IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-50927

KEVIN WALLACE,

Plaintiff - Appellant

v.

ANDEAVOR CORPORATION,

Defendant - Appellee

Appeal from the United States District Court for theWestern District of Texas

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(Filed Feb. 15, 2019)

Before JONES, CLEMENT, and SOUTHWICK, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

This suit concerns the federal Sarbanes-Oxley Act, which protects those who blow the whistle on their employer's failure to comply with Securities and Exchange Commission reporting requirements. The district court found that the employer's decision to fire the plaintiff was not prohibited retaliation and that the plaintiff did not have an objectively reasonable belief

that a violation of reporting requirements had occurred. We AFFIRM.

FACTS AND PROCEDURAL HISTORY

Plaintiff Kevin Wallace worked for Tesoro Corporation from June 2004 until his termination in March 2010. In 2009 and 2010, Wallace was a Vice President of Pricing and Commercial Analysis. Wallace reported to Claude Moreau, who reported to Everett Lewis. At some point in late 2009 or early 2010, Lewis tasked Wallace with investigating financial performance in various industry segments. Through the investigation, Wallace came to believe that Tesoro misunderstood the comparative profitability of certain regions. Wallace also determined that Tesoro improperly booked taxes as revenues in certain *internal* reporting channels.[1]

On February 8, 2010, Wallace sent an email to Moreau and Tracy Jackson, Tesoro's Vice President of Internal Audits, explaining that Pacific Northwest intracompany profit calculations were erroneous in part due to the accounting for taxes. Wallace wrote that "external retail could be ok because it is treated

[1] We were notified in the appellee's briefing that in 2017, Tesoro changed its name to Andeavor Corporation. Appellant moved in November 2018 to substitute Marathon Petroleum Corporation as the appellee, as Marathon allegedly had acquired all the shares of Andeavor. We agree to substitute Andeavor as the appellee in the caption of this case but see no basis to make Marathon the party. We will, nonetheless, refer to the appellee in the opinion as Tesoro, as it was the name of the party at the time of these events.

differently in the intracompany process." After sending that email, Wallace met with Jackson on either February 8 or 9. According to Wallace, Jackson was concerned that a footnote in Tesoro's SEC disclosures might have been incorrect.

On February 9, Wallace sent another email discussing Tesoro's practice of booking taxes as revenues and stated that he did not think "there is any chance that at the corporate level this is not properly accounted for." Inferences from Wallace's testimony could be drawn that after the February 9 email he changed his mind, became concerned that Tesoro did not properly account for sales taxes in Tesoro's SEC disclosures, and spoke to Moreau about the issue.

Wallace was also a sub-certifier of Tesoro's financial statements. In early 2010, Wallace certified that he knew of no reason why the 2009 Form 10-K could not be certified. The filing expressly included the following:

> Federal excise and state motor fuel taxes, which are remitted to governmental agencies through our refining segment and collected from customers in our retail segment, are included in both "Revenues" and "Costs of sales and operating expenses." These taxes, primarily related to sales of gasoline and diesel fuel, totaled $283 million, $278 million and $240 million in 2009, 2008 and 2007, respectively.

Tesoro also disclosed in its 10-K that "[f]ederal and state motor fuel taxes on sales by our retail segment are included in both 'Revenues' and 'Costs of

sales and operating expenses.'" Jackson testified that the disclosures included both excise and sales taxes. On March 12, 2010, the day of Wallace's termination, Wallace certified that he was unaware of any "business or financial transaction that may not have been properly authorized, negotiated, or recorded" for 2009.

While Wallace was investigating internal comparative profitability and accounting for taxes, the Tesoro human resources department began investigating Wallace. It found a pattern of unacceptable behavior, including favoritism and fostering a hostile work environment. Tesoro terminated Wallace and asserts it was for his poor performance. Wallace claims he was terminated in retaliation for reporting Tesoro's practice of booking sales taxes as revenues, which he claims was not properly disclosed in Tesoro's public filings.

Wallace brings his claim under the anti-retaliation provision of the Sarbanes-Oxley Act ("SOX"). 18 U.S.C. § 1514A(a). He claims he personally told Moreau that Tesoro "puffed" revenue figures in SEC filings. Tesoro moved for summary judgment. Wallace responded with briefing and a declaration from Douglas Rule. Tesoro moved to strike the declaration. The magistrate judge struck only those portions that it determined were expert testimony, and the district court adopted those recommendations. The magistrate judge also recommended that summary judgment be granted to Tesoro. The district court did so. Wallace appeals, claiming error in granting summary judgment and in striking portions of Rule's declaration.

DISCUSSION

We review the grant of summary judgment *de novo*. *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006). All inferences "must be viewed in the light most favorable to the nonmoving party." *Bolton v. City of Dallas*, 472 F.3d 261, 263 (5th Cir. 2006). A movant is entitled to summary judgment if it "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

Wallace's retaliation claim is brought under the whistleblower protections of SOX. Registered companies are prohibited from

> discharg[ing] . . . an employee . . . because of any lawful act done by the employee to provide information . . . regarding any conduct which the employee reasonably believes constitutes a violation of . . . any rule or regulation of the Securities and Exchange Commission . . . when the information . . . is provided to . . . a person with supervisory authority over the employee.

18 U.S.C. § 1514A(a). A retaliation claim under that provision requires an employee prove "by a preponderance of the evidence, that (1) he engaged in protected whistleblowing activity, (2) the employer knew that he engaged in the protected activity, (3) he suffered an 'adverse action,' and (4) the protected activity was a 'contributing factor' in the 'adverse action.'" *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 259 (5th Cir. 2014) (footnote omitted) (quoting *Allen v. Admin.*

Review. Bd., 514 F.3d 468, 475-76 (5th Cir. 2008)). Wallace must also show that his belief that Tesoro committed a covered violation was both objectively and subjectively reasonable. *Wallace v. Tesoro Corp.*, 796 F.3d 468, 474-75 (5th Cir. 2015). "The objective standard examines whether the belief would be held by 'a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" *Id.* (quoting *Allen*, 514 F.3d at 477).

Wallace claims that the covered conduct he reported was that Tesoro reported "puffed" revenue figures "to the SEC and the public." Wallace points to a statement by a "Tesoro pricing official," who "confirmed" that the "misallocations found by Wallace's investigation overstated profits by $30 million." Wallace's claim centers on his purported belief that the inclusion of sales taxes in revenues for the retail segment was not properly disclosed in SEC filings. Wallace acknowledges that excise taxes were disclosed, but he believed Tesoro was not accurately reporting its treatment of sales taxes. Wallace claimed that "revenues were not being recognized appropriately, affected consolidated numbers[,] and were misreported in the 10-K and 10-Q filings. . . . violat[ing] the SEC rules requiring compliance with GAAP, keeping accurate books, maintaining internal controls[,] and filing correct reports."

This case turns on whether Wallace's purported belief that his employer was misreporting its revenue was objectively reasonable in light of the undisputed

facts. If Wallace's belief was not objectively reasonable, his SOX retaliation claim fails. *See id*. In answering that question, we must also resolve an evidentiary dispute.

A. Objective Reasonableness of Wallace's Claimed Belief

We start with examining Wallace's training and experience that forms the basis of his belief. *See id*. Wallace had extensive business experience that included "implementing best business practices," performance and market analysis, oversight of accounting services, asset valuation, and experience with Tesoro's internal accounting system, which Wallace refers to as a "SAP system." As a sub-certifier at Tesoro, Wallace had specific expertise in its SEC financial reporting practices. Given Wallace's background and experience with accounting and SEC reporting, he should be capable of understanding disclosures in SEC filings.

We next turn to the facts underlying Wallace's claim. Wallace testified he reviewed the 2009 10-K, which was filed March 1, 2010, shortly before his termination on March 12, 2010. As a certifier, he was required to state whether he knew of any reason why the 2009 10-K could not be certified. Wallace testified that he knew of no reason why the 2009 10-K could not be certified. Notably, the 2009 10-K included the following language:

> Federal excise and state motor fuel taxes, which are remitted to governmental agencies

> through our refining segment and collected from customers in our retail segment, are included in both "Revenues" and "Costs of sales and operating expenses." These taxes, primarily related to sales of gasoline and diesel fuel, totaled $283 million . . . in 2009."

When discussing its retail segment in its 2009 10-K, Tesoro also disclosed that "[f]ederal and state motor fuel taxes *on sales* by our retail segment are included in both 'Revenues' and 'Costs of sales and operating expenses'." Wallace specifically mentioned sales taxes on fuel in Hawaii as an example of sales tax revenues that he believed were improperly accounted.

Wallace attempts to create fact issues on the question of whether his belief in a covered SOX violation was reasonable by pointing to the timing of his certifications, noting that he certified the 2009 10-K, "and did not include the period in 2010 when he discovered and reported his concerns." He also specifically testified that his certification on the day of his termination applied only to 2009.

Wallace's factual argument fails because the same accounting issues he found in 2010 also existed in 2009. Wallace specifically blames the "antiquated SAP system" and a "lack of controls on [Tesoro's] transfer prices" for the inclusion of taxes as revenues and internal profitability reporting issues, which were identified in 2008 and known to Wallace at the end of 2009 or beginning of 2010. That means there is no reasonable dispute that Wallace was aware that the inclusion of sales taxes as revenues would have occurred in 2009

because nothing indicated to Wallace that the procedure for internal revenue reporting changed in the beginning of 2010. Furthermore, a reporting individual who is a sub-certifier with accounting oversight experience should conduct a reasonable investigation to ensure the reasonableness of his conclusion that the public disclosures contained a reporting violation. *See Allen*, 514 F.3d at 479. Had Wallace conducted a limited investigation, he would have determined that the same footnote present in the 2009 10-K was present in the 2008 10-K. A brief look at the retail segment of the 10-K, which Wallace alleges was the source of the sales-taxes-as-revenues problem, would show that Tesoro disclosed that fuel sales taxes were included in revenues.

Jackson also testified that Tesoro's SEC disclosures include sales taxes, not just excise taxes. Wallace attempts to discount the certainty with which Jackson testified, but he does not offer any conflicting evidence on that point other than a portion of Rule's declaration that was struck. Thus, whether there is a dispute of fact turns on whether the district court erred when it struck portions of Rule's declaration.

B. Striking of Portions of Douglas Rule's Declaration

This court reviews evidentiary rulings for abuse of discretion. *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 370 (5th Cir. 2000). "A trial court abuses its discretion when it bases its decision on an erroneous view of

the law or a clearly erroneous assessment of the evidence." *United States v. Caldwell*, 586 F.3d 338, 341 (5th Cir. 2009).

We review only the district court's decision to strike paragraph 22 of Rule's declaration. There Rule opined on the differences between sales and excise taxes and whether Tesoro accurately disclosed sales taxes in its SEC filings. A party is required to disclose the identity of expert witnesses it plans to use at trial to present evidence under Federal Rules of Evidence 702, 703, or 705. FED R. CIV. P. 26(a)(2)(A). In disclosing the identity of the expert witness, a party is also required to submit a written report. *Id.* at 26(a)(2)(B). Wallace does not dispute that he failed to make a timely disclosure of Rule as an expert or provide a report. At issue here is whether paragraph 22 of Rule's declaration constitutes expert or lay opinion testimony.

Lay opinion testimony is limited to that which is "rationally based on the witness's perception" and "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701. Wallace argues that Rule's explanation of the difference between excise taxes and sales taxes is based on his perceptions from working at Tesoro for several years. Wallace argues that even if Rule's declaration is based upon "some specialized knowledge, it is admissible so long as the lay witness offers straightforward conclusions from observations informed by his or her experience." *United States v. Sanjar*, 876 F.3d 725, 738 (5th Cir. 2017).

Rule's training, education, and experience included "'refinery economics, strategy management for commercial crude oil, business development,' and . . . 'transfer pric[ing] between operating segments.'" Notably, Rule did not deal explicitly with tax calculations, SEC reporting requirements, or investor relations. We conclude that Rule's declaration as to paragraph 22 could not have been based on his lay experience as a Tesoro employee but rather on specialized accounting knowledge. Rule's opinion on the application of tax accounting definitions to the SEC disclosures is an example of Rule applying his "specialized knowledge" to "help the trier of fact . . . understand the evidence." FED. R. EVID. 702(a).

The district court did not abuse its discretion in finding that paragraph 22 of Rule's declaration was impermissible expert testimony.[2] AFFIRMED.

[2] We express no view on the admissibility of any of the remainder of Rule's declaration, as those sections are not applicable to the question of Wallace's reasonable belief.

2017 WL 6403050
United States District Court, W.D. Texas, San Antonio Division.

Kevin WALLACE, Plaintiff,
v.
TESORO CORP., Defendant.

Civil Action No. SA-11-CA-099-FB
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Signed 09/28/2017

Attorneys and Law Firms

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ORDER ACCEPTING MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

FRED BIERY, UNITED STATES DISTRICT JUDGE

Before the Court are the Memorandum and Recommendation of the United States Magistrate Judge

concerning Defendant's Motion for Summary Judgment (docket #146); Plaintiff's Objections to the Magistrate's Memorandum and Recommendation to Grant Defendant's Motion for Summary Judgment (docket #149); and Defendant's Response to Plaintiff's Objections to the Magistrate's Memorandum and Recommendation to Grant Defendant's Motion for Summary Judgment (docket #151).

Where no party has objected to a Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review of them. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Report and Recommendation and determine whether they are either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989).

On the other hand, any Report or Recommendation to which there are objections requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987).

In the Memorandum, United States Magistrate Judge Primomo recommends that defendant Tesoro's

motion for summary judgment be granted. The Court has reviewed the plaintiff's objections to the Memorandum and Recommendation and defendant's response to those objections. In addition, the Court has conducted a de novo review of the Magistrate Judge's Memorandum and Recommendation and finds the objections to the Magistrate Judge's Recommendations are without merit. Therefore, the Court hereby accepts, approves, and adopts the Magistrate Judge's factual findings and legal conclusions contained in the Memorandum and Recommendation (docket #146) and incorporates herein the arguments and authorities presented by the defendant in Defendant's Response to Plaintiff's Objections to the Magistrate's Memorandum and Recommendation to Grant Defendant's Motion for Summary Judgment (docket #151). The Memorandum and Recommendation shall be accepted pursuant to 28 U.S.C. § 636(b)(1) such that Defendant's Motion for Summary Judgment (docket #121) shall be GRANTED.

Accordingly, it is hereby ORDERED that the Memorandum and Recommendation of the United States Magistrate Judge filed in this case (docket #146) is ACCEPTED such that Defendant's Motion for Summary Judgment (docket #121) is GRANTED such that plaintiff's remaining claim is DISMISSED WITH PREJUDICE. IT IS FURTHER ORDERED that this case is CLOSED. Motions pending, including Defendant's Motion to Exclude Expert Witness Opinions of Douglas Deffenbaugh (docket #124), are DISMISSED as moot.

It is so ORDERED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KEVIN WALLACE,	*	
	*	
Plaintiff,	*	**CIVIL NO.**
v.	*	**SA-11-CA-00099-FB**
	*	
TESORO CORP.,	*	
	*	
Defendant.	*	

MEMORANDUM AND RECOMMENDATION

(Filed Feb. 23, 2017)

This case involves a claim that defendant Tesoro Corporation terminated plaintiff Kevin Wallace's employment in retaliation for engaging in protected activity pursuant to the Sarbanes-Oxley Act of 2002 ("SOX") in violation of 18 U.S.C. § 1514A. According to his Fourth Amended Complaint, plaintiff was terminated in March 2010 because he reported that taxes collected by Tesoro were being booked as revenue, artificially inflating profits, thereby skewing the financial results reported on the Company's 10-K and 10-Q filings with the Security and Exchange Commission. Tesoro has filed a motion for summary judgment (docket nos. 121, 135), to which motion plaintiff has responded. (Docket no. 129).

Summary Judgment

Summary judgment shall be rendered if the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), Fed.R.Civ.P. The plain language of this rule mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.* at 322-23. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

A summary judgment movant or opponent must cite to materials in the record or show that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. Rule 56(c)(1), Fed.R.Civ.P. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant

is competent to testify to the matters stated. Rule 56(c)(4), Fed.R.Civ.P. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact, as required by Rule 56(c), the Court may grant summary judgment if the motion and supporting materials show that the movant is entitled to it. Rule 56(e), Fed.R.Civ.P. In ruling upon a motion for summary judgment, a court must view the evidence in the light most favorable to the opposing party and all justifiable inferences are to be drawn in his favor. *Tolan v. Cotton*, 572 U.S. ___, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014); *Anderson*, 477 U.S. at 255.

Procedural Background

Wallace filed a second amended complaint alleging essentially four categories of protected activity: investigating and reporting the booking of taxes as revenues, investigating whether Tesoro had some sort of side agreement in Idaho Falls, Idaho, that would violate antitrust laws, identifying retaliation against Wallace for raising concerns about violations of the Tesoro Code of Conduct on certificates of compliance in 2008 and 2009, and investigating and reporting suspected wire fraud from inconsistent discounts and price signaling. *Wallace v. Tesoro Corp.*, 796 F.3d 468, 473 (5th Cir. 2015). Tesoro moved to dismiss, and the undersigned recommended granting the motion as to the first three categories of protected activity and allowing amendment to cure deficiencies related to the wire fraud-based claim. *Id.* In addition to filing objections, Wallace filed a third amended complaint. *Id.* at 474.

Tesoro moved to dismiss it, raising the argument that the wire fraud-based claims had not been presented in the OSHA complaint and were, therefore, unexhausted. *Id.* The undersigned recommended dismissing that complaint based on the failure to exhaust, to which Wallace objected. *Id.* The District Court accepted the recommendations, dismissing the first three categories of protected activity from the second amended complaint.

On appeal, the Fifth Circuit found that SOX has an exhaustion requirement, and the District Court correctly concluded that Wallace's wire fraud-based protected activity was outside the scope of the OSHA complaint or any investigation it would reasonably prompt. *Wallace*, 796 F.3d at 474. Wallace did not question the District Court's conclusions that his Idaho Falls-related activity was not protected activity and that Tesoro was unaware of any of Wallace's actions relating to Idaho Falls; he, therefore, abandoned any challenge to them. *Id.* Wallace did not object to the recommended dismissal of the 2008 Certificate and did not challenge the reason given for dismissing the 2009 Certificate. *Id.* The Court of Appeals concluded that Wallace had stated a claim upon which relief could be granted regarding his investigating Tesoro's allegedly booking taxes as revenue and had adequately pleaded that he engaged in protected activity relating to that practice. *Id.*

Factual Background

Plaintiff Kevin Wallace worked for Tesoro from June 24, 2004 until his termination on March 12, 2010. In 2009 and 2010, he served as Tesoro's Vice President of Pricing and Commercial Analysis as a member of the Marketing Department. Wallace also managed the Pricing team. In his role as VP, his job duties were to establish national prices for refined petroleum products for retail and wholesale channels, establish market strategies to achieve financial objectives which required detailed understanding of revenues, costs and competitors pricing and strategies, supervision of employees that conducted detailed analysis of financial performance (commercial analysis), as well as manage the pricing input process into Tesoro's systems. Both the Pricing and Wholesale Marketing teams reported to Claude Moreau, Senior Vice President of Marketing who, in turn, reported to Executive Vice President and Chief Operating Officer Everett Lewis.

Lewis assigned Wallace the project of investigating why the reported financial performance by the arious channels (sales of petroleum products by category: retail, wholesale, unbranded wholesale, and bulk) did not make sense in light of the known market conditions. In 2009, as part of this investigation into profitability, Wallace's Pricing team looked at Tesoro's internal reports to determine whether Tesoro was making the right choices in where they sold its product and for what prices. Marketing's cash forecasting did not appear to be making sense, and Wallace's team was endeavoring to figure out why. Upon reviewing the

early 2010 invoices in the first week of February 2010, Wallace formed the opinion that they were not constructed appropriately. He met with Greg Belisle, Director of Commercial Accounting, and asked with respect to the invoices, "This doesn't look right. Would – is – are we – are we wrong?" According to Wallace, Belisle responded, "That doesn't look right. I want to go check with Tesoro's best expert on GAAP (Generally Accepted Accounting Principles)." According to Belisle, the accountants informed him that booking taxes as revenues was acceptable while, according to Wallace, Belisle came back and told Wallace that the invoices were wrong.

Wallace then sent an email to Moreau, which he also forwarded to Tracy Jackson, Vice President of Internal Audit ("IA"). The e-mail referred to "inadequate costing of taxes" but stated that "[e]xternal retail could be ok because it is treated differently in the intracompany process." After sending the email, Wallace next met with Jackson and two of her subordinates in IA on February 9, 2010. On February 9, 2010, Wallace sent an email to Jackson, Belisle, and Bruce Gillett, Plant Comptroller Northwest, indicating he did not believe it was a corporate level problem. Meanwhile IA made its own inquiry and determined, from an external corporate reporting perspective, there was no discrepancy.

Wallace testifies that the next communication he had regarding booking taxes as revenues was a meeting with Moreau, which his subordinates Michelle Todesco and Jeff Evans, Director of Pricing, attended.

His presentation to Moreau showed sales taxes as included in revenues in internal retail transaction data. According to Wallace, Moreau expressed the view that it was "no big deal," to which Wallace responded, "Yes, it is. And in the case of Hawaii (where the sales tax is 50 cents a gallon), it's enormous." Moreau then said, "Well, this is a problem for the CEO – Bruce Smith." Wallace believed that the booking of taxes as revenue "caused a distortion of marketing's earnings" because "the revenue should not include sales taxes and it was including sales taxes." During the latter part of February and early March 2010, Wallace exchanged multiple emails with Moreau discussing the implications of Tesoro's practice of booking taxes as revenue.

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Beginning around late October 2009, Wallace became the subject of employee complaints that he engaged in inappropriate behavior, including displaying overt favoritism, publicly berating employees, and behaving autocratically and insubordinately. Tesoro initiated an investigation into the complaints. Employees told Employee Relations ("ER") that Wallace unilaterally refused to abide by an agreement that had been reached by the Wholesale Marketing and Pricing Departments at a meeting in Long Beach, California in September 2008, despite the fact that Moreau endorsed the Long Beach process. Bruce Tophoj told ER that the Pricing and Marketing Departments did not get along because of "Kevin's behavior; Kevin's attitude; he was brusk [sic]; he was abrupt; he was not a team player and that made the working relationship

very difficult." One employee stated that Wallace "routinely disregards SVP's Claude Moreau's requests" and instructs employees to be insubordinate to Moreau. ER also received reports that Wallace was dishonest and unethical.

On January 24, 2010, Rose Sambrano, the Director of Employee Relations and Compliance, sent Moreau and Lewis a document entitled "Allegation of 'Hostile Work Environment' Summary and Recommendations," which summarized the information collected in the investigation to date. ER recommended several different options to address Wallace's behavior, including progressive discipline, a performance improvement plan, and an executive coach. Sambrano also prepared for Moreau a draft of year-end comments for Wallace's performance evaluation.

On February 4th and on February 12th, employees again complained to ER of being publicly criticized by Wallace. On March 3, 2010, Lewis, Moreau, Sambrano and Earl Pete Borths, the Managing Director for Employee Relations, met to discuss the recent developments with respect to Wallace and what actions should be taken. Given the escalation of complaints, as well as the opinion that Wallace's problematic management style would be "very difficult" to change, the participants in the meeting decided that Wallace's employment should be terminated. Moreau seemed reluctant to take this route and the least supportive of the group of this decision, but he accepted Sambrano and Borth's recommendation to terminate. Moreau was the final decisionmaker. It was further determined that Wallace's

position should be eliminated so that he could receive severance benefits. Wallace was informed of the termination decision on March 12, 2010.

Analysis

Title 18 U.S.C. § 1514A, entitled "**Civil action to protect against retaliation in fraud cases**," provides:

(a) **Whistleblower protection for employees of publicly traded companies.** – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

. . .

> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . .

To prevail on a SOX whistleblower claim, an employee must prove by a preponderance of the evidence that (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Allen v. Administrative Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008). SOX prohibits a publicly-traded company from retaliating against an employee who reports information to a supervisor "regarding any conduct which the employee reasonably believes constitutes a violation" of one of the six enumerated categories. 18 U.S.C. § 1514A(a)(1). An employee's reasonable belief must be scrutinized under both a subjective and objective standard. *Allen*, 514 F.3d at 477.

In support of its motion for summary judgment, Tesoro alleges that Wallace never engaged in any SOX-protected activity. Tesoro first states that he never "provided information" about a "reasonable belief" of a violation of "federal law relating to fraud against shareholders" or an SEC rule violation with respect to booking taxes as revenues. In *Allen*, the Fifth Circuit held, based upon the law at the time, that an employee's complaint must "definitively and specifically relate" to one of the six enumerated categories found in § 1514A. *Allen*, 514 F.3d at 476-77. As recognized in

the appeal of this case, the Administrative Review Board ("ARB") has since reconsidered the issue and interpreted SOX not to require that the communication definitively and specifically relate to one of the six SOX categories. *Wallace*, 796 F.3d at 479. *See Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2517148, at *14-15 (ARB May 25, 2011). The "critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law." *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 109 (5th Cir. 2014) (*quoting Sylvester*, 2011 WL 2517148, at *15). *See Wallace*, 796 F.3d at 479.

On appeal, the Fifth Circuit found that Wallace had sufficiently pleaded that he thought the accounting practice of booking taxes as revenue violated SEC rules. As the Court of Appeals noted, the objective reasonableness of an employee's belief under SOX cannot be resolved as a matter of law if there is a genuine issue of material fact. *Wallace*, 796 F.3d at 479-80. As an element of his cause of action, Wallace must create a genuine issue of fact regarding the objective reasonableness of his belief to survive summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. at 322-23. Thus, he must create a genuine issue of fact that he believed the practice of booking taxes as revenue violated SEC rules. *See Wallace*, 796 F.3d at 479-80.

1. Objective reasonableness

In his Fourth Amended Complaint, Wallace alleges that:

> . . . as part of his job as Tesoro VP of Pricing and Commercial Analysis, Mr. Wallace discovered taxes collected by Tesoro were being booked as revenue and costs were falsely attributed to transactions producing overstated profits in both the branded retail segment and the unbranded marketing segment. The practice of booking the taxes and underreporting costs artificially inflated the profits reported, thereby skewing the financial results reported on the Company's 10-K and 10-Q filings with the SEC. Prior to his termination, Mr. Wallace reported to Sr. VP of Marketing Claude Moreau (his direct supervisor) and Internal Audit that Tesoro was not capturing the revenues properly in the unbranded segment, that the costs were incorrect, and that the profits reported were incorrect.

Fourth Amended Complaint, ¶ 25.

> Wallace discovered that taxes were being booked as revenues, thereby artificially inflating the profitability of certain segments of Tesoro. These numbers are reported to the SEC in the company's annual 10-K filing and quarterly 10-Q filings. Thus, Tesoro was knowingly reporting inaccurate information on its SEC-required reporting and in violation of GAAP accounting standards (also an SEC requirement).

Fourth Amended Complaint, ¶ 28.

> Tesoro has misrepresented financial performance internally and externally in reported financial results, to include the total revenue

> numbers reported in the 10-K and 10-Q SEC filings, as a result of the "booking of taxes as revenues" that Mr. Wallace reported and attempted to correct. Sr. VP Claude Moreau told Mr. Wallace that the substance of Mr. Wallace's findings created problems for Bruce Smith, CEO, as Mr. Smith had informed the Tesoro Board of Directors of different financial results. The foregoing conduct of defendant as discovered and reported by Mr. Wallace violated the provisions of Section 13a of the Securities Exchange Act of 1934 and Rule 13a-15 to maintain and ensure accurate financial reporting and to "devise and maintain a system of internal controls." and Section 13b of the Securities Exchange Act of 1934,15 U.S.C. § 78m(b)(2)(B) requirements that no person shall knowingly falsify any book, record, or account. See also 17 C.F.R. § 240.13b2.

Fourth Amended Complaint, ¶ 32.

Tesoro states that Wallace could not have had an objectively reasonable belief of a SOX-covered violation at the time of his reports based on the limited scope and timeframe of the issue he allegedly discovered and reported. The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee. *Allen*, 514 F.3d at 477. Wallace's resume reflects that, prior to joining Tesoro, he had years of business experience in areas including capital projects, economic analysis, market analytics, and

complex strategic planning. In 2010, Wallace was aware that Tesoro filed annual Form 10-Ks with the SEC and was a subcertifier of the accuracy and correctness of quarterly and annual filings. On March 12, 2010, the date of his termination, he submitted his 2009 Annual Certificate of Compliance, indicating that he was not aware of any business or financial transactions that were not properly authorized, negotiated, or recorded and was not aware of any noncompliance with the Tesoro Code of Conduct. Thus, the issues he discovered and reported were limited to the first several weeks of 2010. Also, his emails in early February reflect that whatever discrepancies were created by booking taxes as revenues were only an internal accounting problem, not one that affected the external segment. By that time, complaints had already been made against him by his employees regarding his improprieties as a manager, and Tesoro was investigating what sanctions should be taken against him.

Tesoro contends that Wallace could not have reasonably believed that booking taxes as revenue was fraud or violated SEC rules because Tesoro disclosed the practice on the reports it filed with the SEC. Importantly, an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected. *Allen*, 514 F.3d at 477. A reasonable person in the same factual circumstances with the same training and experience as Wallace would have made some effort to determine if Tesoro was maintaining and ensuring accurate financial reporting and

knowingly falsifying books, records, and accounts by reporting taxes as revenues. No facts in evidence suggest that he did so.

Wallace attempts to justify this failure by arguing that the SEC reports only reflect the reporting of excise taxes, not sales taxes. Tesoro's 2008 10-K, filed on March 2, 2009, states that both "Revenues" and "Costs of sales and operating expenses" "Include[] excise taxes collected by our retail segment." Tesoro filed its Form 10-K for the year ending December 31, 2009 on March 1, 2010. Tesoro's 2009 10-K states that both "Revenues" and "Costs of sales and operating expenses" "Include[] excise taxes collected by our retail segment." Tesoro filed its Form 10Q for the third quarter of 2009 on November 9, 2009. That 10-Q states: Federal and state motor fuel taxes on sales by our retail segment are included in both "Revenues" and "Costs of sales and operating expenses." Tesoro's Form 10-Q for the first quarter of 2010 contains the same statement.

Tracy Jackson, the Tesoro Comptroller, testified that the 10-K disclosure language "[t]hese taxes, primarily related to the sales of gasoline and diesel fuel" includes sales taxes. Response, exh. 3, pp. 227-28. To contradict Jackson, Wallace offers the testimony of Douglas Rule who was employed by Tesoro from May 2005 until April 2016. His testimony regarding sales and excise taxes has been stricken. The Tesoro 2008 10-K indicates under the subtitle *Revenue Recognition*:

> We include transportation fees charged to customers in "Revenues", and we include the related costs in "Costs of sales and operating expenses" in our statements of consolidated operations. Federal excise and state motor fuel taxes, which are remitted to governmental agencies through our refining segment and collected from customers in our retail segment are included in both "Revenues" and "Costs of sales and operating expenses". These taxes, primarily related to sales of gasoline and diesel fuel, totaled . . .

The Tesoro 2009 10-K indicates under the subtitle *Revenue Recognition*:

> Federal excise and state motor fuel taxes, which are remitted to governmental agencies through our refining segment and collected from customers in our retail segment, are included in both "Revenues" and "Costs of sales and operating expenses." These taxes, primarily related to sales of gasoline and diesel fuel, totaled . . .

As Jackson testified, this language indicates that Tesoro reported that it included sales taxes as revenue.

Also, as noted above, the "critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law." *Villanueva*, 743 F.3d at 109 (*quoting Sylvester*, 2011 WL 2517148, at *15). *See Wallace*, 796 F.3d at 479. Wallace claims that Moreau and others had an incentive to book sales taxes as revenue in order to inflate marketing revenue and, consequently, their

compensation. Thus, Moreau had a motive to squelch Wallace's investigation by terminating him.

Congress enacted the Sarbanes-Oxley Act of 2002 to safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation by protecting whistleblowers. *Lawson v. FMR LLC*, 134 S.Ct. 1158, 1161, 188 L.Ed.2d 158 (2014). It is clear from the record that Wallace was not a whistleblower under SOX. His focus was not on a violation of federal law but on the impact on Tesoro profitability of reporting taxes as revenue. According to Wallace, when he presented the issue of booking taxes as revenue to Moreau, Moreau expressed the view that what Wallace was showing him was "no big deal." Wallace responded that it was and, in the case of Hawaii with a 50 cents a gallon sales tax, the problem was enormous, creating a very different result on the profitability of assets in Hawaii. Moreau then said it was a problem for the CEO Bruce Smith who had made a different report to the Board.

Initially, prior to any communication with Moreau, Wallace indicated to Belisle and Jackson his belief that the problem of booking taxes as revenue was regional only and did not reach the corporate level. Assuming he did report to Moreau that the problem was corporate-wide, it is undisputed that in none of the emails or meetings with Moreau did Wallace articulate any belief regarding fraud, intentional misconduct, violation of laws, or violation of SEC rules. Wallace never suggested in any of his communications any issue of actual or imminent violation of a federal law relating

to fraud against shareholders or an SEC regulation. While Wallace may have been correct that booking taxes as revenue caused Tesoro's "numbers" to be incorrect, that did not translate into a report to Moreau that Tesoro was falsifying SEC forms or violating SEC rules. Wallace has failed to create a genuine issue of fact regarding his objective reasonable belief that Tesoro's booking of taxes as revenue violated SEC rules or constituted shareholder fraud. *See Allen v. Admin. Review Bd.*, 514 F.3d 468, 479 (5th Cir. 2008) (considering the fact that she is an accounting expert and Stewart's SEC statements were publicly available, Waldon could have ascertained whether Stewart's SEC statements failed to comply with SAB-101 and informed her supervisors of this fact, but she did not).

2. Contributing factor and avoidance of liability

Next, Tesoro states that two of the three decisionmakers in his termination had no idea Wallace raised an issue of booking taxes as revenue, and the third (Moreau) accepted the termination recommendation made by the others. Tesoro contends that Wallace's termination was related not to his alleged protected activity but, rather, to an ER investigation showing that he displayed disrespect for subordinates, peers, and management, refused to work with others, was an arbitrary micromanager who displayed favoritism, and intimidated others to get his own way. Tesoro argues that the events leading to Wallace's termination clearly and convincingly demonstrate that Tesoro would have

terminated any employee under the circumstances, even in the absence of any purported "protected activity."

As noted above, beginning around late October 2009, Wallace became the subject of employee complaints that he engaged in inappropriate behavior, including displaying overt favoritism, publicly berating employees, and behaving autocratically and insubordinately. Tesoro initiated an investigation into the complaints. On January 24, 2010, Rose Sambrano, the Director of Employee Relations and Compliance, sent Moreau and Lewis a document entitled "Allegation of 'Hostile Work Environment' Summary and Recommendations," which summarized the information collected in the investigation of employee allegations against Wallace. The report indicated that Wallace was an arbitrary micromanager, displaying favoritism/bias, ignores core values, refusing to work with others, refusing to abide by group decisions/agreements, sometimes refusing management's requests, demonstrating little respect for management, peers, and direct reports, and intimidating to achieve his "way." ER recommended several different options to address Wallace's behavior, including progressive discipline, a performance improvement plan, and an executive coach. Sambrano also prepared for Moreau a draft of year-end comments for Wallace's performance evaluation.

On February 4th and on February 12th, employees again complained to ER of being publicly criticized by Wallace. On February 12th, Monica Prado emailed Sambrano to complain that Wallace had just publicly

excoriated her in the middle of a team meeting for using non-final figures for a forecast. When given the opportunity to explain his behavior, Wallace "said that he was justified in criticizing her in the meeting on February 12. He knew he was terse and curt, and he was exasperated beyond frustration with her. He was matter of fact and unapologetic." When told he should not have raised his voice to Prado at a recent staff meeting, he responded that "he intentionally 'burned' her [Prado] because she deserved it and that he was not out of line when people needed to be embarrassed publicly."

On March 2, 2010, Sambrano received an email from Lianne McClure, one of Wallace's direct reports, stating that his behavior continued to include criticizing and yelling publicly at employees, contradicting senior management, telling lower level employees to disregard instructions from senior level employees, and undermining his direct reports by showing favoritism to certain individuals who were their direct reports. Motion for Summary Judgment, Sambrano Decl. McClure revealed that she "recently had a miscarriage and [she] believe[s] the stress [she] continue[s] to endure by Kevin was a contributing factor to [her] health. . . . This is an ongoing hostile environment that no one should have to endure." On March 3, 2010, Lewis, Moreau, Sambrano and Earl Pete Borths, the Managing Director for Employee Relations, met to discuss the recent developments with respect to Wallace and what actions should be taken. *Id*. According to Sambrano, Moreau had explored transferring Wallace to an

individual contributor role, but was unable to find a manager of another department who was willing to allow Wallace to join. *Id*. Ultimately, Borths and Sambrano recommended that Wallace should be terminated in light of the extensive nature of the complaints by other employees about Wallace's managerial style, his destructive impact on the working environment, including Lianne McClure's highly disturbing and recent disclosure about her stress-induced miscarriage, as well as the opinion of Bruce Tophoj that Wallace's problematic management style would be difficult to change. *Id*. Moreau seemed reluctant to take this route and the least supportive of the group of this decision, but he accepted. *Id*. It was further determined that Wallace's position should be eliminated so that he could receive severance benefits. *Id*.

In *Hemphill v. Celanese Corp.*, 430 F.App'x 341, 342 (5th Cir. 2011), a case similar in several material respects to the case at bar, Jeff Hemphill, employed as an auditor by Celanese Corporation, identified and reported several potential violations of law and company policy regarding a Celanese construction project in Mexico. Ultimately, it was determined that company policy, but not federal law, was violated. Hemphill also worked on another project reviewing the travel and entertainment records for several Celanese employees and discovered certain violations of company policies. Hemphill later testified that these violations created the risk of a "books and records violation" of SEC rules. Hemphill's attempt to raise this issue with Celanese's audit committee was rebuffed.

Shortly after these matters, Hemphill was involved in an incident in which he began yelling at his secretary in an abusive manner. One witness described his behavior as "outrageously rude and completely unprofessional"; "atrocious"; "a one-sided rant by Mr. Hemphill . . . she was spoken to like a dog." Another witness stated Hemphill was "aggressive" and "abusive." Human Resources conducted an investigation and recommended termination. Hemphill's supervisor, who was the subject of the SOX-related retaliation allegations, accepted the recommendation and terminated Hemphill's employment.

Hemphill sued under the whistleblower protection provisions of SOX, arguing that Celanese terminated his employment on the basis of activity protected by that statute. The District Court granted Celanese's motion for summary judgment, holding that Hemphill's protected activity was not a contributing factor in his termination and, moreover, that Celanese demonstrated by clear and convincing evidence that it would have terminated Hemphill regardless of his protected activity.

On appeal, the Fifth Circuit noted that, even if it assumed arguendo that Hemphill could establish a factual dispute as to whether his protected activity was a contributing factor in Celanese's termination decision, Celanese could still avoid liability by presenting "clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of that protected behavior." *Hemphill*, 430 F.App'x 341, 345 (5th Cir. 2011) (*Allen*, 514 F.3d at 476). *See* 49

U.S.C. § 42121(b)(2)(B)(iv). In affirming the grant of summary judgment, the Court of Appeals noted that Celanese had shown that its human resources department conducted a thorough investigation of the incident involving Hemphill's verbal abuse of his secretary. *Id.* The primary human resources employee conducting the investigation had no prior knowledge of Hemphill's auditing activities. *Id.* She interviewed several employees who witnessed the incident and reported Hemphill's behavior. *Id.*

Likewise, Tesoro's ER conducted a thorough and independent investigation of misconduct complaints against Wallace. Unlike the single incident which resulted in Hemphill's termination, the complaints against Wallace were far more extensive and occurred over a longer period of time, and the investigation against him began well before he reported the alleged violations which form the basis for his SOX retaliation complaint. Sambrano's initial report to Moreau concerning the investigation did not recommend termination. Only after additional complaints were received in February and March showing continued misconduct by Wallace which potentially subjected to Tesoro to liability to another employee for his actions, did she and Borths, in consideration of Bruce Tophoj opinion that Wallace's problematic management style would be difficult to change, recommend dismissal.

The Court of Appeals in *Hemphill* further found that no evidence suggests that the two executives who contributed to the decision to fire Hemphill – the human resources director and vice president of human

resources – had any particular knowledge of or interest in Hemphill's auditing work. *Hemphill*, 430 F.App'x at 345. The only executive participating in the termination decision who worked with Hemphill on the audits and knew of his discovery of accounting irregularities was Hemphill's supervisor. *Id.* The undisputed evidence indicates, however, that Hemphill's supervisor simply accepted the unanimous termination recommendation provided to her by Human Resources. *Id.*

Similarly, no summary judgment suggests that either Sambrano or Borths, the Director of Employee Relations and Compliance and the Managing Director for Employee Relations, who made the recommendation to terminate had any knowledge of Wallace's complaints that Tesoro was booking taxes as revenue in violation of SEC rules.[1] As in *Hemphill*, Wallace's supervisor, who approved the termination, was aware of his complaints. The undisputed evidence in the case at bar, indicates that Moreau, the final decisionmaker, attempted unsuccessfully to move Wallace to another position in the company to avoid termination. As in *Hemphill*, he reluctantly accepted the termination recommendation of Sambrano and Borths.

The Court of Appeals in *Hemphill* concluded that the evidence clearly and convincingly showed that Celanese terminated Hemphill because Celanese concluded that he mistreated his secretary. *Hemphill*, 430

[1] There is no summary judgment evidence that either Belisle or Jackson, the other two Tesoro officers to whom Wallace complained about booking taxes as revenue, played any part in the decision to remove him from the company.

F.App'x at 345. The Fifth Circuit rejected Hemphill's contention that Celanese's investigation was unreliable because HR did not interview additional employees who may have witnessed the incident. *Id.* Hemphill produced no affidavit, sworn statement, or any other admissible evidence beyond his own testimony demonstrating that these other witnesses would have testified in his favor, much less absolved him. *Id.* In short, Hemphill produced no evidence casting doubt on the integrity of the investigation. *Id.* Thus, the District Court was correct that Celanese established by clear and convincing evidence that Celanese would have terminated Hemphill regardless of any protected activity. *Id.*

In the case at bar, Wallace attacks the integrity of Sambrano's investigation. He states she had no idea if Wallace's concerns about whether the specific business process [sic] were legitimate or not, and had no discussions concerning antitrust issues and how Tesoro was pricing its fuels. Wallace also mentions Prado's performance issues. These matters were not Sambrano's concern and would not justify Wallace's behavior under any circumstances. Wallace notes that Sambrano had not completed the investigation of the employees' complaints about him at the time of his termination. This is correct as of the time she submitted her initial report on January 24th. However, additional complaints in February and March from Prado and McClure forced Tesoro to act.

Wallace states that Sambrano never recommended that he be terminated. This is simply not true.

In her Declaration of December 13, 2016 Sambrano clearly testifies that, at the meeting of March 3, 2010, "[u]ltimately, Borths and I recommended that Wallace should be terminated . . . " Motion for Summary Judgment, Sambrano Decl.

Wallace claims Sambrano never asked him for his side of the story. The investigation was apparently kept secret because both Prado and McClure feared retaliation by Wallace. Response, exh. 29, p. 126. In any event, he was given the chance to discuss his public berating of Prado on February 12th and believed he was fully justified in being "terse and curt." Wallace intentionally humiliated her publicly because he believed she deserved it, and he was unapologetic.

In contrast to *Hemphill*, Wallace has presented two statements ostensibly contradicting the findings of the ER investigation. Michelle Todesco, was hired in 2008 as a Marketing Analyst, and reported to Steve Ecker who was below Wallace in the chain of command. She testified that, as a manager, Wallace encouraged and helped her (and others) to succeed. She states he was an excellent manager and, in her experience, treated all employees with respect. Response, exh. 6. Kristi Burchers, worked for Tesoro in late 2009 and early 2010 as a Pricing Manager and reported directly to Wallace. She also testified that Wallace was an excellent manager and, in her experience, treated all employees with respect. Response, exh. 7. Neither Todesco nor Burchers was interviewed by ER during the investigation into wrongdoing by Wallace.

As Todesco and Burchers are two of the employees to whom Wallace is accused of showing favoritism, their testimony that, *in their experience*, Wallace treated all employees with respect carries little weight. In any event, they do not provide evidence refuting any of the specific events which formed the basis for the investigation and findings in the ER report. Additionally, their testimony says nothing about the conclusions concerning Wallace's insubordination or dishonesty.

Significantly, at no point does Wallace deny *any* of the allegations made against him. As noted above, he appeared to take pride in publicly berating Prado because he believed she deserved it. No summary judgment evidence, from Todesco, Burchers or even Wallace himself, contradicts the ER findings that he was insubordinate and dishonest. It is not the role of the Court to second-guess a human resources decision that followed a thorough investigation. *Wiest v. Tyco Elecs. Corp.*, 812 F.3d 319, 333 (3d Cir.), *cert. denied*, 137 S.Ct. 82, 196 L.Ed.2d 198 (2016). The evidence clearly and convincingly shows that Tesoro terminated Wallace's employment because Tesoro concluded that he engaged in misbehavior in several respects as regards his subordinates, peers and supervisors. Tesoro has established by clear and convincing evidence that it would have terminated Wallace regardless of any protected activity. *See Hemphill*, 430 F.App'x at 345.

RECOMMENDATION

It is the recommendation of the Magistrate Judge that the motion of Tesoro for summary judgment be **GRANTED**.

Instructions for Service and Notice of Right to Object

The District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either electronically or by mailing a copy by certified mail, return receipt requested. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2), Fed.R.Civ.P., any party who desires to object to this Memorandum and Recommendation must serve and file specific written objections within 14 days after being served with a copy. Such party shall file the objections with the District Clerk and serve the objections on all other parties and the Magistrate Judge. A party's failure to file written objections to the findings, conclusions, and recommendations contained in this report within 14 days after being served with a copy shall bar that party from de novo review by the District Judge of those findings, conclusions, and recommendations and, except on grounds of plain error, from appellate review of factual findings and legal conclusions to which the party did not object, which were accepted and adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 150 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

SIGNED February 23, 2017.

/s/ John W. Primomo
JOHN W. PRIMOMO
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50927

KEVIN WALLACE,

Plaintiff - Appellant

v.

ANDEAVOR CORPORATION,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

(Filed Apr. 3, 2019)

(Opinion 02/15/2019, 5th Cir., 916 F.3d 423)

Before JONES, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

Plaintiff Kevin Wallace petitioned this court for rehearing *en banc*. The issue for which Wallace seeks full court consideration is "whether, in applying section 1514A(a) of the Sarbanes-Oxley Act, the determination as to whether a plaintiff's belief was objectively

reasonable is a matter for the trier of fact so long as reasonable minds could disagree about that question."

Wallace asserts that the panel's opinion conflicts with our precedent that the "objective reasonableness of an employee's belief cannot be decided as a matter of law if there is a genuine issue of material fact." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008). We applied that standard and found there were no genuine issues of material fact here. The issue of Wallace's objective reasonableness was thus properly decided as a matter of law. *See id.*

Wallace also asserts that the panel opinion conflicts with a Supreme Court precedent discussing "whether a judge or a jury should determine whether tacking is available in a given case." *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 909 (2015). Although that precedent is not directly on point, we note that despite the Court's conclusion that tacking "operates from the perspective of an ordinary purchaser or consumer," and is thus a question for the jury, *id.*, the Court nevertheless holds that if "the facts warrant it, a judge may decide a tacking question on a motion for summary judgment or for judgment as a matter of law." *Id.* at 911.

Finally, Wallace asserts that the panel's opinion conflicts with certain decisions from our sister circuits and the Administrative Review Board applying standards similar to the one this circuit articulated in *Allen*. Even if that is so, and we do not so hold, we have

determined that our analysis is consistent with *Allen*, which is the controlling authority.

* * *

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
UNITED STATES CIRCUIT JUDGE

*Judge DENNIS did not participate in the consideration of the rehearing en banc.