St. Francis Regional Medical Center *and* SEIU Healthcare Minnesota. Cases 18–CA–092542 and 18–CA–094066

December 16, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On June 12, 2013, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.[4]

In so doing, we have considered and have rejected a preliminary issue raised by the Respondent concerning *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015). We further agree with the judge that deferral to arbitration is inappropriate in this case.

[1] We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge inadvertently stated that the amended consolidated complaint issued on February 13, 2013. We correct that date to February 28, 2013. We also note that the allegations referenced by the judge in her statement of the case were made in the consolidated complaint, filed on January 16, 2013, as well as in the amended consolidated complaint. These inadvertent errors do not affect our disposition of the case.

We reject the Respondent's argument that the consolidated complaint and amended consolidated complaint, filed on January 16 and February 28, 2013, respectively, are invalid because the Board lacked a quorum at the time they were issued. "The authority of the General Counsel to investigate unfair labor practice charges, and to issue and prosecute unfair labor practice complaints, is derived directly from the language of the National Labor Relations Act . . . , not from any 'power delegated' by the Board. Accordingly, the presence or absence of a valid Board quorum has no bearing on the General Counsel's prosecutorial authority in this matter." *American Electric Power*, 362 NLRB No. 92, slip op. at 1 fn. 1 (2015); *Pallet Cos.*, 361 NLRB No. 33, slip op. at 1 (2014). We likewise find no merit in the Respondent's contention that the judge lacked authority to decide this case. *Care One at Madison Avenue*, 361 NLRB No. 159, slip op. at 1 fn. 2 (2014).

The judge relied on *Relco Locomotives*, 358 NLRB No. 37 (2012), in analyzing the Respondent's motivation for the discharges. That case was decided by a panel that included two persons whose appointments to the Board were not valid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). However, prior to the issuance of *Noel Canning*, the United States Court of Appeals for the Eighth Circuit enforced the Board's order in *Relco Locomotives*, see 734 F.3d 764 (8th Cir. 2013), and there is no question regarding the validity of the court's judgment. Further, in affirming the judge's finding that the Respondent unreasonably delayed in responding to the Union's information request regarding employees Meredith Theis and Maria Wolf, we do not rely on the judge's citation to *Postal Service*, 359 NLRB No. 4 (2012), which also was decided by a panel that included Board Members who were not validly appointed.

We agree with the judge that the Respondent violated Sec. 8(a)(1) when it questioned employee and union steward Wolf regarding her investigation into a potential grievance and threatened her with discipline for failing to aid the Respondent in its investigation of other employees who were involved in the same matter. Nevertheless, we note that employers may lawfully question employees as part of a lawful investigation into facially valid claims of misconduct, even if the alleged misconduct took place during the exercise of Sec. 7 rights. However, the employer must avoid impinging on Sec. 7 rights by, among other things, tailoring the questions to address only the narrow facts surrounding the alleged misconduct, offering assurances against reprisals for protected activity, and avoiding probes into the motives for the protected activity. See, e.g., *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 8–9 (2014); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528–529 (2007); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). In this case, the Respondent failed to take such steps.

[3] The judge discussed both *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), and *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in finding that the Respondent violated Sec. 8(a)(3) and (1) by terminating employees Theis and Wolf. Although we agree with the judge's ultimate conclusion, we note that in cases such as this, where the Respondent's motive is at issue, we apply the *Wright Line* analytical framework. See, e.g., *Hawaiian Dredging Construction Co.,* 362 NLRB No. 10, slip op. at 3 (2015); *Nationsway Transport Services*, 327 NLRB 1033, 1034 (1999). Accordingly, we do not rely on her citation to *Fresenius USA Mfg.*, 358 NLRB No. 138 (2012). Applying *Wright Line* here, we agree with the judge that the General Counsel carried his initial burden of showing discriminatory motive. In particular, the Respondent's animus toward the employees' protected activity is amply demonstrated by the pretextual nature of its proffered reasons for the terminations, its disparate treatment of Theis and Wolf, and its shifting reasons for their discharges. We further agree with the judge that the Respondent's unlawful interrogations provide additional evidence of animus, but we do not rely on her citation to *Wynn Las Vegas, LLC*, 358 NLRB No. 80 (2012), and instead rely on other established precedent, e.g., *Atelier Condominium*, 361 NLRB No 111, slip op. at 5 (2014), and *R.J. Corman Railroad Construction*, 349 NLRB 987, 989 (2007).

Member McFerran would additionally find the discharges to be unlawful applying the judge's alternative analysis under *Atlantic Steel*, supra.

[4] We shall modify the judge's recommended Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). In addition, we shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

I. SW GENERAL DOES NOT PRECLUDE LITIGATION IN THIS CASE.

As an initial matter, we address the letter submitted by the Respondent to the Executive Secretary on September 10, 2015. The Respondent described this document as a "letter on behalf of Respondent to draw the Board's attention to *SW General, Inc. v. NLRB*," which the Respondent claimed provided additional support for its argument on exceptions to the judge's Decision.

In *SW General, Inc. v. NLRB*, supra, the U.S. Court of Appeals for the District of Columbia Circuit held that Acting General Counsel Lafe Solomon was qualified to serve in that capacity under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345, et seq., and that he validly served as the Acting General Counsel at the direction of the President beginning June 21, 2010. The court further held that Solomon's authority as the Acting General Counsel ceased on January 5, 2011, when the President nominated him for the position of the General Counsel.

There is no evidence that the Respondent raised the FVRA in any challenge to the authority of the Acting General Counsel in its answer to the complaint or during the hearing before the judge. Rather, the Respondent relied exclusively upon the argument that in the absence of a Board quorum, neither the Acting General Counsel nor the judge could exercise any "delegated authority." Perhaps recognizing the weakness of its case, the Respondent's September 10 letter selectively quotes the statement from its brief in support of its exceptions that the Acting General Counsel was "without power" to prosecute this matter. However, when viewed in context it is clear that the Respondent grounded its "without power" argument in the Board's lack of a quorum, not in any alleged deficiency in the Acting General Counsel's authority under the FVRA.

In its reply brief, the Respondent reiterated its argument that the Acting General Counsel and the judge could not act in the absence of a Board quorum, and, for the first time, argued that the Acting General Counsel lacked authority because his "appointment" was not valid, citing *Hooks v. Kitsap Tenant Support Services*, 196 L.R.R.M. 2703 (W.D. Wash. 2013). The Respondent did not further elaborate on its argument, if any, regarding *Kitsap*.

As noted above, *SW General* does not hold that the "appointment" of the Acting General Counsel was not valid. To the contrary, *SW General* expressly states that Solomon was qualified to serve as Acting General Counsel under the FVRA and that he validly served in that capacity at the direction of the President. Thus, *SW General* does not address any issue the Respondent previously raised in this matter, by exceptions or otherwise, and we reject the Respondent's September 10 letter as an untimely effort to file additional exceptions.

We acknowledge that the decision in *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. While that question is still in litigation, the Respondent did not raise that argument below or in timely-filed exceptions, and we find that the Respondent thereby has waived the right do so.

Finally, on October 5, 2015, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification which states, in relevant part,

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by *SW General* are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. (Citation omitted.)
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

Thus, this ratification renders moot any argument that *SW General* precludes further litigation in this matter.

II. DEFERRAL IS INAPPROPRIATE.

We agree with the judge that deferral to arbitration is inappropriate in this case. In this regard, we find that the complaint's claims of the Respondent's animosity to the employees' exercise of protected rights, as evidenced by the particular Section 8(a)(3) and (1) allegations in this case, establish that this matter is not eminently well suited to arbitration. See *Collyer Insulated Wire*, 192 NLRB 837 (1971). We make this determination without regard to the merits of the allegations before us, and we do not rely on the judge's finding that the strain in the parties' bargaining relationship and the Respondent's alleged delay in providing information weigh against deferral.

Our dissenting colleague disagrees with our rationale for not deferring because Section 8(a)(1) and (3) allegations frequently involve claims of animus, yet the Board has deferred many such allegations to arbitration. But, clearly, Board precedent does not establish any hard-and-fast rule requiring deferral in these circumstances. Rather, our cases establish that when the totality of the facts "show a sufficient degree of hostility, either on the facts of the case at bar alone or in the light of prior unlawful conduct of which the immediate dispute may fairly be said to be simply a continuation," deferral may be inappropriate. *United Aircraft Corp.*, 204 NLRB 879, 879 (1972). Here, the Respondent's substantial animosity toward the exercise of Section 7 rights, as demonstrated by its alleged discipline and discharge of a Union steward and her unit member for activity related to the processing of the member's grievance, exceeds that in the cases cited by our dissenting colleague. Similarly, although the parties have processed numerous grievances over the course of their bargaining relationship, this alone does not necessitate deferral in cases where, as here, the dispute involves allegations concerning the use of the grievance process itself and conduct that challenges the ability of the parties to fairly resolve the case among themselves. See, e.g., *North Shore Publishing Co.*, 206 NLRB 42, 43 (1973) (deferral inappropriate for charge alleging discharge of employee for filing a grievance because such an allegation challenged the integrity of the grievance system and the employer's willingness to allow open access to it). In this particular case, we find that the allegations before us are sufficiently severe so as to demonstrate a degree of hostility that makes deferral inappropriate.

ORDER

The Respondent, St. Francis Regional Medical Center, Shakopee, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their involvement in union or other protected, concerted activities.

(b) Threatening employees with discipline for failing to disclose the identity of employees who engage in union or other protected, concerted activities.

(c) Discharging or otherwise discriminating against any employee for engaging in union or other protected, concerted activity.

(d) Refusing to bargain collectively with the Union by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Meredith Theis and Maria Wolf full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Meredith Theis and Maria Wolf whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Meredith Theis and Maria Wolf for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Shakopee, Minnesota facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 8, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2015

_____

Mark Gaston Pearce, Chairman

_____

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I would defer to arbitration the allegations that Respondent violated Section 8(a)(1) by interrogating and threatening employee and union steward Maria Wolf in connection with a potential grievance involving employee Meredith Theis, and Section 8(a)(3) and (1) by discharging Wolf and Theis.[1] My colleagues base their decision not to defer solely on the fact that these allegations claim that Respondent harbored animosity toward the exercise of protected rights. However, animosity toward the exercise of protected rights is an essential element of *every* 8(a)(3) allegation and of *every* 8(a)(1) allegation where motive is at issue, and it also underlies the vast majority of 8(a)(1) allegations that do not turn on motivation, such as the instant Section 8(a)(1) allegations concerning Wolf. Based on the majority's rationale for declining to defer, 8(a)(1) and (3) allegations would rarely if ever be deferred to arbitration, contrary to longstanding precedent. See, e.g., *United Technologies Corp.*, 268 NLRB 557 (1984) (holding that 8(a)(1) and (3) allegations are deferrable, and deferring to arbitration allegation that employer violated Section 8(a)(1) by threatening employee with discipline if she persisted in processing a grievance); *Postal Service*, 270 NLRB 979 (1984) (deferring to arbitration allegation that employer violated Section 8(a)(1) by threatening employee with discharge because of his union activities); *United Beef Co.*, 272 NLRB 66 (1984) (deferring to arbitration allegation that employer violated Section 8(a)(3) and (1) by harassing and discharging employee engaged in processing grievances).

In the case the majority cites in support of nondeferral, *United Aircraft Corp.*, 204 NLRB 879 (1972), which involved multiple allegations of 8(a)(3) harassment and discrimination, the Board *reversed* the judge's decision not to defer the allegations to arbitration. There, the Board explained that "the nature and scope of the acts currently alleged to show . . . hostility [to the exercise of protected rights], together with a measure of the current impact of any past such acts, must all be evaluated and then together be weighed against evidence as to the developing or maturing nature of the parties' collective-bargaining relationship and the proven effectiveness (or lack thereof) of the available grievance and arbitration machinery. Upon a totality of those facts, it must then be determined whether the parties' agreed-upon grievance and arbitration machinery can reasonably be relied on to function properly and to resolve the current disputes fairly." Id. at 879. Applying that standard here, (i) the nature and scope of the acts currently alleged to show hostility to the exercise of protected rights are comparable to those in the cases cited above, where the Board deferred the claims to arbitration; (ii) neither the judge nor the majority refers to any past acts evidencing such hostility; (iii) the parties' bargaining relationship dates from 2006, and they have successfully negotiated successive collective-bargaining agreements; and (iv) the parties have processed over 1300 grievances across 18 bargaining units, including approximately 240 at the Respondent hospital, and approximately 40 just-cause discipline cases have gone to arbitration. Based on the totality of those facts, I believe "the parties' agreed-upon grievance and arbitration machinery can reasonably be relied on to function properly and to resolve the current disputes fairly." Id.

Because I would defer the 8(a)(3) and (1) allegations concerning Wolf and Theis to arbitration, I would dismiss these allegations, subject to the usual proviso under which jurisdiction is retained for limited purposes. See, e.g., *United Technologies*, 268 NLRB at 560–561. Accordingly, I do not reach or address the judge's or my colleagues' analysis or findings regarding any of these allegations, but I join my colleagues in adopting the judge's finding that the Respondent violated Section

[1] For the reasons stated by my colleagues, I agree that the consolidated complaint and amended consolidated complaint are properly before the Board for disposition. For the reasons stated below, however, I would dispose of the 8(a)(3) and (1) allegations concerning Wolf and Theis by deferring them to arbitration.

8(a)(5) and (1) by unreasonably delaying its response to the Union's November 2, 2012 information request in connection with the employment terminations of Wolf and Theis.

Accordingly, for the reasons stated above, I respectfully dissent in part.

Dated, Washington, D.C. December 16, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees about their involvement in union or other protected, concerted activities.

WE WILL NOT threaten employees with discipline for failing to disclose the identity of employees who engage in union or other protected, concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union or other protected, concerted activities.

WE WILL NOT refuse to bargain collectively with the Union by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Meredith Theis and Maria Wolf full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Meredith Theis and Maria Wolf whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Meredith Theis and Maria Wolf for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Meredith Theis and Maria Wolf, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

ST. FRANCIS REGIONAL MEDICAL CENTER

The Board's decision can be found at www.nlrb.gov/case/18-CA-092542 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Catherine L. Homolka, Esq. and *Tyler J. Wiese, Esq.,* for the Acting General Counsel.

Paul J. Zech, Esq. and *Thomas R. Trachsel, Esq.,* for the Respondent.

Brendan D. Cummins, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge.[1] This case was tried in Minneapolis, Minnesota, on March 13, 14, and 15,

[1] Respondent argues that any actions taken by this Board, including its agents and delegates, lack authority because the court in *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013), found the recess appointments of Members Sharon Block and Richard Griffin were uncon-

2013. SEIU Healthcare Minnesota filed the charge in Case 18–CA–092542 on November 5, 2012, and in Case 18–CA–094066 on December 3, 2012,[2] and the Acting General Counsel issued an order consolidating cases, consolidated complaint, and notice of hearing on January 16, 2013. On February 13, 2013, the Acting[3] General Counsel filed an amendment to the consolidated complaint. The amended consolidated complaint alleges that St. Francis Regional Medical Center (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging two of its employees because they engaged in union and other concerted activities.[4] The amended consolidated complaint further alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying providing SEIU Healthcare Minnesota (the Union) with certain information. The amendment to the consolidated complaint further alleges that Respondent violated Section 8(a)(1) of the Act by interrogating and threatening an employee with discipline, up to and including discharge, because she engaged in union and other concerted activities. Respondent timely filed answers denying the alleged violations in the consolidated complaint and amendment to the consolidated complaint. Respondent's answer further raised 10 affirmative defenses. (GC Exh. 1(g).) The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,[5] including my own observation of the demeanor of the witnesses,[6] and after considering the briefs filed by the General Counsel and Respondent,[7] I make the following

stitutional and invalid. Thus, the Board lacks a quorum. Thus, the Board lacks a quorum. I reject this contention. The Board does not accept the decision in *Noel Canning*, in part, because it is the decision of one circuit court and there is a conflict among the circuits regarding this issue. *Belgrove Post Acute Care Center,* 359 NLRB No. 77, slip op. at 1 fn. 1 (2013).

[2] All dates are in 2012, unless otherwise indicated.

[3] For purposes of brevity, the Acting General Counsel is referenced herein as the General Counsel.

[4] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's Exhibit; "GC Exh." for Acting General Counsel's Exhibit; "CP Exh." for Charging Party's Exhibit; "GC Br." for the Acting General Counsel's brief; and "R. Br." for Respondent's brief.

[5] I make the following corrections to the transcript: : Tr. 95, L. 14: "indirect" should be "in direct"; Tr. 95, LL. 8 and 13: "hazard" should be "hazardous"; Tr. 189, L. 12: "SEU" should be "SEIU"; Tr. 315, LL. 9 and 25: "111" should be "LLL"; Tr. 316, L. 1: "111" should be "LLL"; Tr. 356, L. 20: "Lea" should be "Leah"; Tr. 366, L. 24 "e-identification" should be "de-identification"; Tr. 390, L. 21: "fact" should be "face"; Tr. 514, L. 25: "docket" should be "document"; Tr. 520, L. 17: "Lea" should be "Leah"; Tr. 521, L. 12: "formation" should be "information"; and Tr. 620, L. 20: "or" should be "over."

[6] Although I have included citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

[7] The Charging Party did not submit a brief.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a medical center engaged in providing acute care and clinical services, with an office and place of business in Shakopee, Minnesota, annually derives gross revenues in excess of $250,000 and receives goods valued in excess of $50,000 directly from points outside the State of Minnesota. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The primary issue in these cases is whether Respondent violated Section 8(a)(3) and (1) of the Act in discharging two of its employees for what Respondent asserts was a violation of its patient confidentiality policies, which occurred while the employees were engaged in the investigation of a potential grievance. The General Counsel maintains that these employees were unlawfully discharged for engaging in union activity. Respondent, however, maintains that it was merely enforcing its legitimate policies in discharging the employees.

An issue also exists as to whether Respondent violated Section 8(a)(1) of the Act in questioning one of the employees about her grievance investigation and threatening her with discipline for refusing to reveal certain information to Respondent. The General Counsel alleges that the questioning and threats of discipline violate the Act in that they would reasonably tend to interfere with, restrain, or coerce employees in their exercise of Section 7 rights. Respondent asserts that the questioning was lawful in that it was narrowly tailored to its investigation of a potential patient privacy breach. Furthermore, Respondent asserts that it did not threaten the employee, but merely advised her of the consequences of refusing to cooperate in its lawful investigation.

Another issue in the case is whether Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying its response to an information request made by the employees' union in conjunction with grievances filed regarding their discharges. The General Counsel asserts that Respondent failed to provide the information in a timely fashion. Respondent asserts that it responded to the request as expeditiously as possible given the scope of the requests.

As a preliminary matter, Respondent asserts that this case should be deferred to the grievance-arbitration procedure set forth in the parties' collective-bargaining agreement. The General Counsel maintains that deferral is inappropriate, given that the case arose in the context of employees engaging in protected, concerted activity and because the case involves an allegation of refusal to timely provide information.

B. Overview of Respondent's Operations

Respondent is an acute care and clinical services facility located in Shakopee, Minnesota. (Tr. 36.) Respondent is an affiliate hospital of Allina Health (Allina). (Tr. 35.) Allina is a family of hospitals and clinics located in Minnesota and Wisconsin. (Tr. 35.) Allina has offices in Minneapolis, Minnesota. (Tr. 36.) Several of Respondent's functions, including human resources, health information management, privacy, and labor-management relations, are supported by Allina. (Tr. 37, 582, 738.) Respondent has an onsite human resources department. (Tr. 37.)

1. The health information management department

Respondent's health information management (HIM) department is divided into two divisions: operations and transcription. (Tr. 58.) Transcription employees transcribe dictation by physicians into medical records. (Tr. 84–85.) During the time period at issue, there were only five employees in the operations division of Respondent's HIM department; three of these employees worked full time and two worked part time. These employees held the title of health information services assistant (HISA) III. (Tr. 58.)

HISA IIIs in Respondent's HIM department perform four job functions (or workflows), on a rotational basis. (Tr. 86, 167.) These functions are outpatient processing, inpatient processing, receptionist, and release of information (ROI). (Tr. 86, 167.) During the course of their workday, HIM employees have regular access to protected health information (PHI). (Tr. 583.) When HIM employees are performing in inpatient or outpatient processing, they gather paper medical records and scan them into electronic medical records. (Tr. 86–87.) When performing ROI duties, operations employees review requests for patient records and release the records. (Tr. 87.)

2. Management structure

All of the witnesses who testified on behalf of Respondent in this case were employees of Allina; Respondent did not call any witnesses employed by St. Francis Regional Medical Center. Several Allina departments, and their counterparts in Respondent's facility, are involved in this case.

Derek Kang is a senior vice president and chief compliance officer of Allina. (Tr. 770.) Jean Wirzbach is Allina's corporate compliance director. (Tr. 698.) Wirzbach reports to Kang. (Tr. 698.) Megan Szlechtowski is Allina's compliance manager and was previously Respondent's HIM manager (Tr. 696–697.) Szlechtowski reports to Wirzbach. (Tr. 698.)

Brian Erickson is Allina's corporate HIM director. (Tr. 583.) Erickson reports to Allina's chief information officer, Susan Heichert. (Tr. 584.) Michelle Weiss holds two titles: health information manager and privacy and security lead. (Tr. 402–403.) Weiss supports both functions for Respondent. (Tr. 581, 585.) Weiss reports to Erickson. (Tr. 583.) Beth Fischer is Respondent's HIM manager and reports to Weiss. (Tr. 582–583.) Darlene Walsh is a supervisor in Respondent's transcription department, part of the HIM department; she reports to Erickson. (Tr. 85, 450.)

Mary Selvig is a senior human resources generalist employed by Allina; she supports Respondent. (Tr. 35.) Selvig reports to Allina's director of human resources, Lisa Schwartz. (Tr. 445.) Leah Schmoyer is a human resources generalist employed by Allina; she is a coworker of Selvig. (Tr. 300, 521.) Anita Nystrom is Respondent's onsite human resources generalist. (Tr. 296, 446.)

Timothy Kohls is Allina's director of labor relations. (Tr. 737.) Sandy Francis and Tim Ewald are attorneys in Respondent's labor relations department. (Tr. 739.)

Respondent admits that Schmoyer, Selvig, and Weiss are its agents within the meaning of Section 2(13) of the Act. (GC Exh. 1(g).) Erickson, Ewald, Fischer, Francis, Nystrom, Schmoyer, Schwartz, Walsh, and Wirzbach were not called as witnesses at the hearing.

3. Respondent's labor relations

Since 2005, certain of Respondent's employees have been represented for purposes of collective bargaining by SEIU Healthcare Minnesota (the Union):

> All full-time and regular part-time nonprofessional employees employed by Respondent at its Shakopee, Minnesota, facility; excluding all other employees, office clerical employees, and guards and supervisors as defined by the Act.

(GC Exhs. 1(e) and (g).) The current collective-bargaining agreement between Respondent and the Union is effective through February 28, 2015. (GC Exh. 12, p. 76.) This collective-bargaining agreement covers six Allina facilities, including Respondent's. (GC Exh. 12, pp. 1–2.) Each Allina facility has a separate bargaining unit. (GC Exh. 12, pp. 1–2; Tr. 744.)

Article 7 of the parties' collective-bargaining agreement contains a four-step grievance-arbitration procedure. (GC Exh. 12, pp. 9–12.) At the first step of the procedure, entitled "pregrievance," an employee or steward discusses an alleged grievance with his or her manager in an attempt to resolve the issue. (GC Exh. 12, p. 10.) Information requests are common at the pregrievance step. (Tr. 387.) If the matter is not resolved at the pregrievance step, or the second or third step, it may be submitted to final and binding arbitration. (GC Exh. 12, p. 11.) Any action arising out of the interpretation, application, or adherence to the terms or provisions of the collective-bargaining agreement or arising out of disciplinary and discharge actions taken by Respondent are subject to the parties' grievance and arbitration procedure. (GC Exh. 12, p. 9.)

The current collective-bargaining agreement has several other articles implicated in this case. Article 1 (Recognition) prohibits discrimination against an employee based on union membership or because of the employee's assertion of rights afforded under the collective-bargaining agreement. (GC Exh. 12, p. 2.) Article 4 (Union Stewards) recognizes the right of union stewards to handle union business at the hospital where they are employed. (GC Exh. 12, p. 6.) Article 6 (Corrective Action and Discharge) requires just cause for initiating corrective action, discharge, or suspension of an employee. (GC Exh. 12, pp. 8–9.)

Jamey Gulley is president of the Union. (Tr. 370.) Brenda Hilbrich is the director of the Union's member action center (MAC) and education. (Tr. 288.) The Union represents employees at other Allina facilities, including Abbott Northwest-

ern Hospital. (GC Exh. 12.) Jeff Sarro and Valerie Wooten are union stewards at Abbott Northwestern Hospital. (Tr. 198.) Liz Asmus is an internal organizer employed by the Union. (Tr. 213.)

From 2006 to 2011, Allina and the Union maintained a strategic alliance. (Tr. 373, 759.) As part of the strategic alliance, Allina and the Union worked on numerous joint projects aimed at improving efficiency; in exchange, the Union was provided enhanced employment security benefits and neutrality. (Tr. 374, 759.) In 2011, Allina advised the Union it was no longer interested in neutrality or in the Union's involvement in Allina's business decisions. (Tr. 375, 760.) The strategic alliance was modified and greatly reduced in its scope. (Tr. 373, 760, 766.) Gulley testified that the Union's relationship with Respondent has become negative since the strategic alliance dissolved. (Tr. 389.) Gulley described the parties' current relationship as strained. (Tr. 390.)

4. Respondent's policies concerning patient confidentiality

Respondent maintains a myriad of policies directed at ensuring patient confidentiality in compliance with the Health Insurance Portability and Accountability Act (HIPAA), the Minnesota Health Records Act, and Minnesota Patient Bill of Rights. (Tr. 774–775.) The privacy interests of Respondent's patients are substantial, and Respondent has a significant interest in preventing wrongful disclosure of protected health information. See, e.g., 42 U.S.C. § 1320d-6 (prohibiting wrongful disclosure of individually identifiable health information).

The implementing regulations for HIPAA, promulgated by the United States Department of Health and Human Services (HHS), contain exceptions that permit a covered entity to disclose protected health information without an authorization or consent for purposes of carrying out its health care operations. 45 CFR § 164.501(6)(iii). Health care operations include the resolution of internal grievances. Id. HIPAA regulations also allow a covered entity to disclose protected health information without written authorization to the extent such use or disclosure is required by law. 45 CFR § 164.512. HHS is of the view that HIPAA regulations exempt information otherwise to be supplied under the Act in collective bargaining and in the grievance procedure:

> [t]o the extent a covered entity is required by law to disclose protected health information to collective bargaining representatives under the NLRA, it may do so without an authorization. Also, the definition of "health care operations" at Sec. 164.501 permits disclosures to employee representatives for purposes of grievance resolution.

Federal Register, vol. 65, No. 250, 65 FR 82462, 82598 (Dec. 28, 2000). See also Id. at 82485 (referencing "Other Mandatory Federal or State Laws" with specific mention of the Act, and stating: "If a federal law requires a covered entity to disclose a specific type of information, the covered entity would not need an authorization . . . to make the disclosure.").

Allina defines Protected Health Information (PHI) as health information that identifies or could reasonably be used to identify the individual, and relates to: an individual's physical or mental health or condition; the provision of health care to an individual, or; payment for health care provided to an individual. (R. Exh. 25.) Allina has an obligation to recover improperly disclosed PHI to protect patient privacy and prevent further unauthorized disclosure. (Tr. 604, 605.)

Allina's confidentiality of patient information policy allows for disclosure of PHI only for a legitimate business reason. (R. Exh. 25.) In determining whether a legitimate business reason exists to access, use, or disclose the information, the employee must consider whether it is the minimum amount of information necessary to accomplish the intended purpose. (R. Exh. 25; Tr. 420.) The investigation of a potential grievance is not listed as a legitimate business reason in the policy. (Tr. 239, 675.) Weiss was not sure whether collective-bargaining activity is a legitimate business reason; however, she testified that the Union is not an Allina business unit and, therefore, its stewards have no legitimate business reason for disclosing PHI. (Tr. 420, 421.)

Allina maintains a de-identification policy. (R. Exh. 30.) This policy states that Allina may use or disclose PHI without patient authorization when it is de-identified. (Id.) De-identified information is PHI that does not identify the individual, or any relatives, household members, or employers, and from which there is no reason to believe the person can be identified. (Id.) Redaction is the process of removing information that is individually identifiable. (Id.) It is Allina's policy to redact all documents going outside of Allina; the Union is considered outside of Allina. (Tr. 421–422.) HISA IIIs in Respondent's HIM department are not trained on de-identification or redaction, as these are not part of their job function. (Tr. 420.)[8]

Allina also maintains a "minimum necessary policy" for sharing PHI internally. (Tr. 804.) The minimum necessary standard is that employees should share the minimum amount of information necessary to conduct their purpose in payment, treatment, or operations. (Tr. 804.) Under this policy, internal investigations are a permissible use of patient medical records. (Tr. 428.) The term "internal investigation" is not defined in the policy. (Tr. 76.) The minimum necessary policy does not specifically exclude the processing of grievances as being an internal investigation.[9] (Tr. 76.)

All of the aforementioned policies are those of Allina. However, they apply to all Allina facilities and, therefore, to Respondent and its employees. None of Allina's policies prohibit redacting or sharing PHI for the purpose of investigating a grievance. (Tr. 675.)

Allina maintains a management tool for investigating violations of its patient privacy policies. (R. Exh. 28a.) Privacy violations fall into three categories: level 1; level 2, and; level 3. (R. Exh. 28a; Tr. 642–643.) The alleged breaches of patient confidentiality at issue in these cases were classified as level 3, the most serious level of violation. (R. Exhs. 22a and b; Tr. 643.) A level 1 violation is defined as an unintentional viola-

[8] De-identification is only to be performed when information is being used for a research study, or for a mandatory report, or disclosure to a Federal agency.

[9] Respondent's witnesses also referred to this as the "minimally necessary policy." (Tr. 428.)

tion or carelessness. (R. Exh. 28a.) Examples of level 1 violations include talking loudly about a patient or leaving pass codes in obvious places. (R. Exh. 28a.) A level 2 violation is defined as intentional use, disclosure, or access without following proper rules, policies, or procedures. (R. Exh. 28a.) Examples of level 2 violations include accessing PHI of a family member or acquaintance who has given permission but has not signed an authorization, giving access codes to or signing in for a coworker who has forgotten his or her password. (R. Exh. 28a.) A level 3 violation is defined as intentional use, disclosure, or access without a permitted business reason, such as curiosity, personal gain, ill will, or intent to harm a patient or others. (R. Exh. 28a.) Examples of level 3 violations include accessing PHI of a celebrity or high profile patient out of curiosity, accessing PHI of a coworker to see why the coworker was in the hospital, accessing PHI of a family member or neighbor without permission, or sharing patient information for employee gain. (R. Exh. 28a.) Determining the level of a privacy violation is left to the discretion of an investigative team. (Tr. 715.)[10]

Corrective actions for the various levels of privacy violations are also set forth in Allina's management tool. For a first level 1 violation, managers should provide re-education, coaching, or verbal warnings. (R. Exh. 28a.) For a first level 2 violation, managers should deliver re-education and a written warning or suspension. (R. Exh. 28a.) For a first level 3 violation, managers should consult with human resources to see if termination is appropriate. (R. Exh. 28a.) Not all level 3 violations result in termination. (Tr. 708.) Managers may also consider, in consultation with human resources, the following factors in deciding the level of discipline: employee history of corrective action; whether the employee has previously violated confidentiality, and; whether the employee understands the seriousness of the offense and agrees not to engage in any further violations. (R. Exh. 28a.) Human resources and/or labor relations are charged with overseeing the administration of corrective action in order to ensure systemwide consistency. (R. Exh. 28a.)

Allina employs a violation of confidentiality investigation form for investigating patient privacy policy violations. (R. Exhs. 22a and b.) This form contains narrative sections, as well as boxes that can be checked. (Id.) Relevant here, the form has a check box section in which to explain the rationale for termination; all that apply are to be checked. (Id.) The boxes in this section are labeled: curiosity; coworker access; family or friend access; other; sharing for gain; previous violation; and previous privacy issues. (Id.) Respondent characterized these as "factors," none of which are outcome determinative. (Tr. 407–408.) Respondent also listed a number of other "factors" that can be considered in deciding whether to terminate an employee for a patient privacy violation, including reckless disregard, malice, intent, and whether the employee completed Allina compliance training. (Tr. 425, 658, 669–670.)

Respondent's employees are required to undergo a 45-minute annual training regarding its policies using the Allina Knowledge Network (AKN), a computer system available to all employees. (R. Exh. 45; Tr. 69, 94–96, 269.) The employees participate in this training and take a test at the end via computer. (Tr. 96.) Disposal of hazardous materials, Allina's financial assistance program, antikickback laws, and other topics unrelated to patient privacy are also covered in the annual training. (R. Exh. 45; Tr. 95.) The privacy issues scenarios are rather basic. (Tr. 659–660.) Employees in Respondent's HIM department also undergo periodic informal training as part of monthly staff meetings, some of which concerns patient privacy. (R. Exh. 42(b); Tr. 173.)[11]

In the past, Respondent has shared PHI with the Union in responding to information requests. (Tr. 317.) At the hearing, the Union produced four sets of documents that it had received from Allina containing PHI. (Tr. 322–333; CP Exhs. 1, 2, 3, 4.)[12] These documents contained the patients' names, date of service, diagnoses, dates of birth, procedures, gender, and other PHI of the very type Respondent asserts can be used to identify a patient. (Tr. 322–333.) The Union indicated that it had received other, similar documents containing PHI from Allina. (Tr. 363–364.)[13]

5. Employment of Meredith Theis and Maria Wolf

Meredith Theis was employed by Respondent from February 28, 2006, until November 2, 2012, when she was terminated for what Respondent claims was a violation of its patient confidentiality policies. (R. Exh. 22(b); Tr. 83–84.) Theis was a full-time HISA III in Respondent's HIM department at the time of her discharge. Theis had never been disciplined during her employment with Respondent. (Tr. 129.) In fact, Theis had been recognized for her good work 10 to 12 times during her employment with Respondent. (Tr. 128–129.) As a HISA III in the HIM department, Theis was regularly required to view medical records. (Tr. 86–87.) Theis was a member of the Union, albeit a passive member. (Tr. 155.)

Maria Wolf was employed by Respondent from November 8, 1999, until November 2, 2012, when she was terminated for what Respondent claims was a violation of its patient confidentiality policies. (R. Exh. 22(a); Tr. 166, 222.) At the time of her discharge, Wolf was a part-time HISA III in Respondent's HIM department. (Tr. 167–168.) Wolf, like Theis, had never been disciplined by Respondent prior to her discharge. (Tr. 223.) Both Wolf and Theis were supervised by Fischer. (Tr. 90, 168.)

[10] The General Counsel admitted into evidence a version of this same management tool dated July 23, 2010. (GC Exh. 38.) Respondent's witnesses testified that its undated version of the tool was the one in effect at the time of the events giving rise to these cases. (R. Exh. 28a; Tr. 641.) As the language in R. Exh. 28a is more consistent with the language used in the violation of confidentiality investigation forms pertaining to Theis and Wolf (R. Exhs. 22a and b), I credit this testimony and have relied upon Respondent's version of the management tool in this decision.

[11] In Allina's 2012 compliance training, one scenario resulted in the firing of an employee for posting patient information on Facebook. (R. Exh. 25.) Another scenario involves encrypting email messages containing PHI. (Id.)

[12] These documents were admitted under seal to protect the identities of the patients.

[13] Selvig erroneously testified that, "Allina would never give an unredacted patient medical record to a steward pursuant to an information request." (Tr. 68.)

Wolf was also a union steward from 2005 until the time of her termination. (Tr. 177–178.) In fact, she was the lead steward at Respondent's facility. (Tr. 178.). Wolf served as a union delegate to the strategic alliance. (Tr. 373.) Jamie Gulley, president of the Union, characterized Wolf as an incredibly effective and tenacious steward. (Tr. 370; 372.)

Theis admitted that she understood the importance of patient confidentiality and that Allina takes patient confidentiality very seriously. (Tr. 132.) Both Theis and Wolf understood that Allina maintains policies regarding patient privacy. (Tr. 132, 241.) They also admitted they had completed Respondent's compliance training. (Tr. 97, 170.) Theis knew that Allina has terminated other employees for privacy breaches. (Tr. 147.)

6. Events preceding the termination of Meredith Theis and Maria Wolf

In the course of her ordinary workflow, Theis came upon a medical record with the initials "DAW" as the transcriptionist. (Tr. 104.) Theis found this odd because she did not know any transcriptionist employed by Respondent having those initials. (Tr. 106–107.) Instead, Theis knew a supervisor in the transcription department, Darlene Walsh, who had those initials. (Tr. 106, 129.) Theis became concerned that a supervisor was performing bargaining unit work, a potential violation of the parties' collective-bargaining agreement. (Tr. 107; GC Exh. 12.) Theis also knew that bargaining unit members were being required to take unpaid days off (low need days) and had heard rumors of layoffs due to a low volume of available work. (GC Exh. 7; Tr. 112.)

Therefore, Theis made a copy of this medical record and used white correction tape to cover the name, date of birth, medical record number, and patient address on the record. (GC Exh. 7; Jt. Exh. 2; Tr. 104.)[14] Theis then put this redacted document into a locked cabinet above her desk for safekeeping. (Tr. 108, 115.) Over the following weeks, Theis saw three other documents bearing the initials "DAW" as the transcriptionist. (Tr. 105, 108.) Theis redacted these three documents in a similar fashion to the first document and stored them in the same locked cabinet above her desk. (Tr. 108.)

On September 16, Theis went to see Wolf in the steward office. Theis was on her lunchbreak and Wolf was on a paid steward day at the time of the meeting. (Tr. 110–111, 185.) During the meeting, Theis related her suspicion that a supervisor was doing bargaining unit transcription work. (Tr. 111, 186.) Wolf promised to investigate Theis' suspicion. (Tr. 112, 187.) Theis gave the four redacted documents she had collected to Wolf. (Tr. 111, 186–187.) Theis believed it was important to give the documents in their entirety to Wolf to assist her in the investigation. (Tr. 157.) Wolf locked the documents in a cabinet inside the steward office. (Tr. 111–112, 188–189.)[15]

Wolf candidly testified that there had been tension between her and Walsh in the past; she had accused Walsh of assault a decade ago. (Tr. 260.) However, Wolf's unrebutted testimony was that her relationship with Walsh was not strained at the time of the events giving rise to these cases. (Tr. 259–260.)

On September 26, pursuant to the pregrievance step of the parties' collective-bargaining agreement, Wolf sent an email to Mary Selvig seeking information regarding whether Walsh was performing bargaining unit transcription work. (Tr. 196, 236; GC Exh. 7.) Wolf attached a copy of one of the redacted documents provided by Theis to her email in order to expedite her information request. (Tr. 197; GC Exh. 7; Jt. Exh. 2.) That redacted document is identified in the record as Joint Exhibit 2 and it is crucial to the case because Respondent contends that it is a confidential document that should not have been shared with others, including the Union's agents.

Wolf did not encrypt this message. (Tr. 695.) She also copied Liz Asmus, Valerie Wooten, and Jeff Sarro when she sent the email to Selvig. (Tr. 197; GC Exh. 7.) Wolf copied Asmus, as she had done in the past. (Tr. 199–200.) Asmus was the support person at the Union who assisted the stewards at Respondent's facility. (Id.) She copied the other stewards because she feared that supervisors might also be performing similar unit work at other Allina facilities. (Tr. 200–201.)[16]

When Selvig received Wolf's email, she did not initially open the attachment. (Tr. 451.) Instead, she forwarded it to Erickson so he could start gathering the requested information. (Tr. 450.) Erickson forwarded the email to Walsh. (R. Exh. 5.) Initially, Erickson replied to Selvig that transcription supervisors are "working supervisors" who perform transcription work. (R. Exh. 4.) Within 2 hours, Erickson advised Selvig that he had learned that the transcription work at issue had always been done by an outside provider and that Walsh had been working for that provider when she performed the transcription work. (R. Exh. 5; Tr. 566.)[17]

Selvig later noted that the document attached to Wolf's information request contained dates of treatment, diagnosis codes, medications, and other PHI. (Jt. Exh. 2; Tr. 452.) Selvig believed that forwarding this attached record to persons who were not employed by Respondent and Allina was a patient privacy violation. (Tr. 453, 459.) She then contacted Erickson and Szlachtowski about the potential patient privacy violation. (Tr. 453.)

On September 26, Erickson went to Weiss' office and asked that she look into a potential privacy violation by Wolf. (GC Exh. 7; Tr. 594.) Weiss looked at Selvig's email and the attached document and immediately had privacy concerns. (GC Exh. 7; Jt. Exh. 2; Tr. 516.) Weiss initiated a compliance 360 (C360) investigation after being advised of the alleged privacy breach by Wolf. (Tr. 704.)

[14] Jt. Exh. 2 contains several color-coded redactions. Those appearing in yellow are those that Theis redacted before giving the document to Wolf. (Tr. 101.) Allina redacted the portions in red for purposes of the hearing. (Tr. 187.)

[15] Respondent concedes that Theis was engaged in union activity when she gave the four redacted medical records to Wolf in support of a potential grievance. (Tr. 532–533; R. Br. 59–60.)

[16] Respondent concedes that Wolf was engaged in union activity when she investigated Theis' concern. (Tr. 533; R. Br. 59–60.)

[17] Selvig did not relay this information to the Union. (Tr. 567–568.) It was not until October 26, 1 month after Wolf made her information request that Respondent provided the information sought without any explanation regarding the use of an outside transcription service. (GC Exh. 27; Tr. 219–220, 568.)

7. Investigative meetings with Theis and Wolf

On October 8, Wolf was summoned to a conference room for a meeting with Selvig and Weiss. (R. Exh. 11; Tr. 203.) Sarro acted as Wolf's union steward at the meeting. (Id.) Laura Miller, an internal organizer for the Union, and two other stewards employed by Respondent also attended the meeting on behalf of the Union. (Id.) Selvig started the meeting by asking Wolf why she had sent the information request and attached redacted medical record. (GC Exh. 7; Tr. 204, 466.) Selvig also asked Wolf where she had gotten the medical record attached to the information request. (R. Exh. 11; Tr. 204, 468.) At that time, Wolf refused to reveal the name of the employee from whom she had received the attachment. (Id.) Selvig told Wolf several times that her refusal to reveal the source of the medical record could lead to discipline, up to and including termination. (R. Exh. 11; Tr. 205, 469–470.)[18]

Wolf explained that she sent the information request because she was investigating a member's concern about a manager performing unit work. (R. Exh. 11; Tr. 205–206.) Wolf also explained why she had copied Asmus, Wooten, and Sarro on the email. (R. Exh. 11; Tr. 206.) Selvig asked Wolf if she had shown Joint Exhibit 2 to a transcriptionist. (R. Exh. 11; Tr. 207.) Wolf denied showing the medical record to a transcriptionist, but admitted sending an email to a transcriptionist inquiring about it. (Tr. 207.)[19]

Weiss told Wolf that a patient's date of service constituted PHI and that she had violated Allina's policy on de-identification. (Tr. 207–209.) Wolf credibly testified that she did not know that a patient's date of service constituted PHI and that she had never been trained as such. (Tr. 207–208.) Neither Selvig nor Weiss mentioned that she had violated Allina policies by using and disclosing PHI. (Tr. 209–210.)

During the meeting, Wolf gave the file containing the documents she received from Theis to Sarro. (Tr. 210–211.) Sarro left the meeting with the four redacted medical records in his possession. (Tr. 211.) Neither Selvig nor Weiss expressed concern that the documents were given to or removed from the room by Sarro, who was not employed by Respondent. (Tr. 210–211.) Weiss testified that Wolf gave the documents to Sarro during the meeting and she and Selvig let him leave the meeting with the documents on "good faith." (Tr. 674.)

Following this first meeting, Selvig sent an email to Wolf again asking the name of the employee from whom she had obtained the medical records and the name of the transcriptionist to whom she had shown the redacted record. (GC Exh. 8; Jt. Exh. 2; Tr. 212.) Wolf received a similar email from Selvig on October 11. (Tr. 213; GC Exh. 9; R. Exh. 13.) Selvig's second email gave Wolf until the close of business on October 11 to return the documents.[20] (GC Exh. 9; R. Exh. 13.) The October 11 email advised Wolf that she would be subject to discipline, up to and including termination, should she refuse to comply with Selvig's directives. (GC Exh. 9.) Selvig copied Sarro and Nystrom on her October 11 email and blind copied Kohls, Ewald, and Francis in Allina's labor-relations department. (R. Exh. 13.)

On October 11, the Union sent an email to Selvig indicating that Wolf had received the medical records from Theis. (R. Exh. 12; Tr. 216, 478.) Selvig forwarded the Union's email to Schwartz, Kohls, Ewald, and Francis. (R. Exh. 12.) That same day, Selvig spoke to Weiss and Szlachtowski about opening a second C360 investigation on Theis. (Tr. 481–482.)

On October 12, after she had received the redacted records from Sarro, Selvig sent a third email to Wolf seeking the identity of any other person from whom Wolf might have received medical records such as those returned by Sarro and the name of the transcriptionist to whom Wolf had allegedly shown Joint Exhibit 2. (GC Exh. 10; R. Exh. 15; Tr. 215, 483.) Wolf steadfastly maintained she had not shown the documents to anyone, including a transcriptionist. (GC Exh. 10; Tr. 191, 207.) Selvig copied Sarro and Nystrom and blind copied Schwartz, and Kohls, Ewald, and Francis in Allina's labor-relations department, on her October 12 email. (R. Exh. 15.)

On October 15, Theis attended a meeting in Respondent's conference room with Selvig, Weiss, and Gulley. (Tr. 114, 485.) During the meeting, Selvig and Weiss asked questions about the documents Theis had given to Wolf. (Tr. 114, 486.) Theis explained she had come across the documents in the course of her daily workflow. (Tr. 115.) She stated that she collected the documents because she had concerns about a supervisor performing unit work. (Tr. 487.) She further stated that she had redacted the documents and locked them in a cubby over her desk. (Tr. 487.) Theis did not share the documents with anyone other than Wolf and she did not make any copies of the documents. (Tr. 488.) Theis was questioned by Weiss about redaction and de-identification. (R. Exh. 17; Tr. 115.) Although Theis did not remember any other policies being mentioned, Weiss may have questioned her about the minimum necessary policy. (R. Exh. 17; Tr. 116.)

Theis began examining Allina's scanning matrix on her breaks and lunch periods. (Tr. 117.) In looking at 74 records in the "A" section of the scanning matrix, Theis located 71 records containing PHI. (Tr. 118; GC Exh. 4.)[21]

On October 15, Selvig and Weiss had a second meeting with Wolf. (R. Exh. 18; Tr. 216, 491.) This time Gulley accompanied Wolf to the meeting. (R. Exh. 18; Tr. 216, 376, 491.) Gul-

[18] Although Wolf testified she did not "refuse" to reveal Theis' name, she did not, in fact, reveal it. Clearly, this constitutes a refusal and I do not credit her testimony on this point.

[19] Selvig and Weiss testified that Wolf told them she had showed the redacted medical record to a transcriptionist. (Tr. 469, 607.) This is reflected in Selvig's notes. (R. Exh. 11.) Wolf maintains she did not say she had shown the document to another transcriptionist. (Tr. 191, 207.) On this point I credit Wolf, as I find her to be a generally more credible witness, as discussed infra, and because her testimony is corroborated by an email she showed to Selvig and Weiss at a subsequent meeting. (Tr. 539.) This issue is material, as Respondent cited Wolf's refusal to identify the transcriptionist among the reasons for her discharge. (GC Exh. 24; R. Exh. 22(a).)

[20] Sarro left the documents Wolf had received from Theis in an envelope at Respondent's human resources department on October 11. (Tr. 479.)

[21] Theis was not aware, as Respondent maintains, that there are two components to the scanning matrix: the master scanning book and the scanning matrix. (Tr. 150, 209, 651–652.) Only HIM department employees have access to the master scanning book, the component of the scanning matrix containing actual patient records. (Tr. 651–652.)

ley attended to protest what he deemed a "very clear assault on the Union." (Tr. 377.) At this meeting, Selvig and Weiss questioned Wolf about whether she had attended compliance training. (R. Exh. 18; Tr. 217.) Selvig asked Wolf about the transcriptionist to whom she had allegedly shown the redacted medical record. (R. Exh. 18; Jt. Exh. 2; Tr. 217, 491.) Selvig further asked to see an email that Wolf had sent to the transcriptionist. (R. Exh. 18; Tr. 217, 379.) Wolf obtained a copy of the email, redacted the transcriptionist's name, and provided the email to Selvig.[22] (R. Exh. 18; Tr. 217–218, 380, 492.) Selvig and Weiss again stated that the date of service constituted PHI and that Wolf had violated Allina's de-identification policy. (Tr. 219, 378, 612.) Gulley asked to see a copy of the policy, as Wolf had never seen it. (Tr. 378.)

8. Respondent's investigative team meets

On about October 18, Respondent's investigative team met for the first time via conference call. (Tr. 495, 498, 618.) Present for the meeting were Selvig, Weiss, Szlachtowski, Wirzbach, Schwartz, and someone from labor relations. (Tr. 495, 618.) Respondent's team made an initial review of the facts gathered by Selvig and Weiss in their meetings with Theis and Wolf and applied those facts to Allina's standards for privacy violations. (Tr. 496, 618.) The investigative team reviewed Theis' and Wolf's training records. (R. Exh. 65; Tr. 619–620.) The conference call lasted about an hour, which is longer than normal for such a meeting. (Tr. 498–499.) Respondent's witnesses testified to few specific details of what transpired at this meeting.

On October 26, Respondent's investigative team met for a second time. (Tr. 497, 639.) The purpose of this meeting was to determine the level of the privacy violation. (Tr. 497–498.) Present at the meeting (either in person or via telephone) were Szlachtowski, Wirzbach, Schwartz, Erickson, Weiss, Selvig, and someone from Allina's labor relations department. (Tr. 498.) The investigative team unanimously determined that Wolf committed a level 3 privacy violation by accessing, using, and disclosing PHI and that Theis committed a level 3 privacy violation by using and disclosing PHI. (Tr. 499, 639, 706.) The attendees also decided that both Theis and Wolf should be terminated. (Tr. 501.) The meeting lasted about 1 hour, however, Respondent's witnesses recalled little about what happened. (Tr. 498–499, 639.)

Selvig prepared summary documents regarding Respondent's investigation. (GC Exh. 24; R. Exhs. 22a and b; Tr. 500.) These documents indicate that Theis and Wolf were discharged for "sharing for gain" and "other" reasons. (GC Exhs. 24 and 25; R. Exhs. 22a and b.) The other reasons included: they did not keep PHI confidential; Wolf intentionally accessed, used, and disclosed PHI without a legitimate business reason; Theis intentionally used and disclosed PHI without a legitimate business reason; Wolf knew or should have known that Theis had violated Allina's confidentiality of patient information policy, and; Wolf was not fully cooperative during the investigation. (R. Exhs. 22a and b.) Both forms cited a number of Allina policies: Confidentiality of patient information; confidentiality and nondisclosure; minimum necessary for information disclosure; treatment, payment, operations system policy; de-identification of patient information; use and disclosure of protected health information; and authorization to release and disclose patient information. (R. Exhs. 22a and b).

Selvig, in collaboration with Allina's labor relations department, prepared a Corrective Action form for Wolf following the completion of the investigation. (GC Exh. 11; Tr. 504–505.) This document, indicating that the action being taken regarding Wolf was termination (level 5), lists a multitude of reasons for Wolf's termination, including: she was unable to provide a legitimate business reason for having four patient records in her possession; she was unable to provide a legitimate business reason for forwarding one of the patient records as an email attachment to a nonemployee and three other Allina employees; she intentionally accessed, used and disclosed PHI without a legitimate business reason; she should have been aware that the employee who gave her the patient documents violated the confidentiality of patient information policy, and; she was not cooperative during the investigation. (GC Exh. 11.) A similar document was completed related to Theis. (GC Exh. 5.) This document indicates several reasons for Theis' termination, including: failure to keep patient information confidential in accordance with Allina's confidentiality of patient information policy; use and disclosure of patient records without a permitted business reason, and; incomplete redaction of the records. (Id.)

Despite having already decided the level of privacy violation and to terminate Theis and Wolf, Respondent's investigative team met for a third time via conference call on October 30. (Tr. 506.) Present on the call were Wirzbach, Schwartz, a labor relations attorney, Szlachtowski, Weiss, Selvig, and Erickson. (Tr. 506.) Again, none of Respondent's witnesses could recall with any helpful degree of specificity what was said during this meeting.

9. The termination meetings

Respondent summoned Wolf to a meeting on November 2 at 8:30 a.m. (Tr. 221.) Gulley accompanied Wolf to the meeting; Selvig and Weiss attended on behalf of Respondent. (Tr. 222, 381, 509.) Gulley protested Wolf's firing. (Tr. 382.) Wolf was provided the corrective action form by Selvig. (GC Exh. 11; Tr. 222, 382.) At 9 a.m. on November 2, Theis had her discharge meeting. (Tr. 121–122.. Gulley and Wolf attended the meeting with Theis; Selvig, and Weiss attended on behalf of Respondent. (Tr. 122, 224, 383.) Theis' meeting was similar to that of Wolf. Like Wolf, Theis was provided the corrective action form indicating that she was being terminated. (GC Exh. 5; Tr. 123, 384.)

10. Respondent's disciplinary policies and Respondent's handling of other breaches of patient confidentiality

Respondent's corrective action and discharge policy is incorporated in its collective-bargaining agreement with the Union. (GC Exh. 12, pp. 8–9.) The collective-bargaining agreement indicates that Respondent shall not initiate corrective

[22] Selvig's notes indicate that Allina attempted to recover this email in order to determine to whom it was sent and whether any documents were attached to it, but was unable to do so. (R. Exh. 18.) Selvig testified at the hearing that there was no attachment to the email shown to her by Wolf. (Tr. 539.)

action, discharge, or suspend an employee without just cause. (GC Exh. 12, p. 8.) Respondent completes a "SEIU Corrective Action Procedure Form" when disciplining or discharging an employee represented by the Union. (GC Exhs. 5, 11, 21, 22, 23.)

Respondent and Allina have discharged employees for breaching Allina's patient confidentiality policies. (GC Exh. 31; R. Exh. 46.) An employee at another Allina facility was terminated for accessing a supervisor's medical chart and asking coworkers about the supervisor's medical condition. (R. Exh. 46, p. 6.) Another employee was discharged for accessing medical records without a business reason to do so; however, this employee had been previously suspended for accessing multiple patient records without a business, operations, or care need to do so. (R. Exh. 46, p. 9.) Numerous employees at another Allina hospital were discharged for accessing patient records out of curiosity; some of these were records of high profile patients. (R. Exh. 46.) Of the 192 pages in Respondent's Exhibit 46, only 5 of the corrective action forms appeared to implicate employees of Respondent; of these two were for the employees involved in these cases. The other three employees of Respondent were terminated for accessing and disclosing PHI. (R. Exh. 46, pp. 152, 161, 167.) None of the employees discharged were engaged in union or other protected, concerted activity at the time they accessed, used, and/or disclosed PHI. (Id.)[23]

However, other violators have not been fired or have had seemingly severe violations classified as level 1 or 2 violations. An employee at another Allina facility was issued a 1-day suspension for accessing patient census data without authority and then posting information about a coworker gleaned from the census data on Facebook. (GC Exh. 31(g).)[24] Another employee was not terminated after accessing multiple patient records 15 times over a period of 18 months. (GC Exh. 31().) Another Allina employee received a written warning and suspension for sending an unencrypted email containing PHI to an email address outside of Allina. (GC Exh. 31(bb).) Another employee was suspended for sharing PHI at a luncheon.[25] (GC Exh. 31(oo).) An employee of Respondent was given a verbal warning for improperly revealing a patient's HIV status. (GC Exh. 31(ww).) Another employee of Respondent was given a written warning for accessing and changing a patient's medical chart. (GC Exh. 31(i).) Other employees were given written warnings for posting patient photos on Facebook and posting comments about a patient on Facebook. (GC Exhs. 31(h) and (qq).) Still other employees of Respondent were given written warnings and suspensions for improperly accessing and using the medical records of a patient to fraudulently obtain a medical test for a nonpatient. (GC Exhs. 31(p) and (q).)

In February and March 2012, a privacy investigation was conducted regarding employees in Respondent's emergency and HIM departments. (GC Exhs. 22 and 23.) An HIM employee went to the emergency room for treatment and left her bra behind when she returned to work. (Id.) A nurse from the emergency department called the HIM department and advised a coworker of the patient, that the patient should return to the emergency department and retrieve her bra. (Id.) The HIM department employee who received the call from the nurse advised two other coworkers of the patient about the call. (Id.) The nurse received a verbal counseling and the HIM department employee received a suspension for his incident. (Id.) The HIM employee's corrective action procedure form indicated that she revealed PHI without a legitimate business reason. (GC Exh. 22.)

11. The grievances and information requests following the terminations of Theis and Wolf

The Union promptly filed grievances over the discharges of Theis and Wolf. (GC Exh. 13; Tr. 296.) The grievances were attached to an email sent to Nystrom and Kohls on November 2. (GC Exh. 13; Tr. 296.) Hilbrich asked to expedite the grievances to step 1 because it was Allina personnel, not employees of Respondent, who made the decision to terminate Theis and Wolf. (Tr. 298.) Respondent refused to do so. (GC Exh. 15.) On the face of each grievance, the Union requested the following information:

1. Any and all disciplines issued for HIPPA [sic], Level 3 Violations in the past 5 years
2. Personnel File
3. Any and all documentation about existence and dissemination of the policy alleged to [have been] violated by grievant
4. Copy of the policy alleged to [have been] violated
5. Copies of all investigation notes and rationale for decision to terminate
6. Any and all disciplines issued for violation of the policy alleged to [have been] violated by the grievant
7. Any and all investigations and results of investigation[s] (discipline or not, including supervisors) where date of service was not redacted
8. Copies of all document[s] in Scanning Matrix in current redacted or non redacted form to determine consistency in application of policy
9. Explanation of what aspect of a patient's privacy was violated, and the harm done to said patient (Wolf only). [GC Exh. 13.]

Hilbrich gave Respondent 1 week to comply with the information requests. (GC Exh. 13; Tr. 299.)

On November 7, Hilbrich asked if Respondent would provide the requested information within the requested timeframe. (GC Exh. 14.) If so, Hilbrich asked that the first step grievance meetings be scheduled on November 14. (Id.) On November 19, Hilbrich requested an update on Respondent's progress in complying with the information requests from Schmoyer. (Id.) As Respondent had not yet provided any information responsive to her request, Hilbrich asked to schedule the first step grievance meetings on November 26, 27, or 29. (Id.) Schmoyer

[23] Since 2010, seven level 3 privacy breaches have resulted in employee termination by Respondent; of these employees, two were represented by the Union. (Tr. 518.)

[24] This employee had received a prior Final Written Warning for an issue unrelated to patient privacy.

[25] This employee had been previously terminated by Allina for a HIPAA violation.

responded that she was not involved in gathering the information, but that she would ask how things were progressing. (Id.) Schmoyer also asked how much time Hilbrich would need to review Respondent's responses to the information requests before the grievance meetings. (Id.) On November 20, Hilbrich replied that if she would not have the information until the next week, the grievance meetings should be scheduled for the first week of December. (Id.)

On November 21, for the first time, Selvig informed Hilbrich that she was working on the information requests and would forward the information in the "near future." (GC Exh. 15; Tr. 302.) Selvig testified that she met with labor relations regarding responding to the Union's information requests because they were "complex." (Tr. 519.) On November 27, Hilbrich again requested an update on Respondent's progress in complying with the Union's information requests. (GC Exh. 15.) On November 29, Selvig responded that Respondent had a reasonable amount of time to respond to the information requests and that a proper response would require some time. (Id.) Hilbrich sent Selvig another email and asked for a more specific estimate of when she would receive the information and whether it would be in advance of the grievance meetings scheduled for December 5. (Id.) Selvig replied that Respondent would be willing to reschedule the grievance meetings to allow Hilbrich sufficient time to review the information, which Selvig expected to send early the following week. (Id.)

Before sending her response to the Union's information request, Selvig contacted Wirzbach, Szlachtowski, and Francis. (GC Exh. 32.) Selvig attached copies of the Violation of Confidentiality Investigation forms for Thies and Wolf. (Id.) Selvig sought input from Wirzbach, Szlachtowski, and Francis stating, "I want to make sure it's appropriate that I've marked the Termination reason as 'Sharing for Gain' and I also marked 'Other' with a reference to see rationale." (Id.)

On December 4, Selvig provided various documents responsive to the Union's information request. (GC Exh. 28.) However, instead of providing actual disciplinary records related to other employees disciplined for patient privacy violations, as requested by the Union, Selvig attached a summary chart regarding discipline. (GC Exh. 16.) Selvig's response further did not provide any scanning matrix documents. (GC Exh. 28.) For the first time, Selvig stated that the scanning matrix request was overly burdensome and estimated that it would take 150 overtime hours to gather the documents; Selvig offered to negotiate with the Union concerning this cost. (GC Exh. 28; Tr. 306.)

Hilbrich did not want to further delay the pregrievance step meeting regarding the terminations of Wolf and Theis. (Tr. 308, 359.) Therefore, despite having just received a partial response to her information request the day before, Hilbrich went ahead with the pregrievance step meetings regarding Theis and Wolf as scheduled on December 5. (Tr. 308.)

Hilbrich sent Schmoyer an email on December 6 reiterating her request for the information that had not yet been provided by Selvig. (GC Exh. 17.) Hilbrich limited her request for scanning matrix documents to those in the "A" section. (Id.) She also asked for actual disciplinary forms instead of the summary chart Selvig had provided. (Id.) On December 18, Schmoyer indicated that it would take a full day to gather and send documents just from the "A" section of the scanning matrix; instead Schmoyer offered to send a random sampling of 50 or 100 documents. (GC Exh. 18.) Schmoyer indicated that Respondent could not provide the documents until early January due to the holidays. (Id.) A few days later, Hilbrich sent a followup email to Schmoyer asking for just the first 100 scanning matrix documents. (Id.) Schmoyer indicated she would send the documents by January 4, 2013. (Id.) Hilbrich received these documents on January 7, 2013, over 2 months after she had requested them. (GC Exh. 30(a)–(lll); Tr. 312.)

Both Theis and Wolf applied for unemployment insurance benefits under Minnesota law. (Tr. 162, 225.) During the telephone hearing regarding unemployment benefits, Selvig repeatedly cited that both were terminated for access, use, and disclosure of PHI. (Tr. 162–163, 226.) Selvig did not mention Wolf's alleged history of animosity toward Walsh during the unemployment hearings. (Tr. 272.) Selvig advised the unemployment hearing officer that Theis would have been terminated regardless of how much of the medical records at issue she had redacted. (Tr. 163.)[26]

The Union and Respondent met for step 1 grievance meetings regarding the discharges of Theis and Wolf in January 2013. (Tr. 368.) At the time of the hearing, the grievances were pending arbitration, although a date had not yet been set. (Id.)

Discussion and Analysis

A. Credibility Analysis

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly

[26] Respondent's counsel strenuously objected to the admission of any evidence regarding the unemployment hearings based upon a Minnesota law which states, in pertinent part, that testimony at an unemployment hearing may not be used or considered for any purpose, including impeachment, except by a local, State, or Federal human rights agency. Minnesota Statutes 2012, sec. 2568.105, subpart 5(c) (Tr. 77). After considering the arguments of the parties, and a brief provided by Respondent's counsel, I allowed the testimony. (Tr. 160–161.) State court privileges are allowed in Federal proceedings only when the State law supplies the rule of decision. *North Carolina License Plate Agency No. 18,* 346 NLRB 293, 294 fn. 5 (2006). Where Federal law governs, as it does here, only privileges recognized by the Federal government apply. Id. See also *R. Sabee Company,* 351 NLRB 293, 294 fn. 5 (2007) (even if statements are privileged under State law, FRE 501 renders State privilege claims inapplicable in Federal proceedings); *Cardiovascular Consultants of Nevada,* 323 NLRB 67, 67 fn. 1 (1997) (the Board reversed an ALJ and received a State court unemployment decision because established Board law holds them to be admissible, but not controlling).

when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622.

My credibility findings are generally incorporated into the findings of fact set forth above. My observations, however, were that the General Counsel's witnesses were composed and forthright when they testified. By contrast, Respondent's witnesses (particularly Selvig and Weiss) took great pains to assert that Respondent's commitment to patient privacy is unwavering and that the investigations and discharges at issue were handled like any other, only to have their testimony and credibility undermined by documentary evidence and by other witnesses.

Respondent's witnesses evinced a single-minded desire to reiterate the message that Allina and Respondent take patient privacy very seriously, however, most demonstrated significant difficulty explaining Allina's patient privacy policies or HIPAA. None of Respondent's witnesses seemed aware that HIPAA regulations permit disclosure of PHI for resolution of internal grievances or to a collective-bargaining representative as required under the Act. (Tr. 264, 796.) Selvig was aware that Respondent maintains a de-identification policy, but was unable to explain it. (Tr. 547.) Respondent's witnesses were also unable to consistently explain what is meant by the terms personal gain, sharing for gain, legitimate business reason, or intent as they are used in Allina's policies. (Tr. 73, 420, 425, 562, 610, 667, 731–732.)

I did not credit the testimony of Respondent's witnesses regarding its internal investigation into the privacy violations at issue in these cases. All of these witnesses demonstrated an extremely poor recall of what was said at these meetings, some of which lasted over an hour. Notably, Respondent did not call as witnesses most of those in attendance at those meetings. Additionally, although an attorney from Allina's labor relations department being present on every conference call leading up to the discharges, none of Respondent's witnesses recalled what might have been discussed regarding Theis and Wolf engaging in union activity. Despite not remembering with any particularity what was said at any of the meetings, Respondent's witnesses did remember several points which might otherwise be helpful to Respondent's cause, such as that the discussions were detail-oriented, thoughtful, very extensive, and that the investigative team followed all usual protocols and procedures. (Tr. 464–465, 507.) I give very little weight to the self-serving and nonspecific testimony of Respondent's witnesses regarding Respondent's investigation and the decisionmaking process leading up to the terminations of Theis and Wolf.

I did not find Selvig to be a particularly credible witness. She gave nonresponsive answers on cross-examination. She frequently refused to answer simple "yes or no" questions with a yes or a no. (Tr. 551, 554, 556, 567.) Selvig refused to admit basic concepts such as that it is typical for a union to request such information as the reasons for an employee's termination, personnel files of discharged employees, or discipline records for employees terminated for similar reasons (responding only that "they may" or "it depends"). (Tr. 558.) Her overall demeanor on the witness stand, almost complete unwillingness to concede even basic premises, and frequent sparring with counsel for the General Counsel and the Charging Party detracted from her overall credibility.

Selvig struggled when presented with documentary evidence that contradicted her hearing testimony. For example, she initially denied that Theis and Wolf were discharged for sharing for gain, despite the fact that she checked a box on her investigative form indicating that they were. (GC Exh. 24, 25; R. Exhs. 22a and b; Tr. 53.) Later she testified that sharing for gain is "just part of the form" and "not inclusive of the total reason" for the discharges. (Tr. 73.)

Selvig also had a great deal of difficulty explaining what is meant by "sharing for gain." (Tr. 433–434.) She provided nonsensical responses to the General Counsel when asked what sharing for gain meant including that, "typically it's used as according to the policy to gather something that is not related to your position, so it would be outside of your realm or role." (Tr. 53.) Even before the onset of this litigation, Selvig was unsure that Theis and Wolf were sharing for gain. In an email, Selvig stated, "I want to make sure it's appropriate that I've marked as the [t]ermination reason[] as 'Sharing for Gain'. . ." (GC Exh. 32.) In my view, Selvig was not ever able to satisfactorily explain why she checked the box indicating that Theis and Wolf were terminated for sharing for gain.[27]

I also find that Weiss was not a particularly credible witness. Like Selvig, she frequently sparred with counsel for the General Counsel and the Charging Party. She engaged in the following exchange with counsel for the General Counsel when asked what Respondent may consider in assessing a level 3 privacy violation:

> Q. Now, the Level 3 policy the most current one that was effective at the time of their terminations, it does not take into account reckless disregard for patient privacy, does it?
>
> A. No.
>
> Q. Okay. And it does not take into account any sort of malicious intent, correct? A:They can be factors.
>
> Q. Oh, so reckless disregard and malicious intent can be factors?
>
> A. It's not part of the policy.
>
> Q. So they can be factors, though.
>
> A. Considerations.
>
> Q. Okay. So they can be considerations. Correct?
>
> A. It's not part of the policy.
>
> Q. That's not what I'm asking . . . it is a consideration, right . . . .
>
> A. It can be considered in any case.

(Tr. 670–671.) She also gave contradictory testimony. Weiss initially testified that Theis was terminated for access, use, and disclosure of PHI in violation of Allina policies; a moment later

[27] Selvig also testified that the decade-old feud between Wolf and Walsh meant that Wolf disclosed that Walsh was possibly performing bargaining unit work for personal gain. (Tr. 73.) However, Selvig was unable to explain what Theis might have had to gain by exposing this potential contract violation.

she testified that Theis was terminated only for use and disclosure of PHI. (Tr. 417–418.) After testifying about whether Theis and Wolf were terminated for access, use, or disclosure of PHI, she added, "the whole point is they were not to be using these documents for this." (Tr. 419.)

Like Selvig, Weiss also had problems explaining sharing for gain. Weiss admitted that Respondent indicated on its investigative forms that Theis and Wolf were terminated for sharing for gain, citing Wolf's alleged personal animosity toward Walsh. (Tr. 677–678.) She then quickly stated that sharing for gain was merely a factor considered by the investigative team and not the primary reason for the discharges. (Tr. 678.)

Weiss also possessed a poor grasp of what was said during Respondent's investigative meetings regarding Theis and Wolf. In fact, when Weiss was asked specifically what was said during one such meeting, she refused to answer, stating it would be "hearsay." (Tr. 679.) When directed to answer the question, she stated, "I honestly can't recall." (Tr. 679.)

When asked about the definition of legitimate business reason, Weiss testified that it has to be something done under the auspices of an employee's workflow, and if it were outside of what their work duties were, it would not be a legitimate business reason. (Tr. 425.) Weiss was not able to reconcile how posting a patient photo or patient information on Facebook or editing a family member's medical chart, all of which were found to be lesser violations than those at issue here, were within the offending employees' work duties. (GC Exhs. 31(h), (i), (qq).) By way of contrast, Weiss did not explain how Theis, encountering four documents as part of her regular workflow, would have been outside of her work duties and, therefore, a Level 3 violation resulting in termination.

I also did not find Megan Szlachtowski to be a particularly credible witness. Like Respondent's other witnesses, she had a poor grasp of what was said in critical meetings leading up to the terminations of Theis and Wolf. She testified that Wolf was engaged in union activity when she sent her information request with the attached redacted medical record to Selvig and various union representatives. (Tr. 721.) She admitted that the investigative team discussed the employees' union activity in deciding to terminate them. (Tr. 723.) Szlachtowski engaged in the following exchange with counsel for the Charging Party:

> Q. Well, did you discuss whether or not union business was a legitimate business purpose?
>
> A. It was my understanding that . . . the Union was not part of a business unit of Allina.
>
> Q. Now, I'm asking you about what was discussed now . . . In these conference calls where you're discussing the termination decision, did you discuss whether or not a union business purpose was a legitimate business purpose—for applying this policy?
>
> A. Yes.
>
> Q. And what did you discuss?
>
> A. That the Union is not considered a business unit within Allina; therefore, no permitted business reason for sending the information.
>
> Q. And who said that?
>
> A. It was discussed amongst—I can't remember who said what.
>
> Q. Tell me to the best of your recollection what was said about whether or not union business was a legitimate business purpose in that conversation . . . .
>
> A. I cannot recall details, other than it was a focus . . . in discussion on if the information was sent for a business-related reason, and that answer was no.

(Tr. 723–774.) Clearly, the union activity of Theis and Wolf was discussed during Respondent's investigative meetings. However, Szlachtowski, like Respondent's other witnesses, was not able to recall specific details of what was said during the meetings or regarding the union activity. Her failure to recall such critical details detracts from her credibility.

Respondent's efforts to bolster its position through the testimony of Kang were unavailing. Kang testified that he was not familiar with the facts of these cases. (Tr. 794.) He was not involved in the decisions to terminate Theis and Wolf. (Tr. 795.) In addition, Kang did not know that Allina had been disclosing PHI to the Union until he was informed by counsel for Respondent on the eve of his testimony. (Tr. 799.) He was further unaware of the HIPAA regulations allowing disclosure of PHI to a collective-bargaining representative pursuant to the Act. (Tr. 796, 798.)

Kohls' testimony was not particularly relevant to the merits of this case. Instead, his testimony pertained mostly to the deferral issue and the bargaining relationship between Allina and the Union. He appeared credible and forthright in his testimony.

Hilbrich and Gulley also appeared to testify truthfully. Neither gave testimony that was rebutted by other witnesses. Hilbrich's testimony was corroborated by several email messages exchanged with Respondent. Gulley's testimony was corroborated by Wolf, who I find to be a credible witness as discussed below. Gulley's testimony regarding the bargaining relationship between Allina and the Union was mostly corroborated by Kohls and any differences between their testimony are really matters of opinion.

Both Theis and Wolf appeared to testify truthfully during the hearing. Both candidly responded to questioning under cross-examination. Theis admitted that she understood the importance of patient confidentiality and that Allina takes patient confidentiality very seriously. (Tr. 132.) Both understood that Allina maintains policies regarding patient privacy. (Tr. 132, 241.) They also admitted they had completed Respondent's compliance training. (Tr. 97, 170.) Theis knew that Allina has terminated other employees for privacy breaches. (Tr. 147.) Wolf candidly admitted that there had been tension between her and Walsh in the past; she had accused Walsh of assault a decade ago. (Tr. 260.) Wolf further admitted that Selvig did not need to see the redacted medical record in order to respond to her information request. (Tr. 254.) She also admitted that Asmus, Sarro, and Wooten did not need to see the medical record attached to her information request. (Tr. 255.) Therefore, where their testimony conflicts with other witnesses, I credit Theis and Wolf.

B. The Deferral Issue

Whether the Board should defer to the parties' grievance arbitration procedure is a threshold issue that must be addressed before considering the merits of the complaint allegations.[28] The relevant standard is set forth in *Collyer Insulated Wire,* 192 NLRB 837 (1971). In *Collyer,* the Board explained the competing interests in such cases: [E]ach such case compels an accommodation between . . . the statutory policy favoring the fullest use of collective bargaining and the arbital process and . . . the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices." 192 NLRB at 841.

Recently, the Board reiterated the following list of criteria used to assess the competing policy interests and arrive at a decision on this issue:

> The Board considers six factors in deciding whether to defer a dispute to arbitration: (1) whether the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) whether there is a claim of employer animosity to the employees' exercise of protected rights; (3) whether the agreement provides for arbitration in a very broad range of disputes; (4) whether the arbitration clause clearly encompasses the dispute at issue; (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is eminently well-suited to resolution by arbitration. [Citations and internal punctuation omitted.]

San Juan Bautista Medical Center, 356 NLRB No. 102, slip op. at 2 (2011).[29]

The instant case does not arise within the context of a long and productive bargaining relationship. It appears that the Union had a productive bargaining relationship with Allina between 2006 and 2011, during the life of the strategic alliance. However, more recently, Allina has largely dismantled the strategic alliance, abandoned its previous position of neutrality, and become frustrated with the Union's rejection of its recent proposals. (Tr. 768.) Gulley testified that the relationship between Allina and the Union is now strained. This testimony was not contradicted by any of Respondent's witnesses or other evidence. In addition, Respondent's failure to timely respond to various information requests by the Union reflects poorly on the relationship between the parties. As such, I cannot find that these disputes arise in the context of a long and productive bargaining relationship.

Clearly, this case involves a claim of employer animosity to the employees' exercise of protected rights. Theis and Wolf were discharged for their actions, which arose in the context of union activity. Theis observed what she believed was a violation of the collective-bargaining agreement between Respondent and the Union and reported the violation to her union steward; Wolf, her union steward then attempted to investigate the alleged violation by making an information request pursuant to the pre-grievance step of that same collective-bargaining agreement. Union grievance filing activity and the filing of information requests are both protected and concerted activity. *Shrock Cabinet Co.,* 339 NLRB 182 (2003); *Postal Service,* 345 NLRB 426 (2005). Both Theis and Wolf were subsequently fired as a result of engaging in protected, concerted activity. Therefore, these cases implicate a claim of animosity on the part of Respondent to its employees' exercise of protected rights.

The dispute at issue is not well-suited to arbitration. A dispute is well-suited to arbitration when the meaning of a contract provision is at the heart of the dispute. *Collyer,* 192 NLRB at 842. Deferral is especially inappropriate in a case where the arbitration involves discipline of stewards in reprisal for their grievance activities. *Union Fork & Hoe Co.,* 241 NLRB 907, 908 (1979). Furthermore, the Board has reaffirmed that deferral to the grievance resolution process is inappropriate where the precipitating event leading to an employee's termination is the employee's protected activity. *Mobil Oil Exploration & Producing, U.S.,* 325 NLRB 176 (1997). Respondent would argue that these cases involve interpretation of the just cause provision of the parties' collective-bargaining agreement. However, it also involves an alleged derogation of the nondiscrimination clause and retaliation against a union steward and another union member for engaging in protected, concerted activity. Thus, I find that this case is not well-suited to arbitration.

Moreover, the Board does not traditionally defer failure to provide information cases to arbitration. *Hospital San Cristobal,* 356 NLRB No. 95, slip op. at 1 fn. 3 (2011). See also *Rochester Gas & Electric Corp.,* 355 NLRB 507 (2010) ("deferral is not appropriate as the [c]omplaint alleges violations of Section 8(a)(5) of the Act for failing and refusing to provide information"). The Board has also stated a preference for resolving an entire dispute in a single proceeding and does not favor the piecemeal deferral of complaint allegations. Id. The information requests at issue here would not have been made but for Respondent's discharge of Theis and Wolf; they are linked. Thus, piecemeal deferral as suggested by Respondent would run up against Board policy to resolve an entire dispute in a single proceeding. *15th Avenue Iron Works,* 301 NLRB 878, 879 (1991), enfd. 964 F.2d 1336 (2d Cir. 1992).

Respondent's reliance on *Altoona Hospital,* 270 NLRB 1179 (1984), in support of its deferral argument is misplaced. I find *Altoona Hospital* to be distinguishable from the instant cases. Although *Altoona Hospital* involved the discipline of an employee for disclosing confidential information in contravention of the respondent's work rules, it is factually dissimilar to the instant cases. The offending employee in *Altoona Hospital*, a receptionist in the hospital's emergency department, was issued a written warning for patient complaints regarding her allegedly rude and discourteous behavior. 270 NLRB at 1179. The employee then disclosed the identity of one of complainants to a private investigator, who called the mother of the patient involved. The employee was fired for disclosing the information to the private investigator. Id. The facts in this case involve two employees engaging in union activity. Moreover, the Board in *Altoona Hospital* decided that case under the standards set forth in *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955), and *Olin Corp.,* 268 NLRB 573 (1984), which involve postarbital deferral. Therefore, I find that the Board's holding in *Altoona Hospital* is inapposite to these cases.

[28] See Sec. 102.35(a)(9) of the Board's Rules.

[29] There is no dispute that factors (3), (4), and (5) favor deferral.

I find that deferring this case to arbitration would be inappropriate. The factors set forth in *San Juan Bautista Medical Center,* 356 NLRB No. 102, slip op. at 2 (2011), weigh against deferral. In addition, the Board traditionally does not find deferral of information request cases appropriate and disfavors piecemeal litigation. Therefore, I find that deferral of these cases to the parties' grievance-arbitration procedure is inappropriate and move on to deciding the merits of the cases.

C. Respondent Violated the Act in Interrogating and Threatening Wolf

The evidence establishes, and I find, that Respondent violated the Act by interrogating Wolf and threatening her with discipline for refusing to reveal the name of the employee who provided her with documentary evidence that a member of management was possibly performing bargaining unit work. I further find that Respondent violated the Act by interrogating Wolf and threatening her with discipline for refusing to identify any other employee with whom she had shared or discussed such evidence. I also find that Respondent violated the Act by threatening Wolf with discipline if she failed to assist Respondent in retrieving the documents.

The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House,* 269 NLRB 1176 (1984), enfd. sub nom. *Hotel Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). The Board has additionally determined that in employing the *Rossmore House* test, it is appropriate to consider the factors set forth in *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964): whether there was a history of employer hostility or discrimination; the nature of the information sought (whether the interrogator was seeking information to base taking action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation, and; the truthfulness of the reply. The *Bourne* factors should not be mechanically applied or used as a prerequisite to a finding of coercive questioning, but rather used as a starting point for assessing the totality of the circumstances. *Westwood Health Care Center,* 330 NLRB 935, 939 (2000).

The *Bourne* factors weigh in favor of a finding that the interrogations violated the Act. On October 8, Respondent summoned Wolf to a meeting in its conference room. At this meeting, Wolf was questioned by Selvig and Weiss; both of whom who are agents of Respondent and employed by its overarching parent company, Allina. In addition, Weiss is the supervisor of Fischer, who is the supervisor of Wolf. Thus, Weiss is two levels above Wolf in the corporate hierarchy. In addition, Weiss and Selvig sought information from Wolf on the identity of another employee. When the identity of Theis was finally revealed to Weiss and Selvig, action was swiftly taken against Theis. Thus, the *Bourne* factors weigh in favor of a finding of coercive questioning by Weiss and Selvig on October 8.

Respondent's questioning of Wolf on October 8 was designed to determine with whom Wolf had engaged in protected, concerted activity. In applying the *Bourne* factors, the Board seeks to determine whether under all of the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center,* 330 NLRB 935, 941 (2000). At time Weiss and Selvig questioned Wolf, they knew that she had received the redacted medical records from a union member in her capacity as steward and that she was using those records to investigate a potential contract violation. Threatening her with discipline for failing to reveal the identity of the member from whom she had received the documents, and thus with whom she had engaged in protected, concerted activity, would reasonably tend to coerce her so that she would feel restrained in exercising her Section 7 rights. As such, I find that Respondent's October 8 interrogation of Wolf violated Section 8(a)(1) of the Act.

On October 11, Selvig sent Wolf an email threatening her with discipline if she did not identify the union member from whom she had received the redacted medical records and the transcriptionist to whom she had allegedly shown one of the documents. (GC Exh. 9.) Selvig also directed Wolf to assist Allina in retrieving any documents she had given to others. On October 12, Selvig sent Wolf a similar email threatening her with discipline if she did not identify the transcriptionist to whom she had allegedly shown one of the redacted medical records she had received from Theis and the names of any other person to whom she had provided patient records. (GC Exh. 10.) That these interrogations did not take place in person is of little consequence. Selvig used Allina's official email system to send her messages. In addition, although Selvig was not a member of Wolf's direct chain of command, she was a senior human resources generalist at Allina and well above Wolf's position in the corporate hierarchy. Although Respondent cites to its duty to recover PHI, no evidence was offered that this was done in other investigations and no testimony was elicited on the recovery of PHI in other cases. (Tr. 604.) Again, Selvig's actions in threatening Wolf with discipline for failing to reveal the identity of the member from whom she had received the documents, the identity of the transcriptionist to whom she had allegedly shown one of the documents, and if she did not assist Respondent in recovering any outstanding documents, would reasonably tend to coerce her so that she would feel restrained in exercising her Section 7 rights. Thus, I find that the October 11 and 12 threats during the interrogations of Wolf violated Section 8(a)(1) of the Act.

D. Respondent Violated the Act in Discharging Theis and Wolf

The evidentiary record establishes, and I find, that Respondent terminated Theis and Wolf for engaging in union and protected, concerted activity. As an initial matter, I find that Theis and Wolf were engaging in protected, concerted activity when Thies provided evidence that she believed established a contract violation to Wolf. I further find that Wolf was engaged in protected, concerted activity when she sent an information request to Selvig regarding the purported contract violation. Union grievance filing activity and the filing of information requests are both protected and concerted activity. *Shrock Cabinet Co.,* 339 NLRB 182 (2003); *Postal Service,* 345 NLRB 426 (2005). The Board has held that in presenting and pro-

cessing a grievance, a union steward retains the protection of the Act, except in cases of extreme misconduct in the performance of their union duties. *Union Fork & Hoe Co.,* 241 NLRB 907 (1979).

When an employee is disciplined or discharged for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Co. of America,* 338 NLRB 20 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst or alleged misconduct; and (4) whether the conduct was provoked by an employer's unfair labor practice. *Standard Hotel,* 344 NLRB 558, 558 (2005), citing *Atlantic Steel Co.,* 245 NLRB 814, 816 (1979). For an employee to forfeit the protection of the Act while processing a grievance, the employee's behavior must be so violent, or of such obnoxious character, as to render him or her wholly unfit for further service. *Clara Barton Terrace Convalescent Center,* 225 NLRB 1028, 1034 (1976).

All of the *Atlantic Steel* factors weigh in favor of a finding that Theis and Wolf did not forfeit the protection of the Act. The discussions at issue took place in face-to-face meetings in Respondent's conference room or by way of an email message sent on Allina's email system. The matter discussed was Wolf's investigation of the possible contract violation discovered by Theis. Wolf was pursuing an information request pursuant to the grievance procedure of the parties' collective-bargaining agreement. The nature of the misconduct was twofold: the discovery and retention of medical records possibly showing that a manager was performing bargaining unit work, and; the disclosure of a partially redacted medical record containing PHI to a union representative and two union stewards at another Allina facility. The actions of Theis and Wolf in this case were not of such a nature to render them unfit for further service. Instead, they were attempting to investigate a potential contract violation. The Board has held other violations of an employer's rules protected. A union steward's forging of the names of other employees on a grievance has been found protected. *Roadmaster Corp.,* 288 NLRB 1195 (1988); *Allied Aviation Fueling of Dallas, LP,* 347 NLRB 248 (2006) (signing another employee's name to a grievance seeking to protect bargaining unit work held to be protected). The conduct of Theis and Wolf did not rise to a level approaching that of a crime, such as forgery. Finally, the actions of Theis and Wolf were provoked to some degree by the actions of Respondent. Walsh, a supervisor, was performing transcription work, albeit for an outside transcription service. Theis and Wolf were investigating this possible contract violation. In sum, under the four-factor *Atlantic Steel* test, I cannot conclude that the actions of Theis and Wolf caused them to lose the protection of the Act.[30]

Furthermore, Respondent has not made a clear showing that Theis and Wolf violated the plain language of its confidentiality of patient information policy. Respondent's witnesses testified that Theis used and disclosed PHI and Wolf accessed, used, and disclosed PHI without a legitimate business reason. However, I note that Respondent does not define legitimate business reason in its policy and Respondent's witnesses could not consistently provide a definition. Similarly, Respondent does not define such other relevant terms as intent and sharing for gain. I must construe these ambiguities against Respondent. It is well settled that any ambiguity in a rule or policy will be construed against its promulgator. *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69, slip op. at 27 (2010); *Bryant Health Center*, 353 NLRB 739, 745 (2009).[31]

In their briefs, the General Counsel and Respondent further analyze the discharge allegations using the burden shifting approach set forth in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 395 (1983).[32] It is clear that the *Wright Line* analysis, "is inapplicable where, as here, an employer undisputedly takes action against an employee for engaging in protected conduct; in such cases, the inquiry is whether the employee's actions in the course of that conduct removed the employee from the protection of the Act." *Fresenius USA Mfg.,* 358 NLRB No. 138, slip op. at 4 fn. 7 (2012).

However, I find that even analyzing the facts in these cases under the burden shifting analysis in *Wright Line,* violations of the Act are established. Under *Wright Line*, the General Counsel bears the initial burden that the respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. *Camaco Lorain Mfg. Plant,* 356 NLRB No. 143, slip op. at 4 (2011). Antiunion animus may be inferred from the record as a whole, including disparate treatment. Id. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. Id.; *ADB Utility Contractors,* 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville,* 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council,* 330 NLRB 1100, 1105 (2000).

When the evaluation of the General Counsel's initial case, or the respondent's defense, includes a finding of pretext, this defeats any attempt by the respondent to show that it would have discharged the discriminatee absent his or her union activities. *Rood Trucking Co.,* 342 NLRB 895, 895 (2004); *La Gloria Oil & Gas Co.,* 337 NLRB 1120, 1124 (2002). This is because where the evidence establishes that the reason given for

[30] That Theis and Wolf were mistaken as to the existence of a contract violation does not render their activity unprotected. The reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not. *Odyssey Capital Group,* 337 NLRB 1110, 1111 (2002), citing *NLRB v. Washington Aluminum,* 370 U.S. 9 (1962).

[31] The Act recognizes the enforcement of collective-bargaining agreements as legitimate. Additionally, the implementing regulations for the HIPAA Privacy Rule recognize the Act's legitimacy in this regard as they permit disclosure of PHI for the resolution of grievances or to a collective-bargaining representative as required under the Act. 45 CFR §164.501(6)(iii); 45 CFR § 164.512.

[32] Respondent did not address the *Atlantic Steel* standard in its brief.

the respondent's action is pretextual—that is, either false or not relied upon—the respondent fails by definition to show that it would have taken the same action for that reason. Id. Thus, there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.,* 340 NLRB 382, 385 (2003). See also *Sanderson Farms, Inc.,* 340 NLRB 402 (2003).

The General Counsel has met his initial burden in under the *Wright Line* test. As stated supra, the activities of Theis and Wolf were both protected and concerted. Respondent was well aware of the protected concerted activity of Theis and Wolf when it discharged them. Selvig received one of the redacted medical records at issue attached to an email from Wolf bearing the subject line. "Information Request/Pre-Grievance." (GC Exh. 7.) The email plainly stated that the Union believed Walsh, a supervisor, was performing bargaining unit transcription work, a possible contract violation. Both Theis and Wolf informed Respondent's representatives that the documents were supplied to Wolf in her capacity as a steward. The privacy violations allegedly committed by Theis and Wolf grew out of their union activity.

This case rests on Respondent's motivation. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employee all support inferences of animus and discriminatory motivation. *Relco Locomotives, Inc.,* 358 NLRB No. 37, slip op. at 14 (2012). Several factors establish that Respondent discharged Theis and Wolf based on their protected conduct.

Respondent's repeated interrogations of Wolf regarding her grievance investigation provide strong evidence of animus toward her union activity. As discussed above, Respondent coercively questioned Wolf about her union activity on three occasions. Unlawful interrogations supply evidence of union animus. *Wynn Las Vegas, LLC,* 358 NLRB No. 80, slip op. at 6 (2012). Therefore, I find these repeated interrogations provide evidence of antiunion animus and direct evidence of hostility towards Wolf's union activity. Respondent coercively questioned Wolf on October 8, 11, and 12 to determine with whom Wolf had engaged in protected, concerted activity. On those occasions, Respondent threatened Wolf with discipline up to and including discharge, if she failed to reveal the names of those with whom she had engaged in union activity. As I have found, threatening her with discipline for failing to reveal the identity of the members with whom she had engaged in protected, concerted activity, would reasonably tend to coerce her so that she would feel restrained in exercising her Section 7 rights and thus violated the Act.

Respondent's multiple and shifting justifications for the terminations of Theis and Wolf provide further evidence of its unlawful motive. When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons to justify' its unlawful conduct." *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB,* 703 F.2d 363, 372 (9th Cir. 1983). See also *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action). Respondent advanced a multitude of reasons for its discharges of Theis and Wolf in its investigative documents and corrective action forms. Although Selvig testified that Theis and Wolf were terminated for violating Allina's confidentiality of patient information policy, this policy was never mentioned in Respondent's investigative meetings with Theis and Wolf. (Tr. 612.) In the investigatory meetings with Theis and Wolf, they were repeatedly questioned about Allina's de-identification policy. However, at the hearing, Selvig and Weiss both testified that Theis and Wolf did not violate the de-identification policy.[33]

In responding to the Union's information request, Selvig listed the following policies as having been violated by Theis and Wolf: Confidentiality of patient information; confidentiality and nondisclosure; minimum necessary for information disclosure; treatment, payment, operations system policy; de-identification of patient information; use and disclosure of protected health information; and authorization to release and disclose patient information. (R. Exhs. 22a and b.) When asked to explain which policies were violated by Theis and Wolf, Selvig testified that confidentiality of patient information was the key policy and the only one actually violated by Theis and Weiss. (Tr. 42–44.)

Respondent's disparate treatment of Theis and Wolf provides further evidence of Respondent's unlawful motivation. The record is replete with evidence that other employees were treated less harshly for privacy violations seemingly more egregious than those at issue here. Other employees were not discharged for: accessing patient census data without authority and then posting information about a coworker gleaned from the census data on Facebook (GC Exh. 31(g)); accessing multiple patient records 15 times over a period of 18 months (GC Exh. 31(zz)); sending an unencrypted email containing PHI to an email address outside of Allina and mailing letters containing PHI to the wrong address on two separate occasions (GC Exh. 31(bb)); sharing PHI at a luncheon (GC Exh. 31(oo)); improperly revealing a patient's HIV status (GC Exh. 31(ww)); accessing and changing a patient's medical chart (GC Exh. 31(i)); posting patient photos on Facebook and posting comments about a patient on Facebook (GC Exhs. 31(h) and (qq)); and improperly accessing and using the medical records of a patient to fraudulently obtain a medical test for a nonpatient. (GC Exhs. 31(p) and (q).) Clearly, numerous employees were treated less harshly than Theis and Wolf for violating Respondent's patient privacy rules.

I further note that Respondent's repeated claims of absolute commitment to patient privacy are unconvincing. If Respondent has an unconditional commitment to protecting PHI, it is inconceivable that Selvig and Weiss would have let Sarro leave the October 8 meeting with the four partially redacted medical records in his possession. Sarro was not an employee of Respondent; instead, he attended the meeting as Wolf's union

[33] I would note that Allina's de-identification policy is inapplicable to these cases as the policy only applies to records redacted as part of a research study or for a mandatory report or disclosure to a federal agency.

steward. According to the testimony of both Selvig and Wolf, Sarro would have not had a legitimate business reason to possess the records. In addition, Respondent itself has disclosed PHI to the Union in the past. (CP Exhs. 1, 2, 3, 4.) Therefore, Respondent's patient privacy policies are not absolute and I reject Respondent's arguments that they provide a lawful basis for the discharges of Theis and Wolf.

Respondent argues, by way of an affirmative defense, that Theis and Wolf lost the protection of the Act by violating HIPAA, the HHS HIPAA Privacy Rule, and State laws. (GC Exh. 1(g).) I have discussed the exceptions to the HIPAA Privacy Rule related to the Act, supra. HIPAA regulations contemplate disclosure of PHI for collective-bargaining purposes pursuant to the Act. Any State statute in conflict with the Act would be preempted. Furthermore, I note that Respondent did not claim that it discharged Theis and Wolf for violating HIPAA, but for violating its own rules and policies. I do not find that Respondent has submitted sufficient evidence to sustain any affirmative defense based upon HIPAA, or any State law.

Furthermore, I find that the case of *Beckley Appalachian Regional Hospital,* 318 NLRB 907 (1995), cited by Respondent, is distinguishable from these cases. In *Beckley,* the hospital maintained a rule that "information is absolutely confidential" and that any disclosure of confidential information to persons outside of the hospital was prohibited. 318 NLRB at 908. The rule in these cases is not nearly so straightforward. Furthermore, the employee in *Beckley* sought out information she would not have been entitled to in the normal course of her work. Id. However, in the instant cases, Theis came upon the medical records bearing Walsh's initials as the transcriptionist during the normal course of her workflow. Therefore, I find the *Beckley* case distinguishable from these cases.

Respondent cites *Montgomery Ward & Co.,* 146 NLRB 76 (1964), in support of its argument, however, it is also distinguishable from the instant cases. Although an employee of Montgomery Ward was fired for providing confidential information to a union, several facts distinguish it. First, the employer's ban on providing information in *Montgomery Ward & Co.* was absolute. 146 NLRB at 78–79. However, in the instant cases, Respondent's rules are not so straightforward or absolute. More importantly, Respondent had never advised Theis or Wolf that redaction and disclosure of PHI of the sort they performed was impermissible. Therefore, I find *Montgomery Ward & Co.* inapposite to these cases.

In addition, *Bell Federal Savings & Loan Assn.*, 214 NLRB 75 (1974), also cited by Respondent, is distinguishable from these cases. The employee in *Bell Federal Savings & Loan Assn*., was suspended for revealing that the bank president had spoken to his legal counsel numerous times. 214 NLRB at 78. The employee in *Bell Federal Savings & Loan Assn.* was not engaged in grievance investigation activities when she revealed her boss' discussions with counsel. 214 NLRB at 78. It was noted that the employee in *Bell Federal Savings & Loan Assn.* could not have gleaned the information about the telephone calls from information openly available at work. Id. In this case, Theis encountered the medical records at issue in the normal course of her work.

With this foundation, I find that this is a case involving pretext. I find that the General Counsel has established, by a preponderance of the evidence, that Theis and Wolf were not fired for violating Allina's patient privacy policies, as alleged by Respondent. Instead, I find that Respondent's proffered reasons for terminating Theis and Wolf were pretextual—that is, they were false. Rather, the evidence shows that Respondent terminated Theis and Wolf in retaliation for engaging in union activity. Where a reason for discharge is found to be false, I can and do infer that the true motive lies elsewhere—namely, their union activity. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966). Therefore, I find that their discharges violated Section 8(a)(3) and (1) of the Act.

E. Respondent Violated the Act in Unreasonably Delaying Providing Information

The evidentiary record establishes, and I find, that Respondent violated the Act in unreasonably delaying providing information responsive to Hilbrich's November 2 information request. Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract administration. *A-1 Door & Building Solutions,* 356 NLRB No. 76 slip op. at 2 (2011). Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.,* 344 NLRB 231, 235 (2005). By contrast, information concerning extra unit employees is not pre-sumptively relevant; rather, relevance must be shown. *Shoppers Food Warehouse Corp.,* 315 NLRB 258, 259 (1994). The burden to show relevance, however, is "not exceptionally heavy," *Leland Stanford Junior University,* 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983); "[t]he Board uses a broad, discovery-type standard in determining relevance in information requests." *Shoppers Food Warehouse,* 315 NLRB at 259.

An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to provide the information. *Monmouth Care Center,* 354 NLRB 11, 51 (2009), reaffirmed and incorporated by reference 356 NLRB No. 29 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012). It is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. *Good Life Beverage Co.,* 312 NLRB 1060, 1062 fn. 9 (1993). Rather, what is required is a reasonable good-faith effort to respond to the request "as promptly as circumstances allow." Id. See also *Woodland Clinic,* 331 NLRB 735, 737 (2000). In evaluating the promptness of an employer's response, the Board considers the complexity and extent of the information sought, its availability, and the difficulty in retrieving the information. *West Penn Power Co.,* 339 NLRB 585, 587 (2003), citing *Samaritan Medical Center,* 319 NLRB 392, 398 (1995), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005).

Immediately following the terminations of Theis and Wolf, Hilbrich filed grievances with accompanying information re-

quests. Most of the information sought was presumptively relevant. The personnel files of Theis and Wolf, the policies (and training on those policies) alleged to have been violated by Theis and Wolf, investigative notes and rationale for the decision to terminate Theis and Wolf, and an explanation of the violation and patient harm that had allegedly been committed by Wolf are all related to the terms and conditions of employment of the two bargaining unit employees at issue in these cases. The Union's other requests, concerning comparative discipline and Respondent's investigations of similar allegations, were also relevant. Inasmuch as the Union was investigating Respondent's consistency in enforcing its privacy and disciplinary policies, this information was relevant and necessary to the Union's role in representing its members. Information regarding a misconduct investigation, even of nonunit employees, is relevant to establishing whether there has been disparate treatment of employees. *SBC California,* 344 NLRB 243, 246 (2005).

The scanning matrix documents sought by the Union were also relevant and necessary to the Union's role as exclusive collective-bargaining representative of the unit. The Union was investigating whether Theis and Wolf were treated fairly by Respondent and whether their discharges were proper. Respondent's agents repeatedly mentioned redacting and de-identifying PHI in their meetings with Theis and Wolf. Allina's de-identification policy and other confidentiality policies apply equally to all Allina employees. Thus, it was not unreasonable for the Union to seek other examples of improper redaction or de-identification of PHI by Respondent's other employees and maintained on an Allina website.

Respondent's replies to the Union's information requests were untimely. As stated above, Hilbrich made her information request on November 2. She received a partial response to her request on December 4, the day before the pregrievance step meetings regarding Theis and Wolf. Selvig did not include the actual comparative disciplinary records sought by the Union, instead substituting a summary chart. Also, for the first time on December 4, Selvig notified the Union that its request for scanning matrix documents was overly burdensome and asked the Union to share in the cost of producing the scanning matrix documents. Hilbrich reduced the amount of scanning matrix documents being sought twice, once on December 6 and again on December 21. Nevertheless, she did not receive the scanning matrix documents until January 7, over 2 months after her initial request.

It is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. *Good Life Beverage Co.,* 312 NLRB 1060, 1062 fn. 9 (1993). Rather, what is required is a reasonable good-faith effort to respond to the request "as promptly as circumstances allow." Id. Respondent could have gathered most of the records requested quickly and provided them to the Union. In fact, Selvig testified that personnel files are stored electronically and can be retrieved using an employee number. (Tr. 71.) Respondent could have also requested an accommodation related to the rather voluminous initial request for scanning matrix documents; instead Respondent waited over a month to do so. The burden of formulating a reasonable accommodation is on the employer. *United States Testing Co. v. NLRB,* 160 F.3d 14, 21 (D.C. Cir. 1998), citing *Tritac Corp.,* 286 NLRB 522, 522 (1987).

Based on the record in this case, including the extent, lack of complexity, and availability of the information sought, I conclude that Respondent, had it been so inclined, could have responded to most of the Union's information request regarding Theis and Wolf within the week originally requested by Hilbrich and delayed unreasonably by waiting over 2 months to do so. Absent evidence justifying delay, even a delay of several weeks may constitute a violation. See *Postal Service,* 359 NLRB No. 4, slip op. at 3 (2012) (1-month delay unreasonable); *Postal Service,* 308 NLRB 547, 551 (1992) (4-week delay unreasonable); *International Credit Service,* 240 NLRB 715, 718–719 (1979), enfd. in relevant part 651 F.2d 1172 (6th Cir. 1981) (6-week delay unreasonable); *Monmouth Care Center,* 354 NLRB 11, 52 (2009), enfd. 672 F.3d 1085 (D.C. Cir. 2012) (6-week delay unreasonable).

Respondent's argument that the Union did not protest the timeliness of its response to the November 2 information request is without merit. A request for information may be made orally or in writing and does not need to be repeated. *Bundy Corp.,* 292 NLRB 671, 672 (1989). In any event, Hilbrich sent several emails to Selvig and Schmoyer seeking compliance with her November 2 information request. In addition, any attempt by Respondent to excuse its delay due to the holidays in November and December is meritless. The Board has found that the United States Postal Service had unreasonably delayed providing information to an employee union despite heavier than normal mail volumes at the end of the year. *Postal Service,* 359 NLRB No. 4, slip op. at 3 (2012). Therefore, I find that the delay by Respondent was unreasonable and violated Section 8(a)(5) and (1) of the Act.

Respondent argues, by way of an affirmative defense, that the information request allegations are barred by the doctrines of Accord and Satisfaction. (GC Exh. 1(g).) This defense lacks merit. An employer violates the Act not only when it refuses to supply information in response to a valid request, but also which it unnecessarily delays providing the information. *Britt Metal Processing*, 322 NLRB 421, 425 (1996), enfd. mem. 134 F.3d 385 (11th Cir. 1997); *Tennessee Steel*, 287 NLRB 1132 (1988). The doctrines of Accord and Satisfaction do not excuse Respondent's unreasonable delay in providing information to the Union.

In addition to the affirmative defenses discussed above, Respondent raised a number of other affirmative defenses. (GC Exh. 1(g).) Specifically, Respondent alleges that the complaint fails to state a claim upon which relief can be granted, Respondent has been denied due process of law, the complaint is barred because the Charging Party Union failed to properly serve Respondent, the Agency's position and issuance of complaint are not substantially justified, and there is no basis for the Agency to seek special remedies. (Id.). I note that Section 102.14 of the Board's Rules and Regulations provides that the charging party shall be responsible for the timely and proper service of the charge. However, the Board and the courts have historically held that service by the Board's regional office is sufficient, so long as it is timely. See *T.L.B. Plastics Corp.,* 266

NLRB 331 fn. 1 (1983), and the cases cited there. Respondent does not deny that it was timely served with the charge by the Board's regional office. In addition, Respondent presented no evidence supporting its other affirmative defenses at the hearing and the affirmative defenses were not raised in Respondent's brief. As Respondent seems to have abandoned these remaining affirmative defenses, I will not address them further.

Finally, I am not, as is argued by Respondent in its brief, creating a rule by which employees are free to rifle through confidential medical records where doing so advances the policies of the Act. I do not question Respondent's need to enforce its privacy policies; the issue here was how Respondent dealt with its employees who allegedly violated those policies. Instead, I find only that in the circumstances of these cases, Respondent violated the Act in interrogating, threatening, and discharging its employees.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when it interrogated and threatened Maria Wolf on or about October 8, 11, and 12, 2012.

4. Respondent violated Section 8(a)(5) and (1) of the Act when it unreasonably delayed providing information requested by the Union pursuant to its information request of November 2, 2012.

5. Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Meredith Theis and Maria Wolf.

6. By engaging in the unlawful conduct set forth in paragraphs 3, 4, and 5 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5), and Section 2(6) and (7) of the Act.

7. Deferral to the parties' grievance-arbitration procedure is not appropriate in this case.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged employees Meredith Theis and Maria Wolf, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

For all backpay required here, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

Further, Respondent shall be required to remove from the personnel files of Meredith Theis and Maria Wolf any reference to their unlawful terminations, and advise them in writing that this has been done. In addition, Respondent shall be required to cease and desist from engaging in unlawful discriminatory conduct and to post an appropriate notice, attached hereto as an "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, St. Francis Regional Medical Center, Shakopee, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their involvement in union or other protected, concerted activities.

(b) Threatening employees with discipline for failing to disclose the identity of employees who engage in union or other protected, concerted activities.

(c) Discharging or otherwise discriminating against any employee for engaging in union or protected, concerted activity.

(d) Unreasonably delaying in providing information requested by the Union that is relevant and necessary for the Union to fulfill its role as the exclusive collective-bargaining representative of unit employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Meredith Theis and Maria Wolf full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Meredith Theis and Maria Wolf whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its facility in Shakopee, Minnesota, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 8, 2012.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 12, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees about their involvement in union or other protected, concerted activities.

WE WILL NOT threaten employees with discipline for failing to disclose the identity of employees who engage in union or other protected, concerted activities.

WE WILL NOT terminate any employee for engaging in activities on behalf of any union, including SEIU Healthcare Minnesota, or for engaging in other concerted activities protected under Section 7 of the Act.

WE WILL NOT refuse to recognize and bargain in good faith with Service Employees International Union Healthcare Minnesota (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All full-time and regular part-time nonprofessional employees employed by St. Francis Regional Medical Center at its Shakopee, Minnesota, facility; excluding all other employees, office clerical employees, and guards and supervisors as defined by the Act.

WE WILL NOT unreasonably delay in providing information requested by the Union that is relevant and necessary for the Union to fulfill its role as the exclusive collective-bargaining representative of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Meredith Theis and Maria Wolf full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Meredith Theis and Maria Wolf whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Meredith Theis and Maria Wolf for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Meredith Theis and Maria Wolf, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ST. FRANCIS REGIONAL MEDICAL CENTER

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."