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Issue Date: 22 March 2012

OALJ CASE №: 2009-SOX-00029
OSHA CASE №: 8-0740-08-006

In the Matter of:

JOHN H. MALLORY,

Complainant,

v.

JP MORGAN CHASE & CO.,

Respondent,

and

JP MORGAN CHASE BANK, N.A.,

Respondent.

Appearances: Nathan Davidovich, Esq.
For the Complainant

Jeffrey T. Johnson Esq.
Christina Gomez, Esq.
For the Respondents

Decision and Order

The Complainant, John Mallory, was a funding manager in the mortgage loan management division of JP Morgan Chase Bank, N.A. (hereinafter "the Bank"). He worked for Chase until November 2007, when he alleges he was fired for reporting that Eddie Rogers, a high-performing loan officer, had tried to intimidate him to wire money from a depleted loan account. He filed this whistleblower claim under § 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title

VIII of the Sarbanes-Oxley Act of 2002[1] ("the Act"). The Bank disputes that he ever actually reported anything to his superiors, who say they learned independently about the situation some weeks after the alleged whistleblowing. The Bank argues that it fired Mallory for not having resolved accounting errors pertaining to that and other loan accounts, and for having repeatedly signed reports indicating there were no accounting errors when he knew errors persisted.

I am not persuaded Mallory actually reported any fraudulent activity to his superiors, so he could not have been fired in retaliation for having done so. I therefore find for the Bank and dismiss all claims.

I. Summary of Findings

At the heart of this case lies a dispute about whether the Complainant actually did "blow the whistle" over a clash with loan officer Eddie Rogers about money available to be disbursed in a residential construction loan the Bank made to Pablito and Marilyn Garcia (hereinafter "the Garcia loan"). The Garcia loan was primarily managed by Chase's contractor Granite Loan Management (hereinafter "GLM"), but Mallory was ultimately responsible for funding wire transfers GLM requested. Mallory alleges he reported Eddie Rogers' actions to his immediate superior, David Wicke, on October 2nd, 2007, by e-mail and in person. Wicke and the Bank deny this, claiming instead that Wicke and his superior, Amy Marcussen, didn't learn about the problem with the Garcia loan until October 19, 2007. No documentary evidence confirms or disproves the Complainant's claim he reported the situation to Wicke on October 2, 2007; the only evidence is the Complainant's own testimony.

Mallory's credibility as a witness was severely compromised by actions that came to light after the trial. Around the time this matter was in trial, he sent three e-mails over the course of a month, under the assumed name "Dr. Thomas Jones," to one of the Bank's fraud investigators. In them he falsely accused Wicke and another bank manager, Kathryn Damaskos, of deceiving Bank auditors in a matter unrelated to his whistleblower claim. When confronted by the Bank, the Complainant admitted he sent the e-mails.

Mallory argues, and psychologist he hired agrees, that he was suffering from a "mental breakdown" at the time, and that his actions were out of character, and shouldn't lead me to doubt his honesty. The Complainant sent one of these false e-mails on a day he was testifying at trial, and just three days after his primary testimony in the case.

[1] Pub. L. 107-204. The whistleblower protection provisions are codified at 18 U.S.C. § 1514A (2010).

Even if the Complainant's ill-advised decision to falsely accuse Bank employees of fraud was the product of a temporary one-month "mental breakdown," and doesn't indicate general dishonesty, it destroyed the believability of testimony he gave during that one-month period. I can't treat his testimony as accurate and reliable, especially when no other witness who testified at trial agrees with his timeline, including former and current employees of the Bank whose testimony otherwise tended to favor some of his arguments.

In short, the reliable evidence does not support the proposition that Mallory ever reported Eddie Rogers' alleged demand to any of his superiors at the bank. He could not have been fired in retaliation for reports he never made. It appears likely that the Complainant's superiors misunderstood the Garcia loan situation, particularly with respect to certain documents he signed. They thought he was concealing accounting errors, which doesn't seem to have been the case. That misunderstanding doesn't expose the Bank to liability under the Act for retaliation.

II. The Record

This case came to trial on January 25, 2010 in Denver, Colorado. The record includes January 2010 trial testimony from the Complainant,[2] and the Complainant's wife, Barbara Ann Mallory.[3] It also includes testimony from current or former Chase employees Timothy Hopson,[4] Michelle White,[5] Tresa Bloeman,[6] Barry Hill,[7] Debra Spurlock,[8] Amy Marcussen,[9] David Wicke,[10] Michael Lawler,[11] Edward ("Eddie") Rogers,[12] Linda Goldsmith,[13] and David Schilling.[14] There is

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[2] Tr. at 19–287, 1102. This Decision and Order cites to the record this way: citations to the trial transcript are abbreviated as Tr. at [page number]; citations to the joint exhibit schedule compiled by the parties are abbreviated as Ex.-[exhibit number] at [page number].

[3] Tr. at 539–56.

[4] Tr. at 296–357.

[5] Tr. at 358–98.

[6] Tr. at 399–442.

[7] Tr. at 1003–19.

[8] Tr. at 444–78.

[9] Tr. at 563–703.

[10] Tr. at 704–829.

[11] Tr. at 832–66.

[12] Tr. at 871–983.

[13] Tr. at 983–1002.

[14] Tr. at 1070–1101.

also testimony from GLM employees Travis George,[15] William Borgman, Jr.,[16] and Thomas Ahlborg.[17] Finally, there is testimony from Gregory Taylor, an accountant the Complainant retained to testify about damages.[18]

After the trial, I reopened the record on the Bank's motion and took further testimony and evidence related to the "Dr. Jones" e-mails Mallory admittedly wrote.[19] He testified at that hearing,[20] as did psychologist John M. Bradley,[21] and Chase's former Assistant General Counsel William J. Daley.[22]

The parties agreed to submit joint trial exhibits.[23] During trial, four additional exhibits were identified and admitted.[24] When the record was reopened, the parties submitted further joint exhibits.[25] After the record finally closed, the parties submitted proposed findings of fact and conclusions of law.[26]

III. Factual findings

The record contains extensive testimony from witnesses on all aspects of the Complainant's whistleblower claim. Because I conclude the Complainant's claim fails because he has not proved he ever made his superiors aware of Eddie Rogers' alleged demand, I focus on that aspect of the testimony, without making detailed findings of fact on other issues.

A. The Complainant's Job at the Bank

The Complainant began working for JPMorgan, which later became JPMorgan Chase, in November of 1992.[27] From 2001, he

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[15] Tr. at 1019–27.

[16] Tr. at 1027–33.

[17] Tr. at 1033–69.

[18] Tr. at 480–539.

[19] Order Setting Posttrial Hearing, Denying Certification under 29 C.F.R. § 18.29(B), and Clarifying Standards for Dismissal Under 29 C.F.R. § 18.6(D)(2) and 29 C.F.R. § 18.29(A).

[20] Tr. at 1116–74.

[21] Tr. at 1179–1215.

[22] Tr. at 1225–47.

[23] Ex.-1–141.

[24] E. Ex.-142–145.

[25] Ex.-146–152.

[26] Complainant's Proposed Findings of Fact and Conclusions of Law [hereinafter "Complainant's Closing Brief"]; Respondents' Proposed Findings of Fact and Conclusions of Law [hereinafter Bank's Closing Brief"].

[27] Tr. at 20.

worked in the construction loan lending group of the Bank in Denver, Colorado, [28] which administered all the Bank's residential constructions loans. By 2007, he had become manager of the funding department of the construction loan lending group,[29]and in September 2007, managed six to nine employees.[30] His direct superior in September 2007 was David Wicke;[31] David Wicke's direct superior was Amy Marcussen.[32]

The funding department made the wire transfers through the Federal Reserve system that disbursed proceeds of residential construction loans.[33] Individual borrowers would take out a construction loan and hire a contractor to build the residence.[34] The funding department would approve and process requests for payment from the contractor based on the contractor's budget and building progress.[35]

The funding department funded wire transfers based on the information in the Bank's Vendor Loan System ("VLS"), which contained authoritative loan balance information.[36] Daily wire transfer logs would be recorded and sent via e-mail to the Complainant and other members of the department.[37] Loan officers in the Banks' retail offices were always advised to consult the Bank's VLS to determine the actual amount of money available in a construction loan account.[38] Each loan had its own physical draw file as well, which contained documents relating to that loan, including a "conversation file" with notes from funders about anything unusual.[39] The Complainant's department handled about 2,000 loans at any one time.[40]

As part of the oversight process, the Bank contracted with Granite Loan Management ("GLM") to review contractor budgets and provide funding recommendations.[41] GLM would provide an initial

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[28] Tr. at 23.

[29] Tr. at 24.

[30] Tr. at 134.

[31] Tr. at 139.

[32] Tr. at 140.

[33] Tr. at 24.

[34] Tr. at 24.

[35] Tr. at 24,30–31.

[36] Tr. at 30, 38.

[37] *See*, *e.g.,* Tr. at 174; Ex.-51 at 11074.

[38] Tr. at 38, 42–43, 360.

[39] Tr. at 50, 56.

[40] Tr. at 56.

[41] Tr. at 28.

review and recommend whether to go forward with a project.[42] Once a construction loan was approved by the Bank's risk department, it would receive draw requests from contractors, review them, and recommend to the Bank whether to fund them.[43] GLM maintained its own loan account information database; when loans or disbursements were approved, it would "board"—input—the loans and payments into its own system, so GLM could keep track of account balance information on its own.[44]

Errors would crop up occasionally in GLM's database for various reasons—"out of balance" situations. Whenever the Complainant's funding department encountered an out of balance error in GLM's submissions, it sent a notice to GLM.[45] If GLM couldn't determine how to fix the problem, or if it found balance errors it couldn't correct on its own, GLM would put them in monthly out of balance reports it submitted to the Complainant's department. GLM officials signed these reports, as did the Complainant. GLM officials believed the Complainant's signature on these documents merely represented he acknowledged GLM's report, without necessarily endorsing its accuracy;[46] the Complainant thought his signature meant he was agreeing with GLM about the presence or absence of out of balance situations requiring his department's assistance.[47] Neither the Complainant nor GLM officials appear to have thought these out of balance reports were a definitive record of *all* out of balance situations; rather, they included only those loans GLM couldn't figure out how to fix on its own and needed help with.[48]

In August of 2007, the Complainant sent a series of e-mails to David Wicke with general concerns he had about out of balance problems with GLM's account balance database.[49] They arose from the accounting for interest reserve payments.[50] The problems seem to have been resolved shortly thereafter when the Complainant's department took on additional responsibilities.[51]

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[42] Tr. at 28.

[43] Tr. at 30.

[44] Tr. at 30–32.

[45] Tr. at 43–46, 403. *See, e.g.,* E.-43, -45 (examples of out of balance notices sent to GLM).

[46] Tr. at 1067.

[47] Tr. at 216, 230–233.

[48] Tr. at 216, 230–233, 1068.

[49] Ex.-12 at 008081; Ex.-13 at 008083–84.

[50] Ex.-13 at 008083.

[51] *See* Tr. at 69–71.

B. The Garcia Loan Out of Balance Situation Before October 1, 2007

Among many other loans, the Complainant's department funded a construction loan to Pablito and Marilyn Garcia.[52] GLM handled the day-to-day interactions with the contractor building the Garcias' house.[53] Sometime before November 2006, the first contractor the Garcias had used backed out, probably because he realized he was losing money at the construction contract price.[54] Before that first contractor backed out, he applied for and received one wire transfer for $17,297.02 from the Complainant's department for work done, which was wired on July 6, 2006.[55]

The Garcias found another contractor to complete their home, but for more money.[56] However, when GLM reboarded—re-entered—the new Garcia loan information into its system, it forgot to deduct the money paid to the first contractor.[57] As a result, GLM's system indicated the Garcia loan balance was $17,297.02 higher than the actual loan amount available to the Garcias.[58] The Bank's own VLS system always showed the correct construction loan balance.[59]

At some point, one of the Bank employees the Complainant supervised realized the Garcia loan was out of balance in GLM's system. On November 6, 2006, another of the Complainant's funding department employees, probably Tresa Bloeman, sent GLM an out-of-balance report detailing the reason the loan was out of balance.[60] When GLM didn't fix the issue, further notices were sent, on December 12, 2006,[61] January 23, 2007,[62] and April 27, 2007.[63]

Throughout this period, wire transfer requests continued to be submitted to and approved by GLM and members of the Complainant's

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[52] Tr. at 26; Ex.-42 at 11097.

[53] Tr. at 45, 906, 1020, 1034.

[54] Tr. at 45, 907–09.

[55] Tr. at 45, 145, 910; Ex.-90, at 845, 800.

[56] Tr. at 910.

[57] Tr. at 45, 910, 1040.

[58] Tr. at 45–46, 910–12, 1040.

[59] Tr. at 44–45,

[60] Tr. at 403–04; Ex.-43 at 11048.

[61] Ex.-45 at 11054.

[62] Ex.-47 at 11060.

[63] Ex.-50 at 11071. More notices may have been sent, but these seem to be the only ones in the record. The parties don't dispute that many notices were sent over a period of more than 6 months.

department. Because there was still money in the loan account, the out of balance situation didn't prevent funding those wire transfers.[64] The wire transfers made were reflected on the daily draw logs sent to the Complainant's e-mail.[65] Tresa Bloeman remembers telling the Complainant about the Garcia loan being out of balance several times during this period.[66] Barry Hill, another of the Complainant's funders, also thinks he talked to the Complainant about the out of balance issue, but he can't remember specific dates.[67] The Complainant testified he didn't find out about the out of balance issue until October 1, 2007.[68]

Sometime shortly before October 1, 2007, Mr. Garcia, the second contractor who was building the Garcia house, and the Bank's loan officer on the account, Eddie Rogers, all met to negotiate the amount of the final draw on the account, because the house had been finished.[69] At the meeting, the contractor initially wanted about $45,000.[70] As part of the negotiations, Eddie Rogers pulled up the GLM project cost report, which showed a balance of $40,866.61.[71] At this point, the buyer interjected that he thought, based on documents he had received from the Bank, there was less money left in the account than the GLM balance showed.[72] Eddie Rogers called GLM to check, when he should have checked with the Bank's VLS system, as he had been trained to do.[73] GLM assured Rogers its balance information was correct.[74] Based on that information, the buyer and the contractor decided to settle on a final draw request of $37,405.15.[75]

Eddie Rogers' compensation from the Bank as a loan officer handling residential construction loans was made on a sales commission basis;[76] his job was essentially to sell construction loans to buyers and contractors. Rogers consistently ranked in the top 10% for loan officers involved in any lending in the entire United States; he

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[64] *See* Tr. at 174–79; Ex.-97–98.

[65] Tr. at 147–48.

[66] Tr. at 424, 431.

[67] Tr. at 1008.

[68] Tr. at 178.

[69] Tr. at 917–18.

[70] Tr. at 918.

[71] Tr. at 918.

[72] Tr. at 918.

[73] Tr. at 360.

[74] Tr. at 918–20.

[75] Tr. at 918–19.

[76] Tr. at 882.

was always in the top 5 for construction lending.[77] Rogers attributed his success to his willingness to stand in the shoes of the contractors he worked with; his office would keep track of their balances, and assist them in submitting and processing funding requests.[78] In the year before the Complainant was fired, Rogers brought in about $31 million of loans for the Bank.[79]

C. The October 1, 2007 Partial Wire Transfer and Eddie Rogers' Phone Call to the Complainant about the Garcia Loan Situation

The Complainant's department received the request for the $37,405.15 final draw on the Garcia loan on October 1, 2007.[80] Previous wire requests had been funded despite the out of balance condition because there was money in the loan. [81] Now, however, according to VLS, there was only $23,569.59 actually left.[82] Barry Hill was the funder responsible for the final wire request.[83] Hill asked Tresa Bloeman what to do, because he had just recently become an approver and would come to Bloeman with questions.[84] She told him that he could fund the loan up to the amount left in the account, but no more.[85] Hill approved the draw request up to the amount remaining in the loan, $23,569.59, which he wired to the contractor.[86]

The contractor called Eddie Rogers, to ask why the wire transfer had been only partially funded.[87] Rogers called the Complainant's department.[88] The timing of this call is slightly uncertain, but Rogers likely called the Bank on the afternoon of October 1.[89] Rogers doesn't

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[77] Tr. at 875.

[78] Tr. at 875–78.

[79] Tr. at 618, 622; Ex.-16 at 009457.

[80] Tr. at 183; Ex.-99 at 807.

[81] *See* Tr. at 174–179; Ex.-97–98.

[82] Ex.-99 at 859.

[83] Tr. at 432; Ex-99 at 807.

[84] Tr. at 432.

[85] Tr. at 432.

[86] Ex.-99 at 807.

[87] Tr. at 933.

[88] Tr. at 933.

[89] Tresa Bloeman testified that it was either the 1st or the 2nd, and it would have been late afternoon if it was the 1st. Tr. at 406, 410–411. Rogers thought it would have been the same day the contractor called him, which probably would have been the 1st. Tr. at 955. The Complainant thought it was the 1st. Tr. at 27. The discrepancy does not appear to be particularly important to anyone's version of events.

remember who picked up the phone, but Bloeman testified she spoke with Rogers first.[90]

Witnesses consistently characterized Eddie Rogers as "demanding,"[91] and several testified to his short temper and tendency to yell when he didn't get his way.[92] Rogers demanded to know why the contractor hadn't got the full amount of the draw request.[93] Bloeman tried to explain that she couldn't fund the wire transfer beyond the funds in the account, but Rogers didn't seem to care and kept asserting the contractor should get the full amount.[94] Eventually, Bloeman told Rogers she would go speak to the Complainant and have the Complainant call him back.[95] She didn't ask Rogers why he thought there was more money in the account than there actually was.[96]

Bloeman told the Complainant about Rogers' demand.[97] The Complainant told her she was right, there was no way they could fund the full wire transfer request.[98] Bloeman left the loan draw file with the Complainant; it included a conversation log with notes about the loan history and out of balance situation.[99] The draw file the Bank produced didn't include these notes.[100] Bloeman doesn't know what might have happened to them.[101]

Either later that day or the next morning,[102] the Complainant spoke with Eddie Rogers by phone about the Garcia loan.[103] Rogers wanted to know why the transfer wasn't being funded even though the

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[90] Tr. at 406, 959.

[91] *See, e.g.,* Tr. at 601 (Amy Marcussen), Tr. at Tr. at 1025 (Travis George).

[92] *See, e.g.,* Tr. at 35 (the Complainant), Tr. at 409 (Tresa Bloeman), Tr. at 1022, 1024–25. (Travis George).

[93] Tr. at 407, 961.

[94] Tr. at 407, 961.

[95] Tr. at 410.

[96] Tr. at 409.

[97] Tr. at 411–12.

[98] Tr. at 412

[99] Tr. at 412–14.

[100] Tr. at 412–14.

[101] Tr. at 412–14.

[102] The Complainant testified Eddie Rogers called him back the following morning, October 2. Tr. at 35. Rogers said he eventually got through to the Complainant, but it isn't clear from his testimony whether he called twice, first on October 1 and then again on October 2, or whether he made one call, which was eventually referred to the Complainant. Tr. at 933, 955. The discrepancy doesn't appear to matter to anyone's theory of the case.

[103] Tr. at 35, 933.

GLM database showed there was enough money in the account.[104] He was angry and wanted the contractor to get all the money owed.[105] He had relied on the GLM budget information because that was what he had always done in the past and he had never had any problems.[106] He wasn't satisfied by the Complainant's answers.[107]

Rogers had meant to visit Denver to introduce his staff to the construction loan staff at the Bank and GLM, but his trip had been delayed due his secretary's temporary inability to travel.[108] He decided to deal with the Garcia loan issue at the same time and made plans to visit Denver on October 19.[109]

Rogers called GLM to let them know he would be visiting.[110] He doesn't know exactly when, but it was sometime in the first week or two of October.[111] He claims he spoke to Mark Metzger and Thomas Ahlborg, both GLM employees, and probably mentioned the Garcia loan; he thinks they told him they would look into the situation and get back to him.[112] Ahlborg doesn't remember this conversation.[113] Even if it took place, no details of the loan were discussed because Rogers didn't have any.[114]

D. David Wicke and Amy Marcussen's First Knowledge of the Garcia Loan Situation

On October 19, Eddie Rogers and his staff visited Denver as planned.[115] He visited the Complainant's department at the Bank first, and introduced his staff.[116] Then he sat down with the Complainant, who showed him the draw file for the Garcia loan, and explained the problem with GLM not fixing its reboarding error.[117] This was the first time Rogers learned the actual reason for the funding problem and the

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[104] Tr. at 961.

[105] Tr. at 933–34.

[106] Tr. at 934, 966.

[107] Tr. at 9.

[108] Tr. at 936, 955–57, 977.

[109] Tr. at 936, 955–57, 977. It is unclear whether these plans were made in the first or second week of October.

[110] Tr. at 958.

[111] Tr. at 958, 976–78.

[112] Tr. at 958, 976–78.

[113] Tr. at 1057–58.

[114] Tr. at 977.

[115] Tr. at 937.

[116] Tr. at 937.

[117] Tr. at 937.

first time he heard about an out of balance situation.[118] The Complainant showed Rogers the out of balance reports that had been sent to GLM, which GLM had not acted on.[119]

Rogers then met Mark Metzeger of GLM, and they met with Amy Marcussen, the head of the Bank's funding department.[120] Rogers doesn't think they talked about the Garcia loan at that time.[121] After lunch, Metzeger took Rogers and his staff to GLM, where they talked about the Garcia loan situation and how to fix it.[122] It turned out that one of the accountants at GLM had been receiving the Garcia out of balance reports, along with out of balance reports for four other loans, but had been putting them in a file without doing anything about them.[123] Ahlborg of GLM began fixing the values on the other loans; he didn't immediately fix the Garcia loan because the final disbursement had already been made.[124]

Meanwhile, Rogers and Metzeger met with Amy Marcussen, when Rogers explained to her the situation with the Garcia loan.[125] He also mentioned the four other loans that had been out of balance at GLM.[126] This was the first Amy Marcussen had heard of the Garcia loan, or of the problems with the four other loans.[127] She was angry, upset, and thought people had been hiding the situation from her. She had recently become manager and encouraged everyone to "come clean" to her about any problems in the department.[128] She was worried about the consequences of leaving the loans out of balance so long. [129]

Shortly after Marcussen met with Rogers,[130] she sought out the Complainant's immediate superior David Wicke, and asked him to look into the matter.[131] Wicke learned about the Garcia loan situation earlier that same day, when he overheard Mark Metzeger and the

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[118] Tr. at 937, 977.

[119] Tr. at 938.

[120] Tr. at 974–75.

[121] Tr. at 975.

[122] Tr. at 938.

[123] Tr. at 1039.

[124] Tr. at 1041–49.

[125] Tr. at 940.

[126] Tr. at 940.

[127] Tr. at 572, 940, 979–80.

[128] Tr. at 571–72, 940, 979–80.

[129] Tr. at 572.

[130] It may have been as long as a few hours. Tr. at 641.

[131] Tr. at 572.

Complainant talking about it near the Complainant's desk.[132] Amy Marcussen testified Wicke didn't seem to know about the loan situation when she spoke with him, but Wicke testified he remembers telling her he had just learned about it.[133] In any case, Amy Marcussen asked Wicke to figure out what had happened.[134]

David Wicke reviewed the Garcia loan file, and discovered the out of balance reports that had been sent to GLM several times.[135] These reports reinforced Wicke's judgment that the Complainant didn't do enough to remedy the situation.[136] He thought the Complainant should have stopped funding the loan until it was back in balance, and that the Complainant should have escalated the failure of GLM to bring its system into balance with the Bank's records to more senior managers at the Bank and at GLM.[137] He was also disturbed to see the Complainant had been signing off on the monthly reports from GLM purporting to show no out of balance situations; he thought the Complainant must have been aware of the Garcia loan and shouldn't have signed the reports if he was.[138] Wicke had signed these very reports too, but he had relied on the Complainant to see that the reports were accurate.[139]

As part of this process, Wicke and Amy Marcussen may have met with the Complainant in Wicke's office to find out what he knew about the situation.[140] Marcussen remembers a short conversation where the Complainant told her he had identified the out of balance condition and submitted several reports to GLM to fix the problem, but that GLM had been unresponsive.[141] He said he hadn't escalated the

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[132] Tr. at 718.

[133] Tr. at 572, 641, 644, 718.

[134] In his trial testimony, David Wicke appeared to conflate this initial meeting with a later meeting where he reported the findings of his investigation. He later clarified that he initially looked into the matter then got back to Amy Marcussen. Tr. at 572, 718–19.

[135] Tr. at 719, 740–41.

[136] Tr. at 720.

[137] Tr. at 720. Neither Wicke nor anyone else could cite any written policy that required the Complainant to escalate the situation to senior managers at the Bank or to stop funding on the loan. Indeed, Debra Spurlock, the Bank employee who wrote the written policies on funding, testified that there was really no reason to escalate the situation as long as the loan wasn't overfunded. Tr. at 453–56, 472–77.

[138] Tr. at 721–22.

[139] Tr. at 722.

[140] Amy Marcussen testified they did meet. Tr. at 579. Wicke couldn't remember one way or the other. Tr. at 784–89.

[141] Tr. at 579–80.

matter to management.[142] She didn't ask why not.[143] Wicke doesn't remember this meeting, but thinks it's possible it might have happened.[144]

Based on what they had discovered from the Complainant and from the loan file, and their interpretation of the Complainant's signature on the out of balance reports from GLM, Wicke and Marcussen decided to ask Human Resources for advice about what to do about the situation, and whether the Complainant had violated company policy by, as they saw it, falsifying documents to hide out of balance problems at GLM.[145] Around October 30, they contacted David Shilling at Human Resources, who told them he would look into the situation.[146] He referred them to the fraud prevention group, because he was concerned that if the Complainant was signing off on false information relating to loan balances that might be fraudulent activity.[147]

E. The Fraud Investigation

Based on the referral from David Shilling, Michael Lawler, a Senior Fraud Investigator at the Bank, investigated.[148] Wicke and Marcussen were already considering terminating the Complainant's employment because they had lost confidence in his ability to manage risk for the company.[149] Wicke tentatively filled out a recommendation for termination on October 30,[150] but no further action was taken while they waited for the results of Lawler's investigation.[151] The notice of termination cited the Complainant's failure to escalate the issue to senior management and his signatures on GLM's out of balance statements.[152] It also noted the Complainant's last audit of GLM, which was a part of his job responsibilities, had found no irregularities (or in the Bank's terminology "exceptions.")[153]

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[142] Tr. at 579.

[143] Tr. at 579–80.

[144] Tr. at 784.

[145] Tr. at 582, 678, 723.

[146] Tr. at 581, 1072.

[147] Tr. at 1073.

[148] Tr. at 834.

[149] Tr. at 590, 671, 674, 725, 794.

[150] Tr. at 794, Ex.-20 at 0005.

[151] Tr. at 670–72.

[152] Ex.-20 at 0005.

[153] *Id.*

After Lawler reviewed the out of balance reports the Complainant had signed, he met with the Complainant.[154] The Complainant explained to him that, contrary to what Wicke and Marcussen understood, the out of balance reports he signed were not meant to be a comprehensive statement from GLM that there were *no* out of balance loans in its books.[155] The Complainant didn't think the Garcia loan and the other loans met the criteria to be listed on the reports.[156] Based on this conversation and a follow-up e-mail sent by the Complainant on November 12, 2007,[157] Lawler concluded the Complainant falsified no documents, and that any decision on the Complainant's employment should be left up to management.[158]

F. The November 15, 2007 GLM Audit

The Complainant was scheduled to perform a random audit of GLM's accounts on November 13–15, 2007.[159] He had performed a similar audit in August 2007, which disclosed no issues.[160] At trial, Marcussen criticized the Complainant's August 2007 audit, saying he could have taken the opportunity to pull the Garcia file and the other files and make sure the problems had been corrected, even though the audit was supposed to be random.[161] Despite what the Complainant's managers claimed were concerns about the Complainant's competency to manage risk for the department, they did not assign anyone else to audit GLM, and they had the Complainant do it as planned.[162] These program audits were designed only to assess whether GLM was complying with Bank policies and procedures, not to check actual values in individual loans.[163]

G. The Decision to Terminate the Complainant's Employment

Although Lawler's investigation uncovered no fraud, Marcussen and Wicke met with David Shilling from HR again to talk about what to do about the Complainant.[164] Marcussen thought the Complainant's

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[154] Tr. at 841.

[155] Tr. at 841.

[156] Tr. at 841.

[157] Ex.-105 at 0006.

[158] Tr. at 853.

[159] Tr. at 675–76, 806.

[160] Tr. at 598; Ex.-102 at 0022–25.

[161] Tr. at 675–76.

[162] Tr. at 806.

[163] Tr. at 96, 677–78.

[164] Tr. at 587.

failure to escalate the issue to Wicke showed he wasn't able to perform his normal job functions.[165] They considered whether they might have some other job the Complainant could be transferred to in lieu of termination, but ultimately concluded no such job existed.[166]

Wicke and Marcussen met with the Complainant on November 15, 2007, to terminate his employment.[167] They told him they had lost confidence in his ability to manage the risks associated with his position.[168] They kept meeting short to avoid offering detailed explanations.[169] They told the Complainant to leave the building immediately and come back after work hours to collect his things.[170] Wicke told him a letter would come in the mail explaining the termination, but no such letter was sent.[171]

The Bank resolved the Garcia loan situation by having both GLM and the borrower put more funds into the loan account.[172] The Complainant was jobless for several months, but ultimately secured employment in Chicago.[173] He worked for two employers there for about eight months total before he found another job in the Denver area, where he worked as of the time of trial.[174] In 2009, the Bank decided to close its construction lending department,[175] and at the time of trial the remaining employees were wrapping up the business of the department, with all employees scheduled to be laid off or transferred to other divisions of the Bank based on a competitive process.[176]

H. Underlying Facts Relating to the "Dr. Jones" E-mails

The facts underlying the Complainant's sending of the Dr. Jones e-mails were established in the Order Denying Dismissal and Sanctions of June 24, 2011.[177] Those findings are reproduced below.

On January 6, 2010, nineteen days before trial, Mallory sent an e-mail to the Bank's Fraud Prevention and Investigation Department

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[165] Tr. at 587.

[166] Tr. at 587.

[167] Tr. at 602, 814–16.

[168] Tr. at 602.

[169] Tr. at 815.

[170] Tr. at 818.

[171] Tr. at 818.

[172] Tr. at 606; Ex.-24 at 010540.

[173] Tr. at 120.

[174] Tr. at 120–21.

[175] Tr. at 743.

[176] Tr. at 742–44.

[177] Order Denying Dismissal and Sanctions.

from the e-mail address drthomasjones1959@yahoo.com, signed "T Jones, PhD [sic]."[178] In the e-mail Mallory claimed "a staff member deliberately withheld departmental procedures" from internal auditors that "would have exposed risk and financial losses" caused by the Bank's construction loan department.[179] He listed the Bates numbers the Bank had assigned six documents gathered for trial, and suggested the Fraud Department request copies from Wicke or the Bank's in-house counsel.[180] Someone at the Bank apparently confirmed with outside counsel on January 19, 2010, that the Bates numbers referred to documents produced for this case.[181] The Bank had marked all six documents "CONFIDENTIAL," and all six were covered by a July 2009 protective order.[182]

James Huston, the Bank's Vice President for Global Security and Investigations, responded to "Dr. Jones" on January 26, 2010, requesting more details and stating he hadn't yet contacted Wicke or anyone else at Mallory's former office.[183] Mallory responded as Dr. Jones on the morning of January 28.[184] Mallory claimed to be a "business colleague" of Wicke's, and described a meeting in which Wicke admitted to withholding departmental procedures from the Bank's internal auditors to disguise his department's poor performance.[185] Mallory further claimed another former supervisor, Kathryn Damaskos, was present at the meeting and had commended Wicke for deceiving the auditors.[186]

Huston replied on February 4, after the end of trial, requesting an in-person meeting in Denver.[187] Mallory responded on February 9, again as Dr. Jones, saying he lived in Colorado Springs and was too busy to make a trip to Denver.[188] The last e-mail made no new accusations or claims. Huston sent a final e-mail to the Dr. Jones e-mail address on March 1, 2010, again requesting a meeting, to which Mallory never responded.[189]

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[178] Ex.-146 at 3–4.

[179] Ex.-146 at 3.

[180] Ex.-146 at 3.

[181] Ex.-147 at Ex.-A, p. 3 n.1.

[182] Ex.-146 at 3. The documents referenced appear at Ex.-149–51.

[183] Ex.-146 at 3.

[184] Ex.-146 at 2–3.

[185] Ex.-146 at 2.

[186] Ex.-146 at 2.

[187] Ex.-146 at 2.

[188] Ex.-146 at 1.

[189] Ex.-146 at 1.

At some point after receiving the January 28 "Dr. Jones" e-mail, the Bank began investigating the possibility Mallory was behind them.[190] The Bank hired a forensic IT company to investigate, who discovered the "Dr. Jones" e-mail account was created the same day as the first e-mail, and the second and third e-mails were sent from Littleton, Colorado, where Mallory lives.[191] The Bank also searched Mallory's work e-mails, and discovered he had a family friend named Thomas Jones.[192] At some point after trial Huston met with Wicke and Damaskos, both of whom said they had never met a Dr. Thomas Jones.[193]

On March 19, 2010, the Bank confronted Mallory's counsel with the e-mails and a draft motion describing the results of their investigation.[194] Mallory admitted to his lawyer that he had written the "Dr. Jones" e-mails; this confession came about five or six weeks after sending the third e-mail.[195] Mallory's counsel relayed the admission to the Bank on March 22, 2010.[196]

On April 1, 2010, the Bank moved to reopen the record and depose Mallory about the e-mails. After the deposition and additional briefing from both sides, an order dated June 25, 2010 established Mallory's undisputed authorship of the e-mails.[197] I granted the request to reopen the record, and a posttrial hearing was scheduled for October 5, 2010.[198]

I. Testimony about the Dr. Jones E-mails

At the October 5, 2010, hearing Mallory reaffirmed there is no Dr. Thomas Jones, and the conversation described in the e-mails between himself, Wicke, and Damaskos never occurred.[199] Mallory claimed he falsely accused Wicke because he felt trial documents confirmed his longstanding suspicion Wicke had withheld information

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[190] Tr. at 1228; Ex.-147 at Ex.-A, p. 6.

[191] Ex.-147 at Ex.-A, p. 8.

[192] Ex.-147 at Ex.-A, p. 8; *Id.* at Ex.-O.

[193] Tr. at 1230; Ex.-147 at Ex.-A p. 6.

[194] Tr. at 1140; Ex.-147 at Ex.-A, p. 2.

[195] Tr. at 1163–64.

[196] Ex.-147 at Ex.-A, p. 2.

[197] Order Establishing Complainant's Authorship of E-Mails, Denying the Admission of the Complainant's Deposition, Returning Sealed Psychological Evaluation and Setting Agenda for Post-Hearing Conference, 4.

[198] Order Setting Post-Trial Hearing at 11

[199] Tr. at 1129–31.

from auditors.[200] Mallory wrote the e-mails during what he described as a "mental breakdown" caused by the stress of the trial.[201] He said he created the fake name and e-mail address as a result of his depression.[202]

The Complainant's retained forensic psychologist John Bradley opined Mallory wrote the "Dr. Jones" e-mails during a major depressive episode brought on by a number of environmental stressors.[203] Dr. Bradley described the Complainant's actions as a "single episode" that was "uncharacteristic and abhorrent compared to his personality."[204] Dr. Bradley hadn't treated Mallory, and based his opinion on two post-trial interviews with Mallory, a phone interview with Mallory's psychotherapist, two personality tests, and a partial review of the record in this case.[205]

IV. Rejection of the Complainant Contrary Testimony as not Credible

The Complainant's testimony differs in key respects from the facts I find. After briefly summarizing the Complainant's version of events, the following section explains why I attribute little weight to the Complainant's trial testimony and find events most likely did not occur as he claims.

A. Brief Summary of the Complainant's Version of Events

The Complainant's version of events primarily diverges on October 2, 2007, the date Eddie Rogers probably first spoke with the Complainant on the phone to find out why the last draw on the Garcia loan had been only partially funded. According to the Complainant, when Rogers and he spoke, Rogers demanded the Complainant fund the full draw request, even though there wasn't enough money left in the loan.[206] Rogers threatened that if the Complainant didn't wire the funds immediately, he would advise the contractor to put a mechanic's lien on the property to force the bank to address the issue.[207] Rogers demanded the Bank wire the funds and make up the difference or get

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[200] Tr. at 1125–26.

[201] Tr. at 1160, 1162–63.

[202] Complainant's Response to Respondent's Post-Hearing Brief for Sanctions, 5–6.

[203] Tr. at 1181–82, 1185–86, 1189.

[204] Tr. at 1193–95.

[205] Tr. at 1202; Ex.-148 at 2.

[206] Tr. at 36.

[207] Tr. at 36.

GLM to make up the difference from an errors and omissions account if necessary.[208]

The Complainant says as soon as he got off the phone with Rogers he went to look for Wicke to report the situation and Rogers' threat.[209] He was very upset because he thought Rogers was demanding he fund the loan despite the lack of funds, which he testified at trial he knew would be wire fraud.[210]

He couldn't find Wicke so he began gathering more information by sending e-mails to Travis George and William Borgman, employees in GLM's funding department.[211] The Complainant says he not only sent these e-mails but also printed them out and put them in the conversation log of the draw file for the Garcia loan.[212]

The Complainant testified that because he still couldn't find Wicke, he forwarded to Wicke the e-mail he got back from William Borgman, along with a synopsis of the situation and a request to meet with Tom Ahlborg's group at GLM to try to prevent similar situations in the future.[213] The Complainant says he printed these e-mails and put them in the conversation log as well.[214] Neither these e-mails nor the printed versions were in the evidence the Bank submitted in response to the Complainant's requests, [215] and the Complainant implies Wicke or other Bank employees destroyed them, either knowingly or inadvertently.

The Complainant also testified that the next morning, October 3, 2007, Wicke came by his office to acknowledge his e-mails. He says he told Wicke that Rogers knew exactly what he was doing and shouldn't be trying to take advantage of the Bank and GLM to get more money for his contractor, especially when there wasn't money to wire in the loan account.[216] He says he gave Wicke the draw file, including the conversation file with the printed e-mails, and he hasn't seen it since.[217]

On or about October 7, 2007, the Complainant claims Wicke came up to his desk holding the Garcia loan file, and yelled "this is all

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[208] Tr. at 36.

[209] Tr. at 49.

[210] Tr. at 36.

[211] Tr. at 49.

[212] Tr. at 50.

[213] Tr. at 51.

[214] Tr. at 50–51.

[215] Tr. at 50.

[216] Tr. at 52–54.

[217] Tr. at 53, 60.

your fault" and it "should never have happened" before walking away.[218] The Complainant says he followed Wicke back to Wicke's office and told Wicke the Garcia loan situation was a serious issue that needed to be resolved, and that Rogers was trying to take advantage of an error. He says Wicke told him "you'll shut your mouth and not speak" and to "not talk about this again."[219]

After October 7, the Complainant's version of events largely corresponds with the version given by Bank employees, with a few differences. In particular, the Complainant claims he didn't meet with Marcussen and Wicke on or around October 19 about the Garcia matter; instead, he says they met privately with Eddie Rogers, and that he wasn't invited.[220] He says he didn't meet with Marcussen or Wicke again until he was fired on November 15.[221] The Complainant's testimony also diverges when it comes to the meeting with Mark Lawler. The Complainant testified he thought Mark Lawler was investigating Eddie Rogers for fraud, not him.[222]

The Complainant claims he was fired in retaliation for reporting Eddie Rogers' demand to fund the loan even in the absence of sufficient funds, i.e., for reporting Rogers' attempt to cause wire fraud. The Complainant thinks that because Rogers was one of the Bank's top loan officers in the country,[223] it fired him to avoid angering an influential rainmaker and to take the fall for a situation the Complainant hadn't caused.

B. Reasons for Disbelieving the Complainant's Version of Events and Finding Him an Unreliable Witness

1. The Complainant is not a Reliable Witness

While the Complainant was testifying at trial, he was sending e-mails under a fictitious name, falsely accusing Wicke and Kathryn Damaskos, another Bank manager, of withholding information from corporate auditors.

The Complainant's actions severely undercut his credibility as a witness. I cannot be confident of the accuracy or sincerity of the Complainant's testimony at trial. I know he was falsely accusing Wicke of fraud as he was testifying at trial that Wicke conspired to fire him

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[218] Tr. at 86.

[219] Tr. at 86.

[220] Tr. at 91–93.

[221] Tr. at 90.

[222] Tr. at 102–03.

[223] *See, e.g.,* Tr. at 875.

for reporting alleged attempted fraud by Eddie Rogers. The timing and subject matter of the "Dr. Jones" e-mails are too similar to the Complainant's underlying accusations in this case for me to conclude they do not severely undermine the credibility of his trial testimony.

The Complainant argues I should construe the Dr. Jones e-mails as a temporary, out-of-character lapse of judgment from a generally honest person brought on by severe stress and a "mental breakdown."[224] The psychologist he retained essentially agrees.[225] He thinks I can isolate his unfortunate actions in the Dr. Jones e-mails from his testimony at trial, and therefore I need not find the credibility of his trial testimony diminished.

There are two fundamental problems with this argument. First, even if the Complainant was suffering from a temporary "episode" of "mental breakdown," he suffered it at the very time he testified at trial—testimony which is uncorroborated by any other testimony or evidence and which I must find credible to find in the Complainant's favor. Any "mental breakdown," could affect the honesty—and certainly the accuracy—of the trial testimony he was giving at the same time he was sending the Dr. Jones e-mails.

Second, the Complainant testified that his "mental breakdown" was precipitated by reviewing documents in preparation for trial and that the stress was too much for him and caused him to make false accusations.[226] In particular, he testified that he was upset by what he saw as unfair arguments the Bank made, and by what he thought was evidence of wrongdoing by Wicke and Damaskos.[227] I have no doubt the Complainant thought he was ill treated by the Bank. His wife testified in detail about the effects of stress on the Complainant at the time he was fired,[228] an event as stressful as reviewing documents in preparation for trial, and which could produce feelings of victimization. Knowing the Complainant has fabricated job-related accusations under stress, and invented meetings which never actually took place, I can't be confident his recitation of the events leading up to his firing doesn't include inaccuracies, whether calculated or simply a product of the Complainant's memory of the events being affected by his stress.

The Complainant's version of events relies on Eddie Rogers demanding that he commit wire fraud, and on his having reported this demand to Wicke by e-mail and at a meeting that Wicke denies ever

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[224] *See* Complainant's Closing Brief at 12–13.

[225] Tr. at 1193–95.

[226] Tr. at 1123–25.

[227] Tr. at 1124–26.

[228] Tr. at 544–50.

occurred. These are very similar accusations to those made in the Dr. Jones e-mails, namely illegal behavior by someone at the Bank the Complainant had a bad relationship with, and a meeting which never actually occurred. I simply cannot trust the Complainant's testimony in the one situation knowing he provided false information in the other. Given the Complainant's actions, I give little weight to any of his testimony that is not corroborated by the testimony of other witnesses or by documentary evidence.

In addition, certain elements of the Complainant's testimony ring false. For example, the Complainant testified David Wicke came over to his desk to loudly berate him about the Garcia loan situation on October 7, 2007.[229] But Tresa Bloeman and Barry Hill, funders in the Complainant's department, both testified that that would have been entirely out of character for Wicke; they had never heard him raise his voice to anyone about anything.[230] Bloeman and Hill both testified credibly to matters that favored the Complainant's case in some ways—for example, their knowledge of Eddie Rogers' temper and tendency to yell—and I have no reason to doubt their honesty. The Complainant worked in a cubicle, not an office, and his staff worked around him.[231] If Wicke had yelled at the Complainant as the Complainant testified, his staff would have heard, and would not have forgotten, because Wicke doing so would have been memorable. This episode reinforces my judgment the Complainant's testimony is not reliable where uncorroborated by other witnesses.

2. Other Evidence and Testimony in the Record Does Not Support the Complainant's Version of Events

Even though I can't trust the Complainant's testimony for the reasons given above, if other evidence and testimony in the record established the accuracy of his accusations, or seriously called into question the honesty of contrary testimony from the Bank's witnesses, he might prevail. For example, if other evidence showed David Wicke or Amy Marcussen were aware of the Garcia loan situation after October 2 but before October 19, that might support the Complainant's testimony that he reported the situation to them on October 2.

The record fails to provide substantial support for the Complainant's version of events, and any inconsistency in the testimony of other witnesses is more likely attributable to imperfect recollection than to deliberate deception. I first review other testimony

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[229] Tr. at 86.

[230] *See* Tr. at 435–36, 1012–13.

[231] Tr. at 210–11.

or evidence which might show the Complainant told Wicke or Marcussen about the Garcia loan situation before October 19, 2007. I then examine inconsistencies in the testimony of various Bank witnesses.

a. Absence of E-mails the Complainant Allegedly Sent to David Wicke about the Garcia Loan Situation

The Complainant alleges he sent e-mails to David Wicke, and to George Travis and Bill Borgman of GLM, detailing Eddie Rogers' demand and his objection to it on October 2, 2007.[232] These e-mails are not present in the record.[233] Wicke testified at trial he got no such e-mails and that he didn't have access to the Complainant's e-mail and wouldn't have been able to delete anything even had he wanted to.[234] The Complainant also says he printed out those e-mails and put them in the conversation log file of the Garcia loan, which he gave to Wicke.[235] Wicke testified he never saw these e-mails and that he never removed any e-mails from the Garcia loan folder.[236] George Travis and Bill Borgman also didn't remember any e-mails sent to them,[237] and Travis looked unsuccessfully for them in his GLM e-mail.[238] His e-mail records at GLM only go back 1.5 years, however.[239]

The absence of e-mails in the evidence the Bank submitted undermines the Complainant's allegations. No proof supports the idea that the Bank or Wicke destroyed or otherwise failed to disclose these e-mails, either in electronic or printed form. GLM looked for the e-mails sent to its employees and found none. I conclude these e-mails aren't in the record because they were never sent.

b. Notes in the Garcia Loan File Conversation Log

The Complainant and Tresa Bloeman both testified that funders in the Complainant's department had a habit of writing notes about a loan problem in the conversation file for that loan.[240] According to

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[232] Tr. at 50–51.

[233] Tr. at 50–51.

[234] Tr. at 736–38.

[235] Tr. at 50–53.

[236] Tr. at 738–39.

[237] Tr. at 1024, 1028.

[238] Tr. at 1024.

[239] Tr. at 1024.

[240] Tr. at 413–15.

Bloeman, there were notes in the Garcia conversation file, some that she made, relating to the out of balance problem.[241] These notes were not in the "Conversation Log" the Bank submitted, designated as Exhibit 68.[242] Bloeman doesn't know what could have happened to them; she last saw the file with the Complainant.[243] Sometime after October 19, Wicke remembers taking the file and making copies of the documents in it, to assist in Michael Lawler's investigation.[244] He doesn't remember seeing the conversation log in the file, but it could have been.[245]

No one seems to know what happened to the conversation log in the Garcia file. I am confident it did exist, based on Bloeman's testimony that she made notes in it. It is possible the document was separated or removed from the file inadvertently by the Complainant or Wicke or someone else entirely. If there was any other evidence the Complainant reported the Garcia situation to Wicke before October 19, the absence of the conversation log (and the e-mails) might be suspicious; without such evidence, I don't ascribe much significance to it.

c. Daily Draw Logs

Daily draw logs showing all wire transfers were sent out through e-mail to members of the funding department.[246] These daily draw logs included a "comments" section, where things like out of balance problems could be noted.[247] At least some of the daily draw logs for days on which the Garcia loan was funded include "OOB" (out of balance) in this comments section.[248]

Although each log contains dozens of entries, it is possible Wicke could have learned about the Garcia loan situation if he carefully reviewed these draw logs every day. There is no indication he did, however—and the October 1, 2007 draw log does not include an "OOB" in the comments section,[249] so if he learned about the Garcia loan from the daily draw log it would have been months earlier, before Eddie

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[241] Tr. at 413–14.

[242] Tr. at 414.

[243] Tr. at 414.

[244] Tr. at 799–802.

[245] Tr. at 801–02.

[246] *See, e.g.,* Tr. at 665–67; Ex.-54 at 11089. It appears Amy Marcussen did not receive these logs, but David Wicke definitely did. *See* Tr. at 665–68.

[247] Tr. at 666–67; Ex.-53 at 11085.

[248] *See, e.g.,* Ex-53 at 11085.

[249] Ex.-54 at 11089.

Rogers or anyone else had any problem with it. At that point, Wicke would have had no reason to be particularly concerned about the Garcia loan; "OOB" notations are not uncommon on the daily draw logs.[250] In any case, even had Wicke learned about the Garcia loan from this source, it wouldn't tend to prove Wicke was aware of the Complainant's objections to funding the Garcia loan.

d. David Wicke's October 12, 2007 Request for Updated Procedures

On October 12, 2007, David Wicke received an e-mail from Daniel Agnew, an IT specialist, with an attached copy of the procedures governing the funding department.[251] Wicke initially agreed with a leading question from Complainant's counsel that the e-mail was in conjunction with his investigation of the Complainant's actions.[252] Under clarification from the Bank's counsel, Wicke remembered that in fact the procedures were sent to him so he could send them to Bank Quality Assurance auditors who were going to be auditing the department the following week.[253] He did send them the procedures shortly thereafter, as e-mail records show, [254] and he clarified that he had misremembered and those e-mails had nothing to do with the Garcia loan situation.[255]

I read nothing untoward into this exchange. Wicke was testifying years after the events. He also wasn't shown the second e-mail in the pair, which showed what he did with the procedures he received. The relevant dates were probably obvious to the parties and their lawyers, but there's no reason they would be immediately obvious to Wicke. When shown both-e-mails, Wicke promptly explained the actual situation and cleared up his error, in a way I find credible. Accordingly, this evidence does not support an inference that Wicke learned about the Garcia loan situation from the Complainant on October 2, or was otherwise aware of the Garcia loan situation before October 19, 2007.

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[250] *See, e.g., Id.* at 11089–91 (three OOBs in a record of approximately 75 wire transfers.

[251] Tr. at 792; Ex.-17 at 009521.

[252] Tr. at 792–93.

[253] Tr. at 826–27.

[254] Ex-18 at 009624.

[255] Tr. at 827–828.

e. E-mails Sent by the Complainant to David Wicke in August 2007 about General Out of Balance Concerns

In August 2007, the Complainant participated in an e-mail exchange with David Wicke about loans that were out of balance because of a problem relating to accounting for interest reserve payments.[256] The Complainant argues these e-mails undermine Wicke's testimony that he wasn't aware of any out of balance loans before October 19, 2007.[257] These e-mails weren't about the Garcia loan, and at best show that Wicke might have been aware of some other loans that were out of balance in August 2007 for completely different reasons. Wicke's contrary answer was given in the course of responding to questions about his co-signature on the out of balance reports sent by GLM, which showed no out of balance loans, in conjunction with the Garcia loan.[258] His attention was therefore focused on the Garcia loan situation, not on unrelated out of balances from a month before. When Complainant's counsel asked Wicke about the August 2007 e-mail exchange on cross examination, Wicke clarified that, although he didn't initially remember the e-mails, upon reviewing them the interest reserve issues they discussed were "different than an out of balance where we would be sending out money and over-funding an account."[259]

The most reasonable interpretation of this exchange is that in answering questions about signing GLM's out of balance reports, David Wicke didn't think to mention the August 2007 out of balance problems because he forgot about the unrelated August 2007 e-mail exchange. I don't find this indicates Wicke was lying or that it undermines his credibility as a witness.

f. Eddie Rogers' Testimony that He Told David Wicke about the Garcia Loan before October 19, 2007

In his closing brief, the Complainant asserts that Eddie Rogers testified he spoke to Wicke about the Garcia loan before October 19, 2007.[260] If true, this might tend to support the Complainant's version of events because it would show Wicke's own testimony was inaccurate, and would have given Wicke a reason to meet with the Complainant

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[256] Ex.-12 at 008081; Ex.-13 at 008083–84.

[257] Complainant's Closing Brief at 13–14, Tr. at 722.

[258] *See.* Tr. at 721–23.

[259] Tr. at 781–82.

[260] Complainant's Closing Brief at 14.

about the Garcia situation before October 19, 2007, as the Complainant testified they did.

However, I am not convinced by the Complainant's interpretation of Rogers' testimony. Rogers initially said he spoke with Wicke on October 1 when he first called the Bank to ask about the wire transfer not being fully funded, but when asked again, said it was "with somebody," but he didn't know who.[261] He then went on to say the Complainant was the main person to speak with about problems.[262] A little later in his testimony, Rogers said he didn't remember *ever* talking to David Wicke about the Garcia loan, before again correcting himself that he probably did speak to Wicke at some point on or after October 19.[263] When Complainant's counsel followed up on cross examination, Rogers said he definitely didn't speak to Wicke on October 2 because he didn't like Wicke and thought he wasn't a "doer."[264]

At best, this exchange shows Rogers' memory of who he talked to at what time is less than entirely reliable. He didn't care who he was speaking to when he was trying to bully someone to do what he wanted; he also didn't remember if he spoke to Tresa Bloeman on October 1 before being referred to the Complainant.[265] I don't interpret this evidence to show Rogers actually did speak with Wicke before October 19; he just initially misremembered.

g. The Complainant's Assertion that Eddie Rogers Testified Amy Marcussen Knew about the Garcia Loan before He Talked to Her

In his closing brief, the Complainant asserts Rogers testified that Amy Marcussen knew about the Garcia loan problems before his meeting with her.[266] If true, this would tend to show Marcussen was lying or mistaken when she said she found out about the Garcia loan problems from him.

However, the record doesn't support the Complainant's assertion. Rogers testified that when he told her about the Garcia loan and the other four out of balance loans GLM hadn't fixed, she was angry because she had told everyone before to "come clean" with any problems they had and now she was finding out not only there was a

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[261] Tr. at 936.

[262] Tr. at 936.

[263] Tr. at 942.

[264] Tr. at 954–55.

[265] Tr. at 959–60.

[266] Complainant's Closing Brief at 17.

problem, but that there were five problems.[267] Initially, his testimony was unclear about whether Marcussen was surprised to learn about the Garcia loan *and* the other four loans, or just surprised to learn about the other four.[268] However, he later clarified that she was surprised about all of the loans, and didn't seem to know about any of them beforehand.[269] When he spoke about things happening before, he was referring only to Marcussen's request that everyone "come clean," not to any knowledge of the Garcia loan itself. I am satisfied with this explanation and don't infer from this testimony that Marcussen was aware of the Garcia loan before she spoke with Rogers.

h. Inconsistencies in the Testimony of Bank Witnesses

This section addresses inconsistencies in the testimony of various Bank witnesses about when Bank managers first became aware of the Garcia loan situation. Inconsistency among multiple witnesses testifying about an event isn't unusual. People remember things differently, especially after the passage of years, and particularly about precise timing of events that would not have seemed especially important at the time. Had all witnesses remembered minute details in exactly the same way, I would have been more concerned, and doubtful.

i. Disagreement Over Whether David Wicke Learned About the Garcia Loan on October 19 Before He Spoke with Amy Marcussen

Amy Marcussen testified that she didn't think David Wicke knew about the Garcia loan before she told him about it on October 19.[270] Wicke testified that in fact he had learned about the Garcia loan shortly before on the same day, when he heard Mark Metzeger and the Complainant talking about the situation at the Complainant's desk.[271] He testified didn't know any details at that point because he had just found out about the loan.[272]

This is probably more of a case of misunderstanding than genuinely contradictory testimony. According to Wicke's testimony, he

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[267] Tr. at 940.

[268] Tr. at 940–42.

[269] Tr. at 979–80.

[270] Tr. at 572, 641, 644.

[271] Tr. at 718.

[272] Tr. at 718.

had just found out about the Garcia loan situation shortly before Marcussen came to speak to him about it, and he didn't really know anything other than that there was some issue. Marcussen likely interpreted that as Wicke being unaware of the situation. They had both just found out that, from their point of view, the Complainant had failed to bring a serious problem to their attention. Wicke had no details, and Marcussen asked him to find them; she wouldn't have been focused on whether Wicke found out about the problem a few minutes earlier or not. She may have misremembered the precise chronology or misinterpreted what Wicke told her. I don't find anything sinister here.

ii. Disagreement Over Whether Eddie Rogers Spoke with Thomas Ahlborg Before October 19 about the Garcia Loan

Eddie Rogers initially testified that when he arranged to visit the Bank and GLM on October 19—which would have been some time before October 19—he spoke with Mark Metzeger and Thomas Ahlborg on the phone about the Garcia loan situation.[273] He later clarified that he didn't have any details at that point, and didn't even really know what an out of balance was at that time, so he certainly wouldn't have told Mark Metzeger the loan was out of balance.[274] He further clarified he wasn't absolutely certain he spoke to Thomas Ahlborg, but he probably did, and he probably just asked why the full draw request hadn't been funded.[275] Thomas Ahlborg testified that he never spoke with Eddie Rogers at that time.[276]

Although puzzling, I don't find this inconsistency particularly troubling. Rogers clearly would have had to speak to someone at GLM before October 19 to let them know he was coming; it might well have been Mark Metzeger. He may or may not have mentioned at that time that, when he came to introduce his staff, he also wanted answers about a draw request that didn't get fully funded. He probably didn't speak with Thomas Ahlborg, who seemed quite certain they hadn't spoken.

Even if Rogers did mention the Garcia loan by name to Mark Metzeger before October 19, that wouldn't tend to show the Complainant told his superiors about Rogers' demand to fund the loan.

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[273] Tr. at 958.

[274] Tr. at 977.

[275] Tr. at 978.

[276] Tr. at 1058.

People at GLM had been getting monthly notices for half a year from the Complainant's department telling them the Garcia loan was out of balance without GLM doing anything about it; it wouldn't surprise me if they did nothing about it until Rogers actually showed up in person, even if he mentioned it to them a week or two earlier when arranging to visit.

iii. Possible Disagreement Over Whether the Complainant, David Wicke and Amy Marcussen Spoke About the Garcia Loan Situation Before He Was Fired on November 15, 2007

According to Marcussen, she and Wicke met with the Complainant in Wicke's office sometime after October 19 but before October 30 to find out what he knew about the situation.[277] Marcussen remembers a short conversation where the Complainant told her he had identified the out of balance condition and submitted several reports to GLM to fix the problem, but that GLM had been unresponsive.[278] He said he hadn't escalated the matter to management.[279] She didn't ask why not.[280] Wicke doesn't remember this meeting, but thinks it may have happened.[281]

This inconsistency in testimony would be vexing if the Complainant hadn't testified that he *didn't* meet with Wicke and Marcussen before he was fired. If the Complainant had told them at that meeting about his objections to Rogers' demands, they might have fired him in retaliation for his report, even if they had found out about the Garcia loan situation independently beforehand. The Complainant was adamant he didn't meet with them, however. Given that fact, whether they had a short meeting doesn't have much impact on the case, and Wicke's inability to remember a meeting several years after the fact doesn't indicate he or any other Bank witness is lying.

3. Concluding Remarks

The evidence does not persuade me to accept the Complainant's testimony. Some inconsistencies do suggest the memories of some of the witnesses may be less than perfect several years after the fact, but

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[277] Amy Marcussen testified they did meet. Tr. at 579. David Wicke couldn't remember one way or the other. Tr. at 784–89.

[278] Tr. at 579–80.

[279] Tr. at 579.

[280] Tr. at 579–80.

[281] Tr. at 784.

that doesn't lead me to conclude any Bank witnesses were lying about when or how the learned about the Garcia loan situation. Nothing in the testimony of any of the Bank witnesses gives me serious reason to question their basic honesty and general credibility when testifying about the sequence of events which led to the Complainant's termination.

I find the Complainant's testimony not credible to the extent it conflicts with the basic timeline indicated by the other evidence and testimony. He most likely did not e-mail or speak with Wicke about the Garcia loan situation before October 19, 2007, when Wicke learned of the problem by overhearing the Complainant talk to Mark Metzeger of GLM about it. I don't believe the Complainant ever relayed the alleged demands and threats of Eddie Rogers to any of his superiors at the Bank.

V. Analysis

Section 806 of SOX, codified at 18 U.S.C. § 1514A, prohibits retaliation against employees for engaging in certain protected activities.[282] To engage in protected activity is defined by the statute as:

> (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, 1342, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> (A) a federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) *a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)*. [283]

[282] 18 U.S.C. § 1514A(a) (2006) (emphasis added).

[283] 18 U.S.C. § 1514A(a) (emphasis added).

A. Coverage Under the Act

The Bank initially disputed it was a covered employer under the Act. Subsequent legislation and ARB decisions, however, confirmed my earlier finding that the Bank was covered under the Act, and the Bank no longer disputes coverage.

B. Required Elements of a Whistleblower Retaliation Claim

The implementing regulations for the Act set forth four elements a Complainant must prove in order to prevail on a claim of whistleblower retaliation:

> **i.** The employee engaged in a protected activity or conduct;
>
> **ii.** *The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity*;
>
> **iii.** The employee suffered and unfavorable personnel action; and
>
> **iv.** The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable decision.[284]

The Complainant must prove as an initial matter both that he reported his objections to funding the Garcia wire request to his superiors and that his superiors were actually aware of his objections.[285]

No one disputes the Complainant was fired in connection with his handling of the Garcia loan situation. The firing undoubtedly satisfies the third required element, an unfavorable personnel action. However, as described above, I conclude that the Complainant has not proved he ever reported his objections to Eddie Rogers' demand to Wicke, Marcussen, or any other superior at the Bank before his termination, or that they were otherwise aware of those objections. The Complainant cannot satisfy the second required element of his case, and cannot prevail on his claim. He couldn't have been fired in retaliation for something his superiors didn't know about.

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[284] 29 C. F. R. § 1980.104(b)(1)(i)–(iv) (emphasis added).

[285] 29 C. F. R. § 1980.104(b)(1)(i), (ii); *see Van Asdale v. International Game Technology*, 577 F.3d 989, 1002 (9th Cir. 2009). The 10th circuit has not yet addressed these requirements in a decision.

Because I find the Complainant hasn't proved the second element of his claim, I need not determine whether he had a reasonable belief that Eddie Rogers' funding demand violated a provision of the relevant laws, nor need I evaluate the credibility of the Bank's stated reasons for terminating the Complainant's employment.[286]

VI. Conclusion

The Complainant has not proven by a preponderance of the evidence that he ever reported his objections to Eddie Rogers' demand to his superiors at the Bank. Accordingly, they could not have fired him in retaliation for something they never knew about. His claim fails and is dismissed.

So Ordered.

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William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARBCorrespondence@dol.gov.

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.

[286] *See e.g., Carlos M. Muino v. Florida Power & Light Co.*, ARB Case Nos. 06-092, -143, ALJ Case Nos. 2006-ERA-002, -008, slip op. at 3–4 (ARB April 2, 2008) (affirming dismissal of claim based on finding of no knowledge, without addressing ALJ's findings on other elements of the claim); *Oscar B. Shirani v. CoMed/Exelon Corp.,* ARB Case No. 03-100, ALJ Case No. 2002-ERA-28, slip op. at 8 (ARB September 30, 2005). Although both these cases involve the ERA rather than SOX, the required elements are similar under both statutes.

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. You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).