

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS CASE NO. 0131016262:

RONIS BOLLINGER,)	OAH Case No. 1523-2014
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
BILLINGS CLINIC,)	
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

On May 15, 2013, Charging Party Ronis Bollinger filed a retaliation charge (HR No. 0131016262) against Respondent Billings Clinic with the Montana Department of Labor and Industry’s Human Rights Bureau. Bollinger alleged Billings Clinic retaliated against her for engaging in protected activity regarding her disability discrimination charge against Billings Clinic filed with the Montana Human Rights Bureau (HRB) on October 31, 2012, (HR No. 0131015789), as amended, by discharging her on April 26, 2013, in violation of the Montana Human Rights Act (“MHRA”).

On March 18, 2014, the Montana Human Rights Commission ruled Bollinger’s complaint would be remanded to the Hearings Bureau (now the Office of Administrative Hearings) for a contested case hearing. Upon receipt of the complaint, the Hearings Bureau issued a “Notice of Hearing” on March 20, 2014, appointing the undersigned as presiding Hearing Officer, the parties appeared, and contested case proceedings followed.

The contested case hearing convened January 26 through 30, 2015, in Billings, Montana. Bollinger attended with counsel Veronica A. Procter, Procter Law, PLLC, and Philip McGrady, McGrady Law Firm, LLC. The Clinic attended through its designated representative Ellen Layton, Associate General Counsel, and with counsel, Edward J. Butler, Crist, Krogh, Butler & Nord, LLC.

The transcript is the official record of the hearing proceedings, the witnesses who testified and the exhibits admitted. However, for the benefit of any reviewing or appellate body, the Hearing Officer’s unofficial notes of the hearing indicate the following.

Ronis Bollinger, Charlene (Char) Kinison, Amy Hauschild, Chassidy Moline, Lyndie Jolly, Gerele Pelton, Jackie Hines, Mary Ellen James, Lu Byrd, Marie Taylor and Deanna Evans testified during the parties' cases in chief. Amy Hauschild was recalled by Bollinger in rebuttal. The Hearing Officer granted the Clinic's motion to strike her rebuttal testimony in its entirety as undisclosed opinion testimony from witness never identified as an expert. Ronis Bollinger testified in rebuttal on her own behalf and Carey Jo Horning testified in sur-rebuttal for the Clinic.

Exhibits 1-2, 4-5, 8, 13-14, 17-20, 28-31, 33-35, 37-45, 47-49, 54, 56, 60, 63, 67, 69-75, 81, 101-114, 118-119, 121, 123-126, 131, 138-140, 142-146, 150-156, 162-163, 165, 167-176, 178-179, 181-183 and 200-201 were admitted into evidence. Exhibits 7, 22 and 77 were offered and refused. Exhibit 180 was withdrawn as duplicative of Exhibit 2. Exhibits 13-14, 17-19, 38-45, 47-49, 56, 60, 63, 69-75, 81, 114, 125-126, 131, 181, 200, and 201 were sealed from the public record. The "Settlement Agreement and Release" between the Billings Clinic and Char Kinison, signed by Kinison on July 16, 2013, was utilized to argue a motion to preclude Kinison from testifying, and to voir dire her. That agreement was sealed but not offered into evidence. The final sealing order accompanies this decision.

Patients' identities (other than Bollinger and Char Kinison) are protected and sealed as are the identities of employees (with the same two exceptions) whose involvement in this case arose out of contentions and/or evidence that they were involved in alleged events regarding privacy breaches within the Clinic. A sealing order accompanies this decision.

The parties submitted proposed decisions and supporting materials, and the matter was submitted for decision.

II. Issues and Rulings re Events before November 16, 2012

The pivotal issue here is whether the Billings Clinic discharged Bollinger in retaliation for engaging in protected activities by filing a disability discrimination claim against Billings Clinic on or about October 31, 2012. Bollinger's retaliation claim relating to the discharge was filed May 15, 2013 (HR No. 0131016262). A full statement of the issues appears in the final prehearing order. Findings regarding events occurring more than 180 days before Bollinger filed her retaliation claim for her discharge (i.e., before November 15, 2012), as well as findings regarding events other than the discharge of Bollinger are made, of necessity, because Bollinger asserted that her prior history of discipline and investigative interactions by the Billings Clinic provided evidence of a retaliatory motive that ultimately caused or contributed to the decision to terminate Bollinger's employment. The Hearing Officer allowed that evidence, over a series of continuing objections by Billings Clinic.

Those objections are now again overruled, and any and all implicit or explicit motions to strike or exclude from the record any part of the evidence admitted at hearing, provisionally or otherwise, are overruled (except for the motion to strike the rebuttal testimony of Amy Hauschild, which was and remains granted). Bollinger was entitled to present that evidence and attempt to establish its relevance to her claims regarding whether a continuing course of adverse employment actions taken against her by the Clinic, commencing with her identification as a potential witness to Char Kinison's privacy breach complaints, manifested an illicit retaliatory motive and made it more likely than not that retaliatory animus led to termination of her employment in 2013. Although she did not establish an illicit retaliatory motive that made more likely than not that retaliatory animus was a reason for her discharge, the evidence is appropriately in the record, since the Hearing Officer heard it before ruling upon it, and the public has a right to know the bases upon which the proposed decisions were proffered, as part of the public right to know what actions its government is taking and why.

III. Findings of Fact

1. Charging Party Ronis Bollinger is a registered nurse (RN) with approximately 42 years of experience. She initially worked at Sunrise Hospital in Las Vegas for approximately 5 years, then she went to the University of North Carolina where she learned to "scrub open hearts." From North Carolina, she went to the Stanford University Medical Center, where she scrubbed all specialties including open heart for about a year and a half. After her marriage, she went to Shady Side Hospital in Pittsburgh, where she worked for a year. Her husband reenlisted in the military, so she went to the University of California in San Diego Medical Center, where she was awarded the Commendation of "OR Nurse of the Year." Overall, about 40 years of her nursing work has been spent as an operating room nurse.

2. In 1987, Bollinger came to work at the Billings Clinic ("the Clinic") in Billings, Montana. She subsequently left the Clinic to work as the assistant director of the operating room at the hospital in Libby, Montana. A year and a half later, she was offered a position of Director of Surgical Services at Rocky Mountain Eye Surgery Center, which she took in Missoula, Montana. She remained there until a family death required her return to Billings in 1998, at which time she returned to employment with the Clinic.

3. Bollinger enjoyed her second employment with the Clinic for years. An experienced surgical nurse, she performed her job for over a decade with hardly any on-the-job issues. From 1998 to 2008, Bollinger had one write-up at the Clinic, but no other discipline or proven issues with her employer. Bollinger helped train younger nurses. She was a good trainer, and was knowledgeable. She was a patient advocate. She would stand up for young nurses if the doctors belittled them. Even

after her problems with Clinic management developed, she still volunteered to work many extra shifts and extra hours, although not as many as before, which the Clinic assigned to her, and which continued to increase her earnings.

4. During her second employment with the Clinic, Bollinger was represented by Local 2 of the Montana Nurses' Association. Bollinger became an MNA member in 2009, and remained a member until she was discharged. Bollinger was aware that the terms and conditions of her employment were dictated by Collective Bargaining Agreements ("CBAs") between the Clinic and MNA.

5. The Clinic had numerous policies and procedures that govern the conduct of the Clinic and its employees. The Clinic's staff often conducted in-services on various subjects, and the Clinic's policies and procedures were reviewed during these in-services. Bollinger had access to the Clinic's policies while she was employed. Bollinger also knew how to access the Clinic's policies because she was trained on that when she was employed. Bollinger had the continuing opportunity to be or to become knowledgeable about any Clinic policy or procedure that related to her employment while she worked there the second time.

6. The Clinic had a Patient Rights and Responsibilities policy that was in effect while Bollinger was employed by the Clinic. The purpose of the policy was to recognize and respect the rights of the Clinic's patients and provide for the responsibilities of staff with regard to patients. One of the patient rights in the policy was privacy and confidentiality. Patients had the right to every consideration of privacy. This meant that case discussion, consultation, examination and treatment had to be conducted in a manner to protect each patient's privacy. It also meant that patients had the right to expect that communications and records pertaining to their care would be treated confidentially in accordance with the law and the Clinic's policies. It further meant that patients' medical records would be released by the medical records department only in accordance with state and federal privacy regulations. The Clinic took these patient rights very seriously. The Clinic needed its patients to provide a great deal of extremely sensitive information in order to care for them appropriately. The Clinic's patients entrusted the Clinic and its employees with their healthcare information, their financial information and their personal family information. This resulted in the Clinic receiving an enormous amount of very private and confidential information that was stored in various forms in the Clinic's systems and on the Clinic's premises. The Clinic was committed to and required to keep that information confidential.

7. The Clinic had a confidentiality commitment with its employees that applied to all confidential patient information. This commitment stated that: (1) Clinic patients had the right to expect that all patient information would be kept confidential; (2) Employees would keep patient information confidential because it

was essential to providing quality patient care and performing job duties; (3) Employees would adhere to the law and the Clinic's policies regarding confidentiality, privacy and security; (4) Employees would access and use patient information only to the extent that they had a need to know in order to perform job functions; (5) Employees would disclose patient information only in accordance with the Clinic's policies and the law; and (6) Employees would be disciplined or discharged if they violated the Clinic's policies on patient confidentiality.

8. On June 29, 1998, Bollinger signed the Clinic's Confidentiality Policy and Agreement, and then on August 2, 2002 and again on September 12, 2012 she signed the then-current versions of the same document. By signing these documents, Bollinger agreed that all information pertaining to patients would be guarded and treated as confidential, that she would access patient information only on a need-to-know-for-job-functions basis and that if she did not comply with this policy on confidentiality, she could be disciplined or discharged. All Clinic employees signed and were governed by these documents.

9. Bollinger received annual training while employed by the Clinic, which included patient confidentiality training. On June 29, 1998, October 14, 1998, November 13, 1999, November 29, 2000, November 27, 2001, January 22, 2003, and December 29, 2003, Bollinger received training on, among other things, patient confidentiality.

10. The Clinic also had a Code of Business Conduct Certification, which addressed patient privacy and rights as well as the requirements for employee conduct. The Clinic regularly trained employees on the requirements of this Code. On April 14, 1999 Bollinger signed the Clinic's Code of Business Conduct Certification. On July 25, 2007 Bollinger again signed regarding the then-current Code and on April 11, 2013 again signed, this time electronically, regarding the then-current Code. Bollinger read and understood the certification each time she signed it. Her signatures also indicated that she agreed to abide by the Code and agreed that the Clinic could discipline or discharge her if she engaged in any conduct that violated the Code. Included in the Code was the obligation of Clinic employees both to comply with the Clinic's patient privacy policies, federal privacy regulations, and state privacy laws and to report violations to the Clinic Privacy Officer.

11. The Clinic had a Shredding Hard Copy Protected Health Information policy ("Shredding Policy") dated April 2, 2012. The intent of the Shredding Policy was to comply with the requirements of the Health Insurance Portability and Accountability Act ("HIPAA") regarding destruction of Protected Health Information ("PHI") and to provide for the shredding of all hard copy media containing PHI. The Shredding Policy provided that all PHI in hard copy form will be properly destroyed and disposed of when no longer needed to accomplish the purpose of its

use, disclosure or request. The Shredding Policy also provided that this destruction will be accomplished by shredding the documents so that they are unusable, unreadable and indecipherable. The Shredding Policy stated that redaction of PHI or any other method of destruction was not acceptable. The Shredding Policy also applied to all Clinic documents with sensitive information on them. The Shredding Policy provided that any employee who violated its terms was subject to discipline, up to and including termination of employment. The Shredding Policy was in effect while the Clinic employed Bollinger and applied to all Clinic employees.

12. The Clinic also had a practice regarding shredding documents containing confidential and sensitive information. The Clinic had contracts with providers to shred sensitive documents, specific procedures for collecting these documents at various collection locations and specific procedures for shredding the documents at a centralized location. Clinic employees, at least in surgery, were required to assist in the shredding process by leaving copies of papers containing PHI they were done utilizing for patient care in particular places inside of the surgery area in which they worked.

13. In November 2008, a Clinic employee, R.N. Charlene (“Char”) Kinison, injured her wrist during a church softball game. The next day she was examined (including x-rays) at the Clinic, and diagnosed with “bone fragments, bone chipping” in her wrist. Her wrist was casted and she was directed to stay off work for six weeks.

14. While Kinison was off work in December 2008, another Clinic employee telephoned her and reported to her that some Clinic employees had accessed and discussed her Clinic medical records from an operating room at the Clinic, without a need-to-know-for-job-functions basis. Kinison testified in the current case that she had further contacts with Clinic employees who reported additional inappropriate accessing of her medical records. Kinison also testified that an employee who told her about inappropriate access to her records also told her that Bollinger was a nurse in the operating room on one of the multiple occasions when Clinic employees accessed and viewed her records electronically.

15. Bollinger did not witness anyone accessing Kinison’s medical records. She testified that she heard another employee report that had happened.

Q Okay. So from 1998 to 2006, you had one write-up, correct?

A That's correct.

Q And then after that in 2006, did you have any other issues at Billings Clinic?

A I did.

Q When?

A In December of 2008.

Q What occurred then?

A I inadvertently became a witness against Billings Clinic when I obtained knowledge from an anesthesiologist, employee number 105, that he had notified patient A [Kinison] that her medical record had been breached by the team that was working in the heart room, including employee 101, 102, 103, 104, 106, and 107.

Trans. Vol. I, p. 18, ln. 23 - p. 19, ln. 6. Her testimony was corroborated by other testimony about alleged improper access to Kinison's PHI and was therefore credible.

16. In December 2008, a physician (herein "Employee 101") who performed surgeries in the Clinic made a comment to interim clinical coordinator Marie Taylor that he had looked at Kinison's x-rays. Taylor testified, "Employee 101 approached me regarding accessing Char Kinison's record. I took that information directly to my supervisor." She specifically testified about what Employee 101 said to her.

Q Do you know what employee 101 was doing when he viewed her medical records?

A I do not. I know – what I remember of that day is I was coordinating the desk. Char Kinison had called off sick for, I think, a wrist injury. She was not in my – she was in the heart team, not my team, so I was not responsible for her schedule or her being sick. She was a private scrub for them.

He walked by the desk and said, "Oh, I don't think –" something along the lines of he didn't think she broke it, and he knows, because he looked at her x-ray. I did not respond to that, and I went directly to my supervisor with that.

Trans. Vol. V, p. 1311, lns. 9-22.

17. Taylor reported the invasion of Kinison's medical privacy apparent in the physician's comment to Jackie Hines, Manager of Surgical Services, her direct supervisor. Hines alerted the Vice President of the Clinic Peggy Wharton and the Vice President of Hospital Operations Lu Byrd (who also was and is Director of Nursing, also called "CNO" or "Chief Nursing Officer") of a possible privacy breach. At that time Byrd was also acting as interim director of surgical services, and in that interim position was Hines' immediate supervisor.

18. After Hines told her about the possible patient privacy breach, Lu Byrd attended the next day's "morning huddle." The "morning huddle" was a daily meeting of the persons working the day shift in surgery, just at the beginning of that shift. Byrd told the 15 to 20 persons working that day about the concern that there may have been a privacy breach. Byrd reminded those employees about patient

confidentiality and records confidentiality. Bollinger was present. Byrd testified at hearing that she didn't think there had been any questions from the employees present and that she had mentioned during the morning huddle that if employees wanted to see the confidentiality policy it was on the Clinic "Intranet," its internal site where there were numerous departmental sections, one of which included the Clinic's policies and procedures. All employees of the Clinic had access to the Clinic Intranet.

19. At some point in December 2008, Kinison was released to work and returned to her job at the Clinic. She testified that she was placed on administrative leave with pay within a few days and told by Human Resources that she was being put on administrative leave because "I was not a team player, and I was investigating why my records were looked at." Trans., Vol. II, p.315, lns. 10-18. Before Kinison returned to work in December 2008, the Clinic had already started its investigation ("Kinison privacy breach investigation") into alleged privacy breaches regarding her medical records.

20. Kinison testified that while on administrative leave she had two face-to-face meetings with Clinic management, specifically the Vice President of Hospital Operations and Director of Nursing (Byrd) and the Vice President of the Clinic (Wharton). Kinison testified about what happened during those two meetings, sometimes without being entirely clear as to which meeting some of her testimony described. Generally, she testified that the meetings were antagonistic, that her accounts of what she had been told about breaches of her medical privacy were rejected by management, and that she had threatened to report the breaches to state, federal and licensing authorities. She also testified that she tried to get back to work at the Clinic, was given an interview that she thought was a sham, and then was sent a letter discharging her from her employment.

21. Prior to the 2015 Bollinger hearing, Kinison had settled her claims against the Clinic. The settlement applied to "all claims, known or unknown, foreseen or unforeseen, including claims arising out of the witness's status and time or experience as a patient, former patient, employee, or former employee of Billings Clinic or in any way relating to Billings Clinic's disclosure, review, observation or discussion of any of the witness's medical or healthcare information." The agreement included a non-disclosure clause. Kinison acknowledged in *voir dire*¹ at the beginning of her testimony that she knew that testifying at the Bollinger hearing about her interactions with the Clinic during the last weeks of her employment and

¹ "Voir dire" is a Anglo-French or Old French phrase (literally "speak truth"), which in American jurisprudence refers to a preliminary examination to determine competency of a witness or a juror. Counsel for the Clinic conducted such a preliminary examination of Kinison, without objection, at the beginning of Kinison's testimony.

immediately thereafter might expose her “to liability for damages” to the Clinic. She nonetheless testified, with some intensity, about her feelings and perceptions that the Clinic had not dealt fairly with her and had not honestly investigated the alleged breach of her privacy by other employees.²

22. On this record, it was not proved that any of Kinison’s claims against the Clinic regarding the alleged privacy violations that led to Clinic and federal privacy breach investigations involved claims of violations of Kinison’s rights under MHRA.

23. Gerele Pelton was the Corporate Compliance officer handling the Clinic’s Kinison privacy breach investigation. At the time of that investigation, Pelton was the Clinic’s Compliance Director and Privacy Officer. She held that position from February 2002 through June 2014,³ with a primary responsibility to investigate potential privacy breaches at the Clinic and manage investigations by others on the Corporate Compliance team of such potential breaches. Over the years, Pelton conducted hundreds of privacy investigations. She received education and training on compliance issues, privacy and information security. She currently also develops and conducts education and training on privacy and confidentiality for the Clinic’s employees. Pelton has a Certification in Healthcare Compliance from the Healthcare Compliance Association, which initially required successful completion of an examination and thereafter required continuing education to maintain the certification. At the time of hearing, Pelton had maintained that certification for more than ten years.

24. On December 31, 2008, with her Corporate Compliance team, Lu Byrd, Jackie Hines (Bollinger’s immediate supervisor), and a Human Resources employee to take meeting notes, Pelton interviewed Bollinger as part of the Kinison privacy breach investigation. Pelton routinely used “defined interview guides” in all of her interviews, including the December 31, 2008, Bollinger interview. Pelton had prepared the questions she wanted to ask before the interview. She commenced Bollinger’s interview, as was her practice, with a prepared introduction defining the reason for the interview. Bollinger was told that she was not a subject of the investigation, but that her name had come up as a possible witness in the Kinison privacy breach investigation. Pelton followed her ordinary practice of departing from her prepared interview guide when and if she needed to ask follow up questions for

² Findings 19 through 21 are recitations of Kinison’s testimony and demeanor, to provide context herein, and are not findings of fact about how the Clinic treated her. How the Clinic treated Kinison is not an issue to resolve in this case. How the Clinic treated Bollinger during the Kinison investigation is at issue here only because of Bollinger’s contentions that animosity developed during that investigation led to her discharge several years later.

³ At the time of the hearing, Pelton was the Information Security Officer and Regional Compliance Consultant for the Clinic, the position she has held since June 2014.

clarification. After asking all of her questions and any follow up questions, Pelton went through a “closing summary” with all interviewees including Bollinger. In that closing summary Pelton asked each interviewee if she or he had any questions. At the end of her closing summary Pelton told all interviewees including Bollinger that this was an investigation. She told all interviewees including Bollinger not to discuss any information regarding the situation with anyone except the interviewee’s immediate supervisor. Different people present during the various interviews regarding the Kinison privacy breach had slightly different ways of describing how Pelton raised this subject and how exactly she stated the prohibition against discussing the situation. The basic message was consistent and clear, however – do not talk about the investigation at all, let alone talk about what the questions and the answers were, and do not talk about the situation being investigated.

25. This was the second time Bollinger had been told by the Clinic not to discuss Kinison’s situation as a Clinic employee and a Clinic patient who allegedly had her medical records accessed and discussed by other Clinic employees without any need-to-know-for-job-functions basis. Any Clinic employee, including Bollinger, should reasonably have understood that discussion of these matters, with no need-to-know-for-job-functions basis, about alleged privacy breaches by Clinic employees regarding Kinison’s medical records was very likely itself to be a breach of Kinison’s privacy rights as an employee and as a patient.

26. Aside from privacy concerns, the Clinic’s additional purpose in directing employees not to discuss any information regarding the situation (in this case the ongoing investigation of Kinison’s complaint and that Kinison was the patient) was to “preserve the integrity of the investigation.” Pelton and the rest of the Clinic’s Corporate Compliance team wanted to capture the observations of each interviewee – what that person saw, heard and knew – first hand. Discussions between employees about an ongoing investigation might include what it was about, what it could mean, what each employee knew or had heard or had been asked or had wondered about. Such discussions could influence the answers of some interviewees to Pelton’s questions, so that Pelton might not be able to get answers from each interviewee based solely upon that interviewee’s actual first-hand knowledge, if any, about what had happened.

27. The Clinic’s pertinent direction to all the interviewed employees was not to discuss the investigation at work or with coworkers. It appears that often the perception of that direction was a prohibition against talking about the investigation any time and anywhere with anyone other than the employee’s supervisor. If either perception of that direction was later determined to be an unfair labor practice as applied to Bollinger and perhaps other select Clinic employees, that determination did not in itself evidence any retaliatory animus toward Bollinger, as defined in the MHRA in particular.

28. Members of the Corporate Compliance team who were at Bollinger's interview generally agreed that they acquired no information from Bollinger regarding the possible privacy breach under investigation. Not one of the members of the Corporate Compliance team testified that Bollinger told them that she heard another employee, Employee 105, admit that a surgical team had accessed Kinison's medical records without a need-to-know-for-job-functions basis. Bollinger testified at hearing that she had not witnessed anyone accessing Kinison's medical records at the Clinic. Bollinger also testified at hearing that she had not given "patient A [Kinison] any information from inside the hospital." Not one of the members of the Corporate Compliance team testified that Bollinger told them that she had provided Kinison with any information about any employees allegedly improperly accessing Kinison's medical records. None of the rest of the other witnesses credibly testified that they witnessed Bollinger giving information to Kinison about any medical privacy breach involving Kinison's records.

29. During her rebuttal testimony on the fifth day of the hearing, Bollinger contradicted her previous testimony and said that during the Kinison privacy breach investigation she had provided information to the Clinic's management about Employee 105's account of viewing Kinison's medical record. Immediately after that testimony, in answer to essentially the same question from her attorney, Bollinger reversed herself and testified that she had never provided that information to Clinic management. She then testified that she told Kinison and told the federal investigators about Employee 105's account of viewing Kinison's medical record.

Q Roni, did you ever provide information to Billings Clinic management regarding an employee who viewed Char Kinison's medical record during that investigation?

A Yes.

Q Using the key in front of you, can you identify which employee that was?

A It was employee 105.

Q Who did you report employee 105 to?

A I told Char.

Q Did you tell anyone in Billings Clinic management about employee 105 accessing Char's – excuse me, viewing Char's medical record?

A No.

Q Were you ever subsequently interviewed in that federal investigation regarding privacy regarding any knowledge of an employee who accessed Char's medical record?

A Yes.

Q And did you tell that investigator about employee 105?

A Yes, I did.

Trans. Vol. V, p. 1361, ln. 20 - p. 1362, ln. 16.

30. Thus, by Bollinger's own testimony, she did not tell her employer that she heard a clinic employee [Employee 105] admit viewing Kinison's private medical records without a need-to-know-for-job-functions basis. Even though she concealed what she knew from her employer, contrary to its privacy policy regarding reporting breaches, she shared what she knew with Kinison. She also later shared what she knew with the federal investigators. The Corporate Compliance team never heard from Bollinger that she had heard Employee 105 admit improperly viewing Kinison's records. More likely than not, during the Clinic investigation and the federal investigation, Clinic management did at least learn that Bollinger had provided information to the federal investigation. Since Kinison had identified Bollinger as someone who had information about the unauthorized accessing of her medical records, the Clinic at least had reason to suspect that Bollinger had provided information to Kinison.

31. The substantial and credible evidence of record established that from what Pelton and the rest of the Corporate Compliance team said and did in Bollinger's initial interview on December 31, 2008, Bollinger could not reasonably have believed that her employer considered her a traitor and a witness "against" the hospital. She could not reasonably have feared that she was going to be terminated. Bollinger accused the persons who interviewed her of harassing and bullying her, but her testimony was not credible, based upon other testimony of what happened during those meetings.

32. Bollinger may have felt that the investigative interviews and other meetings with management during the investigation were "horrible" and that she "was taken to a basement and interrogated many times over by people who were my managers, and quite hostile to me." None of the other persons present during those interviews and meetings corroborated Bollinger's accounts of persons smirking, laughing or otherwise behaving in inappropriate ways. She did not prove that her feelings about those interviews and meetings were reasonably based upon what actually took place during them.

33. At the beginning of 2009, Bollinger had been told twice – once by Lu Byrd during a "morning huddle" and once more by Gerele Pelton at the conclusion of that December 31, 2008 interview, not to discuss with other employees the Kinison privacy breach investigation and Kinison's situation. In January 2009, the Clinic received a report of Bollinger talking with at least one other employee about Kinison's situation and the Kinison privacy breach investigation. This report triggered a meeting with Lu Byrd on January 23, 2009. Bollinger admitted she had talked about Kinison to another employee at work, but gave the impression she

thought that was acceptable. Byrd specifically ordered Bollinger not to talk with other employees about Kinison or about the privacy investigation. Her demeanor was stern. There could now have been no reasonable question in Bollinger's mind about the directives to be silent at work about Kinison and about the privacy investigation.

34. Bollinger was interviewed again by Pelton, on January 29, 2009, with her Corporate Compliance team present. Pelton again cautioned Bollinger not to talk with other Clinic employees about Kinison or the privacy investigation. Thus, Bollinger was directed at least four times not to talk with anyone except her direct supervisor or the Corporate Compliance team about the Kinison privacy breach investigation or about Kinison – during the “morning huddle” that Byrd had attended, during two investigative interviews and during the January 23, 2009, meeting. At the morning huddle, no questions were asked, by Bollinger or any other employee. After the directions at the other three meetings, Bollinger affirmatively indicated that she understood those directions.

35. On January 31, 2009, 2 days after Bollinger's second interview with Pelton and 8 days after Bollinger received a direct order from Byrd not to talk with other employees about Kinison or about the privacy investigation, the Clinic received a report that Bollinger had a telephone conversation with another employee who called surgery where Bollinger was at work, during which Bollinger talked to that employee about Kinison and the privacy investigation. That led to another meeting for Bollinger with management, on February 6, 2009, with Byrd, Hines and a Human Resources employee, to discuss again Bollinger talking about Kinison and the Kinison privacy breach investigation. Bollinger again admitted she had talked with another employee, in a second violation of the directions given to her, about Kinison and about the privacy investigation. Bollinger was placed on paid administrative leave while the Clinic further investigated the circumstances surrounding this instance of failing to follow direct orders. After she returned from her administrative leave, Bollinger was given a written warning – a disciplinary letter – which was placed in her administrative file. Ex. 201, dated February 13, 2009.

36. There was some limited testimony about what it was that Bollinger was talking about (vis-a-vis Kinison and the investigation) with other employees. Jackie Hines, one of Bollinger's immediate supervisors during her second employment with the Clinic, testified about who turned Bollinger in both times for talking about Kinison and the investigation, and gave some testimony about what the content of those conversations were according to the reporters.

Q What did they specifically report to you that Ms. Bollinger was saying?

A [Employee] 152 reported that Ms. Bollinger and they had had a discussion, and that she had approached her – sorry. 152 reported that Ms. Bollinger had approached her about a text message from Char Kinison and was asking about the investigation, the interview process.

Q What did employee 103 report to you?

A That Ms. Bollinger said that she had not talked to Char, but that she was getting raked over the coals for being her friend.

Trans., p. 932, ln. 20 – p. 933, ln. 6.

37. On February 9, 2009, before the disciplinary letter actually issued, Bollinger filed a retaliation complaint with the Office of Civil Rights, U.S. Dept. Health & Human Services, Denver, Colorado (“OCR”). She alleged (perhaps by amending her original complaint after she received the disciplinary letter) that “the Clinic had retaliated against her by harassing her, issuing her a disciplinary letter, and placing her on administrative leave because she participated as a witness in a complaint investigation that was the basis of a Privacy Rule complaint filed with OCR by [Kinison] . . .” (Ex. 13, p. 1). There is no evidence that any of Bollinger’s claims against the Clinic in her OCR complaint involved claims of violations of her rights under MHRA (the OCR would have no jurisdiction over such claims).

38. Jackie Hines, testified at hearing that Bollinger’s performance as an R.N. working in surgery at the Clinic was “inconsistent.” Hines explained with some examples of what she meant by “inconsistent.”

Q And by “inconsistent performances,” what specifically are you referring to?

A She would bring up things in the OR instead of focusing on the patient at hand. There were times where she wouldn't, you know, lock the OR or send the blood down, or she would – she made a comment to a patient about another surgeon.

There were these kinds of inconsistencies where just her head wasn't always in the game, focusing on this patient and paying attention to what needed to be done in the surgery.

Q Why was that a concern to you?

A Surgery is a – surgery is a difficult place, and it can be unsafe. Those patients go back; they can't breathe; they can't move. They trust us to take care of them. They trust us to be paying attention and to be their advocate. And it's important that that [sic] team has their head in the game when we're operating on somebody. Things can happen.

Trans. Vol. IV, p. 814, ln. 18 - p. 815, ln. 11

39. The problem with this testimony was that the Clinic's willingness to rely upon Bollinger for the extra hours and shifts she volunteered to work (and was assigned to work, through 2011 and through at least 2012), undercut the probative value of the evidence suggesting that Bollinger's work performance as a nurse was "inconsistent."⁴ It is very unlikely that the Clinic would have concerns about loss of focus in the operating room by a nurse and yet at the same time schedule her for extra hours and shifts working in the operating rooms.

40. In the Kinison privacy breach investigation, Pelton and the rest of the Clinic's Corporate Compliance team completed their interviews, reviewed audit trails and time frames, had further interviews with staff (apparently near the end of January 2009, based upon when Bollinger's second interview took place) and worked with the Patient Advocate Risk Management Department. According to Pelton's testimony at hearing in the current case, at the end of their investigation the only direct evidence they had found of any violation of Kinison's medical privacy rights was an audit trail record of one electronic access of Kinison's medical records for a 1-2 second interval. The access was gained with the access code of a physician who worked in the surgery department and who had no work-related reasons for accessing Kinison's medical records (Employee 101). Pelton testified that Employee 101 denied accessing Kinison's records himself and said that he had shared his access code with other employees. Pelton testified that every one of the employees identified by Kinison as accessing her records denied it when interviewed by Pelton. There is no evidence that Employee 101 was ever questioned during the investigation about the admission Taylor testified in this case she had heard Employee 101 make. There is no evidence that Employee 105 was ever questioned during the investigation about the admission Bollinger testified in this case she had heard Employee 105 make. There is also no evidence that Pelton and her team knew about either reported admission during their investigation.

41. As already found, Lu Byrd was and is the Vice President of Hospital Operations and the Chief Nursing Officer. She is the executive in charge of the roughly 1,000 nurses at the Clinic. She is also an R.N. and has been an R.N. for 43 years. She started as a nurse and has worked her way up into management to her current position. She was the decision-maker in the Clinic's discharge of Bollinger. Her demeanor during her testimony made it abundantly clear that she is a very strong personality. Given her strong personality, her position and her experience she could be quite intimidating. If she became stern, it could be frightening to a Clinic employee. Since none of the other witnesses testifying about those meetings confirmed Bollinger's testimony about Byrd's inappropriate behavior, Bollinger did

⁴ See Appendix "A," *infra.*, pp. 51-55, for full quotations of Hines' testimony about the alleged "loss of focus."

not prove it more likely than not that there was inappropriate animus toward her in those meetings. More likely than not, the later meetings between Bollinger and Clinic management regarding not discussing either Kinison's situation or the Kinison privacy breach investigation were tense and uncomfortable. Given Bollinger's repeated and remarkably impervious responses to the increasingly intense and stern directions to stop talking about Kinison and the investigation, it would have been strange if those meetings proceeded without tension and some discomfort. But there was insufficient credible evidence to prove that Bollinger was treated inappropriately in any of those meetings. If Byrd was "stern," the substantial evidence indicates that she was nonetheless appropriate in her sternness.

42. The only two employees disciplined in connection with Kinison's complaints and the Clinic's investigation were Employee 101, who got a letter in his file for sharing his access code, and Bollinger, who got a written reprimand for not following repeated directions to stop talking about Kinison or the investigation at work with colleagues. The substantial and credible evidence of record established legitimate business reasons for both instances of discipline. Kinison herself was discharged, but why and how that happened is not relevant to this case. Pelton succinctly explained why the other employees who allegedly accessed Kinison's medical records without a need-to-know-for-job-functions basis were not disciplined. Trans., Vol. III, p. 667, lns. 11-14.

I was not – the other employees were not disciplined because I was not able to determine that any of them had actually used the password, had the password or had accessed the medical record.

43. The Clinic is a large and very busy medical facility, consisting of a combined clinic and hospital. Its nurses, as well as its other employees, work under pressure to complete each and every assignment in timely and completely correct fashion. The stress of the work can be lessened if all workers cooperate with each other, trust each other and their management and rely upon each other and their management. The stress of the work becomes far greater, and extremely daunting, for an employee who distrusts fellow workers and management. That increased stress can result in misunderstandings and overreactions over small matters, magnifying them into enormous and sinister matters, with even more stress resulting.

44. In 2009 through 2012, Bollinger experienced increasing health problems. Bollinger's health problems were real and required treatment. Because she lived in Absarokee, Montana, which required her to make long commutes between work and home, a work schedule with variable days off and some double shifts, made scheduling and keeping her health care appointments more difficult. Over that same period of time, Bollinger believed that she was increasingly being assigned two "split" days off per week, instead of being assigned Monday and Tuesdays off, as she

believed had been consistently her schedule for over a decade. She realized that it would be much simpler if she did consistently get the same two days off each week.

45. Bollinger requested Monday and Tuesday off on a regular basis, reporting to Jackie Hines that the change in schedule that was now requiring her to remain for long periods of time at the nurses' dormitory in Billings with no opportunity to go home to Absarokee was unnecessary, unjustifiable and bad for her health. Hines referred Bollinger to go see Mary Ellen James in Human Resources because this appeared to be a request for an accommodation. Bollinger did so. James told Bollinger to provide a doctor's verification of her need for an accommodation of regularly having Monday and Tuesday off. Bollinger obtained such a note, dated October 4, 2011, from her treating physician, Dr. Kane recommending that she be given Mondays and Tuesdays off "for her mental health and ability to get counseling."

46. James reviewed the documentation and asked Hines if she could accommodate Bollinger by scheduling her for every Monday and Tuesday off work. Hines responded that almost always the Clinic could accommodate Bollinger by assigning her two consecutive days off, with most but not all of the two days being Mondays and Tuesdays. On December 8, 2011, Bollinger and Hauschild, her union representative, met with James and Hines regarding this accommodation request. James conducted this meeting. James informed Bollinger that the Clinic would accommodate her request to have two days off in a row, although the two days off may vary. James also stated that the majority of the time, the two consecutive days off would be Monday and Tuesday, but that there would be times when the two consecutive days off would be other days. Bollinger responded positively and agreed that she could be flexible.

47. James drafted a memorandum regarding this accommodation. The memorandum stated that the Clinic would accommodate Bollinger's request for two consecutive days off per week, that most of the time those two days would be Monday and Tuesday, and that for any week in which the Clinic could not provide her with Monday and Tuesday off, she would still get two consecutive days off. James sent Bollinger a copy of this memorandum. There was also an understanding at the time that there might be special circumstances such that two days together might not be available for a week every now and then.

48. Hines implemented this accommodation by informing Taylor about it, and telling her what needed to be done. During the following year, Bollinger received every Monday and Tuesday off, for all but a very few of her work weeks. Bollinger testified that the Clinic departed from honoring this agreement. However, there is substantial and credible evidence that the Clinic did honor the accommodation, which specifically included occasional scheduling of two consecutive days off other than Monday and Tuesday, as well as the possibility that every now and then two

days together might not be available. Bollinger was not assigned every Monday and Tuesday off, and even occasionally had a week where she was not scheduled for two consecutive days off. But more likely than not, the Clinic made a good faith effort to provide the accommodation to which it had agreed.

49. Bollinger was under the stress of physical and emotional health problems. She sincerely believed that her employer was treating her unfavorably, and doing so because of her prior support of Kinison. She blamed the Clinic for any decrease in her hours and earnings. She felt certain that every change in her schedule and any miscommunications about her schedule were all motivated by management's hostility toward her because of her support for Kinison, or perhaps now because of her accommodation request. She believed she was not getting the accommodation she had been promised, but the evidence adduced does not establish that more likely than not that her belief was accurate.

50. On October 31, 2012, Bollinger filed an administrative complaint with the Montana Human Rights Bureau (HRB) against the Clinic, alleging disability discrimination and failure to accommodate (Charge No. 0131015789).

51. Bollinger had come to suspect that her superiors were plotting against her because of her participation in the Kinison privacy breach investigation and/or her accommodation request. Having that suspicion, she watched carefully for evidence to support it. She found what she thought was evidence of such plots in several rather innocuous events at the Clinic. On the present record, her testimony was insufficient to establish that the Clinic took adverse employment actions against Bollinger for retaliatory reasons at any time after she began to engage in protected action with her first accommodation request.

52. Bollinger believed her career was in jeopardy. She was consulting her counsel about what to do. She was keeping track of any slights or injustices she thought she saw in her scheduling or in her treatment by her supervisors. Bollinger tried to self-check whether her perceptions were accurate:

A I know that I had severe symptoms of Post-Traumatic Stress Disorder, anxiety and depression, and I know that paranoia can be part of that.

I tried to realize that the paranoia was part of my disability that I had, and I tried to distinguish that from what was really going on.

Tr., Vol. II, p. 238, lns. 14-20. It is to Bollinger's credit that she did her best to self-check her feelings and perceptions. She believed her perceptions were accurate. Her belief was outweighed by the substantial evidence presented by the Clinic that it had legitimate business reasons for its actual adverse employment actions.

53. On January 18, 2013, Bollinger was assigned what she testified was a challenging day of multiple surgeries with a demanding surgeon.⁵ Perioperative nurses work in teams as a “primary” and as a “second circulator.” Bollinger was the primary circulator that day. The second circulator that day was, as far as Bollinger knew, a “rookie” who had barely been exposed to general surgery and had only previously been in ob-gyn. Breaks during long or back-to-back shifts are important for nurses. Nurses use their discretion and professional judgment when it comes to situations regarding patient safety, whether in working in patient rooms or in surgery. On the January 18, 2013 surgery schedule, Bollinger did not have any lunch break relief assigned – no other nurse designated to cover for her while she ate. Bollinger worried that the nurse she would be working with that day could not responsibly be left alone due to patient safety concerns. Bollinger also had concerns about whether she, Bollinger, could safely work the shift without a break. According to Bollinger, she took that day’s surgery schedule (Exhibit 114 – in evidence and sealed) to Jackie Hines at the beginning of the January 18, 2013, shift, to discuss the assignments. Bollinger testified that Hines said that she would not discuss day’s scheduling with her and that she should talk to Human Resources about scheduling issues.

54. Hines denied that Bollinger tried to talk to her about the schedule and denied that she knew that Bollinger had taken possession of a copy of the surgery schedule. Hines testified that she would have talked with Bollinger about the day’s scheduling, had she been asked and denied that she would have directed Bollinger to talk to James with the surgery schedule in hand.

Q Ms. Hines, take a look at Exhibit 114 again, please.

A Okay.

Q Do you recognize the document?

A Yes.

Q What is it?

A A surgery schedule.

Q Now, are you familiar with what surgery schedule in particular this is?

A In terms of –

Q Why it's an exhibit in this case?

A Yes.

Q What is your knowledge of that?

A This was a surgery schedule that Ms. Bollinger had taken from the OR and given to her counsel, and then came back through some sort of legal process into the Billings Clinic.

⁵ Other experienced nurses testified that the January 18, 2013, schedule for Bollinger involved four fairly simple surgical procedures.

Q Now, before all that happened, did Ms. Bollinger come to you to discuss the surgery schedule that's Exhibit 114?

A No.

Q Did she ever come to you to discuss that schedule?

A No.

Q If she had come to you to discuss the surgery schedule like Exhibit 114, what would you have done?

A Discussed it with her.

Q And what process would you have followed to discuss it with her?

A Hear her concerns; understand what she was – why she was bringing it to me.

Q If Ms. Bollinger had come to you with that surgery schedule to discuss it with you, would you have referred her to Mary Ellen James?

A No. With the schedule? No.

Q Why not?

A This schedule doesn't leave – these schedules don't go out to – not anyone can view them. It's protected health information, and it's something you can't just take out wherever you want.

Tr., Vol. IV, p. 881, ln. 7 – p. 882, ln. 22.

55. At the end of that day, as far as this record reflects, there had not been any problems resulting from what Bollinger saw as the dangerous lack of experience of the other nurse. There had not been any problems resulting from the taxing work schedule Bollinger had worked. Whatever breaks either nurse took or skipped that day, the evidence does not show any harm or unreasonable risk of harm to any of the patients and does not show any harm to Bollinger, aside from feeling more justified in her belief that she was being “set up.”.

56. When she left surgery that day, Bollinger had taken personal possession of a copy of the surgery schedule, rather than leaving it in surgery for shredding, as required. She would later take that surgery schedule off Clinic premises, and provide it to the attorney she was consulting at that time. At that time, Bollinger, with the attorney, apparently blacked out the patient names on the schedule. Bollinger kept a copy of the surgery schedule. The attorney provided a copy of the surgery schedule, with the blackouts, to the HRB investigator of Bollinger's administrative complaint. At some still later point, Bollinger would take her copy of the surgery schedule to Human Resources, outside of the surgical portion of the Clinic, and show it to James.

57. Bollinger apparently could not think of any other avenue to document the schedule for January 18, 2013, other than to remove it and to provide that particular

surgery schedule to her attorney. Bollinger believed that the conflict she perceived between her and her employer had escalated to the point where patient safety might be in jeopardy. She testified about her reasoning, but her reasoning was not enough to establish any entitlement to remove the surgery schedule, first from the surgery and then from the Clinic's premises. She knew or reasonably should have known that she was violating a number of Clinic policies in removing the schedule and in providing it to someone outside of the Clinic, even with "redacted" names of patients. She knew or reasonably should have known that what she was doing was not consistent with her duty to safeguard patient confidentiality. She knew or reasonably should have known that following all of the policies and practices of her employer while either grieving through her union or asking HRB (through her attorney) to subpoena or otherwise obtain and preserve the schedule would have been a more appropriate and proper way to obtain documentation of the scheduling.

58. Bollinger took the surgery schedule to her attorney in a sealed manila envelope, to use in support of her claim filed with the HRB. Bollinger believed she was being subjected to retaliation, harassment and bullying. She was afraid for her career, and she may or may not have believed at the time (with little to no evidence) that her schedules were becoming so retaliatory and burdensome that patients might be endangered. Her primary concern at the time was her schedule and her administrative complaint and not patient safety.

59. The Hearing Officer has looked closely at the blacked out names on Ex. 114, and can make out the letters under the "black-out."⁶ Bollinger's attorney provided a copy of that schedule to the HRB investigator in January 2013. HRB sent a copy of that surgery schedule to the Clinic or its counsel in early February 2013.

60. On February 21, 2013, Bollinger's superiors accused Bollinger of "disrupting the OR." She was written up that day for writing an email in all caps and "contribut[ing] to a disruptive work environment." She was found to have disrupted the operating room because she was in tears and being comforted by another nurse, outside of the operating room. This discipline was later removed from Bollinger's personnel file in response to an Unfair Labor Practices claim filed on her behalf by the union. Unquestionably, the operating rooms were not places for personal drama or outside issues. But being in tears outside of the operating room seems weak as an adequate basis for discipline, without more. Nothing more appeared in this record. Being disciplined for writing an email in all caps seems even weaker. There is a significant difference between yelling face-to-face at a supervisor and writing the supervisor an email in all caps. This discipline was not adequately justified by the

⁶ Gerele Pelton also testified about this inadequacy of the blacking out of the patient names. Trans., Vol. III, p. 634, ln. 7 – p. 635, ln. 2.

Clinic. The events for which it was imposed, as well as the write-up that Bollinger received, occurred less than two months after the Clinic received a copy of the surgery schedule from HRB in Bollinger's administrative complaint and less than four months after that administrative complaint was filed. At the time of this curious disciplinary action, HRB was still investigating Bollinger's first complaint of disability discrimination, in which Bollinger was still participating. The weak basis for that written warning and the pending disability complaint under MHRA give rise to a presumption that this was retaliatory discipline in response to Bollinger engaging in protected activity by participating in her MHRA complaint.

61. Bollinger was still trying to discuss her scheduling issue with management. She testified that she tried to talk with her supervisor in charge of scheduling, Marie Taylor, but Taylor refused to talk with her. Bollinger testified that Taylor told her to go talk to Ellen James, in Human Resources. It is inherently incredible that Taylor would have said anything to suggest that Bollinger should take the surgery schedule to James outside of the operating rooms. Taylor testified that she told Bollinger to go to talk to James about any "hostile environment" complaint she had, since that kind of claim was properly presented to Human Resources. Bollinger did not testify that she ever showed Taylor her copy of the surgery schedule. Had Bollinger shown Taylor the surgery schedule and expressed her intention to take it to James, Taylor more likely than not would have given Bollinger some straightforward reminders about policy and practice with PHI.

62. Contrary to policy and procedure regarding patient privacy, Bollinger took the surgery schedule to James in early March 2013. Showing a document containing protected health information (PHI) to a Clinic employee who could not possibly have had a need-to-know-for-job-functions basis for seeing it was a serious breach of Clinic policies and practices and of patients' privacy. James refused to discuss the schedule or Bollinger's concerns related to the schedule. James did not even read the surgery schedule, only glancing at it. James did not tell Bollinger that the Clinic was now aware that a surgery schedule had also been provided to the HRB investigator by Bollinger's lawyer. Bollinger testified that after that meeting, she shredded the surgery schedule in her possession.

63. The Clinic thereafter initiated an investigation into the removal of January 18, 2013 surgery schedule. This investigation was prompted by Bollinger taking the schedule to Mary Ellen James, which James reported, and HRB sending the Clinic a copy of the surgery schedule, which had not come from the Clinic originally, during its investigation into Bollinger's disability discrimination and retaliation charges (HR No. 0131015789). Gerele Pelton, Mary Ellen James, and Jackie Hines met on March 15, 2013 to discuss the investigation. Hines knew before

the March 15, 2013 meeting that a surgery schedule had been provided to HRB by Bollinger's attorney. She had known this several weeks before March 15, 2013.⁷

64. On April 3, 2013, Bollinger was called to a meeting with Gerele Pelton, Mary Ellen James, and Jackie Hines, involving Bollinger removing the surgery schedule from the operating room area and showing it to James. Bollinger's union representative, Amy Hauschild, was also in attendance. Bollinger admitted that she took the schedule to James' office to discuss a workplace issue and explain her concern about her scheduling. Bollinger's union representative, Amy Hauschild, tried to explain the purpose of Bollinger wanting to discuss the surgery schedule with management, but Pelton told her that Bollinger's issues with her schedule were not relevant to the privacy investigation regarding removal of the surgery schedule from surgery.

65. It seems odd that Bollinger's specific reasons for taking the surgery schedule to James in Human Resources were not relevant to the privacy investigation regarding removal of the surgery schedule from surgery. But from Pelton's point of view, the issues involved were breaches of rather important Clinic policies and practices regarding patient privacy. Taking the surgery schedule out of surgery was one of the privacy breaches. Taking the surgery schedule off the Clinic's premises and providing it to outsiders was another even more egregious privacy breach. Presumably an order recognized by the Clinic as requiring production of the schedule with adequate protection of patient privacy and of confidential and sensitive Clinic information would have been honored (perhaps after obtaining a review and a ruling upon its legality). Without any such order or any internal authorization, a schedule had been removed from the operating room area and taken or sent out of the Clinic, without the Clinic's knowledge or consent. The Clinic already knew of these breaches of policies and practice regarding patient privacy. James had reported Bollinger bringing her the schedule, so the Clinic knew that Bollinger had possession of a copy of the surgery schedule. The Clinic had received a copy of the surgery schedule, with names of patients blackened, from HRB, in Bollinger's case. The Clinic had not authorized any removal of the schedule from the surgery or from the premises, and had not authorized retention of a copy of the surgery schedule by Bollinger. Thus, the reasons for removal of the schedule were not of immediate interest to Pelton, who was seeking evidence of how and when Bollinger obtained the schedule and whether she provided it to any person or entity other than James.

66. Ultimately, the Clinic in this case provided data about the reasons why other employees violated privacy requirements and how they were disciplined. The

⁷ On March 19, 2013, Bollinger amended HRB Complaint No. 0131015789 to add retaliation charges related to adverse actions that had been taken by the Clinic prior to that date.

reasons given for the violations were fairly well documented in each case. That same information was ultimately available for Bollinger's case, and was in the hands of the Clinic before it discharged Bollinger. Thus, based upon the events in Bollinger's case, the Clinic appears to have gathered the information about why privacy requirements were violated at or before the time of imposing discipline on the various involved employees, after the initial investigations in each of those cases.

67. Pelton (who, as usual, was asking the questions and generally controlling the flow of the meeting) did not tell Bollinger that the Clinic knew that a surgery schedule had been provided to HRB in Bollinger's case. Pelton did not know whether Bollinger had removed a schedule from the Clinic, and therefore Pelton asked Bollinger if she had done so. When asked, Bollinger denied providing a surgery schedule to anyone else outside of surgery except James and denied taking a surgery schedule off the premises of the Clinic. She testified at hearing that she did so because she was terrified that she would be fired.

68. The Hearing Officer accepted, at face value, Bollinger's testimony under oath that she was dishonest about taking the schedule out of the Clinic because of fear of losing her job. Attorney-client privilege shields verification or explanation of the presence or absence of any warning to or preparation of Bollinger before she attended the April 3, 2013 meeting, so it is not surprising that there were no questions at hearing about whether Bollinger was expecting to hear about the surgery schedule at the meeting. On the evidence, Bollinger seems to have been entirely unprepared for the questioning about the surgery schedule. However, she had twice previously violated directions not to discuss the Kinison privacy breach investigation and/or Kinison's situation after repeatedly agreeing she understood she was not to do so. Whether or not she had discussed with either counsel or union representation or anyone else what questions she might expect in the April 3, 2013, meeting, when the question came, and whether or not Bollinger was told that HRB had sent a surgery schedule to the Clinic, she gave a dishonest answer because she wanted to avoid the consequences that might result from what she had done. In any event, the Clinic was under no legal obligation to disclose to Bollinger that it had received a copy of the surgery schedule from HRB before asking her if she had provided a surgery schedule to anyone (other than showing it to James) or if she had taken a surgery schedule off of the premises.

69. The evidence in this case indicates that the investigative technique Pelton used was to ask direct questions about what the interviewee had done and what the interviewee had first hand knowledge about. Pelton testified that she did not know whether Bollinger had removed a surgery schedule from the Clinic's premises when she asked Bollinger that question. Even though Pelton might have surmised that Bollinger had done so, she did not have confirmation of that through anyone with

first hand knowledge, and she did not know what Bollinger would say in response to the question when she asked it.

70. Before and after that first interview, Pelton could readily have surmised that Bollinger was the most likely source of the surgery schedule provided to HRB, which had come to HRB from Bollinger's then attorney. No other explanation had been found for HRB ending up in possession of the same surgery schedule that Bollinger had removed from surgery and taken to James.

71. Another meeting with Bollinger regarding a surgery schedule being taken or sent outside of the Clinic occurred on April 26, 2013. Before that April 26, 2013, meeting, Lu Byrd had decided that Bollinger had not only taken the surgery schedule, Ex. 114, out of the surgery rooms where it was supposed to stay and attempting to give it to James (which she had admitted) but more likely than not had also had taken it from the premises and given it to her attorney. If this was the case, Bollinger had not told the truth in the April 3, 2013, meeting when she denied any other disclosure of the schedule except within the Clinic to James. At Byrd's direction, Clinic management prepared paper work to terminate Bollinger's employment, to be ready to carry out that firing if Byrd decided it was appropriate after the initial discussion about what Bollinger had done and what Bollinger denied doing. Byrd would be the decision maker.

72. Those in attendance at the April 26, 2013 meeting were Lu Byrd, Mary Ellen James, Deanna Evans (a union representative), and Bollinger. Byrd conducted the meeting. She followed the usual practice for a probable discharge exit meeting. There is substantial and credible testimony that Byrd was firm and professional during this meeting. That testimony has more credence than Bollinger's, about this meeting as about previous meetings, that Byrd behaved inappropriately and yelled and screamed and pounded on the table. Byrd did not yell, scream or pound the table. To begin the meeting, Byrd stated that the purpose of the meeting was to follow up on an issue regarding a surgery schedule being removed from the Clinic's premises. Byrd then asked Bollinger questions, which Bollinger answered. James took notes during the meeting. Evans also took notes during the meeting and advised Bollinger about her rights and options after the meeting.

73. Byrd asked Bollinger if she had removed a surgery schedule from the Surgery Department, and she said she had taken one to James. James then said the surgery schedule had patient information on it so she gave it back to Bollinger. Bollinger said again that she had shredded that surgery schedule.

74. Byrd then asked Bollinger if she had ever taken another surgery schedule out. Bollinger said she had taken a surgery schedule out of the facility and given it to her attorney. Byrd reminded Bollinger that she had told Pelton during the initial interview that she had only taken the surgery schedule out and tried to give it to

James. Bollinger admitted that was what she had told Pelton. Byrd asked Bollinger if she had permission to take the surgery schedule off out of the facility and to give it to her attorney. Bollinger said that no one had given her permission.

75. Byrd reminded Bollinger that she, Bollinger, knew that the Clinic's policies prohibited removing the surgery schedule, and asked her why she had taken it out of the facility. Bollinger responded that what she had done was really stupid and she was not thinking. Byrd asked Bollinger why she had not told Pelton the truth. Bollinger responded that she was not sure that she understood the questions Pelton had asked her. Byrd had with her the questions that Pelton had asked, which she reviewed with Bollinger and said were clear. Byrd asked Bollinger again why she had not told Pelton the truth and Bollinger replied that she was not thinking.

76. Byrd then showed Bollinger the Confidentiality and Security Commitment she had signed in September 2012 and asked Bollinger if it was her signature on the document. Bollinger agreed that it was her signature on the document. Bollinger added that she thought it was okay if she blacked out the patients' names. Byrd responded by pointing out that the patient names could be seen if the original document was held up to the light, and that the patient financial numbers were visible on the Surgery Schedule. Bollinger said again that what she had done was really stupid. Byrd agreed and added that was especially true given the recent training Bollinger had received, which was unkind. Until this statement, Byrd still had the option to put Bollinger's discharge on hold if anything happened in that meeting made her think further inquiry was justified before deciding what to do. Her unkind statement about recent training (which was true) was apparently the point at which Byrd decided that discharge at that time was necessary.

77. Byrd then said that she had to discharge Bollinger for this misconduct. Bollinger responded by apologizing.

78. If during the April 3, 2013 initial meeting, Bollinger had admitted removal of the surgery schedule from the facility, the same decision would have been reached. Byrd testified that she would discharged Bollinger for removing the surgery schedule if names were apparent and Bollinger had provided it to her attorney, even if she had been honest at the first interview about doing so. But the additional basis proffered by the Clinic for firing Bollinger (that she had been untruthful in her denials of removing a surgery schedule from the premises) was not necessarily superfluous to the decision to discharge Bollinger. In deciding she was going to fire Bollinger unless some radically different explanation for how HRB could have obtained the schedule was revealed during the April 26, 2013 meeting, Byrd reasonably presumed that Bollinger had not been truthful in the meeting with Pelton, so even before Bollinger confesses that not been truthful, Byrd had considered it likely what had happened and directed staff to prepare the dismissal papers.

79. During the April 26, 2013, meeting, Bollinger had the chance to explain her conduct, to make statements and to ask questions. She said nothing about the Clinic retaliating against her, nothing about being treated differently from other employees and nothing about her discharge being inappropriate or improper. She said nothing about being a whistle blower, nothing about having the right to take the Surgery Schedule out of the facility and nothing about an issue of patient or employee safety or employee safety. There was no legal requirement for her to say anything. She did not waive any rights or claims by not stating them. Bollinger could not have challenged her discharge during that meeting, under the CBA. Nonetheless, it is reasonable to note that Bollinger's apology was an effort to save her job. Had she actually had other reasons in mind for her acts with the surgery schedule, it would have been reasonable for her to advance all such reasons in her effort to avoid being fired.

80. After the meeting ended, Byrd and James asked Bollinger about any items she might have in the workplace. Bollinger said she had some things in the house for nurses on call. Byrd and James walked to the house and packed up Bollinger's things, had the things taken back to the premises and placed them in the Board room. While that was being done, Hines retrieved Bollinger's belongings from her work locker. Byrd and James then escorted Bollinger to the Board room to have her see if all of her belongings were there. Bollinger told them that she had some additional items in the house. Byrd and James told her that she could collect them later at Human Resources.

81. Bollinger apologized again for what had happened. Byrd and James then helped her take the items to her car and she left.

82. Bollinger admitted in the April 26, 2013, meeting that she had taken a surgery schedule off the premises and had provided it to her attorney and apologized for what had happened because her union representative advised her to. No one could have reasonably believed that Bollinger had intended to harm patients by taking the surgery schedule to her attorney, but her intentions were not at issue. Her breaches of Clinic policies and practices about patient privacy were at issue.

83. Byrd terminated Bollinger's employment because Bollinger had removed a document with confidential patient health information (PHI) from the Clinic's facility without permission in violation of the Clinic's policies, sharing that document with her lawyer, who she knew would supply it to the investigator at HRB, and Bollinger had been dishonest during an internal investigation.

84. The Clinic did not contact any of the patients on the surgery schedule, because it had no knowledge of any wider disclosure or other potential harm to the patients. There is no evidence regarding whether any efforts have been made to assure that the HRB copy of Ex. 114 is protected from access. The Clinic was, at the

time of discharge of Bollinger, uncertain whether other surgery schedules had also been removed, and only later after the discharge that Bollinger had also taken and retained copies of other surgery schedules off facility premises (Ex. 125). This information was not part of what the Clinic knew when it fired Bollinger, and could not have been a reason for firing her. But it is evidence that Bollinger was still not telling the truth when she told the Clinic her only involvement in removing surgery schedules from the facility was with Ex. 114, in another attempt to avoid the consequences of her actions.

85. Bollinger testified at hearing that she did not know removing and keeping other surgery schedules with her journal was improper. It is not necessary for the Hearing Officer to decide whether including some limited PHI in a hand-written personal journal Bollinger kept at the direction of some attorneys she originally consulted about her situation were also violations of the Clinic's privacy policies and procedures. If such entries were violations, that evidence would be entirely cumulative, given the removal and retention of more surgery schedules than just Ex. 114.

86. On April 29, 2013, the HRB investigator issued a finding of no probable cause regarding Bollinger's disability discrimination and retaliation claims in HRB Complaint No. 0131015789 against the Clinic. There is no real evidence that the Clinic knew about this finding when it discharged Bollinger. Bollinger did not pursue those claims by either District Court complaint or a Human Rights Commission appeal after the dismissal.

87. After her discharge, the Montana Nurses Association filed a grievance on behalf of Bollinger in May 2013. The Montana Nurses Association also filed two Unfair Labor Practice claims on behalf of Bollinger, and both charges were found to have merit. The findings in those matters are not relevant to the issues in this case, involving as they do CBA or labor law violations by the Clinic, rather than violations of MHRA. To the extent the fact finder could presume that engaging in unfair labor practices might manifest retaliatory animus against Bollinger, any such presumption is overcome by the cold fact that Bollinger violated some of the Clinic's fundamental policies and procedures regarding patient confidentiality.

88. On May 15, 2013, Bollinger filed her current charge of retaliation.

89. After Bollinger's discharge, on June 13, 2013, OCR issued a letter determination (Ex. 13), regarding Bollinger's February 2009 complaint. OCR determined that Bollinger had engaged in protected activity "by participating in interviews conducted by the Clinic as part of its investigation into [Kinison's] Privacy Rule complaint to OCR." Ex. 13, p. 2. OCR went on to explain that due to the "voluntary corrective action" taken by the Clinic in response to Bollinger's complaint, and "[d]ue to the Clinic's voluntary actions regarding [Bollinger's] allegation

[removing the disciplinary letter from her personnel file]” OCR had decided to “close [Bollinger’s] complaint,” Ex. 13, p. 3.

90. OCR did not determine and would not have had jurisdiction to determine that Bollinger’s activity was protected activity under the MHRA. OCR determined that the Clinic’s “administrative leave placement and disciplinary action taken against Bollinger constitute adverse employment actions.” Id. Finally, OCR determined there existed a causal connection between Bollinger’s participation in the Clinic’s interviews regarding the Kinison privacy breach investigation and the disciplinary letter the Clinic gave to Bollinger. OCR decided the nearness in time between the protected activity and the adverse action triggered a presumption of that causal connection. “Due to the temporal proximity of Complainant’s protected activity on December 31, 2008 through February 6, 2009, to her administrative leave and disciplinary action February 6-13, 2009, causation is assumed, and a prima facie case of retaliation is established.” Id. OCR noted that the Clinic asserted it had disciplined Bollinger to stop her from talking about Kinison “in order to prevent further impermissible use of [Kinison’s] PHI and to prevent contamination of evidence of its investigation into [Kinison’s] complaint.” Ex. 13, p. 2. The Clinic “provided evidence that it took action against [Bollinger] because her discussion of [Kinison] was disruptive; she was told not to discuss the situation, but continued to do so.” Id.

91. OCR also “found evidence that many employees, not identified by [Kinison] as a witness [sic], discussed [Kinison’s] termination and impermissible disclosure of her PHI, yet [Bollinger] was the only employee to receive disciplinary action for doing so.” Id. OCR concluded its determinations by stating:

Evidence OCR collected indicates that the Clinic disciplined [Bollinger] both for discussing [Kinison] after she was told not to do so, and for assisting [Kinison] in discovering the impermissible disclosure of her PHI and/or for acting as a witness in [Kinison’s] complaints to the Clinic and/or OCR. A preponderance of the evidence did not reveal that the Clinic would have disciplined [Bollinger] and put her on administrative leave had she not participated in [Kinison’s] grievance as a “witness.”

Ex. 13, pp. 2-3. As already noted, there is no evidence that any of Bollinger’s claims against the Clinic on her OCR complaint involved claims of violations of Bollinger’s rights under MHRA. The retaliation OCR found was not retaliation as defined in the MHRA.

92. The evidence in this present case clearly identified two other employees of the Clinic who violated the directions not to talk about Kinison’s situation and not to talk about the investigation into Kinison’s privacy breach. Obviously, Bollinger

was not the only Clinic employee involved in conversations about Kinison and the privacy investigation. Even if Bollinger was involved in every single conversation on these topics (which she almost certainly was not) she could not have had any of those conversations by herself, so at least one other employee was involved in each of her reported violations. In both instances, the other employee with whom Bollinger discussed Kinison and the privacy investigation was also the employee reporting that conversation to management. Those two other employees involved in the two conversations with Bollinger were Employee 103 (Trans., Vol. IV, p. 831, ln. 23 – p. 833, ln. 4) and Employee 152 (Trans., Vol. IV, p. 931, ln. 19 – p. 833, ln. 10, identifying both 103 and 152). By being involved in the conversations they were also in violation of the directions not to talk about Kinison’s situation and not to talk about the investigation into Kinison’s privacy breach. As already noted, both employees reported the conversations, blaming Bollinger for bringing up the illicit topics and talking about them to both of the reporting employees. According to Hines, there was “a lot of chatter” about the Kinison situation, presumably going beyond just Bollinger, Employee 103 and Employee 152. Even so, what was unique about Bollinger’s failure and refusal to follow directions was that it was conspicuously recurrent after multiple warnings. No other employee was identified as engaging in such conspicuously recurrent violations after multiple warnings.

93. The confidentiality of Kinison’s situation (she was the patient whose records were allegedly accessed improperly and she was an employee just like the alleged viewers of her records) and the confidentiality of the investigation of the alleged breach of her privacy had been pointed out to Bollinger once at the “morning huddle” (see, e.g., Finding 33, p. 12, supra) and once at the end of that first Pelton interview. After being told twice, Bollinger disobeyed the instructions. Bollinger was then told at least two more times about the same kinds of confidentiality (in her meeting with Byrd and in her second interview with Pelton). Now having been given at least four separate warnings against talking about these topics at work,⁸ she did it again. As far as this record reflects, this was a significant difference between Bollinger and every one of the other “many employees” talking about Kinison or the privacy investigation in violation of the Clinic’s directions. There is no evidence that any other employees involved in talking about Kinison or the Kinison privacy breach investigation had been warned multiple times. There is no evidence that any of the other employees involved in talking about Kinison or the Kinison privacy breach investigation had been reported to management by co-employees once, let alone

⁸ There probably were more admonitions. Hines testified about a one on one meeting she had with Bollinger before her discipline, after which Bollinger left her a note professing not to have understood she was not to talk about the investigation or Kinison’s situation. Her testimony was credible on this point, but her time sense was off – she dated the meeting in March or April instead of early February. See Appendix “B” for Hines’ date inaccuracy.

twice, and each time after multiple warnings against such behavior. Thus, in the present record there was ample evidence that the Clinic would have given Bollinger the written warning of February 13, 2009, regardless of whether Bollinger participated in investigations of Kinison's complaints.

94. Over the years, the Clinic had dealt with many instances of violations of its policies regarding protection of patient privacy in handling their medical records. A number of employees had breached patient privacy requirements. Some were fired. Others were not.

95. Employee 109 used her access code to the Clinic's protected health information to obtain patient medical information from an adult patient's record and gave that information to the patient's mother without patient consent. She was discharged for releasing patient records without patient authorization (and for dishonesty). Trans., Vol. III, pp. 691-693. Her offenses were similar to Bollinger's, and she received the same punishment.

96. Employee 110 accessed and used patient medical information, released records without either patient consent or Clinic authorization, for personal reasons (and also was dishonest) was discharged. Trans., Vol. III, pp. 693-94. Her offenses were similar to Bollinger's, and she received the same punishment.

97. Employee 111 accessed multiple patient records on former friends and family. She was discharged for accessing patient medical information, violating policy related to patient privacy and not being honest during the investigation. She accessed medical information on more than ten patients. Trans., Vol. III, pp. 693-94. Her offenses were similar to Bollinger's, albeit significantly more numerous. She received the same punishment as Bollinger. Discharge is usually the most severe discipline an employer can impose upon an employee.

98. Employee 112 took protected health information on a minor patient and released that information to the employee's spouse and to law enforcement. The employee was discharged for violating policy, being dishonest during the investigative process and causing significant harm to the patient when the disclosure to the spouse led to the minor patient's parents learning of the patient's medical treatment (which had not been known to the parents). Trans., Vol. III, pp. 694-95. Her offenses were similar to Bollinger's, but more serious, due to the significant harm resulting to the patient whose privacy was breached. She received the same punishment as Bollinger.

99. Employee 113 accessed protected health information on a co-worker. The employee was suspended rather than discharged because the information was not disclosed outside the Clinic or to others, and the employee was fully cooperative with the investigation, had no intent to harm and explained exactly what she accessed and when she had accessed it. Trans., Vol. III, pp. 695-96. Her offenses differed from

Bollinger's because Bollinger had disclosed the information outside of the Clinic and had not initially been honest or cooperative with the investigation.

100. Employee 114 accessed protected health information on a co-worker out of care and concern when the co-worker didn't come to work, cooperated with the investigation and did not disclose the information to others. She was suspended rather than discharged. Trans., Vol. III, pp. 696-97. Her offenses differed from Bollinger's, there being no disclosure of information to others and there being full cooperation with the investigation.

101. Employee 115 released information that a patient's name was on a non-treatment, non-patient list in a department of Billings Clinic that provides employer services rather than patient care to the patient's ex-wife. Employee 115 received a written warning because the employee fully cooperated, there was confusion about privacy expectations regarding the list and how it should be safeguarded, and it was not patient information. Trans., Vol. III, pp. 697-98. The distinctions between this employee's situation and Bollinger's situation are significant.

102. Employee 116 accessed a family member's electronic medical record and released the information to another Billings Clinic healthcare provider who was not treating the patient. The patient actually wanted Employee 116 to be involved with their care, the confidential information was not further disclosed outside of the Clinic and the employee was attempting to help the family member patient to access care at the Clinic but used the wrong process. Trans., Vol. III, pp. 699. There is no evidence that any of the patients on the January 18, 2013, surgery list taken by Bollinger wanted Bollinger involved in their care, and Bollinger certainly was not "helping" those surgery patients "to access care at the Clinic."

103. Employee 117 received a suspension for intentionally accessing the date of birth of a co-worker to have a discussion about retirement. Employee 117 cooperated when interviewed and received a suspension. Trans., Vol. III, pp. 700. There is no evidence that the information accessed was disclosed outside the Clinic and there was full cooperation with the investigation, significant differences from Bollinger's case.

104. Employee 118 posted the picture of a foot of a small child (the patient) on Facebook. The posted picture did not contain protected health information, and Employee 118 cooperated in the investigation and was "very understanding" of the Clinic's concern. Trans., Vol. III, pp. 603-04 and pp. 700-01. The picture of a little foot was not PHI, and the employee cooperated with the investigation, significant differences from Bollinger's case.

105. Employee 119 printed patient records to be released with a patient who was getting care in another state from another provider. The records released were appropriate to release for the patient's out of state treatment. The employee did not follow the Clinic's required release of information process, and received a verbal warning. Trans., Vol. III, pp. 701-02. The release of patient records to the patient for out-of-state treatment was significantly different from Bollinger's removal of the surgery schedule to further her own claims against the Clinic. Bollinger's justification that not getting a scheduled break was a threat to patient safety made little sense, since she did not make a serious attempt to report alleged patient safety issues at the start of her shift.

106. Employee 121 accessed information on a friend. There was no evidence that it was further released. Still, accessing the information was unauthorized. The patient was not a close family member nor a family member at all. The employee had either lived with or rented from the patient. The access could have harmed the patient. Employee 121 received a suspension. Trans., Vol. III, pp. 702-03. The employee in this case had a benign interest in the patient, but without a close enough relationship with nor a genuine desire to help the patient a suspension was warranted. There was no outside disclosure of the information, and therefore the continued employment of this person does not evidence any unfair or retaliatory treatment of Bollinger.

107. Employee 122 accessed protected information on multiple (more than six) estranged former family members, some or all of whom were minors, intending to use the information in litigation or legal proceedings. Employee 122 was discharged. Trans., Vol. III, pp. 703-04. Both Employee 122 and Bollinger took confidential patient information with the intent of using it to advance their respective legal claims. This employee's privacy breaches, like Bollinger's privacy breaches, could have been far more damaging for the patients involved. The lengths necessary for protection of PHI in this current proceeding underlines the problems in avoiding inadvertent disclosures of PHI in legal proceedings. Like Employee 122, Bollinger was discharged.

108. Employee 123 was a physician at the Clinic who accessed a co-worker's medical records without authorization, out of care and concern. There was no further disclosure and the employee fully cooperated with the investigation, but there needed to be accountability. Employee 123 received a "letter to the file," the process used for discipline of physicians. Trans., Vol. III, pp. 704-05. This employee received a lesser penalty than others whose privacy breaches were quite similar, but it seems more likely that the difference was because this employee was a physician rather than proof of retaliatory animus toward Bollinger. That status distinction is unfair, but the MHRA lacks a protected class of "not being a doctor." Also, however,

unlike Bollinger, there was no outside disclosure of PHI by Employee 123, so a lesser penalty was reasonable for a less egregious offense.

109. Employee 124 accessed the electronic record of a daughter without having an authorization on file, and released test results to the patient (the daughter). The patient (the daughter) wanted the employee involved with her care. The required process of having an authorization on file was not followed, so this disciplinary matter involved a process concern. If that had been all, then there may not have been any discipline. Releasing the test results to the patient/daughter was inappropriate, and coaching and counseling of Employee 124 was done. Trans., Vol. III, pp. 705-06. Even with the release of the test results to the patient (daughter), this employee's privacy breach was significantly less egregious than Bollinger's.

110. Employee 125 accessed PHI regarding two patients, with no need-to-know-for-job-functions basis, and discussed the patients' information with co-workers at the Clinic who knew the patients. Employee 125 cooperated with the Clinic's investigation, but knew what she had done was in violation of requirements for dealing with PHI. She was suspended. Trans., Vol. III, pp. 706-07. This employee's breach was similar to Bollinger's attempt to share PHI with a co-worker, but Bollinger also released PHI outside the Clinic's employees and the Clinic's premises. Also, this employee cooperated with the investigation, which Bollinger did not. The lesser penalty was appropriate.

111. Employee 126 accessed information on a family member and released information to another family member. The patient had not requested that Employee 126 be involved in the care, and the family member to whom Employee 126 provided information reported it to the Clinic. Since the family members had not asked Employee 126 to access and share medical information, a written warning would not have been sufficient, but because Employee 126 fully cooperated with the Clinic's investigation and was "very honest about what happened" she was suspended rather than discharged. Trans., Vol. III, pp. 707-08. The only real difference in the seriousness of this breach as opposed to Bollinger's breach arises out of this employee's honesty about what she did and her apparent recognition of the seriousness of the breach, while Bollinger apparently never did recognize.

112. Employee 127 updated her own and her spouse's electronic records, in part submitting prescriptions for herself. She was not providing care for herself nor for her husband. Her conduct compromised the care for both her and her spouse, and the updates that she made caused disclosures outside of the Clinic. Pelton did not know whether Employee 127 cooperated with the Clinic's investigation. Employee 127 was discharged. Trans., Vol. III, pp. 708-09. Changing medical records and thereby causing outside disclosures and "compromising" patient care justify discharge regardless of cooperation. This is another comparator whose

transgressions actually seemed larger than Bollinger's, but that does not suggest that Bollinger's discharge was inappropriate.

113. Employee 128 accessed a minor child's patient's information and gave it to the mother, who had requested that Employee 128 do this because the mother did not have access to the information at that time. Although the mother wanted Employee 128 involved with the care of her minor child, the information accessed and disclosed was sensitive and had not yet been reviewed by a physician, and therefore should not have been released to the mother at that time. Employee 128 cooperated in the Clinic's investigation. She received a suspension. *Trans.*, Vol. III, pp. 709-10. Giving the patient's mother sensitive PHI before physician review seems somewhat similar to the conduct of Employee 124. Neither Employee 124 nor Employee 128 was fired. Both committed lesser offenses than Bollinger.

114. Employee 129 printed her spouse's medical records and released them to a state agency in Wyoming. The information released to the state agency needed to go to that state agency, but the spouse should not have printed it. Employee 129 cooperated in the Clinic's investigation. *Trans.*, Vol. III, pp. 710-11. This was another "process concern," involving an employee and a patient married to each other and an end run around proper procedure in order to get a medical record to an outside entity that needed it, with the patient having no objection to it being done. This employee did not breach the privacy policies and procedures as seriously as Bollinger did.

115. Employee 130 accessed test results on an acquaintance, rather than a family member or friend of the employee. Employee 130 had previously had a need-to-know-for-job-functions basis to access this patient's medical information, but did not have such a basis at the time she accessed the test results. Employee 130 fully cooperated in the Clinic's investigation. She was suspended. *Trans.*, Vol. III, pp. 711-13. There is no indication that this employee took information out of surgery or off the premises and showed or gave it to others. A lesser penalty than discharge seems appropriate.

116. Employee 131 released protected health information verbally to other employees of the Clinic who did not have a need-to-know-for-job-functions basis for receiving that information. Employee 131 did not release the information to anyone outside the Clinic. Employee 131 fully cooperated with the investigation, admitted to the verbal release of the information and was suspended. *Trans.*, Vol. III, pp. 713-14. No outside release of information and full cooperation in the investigation are significant differences from Bollinger's conduct.

117. Employee 132 accessed her adult daughter's medical record without authorization from her daughter. She did not further disclose the information and cooperated with the investigation. She was suspended. *Trans.*, Vol. III, pp. 714-15.

No further disclosure and cooperation with the investigation are, once again, significant differences from Bollinger's conduct.

118. Employee 133 released information about a patient to Employee 133's adult daughter. The employee resigned before the investigation was completed, and the Clinic therefore took no action. Trans., Vol. III, pp. 715-16. Since the Clinic took no action, there is no way to compare this situation with Bollinger's situation.

119. Employee 134 accessed a boyfriend's medical record. The Employee did not understand that looking at an electronic census would give her access to a patient's records. She cooperated in the Clinic's investigation. She received a written warning. Trans., Vol. III, p. 716. Lack of understanding that she was accessing PHI and cooperation in the investigation distinguish this employee's conduct from Bollinger's.

120. Employee 135 accessed her own medical records, printed them, and released them to her own insurance company. She cooperated in the Clinic's investigation. . Employee 135 did not follow the Clinic's policies. She received coaching and counseling. Trans., Vol. III, pp. 716-17. This employee avoided the process to get a result that she was entitled to get through the process. Her lighter punishment does not indicate any animosity toward Bollinger, who committed more serious breaches of privacy.

121. Employee 136 accessed her own medical records, using the information to communicate with her Clinic providers about her care. She cooperated in the Clinic's investigation. Employee 136 received coaching and counseling. Trans., Vol. III, pp. 717-18. This employee's lighter punishment does not indicate any animosity toward Bollinger, who committed more serious breaches of privacy.

122. Employee 137 accessed the medical record of a co-worker. Employee 137 cooperated in the investigation, admitted to the access and admitted that it was inappropriate and shouldn't have happened. There was no dissemination of the information outside of the Clinic. She received a letter to her file and a suspension. Trans., Vol. III, pp. 718-19. No further disclosure and cooperation with the investigation are, once again, significant differences from Bollinger's conduct.

123. Employee 139 accessed medical records of a family member and did not further disclose the information. The family member (patient) wanted the employee involved in the care, and the family was not complaining about the access. The employee cooperated in the Clinic investigation. Employee 139 received a written warning. Trans., Vol. III, pp. 721-22. Family connections and the patient's desire that the employee be involved in the care distinguish this situation from Bollinger's.

124. Employee 140 accessed x-rays of multiple co-workers without permission or authorization. She cooperated in the investigation. Employee 140 was suspended.

Trans., Vol. III, p. 722. No further disclosure and cooperation with the investigation are, once again, significant differences from Bollinger's conduct.

125. Employee 141, in 2010, posted a picture of a patient room without identifying information on it on social media. The posting did not disclose individually identifiable patient information. Employee 140 fully cooperated with the investigation. She received a verbal warning.⁹ Trans., Vol. III, pp. 732-34. Lack of improper access to and lack of disclosure of PHI justify the lighter punishment than Bollinger received.

126. Employee 141, in 2014, posted information regarding an internal celebration for a patient on social media. The family of the patient wanted the celebration to be publicized and wanted people to be invited to it, but the employee did not have approval from management to post it on social media. She cooperated in the investigation and received a written warning. Trans., Vol. III, pp. 724-25. The circumstances of this punishment are sufficiently different, regarding knowledge and approval of the action by the family of the patient, to justify the lighter discipline imposed here than in Bollinger's case.

127. Employee 142 accessed a physician schedule to see if there was an opening for her to make an appointment with that physician. She circumvented the processes at Billings Clinic for getting an appointment, using her access to electronic health records to get an appointment for herself. She cooperated in the investigation and she did not access multiple patients or disclose information. Employee 142 received coaching and counseling. Trans., Vol. III, p. 725. The discipline was appropriately less severe than that received by Bollinger.

128. Employee 143 accessed the electronic health record for herself and for her spouse for personal reasons, without any need-to-know-for-job-functions basis, and did not follow the processes and procedures for patients to communicate with their providers. The only such accessing of records was for her and for her spouse. She cooperated in the investigation. She received coaching and counseling. Trans., Vol. III, pp. 725-26. The discipline was appropriately less severe than that received by Bollinger.

129. Employee 144 took business and patient information home with her in a notebook without authorization from the patients or management. Employee 144 resigned before the Clinic's investigation and no further investigation went forward. Trans., Vol. III, pp. 726-27. Since the Clinic took no action, there is no way to compare this situation with Bollinger's situation.

⁹ A verbal warning is less severe than a written warning in the Clinic's progressive discipline scheme.

130. Employee 145 shared directory census information with her daughter, who was an employee of Billings Clinic. Employee 145 did not follow process and procedure, but the information shared with her daughter was information available to the daughter. Employee 145 cooperated in the Clinic's investigation. She received a verbal warning. Trans., Vol. III, pp. 727-28. The discipline was appropriately less severe than that received by Bollinger.

131. Employee 146 accessed patient records without any need-to-know-for-job-functions basis. There were multiple accesses to multiple patients, but no release or disclosure of the information. Employee 146 cooperated in the Clinic's investigation and received a suspension. Trans., Vol. III, pp. 728-29. The discipline was appropriately less severe than that received by Bollinger.

132. Employee 147 accessed her adult daughter's medical record with her daughter's permission but without authorization on file. She and her daughter had not done the requisite paperwork. The daughter knew of and approved of the mother's access. Employee 147 cooperated with the investigation. She received coaching and counseling. Trans., Vol. III, pp. 729-30. The discipline was appropriately less severe than that received by Bollinger.

133. Employee 148 accessed protected health information on a family member. The family did not ask for her to access the records. She did not have family authorization or permission. There was no outside disclosure of the information. Employee 148 cooperated in the Clinic's investigation. She was suspended. Trans., Vol. III, pp. 730-31. The discipline was appropriately less severe than that received by Bollinger.

134. Employee 149 inadvertently left some hard-copy protected health information in one of the clinic areas that was not secured. The hard-copy information could have been read by anyone in the unsecured area or could have been taken outside of the facility by somebody who was not an employee of the Clinic, and perhaps further disclosed. Employee 149 soon recognized she had left the records in that area and immediately tried to go back and get them, reported it to security and her supervisor, fully cooperated with the investigation, and attempted to resolve the risk. She received coaching and counseling. Trans., Vol. III, pp. 731-32. The discipline was appropriately less severe than that received by Bollinger.

135. Employee 151 accessed and updated the demographic information and financial records of family members. It was her job-related task to update demographic and financial records, but she should not have done it for her family members under the circumstances. Employee 151 cooperated fully with the investigation. She received a written warning. The discipline was appropriately less severe than that received by Bollinger.

136. Pelton credibly testified that, other than the discharges, none of the identified employees disciplined for privacy breaches were disciplined because of conduct comparable to the conduct of Bollinger. This testimony was credible and it was corroborated by the facts shown at hearing.

137. Bollinger failed to prove through comparator evidence that she was subjected to unfair and unduly severe, and therefore retaliatory, discipline for the privacy breaches that she committed in taking the surgery schedule out of the Clinic and providing it to HRB.

138. Ultimately, she also failed to prove it was more likely than not that she was discharged because of her protected activity based upon the evidence of retaliatory animus through the number and the invalidity of disciplinary actions taken against her from 2009 until she filed her first MHRA complaint of disability discrimination in October 2012. Any and all retaliation before her first MHRA action was filed could not have been in violation of the MHRA, since such retaliation was not in response to protected activity.

IV. Discussion¹⁰

Bollinger's Prima Facie Case on Retaliation

Mont. Code Ann. § 49-2-301 provides, in pertinent part, that retaliation is prohibited, and describes retaliation as the unlawful discriminatory practice of taking adverse action against an individual because she (in this case) filed a complaint or participated in a proceeding under Mont. Code Ann., Title 49, Chapter 2, MHRA. Admin. R. Mont. 24.9.603, "Retaliation and Coercion Prohibited," states, in pertinent part, the elements involved in this particular retaliation claim.¹¹

(1) It is unlawful to retaliate against . . . a person because the person engages in protected activity. A significant adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is illegal retaliation. "Protected activity" means the exercise of rights under the act or code and may include:

. . . .

(c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code.

¹⁰ Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

¹¹ Both counsel instead cite to Admin. R. Mont. 24.9.610(2) but the elements are the same.

(2) Significant adverse acts may include the following:

.....

(b) discharge, demotion, denial of promotion, denial of benefits or other material adverse employment action;

.....

(3) When a respondent or agent of a respondent has actual or constructive knowledge that proceedings are or have been pending with the department, with the commission or in court to enforce a provision of the act or code, significant adverse action taken by respondent or the agent of respondent against a charging party or complainant while the proceedings were pending or within six months following the final resolution of the proceedings will create a disputable presumption that the adverse action was in retaliation for protected activity.

A prima facie retaliation case is established by proof that (1) the employee engaged in protected activity under MHRA; (2) the employer thereafter took an adverse employment action against that employee; and (3) there is a causal connection between the protected activity and the employer's adverse employment action. *Rolison v. Bozeman Deaconess Health Services, Inc.*, ¶16, 2005 MT 95, 326 Mont. 491, 111 P.3d 202; *Beaver v. DNRC*, ¶71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857.

There are several bases for the retaliation claim involving the Clinic's discharge of Bollinger. Bollinger appears to argue that her participation in Kinison's privacy complaints and investigations in 2008 and 2009 generated discriminatory animus from her employer, eventually prompting her discharge in April 2013. Second, Bollinger also appears to argue that her retaliation complaint to OCR in February 2009 constituted protected activity that generated discriminatory animus from her employer, eventually prompting her discharge in April 2013. Third, Bollinger also appears to argue that the grievances she filed regarding disciplinary actions against her during the same time period constituted protected activity that generated discriminatory animus from her employer, eventually prompting her discharge in April 2013. Finally, Bollinger alleged that Billings Clinic retaliated against her for engaging in protected activity by requesting accommodation and then by filing and going forward with her disability discrimination and retaliation charges filed with HRB on October 31, 2012 (HR No. 0131015789), as amended on March 19, 2013, by discharging her in April 2013.

First, Bollinger's participation in Kinison's privacy investigations did not constitute protected activity as defined under MHRA. Kinison's HIPPA privacy rights were not protected by MHRA. The Clinic's investigation into the alleged breach of Kinison's patient privacy was likewise not a proceeding under MHRA. The

OCR's investigation into the alleged breach of Kinison's patient privacy was not a proceeding under MHRA, nor did it involve rights protected under that Act. "Protected activity" is the exercise of rights under MHRA, such as filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of that Act. Admin. R. Mont. 24.9.603(1)(a) through (c). The privacy breaches asserted by Kinison were certainly serious matters, but they were not discriminatory acts under Montana's anti-discrimination laws.

Bollinger's complaint with OCR that the Clinic had retaliated against her for participation in Kinison's privacy breach complaint and in investigation of that complaint was likewise not a proceeding that arose under MHRA, nor did it involve violations of rights protected under MHRA. Bollinger's grievances under the CBA over the Clinic's discipline of her during that same time period were not proceedings that arose under or involved rights protected under the MHRA. All these claims were not even cognizable by HRB for this reason. Mont. Code Ann. §49-2-512(1). Collective bargaining disputes are cognizable in other tribunals. Bollinger failed to establish the first element of a prima facie retaliation claim with respect to any retaliatory animosity the Clinic allegedly had toward her because of any events prior to her first complaint filing. In addition, the retaliation claims she had already raised in HR No. 0131015789, as amended, regarding conduct before taking of the surgery schedule cannot be the basis of recovery herein and are not cognizable here, because those claims were found lacking in merit, and Bollinger did not pursue HRC review and did not file a civil action asserting those same claims. Thus, at the end of the day, the only real issue here is whether her discharge was retaliatory, based upon the evidence adduced in this hearing regarding the bases for her discharge that arose after she requested accommodation, the earliest protected activity cognizable under the MHRA.

Bollinger's cognizable retaliation claims in HRB No. 0131016262, filed on May 15, 2013, involved her discharge. She alleged that her discharge resulted from her protected class status, being an escalation of the prior retaliation alleged therein. Bollinger can only recover in this case if she proves that the Clinic fired her because of her prior accommodation request or her filing and participation in proceedings regarding her first MHRA complaint. The Clinic admitted that Bollinger established the first and second elements of her prima facie case with regard to this present claim. She began to engage in protected activity covered by the MHRA when she requested the accommodation in October 2011. She filed her initial disability discrimination charge on October 31, 2012, and it was still pending when the Clinic took adverse action by discharging her on April 26, 2013.

"Significant adverse action taken by respondent or the agent of respondent against a charging party or complainant while the proceedings were pending or within six months following the final resolution of the proceedings will create a disputable

presumption that the adverse action was in retaliation for protected activity.” Admin. R. Mont. 24.9.603(3). The Clinic argued that “approximately six months” after the filing of the complaint until taking of an alleged adverse action was too long a time to establish the causal connection based on timing alone, based upon both Admin. R. Mont. 24.9.610(2)(b)(3) and some federal cases. The express language of Admin. R. Mont. 24.9.603(3) establishes that the disputable presumption does arise if the adverse action is taken while the proceedings were pending or within six months thereafter, regardless of the federal cases.

Thus, Bollinger established each element of a prima facie case of retaliation with regard to her discharge. *Rolison v. Bozeman Deaconess Health Serv., Inc.*, ¶16, 2005 MT 95, 326 Mont. 491, 111 P.3d 202; *Beaver v. DNRC*, ¶71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. See, *Mahan v. Farmers Union Central Exch., Inc.* (1989), 235 Mont. 410, 422, 768 P.2d 850, 858. Bollinger’s evidence shifted the burden to the Clinic to establish legitimate and non-retaliatory reasons for discharging Bollinger. *Rolison*, supra; see also, Admin. R. Mont. 24.9.610(3). The Clinic did so, shifting the burden back to Bollinger to demonstrate that those reasons were a pretext for retaliation. *Id.*

The Clinic asserted that it discharged Bollinger for two reasons: 1) removal of the Surgery Schedule without authorization in violation of the Clinic’s policies and practices; and 2) not being truthful during the Clinic’s internal investigation into Bollinger’s removal of the Surgery Schedule. The Clinic demonstrated that its surgery schedules contain confidential patient information and confidential business information. The Clinic also proved that employees were prohibited from removing the surgery schedules from the Clinic’s premises. The Clinic also demonstrated that it takes its obligation to protect confidential patient information seriously and that it expects all of its employees to be truthful and forthcoming during internal investigations involving potential privacy violations. The Clinic did articulate legitimate, non-retaliatory reasons for Bollinger’s termination.

To establish pretext, Bollinger must demonstrate that in fact a retaliatory reason motivated the Clinic to discharge her, or that the Clinic’s reasons for discharging her were unworthy of credence. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063, 1064-65 (9th Cir. 2002).

On the first basis for establishing pretext, Bollinger has not demonstrated any causal connection between her filing of Charge No. 031015789 and her discharge except for the nearness in time. Aside from that disputable presumption, she has not shown that a retaliatory reason involving her actions in asking for an accommodation, in filing the first discrimination and retaliation complaint that the Clinic ceased providing it later or her participation in investigation of that complaint, motivated

the Clinic to discharge her. There is virtually no persuasive and credible evidence of retaliatory animus on any of those bases during that entire time period.

The discipline imposed for crying on duty and sending an email all in caps to management was dubious at best. Standing alone or even in conjunction with the proximity in time between the first complaint and the alleged retaliatory discharge, that discipline remained insufficient to rebut the legitimate, non-retaliatory reasons for discharging Bollinger based upon Bollinger's privacy breaches. Therefore, Bollinger did not establish pretext on the first basis.

On the second basis for establishing pretext, Bollinger has not demonstrated that the Clinic's reasons for discharging her were unworthy of credence. The evidence of record established that the Clinic conducted a careful and thorough investigation into Bollinger's conduct. During this investigation, Bollinger falsely denied the conduct that led to her discharge, only admitting it on the day of her discharge, after her initial dishonest denials of the worst of that conduct. It is clearly true that Bollinger's conduct in taking the surgery schedule and then taking it out of the Clinic and disclosing it outside of the Clinic violated the Clinic's Code, Shredding Policy and Confidentiality Commitment. At hearing, Bollinger admitted that she engaged in the conduct that triggered her discharge and admitted that the reasons for her discharge were true. Bollinger did not establish that the Clinic's reasons for her discharge were unworthy of credence. *Niswander v. Cinc. Ins. Co.*, 529 F.3d 714, 726-28 (6th Cir. 2008) (employee who was discharged for secretly removing confidential documents and providing them to her lawyers in an ongoing discrimination case in which she was a member of the class of plaintiffs, had no retaliation claim on her discharge, because her misconduct was a legitimate, non-retaliatory reason for her discharge).

Relevance of the Clinic's Treatment of Bollinger in the Kinison Investigation

With regard to the Char Kinison matter, the Hearing Officer included findings about what was said during that time and a few findings about what happened. The Kinison matter was only ever potentially relevant in relation to Bollinger's argument that the retaliatory animus that she claims began with her role in the Kinison matter was the cause of her discharge. However, the evidence established that any animus toward Bollinger regarding her conduct in the Kinison matter could not be "retaliatory" under the MHRA since it was not protected conduct. Thus, the only retaliatory animus that could exist under the MHRA could only arise after Bollinger requested accommodation in October 2011. That renders all of the adverse actions alleged taken against Bollinger before October 2011 irrelevant.

MHRA Retaliatory Animus Did Not Fuel the Clinic's Treatment of Bollinger During/After the Kinison Investigation and Before She Sought Accommodation

The Clinic's Kinison privacy breach investigation was ultimately inconclusive. The evidence regarding the interactions between Bollinger and the Clinic during the Kinison investigation failed to prove MHRA retaliatory animus toward Bollinger. The substantial and credible evidence shows that Clinic management was increasingly frustrated with Bollinger's apparent inability not to discuss the Kinison privacy breach investigation and/or Kinison's situation (related to the investigation of her assertions). But even if there was any animus toward Bollinger because of her involvement in the Kinison investigation, that investigation was not a proceeding under the MHRA, and therefore any alleged retaliatory animus toward Bollinger was not within the scope of MHRA's strictures.

Bollinger also requested findings about a verbal reprimand given for reasons other than discussing the Kinison investigation, but allegedly given in retaliation for Bollinger's participation in the Kinison investigation.

56. In addition to her complaint with the Office for Civil Rights, Ms. Bollinger filed a grievance through the Montana Nurses' Association for a hostile work environment in February of 2009 relating to her treatment in the Char Kinison investigation. (Hrg. Transcr. 26:10-27:22.)

57. Billings Clinic responded with a verbal reprimand on the day of the grievance meeting, March 6, 2009. (Hrg. Transcr. 30:25-31:5.)

58. The verbal reprimand was for taking sick leave for bronchitis, when she had two doctors' notes for the beginning and the end of the time she was out of work; and she attempted to come back to work in the interim and was sent home by the doctor on duty in the operating room. (Hrg. Transcr. 31:5-31:21.)

"Charging Party's Proposed Final Agency Decision," p. 6.

The testimony cited in support of these proposed findings was virtually all from Bollinger. There was limited testimony about co-workers witnessing Bollinger being treated differently and more unfairly than other employees, but virtually all of the other employees' testimony was based upon second and third hand information.

It is unclear on this record whether the discipline imposed on Bollinger in February 2009 for attendance issues was one of the disciplinary actions subsequently found to be an Unfair Labor Practice. Whether it was or not, any Bollinger claim in 2009 of retaliation in any way by the Clinic because of Bollinger's participation in the Kinison privacy breach investigation could not have been a retaliation claim based upon retaliation as defined in the MHRA. Bollinger had filed a CBA or labor law complaint about her absenteeism discipline. The discipline did not involve

retaliation for engaging in activity protected under the MHRA. Even if animosity over Bollinger's role in the Kinison investigations prompted this discipline, Kinison's privacy breach claims were not based on the MHRA, and thus Bollinger's participation in the investigation of those claims was not protected action for the enforcement purposes under the MHRA. Cf., Mont. Code Ann. § 49-2-301 (emphasis added):

It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because the individual has opposed any practices forbidden under this chapter or because the individual has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

Hines' Inaccurate Dating of Her Individual Meeting with Bollinger Lessened the Weight of that Testimony

Understandably, witnesses sometimes had difficulty pinning down dates upon which various events occurred. Jackie Hines testified rather specifically that she reported something to Lu Byrd regarding Bollinger that led fairly directly to Bollinger being placed on administrative leave before she received her written warning. In the findings, based upon both the most credible and consistent testimony and the dates established in Ex. 201, the Hearing Officer found that Bollinger was placed on administrative leave on February 6, 2009, and disciplined on February 13, 2009. Finding 35, *supra*, p. 13. Hines' detailed account of events leading up to that discipline still has some credibility, but she got the chronology very wrong. See "Appendix B" (beginning p. 55) for the testimony at issue.

The questions and answers pinned down the time frame within which Hines believed the events had occurred (March or April 2009). But the discipline for continuing to talk about the investigation and Kinison's situation happened in February 2009 (refer to Ex. 201, dated February 13, 2009). Necessarily, Bollinger's lack of understanding, before her discipline in February 2009, of the directions not to talk about the investigation and Kinison's situation, could not have occurred or recurred in March or April 2009, but instead had to have occurred earlier in February 2009. Hines' testimony (Appendix B) indicated that Bollinger, for some reason, failed to grasp that her employer was clearly and adamantly telling her to stop talking about the investigation and about Kinison's situation. But Hines' dating of the one-on-one meeting she had with Bollinger and the subsequent meeting Bollinger had with Byrd was entirely inconsistent with the documentary evidence of when any such additional meetings had to have happened. As a result, Hines' testimony did not

have sufficient probative value so that another instance of Bollinger being warned against such conduct should have been counted against her in the findings.

Bollinger's Faulty Reasoning Regarding then director of Human Resources
Mary Ellen James' Refusal to Discuss the Surgery Schedule

Counsel for Bollinger argued that Mary Ellen James refused to look at or discuss the surgery schedule when asked, even though Bollinger would not have been terminated for taking the surgery schedule to Human Resources, thus demonstrating her retaliatory animus toward Bollinger. This is a misunderstanding of the reason why Bollinger's proffer of the schedule to James did not arise to a violation that might require discharge. If James had actually read the schedule and discussed it with Bollinger, Bollinger would have been at risk of more severe discipline, perhaps including discharge, as Byrd succinctly testified. Far from unreasonably refusing to talk to Bollinger, James protected both Bollinger and herself when she refused to read or to talk about the schedule at all.

Q And is it your testimony that that's a violation of Billings Clinic's policies?

A Yes. As I believe Mary Ellen James testified, she gave it back to Roni.

Q Is that alone a fireable offense?

A Since it was handed to Ms. James, and she immediately recognized and did not look at any information, she gave it back to Roni, said she couldn't take it because it had patient information, and then she warned Roni – she really warned Roni then that she couldn't have something with patient information on it.

HEARING OFFICER: I'm not sure whether the answer to his question was yes or no.

Could you read the question back, please, Barb? (Whereupon the requested material was read by the reporter.)

HEARING OFFICER: Go ahead.

THE WITNESS: No.

Hrg. Transcr., Vol. IV, p. 1225, ln. 15 – p. 1226, ln. 5 [emphasis added].

Comparator Evidence

The Clinic initially provided a short list of what it considered to be the “relevant” disciplinary actions taken against other employees under similar circumstances, largely consisting of a few employees discharged for privacy breaches. The Hearing Officer subsequently granted a motion by Bollinger to compel additional responses, which resulted in a larger list of disciplinary actions that the Clinic had

withheld as irrelevant but that Bollinger persuaded the Hearing Officer should be disclosed and available as evidence that Bollinger might argue was appropriate to compare to what disciplinary action was taken against her. There were a number of arguments about the relevance of those additional disciplinary actions, all of which have been useful to the Hearing Officer in weighing whether the Clinic had legitimate business reasons for discharging Bollinger. Having required the additional disclosures, the Hearing Officer is satisfied that access to that additional information was useful for Bollinger in presenting her case, even though she ultimately did not prevail.

Near the end of examination of Gerele Pelton, counsel for Bollinger moved to strike all evidence about comparison discipline of other employees whose discharges resulted at least in part from dishonesty in the investigation, but whose dishonesty was not identified a cause for discharge in response to Interrogatory No. 8. Trans., Vol. III, p. 745, lns. 20-24. The Hearing Officer deferred ruling on that motion.

HEARING OFFICER: And I'll take that motion under advisement, and you can address it in your briefs post-hearing so that I can rule upon it with a decision. Because I don't think it's going to make any difference if I strike it or not strike it, because if I strike it, it's out, and if I don't strike it, it's in, but it's not going to change the rest of your presentation.

So I'd like the opportunity to read what you have to say about it when you have the opportunity to brief it. So that's a motion to strike the testimony about dishonesty for employees 110, 112, 122 and 127.

Trans., Vol. III, p. 745, ln. 25 – p. 746, ln. 12.

A motion to strike witness testimony may be well-taken, in the discretion of the tribunal, when part of the substance of that testimony was properly requested in discovery but not disclosed in the discovery responses. However, in light of the orders compelling additional disclosures, the Hearing Officer needed a more specific sequence of the timing of the request for the information about dishonesty vis-a-vis the timing of the orders to compel and the additional responses thereto. Bollinger did not clearly establish such timing. With all of the work counsel had to do at the last minute in this case, the Hearing Officer believed and believes that nothing of value would have been gained by granting the motion or else postponing the rest of the hearing to allow for more discovery and then bring back many of the same Clinic witnesses for further cross-examination about the precise nature of the dishonesty involved in the comparator witnesses how it was or why it wasn't documented. The original scheduling order noted the requirement for the necessary predicate for

advancing discovery abuse motions at hearing.¹² The Hearing Officer remained dissatisfied about the predicate provided, and after postponing deciding the motion now denies it, after considering the arguments and authorities provided.

Bollinger's arguments that some employees who were dishonest were not fired was certainly not the case with regard to employees whose privacy breaches were comparable to Bollinger's. Employees who (1) accessed and removed PHI from the facility, (2) disclosed the PHI outside of the Clinic's premises, (3) for reasons other than to facilitate delivery of additional care thereafter to the patient, and (4) who were dishonest about doing it, were uniformly terminated. Bollinger was one of them.

Safety Concern

Bollinger's counsel ably argued that she removed the surgery schedule because of patient safety concerns, but Bollinger's conduct impeached her testimony about these concerns. On January 18, 2013, she could have immediately raised any real patient safety concerns she had about her co-worker's competence and/or her need to have someone scheduled to allow her a break during the shift. She did not need a copy of the surgery schedule to raise that concern when she first saw the schedule. It was not at all credible that lack of assigned relief for break for a nurse working a surgery schedule was actually a real patient safety concern for Bollinger at the time. If it had been, she should have and she would have insisted upon discussing the issue with her scheduling supervisor at once or immediately called to warn a higher up of the safety concern. Being a qualified, capable and experienced R.N., she would not have gone ahead with that shift without notifying the Clinic of the absence of assigned relief for a break, if such a situation actually put her surgery patients that day at unacceptable risk.

Bollinger offered no credible corroborating testimony for her statement that absence of assigned relief for an R.N. to take a break during a surgery shift was a

¹² The original "Order Setting Contested Case Hearing Date and Prehearing Schedule and Allowing Withdrawal of Former Counsel Eiselein," dated May 6, 2014, contained the following provisions, in the "Prehearing Schedule" section, at the following pages and in the noted subsections:

The "motions" section of this order governs discovery disputes not timely presented before hearing.

Id., p. 3, "Prehearing Schedule, Discovery and Rule 26 Expert Statements."

. . . . The department may grant motions at hearing which require resort to matter outside the record (such as motions to exclude documents or to strike testimony based upon alleged discovery abuses), if the movant is ready at the time of the motion to produce the necessary predicate for advancing the motion, such as the discovery requests and responses that prove the abuse.

Id., p. 4, "Motions: By close of business on October 13, 2014, the parties must file and serve their prehearing motions, with briefs and supporting documents."

genuine patient safety issue. Her failure to raise the issue immediately cast too much doubt upon her testimony at hearing. Had she been a whistle blower, she would have blown her whistle at the beginning of her January 18, 2013 shift.

V. Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. §49-2-512(1) MCA.

2. Ronis Bollinger established a prima facie case of retaliation by Billings Clinic in discharging her from her employment for her filing of and participation in her Montana Human Rights Act complaint of disability discrimination and retaliation. *Rolison v. Bozeman Deaconess Health Services, Inc.*, ¶17, 2005 MT 95, 326 Mont. 491, 111 P.3d 202; *Beaver v. DNRC*, ¶71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857; *Mahan v. Farmers Union Central Exch., Inc.* (1989), 235 Mont. 410, 422, 768 P.2d 850, 858; see also Admin. R. Mont. 24.9.603(2).

3. Bollinger's evidence shifted the burden to the Clinic to establish a legitimate and non-retaliatory reason for discharging Bollinger. The Clinic did so, proving that Bollinger removed a surgery schedule from the Clinic's premises without authorization in violation of the Clinic's policies and practices and was initially dishonest during the Clinic's internal investigation into Bollinger's removal of the schedule. *Rolison*, supra; see also, Admin. R. Mont. 24.9.610(3).

4. The Clinic's proof of a legitimate and non-retaliatory reason for discharging Bollinger shifted the burden back to Bollinger to demonstrate that reason was a pretext for retaliation. *Rolison*, supra; see also, Admin. R. Mont. 24.9.610(4). To meet this burden, Bollinger had to demonstrate that a retaliatory reason motivated the Clinic to discharge her, or that the Clinic's reasons for discharging her were unworthy of credence (i.e., that the Clinic did not believe its own reasons for Bollinger's discharge). *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063, 1064-65 (9th Cir. 2002).

5. Bollinger did not establish pretext. While there was some limited evidence of the Clinic's possible animosity toward Bollinger, the apparent source of that possible animosity was not due to actions by Bollinger protected under the MHRA. In addition, the Clinic's evidence that Bollinger violated the Clinic's policies and practices regarding patient privacy was substantial and credible. The evidence that Bollinger was dishonest about removing the surgery schedule during her initial interview was likewise substantial and credible. Bollinger testified that she was dishonest because she was afraid of being discharged, which was an explanation for her dishonesty, not a denial. The evidence indicates that Bollinger also asserted, in her discharge interview, that she did not understand Pelton's questions, which is still not a denial, and which was not credible as an explanation. She did not prove that

the Clinic's reasons for discharging her were unworthy of credence – the reasons, in fact and in law, were true reasons. Bollinger violated the Clinic's policies and practices and was dishonest in her initial interview about the removal of the schedule.

6. The burden of producing evidence is initially upon the party who would lose if neither side produced any evidence; thereafter, the burden of producing evidence during the trial is upon the party against whom a finding would issue if no further evidence was produced. Mont. Code Ann. §26-1-401. Unless there is specific law to the contrary (which there is not in Human Rights administrative hearings), the burden of persuasion always remains on the party advancing the claim for relief or the defense at issue. E.g., Mont. Code Ann. §26-1-401; *Taliaferro v. State* (1988), 235 Mont. 23, 26, 764 P.2d 860, 864 (“... the ultimate burden of persuading the trier of fact is on the plaintiff at all times.”); *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 818 (“Ultimately, the plaintiff must persuade the court by a preponderance of the evidence that the employer intentionally discriminated against her.”); *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 140, 734 P.2d 209, 213 (“Under the third stage, if the plaintiff's prima facie case is rebutted, he then has an opportunity to prove, by a preponderance of the evidence, that the legitimate reasons offered by the employer are only a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 805, 93 S.Ct. at 1826, 36 L.Ed.2d at 679. “This burden now merges with the ultimate burden of persuading the court that [plaintiff] has been the victim of intentional discrimination.” Quoting and applying *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207, 217 (1981)). Bollinger did not carry this burden.

7. Counsel for Bollinger ably argued that Bollinger engaged in protected activity by taking the surgery schedule to Human Resources and by taking the surgery schedule to her attorney. Her counsel argued that her discharge was in retaliation for that protected activity. The enormous problem with this argument is that violating privacy policies and putting patient information at risk of disclosure without patient knowledge or consent was not protected activity. The alleged importance of the schedule itself to show retaliatory treatment of Bollinger is largely hypothetical. The surgery schedule clearly revealed Protected Health Information, even including some patient names (on some copies, visible through the redactions). The arguments that this was a “smoking surgery schedule,” as it were, proving retaliation, were implausible and the substantial evidence of record established that, more likely than not, Bollinger was discharged for her breaches of patient privacy and not out of retaliatory animus. The violation of patient privacy policies was patent. Bollinger had been trained on the patient privacy policies. Her insensitivity to the enormity of taking a surgical schedule out of the Clinic is all too reminiscent of her inability to grasp that she was not supposed to talk about Kinison and the privacy breach investigation. Allegations that she was engaging in protected activity do not

absolve her of her privacy policy violations. This is not a case in which retaliatory animus played any role in the decision to discharge her.

VI. Order

I. Judgment is found in favor of the Billings Clinic and against Ronis Bollinger on the charge that the Clinic retaliated against her for engaging in protected activity regarding her disability discrimination charge filed with HRB on October 31, 2012, (HR No. 0131015789), as amended, by discharging her on April 26, 2013, in violation of the Montana Human Rights Act.

Dated: December 29, 2015.

TERRY SPEAR

Terry Spear, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

* * * * *

APPENDIX A – Hines Examination re Bollinger Losing Focus at Work

Q Let me stop you right there. How many times are you aware of as her supervisor that she lost focus with a patient?

A Six to eight times. [Emphasis added.]

Q When were those times?

A There was -- can you clarify that question? Do you want me to go over a list?

Q Yeah, I want you to go over the six to eight times.

Trans., Vol. IV, p. 895, lns. 8-16.

First Incident of Alleged Loss of Focus at Work

A All right. So there was a time where she was frustrated because she couldn't go home early.

Q When was that?

A I can't remember the exact date.

Q Was it in the last couple of years?

A Yes.

Q So 2012?

A I can't remember the exact date.

Q 2011?

A (No response by the witness.)

Q Just do the best you can.

A Okay. So I would say it would have been still when Darlene was here.

Q When was that?

A So she left in -- I'm going to say fall of 2012 was one issue, so I'm going to say fall of 2011 was when Darlene left. And she brought up issues regarding her wanting to go home early to go to the vet, to go to the bank, this, that, and everything else. And she had talked to Roni about --

Q Who wanted to go home early?

A Roni. So Darlene had brought issues to me about Roni wanting to go home early to look after personal issues, whether it was the bank, or the SPCA, or what have you. And Roni being a 12-hour person, Darlene needed her to stay.

Q What did you do about that?

A Darlene talked with Roni, and so as her initial supervisor, she had those conversations.

Trans., Vol. IV, p. 895, ln. 17 – p. 896, ln. 20.

This first alleged loss of focus was based entirely on the hearsay testimony of Hines about what she heard former supervisor Darlene Dibble say, apparently in 2011, although that time period was only generally established, had happened in an operating room in which Bollinger was working. Dibble did not testify at hearing.

Second Incident of Alleged Loss of Focus at Work

Q So that's one incident. You said six to eight. What are some of the others?

A There was another issue that was brought to me by one of the clinical coordinators where she overheard Roni say to a patient, "Well, don't be mad at me. It's not my fault we're late. You should be mad at Dr. Byorth." Because the patient was upset that they were late.

Q Which clinical coordinator was that?

A Renae Georgius.

Q And when was that?

A 2012-ish.

Q And what was the issue exactly?

A comment made to a patient.

Q Roni made a comment to a patient?

A Yes.

Q And what was the comment? "Don't be mad at me"?

A "Be mad at Dr. Byorth. He's the reason why we're late."

Q And Ms. Georgius reported this to you?
A Yes.
Q And what did you do?
A She spoke with Roni –
Q No, I asked, what did you do?
A I took the information.
Q That's all you did?
A It had already been followed up on, so she was passing the information to me, reporting it to me.
Q And what information did she report to you?
A The conversation that Roni had with the patient, and that she had followed up with her on that.

Trans., Vol. IV, p. 896, ln. 21 – p. 898, ln. 5.

This second alleged loss of focus was based entirely on the hearsay testimony of Hines. In this instance, Hines was testifying about what she had heard former supervisor Renae Georgius say, apparently in 2012, although that time period was only broadly established (“2012-ish”) had happened in an operating room in which Bollinger was working. Georgius did not testify at hearing.

Third Incident of Alleged Loss of Focus at Work

Q What's the third issue?
A This would be out of order, but another issue would be what I described around the surgeon and the communication that the anesthesiologist brought to me.

Trans., Vol. IV, p. 898, lns. 6-10.

This third issue had been described in more detail by Hines during her direct examination by the Clinic’s attorney.

Q Can you give us another example of the kinds of things that you learned about Ms. Bollinger's performance issues in early 2013?

A There was a situation involving one of the surgeons. And she shared information with him about a situation immediately prior to going into the OR to operate that had already been handled. He got all worked up.

And so, again, anesthesia – the anesthesiologist came to me and said, you know, this was unnecessary; it was distracting at the beginning of the case; and it had already been handled.

Trans., Vol. IV, p. 868, lns. 11-22.

Once again, this third alleged loss of focus was based entirely on hearsay testimony of Hines. In this instance, Hines was testifying about what she had heard an unidentified anesthesiologist say about events in an operating room in which Bollinger was working in early 2013. The unidentified anesthesiologist did not testify at hearing.

Fourth Incident of Alleged Loss of Focus at Work

Q What specifically were some of the issues that you were having in those categories?

A I had anesthesia report to me that during emergents, when the patient is waking up at the end of the case, she would go off on tangents and discuss world tragedies instead of paying attention to the patient. And there was a situation where the patient was struggling to wake up, and that the anesthesiologist actually had to, you know, say, "You need to get over here and pay attention to this."

Trans., Vol. IV, p. 867, ln. 19 – p. 868, ln. 3.

Q Okay. So number four?

A Anesthesia reporting that she was talking about – not paying attention when the patient was emerging from anesthesia, talking about world tragedies.

Q Who was the anesthesiologist?

A Dr. Roos.

Q And when was that?

A That would have been early 2013.

Q And be more specific about what the complaint – who made the complaint? Dr. Roos?

A Yes.

Q And Dr. Roos's complaint was that Roni was talking about world tragedies?

A Yes.

Q During the course of the surgery?

A At the end. The concern specifically was the patient was waking up, which is – which can be – which is one of the high-risk times. And instead of paying attention to the patient, she was talking about these world tragedies, and Dr. Roos had to tell her, "Could you please pay attention here; we're having issues."

Q Who was the surgeon?

A I don't remember.

Q Did the surgeon make a complaint?

A The surgeon's usually not in the room when the patient –

Q That's not my question. Did the surgeon make a complaint?

A Sorry. No.

Q Did anyone else other than Dr. Roos make a complaint?

A No.

Q What did you do about this incident that was reported to you by Dr. Roos?

A We investigated it.

Q Who's "we"?

A I did. I investigated it.

Q What was your investigation?

A We met with Roni and talked with –

Q Who's "we?"

A So it was Mary Ellen, and it was Danni Deyle; talked with Roni about these issues.

Q And was that when she was written up?

A Yes.

Q And that was in February of 2013?

A Yes.

Trans., Vol. IV, p. 899, ln. 20 – p. 901, ln. 17.

This fourth alleged loss of focus led to a meeting and imposition of discipline. It also occurred (as did most of the rest of the examples) after Bollinger began to feel that management was hostile toward her, and as a result may not have been performing as well. In any event, none of these examples of loss of focus were involved in the Clinic's decision to discharge Bollinger.

* * * * *

APPENDIX B: Hines' Impossible Dating of Meeting with Bollinger

Q Now, do you recall having a meeting with Ms. Bollinger yourself about the Char Kinison issue and the investigation?

A Yes.

Q Do you remember approximately when that meeting was?

A I don't, Ed. I'm sorry.

Q Do you remember in relation to when the investigation began approximately when that meeting occurred?

A I would say probably March or April of the next year, so 2009.

Q Where did the meeting take place?

A In my office.

Q What was the reason -- did you call the meeting?

A Yes.

Q What was the reason you did that?

A I came to work that morning, and I had an employee approach me, saying that Ms. Bollinger and another employee were talking about the Char Kinison investigation. And she was part of the interview, the group that had been interviewed, and knew that we weren't to be discussing it. And so I asked Roni to come to my office, and we had a meeting.

Q Was anyone else in the room at the time?

A Just Roni and I.

Q And what was the discussion during the meeting?

A I just -- I asked Roni if this was true. She said yes. And I just -- I reminded her that we were trying to preserve the integrity of the investigation, and to please not discuss it.

Q What was her response to that?

A "Okay."

Q Was that the end of that meeting?

A Yes.

.....

Q Now, on the day that you had this meeting with Ms. Bollinger, just the two of you, was that the end of that issue for that day?

A It was not.

Q What happened next?

A I had a retreat that I was a part of, so I went off to that retreat. It was a half day. When I came back, there was a note on my desk. And at that point --

Q What did the note say?

A That she didn't realize -- it was something -- I can't remember the exact words, but basically, she didn't know she wasn't supposed to say something or wasn't supposed to be talking about it.

Q Who was the note from?

A Roni.

Q So where was the note in relation -- when you walked in, what happened?

A It was on my desk. It was right on my phone.

Q And you could tell from the note who it was from?

A Yeah, she signed it.

Q And can you just give your best description of what the note said?

A "I didn't know it was wrong." Basically, that was it. It was on a card that we – that came off our sterile gowns, and so it's a very limited space.

Q What did you do after you received that note?

A I talked to Lu Byrd about the breach and the discussion, and then she requested that we meet.

Q Now, we've talked a lot about the word "breach." When you say "breach," what do you mean?

A I mean the violation of the request to not discuss this in the work environment.

Q How did you communicate with Ms. Byrd?

A Phone; telephone.

Q And just so we have the context, are you aware that Ms. Bollinger ultimately was disciplined by Ms. Byrd for speaking out about the Char Kinison issue?

A Yes.

Q When you had this meeting with Ms. Bollinger in your office and then received the note the same day, was that day before the discipline, or after?

A Before.

Q What was Ms. Byrd's response when you told her about what Ms. Bollinger had done?

A She requested a meeting with Ms. Bollinger, myself, Lu, and Carey Jo.

Q Who's Carey Jo?

A Carey Jo was the manager of Human Resources.

Q When you had these meetings with Ms. Bollinger, was there always a Human Resources representative present?

A Yes.

Q Do you know why that is?

A It's – I would assume it's a part of the investigation, a standard protocol.

Q When did that meeting occur with Ms. Byrd after you received the note?

A Later that afternoon.

Q Where did the meeting occur?

A In Lu Byrd's office.

Q Where is Lu Byrd's office?

A It's in the Clinic basement by Human Resources.

Q What other offices are in the basement of the Clinic?

A There are – well, there is the administration offices, the Human Resources offices, and then there's a bank of conference space, and then there's some medical staff offices down there as well, and legal.

Q Now, what happened – I just want to go through the specifics of this one meeting. What happened during the meeting with Ms. Byrd and Ms. Bollinger and you and Carey Jo on that day?

A It was a relatively quick meeting. Lu reviewed with Ms. Bollinger the issue at hand around trying to keep the integrity of the investigation, and also some other distractions in the environment related to this; asked her if she understood; yes. And that was pretty much it. It was a very quick meeting.

Q So after Ms. Byrd explained the issue to Ms. Bollinger again, Ms. Bollinger's response was –

A She understood.

Q After that meeting concluded, did you receive any information that Ms. Bollinger once again was speaking about the Char Kinison matter?

A I did.

Q Approximately when after that meeting did you receive that information?

A It was a relatively short time frame. I would say less than a week.

MR. MCGRADY: I'm going to object to the – we don't know the time frame yet. They're just talking in general terms.

HEARING OFFICER: Overruled.

BY MR. BUTLER:

Q Can you pinpoint when that particular – when you received that information, approximately?

A The conversation took place on a weekend, and I received the information the following Monday.

Q And when you say the conversation occurred on the weekend, what conversation are you referring to?

A A nurse – one of the nurses called in, and she said she was on call. Roni was working on the Saturday shift. She was asking what was going on, and Ms. Bollinger referenced the investigation and the Char Kinison case and her treatment.

The nurse got off the phone with her and then came in Monday and said, “I need to report this.”

Q Who was that nurse?

A Do I use the key?

Q Yeah. If she's on there, yes.

A Employee 103.

Q So just so I have it clear, the conversation that Ms. Bollinger engaged in, did that happen over the weekend?

A My understanding was yes.

Q And then it was reported to you on Monday?

A Uh-huh.

MR. MCGRADY: I'm going to object again. Vague as to the time frame. We're still just talking about some Monday in some month and year.

HEARING OFFICER: Well, counsel, I think it's been pinned down to within a week after the meeting with Lu Byrd that was described by the witness.

And that was the same day, as I understand the testimony, as the meeting that you had with Ms. Bollinger earlier in the day; is that correct?

THE WITNESS: I'm sorry, can you say that question again?

HEARING OFFICER: Sure. If I'm understanding your testimony, the meeting that Lu Byrd had with you and Ms. Bollinger when she went over again the preserving the integrity of the investigation was the same day that you had met earlier in the day with Ms. Bollinger to have a similar conversation.

THE WITNESS: Yes.

HEARING OFFICER: And you indicated that was in March or April of the year after, which would be 2009?

THE WITNESS: Yes.

HEARING OFFICER: I think that's sufficiently pinned down. Overruled.

BY MR. BUTLER:

Q What did you do after you received the notice from Employee 103 that Ms. Bollinger was continuing to discuss the Char Kinison case?

A Reported it to Lu Byrd.

Q How did you do that?

A I paged her and talked to her on the phone.

Q Please describe the conversation with Ms. Byrd.

A I don't remember the specifics. I just recounted what had gone on, what I'd been told.

Q What did Ms. Byrd say in response?

A She said, "Okay." She didn't discuss anything further with me. She said, "Okay."

Q What was the next thing that happened with regard to that issue about Ms. Bollinger speaking again about the Char Kinison matter that you were involved in?

A I was involved in taking her off the surgery schedule, because she was being put on administrative leave.

Q And did you do anything before she was taken off the surgery schedule and put on administrative leave with regard to Ms. Bollinger?

A No.

Trans., Vol. IV, p. 822, ln. 2 – p. 827, ln. 13, and p. 828, ln. 6 – p. 835, ln. 12.

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The Notice of Issuance of Administrative Decision is on p. 61.

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Veronica A. Procter, Procter Law, PLLC, and Philip McGrady, McGrady Law Firm, LLC, attorneys for Ronis Bollinger, and Edward J. Butler, Crist, Krogh, Butler & Nord, LLC, attorney for the Billings Clinic:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.

Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505 (4), WITH 6 COPIES, with:

Human Rights Commission c/o Marieke Beck
Human Rights Bureau, Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE AN ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions do NOT apply. The statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), precludes extending appeal time for post decision motions seeking relief from the OAH.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The original transcript is not in the contested case file, but has already been prepared.