



**Issue Date: 17 September 2008**

CASE NO: 2008-SOX-00033

In the Matter of:

PAUL GRONCKI,  
Complainant,

v.

AT&T MOBILITY,  
Respondent.

### **DECISION AND ORDER DISMISSING COMPLAINT**

This case arises under the whistleblower provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (“SOX” or “the Act”) enacted on July 30, 2002. The Act prohibits companies with a class of securities registered under § 12 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, or which are required to file reports under § 15(d) of the same Act, and any officer, employee, or agent of such company, from discharging, harassing, or in any other manner discriminating against an employee in the terms and conditions of employment because the employee provided the employer or Federal Government with information relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, any rule or regulation of the Securities and Exchange Commission (“SEC”), or any provision of Federal law relating to fraud against shareholders.

#### **I. PROCEDURAL BACKGROUND**

On or about December 7, 2007, Paul Groncki (“Complainant” or “Groncki”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) in Philadelphia, Pennsylvania in which he alleged, *inter alia*, that his employment with AT&T Mobility (“Respondent” or “AT&T”) was terminated as a result of having engaged in activity protected by SOX.

In a letter dated February 20, 2008, Complainant was informed by OSHA’s Acting Regional Administrator that an investigation into the allegations set forth in Groncki’s complaint disclosed that there was no reasonable cause to believe that Respondent violated the Act and that his complaint was therefore being dismissed.

On March 20, 2008, Complainant filed with the Office of Administrative Law Judges a notice of appeal of the Secretary’s dismissal of the complaint and requested a formal hearing before an administrative law judge.

On April 1, 2008, the undersigned issued a notice of hearing and pre-hearing order scheduling this matter for a formal hearing beginning June 9, 2008 in Baltimore, Maryland.

A formal hearing was held in the Federal Courthouse in Baltimore, Maryland on June 9 and 10, 2008. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence, submit oral arguments, and file post-hearing briefs. The following exhibits were admitted into evidence at the hearing: Joint Exhibits (JX) 1-38 and ALJ Exhibits (ALJX) 1-4. Post-hearing briefs were received from both Complainant and Respondent.

## II. ISSUES

1. Whether Complainant engaged in activities that are protected by Sarbanes-Oxley?
2. Whether Respondent actually or constructively knew of or suspected such activity?
3. Whether Complainant suffered an unfavorable personnel action?
4. Whether Complainant's activity was a contributing factor in the unfavorable personnel action taken against him?
5. Whether Respondent has established by clear and convincing evidence that it would have taken the same unfavorable personnel action against Complainant irrespective of any protected activity?

## III. SUMMARY OF EVIDENCE

### Paul Groncki

Complainant resides in Ellicott City, Maryland, obtained a Bachelor of Arts Degree in Public Affairs and Administration, and is a certified corporate finance and business law paralegal. Tr. 30. He is licensed in the State of Maryland as a real estate salesperson and has worked in commercial real estate for 23 years. *Id.* His commercial real estate experience includes working on both the landlord and tenant sides of transactions and has involved site selection, asset management, document negotiations, lease negotiations, and asset dispositions. Tr. 31. He has worked as a site selection specialist for both Blockbuster Video and AT&T. *Ibid.*

Groncki was hired by AT&T on September 11, 2006 and worked there until September 10, 2007. Tr. 31. His duties while working for Respondent included interacting with a network of brokers throughout the United States to secure prime locations for AT&T Wireless stores. *Id.* When he found what he believed to be a suitable location, he then would get the AT&T sales director involved to see if he or she approved of the selected site from an operational standpoint, and, if approved, would thereafter begin negotiations with respect to a letter of intent for the site. Tr. 31-32.

Commercial real estate brokers with whom Complainant worked while employed by AT&T were independent contractors and were not employees of AT&T. Tr. 32. They worked for Respondent to find sites but were compensated by the landlord. *Ibid.* Brokerage commission agreements were generally geared so that the broker received compensation based on how much rent the client paid for the site, multiplied by the square footage and the number of years in the

lease. *Ibid.* The higher the rent, the greater the square footage, and the longer the lease, the more the commission paid to the broker. *Ibid.*

On August 16, 2007, Complainant sent an email regarding a site at Gallery Place in the Chinatown segment of Washington, DC to Bill Dickinson, an AT&T broker, Colin Martin, an AT&T Sales Director, and Jennifer Fried, AT&T's outside counsel "because there was a lot of misinformation [that] was flying back and forth." Tr. 33; JX 14. According to Complainant, Dickinson and Martin were calling Fried and dealing with the landlord and "the deal had went from 2700 square feet, to 3400 square feet, to 3700 square feet, to a final square footage of 8,800 plus square feet." Tr. 34. The email notes that Complainant was on record as not supporting the transaction and further states: "Although I like the location, the economics of the deal are not palatable to me, and in my opinion unreasonable." *Ibid.* Complainant was totally opposed to the deal, believed the parties were at an impasse, and would not sign off on the deal. Tr. 36-37. AT&T had been negotiating to lease the Gallery Place site prior to the time Complainant began working for AT&T, and the initial rent of \$80 a square foot for 2,700 square feet had already been negotiated by the sales director with the landlord and broker and approved by Steve Hodges, a local or regional VP for AT&T. Tr. 37-38.

According to a March 14, 2007 email from Complainant to Colin Martin and Groncki's immediate supervisor, Toni Pallis, Groncki was under the impression that AT&T was to have the entire first floor of the Gallery Place retail space, including window space along 7<sup>th</sup> Street near the Chinatown Arch, but the landlord was now allocating that window space to another retailer. Tr. 38-39; JX 30. Complainant testified: "So what we were left with was 25 foot of frontage, stuck behind the Metro [subway] entrance, pushed back off of the street on the first floor." Tr. 39. Complainant believed that inaccurate information had been given to headquarters about the space and he now needed to get special approval to do the deal. Tr. 39-40.

Based on the changes in the lease provisions increasing the square footage of the space and extending the term from five to ten years, Complainant questioned Colin Martin about how he was going to support a store at this location. Tr. 41. Martin responded in an email dated February 19, 2007 that the store would have five hundred gross new activations per month and a thousand customer opportunities per month. Tr. 41-42; JX 34 at 4. According to Complainant, when he questioned the figures given by Martin, Martin responded "I'm going to use the sales from another business marketing group to support those gross adds."<sup>1</sup> Tr. 42. Complainant thought that this amounted to "stealing from Peter to pay Paul," and he believed that "a store should show and be based on its own merits." *Ibid.*

At some point, according to Complainant, the landlord of the Gallery Place site contacted AT&T's sales director and said: "Oh, we're having a difficult time leasing the second floor. If you want the [first] floor you're going to have to lease the second floor." Tr. 43. Complainant believed the upstairs space was unsuitable for a business marketing group which "should be in a back office location . . . [rather than] a retail location." *Ibid.* Complainant further testified that the landlord was going to pay Benetton, the existing tenant on the second floor, \$675,000 to vacate because the AT&T deal was better. Tr. 43-44. By August 29<sup>th</sup>, according to

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<sup>1</sup> "Gross adds" refers to the total number of new cellular telephone activations generated at a specific retail location. *See, e.g.*, Tr. 41-42.

Complainant, Benetton had received its termination check, closed its store and was in the process of vacating the premises, and AT&T “should have been in a very strong position to clean up and negotiate all the terms that were possible because they had already notified the tenant to vacate . . .” Tr. 44. Complainant testified that it was a normal practice after signing a letter of intent with respect to a site that a landlord might go back on some minor negotiated terms, but never to the extent involved in the Gallery Place deal. Tr. 46.

Complainant testified that AT&T had only four other stores in the DC metropolitan area, all of which were 2000 square feet or less in size. Tr. 47. Of the two stores which were closest to Chinatown, one was leased at \$38 per square foot and another at \$40 or \$42 per square foot. Tr. 49-50. He further testified that both of those stores “were located in a much higher demographic location than the Chinatown location.” Tr. 50. When asked by Complainant for “comparables,” Dickinson gave him a letter of intent for Starbucks nearby on Massachusetts Avenue for 1600 square feet at \$45.50 for the first 5 years and \$50 per square foot for the next 5 years. *Ibid.*; JX 36. In Complainant’s view, this “comparable” did not support \$80 a square foot for the Gallery Place space which had been agreed to by Dickinson and Martin prior to Complainant’s involvement in the transaction. *Ibid.*

According to Complainant, various individuals, including Bill Dickinson, Colin Martin, and the property’s landlord engaged in negotiations regarding the Gallery Place transaction at a meeting in Georgetown in which he was not involved. Tr. 51-52. An email dated August 3, 2007 from Martin to Herb Miller and others mentions meeting “again” in Georgetown. JX 38 at 2. Herb Miller was one of the partners involved in the transaction and was a decision maker. Tr. 53. According to Complainant, these communications directly between the landlord and the individuals identified in the email were against company policy. *Ibid.* It was also contrary to instructions from Complainant’s immediate supervisor, Toni Pallis, in which she instructed Martin and Kristy Turner, another sales director, in a May 2007 email that Groncki was to be the liaison between Martin and Dickinson. Tr. 54; JX 37 at 32. When asked if these communications without him raised a red flag for Complainant, he answered: “Absolutely.” Tr. 55.

Complainant testified that the Gallery Place transaction also included a “branding agreement” which provided for advertising on the exterior of the building. Tr. 56. He further stated that he requested copies of the branding agreement on more than half a dozen occasions but was never given a copy. *Ibid.*; *see also* JX 21 at 1-6. According to Complainant, the branding agreement was a contingency of the lease agreement and Jennifer Fried, the outside counsel, and Debbie Braun, AT&T’s in-house counsel, also requested a copy but never got it. Tr. 56-57. Fried and Dickinson both said that the branding agreement was an important part of the deal. Tr. 58; JX 21 at 4, 7.

The Gallery Place location which was the subject of the lease agreement is located in Chinatown at the corner of 7<sup>th</sup> and H Streets, Northwest in Washington, DC. Tr. 60; JX 23 at 1. There is also a Metro subway stop at that location, and the escalators coming up from Metro are in front of the first floor of the retail space which is “[p]ushed back behind the street.” Tr. 60-61; JX 23 at 2.

Complainant testified that, not only did AT&T end up leasing the first and second floors of the Gallery Place building, but the landlord “retained what should have been our sign banding [sic] for our company on the street, and then put up these multiple video, video display cabinets.” Tr. 62; JX 23 at 3. Groncki further testified that he was unaware of this aspect of the deal inasmuch as it was all covered by the branding agreement which had not been provided to him. *Ibid.* According to Groncki, AT&T paid \$80,000 per month extra for the video signs which were ultimately placed at that location. Tr. 66; JX 23 at 3. When AT&T leases space in a shopping mall, he testified, signage is “usually covered under promotional fund, advertising fund, merchant’s association fund, or the like, and it’s included in the store’s expense.” Tr. 66. Before this transaction, Complainant had never been involved in a deal where there was a separate branding agreement. Tr. 67.

Groncki understood that the video displays “were going to promote all the tenants, all the tenants including AT&T, we’re going to be 25 percent of the time.” Tr. 67. The signs for the Washington Sports Club, another tenant of the building, covered “more real estate [on the building] because they’re on both sides, both on H street and on 7th, for their small entrance, whereas we have 25 foot pushed back, and not only lease the bottom floor but the top floor, and wasn’t even allowed to have signage.” Tr. 68; *see also* JX 23 at 3-4 and Exhibit B of JX 17. In his opinion, costs associated with advertising specific to AT&T on the video displays should have been included as part of the costs of leasing the store. Tr. 69.

According to a chart labeled “Chinatown Branch – LTV Analysis,” the rent at Greenway Center and Mt. Vernon, the two AT&T stores closest to the Gallery Place location, were rented at a cost of \$42.55 and \$38.80 per square foot, respectively. Tr. 72; JX 16 at 2. The chart also reflects rents for AT&T stores in Columbia Mall in Howard County, Maryland at \$107.88 per square foot and in Annapolis, Maryland at \$96.32 per square foot. JX 16 at 2. Complainant could not understand why they were using these stores in Maryland as comparables for the Washington, DC location. Tr. 74. The chart also reflects \$1.5 million for signage and a sidewalk kiosk plus \$1 million for “branding” of Gallery Place to include the word “Cingular”<sup>2</sup> all of which costs were to be assumed by AT&T Marketing. Tr. 75-76; JX 16 at 2. In Groncki’s opinion, that amount should have been part of the leasing agreement and charged against the store. Tr. 76. The \$2.5 million would be in addition to the \$80 per square foot for the space. Tr. 77. Although he acknowledged that he had never been involved in any transactions relating to kiosks, Complainant believed they should be treated as individual profit centers and covered by a separate lease agreement. Tr. 78. Groncki was unaware of the \$2.5 million in costs over and above the \$80 per square foot for the space and would have objected to the deal even more strenuously than he did had he known. Tr. 79.

In an email from Groncki to Bill Dickinson dated August 24, 2007, Complainant asked whether another meeting was needed with the principal parties to discuss several issues regarding the Gallery Place lease and revisions made by the landlord. JX 20 at 3.<sup>3</sup> A responding

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<sup>2</sup> According to Toni Pallis, “AT&T Wireless was subsequently bought out by Cingular, and Cingular was then bought out by AT&T.” Tr. 286. References to Cingular herein thus refer to Respondent.

<sup>3</sup> The vast majority of Groncki’s email to Dickinson was copied verbatim from an email Groncki received from AT&T’s outside counsel Jennifer Fried dated August 23, 2007. *See* JX 20 at 6-7. However, Groncki’s email listed only 17 issues which were contested whereas Fried’s email listed 21. Tr. 83-84.

email from Dickinson to Groncki, with copies to Toni Pallis and Christine Marr, states that he has discussed the issues noted in Groncki's email with Jon Miller and "[t]hey still want to put together a call with everyone to close the loop on these issues." *Ibid.* "Everyone" was Colin Martin, Bill Dickinson, Christine Marr, Shelley Kroll, Jennifer Fried, Herb Miller, Jon Miller, and John Viglianti. Tr. 83.

On August 27, 2007 Toni Pallis sent an email at 6:11 p.m. to Dickinson and Groncki in which she states that none of the issues in Groncki's email appear to be "that serious" and says: "I reiterate – stand firm on the on [sic] things we have to have and concede where we can. Some of this is just a matter of language. Get this call on everyone's calendars for tomorrow and drive this to resolution please." Tr. 81-82; JX 20 at 2. Twenty minutes later in a 6:31 p.m. email from Groncki to Pallis, Complainant states that the landlord is not available until Wednesday morning. *Ibid.* Pallis responded "That's fine. Wednesday then. Thanks." *Ibid.*

Complainant understood that Dickinson was supposed to gather everybody together – the lawyers, the business people, the decision makers – for the August 29<sup>th</sup> meeting. Tr. 85. Groncki further understood that they were going to discuss at a minimum the issues listed in his email. *Ibid.*

The August 29<sup>th</sup> meeting was conducted by telephone and the only participants initially on the call were Shelley Kroll, Jennifer Freid, and Groncki. Tr. 86. Complainant asked where everyone else was and was informed by Kroll, counsel for the landlord, that Jon Miller had been called away at the last minute. *Ibid.* Jon Miller was Herb Miller's brother (the landlord) but was not a decision maker and there were no decision makers at the meeting. *Ibid.* Groncki and the two attorneys attempted to go through the outstanding issues but Shelley Kroll was refusing to concede on anything. Tr. 86-87. Complainant was angry and told Kroll "loudly" and "forcefully" that there were supposed to be decision makers participating in the meeting and that the meeting was a waste of his time. Tr. 87-88. Kroll's response was to get Jon Miller, a non-decision maker, on the phone and they again began discussing the issues described by Groncki and Freid, but Miller said that he could not agree to anything and would have to talk to his brother Herb. Tr. 88. Groncki was angry, upset, and raised his voice. *Ibid.* Before the call ended, everyone agreed to schedule a call for later that day. *Ibid.*

After the morning meeting on August 29<sup>th</sup>, Complainant received an email at 11:35 a.m. from Fried discussing the meeting planned for later that day. Tr. 80; JX 20 at 1. Nothing in the email suggested that Groncki had been objectionable, obnoxious, or disrespectful during the morning meeting. *Ibid.*

Before the afternoon meeting, Groncki received a telephone call from Toni Pallis during which she informed him that she had gotten a call from Colin Martin stating that Complainant had been abusive during the phone call and Martin wanted him off the transaction. Tr. 91. Pallis told Groncki that she would take care of the 1:30 conference call and instructed him to send her all the information he had on the deal. *Ibid.*

Complainant testified with respect to the telephone meeting on the morning of August 29<sup>th</sup>.

They knew that it was going to get heated. They also knew that they wanted me off of this transaction. I was the stumbling block for this transaction and did not want this deal to go through ever since I realized that we were taken [sic] on this much square footage and paying an enormous rent for this market. They wanted me off this transaction the worst way.

Tr. 92.

In an email dated September 17, 2007 from Toni Pallis to Robert Forsyth, Steve Hodges, and Kevin Mairs, with copies to Colin Martin and several others, Pallis sought approval of the terms and conditions in the 10 year lease of the Gallery Place site because of the expense of the project. Tr. 93; JX 20 at 14-15. After reviewing a financial analysis of the Gallery Place transaction prepared by AT&T's Cecelia Ambrosio after Complainant's employment with AT&T was terminated, it was Groncki's opinion that Pallis' email was misleading inasmuch as she stated the total cost was \$3.3 million when he believed the total cost, including the branding agreement, the kiosks, and other components, would have added an extra \$25 million in expenses to the transaction. Tr. 93-96. After seeing Ambrosio's analysis, he further believes the deal was worse than he thought it was when he was working for AT&T. Tr. 97. Groncki testified:

There is -- there was some sort of fraudulent activity, some sort of, some sort of -- I don't know if people were getting relating to the commissions. It was a kickback scheme between the landlord, Bill Dickinson, and Colin Martin.

*Ibid.* Complainant has requested, but not been provided with, a copy of the brokerage agreement between Dickinson and AT&T. Tr. 98.

Groncki testified that Toni Pallis was AT&T's Director of Real Estate for the Northeast market and his boss. Tr. 100. He further stated that she never wrote him up or put him on any kind of a progressive discipline plan. *Ibid.* He acknowledged, however, that there were two meetings with Pallis where "some screaming" occurred. Tr. 100-01.

The first meeting involved Complainant's participation in a proposed Richmond, Virginia transaction shortly after he began working for AT&T. Tr. 101-07; JX 26. According to Groncki, a broker working on a potential lease for AT&T in Richmond had called Pallis and complained that Groncki had either refused to get on a call with the landlord for the property or had hung up on the landlord. Tr. 107. He testified that Pallis subsequently summoned him to her office in Pennsylvania "and she started screaming at me." *Ibid.*

The second "screaming" incident occurred in April 2007 when Groncki was involved in terminating an existing store lease and relocating the store to a new location involving Ardmore and Bryn Mawr, Pennsylvania. Tr. 113-14; JX 19 at 7-8. Complainant questioned the logic of Pallis' insistence that the termination date for the lease on the first store be in September 2007 rather than a later date, but ultimately signed a letter of intent with the landlord consistent with the date Pallis had set. Tr. 113-18. Pallis subsequently called Complainant and ordered him to

come to her office in Wilkes-Barre, Pennsylvania to discuss the matter. Tr. 118-19. During the meeting, according to Complainant, Pallis was “yelling” and “screaming” at him and he told her “Toni, if you want to talk like this to me I want HR involved.” Tr. 120. A man named Hood from Human Resources subsequently joined them, and sometime after that meeting, Hood called Groncki and stated that Pallis “should have defused the situation way before it actually went to a meeting, but that you [Groncki] should also agree that when Ms. Pallis calls a meeting you should attend.” Tr. 121; JX 37 at 6.

On cross-examination, Complainant testified that he did not believe there was any fraud or other wrongdoing amounting to a Sarbanes-Oxley violation in connection with the Bryn Mawr-Ardmore transaction. Tr. 136. He further testified that he agreed on behalf of AT&T to pay \$80 per square foot in rent for the Chinatown lease and did not challenge the transaction at that time as being fraudulent. Tr. 136-37. Groncki’s claim of fraud with respect to the Chinatown lease is tied to the “cost per square foot of the property.” Tr. 140. In Complainant’s view, the cost of the transaction has an overall impact on the company’s performance and thus on shareholders. Tr. 144-45. He testified:

The fraud was perpetrated by<sup>4</sup> allowing, or -- the fraud was perpetrated because we have a lease situation, in Chinatown, on a store that is an above-market rent, even higher than the initial eighty; a store size that is larger than what is outlined or was promulgated by headquarters; a lease term that we normally do not agree to, especially when there’s no tenant improvement allowance allowed, involved; and and a document -- a document associated with the agreement that I asked for numerous occasions, numerous occasions that impacted the financial information on this agreement; a brokerage agreement that I also was concerned about that I asked for but was told I shouldn’t ask, get that from the stockbroker because he’s going to get paid, that’s going to impact the lease agreement; and, about even -- even with the direction from Toni Pallis that all communications should go to me, the sales director and the broker are having secretive meetings in Georgetown to discuss the lease. They shouldn’t have meetings anywhere without real estate representation.

Tr. 146.

Complainant’s original SOX complaint in this matter alleges, *inter alia*:

40. Ms. Pallis told Mr. Gronki [sic] that he was being terminated for violating AT&T core values, however, he suspects that the reasons for the termination was that he was unwilling to go along with what he considered to be an unreasonable and possibly fraudulent leasing agreement with the landlord.

41. He suspected, but did not charge at that time that there was some unsavory behavior going on between Collin Miller, the AT&T broker and the landlord.

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<sup>4</sup> The transcript of the hearing in this proceeding is replete with various utterances by witnesses such as “um” and “uh” which have been omitted to facilitate the reading of this decision and order.



Tr. 158; JX 10 at ¶¶ 40-41. Groncki agreed that these paragraphs were a correct statement of his belief. *Ibid.* After the telephone conference on the afternoon of August 29<sup>th</sup> he did, however, tell Mike Chisholm “There was some unusual behavior going [on] up here and I would appreciate it if I could get away from this market.” Tr. 160. His comments to Chisholm were made in the context of requesting a transfer, and he implied without being explicit that there was fraudulent activity involved in the transaction. Tr. 160-61.

Complainant testified that he first became aware of Respondent’s ethics hotline after he was fired, had retained counsel, and reviewed AT&T’s employee handbook. Tr. 164. Although he also testified that he never knew the handbook existed until after he was fired, both Complainant and Toni Pallis signed a “Code of Business Conduct Acknowledgement Form” when he was hired on September 11, 2006, which is attached to a copy of Respondent’s employee handbook and acknowledges that Groncki has “carefully read and reviewed” the handbook. Tr. 165; JX 13 at 37. Groncki further testified that he did not recall taking a training course regarding Sarbanes-Oxley Whistleblowers and Corporate Fraud while employed by Respondent, although a Learning Services Employee Transcript Report reflects that Complainant completed that course on September 19, 2006. Tr. 167; JX 7 at 1; *see also* JX 8.

Prior to the morning telephone call involving Shelley Kroll, Jennifer Freid, and Groncki on Wednesday, August 29<sup>th</sup>, Pallis spoke to Complainant, told him that Bill Dickinson was concerned that Groncki was unhappy with the transaction, and told him not to be confrontational on the call. Tr. 181. He understood her to mean that “once the decision makers are on the phone that we talk in a cordial manner, with Christine Marr, and the brokers and try to come to some resolution.” Tr. 182. Groncki testified that he believed it was okay to be confrontational as long as the landlord’s representative and Christine Marr were not on the phone. Tr. 183. He acknowledged, however, that prior to August 2007 Pallis had advised him that it was unacceptable to behave unprofessionally on calls with business partners, including brokers, landlords, and other employees. Tr. 183-84. Groncki’s 2006 performance evaluation similarly notes “[Complainant] needs to treat our brokers as an extension of our team. If there is an issue with a broker Paul needs to quantify those issues and address them in a professional manner.” Tr. 184; JX 2 at 1. It further notes that “To date many of our brokers and some sales directors have complained that Paul’s communication style within the broker community is abrasive. We discussed this at length on two occasions and the expectation is that this [will] immediately improve.” *Ibid.* Under the heading “Drives Strategy,” the performance evaluation states that “Paul needs to build relationships within the broker community. He needs to be more adaptable to difficult situations and less defensive toward constructive criticism.” Tr. 185; JX 2 at 4.

Groncki acknowledged that he was yelling during the August 29<sup>th</sup> morning conference call and that yelling was not professional behavior. Tr. 195. He believed that Respondent should have paid only half of the lease rate for the first floor of the Gallery Place site, that the second floor rental for the business management group should have been handled by a different department, the space had limited frontage and was inside a “crotch area,” the lease should have included signage for advertising, and the lease contained an exorbitant amount for administrative costs. Tr. 196-97. After the morning conference call, he received a call from Toni Pallis and she demanded to know “Was it confrontational tell me yes or no, I want a yes or no, tell me yes or no.” Tr. 200. Pallis had received a call from Colin Martin complaining that Groncki’s conduct

during the conference call was improper. Tr. 200-01. Groncki did not raise his voice during his conversation with Pallis. Tr. 201.

Complainant is presently employed by Smart Link and earns \$90,000 per annum. Tr. 206. He is eligible for a bonus over and above his salary based on performance. *Ibid.* He has worked for Smart Link for thirty days, and is a project manager. Tr. 206-07. After being terminated by AT&T, Groncki worked for Wireless Enterprises, Inc. at a salary of \$87,000 per annum. Tr. 207. He was only with Wireless Enterprises for about a month during 2008. Tr. 208-09.

Complainant spoke only to Pallis and Chisholm with respect to his allegations of wrongdoing in connection with the Chinatown lease transaction. Tr. 210. He never used the word "fraud." *Ibid.* He testified:

I said, I would say, "Something's really wrong with this deal, something stinks, and something is, is going on here." I was never supplied the branding agreement. The transaction metamorphosed from 2,700 square feet to over 8,800 square feet.

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On several occasions I spoke to Toni Pallis about this deal. I also spoke to her about the broker [Bill Dickinson] in general. . . .

....

Other than the emails that I sent to to [sic] the attorneys strongly objecting, telling them that I would not support this transaction other than the emails that I sent to Toni Pallis saying, "What's going on with this marketing agreement is that leading the deal or is it not, or is, you know are we like -- is the marketing agreement, are we bending over in this case to no matter what these people demand," and other than my phone calls to her about actually the concerns about this transaction. Normally we don't even get the level of approvals on the letters of intent that we got with this transaction. I mean there was -- I think she was concerned, you know? I think she was, she was concerned about the amount of money that was being spent and, and that because unlike other letters of other, unlike the approvals that we got for other letters of intent, because of the size and space and the money, she went up even higher on the approval chain.

Tr. 210-13. Complainant also testified that Colin Martin, Jennifer Fried and Debbie Braun were aware of his concerns. Tr. 215.

### Toni Pallis

When called as a witness during Complainant's case-in-chief, Pallis testified that Paul Groncki's employment with AT&T was terminated on September 10, 2008. Tr. 237; JX 6. Pallis authored a "Termination Document" which describes chronologically events leading up to the time Complainant was fired. *Ibid.*

According to an email dated May 31, 2007 from Pallis to Colin Martin and Kristi Turner, Groncki was to be their main source of contact regarding non-mall sites and was to act as liaison between the market and Bill Dickinson. Tr. 238; JX 37 at 32. However, on occasion, Pallis would deal directly with real estate brokers used by AT&T. Tr. 239. Groncki's role as a real estate manager was "to work as a liaison between the market and the real estate brokers in terms of site selection and LOI [Letter of Intent] negotiation for retail sites." Tr. 245.

On August 24, 2007, Bill Dickinson called Pallis to let her know that "the landlord for Chinatown requested a conference call with our business people and legal counsel along with his legal counsel to resolve open issues on the lease." Tr. 246; JX 6 at 1. Dickinson said he was concerned that Groncki "would be difficult to deal with on the call as this was typical for him in the past." *Ibid.* Pallis assured him that she would talk to Complainant before the conference call "to ensure he demonstrated the appropriate demeanor on the call." *Ibid.* Pallis subsequently contacted Groncki and told him not to be confrontational. *Ibid.* She followed up with an email to Complainant reiterating that the call was not to be confrontational. JX 6 at 1.

On Wednesday, August 29, 2007, Pallis talked to Dickinson and Colin Martin and was informed by both that the landlord had indicated that the conference call had taken place and that they were forced to end the call because Groncki was confrontational, began yelling, and it was impossible to discuss the deal with him because of his demeanor. Tr. 249; JX 6 at 1. Pallis told Martin that Groncki would no longer be involved in the deal and subsequently called Complainant. *Ibid.* According to her Termination Document:

I asked Paul who else was on the call besides the LL's [Landlord's] counsel and he said our outside counsel (Jennifer Fried) was there. Although one of the LL's was on the call, Paul did not mention that. I asked why Christine Marr and the others who were supposed to be on the call were not present. He said the call just got scheduled that morning and that he had no time to let the others know of the call. Paul again stated the LL wants to go back on what was agreed to in the LOI. I asked him if he indicated to those on the call that this deal was being shoved down his throat and that he would be happy if it was killed. He said he told them that he did not support the deal. I asked him if he was yelling on the call and he said that he was. I asked him if he recalled our conversation on Friday where I specifically told him the call was not to be confrontational and I asked him if he received my emails instructing the same. He started screaming and I could not understand him. I told him I needed a yes or no answer to my question. He continued to yell and he told me not to yell at him. I told him I had not raised my voice. He said he did not like my tone. I again asked him to answer my question. He asked why we were discussing this. I told him that I had received complaints about his demeanor on the call. He yelled that this was a witch hunt and that he wanted to talk to HR. I told Paul that he is no longer to work the deal and that he is not to participate in any calls pertaining to the deal. He said he was going to call Colin. I told him that Colin had complained and that he was not to contact Colin. He told me to talk to our legal counsel who was on the call. I told him I would follow up with her. I asked him to send me her phone number and we ended the call.

JX 6 at 1-2; *see also* Tr. 251-58; JX20 at 1.

Pallis oversees leasing transactions and construction for AT&T for the northeast region on retail real estate sites. Tr. 268. She was also involved in budgetary issues and any type of discrepancy on locations should they need to be litigated for any reason. *Ibid.* When she assumed her position, there was someone other than Groncki in the real estate manager role, and when that person left, Pallis and Christine Marr would assist in the LOI negotiations for locations that the market<sup>5</sup> chose. Tr. 268-69. Pallis rarely saw the sites for the retail stores, and Marr never saw them since she was in California. Tr. 269.

Groncki was hired at AT&T by Pallis to “backfill a vacant position” and to “fill the role of real estate manager and assist the markets in the negotiation of retail real estate properties.” Tr. 270, 271. Complainant was told that he was free to express his opinion to the market whenever he disagreed with a particular location, but it was ultimately the market’s decision whether to move forward with that location since the market was the ultimate decision maker. Tr. 271.

A performance appraisal prepared by Pallis for Groncki for the period September 11 through December 31, 2006 reflects an overall assessment of performance objectives for the year as “ME - Meets, Exceeds Some.” JX 2 at 7; Tr. 276. The report was prepared based on ratings compiled by Pallis, Groncki, and people with whom he had dealings. Tr. 276. The report notes, in part, that Complainant needs to develop mutually beneficial relationships with AT&T’s brokers and address issues in a professional manner. JX 2 at 1. It also states: “To date, many of our brokers and some sales directors have complained that Paul’s communication style within the broker community is abrasive.” *Ibid.* It similarly notes: “Paul needs to improve his interactions with the broker community so that he is perceived as a competent, seasoned professional rather than an adversary or an obstacle.” JX 2 at 3. In addition, the appraisal form states: “He needs to be more adaptable to difficult situations and less defensive toward constructive criticism.” JX 2 at 4. Regarding his need to improve in these areas, Pallis also wrote: “I have reviewed areas with Paul that require improvement and he has met those discussions with resistance and defensiveness.” *Ibid.*

Pallis called Complainant to Wilkes-Barre for a meeting because he did not agree with her decision regarding a retail store in Ardmore, Pennsylvania and because his communications with her about the deal were unprofessional. Tr. 282. She believed a face-to-face meeting was necessary. Tr. 283. At some point during the meeting, Complainant asked for human resources’ number and subsequently left the meeting. Tr. 283-84. Pallis contacted Mr. Hood in HR after Groncki left the building. Tr. 284. Pallis believes that Hood later told Groncki that when she requested a meeting with Groncki he was to meet with her and his behavior should remain professional. Tr. 285. Pallis and Hood agreed that she would follow up with Groncki, let him know that his behavior had been unprofessional, and send him an email confirming in writing that they had had a conversation regarding his behavior. *Ibid.*

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<sup>5</sup> “The market” as that term was used by Pallis, Complainant and others in this matter refers to Colin Martin and/or other Sales Directors on the operational side of AT&T. *See, e.g.*, Tr. at 35, ln. 15-18.

When questioned by AT&T's counsel, Pallis testified about what she told Groncki his duties would be as real estate manager after he was initially hired. Tr. 295. She stated:

Basically I described the role of the real estate manager was to assist the markets in the negotiation of retail sites and letters of intent. I advised him that although he would certainly be offering his opinion in regards to the real estate sites that the market was looking at that it was ultimately the market's decision as to whether or not they decided to move forward on a site. I also advised him that once the LOI was completed he would assist the legal department and the construction department with any issues that might arise through the lease negotiation or through the construction planning.

*Ibid.* Complainant acknowledged that he understood and would work within those guidelines. *Ibid.*

The first time Groncki ever expressed his disagreement with a lease transaction after he began working at AT&T was in December 2008 during the negotiations relating to the White Oak property in Virginia. Tr. 298. That transaction involved proposals by the landlord to modify the terms stated in the LOI similar to what happened in the Chinatown transaction. *Ibid.* She met with Complainant about his inappropriate behavior during the White Oak transaction in January 2007. *Ibid.*

Pallis' next discussions with Groncki regarding his behavior occurred in connection with his performance evaluation in February 2007. Tr. 298-99. One of the most important areas in which Complainant needed improvement, as noted in the performance evaluation, was his behavior with respect to his dealings with brokers. *Ibid.* The overall rating reflected in the evaluation equates to a "3" on a scale of 1 to 5. Tr. 299-300.

The next time Pallis discussed Groncki's behavior with him was in connection with the Ardmore/Bryn Mawr, Pennsylvania transaction when she requested to meet with him because of his insubordination. Tr. 300-01; JX 15. In a March 30, 2007 email, Groncki had told Pallis to "[s]top the domination" and said "WE [sic] don't need a meeting." JX 15 at 1. Pallis described the meeting which took place approximately one week later as follows:

Paul and I were in a conference room. I began discussing with him the Ardmore transaction, the termination specifically, and why I felt that it was a reasonable compromise to terminate the lease on the existing location when I did. I explained to him that I felt it was fair and reasonable based on the timing on when the new location was going to be ready. I asked him if he understood why I made the decision that I made. He indicated that he didn't necessarily agree with me but that he understood it.

The meeting was in my opinion going very well, it was calm. I continued to talk with Paul in regards to appropriate behavior and indicated to him that it was inappropriate for him to refuse to meet with me. At that point Paul became enraged. He stood up from the conference table very forcefully leaned over the

table screaming at me that he wanted to speak with HR. I asked him to please sit down and calm down so that we could continue the discussion. He refused. At that point he exited the building very forcefully.

I went and called John Hood and let him know the situation that Paul was very upset. I let John Hood know that I was going to stop the meeting at that point. I felt it was no longer productive based on how upset Paul was. I walked back in the conference room[.] Paul came in [and] he gathered up his things. I let him know that we were going to put an end to the meeting because he was very upset [and] that I would be following [up] with him at a later time. He asked me for the phone number of John Hood and I provided it to him. That was the end of the meeting.

Tr. 302-03. In a subsequent telephone conversation with Groncki, Pallis informed him that his behavior during their meeting was inappropriate, it would no longer be tolerated, and any future incidents involving such behavior could result in disciplinary action. Tr. 304. She thereafter followed-up on their conversation with a confirming email. JX 4. Pallis considered her email to be a coaching session in which she was advising him of the need to improve his conduct. Tr. 305.

Between December 2006 and April 2007 Pallis had at least three conversations with Groncki during which she advised him to behave in a more professional manner. *Ibid.* It was less than a month after her conversation with Complainant regarding the Ardmore transaction when she received a complaint from Bill Dickinson regarding Groncki's inappropriate behavior with respect to a proposed Annapolis, Maryland project. Tr. 306; JX 33. Dickinson complained that Groncki's response to a proposed modification by the landlord was "completely confrontational" and that Groncki had gotten so mad at Dickenson during a telephone conversation when he suggested they might lose the deal that Groncki hung up on him. JX 33.

AT&T Mobility owns in excess of eighteen hundred retail stores nationwide. Tr. 308. More than four hundred of those stores are located in the northeast region. The Chinatown store at Gallery Place was intended to replace an existing store located in Washington on Pennsylvania Avenue. Tr. 308-09. The Pennsylvania Avenue store was not a high performing store, and it housed a small business group which was to move to the Chinatown store when it opened. Tr. 309. The Chinatown store was physically connected to the Verizon Center, and AT&T was willing to pay a premium for the opportunity to have a presence at a location where a competitor was sponsoring an arena. Tr. 310. Pallis never discovered anything about the Chinatown transaction that was "undisclosed," and Groncki never complained to her that he believed the Chinatown transaction involved fraud. *Ibid.*

It was neither Groncki's nor Pallis' role to participate in any branding or licensing agreements for that location, and the real estate transaction did not depend upon knowing what transpired with respect to such agreement. Tr. 310-11. The market is ultimately responsible for approval of real estate transactions because he or she is ultimately responsible for the productivity and profitability of the location. Tr. 311-12. As Real Estate Director, Pallis is not responsible for the profitability of a location, and she does not monitor the number of gross adds

for stores. Tr. 312. It is not unusual for AT&T to pay above-market rates for properties for any one of several reasons including: it is a premium location; the location is on a corner, the location has high visibility; or the location is near a competitor. Tr. 312-13.

Jennifer Fried's role was as AT&T's outside counsel assisting in the negotiation of the Chinatown lease. Tr. 313-14. Groncki was her "client" and it would not have been appropriate for her to admonish him regarding his behavior on the August 29<sup>th</sup> conference call. Tr. 314. Pallis spoke with Fried regarding Groncki's behavior on the conference call and was informed that the parties had just begun discussing the points of contention left to decide on the lease when Groncki became very agitated and began yelling. *Ibid.* Pallis believed Groncki's actions jeopardized the Chinatown transaction, as did Colin Martin. Tr. 316.

Pallis testified that Groncki never told her he believed Colin Martin and Bill Dickinson were engaged in a kickback scheme. Tr. 317. He also never told Pallis that he believed Colin Martin had something to gain by the Chinatown transaction or that it was not in the best interest of AT&T. *Ibid.* Pallis did not understand any of Groncki's concerns to involve any financial impropriety on the part of Colin Martin or Bill Dickinson. *Ibid.*

Bill Dickinson is still currently a broker in the DC market for AT&T. Tr. 318. The DC market includes the District of Columbia and Maryland, and Rob Forsyth is the Vice President and General Manager for that market. Tr. 318-19. Forsyth reports to Steve Hodges, and Hodges reports to Paul Roth who is the President of Sales and Marketing. Tr. 319. Hodges was aware of the Chinatown transaction and wrote in a February 20, 2007 email to Pallis:

I love the spot and have seen it. Huge traffic and the highest selling Radio Shack nearby. Make sure we have adequate signage so we don't get lost in the noise. It's the Times Square of DC. I approve.

Tr. 319-20; JX 20 at 18. The Chinatown transaction received a great deal of review by AT&T's upper management. Tr. 320.

Pallis was one of the AT&T decision-makers who made the decision to terminate Groncki's employment with AT&T. Tr. 320. Her decision was reviewed by her supervisor Mike Chisholm and by Steve Gray, both of whom supported the decision. Tr. 320-21. Pallis was also advised by AT&T's Human Resources Department that termination of Groncki was appropriate. Tr. 321. His termination had nothing to do with his dissatisfaction with the Chinatown transaction but was directly related to his behavior in the context of the transaction. *Ibid.*

#### Colin Martin

When called as a witness in Complainant's case-in-chief, Martin testified that the AT&T store at Gallery Place in Chinatown opened March 31, 2008 and did sixty gross adds the first day. Tr. 327. For the month of April, the store did 520 gross adds and it did 549 gross adds in May. *Ibid.* The store was the 29<sup>th</sup> largest store in AT&T's portfolio of 1800+ stores. *Ibid.* There is a group of sales people who work in the store selling to existing AT&T business

customers, and their sales are counted in the retail sales numbers for the Chinatown store. Tr. 327-28. The store has been open a month and a half. Tr. 328. It is the only store in DC that has a business sales group. Tr. 329. Two retail stores in Baltimore also have business sales groups. Tr. 330. The Chinatown store was a relocation of AT&T's Pennsylvania Avenue store, and there was no room for the Pennsylvania Avenue store's business sales group elsewhere in DC. *Ibid.*

The Chinatown transaction originally involved discussions only about retail space but eventually grew to include discussions concerning marketing opportunities "to brand on the Gallery Place location." Tr. 331-32. According to Martin:

[W]e went through a long exhaustive process of understanding what they wanted, what was feasible, what the market, you know what the market dynamics were, understanding that we brought in our marketing team, our national marketing team to review it. We had a third party review, a bunch of different statistics about the marketplace --

Tr. 332. They never shared this information with Groncki because he was not a member of the marketing team. *Ibid.* AT&T was looking at the Gallery Place location as a marketing opportunity whether they placed a retail store there or not. Tr. 333. They have negotiated separate branding agreements for advertising on stores but have not done so for signage. Tr. 335. The difference, according to Martin is:

Advertising is something where we would be putting up a billboard, or in this case with the Chinatown location, video boards, right, which we would be renting space off of, right? So, we have an agreement to have advertising with that location.

*Ibid.* This is the first time in Martin's area of responsibility that the company has used video signs. Tr. 336. As far as the agreement for the Chinatown location, Martin testified:

The signage agreement is for us to rent thirty percent of the time on the video boards. They're not our video boards, we don't own them, they're attached to the building, and we provide advertising that goes on those video boards along with other people who decided to, to advertise, just like a billboard would be, right?

*Ibid.* The video boards are in addition to signage that was part of the lease agreement, and the signs provided for in the lease agreement were only recently installed in the recessed area where people exit the Metro subway as well as on the exterior of the building on the rotunda. Tr. 337-38, 341-42; JX 23 at 3, 10.

Martin and AT&T's Director of Marketing Nancy Ford met with the landlord in Georgetown about the proposed advertising agreement for the Chinatown site. Tr. 343. Groncki was not invited to the meeting because it pertained to advertising, and the lease and advertising were two separate things. Tr. 343-44. Martin was unsure whether AT&T could have completed the advertising agreement without the lease agreement. Tr. 345.



Martin knew that Groncki was opposed to the transaction, specifically the rental rate, and he wanted Groncki removed because of his interactions with Martin and the landlord. Tr. 345-46. With respect to the latter, Martin was told by Bill Dickinson and the landlord that they were upset with Groncki because of his behavior during the August 29<sup>th</sup> telephone conference. Tr. 347-48.

The people Martin dealt with regarding the Chinatown transaction were John Miller, Herb Miller, John Viglianti, and Shelly Kroll. Tr. 349. John Miller was on the August 29<sup>th</sup> call and Martin understood that John Miller was “part of the decision making process . . . .” Tr. 349-50. Viglianti was a project manager and engineer and worked for John and Herb Miller. Tr. 350. Herb Miller represented Gallery Place which was a partnership owned by multiple corporations. *Ibid.* It was Martin’s understanding that John and Herb Miller were not individual owners but were instead part of the partnership which owned Gallery Place. Tr. 351.

Martin’s duties as Sales Director are three-fold: managing a sales team of about 250 people; delivering on sales results; and monitoring distribution of products in his locations to determine whether productivity is in line with the company’s goals. Tr. 354. Martin is compensated based on sales, and when he sees advertising opportunities in transactions he works with Nancy Ford, the Advertising Director, who is responsible for handling those matters. *Ibid.*

According to Cecelia Ambrosio’s financial analysis of the Gallery Place location, the annual rent for the store during the first five years was \$692,690.00. Tr. 356; JX 16 at 2. The Chinatown store was considerably larger with respect to square footage than the other DC locations. Tr. 356-57. The \$1.5 million per year reflected in her report refers to their offer to install a wedge sign on the side of the Gallery Place building and place an advertising kiosk on the adjoining sidewalk which AT&T declined. Tr. 357-59. AT&T instead opted to advertise on the video boards at a cost of \$45,000 per month for five years. Tr. 359.

Martin did not recall whether Groncki asked for a copy of the branding agreement. Tr. 360. He had not seen the August 29, 2007 email from Jennifer Fried to Groncki mentioning the status of the branding agreement. Tr. 361-62; JX 20 at 1. He did not recall a July 19, 2007 email to him from Groncki asking if there was any update on the marketing agreement and did not know if he responded to a July 9, 2007 email from Groncki to Fried, with a copy to Martin, in which Groncki asked him to respond to Fried’s question regarding the branding agreement. Tr. 363; TX 21 at 2.

On cross-examination, Martin testified that he had been with AT&T Mobility through its mergers and acquisitions since 2002, and that he started off in the internal audit group as a CPA but then moved into sales where he worked in Seattle, Atlanta, and Washington, DC. Tr. 367. He is presently the Executive Director in charge of sales for Washington, DC and northern Virginia. *Ibid.* Before that, he was VP of distribution in the southeast region. *Ibid.* His position in August 2007 was Executive Director of Sales. Tr. 368.

There were two separate interactions with Groncki that caused Martin to be concerned about his conduct. Tr. 368. The first was a phone call Martin had with him before the August 29<sup>th</sup> incident during which Martin inquired about the status of the lease on the Gallery Place site.

*Ibid.* Martin testified:

I asked him about what was, you know, what were the issues holding it up and there was a list of things on, on the email that he had been working with the landlord, and I asked, you know the status of those things and whether those were material or not to, you know, getting the leas[e] done. At that point Mr. Groncki made the comment, "I have been [in] real estate for", I don't remember how many years. "These guys are crooks," you know, "They're trying to change things from, originally it was agree[d] in the letter of intent. I'm not going to stand for this, you shouldn't stand for this," and proceeded to get very upset.

And I said, you know, "Please, you know let's not get upset. Let's discuss the issues at hand with; try to get these resolved." [He] continued to be yelling over the phone, and I, you know I took the phone away from my ear at that point and finally he stopped. And I said, "Are you done yelling," and he proceeded to hang up on me.

Tr. 368-69. Martin discussed the incident with Pallis because he was concerned about the Gallery Place project and Groncki's behavior. Tr. 369. He was specifically concerned about whether Groncki would engage in similar conduct in the presence of the landlord while negotiating for the location. Tr. 370. Martin subsequently called Groncki to see if he had "cooled off" and emphasized that the Gallery Place project was an important element to the DC market which AT&T wanted to be successful. *Ibid.*

Martin is generally familiar with the leasing transaction process for AT&T. Tr. 370. Once they have determined that they want to pursue a particular location, they communicate that to a broker and proceed with the LOI process. *Ibid.* After the LOI is signed but before the lease is finalized, either AT&T or the landlord may request changes or modifications from the original items listed in the letter of intent. *Ibid.* It is not unusual for that to happen, and there may be changes in the store location and size. Tr. 371.

During Martin's conversation with Groncki when he became upset and began yelling, Groncki never suggested that Martin was doing anything improper. Tr. 372. Martin did not receive any personal benefit as a result of the transaction. *Ibid.* Martin's principle goal when working on a transaction is to find a location that has high traffic, good visibility, and good signage so that he can deliver on the sales goals for which he is responsible. *Ibid.* He knows by the time the lease is signed what his sales goals are. *Ibid.* The process starts with AT&T conducting research to find an area where it wants to do business, and then Martin, his boss and his subordinate sales managers determine whether they believe the site is suitable. Tr. 372-73. If it is, they talk to the broker to determine what the financial terms would be and the availability of the location. Tr. 373. The information then is entered into a tracking database maintained by the real estate people, and Martin's group receives information on the site as negotiations progress. *Ibid.* The real estate people provide information on the square footage and calculate common area maintenance costs, and that information is communicated to AT&T's finance people. *Ibid.* According to Martin:

The finance organization then puts it into the LTV<sup>6</sup> models, or the profitability models, and comes up with a calculation of how much productivity we need to do to be in line with the company standards, and at that point we make a decision whether it's a profitable venture or not profitable for us and either proceed to, you know, go past LOI or to pull out of the transaction because it doesn't, doesn't make sense.

Tr. 373-74. If Martin's group decides to proceed with the transaction, the deal must be approved by the finance department, the General Manager, and the Real Estate Department, and the lease goes through a final signature/approval process. Tr. 374. There is a "Schedule of Authorizations" which provides different levels of approval that must be sought within AT&T based on the dollar value of the transaction. *Ibid.* Martin is held accountable for sales projections he has made with respect to the locations he has approved, and productivity at the site must meet those projections in order for him to receive a commission. Tr. 374-75.

The LTV analysis for the Chinatown property reflects total gross adds ranging from 250 to 800 and shows by way of comparison an average of 205 total gross adds for the Pennsylvania Avenue store. Tr. 376-77; JX 16 at 2. When considering whether to move a store to a new location, it is important to determine whether there will be an increase or decrease in the new location and whether the store will be profitable. Tr. 377-78. The new Chinatown store has performed as well as expected, and on the first day that it opened on March 31<sup>st</sup> it had sixty new customers. Tr. 382. The store had 515 new customers in April and 549 in May which ranked that store as the 29<sup>th</sup> highest producing AT&T store out of eighteen hundred plus stores. *Ibid.* The projection for June was over 600 gross adds. *Ibid.* The Gallery Place store is one of only six locations nationwide which has been given the new Microsoft Surface Table technology because of its performance.<sup>7</sup>

With respect to the August 29<sup>th</sup> incident, Martin received two phone calls that day; one from Bill Dickinson and another from John Miller. Tr. 384. He testified:

I don't recall who I spoke to first. The comments I remember from Bill were along the lines of that the call did not go well, there was yelling, they didn't get past the first point of discussion, and, it went very terribly and everyone is very concerned about this project. I also received a voice mail from John Miller who made the comments of that in a very long time he's never -- he doesn't recall someone ever speaking to him that way, and that Mr. Groncki was the one angry man, and he told us he didn't want this deal to happen and do I feel that same way. And at this point I didn't know what had happened. I just had heard that this call happened and that it had blown up. And so that's when I, you know, reached out to Toni and everyone to find out, you know, what's going on and

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<sup>6</sup> Martin explained that, since AT&T does not have an income statement for its stores, it has created "an LTV model, which is the lifetime value . . . [which] is a calculation of the value of a customer to AT&T over the tenure of that customer." Tr. 375. The model looks at all the costs associated with the location and the revenue which is generated on average from customers, and then multiplies that "value" times the number of projected customers to determine what the value of the location is likely to be. Tr. 375-76.

<sup>7</sup> According to Martin, this technology "is a sales tool which creates a coffee table experience that is lit up underneath it, and it's a touch screen, and we can sell our products and services off of it, it's a trial." Tr. 383.

then, also, get back to the Millers and let them know that we were still very much interested in this transaction and that, you know, let AT&T regroup, and we'll get back to you shortly with our response.

*Ibid.* Martin further testified that it was the market's decision whether the deal was to go forward, not Groncki's. Tr. 385.

After Martin moved to the DC area market in mid 2006, he determined based on feedback from his marketing team that AT&T should have a retail presence in the Chinatown area. Tr. 385-86. He believed Benetton, the tenant in the space ultimately leased by AT&T, was looking to get out of that location, and Benetton was not viewed by the Millers as an ideal tenant. Tr. 386. Initial meetings between AT&T and the Millers included discussions regarding both leasing retail space and advertising. *Ibid.*

Various advertising proposals for the Gallery Place site were considered including sidewalk billboards, video boards, a wedge sign, and even changing the name of the building from Gallery Place to AT&T Place. *Ibid.* According to Martin, Nancy Ford, AT&T's Director of Marketing in the DC market, became involved and "engaged our national organization, and they came to town and did an evaluation of the whole Gallery Place property and created a recommendation for us for an advertising perspective." Tr. 387. Based on their survey and information provided by the Millers, they determined that the Gallery Place location was situated at the busiest pedestrian intersection in Washington, DC with over 100,000 people passing there daily. *Ibid.* That fact alone was enough to make AT&T interested in the site from just an advertising perspective. *Ibid.*

During the time the Gallery Place negotiations were going on, AT&T was paying \$32,000 per month for a billboard one block up on G Street from the Gallery Place site, and:

the intent was that when we -- when we put these video boards into place that we could remove billboards. The idea was that no net new expense was going to be incurred to the market unless it was incremental value, so we took down the billboard and we did the marketing agreement.

Tr. 388. There were no video screens present on the side of the Benetton store when it was there, and the landlord paid for their installation, production, and management after AT&T leased the space. *Ibid.*

The branding agreement negotiated by AT&T precludes advertising on the video boards by any of AT&T's competitors, such as Verizon, T-Mobile, and Sprint, and AT&T is entitled to 22 minutes of every hour for advertising, 10 percent of which is donated by AT&T to the community. Tr. 389. There was no reason for Groncki to be involved in the advertising negotiations. *Ibid.* AT&T wanted to finalize the branding agreement and lease agreement at approximately the same time so the lease and the branding agreement would run concurrently. Tr. 390. Both were executed sometime around mid September, and they proceeded through different channels for approval. *Ibid.* Nancy Ford, the Marketing Director, and Nancy Broughel, the in-house attorney for AT&T Marketing, approved the branding agreement. Tr. 390-91.

Martin called Pallis on August 29<sup>th</sup> to inform her of what happened during the conference call that morning. Tr. 391. He testified:

I spoke to her and, and let her know that she may be receiving a call from Bill [Dickinson]. I also spoke with the Millers that, the conversation with them regarding the lease went very poorly, they were shouting, they had to end the call, none of the issues had been resolved, and I was very concerned that, this project that our market, myself and others had been working on for a year and a half was in jeopardy of falling apart because the landlord had construed that we no longer were interested in this based upon the phone call.

*Ibid.* Martin asked Pallis to remove Groncki from the negotiations. *Ibid.* He would have had no reason to make that request if Groncki had not behaved inappropriately during the conference call. Tr. 392.

Bill Dickinson did not work on the branding agreement with Martin; his role was to provide the introduction to the Millers. Tr. 392. He participated early in one meeting as an observer just to understand how and what AT&T was planning to do from an advertising perspective. *Ibid.* Martin would absolutely not consult with Dickinson regarding advertising and marketing decisions. Tr. 393.

#### Patricia Granberg

Granberg is a Senior HR Manager for AT&T, and was in that position in August 2007. Tr. 414. Her duties involve employee relations, discipline, termination, benefits, training and development, and talent review. *Ibid.* She has been with AT&T for a little over five years, and has always been an HR manager, although she has supported different client groups within AT&T. Tr. 415.

In August 2007, Granberg supported Sales Operations and the International Roaming Group, which included real estate operations in the Maryland-DC area. *Ibid.* Toni Pallis was one of her clients, and Pallis contacted Granberg because she was having difficulty with Groncki. *Ibid.* The prior Spring, Pallis had had discussions with John Hood, the prior HR manager, about Groncki. Tr. 416.

Pallis contacted Granberg by phone in August regarding a situation involving Groncki and “a deal that had almost not closed because of his behavior on a call.” Tr. 416. Based on the information provided by Pallis in the telephone call and emails, Granberg informed her that HR would ask for either “a final written warning or termination of the employee.” Tr. 417. Pallis and her superiors definitely wanted a termination. *Ibid.* Granberg described the process as follows:

When we -- when a manager wants to terminate an employee they need to go through HR and provide us with all of the information surrounding the employee and the employee’s situation. In this case they also had to have the executive

director, who was Toni's manager at the time, look into the situation and have a conversation with Paul to make his own determination as to whether the employee should be terminated. We also require that we have another level of management, which was the vice president of converged services I believe is his title, Steve Gray, who approved it. Also from an HR perspective I always run things through my executive director so there were two levels of HR approval for this particular termination, as well as three levels of line management, and then we also asked for a legal concurrence. So there is quite a number of folks involved when a termination is requested.

Tr. 417-18.

Granberg became aware of the facts underlying Groncki's SOX complaint sometime in September or October and recalled seeing his ethics complaint. Tr. 418. AT&T has an 800 number that employees are instructed to call should they have any information regarding unethical behavior. *Ibid.* The complaint is handled by a vendor who assigns someone to conduct an investigation and make a final determination. Tr. 419. The ethics investigation regarding Groncki's complaint was launched after he had left AT&T. *Ibid.* There was no indication that Groncki had made complaints regarding financial improprieties within the DC area market when Granberg was contacted by Pallis. *Ibid.* Granberg was aware from emails that Groncki was not happy with the deal he had been working on, but she did not conclude from those emails that Groncki had raised a SOX complaint. *Ibid.* According to Granberg, "AT&T takes any sort of whistleblower allegation very seriously, and it would have been looked at very closely by our legal department, and there would have been an extra level of scrutiny placed on it." Tr. 419-20.

Granberg believed termination was warranted for Groncki. Tr. 420. The approval of Nancy Glubi, Granberg's Executive Director, was not required, but she was aware of the facts in Groncki's case and concluded that termination was appropriate. *Ibid.* Groncki was a salaried management-level employee and was not covered under AT&T's progressive discipline policy. Tr. 421. Granberg considered the emails between Pallis and Groncki which she had seen as "coachings" or requests for improvement, and they "definitely" gave Groncki adequate notice that his behavior was unacceptable. *Ibid.* Granberg saw no improvement in Groncki's behavior as a result of the emails. *Ibid.*

The 800 number for ethics complaints is listed in AT&T's code of business conduct. Tr. 422. The company provides training on Sarbanes-Oxley, and Granberg as well as Groncki completed that training. *Ibid.* Groncki also completed "the code of conduct training, as well as professional work environment training." *Ibid.*

With regard to the performance review process at AT&T, Granberg testified:

Typically, managers will ask employees to do a self-evaluation and then managers will do their own evaluation of the employee, and the employee is able to fill in on the form, you know any sort of disagreements that they might have. It goes up one level for review so, in Toni's case, Mike Chisholm would be aware of, you know whatever her ratings were for her employees.

Tr. 423-24. Granberg has reviewed Groncki's performance evaluation and characterized it as "average to below average." Tr. 424. Pallis' evaluation noted that Groncki was abrasive and "at that point had some instances where he had been yelling on calls and hanging up on people, . . ." *Ibid.* Groncki's egregious behavior was a violation of AT&T's code of business conduct, and it is customary for the company to terminate an employee for a code of business conduct infraction without giving prior levels of discipline. Tr. 426.

Granberg did not speak with Groncki with respect to Pallis' complaint. Tr. 427. It was the responsibility of Groncki's second level manager to investigate the matter, not the HR manager. Tr. 427-28. Granberg was able to make a determination based on her review of the emails she reviewed which revealed several instances where Groncki "was very abrasive" to his manager and others. Tr. 428. It was up to Mike Chisholm, the Executive Director, to investigate and talk to Groncki. *Ibid.* AT&T does not conduct exit interviews. Tr. 429.

AT&T's Sarbanes-Oxley course is taken online and takes about 45 minutes to complete. Tr. 430. Granberg's knowledge of Sarbanes-Oxley is limited to what she learned in that course. *Ibid.* Any information that an employee brought her which would make her think "there was any sort of irregularity would have been brought to someone else such as our legal department." *Ibid.* There was no Sarbanes-Oxley complaint in the information Groncki provided. Tr. 430-31. Granberg reviewed emails involving Groncki from the fall of 2007 up to the time of Groncki's termination. Tr. 431. She knew from reviewing those emails that Hood, Granberg's predecessor in HR, had spoken with Groncki. Tr. 432. Groncki's conduct violated the parts of AT&T's code of business conduct relating to complying with all reasonable requests of management and professional work behavior. *Ibid.* "There was a significant pattern of Paul's behavior being insubordinate and abrasive that was documented in several emails throughout his employment." Tr. 434. His conduct and failure to comply with coaching was documented in his performance appraisal as well. *Ibid.* The event that led to his termination was the conference call during which he "behaved in very inappropriate behavior and was terminated for his egregious conduct." Tr. 434-35. Groncki could have been terminated based on that one incident alone, even if it had not been preceded by other instances of misconduct. Tr. 436.

#### IV. DISCUSSION

The whistleblower provision of SOX states in relevant part:

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)), 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 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) . . . .

18 U.S.C. § 1514A (a); *see also* 29 C.F.R. § 1980.102 (a), (b)(1).

The legal burdens of proof set forth in AIR21, 49 U.S.C.A. § 42121(b), govern SOX actions. Accordingly, to prevail, a SOX complainant must prove that: (1) the complainant engaged in a protected activity; (2) the respondent knew that the complainant engaged in protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005).

#### Whether Complainant Engaged in Activities Protected by Sarbanes-Oxley

“Protected activity,” as defined under the Act and relevant regulations, includes, *inter alia*, providing (or causing to be provided) to an employer or to the Federal Government information regarding any conduct which the employee reasonably believes constitutes a violation of various fraud provisions of the U.S. Code, any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1); *see also* 29 C.F.R. § 1980.102(a),(b)(1). The employee is not required to show the reported conduct actually constituted a violation of the law. The complainant must, however, show that he reasonably believed the respondent violated one of the laws and regulations enumerated in the Act. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 193-ERA-6 (ARB July 14, 2000) (citing *Oliver v. Hydro-Vac Servs., Inc.* Case No. 91-SWD-1, Sec’y Dec., Nov. 1, 1995, slip op. at 9-13). The complainant’s belief “must be scrutinized under both subjective and objective standards, *i.e.*, he must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable.” *Id.* at 20. The reasonableness of a complainant’s belief regarding illegality of a respondent’s conduct is to be determined on the basis of “the knowledge available to a reasonable [person] in the circumstances with the employee’s training and experience.” *Melendez*, ARB No. 96-051 (quoting *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec’y Jan. 25, 1995), slip op. at 7, n.5).

Along with the reasonable belief requirement, a certain level of specificity is also required when raising a SOX-based complaint. Recently, in *Platone*, the ARB stated:

In defining the scope of protected activity under other Federal whistleblower protection provisions, the Board has held that an employee’s protected communications must relate “definitively and specifically” to the subject matter of the particular statute under which protection is afforded. The Corporate and



Criminal Fraud Accountability Act of 2002 does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills. Rather, under the SOX, the employee's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1). Thus, for example, an employee's disclosure that the company is materially misstating its financial condition to investors is entitled to protection under the Act.

*Platone v. FLYi, Inc.*, ARB No. 04 154 (Sept. 29, 2006) (citing *Kester v. Carolina Power & Light Co.*, ARB No. 01-007, ALJ No. 2000-ERA-31, slip op. at 9 (ARB Sept. 30, 2003)); *see also Allen v. Administrative Review Board, USDOL*, No. 06-60849 (5th Cir. Jan. 22, 2008) (Case below ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62), slip op. at 11 (affirming ARB's legal conclusion that an employee's complaint must "definitively and specifically relate" to one of the six enumerated categories found in § 1514A.

It is clear that all instances of alleged protected activity in which Complainant asserts he participated relate exclusively to the Gallery Place transaction. For example, he testified that he did not believe there was any fraud or other wrongdoing in connection with the Ardmore-Bryn Mawr transaction, and nothing he described in connection with the White Oak transaction suggests any unlawful behavior. *See, e.g.*, Tr. 136-37. Indeed, every instance of what he now says he believed was improper conduct revolves around the Chinatown deal. *See, e.g.*, Tr. 144-46, 160-61, 210; *see also Brief of Paul Groncki* ("Comp's Br.") at 18-20.

It is equally clear that Groncki never "definitively and specifically" communicated to anyone at AT&T or elsewhere any conduct related to the Gallery Place transaction which he, or anyone with his knowledge, training and experience, could reasonably have believed was a violation of any of the categories of fraud or securities violations identified in 18 U.S.C.A. § 1514A(a)(1). For example, his original SOX complaint alleges:

40. Ms. Pallis told Mr. Gronki [sic] that he was being terminated for violating AT&T core values, however, *he suspects* that the reasons for the termination was [sic] that he was unwilling to go along with what he considered to be an unreasonable and *possibly fraudulent* leasing agreement with the landlord.

41. *He suspected, but did not charge at that time* that there was some unsavory behavior going on between Collin Miller, the AT&T broker and the landlord.

Tr. 158; JX 10 at ¶¶ 40-41. (Italics added). Groncki testified that he spoke only to Pallis and Chisholm with respect to his allegations of wrongdoing in connection with the Gallery Place deal, and he acknowledged that he never used the word "fraud." Tr. 210. He testified that he would say things like: "Something's really wrong with this deal, something stinks, and something is, is going on here." Tr. 210; *see also Comp. Br.* at 7 ("He did not accuse his bosses and fellow workers of mail fraud, wire fraud or fraud against the stockholders with these specific words and charges . . . Groncki made his position on the Chinatown real estate deal very clear. In e-mails, he stated that this deal made no economic sense and that he would not support it

because its rental figures were grossly in excess of commercial rates in Washington, D.C.”). Similarly, in an email to Bill Dickinson, with copies to Colin Martin and Jennifer Fried, Complainant wrote:

I am on the record that I do not support this transaction. Although I like the location, the economics and deal terms are unpalatable to me and in my opinion unreasonable. . . .

JX 14 at 1. Groncki testified that his communications “implied” wrongdoing “without being specific.” Tr. 160-61.

In addition, despite having received training on Sarbanes-Oxley and AT&T’s code of business conduct at the beginning of his employment, it was not until October, 11, 2007, one month *after* his termination from AT&T, that Complainant first utilized the company’s ethics hotline to file a report concerning his allegations. JX 1. Even then he never described anything related to the Gallery Place transaction as involving “fraud” or a “kickback.” The most damning allegation raised during the conversation was that he “thinks there is a separate, substantial financial gain for DICKENSON and MARTIN.” *Id.* at 2.

I find that Complainant’s communications concerning the Chinatown deal do not “definitively and specifically” relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1). *Platone v. FLYi, Inc., supra.*, slip op. at 9. His conduct is thus not protected by the whistleblower provisions of SOX. *Ibid.* See also, *Allen v. Admin. Review Bd., USDOL, supra*, slip op at 11; *Reed v. MCI, Inc.*, ARB No. 06-126, ALJ No. 2006-SOX-71 (ARB Apr. 30, 2008) (“Speculation or a mere possibility that shareholders would be defrauded because [the respondent] used [pirated] software . . . does not satisfy the reasonable belief requirement.”); *Harvey v. Home Depot USA, Inc.*, ARB Case No. 04-114, 2006 WL 3246905 at \*11 (ARB June 2, 2006) (“[A]n employee’s complaint must be directly related to the listed categories of fraud or securities violations.”). Having failed to establish by a preponderance of evidence that he engaged in protected activity, Groncki’s complaint must be denied.

Clear and Convincing Evidence that Respondent Would Have Terminated Employment  
Notwithstanding Protected Activity

As noted above, if a complainant succeeds in establishing that protected activity was a contributing factor in the unfavorable personnel action giving rise to the complaint, the employer may still avoid liability by producing clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 29 C.F.R. § 1980.109(a) (“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.”); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at 8 (ARB July 29, 2005); *Peck v. Safe Air Int’l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-10 (ARB Jan. 30, 2004).

Even if I were to assume that Groncki had engaged in protected activity, and that the evidence established the remaining elements of a legitimate SOX complaint, there is clear and convincing evidence in the record that AT&T's decision to terminate Complainant's employment was justified notwithstanding his alleged protected activity. Groncki admits, and the record clearly confirms, that on more than one occasion he was rude, abrasive, confrontational, unilaterally terminated telephone conversations, and "yelled" and "screamed" at various individuals with whom he dealt, including his own supervisor.

For example Pallis first met with Complainant regarding his inappropriate behavior around January 2007 after she received a complaint in connection with Groncki's involvement in the White Oak Village transaction near Richmond, Virginia. *See, e.g.*, Tr. 101-07, 298; JX 26. While Groncki makes much of the fact that AT&T ultimately decided to stop using John Merenda, the local real estate broker involved in the deal, he admits that his meeting with his Pallis regarding the incident was "confrontational" and that "some screaming" occurred. Tr. 100-02. According to Complainant, Merenda had called Pallis complaining that Groncki had hung up on the landlord for White Oak, and Pallis subsequently summoned Complainant to her office in Pennsylvania. Groncki testified that after he arrived, Pallis "started screaming" at him and wanted to know if he had hung up on the landlord. Tr. 107. He denied that he had done so, said he had simply told Merenda he wanted him to reschedule the conference call with the Landlord, and stated the meeting ended amicably. Tr. 107-08, 116. On cross-examination, however, he admitted that he ultimately refused Merenda's request to speak with the landlord, who was then on the telephone, while he was in Richmond. Tr. 155-56.

Pallis' version of the events similarly reflects Groncki's unprofessional behavior with respect to this incident. She testified that Groncki had come to her office after she received a complaint from Merenda and the landlord's agent, Jim LaRue, about Complainant's conduct. Tr. 279. Regarding her meeting with Complainant in Pennsylvania, she testified:

As we got into the discussion and Paul explaining what occurred on the call he had indicated that John Merenda had reserved a conference room in a hotel for them to hold a conference call with the landlord. Apparently John Merenda had connected the call with the landlord. Paul walked into the room, said that he was going to refuse to take the meeting, and then he walked out of the room.

Tr. 279-80.

Pallis' next meeting with Groncki regarding his unprofessional behavior occurred in February 2007 in connection with his performance evaluation which noted, *inter alia*, that brokers and some sales directors had complained that he was abrasive and Pallis concluded that he needed to be more adaptable and less defensive towards constructive criticism. Tr. 183-85, 298-99; JX 2. The performance evaluation notes that Pallis "discussed at length on two occasions [the need for Groncki to develop better relationships with brokers and address issues in a professional manner] and the expectation is that this [will] immediately improve." JX 2 at 1. When questioned at trial about the several notations in the performance evaluation reflecting Complainant's need to be less abrasive in his dealings with brokers and less defensive when

presented with constructive criticism, Groncki simply testified “Yeah, she just reiterated everything four times.” Tr. 186.

Just a few months after having met with Pallis to review his performance evaluation, Groncki had another confrontational meeting with her in April 2007, this time relating to the Ardmore-Bryn Mawr transaction which involved the proposed termination of an existing store lease and the relocation of that store to a new location. Tr. 113-14; JX 19 at 7-8. After Groncki challenged Pallis’ decision to terminate the lease on the existing store in September rather than a later date, and sent her an email telling her that they did not need to meet and to “stop the domination,” she ordered him to come to her office in Wilkes-Barre, Pennsylvania to discuss the matter. Tr. 118-19; JX 15 at 1. He testified that, after he arrived, “[s]he explained to me that I didn’t need to always be so defensive, and there was a bunch of things discussing back and forth.” Tr. 120. He stated that he tried to explain things but she only wanted a “yes” or “no” answer, that she was “screaming” and “yelling” and him, and at that point he asked that HR become involved. Tr. 120-21.

When Pallis was asked why she insisted that Groncki drive three and one-half hours to meet with her at her office in Pennsylvania, she testified that it was because he repeatedly questioned her decision regarding the Ardmore-Bryn Mawr transaction, she did not believe he understood why the decision was made, and he had been unprofessional in his communications with her about the deal. Tr. 282. She testified that the meeting started out well but Groncki ultimately became enraged, leaned over the conference table, screamed at her, and refused to calm down. Tr. 302-03. She denied that she ever raised her voice during her meeting, testified that she contacted John Hood in HR after Complainant left her office, and stated that both she and Hood subsequently informed Groncki that he was to meet with Pallis when requested to do so and his behavior during future meetings should be professional. Tr. 283-85, 302-03. An email to Groncki following their meeting notes, in part:

To briefly recap, I would expect that you will agree to meet with me when requested. In addition, I would expect that when we are having a discussion you will display professional behavior at all times. Conduct such as what you displayed last Friday, 4/13/07 is not acceptable. Future occurrences may lead to corrective action. . . .

JX 37 at 6.

As noted previously, between December 2006 and April 2007 Pallis had at least three more conversations with Groncki during which she advised him to behave in a more professional manner. Tr. 305. One of them involved a May 8, 2007 complaint from Bill Dickinson that Groncki had been “completely confrontational” regarding a landlord’s proposed modification to a letter of intent related to an Annapolis, Maryland project. According to Dickinson, Groncki had gotten so mad at him during a telephone conversation when Dickinson suggested they might lose the deal that Groncki hung up on him. *Ibid.*

The final instance of Complainant’s unprofessional behavior, the one which ultimately led to the decision to fire him, was the August 29, 2007 conference call involving Shelley Kroll,

Jennifer Freid, and Groncki. Prior to the conference call, Pallis informed Groncki that Bill Dickinsen had expressed concern that Complainant was unhappy about the deal, and she specifically directed him not to be confrontational on the call. Tr. 181. Groncki expressly acknowledged that Pallis had told him prior to August 2007 it was unacceptable to behave unprofessionally on calls with business partners, including brokers, landlords, and other employees. Tr. 183-84. Despite these admonitions, however, Complainant admitted that he was angry, upset and raised his voice during the call, and testified that he told Kroll “loudly” and “forcefully” that there were supposed to be decision makers participating in the call and the meeting was a waste of his time. Tr. 87-88. Groncki further acknowledged that his behavior during the conference call was unprofessional. Tr. 195.

Martin testified that after he spoke with Bill Dickinsen and the landlord about the conference call, he wanted Groncki removed from the Gallery Place deal because of his unprofessional behavior. Tr. 345-47. Although Martin was not a party to the August 29<sup>th</sup> conference call, he had himself been subjected to Groncki’s abusive conduct during a telephone conversation prior to that morning. Martin testified that he called Complainant to inquire about the status of the Gallery Place lease and during their conversation Groncki became very upset, yelled at him, and ultimately hung up. Tr. 368-69. With respect to the morning conference call on August 29<sup>th</sup>, Martin testified that John Miller left him a voice message saying that no one had ever spoken to him the way Groncki had, and he questioned whether AT&T wanted to proceed with the deal. Tr. 384. After speaking with Dickinsen and listening to the message from Miller, Martin called Pallis to ask that Groncki be removed from further negotiations on the deal. He told her:

I was very concerned that, this project that our market, myself and others had been working on for a year and a half was in jeopardy of falling apart because the landlord had construed that we no longer were interested in this based upon the phone call.

Tr. 391.

Pallis similarly testified about this incident that she talked to Dickinson and Martin after the morning conference call and was told by both that the landlord said they were forced to end the call because Groncki was confrontational, began yelling, and it was impossible to discuss the deal with him because of his demeanor. Tr. 249; JX 6 at 1. When Pallis subsequently talked to Complainant and asked if he had been yelling during the call, he admitted he had done so. JX 6 at 1-2; *see also* Tr. 251-58; JX20 at 1. Pallis testified that when she asked Groncki during that conversation if he remembered her prior instructions not to be confrontational he started screaming, yelled that she was engaged in a “witch hunt,” and said he wanted to talk to HR, after which Pallis told him he was to have no further involvement in the Chinatown transaction. *Ibid.* In a termination memorandum prepared by Pallis on September 11, 2006, she noted that she had spoken to Jennifer Fried, AT&T’s outside counsel, who was involved in the August 29<sup>th</sup> conference call, stating:

She said that Paul was agitated and upset on the call. She said he was very emotional. She said he was yelling. She said she “could not get a word in”. She

said out of the 17 issues to be addressed, they only addressed three of them and they did not resolve any. She said that when they began to address the third issue, Paul began yelling and the call could not go on.

JX 6 at 2. The memorandum further recounts a conversation Mike Chisholm, Pallis' supervisor, had with Complainant after the August 29<sup>th</sup> conference call:

Mike Chisholm spoke with Paul on 9/4/07 and let him know that his actions were unacceptable. He acknowledged that he was asked not to make the call confrontational, and did so anyway. . . .

*Ibid.*

Granberg, AT&T's Senior HR Manager, testified that she believed Groncki's termination was appropriate, and that various people had reviewed the situation before he was fired including Mike Chisholm, Toni Pallis' Executive Director, the next level supervisor who was a Vice President, and the Legal Department. Tr. 417-18, 420. Nancy Glubi, Grandberg's supervisor and the Executive Director of HR, also reviewed and concurred in the decision although her approval for the termination decision was not necessary. Tr. 420. Granberg was familiar with the various incidents involving Groncki's misconduct, had had a discussion with John Hood, her predecessor in HR about Groncki's conduct, and had reviewed various emails from Hood, Pallis, Groncki and others, as well as Groncki's performance evaluation. Tr. 416-17, 423-24, 428. She testified that Groncki's egregious behavior was a violation of AT&T's code of business conduct, and it is customary for the company to terminate an employee for a code of business conduct infraction without giving prior levels of discipline. Tr. 426. She further testified that Complainant's conduct violated the parts of AT&T's code of business conduct relating to complying with all reasonable requests of management and professional work behavior, and that there was a significant pattern of Paul's behavior being insubordinate and abrasive that was documented in several emails throughout his employment." Tr. 432, 434. Finally, she testified that Groncki could have been terminated based on the August 29, 2007 incident alone, even if it had not been preceded by other instances of misconduct. Tr. 436.

It is clear from the foregoing that Respondent had more than adequate justification for its decision to fire Complainant based on his conduct during the twelve months of his employment with AT&T. Although Groncki's inability to control his temper, as well as his rudeness, argumentativeness, insubordination, and frequent disputes with his supervisor are best typified by the events surrounding the August 29<sup>th</sup> conference call, that episode is but one of several incidents which support his discharge. I thus find that, even if Complainant were able to establish that he had suffered an unfavorable personnel action due in part to protected activity, AT&T has demonstrated by clear and convincing evidence that Groncki's termination was based on performance related issues unconnected to his alleged protected activity.

## V. CONCLUSION

Based on the foregoing, I find that Complainant has failed to prove by a preponderance of the evidence that his employment with Respondent was terminated as a result of any activity protected by 18 U.S.C. § 1541A and the regulations promulgated thereunder. I further find that, even if the evidence presented in this matter had established that the decision to fire Groncki was at least partly attributable to conduct protected by SOX, AT&T has demonstrated by clear and convincing evidence that it had a legitimate reason for terminating Complainant's employment without regard to such protected activity.

## ORDER

IT IS HEREBY ORDERED that the Complaint of Paul Groncki filed pursuant to the provisions of 18 U.S.C. § 1514A be DISMISSED.

A

STEPHEN L. PURCELL  
Associate Chief Judge

Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).

