DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND ORDER DISMISSING COMPLAINT (DECEMBER 16, 2016)

U.S. DEPARTMENT OF LABOR
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
11870 MERCHANTS WALK–SUIT 204
NEWPORT NEWS, VA 23606

In the Matter of:
MICHAEL B. BROWN,

Complainant,

v.

SYNOVUS FINANCIAL CORPORATION,

Respondent.

Case No.: 2015-SOX-00018

Before: Alan L. BERGSTROM,
Administrative Law Judge.

This case arises under the employee "whistle blower" protection provisions of Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, as amended (SOX),

18 U.S.C.A. § 1514A and its implementing regulations found at 29 CFR Part 1980 and Part 18, Subpart A. Section 806 provides "whistleblower" protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain "protected activity" by the employee. This complaint was referred to the Office of Administrative Law Judges for formal hearing upon appeal by Complainant of the April 24, 2015, Occupational Safety and Health Administration determination that there was no reasonable cause to believe the Respondent violated the Complainant's rights under SOX.

By Order issued February 11, 2016 the formal hearing scheduled to commence on May 24, 2016 was re-scheduled to commence at 10:30 AM, Tuesday, May 17, 2016, in Atlanta, Georgia. By Order dated April 20, 2016, the May 17, 2016 formal hearing was cancelled pending resolution of Respondent's Motion for Summary Decision.

PROCEDURAL HISTORY

On Thursday, July 3, 2014, Complainant, through his counsel, filed a complaint of retaliation under SOX with the Occupational Safety and Health Administration (OSHA). The Complainant alleges that he was employed by Respondent from November 19, 2007 through January 6, 2014, at which time his employment as an Audit Manager was involuntarily terminated. He alleges—

> "On numerous occasions throughout his employment, [the Complainant] complained to his supervisors that they were preventing him from thoroughly and accurately conduc-

> ting audits, altering audit work papers to lessen the severity of his audit findings, and blocking him from reporting matters requiring immediate attention (MRIA) to management. [The Complainant] reasonably believed that these actions could mislead Synovus' Board as to actual risks, materially affect financial statements, and deceive investors. When [the Complainant] reported his concerns to management, he was met with unwarranted performance-based criticism, placed on unjustified Performance Improvement Plan (PIP) and ultimately terminated, in retaliation for his complaints."
>
> He also alleges he "was reassigned in retaliation for his audit findings to [S. Weekley's] team which was responsible for operations audits—a less desirable assignment" . . . [and in 2010, the Complainant's] role of auditing Finance areas was drastically reduced . . . [and his] role in performing SOX controls was substantially reduced to almost none."

In support of his alleged protected activity, the Complainant points to his work with the 2008 Tax Audit, Tax Footnotes to the 2008 financial statements, the 2009 Melton Region Lending Audit, Fraud Risk Assessment from late 2009 to mid-2010, the June 2011 Corporate Trust Audit, and the December 2013 Tax Audit.

On April 12, 2016, Respondent's counsel filed "Respondent Synovus Corp.'s Motion for Summary Decision and Memorandum in Support" with extensive attachments. Respondent seeks to have the complaint dismissed and, in support thereof, submits that "this

case is appropriate for summary decision . . . for three independent reasons, any one of which requires entry of a summary decision for Synovus:

- Synovus made the decision to discharge [the Complainant] substantially before the action he identifies as his alleged protected activity, and therefore he cannot prove that the alleged protected activity contributed to his discharge.
- [The Complainant's] now-claimed alleged protected activity, his pre-Christmas, late-night submission of a routine workpaper on a tax audit, was not, and was not perceived to be, protected activity as defined by Sarbanes-Oxley.
- Even if [the Complainant] could establish each and every element of his claim on which he bears the burden of proof, Synovus would have terminated [the Complainant] for his longstanding and persistent unsatisfactory performance in the absence of any alleged protected activity."

On April 12, 2016, Respondent's counsel also filed joint stipulations of the Parties that (1) the Complainant began employment with Synovus as a Senior Auditor on November 19, 2007 and became an Audit Manager in 2008; and (2) the Complainant's last day of employment was January 6, 2014.

Respondent submits in its Motion that the Complainant was placed on a Performance Improvement Program (PIP) in December 2012 by S. Weekley prior to a September 2013 decision to terminate the Complainant's employment. Respondent asserts that the Complainant worked as an Audit Manager in Respondent's Internal Audit Department, which "is

responsible for testing and evaluating Synovus's internal controls and processes (checks and balances designed by management to ensure that objectives are being met in accordance with all applicable standards) to ensure that they are adequate and functioning to manage and mitigate risk . . . it is not responsible for creating or reviewing Synovus's external financial reports (*i.e.*, those reports filed with the SEC) . . . [it] also does not perform testing for consumer compliance, nor is it responsible for credit administrative loan quality reviews; those functions are handled by other departments with the proper expertise. . . . None of the work Internal Audit performs materially affects Synovus's SEC filings, filings with tax agencies, or information provided shareholders." Respondent submits that the Complainant was placed on the PIP for a "continued pattern of poor performance" and that when the Complainant failed to respond to continued counseling sessions, supervisor feedback, and the PIP, a decision was made in September 2013 to terminate the Complainant's employment at the end of 2013.

On May 17, 2016 Complainant's counsel filed a "Response to Motion for Summary Decision" with supporting attachments. He submits that on November 30, 2012 the Complainant requested his name be removed for the SOX controls audit report and that the Complainant was placed on a 45-day PIP commencing December 10, 2012, which he successfully completed in January 2013 and continued with his employment. He submits that during 2013 the Complainant notified superiors and IT personnel of problems uploading and adding files to the work program 'Paisley' and with the program reflecting

the actual dates of completion or modification. He submits that in December 2013 Respondent identified the Complainant as a low performer, based in part on information from the "Paisley" program, during the evaluation period and that the Complainant was subsequently terminated upon his return from vacation in January 2014. He submits that the "Complainant received no written warnings and/or disciplinary infractions following receipt of his 2012 PIP and thus was unaware of any indication of potential termination." He argues that Respondent "claims legitimacy in terminating Complainant based on an improvement plan, from a year prior, as a futile effort to justify retaliating against Complainant for his unwillingness to participate in potentially fraudulent loan activity." Complainant's counsel argues that the Complainant filed a work paper in December 2013 in which he concluded, as an auditor, that 13 of 15 loans contained issues involving manipulation of the loans to avoid downgrading the loan that could or should preclude accruing interest and that the issues impacted state and federal tax returns and could impact on financial reporting. He argues that there is a genuine issue of fact as to the objective reasonableness of the complaint, when a decision to terminate the Complainant was actually made, and the contributing factor protected activity played in the decision to terminate the Complainant's employment.

On May 17, 2016, Respondent's counsel filed a "Supplement and Reply in Support of Respondent Synovus Financial Corp.'s Motion for Summary Decision" with attachments. She argues that the "undisputed material facts compel entry of a summary decision in its favor because the decision to terminate

alleged protected conduct." She argues that the Complainant's alleged protected activity in 2012 did not contribute to the 2012 PIP; that his alleged protected activity in 2013 did not contribute to the decision to terminate his employment; that his alleged December 2013 protected activity was after the decision to terminate the Complainant's employment had been made, so it could not have contributed to that decision; and that Respondent would have discharged the Complainant regardless of any protected activity.

She submits that a PIP is typically the last pre-termination opportunity to correct unacceptable performance and that the Complainant was explicitly warned that termination may result from a failure to maintain acceptable performance and that the reason for Complainant's termination of employment was "Involuntary Termination Unsat Perf/Violation of Wrk Rules."

STATUTORY AND REGULATORY FRAMEWORK

The evidence of record establishes that the above captioned matter arose from the Parties' actions in Columbus, Georgia, which is within the jurisdictional area of the U.S. Court of Appeals for the Eleventh Circuit. Accordingly, the judicial precedents of the U.S. Court of Appeals for the Eleventh Circuit apply.

SOX, at 18 USC § 1514A, provides in pertinent part:

> (a). . . . No company with a class of securities registered under section 12 of the Security Exchange Act of 1934 . . . or that is required to filed reports

under section 15(d) of the Security Exchange Act of 1934 . . . or any officer, employee, contractor, subcontractor, or agent of such company 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 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–

   (A) a Federal regulatory or law enforcement agency;

   (B) any member of Congress or any committee of Congress; or,

   (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); or

(2) To file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged 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.

(b)

(2)

(D) . . . An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

Implementing federal regulations applicable to the SOX at 29 CFR Part 1980 were revised as a final rule effective March 5, 2015.[1] These regulations provide, in pertinent part:

§ 1980.102 Obligations and prohibited acts.

(a) No covered person may discharge, demote, suspend, threaten, harass or in any other manner retaliate against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee . . . has engaged in any of the activities specified in . . . this section.

(b) An employee is protected against retaliation . . . by a covered person for any lawful act done by the employee:

(1) To provide information, cause information to be provided, or otherwise assist in an

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[1] Fed. Reg., Vol 80, No.43, 11865-11885 (Mar. 5, 2015)

investigation regarding any conduct the employee reasonably believes constitutes a violation of 18 U.S.C. 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–

(i) a Federal regulatory or law enforcement agency;

(ii) any member of Congress or any committee of Congress; or,

(iii) 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); or

(2) To file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of 18 U.S.C. 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.

§ 1980.109 Decision and orders of the administrative law judge.

(a) . . . A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence

[the Complainant's] employment resulted from his persistent, documented performance failings, not from

> that protected activity was a contributing factor in the adverse action alleged in the complaint.
>
> (b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

To prove unlawful retaliation at a formal hearing under SOX, the Complainant must prove by a preponderance of the evidence (1) that the Complainant engaged in the described protected activity, (2) that an appropriate Respondent supervisor, or otherwise authorized employee, had knowledge of the described protected activity, (3) that the Complainant was subjected to an adverse personnel action amounting to discharge or retaliation with respect to compensation, terms, conditions, or privileges of employment, and (4) that the protected activity was a contributing factor in the adverse employment action. 18 U.S.C. § 1514(a); 29 CFR § 1980.109(a); *Palmer v. Canadian National Railway*, ARB Case No. 16-035, 2016 WL 6024269, ALJ Case No. 2014-FRS-00154 (ARB Sep. 30, 2016)[2] SOX "requires an employee demonstrate both a subjective [good faith] belief and an objectively

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[2] In *Palmer* the ARB reversed *Fordham v. Fannie Mae*, ARB No. 12-061, 2014 WL 5511070, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014) and restated it had previously vacated *Powers v. Union Pacific Railroad Co.*, ARB Case No. 13-034, 2014 WL 5511088, ALJ No. 2010-FRS-30 (ARB Oct. 17, 2014), reissued *remand en banc*, 2015 WL 1876029 (ARB April 21, 2015), remand *vacated en banc*, 2016 WL 4238457 (ARB May 23, 2016). The ARB declared that it is legal error to follow the *Fordham* and *Powers* decisions.

reasonable belief that the company's conduct violated a law listed in [§ 1514A(a)(1)]. A subjective belief means that the employee 'actually believed the conduct complained of constituted a violation of pertinent law'" *Gale v. U.S. Dept of Labor*, 384 Fed. Appx. 926, 930 (11th Cir. 2010) *unpub*, citing *Welch v. Chao*, 536 F.3d 269 at 277 n. 4 (4th Cir. 2008); 80 Fed. Reg. 11867-11868 (Mar. 5, 2015) Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 80 Fed. Reg. 11870 (Mar. 5, 2015) If the employee does not prove any one of the required elements by a preponderance of the evidence, the entire complaint fails and warrants dismissal. *Coryell v. Arkansas Energy Services, LLC.*, No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013)

Additionally, relief under SOX may not be ordered if the respondent (its contractor or subcontractor or agent) demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.[3] 29 CFR § 1980.109(b); *Palmer*, *supra*; *Formella v. U.S. Dept of Labor*, 628 F.3d 381 (7th Cir. 2010) "Clear and convincing evidence is 'evidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Coryell*, *supra*, quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013) "'Clear' evidence means the respondent has presented evidence of unambiguous explanations for the adverse action in

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[3] Renamed the "same-action defense" by the ARB in *Palmer, supra*.

question. 'Convincing' evidence has been defined as evidence demonstrating that a proposed fact is 'highly probable.' . . . 'clear and convincing evidence' [is] evidence that suggests a fact is 'highly probable' and immediately tilts' the evidentiary scales in one direction." *Speegle v. Stone & Webster Construction, Inc.*, ARB Case No. 13-074, 2014 WL 1870933, *6 (Apr. 25, 2014) citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

The described conduct which constitutes the alleged violation must have already occurred or be in the progress of occurring based on circumstances that the Complainant observes and reasonably believes at the time the information or the complaint was provided. *Livingston v. Wyeth, Inc.*, 520 F.3d 344 (4th Cir., 2008); *Welch, supra*; *see also Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB, July 29, 2005) While the Complainant need not cite a code section he believes was violated in his communication to the supervisor or other individual authorized to investigate and correct misconduct, the communication must identify the specific conduct that the employee reasonably believes to be illegal, even if it is a mistaken belief. General inquires do not constitute protected activity. The communication only involves what is actually communicated to the covered employer prior to the unfavorable employment action and not what is alleged in the complaint filed with OSHA. *Welch, supra*, citing *Platone v. FLYi, Inc.*, ARB Case No. 04-154 (ARB, Sept. 29, 2006) and *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D.N.Y. 2006)

SUMMARY OF RELEVANT EVIDENCE

Joint Stipulations of Fact

On April 12, 2016 Respondent's counsel filed "Joint Stipulations of Agreed Facts" signed by counsel for the Parties. The Parties stipulated:

1. The Complainant began employment with Synovus as a Senior Auditor on November 19, 2007 and became an Audit Manager in 2008.
2. The Complainant's last day of employment was January 6, 2014.

July 3, 2014, Complainant

In the original complaint the Complainant states he was employed by Respondent from November 19, 2007 through January 6, 2014. He alleges he engaged in protected activity as an auditor during a 2008 tax audit; a 2008 financial statement footnote review/audit; a 2009 Melton Region lending audit; a late-2009 or early to mid-2010 fraud risk assessment of the financial department; a June 2011 corporate trust audit; and a December 2013 tax audit, when he "complained to his supervisors that they were preventing him from thoroughly and accurately conducting audits, altering audit work papers to lessen the severity of his audit findings, and blocking him from reporting matters requiring immediate attention ("MRIA") to management."

The Complainant alleges that shortly after the 2009-2010 fraud assessment of the financial department his "role in auditing finance areas was dras-

tically reduced [and his] role in performing SOX controls was substantially reduced to almost none."

Excerpts from September 28, 2015, Deposition of Complainant (Respondent Attachment)[4]

On September 28, 2015, the Complainant testified that he received a Bachelor's degree in accounting in 1993 and passed the Certified Public Accountant (CPA) examination in 2005. He also received certification in internal auditing in 2008. He is a certified public accountant in the State of Georgia.

The Complainant testified that he was hired by Respondent as a senior auditor and his first supervisor was K. Greene. He agreed that he received a copy of Respondent's "Team Member Guide" and had acknowledged he had access to the document and would become familiar with the contents of the document. The Complainant agreed he had access to and agreed to become familiar with Respondent's "Code of Business Conduct and Ethics." The documents involved were annual documents from 2007 through 2013, all prior to the Complainant's termination of employment.

The Complainant testified that Respondent's internal audit group is tasked with testing and evaluation of the Respondent's internal controls and

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[4] Respondent attached to its Motion for Summary Decision excerpts from deposition testimony of the Complainant (with select exhibits used at deposition), excerpts from a deposition of S.C. Weekley (with select exhibits used at deposition), declaration of S.C. Weekley with exhibits incorporated therein, declaration of R.J. Cello, Jr. with exhibits incorporated therein, declaration of K. Greene with exhibits incorporated therein, and excerpts from a deposition of S.M. Sawyer with one exhibit incorporated therein.

processes and that he had not been an auditor or senior auditor for a commercial bank before coming to Respondent's business. He testified that the internal audits done do not create external financial reports and that external reports involve the Finance Department, General Counsel, and the Tax Department. He stated Respondent has outside auditors to perform compliance testing on Respondent. He stated internal audit performs audits of departments that review loans and approves loans. He reported that the Credit Review Department reviews loan quality and that compliance with Respondent's loan policies is reviewed by several departments including the Corporate Credit Administration Department, credit risk, lending & loan review, and loan loss review.

The Complainant testified that his supervisor K. Green gave a negative review of his audit work in 2009 and his subsequent supervisor S. Weekley discussed the need to put information into "Paisley" in a timely manner. He reported he was permitted to write the control and testing procedure for one audit, the MSB Controls audit. He stated that "an auditor generally sticks with testing the controls and testing the procedures that are assigned" and he can't change that without direction from management. He agreed that one of the audit requirements is the number of hours budgeted for the audit and stated "the team members don't assign that; we can make recommendations. We have no control over the time budgets." He stated repeatedly that "audit management has the assignments and determines the audits' schedule."

The Complainant testified that he had conversations with supervisor S. Weekley regarding the need

to put information into "Paisley" and to give her accurate information on the number of hours he needed to complete his work. He acknowledged copies of his "Right Steps Form"[5] for 2009, 2010, 2011 and 2012. He acknowledged that he submitted a two page response to the 2010 performance review by S. Weekley to address the negative comments entered by S. Weekley and "explain why I didn't agree with the ratings that were provided." He reported that the 2012 performance rating and comments were entered after completion of the 2012 Financial Recording audit. The Complainant testified that his placement on the December 2012 "performance improvement plan occurred seven days after I complained about the ethical concerns regarding the 2012 Financial Reporting audit." He stated that the daily updates required for several months prior to the December 2012 performance rating "were based on [S. Weekley's] failure to load "Paisley" so that I could load the time in; and that was the basis of initiation of those [daily] meetings." The Complainant stated that his performance ratings were higher the first year of employment and that "after the audit director and audit manager stated that they were uncomfortable with me in the meeting with the chief audit executive in 2009, the ratings changed and there was less agreement after that point" in his own rating of per-

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[5] The "Right Steps Form" is specific to the employee and includes individual performance and development goals for training and proficiency, timely completion of fieldwork, leadership, and work product quality. It contains a "performance Dimensions Rating" section for entry of the employee's perception on meeting goals during the performance grading period and the supervisor's rating on the employee's performance in meeting the described goals during the performance rating period.

formance and his supervisor's rating of his performance.

The Complainant identified deposition exhibit 16 as the December 10, 2012 PIP addressing the areas for improvement in effective communication, timeliness of work, and quality of work. He stated he went over the performance improvement plan with S. Weekley. He stated he understood that "failure to execute this [PIP] in accordance with the deadlines established, to follow departmental processes and procedures, or to otherwise meet expectations outlined herein will result in further disciplinary actions up to and including termination of [his] employment." He stated that from October through December 2012, he had regular meetings with S. Weekley "to update them on the status of the audits" and that he "didn't see coaching in those meetings . . . they were status meetings and not coaching and counseling as in the true sense of what coaching and counseling is." He testified that "there was a meeting that occurred at 9:15, first in the morning, with [S. Weekley and S. McFarland]. So we had a 9:15 meeting . . . and then at the end of the day . . . there was an e-mail that I would have to send to both of them to give status of what was had been done during the day." He stated that during the PIP process the meetings were called coaching and counseling.

The Complainant testified that during the second half of 2013 he worked on three audits—the Information Reporting audit, the Tax audit, and the follow up to a Deposit Operations audit. He stated portions of the Tax audit were carried over into 2014 and that he could not remember the end date for his portions of the work. The Tax audit involved testing a template

the Tax Department used to estimate and record income tax expense. He was to verify the assumptions behind the income numbers. He reported "the testing requirement said verify the . . . major assumptions in the estimated tax rate template. The major and very largest item in the estimated tax rate income template is net interest income revenue, which is based on loans." He was given the same information from the Tax Department and the Treasury Department. He considered looking at specific loans as being included within the scope of his work on the Tax audit. He stated that S. Weekley did not have the Tax audit loaded into "Paisley" until December 9, 2013 when 64 hours of the 80 hour budget had been used.

The Complainant testified that the Deposit Operations audit was an expanded audit completed in June 2013 and that he had some follow up work on remaining issues in the fourth quarter of 2013. His work depended on receipt of information from others and that he loaded updates to "Paisley" about the work he did on the project; but could not say if all work was completed before he went on vacation in December 2013.

The Complainant testified that the Information Reporting audit was also assigned to him to work but he did not know if he had uploaded any documents to "Paisley" on that audit before his employment terminated in January 2014. He stated "we" discussed the Information Reporting audit that "was scheduled at the same time concurrently with the tax audit."

The Complainant testified that on January 6, 2014 he was provided a copy of his "Team Member Counseling Form" (CX 5; EX 1) that indicated his employment was terminated. The form was delivered by S.

Weekley and D. Adams in a meeting on January 6, 2014 "that was basically a meeting where I was being told of a decision . . . They had made their decision." He reported that he had earlier talked to the HR Department about his ethical concerns about his name being included on a 2012 audit report. He did not talk to anyone in HR Department after the January 6, 2014 termination meeting. He testified that at the January 6, 2014 termination meeting he listened to what S. Weekley and D. Adams had to say, the performance concerns were listed on the form he was given. With regard to questions as to whether he questioned the termination decision, the Complainant stated "They made their decision and it was not open to discussion . . . except for at the very end a comment 'Is there anything that you want to say?'" He did not make other comments at the January 6, 2014 termination meeting. He stated "it was a surprise to be told that I was terminated." He acknowledged that S. Weekley rated his performance lower than he rated his performance; and disputed that his performance ratings by S. Weekley declined each year she rated the Complainant.

The Complainant testified that "I turned in a work paper suggesting fraud in this company . . . I don't believe that the laws and regulations require the word "fraud." It had everything in there to indicate the word fraud. It had everything in the work paper to indicate fraud." The information was in the ETR work paper for the Tax audit and was provided December 20, 2013. He testified that "The words that were used showed intentional misrepresentation by the company which is fraud. It said that the disbursement authorization forms were used to transfer

balances from loans essentially that were not performing to new loans" so the implication is intentional misrepresentation. He testified that "When I turned that workpaper in "Paisley" on December the 20th, it was said and done in a manner to say and suggest and imply fraud and intentional misrepresentation . . . [and] it's documented in there that shows the misrepresentation intent on the part of the Respondent." He declined to say if he told S. Weekley, Mr. Cottle, Mr. Sawyer or the general counsel, of his belief of intentional misrepresentation/fraud in the ETR workpaper. The Complainant testified that "The first thing I'm supposed to do is to turn in the work to my supervisors . . . which I did. The next thing I did was come to work and got terminated before I could do those—following procedures. If you look at the time on the work paper, I believe that workpaper was turned in on December 20th by 11 something at night; and the audit committee was not available I'm sure at 11:20 at night." He did not notify the audit committee through the general counsel's office and did not notify representatives through the 24/7 help line about fraud reported in the ETR workpaper. The Complainant testified that "I was terminated before [reporting the fraud to the supervisor, general counsel's office, the audit committee, HR Department or help line] could have been done while I was working." He asserted that filing his report in "Paisley" was a way all the necessary people got the report of fraud.

The Complainant testified "I know that I was terminated on [January 6, 2014]. They could have been considering other days, but I know factually that the final decision was made on January 6th,

2014 . . . A final decision to terminate me I believe was done on January 6th, 2014, which is documented by the evidence . . . [including] the team member counseling form" that was given at the termination meeting. He asserted that "The evidence that has been submitted by you and me supports a January 6th 2014 [termination decision] day, at least by me." He noted that "there were several e-mails between [S. Weekley] and HR that did not indicate a decision to terminate."

The Complainant acknowledged that creating the audit issue and the workpaper was part of his job; and providing the information contained in the workpaper was part of his job. He testified that there was a team that looked at the lending and credit area; that federal and bank regulators examine the Respondent's loan process; and that KPMG audits Respondent annually to assess the accuracy of loan grading and financial reporting, including loans, aspect of Respondent. He acknowledged that there are particular departments within Respondent's organization that review loans though he does not know what they would specifically look at.

Team Member Counseling Form Dated January 1, 2014 (CX 5,[6] Supplemental EX 1; Exhibit O to Supplemental Response Attachment EX 2)

This exhibit indicates that that on January 6, 2014 a counseling session was held by Complainant's supervisor S. Weekley and HR Representative D. Steel with the Complainant to address "Involuntary Termination" for "Incident Type Poor Performance."

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[6] Page 2 of the complete exhibit was not included in CX 5.

The performance issues were described as—

"In December 2012, [the Complainant] was placed on a Performance Improvement Plan (PIP) for 45 days. [The Complainant] has failed to consistently sustain expectations set forth in the PIP, since its expiration.

Over the past year, there are several issues of key areas in which [the Complainant] has not demonstrated the ability to sustain meeting expectations. They are outlined below with specific examples:

Effective Communication

1. 'Keep Manger-Audit and the person who assigned the audit work informed of audit process, issues encountered, etc. Communication should include sufficient drill down detail and clarification when requested.'

   [The Complainant] gives status updates and deliverable dates for work completion, but fails to meet these, and there is no communication initiated by him to indicate that there have been changes. When promised items aren't delivered on the expected deliverable date, the Manager-Audit is asking about them and that is when communication takes place.

   {contents of page 2 follows}

   This most recently occurred in the audit of the Tax area when he notified me on 12/12 about three items that would be delivered on 12/15, but they were actually delivered on 12/20, 12/23, and 12/27. A conversation took

place on 12/16 to find out why they hadn't been delivered as promised on the 12th, and he said that was the 'plan' on the 12th but 'things change.' I told him that without communication from him, I had no way to know that circumstances had changed.

We encountered similar problems with the Wire audit where he stated that 8 work-papers were 'in process' and were 30-40% complete. Upon my inspection, only 2 of these 8 work-papers had any documentation in the attachments or the Rich Text which contradicts the estimated completion he provided.

These examples support that the communications provided about status are inaccurate and therefore ineffective.

Timeliness of Work

1. 'Spend no more hours on assignment than is budgeted and assigned to him unless otherwise approved in advance by the Manager-Audit or person assigned to the task being performed.'

   [The Complainant] goes well over budgeted hours even after being told to stop working on an audit or draw it to a close.

   The Corporate Safety and Security audit was budgeted for a total of 80 hours, yet [the Complainant] spent 94 hours on performance of planning procedures, forcing Manager-Audit to halt the audit before fieldwork. [The Complainant] did not communicate problems

with completion of planning or elevate concerns about the ability to complete the audit within budgets or scheduled time frames.

Most recently [the Complainant] has spent 120.5 hours on the Tax audit which has a total budget of 80 hours. [The Complainant] was asked two weeks ago to finish documenting his work on it an draw it to a close. However, [the Complainant] continued to request additional information and spend time on this audit.

2. 'Submit completed work in time frames communicated in status updates.'

See notes under 'Effective Communication.'

These examples support that [the Complainant's] work assignments are not performed timely.

Quality of Work

1. 'Fully document work in Paisley as it is performed and information is gathered.' [The Complainant] is not consistently documenting his work in Paisley as performed.

On [the Complainant's] most recent assignment, we had 73.5 hours on the Tax audit 9of [sic] an 80 hour budget) before the first work-paper was submitted to Paisley for review.

[The Complainant] indicated that he significantly modified the approach to testing for some of the controls in Tax which consumed a lot of time, but there was no communica-

> tion with the Manager-Audit about his plan to do this. Without any documentation in Paisley, the Manger-Audit could not provide effective oversight of the amount of work being performed. (The Manager-Audit didn't agree that the additional testing was needed.)
>
> {contents of page 3 follows}
>
> In another recent assignment, [the Complainant] had 100 hours spent in the Wire Operations audit before the first work-paper was turned in. He then proceeded to turn in 8 work-papers within less than 4 hours, indicating he had not been documenting his work in Paisley as it was performed. Through conversations on the Wire Audit, [the Complainant] would state that a control was going to "pass" (which would indicate he had performed enough testing to draw that conclusion) but that he was working on other controls. [The Complainant] was reminded that he was supposed to finish documenting his work on each work-paper as it was completed rather than having so many 'in process' at one time and none of them complete. These examples offer support that the quality of [the Complainant's] work is not well documented to department standards."

The "Action to be Taken" was indicated as "Based on the above, Manager recommends termination of employee for failure to sustain improvement in meeting performance standards set forth in the previous Performance Improvement Plan." The form was signed

by Complainant's supervisor, S.C. Weekley on January 6, 2014.

State of Georgia Separation Notice (CX 4)

On January 6, 2014, T. Wells, as Respondent's "HR Representative" completed a Separation Notice that was released to the Complainant in accordance with Georgia employment security law, OCGA § 34-8-190(c). The form states the Complainant was employed by Respondent for the period from November 19, 2007 through January 6, 2014; and that the Complainant's separation was "Involuntary Termination. Unsat Perf/ Violation Wrk Rules."

Excerpts from March 6, 2016, Deposition of S.C. Weekley (Respondent Attachment)

S. Weekley testified that she was a Manager-Audit when the Complainant worked for her and that as a Manager-Audit she managed teams responsible for audits. She state an audit team was composed of a staff auditor, who was usually right out of college or new to the audit area, a senior auditor, who usually had a higher level of experience, and an audit manager who usually had three to five years of audit experience with Respondent. The audit manager usually was responsible for overseeing specific audits and could usually handle the more complex audits.

S. Weekley testified that that she did not complete the 2013 Right Steps Form for the Complainant because it would have been completed in January 2014 and the Complainant was terminated before then in January 2014. She stated that she first placed the Complainant on a Performance Improvement Plan (PIP) on December 12, 2012. She was not aware of

the Complainant being placed on a PIP earlier with Respondent. She testified that the primary purpose of the PIP was to "make it very clear as to what the expectations are in performance . . . throughout their employment . . . It's to improve performance" and is not used as a tool to terminate an employee. If the employee's performance does not improve while they are on a PIP, there is a follow-up within the PIP for termination. S. Weekley testified that on December 12, 2012 she and the Complainant went through the each item of the PIP line by line for clarity. Then weekly meetings were held for the duration of the 45-day PIP period. At the end of 45 days "weekly meetings would stop and we would resume regular communications and activities as with other staff. The expectations of performance outlined in the PIP would still be in place. But as far as being on a PIP for not being eligible for merit increases or other considerations" that ended with the PIP. She testified that prior to discussing the PIP with the Complainant, she sent a copy of the draft and final PIP to S. Sawyer as Chief Audit Executive; she copied A. Cottle as Director of Audits on the e-mails about the PIP; and discussed the PIP with S. McFarland as Manager-Audit who also co-managed a team of which the Complainant was a member. S. Weekley testified that "My past experience was any time performance discussions took place with [the Complainant] that had any constructive criticism or any recommendations to change or modify his work, it was not usually received well." She testified that the Complainant stated he was surprised to see a formal PIP; "but there were no surprises in [the PIP document as if it] was something he had not heard before or we had discussed before." During the weekly meetings to

discuss the PIP concerns, she specifically recalled the Complainant "felt he was already doing these things and nothing needed to change and I told him I thought that would be an issue because there would not have been a need for a Performance Improvement Plan had he been doing these things." She stated that the PIP expired after 45 days and nothing had to be specifically done to close the PIP. She testified that "At the time of this PIP, we were kind of coming down toward the end of an audit cycle where [the Complainant's] assignments and responsibilities would have been lower risk areas, because of the nature of his performance issues up to that time. More critical, time sensitive [audit work] were not [the Complainant's] responsibilities at that time. That time of year, my team is responsible for providing a lot of assistance to our external auditors, and a lot of work related to that [was] sensitive testing for them." She reported that her team audit cycle ran from March to February and that auditor work was steady in January and February. S. Weekly testified that at the end of the PIP period, "I was cautiously optimistic that [the PIP] may have been the wake-up call needed to improve his performance." She testified that the PIP was to improve performance and if an employee's performance does not improve with a PIP, she would discuss the matter with her supervisor and the HR Department.

S. Weekley testified that she first made the recommendation to terminate the Complainant's employment in late summer 2013 to her supervisor, A. Cottle. He directed her to contact the HR Department and "see what we need to do." She talked to HR representative D. Steele, who asked for a copy of the PIP

and time to talk to the previous HR representative, D. Adams. S. Weekly testified that she had a "Step Two" of the "Right Steps process" conversation with the Complainant several weeks before approaching D. Steele about terminating the Complainant's employment.[7] A "Step One" conversation is to establish goals for the year. A "Step Two" conversation "is coaching and it's an opportunity to kind of assess where you are in relation to goals set forth earlier in the year" that she has with each of her team members. The "Two Step" conversation with the Complainant took place in September 2013 and she advised the Complainant "it appears we are slipping back into some of our old habits and things specifically cited in the PIP." She stated that at the time of the September conversation with the Complainant, he "had not worked on any major audits which required an auditor evaluation, which is an internal process we have for audits in which you spend more than 40 hours."

S. Weekley affirmed the information contained in Exhibit 8 to her deposition that the decision to terminate the Complainant was made after her September 19, 2013 conversation with D. Steele in which D. Steele advised he had reviewed the provided PIP and the courses of action would be to terminate the Complainant or provide the Complainant with one last counseling session that would give Synovus "additional documentation if we terminate [the Complainant] and he chooses to sue us."

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[7] Exhibits 7 and 8 to S. Weekly's deposition indicates the "Step Two" conversation with Complainant took place on September 6, 2013 and the first discussion with D. Steele took place on September 19, 2013. It is specifically noted that the date of the e-mail in Exhibit 8 has been deleted.

S. Weekly testified a decision was made to terminate and to put the termination date on hold until after the Complainant gathered the low or moderate risk audits he would work "as well as waiting until after the holidays." She testified that the decision to terminate the Complainant and place the termination date on hold until after the holidays was made "in that September timeframe. I think in coordinating the holiday schedules, the work load availability of impacted parties, all were factored into that [decision]." S. Weekley testified that "I would not have been the one making the decision [to terminate the Complainant's employment]. I would have had the conversation with [A. Cottle] about that." She testified that she had a conversation with A. Cottle that "was basically what's in [Exhibit 8 to her deposition], that we appeared to be less than seven months, seven or eight months, after coming out of specific performance expectations outlined in the PIP, and we were right back where we were when we put that [PIP] in place." She stated that she documented the Complainant's poor performance and could not specifically recall if she recommended termination of employment to A. Cottle. She testified that the decision to terminate the Complainant's employment was made before she submitted her January 2, 2014 e-mail to A. Cottle documenting the additional performance issues involving the Complainant's work on the Tax audit where the Complainant had logged 120.5 hours as of January 2, 2013 on the audit which was originally budgeted at 40 hours and then increased to 80 hours. S. Weekley again testified that "The decision [to terminate the Complainant] had been made. I would not say that I had made that decision." She testified that the decision to terminate the Complainant

"would have come through [A. Cottle], but I don't recall if it was a conversation, or an e-mail, or what the method may have been."

S. Weekley testified that she signed the "Team Member Counseling Form" (CX 5; Supplemental EX 5; EX 11 to S. Weekley deposition) and dated the form January 6, 2014. She stated her belief that several verbal counseling sessions and several written counseling events, not on Synovus forms, had taken place with the Complainant. She testified "Sometimes the feedback and where we discussed those performance issues was [done] verbally, and sometimes it was written, and sometimes it was documented in performance evaluations in the 'Right Steps' process. So his counseling and feedback where his performance was not meeting expectations was consistently done over an extended period of time." She stated that she prepared the "Team Member Counseling Form" signed on January 6, 2014 "with feedback from primarily [A. Cottle and D. Adams]" using "InSite" forms available to supervisors. She reported that "no single event triggered the PIP, nor [the Complainant's] termination; it was a continued pattern of poor performance.... This was not a decision taken lightly."

S. Weekley testified that when the Complainant was told he was being terminated on January 6, 2014, "He really had no response. He asked for a copy of the form, and that's why it was in the documents presented and copies were provided as requested."

May 16, 2016, Second Declaration of S. Weekley (Supplemental Response Attachment EX 2)

This exhibit reflects that, from 2004, S. Weekley was a Manager-Audit for Synovus. She was the

Complainant's supervisor from early 2010 to January 6, 2014. The Complainant was in a non-managerial position of Audit Manager during that timeframe. She was the Complainant's direct supervisor for administrative purposes, such as coaching, counselling and preparing and discussing performance reviews and for directly managing the Complainant on numerous audits.

S. Weekley reported the Internal Audit Department was led by S. Sawyer as Chief Audit Executive. A. Cottle as Director-Audit and A. Perry as Director-IT reported to S. Sawyer. S. Weekley, S. McFarland, T. Henry and K. Greene as Managers-Audit reported to A. Cottle.

S. Weekley reported that "InSite" is Synovus' intranet and contains the current version of the "Team Member Guide" which "directs employees to report concerns about financial or auditing practices by contacting the General Counsel's office or the anonymous ethics hotline . . . the [Team Member] Guide notes that members are responsible for notifying management if they have knowledge of any error, fraud, embezzlement, or team member misconduct." She reported the Complainant electronically acknowledged he had access to the Synovus Code of Business "Conduct and Ethics," "Team Member Guide," and certain listed policy statements and agreed to become familiar with those documents annually from 2007 to 2013.

S. Weekley reported that "Internal Audit's purpose is to test and evaluate Synovus' internal controls and processes to ensure that they are adequate and functioning in a manner to manage and mitigate risk. Internal controls are checks and balances designed

and implemented by management to ensure that objectives are being met in accordance with applicable standards . . . Although some of the controls we test relate to Synovus' financial statements, we do not create or review the external financial reports of Synovus Financial Corp. Those responsibilities reside with other departments in Synovus—financial reporting is managed by the Accounting/Finance Department . . . and tax accounting is managed by the Tax Department in conjunction with Synovus' outside accountants, KPMG, and tax advisors, Ernst & Young. . . . Internal Audit performs some testing on behalf of Accounting/Finance Management for their use in their evaluation of SOX compliance. Internal Audit does not perform consumer compliance or credit administrative loan quality reviews because those functions are handled by other departments with the proper expertise. Consumer compliance is the responsibility of the Consumer Regulatory Compliance Department; loan quality reviews are the responsibility of Synovus Credit Review; and the Corporate Credit Administration Department oversees other aspects of credit administration. Because Internal Audit is not responsible for consumer compliance, financial reporting, tax accounting, or SOX compliance, none of our employees' work materially affects filings with the Securities and Exchange Commission, filings with tax agencies, or information provided shareholders.

S. Weekley stated that Internal Audit performs quarterly 9-factor risk assessments in all areas on which the Internal Audit Department performs audits of internal controls and processes. The 9-factor risk assessment is used to set a 3-year schedule used to

allocate resources and budget audit hours to each scheduled audit. Each audit to be performed is broken down into defined tasks; the controls and tests to be performed are clearly identified and communicated; the scope of the audit is also clearly identified and communicated to each auditor for each assigned audit. S. Weekley stated that she assigns a lead auditor and audit team to each of her audits based on availability and experience and that each auditor is assigned a specific number of hours to complete their work.

S. Weekley stated that "Paisley" is Synovus' automated paperwork tool used to document testing performed during an audit, risk assessments, audit issues identified during testing, and each auditor's time used for working on the assigned audit. She reported that many auditors use a company common drive to prepare their paperwork prior to uploading to "Paisley." Auditors may not use removable disks, flash drives, or any removable media to store company data. Auditors are discouraged from using personal directories and hard drives because of the limited access to the company data by other team members assigned to the particular audit. "Paisley" creates a daily report of audit issues identified by auditors and can be used to create reports to review the progress of each auditor's work in real time, identify potential workflow issues, and to access to determine if the audit is on schedule and in compliance with updates being provided by auditors.

S. Weekley stated that the terms of the Complainant's December 2012 PIP were explained to the Complainant by herself and D. Adams. She stated "the PIP's initial duration ran without serious incident.

Nevertheless, the expectations set forth in the PIP—the basic requirements of his position—remained in place for the remainder of [the Complainant's] employment. Although [the Complainant] demonstrated some improvement immediately after receiving the PIP, he failed to sustain it [and] soon lapsed into the behaviors that had rendered his performance unsatisfactory before the PIP."

S. Weekley stated she consulted with D. Steele twice in September 2013 on how to address the Complainant's persistent performance problems. The two options discussed with D. Steele were to "terminate [the Complainant] or have one more counseling session with him." S. Weekley recommended to A. Cottle that the Complainant's employment be terminated to which he agreed. She stated "We made the decision to terminate [the Complainant's] employment in late September 2013 and the only issue that remained was when we could implement the termination in view of the pending assignments [the Complainant] had to complete during the critical fourth quarter and other business decisions . . . From October to December 2013, when [there were] no other auditors available due to staffing assignments and a vacant position . . . [the Complainant was] assigned to an Information Reporting audit, a Tax audit, and issue follow-up testing on a Deposit Operations audit" with specified due dates before the end of 2013. She reported the Complainant's had two issues related to the Deposit Operations audit that were due by October 31, 2013 and were not closed out by the Complainant even by January 2014.

S. Weekley stated that the Complainant was also assigned to the Tax audit which she began

reviewing and discussing with the Complainant more closely on and after December 12, 2013. The three reports with December 12, 2013 scheduled completion dates were not submitted until December 20, 2013; December 23, 2013; and December 27, 2013. S. Weekley discussed the report for testing the Effective Tax Range (ETR) because "there was a detailed table with individual loans listed and several columns of testing that had been performed . . . [She stated she] was not sure how [the Complainant] reached the decision that detailed loans needed to be tested. During this conversation [the Complainant] said that loan interest income was a significant portion of the company's income, so he needed to be able to verify the accuracy of that number before he could rely on the income amounts used by the Tax Department personnel for the ETR templet . . . [The Complainant] communicated that he could not rely on the testing performed by other auditors within the department, even if it had been reviewed by the responsible Manager-Audit, Audit Director, and Chief Audit Executive." S. Weekley reported that "As late as January 2, 2014, long after the audit deadlines had run and the hours had been exhausted, [the Complainant] had not completed the audit . . . it appears that [the Complainant] used the [ETR] sample to perform interest recalculations that were done in another audit and he also attempted to assess whether the loans were properly accruing interest by looking at supporting documentation. . . . there was nothing about the workpapers that made me think he had found any issues that needed to be escalated. [The Complainant's] 2013 Tax audit workpapers that [S. Weekley] reviewed contained no reference or suggestion of any violation of SOX, any Securities and Exchange Commission

rule or regulation, or any fraud. Nor did he make statements about shareholders, financial filings, or tax filings."

S. Weekley stated "Mr. Cottle and I had decided in September 2013 that we would terminate [the Complainant] before he even began the 2013 Tax audit. The decision was based on [the Complainant's] persistent refusal and failure over the course of his employment to address his significant performance deficiencies despite exhaustive coaching, counseling, performance reviews and a PIP. . . . [The Complainant's] termination would have taken place in early fourth quarter, but it was delayed because of the demand of our work, my own scheduling needs, and the occurrence of the holidays. . . . and we did not want to terminate [the Complainant] during the holidays. . . . [The Complainant's] termination was due entirely to his persistent poor performance and failure to improve despite years of consistent coaching on the same issues. It was entirely unrelated to any observations he made in his 2013 Tax audit workpapers."

S. Weekley stated that "during his employment [the Complainant] never raised any concerns to me that Synovus' conduct was in violation of SOX or Dodd-Frank, in violation of a rule or regulation of the Securities and Exchange Commission, or that there was fraud that would negatively affect shareholders . . . If he had made such statement or suggestion to me, I would have escalated the issue to Mr. Cottle for further investigation and guidance."

Exhibit M to the May 16, 2016, Second Declaration of S. Weekley (Supplemental Response Attachment EX 2)

Exhibit M is page 6 of 7 titled "Workpaper—Control Test" related to the ETR uploaded to "Paisley" by the Complainant the end of December 2013. This exhibit includes the report—

To address risks regarding income projections, detailed testing was performed for the Projected 2013 Income Before Tax line on the ETR, which is the largest item on the ETR. Interest income projections provided in quarterly tax books are at a high level and fail to be adequately verified by tax department management and forwarded to external auditors who also appear to get the same high level summary numbers which are not readily verifiable in and of themselves.

> "Since part of the credit crisis problem from the past several years was related to the loss of unpaid loan assets and associated interest revenue, paid loan reports were examined initially to see if loans on the paid report were actually paid. Net interest is derived from loans. After reviewing paid loan reports at a high level, most of the loans on the paid loan report were loans that had not actually been paid off but that were renewed. While this is not an issue itself, it was noticed that loans were not only renewed, but in many cases there were multiple renewals of loans that had gone past their maturity dates, paid off in the system, renewed or extended with the same or lower interest rates, new maturity date, and the maturity balance from the past due

> maturity note transferred to new notes using Disbursement Authorization forms to transfer the balance(s) of loan notes onto new loan notes; without an actual loan payoff effectively keeping loans past their maturity dates accruing interest when the loan possibly should not be accruing interest and reflected in net interest income or estimated and booked income tax expense.
>
> Fifteen loans were judgmentally selected and tested to see if the interest income contribution from a small select sample of loans represented interest that appears as if it should be accruing interest included in net interest revenue and reflected in tax expense estimates. Thirteen of 15 loans selected were noted as having potential issues that were prevalent . . . that could or should prevent the loan/notes from accruing interest including. . . . "

Exhibit N to the May 16, 2016, Second Declaration of S. Weekley (Supplemental Response Attachment EX 2)

In this exhibit S. Weekley reports to A. Cottle on January 2, 2014, that

> "It's now 1/2/2014 and [the Complainant is] continuing to request information from management and document workpapers. The [Tax] audit was almost out of budgeted time before the first workpaper was documented and submitted for review.
>
> [The Complainant] told me he couldn't rely on the work of others (*e.g.* loan interest recal-

> culation) when he didn't even need to be going to that level of detail in this audit; he significantly expanded scope for testing for some tests without consulting me. He chose to perform interest recalculations which are performed in another audit (claimed he didn't know there was an audit on this, but he didn't ask; it's covered by our team and he did some of the PP work for that audit in 2012); he also selected a sample of loans and looked at supporting documentation for them. He claimed the extra work was to get comfortable with the income associated to loans since it was a significant portion of the amount used in calculating the tax expense of the company. . . . "

Excerpts from March 8, 2016 Deposition of S.M. Sawyer (Respondent Attachment)

S. Sawyer testified that he has been the Chief Audit Executive with Respondent for about 13 years and was in that position when the Complainant's employment was terminated. He reported he was aware of the Performance Improvement Plan (PIP) that the Complainant had been put on as well as the "talent management process" that led to the Complainant's termination of employment. He stated that the "talent management process" was a process "where we were identifying within the risk group of the . . . company, top performers and low performers. And with top performers we were identifying what additional development activities needed to take place; with low performers, what action plans needed to take place. When [the Complainant] was identified as a low performer, given the past history we had,

having been on a [PIP], and being unable or unwilling to meet the objectives of that plan, our conclusion was the termination was the next process and not another PIP.

S. Sawyer testified that high performers were identified for additional training, developmental training and leadership training. Low performers were identified to determine what would be the next step—PIP or terminate. He testified that in his group two individuals were identified as low performers, the Complainant who was terminated and T. Henry who was demoted from Manager-Audit to Audit-Manager in December 2013. He reported that employees were fired in other groups as a result of the "talent management process."

S. Sawyer identified Exhibit 1 to his deposition as "a summary from HR of the discussion that took place at the talent management meeting on November 19th" 2013, in which he participated. He testified that the Complainant was identified as being in the bottom 10% of his pay grade range.

October 31, 2014, Declaration of K. Greene (Respondent Attachment)

This exhibit reflects that K. Greene has worked in the Respondent's Internal Audit Department for 20 years, has held the management position of Manager-Audit since 2005, and made the decision to hire the Complainant as a Senior Auditor November 19, 2007. For the period from 2007 to the first quarter of 2010 he was the Complainant's direct supervisor, oversaw the Complainant's work, conducted the Complainant's performance reviews, and informally counselled the Complainant on an ongoing basis as issues arose.

K. Greene reported that when the Complainant worked for him, the "team focused on audits that evaluated lending, credit cards, electronic payments, liquidity, funds management, financial reporting, treasury management functions, Synovus Securities (broker-dealer), and Synovus Trust." The Complainant was assigned to work on financial reporting and treasury audits because he was a certified public accountant (CPA). He reported that audit workpapers go through a two stage review and may also be further reviewed by the Chief Audit Executive, S. Sawyer. As Manager-Audit, he provided first level review of the Complainant's workpapers and the Director-Audit, A. Cottle, provided second level review. The financial audits conducted by K. Greene's team" tested controls over the reporting process to ensure proper functioning of Synovus' processes for gathering, reviewing, and reporting results of financial operations to those individuals who had an interest in the information (shareholders, regulators, and the general public)." Determining if Generally Accepted Accounting Principles (GAAP) were followed was beyond the scope of the audit. Outside auditor KPMG determines if GAAP was followed in Synovus' financial documents and tax related assertions.

K. Greene reported he recognized performance deficiencies in the Complainant the first year of employment, including audit work consistently behind schedule throughout the year. The Complainant was reclassified to the non-management position as Audit-Manager during a 2008 reorganization. K. Greene continued to coach the Complainant "about his job requirements and opportunities for improvement both orally and in writing . . . [the Complainant's] work

needed to be reworked before it could be used, among other issues." K. Greene reported the Complainant consistently missed deadlines, was regularly unable or unwilling to state when workpapers and testing would be completed, gave misleading status updates, regularly exceed the hours budgeted for his audit assignments, consistently failed to stay within his budgeted hours or to request authority for and justify additional hours, was unable or unwilling to provide explanations for hour overages, failed to draft clear and concise workpapers, created problems with team members if assigned to a team audit, often horded information and kept it from his team members, and engaged in disruptive behavior when assigned to a team audit so that some peers requested not to work with him again.

K. Greene reported that all auditors are required to timely document their work in "Paisley" which is Synovus' automated workpaper tool. He noted that auditors commonly complete their work using Microsoft Word or Excel and save their files to a common drive accessible to everyone in the Internal Audit Department so that the work can be reviewed promptly and in an on-going basis as an audit progresses. He stated he regularly reminded and counselled the Complainant about requirements and procedures but the Complainant "persistently refused to upload his work to 'Paisley' or save it to the common drive. Instead, he used portable flash drives to save his work, a serious violation of the Company's Information Security Policy." K. Greene reported that "Throughout the time I supervised [the Complainant] he sometimes showed sporadic improvement in his performance after counseling; however, he never sustained any such improvement.

His patterns of inadequate and unsatisfactory performance continued."

K. Greene reported that during a 2008 Tax audit the Complainant "asserted that Synovus should have been using a different methodology to calculate income taxes and that management had not met its estimated obligations under the annualization method." K. Green disagreed with the Complainant's opinion and took the matter to M. Robinson as Director of Tax. He stated M. Robinson gave the Complainant the opportunity to explain his position and determined that Synovus was required to use the methodology then employed and was not allowed to use the method identified by the Complainant. KPMG and Ernst & Young also reviewed the methodology used and found it correct and consistent with tax elections made. A. Cottle and S. Sawyer also reviewed the Complainant's report and concurred with the methodology used and approved by KPMG and Ernst & Young.

K. Greene reported that the Complainant did not raise any issues with the 2009 Financial Statement Footnote audit he was assigned to review. During the 2009 Melton Region Lending audit K. Green reported that "it became clear to me that [the Complainant] did not understand the use of interest reserves for loan customers, an accepted practice in the industry. I explained to [the Complainant] what interest reserves were and how they worked. I gave him documentation to educate him. Despite my guidance, however, [the Complainant] refused to change his incorrect position about the loans at issue . . . The final audit workpapers were reviewed in accordance with the established review process of Internal Audit and the Director-Audit agreed with my assessment of the control. By

2010, I felt [the Complainant's] work product was unreliable and did not match his purported level of training or his position's responsibilities at Synovus." The Complainant was moved to S. Weekley's team in early 2010 during restructuring.

K. Greene reported "During [the Complainant's] employment, including the time I supervised him directly, [the Complainant] never raised any concerns to me that Synovus' conduct was in violation of SOX, in violation of a rule or regulation of the Securities and Exchange Commission, or that there was fraud that would negatively affect shareholders. If he had, I would have immediately informed Mr. Sawyer and Mr. Cottle. His move to Ms. Weekley's team thus had nothing to do with any concerns that he raised during the time he worked under my supervision."

K. Green reported that he reviewed the December 2012 PIP that S. Weekley issued to the Complainant "to ensure it fairly reflected [the Complainant's] performance and performance improvement needs I had observed. Ms. Weekley's assessment was consistent with the experiences that I had when I supervised [the Complainant] and I concurred with her plan to try to improve his performance."

K. Green reported he reviewed the Complainant's "claim about purported improper conduct that he discovered during the 2013 Tax audit, and I also analyzed the documentation upon which [the Complainant] said he relied to make his conclusions. First, I saw that the work he performed on loans during the Tax audit had no correlation to the control test he was asked to perform. For instance, he made assessments about the grading of loan that he selected rather than testing specific controls, an improper

process. Second, in approximately two (2) hours, I was able to determine that the relevant information proved that there was no fraudulent manipulation of the loans to overstate income. In each of the cases that [the Complainant] cited as issues, he alleged that the customers had not made interest payments on the loans and that the loans were renewed to prevent them from going past due. He was wrong. In each of the cases, the customer paid the total amount of interest due on the loan from their own funds prior to the loan being renewed. All of the documentation and resources I reviewed to determine that Synovus' loans were lawful were available to [the Complainant], but [the Complainant] either ignored them or did not understand them. For whatever reason, he reached the wrong conclusion."

October 31, 2014, Declaration of R.J. Cellino, Jr. (Respondent Attachment)

This exhibit reflects that R. Cellino has worked for Respondent in the Corporate Credit Administration Department since 2002 and as Senior Manager of Corporate Credit Administration since 2011. He also serves on the Special Assets Loan Committee which reviews and approves problem loans throughout Synovus, and is the company's primary contact with regulatory agencies and the outside auditor KPMG.

R. Cellino reported that after the Complainant filed his SOX complaint, "I reviewed and analyzed a spreadsheet taken from the workpapers associated with the 2013 Tax audit that [the Complainant] conducted and a workpaper that I am told [the Complainant] attached to his demand letter dated August 19, 2014 [attached to the Declaration as Exhibit A]. It is my

understanding that [the Complainant] is claiming now that his assessment was that Synovus attempted to inflate its profitability by fraudulently manipulating loans to avoid recognition of higher risk loans. My analysis of his spreadsheet and workpaper showed no evidence of any such conduct. In his workpaper [the Complainant] asserted that 13 of the 15 loans he selected and tested had 'potential issues that were prevalent.' He indicated that these issues 'could or should prevent the loan/notes from accruing interest.' Contrary to [the Complainant's] assessments, none of the 15 loans he listed should have been placed on non-accrual status (meaning they no longer accrue interest). In fact, the available documentation supports the opposite conclusion, that Synovus was warranted in continuing to accrue interest on those loans. Synovus did not overstate the interest income, nor did it understate the allowance for loan and lease losses associated with the reviewed credits."

R. Cello reported that during "the period covered by [the Complainant's] spreadsheet and workpaper, seven (7) interagency examinations were conducted . . . the results of those examinations affirmed our grading and were very positive. In the fourth quarter of 2013, KPMG conducted its annual review to assess the accuracy of our loan grading. Their thorough review considered loan upgrades, loan downgrades, and Top Borrowers within the organization, among others, and it resulted in only minor changes . . . KPMG affirmed Synovus' internal controls. . . as of December 31, 2013."

DISCUSSION

Respondents have requested the case be dismissed through summary decision.

Summary decision is appropriate in a proceeding before an Administrative Law Judge "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d); *see also Williams, supra.* All material contained in the administrative file are considered. The moving party bears the burden of establishing that there is no genuine issue of material fact when the material submitted for consideration is viewed in a light most favorable to the non-moving party. *Celotex Corp. v. Catrett*, 477 US 317, 106 S. Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 106 S. Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986).

The first step of the analysis is to determine whether there is any genuine issue of a material fact. If the pleadings and documents that the parties submitted demonstrate the existence of a genuinely disputed material fact, then summary decision cannot be granted. Denying summary decision because there is a genuine issue of material fact simply indicates that an evidentiary hearing is required to resolve some factual questions and is not an assessment on the merits of any particular claim or defense." *Johnson, supra*, slip op. at 7.

As the ARB has earlier explained,

> Determining whether there is an issue of material fact requires several steps. First,

the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial. Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact. When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the nonmoving party, the complainant in this case. The moving party must come forward with an initial showing that it is entitled to summary decision. The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim.

In responding to a motion for summary decision, the nonmoving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts that could support a finding in his favor. *See* 29 C.F.R. § 18.40(c)[8]. If the moving party presented admissible evidence in support of the motion for summary decision, the nonmoving party must also provide admissible evidence to raise a genuine issue of fact.

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[8] 29 CFR § 18.40 was restated in the revised Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges at 29 CFR § 18.72, effective June 18, 2015.

Williams, supra, slip op. at 6, quoting *Hasan v. Enercon Servs., Inc.*, ARB No. 10-0061, ALJ Nos. 2004-ERA-00022 &-00027, slip op. at 4-5 (ARB July 28, 2011) (citations omitted).

I. Adverse employment actions that occurred before January 1, 2014 may not be redressed under SOX.

In his complaint, the Complainant alleged, as adverse employment actions, "unwarranted performance-based criticism, placed on unjustified Performance Improvement Plan (PIP) and ultimately terminated, in retaliation for his complaints," as well as being reassigned from supervisor K. Greene's team to supervisor S. Weekley's team, "a less desirable assignment" in 2010.

SOX requires that complaint of adverse employment actions in retaliation for engaging in protected activity must be filed within 180 days of the adverse employment action, 18 U.S.C. § 1514A(b)(2)(D). Here, the complaint filed by Complainant's counsel was undated and has no indication of whether it was filed by mail or facsimile transmission or delivered by hand or courier; though OSHA indicates the complaint was filed on Thursday, July 3, 2014. Thus the SOX 180-day statute of limitations period would span the period no earlier than January 1, 2014. 29 CFR § 18.32(a).

The only adverse employment action alleged to have occurred on or after January 1, 2014 is the termination of the Complainant's employment on January 6, 2014. The Complainant's alleged adverse change in employment duties in 2009-2010, stated as his "role in auditing finance areas was drastically

reduced [and his] role in performing SOX controls was substantially reduced to almost none," is an allegation statutorily barred from consideration as an adverse employment action in this current SOX complaint. Likewise the Complainant's 45-day December 2012 Performance Improvement Plan is statutorily barred from consideration as an adverse employment action in this current SOX complaint.

II. The termination of the Claimant's employment on January 6, 2014 was an adverse employment action within the meaning of SOX

The Respondent submits that the decision to terminate the Complainant's employment was made before the Complainant was assigned three audits to perform in December 2013.

The Complainant's deposition testimony, S. Weekley's deposition testimony, and the "Team Member Counseling Form" dated January 1, 2004 (CX 5, Supplemental EX 1; Exhibit O to Supplemental Response Attachment EX 2) all indicate that the Complainant participated in a meeting with his immediate supervisor on January 6, 2014 during which he was informed that his employment was terminated effective January 6, 2014.

While the decision to terminate that Complainant's employment may have been made prior to January 2014, there is no evidence that the decision to terminate his employment was communicated to the Complainant before January 6, 2014. Upon completion of the meeting with S. Weekley, on January 6, 2014, the Complainant was escorted from Respondent's property.

After deliberation on the entire administrative file in a light most favorable to the Complainant, the evidence establishes that the Complainant suffered and adverse employment action within the meaning of SOX on January 6, 2014, when his employment was terminated by Respondent.

III. When Viewed in the Best Light for the Complainant, Whether the Respondent Made the Decision to Terminate the Complainant's Employment Was Made Before the Complainant Uploaded His ETR Workpaper on December 20, 2013, Remains a Genuine Issue of a Material Fact

While the Complainant was notified that his employment was terminated upon his return to work January 6, 2014, when the decision was made by Respondent to terminate the Complainant is important because the Complainant alleges he engaged in protected activity on December 20, 2013. The Respondent argues the Complainant's December 20, 2013 activity was after the date the decision to terminate the Complainant was made. If true, no protected activity occurring after the decision to terminated employment was made can be considered as a factor contributing to the termination decision.

The Respondent submits that the decision to terminate the Complainant's employment was made before the Complainant was assigned three audits to perform in December 2013. The Complainant's Supervisor S. Weekley states she began the termination process with conversations her supervisor A. Cottle and HR representative D. Steele in mid-September and that by the end of September the decision had

been made to terminate the Complainant after the Complainant completed assigned work due before he departed on vacation at the end of December 2013. S. Sawyer stated that he was aware of the Complainant's PIP and that a "talent management process" was done in November 2013; that at a November 19, 2013 meeting with HR representatives, the Complainant was identified as a low performer in the lower 10% of the Audit Department; and that the "talent management process" led to the decision to terminate the Complainant's employment. The "Team Member Counseling Form" which was used to notify the Complainant that his employment was being terminated was prepared on January 1, 2014.

When the documents submitted for consideration are viewed in the best light for the Complainant, the Respondent has failed to establish that the decision to terminate was made before the Complainant uploaded his workpapers to "Paisley" prior to departing on vacation at the end of December 2013.

IV. When Viewed in the Light Most Favorable to the Complainant, the Complainant Has Established His Subjective Belief That the Respondent's Alleged Conduct Constitutes a Violation of 18 U.S.C. 1341; or a Rule or Regulation of the Securities and Exchange Commission; or a Provision of Federal Law Relating to Fraud Against Shareholders

As noted above, SOX "requires an employee demonstrate both a subjective [good faith] belief and an objectively reasonable belief that the company's conduct violated a law listed in [§ 1514A(a)(1)]. A subjective belief means that the employee 'actually

believed the conduct complained of constituted a violation of pertinent law'" *Gale v. U.S. Dept of Labor*, 384 Fed. Appx. 926, 930 (11th Cir. 2010) *unpub*, citing *Welch v. Chao*, 536 F.3d 269 at 277 n. 4 (4th Cir. 2008); 80 Fed. Reg. 11867-11868 (Mar. 5, 2015)

The Complainant alleges that the ETR workpaper he uploaded to "Paisley" on December 20, 2013, demonstrates that Respondent was engaged in fraud and misconduct in handling 13 of the 15 loans he reviewed as part of his Tax audit assignment.

Deposition testimony and copies of the December 20, 2013 ETR workpaper, when viewed in a light most favorable to the Complainant demonstrates his subjective belief that the Respondent's alleged conduct involving the referenced loans constituted a violation of 18 U.S.C. 1344, which refers to bank fraud; a rule or regulation of the Securities and Exchange Commission; or a provision of Federal law relating to fraud against shareholders. The Complainant has not contradicted his subjective belief on these potential violations.

There is no submitted documentation or deposition testimony that infers a subjective belief that the Respondent's alleged fraud and misconduct constitutes a violation of 18 U.S.C. 1341, 1343 or 1348, which refer to mail fraud; fraud by wire, radio or television; and securities and commodities fraud, respectively.

V. When Viewed in the Light Most Favorable to the Complainant, the Complainant Has Failed to Demonstrate That a Reasonable Person Would Believe That the Respondent's Alleged Conduct Constitutes a Violation of 18 U.S.C. 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.

In order to ultimately prevail in a SOX complaint, the Complainant must also establish that a reasonable person would believe the Respondent's alleged conduct constitutes a violation of 18 U.S.C. 1344; any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law relating to fraud against shareholders when the same information known to the Complainant is also known to the reasonable person of similar training, skills and ability.

Here, the Complainant testified in deposition that he turned in an ETR workpaper on December 20, 2013 involving the assigned Tax audit work. He testified in deposition that "the words that were used showed intentional misrepresentation by the company which is fraud. It said that the disbursement authorization forms used to transfer balances from loans essentially that were not performing to new loans . . . when I turned that paper into 'Paisley' on December the 20th, it was said and done in a manner to say and suggest and imply fraud and intentional misrepresentation . . . [and] it's documented in there that shows the misrepresentation intent on the part of the Respondent." The Complainant testified he was terminated before he could report the fraud to

the supervisor, General Counsel's office, the audit committee, HR Department or the Help line.

The Complainant did not submit evidence for consideration that related to the requirement that a reasonable employee with similar knowledge, training, ability and skills also believe the alleged actions set forth in the December 20, 2013 ETR workpaper constituted a violation of 18 U.S.C. 1344; any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law relating to fraud against shareholders.

The Respondent did however submit evidence for consideration on the requirement that the alleged violation(s) be objectively reasonable.

K. Greene was the Complainant's first direct supervisor. He testified by declaration that he analyzed the ETR, 2013 Tax audit documentation that the Complainant said demonstrated fraud and misrepresentation by Respondent and that within two hours "I was able to determine that the relevant information proved that there was no fraudulent manipulation of the loans to overstate income. In each of the cases that [the Complainant] cited as issues, he alleged that the customers had not made interest payments on the loans and that the loans were renewed to prevent them from going past due. He was wrong. . . . For whatever reason, he reached the wrong conclusion."

R. Cellino as Senior Manager of Corporate Credit Administration reviewed the spreadsheet submitted by the Complainant in the ETR workpapers for the 2013 Tax audit. He testified by declaration that "my analysis of [the Complainant's] spreadsheet and

workpaper showed no evidence of any [fraudulent manipulation of loans] conduct. In his workpaper [the Complainant] asserted that 13 of the 15 loans he selected had potential issues that were prevalent. [The Complainant] indicated that these issues could or should prevent the loan/notes from accruing interest. Contrary to [the Complainant's] assessments, none of the 15 loans he listed should have been placed in non-accrual status . . . In fact, the available documentation supports the opposite conclusion, that Synovus was warranted in continuing to accrue interest on those loans. Synovus did not overstate the interest income, nor did it understate the allowance for loan and lease losses associated with the reviewed credits."

While the Complainant has asserted his subjective belief of fraud and misrepresentation associated with the ETR workpaper and 2013 Tax audit, the unrebutted documentation submitted by Respondent is that a reasonably prudent person would not believe that Synovus engaged in fraud and intentional misrepresentations based on the 2013 Tax audit as alleged. Accordingly, when the evidence is considered in a light most favorable to the Complainant, the Complainant has failed to establish that this alleged activity was such that a reasonable person would believe that it constitutes a violation of 18 U.S.C. 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.

The Complainant also alleges that his supervisors "were preventing him from thoroughly and accurately conducting audits, altering work papers to lessen the severity of his audit findings and blocking him from reporting matters requiring immediate attention to

management." The Complainant testified in deposition that he did not contact the General Counsel's office or use the Help line to report any concerns. His immediate supervisors, K. Greene and S. Weekley testified that the Complainant never brought any allegations of SOX violations to their attention.

The Complainant's performance evaluations submitted for consideration provide information on these allegations. The annual evaluations show a pattern of assigned work being submitted late, work being performed exceeding allotted hours for completion, repetitive requests for information and updates being ignored, insufficient documentation for his conclusions, and discussions with his supervisor about budgeted hours and performance issues. None of the performance evaluations support the allegation the superiors were preventing him from doing his assigned work, altering his workpapers, or blocking him from reporting concerns to management. Accordingly, when the evidence is considered in a light most favorable to the Complainant, the Complainant has failed to establish that this alleged activity was such that a reasonable person would believe that it constitutes a violation of 18 U.S.C. 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.

VI. Respondent Is Entitled to Summary Decision and Dismissal of the Complainant

As noted above, if the Complainant does not prove any one of the required elements, the entire complaint fails and the complainant warrants dismissal. *See*; *Coryell*, *supra.*; *Sylvester v. Parexel International LLC*,

ARB No. 07-123, ALJ Case No. 2007-SOX-00039 & 00040 (ARB May 25, 2011)

After review of the administrative file, the position of the Parties, and evidence submitted by the Parties on the Motion for Summary Decision, when the evidence is view in the best light for the Complainant, it is established that—

1. The Complainant suffered an adverse employment action on January 6, 2014 when his employment was terminated by Respondent.
2. The Complainant had a subjective belief [good faith belief] that the Respondent's alleged conduct constitutes a violation of 18 U.S.C. 1344 or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.
3. A reasonable person with similar knowledge, training, abilities, and skills of the Complainant would not believe that the Respondent's alleged conduct constitutes a violation of 18 U.S.C. 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.

In that the evidence when viewed in the best light for the Complainant failed to establish a genuine issue of a material fact involving the required objective belief that a reasonable person with similar knowledge, training, abilities, and skills of the Complainant would believe that the Respondent's alleged conduct constitutes a violation of 18 U.S.C. 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, the complaint warrants dismissal. Accordingly, the additional issues of (1) whether alleged protected activity was a contributing factor to the decision to terminate the Complainant's employment; and, (2) whether the Respondent would take the same action of terminating Complainant's employment without protected activity having occurred, need not be addressed.

ORDER

It is hereby Ordered that Respondent's Motion for Summary Decision is GRANTED and the Complaint filed July 3, 2014 is DISMISSED.

/s/ Alan L. Bergstrom
Administrative Law Judge

ALB/jcb
Newport News, Virginia

PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING (JULY, 30 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL B. BROWN,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR,

Respondent.

No. 19-13120

Petition for Review of a
Decision of the Department of Labor

Before: WILSON, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

CONSTITUTIONAL, STATUTORY, AND JUDICIAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5 U.S.C. § 706–Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

18 U.S.C. § 1514A–Civil Action to Protect Against Retaliation in Fraud Cases

(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. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of

1934 (15 U.S.C. 78c),[1] or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, 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—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(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); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed

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[1] So in original. Another closing parenthesis probably should precede the comma.

or about to be filed (with any knowledge of the employer) relating to an alleged 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.

(b) Enforcement Action.—

(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) JURY TRIAL.—A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

(c) Remedies.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) Rights Retained by Employee.—

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of

any employee under any Federal or State law, or under any collective bargaining agreement.

(e) Non-enforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes.—

(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

28 U.S.C. § 2072–Rules of Procedure and Evidence; Power to Prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

49 U.S.C. § 42121(4)(A)

(4) REVIEW.—

(A) APPEAL TO COURT OF APPEALS.—Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

29 C.F.R. 1980.109–Decision and orders of the administrative law judge

(a) The decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (b) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to

§ 1980.104(b) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge will hear the case on the merits.

29 C.F.R. 1980.110–Decision and orders of the Administrative Review Board

(a) Any party desiring to seek review, including judicial review, of a decision of the administrative law judge, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board ("the Board"), which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within 10 business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by

hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the administrative law judge will become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement will be effective while review is conducted by the Board, unless the Board grants a motion to stay the order. The Board will specify the terms under which any briefs are to be filed. The Board will review the factual determinations of the administrative law judge under the substantial evidence standard.

(c) The final decision of the Board shall be issued within 120 days of the conclusion of the hearing, which will be deemed to be the conclusion of all proceedings before the administrative law judge—i.e., 10 business days after the date of the decision of the administrative law judge

unless a motion for reconsideration has been filed with the administrative law judge in the interim. The decision will be served upon all parties and the Chief Administrative Law Judge by mail to the last known address. The final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210, even if the Assistant Secretary is not a party.

(d) If the Board concludes that the party charged has violated the law, the final order will order the party charged to provide all relief necessary to make the employee whole, including reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

(e) If the Board determines that the named person has not violated the law, an order will be issued denying the complaint. If, upon the request of the named person, the Board determines that a complaint was frivolous or was brought in bad faith, the Board may award to the named person a reasonable attorney's fee, not exceeding $1,000.

29 C.F.R. Part 18 Subpart A

§ 18.10–Scope and purpose.

(a) IN GENERAL. These rules govern the procedure in proceedings before the United States Department of Labor, Office of Administrative Law Judges. They should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding. To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

(b) TYPE OF PROCEEDING. Unless the governing statute, regulation, or executive order prescribes a different procedure, proceedings follow the Administrative Procedure Act, 5 U.S.C. 551 through 559.

(c) WAIVER, MODIFICATION, and suspension. Upon notice to all parties, the presiding judge may waive, modify, or suspend any rule under this subpart when doing so will not prejudice a party and will serve the ends of justice.

Fed. R. Civ. P. 60–Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.

The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or

applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief.

This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished.

The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

DEPOSITION OF KEITH GREENE-EXCERPT (APRIL 27, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

MICHAEL B. BROWN,

Plaintiff,

v.

SYNOVUS FINANCIAL CORPORATION,

Defendant.

Civil Action No. 4:16-cv-00249-CDL

[April 27, 2017 Transcript p. 19]

A. Uh-huh.

Q. And that says, Michael has participated in the educational opportunities that have been presented to him in attaining his CPE hours?

A. Yes.

Q. And so is it—is it a document that you add things to throughout the year when you create the Right Steps form or this specific Right Steps form?

A. Would have been when documentation of the meeting that would have been held in the interim period.

Q. And earlier you were saying that there-the evaluations can occur throughout the year, so is it—is it correct to say that on October 26, 2009, you would have had an evaluation meeting where that would have come up?

A. Yes.

Q. In the next block, it has some—an entry from May 11, 2009 and October 26, 2009, and then March 1, 2010. Do you see that?

A. Yes.

Q. And you say on March 1, 2010, that Michael made improvements in completing the work in the allotted time and he had been taking additional steps to meet project completion deadlines; is that right?

MS. CAMPBELL: Dates.

Q. Oh, I'm sorry. Dates.

A. Yes.

Q. In the section that's marked—the box that's titled "leadership," on March 1, 2010, it says, Michael has been assisting with preplanning audits since the time of last review. He has helped to pull together two sets of finance audits that we have completed.

And what's the relationship between that and leadership skills?

A. It would be a part of developing a process of setting out planning the audits, working to get the audit established, set up.

Q. And so that was a positive thing that you felt that Michael had done?

A. At that time.

Q. And, in fact, just above that, in December—October 26th of 2009, you seem to indicate that there were additional things Michael could be doing to improve his leadership skills; is that fair to say?

A. Repeat that.

Q. Is it fair to say that on December—on October 26th of 2009 that you were indicating that Michael could be doing more to improve his leadership development skills?

A. No.

Q. How would you describe that?

A. There were issues that were hindering his development in leadership skills.

Q. And what were those issues?

A. The—as it puts here, his preference to work alone, that he would go into the work papers and assign large portions of an audit to himself but rarely complete them by the given deadlines.

Q. And when you made the notation on March 1, 2010, did you feel as if those issues had improved?

A. There was some improvement.

Q. And if you would turn to page 3 of 5. And this is a section marked "ACL utilization." What is ACL utilization?

A. ACL is a software that we used as part of the audit process to perform sampling of large amounts of data. It has random sample features and other available sampling methodologies that can be done on a more automated basis.

Q. And you indicate on March 1, 2010 that the documentation audit says improved?

A. Repeat that.

Q. You indicated on March 1, 2010 that the documentation in the audits had improved?

A. Under ACL utilization?

Q. Yes.

A. I don't see a March 2010.

MS. CAMPBELL: It goes to the next page.

THE WITNESS: Okay. But that's in a different section.

Q. Oh, I apologize. So this is a new section?

A. Yes.

Q. I see. I see. Okay. This is, Consistently ensure high-quality work product?

A. Correct.

Q. And in that regard, you felt that Michael had improved, as of March 1, 2010?

A. As of March 1, 2010, at the time this was done, yes, there was improvement.

Q. As of March 1, 2010 in terms of quality of work output, you said that Michael's work typically exceeds what the department standards address?

A. I'm sorry. This copy is—I can't really read—read the heading of this very well.

MS. CAMPBELL: It said quantity. A. Is it quality or quantity?

MS. CAMPBELL: It's quantity.

Q. It appears to be quantity. The first sentence says the quantity or amount of work produced.

A. Okay. This statement there, yes.

Q. In fact, if you look through Exhibit D, you rated Michael as a four, exceeds performance, in all but one category; is that right?

A. No.

Q. I'm sorry. How many categories did you rate him in exceeds performance in?

A. There appears to be eight.

Q. So eight out of ten; is that right?

A. That's what it appears to be, yes.

Q. And the two areas that you did not rate him as exceeds performance, you rated him' as meets performance?

A. That's what this shows, yes.

Q. And the scale for these—for—excuse me—this 2009 Right Steps form, is that out of five?

A. Yes.

Q. And this is—Exhibit D to your declaration would have been the last review that you did—excuse me—last evaluation that you did of Michael Brown; is that right?

A. Yes.

Q. Based on—based on Exhibit D, would you describe this evaluation to be one of someone who's a good performer?

A. Average.

Q. And at the time of this Right Steps time period in March of 2010, who else did you supervise besides Michael Brown?

A. Trying to think. Matt Jones was one of the individuals supervised then. I believe Janeen Richardson. I can't remember any others. I know there are others, but it's been quite a while back.

Q. Did you have—did you engage in any progressive discipline with Matt Jones while you supervised him?

A. Not progressive discipline.

Q. Did you engage in something other than progressive discipline?

A. Counseling.

Q. Is that the same type of counseling that you gave to Mr. Brown?

A. Yes.

Q. So nothing in writing? This would have just been oral counseling?

A. Mostly, yes.

Q. Did you put some counseling in writing for Mr. Jones?

A. Not that I remember.

Q. Did you indicate counseling-related issues in his Right Steps evaluation?

A. If there were issues, I would have, yes.

Q. But you don't recall any as you sit here today?

A. No. I'd have to look at the document to see.

Q. And Janeen Richardson, did you engage in any progressive discipline with her?

A. Mostly would have been verbal.

Q. Do you recall any written that you would have done?

A. None outside of the performance evaluations.

Q. Have you placed any employees on a performance improvement plan while you've worked at Synovus?

A. Yes.

Q. Who?

A. John Koon, Matthew Vasconcelles.

Q. And when did you place John Koon on a performance improvement plan?

A. I'm not sure of the dates. It would have been probably in the 2006-7 time frame.

Q. And Matthew—

A. Prior to his leaving.

Q. And Matthew Vasconcelles?

A. Trying to think when he left. It would have been in the year prior to his leaving.

Q. Was that 2013?

A. I can't remember when he—when he left.-

Q. And why did Matthew Vasconcelles leave?

A. He took a position at CSB Bank in Atlanta, senior auditor position.

Q. And had he completed his performance improvement plan as of the time he did that?

A. He did.

Q. Do you know how long it was after he completed his performance improvement plan that he left?

A. No.

Q. With Matthew Vasconcelles's performance improvement plan, did you submit it to Mr. Cottle to review?

A. I don't remember.

Q. What about for Mr. Koon?

A. Yes.

Q. Ever given any written warnings to any employees of Synovus?

A. No.

Q. Have you ever recommended any employees for termination from Synovus?

A. From Synovus, no.

Q. If you could turn to page 9 of your declaration.

A. Okay.

Q. In paragraph 27, you say that by 2010, you felt Mr. Brown's work product was unreliable and did not match his purported level of training or his position's responsibilities at Synovus. Do you see that?

A. Yes.

Q. How long after March 1, 2010 did you supervise Mr. Brown?

A. I don't remember exactly when the change—the switches occurred.

Q. But in the next paragraph, it does say in early 2010 that the structure was changed; is that right?

A. Yes.

Q. So did you—do you feel like the Right Steps form from Exhibit D reflects your concerns that Mr. Brown's work product was unreliable?

A. It showed the inconsistency, yes.

Q. But you didn't—you didn't give him any kind of performance improvement plan as a result of that?

A. I did not, no.

Q. And is there any reason that you didn't do that?

A. My preference is to work directly with the individual, attempt to coach them through it. And if I reach a point where I believe that the coaching is not getting through, not being received or there's no change, then I would move to a performance plan.

Q. And if you could go to page 10.

A. Okay.

Q. And paragraph 31, it says that, Although I no longer directly supervised Mr. Brown after the first quarter of 2010, I reviewed the performance improvement plan that Ms. Weekley issued to Mr. Brown in December 2012 to ensure that it fairly reflected Mr. Brown's performance and performance improvement needs I had observed.

(Brief interruption.)

(Off the record.)

(Court reporter reads back the last question.)

Q. (By Mr. Keegan) And that accurately reflects your testimony in paragraph 31?

A. Yes.

Q. And did anyone ask you to review that performance improvement plan?

A. Ms. Weekley did.

MS. CAMPBELL: I would note for the record that's not the entirety of paragraph 31. Just make that clear on the record.

MR. KEEGAN: That's a good point.

Q. (By Mr. Keegan) And let's go ahead and get the rest of it in there. So the last sentence of paragraph 31 is, Ms. Weekley's assessment was consistent with the experiences that I had when I supervised Mr. Brown, and I concurred with her plan to try to improve his performance.

A. Yes.

Q. And that's accurate?

A. Yes.

Q. Did Ms. Weekley tell you why she wanted you to review the performance improvement plan?

A. I don't remember.

Q. And at this point, you hadn't actually supervised Mr. Brown for at least a year; is that right?

A. Based on these dates, that would be correct.

Q. Okay. I don't have any other questions.

MS. CAMPBELL: We have no questions at this time either. He will read and sign.

(The deposition of Keith Alan Greene concluded at 12:56 p.m. on April 27, 2017.)

Reported by:

Lynne C. Fulwood
Certified Court Reporter

DEPOSITION OF MICHAEL B. BROWN-EXCERPT (SEPTEMBER 28, 2015)

IN THE UNITED STATES DEPARTMENT OF LABOR OFFICE OF ADMINISTRATIVE LAW JUDGES

MICHAEL B. BROWN,

Petitioner,

v.

SYNOVUS FINANCIAL CORPORATION,

Respondent.

Case No. 2015-SOX-00018

[September 28, 2015 Transcript p. 265]

[. . .]

. . . matters requiring immediate attention which is an expression of concern.

Q. So—

A. All concerns—the strongest concern that can be addressed in an audit.

Q. —is every matter requiring—whatever it is, does that mean fraud? Every time you have noted that—

A. In this case, it did.

Q. In this case, it did; but it didn't say fraud. So—

A. If you—

Q. —did you go—did you tell anyone, Ms. Weekley, Mr. Cottle, Mr. Sawyer, the general counsel, did you tell any of them that you suspected fraud?

A. I told—I did that in the work paper.

Q. Okay. So you didn't do anything to notify them?

A. I turned in my work paper.

Q. Okay. Is that—

A. If I had not turned in the work paper—

Q. —Is that something that goes to the general counsel?

A. It goes to my supervisor.

Q. Okay. And under the accounting— internal accounting—

A. The—

Q. —controls—excuse me—an auditing matters portion of the code of business conduct and ethics you are supposed to report it to the audit committee through the general counsel's office or if you wish to remain anonymous by calling the toll-free help line that's open 24/7.

A. The first thing I'm supposed to do is to turn the work in to my supervisors. That's the first thing I'm supposed to do, which is what I did.

Q. That's what you're supposed-

A. The next thing I did was come to work and got terminated before I could do those—following the procedures.

Q. —Nothing stopped you from calling the 24/7 help line except that you chose not to do it because you were on vacation.

A. If you look at the time—if you look at the time of the work paper—I believe that work paper was turned in on December 20th by 11 something at night. And the audit committee was not available I'm sure—

Q. Well—

A. —at 11:20 at night.

Q. The help line is 24/7.

A. When did they add that?

Q. Mr. Brown, that's in everything you've acknowledged and it has—

A. And how many—

Q. —the phone numbers.

A. The—the code of conduct and that acknowledgement—those documents are probably about a hundred pages.

Q. And they're called to your specific attention on the acknowledgment themselves.

A. And they're buried in—that phone number that you're referencing is buried in the 100 or so pages that are presented as a little box to check every—every year.

Q. Well, we'll see about that. All right. So after you're terminated you don't contact—even at that point you don't contact the general counsel's office or the help line or HR or any member of management about your termination, correct? The first time that

you allege fraud is when you filed the complaint in this action, correct?

A. Within the timeframe, yes. don't know what that means, within the timeframe. the audit committee. Again, that work paper was turned in on October—work papers were turned in on—work papers were turned in on December the 20th at 11 something and I mentioned that it was very late at night. And I went on vacation, came back—well, came back, first day I was terminated after turning in that work paper.

Q. Okay.

A. Before contacting or doing anything in that policy.

Q. Well, did you—

A. Seeing I remember what was in there, all the almost 180 so pages.

Q. —So, I'm sorry, did you say assuming I remembered what was in there?

A. I'm saying that there are approaching a hundred something pages and then-

Q. Okay.

A. —the three documents.

Q. So you're not saying you had a plan to call the audit committee or the general counsel's office?

A. I'm saying I was terminated before—before it could have been done while I was working.

Q. But nothing—nobody prevented you—

[. . .]