U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

DR. ANNETTE SMITH,

COMPLAINANT,

v.

FRANCISCAN PHYSICIAN NETWORK,

RESPONDENT.

ARB CASE NO. 2022-0065

ALJ CASE NO. 2020-ACA-00004
ALJ JASON A. GOLDEN

DATE: June 29, 2023

Appearances:

***For the Complainant*:**
Dr. Annette Smith; *pro se*; Indio, California

***For the Respondents*:**
Elizabeth M. Roberson, Esq., and Shelly M. Jackson, Esq.; *Krieg Devault LLP*; Carmel, Indiana

Before HARTHILL, Chief Administrative Appeals Judge, PUST and BURRELL, Administrative Appeals Judges

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the employee protection provisions of the Patient Protection and Affordable Care Act (ACA).[1] Dr. Annette Smith (Complainant or Smith) filed a complaint against Franciscan Physician Network (Respondent) alleging that it terminated her employment because she engaged in conduct protected under the ACA. On September 6, 2022, a Department of Labor (Department) Administrative Law Judge (ALJ) issued an Order Granting

[1] 29 U.S.C. § 218c, as implemented by 29 C.F.R. Part 1984 (2022).

Respondent's Motion for Summary Decision (Order Granting Summary Decision). Complainant appealed the matter to the Administrative Review Board (ARB or Board). After thoroughly examining the parties' arguments and the record, the Board affirms the ALJ's Order Granting Summary Decision.

BACKGROUND

Respondent provides coordinated, comprehensive healthcare across hospitals, physician practices, and other healthcare providers to enhance the healthcare experience of patients. Respondent hired Complainant for the position of Physician Express Care on October 2, 2017.[2]

Throughout Complainant's tenure with Respondent, she reported multiple alleged violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Respondent.[3] Specifically, Complainant reported that Respondent's employees who were not involved in the care of particular patients were reviewing those patients' medical charts and records.[4] Complainant reported these alleged violations to Respondent's medical director, Respondent's compliance hotline, and other individuals.[5]

On April 22, 2020, Complainant filed a complaint with the Department's Occupational Safety and Health Administration (OSHA) alleging that Respondent violated Title I of the ACA (Title I) by unlawfully terminating her employment in retaliation for her engaging in protected activity.[6] On May 13, 2020, OSHA dismissed the complaint for lack of reasonable cause to believe that a violation of Title I of the ACA occurred because it found that Complainant did not engage in protected activity under the ACA.[7] On June 3, 2020, Complainant timely filed an

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2 Order Granting Summary Decision at 2.

3 *Id*. at 2.

4 *Id*.; Declaration of Annette Smith (Smith Decl.) (attached as an exhibit to Complainant's Brief in Opposition to Respondent's Motion for Summary Decision) at ¶¶ 10-13.

5 Order Granting Summary Decision at 2; Smith Decl. ¶¶ 5, 7-9.

6 Objection to Findings and Request for Hearing, Exhibit (Ex.) 3, para. 1. An employee is protected under the ACA if she provides information or complains to her employer about, or refuses to participate in, conduct that she reasonably believes violates any provision of **Title I**. 29 U.S.C. §§ 218c(a)(2), (5); 29 C.F.R. §§ 1984.102(b)(2), (5) (emphasis added). *See also Perkins v. Cavicchio Greenhouses, Inc.*, ARB No. 2022-0018, ALJ No. 2019-ACA-00005, slip op. at 5 (ARB Sept. 30, 2022).

7 Objection to Findings and Request for Hearing, Ex. 4.

Objection to Findings and Request for Hearing with the Office of Administrative Law Judges (OALJ).[8]

Before the ALJ, Respondent filed a Motion for Summary Decision on the grounds that Complainant was unable to "establish a genuine issue of material fact sufficient on her claim to warrant a hearing in this matter."[9] Specifically, Respondent argued that it was undisputed that Complainant did not engage in protected activity under the ACA because: (1) Title I of the ACA does not regulate the healthcare activities of health care providers like Respondent; (2) Complainant's HIPAA violation reports are not protected under Title I of the ACA because they "are entirely unrelated to health insurance reform;" (3) Complainant's retaliation claim was based on her belief that she was terminated solely due to reporting HIPAA violations, not ACA Title I violations; and (4) the activity that Complainant alleged was protected was not a contributing factor in Respondent's decision to terminate her employment.[10]

Complainant filed a Brief in Opposition to Respondent's Motion for Summary Decision (Opposition to Summary Decision) in which Complainant asserted that she reasonably believed "Respondent violated HIPAA which provides data privacy and security provisions for safeguarding of medical information and was promulgated prior to the passage of the ACA."[11] Complainant also alleged that: (1) she engaged in protected activity on multiple occasions when she complained to Respondent that its employees violated HIPAA and accessed patient medical records without permission;[12] (2) Respondent's reasoning for terminating her employment was pretextual;[13] (3) Respondent citing to its anti-retaliation policy does not prove that Respondent followed it;[14] and (4) her claims against Respondent were factually distinct from *DeHaan v. Progress House, Inc.*, a case in which an ALJ concluded that the complainant did not engage in protected activity or had a reasonable belief that he engaged in protected activity.[15]

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8 Order Granting Summary Decision at 2.

9 Respondent's (Resp.) Motion for Summary Decision at 3.

10 *Id*. at 2, 10, 13-14.

11 Complainant's (Comp.) Opposition to Summary Decision at 5.

12 *Id*. at 6.

13 *Id*. at 6-7.

14 *Id*. at 7-8.

15 *Id*. at 8; *DeHaan v. Progress House, Inc.*, ALJ No. 2020-ACA-00003, slip op. at 1, 8-9 (ALJ Feb. 7, 2022). Complainant's original attorney, Kimberly Jeselskis, Esq., jointly filed Objections and Request for Hearing to OALJ in the *DeHaan* and *Smith* matters, arguing in both cases that the alleged HIPAA violations were ACA-protected activity.

On September 6, 2022, the ALJ issued an Order Granting Summary Decision dismissing Complainant's claim after concluding that Complainant had not: identified any provision of Title I that regulates a health care provider; explained how Complainant's alleged protected activities violated any of the health insurance reforms found in Title I; or provided sufficient evidence that Complainant believed that her complaints pertained to the ACA's reforms relating to health insurers or group plans.[16]

On September 21, 2022, Complainant petitioned the Board for review of the ALJ's Order. On October 5, 2022, Respondent filed a Motion to Dismiss Complainant's Untimely Appeal. On January 13, 2023, the Board issued an Order Denying Motion to Dismiss and Reestablishing Briefing Schedule. On February 10, 2023, Complainant timely filed an Opening Brief (Initial Opening Brief) and Exhibit Emails and Statement of Fact Forms (Exhibits).[17] The following day, Complainant filed an untimely Final Edited Opening Brief (Revised Opening Brief). In these submissions, Complainant lists numerous instances of Respondent's alleged HIPAA violations, including claims that she believed these incidents were HIPAA violations based on training she received from required Centers for Medicaid and Medicare Service (CMS) modules,[18] she engaged in other types of protected activity,[19] and she suffered from other adverse actions by Respondent.[20]

On March 7, 2023, as an alternative to filing a response to Complainant's filings, Respondent filed a Motion to Strike Complainant's Initial Opening Brief, Exhibits, and Revised Opening Brief (Motion to Strike), arguing that:

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[16] Order Granting Summary Decision at 6.

[17] Complainant's Exhibits include several emails; a letter summarizing the results of an internal investigation against Complainant's supervisor; several incident reports (Statements of Facts) to Respondent's human resources department; an investigation interview questionnaire; and a photograph depicting a hand injury.

[18] Comp. Revised Opening Brief (Comp. Br.) at 12-13. According to Complainant, Respondent mandated that all new employees had to complete "CMS modules." *Id.* at 13.

[19] These new claims of protected activity include the following: complaining to her supervisor that she suffered harassment and intimidation from staff; reporting workplace violence; intervening "to protect others from being harrassed [sic] by [Respondent's medical director];" intervening to protect and treat an employee; reporting Medicaid fraud; reporting patient health and safety issues; and complaining about pay discrepancies among staff. *Id.* at 16-19.

[20] These new alleged adverse actions include the following: threatening and harassing Complainant; creating a hostile work environment; intentionally omitting Complainant's statements from human resources' paperwork; forcing Complainant to write a character reference for a doctor; permitting workplace violence; removing essential medical equipment from a clinic; removing Complainant's name from medical charts; and re-assigning Complainant to different patients. *Id.* at 5-7, 13-20, 22.

(1) Complainant's Exhibits should be stricken as untimely;[21] and (2) Complainant's filings should be stricken because they contain evidence and related arguments newly presented on appeal.[22] In the alternative, Respondent requested that portions of the filings containing protected health information (PHI) be stricken.[23]

Complainant filed a Response to Motion to Strike on March 21, 2023, claiming that "[t]here is [not] any new information that wasn't already submitted in either the written or verbal form to" Respondent's human resources department or attorneys.[24] Complainant also states that, "[m]uch of this information was already either typed up in Statement of Facts Forms or in emails that were sent to myself to record occurrences for future reference."[25]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of the Department of Labor has delegated to the Board the authority to review ALJ decisions under the ACA.[26] In the current matter, Complainant has petitioned the Board to reverse the ALJ's Order Granting Summary Decision. The ARB reviews an ALJ's grant of summary decision de novo, the same standard the ALJ applies.[27]

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[21] Resp. Motion to Strike at 3. Complainant filed a Certificate of Service with the Board on February 13, 2023. Complainant certified that she served on Respondent the Revised Opening Brief on February 11, 2023, and the Exhibits on February 13, 2023.

[22] *Id*. at 3-4.

[23] *Id*. at 4-6. Respondent further argues that Complainant's filings fail to comply with Rule 28, Federal Rule of Appellate Procedure, which has impaired its ability to cogently respond to these filings. *Id*. at 4. Specifically, Respondent avers that Complainant's filings fail to comply with the requirements set forth in Rule 28(a) and (e). Motion to Strike at 4. Rule 28(a) provides procedural rules for an appellant's brief, while 28(e) provides rules for parties citing to the record and appendices. FED. R. APP. P. 28(a), (e).

[24] Comp. Response to Motion to Strike at 1.

[25] *Id*.

[26] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

[27] *Perkins*, ARB No. 2022-0018, slip op. at 4 (citing *Oberg v. Quinault Indian Nation*, ARB No. 2019-0036, ALJ No. 2017-ACA-00003, slip op. at 3 (ARB Feb. 22, 2021) (citation omitted)).

DISCUSSION

1. Motion to Strike

A. Complainant's Filings Present New Information and Evidence on Appeal

Complainant was represented by counsel before the OALJ but is self-represented before the ARB. Although the Board "construe[s] 'papers filed by *pro se* complainants liberally in deference to their lack of training in the law and with a degree of adjudicative latitude[,]'[28] we have a duty to not become an advocate for a pro se litigant."[29] The Board has carefully reviewed Complainant's filings under this liberal standard, and finds that they are largely comprised of claims of protected activity and adverse actions raised for the first time on appeal and Exhibits comprised of evidence not previously part of the record before the ALJ. The Board does not generally consider arguments raised for the first time on appeal, nor evidence submitted for the first time on appeal.[30]

While the Board recognizes that striking filings is generally disfavored,[31] the Board has previously struck filings which contain arguments raised for the first time on appeal or evidence not previously made a part of the record below.[32] When determining whether to consider new evidence, the Board relies on the standard contained in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ's Rules of Practice and Procedure),[33] which provides that "[n]o additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed."[34]

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[28] *Bart*, ARB No. 2018-0004, ALJ No. 2017-TAE-00014, slip op. at 4 (ARB Sept. 22, 2020) (quoting *Cummings v. USA Truck, Inc.*, ARB No. 2004-0043, ALJ No. 2003-STA-00047, slip op. at 2 (ARB June 30, 2005) (Order Denying Reconsideration)).

[29] *Bart*, ARB No. 2018-0004, slip op. at 4 (citing *Pik v. Credit Suisse AG*, ARB No. 2011-0034, ALJ No. 2011-SOX-00006, slip op. at 5 (ARB May 31, 2012)).

[30] *Martin v. Paragon Foods*, ARB No. 2022-0058, ALJ No. 2021-FDA-00001, slip op. at 15 (ARB June 8, 2023) (citing *Bauche v. Masimo Corp.*, ARB No 2022-0035, ALJ No. 2022-SOX-00010, slip op. at 8 n.35 (ARB Sep. 27, 2022) (citations omitted)).

[31] Motions to strike are generally disfavored. *Pilken v. Sony Interactive Ent. LLC*, No. 20-7115, 2021 WL 2451299, at *1 (D.C. Cir. 2021) (citing *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981)).

[32] *Smith v. Akal Express, Inc.*, ARB No. 2022-0041, ALJ No. 2021-STA-00028, slip op. at 7-8 (ARB Jan. 12, 2023) (Order Regarding Pending Motions) (striking a party's opening brief and appendix that cited and contained material not in the record before the ALJ).

[33] 29 C.F.R. Part 18 (2022).

[34] 29 C.F.R. § 18.90(b)(1).

Complainant has failed to demonstrate that the new materials she wishes to introduce into the record on appeal could not have been discovered with reasonable diligence or were not readily available prior to the closing of the record below. To the contrary, Complainant admits that these new materials were either in her or Respondent's possession, or were readily available prior to the closing of the record below.[35] Complainant's Exhibits are all dated between June 16, 2018, and October 30, 2019, well before the start of the OALJ proceedings.[36] Thus, the documents could have been discovered with reasonable diligence and were readily available prior to the closing of the record. For these reasons, the Board strikes Complainant's Exhibits in their entirety.

With regard to her new claims of protected activity[37] and new allegations of adverse actions,[38] the Board affirmatively disregards these new arguments and materials in Complainant's briefs before the Board.[39]

Accordingly, Respondent's Motion to Strike is **GRANTED**, in part.[40]

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[35] Comp. Response to Motion to Strike at 1.

[36] This case was originally assigned to ALJ Silvain, Jr. on July 14, 2020, and was reassigned to ALJ Golden on May 4, 2021. Order Granting Summary Decision at 2.

[37] Comp. Br. at 16-19.

[38] *Id*. at 5-7, 13-20, 22.

[39] While the Board elects to disregard the new arguments and materials presented in Complainant's opening briefs instead of striking the briefs, the Board also recognizes that these briefs contain PHI. The briefs are in DOL's custody and only accessible by the parties and DOL staff, and thus, in practice, the PHI contained in these briefs are protected from disclosure. However, the Board notes that these briefs become part of the record and are subject to the Freedom of Information Act (FOIA or Act). 5 U.S.C. § 552; see also 29 C.F.R. Part 70 (setting out the procedures for responding to FOIA requests and for appeals by requestors from denials of such requests).

[40] Respondent's Motion to Strike also argued that Complainant's Exhibits should be stricken as untimely and Complainant's filings fail to comply with Rule 28, Federal Rule of Appellate Procedure, which impaired its ability to cogently respond to the filings. Resp. Motion to Strike at 3-4. These arguments are now moot. After striking and/or disregarding new claims and evidence, the Board is able to decide this matter as a matter of law without further briefing. Thus, the Board does not need to rule on the issue of whether Complainant's filings failed to comply with Rule 28, were untimely, and/or impaired Respondent's ability to respond.

2. Motion for Summary Decision

A. Summary Decision Standards

Summary decision should be entered when there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law.[41] The ARB reviews the record on the whole in the light most favorable to the non-moving party.[42]

To avoid summary decision, the non-moving party must rebut the motion and evidence presented by the moving party with contrary evidence sufficient to create a genuine issue of material fact. "Genuine" means that the evidence must be such that a reasonable fact finder could decide in favor of the non-moving party.[43] "That rebuttal, or answer, 'may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.'"[44]

B. Burdens of Proof Under the ACA

The ACA's employee protection provision prohibits an employer from discharging or otherwise discriminating against an employee because the employee has engaged in conduct protected by the statute.[45] To prevail on an ACA claim, an employee must demonstrate that: (1) she engaged in activity that the ACA protects; (2) her employer took adverse action against her; and (3) her protected activity was a contributing factor in the adverse action.[46] If the complainant meets her burden of proof, the respondent may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[47]

An employee is protected under the ACA if she provides information or complains to her employer about, or refuses to participate in, an activity that she

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41 29 C.F.R. § 18.72.

42 *Perkins*, ARB No. 2022-0018, slip op. at 5 (citing *Oberg*, ARB No. 2019-0036, slip op. at 4) (citation omitted)).

43 *Kao v. Areva Inc.*, ARB No. 2016-0090, ALJ No. 2014-ERA-00004, slip op. at 4 n.19 (ARB Apr. 30, 2018) (citing *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 2011-0013, ALJ No. 2010-FRS-00012, slip op. at 8 (ARB Oct. 26, 2012)).

44 *Perez v. Citigroup, Inc.*, ARB No. 2017-0031, ALJ No. 2015-SOX-00014, slip op. at 3 (ARB Sept. 30, 2019) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (citation omitted)).

45 29 U.S.C. § 218c(a).

46 29 C.F.R. § 1984.109(a).

47 *Id*. § 1984.109(b).

reasonably believes violates any provision of Title I of the ACA.[48] In order to have a "reasonable belief," a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates Title I.[49]

The employee's belief is objectively reasonable if a reasonable person in the same factual circumstances and with the same training and experience would have believed that the conduct about which she complained constituted a violation of the pertinent law.[50] "A reasonable but mistaken belief that the respondent's conduct constitutes a violation of the applicable law can constitute protected activity."[51] Often, objective reasonableness involves factual issues that cannot be decided absent an adjudicatory hearing.[52] However, if no reasonable person could have believed that the facts amounted to a violation, the issue of objective reasonableness can be decided adversely as a matter of law.[53]

As stated above, we afford Complainant some adjudicative latitude as a *pro se* litigant. Nevertheless, she bears the same burdens of proving the necessary elements of her case as do litigants represented by counsel.[54]

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[48] 29 U.S.C. §§ 218c(a)(2), (5); 29 C.F.R. §§ 1984.102(b)(2), (5). Only violations of Title I of the ACA are protected. *Supra* note 6.

[49] *Perkins*, ARB No. 2022-0018, slip op. at 5 (citations omitted)*; see also* Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 81 Fed. Reg. 70,607, 70,611-12 (Oct. 13, 2016) (ACA Final Rule) (explaining that a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the enumerated categories of law).

[50] *Perkins*, ARB No. 2022-0018, slip op. at 5 (citing *Oberg*, ARB No. 2019-0036, slip op. at 4-5 (citation omitted).

[51] *LaQuey v. UnitedHeath Group, Inc.*, ARB No. 2017-0060, ALJ No. 2016-SOX-00002, slip op. at 13 (ARB Oct. 9, 2020) (citing *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 16 (ARB May 25, 2011)). The Board applies principles and precedent from the Sarbanes-Oxley Act of 2002 (SOX) to ACA cases. *Oberg*, ARB No. 2019-0036, slip op. at 4 & n.16 (drawing from principles and precedent from analogous statutes, including the Sarbanes-Oxley Act, 18 U.S.C. § 1514A)); *see also* ACA Final Rule, 81 Fed. Reg. at 70,611-15 (referring to standards and precedent under "analogous" provisions in the Sarbanes-Oxley Act).

[52] *Sylvester*, ARB No. 2007-0123, slip op. at 15 (citations omitted).

[53] *See id.* (citing *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 361 (4th Cir. 2008) (Michael, M., dissenting) ("The issue of objective reasonableness should be decided as a matter of law only when 'no reasonable person could have believed' that the facts amounted to a violation . . . .").

[54] *LaQuey*, ARB No. 2017-0060, slip op. at 13 (citing *Pik*, ARB No. 2011-0034, slip op. at 5 (citation omitted)).

Before the ALJ, Respondent moved for summary decision arguing, *inter alia*, that Complainant was unable to establish facts sufficient to sustain an ACA-retaliation claim because the sole basis for her claim was her alleged belief that Respondent terminated her as a result of her reports regarding HIPAA violations.[55] Respondent argued that because reporting HIPAA violations is not protected conduct under the ACA, Complainant failed to state a claim upon which relief could be granted.[56]

In response, Complainant did not dispute that her alleged protected activity consisted solely of reporting HIPAA violations, nor did she argue that she reasonably believed that the conduct she reported constituted a violation of the ACA.[57] Complainant instead asserted that she reasonably believed "Respondent violated HIPAA which provides data privacy and security provisions for safeguarding of medical information and was promulgated prior to the passage of the ACA."[58] Complainant submitted two exhibits in support of her Opposition to Summary Decision: her own declaration and a chart audit concerning the scope of practice and quality of care issues with patients.[59] Complainant 's Declaration reiterated her assertion that she reported HIPAA patient-privacy violations and that she was terminated for reporting HIPAA violations.[60]

The ALJ issued an Order Granting Summary Decision concluding that there was no genuine issue of material fact because Complainant did not engage in protected activity or have a reasonable or good faith belief that she engaged in activity protected under the ACA, 29 U.S.C § 218c.[61]

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55 Comp. Opposition to Summary Decision at 4-6.

56 *Id.* Resp. Motion for Summary Decision at 11, 14. Respondent also argued that Title I of the ACA does not regulate the health care activities of health care providers like Respondent, *id.* at 10, and that the activity that Complainant alleged was protected was not a contributing factor in the decision to terminate her employment. *Id.* at 14.

57 Comp. Opposition to Summary Decision at 4-6. Smith also argued that Respondent's reasons for terminating her employment were pretextual as she was terminated for reporting HIPAA violations; Respondent's anti-retaliation policy did not prove that it followed the policy; and Smith's claims against Respondent were factually distinct from *DeHaan v. Progress House, Inc*. *Id.* at 6-8.

58 *Id.* at 5-6.

59 Complainant's Appendix to Response in Opposition to Motion for Summary Decision, Exs. 1-2.

60 *Id*. Ex. 1.

61 Order Granting Summary Decision at 6-7. Given the legal effect of this determination, the ALJ's Order Granting Summary Decision did not analyze the other elements of Complainant's ACA whistleblower claim.

C. Protected Activity Under the ACA

An employee is protected under the ACA if she provides information or complains to her employer about, or refuses to participate in, an activity that she reasonably believes violates any provision of Title I of the ACA.[62] "The ACA was enacted to reform the healthcare industry by reducing health care costs and providing affordable health insurance to Americans."[63] Title I includes several health insurance and healthcare coverage reforms. These reforms include, but are not limited to, prohibiting lifetime and annual dollar limits on essential health benefits, prohibiting pre-existing condition exclusions, providing for the creation of health benefit exchanges, imposing insurance coverage requirements for individuals, providing tax-credits for insurance premiums, and setting health insurance requirements for employers.[64]

i. Complainant *'s Alleged Protected Activity Consists Solely of Reporting Alleged HIPAA Violations*

Here, Complainant made complaints alleging that Respondent violated HIPAA on several occasions. These alleged violations included a nurse practitioner accessing a patient's medical record even though she had not participated in the patient's care;[65] a physician's assistant accessing charts for patients to whom that physician's assistant was not assigned;[66] and staff improperly accessing a medical assistant's medical records who had been in the emergency room to obtain care.[67]

In her response to the Motion for Summary Decision, Complainant summarily asserted that her HIPAA complaints are protected under Title I.[68]

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62 29 U.S.C. §§ 218c(a)(2), (5); 29 C.F.R. §§ 1984.102(b)(2), (5).

63 *Perkins*, ARB No. 2022-0018, slip op. at 7 (citing 156 Cong. Rec. E618-04 (daily ed. Apr. 22, 2010) (statement of Rep. Jerry McNerney); 156 Cong. Rec. H1854-02 (daily ed. Mar. 21, 2010) (statement of Rep. Jackson Lee); 155 Cong. Rec. S11907-02 (daily ed. Nov. 21, 2009) (statement of Sen. Max Baucus)).

64 Title I of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see also* Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 81 Fed. Reg. at 70,608.

65 Comp. Opposition to Summary Decision at 2; Comp. Br. at 6, 8, 11, 13.

66 Comp. Opposition to Summary Decision at 3; Comp. Br. at 5-6, 8, 11.

67 Comp. Opposition to Summary Decision at 3. In Complainant's Revised Opening Brief, she states that a medical assistant improperly accessed an employee's father's medical records, not an employee's medical records, who obtained care at the emergency room. Comp. Br. at 21.

68 Comp. Opposition to Summary Decision at 5.

Complainant's sole discernable attempt to connect the ACA and HIPAA was a statement that HIPAA was promulgated prior to the passage of the ACA.[69]

Complainant did not identify which provision of Title I of the ACA she believed Respondent violated or explain how her specific type of HIPAA concerns related to Title I.[70] Nor did she assert that she reasonably believed any of the alleged HIPAA violations also violated any provision of Title I of the ACA. Similarly, Complainant's initial Opening Brief and Revised Opening Brief before the ARB are replete with assertions regarding her complaints of HIPAA violations, but do not reference Title I of the ACA or allege that she had a reasonable belief that the HIPAA violations violated any provision of Title I.[71]

ii. Complainant's HIPAA Complaints Are "Clearly Outside the Realm of Title I"

Complainant's complaints of HIPAA violations relate to the Privacy Rule and the Security Rule. The Privacy Rule establishes national standards to protect individuals' medical records and PHI.[72] The Privacy Rule requires appropriate safeguards to protect the privacy of PHI and sets limits and conditions on the uses and disclosures of such information without an individual's authorization.[73] Similarly, the Security Rule establishes national standards to protect individuals' electronic PHI that is created, received, used, or maintained by a covered entity.[74] The Security Rule also requires appropriate administrative, physical, and technical safeguards to ensure the confidentiality, integrity, and security of electronic PHI.[75] Upon examining Title I of the ACA, it is clear that Sections 1104, 1201 (adding subsection 2705 of the Public Health Service Act), and 1413 are the only ACA provisions which potentially relate to or reference HIPAA patient privacy and security concerns.

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69 *Id.* at 5. That fact is not in dispute. HIPAA was enacted on August 21, 1996. Health Insurance Portability and Accountability Act, Pub. L. 104-191, 110 Stat. 1936 (1996).

70 *See* Comp. Opposition to Summary Decision at 5-6.

71 To determine whether to grant Respondent's Motion to Strike, the Board reviewed Complainant's briefs in their entirety and they do not contain any additional references to the ACA, Title I or otherwise. *Supra* notes 19 and 20. Thus, even if the Board did not affirmatively disregard the new claims on appeal, the result would be the same.

72 *See* 45 C.F.R. Parts 160, 164 (2022). The Patient Privacy Rule applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically. *Id.*

73 *Id*.

74 *Id*.

75 *Id*.

Section 1104, entitled "Administrative Simplification," requires the Secretary of Health and Human Services (HHS) to develop uniform operating rules for the purpose of streamlining health care administrative transactions, encouraging greater use of standards by providers and making existing standards work more efficiently.[76] These standards and operating rules adopted by the Secretary of HHS amend and update existing HIPAA requirements by creating new uniform standard codes and standard transactions for electronic claim filing and processing.[77]

Section 1201 discusses subsection 2705 of the Public Health Service Act, entitled "Prohibiting Discrimination against Individual Participants and Beneficiaries based on Health Status," and precludes group health plans and health insurance issuers from discriminating against participants, beneficiaries, and individuals in eligibility, benefits, or premiums based on a health factor.[78]

Subsection 2705 provides for an exception to this general prohibition by allowing premium discounts, rebates, or modification of otherwise applicable cost sharing in exchange for adherence to certain programs of health promotion and disease prevention, commonly referred to as wellness programs.[79] Similar nondiscrimination and wellness program provisions were originally established by HIPAA but have been amended and updated through the ACA and agency rulemaking.[80]

While ACA Section 1104 and subsection 2705 piggyback off of existing HIPAA reforms, they clearly do not relate to patient privacy or medical record safeguarding within medical care settings.[81] Instead, the goal of Section 1104 is to make the health care system more uniform and efficient by reducing clerical

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[76] Patient Protection and Affordable Care Act § 1104; Health Insurance Portability and Accountability Act § 261.

[77] 42 U.S.C. § 1320d-2; *compare* Patient Protection and Affordable Care Act § 1104(b)(2)(B), *with* Health Insurance Portability and Accountability Act § 262.

[78] 42 U.S.C. § 300gg-4(a) (2010); Patient Protection and Affordable Care Act § 2705.

[79] 42 U.S.C. § 300gg-4(j).

[80] *Compare* Patient Protection and Affordable Care Act § 1201 (discussing subsection 2705), *with* Health Insurance Portability and Accountability Act § 102 (discussing subsection 2702 of the Public Health Service Act).

[81] *See DeWolfe v. Hair Club for Men*, ALJ No. 2012-ACA-00003, slip op. at 13 (ALJ Apr. 1, 2014) (dismissing claim based on reporting of improper disposal of medical records because "a report of improperly disposed patient medical records is not protected activity under the ACA.").

burdens on providers, patients, and health plans,[82] while the goal of subsection 2705 is to prevent discrimination against individuals based on health factors.[83]

The Board also acknowledges that the ACA contains cross references to "privacy" requirements for enrollment, data collection, and exchange programs. Yet, most of these privacy references are not included in Title I.[84] The lone reference to "privacy" within Title I is in Section 1413, entitled "Streamlining of procedures for enrollment through an exchange and State Medicaid, CHIP,[85] and health subsidy programs." Section 1413 requires the Secretary of HHS to establish a system for Americans to apply for enrollment in, receive a determination of eligibility for participation in, and continue participation in applicable state health subsidy programs.[86] Under Section 1413, state health subsidy programs must ensure privacy and data security safeguards.[87] While this section focuses on privacy concerns for individuals, such privacy and data concerns are limited to the establishment of state health subsidy programs, not patient privacy and data concerns within medical care settings.

The Board recognizes that Complainant believed that Respondent violated HIPAA. However, her HIPAA concerns relate exclusively to patient privacy and medical record safeguarding, not Title I's health insurance and healthcare coverage reforms, and not any of the HIPAA provisions contained in Title I. Thus, even providing Complainant adjudicative latitude in her *pro se* appearance before the Board, Complainant's reported HIPAA violations do not, in and of themselves, implicate protection under Title I of the ACA. Indeed, all of Complainant's alleged reports of HIPAA's patient privacy rules are clearly outside the realm of Title I of the ACA.[88]

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[82] 42 U.S.C. §§ 1320d-2(a)(4)(B), 1320d-2(g)(1); Patient Protection and Affordable Care Act § 1104.

[83] 42 U.S.C. § 300gg-4; Patient Protection and Affordable Care Act § 2705.

[84] *See* Patient Protection and Affordable Care Act §§ 3015, 4101, 4103, 4302, 5002, 6201, 6301, 6402, 6703, 10213, 10331, 10411. These sections (and references to privacy) are in Titles III, IV, V, VI, and X of the ACA. As previously addressed, *supra* note 6, an employee is protected under the ACA if she provides information or complains to her employer about, or refuses to participate in, conduct that she reasonably believes violates any provision of **Title I**.

[85] CHIP is an acronym for Children's Health Insurance Program.

[86] 42 U.S.C. § 18083; Patient Protection and Affordable Care Act § 1413.

[87] *See id.*

[88] The Board has previously discussed HIPAA within the context of the ACA in *Gallas v. The Med. Ctr. of Aurora*, ARB Nos. 2016-0012, 2015-0076, ALJ Nos. 2015-SOX-00013, 2015-ACA-00005 (ARB Apr. 28, 2017). Specifically, we noted that ACA Title I addresses the

Nevertheless, Complainant is protected if she can prove that she subjectively believed, in good faith, that the conduct which she complained about constituted a violation of the ACA, and that her belief was objectively reasonable.[89]

iii. Complainant's Reasonable Belief

In the context of a motion for summary decision, the ALJ examines pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed to determine whether there is no genuine issue as to any material fact and that a party is entitled to summary decision as a matter of law.[90] In the instant case, an examination of the materials and arguments advanced by Complainant leads to a determination that Complainant has not raised a genuine issue as to whether she reasonably believed that her HIPAA patient-privacy complaints violated Title I.

Before the ALJ, Complainant argued that she "reasonably believe[d] that Respondent violated the HIPAA Privacy Rule which provides data privacy and security provisions for safeguarding of medical information and was promulgated prior to the passage of the ACA."[91] Before the Board, she has reiterated her claims regarding her HIPAA patient privacy complaints. But at no point in her submissions to the ALJ or the Board does Complainant address the reasonableness of her belief that Respondent's alleged HIPAA violations *also violated Title I of the*

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subject matter of HIPAA, and that "HIPAA access to coverage reforms provided both the ACA's legislative precedent, as well as its federal/state enforcement framework." *Id.* at 11 (citations omitted). Consequently, in the context of a motion to dismiss, a complainant need only show some relatedness between her alleged protected activity and the general subject matter of Title I to meet the low threshold required to defeat a motion to dismiss. *Id.* at 10 (citing *Evans v. EPA*, ARB No. 2008-0059, ALJ No. 2008-CAA-00003, slip op. at 9 (ARB July 31, 2012)); *see also* 29 C.F.R. § 1984.103(b) ("Nature of filing. No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language."). However, the Board provided that a disclosure may not be protected if it was clearly outside the realm covered by the statute. *Id.* (quoting *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 2004-0149, ALJ No. 2004-SOX-00011, slip op. at 17 (ARB May 31, 2006)).

89 *Perkins*, ARB No. 2022-0018, slip op. at 5 (citing *Oberg*, ARB No. 2019-0036, slip op. at 4 & n.17 (citations omitted).

90 *See* 29 C.F.R. § 18.72.

91 Comp. Opposition to Summary Decision at 5. Complainant also noted that "[t]he HIPAA Privacy Rule establishes national standards to protect individuals' medical records and other . . . [PHI] and applies to health plans, health care clearinghouses, health care providers and business associates." *Id.* at 6.

ACA. While Complainant has repeatedly asserted that Respondent violated HIPAA and thus she is ACA-protected, Complainant does not provide any suggestion of any reasonable belief that supports her claim—either her subjective good faith belief or an objectively reasonable belief.

The Board has similarly affirmed summary decisions where complainants fail to present sufficient evidence regarding their objectively reasonable beliefs under the ACA[92] and SOX.[93] For example, in *Micallef v. Harrah's Rincon Casino & Resort*,[94] the ARB affirmed an ALJ's holding that a complainant's concerns regarding the casino's tip policy may have "some relevance" to its financial state, but that SOX does not protect an employee from reporting all illegal activities.[95] Similarly, in *Fredrickson v. The Home Depot U.S.A., Inc.*,[96] the Board held that SOX complaints about corporate expenditures that do not directly implicate the categories of fraud listed in the statute are not protected activity because the "mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and the effect on the financial condition could in turn be intentionally withheld from investors, is not enough."[97]

As with the present case, an alleged violation of the patient privacy requirements under HIPAA, standing alone, does not establish a violation of Title I of the ACA. Complainant would be protected, however, if she could show that she had a reasonable belief that Respondent's alleged HIPAA violations also violated Title I. Other than her general assertions that reporting HIPAA violations are protected conduct[98] and that the HIPAA Privacy Rule and Security Rule apply to health plans,[99] Complainant presents no other arguments or evidence to support her subjective good faith belief or why it was reasonable. The Board has consistently held that such general assertions are insufficient to avoid summary decision.[100]

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92 *Oberg*, ARB No. 2019-0036, slip op. at 10.

93 The Board applies SOX principles and precedent to ACA cases. *Supra* note 51.

94 *Micallef v. Harrah's Rincon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025 (ARB July 5, 2018).

95 *Id*. at 5.

96 *Fredrickson v. The Home Depot U.S.A., Inc.*, ARB No. 2007-0100, ALJ No. 2007-SOX-00013 (ARB May 27, 2010).

97 *Id*. at 6 (citations omitted).

98 Comp. Opposition to Summary Decision at 5; Comp. Br. at 12-13.

99 Comp. Opposition to Summary Decision at 6.

100 *Oberg*, ARB No. 2019-0036, slip op. at 9 (general averments are not sufficient to avoid summary decision); *Nieman v. Se. Grocers, LLC*, ARB No. 2018-0058, ALJ No. 2018-

After considering the parties' arguments and evidence, the Board concludes that Complainant's claim does not prevail on summary decision because Complainant did not sufficiently allege that she had a reasonable belief that the conduct she complained about related to any provisions found in Title I of the ACA.

CONCLUSION

For the foregoing reasons, the Board **GRANTS** in part, Respondent's Motion to Strike, and **AFFIRMS** the ALJ's Order Granting Summary Decision.

SO ORDERED.

SUSAN HARTHILL
Chief Administrative Appeals Judge

TAMMY L. PUST
Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

LCA-00021, slip op. at 17 (ARB Oct. 5, 2020) (mere speculation and unsupported allegations are insufficient to avoid summary judgment); *Latigo v. ENI Trading & Shipping*, ARB No. 2016-0076, ALJ No. 2015-SOX-00031, slip op. at 3 (ARB Mar. 8, 2018).