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Issue Date: 01 April 2010

In the Matter of

AMY STROUPE
Complainant

v.

BRANCH BANKING & TRUST COMPANY
Respondent

Case No. 2008-SOX-00047

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For the Complainant

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For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER¹

This case arises out of a complaint of discrimination filed by Amy Stroupe (“Complainant”) against Branch Banking & Trust Company (“BB&T” or “Respondent”), pursuant to the employee protection provisions of 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 (the “Act”), and the implementing regulations at 29 C.F.R. § 1980.² The Act prohibits

¹ Citations to the record of this proceeding are abbreviated as follows: CX – Complainant’s Exhibit; RX – Respondent’s Exhibit; TR – Hearing Transcript; CX Brief – Complainant’s Closing Brief; RX Brief – Respondent’s Closing Brief.

² The Act incorporates the procedural provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b). See 18 U.S.C. § 1514A(b)(2)(B).

publicly traded companies from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer, a federal agency, or Congress information relating to alleged violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission (“SEC”), or any provision of federal law relating to fraud against shareholders. The Act extends such protection to employees of any company “with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 780(d))”

On September 11, 2007, Stroupe filed a whistleblower complaint with the Occupational Health and Safety Administration (“OSHA”). *Id.* at 12-13. OSHA’s investigation concluded that her termination by BB&T was not a retaliatory action. *OSHA Final Investigative Report* at 2-3. Stroupe requested a hearing.

On August 6, 2008, BB&T filed a *Motion to Stay and to Seal Portions of the Complaint*;³ I denied the motion to stay the proceedings and granted a protective order on November 12, 2008. *See Order Denying Motion to Stay Proceedings, Granting Protective Order and Denying Request for Interlocutory Review.* On May 21, 2009, BB&T filed a *Motion for Summary Judgment*; I denied the motion June 9, 2009. *See Order Denying Motion for Summary Judgment.*

A formal hearing was held in Winston-Salem, North Carolina from June 15-19 and 23-25, 2009. At the hearing, Complainant’s Exhibits 1-29 and Respondent’s Exhibits 1-26, 28-33, 36, 46, 52, 56-58, 63-90, 92-95, 98, 100-103, and 106-08 were admitted into evidence. Both parties filed post-hearing briefs. With its brief, BB&T filed a post-hearing *Motion to Correct Portions of the Hearing Transcript*. Complainant objected to the motion, contending it was untimely under 29 C.F.R. § 18.52(b), and Complainant is correct. However, in requiring corrections to be submitted within 10 days of receipt of the transcript, § 18.52(b) does not contemplate a 2000 page transcript. Accordingly, I will consider Respondent’s motion. Further, the changes proposed by Respondent are non-controversial and, based on my review of the transcript and the proposed changes, clearly correct. Accordingly, the transcript is amended to reflect the changes listed in *Respondent’s Proposed Trial Transcript Corrections*. I have marked this document as Respondent’s Exhibit 109, and it is admitted into evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BB&T is a publicly-traded banking company with a class of securities registered under Section 12 of the Securities Exchange Act and is required to file reports under Section 15(d) of the Securities Exchange Act. BB&T’s corporate offices are located in Winston-Salem, North Carolina and it operates branch offices in, among other locations, western North Carolina. On August 1, 2005, Stroupe began work as a Corporate Investigator for BB&T. She was assigned to an office on Arrowpine Drive in Charlotte, North Carolina. CX 1.

³ On August 18 and 28, 2008, BB&T filed a supplemental and second motion.

Stroupe's Employment with Cleveland County Sheriff's Office

Prior to joining BB&T, Stroupe worked for the Cleveland County, North Carolina Sheriff, most recently as a detective. TR 51. When she joined BB&T, Stroupe wished to maintain her law enforcement certifications and asked permission of her supervisor, Brian Prater, a Regional Manager of Corporate Investigations for BB&T, and Prater's supervisor at the time, Bob Myers, the Corporate Investigations Manager. TR 57. With permission, Stroupe continued her employment with the Cleveland County Sheriff, largely performing civic functions and working an occasional shift. TR 58. In order to retain her law enforcement certification, Stroupe was required to complete classroom and weapons training. Prater testified that Stroupe told him she would need to be away from the office for this training once or twice a year. TR 1286.

Assigned Office Location

Within the first few days of working for BB&T, Stroupe approached Prater to discuss the possibility of working from a different branch location closer to her home than the Charlotte office. TR 56. Prater suggested that she contact Charlie Mattox, the Regional Branch Office Manager, to determine if any of the branch locations had available office space. TR 67. Mattox told her there was space available in the main branch office in Shelby, North Carolina. TR 68. Shelby is about forty-five miles closer to Stroupe's home than the Charlotte office. She started working out of the Shelby office, on average, two or three days per week. TR 68.

BB&T's Corporate Structure

Four departments within BB&T in North Carolina were involved in the events underlying this claim: Corporate Investigations, Regional Management, Direct Retail Lending and Employee Relations. While Stroupe was working as a detective for the Cleveland County Sheriff, she was invited to apply for a position as a Corporate Investigator with BB&T by Dan Hill, now BB&T's Corporate Investigations Manager, who had met her when he was an investigator for BB&T. TR 1679-80. She was hired by Prater. Hill replaced Myers as Corporate Investigations Manager in April, 2007. TR 1263, 1676. In May 2006, George Wilson was hired as a Corporate Investigator. TR 1133. Wilson and Stroupe shared office space and worked in the same geographical region. TR 1133-34.

Charlie Mattox was the Regional Branch Operations Manager ("RBOM") beginning in 2003. He oversaw branch operations in the Western Region. TR 1792-94. In February, 2007, Mattox was promoted to Regional Banking Manager ("RBM"); in that position he supervised the lending practices of all lenders in the Western Region, including Bryan Drum and Jason Harrill. TR 1794, 1806-07. Mike Willett, the Regional President, supervised Mattox. TR 1794.

The Direct Retail Lending group manages BB&T's retail loan portfolio. Karen Price-Crowder is the senior manager of the group. TR 1534-39. Beginning in February, 2007, Carlos Goodrich was a Risk Manager within the group and reported to Price-Crowder. Dan Loftis was the Portfolio Administrator for the Western Region. TR 1539-40.

Finally, Employee Relations administers personnel policies and procedures within the bank. Sherri Harper is the Regional Employee Relations Manager for the Charlotte Metro and Western Regions. TR 961. Sandra Blanton, Group Employee Relations Manager, is Harper's supervisor, and manages the state of North Carolina. TR 962, 1764-65.

Stroupe's Job Responsibilities and Performance Reviews

The purpose of a Corporate Investigator, as defined by the job description, is to investigate and report suspicious activities by bank employees or non-employees. RX 84. The job duties include working with other staff, including legal staff, and law enforcement to research, collect evidence, and conduct interviews. RX 84. In addition, a Corporate Investigator prepares reports for bank regulators and law enforcement, and is expected to build relationships with law enforcement authorities and industry peers. RX 84. Prater testified that Corporate Investigators were required to work approximately 8:15 a.m. to 5:00 p.m. each day and often work more than 40 hours per week. TR 1267.

Throughout her employment, Stroupe received excellent performance evaluations. At her 90 day evaluation on October 21, 2005, Stroupe had satisfied the requirements of her new position and her employment was continued. In the comments section, Prater wrote, "Amy is an asset to the BB&T Corporate Investigations team. Amy has established herself as a consistent contributor to the investigative team." CX 3. At her sixth month review on January 18, 2006, Prater commented, "Although Amy began her employment on August 1, 2005 she is on target to complete most of her goals and objectives." CX 4 at 647.

Stroupe received her annual review on March 24, 2006.⁴ In the 32 elements of the "Organizational Values and Core Competencies" and the seven "Objectives", Prater rated Stroupe a "performer" or "very good performer". "Objectives" are the training and work product goals for the position. The review defines "performer" as:

This level of achievement is considered to represent solid performance. Individual consistently and reliably meets job expectations and requirements. As the individual gains knowledge and experience, progress is being made in their overall development. Performance at this level is typical in well-managed, high-performance organizations.

CX 5 at 658. The review defined "very good performer" as:

This level of achievement is considered to exceed normal job expectations in many areas. Individual consistently accomplishes complex and difficult parts of the job, often going beyond anticipated results. Employee is making a substantial contribution to the organization.

CX 5 at 658.

As a result of this positive evaluation, BB&T increased Stroupe's salary five percent. Her pay increased from \$46,500 to \$ 48,825 annually. CX 5 at 658.

⁴ According to Stroupe's testimony, BB&T conducted annual reviews in March of each year. TR at 77-78.

At her mid-year review in September 2006, Prater commented,

Amy has as of August 16th, 2006 been assigned and worked 139 cases which is an average of 23 cases per month. Amy has successfully cleared 98.56% of these cases which is outstanding. Amy has a strong work ethic, with a great determination to resolve the cases assigned to her for investigation. Amy has worked very hard on regional relationships. The RBOM's over the Charlotte-Metro and Western regions have praised Amy for her positive impact on their regions. Amy is a valued employee and she is valued greatly by her Corporate Investigations teammates.

CX 6 at 661.

Stroupe received her second annual review on March 8, 2007. CX 7. In the 17 elements of the "Organizational Values and Core Competencies", Prater ranked her as a "very good performer" in 11 areas, and as a "good performer" in the remaining six. CX 7. She was also highly ranked in Prater's assessment of her completion of training objectives for the year. Prater described Stroupe's career potential this way:

Amy's future with BB&T is very bright. Amy is always willing and open to learn new ways to complete her job assignments in the most professional and timely manner. Amy has broaden [sic] her financial and law enforcement contacts which has enabled her to successfully complete her investigations for BB&T. Amy needs to continue to attend professional courses in Leadership and branch operations in order to expand her development in a corporate setting.

CX 7 at 669.

In the "Summary Comments on Overall Performance and Potential", Prater wrote,

Amy's overall performance in 2006 has been very good. Amy continues to work hard in learning the BB&T culture and the long term potential for Amy is outstanding. As Amy's banking experience grows and as she develops her investigative skills and increased bank operations experience she will be an even bigger asset to BB&T Corporation.

CX 7 at 670. Prater summarized her strengths as follows:

Amy's work ethic is unmatched which is reflected in her case work. Amy investigated 250 cases and solved 243 (97%) of her assigned investigations. Amy works each case with an abundance of energy, and constantly strives to find the facts of each case and works hard to recover any losses to BB&T. In 2006 Amy recovered \$277,569.00 and assisted her regions in preventing \$2,544,175.00 in losses. Amy has strong leadership skills and is always willing to work with other investigators.

CX 7 at 670. Prater then described her weaknesses.

Amy needs to continue to work on her communication style in a corporate setting, such as keeping her opinions or recommendations about her cases only for BB&T Investigation's management, Human Systems and Regional Management. Amy needs to continue to work on ensuring accuracy on her regulatory reports

Id. In the portion of the evaluation labeled "Developmental Coaching", Prater indicated that Stroupe should continue to "aggressively investigat[e] her cases", but do less "police work." Further, he commented that Stroupe should "[d]evelop 'Corporate' Investigative skills" and to "[c]ontinue to learn and portray the BB&T values." CX 7 at 670. As a result of this evaluation, Stroupe received a 4.2% pay increase; her annual salary for 2007 was \$50,889.72. CX 7 at 671.

Village of Penland Investigation

On February 20 or 21, 2007, Michael Smith, a Retail Service Officer, approached Stroupe with concerns about a series of loans made by Bryan Drum, a Financial Center Manager, in a real estate development called the Village of Penland located in Spruce Pine, North Carolina. TR 115-19. On February 26, Stroupe met with Prater to discuss the information gathered from Smith, and Prater instructed her to share the information during an upcoming training. TR 119. At a training session the following day, Stroupe shared the information with Janet Skutt, an analyst with Direct Retail Lending. TR 119, 122. Stroupe detailed what she knew about the loans at the time: the loans were administered by Bryan Drum, whose office was located an hour and a half from the development; Peerless, the development company, was making payments on the individual loans; a single person served as the appraiser, surveyor and closing attorney for many of the loans; the loans were structured as balloon loans; the lots were appraised for the same amount even though some of the lots were unusually small; and the same photograph was used in many of the loan documents. TR 120.

On March 5, Stroupe contacted an FBI Special Agent Mike McNeely. TR 126. Stroupe knew that he had investigated many bank fraud cases in the past. Her purpose for calling McNeely was to determine the type of fraud possibly being perpetrated. TR 127. In this conversation, she offered a basic description of the facts and asked McNeely if the FBI would be interested in investigating the case. TR 126. Special Agent McNeely indicated that they would. TR 126. In a later conversation, Stroupe mentioned the Village of Penland loans to a Secret Service Agent, who indicated that if the FBI did not investigate the loans, the Secret Service would be interested. TR 128.

Stroupe scheduled an appointment to meet with Dan Loftis, the Portfolio Manager, Skutt and Prater on March 9. TR 123. Stroupe took documents gathered by Michael Smith to the meeting and explained facts about the loans that appeared suspicious. Based on the documents available at the time, the potential risk for BB&T totaled \$20 million. TR 124. At the meeting each participant was assigned individual tasks to investigate. Stroupe provided names to Elizabeth O'Ferrell, a member of the Business Integrity group within the bank; this group aided in lending investigations. TR 125. She also asked O'Ferrell to investigate Drum's personnel accounts to see if he was receiving kickbacks from the loans. *Id.* Later on, she asked other members of the Business Integrity Group to investigate some of the loans. TR 129.

On March 16, Stroupe, Prater, and Loftis, along with members of the Business Integrity Group, met again to discuss the Village of Penland loans. TR 130. At this meeting, the parties exchanged information about the individuals involved with the development company. They also decided to contact one of the individual borrowers to determine what he knew about the development and to gauge whether the borrowers themselves may be involved in the scam. TR 132. At this meeting, the group also determined not to discuss the investigation of the Penland loans with others at the bank; they were determined to keep the investigation discrete as long as possible. TR 138. Stroupe testified that Prater and Dan Hill specifically instructed her not to discuss the investigation with Charlie Mattox.⁵ TR 137.

On March 19, Stroupe contacted one of the borrowers whose credit report was flagged with a "Fraud Alert" to discuss the Village of Penland development. TR 132-35. About an hour after speaking with the borrower, Drum approached Stroupe in the office because he received a call from Peerless, the developer, stating that someone from the bank had contacted one of the investors. TR 135. Since Drum knew that someone within BB&T was asking about the loans, she used this opportunity to ask Drum about the development. TR 138. Stroupe asked Drum about the level of development at the site, and if he was aware that the developer was making payments for the individual borrowers. Drum tried to explain the structure of the loans with a flow chart. TR 140-41.

The following day, March 20, Stroupe had a meeting scheduled with Mattox. Prater instructed her to tell Mattox about the Village of Penland investigation since Drum knew about the investigation. TR 143. Stroupe testified that when she informed Mattox about the Penland loans, Mattox asked if the bank had suffered a loss. She testified that Mattox also seemed more focused on an investigation of another employee in his region. TR 143.

On March 21, Drum approached Stroupe and provided her a copy of the "Village of Penland Lot Sales Program." TR 145, 147. *See* CX 14. In turn, Stroupe provided a copy to Prater, Skutt and Mattox. TR 147. Although she did not have the lending background to understand the Sales Program, she received negative feedback about the Program from Loftis and Skutt. TR 148.

Drum also informed Stroupe that the bank was not funding additional loans for the Village of Penland. TR 148. At this time, she thought there were three open loans remaining. TR 148. Stroupe was aware of these outstanding loans because she, Michael Smith, and another bank employee had been watching for loan information transmitted to Drum by fax. TR 146. She was concerned about the possibility of funding additional loans in the Village of Penland, but did not discuss her concerns with others at the bank after learning from Drum that the loans would not be funded. TR 146-48. On March 30, Loftis informed Stroupe that the remaining loans had been funded. TR 150.

⁵ Hill denied giving these instructions to Stroupe. He testified that he did not have direct supervisory authority over Stroupe at this time. He did not assume his position as Corporate Investigations Manager until April 1, 2007. TR 1683-84. Further, Hill testified that he had no knowledge of the Village of Penland investigation prior to March 30, 2007. TR 1683-84.

On April 2, Stroupe and Prater met with Mattox and Willet, Regional President for the Western Region, to discuss the status of the investigation. TR 152, 158. Following this meeting, Stroupe and Prater visited the Registrar of Deeds and County Tax Collector in Mitchell County, where the Village of Penland is located. TR 158. During these interviews, Stroupe learned that the property taxes were in arrears by over \$400,000 and that similarly valued lots within the development varied greatly in size. TR 159-61; *see also* RX 12-15.

On April 4, 2007, Stroupe and Loftis interviewed Drum at the BB&T branch in Hickory, North Carolina. TR 152-53. The purpose of the interview was to determine Drum's role in making the loans and the possibility of fraudulent activity related to the Village of Penland development. TR 153-54. At the time, the labels "securities fraud," "Ponzi scheme" and "bank fraud" had all been used by employees involved in the investigation to describe the loans. TR 154-55. Following the interview, Stroupe and Loftis participated in a conference call with Prater, Mattox, Harper and O'Ferrell to discuss what they learned from Drum. TR 161; *see infra*.

Stroupe authored a report summarizing her investigation of Drum's involvement with the Village of Penland loans and Peerless real estate company. *See* CX 10. On April 10, 2007, she submitted the report, labeled "internal", by email to Prater, Loftis and Harper. CX 10(a). The purpose of this report was to provide information for Drum's supervisors to make a personnel decision regarding Drum's employment with the bank. TR 163. The report details the facts recited above, the conversations with the Registrar of Deeds and the Mitchell County Tax Collector, and the April 4 interview with Drum. TR 163. In the three pages of bullet points summarizing the interview, each point is followed by a statement regarding a bank policy violation Stroupe believed Drum committed or a comment on the information Drum provided. She concludes the report by listing other potential policy violations by Drum that should be considered. CX 10(a) at 817-18.

Charlie Mattox and Dan Loftis each received a copy of the report and made written comments on the report. *See* CX 10(b) and 10(c). Mattox faxed his comments to Carlos Goodrich, a member of the Direct Retail Lending group. *See* CX 10(b). Loftis circulated his comments to Blanton, Harper, Hill, Price-Crowder and Lynn Stone, his manager. *See* CX 10(c); TR 166. Stroupe authored another report labeled "Peerless Real Estate" and "External" which she intended to provide to outside law enforcement. *See* CX 10(d); TR 166-67. Finally, on May 21, 2007, she sent a copy of this report to Elizabeth Repetti, an attorney with Bell, Davis & Pitt P.A., a law firm representing BB&T regarding the Village of Penland investigation. *See* CX 10(e); TR 168.

Stroupe submitted the report to Bell, Davis & Pitt on May 21 in preparation for a meeting with the firm the following day. TR 169. The May 22nd meeting was attended by Stroupe, Dan Hill, Price-Crowder, two other BB&T employees, and Walter Pitt, a lawyer with Bell, Davis & Pitt. TR 169. This meeting was convened in order to prepare for a meeting with the FBI which Stroupe had previously scheduled for the following day, May 23, 2007. TR 170.⁶

⁶ Stroupe had two prior meetings with Pitt on May 14 and May 16 to discuss the Village of Penland investigation. TR 171.

On May 22, Stroupe arrived first at the Bell, Davis & Pitt offices. TR 178. She testified that she had a conversation with Pitt in which he said that he had problems with the way she had written her investigative report. TR 178. First, Pitt was concerned that she referred generally to Peerless instead of citing the specific holding company that sold a particular lot. TR 178. Pitt also stated that the report should not list the specific policy violations Drum may have committed when approving the loans. TR 179. In response, she explained that there were over 200 different companies registered to the principal of Peerless; therefore, being specific regarding each individual loan would have been difficult. She also stated that the reason she listed the policy violations in the report was because when writing the original report, Charlie Mattox asked for references to specific policy violations Drum may have committed. TR 179. She also rationalized that listing the specific policies Drum violated demonstrated that BB&T had policies and procedures in place to prevent this type of fraudulent loan. TR 179.

When Dan Hill arrived at the Bell, Davis & Pitt offices, Stroupe, Hill and Pitt continued their conversation in Pitt's office. TR 181. Pitt, Hill and Stroupe testified that Pitt had a question about a particular statement in Stroupe's report on her investigation. TR 181-82, 1492 and 1709-10. The statement reads, "Drum said he was involved in developing the Incentive Program." *Id.*; see CX 10(e) at 1366. Stroupe answered she did not believe that Drum was smart enough to develop the incentive program, but that Drum stated that he suggested that Peerless use direct drafts. TR 182. Hill testified that Drum told him in an interview that he was not involved in creating the incentive program, but had suggested the direct draft payments, the next bullet point in Stroupe's report. TR 1710; CX 10(e) ("Drum said that he pushed Peerless to pay the loans through their Peerless account using a direct draft."). Hill testified that Stroupe agreed with this statement. TR 1710.

Based on this discussion, Pitt informed Stroupe that he would not include her report in the documents delivered to the FBI the following day. TR 183. Stroupe testified that based on this conversation, she felt like she was being held responsible for the fraudulent loans, not Drum. TR 183. She felt as though the situation was her fault. TR 183-84. Further, Stroupe testified that Pitt told her she would not be attending the meeting the following day with the FBI. She said that Pitt stated, "We don't want you in the meeting with the FBI because if they ask questions you'll answer them." TR 184.

Pitt testified that he did not provide Stroupe's report of the Village of Penland investigation to the FBI at the meeting the following day. When asked why he did not provide the reported, he answered:

Well, for one reason, it contained what I believe to be a materially inaccurate statement that she confirmed that was inaccurate. And I didn't have time to verify all the statements that were made in the report. I had reviewed it on the 22nd, an[d] we had a meeting on the 23rd. So I didn't have time to look at all those statements, but I did know I had a materially inaccurate statement.

Secondly, it didn't fit in with the overall approach we were taking. If we were doing a topical-type approach, a narrative was not what we were intending to provide.

The third thing was that it was prepared for me, and I thought at that time that it was, indeed, an attorney-client privilege communication. And I anticipated a lot of litigation over the Penland matter, and that is certainly proven to be the case. And I felt that if I released that report, it would have been discoverable for all purposes. And – so they were, basically, the reasons why.

TR 1497-98.

Regarding who would attend the meeting with the FBI the following day, Hill testified that at the close of the conversation between himself, Stroupe and Pitt, he broached the topic of who would attend the meeting. TR 1711. He said that, based on his experience, all of the people who have been attending the initial meetings did not need to be present at the meeting with the FBI. TR 1711-12. He said only a few people needed to present the information to the FBI. He suggested that only the heads of the departments attend the meeting. TR 1712. Hill testified that he raised the same issue later with the larger group. TR 1712.

Pitt testified that during the larger group meeting, Hill raised the issue of who was going to accompany him to the meeting with the FBI. TR 1498. Pitt said that Hill stated that based on his experience it was not appropriate for everyone involved to present the information to the FBI agents. Therefore, a group decision was made that senior members would attend the meeting, specifically Hill and Price-Crowder. Pitt would attend along with another attorney from the firm, Chip Clark. TR 1499.

The meeting with the FBI took place the following day, May 23, 2007, in a conference room in one of the BB&T offices in Charlotte. TR 184. Stroupe testified that Pitt asked her to introduce the BB&T representatives to the FBI agents, and then excuse herself from the room, which she did. TR 185. After the meeting, Pitt instructed Stroupe to refer the FBI to him if she received any questions about the Village of Penland in the future. TR 199.

After May 23, 2007, Stroupe continued to work on the Village of Penland investigation. During the May 16 meeting at Pitt's office, Pitt requested that documents that came to him regarding the Village of Penland investigation be stamped "Attorney-Client Privilege." TR 190. Thereafter, she stamped all the documents she forwarded to Pitt, "Attorney-Client Privilege," including the contents of Drum's office related to the Penland loans. TR 190-93. *See* CX 12. She also became a "collecting point" of information regarding the Penland loans. TR 274.

Problems with Mattox

Stroupe testified that from the beginning of her employment with BB&T, she had difficulties working with Charlie Mattox. TR 211. Stroupe recounted a series of events in which she believed that Mattox interfered with her investigations or tried to limit her investigations. TR 343; *see* CX 13(a) and (b). Each event involved employees who worked within the region Mattox managed.

The first problem Stroupe had with Mattox occurred on October 20, 2005. *See also* CX 13(b) at 2691. The impetus for the investigation was a bank customer who opened an account

with an insurance check, received cash back, and stole her check back from the employee who assisted her in the transaction. TR 334. During the course of the investigation, Stroupe discovered that two bank employees were using the same cash drawer to conduct transactions, and these two employees had been repeatedly warned to not share the same drawer. TR 335. Stroupe testified that she telephoned Mattox to tell him she was investigating the situation, and inquired who the Employee Relations Manager was for the particular branch. TR 333. She testified that Mattox informed her that Harper was assigned to the region, but Willet (Mattox's supervisor) did not like Harper and did not want to "involve" her in cases in the region. TR 334. At the end of her investigation, Stroupe gave her information to Mattox. TR 335.

Stroupe testified that this incident caused her to have two concerns about Mattox. First, the bank employees had been repeatedly warned about sharing the same drawer, a terminable offense. She was concerned that Mattox did not take any corrective action in the situation. TR 335-37. Second, Stroupe spoke with Prater about Mattox's request not to involve Harper in the situation. TR 338. Prater informed her that despite Mattox's request, she must inform Harper of employee investigations. TR 338.

Stroupe recalled another incident, in December, 2005. After an investigation of a bank employee suspected of taking money from a customer's deposit, Stroupe filed a police report. TR 354-57; *see also* CX 13(b) at 2691. In her complaint about Mattox, Stroupe recounted that a newspaper printed that BB&T reported embezzlement, in reference to this investigation. When Mattox learned of the newspaper's report, he was angry that Stroupe filed a report with the police. CX 13(b) at 2691. Mattox complained that the police report was "bad for the bank and blamed [Stroupe]." *Id.* However, Stroupe's supervisor at the time told Mattox that the crime was a public record and the reporting could not be controlled by the bank. *Id.*

On January 16, 2006, Stroupe interviewed a teller suspected of taking \$1600 from a client's account. TR 361; CX 13(b) at 2692. Mattox asked Stroupe if he could sit in on her interview of the teller, and Stroupe agreed, believing it to be an opportunity for Mattox to observe how she conducted employees' interviews and he would serve as a witness to the teller's statements. TR 362. However, the teller began to cry when Stroupe asked her questions, and Mattox ended the interview. TR 362. When the interview ended, the teller asked if she was going to be terminated. Mattox responded that she would not, although Stroupe believed missing money was a terminable offense. CX 13(b) at 2692. Stroupe testified that she was "shocked" when Mattox ended the interview. TR 363.

When Mattox learned that Stroupe had filed a police report regarding this incident, he instructed her to contact the detective working on the case and say that BB&T did not wish to pursue the investigation. *Id.*; TR 363. Stroupe contacted the detective to ask him to stop the investigation; however, when she discussed the situation with Prater, her supervisor, Prater instructed her to report the incident to the police. *Id.* Stroupe described the repeated, conflicting calls she made to the detective as embarrassing and humiliating. TR 363.

Mattox also testified about the teller interview on January 16, 2006. Mattox recalled that he believed one of two employees could have taken the money. TR 1796. When Stroupe approached the interview she stated, "Let me get a confession." TR 1796. After about 45 or 50

minutes of the interview, the teller had provided the same answers to what Mattox thought were similar questions. TR 1796-97. He testified that he ended the interview because the questions were not leading anywhere. He thought that Stroupe asked questions based on her desire to get a confession, and that Stroupe was starting to badger the employee through her questions. TR 1797.

As a result of the January, 2006 incident, Prater offered to speak to Mattox on Stroupe's behalf. However, Stroupe decided she would rather discuss her disagreements with Mattox personally. CX 13(b) at 2692. Stroupe asked Mattox to join her for lunch so that they could discuss their conflicts. *Id.* At lunch, Mattox asked Stroupe what her biggest challenge was when she left law enforcement and started working for BB&T. TR 365. Stroupe responded, "you," referring to Mattox. TR 365. Stroupe explained that she believed she and Mattox may be having a personality conflict, and Mattox suggested that she complete the BB&T Managing Interpersonal Relationships course. CX 13(b) at 2693. Stroupe stated that the meeting ended with a positive, and she and Mattox agreed to work together. *Id.*

Mattox also testified regarding the lunch meeting following the teller interview. He testified that he appreciated Stroupe inviting him for lunch, stating that in his position he needed to have a good relationship with the Corporate Investigator. TR 1799. Mattox also stated that Stroupe said that her big challenge since starting to work for BB&T was him. TR 1800. Mattox testified that he "clearly got a message that day," although he did not explain what the message was. TR 1800. He said that at the end of the meeting, the two agreed to work together. TR 1800.

In the course of an investigation that followed the lunch meeting, Stroupe reported an incident to the police involving cash missing from a client's deposit. CX 13(b) at 2693; TR 366-70. On a Friday, the detective arrived at the branch location where the incident occurred to interview employees. CX 13(b) at 2693. Mattox informed him that the employees were working, and the detective would have to schedule a time to interview the employees. TR 370. Mattox telephoned Stroupe the following Monday to tell her that the detective could interview the employees. TR 317. Stroupe did not feel comfortable telling the detective he could conduct the interviews or scheduling the interviews on his behalf. She believed that if she arranged the interviews for the police, then BB&T could be considered an agent for the police. TR 371-72. She testified that her belief was confirmed by a member of BB&T's legal department. TR 372. Stroupe noted that this event raised concerns for how future interactions with the police would be conducted. CX 13(b) at 2693.

This investigation also required a BB&T employee to write a letter to the client explaining the missing deposit. Mattox testified that Stroupe believed the letter was a "clear lie", while he and Human Systems did not agree. TR 1801. Mattox later heard from an employee at another branch that Stroupe thought that Mattox was covering for the employees involved in the missing deposit. Mattox believed that the employee's knowledge of the situation raised questions about Stroupe's ability to keep investigations confidential. TR 1801.

On March 15, 2007, a few weeks after Stroupe began working on the Village of Penland investigation, she received a call from Harper to report an anonymous complaint letter regarding

a Sales and Service Leader for the region, LEEANNE BRIGGS. TR 92; *see* CX 9. The letter contained a range of complaints including ethics violations, data manipulation, intimidation, and abuse of power. TR 95. The letter mentioned a number of BB&T employees who had been affected or had participated in Briggs's actions. On March 20, Stroupe spoke with Mattox, Briggs's supervisor, about the letter, and informed him that she would be required to conduct multiple interviews to complete the investigation. TR 95-96.

Stroupe testified that during the course of her interviews, many employees referred to Briggs as a "top producer" in the region. TR 97. She received conflicting negative and positive comments about Briggs, and was often referred to other employees for additional information. TR 98. She asked employees she interviewed to prepare a written statement to be included with her report. In the course of the investigation, Stroupe discussed her findings with Mattox several times; however, when Mattox requested copies of the written statements, she did not provide him copies of the statements. TR 106-07. Stroupe testified that several employees' statements mentioned Mattox personally, and one employee specifically requested that Mattox not see the statement. TR 109. She sought input from Prater, who advised her to give the statements to Harper, and allow Harper to determine whether to provide the statements to Mattox. TR 109.

Stroupe testified that during the course of the Briggs investigation, Mattox "consistently rushed [her] on the case," wanted the case to be a priority over other investigations and wrapped up quickly. TR 110. When Mattox pressured her to finish the investigation, she attempted to explain that she was also working on the Village of Penland investigation and other cases. TR 110.

On April 11, 2007, Mattox emailed Harper stating that he had concerns about the way Stroupe conducted investigations. *See* RX 64. After receiving the email, Harper telephoned Mattox to discuss his concerns. TR 1027. Harper testified that Mattox was concerned about the length of time Stroupe was taking to conduct a particular investigation in his region and her unprofessional behavior during interviews. TR 1028. During the conversation, Harper explained to Mattox that Stroupe needed to conduct interviews in order to complete her job and that if Mattox had continuing concerns, he should express those to Prater and put them in writing. TR 1028.

On April 16, 2007, Mattox telephoned Stroupe trying to obtain the employees' statements in the Briggs investigation. TR 212. Stroupe testified that during this conversation, Mattox expressed various problems he had with how Stroupe conducted investigations and wrote her reports. TR 212-13. Specifically, Mattox stated that she had "manipulated" her investigation of Bryan Drum. TR 213. Stroupe suggested that if Mattox had problems regarding her job performance, he should contact her supervisor, Brian Prater. TR 213.

Upset by the exchange, Stroupe relayed the conversation to Prater, who encouraged her to contact Sherri Harper, Employee Relations Manager for the region. TR 214. Stroupe testified that Harper gave her a "sticks and stones" speech, but Stroupe responded that she felt that her credibility as an investigator was damaged by Mattox's comments. TR 214. Harper also told her that because of the nature of the position Stroupe held at the bank, other bank employees were not going to like her and would make negative comments about her. TR 214.

Harper also testified regarding this meeting with Stroupe. Harper recalled that Stroupe was “very upset” because Mattox was attacking her character in ways Stroupe believed would damage her reputation as an investigator. TR 1032. Harper recalled that she spoke with Stroupe for approximately 45 minutes and that she encouraged Stroupe to express her concerns to Prater and record her concerns in writing. TR 1033.

On April 17, 2007, Mattox emailed a list of his concerns about Stroupe’s job performance to Dan Hill and Sherri Harper. *See* RX 75. On May 1, Hill contacted Mattox and his manager, Mike Willett, to arrange a meeting to discuss Mattox’s concerns. *See* RX 76. In his email response, Mattox provided a list of BB&T employees Hill should contact for further information and offered a script for asking questions about Corporate Investigations. *Id.* Hill responded,

I am more than willing to speak to individuals that I deem appropriate. However, I will not speak to them from scripted questions from another individual. I feel that I have enough experience and am professional enough to prepare my own questions and the way in which they are asked. When I determine the problem and the pertinent issues, I will then speak with people, if warranted.

Id. at 2700.

Mattox’s four page list of concerns, most of them repetitive, can be summarized as follows: the perceived lack of objectivity in Stroupe’s approach to investigations; the belief that Stroupe slanted facts or “puts words in people’s mouths”; the observation that Stroupe shared information gathered during investigations with employees who did not need to know the information; and a lack of sensitivity to the potentially negative atmosphere an investigation can create in the work environment. *See* RX 76 at 2704-07.

In response to Hill, Prater and Harper’s suggestions, Stroupe prepared a statement listing her concerns about Charlie Mattox. *See* CX 13; TR 215. Stroupe understood from Hill’s instructions that she should detail her history of problems with Mattox. TR 215. Hill testified that when he received an early copy of the statement, it read like a list of personal attacks against Mattox which would not be beneficial to Stroupe or himself. TR 1696. He suggested that she make changes to the statement. TR 1696. Stroupe accepted almost all of the suggested changes, including deleting entire portions of it. Hill pointed to one proposed change she did not make, and one addition to the statement which he did not suggest. *See* TR 1967; TR 219.

Stroupe personally delivered her report to Harper, and Harper read the report in Stroupe’s presence. TR 1035, 1037. Harper testified that she said little to Stroupe about the report, commenting that the report contained Stroupe’s feelings about the situation. TR 1037. Harper recalled discussing with Hill at another time the emotional and personal nature of Stroupe’s report. TR 1040. Hill responded that he had tried to coach Stroupe in not including emotional and personal content in the report. TR 1040. Harper also discussed specific points about Mattox’s behavior with his manager, Mike Willett, because she recognized coaching opportunities for Mattox in Stroupe’s comments. TR 1041. Harper also understood that Willett, Mattox, Prater and Hill were to meet to discuss these concerns.

On May 11, 2007, Hill and Prater traveled to Asheville to meet with Mattox and Willett. TR 1700. Hill testified that the primary purpose for the meeting was to resolve the conflict. TR 1700. Hill stated that he opened the meeting by stating,

Charlie, Amy Stroupe was our investigator in the Western Region. She's going to remain our investigator in the Western Region. I understand – I read your issues. I know what her issues are. I know that we have some coaching to do with Amy. I've been told by Sherri [Harper] that Mike Willett[t] had some coaching to do with you. I'm not getting into that. I'm here to talk about Amy.

TR 1701.

Hill continued,

The conversation went that “I am very aware that Amy is, perhaps, over aggressive, and some of her tactics is [*sic*] confrontational. She's very opinionated.” I said, “Those are our problems, and those are the problems that we're going to work on Amy with, and we're going to coach her on that.” And I said, “At the same time, I do know there's a couple of issues I want [to] take up with you.” And I told Charlie I thought it was inappropriate that he attended – sat in on any of her investigations. And that if he had anything to say about Amy or if he had any issues with Amy, he was to go to her manager and not go to Amy.

TR 1701.

Hill summarized the results of the conversation,

So when I left that meeting after two hours, I felt very good. Charlie felt very good about it. Brian felt good. Mike Willett felt good. We – what we did is just put everything on the table and aired everything out.

TR 1701.

Prater testified that he and Hill left the meeting noting specific concerns raised by Mattox and Willett. TR 1359. They were disturbed by remarks Stroupe made about Mattox to some of the employees Mattox managed. Mattox and Willett also worried about conversations Stroupe held in an open working area in the branch office and her history of not keeping information gathered during investigations confidential. Finally, they were also concerned, and Prater and Hill discovered for the first time, that when Stroupe worked at the Shelby office, she worked at a desk in an open area of the office, not in a private office space. TR 1359; TR 1701-02.

On May 14, 2007, the same day as one of the meetings at Bell, Davis & Pitt, Hill and Prater met with Stroupe to discuss the results of their meeting with Mattox and Willett. Hill, Prater and Stroupe each testified regarding the meeting. Hill testified that he and Prater informed Stroupe that she was going to remain the Corporate Investigator assigned to the Western Region.

TR 1703. However, Prater was going to distribute cases between Stroupe and George Wilson, the other Corporate Investigator for the region, so that Stroupe would spend more time working in Charlotte. TR 1703. Hill and Prater also informed Stroupe that because of the work space situation, she would no longer be working from the Shelby office. TR 1703. Hill also testified that he “informed [Stroupe] that there was some coaching that we needed to do with her” TR 1703. The major issue was that she was not to discuss investigations with people who did not need to know. TR 1704. Stroupe was also instructed not to “bad mouth” Mattox. TR 1704. Hill also testified that he informed Stroupe that Prater was going to work with her on her “aggressive” investigation techniques, report writing, and that there would be future coaching sessions. TR 1704. Hill testified that at the end of the meeting Stroupe agreed it was inappropriate to talk about investigations and Mattox, and said it would not happen in the future. TR 1704-05.

Prater testified that he began the May 14, 2007 meeting with Stroupe and Hill by “mak[ing] it clear to Amy that I supported her. I still thought the world of her. That the complaints that Charlie had – had levitated [*sic*] against her was a concern, but nothing that we could not overcome, and that she was, you know, a 100 percent supported by me, especially, and by Dan.” TR 1363. Prater described the meeting as “a very positive meeting” and that he continued to support Stroupe working as a Corporate Investigator in the Western Region. TR 1364. He also cautioned Stroupe about “poor mouthing” management, specifically Mattox, telling her that she should respect the position her coworkers hold, even if she has personal differences with them. TR 1364. Prater also testified, “I had my concerns about Mr. Mattox. I had my own personal feeling, but I respected him as – as a coworker and the position [that he’s in].” TR 1364.

Prater also testified that he considered the meeting a “coaching session” and that they had relayed a verbal warning. TR 1365. Prater described the verbal warning as Stroupe should keep information confidential and discuss cases on a need-to-know basis, and to stop “poor mouthing” management. TR 1365. At the end of the meeting, Prater believed that Stroupe would improve and that she appreciated their support. TR 1365.

Prater did not document the meeting or the verbal warning in Stroupe’s personnel file. TR 1365. He stated that he was not required to document the warning, and that he did not want to put anything negative in her file because she was a valued employee. TR 1365.

Stroupe testified that the May 14, 2007 meeting opened with Prater telling her about Mattox’s complaint that she talked about investigations with those that did not need to know. TR 225. Stroupe answered that she did not recall ever having inappropriate discussions about cases. She testified that Hill and Prater told her that she needed to be careful not to discuss cases around Mattox. TR 225. She recalled that Hill and Prater told her that they discussed with Mattox “how investigations were conducted to help him better understand that I wasn’t doing anything wrong” when she shared information with an employee about another interview. TR 226. Prater and Hill told her that she was doing a good job and should “keep up the good work, and just keep on doing investigations like I had.” TR 227. Stroupe also testified that Hill and Prater did not come out of the May 11 meeting with a positive impression of Mattox, and that she had offered “legitimate” concerns in her written statement about Mattox. TR 227.

Stroupe did not receive a written warning or notice at the meeting. TR 228. She also did not receive any indication that her employment situation was in jeopardy. Instead, Stroupe left with a sense that she was supported and encouraged by Prater and Hill. TR 228.

BB&T's Disciplinary Policies and Discipline of Other Employees

Sherri Harper, Employee Relations Manager for the Charlotte Metro and Western Region of North Carolina, testified regarding BB&T's employment policies and procedures. At the time Stroupe was employed by BB&T, each employee was provided with an employee handbook during the initial orientation process, and the book is published yearly. TR 962-63. As a part of her position, Harper provides "coaching" to employees and managers regarding implementation of the policies and procedures. TR 964. "Coaching," as the term is used within BB&T, is an opportunity for managers to discuss an employee's performance and the job expectations. Coaching is not considered a disciplinary action. TR 1041. In addition, Harper is responsible for reviewing management's termination decisions and documentation prior to an employee's termination. TR 965.

Harper described BB&T's progressive disciplinary process as consisting of a verbal warning, a written warning, a final written warning, and termination. TR 966-67. If an employee is given a verbal warning, documentation is generally not placed in the employee's personnel file. TR 967. If an employee is given a written warning, the warning is noted in their personnel file. TR 967. Harper noted that situations exist where BB&T would terminate an employee without prior discipline. She noted examples such as an employee processing her own transactions, embezzlement, theft, or when a manager loses confidence in the employee's ability to exercise professional judgment. TR 968. She also noted that if an employee has some evidence to question a disciplinary decision, BB&T would consider the information and "act on it." TR 968.

Harper testified regarding various employment policies implemented at BB&T during 2006 and 2007. First, confidential information is discussed at the bank on a "need-to-know" basis. TR 973. BB&T's employee handbook also required employees to update their outgoing voicemail message daily. TR 973. The message should provide a caller with an accurate description of the employee's schedule for the day. TR 973. Finally, BB&T's attendance policy required an employee who knew he or she needed time off to seek management approval in advance. TR 975. An individual employee is responsible for recording his or her attendance using an electronic system. TR 975-76.

Sandra Blanton, a Group Employee Relations Manager for BB&T whose territory covers the state of North Carolina, also testified about employee discipline practices at BB&T. TR 1764. Blanton described her job responsibilities as providing "guidance and counseling" concerning Human Systems policies and procedures, including to managers making decisions regarding disciplinary actions. TR 1764. Blanton is Harper's supervisor. TR 1765.

Blanton testified regarding BB&T's disciplinary procedures. *See* RX 108 at 1927. She stated,

[U]nder normal circumstances, we do endorse progressive coaching and disciplinary action, which would include or can include a verbal written warning and/or final written warning prior to termination of the employment.

But the policy also states that we reserve the right to administer disciplinary action however the company sees fit, meaning that we can skip these steps.

TR 1768. She also explained the types of circumstances that would result in immediate termination of an employee without progressive disciplinary procedures as “depend[ent] on the egregious nature of the offense. If it involves any type of dishonesty or a breach of trust and also if the employee has been involved in any other type of disciplinary issues, whether it’s related to the issue at hand or other issues.” TR 1768. She also explained that if an employee has been counseled regarding a particular issue, “our position is we can go ahead [and] proceed [with] the termination without rehashing and going over the same thing over and over.” TR 1769.

In the course of her job as Group Employee Relations Manager, Blanton compiled a list of examples of BB&T employees in North Carolina who were terminated without previous discipline and those who were terminated for taking unauthorized time off of work. TR 1769; *See* RX 108. Blanton’s list includes the following list of offenses that resulted in the immediate termination of the employee without prior discipline: “failing to follow operating procedures when implementing [computer] programming changes, which resulted in systems problems and negatively impacted client services;” “placing non-originated loan files in shred bin;” “force balancing⁷ her teller drawer using her own money;” “force balancing and falsifying bank records;” “looking at another employee’s account;” “using another employee’s teller machine to process transaction for family member;” “deviating from established procedures and changing the amount of a client transaction in order to avoid completing currency transaction report;” “being dishonest with manager about relationship with another Bank employee;” “falsifying bank records to indicate that she was contacting clients when she had not.” RX 108 at 1924.

Blanton also testified about other employees who were terminated without prior discipline. She named an employee who requested leave for a Monday and Tuesday, but did not return to work until the subsequent Monday. During the three day absence, his manager was unable to contact him by phone or email. TR 1771-72. She also recalled an employee who asked for and was granted permission to leave a training session at 3:00, but never returned from lunch, and then falsified her attendance record. TR 1772-73, 1783. Other employees that were terminated without prior discipline had falsified a loan document; assaulted a co-worker over a parking place; accessed pornographic material through BB&T internet systems; and misrepresented her employment status with BB&T. TR 1771-75. Another employee was terminated for showing up to work four hours late; however, upon cross examination, Blanton

⁷ Stroupe explained the concept of forced balancing during her testimony. *See* TR 378-80. When a bank employee counts his or her cash drawer at the end of a shift, the balance should come to zero after the transactions of the day. If the balance does not come to zero, an employee may force balance by removing any money that is over the balance, or adding money to force the balance to come to zero. If an employee takes money out of the drawer to force balance, BB&T policy does not permit the employee to keep a kitty for days that the drawer balance is short.

stated that this employee had received a prior written warning regarding his history of absenteeism. TR 1779; 1784.

Finally, two other employees involved in the Village of Penland and the internal investigation, Bryan Drum and Dan Loftis, were terminated two months and one month, respectively, prior to Stroupe. Karen Price-Crowder, who was the Direct Retail Lending Manager in 2007, testified regarding the decision to terminate Dan Loftis. As a Portfolio Administrator within the Direct Retail Lending group, Loftis was involved with the Village of Penland investigation. He was asked “to participate and hear first hand as a credit professional and to help gather the facts and to make judgment about what – what the facts were and what the ramifications were and what steps, if any, we needed to take.” TR 1542. Blanton expected Loftis to review as needed individual loan files for the Village of Penland; to determine whether the lender complied with BB&T policies and procedures; to quantify the potential risk exposure for the Bank; and to communicate the status of the investigation to others in the Bank. TR 1543.

Loftis participated in Stroupe’s first interview with Bryan Drum. After the interview, Carlos Goodrich, a Risk Manager for the Direct Retail Lending group, expressed frustration that Loftis had not reported back to him about the interview. TR 1549. When Price-Crowder received Stroupe’s report about the Village of Penland investigation in April, 2007, some time after the interview, her reaction was “extreme alarm,” and, based on the problems discussed in the report, surprise that Loftis had not immediately reported the information gathered in the interview. TR 1551-52. Goodrich subsequently asked Loftis to make comments on Stroupe’s report. TR 1559; *See* RX 68 at 774-780. The purpose of asking Loftis to record his comments to Stroupe’s report was because he had yet to put anything in writing about the interview with Drum and to provide a perspective as a credit specialist. TR 1559.

After receiving Stroupe’s investigative report, Price-Crowder began to have concerns about Loftis’s job performance. TR 1575-76. She was confused why Loftis had not immediately alerted her to what he learned during the first interview with Drum. TR 1576. Her concerns about Loftis’s performance “crystallized” during a meeting with Goodrich, Loftis and Lynne Stone, Loftis’s team leader. TR 1576.

The purpose of the meeting was twofold. TR 1580. First, Price-Crowder hoped to take lessons away from the situation with Drum. Second, based on some of Loftis’s answers, she and Goodrich wanted to gauge his job performance. TR 1580. Price-Crowder made a list of questions she wanted to present to Loftis during this meeting. TR 1578-79; *see* RX 102 at 2088. She was trying to gauge Loftis’s “assessment of the facts and judgment about what was proper or improper behavior [on the] part of our accounts officers since that was a primary function of his job.” TR 1579. One of Price-Crowder’s questions for Loftis concerned whether Drum should have been terminated from his position. She characterized Loftis as being hesitant to take a position on Drum’s termination. TR 1579.

During the meeting, Loftis made a suggestion that there should be a system in place to track exposure limits within a geographical area. TR 1586. Loftis said he was aware the Drum had approved a significant number of loans for the purchase of lots. However, Price-Crowder suggested that Loftis did not have sufficient knowledge of these lot loans, especially given

Loftis's position as coordinator of the Special Lot Program. TR 1587-88. During this meeting, Price-Crowder also developed the impression that Loftis did not understand the various purposes of having a "High Producers" list, a report that tracked those lenders who made more than one million dollars of loans in a month. TR 1995-97. Price-Crowder stated that Loftis did not seem to understand that the purpose of the list was to indicate to supervisors that the loans made by "high producers" should be monitored to ensure the loans are made in accordance with bank policy. TR 1596.

Price-Crowder's notes also contained the notation "Performance Improvement Plan." RX 102 at 2088. She testified that they were having serious concerns about Loftis's job performance and competence in the job. TR 1581. She continued,

And BB&T has very strong Human System processes in place that having worked there 22 years, I'm very familiar with, and so we would never make a snap judgment round that. We've got a process we follow and one of the steps in that process would be that, you know, it is a usual process that someone would be put on a Performance Improvement Plan to give them an opportunity to be very clearly and [*sic*] told where their performance weaknesses [*sic*]. I give them a chance to correct those where they are things that can be corrected. So what, you know, one of the outcomes of this – or this meeting was going to be would it now be the time to put Mr. Loftis on a Performance Improvement Plan.

TR 1581.

Price-Crowder continued to explain her experience using Performance Improvement Plans.

I can tell you my own personal experience [using Performance Improvement Plans] would be that it would depend on the gravity of the misconduct. So if someone has a bad day, so to speak, and has a misstep, that would be a whole other end of the spectrum from, certainly, someone who knowingly committed a fraudulent act or put the bank at risk.

And another big part of it is that is the judgment that the manager has to make is this something they can be rehabilitated, or is it just a lack of suitability or accountability for the job that they've been asked to do. And it that's the case, you have a judgment to make about whether 90 days is going to change that. It's just a judgment as a manager you have to make.

TR 1581-82.

When she left this meeting, Price-Crowder made notes of her thoughts about Loftis's answers to her questions. TR 1602. Her notes indicate that she thought it would be difficult to hold Loftis accountable for not discovering the problems with the Penland loans, but he showed a lack of awareness and judgment once the situation was uncovered. TR 1601; *see* RX 102 at 2093.

On May 11, 2007, Carlos Goodrich drafted a “Final Written Warning & 6-Month Corrective Period” regarding Loftis. *See* RX 103. The warning points to several behaviors, discussed above, that created concern about his job performance. In addition, there was concern about “inappropriate” guidance Loftis provided to two lenders unrelated to the Penland loans. TR 1606.

However, the warning was never given to Loftis. In the course of creating the warning, Direct Retail Lending discovered that in August, 2005 or 2006, another Corporate Investigator emailed Loftis to alert him to suspected problems with the Village of Penland loans. TR 1608. Loftis did not respond to this email for approximately two weeks, and the Investigator emailed him again about the loans. TR 1608-09. Price-Crowder viewed this incident as another example of Loftis’s poor performance and judgment in his role as Portfolio Administrator. TR 1610.

Price-Crowder and Goodrich ultimately determined that Loftis should be terminated. TR 1611. The reasons for his termination included those listed in the warning and the failure to respond to the Investigator’s information in August, 2005 or 2006. TR 1611. Loftis’s employment was terminated on May 18, 2007. *See* RX 106.

As a result of the Village of Penland investigation, Bryan Drum’s employment with BB&T was also terminated. After Stroupe and Loftis interviewed Drum regarding the Village of Penland loans, they participated in a conference call with Prater, Mattox, Harper and O’Ferrell to discuss what they learned from Drum. TR 152-53; 161. Mattox, as Drum’s supervisor, was included on the conference call because he would carry out any employment action regarding Drum. During the conference call, Stroupe and Loftis related the information they gathered from the interview with Drum. Harper testified that during the conference, Stroupe was concerned that Drum had participated in criminal activity by making the loans and should be terminated. TR 986. Loftis had the impression that Drum was ignorant of any possible fraudulent activity behind the loans, and Drum’s lending authority should be revoked while he went through training. TR 986-87. Harper testified that Mattox was concerned about the policy violations Drum may have committed. TR 987. After the conference call, the group exchanged a series of emails to discuss Drum’s possible violations. TR 989-90; *see* RX 16.

On April 11, 2007, Harper and Mattox exchanged emails regarding giving Drum a final written warning, the last step in BB&T’s progressive disciplinary procedures before termination. TR 993-95; *see* RX 64. In her email to Mattox, Harper stated that she wanted to review Stroupe’s investigation report, and “make sure we understand all the facts and circumstances before we make a final decision on our next step.” RX 64 at 2698. Mattox agreed to wait to deliver a warning to Drum. *Id.*

Human Systems requested input from Direct Retail Lending regarding Drum’s lending authority. On April 18, 2007, Goodrich responded by email that Drum’s lending authority be revoked. TR 1557-58; *See* RX 68. On April 18, Loftis provided a list of Drum’s possible policy violations. The violations included: failing to witness signatures in accordance with BB&T procedures; exceeding the appropriate percentage of loans in a lender’s portfolio from a single referral source; and a possible improper outside venture. *See* RX 69. In the evening on April 18,

Goodrich sent another email to Harper and Blanton indicating Mike Willett, Regional President for the Western Region, supported whatever employment action they determined necessary. RX 71; TR 1010-11. He also indicated that Direct Retail Lending would like an opportunity to conduct an additional interview with Drum. Goodrich asked that Harper and Blanton “[p]lease keep this in mind as we plan our next steps with him.” RX 71.

Ultimately, Mattox decided to terminate Drum’s employment, and that decision was authorized by Blanton. TR 1013. Drum’s employment was terminated on April 24, 2007. See RX 73. The “reason for separation” listed on the termination form indicates that Drum was fired for “poor professional judgment – policy violation.” RX 73.

Stroupe’s Termination on June 20, 2007

By early June, 2007, Stroupe became hesitant to work on other investigations at the bank. TR 249. She testified that after the May 14 meeting, she understood that Mattox requested that she no longer work from the Shelby Branch or in the Western Region. TR 242. Stroupe felt that Mattox was attempting to have her terminated, “but [she] felt like Brian Prater had protected [her] up to a point.” TR 243. Prater also informed her that Drum accused her of giving poor recommendations on his behalf. TR 243-44. When Stroupe investigated who was giving the negative reviews to Drum’s potential employers, Prater was concerned that so many people in the bank were aware of the Village of Penland investigation. TR 244. Stroupe responded that the investigation was widely known within the bank. TR 245.

Stroupe testified that when a bank employee approached her to investigate another “top producer” in Mattox’s region, she would not do it. Instead, she referred the employee to his chain of command and the BB&T Ethics Hotline. TR 250. She recalled the conversation,

If I do, if I investigate one more thing, just one more thing involving, you know, somebody in the western region that’s maybe one of [Mattox’s] top producers, or whatever, I’m going to lose my job. . . . I was too – I mean – at this point – and I hate to admit it, but I was an absolute and total coward. I had become a total coward. I was afraid to investigate anything in the bank and it’s embarrassing and humiliating for me to sit here and admit that I had just become a jelly fish, I didn’t have a backbone. I was afraid to stand up and say what was right and what was not.

TR 250.

On June 14, 2007, Stroupe had a telephone conversation with Jason Harrill, a Branch Manager in the Western Region. She testified that the purpose of her call was to discuss the location of a computer hard drive used by Bryan Drum. TR 253. After discussing the location of the hard drive, Stroupe testified,

And he asked me if – well he said, “We’re all – because of this Penland case -, and the case with Bryan you know, we’re afraid to do loans. We’re afraid to conduct business, we’re – all the lenders are afraid.” And I tried to encourage him and I said, “You know, you’re a good lender. You know, don’t let it worry you, you do a good job.” And I said,

I said, "But the case is affecting me too. I can't work out of the Shelby branch anymore." And he said, "Who made that decision?" and I told him Charlie had, Charlie Mattox.

And we continued to talk and he said that, that he had learned that Dan Loftis had been terminated and did I know that, and I said yes, that I had heard that. And he said, "Well why was he terminated, because he didn't" – and he questioned me – "Was it because he didn't catch the Penland fraud?" And I said, "From what I understood there was no way that Dan could have caught it. I don't think Dan could have caught it ahead of time from the information that I had, that I had heard." And I told, I said, I told Jason that I felt that the reason that Dan Loftis had been terminated was because Charlie had influenced, Charlie Mattox had influenced Dan Loftis. And I told Jason that Charlie did not want to terminate Bryan Drum because during, during this investigation Charlie did not want to terminate Bryan Drum.

And we continued – he said, "Well what were they waiting to do continue to do those loans up there?" And I said, "You know, I don't know, I don't think they want to continue to do loans." And he said, "Well, Leanne Briggs was terminated," and said, "Was she terminated because of the Penland case too?" And I said, "No, she wasn't." And I said, "You know, really Jason I shouldn't, probably shouldn't be discussing this with you." And, so, he said that, you know, "Okay, I understand" and we sort of hung up from our call.

TR 253-55.

Prater also testified regarding this telephone conversation between Stroupe and Harrill:

I received a call from Employee Relations Manager, Sherri Harper informing me that she had received a call from a Western Region employee by the name of Jason Harrill. And that she informed – that he informed Sherri that he had received a phone call from Amy, and that Amy was following up on some issues at his branch, and from what I can recall, it may have been with the Penland issue. And Mr. Harrill started to inform Sherri that Amy began to say that, you know, "Charlie will not let me work in the Shelby Branch anymore. This investigation is really getting too – things of that nature to the point that Jason informed Sherri that he felt uncomfortable. So they discontinued the call, from what I understand. And the information that I received from Employee Relations he called Mr. Mattox to inform him of this telephone call.

TR 1267-68.

Prater also identified an email he received from Harill regarding the June 14, 2007 conversation he had with Stroupe. In its entirety, the email read,

Amy called me on June 14, 2007 with questions concerning my computer. After we had discussed the computer issue Amy went on to say that this investigation was very stressful. I agreed with Amy. We both talked about how tough this has been on everyone at BB&T. I felt that everything that was discussed to this point was appropriate

and generic in nature. Amy then said that Charlie Mattox and her have not seen eye to eye on every issue during the past few months. She went on to say that they don't want her working in the Shelby office. I did not feel that this was information that I needed to know. I said "I think we need to hang up." We then hung up. I called Charlie Mattox on June 15, 2007 to report this conversation to him. He referred me to Sherri Harper.

RX 92.

After receiving information about this phone call, Prater prepared a "Final Written Warning – Insubordination" on June 19, 2007, which he intended to deliver to Stroupe the following day. RX 93. In this report, Prater reviews the discussion he and Hill had with Stroupe on May 14, 2007 and summarizes the information he received from Harper and Harrill about the June 14, 2007 telephone conversation. He characterizes the situation with the following paragraph.

These comments about the regions [*sic*] Retail Banking Manager to one of his direct reports goes against everything that we had verbally warned you to stop doing immediately. Discussing your feelings about how Charlie viewed the Brian Drum case is considered an open discussion of an internal employee issue between Human System, Corporate Investigations and the Western Region. For you to openly discuss a case and make disparaging remarks about the regions [*sic*] Retail Banking Manager, (Charlie) is troubling, especially in light of your counseling session and verbal warning held just a month ago.

RX 93.

Around noon on June 19, 2007, without notifying her supervisor, Stroupe left work to complete firearms training with the Cleveland County Sheriff's Department. TR 636. After lunch with co-workers from the Sheriff's Department and an FBI agent, she arrived at the training facility sometime after 1:30 p.m. TR 261. During this time, Prater called Stroupe's office phone and emailed her in order to arrange a meeting to deliver the final written warning. TR at 1376-78. Prater finally called George Wilson, with whom Stroupe shared an office space, and learned that she left work early because she forgot an appointment. TR 1378. Stroupe testified that she heard her cell phone ring while she was on the firing line, but was unable to leave the line in order to answer her phone. She answered the phone when it rang a second time. Prater asked Stroupe where she was and if she had requested permission to leave work. He also asked her to come to Winston-Salem the following day.

Prater testified that after hanging up the phone, he called Dan Hill to discuss the fact that Stroupe was at the training facility without first requesting leave from work. TR 1380. Hill suggested that they meet Stroupe in Charlotte instead of Winston-Salem the following day. Meeting in Charlotte would also enable them to discuss any potential action with Sherri Harper. TR 1380.

Prater called Stroupe a third time on her cell phone to tell her about the new meeting place. TR 1381. Stroupe, who was still at the training facility, answered the phone. Prater

testified that she answered the phone, “What?” TR 1380-81. He did not indicate that this monosyllabic answer appeared to be an expression of annoyance or was in any way insubordinate. He stated that he was amazed that she was still at the training facility. TR 1381. Prater offered no further discussion of the manner in which Stroupe answered her phone, except to state that he did not have any difficulty hearing Stroupe during the conversation. Stroupe testified that she answered with a raised voice, but did not answer “What!” TR 641. She recalled that she was having trouble with her phone reception and may have said something like, “Can you hear me?” TR 641. Although Prater testified that he expected Stroupe to leave the firing range and return to an office immediately, it is clear that the major focus of his phone calls to Stroupe on the afternoon of June 19 was to set up a meeting for the following day. (TR 1379-81). Stroupe did not indicate that she was told to leave the firing range; instead, she stated that Prater told her during the first call to come to Winston-Salem the next day. He called her again to let her know the meeting had been moved to Charlotte. TR 261-63. So she completed her training and went home at 4:30. TR 264.

On June 20, 2007, Hill and Prater drove to Charlotte to meet with Harper and, afterward, with Stroupe. During the two hour drive from Winston-Salem to Charlotte, Hill and Prater discussed the situation. TR 1721. Hill testified that when they arrived in Charlotte, he and Prater talked about the situation with Harper for approximately 90 minutes to two hours. TR 1721. During the meeting with Harper, the three reviewed the ongoing conflicts, Stroupe’s aggressive investigation strategies and opinionated approach. They also discussed her inability to “conform to a Corporate Investigator.” TR 1721. According to Hill, the three finally came to a consensus that Stroupe be terminated. TR 1721-22. Prior to this time, Hill testified that he had not been party to any discussion that Stroupe should be terminated. TR 1722.

Hill testified that the decision to terminate Stroupe’s employment was based on three factors. First, Stroupe had violated the instructions she received during the May 14 meeting regarding keeping investigation information confidential. TR 1723. Second, Stroupe had spoken poorly of Mattox, also in direct violation of the instructions she received during the May 14 meeting. TR 1723. Finally, Stroupe was fired for her insubordination, both for disregarding the instructions given to her on May 14 and for not returning to work on June 19 when she received the first telephone call from Prater while at the firing range. TR 1724.

Prater testified that coming to the decision to terminate Stroupe’s employment was a “very tough decision.” TR 1383. Prater stated that Hill was the first to recommend termination, reasoning that three or four months later they could experience the same problems with Stroupe’s performance. Prater agreed with Hill’s assessment. TR 1383. Prater agreed that a final written warning would not be appropriate because they had supported Stroupe and given clear instructions for her improvement. Subsequently, Stroupe had failed to give notice that she was leaving to attend training with the Sheriff’s Office, or to call while she was on her way to the training, and had displayed “total insubordination and lack of care toward our company with regard to her not being at work when she’s supposed to.” TR 1384. Prater testified that he supported the decision to terminate Stroupe “100 percent.” TR 1384.

Prater testified that during the termination meeting, he “discussed” the telephone conversation Stroupe had with Harrill, and expressed his “disappoint[ment] that this had all

started again.” TR 1385. Stroupe acknowledged that she had violated his verbal warning during her conversation with Harrill. TR 1385. Prater also discussed with Stroupe that he was unaware that she would be attending the law enforcement training the previous day. TR 1385. Stroupe agreed that she had taken unauthorized time away from work. TR 1385. Prater also recalled that at some point during the conversation, Hill told Stroupe that she was not making an adjustment to working at BB&T or the corporate setting, although Prater could not recall the exact term Hill used in the conversation. TR 1385.

Stroupe testified that on the day she was terminated, Prater asked her to come into a conference room. TR 265. After she went to the conference room, Prater began the discussion by stating, “Amy, it’s become obvious that you cannot conform to a corporate setting, therefore we are terminating your employment.” TR 265. She testified that Prater explained that her conversation with Harrill about Drum’s computer was appropriate, but that her statement to Harrill that she had a disagreement with Mattox was not acceptable. The discussion of her disagreement with Mattox was considered discussion of an investigation, and, therefore, she was being terminated. TR 265.

Stroupe testified that, prior to her termination, she was not given an opportunity to explain her conversation with Harrill. TR 265. She said that she tried to explain that she did not say anything derogatory about Mattox, but was immediately cut off. TR 266. Stroupe testified that Prater asked her, “Did you ask me if you could go?” TR 267. She testified that her response to the question was, “No, because I know you wouldn’t care, I know you don’t care that I go to the firing range.” TR 267. Stroupe testified that during the period she worked for BB&T she went to the shooting range for training on nine separate occasions. Each time she was away from work for three or four hours. TR 670. There is no testimony in the record regarding whether Stroupe sought permission to leave work for these previous trainings at the Sheriff’s office.

Stroupe stated that at this point in the meeting, she was confused about why she was being terminated, and asked Prater to explain. TR 267. Prater responded that it was because her conversation with Harrill was considered discussing an investigation, which was not permitted. She then asked Prater if going to the firing range was the reason, and Prater responded, “No, that was icing on the cake.” TR 267. Therefore, at the time, Stroupe understood that the reason she was terminated was because she discussed Drum with Jason Harrill. TR 267. Stroupe also recalled that during the conversation, Hill said that in May (referring to the May 14 coaching session), Employee Relations had wanted to terminate her, but that he and Prater had saved her job. TR 268-69. Hill also expressed that firing her was a difficult decision and that she was a good investigator and that they would give her a good recommendation for another position. TR 268.

Stroupe also testified that prior to her termination on June 20, 2007, she had not received any disciplinary actions while working for BB&T. TR 270. She had not received any form of written warning, and was unaware of anyone recording that she was at risk of losing her job. TR 271. She also testified that prior to her termination, no one asked her “her side of the story” regarding the telephone conversation with Jason Harrill. TR 271.

Prater testified that after Stroupe was terminated, he escorted her back to her office so that she could gather her personal belongings. TR 1386. While she was packing up her belongings, Prater asked her about her cases and the location of the Village of Penland file. He testified that Stroupe was “gracious,” and said that she “[b]riefed him on whatever was out there” TR 1386. Prater then carried Stroupe’s belongings to her car. TR 1386. Prater testified that as he walked Stroupe from the conference room to her office, and then from her office to her car, they did not encounter another bank employee. TR 1387-88. After Stroupe’s termination, Prater emailed Corporate Investigation employees, Charlie Mattox and two other BB&T employees to inform them that Stroupe was no longer working for BB&T. TR 1388-90; *see* RX 95.

Subsequent to her termination, Stroupe received notice that her stock options in BB&T were not vested and had been forfeited. TR 276; *See* CX 19. She was awarded state unemployment benefits. TR 276; *See* CX 16. Stroupe also sought other employment, and continued her part-time employment with the Cleveland County Sheriff. TR 276-77.

The parties stipulated that at the time Stroupe was terminated from BB&T her yearly salary was \$50,889.72. TR 282. Between the date of her termination and the beginning of the hearing, Stroupe earned \$9,673.82 working with the Cleveland County Sheriff’s Office. TR 283.

Stroupe’s Testimony

Stroupe’s credibility is of utmost importance in this case. I had the opportunity to observe her over the more than two full days that she testified, and I found her to be a very credible witness. In particular, her candor, energy and strong sense of doing what is right were apparent. She displayed a strong work ethic and a desire to perform her job well. She did not resort to self-serving testimony, admitting mistakes and uncertainty. She was also cooperative and non-confrontational on cross-examination. Finally, she displayed remarkably little animosity toward anyone at BB&T. I give the greatest weight to her testimony.

The Parties’ Burdens

Complaints filed under the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005). 18 U.S.C.A. § 1514A(b)(2)(C). To prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. [Citations omitted].

If the complainant establishes by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action, then the respondent can still avoid liability by proving by clear and convincing evidence

that it would have taken the same unfavorable personnel action in the absence of the protected activity.

Bechtel v. Competitive Technologies, Inc., ARB Case No. 06-010, ALJ Case No. 2005-SOX-00033 (March 26, 2008).

a. Protected Activity

The complainant must first establish that she engaged in protected activity. The Fourth Circuit, the jurisdiction where this case arises, has held that in order to constitute protected activity under the Act, an employee must reasonably believe that a violation of one or more of the enumerated statutes has occurred. *Livingston v. Wyeth*, No. 06-1939 (4th Cir. Mar. 24, 2008). The employee's reasonable belief must be both a subjective belief that a violation occurred as well as an objectively reasonable belief. *Id.* In addition, the complainant'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)." *Platone v. FLYi, Inc.*, ARB No. 04-154, *slip op.* at 17 (Sept. 29, 2006); *see also Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008).

Stroupe argues that her actions satisfy the requirements of protected activity because her investigation of BB&T's involvement in the Village of Penland concerned violations of the enumerated statutes. She argues that she reported conduct by Peerless that she reasonably believed constituted mail fraud (§ 1341), wire fraud (§ 1343), bank fraud (§ 1344) and securities fraud (§ 1348). Consistent with her belief, five co-conspirators in the Village of Penland scheme pleaded guilty to charges brought by the United States Attorney in the Western District of North Carolina which included mail fraud (§ 1341), wire fraud (§1343), bank fraud (§ 1344) and securities fraud. CX 22(a) – (e). Stroupe points out that she investigated and provided information regarding the exchange of loan documents by facsimile, electronic mail, and Federal Express for lots in the Village of Penland, and this conduct constituted mail, wire and bank fraud. Further she argues that the record demonstrates that between late February and May 22, 2007, she provided definitive and specific information regarding her investigation of the possible fraud to Prater, her direct supervisor; Hill, the manager of Corporate Investigations; Mattox, Drum's supervisor and Retail Banking Manager; Price-Crowder and Goodrich, senior members of Direct Retail Lending; and Pitt, outside counsel hired by BB&T to assist in the investigation. Specifically, Stroupe argues that her written report details possible instances of bank, wire and mail fraud. For example, her investigation summary describes problems with the loan documents, such as using the same photograph to depict multiple lots and appraising different sized lots for the same value, even lots that were unusually small. Her report described that the closing attorney for the Penland loans was paid multiple closing fees, even for lots purchased by the same investor. Stroupe also provided information about the incentive program. She wrote,

The incentive program details BB&T will finance 80% of the loan and Peerless will finance the 20% down payment, plus the investor will receive an 8% return no the purchase price of the property. This means the investor has no money in the property and the property is financed 100%. It also leads one to believe the lots were appraised for more than they should be.

CX 10(a) at 814. She also mentions that Drum improperly witnessed investors' signatures. Stroupe also testified that some of the documentation for the loans was transmitted by fax and Federal Express. *See* RX 12-15. Finally, Stroupe and others involved in the investigation testified to multiple meetings and conference calls during which Stroupe relayed her findings regarding Peerless and the Village of Penland development.

Based on this evidence, I find that Stroupe definitively and specifically communicated information related to possible bank, mail and wire fraud.

Respondent does not contest that Stroupe had a reasonable belief that fraud was involved in the Penland scheme. RX Brief at 13. But BB&T argues that Stroupe did not engage in protected activity because, although Penland involved fraudulent activities, Stroupe did not have a reasonable belief that *BB&T* committed fraud. Instead, BB&T asserts that Stroupe's investigation focused on fraudulent acts committed by Peerless, not BB&T. Further, BB&T states that Stroupe believed that Drum was the only BB&T employee involved in the fraudulent loans scam. However, because Stroupe testified that Drum did not understand the loan scheme and other employees determined that Drum did not intend to commit fraudulent acts, BB&T argues that Stroupe did not have a reasonable belief that Drum intended to commit fraud.

BB&T's argument that Stroupe did not engage in protected activity because she did not have a reasonable belief that *BB&T* committed fraud is not supported by the statute. First, BB&T seems to assert that the text of the statute requires that the "named party" be the party perpetrating the fraudulent acts. I do not find such a requirement in the text of the statute. Section 1514A states, in pertinent part, that a publicly traded company may not retaliate against an employee on the basis of an employee's lawful act:

(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 . . . ; or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A.

Subpart (1) of the provision protects "conduct the employee reasonably believes constitutes a violation of" the enumerated statute. §1514A(1). Subpart (2) protects the employee who participates in an investigation "related to an alleged violation of" the enumerated statutes. §1514A(2). Neither subpart states that the conduct the employee believes to be fraudulent had to have been committed by the employee's employer. Rather, all the text requires is that the

employee reasonably believes that a violation of one of the enumerated statutes has occurred. And that is consistent with the purposes of SOX. It is not difficult to envision situations where an individual might be discriminated against by a current or potential employer for reporting fraud engaged in by another company. For example, where a potential employer blackballs a job applicant for reporting fraud by a previous employer; an employee reports fraud by the employer's parent, subsidiary, contractor or joint venturer; or an employee reports that the employer was a victim of fraud, which could prove embarrassing to the employer and its officers and high-ranking employees and hurt the employer's bottom line and the value of its stock. The employee protection provisions of SOX should be applicable to such situations. It would be apostate to the purpose of the Act to narrowly construe its provisions so as not to protect whistleblowers who report fraud potentially harmful or embarrassing to their employers or who have reported fraud in past positions and are discriminated against because of it by their current employers. Therefore, I find that BB&T's argument that Stroupe could not have had a reasonable belief that fraud occurred because the fraud was not perpetrated directly by BB&T to be without merit.

Further, it was complainant's reasonable belief that BB&T was aiding in the fraud being perpetrated by Peerless, through the actions of Drum and by funding four loans after BB&T had become aware of the fraud involved in the Penland development. Although complainant later came to believe that Drum did not intend to commit fraud, but merely acted stupidly, the fact remains that BB&T, through the loans it was making to Penland lot purchasers, was aiding in Penland's fraud. Accordingly, BB&T was not just a victim of fraud committed by others; it was aiding Peerless in committing the fraud. Therefore, even if the case law develops that a complainant must have a reasonable belief that her employer engaged in fraud, I find that Stroupe has met this burden as well.

BB&T also argues that Stroupe did not engage in protected activity because she was employed by the bank as an investigator, and reporting fraud which she learned of while performing her job duties as an investigator is not protected under SOX. BB&T cites *Sassè v. Department of Labor*, 409 F.3d 773 (6th Cir. 2005) and *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001), in support of its position. However, these cases are distinguishable.

In *Sassè*, an Assistant United States Attorney ("AUSA") filed a claim for retaliation under the whistleblower provisions of a number of environmental statutes. In the course of his duties as an AUSA, Sassè investigated and prosecuted companies that violated environmental laws. He claimed that the United States Department of Justice retaliated against him for prosecuting such cases. In clarifying the limited nature of its holding, the court explained, "We emphasize that we do not hold that Sassè's activities were unprotected merely because they were related to his official duties. Rather, we hold that Sassè's investigation and prosecution of environmental crimes were not protected activities because he had a duty, as an Assistant United States Attorney, to perform them." *Sassè*, 409 F.3d at 780, fn. 2. In so holding, the court adopted the reasoning of *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), in which a USDA employee claimed whistleblower protection after he reported that seven farms were out of compliance. Willis filed his claim for whistleblower protection under the Whistleblower Protection Act ("WPA"), 5 U.S.C. § 2302(b)(8), which protects federal

employees who claim whistleblower retaliation. The *Willis* court reasoned that the whistleblower protection Willis claimed “is designed to protect government employees who risk their own personal job security for the benefit of the public.” *Id.* at 1143. Applying this reasoning in *Sassè*, the court determined that when a federal government employee, such as an AUSA, conducts an investigation within his or her job requirements and corresponding fiduciary duty as a government employee to protect the public good, that federal employee cannot claim whistleblower protection under the WPA or the environmental whistleblower provisions.

BB&T also cites *Huffman v. Office of Personnel Management*, 263 F. 3d 1341 (Fed. Cir. 2001), in which an Assistant Inspector General, employed by the Office of Inspector General (“OIG”) of the Office of Personnel Management (OPM), filed for protection. Huffman claimed that his supervisor retaliated against him for raising questions regarding breaches of the merit protection system principles, agency contracting, and other instances of violations of law that occurred within OIG. As in *Willis*, the Federal Circuit determined that a federal employee is not protected by the WPA when reports made as part of his or her normal assigned duties are made through normal reporting channels. *Id.* at 1344.

In its very recent decision in *Robinson v. Morgan Stanley et al.*, ARB Case No. 07-070, ALJ Case No. 2005 SOX-00044 (January 10, 2010), the Administrative Review Board found that the holding in *Sassè* was inapplicable to whistleblower cases brought under SOX. The Board distinguished between the language of the employee protection provisions of the Federal Water Pollution Prevention Control Act, Clean Air Act and Solid Waste Disposal Act, under which *Sassè* was brought, and the employee protection provision of SOX:

SOX’s employee protection provision states that an employee cannot be subjected to discrimination because he “provide[d] information . . . to . . . a person with supervisory authority over the employee [Citation omitted] It does not indicate that an employee’s report or complaint about a potential violation must involve actions outside the complainant’s assigned duties.

Id., slip op. at 13-14. Although the Board did not discuss *Huffman*, its discussion would apply equally to that case, due to differences between the employee protection provisions of the WPA and SOX. Further, *Willis*, *Huffman* and *Sassè* relied heavily on the complainants’ status as employees of the Federal Government whose duty it is to protect the public interest. This further distinguishes those cases from Stroupe’s. Therefore, I find that BB&T’s argument that Stroupe did not engage in protected activity because of the nature of her job is without merit.

Accordingly, for all of the reasons discussed above, I conclude that Stroupe engaged in protected activity under SOX.

b. Knowledge of Employer

The complainant must also establish that the employer “knew or suspected, actually or constructively, that [she] engaged in the protected activity.” 29 C.F.R. § 1980.104(b)(1)(ii). Stroupe reported the fraudulent activity to several BB&T employees and outside law

enforcement over the four months she was investigating the Village of Penland loans. BB&T does not dispute that Stroupe reported the suspected fraudulent activity to her supervisors and federal law enforcement officers. Therefore, I find that BB&T had actual knowledge that Stroupe engaged in protected activity. Therefore, the second element of her case has been established.

c. Unfavorable Personnel Action

To establish the third element of her case, the complainant must establish that she “suffered an unfavorable employment action.” 29 C.F.R. § 1980.104(b)(1)(iii). On June 20, 2007, BB&T terminated Stroupe’s employment. RX 78. BB&T does not dispute that Stroupe suffered an unfavorable personnel action when her employment was terminated. Accordingly, I find that Stroupe has satisfied the third element of her case.

d. Contributing Factor

To prove the final element of her case, the complainant must show that her protected activity was a contributing factor in her termination. The Board defines a contributing factor as “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). This standard is “intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action in order to overturn that action.” *Id.*

Stroupe points to the following factors to prove that her protected activity led to her termination by BB&T: temporal proximity; BB&T’s desire to curtail her investigation of Penland; Mattox’s hostility due to the Penland investigation; and the pretextual nature of the reasons given for terminating her employment. These factors will be discussed below.

(i) Temporal Proximity

An unfavorable personnel action taken shortly after a protected disclosure may lead the fact-finder to infer that the disclosure contributed to the employer’s action. 29 C.F.R. § 1980.104(b)(2). The Board has noted that “[t]emporal proximity does not establish retaliatory intent, but may establish the causal connection component of the prima facie case. The ultimate burden of persuasion that the respondent intentionally discriminated because of complainant’s protected activity remains at all times with the complainant.” *Taylor v. Wells Fargo Bank, NA*, ARB No. 05-062 at n. 12 (June 28, 2007). Courts and the Administrative Review Board have issued decisions under the various whistleblower protection statutes over which this Department has jurisdiction holding that various time periods either do or do not permit an inference of causation, and no purpose would be served by citing these conflicting decisions here. But I know of no cases holding that a period of one month is too removed in time to create an inference of causation.

Some courts have recognized that the inference of temporal proximity may be disrupted by significant intervening events. In the only SOX case decided by an appellate body regarding

this issue which is cited by BB&T, *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 07-021, 07-022, at 7-8 (Aug. 31, 2009), the Administrative Review Board's discussion of the effect of intervening acts on the inference of temporal proximity is limited to the following paragraph.

First, Klopfenstein claims temporal proximity between his reporting the in-transit inventory discrepancy and his firing "within weeks." However, as the ALJ points out, between the expression of the in-transit inventory concern and the firing was an independent event, disclosure of the revenue recognition problem. The intervening event was the employer's reason for Klopfenstein's discharge and helps defeat the inference of causation.

Id. (internal citation omitted). While BB&T suggests that *Klopfenstein* holds that intervening events supersede the inference created by temporal proximity in all cases, I disagree. The inference is still there, but in that case the inference did not control because other evidence overcame it. The primary issue in this case is whether Stroupe's actions on June 14 and June 19 overcome the inference of causation.

Stroupe argues that the temporal proximity between the meeting with herself, Pitt and Hill on May 22, 2007, and her termination on June 20, 2007, raises an inference of causation. In the May 22, 2007 meeting Pitt, Stroupe and Hill discussed the contents of Stroupe's investigative report and whether the report should be provided to the FBI during the meeting scheduled for the following day. At this meeting, the parties also discussed concerns Pitt had regarding statements in the report concerning internal policy violations Drum may have committed when authorizing the loans to Village of Penland buyers. Stroupe testified that Pitt's statements about her report caused her to think that her report could create greater potential liability for BB&T. Pitt first saw this report the day before the meeting with Stroupe and Hill. At this meeting the parties also determined that Hill would represent Corporate Investigations during the meeting with the FBI the following day rather than Stroupe.

BB&T argues that the events between May 22, 2007 and June 20, 2007 destroy any inference raised by temporal proximity. First, BB&T contends that the passage of these 29 days militates against finding an inference of causation, because after May 22, 2007, Stroupe was no longer investigating the Village of Penland loans and the investigation was turned over to law enforcement. However, for one thing, Stroupe did not cease her investigation of Drum and Penland following the meeting with the FBI on May 23. In fact, her conversation with Harrill on June 14 was occasioned by her seeking to obtain the hard drive from Drum's computer at the Forest City branch, which Prater had asked her to do (TR 252; *cf.* RX 77). Accordingly, Stroupe was still investigating the Penland matter as late as June 14, and Prater was aware that her investigation was ongoing.

Second, BB&T argues that any inference drawn from the temporal proximity of the Village of Penland investigation and Stroupe's termination is disrupted by Stroupe's intervening misconduct. Stroupe's misconduct, BB&T asserts, included disclosing confidential information to co-workers who did not have a need to know, making derogatory remarks about Regional

Management, being absent from work on June 19, 2007 without authorization, and displaying insubordination toward her supervisor. *Id.* at 17.

In this case, less than a month passed between the May 22 meeting and Stroupe's termination. Her absence from a half day of work on June 19, 2009 was the first time during her employment with BB&T that she was absent from work without seeking prior approval. I also credit her testimony, backed up by that of George Wilson, that she previously attended police training several times during the course of her employment with BB&T. Further, there is no indication that the manner in which Stroupe answered her telephone the second time she spoke with Prater on June 19, 2007 was in any way "insubordinate."

Accordingly, based on the passage of only 29 days between Stroupe's reporting to Pitt on May 22, 2007 and her continued investigation of the Penland matter even after that date, her termination on June 20, 2007 is close enough in time for an inference of causation based on temporal proximity. However, I find that this inference is not strong enough in this case, by itself, to meet Stroupe's burden of proving by a preponderance of the evidence that "the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." 29 C.F.R. § 1980.104(b)(1)(iv). Therefore, I consider Stroupe's other arguments to support causation.

Curtailing the Penland Investigation

Stroupe asserts that Mattox and Hill were motivated by their desire to silence her investigation when they terminated her employment, and points to Pitt's actions as proof of this intent. Stroupe argues that prior to her investigation coming to the attention of Direct Retail Lending, Mattox tried to protect Drum because Drum generated much revenue for BB&T, and Mattox's region in particular. However, once Direct Retail Lending became aware of the problems with Penland loans, Mattox had little choice but to terminate Drum. Finally, Stroupe argues that Mattox pressured Dan Hill to terminate her and eventually requested that Stroupe no longer work from the Shelby Branch location. Stroupe characterizes Mattox's actions as trying to stop her investigation of BB&T's management regarding the Village of Penland loans.

Stroupe characterizes Hill's actions as motivated to protect the financial interests of the bank from further investigation of Penland. She reasons that Hill asked her to edit her concerns about Mattox to remove the most damaging statements about him, and to qualify her statements that the Village of Penland loans were "possibly" fraudulent. Further, Stroupe argues that Hill's decision to no longer permit her to work from the Shelby Branch was to prevent her from continuing the Village of Penland investigation.

Stroupe further argues that once Pitt was retained, he tried to suppress BB&T's involvement with the loan scheme. She notes that when Pitt requested documents regarding the Penland loans, he wanted them stamped "attorney-client privilege." Further, Stroupe asserts that Pitt's presentation to the FBI minimized Drum's involvement in the incentive program. In sum, Stroupe argues that in order to limit BB&T's liability, Pitt purposefully withheld her investigation report from the FBI, and selected Hill to attend the May 23, 2007 meeting with the FBI, even though Hill was not as involved as Stroupe in the Penland investigation.

But Stroupe did not provide direct evidence that any of these factors led to her termination by BB&T. Moreover, at least some of these actions by BB&T, such as moving her out of the Shelby Branch, where she had been working in the lobby, appear unrelated to Stroupe's Penland investigation. Further, Drum had been fired two months before Stroupe was, so protecting Drum could not have played a role in her termination.

I also find that Pitt's actions in regard to the FBI meeting were appropriate. As a general matter, BB&T hired Pitt to represent the bank when it presented information to the FBI, and subsequently in investigations by the United States Attorney. As BB&T's counsel, it was appropriate for Pitt to present BB&T's actions in the best possible light, and Stroupe's report clearly did not do that. It even overstated Drum's involvement in Penland, and Pitt testified that he did not have sufficient time to analyze the report and determine if it contained other errors. Therefore, withholding Stroupe's report from the FBI was reasonable under the circumstances. The decision to exclude Stroupe from the meeting with the FBI was a prudent move since Pitt was afraid she would tell the FBI more than he thought was necessary and which could make the bank appear more culpable than it was. Based on the testimony, Pitt was acting appropriately in his representation of the bank, even if he did not act as Stroupe wanted or expected.

To further support her causation argument, Stroupe notes that after BB&T representatives met with FBI agents on May 23, 2007, she continued to gather information related to the Village of Penland case. She asserts that her persistence in the investigation, after BB&T wanted it to end, gave BB&T motivation to terminate her employment. This argument has some merit. Again, however, there is no direct evidence of this to support Stroupe's position.

Mattox's Animosity Toward Stroupe

Next, Stroupe argues that Mattox influenced Hill and Prater in their decision to terminate her employment. Stroupe's testimony about her continuing conflicts with Mattox demonstrates that she repeatedly met resistance or was misled when trying to conduct investigations in the Western Region over a period of almost 18 months, from October, 2005 to March or April, 2007. She noted, and this testimony was not refuted, that Mattox wanted to make decisions about handling investigations without involving Human Systems, and did not want to report internal problems to law enforcement. During these 18 months, Mattox limited his complaints about her performance to personal discussions with Stroupe. Stroupe informed Prater of these conflicts when she sought advice about how to proceed when she received conflicting or questionable instructions from Mattox.

However, when Stroupe began investigating Drum and Briggs, Mattox became more vocal in his discontent with Stroupe. Stroupe first informed Mattox that she was investigating these cases on March 20, 2007. Almost three weeks later, on April 11, 2007, Mattox emailed Harper asking her to address complaints he had about Stroupe's job performance, particularly conducting so many interviews in the Briggs investigation. Harper informed Mattox that in order to perform her duties, Stroupe must conduct employee interviews. On April 16, 2007, Mattox again questioned Stroupe about her job performance in a telephone conversation. When Stroupe told him to address his concerns to her manager, Mattox, for the first time, addressed his

concerns to Prater and Hill, and documented his disapproval in writing. It is clear that the contentious relationship between Mattox and Stroupe was creating tension between the Western Region and Corporate Investigations. In subsequent emails to Hill, Mattox encouraged Hill to ask a number of employees about Stroupe's job performance, but Hill refused. Nevertheless, in response to Mattox's criticism of Stroupe, Prater and Hill held the May 14 meeting which, in retrospect, they considered a "coaching session"; and it was Stroupe's alleged failure to accede to the instructions given to her at that meeting which BB&T contends was the primary reason for her termination.

Although there is no direct evidence that Mattox played a role in Stroupe's termination, Stroupe's investigation of the Penland matter clearly raised his ire and caused him to voice his complaints regarding her job performance to the BB&T officials who ultimately fired her. It is of note that Stroupe testified that, at the May 14 meeting, Hill told her that Mattox was retaliating against her because two of his top producers were terminated.⁸ TR 270. Of all the possible scenarios regarding Stroupe's termination suggested by the parties, that she was terminated due to the animosity Mattox had for her is the most plausible. And that animosity was based, in significant part, on her investigation of the Penland matter.

Pretext

Finally, Stroupe argues that the reasons given by BB&T for her termination were pretextual. Stroupe notes that during the two years she worked for BB&T, she received five positive performance evaluations, several with high performance marks. However, four months after receiving a very positive performance evaluation, and a month after being assured by Prater that he and Hill supported her 100% (TR 1363), her employment was terminated. Stroupe argues that after she submitted her internal investigative report and Mattox complained about her performance, Prater and Hill held what they now refer to as a coaching session on May 14, 2007. At the time, Stroupe did not understand the May 14 meeting as a coaching session. She also notes that the only complaints about her performance at that time came from Mattox.

Stroupe argues that the reasons offered at the time for her termination were minor policy violations. She also observes that the decision to terminate her employment was made at the last minute during Prater and Hill's meeting with Harper the morning Stroupe was fired. Finally, Stroupe argues that she was not permitted an opportunity to tell her side of the story regarding the telephone conversation with Jason Harrill.

In order to establish that an employer's motivation for an adverse employment action is pretextual, a complainant must show that the employer's proffered rationale underlying the adverse action was not the actual motivation. *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA-53, ARB Nos. 98-111, and 128 (ARB April 30, 2001). I find that BB&T's reasons for firing Stroupe on June 20, 2007 were pretextual.

At the end of February, 2007, Stroupe received an exceptional performance evaluation. She excelled in the number of resolved cases and continued to follow her professional development plan by taking continued training within BB&T. Prater also noted that Stroupe was

⁸ Hill did not refute this during his testimony.

a valued member of the Corporate Investigation group and had a “bright future” with the bank. Prior to this performance review, Prater evaluated Stroupe with four similarly positive reviews.

The only complaint about Stroupe’s performance subsequent to this performance evaluation was the complaint from Mattox. On May 11, 2007, Hill and Prater met with Mattox and Willett to discuss Mattox’s complaints about Stroupe’s job performance. While Hill and Prater acknowledged that there were skills and tactics that Stroupe should improve and refine, they emphasized to Mattox that Stroupe would remain the Corporate Investigator assigned to the Western Region. Hill and Prater then scheduled a meeting with Stroupe to discuss Mattox’s concerns.

At the May 14 meeting, Prater and Hill informed Stroupe that she was not to speak poorly of Mattox, and should reveal information about investigations only on a need-to-know basis. Stroupe testified that she did not understand the May 14th meeting as a coaching session, or that Prater and Hill delivered a verbal warning. Nevertheless, she did receive these instructions. Stroupe also testified that during her telephone conversation with Harrill, she may have revealed information that Harrill did not need to know.

However, I find BB&T’s characterization of the significance of Stroupe’s telephone conversation with Harrill to be inflated. At the time of her termination, Prater stated that this telephone call was the reason for her immediate termination. Based on the telephone call, Prater and Hill concluded that Stroupe ignored their instructions from the May 14 coaching session by speaking poorly of Mattox and discussing confidential information. In doing so, Prater and Hill represented that Stroupe displayed insubordination to her supervisor. In its argument, BB&T repeatedly describes Stroupe as making “derogatory statements” about Mattox in the course of this conversation.

Admittedly, Stroupe may have said more than she should have during the conversation with Harrill regarding personnel matters surrounding the Village of Penland investigation. During the conversation with Harrill, she offered an opinion concerning the rationale behind Loftis’s termination, but she had no inside knowledge of the decision; the decision was made outside of her working group and without her input. When Stroupe discussed Loftis with Harrill, the two were engaging in everyday office gossip about a fellow employee’s termination. She did not discuss confidential information. When Stroupe and Harrill briefly mentioned Drum and Briggs’ terminations, Stroupe said that Briggs was not involved with the Village of Penland loans. When she discussed Drum, she simply said that Mattox initially did not want Drum fired. Little if any of what she told Harrill could be considered confidential information about an investigation. Hill admitted during his testimony that what had happened to Drum was not a secret when Stroupe and Harrill spoke. TR 1747.

Moreover, Harrill’s role in this matter seems contrived. What is striking about this incident is that Harrill allegedly thought his conversation with Stroupe, a private conversation between two people who knew each other,⁹ was so significant that he called Mattox while

⁹ On June 7, 2007, Harrill called Stroupe for advice when asked to provide a job reference for Drum. TR 251. There was no reason for Harrill to ask Complainant for advice regarding this matter rather than Human Systems,

Mattox was on vacation to inform him of it. But even assuming this conversation merited being brought to Mattox's attention, by no stretch of the imagination did it require Mattox's *immediate* attention. Further, it seems disingenuous that Harrill was pumping Stroupe for information and then reported her to Mattox when she provided it. Unfortunately, despite the importance of Stroupe's phone call to Harrill on June 14, Respondent did not call Harrill to testify about it.¹⁰

In addition, the record indicates that it takes much more than simply missing a half day of work without permission to be immediately terminated under BB&T's policies and procedures. Other employees who were absent without notice, and subsequently fired, had a history of such absences, misrepresented their absences, or falsified documents regarding an absence. Those situations are distinctly different from the testimony regarding June 19, 2007. On that day, Stroupe arrived at work before 8:00 a.m. and left around noon to meet co-workers from the Sheriff's Office for lunch. After lunch, she went to the firing range to complete her weapons certification training. Stroupe's testimony that initially she forgot she was supposed to be going to training that day was supported by George Wilson, the Corporate Investigator with whom she shared office space. Wilson testified that Stroupe told him she was leaving for training that she had forgotten about earlier in the day. Stroupe also testified that she attended weapons training on previous occasions during her working hours at BB&T, and there is no reason to believe, had she asked Prater for leave to go to the firing range, that permission would have been denied. Further, Stroupe had not previously been absent from her job without notifying Prater beforehand, so this was, at most, a blip on an otherwise unblemished attendance record. It is apparent that Stroupe's failure to get permission from Prater was due to either inadvertence or a misunderstanding, and was not an attempt to sneak off on a lark. Also, she was never out of contact with the office since she had her cell phone with her.

Further, the internal procedures for progressive discipline were not applied in Stroupe's termination as they were for other employees at BB&T. Blanton and Harper testified that BB&T employs a four part progressive disciplinary process. Each noted that if an employee displays egregious conduct, the discipline policy permits deviating from the progressive disciplinary procedures, including immediate termination. In this case, Prater and Hill talked to Stroupe on May 14, 2007, regarding her relationship with Mattox, but did not inform her that the conversation constituted a verbal warning under BB&T's disciplinary system. In fact, Prater testified that this was not a disciplinary session. In the following weeks, neither Hill nor Prater disciplined Stroupe. At the time her employment was terminated, Prater stated that she was terminated as a result of her telephone conversation with Jason Harrill; her unexcused absence from work was a small contributing factor, if a contributing factor at all.

I find it virtually unfathomable that BB&T would fire an employee as highly regarded as Stroupe, and who had recently provided invaluable service to BB&T, over one or two essentially minor issues and without following its progressive disciplinary system. First, it is doubtful that Stroupe even received a verbal warning, the first step in BB&T's four-step disciplinary system, since Prater denied that the May 14 meeting at which the alleged verbal warning was given was a

Mattox or even BB&T's attorneys. That he solicited her advice shows that Stroupe and Harrill had more than just a passing acquaintance.

¹⁰ Harrill was only available to testify on some of the days the hearing was held. Respondent was given permission to call him out of turn if necessary (TR 13-14), but did not call him.

disciplinary session. So she was fired either without any previous disciplinary action having been taken or after having gone through only the first, highly informal disciplinary step. My experience in hearing whistleblower and related employment cases for over 30 years leads me to believe that employees of entities employing progressive disciplinary systems would not be fired over what are, in the overall scheme of things, essentially minor matters, as a first or second disciplinary action. In fact, I have been amazed at the misdeeds of employees that employers routinely put up with. Taking a half day off work without prior approval once in almost two years (and for training which benefitted BB&T by maintaining her contacts with the Cleveland County police and FBI), and criticizing a higher-ranking employee in a telephone conversation with another employee, are so low on the hierarchy of employee abuses that Stroupe's precipitous termination for these incidents would be aberrant if she was a marginal employee, let alone a highly regarded one. Second, the situations described by Harper and Blanton in which a manager may deviate from the progressive disciplinary procedures are not analogous to the facts of this case. Harper noted generally the examples of employees who process their own transactions or embezzle funds from the bank. Blanton noted specific instances where employees were immediately terminated; however, each example involved employees who compromised the financial security or customer service at the bank; had a history of unexcused absences; or falsified information. In this case, Stroupe had a telephone conversation with a co-worker, and spent an afternoon at the shooting range to maintain her police certification; she did not compromise the financial security or customer service at the bank.

Harper and Blanton mentioned that BB&T policy permitted a manager to terminate an employee outside the disciplinary procedures, if the manager lost confidence in the ability of the employee to perform his or her job functions. Although Harper and Blanton do not mention Loftis's situation, his termination without prior warning seems a good example of this scenario. Price-Crowder and Goodrich had a list of concerns about Loftis's job performance, which they discussed in depth with Loftis. In sum, Price-Crowder and Goodrich were concerned that Loftis did not have the skills and professional judgment to do his job. Goodrich drafted a "Final Written Warning & 6-Month Corrective Period" which he was preparing to provide Loftis. Before the written warning was delivered, his managers discovered that Loftis was alerted to possible problems with the Village of Penland loans at least one year before Stroupe's investigation and he had failed to respond to the reports. In light of this added information regarding his poor performance and professional judgment, Goodrich and Price-Crowder determined that Loftis should be immediately terminated.

Comparing the terminations of Drum and Loftis to Stroupe's discloses just how far an employee must go at BB&T to be fired without progressive discipline. It took BB&T a month to finally decide to fire Drum, who made \$20,000,000 in bad loans and repeatedly violated BB&T policies in making those loans; and at least as long to fire Loftis, who displayed a continued pattern of poor professional judgment, including his failure to alert his supervisors to Drum's problematic loans for over a year. In contrast, Stroupe has been an exemplary employee who performed a great service to BB&T by bringing the Penland loans to the attention of BB&T's management. Nevertheless, she was fired only days after Prater and Hill learned of the Harrill phone call and less than a day after the firing range incident, neither of which had any effect on BB&T's business or directly affected Stroupe's ability to successfully continue performing her job as an investigator.

Due to all of these factors, I find BB&T's stated reasons for terminating Stroupe to be pretextual. It is inconceivable that she would have been fired merely for these reasons. Rather, it appears that BB&T was looking for an excuse to fire her, and latched onto the conversation with Harrill and the firing range incident as convenient reasons.

Considering all of this evidence – the temporal proximity of her protected activity to her termination; Mattox's complaints about her job performance, which were exacerbated by her investigation of the Penland development and which eventually led to her termination; and the pretextual reasons given for her termination - I find that Stroupe's protected activity was a factor in her termination. Although all of this evidence is circumstantial, taken together I find it convincing. Accordingly, I find that Stroupe has met her burden of proof under the Sarbanes-Oxley Act. She has established by a preponderance of the evidence that she engaged in protected activity, and suffered an unfavorable personnel action as a result of the bringing it to the attention of BB&T.

BB&T's Rebuttal Evidence

Once a complainant has met her initial burden of proof, an employer may demonstrate by clear and convincing evidence that it would have taken the same adverse employment action absent the protected activity. If the employer makes such a showing, the complainant cannot recover. 49 U.S.C. 42121(b)(2)(B); 29 C.F.R. § 1980.104(c). BB&T argues that it terminated Stroupe because she failed to follow the instructions given during the May 14, 2007 coaching session, her unauthorized absence from work on June 19, 2007, and her insubordination to her manager. Each reason is discussed in turn.

First, BB&T argues that Prater and Hill determined Stroupe should be terminated because she failed to follow their instructions offered during the May 14, 2007 coaching session. Specifically, Prater and Hill testified that during the coaching session, they clearly informed Stroupe that she should not voice her negative opinion of Mattox, and that investigation information must remain confidential and only discussed on a need-to-know basis. Prater testified that although he did not consider this coaching to be disciplinary in nature, he considered the instructions to be a verbal warning. Since a verbal warning is the first step in BB&T's progressive disciplinary system, this testimony makes no sense. I credit Complainant's testimony that she was not told the May 14 meeting was a coaching session and was not given a verbal warning.

On June 19, 2007, Jason Harrill emailed Prater, briefly describing the June 14 telephone conversation he had with Stroupe. Harrill sent his email at 8:57 a.m. *See* RX 92. Subsequent to receiving the email, Prater prepared a "Final Written Warning," and called Stroupe around noon to arrange a meeting to deliver the warning. The warning was to inform Stroupe that she had violated the May 14, 2007 verbal warning by making disparaging remarks about Mattox and discussing confidential information regarding an internal investigation.

Around noon, Prater emailed and telephoned Stroupe in her office to arrange a meeting the following day to deliver the warning. After several telephone calls and emails, Prater learned

from Wilson that Stroupe was at the firing range with the Cleveland County Sheriff's Office. Stroupe had not made a prior request to be absent from work for the afternoon, and had not called Prater to inform him she was leaving work for the afternoon. When Prater finally spoke with Stroupe, he arranged to meet with her the following day to discuss the telephone conversation with Harrill. As of the end of day on June 19, 2007, Prater believed he would be delivering the "Final Written Warning" to Stroupe the following day.

On the morning of June 20, 2007, Prater and Hill drove approximately two hours from Winston-Salem to Charlotte to discuss the situation with Stroupe. When Prater and Hill arrived in Charlotte, they met with Sherri Harper for approximately ninety minutes, before meeting with Stroupe. During the meeting with Harper, Hill suggested, and Harper and Prater agreed, that Stroupe should be terminated. Based on the record, the decision to terminate Stroupe's employment was made in less than 90 minutes. Once the decision was made, Hill and Prater informed Stroupe that she was terminated, offering as their rationale her conversation with Harrill on June 14, 2007. At the time of her termination, Stroupe asked Prater to clarify his reasons for firing her. He stated she violated the instructions given to her on May 14th. He stated that her absence from work the previous day was just "icing on the cake."

As discussed above, I do not find BB&T's characterization of the June 14 telephone call reasonable or persuasive. Admittedly, Stroupe may have discussed more information than was appropriate, but none of her statements revealed truly confidential information, and her statements about Mattox in a single phone call with a co-worker are hardly a cause for alarm. Therefore, I find that this rationale for terminating Stroupe's employment is not supported by clear and convincing evidence. In addition, Stroupe's half-day absence from work was a secondary reason for her termination, and accordingly it cannot support a finding that BB&T would have fired Stroupe for this absence, standing alone.¹¹

Second, any argument that BB&T fired Stroupe because of her half-day absence also falls flat. If BB&T fired Stroupe solely for her half-day absence, the decision would be uncharacteristic of BB&T's practices and procedures in other situations where employees missed work without prior notification or who had a history of unauthorized absences. As Blanton testified, those employees who were immediately fired for violating BB&T employment policies compromised the bank's financial interests, falsified bank documents, and misused the bank's computer system to access information about other employees as well as pornographic material. Compromising an employer's financial interests and security seems an appropriate situation for immediate termination. However, a half-day absence from work does not pose such a threat, at least in this situation. Further, the employees listed by Blanton who were immediately terminated because of an unapproved absences from work had a history of excessive or unapproved absences or falsified an attendance record. In this case, Stroupe had no prior history of unapproved absences and she testified that she participated in previous firearms training without prior permission from Prater in the past. Therefore, standing alone, BB&T has not

¹¹ BB&T also repeatedly emphasized that among Stroupe's failings on June 19, 2007, was her failure to update her voicemail when she left the office to attend firearms training. This cannot be taken seriously. It is unbelievable that disciplinary action of any kind would even be contemplated against an employee for a single inadvertent instance of failing to update her voicemail for an afternoon, especially since Stroupe continued to be reachable on her cell phone.

supported by clear and convincing evidence that it would have immediately terminated Stroupe for missing an afternoon of work without prior consent.

BB&T also argues that Stroupe's insubordination contributed to its decision to terminate her employment. BB&T asserts that when Stroupe discussed Mattox and case information with Harrill, she displayed insubordinate behavior. However, this argument is dependent upon BB&T's characterization of the conversation, which I have already rejected.¹² Moreover, one thing that is clear from the evidence in this case is that Complainant was never insubordinate. The record shows that she did what she was told to do, even when she disagreed. For example, in CX 13-B, Stroupe's letter listing her problems with Mattox, Hill suggested numerous changes. She made all but one. TR 1750-51. Also, despite the fact that Stroupe believed she should have been at the meeting with the FBI on May 23, 2007, Hill testified that Stroupe did not complain to him or express resentment regarding her exclusion from the meeting. TR 1500. As Prater stated, "Amy was always one, you know, if I informed her to do it, she was going to do it." TR 1366. BB&T also argues that Stroupe's monosyllabic response to Prater's second phone call on the afternoon of June 19 was insubordinate, but there is no evidence to support this contention. Prater did not indicate that he thought Stroupe acted rudely or insubordinately, and it would have been completely out of character for her to have been either rude or insubordinate. Therefore, I find that BB&T has not supported by clear and convincing evidence that it would have fired Stroupe for her behavior absent her protected activity.

Accordingly, I find that BB&T has failed to support by clear and convincing evidence that it would have taken the same adverse employment action absent Stroupe's protected activity. Therefore, Stroupe is thus entitled to relief under the whistleblower provisions of the Sarbanes-Oxley Act.

1. Remedies

Any employee who prevails under the whistleblower provisions of SOX "shall be entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). Relief can include reinstatement, back pay with interest, and compensation for any special damages sustained, including litigation costs and reasonable attorneys fees. 18 U.S.C. § 1415A(c)(2)(A)-(C).¹³

In her complaint, Stroupe seeks reinstatement with BB&T as a Corporate Investigator. There is no question that Stroupe is an excellent investigator, and her termination, even if BB&T's version of why she was terminated is to be believed, had nothing to do with her ability to perform her investigative duties. However, BB&T opposes reinstatement, contending that it is

¹² Further, BB&T cites *Livingston v. Wyeth, Inc.*, 2006 WL 2129794 (M.D.N.C. July 28, 2006), *aff'd.*, 520 F.3d 344 (4th Cir. 2008), to support its argument that insubordinate behavior can be good evidence to support the employer's decision to terminate an employee despite his or her protected activity. However, the facts of *Livingston* are so dissimilar from those in this case, the argument is nonsensical. In *Livingston*, the plaintiff had a continued dispute with a supervisor regarding the company's reporting requirements to a federal agency. The conflict escalated to the point that the plaintiff physically and verbally threatened the supervisor at an office holiday party in the presence of other employees. This display of insubordination is hardly similar to the disobedient behavior BB&T argues Stroupe displayed toward Prater and Hill.

¹³ At the hearing, Stroupe withdrew any claim for damages for emotional distress.

not an appropriate remedy in this case. BB&T cites several cases holding that reinstatement should not be ordered where the parties have a hostile relationship or a relationship which has been irreparably damaged by animosity between the parties, and I agree that in many such instances reinstatement may not be practical. But since virtually every whistleblower case involves some acrimony between employer and employee, if the mere existence of animosity between the parties was a reason to deny reinstatement, reinstatement could rarely be ordered.

In this case, having had a chance to observe Stroupe, Prater and Hill and listen to their testimony, I believe Hill and Prater's relationship with Stroupe has not been irreparably damaged. In fact, despite the events of May and June, 2007, I believe they still like and respect each other, and could work together once again. The only hostile relationship I see is between Stroupe and Mattox, who neither like nor respect each other. However, Stroupe does not work for Mattox, nor are they in the same chain of command. She works for Corporate Investigations, whereas Mattox works for Regional Management. So on a day-to-day basis, there is no reason for Stroupe and Mattox to interact. Their interaction can be further limited, if necessary, by assigning Stroupe more investigations in Charlotte and fewer in the Western Region, a step which Prater had planned on taking when he became aware of the acrimonious relationship between Stroupe and Mattox. Further, I would like to think that both Stroupe and Mattox have learned something about interpersonal relationships as a result of this litigation, and could be civil on those occasions where they must work together.

Accordingly, I believe reinstatement is an appropriate remedy in this case, and Stroupe is entitled to be reinstated to her former position. As provided by 29 C.F.R. § 1980.109(c), the order of reinstatement will be effective immediately upon its receipt by BB&T, and will not be stayed regardless of whether a petition for review is filed with the Administrative Review Board. As provided by § 1514A(c)(2)(A) of SOX, she shall be reinstated with the same seniority status she would have had had she not been terminated, including all raises in pay she would have received. Further, she is also entitled to back pay with interest established by Section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621, from June 21, 2007 until she is reinstated. In addition, the stock options which were forfeited on her termination (*see* CX 19) shall be reinstated.

The only evidence regarding Stroupe's income from June 21, 2007 to the date of the hearing is her testimony that during this period she earned \$9,672.82 working for the Cleveland County Sheriff's Office. TR 283. BB&T has adopted this amount in its calculations of the back wages due to Stroupe. Accordingly, Stroupe is entitled to back wages from June 21, 2007 until the date she is reinstated, including any appropriate wage increases, less \$9,672.82. In regard to wage increases during the period following her termination until she is reinstated, Stroupe based her calculations on projected wage increases of 4.6% per year beginning in April of each year. CX Brief at 46. This is the average of her raises in 2006 (5%) and 2007 (4.2%). BB&T argues that this is excessive, contending that raises for corporate investigators subsequent to 2007 have decreased due to the economy, averaging between one and two percent in 2008 and 2009. TR 1295-96. Prater testified that Stroupe would not have received four to five percent raises had she remained with BB&T. TR 1296. This testimony is uncontradicted, and I accept it. Therefore, in calculating Stroupe's back wages, and in setting her pay on reinstatement, it should be assumed that her salary would have increased by at least 2% on April 1, 2008 and April 1, 2009.

Beginning on April 1, 2010, for purposes of determining Stroupe's salary on reinstatement, she shall be given a raise comparable to those given to other investigators who were rated as "very good performers" for their work in 2009.

Next, Stroupe claims reimbursement of health insurance payments of \$372 per month during the period she was out of work. CX Brief at 46. Although unexplained in her brief, Stroupe testified that she has to pay \$93 a week for herself and her son Shawn, who was born on February 4, 2008, to be included on her husband's health insurance. TR 285. Stroupe did not state whether her husband's health insurance plan had different rates for adding only a spouse as opposed to adding both a spouse and a child, as BB&T's plan does. Until Shawn was born, all the additional coverage needed on her husband's health insurance was for herself alone. BB&T objects to paying for health insurance coverage for Shawn, since Stroupe had self-only coverage while working for BB&T. TR 1781. However, it stands to reason that Stroupe would have obtained coverage for Shawn had she still been employed by BB&T when he was born, since it appears that BB&T's health insurance was less expensive than Stroupe's husband's plan. If Stroupe added coverage on her BB&T health insurance for Shawn when he was born, her monthly insurance payment would have increased from \$31.07 to \$209.00, an increase of \$177.93, based on the rates in effect in 2007. CX 3, at 0005437.¹⁴

I find that Stroupe is entitled to reimbursement of the amount her husband paid to add herself and Shawn to his health insurance from February 4, 2008 until she is reinstated, less what she would have paid had she and Shawn been insured through BB&T's employee health insurance. This comes out to \$163.00 a month. I cannot order reimbursement for the additional cost to add her to her husband's health insurance from the date she was fired until Shawn's birth because there is no evidence in the record of the additional costs she and her husband incurred to add only her to his health insurance policy.

Stroupe also requests reimbursement of \$5,455.07 for unspecified medical expenses for pre-natal care and medical and surgical treatment for Shawn that were not covered by her husband's health insurance. TR 284-86. However, she does not articulate the basis for this claim. If she is contending that these costs would have been covered by BB&T's health insurance plan, she has not offered any proof. I see no other possible basis for ordering reimbursement of these medical expenses.

Next, Stroupe seeks reimbursement of cell phone charges of \$30.00 a month which she received from BB&T. Actually, she was paid up to \$35 a month for charges incurred on her own cell phone. TR 1276-77. The obvious purpose for BB&T to assume these charges was to cover investigators' costs in making business-related calls and to assure that they could be reached when out of the office. Since Stroupe was not using her cell phone for any BB&T-related business after she was terminated, I see no basis to order BB&T to pay her a cell phone allowance.

Next, Stroupe seeks an order for BB&T to remove any records regarding her June 20, 2007 termination from her personnel file. This request is reasonable, and it is approved.

¹⁴ Rates for subsequent years are not in the record.

Finally, as a prevailing party, Stroupe is entitled to receive litigation costs and expenses, and reasonable attorney's fees. A fee petition including a detailed explanation of the billing rates charged by each of the attorneys representing the Complainant in this case, as well as an itemization of any costs and expenses for which reimbursement from the Respondent is sought, including supporting documentation, must be submitted by Complainant's counsel within 30 days of receipt of this decision. BB&T may respond to the fee petition within 30 days of receiving it. Complainant's counsel may reply to Respondent's response within 15 days of receiving it.

ORDER

IT IS ORDERED that:

1. Respondent shall reinstate Complainant to her previous position as a Corporate Investigator immediately upon receipt of this *Decision and Order*, with the same salary, seniority status and benefits she would be receiving had she not been terminated. Respondent shall also expunge any records of Complainant's termination from her personnel file within 30 days of its receipt of this *Decision and Order*.
2. Respondent shall pay Complainant:
 - a. Back pay from June 21, 2007 until she is reinstated, reduced by her earnings of \$9,672.82 from the Cleveland County Sheriff's Department through the conclusion of the hearing and any other money she may have earned subsequent to the hearing until she is reinstated.
 - b. One hundred sixty-three dollars (\$163.00) per month from February 4, 2008 until she is reinstated.

Pre-judgment interest as provided by 26 U.S.C. § 6621 shall be paid on both of these sums.

 - c. Reasonable attorneys' fees, costs and expenses.
3. Complainant is not entitled to reimbursement for other medical expenses and cell phone charges.

A

JEFFREY TURECK
Administrative Law Judge

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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1980.109(c). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board, unless the Board grants a motion to stay the order. 29 C.F.R. § 1980.110(b).