and others seemed to be “brushed aside” and they were given “pep talks about why this would be great.” TR 191. She testified TMCA did not listen to the complaints. TR 192. She testified she also felt anxious about management’s push to complete evaluations in thirty minutes, because she did not think a good evaluation could be done in that amount of time. TR 193.

Ms. O’Neal stated the TeleMental Health at TMCA was initially presented as optional, but eventually TMCA started to make it mandatory. TR 189. At that point, she decided to quit because she did not want to perform TeleMental Health. TR 189. Ms. O’Neal testified that she only used TeleMental Health briefly, because she left TMCA approximately six months after it was implemented. TR 187, 189. She still performs psychiatric evaluations at her current job, but does not use TeleMental Health. TR 187.

3. Keith Krull

Mr. Krull testified he was a manager of the Support Line team (before the name changed to HCAT) for 19 and a half years. TR 195. He is a licensed professional counselor and has an MBA. TR 195.

Mr. Krull testified a psychiatric assessment typically takes about forty-five minutes to an hour, depending on the case and the conditions. TR 196. For a complete case disposition, it can take two to three hours, sometimes longer. TR 197. Mr. Krull testified with the new TeleMental Health implementation at TMCA, a concern of his was the amount of time they were suggesting it should take to do an evaluation, 10 or 15 minutes, and the affect that would have on liability and safety of the patients. TR 198. He testified he did not believe TeleMental Health was illegal, but that it can be misused. TR 207.

Mr. Krull stated that when the location moved from Presbyterian St. Luke’s to TMCA, the administration changed, because each HealthOne Hospital has its own administration. TR 206. He stated he had some issues with the new administration and felt his opinions were discounted. TR 205. He ultimately accepted an offer at another hospital system and left TMCA because he wanted to go somewhere where he could make a contribution. TR 205.

Mr. Krull described Ms. Gallas as an “excellent employee” with very good clinical skills and interactions with clients. TR 202.

4. Hilda Susette Calvillo

Ms. Calvillo has a MSW and a Ph.D. in Psychology. TR 209. She worked with Support Line/HCAT for eight years from 2006 to 2014. TR 210.

Ms. Calvillo testified she did not believe TeleMental Health should be used for initial psychiatric evaluations, and face-to-face evaluations, at least in a metro area, are preferable. TR 211. She believes the best practice is to go see the person in their environment, and gather information from the nurses treating the patient and the security guards. TR 212. Her opinion was that TeleMental Health is too limited and you cannot see the whole person, limiting the assessment and decision on how to best help the patient. TR 212.

Ms. Calvillo testified that when TMCA started TeleMental Health, she contacted the American Psychological Association, the Ethics Committee, and the Colorado Psychological Association, and they stated best practice was to do face-to-face evaluations and TeleMental Health should only be used in very limited conditions. TR 213. She voiced complaints to Eric Artis in HR, and he responded they were going to continue using TeleMental Health because no one had said they cannot do them. TR 215. Ms. Calvillo testified she also made complaints to her supervisor, Brent Longtin. TR 213. She stated he informed her if she refused to perform TeleMental Health, she would be terminated. TR 214.

Ms. Calvillo performed about ten psychiatric evaluations via TeleMental Health. TR 222. She felt nervous about the TeleMental Health evaluations and felt like she could not get a complete picture, so she informed management she would not use TeleMental Health anymore. TR 214. She ultimately resigned in July 2014. TR 222.

Ms. Calvillo testified when the Complainant tried to voice concerns during team meetings, management would cut her off. TR 223.

5. Deborah Bowers

Ms. Bowers is a licensed Clinical Social Worker and has been a psychotherapist in private practice for almost 20 years. TR 224. She worked at TMCA's Support Line/HCAT from 1995 to July 2014. TR 224.

Ms. Bowers stated it typically takes about an hour to do a face-to-face evaluation, but that does not include the time it takes to gather information. TR 255. Ms. Bowers testified that she did not believe TeleMental Health was proper, because on the human level, an evaluator should be there with the patient in person. TR 226. She thought TeleMental Health may be beneficial in limited circumstances, for example if it was a second evaluation. TR 227.

Ms. Bowers raised her concerns about TeleMental Health to Jessica Googins, the disciplinary person at DORA, who told her that she should not do TeleMental Health because of ethical concerns and because it was against Colorado's statute for mental health, which states initial assessments must be done in person. TR 228. Ms. Bowers stated she complained to Ms. Meehan about DORA's response, and Ms. Meehan told her not to worry about it and that it was not illegal. TR 229. Ms. Bowers stated she was also concerned about HIPAA violations, because they were not given any information about who had access to the telecommunications. TR 233. She acknowledged, however, that the TeleMental Health evaluations were not recorded. TR 242. Ms. Bowers stated she also complained to Paul Burgeson and Eric Artis in HR, and they told her it was not illegal. TR 238.

Ms. Bowers testified that when Complainant complained in staff meetings, management would cut her off. TR 236. She stated HCAT staff never received anything in writing from the hospital in response to complaints that TeleMental Health was placing their licenses at risk or violating Colorado law. TR 237.

Ms. Bowers testified that once TeleMental Health was implemented, twenty people left TMCA due to ethical concerns. TR 229. She stated she worked full-time and was stationed at Aurora South, where she did not have to do TeleMental Health evaluations. TR 230. She stated because so many evaluators had left, there was a shortage of personnel to conduct the emergency psychiatric evaluations. TR 231. She stated that if a patient refused to be evaluated via

TeleMental Health, they would have to wait until an evaluator was available for a face-to-face evaluation, which could be another full day of holding the patient against his or her will. TR 231.

Ms. Bowers testified that she did one or two TeleMental Health evaluations, but they were with patients that she felt clinically might be okay. TR 245. She testified to an incident where she was at Aurora South and the dispatcher told her to have a patient at the hospital sign a consent for TeleMental Health, and then go to Aurora North to conduct the evaluation by TeleMental Health. TR 234. She refused because she was already at the hospital, and she was written up for her refusal. TR 235.

Ms. Bowers testified that she was let go in July 2014. TR 240. She asked for a peer review of her termination, but the peers consisted of a pharmacy technician and a couple of nurses, and no one who did psychiatry, and she was not allowed to discuss TeleMental Health at the peer review. TR 241.

6. Paul Burgeson

Mr. Burgeson was an HR Business Partner at TMCA from 2013 to 2016. TR 259. He stated he was the first point of contact for “generalist issues” for multiple client groups, including Behavioral Health. TR 269-70.

Mr. Burgeson testified he was aware Complainant was against TeleMental Health, that there was a difference in opinion between TMCA and Complainant, and that Complainant was firmly against the changes being made with TeleMental Health. TR 260.

Mr. Burgeson testified that he recalled being in a meeting with Brent Longtin prior to Complainant’s termination. TR 262. He stated he would also be there as a witness for any corrective disciplinary action. TR 263. He could not recall any specific conversations or corrective actions he observed with regard to Complainant’s concerns with TeleMental Health. TR 265.¹⁵

7. Jennifer Meehan

Ms. Meehan is a licensed Clinical Social Worker. TR 290. She started working for TMCA in December 2012 in Behavioral Health Utilization Review for the Adult In-Patient Unit,¹⁶ and became a manager of HCAT on September 8, 2013. TR 291. She left TMCA on April 6, 2014, having served as manager of the HCAT for six months. TR 293, 338.

Ms. Meehan testified that TeleMental Health went live on her first day in the manager role. TR 339. Her understanding was that it was not the clinician’s choice to decide to do a face-to-face evaluation versus a TeleMental Health evaluation, but rather it was the doctor’s call. TR 339. She acknowledged the Complainant and other staff members complained about TeleMental Health and raised concerns about their licenses, and she raised the issue with her supervisor and

¹⁵ Mr. Burgeson’s testimony was of limited value, as he testified he could not recall any specific meetings with Complainant, or any specific complaints Complainant may have made about TeleMental Health.

¹⁶ In Behavioral Health Utilization Review, Ms. Meehan completed insurance reviews and obtained authorization for all the adults admitted into the unit. TR 291-92.

with corporate. TR 326, 344. Ms. Meehan stated in response to complaints from staff about TeleMental Health, she also implemented the Unit Practice Council (“UPC”), and she asked for volunteers to look further into the use of TeleMental Health and to be the voice of HCAT to bring collective concerns to the administration, including to Scott Williams, the vice president of Behavioral Health. TR 340, 353. She stated one issue the UPC raised was written informed consents, which was addressed and implemented by management. TR 353, 357. She stated they had monthly staff meetings as well, during which staff could raise concerns. TR 340.

Ms. Meehan stated that staff was notified in September or October of 2013 that they had until January to become comfortable with TeleMental Health, and that they could shadow full-time staff conducting TeleMental Health evaluations. TR 341. She stated Complainant was one of the staff members who requested to shadow staff. TR 342. She stated that TeleMental Health people and a consultant came to role model how to use the monitors, and HCAT staff had an opportunity to practice with the equipment. TR 342. She stated, however, that the psychiatric assessment itself was the same, it was just done over the monitor. TR 342.

Ms. Meehan stated she met with Complainant on November 12, 2013 to address some concerns she had, not to address Complainant’s EMTALA complaints; she did not consider it to be a disciplinary meeting. TR 346-47, 349. She stated Complainant did not raise EMTALA complaints until she had already scheduled a meeting with Complainant. TR 349.

Ms. Meehan testified she recalled discussing the complaint with Dr. Rogers, but not the issue with Dr. Krohn. TR 307. Ms. Meehan stated Complainant believed that Dr. Rogers not wanting to take the patient because she was pregnant was a violation of EMTALA. TR 307. However, Ms. Meehan recalled that the issue was pregnant women were on the hospital’s exclusion list. TR 307. She stated she discussed the issue with Scott Williams, Brent Longtin, Jonathan White and Carol Woodruff. TR 308. She testified that she wanted to make the issue known and that the exclusion criteria be changed, if needed. TR 308. She stated everyone weighed in on the issue. TR 308. She went back to Complainant several times to tell her she had reported it to her supervisors. TR 309. She did not believe she provided Complainant with any documentation on the matter. TR 309.

Ms. Meehan recalled temporarily removing some of Complainant’s duties until she could retrain her, including presenting the case for admission to the accepting doctor. TR 318, 320. She testified that there were a lot of changes occurring in the program, including how clinicians would present a case for admission; she stated originally the Office Manager would present the case and they switched to having clinicians present the case. TR 319. She stated Complainant had some difficulties with the switch, and so she told Complainant not to worry about it until they sat down together.¹⁷ TR 319. She believed Complainant could continue to do her assessments without presenting the case. TR 321.¹⁸

¹⁷ In the course of examining Ms. Meehan, Complainant disagreed with this testimony, stating that the in-house staff never presented the case, and that she always presented to the doctors directly. TR 324-25.

¹⁸ Ms. Meehan testified in regards to telling Complainant she needed to respond to all her emails, she believed she clarified that the expectation was not that she should be responding during her time off, but rather that she should check and review her emails once she came onto a shift. TR 327.

Ms. Meehan testified that Susan Rinaldi sat in on the meeting regarding retraining because she believed Ms. Rinaldi had valuable experience and could be supportive and clarify any confusion. TR 330-31. She did not believe the meeting was about Complainant's performance, but rather was to clarify new procedures, such as three-way calling and intake changes. TR 332-33. She did not believe it was a violation of Complainant's privacy. TR 333, 336. She stated that Scott Williams was supposed to sit in on the meeting, and was unable to, so he asked that Ms. Rinaldi sit in on the meeting so that someone else was present. TR 337. She stated Ms. Rinaldi was in a supervisory managerial role, but was not a supervisor to Complainant. TR 337-38.

Ms. Meehan stated she never disciplined Complainant, or attempted to chill her ability to ask questions or raise concerns. TR 357. She did not believe anyone retaliated against Complainant for raising concerns, and agreed that other people in the department raised concerns as well. TR 357. She stated when Complainant raised concerns about EMTALA, she elevated it up the chain of command. TR 357.

Ms. Meehan left the HCAT manager position in April 2014 to work in Behavioral Health at the company's South Carolina location, performing utilization review and emergency room assessments. TR 342-43. She is now back at Rose Medical Center in Denver, still with the same company. TR 343. Ms. Meehan stated in her current position she interacts with doctors in the ER on a daily basis, and "very consistently from the doctors, the [physician assistants] and the nurses, they said that things are so much better now that they can use tele, telepsych." TR 351. She testified the ER staff tells her that they are able to place patients and dispel them to safe places in a healthy time frame. TR 351.

8. Brent Longtin

Mr. Longtin is employed with Respondent, based in Nashville, Tennessee. TR 360. He was a regional vice president for Denver, the Far West Division and Mountain Division to Salt Lake City and Las Vegas from 2012 to 2016. TR 360. As the regional vice president, he oversaw operational and clinical oversight, including new business development and working as a local expert on how to manage Behavioral Health patients. TR 361-62. He is an Advanced Practice Nurse in Psychiatric Mental Health. TR 360.

Mr. Longtin testified that after Ms. Meehan left her supervisor position, he moved to Denver for five months, starting in May 2014, to act as an interim AVP until a new leader was brought in for the local Service Line. TR 362. Prior to filling in as an interim AVP, Mr. Longtin came to Denver for several staff meetings. TR 363.

Mr. Longtin stated that the purpose of TeleMental Health was to lessen the time it took to have Behavioral Health patients in the ERs waiting for an assessment and disposition recommendation. TR 389. He stated that instead of waiting for someone to arrive to perform an evaluation, which could take hours, the same licensed therapists could get to the patient quicker through TeleMental Health and provide a disposition to the physician. TR 390. He stated that since implementing TeleMental Health, they have seen a decrease of up to five hours less time in the ER. TR 391. He stated currently 90% of evaluations are done through TeleMental Health. TR 391. He testified he never told staff to conduct assessments in 10 or 20 minutes, which would be impossible. TR 392. He stated the average was 40 minutes to conduct the psychiatric assessment portion, across the enterprise, including the Denver market. TR 428.

Mr. Longtin testified that when a patient arrives at an ER, he or she sees a triage nurse and is assigned a triage level; based on the triage level, the individual is placed in a queue to be seen by an ER physician, nurse practitioner, or physician's assistant. TR 393. If there is a known behavior health need, there is a second determination that needs to be made as to the behavioral stability of the patient, in addition to the medical condition. TR 393. If there is a behavioral complaint, the ER physician will determine whether there should be an HCAT assessment by a licensed therapist, and the ER physician decides whether the evaluation should be done face-to-face or via TeleMental Health. TR 394. Once the behavioral health assessment is completed, a recommendation is given to the ER physician so he or she can make a determination for treatment. TR 394. Mr. Longtin testified that if the ER physician decides to admit the patient for in-patient psychiatric disposition, various facilities are contacted to see if they can accept that patient. TR 396. He stated when reaching out to facilities, they do not discuss the ability to pay for the services because by EMTALA standards, they are obligated to accept the patient. TR 396.

Mr. Longtin recalled Complainant making complaints about TeleMental Health, but he did not recall any specific EMTALA complaints that she made to him. TR 364. He stated in one-on-one meetings with the Complainant, she made it clear that she would not conduct TeleMental Health, which he reminded her was required as part of her job. TR 365. He recalled her assertion that TeleMental Health was not legal, but he stated he showed her that it was a legal process. TR 365.

Mr. Longtin stated that in staff meetings they conducted training and Q&A sessions. TR 366. He stated the hospital also created a FAQ document that explained and answered all questions that the staff was having about TeleMental Health, including its legality. TR 366. He stated that they reviewed the issue of legality extensively with the appropriate boards and agencies in Colorado and were able to conduct a "clear-cut compliance and legal review" and determine it was a legal process. TR 367. He did not recall anyone from the legal department being present at staff meetings, but stated Carol Woodruff, who was part of Corporate Ethics and Compliance, attended a couple of meetings. TR 368.

Mr. Longtin stated anytime there was a change or update, they sent out an Urgent Care Alert as an additional communication between staff meetings, which was sent to the employees' emails. TR 406-07. He stated there was also a Unit Practice Counsel made up of peers, who developed patient care clinical processes based on the new technology and new approach. TR 407.

Mr. Longtin testified in the July 2014 staff meeting, they discussed a reorganization of HCAT. TR 409. He explained "we needed to be able to provide a structure, so we could make sure that the patients in the queue for assessments were seen in queue and that the right people were assigned to the right direction, whether it was TeleMental Health or face-to-face." TR 409. In order to do this, everyone, including part-time employees, were required to report for duty to the North Campus HCAT work room at the beginning of their shifts.¹⁹ TR 409, 414; *see also* RX 10 at 86.

¹⁹ Complainant disputed that she was required to report to TMCA, North Campus at the beginning of her shift. TR 420-21, 423. There remains some uncertainty in the record as to whether Respondent started to enforce the

Mr. Longtin stated that since he was an interim supervisor, in order to do performance evaluations, he asked everyone to do a self-evaluation, so that he could see their perspective on their performance, and he also talked to immediate supervisors and leads, who were licensed therapists responsible for assigning the TeleMental Health assessments, for feedback on performance in the field. TR 380. He stated he used these components to gauge where the employees were with the new TeleMental Health process. TR 381. Mr. Longtin stated in Complainant's self-evaluation, she told Mr. Longtin for the first time that she would never accept a TeleMental Health assessment, and that she had a goal of doing face-to-face evaluations 98% of the time, which he stated was not appropriate. TR 384.

Mr. Longtin testified that he met with Complainant on July 22, 2014 because she was refusing to accept TeleMental Health assessments, as required by her job description and communications to her. TR 415. He stated he informed Complainant that final refusal would mean termination. TR 415. He stated Complainant did refuse to perform TeleMental Health soon after the meeting, and he spoke with Eric Artis and Paul Burgeson in HR and they stated the only possible result was termination. TR 416. He stated "we were assigned patients for the best care for the patient, and we can't have employees be rogue in what they want to do and how they want to do it. We have an operational system in place." TR 418. Mr. Longtin testified that "it's unfair, because you're closer to one ED and you go and do assessment that may have just arrived, versus there's people waiting for two or three hours- - that's where we need to focus." TR 419. He testified there was more than one occasion when Complainant was finding excuses for not performing TeleMental Health. TR 418.

9. Carol Woodruff

Ms. Woodruff is a registered nurse. TR 484. She has been with Respondent for 20 years. TR 433. She is the Ethics and Compliance Officer and Privacy Official, and in this capacity she oversees all contracts for the facility, works with the Quality Department to oversee all regulatory compliance, works with the pharmacy to ensure compliance with controlled substance use, and works with billing areas to make sure CMS and Medicaid requirements for billing are being followed. TR 433-34.

Ms. Woodruff testified that if employees have a complaint, they can voice their concerns to her at any time. TR 434. She stated the Ethics and Compliance Line complaints also get reported to her to investigate. TR 434.

Ms. Woodruff testified that Complainant first raised concerns with her directly, then she reached out to the Ethics and Compliance Line, and also reached out to Stephanie Tice, who works for corporate compliance.²⁰ TR 437. Ms. Woodruff testified Complainant had multiple concerns, so there were multiple people involved in her investigation. TR 435. She stated after they had addressed all of Complainant's concerns through an investigation, she sent a written Frequently Asked Questions to Complainant directly by email, and to everyone else in the office, because others also had concerns. TR 435. She stated that Complainant's complaints were the basis for most of the issues addressed in the FAQ. TR 436. Ms. Woodruff testified that she

requirement that staff report to TMCA at the beginning of their shift before or after Complainant's termination. TR 427-28.

²⁰ Ms. Woodruff testified corporate compliance oversees compliance for the entire company. TR 469. In comparison, Ms. Woodruff only oversaw compliance issues for TMCA. TR 470.

drafted the FAQ, but it was not done solely by her, but rather was a result of investigations conducted by the Legal Department, the Quality Department, and the Corporate Behavioral Health Department. TR 462. She testified by the April staff meeting, where she went over the FAQs with HCAT staff, it was her opinion that at that point all Complainant's concerns had been addressed, and it was her understanding that the Complainant had appreciated the information and agreed her concerns had been addressed. TR 437, 465. In addition to the FAQs, Ms. Woodruff testified that she talked to Complainant in person and responded to concerns in staff meetings. TR 442.

Ms. Woodruff testified that after the FAQs were provided, Complainant continued to call Ms. Tice with complaints, and so the investigation continued. TR 437-38. She explained that as long as someone keeps calling with complaints, "we feel that their concern is still valid to investigate and address, even if it's similar." TR 438. She stated Complainant continued to make complaints, similar in nature, but with slight additions, so her Ethics Hotline case was never closed. TR 438. Ms. Woodruff stated that other co-workers made similar complaints, which were combined with the Complainant's case, and that also expanded the time frame for closing the case. TR 438. She stated even after she was terminated, Complainant continued to email Stephanie Tice, and it was not until after all communications stopped that they closed her case. TR 438. She stated there were many people involved in the Ethics Line investigation, due to the amount of claims, and the fact there were legal and regulatory issues, and each person who reviewed the case had their own specialty or reason for being involved. TR 471.

Ms. Woodruff testified that she met with Complainant, Mr. Williams and Ms. Meehan in November 2013 to address Complainant's concerns about EMTALA violations. TR 443. Ms. Woodruff stated she addressed the concerns with the Behavioral Health person at corporate, John White, and Brent Longtin, who was ultimately the decision maker with EMTALA issues. TR 443. She stated they reviewed patient medical records and found no violations. TR 443. She then informed Complainant that she did not believe the issues she raised were EMTALA violations. TR 443. Ms. Woodruff testified that in regards to Dr. Krohn, he had informed her that he accepted the patient, but once he accepted the patient, he had asked the Complainant if she looked into insurance to make sure that the patient was not going to have any financial burden being placed at a facility that might not accept the insurance. TR 444. Ms. Woodruff told Complainant that this was not an EMTALA violation because EMTALA applies to medical screening exams, and the physician had accepted the patient. TR 459.

Ms. Woodruff testified that the Joint Commission, a state regulatory agency for hospitals, conducts reviews of the hospital for compliance. TR 476. She stated she would be made aware of any issues that arose during such a compliance review and there has never been an issue raised with TeleMental Health by a regulatory body. TR 476-77. She testified prior to Complainant's termination, the Joint Commission evaluated the North Suburban Hospital ER, where TMCA provides telemedicine, and cited it for best practice using Telemedicine in their ER. TR 477, 484.²¹

²¹ This Site Review is not contained in the record. Ms. Woodruff cited a reference to the Site Review in the Ethics Hotline Case Report, which stated the Respondent was "recognized for best practice by Joint Commission surveyor at NSMC." JX 11 at 26.

Ms. Woodruff testified a HCAT staff member, Mike Tapp, participated in the UPC and brought up concerns about TeleMental Health. TR 460. She testified that he is still employed at TMCA on the HCAT staff and performs TeleMental Health assessments on a routine basis. TR 460. She stated there were other members of the UPC who were adamant with their concerns, but once the concerns were addressed, they continued working at the facility doing TeleMental Health evaluations. TR 460.

B. Documentary Evidence

1. Complainant's Internal Communications

On September 6, 2013, Complainant expressed to Ms. Meehan in an email that she did not wish to do any TeleMental Health evaluations because she was concerned about the quality of care and asked whether TeleMental Health would violate HIPAA or jeopardize her license. CX 9 at 1.²²

On November 1, 2013, Ms. Meehan emailed Complainant, stating that Dr. Krohn had reported concerns about her, and asked Complainant for an update. RX 48.

On November 8, 2013, Ms. Meehan emailed Complainant again, stating she had not heard back from her. RX 75 at 678. She further stated Dr. Mayer²³ had several concerns about a phone call the prior night and that Complainant needed to meet with her in person to review new procedures and re-train. *Id.* She also stated she wanted to talk about productivity because Complainant's evaluations were taking a considerable amount of time. *Id.* She directed Complainant not to sign up for more shifts until the meeting occurred. *Id.*

Complainant responded to Ms. Meehan on November 9, 2013, providing her availability for a meeting, and stating she re-sent her reply of November 2, 2013, which she assumed Ms. Meehan had not received. CX 9 at 8. The email that Complainant resent on November 9, 2013 stated she was concerned that Dr. Krohn violated HIPAA²⁴ because he required pre-authorization before admitting a patient. RX 48; TR 104.

On November 11, 2013, Ms. Meehan sent an email to Complainant stating she received multiple complaints during the weekend from doctors and that they needed to meet before she worked again. RX 75 at 677. Ms. Meehan then sent an email to the entire HCAT team, stating if anyone does not know how to complete a three way call, they need to speak with her, as there had been multiple complaints from physicians stating the staff does not know to do three-way calling. *Id.* Complainant replied all, asking when Ms. Meehan would like to meet. *Id.* They scheduled a meeting for the next day, November 12, 2013. *Id.* at 678-70. Complainant emailed Ms. Meehan later the same day, stating she wanted to discuss her interaction with Dr. Rogers in

²² Complainant forwarded this email to Ms. Woodruff and asked whether TeleMental Health violated her Professional Code of Conduct and Ethics, or HIPAA. CX 9 at 17. She stated that she was worried about her licensure, and that TeleMental Health is not approved by the AMA and "best practice" is face-to-face evaluations. *Id.*

²³ Mr. Longtin testified that Dr. Mayer was the medical director for In-Patient Psychiatry and for HCAT. TR 404.

²⁴ Complainant indicated at trial that she meant to raise a concern under EMTALA and not HIPAA. TR 299; CX 9 at 4.

the scheduled meeting, stating that Dr. Rogers initially refused to admit a pregnant patient she had placed a hold on. CX 9 at 10.

Also on November 11, 2013, Dr. Teresa Mayer, the Medical Director of Adult Behavioral Health, filed a complaint against Complainant on behalf of the pregnant woman, who believed the hold Complainant placed on her was a violation of her rights. RX 69. She also complained that Complainant acted inappropriately, wearing revealing clothing, sitting close, and sharing personal information, and that she felt coerced by Complainant. *Id.*

Complainant met with Ms. Meehan on November 12, 2013. Following the meeting, Ms. Meehan provided Complainant with a written document outlining the concerns she raised during the November 12, 2013 meeting. Complainant submitted written comments to Ms. Meehan's outline of the meeting via email on November 15, 2013, and Ms. Meehan responded the same day, stating: "I'm really disappointed you did not express these concerns while we were meeting. Until I can retrain you I am taking the intake part if [sic] your job off your responsibilities." CX 9 at 12. Complainant and Ms. Meehan met again on November 20, 2013, with Susan Rinaldi present; during the meeting they discussed Complainant's comments to Ms. Meehan's written outline of the November 12, 2013 meeting. JX 1; TR 124; CX 9 at 13.

Ms. Meehan's written summary of the November 12, 2013 meeting, along with Complainant's comments to the summary, and Ms. Meehan's November 20, 2013 responses to Complainant's comments are contained in JX 1. The document is signed by Complainant, Ms. Meehan and Susan Rinaldi. *Id.* at 141. The document indicates Ms. Meehan raised concerns that Complainant did not know how to do three-way calling, was using an incorrect form for holds,²⁵ was not using a Physician Presentation Form for patient admissions,²⁶ and was not responding to emails.²⁷ *Id.* at 138-39. She also discussed the length of time it was taking Complainant to conduct assessments. *Id.* at 139-40. In addition, Ms. Meehan and Complainant discussed Dr. Rogers' complaint that Complainant did not properly put a hold on a pregnant patient, and Complainant's concern that Dr. Rogers did not want to admit the patient because she was pregnant. *Id.* at 138-39. Complainant's comments state that she believed this incident was an EMTALA violation, and Ms. Meehan responded that Mr. Williams is managing all of her EMTALA concerns.²⁸ *Id.* Ms. Meehan also discussed the complaint filed by the pregnant patient

²⁵ Complainant in her comments to Ms. Meehan's meeting summary stated she never said she did not know there was a difference between two separate forms. JX 1 at 138. In response to her comment, Ms. Meehan wrote: "As there is now a discrepancy with what we both think occurred during supervision . . . I am implementing a formal supervision, that will occur weekly with a third party that may vary, to give you time to address concerns and to get any additional updates you may need." *Id.*

²⁶ Ms. Meehan warned Complainant in her November 20, 2013 response regarding the presentation forms that "if any aspect of your job is not complete, including insurance verification you will be subject to disciplinary actions." JX 1 at 139.

²⁷ Ms. Meehan stated she directed Complainant to read emails before each shift and email her back confirmation she received the communications. JX 1 at 139.

²⁸ After the meeting, Ms. Meehan followed up on Complainant's EMTALA complaints in regard to the admission of the pregnant woman. RX 70. She reached out to Jonathan White regarding the EMTALA requirement for excluding the admission of pregnant women, and Mr. Longtin, Mr. Williams, and Nancy Purtell weighed in on this issue and discussed when it is appropriate to refuse to admit a pregnant patient with psychiatric issues, due to a lack of capability of the hospital to treat the pregnancy. *Id.*

against Complainant. *Id.* at 140. Complainant again commented that she raised EMTALA violations regarding the admittance of this patient, and Ms. Meehan again stated that this was being handled by Mr. Williams.

Ms. Meehan and Complainant also addressed Complainant's concerns with TeleMental Health evaluations and Ms. Meehan informed Complainant that she was expected to do both face-to-face and TeleMental Health evaluations. Complainant commented that she completed the TeleMental Health training and signed the new contract²⁹ and had no problems continuing in her job. JX 1 at 141. However, she noted her continued objections that TeleMental Health was not best practice and not legally recognized by AMA, DORA, EMTALA, CMS and any regulatory agency, and she feared for her professional license. *Id.* Ms. Meehan responded that she could not adequately address Complainant's concerns unless she provided specific guidelines or statutes, and referred Complainant to the TeleMental Health Association's guidelines. *Id.*

On November 20, 2013, Complainant also had a separate meeting with Ms. Meehan and Mr. Williams. RX 74; TR 124. On November 21, 2013, Complainant sent an email to Mr. Williams, thanking him for the meeting and further addressing her concerns. *Id.* She first complained about how Ms. Meehan handled her complaints of EMTALA violations and the presence of Susan Rinaldi in her meeting with Ms. Meehan. *Id.* She continued to voice her disagreement with TeleMental Health, and stated she felt she had been intimidated, threatened and subjected to a hostile work environment because of her complaints. *Id.* She believed Ms. Meehan's limiting of her duties and requiring weekly meetings were a result of her reporting EMTALA violations. *Id.*

Mr. Williams replied to Complainant's email on November 22, 2013, scheduling a follow-up meeting for November 26, 2013 with Carol Woodruff, and assuring her they investigated her concerns as soon as they were received. RX 74 at 674.

Complainant met with Mr. Williams and Ms. Woodruff on November 26, 2013. On November 29, 2013, Complainant sent an email providing a "recap" of the meeting. RX 73. She stated they discussed her EMTALA issues, two relating to insurance and one relating to TeleMental Health. RX 73. She alleged Ms. Woodruff stated as long as a patient is ultimately admitted, there is no EMTALA violation, and Complainant disagreed. RX 73. Complainant stated she again voiced concerns that TeleMental Health was unethical, unprofessional, illegal, and may affect the health and safety of patients and that Mr. Williams responded TeleMental Health is not illegal and they are doing it in Houston. *Id.* Complainant also complained of retaliation by Ms. Meehan in response to her complaints, including having Ms. Rinaldi present in a meeting with Complainant. *Id.* She asserted that Mr. Williams acknowledged he had authorized Susan Rinaldi's presence. *Id.* She stated Mr. Williams admitted he never reviewed the evaluations that precipitated her EMTALA complaints. *Id.* Lastly, she stated that Ms. Woodruff and Mr. Williams stated changes had been made based on her complaints and they invited her to contribute any concerns at the next meeting on EMTALA. *Id.*

On November 30, 2013, Ms. Woodruff responded to Complainant's email, stating that "I am concerned that when we concluded the meeting we agreed on each issue and from below that

²⁹ Complainant signed her job description on November 20, 2013, and the job description stated that evaluations may occur face-to-face or by TeleMental Health. RX 67.

is not the case.” RX 73. She requested that they meet again to further discuss Complainant’s concerns and for clarification. *Id.*

Similarly, Mr. Williams responded to Complainant on December 2, 2013, stating that he had been in two meetings with her and her recollection of what transpired in both meetings was significantly different than his own. CX 9 at 25. Complainant responded on December 3, 2013, telling Mr. Williams he needed to put in writing why he believes her complaints were not valid. *Id.*

On December 5, 2013, Complainant emailed Mr. Burgeson a written statement, alleging a hostile work environment since voicing complaints about the implementation of TeleMental Health, and identifying several actions taken by Ms. Meehan, which Complainant alleged was in retaliation for her raising concerns. RX 51. She met with Mr. Burgeson on January 2, 2014. *Id.*

On January 9, 2014, Paul Burgeson wrote a letter to Complainant regarding her written summary of her concerns. RX 68. He conducted a review of Complainant’s complaints of Ms. Meehan, including her modifying Complainant’s job duties, breach of privacy, weekly coaching, and retraining. *Id.* He found there was not sufficient evidence to support Complainant’s allegations. *Id.* He noted there were no formal corrective actions taken against her, and that her intake responsibilities were suspended for only one week, after she was trained on three-way calling, which she admitted she did not understand. *Id.* Lastly, he found it was not inappropriate to have Susan Rinaldi sit in on a meeting because the discussion was regarding a retraining plan, in which Ms. Rinaldi, as the Department Educator, would need to be involved. *Id.*

On January 13, 2014, Complainant wrote an email to Mr. Burgeson “recapping” their January 2, 2014 meeting. RX 52. She stated that her primary concerns were the retaliation she endured from Ms. Meehan after voicing her concerns about TeleMental Health and EMTALA violations, and that Mr. Burgeson stated this would be handled by someone else. *Id.* She stated she informed Mr. Burgeson that she would not perform TeleMental Health evaluations because it was substandard and an inadequate method of performing assessments. *Id.* She also discussed Mr. Burgeson’s findings in his January 9, 2014 letter, asserting he refused to address the retaliation, intimidation and harassment she experienced. *Id.* She also stated that Ms. Rinaldi was not a department educator at the time she sat in on Complainant’s meeting. *Id.*

2. Complainant’s Ethics Hotline complaints

Complainant made numerous complaints to Respondent’s Ethics Hotline, commencing on January 17, 2014, and continuing after her termination. JX 11; JX 5; RX 30; CX 7. She raised concerns that TeleMental Health was illegal, violated state board guidelines, CMS regulations, Colorado state laws, including DORA Policy 30-1, EMTALA, Title I of the ACA, OSHA regulations, and SOX/SEC regulations, and jeopardized her license. JX 22; JX 11; RX 31. She stated TeleMental Health put the health and safety of patients at risk, did not constitute “best practice,” was a substandard “standard of care” and violated her professional code of conduct and ethical beliefs. CX 7. She stated that EMTALA, DORA, the Board of Psychological Examiners, Professional Code of Conduct and Ethics, state that a psychiatric evaluation, on a first time basis, should be face to face. CX 7. She stated any billing for TeleMental Health would violate CMS and be fraudulent and illegal. CX 7. She also reported a perceived violation of EMTALA regarding Dr. Krohn’s request for insurance information, and asserted that patients were being coerced to accept a TeleMental Health evaluation, or else have to wait an additional

day. JX 11; CX 7. She also reported she was retaliated against for her internal and external complaints through the actions of Ms. Meehan, her negative evaluation by Mr. Longtin, and her ultimate termination. JX 21; JX 11; RX 30; RX 31.

The Ethics Hotline investigation was initially scheduled to be completed by April 11, 2014, but the completion date was pushed back on numerous occasions, as similar cases were combined as they were received. JX 22; RX 2 at 49-55. On August 21, 2014, Complainant's Ethics Hotline case was closed, and the Case Report summary stated:

The caller's claims management is requiring Mental Health Professional to perform telemental health processes that violate state board guidelines, management did not handle the implementation appropriately, and after reporting EMTALA and process concerns involving the telemental health procedures, it resulted in her receiving a negative evaluation and unfair termination was unsubstantiated.

JX 11 at 22. Complainant was notified of the outcome on August 28, 2014. RX 3; JX 11 at 33.

3. Complainant's External Communications

On November 18, 2013, Complainant filed a complaint with the State of Colorado Medicaid Fraud Control Unit ("MFCU"),³⁰ complaining that TMCA's use of TeleMental Health violates CMS, EMTALA, HIPAA and Colorado state laws, and the lack of informed consent for TeleMental Health also violated EMTALA and HIPAA. RX 59. She stated she believed TeleMental Health was illegal and jeopardized patient health and safety. *Id.* at 437. She stated that the American Psychiatric Association, the American Medical Association, the Department of Health Services and CMS all state that face to face evaluations are best practice. *Id.* at 438. She stated she had been retaliated against for voicing her concerns. *Id.* Karen Peregoy, the Chief Investigator of MFCU responded on December 4, 2013, indicating that the laws cited by Complainant are all federal laws, and MFCU does not have jurisdiction to enforce federal laws. *Id.* at 436. She referred Complainant to the Department of Health and Human Services – Office of Inspector General. *Id.* Complainant responded, stating that TMCA was improperly billing CMS for TeleMental Health. *Id.* at 440.

On December 13, 2013, Complainant filed a complaint with the Office of the Inspector General. CX 12; TR 175. She did not receive a response. TR 174.

On January 5, 2014,³¹ Complainant filed a complaint with the Joint Commission, asserting the use of TeleMental Health, and the lack of informed consent for TeleMental Health, were illegal. RX 57. Complainant testified she did not receive a response. TR 175.

On January 17, 2014, Complainant also filed a complaint with the Department of Regulatory Agencies ("DORA"), alleging substandard practice, abuse of client/patient, poor

³⁰ It appears that Complainant first filed the complaint with CMS on November 17, 2013, and CMS referred Complainant to the MFCU. CX 7; CX 11 at 4; TR 43, 80. She gave a copy of the complaint to Ms. Meehan, Carol Woodruff and Paul Burgeson. *Id.*

³¹ This date is handwritten on RX 57. Parties' Joint Exhibit list also refers to the date of this complaint as January 5, 2014; therefore this is the date I will rely on herein.

communication, fraud, documentation issues, and statutory violations regarding TeleMental Health. CX 14. On January 28, 2014, DORA responded to Complainant, acknowledging receipt of her complaint, and indicating it does not have jurisdiction over TMCA. RX 55. The letter stated that the Department of Human Services, Office of Behavioral Health, would have jurisdiction over mental health facilities. *Id.*

On February 15, 2014, Complainant reported to Ms. Perego at MFCU that patients do not receive writing consent about TeleMental Health and that the Board of Psychological Examiners states a face-to-face evaluation is recommended. CX 11 at 2. Ms. Perego referred Complainant to the Colorado Department of Health Policy and Financing to discuss her concerns of EMTALA violations. CX 11 at 3.

On April 30, 2014, Complainant contacted the Colorado State Department of Behavioral Health – Health Care Policy and Financing. CX 11; TR 174. She alleged that Respondent’s use of TeleMental Health jeopardized the health and safety of patients and placed her license at risk. *Id.* at 4. She also stated that it violates her professional code of conduct and ethics and is a substandard method of care. *Id.* She asserted that TeleMental Health violates EMTALA, which requires medical screening evaluations to be performed to the best possible standard of care. *Id.* at 5. She further stated DORA and the Board of Psychological Examiners state that a psychiatric evaluation should be face to face with a first time client. *Id.* She alleged any billing for TeleMental Health would be fraudulent and illegal under CMS rules for Telemedicine. *Id.*

4. HCAAT Monthly Meetings and Information Disseminated by Management

On November 20, 2013, Complainant signed a new job description, which states that behavioral health emergency evaluations may “occur face to face or by HCA’s TeleMental Health computer program.” RX 67.

There was a staff meeting on February 12, 2014. JX 2. Meeting minutes indicate that Ms. Meehan, Mr. Williams, and Brent Longtin were present, as well as the Complainant and others. JX 2; JX 16. During this meeting, it was noted that the Joint Commission came the prior week and HCAAT scored well, and the 27-65 review by the Colorado Office of Behavioral Health also occurred with no issues identified. JX 2 at 1. Staff members raised concerns about the validity of TeleMental Health and that their licenses were at risk without a written consent in place, and Mr. Longtin noted that they were working on incorporating informed consent for telemedicine. *Id.* at 4.

The next staff meeting was on March 12, 2014, with Ms. Meehan, Mr. Williams, Ms. Woodruff, and Complainant in attendance. JX 14. Mr. Williams provided updates on informed consent for TeleMental Health, stating ER physicians were to provide an information sheet to patients and obtain written consent. *Id.* at 151. The minute notes also stated: “If you are called to do an eval at a ‘Go Live’ location . . . and the patient can be served quicker with a face-to-face eval (meaning that you live closer to the facility than to the office), please go to the hospital and do face-to-face and document reason for no tele.” *Id.* at 152. TMCA was slated to “go live” with Tele-Psych on March 10, 2014. *Id.* at 153.

On April 9, 2014, there was another staff meeting; the notes do not indicate who was present. JX 15. When discussing admission protocol, notes indicated the person who does the evaluation should do the physician presentation. *Id.* at 175. Ms. Woodruff stated that all ERs

are now directed to use a consent form for TeleMental Health. *Id.* at 176; *see also* JX 9 (copy of consent form).³²

On the same day, the HCAT staff had individual meetings to go over recent changes and to answer questions about the changes and provide clarity. JX 12. Complainant signed a form indicating that she received TeleMental Health Guidelines, “which includes our endorsement of the use of telemental health assessments when appropriate, and the use of an informed consent for the patient to agree to such an intervention,” her updated job description, ICARE Values, a PRN Agreement,³³ an attendance policy, and the Chain of Command for reporting ethical and quality concerns. *Id.*

The “TeleMental Health Guidelines” found at RX 62, effective April 7, 2014, contain inclusionary/exclusionary criteria for determining whether a TeleMental Health assessment is appropriate for patients. This document further states that the Respondent had determined that TeleMental Health assessments in emergency rooms are: (1) consistent with practices in other states such as Utah, Texas, and Tennessee; (2) is in the best interest of patient care, as it eliminates many time-wasting barriers to seeing the patient immediately; (3) has been legally vetted by the Respondent; (4) is consistent with Colorado law; and (5) should be provided after receiving informed consent. RX 62.

On May 1, 2014, TMCA issued a written “Information for HCAT staff,” in the form of Frequently Asked Questions (hereinafter referred to as “FAQ”).³⁴ JX 8. The FAQ addressed staff concerns about TeleMental Health. JX 8. In response to the question: “My licensing board does not approve of telemental health evaluations for the initial evaluation,” TMCA responded as follows:

Attached is an email conversation between Scott Williams AVP TMCA Adult Behavior Services and Jackie Arcelin, Program Director with Colorado DORA on 4/17/2014:

I just spoke with Jackie Arcelin, Program Director with Colorado DORA who oversees the 7 boards that represent the professions such as those who provide mental health assessments in our Emergency Departments. Jackie told me that the only standard she could find about telemental health was the one that *recommended* that the initial contact before initiating telemental health services be face to face. I explained that it was our understanding that this seemed to describe

³² In a memo dated August 6, 2014, Mr. Longtin summarized the April 9, 2014 meeting and stated that Ms. Woodruff explained to staff that after research, they determined that TeleMental Health was legal in Colorado. RX 6. However, this is not reflected in the meeting minutes.

³³ The PRN agreement, signed by Complainant on April 9, 2014, is at RX 54. This agreement states “I understand that when I am scheduled for a PRN shift wherever it is (float, Aurora, north campus) I will cooperate with whatever the needs are, including completing a TeleMental Health evaluation, or floating in between hospitals if needed, or going to the Access Center.” *Id.*

³⁴ In a memo dated August 6, 2014, Mr. Longtin provided a summary of a May 1, 2014 staff meeting; however, minutes from this meeting are not in the record. RX 6 at 77. He indicated in this meeting he reviewed the TeleMental Health Policies and Procedures, and employee expectations and requirements of duties as assigned to TeleMental Health patient crisis assessments. *Id.*

the intention to have an ongoing therapeutic relationship rather than one time emergency assessments to determine disposition.

She said that there is nothing in state standard that prohibits us from providing initial assessments in our Emergency Departments as I have described, and that if a complaint were registered that an assessment was done remotely it would not be treated any differently than a complaint about a face to face assessment.

She explained that they have things in “policy” because this represents the least stringent structure to guide practice, and that that is what these are, guidelines, but not to be interpreted as legal requirements.

Jackie, I hope I have represented our conversation accurately and thank you so much for responding so quickly. Jackie will be doing some research in her own area while we continue our own. I let her know that we were just looking to provide some assurance to our clinicians that what we are asking them to do does not violate Colorado law in any way.

Thank you, Scott, for the conversation today. You have provided a correct representation of our conversation and I will continue to do research on my end regarding the topic.

Best regards,

Jacki Arcelin

JX 8 at 4.³⁵ In response to the question “Are telemental health evaluations illegal in Colorado?” the FAQ stated: “NO. Legal Counsel is re-reviewing this issue. This was previously reviewed and determined not to be illegal. I will send you an[] updated [sic] when the review is complete.” *Id.* at 6. In response to the question “Is a consent form required for TeleMental Health Evaluations?” the response was “Yes. HealthOne now requires a consent form be completed prior to the TeleMental Health Evaluation. Attached is the form. . . .” *Id.* The FAQ also outlined criteria for patient inclusion or exclusion for TeleMental Health Evaluations, and stated that “HealthONE facilities do not bill Medicare, Medicaid or any other insurance for any telemedicine or in person evaluations done by HCAT employees.” *Id.* Ms. Woodruff emailed and mailed a copy of the FAQ to staff members, including Complainant. RX 17; RX 64.

On May 2, 2014, Complainant replied all to Ms. Woodruff’s email containing the FAQs, stating she appreciated the response to her concerns. RX 65 at 569; TR 146. She acknowledged that Ms. Arcelin “endorses that telemental health evaluations in the ER are ok and thus are not subject to either Colorado statutes or any of the DORA, boards, or Colorado State Board of Psychological Examiners’ [policies, rules or regulations].” RX 65 at 569. Complainant acknowledged that Ms. Arcelin found face-to-face evaluations are not effected by DORA 30-1 and were not required, and that doctors would not be in violation of the Colorado Medical Practice Act, Section 12-36. *Id.* at 571, 573. She stated: “It is reassuring to know that Jacqueline

³⁵ In a follow-up email on May 2, 2014 to HCAT staff, Ms. Arcelin stated there is no information in statute or rule regarding teletherapy, and therefore the policy was simply guidance. RX 65. She stated that boards cannot discipline an individual based on violation of policy as it is not enforceable. *Id.*

Arcelin, and HCA have developed this new policy, and standard of care, to embark not for profit, but to limit risk to health and safety of employees, and the patient for a better quality of care, reflecting HCA's 'Culture of Excellence.'" *Id.* at 573.

On June 9, 2014, a Care Alert was sent by email to HCAT staff, indicating, among other things, that the goal was to perform 25% of assessments via TeleMental Health for the month of June. RX 19.³⁶

There are also meeting minutes from a July 9, 2014 staff meeting, during which Brent Longtin, acting as the Interim AVP, was the facilitator. JX 3. Complainant was not present at the meeting, but the document indicated meeting minutes are emailed to all staff. *Id.* Minutes indicated UPC continued to pursue ongoing training opportunities on TeleMental Health. *Id.* at 178, 180. The minutes also addressed a HCAT reorganization, and stated employees who wish to maintain their PRN status will be required to sign a new job description once all the full time positions were filled. *Id.* at 180; *see also* RX 16; RX 35. The notes also stated effective July 14, 2014, all staff assigned to work at TMCA will report for duty to the North Campus HCAT Workroom, and then call the Access Center for assignments. *Id.* Staff was informed that they were expected to "complete evaluations via telemental health where appropriate and/or possibly be sent to other facilities if necessary" and that "any face-to-face evaluations . . . will be completed by [one particular individual]." *Id.* at 180-81. Staff were directed to follow all assignments, and "if not followed, staff members may be subject to Performance Management, up to and including termination." *Id.* at 181.

5. Site Review Reports

On February 11, 2014, March 31, 2014, and April 10, 2015, the Colorado Department of Human Services, Office of Behavioral Health ("OBH") issued Site Review Reports for TMCA, finding it in compliance³⁷ with all relevant Colorado rules, regulations and policies. RX 1; RX 22; RX 23.

On April 25, 2014, OBH issued a Site Review Report for Centennial Medical Plaza Emergency Department,³⁸ finding it to be in full compliance with all rules, regulations, and policies associated with the Colorado "Care and Treatment of Mentally Ill Act." RX 18.

On May 19, 2015, OBH issued a Site Review Report for the Saddle Rock ER, and found it to be in partial compliance with Colorado rules, regulations and policies. RX 25. OBH included several recommendations to address in the next year. *Id.*

The Site Review Reports do not mention TeleMental Health.

³⁶ According to a memo prepared by Mr. Longtin, there was also a May 27, 2014 Urgent Care Alert message sent to HCAT staff. RX 6 at 77. This is not contained in the record. Mr. Longtin stated the Urgent Care Alert indicated that "if you are a HCAT employee assigned to do the telementalhealth assessment and the patient meets the evaluation criteria for tele, the HCAT employee is expected to complete the tele crisis assessment." *Id.*

³⁷ The first two reports found "full compliance," and the last report found "substantial compliance." RX 1; RX 22; RX 23.

³⁸ Ms. Woodruff testified that the Centennial Medical Plaza is a free-standing ER associated with TMCA. TR 479.

6. Complainant's July 2014 Performance Evaluation

The record contains a performance evaluation of Complainant, signed by Complainant on June 22, 2014, and by Mr. Longtin on July 3, 2014. JX 10. The evaluation was completed by Mr. Longtin as the interim AVP at the time. *Id.* In the self-evaluation portion of the performance evaluation, Complainant wrote: "I cannot in good conscience perform telemental health evaluations as they do not conform to the accepted standards of 'best practice,'" and "My commitment to best patient care are to provide a safe disposition working closely face to face with physician and nurses." *Id.* at 15, 18. Mr. Longtin responded that employees must comply with the use of TeleMental Health as approved by HCAT and hospital policy and UPC best patient practices as approved by the medical director. *Id.*

In the evaluator comments section of the performance evaluation, Mr. Longtin wrote: "Please note that your refusal to use telemental health as per policy was the first time I have been aware of it from you within this document. Please be informed in writing that refusal of telemental health per policy will result in performance management up to and including termination from employment. Please make an [illegible] appointment with me to discuss further at your convenience." JX 10 at 18.

In the "Employee Performance Against Goals/Objectives January 2013-June 2014," section of the performance evaluation, Claimant listed as a goal, "Face to Face evaluations 98% - unless-re-evaluated." *Id.* at 19. Mr. Longtin crossed the goal out and responded "denied as appropriate goal." *Id.*

Complainant was given an overall performance rating of 3.1 out of 5, with a 1% merit increase. JX 10 at 18.

Mr. Longtin wrote an undated memo to Ms. Woodruff and Mr. Artis about the Complainant's July 2014 performance evaluation. RX 5. He stated because Complainant used the self-evaluation process to document her opposition to TeleMental Health to him for the first time, he was obligated to respond. *Id.* He stated he consulted with Human Resources to review the evaluation for guidance related to the scoring and merit increase awarded to the Complainant, prior to emailing the performance evaluation to the Complainant. *Id.* He stated he requested a meeting with the Complainant on July 22, 2014, and during the meeting, at which Mr. Burgeson was also in attendance, he reviewed with Complainant the requirement to perform TeleMental Health evaluations as assigned, and informed Complainant that if she refused to perform TeleMental Health as assigned, she would be terminated. *Id.* at 75. He stated he further informed her that if she was in conflict with TeleMental Health, he would accept her resignation and she stated "I will not resign; I will not make it that easy for you." *Id.*

7. Complainant's July 2014 Suspension and Termination

On July 17, 2014, a dispatcher, Catherine Courier, emailed management, stating Complainant had called, indicating she could start her shift a half hour early, and Ms. Courier assigned her a TeleMental Health evaluation. RX 66. Ms. Courier stated Complainant responded that she does not do TeleMental Health evaluations and she would do a face-to-face evaluation once her shift started. *Id.* Ms. Courier stated due to the volume of calls, it took another 35 minutes to reach out to Complainant and assign her a face to face evaluation for a TeleMental patient at Swedish. *Id.* Complainant was suspended for her refusal to perform the

assigned TeleMental Health evaluation; however, on July 18, 2014, Eric Artis emailed Mr. Longtin, stating that because Complainant was not on duty when she refused to perform TeleMental Health, they could not hold her to the assessment and would need to pay her for the hours she was placed on administrative leave. CX 9 at 32.

On July 23, 2014, Ms. Courier again emailed Mr. Longtin, informing him that she assigned Complainant a TeleMental Health evaluation at Swedish hospital, and Complainant responded it did not make sense for her to do a TeleMental Health evaluation because she lives 40 minutes from Swedish and an hour and fifteen minutes from North. RX 21. Ms. Courier stated she told Complainant she needed to come to North because it was likely she would have more TeleMental Health evaluations for her to perform, and Complainant reported she does not do TeleMental Health evaluations. RX 21. Ms. Courier stated she did not have anyone else available to do the TeleMental Health evaluation, so she sent Complainant to see the patient face to face. RX 21. Mr. Longtin forwarded the email from Ms. Courier to Eric Artis and Paul Burgeson for advice on next steps. *Id.*

On July 24, 2014, Mr. Burgeson wrote Complainant a letter, confirming that her last day of work with TMCA was effective the same day and that her employment was “being terminated for failure to follow management’s instructions concerning the performance of your job duties.” JX 4; *see also* RX 9. Another employee, Debra Bowers, was also terminated the same day for refusing to perform a TeleMental Health evaluation. CX 15; TR 234-35.

Following her termination, on July 26, 2014, Complainant emailed Mr. Longtin, Mr. Burgeson, Mr. Artis, and Ms. Tice, with a subject line of “recap of meeting 7/22/14.” RX 27. She stated she refused to perform TeleMental Health on July 17, 2014 and July 23, 2014 because it would have required her to drive past Swedish for an additional 45 minutes to TMCA North to assess the patients via TeleMental Health. *Id.*³⁹ She also asserted that the time restraints expected to perform an assessment of one hour, “comprises patient safety and place the evaluator at risk of making a poor disposition decision.” *Id.* She stated she believed her termination was unlawful. *Id.* at 241.

On July 28, 2014, Complainant emailed Mr. Longtin, Mr. Burgeson, and Mr. Artis, stating she was faxing them an EMTALA document which states that video conferencing is only permitted if the physician consultant is not available for a personal assessment. RX 11; *see* JX 19.⁴⁰ She also stated she was sending a copy of an email from the CPA Ethic Committee, which determined that TeleMental Health violates the APA’s standard of care. RX 11. She stated she was unlawfully terminated for refusing to perform TeleMental Health, which is illegal and unethical. *Id.*

³⁹ Mr. Longtin sent an email to Christine Belle and Carol Woodruff, responding to Complainant’s allegations. RX 10. He stated that as a PRN employee, when Complainant is on the schedule, she is on call and assigned to the first cases across the HealthOne System when her shift starts, either TeleMental Health, or face-to-face, regardless of where she lives. RX 10 at 87. He stated when an employee choses to do it his/her own way, it requires a reset of patient re-assignment every time. *Id.*

⁴⁰ The EMTALA document Complainant attached appears to be a document pulled from Respondent’s website on July 17, 2014, and its states that under EMTALA, on-call physicians must provide in-person care, but for “consultation with specialists who are not present in the hospital, . . . video conferencing . . . is permitted. In such arrangements, it is expressly stated that the physician consultant is not available for an in-person assessment of the individual at the treating physician’s hospital.” JX 19.

On August 6, 2014, Mr. Longtin wrote a memo to Mr. Artis, documenting information provided to Complainant “regarding employment expectations and requirements related to performing telemental health patient crisis assessments as assigned per TMCA policy and procedures,” including: (1) the February 2014 HCAT staff meeting; (2) the March 2014 HCAT Staff Meeting; (3) the April 2014 Individual/1:1 Meeting with Mr. Williams; (4) the April 2014 HCAT Staff Meeting; (5) the May 2014 HCAT Staff Meeting; (6) the May 27, 2014 Urgent Care Alert to all HCAT staff; (7) the July 2014 Staff Meeting; and (8) the meeting with Mr. Longtin on July 22, 2014. RX 6.

Complainant requested a Peer Review of her termination, and on September 11, 2014, Mr. Artis informed Complainant by letter that the Peer Review Panel, “comprised of three fellow employees (peers) and two Management representatives,” upheld the disciplinary decision. CX 15. He stated the decision had also been reviewed by the Chief Executive Officer and the Chief Nursing Officer. *Id.* On October 7, 2014, the President and Chief Executive Officer wrote a letter to Complainant informing her that he affirmed the decision of the Peer Review Panel to uphold her termination. JX 7.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under the ACA whistleblower provision, “[n]o 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)” engaged in protected activity. The statute defines protected activity as:

- (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 assist or 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; *see also* 29 C.F.R. § 1984.102(2). The reference to “this Title” in the statute and the implementing regulations refers to Title I of the ACA. 29 C.F.R. § 1984.102(b)(2)&(5).

To succeed in an ACA whistleblower claim, a complainant must demonstrate by a preponderance of the evidence⁴¹ that his or her protected activity under the Act was a contributing factor in the adverse action alleged in the complaint. 20 C.F.R. § 1984.109(2); *see also* 15 U.S.C. § 2087(b)(2)(b)(i) (whistleblower provision of Consumer Product Safety Improvement Act (“CPSIA”), incorporated in Section 218c). Specifically, the complainant must establish: (1) that he or she engaged in protected activity as set forth in the statute; (2) that the employer took an adverse action against the employee; and (3) that the protected activity was a contributing factor in the adverse action. *Palmer v. Canadian Nat’l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 15-16 (ARB Sept. 30, 2016),⁴² *reissued* Jan. 4, 2017 (en banc); *see also* 49 U.S.C. §§ 42121(b)(2)(B)(iii), (iv); 29 C.F.R. § 1984.104(e)(2).

If a complainant proves that his or her protected activity contributed to the adverse action, the employer may avoid 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); *see also* 15 U.S.C. § 2087(b)(2)(B)(ii). “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” 81 Fed. Reg. 701615 (*citing Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-00018, 2011 WL 2614326, at *3 (ARB June 29, 2011)); *see also Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, PDF at 5 (ARB Jan. 31, 2011) (*quoting Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006)).

Accordingly, I must consider all the evidence presented and determine whether Complainant has established that she engaged in activity protected by the ACA whistleblower provision and that protected activity was a contributing factor in the adverse action taken against her. If Complainant meets her burden, then I must determine whether the Respondent has established that it would have taken the same adverse action absent the protected activity.

A. Complainant’s Burden of Proof

1. Protected Activity

In order to establish a whistleblower claim, Complainant must first establish that she engaged in protected activity as enumerated in Section 218c(a). Complainant has alleged protected activity under Section 218c(a)(2), which protects employees who provide information to their employer or the federal government relating to actions or omissions the employee reasonably believes violates any provision of Title I of the ACA, and under 218c(a)(5), which protects employees who object to or refuse to participate in any activity the employee reasonably believes violates any provision of Title I of the ACA. Cl. Br. at 15-16.

⁴¹ The “[p]reponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (*quoting Black’s Law Dictionary* 1201 (7th ed. 1999)).

⁴² While the Board’s *Palmer* decision arose out of an FRSA claim, the Board explicitly extended its analysis to all whistleblower statutes with the same burden of proof framework, including the ACA whistleblower provision. *Palmer*, ARB No. 16-035, slip op. at 15 & n.177.

To establish protected activity under the ACA, the Complainant must show she had a “reasonable belief” that a violation of the ACA occurred. This includes “both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the listed categories of law.” 81 Fed. Reg. 70611-12 (*citing Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1132 (10th Cir. 2013); *Wiest v. Lynch*, 710 F.3d 121, 131-32 (3d Cir. 2013); *Sylvester v. Parexel Int’l LLC*, ARB No. 07–123, ALJ No. 2007-SOX-00039/42, 2011 WL 2165854, at *12 (ARB May 25, 2011)). A complainant has a subjective, good faith belief “so long as the complainant actually believed that the conduct complained of violated the relevant law.” *Id.* at 12 (*citing Sylvester*, 2011 WL 2165854 at *12; *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10 (1st Cir. 2009)). The objective reasonableness is “evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* (*citing Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 811 (6th Cir. 2015); *Sylvester*, 2011 WL 2165854 at *12)). An employee’s whistleblower activity is protected when it is based on a reasonable, but mistaken, belief that a violation of the relevant law has occurred or is likely to occur. *Id.* (*citing Sylvester*, 2011 WL 2165854 at *13; *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476-77 (5th Cir. 2008); *Melendez v. Exxon Chemicals Americas*, ARB No. 96–051, ALJ No. 1993-ERA-00006, slip op. at 21 (ARB July 14, 2000)).

i. Alleged Violations of the ACA

Complainant consistently made internal and external complaints alleging that TMCA’s use of TeleMental Health violated EMTALA,⁴³ HIPAA,⁴⁴ CMS regulations, Colorado state laws, and state board and ethical guidelines. Joint. Stip. 14 & 15; JX 11; RX 59; TR 30, 36-37. She alleged that TeleMental Health was a substandard practice and that she was concerned about the quality of care. TR 39; CX 9 at 1. She asserted that the State Board of Psychology, the

⁴³ Emergency Medical Treatment & Labor Act (“EMTALA”) ensures access to emergency services by requiring hospital emergency departments, for hospitals participating in the Medicare program, to medically screen every patient who seeks emergency care and to stabilize or transfer those with medical emergencies regardless of health insurance status or ability to pay. Pub. L. No. 99-272, 100 Stat. 165 (1986) (codified as amended at 42 U.S.C. § 1395dd(2006)). As noted by Respondents, the text of EMTALA was not changed by the 2010 passage of the ACA. Pub. L. 111-148. Nor were the regulations addressing the EMTALA requirements affected by the ACA. *See, e.g.* 42 C.F.R. § 489.20(q)(1) (effective through Dec. 31, 2008); 24 C.F.R. § 489.20(q)(1) (effective Oct. 1, 2016) (reflecting no change to the EMTALA requirements despite changes unrelated to the ACA); 42 C.F.R. § 489.24 (effective through Sept. 20, 2009); 42 C.F.R. § 489.24 (effective Oct. 1, 2013) (indicating no change to the EMTALA requirements even though there were changes unrelated to the ACA). *Er. Br.* at 20 n.15.

⁴⁴ Health Insurance Portability and Accountability Act provides data privacy and security provisions for safeguarding of medical information and was promulgated prior to passage of the ACA. Pub. L. 104-191, 110 Stat 1936 (1996); 42 U.S.C. § 1320d. HIPAA has four main components. It provides the ability to transfer and continue health insurance coverage for American workers when they change or lose their jobs; reduces health care fraud and abuse; mandates industry wide standards for health care information on electronic billing and other processes and requires the protection and confidential handling of protected health information. The ACA requires the Department of Health and Human Services to implement operating rules for HIPAA standard transactions so that information and transmission formats are more uniform and provide information that must be included when conducting standard transactions making it easier for providers to use electronic means to handle administrative transactions. Center for Medicare and Medicaid Services [CMS.gov/Regulations-and-Guidance/Administrative-Simplification/Operating-Rules/OperatingRulesOverview.html](https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/Operating-Rules/OperatingRulesOverview.html). The ACA Title I changes to HIPAA require the creation of standard codes and standard transactions for electronic claim filing and processing. *See* 42 U.S.C. § 1320d-9.

American Psychiatric Association, the American Medical Association, the Board of Psychological Examiners, the Department of Health Services, DORA, CMS and EMTALA all state that face-to-face evaluations are best practice. TR 32-33, 39, 41, 44-45; CX 9 at 1; JX 11; RX 59; CX 11.

Complainant also complained TMCA's initial lack of informed consent for TeleMental Health evaluations violated EMTALA and HIPAA, and once informed consent was implemented, it still violated HIPAA and EMTALA because the consent form stated that you may not have the same privacy with TeleMental Health as it can be accessed by unauthorized persons, and because patients were told if they did not consent they would have to wait for an in-person evaluation. TR 45, 54-56; JX 11.

In addition to her complaints about TeleMental Health, Complainant also complained about two specific instances where one physician allegedly required pre-authorization before a patient was admitted to the hospital, and another physician initially refused to admit a pregnant individual. RX 48; CX 9 at 10; JX 1. She alleged both incidents constituted a violation of EMTALA. TR 49-50, 52; JX 1.

The only reference to the ACA in all Complainant's internal and external complaints was in a telephone conversation with TMCA's Ethics Hotline on April 23, 2014, in which she stated TeleMental Health violated "title one patient protection, 2717 quality of care." JX 22; JX 11 at 25.

In her post-hearing brief, Complainant asserts that her complaints about "HIPAA, EMTALA, Informed Consent, Prior Authorization of Insurance, Quality of Care, Best Practices, Parity (Geographical location of patient to provider), Patient access or lack of Face to Face and TeleMental Health, all fall under Title I of the ACA." Cl. Br. 15 (*citing* 29 U.S.C. §§ 218c(a)(2),(5)). However, she does not indicate which provisions of Title I of the ACA she believes the Respondent violated or provide any arguments on how she believed these complaints were connected to Title I of the ACA.⁴⁵ With that said, I acknowledge Complainant is acting *pro se* in this matter, and is entitled to some latitude. As such I will construe her allegations as broadly and liberally as possible, while still remaining impartial and without becoming an advocate for the self-represented litigant. *See Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-00003 (ARB Jan. 30, 2004).

Complainant's reported violations of EMTALA, HIPAA, CMS regulations, and Colorado state laws and regulations, cannot in and of themselves implicate protection under the ACA, and must somehow be connected or related to the provisions of Title I of the ACA. They are separate statutes not incorporated into the ACA and therefore an alleged violation of these other statutes, standing alone, does not establish a violation of the ACA. *See Stroud v. Mohegan Tribal Gaming Auth.*, ARB No. 13-079, 2013-ACA-00003/2013-CFP-00003 (ARB Nov. 26, 2014) (finding complaints referencing violations of the Comprehensive Omnibus Budget

⁴⁵ The Board in its decision remanding this matter stated Complainant was not required to identify a specific provision of the ACA she believed TMCA violated at the pleading stage. ARB Remand at 10. However, a full hearing has been held on the merits of the case, and Complainant still has not identified how her EMTALA, HIPAA, pre-authorization, informed consent, and best practices/quality of care concerns violated Title I of the ACA.

Reconciliation Act of 1985 (“COBRA”) “are not sufficient to raise a claim under the ACA as it is a separate and independent statute.”).

The Board in its decision on remand stated that while the ACA does not explicitly incorporate EMTALA or HIPAA, the subject matter of EMTALA and HIPAA is “not merely referenced in the ACA but explicitly addressed.” ARB Remand at 11. The Board continued by stating:

Indeed, HIPAA access to coverage reforms provided both the ACA’s legislative precedent, as well as its federal/state enforcement framework. And the ACA either extended or rendered moot many of HIPAA’s portability rules, which require outright elimination of preexisting condition exclusions. In addition to the more publicized reforms that the ALJ noted, the ACA includes many other general reforms, including the use of best clinical practice’s and quality care reporting, patient protections related to emergency care, and ten specified coverage categories known as ‘essential health benefits’ that include emergency services and mental health and substance use disorder services and behavioral health treatment.

ARB Remand at 11 (internal footnotes omitted). I interpret the Board’s statements to mean that the underlying subject matter of the different statutes cited by the Complainant must be considered when determining whether a violation of the ACA was alleged. Thus, while Complainant cited to violations of different statutes outside of the ACA, primarily EMTALA and HIPAA, those allegations may still constitute protected activity under the ACA if the subject matter of those statutes is also applicable under Title I of the ACA.

With this direction from the Board, I look to the provisions of the ACA to determine whether Complainant’s allegations of EMTALA and HIPAA violations, pre-authorization violations, substandard care, informed consent, best practices and quality care can fall under Title I of the ACA. The Board cited to three provisions of Title I in its decision, which it found could be potentially related to Complainant’s allegations of EMTALA, HIPAA and pre-authorization violations at the pleadings stage.⁴⁶ See ARB Remand at 8-13. Specifically, the Board cited to Sections 2717, 2719A and 1302 of Title I of the ACA, which are discussed below. *Id.*

Section 2717 of Title I of the ACA,⁴⁷ entitled “Ensuring the Quality of Care,” requires the Secretary of Health and Human Services to develop reporting requirements “for use by a group health plan, and a health insurance issuer offering group or individual health insurance, with respect to plan or coverage benefits and health care provider reimbursement structures” that:

⁴⁶ I note the burden at the pleadings stage is a low one. The Board stated “to state a whistleblower claim under the ACA, [Complainant] need only allege activity or disclosures ‘related’ to the ACA’s subject matter.” ARB Remand at 10.

⁴⁷ Complainant cited to this provision in an Ethics Line complaint on April 23, 2014, stating TeleMental Health violated “title one patient protection, 2717 quality of care.” JX 22; JX 11.

(A) improve health outcomes through the implementation of activities such as quality reporting, effective case management, care coordination, chronic disease management, and medication and care compliance initiatives . . . , for treatment or services under the plan or coverage;

(B) implement activities to prevent hospital readmissions through a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post discharge reinforcement by an appropriate health care professional;

(C) implement activities to improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence based medicine, and health information technology under the plan or coverage; and

(D) implement wellness and health promotion activities.

42 U.S.C. §§ 300gg-17(a)(1)(A)-(D). Under Section 2717, “[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall annually submit to the Secretary, and to enrollees under the plan or coverage, a report on whether the benefits under the plan or coverage satisfy the elements described in subparagraphs (A) through (D).” § 300gg-17(a)(2)(A).

Section 2719A of the ACA addresses coverage of emergency services,⁴⁸ and states that “if a group health plan, or a health insurance issuer . . . , provides or covers any benefits with respect to services in an emergency department of a hospital, the plan or issuer shall cover the emergency services,” without requiring prior authorization, and even if the health care provider is not a participating provider. 42 U.S.C. § 300gg-19a.

Section 1302, titled “Essential Health Benefits Requirements” identifies “Mental health and substance use disorder services, including behavioral health treatment” as an “Essential Health Benefit.” 42 U.S.C. § 18022(b)(1)(E). Section 1302 requires that qualified health plans provide, among other things:

coverage for emergency department services . . . without imposing any requirements under the plan for prior authorization of services or any limitation on coverage where the provider of services does not have a contractual

⁴⁸ Section 2719A defines emergency services as follows:

(B) EMERGENCY SERVICES.—The term ‘emergency services’ means, with respect to an emergency medical condition—

(i) a medical screening examination (as required under section 1867 of the Social Security Act) that is within the capability of the emergency department of a hospital, including ancillary services routinely available to the emergency department to evaluate such emergency medical condition, and

(ii) within the capabilities of the staff and facilities available at the hospital, such further medical examination and treatment as are required under section 1867 of such Act to stabilize the patient.

42 U.S.C. § 300gg-19a(b)(2)(B)(i),(ii).

relationship with the plan for the providing of services that is more restrictive than the requirements or limitations that apply to emergency department services received from providers who do have such a contractual relationship with the plan.

42 U.S.C. § 18022(b)(4)(E)(i).

While the Board relied on Sections 2717, 2718A and 1302 of Title I to find Complainant sufficiently plead protected activity under the ACA to survive a motion to dismiss, I do not find these provisions establish protected activity on the merits of the case after a full evidentiary hearing.

I am persuaded by Respondent's contention that the above three sections of Title I of the ACA only apply to health insurers and not to health care providers like TMCA. Resp. Br. at 18-19. Complainant complained only about TMCA's rendering of medical services, and not any part of its insurance benefits plan. Resp. Br. 18, 20.

While Section 2717 contains the terms "Quality of Care," and "best clinical practices," it does not mandate health care *providers* provide a certain quality care, or exercise best practices. Instead, the purpose of Section 2717 is to develop requirements for all health *insurers* to report on how they are using plan or coverage benefits and health care provider reimbursement structures to, among other things, improve patient safety through the appropriate use of best clinical practices. Thus, the focus is not on actions by health care providers, but rather on indirect actions by health insurance issuers through the use of incentives, to improve quality of care. In addition, while Sections 2719A and 1302 state that pre-authorization cannot be required for emergency services, as stated above, the statutory sections state that a health insurance issuer may not require pre-authorization for emergency services, not health care providers. There is no discussion in these three sections, or anywhere else in Title I of the ACA, on the use of TeleMental Health for emergency services and/or mental health services,⁴⁹ nor is there reference to the admittance of pregnant women to a hospital, or addressing informed consent.⁵⁰

Based upon the above discussion, the Complainant's ACA claim fails because she has not established that her complaints about and refusal to perform TeleMental Health, as well as her alleged violations of EMTALA, HIPAA, preauthorization, informed consent, and quality of care, fall within the purview of Title I of the ACA. While Complainant is self-represented in this matter, and given some latitude, she is still required to establish the elements of her claim. *See*

⁴⁹ The only mention of telemental services in Title I of the ACA is found in Section 2719A in the context of defining "wellness and prevention programs" under Section 2717(b). 42 U.S.C. §§ 300gg-17(b). The section states "wellness and health promotion activities may include . . . a health, wellness or prevention services organization that conducts health risk assessments or offers ongoing face-to-face, telephonic or web-based intervention efforts for each of the program's participants, and which may include the following wellness and prevention efforts: (1) Smoking cessation. (2) Weight management. (3) Stress management. (4) Physical fitness. (5) Nutrition. (6) Heart disease prevention. (7) Healthy lifestyle support. (8) Diabetes prevention." *Id.* This regulation does not address the validity of or proper use of telemental health services, and it appears to accept telemental services in the context of wellness and prevention programs.

⁵⁰ The only reference to informed consent states that the Secretary of Health and Human Services cannot promulgate regulations that violate informed consent and ethical standards of health care professionals. 42 U.S.C. § 18114(5).

Pik v. Credit Suisse AG, ARB No. 11-034, ALJ No. 2011-SOX-00006 (ARB May 31, 2012). I acknowledge the Board's finding that Complainant's complaints were "sufficiently related" to the ACA to survive a motion to dismiss; however, I find, after all the evidence, Complainant has not established she made complaints or refused to engage in activities which fall under Title I of the ACA. While the sections cited by the Board make reference to EMTALA, HIPAA, best practices, quality of care, and prohibiting pre-authorization, on its face, these provisions apply to health insurance issuers and not health care providers such as TMCA.

With that said, for purposes of completeness and in the event that the Board finds the Complainant's complaints arise under the ACA, I will proceed with analysis, assuming *arguendo* that Complainant's internal and external complaints could be construed to fall within the purview of Title I of the ACA.

ii. *Protected Activity/Reasonable Belief*

a. TeleMental Health

To establish protected activity under the ACA, the Complainant must show she had both a subjective and an objective reasonable belief that a violation of Title I of the ACA occurred. I find Complainant initially had a subjective and objective reasonable good faith belief that TMCA's use of TeleMental Health was unlawful or improper and might place her nursing license at risk when the new program was rolled out. I find Complainant's testimony about her concerns on the legality of TeleMental Health for emergency behavioral health assessments and the potential risk to her professional license credible, given her extensive experience as a psychiatric nurse and her testimony that based on her experience, she believed that an effective emergency psychiatric assessment required the use of all of one's senses, and that subtle cues would be missed using TeleMental Health. TR 9, 12, 17, 30, 36-37. Additionally, when introduced TeleMental Health was a new procedure at TMCA. From an objective basis, several other psychiatric evaluators on the HCAT staff, with similar knowledge and experience, expressed the same concerns about TeleMental Health assessments being illegal, unsafe to patient safety, and a substandard practice, supporting a finding that Complainant's beliefs were objectively reasonable initially. TR 185-88, 191, 211-15, 226-28, 238, 326, 344.

However, I find these complaints about TeleMental Health ceased to be reasonable after the Respondent provided staff with a copy of the FAQs on May 1, 2014, outlining its findings on the legality of TeleMental Health and responding to concerns raised by Complainant and others. JX 8. The FAQ was developed after consultation with the Legal Department, the Quality Department, the Corporate Behavioral Health Department, and Ethics and Compliance. TR 462. The FAQ stated that the Program Director with the Colorado DORA, who oversees the 7 boards that represents the professions and licensing of professionals who provide mental health assessments in the ERs, found that there is nothing in state Colorado law prohibiting TeleMental Health assessments.⁵¹ TR 66; JX 8.

⁵¹ While I credit Ms. Woodruff's testimony TMCA informed Complainant and staff that TeleMental Health was legal at staff meetings prior to this date and provided training as to how and when to perform a TeleMental Health evaluation, this was the first document that explained a basis for its finding that TeleMental Health was in compliance with the law. TR 442; *see also* RX 62. Furthermore, while there were prior site reviews by OBH and the Joint Commission finding TMCA was in compliance with all state rules and regulations, these site reports did

Upon receipt of the FAQ, Complainant appeared to accept the conclusion that TeleMental Health was not illegal. RX 65. In an email dated May 2, 2015, she thanked Ms. Woodruff for the FAQ response, and acknowledged that DORA found TeleMental Health BHAs did not violate Colorado law or the professional state boards' requirements. RX 65. Complainant also acknowledged DORA policy does not prohibit TeleMental Health and that DORA recognized TeleMental Health as the new standard of care for BHAs in the Emergency Room. She concluded "It is reassuring to know that Jacqueline Arcelin, and HCA have developed this new policy, and standard of care, to embark not for profit but to limit risk to health and safety of employees, and the patient for a better quality of care, reflecting HCA's 'Culture of Excellence.'" *Id.* at 573.

Despite the FAQ and Complainant's response to the FAQ, she continued to make the same complaints about TeleMental Health to the Ethics Hotline and to others in management at TMCA. JX 11; TR 415, 437-438; JX 10. At hearing, she testified that she disagreed with DORA's stance on TeleMental Health and would still refuse to do TeleMental Health if TMCA offered to rehire her for her prior position. TR 84-85, 163. DORA is a Colorado regulatory agency which regulates professional licenses including those of nurses. Complainant's testimony she disagreed with the determination of DORA regarding TeleMental Health is not reasonable. Complainant's testimony she would continue to refuse to use TeleMental Health to perform BHAs in the emergency department if she were rehired by TMCA, is powerful evidence there is nothing the Employer could have provided to the Complainant to change her position. Complainant continues to maintain a philosophical objection to the use of TeleMental Health in performing BHAs in emergency rooms.

Based on the foregoing, I find Complainant had a subjective and objective reasonable belief that TeleMental Health was improper/illegal up until her receipt of the May 1, 2014 FAQs. *See Day v. Staples, Inc.*, 573 F.Supp.2d 336, 347 (D. Mass 2008), *aff'd Day*, 555 F.3d at 58 (stating the employer's "repeated (and valid) explanations," undercut the reasonableness of plaintiff's beliefs). Thereafter, her continued complaints that TeleMental Health was illegal, put her nursing license at risk, or was not best practice were unreasonable.

b. Informed Consent for TeleMental Health

I find Complainant's initial complaints about a lack of informed consent for TeleMental Health assessment were subjectively and objectively reasonable, based on Complainant's credible testimony and the fact that management implemented informed consent after concerns were raised not only by the Complainant, but also by other HCAT staff members and the UPC members. TR 45, 353, 357; *see Ryerson v. American Financial Services, Inc.*, ARB No. 08-064, ALJ No. 2006-SOX-00074, PDF at 9 (ARB July 30, 2010) (finding that an employer's revision of forms in response to complainant's reported concerns supported a finding that complainant reasonably believed there was a violation under SOX). With that said, the complaints about informed consent ceased to be reasonable as of the March 12, 2014 staff meeting, in which

not address the validity of TeleMental Health, and it is unknown whether OBH and the Joint Commission considered the use of TeleMental Health. *See JX 2* at 1; RX1; RX 22; RX 23. Therefore, I find Complainant's complaints continued to be reasonable until TMCA provide a basis for its conclusion that TeleMental Health was proper.

management informed staff that they had implemented a new written informed consent form, based on staff's voiced concerns on this issue. TR 54, 56-57, 353, 357. Additionally, the requirement to obtain informed consent and use informed consent forms, which were distributed, for TeleMental Health was reiterated to Complainant and others in the FAQs provided on May 1, 2014. JX 8. The FAQ indicates the legal department was consulted on the consent form issue. *Id.*

Complainant alleged even after the implementation of informed consent, there were HIPAA violations, because the consent form stated in small print that TeleMental Health may be accessed by non-authorized persons, which constituted a privacy violation. TR 54-55; CX 13. I find this complaint is not objectively reasonable. Complainant is not an attorney and the FAQ states the legal department was involved in determining consent forms would be utilized. Additionally, the evidence establishes TeleMental Health assessments were not recorded. JX 18 at 238; TR 242-43. Complainant also complained that patients were coerced to sign the informed consent for TeleMental Health because they were told they would have to wait for a face-to-face evaluation. TR 45; JX 11; CX 7; CX 13; RX 28. I also do not find this to be an objectively reasonable belief, based on testimony that even before the implementation of TeleMental Health, it could take hours before an in-person psychiatric evaluation occurred due to staffing and the number of other psychiatric patients in the queue to be evaluated. TR 389-90. Accordingly, while Complainant's complaints were initially reasonable, once TMCA developed consent forms for TeleMental Health and began using them, her complaints regarding informed consent were no longer protected.

c. Additional Alleged EMTALA Violations

In addition to her primary concerns about TeleMental Health, Complainant also reported two specific incidents which she alleged violated EMTALA; one in which a physician, Dr. Rogers, allegedly refused to admit a pregnant patient, and the other in which another physician, Dr. Krohn, allegedly required pre-authorization before admittance. TR 47-52; JX 11; JX 1; RX 73; CX 9 at 6, 7. Both patients were ultimately admitted. TR 48, 104; RX 48; CX 9 at 6, 7. Complainant first complained to Ms. Meehan about the two physicians in November 2013, and Ms. Meehan informed Complainant that Mr. Williams would handle her complaints. JX 1; TR 308-09. Complainant met with Mr. Williams and Ms. Meehan on November 20, 2013, and again met with Mr. Williams and Ms. Woodruff on November 26, 2013, to discuss her EMTALA concerns. RX 73; RX 74. Mr. Williams and Ms. Woodruff ultimately found there were no violations after reviewing patient medical records and discussing the issue with Behavioral Health personnel and with Mr. Longtin, who was the ultimate decision-maker on EMTALA. TR 443-446; RX 70; RX 73. Ms. Woodruff then informed Complainant she did not find any violations. TR 443, 445; RX 73. Complainant also raised the same EMTALA concerns to Mr. Burgeson during a meeting on January 2, 2014, and he stated someone else was addressing these concerns. RX 52.

I find Complainant's reported concerns about Dr. Rogers' initial refusal to admit a pregnant patient to be subjectively and objectively reasonable. On a subjective basis, Complainant had undergone training on EMTALA and credibly testified that she believed the interaction with Dr. Rogers violated EMTALA. I also find the Complainant's reported concern to be objectively reasonable. Ms. Meehan told Complainant that Dr. Rogers did not want to

admit the pregnant individual because pregnant women were on the exclusion list for hospital admittance. TR 307; JX 1. However, following Complainant's complaint, there were internal email discussions between management and HR discussing when pregnant patients may or may not be excluded from admittance under EMTALA, with differing opinions voiced on the matter, and the discussion appears to have resulted in the creation of an outline protocol for admitting pregnant patients. RX 70; RX 71. These internal communications support a finding that the issue was not clear cut, and that a reasonable person with similar training and experience might have similarly voiced EMTALA concerns regarding the admittance of the pregnant patient.

I further find Complainant's reported EMTALA concerns about Dr. Krohn requiring pre-authorization were objectively and subjectively reasonable. While Ms. Woodruff informed Complainant that Dr. Krohn had already admitted the patient when he asked her to check the patient's insurance, this is inconsistent with the email Ms. Meehan sent to Complainant on November 1, 2013, in which she stated Dr. Krohn "made it very clear to you patient needed to be pre-certed *before admission*." Cf. TR 444, 459 with CX 9 at 2 (emphasis added). I credit the statement in the November 1, 2013 email over that of Ms. Woodruff, as it is in closer temporal proximity to the event in question. TR 459. Further, Complainant testified that Respondent changed the "Doctor's Presentation Form" to exclude information regarding insurance in response to her complaints. TR 54. Her testimony is consistent with a statement in the Ethics Hotline report, stating that following Complainant's complaint about pre-authorization, "To avoid further confusion, staff were told not to discuss insurance with admitting physicians." JX 11 at 40. TMCA's response to Complainant's allegation supports a finding that Complainant's belief was objectively reasonable.

2. Adverse Action

A complainant has the burden to show the respondent took some adverse action against him or her. *See Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). Under the ACA whistleblower provision, an employer is prohibited from discharging or discriminating against an employee "with respect to his or her compensation, terms, conditions, or other privileges of employment" because the employee engaged in protected activity. 29 U.S.C. § 218c. The phrase "terms, conditions, or other privileges of employment" does not indicate that actionable adverse action is limited to "economic" or "tangible" conditions of employment. 81 Fed. Reg. 70613 (*citing Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002/3, ALJ No. 2007-SOX-00005, 2011 WL 4439090 at *11-12 (ARB Sept. 13, 2011)). An adverse action "is any action that a reasonable employee would find 'materially adverse,' that is, the action is more than trivial. Specifically, the evidence must show that the action at issue could well have dissuaded a reasonable worker from engaging in protected activity." *Id.* (*citing Burlington Northern & Santa Fe R. R. Co. v. White*, 548, U.S. 53, 68 (2006)).

i. Actions Taken by Ms. Meehan

Complainant alleges that several actions taken by Ms. Meehan constituted adverse action, including the meetings on November 12 and 20, 2013, Ms. Rinaldi's presence in the meeting on November 20, 2013, the requirement that Complainant reply to emails sent by Ms. Meehan, the requirement to undergo re-training, and the removal of intake duties until retraining was completed. TR 61, 318, 320, 327; CX 9 at 12; JX 1; Cl. Br. 11-12.

During the meetings on November 12 and 20, 2013, Ms. Meehan discussed physician and patient complaints about Complainant, Complainant's use of three-way calling, use of incorrect forms for holds, failure to use a physician presentation form for patient admissions, failure to respond to emails, and the length of time it was taking to perform assessments. JX 1. I equate these meetings with Ms. Meehan with "counseling sessions" discussed in ARB case law. The Board has held that adverse action should be construed broadly and that "as a matter of law, reprimands (written or verbal), as well as counseling sessions . . . which are coupled with a reference to potential discipline" constitute adverse action. *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-009, slip op. at 10-11 (Feb. 13, 2015) (quoting *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (Dec. 29, 2010)). While Ms. Meehan did not formally discipline Complainant, she did warn Complainant "if any aspect of your job is not complete, including insurance verifications you will be subject to disciplinary actions." JX 1 at 139. Thus, I find under current ARB case law, the counseling session, combined with Ms. Meehan's reference to potential discipline constituted an adverse action. See *Sewade*, ARB No. 13-098 at 10-11.⁵²

As for the retraining and temporary removal of intake duties, I do not find this constitutes an adverse action. The retraining required by Ms. Meehan was on newly implemented procedures, specifically three-way calling, which the Complainant acknowledged she did not know how to perform.⁵³ TR 60-62, 81; JX 1; CX 9 at 15; RX 75 at 678. The retraining, and temporary removal of intake duties during the pendency of the retraining, lasted only three shifts, and Complainant was still able to perform the essential duties of her job without the intake responsibilities, including conducting psychiatric evaluations. TR 61, 72, 123, 321, 347, 349; RX 68. I do not find the retraining on a new procedure that Complainant acknowledged she did not know how to perform, and the brief, temporary removal of one job duty related to the subject of the retraining constituted an adverse action. See *Fraser v. Fiduciary Trust Company, Int'l*, 04 CIV 6958 (PAC) (S.D.N.Y. Aug. 25, 2009) (finding that while relieving a complainant of his responsibility for the client newsletter might constitute an alteration of job responsibilities, it did not represent a significant diminution of those responsibilities constituting an adverse action).⁵⁴

⁵² While Complainant also expressed concerns over the presence of Ms. Rinaldi during one of the meetings with Ms. Meehan, I do not find this constituted an adverse action in and of itself, as evidence establishes Ms. Rinaldi was the Department Educator and head-nurse for the in-house staff, and the meeting involved discussing procedures and a retraining plan. RX 68; TR 63, 126, 331-33.

⁵³ Furthermore, on November 11, 2013, Ms. Meehan emailed the entire staff stating that if anyone did not know how to complete three way calling, to meet with her to learn the process; thus the retraining was not limited to the Complainant. RX 75.

⁵⁴ Complainant's allegation that Ms. Meehan required her respond to all emails she sent, even on days that she was not scheduled to work, is not supported by the evidence. TR 82-83. The evidence reflects Ms. Meehan simply directed Complainant to check her emails once she came on shift. TR 327; JX 1 at 139; JX 8 at 150. Additionally, to the extent Complainant alleges management was dismissive towards her complaints in staff meetings, this does not constitute adverse action, particularly in light of the fact that management responded to many of the concerns raised and implemented certain procedures in response to concerns raised in staff meetings by Complainant and her colleagues. See *Erickson v. U.S. Environmental Protection Agency*, ARB No. 03-002, ALJ No. 1999-CAA-2 (ARB May 31, 2006) (finding a "din of hostile remarks" in a regular scheduled staff meeting did not constitute an adverse action).

ii. *Unfavorable Performance Evaluation*

Complainant has also alleged that she was given an unfavorable performance evaluation by Mr. Longtin on June 22, 2014. JX 10. In response to Complainant's comments in her self-evaluation that she would refuse to perform TeleMental Health, Mr. Longtin responded that Complainant was required to use TeleMental Health as part of her position and a refusal to do so could result in performance management up to and including termination. JX 10 at 18. Complainant was given an overall performance rating of 3.1 out of 5, with a 1% merit increase. *Id.* at 18. A rating of 3 is "Meets all expectations." *Id.* at 14. Mr. Longtin stated that he met with HR for guidance on how to score and determine a merit increase. RX 5. On its face, this evaluation does not appear to be a patently negative evaluation. Mr. Longtin's comments only addressed the requirement to conduct TeleMental Health assessments, and not the quality of Complainant's performance. Complainant was found to meet expectations and was given a merit increase. Without any evidence from Complainant of past performance evaluations to compare with the evaluation of June 2014, I cannot find that this performance evaluation constitutes an adverse action.⁵⁵

iii. *Suspension*

Complainant also asserts her suspension on July 17, 2014 constituted an adverse action. RX 66. Complainant was initially suspended because she refused to perform a TeleMental Health assessment as assigned. CX 9 at 32. The next day, HR determined that because Complainant was not yet on duty when she refused TeleMental Health, her suspension for refusing to perform a TeleMental Health evaluation was not appropriate and that she was entitled to pay for the hours she was placed on administrative leave. CX 9 at 32. While Complainant was ultimately paid for her suspension, at the time Complainant was sent home, she did not know she would ultimately be paid for the time lost. I find that this suspension was more than a trivial action and could dissuade a reasonable worker from engaging in protected activity. *See Burlington Northern*, 548 U.S. at 68; *Vannoy v. Celanese Corp.*, ARB Case No. 09-118, ALJ No. 2008-SOX-064, PDF at 14 (ARB Sept. 28, 2011) (finding that paid administrative leave may constitute an adverse action).

iv. *Termination*

Complainant's termination on July 24, 2014, constitutes an adverse action under the plain language of the ACA whistleblower provision. 29 U.S.C. § 218c (stating an employer is prohibited from "discharging" an employee for engaging in the enumerated protected activity).

In conclusion, for the reasons stated above, I find Complainant has established adverse action under the ACA whistleblower provision, based on her "counseling session" with Ms. Meehan, her suspension, and her ultimate termination on July 24, 2014.

⁵⁵ In a letter dated January 9, 2014, Mr. Longtin noted that Complainant provided him with an unsigned performance evaluation by Mr. Krull which showed a 2% merit increase; he did not indicate what the rating was or the date of the evaluation. RX 68. This performance evaluation is not contained in the record, and Complainant does not refer to it in her case before me. Thus the evidence in the record is insufficient to establish that the June 22, 2014 evaluation constituted a negative performance evaluation.

3. Contributing Factor

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 similar standards of proof in whistleblower cases administered by the Department of Labor. A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." 81 Fed. Reg. at 706614 (emphasis added)(citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Lockheed*, 717 F.3d at 1136)); *DeFrancesco*, ARB No. 10-114, ALJ No. 2009-FRS-00009, PDF at 6 (ARB Sept. 30, 2015) (quoting *Williams*, ARB No. 09-092 at 5); see also *Palmer*, ARB No. 16-035 at 18.

A complainant is not required to show retaliatory animus or motive to prove that his protected activity contributed to employer's adverse action. *DeFrancesco*, ARB No. 10-114, PDF at 6; *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, PDF at 7 (ARB May 31, 2013). In establishing the contributing factor element, a complainant need not "prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action" but only that his protected activity "tends to affect in any way the outcome of the [employer's] decision." *Araujo*, 708 F.3d at 158 (quoting *Marana*, 2 F.3d 1137). This is a low standard for an employee to meet, as "[t]he protected activity need only play some role, and even an '[in]significant' or '[in]substantial' role suffices." *Palmer*, ARB No. 16-035, at 18 (alteration in original).

A complainant can connect his protected activity to the adverse action directly or indirectly through circumstantial evidence. See *Araujo*, 708 F.3d at 157; *Williams*, ARB No. 09-092 at 6; *DeFrancesco*, ARB No. 10-114 at 6-7; 29 C.F.R. § 1984.104(e)(3). Direct evidence "conclusively links the protected activity and the adverse action and does not rely upon inference." *Williams*, ARB No. 09-092 at 6 (citing *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-00028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114 at 6. A complainant may also rely upon circumstantial evidence, which:

may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward a complainant after he or she engages in protected activity.

DeFrancesco, ARB No. 10-114 at 7; see also *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-05, ALJ No. 2005-SOX-00033, PDF at 13 n.69 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-00003, PDF at 13 (ARB June 24, 2011); 29 C.F.R. § 1984.104(e)(3). Circumstantial evidence must be weighed "as a whole to properly gauge the context of the adverse action in question." *Bobreski*, ARB No. 09-057 at 13-14. This is because "a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction." *Bechtel*, ARB No. 09-057 at 13 (quoting *Sylvester v. SOS Children's Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)).

When considering direct or circumstantial evidence, the ALJ must make a factual determination based on all of the relevant, admissible evidence and must be persuaded that it is more likely than not that the complainant's protected activity played some role in the adverse action. *See Palmer*, ARB No. 16-035, at 17-18, 55-56. Where an employer suggests the only reasons for its adverse actions were nonretaliatory reasons, the ALJ must take the nonretaliatory reasons into consideration. *See Id.* at 53, 55. However, in order to establish contributing factor, a complainant does not necessarily need to prove the respondent's articulated reason for the adverse action was a pretext, because "a complainant alternatively can prevail by showing that the respondent's 'reason, while true, is only one of the reasons for its conduct,' and that another reason was the complainant's protected activity." 81 Fed. Reg. at 706614 (*citing Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-00011, 2006 WL 3246904 at *13 (ARB May 31, 2006)). "Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity." *Id.*

i. Complainant's Counseling Session

Complainant alleges her protected activity was a contributing factor in her counseling session with Ms. Meehan. In support of her position, she argued that her counseling session was taken in close temporal proximity to her complaints about TeleMental Health and the two specific complaints about physicians violating EMTALA.

Complainant complained about TeleMental Health in an email to Ms. Meehan on September 6, 2013. CX 9 at 1. On November 1, 2013, Ms. Meehan informed Complainant she had received complaints from Dr. Krohn, and wanted an update from the Complainant. RX 48. On November 8, 2013, Ms. Meehan emailed Complainant stating that she had not heard back from the Complainant and had since received further complaints about the Complainant from a Dr. Mayer relating to a phone call the previous evening. RX 75 at 678. At this point, she required a meeting with Complainant to discuss the complaints received, and to review new procedures and re-train. RX 75 at 678. Complainant raised concerns about Dr. Krohn violating EMTALA, for the first time, on November 9, 2013.⁵⁶ RX 48. On November 11, 2013, Ms. Meehan informed Complainant she received additional complaints from doctors over the weekend and they needed to meet before she worked again. RX 75 at 677. Later the same day, Complainant raised for the first time her concern that Dr. Rogers violated EMTALA. CX 9 at 10. Also on November 11, 2013, there is a formal complaint about Complainant by Dr. Mayer on behalf of the pregnant patient. RX 69.

Complainant relies on temporal proximity between her EMTALA complaints and her counseling sessions with Ms. Meehan. However, Ms. Meehan scheduled the meeting with Complainant *prior* to her protected activity of reporting EMTALA violations by Dr. Rogers and Dr. Krohn. TR 349. In addition, Ms. Meehan informed the Complainant, before Complainant voiced her concerns about the two physicians, that the purpose of the meeting was to discuss several physician complaints, new procedures, and retraining, and ultimately the meeting was

⁵⁶ Complainant asserts she originally attempted to send this email on November 2, 2013, and it did not go through to Ms. Meehan. However, whether she intended to send it earlier or not, there does not appear to be a dispute that Ms. Meehan first learned of the allegation on November 9, 2013 after she had scheduled a meeting with Complainant to address concerns expressed by Dr. Krohn about Complainant and to review new procedures and re-training.

consistent with the topics Ms. Meehan initially told Complainant she would discuss. TR 349; RX 75; RX 48; CX 9 at 10; RX 69. Thus, because the meeting with Ms. Meehan and the reasons for the meeting were established prior to Complainant's protected activity of reporting EMTALA concerns about the two physicians, I cannot find that this protected activity was a contributing factor in the counseling session.

Complainant did voice concerns about TeleMental Health to Ms. Meehan about one month prior to the counseling session, establishing temporal proximity. However, I do not find temporal proximity alone is sufficient in this case to establish contributory factor between Complainant's complaints about TeleMental Health and her counseling session, as there is evidence that supports a finding of an intervening event between the protected activity and the counseling session. Specifically, there were several documented physician complaints about the Complainant and new procedures were implemented, which led to the counseling session, and there is no evidence that the stated reasons for the counseling session were pretextual. *See Fraser v. Fiduciary Trust Co., Int'l*, No. 1:04-cv-06958, PDF at 11 (S.D.N.Y. Aug. 25, 2009) (finding temporal proximity did not establish causation because there was a significant intervening event providing a legitimate basis for the plaintiff's termination). Complainant has presented no other evidence, besides temporal proximity, to suggest that her complaints of TeleMental Health were an additional reason for the counseling session.

Based on the foregoing, I find Complainant has not established her protected activity was a contributing factor in her counseling session.

ii. Complainant's Suspension and Termination

Complainant also alleges her protected activity was a contributing factor in her suspension on July 17, 2014, and her termination on July 24, 2014. Complainant argues that she was terminated "in circumstances that directly dwelt" with her protected activity. Cl. Br. at 19. The ARB has found that if the protected activity and adverse action are "inextricably intertwined," meaning the basis of the adverse action cannot be explained without discussing the protected activity, there exists a presumptive inference of causation. *See Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-00012, PDF at 13, 15 (ARB Oct. 26, 2012); *DeFrancesco*, ARB No. 10-114 at 7; *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-00007, PDF at 8 (ARB June 20, 2012). However, as discussed previously, I have found Complainant's complaints and refusal to perform TeleMental Health no longer constituted protected activity as of the May 1, 2014 FAQ because Respondent had met with Complainant numerous times to address her concerns related to TeleMental health and then provided FAQs which responded to Complainant's concerns regarding her nursing license and the legality of using TeleMental Health to conduct BHAs in the emergency department. Consequently, her refusal to engage in TeleMental Health on the day of her suspension and the day she was terminated was not protected activity, and therefore cannot be considered protected activity that is inexplicably intertwined with the adverse actions taken.

Complainant also alleges that there was close temporal proximity because she was terminated soon after she made complaints in her performance review on June 22, 2014 about TeleMental Health. Cl. Br. 18. Again, Complainant's complaints about TeleMental Health ceased to be protected as of May 1, 2014, and her statements in her June 2014 performance

evaluation that she would refuse to perform TeleMental Health were not protected under the ACA. Thus, close proximity between her stated refusal to conduct TeleMental Health BHAs in her performance review comments does not assist in establishing the performance review comments were a contributing factor in her suspension/termination.⁵⁷

Similarly, I find the amount of time between Complainant's reported EMTALA violations by Dr. Rogers and Dr. Krohn and her suspension/termination is not sufficient to establish contributing factor based on temporal proximity alone. Complainant first voiced her concerns about Dr. Rogers and Dr. Krohn in November 2013, eight months prior to her suspension and termination. RX 73; RX 74. Complainant again raised the same EMTALA concerns on January 2, 2014, and this appears to be the last time she voiced the complaints, six months prior to her suspension and termination. RX 52. While this amount of time, coupled with other circumstantial evidence, may be sufficient to establish contributing factor, Complainant has provided no other evidence to link her reports of the two physicians violating EMTALA with her suspension and ultimate termination, and there was a significant intervening event, namely Complainant's refusal to perform TeleMental Health as required by her job description, that led to her suspension and termination. *See Fraser*, No. 1:04-cv-06958 at 11.

Complainant also contends that the circumstances surrounding her refusal to conduct a TeleMental Health evaluation on July 23, 2014 supports a finding of contributing factor. She testified that she was already near Swedish Hospital, where the two patients were located, but the dispatcher wanted her to drive at least a half hour to TMCA to evaluate the patients via TeleMental Health. TR 68; RX 21; RX 27. She stated that the second evaluation was eventually done face-to-face by other evaluator, five hours later. TR 70. She claims that it made no common sense for TMCA to require her to conduct the evaluations via TeleMental Health under the circumstances. Cl. Br. at 18. However, Mr. Longtin credibly explained as a PRN employee, when Complainant was on the schedule, she was on call and assigned to the first cases across the affiliated hospitals when her shift started, either Tele, or face-to-face, regardless of where she lives. RX 10 at 87. He testified that as of July 2014, there was an operational system in place, in which every patient is taken in order, and if an evaluator conducts a face-to-face evaluation simply because she is physically closer, that may put that patient ahead of others in queue that have been waiting longer and it requires a reset of patient re-assignment each time. TR 419. In addition, staff notes from July 14, 2014 placed Complainant on notice that face-to-face evaluations were to be done by one individual and that staff were to follow all assignments and if not followed, staff members may be subject to performance management, up to and including termination. JX 3 at 181. Her refusal to perform a TeleMental Health evaluation on July 23, 2014 as assigned was not protected activity, but rather constituted insubordination for refusing to

⁵⁷ Complainant's ongoing complaints about TeleMental Health constituted protected activity up until April 30, 2014, approximately two and a half months prior to her suspension and termination. While this is a relatively short period of time, I find Complainant cannot establish contributing factor based on temporal proximity alone, given contrary circumstantial evidence in the record. Complainant's first complained about TeleMental Health in September of 2013, ten months prior to her suspension and termination. During this ten month period, TMCA was responsive to concerns raised by Complainant and others, by, among other actions, creating the UPC for volunteer staff members to voice concerns, drafting the May 1, 2014 FAQ to address staff complaints, and implementing informed consent. TR 340, 353, 407, 436. The substantial amount of time between Complainant's first complaints about TeleMental Health and her suspension and termination, coupled with the fact that TMCA was responsive to concerns raised by Complainant and other staff members, weakens any inference raised by temporal proximity.

perform her job duties as directed, and do not support a finding of contributing factor to her termination.

Antagonism or hostility toward a complainant's protected activity can also be circumstantial evidence of contributing factor. Here, while Complainant alleges management was dismissive of and nonresponsive to her complaints during staff meetings and individual meetings, this is inconsistent with the fact that several management officials met with Complainant to address her concerns, and management conducted investigations and implemented changes in response to concerns raised by Complainant. TR 43, 59, 191-92, 223, 236. I cannot find based on the evidence before me that Complainant established contributing factor based on hostility or antagonism by Respondent.

Considering the totality of the circumstances, I find the Complainant has not proven by a preponderance of the evidence that her protected activity was a contributing factor in her suspension or termination.

For the reasons addressed above, I find Complainant has not established her protected activity was a contributing factor in her counseling session, suspension, and/or termination. However, again for completeness sake, I will assume that Complainant established contributory factor for her counseling session, suspension, and termination and will proceed to the next step in the analysis, namely whether TMCA has met its burden of establishing that it would have taken the same actions absent the protected activity.

B. Respondent's Affirmative Defense

If a complainant proves that his or her protected activity contributed to the adverse action, the employer may avoid 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); *see also* 15 U.S.C. § 2087(b)(2)(B)(ii); *Palmer*, ARB No. 16-035 at 56-57. The clear and convincing standard is a higher burden than a preponderance of the evidence and the respondent must conclusively demonstrate "that the thing to be proved is highly probable or reasonably certain." 81 Fed. Reg. 70615 (*citing Clarke*, 2011 WL 2614326 at *3); *see also DeFrancesco*, ARB No. 10-114 at 8; *Williams*, ARB 09-092 at 5; *Araujo*, 708 F.3d at 159. Respondent's burden of proof is purposely a high one. *See Hutton*, ARB No. 11-091 at 13; *Araujo*, 708 F.3d at 159-160 (noting the burden shifting analysis is intended to be protective of plaintiff-employees and is a "tough standard" for employers to meet). Thus, "[i]t is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have." *Palmer*, ARB No. 16-035, at 57 (emphasis in original); *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-00006, slip op. at 11 (ARB Apr. 25, 2014).

An ALJ must consider all relevant, admissible evidence in determining whether the employer has proven it would have taken the same adverse action absent the protected activity. *See Palmer*, ARB No. 16-035 at 52, 57. This can be shown by direct or circumstantial evidence of what the employer "would have done." *See Speegle*, ARB No. 13-074 at 11. "The circumstantial evidence can include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee's work record; (3)

statements contained in relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions.” *Speegle*, ARB No. 13-074 at 11; *see Palmer*, ARB No. 16-035 at 57 & n. 236.

TMCA, on numerous occasions, informed Complainant that conducting TeleMental Health assessments was a required part of her job duties and a refusal to perform TeleMental Health assessments would result in disciplinary action, up to and including termination. As early as November 12, 2013, Ms. Meehan informed Complainant that she was expected to perform TeleMental Health evaluations; Complainant responded that she completed the TeleMental Health training and signed the new job description, and she had no problem continuing in her job. JX 1. The new job description, signed on November 20, 2013, stated that behavioral health evaluations may occur by TeleMental Health. RX 67. Complainant again signed an updated job description on April 9, 2014, along with a PRN agreement, which stated that “I understand that when I am scheduled for a PRN shift . . . I will cooperate with whatever the needs are, including completing TeleMental Health evaluations. . . .” JX 12; RX 54.

On May 27, 2014, there was an Urgent Care Message sent to HCAT staff that stated if staff members are assigned to perform a TeleMental Health assessment and the patient meets the evaluation criteria for TeleMental Health, they are expected to complete the TeleMental Health assessment. RX 6 at 77. Meeting minutes from a July 9, 2014 staff meeting also stated that staff was expected to complete evaluations by TeleMental Health where appropriate and that face to face evaluations were to be completed by one specifically identified individual. JX 3 at 180-81. The meeting minutes reflected staff was advised they were to follow all assignments and if not followed, staff members may be subject to performance management, up to and including termination. *Id.* at 181.

In Complainant’s June 22, 2014 performance evaluation and in a follow-up meeting with Mr. Longtin on July 22, 2014, Mr. Longtin again informed Complainant that she was required to perform TeleMental Health assessments as assigned per policy and by her job description and refusal would result in termination. TR 365, 415; JX 10; RX 5.

Ultimately, consistent with warnings given to Complainant, she was temporarily suspended on July 17, 2014 and terminated on July 24, 2014 immediately following her refusals to perform a TeleMental Health assessment.⁵⁸ Her termination letter stated she was terminated for “failure to follow management’s instructions concerning the performance of your job duties.” JX 4. Complainant testified that she was not surprised that she was terminated for refusing to perform TeleMental Health evaluations. TR 179.

Thus, there is ample evidence to establish that Complainant was suspended and terminated consistent with company policy, which required the performance of TeleMental Health as part of Complainant’s job duties, and which provided for discipline, up to and including termination, for failing to follow this job requirement. *See McLean v. American Airlines, Inc.*, ARB No. 12-005, ALJ No. 2010-AIR-00016 (ARB Sept. 30, 2014) (finding that complainant’s failure to adequately perform his duties was clear and convincing evidence that

⁵⁸ Ultimately, TMCA paid Complainant for her administrative leave during her suspension, as it was determined that she refused TeleMental Health before her official shift had started. CX 9 at 32.

the employer would have taken the same adverse action against complainant absent protected activity). Furthermore, Complainant was not the only employee to be terminated for failing to follow company policy regarding TeleMental Health; Debra Bowers was terminated the same day as Complainant, for the same reason of refusal to perform a TeleMental Health evaluation. CX 15; TR 234-35. It is worth again noting that while Complainant's initial complaints about TeleMental Health were reasonable and constituted protected activity, at the time she refused to perform TeleMental Health in July 2014, her refusal was no longer protected activity.

In addition to evidence demonstrating TMCA acted in accordance with its company policy, there is also evidence in the record showing that while multiple staff members initially complained about TeleMental Health, both internally and externally, they were not all terminated as a result. For example, one HCAT staff member, Mike Tapp, was a member of the UPC, and brought concerns about TeleMental to management's attention. TR 37-38, 460; RX 29. He is currently still employed at TMCA, and conducts TeleMental Health evaluations on a daily basis. TR 460. However, as noted another employee who refused to use TeleMental Health in conducting BHAs on the same date as Complainant was also fired.

Based on the foregoing evidence, I find that the Respondent has established by clear and convincing evidence that it would have taken the same adverse action absent Complainant's protected activity.

ORDER

For the foregoing reasons, I find that the Complainant has not established she engaged in protected activity under the ACA. Assuming *arguendo* that Complainant engaged in protected activity, I find that she has not established that her protected activity was a contributing factor in TMCA's adverse actions. I further find that TMCA has met its burden of establishing an affirmative defense, namely that it would have taken the same adverse action absent the protected activity. Accordingly, the complaint is hereby **DISMISSED**.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).