



Issue Date: 26 March 2007

Case No.: 2005 SOX 44
In the Matter of

BEVERLY E. ROBINSON
Complainant

v.

**MORGAN STANLEY/
DISCOVER FINANCIAL SERVICES/
KELLY MCNAMARA-CORLEY/
DAVID SUTTER**
Respondents

Appearances: Mr. David Lehman, Attorney
For the Complainant

Mr. Andrew J. Schaffran, Attorney
Mr. Sari M. Alamuddin, Attorney
For the Respondents

Mr. Mark Greenfield, Attorney
(In-house counsel for Morgan Stanley)¹
Mr. James Swift, Attorney
(In-house counsel for Discover Financial Services)
Ms. Sheila Wilson-Freelon, Attorney
(In-house counsel for Discover Financial Services)

Mr. James Figliulo, Attorney
For Mr. Rocco DeGrasse on August 17, 2005

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**INITIAL DECISION AND ORDER –
DISMISSAL OF COMPLAINT**

This matter arises under the employee protection provision of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A (“Act” or “SOX”) as implemented by 29

¹The various in-house counsel did not actively participate in the hearing and were only present on occasion.

C.F.R. Part 1980. This statutory provision, in part, prohibits an employer with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and companies required to file reports under Section 15(d) of the Securities Exchange Act of 1934 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 or Federal Government 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.

Procedural History

In her November 19, 2004 SOX complaint, Ms. Robinson alleged Morgan Stanley and its subsidiary, Discover Financial Services (“Discover” and “DFS”), violated the SOX employee protection provision by terminating her employment on August 23, 2004 in retaliation for her protected activity. On March 11, 2005, after investigation of the complaint, the Regional Administrator for the Occupational Safety and Health Administration (“OSHA”), U.S. Department of Labor (“DOL”), dismissed Ms. Robinson’s complaint. The Regional Administrator determined the Respondents would have taken the same unfavorable personnel action absent the protected activity. On April 7, 2005, Ms. Robinson objected to the findings and requested an administrative hearing.

Pursuant to a Notice of Hearing, dated May 17, 2005 (ALJ I),² I conducted a hearing in Chicago, Illinois on the following days: August 9 through August 12, August 17 through August 19, September 12, September 13, and September 15, 2005.

Parties’ Positions

Complainant³

For several years, as a senior internal auditor for Morgan Stanley/Discover, Ms. Robinson conducted numerous audits, identifying significant financial and security issues related to SOX. In October 2003, Ms. Robinson informed the vice president in charge of audits at Discover, Mr. David Sutter, that she intended to discuss her findings with Mr. DeLuca at Morgan Stanley. Subsequently, in an attempt to bring her concerns about identifiable deficiencies in the company’s financial operations to higher levels of management, Ms. Robinson submitted a detailed memorandum, dated February 2, 2004, to senior executives at Discover setting out numerous failures in audit controls and examples of management fraud. Based on the circumstances and nature of the memorandum, Ms. Robinson’s report was a protected activity under SOX, despite her employment status as an internal auditor.

²The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

³TR, p. 9-14 and December 23, 2005 closing brief.

In response to her report, Morgan Stanley/Discover initiated an investigation by an outside audit company in which Ms. Robinson participated for several weeks. Not long after the conclusion of the outside audit, Ms. Robinson received a job in jeopardy letter and then was terminated two weeks later on August 23, 2004. Although Ms. Robinson had received mixed performance reports and been under an improvement action plan, her supervisor, Mr. Sutter, indicated that in January 2004 he had no intention of terminating her employment. Yet, according to a corporate officer for Morgan Stanley, Mr. DeLuca, the decision to terminate Ms. Robinson's employment was made at the end of May 2004. Since Ms. Robinson's job performance did not worsen between January 2004 and May 2004, the triggering event for her termination was her SOX protected February 2004 memorandum. Accordingly, Morgan Stanley's/Discover's termination of Ms. Robinson's employment violated the employee protection provisions of SOX.

All the parties named in Ms. Robinson's complaint are proper respondents under SOX. Morgan Stanley is a publicly traded company. Although Discover is a wholly owned subsidiary of Morgan Stanley, the two companies present themselves as one company to its employees and the public. Additionally, both companies file consolidated tax returns and financial reports to the SEC. Ms. Kelly McNamara-Corley is a properly named respondent because she worked as an agent of Morgan Stanley, providing legal advice to the Discover Human Resources Department ("HR") regarding actions against Ms. Robinson. Additionally, Ms. McNamara-Corley is the niece of the Morgan Stanley CEO who has a significant financial stake in the company that could have been adversely affected by Ms. Robinson's allegations. Finally, Mr. David Sutter is a proper party because as Ms. Robinson's supervisor, he was extensively involved in the events associated with her employment termination. Mr. Sutter was also one of the subjects of Ms. Robinson's critical memorandum.

Morgan Stanley/Discover failed to establish by clear and convincing evidence that Ms. Robinson would have been terminated on August 23, 2004, absent her February 2, 2004 protected activity. Had Ms. Robinson's alleged poor job performance and adverse 360 degree reviews been the cause of the adverse action as stated by the Respondents, then they had sufficient reasons by January 2004 to fire her. The companies have not sufficiently explained what additional job-related deficiency arose after January 2004 that warranted the termination action in August 2004.

Due to the SOX violation, Ms. Robinson seeks reinstatement, back pay based on her pre-termination annual salary of \$75,000, plus associated benefits, attorney fees, and litigation expenses.

Respondent⁴

In orally presenting her concerns in October 2003 and submitting a memorandum on February 2, 2004, Ms. Robinson did not engage in SOX protected activity for two reasons. First, none of Ms. Robinson's allegations involved fraud against shareholders or a violation of any of the statutes specifically enumerated in SOX. Second, Ms. Robinson previously identified and reported the issues as part of her regular duties as a company auditor.

⁴TR, p. 14-40 and December 23, 2005 closing brief.

Ms. Robinson's employment was terminated because she failed or refused to correct, consistent, repeated, and well-documented performance deficiencies in the four principal areas of judgment, professionalism, timeliness, and acceptance of feedback. Over the course of her employment, five managers identified her employment issues and on several occasions before October 2003 took action to correct her performance. After completion of an 11 week investigation in May 2004 of her February 2, 2004 memorandum, which failed to substantiate any of her allegations, supervisors continued their efforts to improve her job performance and provided an executive coach. When Ms. Robinson continued to fail to meet deadlines and correct her behavior, her supervisors decided to terminate her employment. Absent her alleged protected activities, Ms. Robinson would still have been terminated from employment.

Three of the named respondents should be dismissed. First, Ms. Kelly McNamara-Corley, the general counsel for Discover Financial Services, should be dismissed because she was not involved in the supervision of Ms. Robinson and did not cause, recommend or approve her employment termination. Additionally, as an employee of Discover Financial Services, Ms. McNamara-Corley is not an officer, employee, or agent of a SOX covered employer. Second, Mr. Sutter is not a proper respondent because he did not make, recommend, or approve the decision to terminate Ms. Robinson's employment. Third, Discover Financial Services should be dismissed as a respondent because it is not a publicly traded company covered by SOX and Discover Financial Services did not terminate her employment.

Since her termination, Ms. Robinson has failed to mitigate her damages. In the year since her termination, Ms. Robinson has not submitted any applications for employment. During this same period, the job market was viable with high demand for experienced internal auditors.

In summary, Ms. Robinson's SOX complaint should be dismissed because she did not engage in protected activity and her alleged protected activities were not contributing factors in the termination of her employment. Ms. Robinson would have been terminated even in the absence of the alleged protected activities.

ISSUES

1. Whether Ms. Robinson engaged in a protected activity under the Act.
2. If Ms. Robinson engaged in a protected activity, whether that protected activity was a contributing factor in the Respondents' decision to terminate her employment on August 23, 2004.
3. If Ms. Robinson's protected activity was a contributing factor in the decision to terminate her employment, whether the Respondents have established by clear and convincing evidence that they would have terminated Ms. Robinson's employment on August 23, 2004 in the absence of her protected activity.
4. Whether Discover, Ms. McNamara-Corley, and Mr. Sutter should be dismissed as Respondents.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE⁵

Sworn Testimony

Ms. Beverly Robinson

(TR, p. 45 to 734, 853 to 1003, 1068 to 1167, 1225 to 1270, and 2328 to 2417)

[Direct examination] After obtaining a Bachelor's Degree in Business with an accounting specialty, Ms. Robinson worked as an internal auditor for several companies, including large corporations, between 1986 and 1996. As an internal auditor, Ms. Robinson planned, executed, and authored audits. She conducted risk assessments, determined evaluation criteria, tested controls, and presented findings. During this period, Ms. Robinson also became certified as an information systems auditor. For the next two years, Ms. Robinson operated a private business. At the end of 1999, she returned to work as an internal auditor with an insurance company. In September 2000, Ms. Robinson was hired by Morgan Stanley as a senior auditor because the company needed experienced auditors. Her starting annual salary was \$74,000. The company's welcoming letter, dated September 1, 2000, was written on Discover stationary with a Discover letterhead (CX 1A). The first sentence stated, "Welcome to Morgan Stanley Dean Witter & Co." Her senior auditor position was in the "Internal Audit Department here at Morgan Stanley Dean Witter & Co." Her first couple of paychecks were issued by Novus Services which used to be a division of Discover.

For the first few months, Ms. Robinson was assigned to the audit team of Ms. Delores Wheeler, who had hired her. However, due to a couple of personal confrontations, Ms. Robinson chose to join a different audit team in December 2000, working for Ms. Marie-Frances Weiler.

During the collections audit in 2001, Ms. Robinson discovered that bankruptcies were not being "charged off" in the correct period according to banking regulations. In many cases, rather than using the date of notice of the bankruptcy, the company used the date the bankruptcy was entered into its system. Due to the time delay between those two events, bankruptcies were charged off late. In Ms. Robinson's opinion, this problem could affect the financial statements of Morgan Stanley because if the Discover account bankruptcies were delayed in being written off, then at the cutoff date for Discover's yearly financial statement, which was rolled into Morgan Stanley's statement, the accounts would appear incorrectly on the balance sheet as receivables, thereby inflating the balance sheet by making "it look like they had more assets than they did." Ms. Robinson's concern involved the timing of the write off dates rather than a concern that the bankruptcies were not being written off. Based her conversations with a knowledgeable Discover attorney, Ms. Robinson believed banking regulations required the bankruptcies to be written off in the proper period. Ms. Robinson identified the problem in an "audit observation" and informed Ms. Weiler and Mr. Sutter about the issue. Ms. Robinson also noted that nearly a million credit card accounts did not have the cardholder's social security number. She wondered how the company was able to do a credit check without a social security number. The absence of a social security number would make obtaining the status of any pending bankruptcy difficult. At that time in 2001, Ms. Robinson did not observe any change in

⁵Although I kept the record open for a post-hearing deposition of Ms. Rhonda Navidad, counsel subsequently advised that the parties elected not to conduct the deposition.

the company's bankruptcy charge off practice. About a year later, when Ms. Robinson became aware that another audit team might be looking at the same issue, she was unable to find her working papers on the late charge offs in the company's files. Similarly, most of the electronic/computer record of her work was gone.

The Orion audit involved an assessment of a new system being used to access personal credit card member account information. Based on her work, Ms. Robinson developed concerns about the lack of information security which she reported to Ms. Weiler and Mr. Sutter. The final audit report was never issued. Ms. Weiler and Mr. Sutter faulted Ms. Robinson for incomplete work on the audit. However, because no documentation existed for the new system, the computer code was too complex, the audit division would not permit her to develop a test system, and she was not permitted to travel to the location of the system users, Ms. Robinson recommended to Ms. Weiler and Mr. Sutter that the report be issued with "scope limitations." Ms. Robinson believed work on the audit was finished in September 2001. Subsequently, in early 2002, during her annual review, Mr. Jerry Grackowski, who became her supervisor in mid-2001, indicated that Ms. Weiler and Mr. Sutter had stated the audit had been cancelled because Ms. Robinson hadn't completed her work. In 2003, after passage of SOX, while a member of a team acquiring SOX-related documentation, Ms. Robinson concluded that the Orion audit concerns about information security related to the internal controls governed by Section 404 of SOX. During later audits, Ms. Robinson continued to mention the Orion information security problems to other auditors and Mr. Sutter.

After the Orion audit, Ms. Robinson started an audit of the Resource Access Control Facility ("RACF"), a "security package" provided for computers by IBM. Ms. Robinson identified software security issues in RACF and presented her concerns to the audit team and Mr. Sutter. Her comments were within the scope of her audit. Prior to issuance of the audit report, Ms. Robinson took two months of medical leave starting in November 2001.

Upon her return from medical leave on January 30, 2002, Mr. Grackowski told Ms. Robinson that she was getting a bad review and being demoted from supervisor back to a senior auditor due to incomplete work on the Orion audit and personnel issues associated with the RACF audit. Ms. Robinson had been a supervisor since August 2001. In February 2002, Mr. Grackowski put Ms. Robinson on an action plan in an effort to show Mr. Sutter how good a job she could do. Later, based on an e-mail copy sent to Ms. Robinson, she believed Mr. Grackowski considered the action plan was completed. At mid-year, Mr. Grackowski gave her an "exceeds" rating. In mid-2003, Ms. Rhonda Navidad, who worked in the HR department, told Ms. Robinson that she had been placed on the action plan because she took leave under the Family Medical Leave Act.

In September 2002, Ms. Robinson became involved with Discover's fund raising efforts for the Juvenile Diabetes Research Foundation. Upon a successful effort, Ms. Robinson received a compliment from Mr. Sutter. However, in December 2003, Mr. Sutter referred to her efforts as an extracurricular activity rather than something for which she should be applauded.

In the first half of 2002, Ms. Robinson worked on an audit of the company's local area network ("LAN"). During the audit, she developed concerns about LAN access and physical

security. Because the LAN was an access point for many other company systems, Ms. Robinson was troubled by the insufficient password policies. Unauthorized access was easy because the company permitted users to use simple passwords and did not require frequent changes. Ms. Robinson also identified the absence of a fire suppression system for one of the company's computer server banks. Ms. Robinson reported the issues to Mr. Graczkowski and Mr. Sutter. Some corrective actions were taken but the lack of fire suppression remained a problem.

In the second half of 2002, Ms. Robinson conducted a joint audit of Unix machines and an Oracle database. Again, she discovered information security problems associated with the absence of sufficient internal controls over data. Additionally, at one computer server farm in North Carolina, backups were not stored offsite. Further, since the servers were out-dated, Ms. Robinson was told the server farm could not be rebuilt. Loss of the servers and their data would mean Discover customers and merchants would be unable to access the credit card accounts. Ms. Robinson also had difficulty with personnel being secretive about the software they were purchasing for the system. At the conclusion of the audit, Ms. Robinson reported her findings to Mr. Graczkowski, Mr. Sutter, and other managers in systems technology. Subsequently, some security changes were slowly implemented. Nevertheless, because only some issues were being addressed, Ms. Robinson included the findings of this audit in her February 2004 memorandum to "get this information to someone in power to be able to correct these things." Ms. Robinson believed some of the deficiencies related to SOX because she discovered a lack of internal controls at a time when the company CEO and CFO were required by SOX to certify that sufficient internal controls were in place. Since Discover was a wholly owned subsidiary of Morgan Stanley, and the companies filed a consolidated financial statement, Ms. Robinson also believed Discover was subject to all the regulations SOX imposed on Morgan Stanley. Additionally, Discover had to comply with numerous banking laws.

In January 2003, Ms. Robinson began an audit of the Public Branch Exchange ("PBX") voicemail system for security, function, and maintenance. The audit also included a review of company's phone calling cards and cell phones. Ms. Robinson found the PBX system to be well run by contractors. However, she discovered problems with use of calling cards and cell phones. Discover wasn't tracking its calling cards or scrutinizing the calling card bills for misuse or unauthorized use. In regards to cell phones, the company was not procuring the most efficient plans. Inventory control on the phones was poor and many cell phones could not be located. Due to lack of oversight, many cell phone billing errors were discovered. Ms. Robinson also discovered that one vice president had given an administrative assistant a company cell phone for personal use, which was an abuse of company assets. Based on her audit experience, "most statistics show that frauds, most big corporate frauds start out very small or at least relatively small and get bigger and bigger and bigger." She also believed the company would view the situation as an error of judgment by the vice president.

Although Ms. Robinson completed the PBX audit and gave it to Mr. Sutter, the report was never issued. Ms. Robinson believed that SOX required fraud by a company officer be reported to the Morgan Stanley Audit Committee and the problem should be disclosed in its financial statements. Specifically, the vice president had responsibility for the internal controls associated with information technology. Under Section 302 of SOX, fraud by such a corporate officer must be reported. Ms. Robinson believes Mr. Sutter spoke to the vice president in

response to her report about the cell phone. Even though part of her audit duties was to report her findings to Mr. Sutter, he criticized her for spending time in those areas. The vice president of the cost centers being audited also believed too much time was being spent on calling cards and cell phones.

While Ms. Robinson was doing the PBX audit, she also reviewed the operations of outside contractors who were processing Discover credit card applications. She noted the absence of a confidentiality agreement with the contractors. At that time, Discover had about 40 million credit card holders.

Upon enactment of SOX, Discover spent a great amount of time bringing the company into compliance.

When Mr. Tony DeLuca became the audit director for Morgan Stanley in about August 2003, Ms. Robinson met him at an "open forum" breakfast. During the breakfast, Ms. Robinson asked Mr. DeLuca whether he had considered eliminating the 3 tier reporting system for audit issues so that all issues and audit findings were reported to the Audit Committee and him. Mr. DeLuca responded that he was considering the issue. At that time, tier 1 issues went to the Audit Committee of the Morgan Stanley Board of Directors. Tier 2 issues went to the Discover Management Committee. Tier 3 issues only went to line managers or the direct auditees. Ms. Robinson asked the questions because she perceived that many audit issues were not being addressed due to the lack of proper level of management involvement. In her prior companies, every issue went to the directors' audit committees.

Ms. Robinson also asked Mr. DeLuca whether he valued experienced auditors. He did. She also queried whether he intended to change how the annual audit plan was developed. When Mr. DeLuca asked for more detail, Ms. Robinson complied.

Some time after the breakfast meeting, in about October 2003, Mr. Sutter criticized Ms. Robinson for making inappropriate comments and asking inappropriate questions at the breakfast meeting. Mr. Sutter believed she had embarrassed people and made the department look bad. Mr. Sutter's criticism also appeared in the late 2003 action plan and her appraisal. Mr. Sutter also directed Ms. Robinson to talk to Mr. DeLuca at the November 2003 worldwide conference only on a one to one basis. However, because Mr. DeLuca would be in a large room during the conference, Ms. Robinson understood Mr. Sutter's direction to mean she should not discuss anything with Mr. DeLuca. At the conference and later, Ms. Robinson didn't pursue further contact with Mr. DeLuca because she believed Mr. Sutter "had already poisoned Tony's mind against me" and she thought the problems needed to go to someone outside of audit to get fixed. "I wanted to present the information in a way that it would be recognized and resolved."

In the beginning of 2004, Ms. Robinson started an audit on physical security. She discovered multiple problems, ranging from entries that permitted piggybacking to terminated employees retaining access badges. She brought her concerns to Ms. Zlateva.

In August 2003, Ms. Robinson started taking notes that led to her February 2004 memorandum. On February 5, 2004, Ms. Robinson presented the memorandum to Mr. Marty

Slusarz, the Discover Chief Financial Officer (“CFO”), and Mr. David Nelms, President of Discover (CX 1). She delivered the memorandum to Mr. Slusarz in his office. After reading the report, Mr. Slusarz believed some of the concerns fell under SOX and he noted the company was getting ready to certify its financial statement. The next day, Mr. Slusarz called Ms. Robinson to his office where she discussed the memo with him and Ms. Kelly McNamara-Corley, the Discover general counsel. Mr. Slusarz informed Ms. Robinson that Discover would do an investigation based on her memorandum. Ms. Robinson developed the impression that Ms. McNamara-Corley would be heading the investigation.

During the course of the investigation, Ms. Robinson complained about retaliation. In an April 2004 meeting with Ms. McNamara-Corley, Ms. Robinson expressed her belief that the focus of the investigation had turned on her. Ms. Robinson believed she was being watched on surveillance tape and that her supervisor, Ms. Zlateva, had started wearing perfume because she knew Ms. Robinson was highly allergic to it. Additionally, other employees in her department avoided her. “Everything I did was criticized and torn apart.” An e-mail, dated April 9, 2004, sets out the various incidents of retaliation that Ms. Robinson was experiencing during the investigation (CX 1B). Ms. Robinson also sent her concerns to Ms. Navidad and Ms. Piercy in HR (CX 1C).

Within a few days of her submission of the memorandum, the investigation was initiated and Ms. Robinson was informed that the group would need a lot of information and assistance from her. The meetings with the investigation group occurred in Ms. McNamara-Corley’s conference room, which is located in sight of the majority of the internal audit employees. During the course of the investigation, as requested, Ms. Robinson provided a great deal of information and answered “many, many questions.” On one day, Mr. David Oppenheim, a member of the Discover law department, and another KPMG (the outside audit company) member took all the paperwork, about six large boxes, from Ms. Robinson’s desk. Although she requested return of many documents which were follow-up files for prior audits, the papers were not returned to Ms. Robinson (CX 4 and RX 43). When Ms. Robinson was told the documents might have been placed in a file room, she went to retrieve the papers and couldn’t find them (RX 44). Ms. Robinson also turned in an old laptop computer to the investigating group. During the course of the investigation, Ms. Robinson continued to perform her normal duties, which included the physical security audit.

On May 7, 2004, Ms. Robinson met with the investigation group for an exit meeting. Mr. Oppenheim informed her that the investigation was complete and they were going to give her a summary of the results, which fell into three “buckets” (categories), rather than the complete report. First, on some issues, Ms. Robinson didn’t have access to knowledge or information indicating that management was already taking steps to correct those issues. Second, no substance was found in regards to other issues. Third, Mrs. Robinson had contributed to some of the remaining issues. They found no retaliation and did not believe that the independence of Mr. Sutter and Ms. Robinson as auditors had been compromised. Then, the group thanked Ms. Robinson for her participation.

As an internal auditor, Ms. Robinson believed that she had a professional obligation to obtain the results of the memorandum investigation. Since she had participated in the

investigation, Ms. Robinson was concerned that she might be considered a party to an act of concealing information from the public. She noted to various individuals that if she had presented her complaint through the company's hotline system, she would have received the results of the inquiry.

Right after the meeting with the investigation group, Ms. Robinson was led into another room to talk with Ms. Kelly Piercy, the HR vice president. Ms. Piercy indicated that she was going to help Ms. Robinson.

When Ms. Robinson was placed on the action plan in October 2003, she believed it was to last 60 days. During that period, she met a few times with Mr. Sutter. On occasion, Mr. Sutter would cancel their scheduled action plan meetings. In January 2004, Mr. Sutter indicated the plan was being extended through February 23, 2004. Ms. Robinson never had a close out meeting regarding the action plan.

On June 1, 2004, Ms. Robinson was placed on another action plan by Ms. Zlateva, who had become her new supervisor in December 2003. The plan looked almost the same as the October 2003 plan. The plan highlighted needed corrections in employee relationship, organization, and meeting deadlines. After Ms. Robinson provided some comments, Ms. Piercy responded on June 7, 2004 with more specific issues set out as bullet points with examples (RX 33). Ms. Robinson disagreed with each point. She was not aggressive, undisciplined or unfocused. The action plan was revised in the third week of June.

RX 5 is Ms. Robinson's response to Mr. Takada's evaluation of her work on the general ledger audit in 2001. The draft appraisal was then re-written by Ms. Weiler (RX 6). Ms. Robinson believes HR had Ms. Weiler rewrite the appraisal because Mr. Takada's review was a personal attack. Mr. Takada also assessed her job performance on the collections audit (RX 8).

RX 35 appears to be a mid-year review of Ms. Robinson by Ms. Zlateva. Ms. Robinson never received that evaluation and was unaware of its existence until the present litigation. Typically, an employee signs an appraisal when she receives it. Ms. Robinson's signature is not on RX 35.

After receiving the action plan in June 2004, Ms. Robinson continued to work on the physical security audit and a vendor audit. She worked with an executive coach and met weekly with Ms. Zlateva and Ms. Piercy. Ms. Robinson felt the meetings were simply a continuation of attacks on her. Ms. Zlateva would just read a list of wrongs. They didn't seem willing to discuss anything. She believed their intention was really to fire her.

In early August 2004, Ms. Robinson received a job in jeopardy ("JIJ") letter, which indicated she needed to make immediate correction and there would be another 15 days of job performance review. During the next two weeks, Ms. Robinson attempted to fulfill her audit responsibilities. However, during the action plan and JIJ period, her supervisors kept adding work that made meeting deadlines almost impossible. Ms. Robinson was also criticized for things that she had no power over. During this period, Ms. Robinson also noted a sudden interest in addressing her perfume sensitivity problem when Mr. Sutter issued a letter to the department

highlighting that personnel needed to recognize that some employees were sensitive to fragrances.

On August 23, 2004, when Ms. Robinson arrived at work around 9:00 a.m., some workers were conducting an air quality survey in her work area. She worked on a few e-mails until she went to a meeting scheduled at 10 with Ms. Zlateva and Ms. Piercy. When Ms. Robinson arrived, she handed Ms. Piercy a second completed medical certification form concerning her sensitivity to perfume. Then, after Ms. Zlateva mentioned a couple of deficiencies in Ms. Robinson's performance, she told Ms. Robinson that she was no longer an employee and terminated. Ms. Robinson asked for something in writing and Ms. Zlateva indicated they would get it to her. She then handed Ms. Robinson some information on stress and indicated a counselor was available in the next room if she needed help. Ms. Robinson declined because she didn't want to talk to anyone at the moment. Ms. Piercy then brought in security who escorted her to the atrium while her personal belongings were retrieved from her desk. She was then moved outside to a stretch limousine. While an employee made a couple of trips to Ms. Robinson's desk to get additional items, Ms. Robinson stood beside the limo for about half an hour.

Other than a call that she received from a headhunter a few days after her termination, Ms. Robinson had no other contacts with headhunters. Ms. Robinson contacted other companies and looked for auditor job opportunities on the internet. She sent out a few resumes. However, Ms. Robinson was never able to obtain an interview. Due to her termination, Ms. Robinson suffered a loss of income of \$75,000 a year. She has spent several months working on her whistleblower case.

On occasion, Ms. Robinson had been criticized for her body language and facial expressions. In particular, she was told that she leans into people. Some fellow employees also criticized Ms. Robinson for stating that she was more qualified than other people in her department. In her opinion, Ms. Robinson was simply pointing out "how things were done at certain companies." Ms. Robinson had also served as a meeting director for a professional auditor association.

In the company's handbook, the term "insubordination" is defined as refusing to follow orders. Company officials accused Ms. Robinson of insubordination several times. On every occasion, Ms. Robinson challenged the assertion. She believed some company officials used the word "insubordination" to mean disagreement. While she disagreed with opinions, Ms. Robinson never refused to do anything, unless it was illegal. When the problem of insubordination was raised in June 2004, Ms. Robinson believed they wanted her to stop disagreeing with other people's opinions. She believed the criticism arose to teach her a lesson about dissenting as she had done through the February 2004 memorandum.

After she submitted the February 2004 memo, the company made an example of her. Management no longer included her in "anything anymore" and went to other auditors to address issues that she had been following for a long time. Anyone who befriended her "was an outcast as well." Her participation in the subsequent investigation was noted and was something that

“was considered not good.” Her known weekly meetings with Ms. Zlateva and Ms. Piercy reinforced her colleagues’ perception that she was being evaluated negatively.

Ms. Robinson is willing to accept reinstatement.

[Cross examination] Ms. Robinson is not seeking damages for emotional distress or physical injury. She has not been disabled or hospitalized. Other than helping to conduct an audit review class once a week for \$150 a session from March to May 2005, Ms. Robinson has not been employed since her employment termination in August 2004. Ms. Robinson also has not submitted any formal job applications.

Ms. Robinson’s audits on telemarketers, the general ledger, bankruptcies, Orion, and the LAN were conducted for Discover.

The woman on Ms. Weiler’s team who was the auditor in charge became angry when Ms. Robinson told her that in her experience before an audit test was conducted a determination needed to be made on the test criteria. Ms. Robinson doesn’t know why the woman started screaming at her.

When Ms. Weiler reached across her desk to grab Ms. Robinson, she was telling her to stay on Ms. Weiler’s team for her own good.

Ms. Robinson did not pass all parts of the CPA examination.

On the audit with Mr. Takada, Ms. Robinson expressed her belief that they were delaying the start of the audit because Mr. Takada did not seem able to make a decision about the scope of the audit. Based on his reviews of her performance, Ms. Robinson believed Mr. Takada was “a little uncomfortable with working with people who had more experience than him.” He didn’t have a lot of audit background outside of Morgan Stanley. She didn’t feel that he had been trained to evaluate performance, “period.” She believed his appraisal was a personal attack; however, she no longer remembers much of the review because it was rewritten by Ms. Weiler. One comment he criticized her for was asking an employee to take gum out of his mouth on the way to a meeting. He also objected to her advice that another manager should be brought in to finalize the scope of an audit. He gave her an overall rating of “needs improvement.” RX 4 appears to be Mr. Takada’s appraisal. Ms. Robinson found nothing in the report that was useful to her. RX 5 is her response to the review. Her chief objection was that the feedback needed to be objective and specific.

Due to her objections, a member of HR and Ms. Weiler met with Ms. Robinson. The HR representative recommended that Ms. Weiler rewrite the appraisal. Ms. Weiler’s appraisal, RX 6, was more objective and constructive in the areas of communication, teamwork, and leadership. She also gave Ms. Robinson a “needs improvement” overall rating. Ms. Weiler indicated that Ms. Robinson’s tone, attitude, and approach was not consistent with the level of service to clients. While Ms. Robinson agreed with that comment, she disagreed with the observation that she was abrasive and rude in response to conflicts. She also disagreed with the rating that her communication skills needed improvement. In response to the observations, Ms.

Robinson tried to soften her tone. She also spoke with colleagues on how she could improve her communication skills. She made efforts to improve her leadership and team conflict skills.

RX 7 is Ms. Robinson's mid-year evaluation for 2001 by Ms. Weiler. She verbally disagreed with the comments about teamwork, communications, organization, and acceptance of feedback. The feedback reflected issues that developed when Ms. Robinson worked with Mr. Takada on another audit involving collections. RX 8 is Mr. Takada's November 2001 internal evaluation of Mrs. Robinson's work on the project. In her written comments, Ms. Robinson expressed her belief that Mr. Takada's observations did not accurately reflect the situation or her performance. She did not consider her responses to be combative. Ms. Robinson found a few of the comments helpful in the areas of learning unique methodology and resolving conflicts with different levels of management.

When Mr. Graczowski rated Ms. Robinson's overall performance for November 30, 2000 through November 30, 2001, he gave her a "needs improvement," RX 9. However, she really didn't agree with the rating, though the observations about teamwork and curtailing her comments about past experiences were helpful. She did not take an adversarial stance with clients; she was not overly demanding and patronizing. Instead, Ms. Robinson would "challenge things." Ms. Robinson strongly disagreed with the comment that a project had been abandoned. Due to her being out for medical leave, she did not have time to work on audit revisions. Ms. Robinson believed that she delivered a quality product.

Concerning the timing of the bankruptcy charge offs, Ms. Robinson was aware that the legal department had determined that Discover's practice was not a problem.

When Mr. Graczowski placed her on the March 2002 action plan, RX 10, Ms. Robinson agreed that it was a good idea and would show Mr. Sutter how good she was, especially if she met the established criteria. However, upon present review of the document, which sets out specific deficiencies and directs improvement, Ms. Robinson would no longer accept Mr. Graczowski's characterization.

RX 123 is a professional development plan Ms. Robinson also received in March 2002. She believed the proposed benchmark for the development of beneficial relationships with clients and other members of her audit team in terms of constructive, positive interaction was "too vague and unmeasurable." The mention of a dogmatic approach to audits and unwillingness to partner in her 2002 performance appraisal, RX 12, probably reflects the attitude of a couple of auditees in the LAN audit who did not want Ms. Robinson looking into the purchase of security software. Ms. Robinson believed the inquiry was within the audit's scope. At some point during that audit, a couple of the auditees swore at Ms. Robinson. She believes they were trying to intimidate her into doing what they wanted. These individuals later complained to Mr. Graczowski and Mr. David Sutter.

In a March 12, 2003 e-mail, CX 32, Mr. Sutter expressed his support for Ms. Robinson's work with the Diabetes Foundation. He also complimented her work in September 2002 e-mail, CX 38. Her 2003 appraisal mentioned her work in the program and indicated that she had been selected as a campaign leader.

Another comment in her 2003 appraisal, RX 17, recognized her participation in the Information Systems Audit and Control Association.

The concerns and issues Ms. Robinson identified and reported during her Internal Audit Department (“IAD”) audits were part of job as an internal auditor. As an internal auditor, she had an obligation to report those issues and concerns in her audit reports. She reported the audit results to the auditees up to the vice president level and to her audit supervisor, who varied depending on the audit from Ms. Weiler to Mr. Graczowski to Mr. Sutter. Her audits also included a “write back” document which contained more detail and set out management responses and action plans. In the normal course of her work, the highest level of management to receive her audit reports was the President of Discover, Mr. Nelms. The CFO of Discover, Mr. Slusarz, the Discover General Counsel, Ms. McNamara-Corley, and the Morgan Stanley Audit Director, Mr. Burr or Mr. DeLuca, were also copied on the report. She believes everyone on the Discover Management Committee received a copy of her audits. The committee members were also aware of the quarterly report which summarized the status of every audit being conducted at that time.

Although Mr. Nelms was copied on the audit reports, Ms. Robinson felt compelled to send her February 2004 memorandum to him because most of the issues in her memo “had been deemed as too low of a tier to be in the reports or were not reported at all.” Some examples include the Orion and PBX audits, which were never reported, and the lack of a disaster plan for the Unix server farm and the bankruptcy charge off problems, which were deemed tier three issues and hadn’t been reported to Mr. Nelms or Mr. Slusarz.

While the problem was an internal control deficiency, Ms. Robinson doesn’t believe the lack of a fire suppression system at a Delaware bank used to issue Discover credit cards involved fraud against shareholders.

In the Oracle/Unix audit, Ms. Robinson noted the company was going to purchase software with a free two year maintenance program before Discover was ready to implement it. Although the premature purchase wasted a portion of the free maintenance period, Ms. Robinson does not believe the issue involved fraud against shareholders.

In the second half of 2002, Ms. Robinson also reported that an individual was intentionally misrepresenting the “numbers and information” to the approval committee in an effort to obtain software to the detriment of the company, which amounted to fraud against shareholders.

Ms. Robinson believes that by the time of her February 2004 memo the president and CFO of Discover were required to attest that internal controls were in place and had been reviewed. Ms. Robinson presented her memo to Mr. Slusarz because she “wanted to be sure” that the information got to “someone outside of audit who had the power and authority to be able to address the issues.” In her memo, Ms. Robinson stated that she had tried to proceed through normal reporting channels and the chain of command. However, Ms. Robinson had not discussed the memo with Mr. DeLuca or Ms. McNamara-Corley.

When she conducted the cell phone audit, Ms. Robinson reviewed billing records for patterns that might indicate non-business use. She believes the vice president's decision to let her administrative assistant use a company cell phone for personal use for four months and charging it off as a business expense was the type of concern Congress had in mind when it passed SOX. She also believed the incident would warrant the company considering whether the vice president was exercising poor judgment in other areas. Characterizing the phone use as a business expense was fraud against the company and shareholders.

She was also concerned about tax implications associated with contractor use of company cell phones because they might not be considered employees and the IRS requires substantiation of the business purpose for calls by company employees. If Discover reported the use as a business expense, and that expense was later disallowed by the IRS, the company's tax liability would increase which would affect the financial statement and represent fraud against shareholders.

After Mr. Sutter looked into the phone issues, he informed Ms. Robinson that he talked to the cost center managers about the problems and was satisfied that no issue of fraud existed.

During the spring of 2003, Ms. Robinson met with Mr. Graczkowski, Mr. Cavaliero of HR, Mr. Sutter and Ms. Navidad, to discuss a drop in her performance, among other things. Ms. Robinson had many questions about the change. She also expressed concerns about the independence of the audit department. They gave her some negative feedback about her performance and "may have" made a comment about her ability to partner and "possibly" about her communication style. They informed her that cost center manager who was identified in the phone audits had complained about Ms. Robinson's threatening tone.

Ms. Robinson doesn't recall meeting with Mr. Sutter in March 2003 to complain about Mr. Graczkowski's approach to her professional development plan. Mr. Sutter did talk to her about inappropriate comments she made to an audit manager, Mr. Brad Bolomo. Sometime in April or May of 2003, Mr. Sutter discussed with Ms. Robinson feedback from Ms. Karen Dollmeyer who alleged Ms. Robinson had "jumped over her head with an issue or issues." About the same time, Mr. Sutter also indicated that another audit department member, Mr. Osborne, complained about her jumping to conclusions and going several directions at once. Later in 2003, Mr. Sutter also informed Ms. Robinson that he had heard about an unpleasant conversation between her and Mr. Marshall. When Ms. Robinson approached Mr. Marshall about a change in an upcoming audit which she believed she was going to lead, they both became angry. Mr. Sutter also told Ms. Robinson that Ms. Zlateva complained about her being rude and uncooperative.

In June 2003, when Mr. Sutter and Ms. Navidad presented criteria for promotion, Ms. Robinson noted that "many if not all of the items on the list were not measurable criteria, and much of it was subjective." She was accustomed to having more measurable criteria. Ms. Robinson doesn't recall whether being open to feedback was one of the items; however, she does not believe that to be an appropriate item for a list of promotion criteria because of the measurement difficulties.

Around the spring of 2003, Ms. Robinson concluded that having HR involved was making her life more difficult and Ms. Navidad indicated that she would stop meeting with her. About this time, Ms. Robinson believed one of her strongest strengths was leadership.

In her initial meeting with Mr. DeLuca during an open forum in August 2003, Ms. Robinson asked if he considered changing the tier system for reporting audit findings and the method used for risk assessment. She also inquired whether he valued people with audit experience. A couple months later, Mr. Sutter indicated that she should talk to Mr. DeLuca one on one, rather than during a conference. Later, “in a fit of anger,” he told Ms. Robinson that some colleagues considered her questions inappropriate.

Although she doesn’t recall telling anyone, and might have agreed with another colleague’s assessment, Ms. Robinson believed Mr. Sutter was incompetent “in some ways.”

Sometime in the spring of 2003, Ms. Robinson told Mr. Sutter that she disagreed with making Ms. Zlateva and Ms. Greco managers because the appointment had gone to their heads and he had created “two little monsters.”

In the fall of 2003, Ms. Robinson disagreed with Mr. Sutter over the need to develop an audit plan agreeable with the chief information officer for Discover because in an earlier audit she had reported the phone issue with one of the officer’s direct reports. Ms. Robinson then told him that she intended to go to Mr. DeLuca with some of her concerns. At that point, Mr. Sutter became angry and told her about the complaints he had received about her questions to Mr. DeLuca during the August 2003 meeting.

Over the course of several audits, Ms. Robinson noted the absence of an effective process to cancel access to computer systems of persons who had left the company or been transferred.

During the investigation of her February 2004 memo, Ms. Robinson was interviewed for 10 to 12 days.

The October 2003 action plan listed several deficiencies and associated action steps. The plan was presented by Mr. Sutter and Ms. Dollmeyer. Ms. Robinson doesn’t recall her reaction. However, she was not “shocked about it” because she knew Mr. Sutter’s “reaction when I had told him a few weeks a couple of weeks before that I wanted to go to Tony DeLuca. And, I had experienced retaliation from him in the past, so I wasn’t surprised that after I told him that that there would be some kind of action like this.” Ms. Robinson acknowledged that the draft of the action plan was completed in August 2003, before her October 2003 conversation with Mr. Sutter about going to Mr. DeLuca.

The October 23, 2003 performance action plan listed numerous deficiencies, including deadlines, scope of audits, quarterly follow-ups, openness to constructive criticism, changing roles, teamwork, and trust. Ms. Robinson did not agree with the blanket statements. Nevertheless, while Ms. Robinson believed that she was performing satisfactorily in each area “in the audit profession,” the action plan indicated that her employer apparently disagreed.

Concerning feedback, Ms. Robinson was willing to accept constructive feedback; however, “I didn’t feel like I was getting any.”

In mid-November, a few weeks after receiving the October 2003 performance action plan, Ms. Robinson completed a self-evaluation of her performance as an auditor as part of the year end appraisal process, RX 16. In filling out the primary development needs portion, Ms. Robinson did not list any of the deficiencies identified in the October 2003 action plan. In the areas of teamwork, communication, and leadership, Ms. Robinson rated herself as “exceeds” or “consistently exceeds.” She listed as one of her development needs becoming proficient with a computer language. Finally, Ms. Robinson recommended that she be moved to a management position immediately to add more value to the audit team. As a manager, Ms. Robinson could mentor and train colleagues and become an active participant in making the audit department “a world-class organization.”

Ms. Robinson does not recall being advised by Mr. Sutter and Ms. Dollmeyer early in December 2003 that her action plan was going to be extended in order to conduct a 360 review. Any discussions Ms. Robinson may have had with Mr. Sutter and Ms. Dollmeyer about a 360 review were not tied to the action plan.

Although Ms. Zlateva was not mentioned in the February 2004 memorandum, Ms. Robinson believes she started wearing perfume that irritated her “because a lot of people in the department seemed to be participating in what I considered retaliation, such as isolating me and things like that.” Since Ms. Robinson did some printing and copying in the department area for the subsequent investigation, many people in the department knew she was involved in “something big” and they reacted negatively. Once the investigation started or shortly after, every time Ms. Robinson met with Ms. Zlateva she was wearing perfume. Ms. Robinson believes Ms. Zlateva was deliberately putting the perfume on because she was meeting with Ms. Robinson. Beginning in March 2004, at the start of a meeting, Ms. Robinson informed Ms. Zlateva about her allergic response to perfume and then moved away from Ms. Zlateva. Since they were in the middle of a conference call at the time, Ms. Zlateva didn’t respond verbally to Ms. Robinson’s whisper about the perfume. Although Ms. Robinson stayed for the half an hour meeting, she “was quite ill after the meeting” and had breathing difficulties. In previous discussions, some as early as 2001, Ms. Robinson had made Ms. Zlateva aware of her perfume allergy. Ms. Robinson also mentioned the allergy problem in front of Ms. Piercy; about late July 2004, Ms. Piercy indicated she had asked Ms. Zlateva to stop wearing the perfume.

About three weeks before her termination, Ms. Robinson was surprised by management’s sudden concern about her perfume sensitivity and Mr. Sutter’s memo to the department about fragrance sensitivity because they had been aware of the problem for several years. She suspects that since they decided to fire her, the company was trying to resolve the perfume issue to avoid a problem under the American Disabilities Act. CX 7A is the medical certification form, dated August 22, 2003, about her perfume allergy. Ms. Robinson completed a portion of the form with her physician, Dr. Lisa Abrams, indicating high sensitivity to perfume. No restrictions or durations were noted on the form. In December 2003, Mr. Tony Cavaliero, an HR representative, asked Ms. Robinson for an updated medical form. Around March 2004, Ms. Robinson met with Mr. Cavaliero and told him that her physician had told the company

physicians that she should be placed in a area that was not high traffic. CX 7B is a request from Ms. Piercy to complete a second form. CX 7C to CX 7E are August 2004 e-mails relating to her perfume sensitivity. Ms. Robinson supposes "it's possible" the activity about the perfume problem may have arisen then in response to her August 11, 2004 e-mail about the perfume problem, RX 214. Although she did not provide any additional documentation following the August 22, 2003 medical certification, Ms. Robinson verbally provided information on several subsequent occasions. The company did not ask for anything else in writing. When the company asked her to fill out another form in March 2004, and though perfume exposure remained a problem, Ms. Robinson did not complete the form because she was busy with the investigation and working late. Consequently, as of August 13, 2004, Ms. Robinson had not submitted another medical form. Ms. Robinson presented another medical certification form at the August 23, 2004 meeting when she was terminated.

About December 11, 2003, Mr. Sutter and Ms. Dollmeyer talked to Ms. Robinson about her abusive behavior. They also told her about complaints about her being uncooperative, tactless, disrespectful, and unable to receive feedback or constructive criticism. When Ms. Robinson received her 2003 evaluation, RX 17, she disagreed with the three primary development needs. Because she didn't believe the development concerns were "valid," she did not incorporate the feedback into her self-evaluation. In a December 2003 meeting, Mr. Sutter noted that his appraisal and her self-evaluation were "very far apart." Ms. Robinson doesn't recall many of the comments presented at that meeting. She did not agree with Mr. Sutter's statement that her team relationships were frayed. She recalls Mr. Sutter noting her participation in the diabetes program as positive. He also noted that she was a strong auditor in terms of technical skills. Mr. Sutter observed that while she had responded positively to the 2002 action plan, she had gone the wrong direction in 2003. He also commented about her difficulty with feedback and noted that none of his concerns were mentioned in her self evaluation. Mr. Sutter indicated that if she couldn't adjust quickly, they were going to have a hard time going forward. At the close of the meeting, she was informed that her overall rating was "needs improvement" and her salary would remain unchanged. Despite the comments at the meeting, based on her past experience with the company, Ms. Robinson "had no reason to think that it wouldn't just wear off" and her performance appraisal would go back up. Ms. Robinson did not believe her job was in jeopardy.

About December 15, 2003, Ms. Robinson contacted Ms. Bernice Jee, to discuss her medical leave problem because she believed the statute of limitations was running out. During that conversation, she may have mentioned that Mr. Sutter indicated he was going to place her on an action plan after she mentioned taking something to his boss. She may have also mentioned that IAD had several auditors with no experience and a lot of distrust was present. In response, Ms. Jee sent Ms. Robinson a form to request mediation or arbitration.

At a January 16, 2004 meeting about the 360 review, Mr. Sutter, Ms. Laura Birk, and Ms. Robinson completed a list of evaluators. Ms. Robinson disagreed with the inclusion of a few individuals on the list. Ms. Robinson recognizes Mr. Sutter's January 2004 e-mail indicating a list had been established, RX 90A. However, she did not agree completely to the list as he stated. Instead, based on the visual exchanges between Ms. Birk and Mr. Sutter, she believed that in response to her objections to some of the persons, Ms. Birk was influenced by Mr. Sutter

to keep them on the list as evaluators. The survey went out towards the end of January and were due back early February.

Ms. Robinson received a summary of the 360 review on about March 15, 2004 during a meeting with Ms. Piercy and Ms. Birk, RX 21. Ms. Robinson expressed some concerns about the process. In particular, she had been told she and Mr. Sutter would receive the results at the same time. She was also concerned about the integrity of the survey because at least one designated person didn't receive the survey and a colleague told her some members of the audit department were joking and bragging about trashing her 360 review. Additionally, one participant had told her about her 360 input but her comments were not in the final report. She believed the individuals conducting the 360 review may have selectively taken some comments out. The auditors' comments were "horrible." Based on the patterns of some of the responses, she also questioned the authenticity of the responses. At the same time, many of the auditees provided extremely good comments, though a few were bad.

Ms. Piercy and Mr. Birk responded that the feedback was accurate and she should focus on improved performance rather than challenging the feedback. Ms. Robinson's managers and supervisors fell in the auditor category. Due to her integrity concerns, Ms. Robinson questioned the validity of the 360 responses. Since she believed feedback was not valid, Ms. Robinson tried not to let the bad comments hurt her feelings. Many of the comments were taken out of context. At that time, Ms. Robinson believed she could identify several of the individuals who provided negative feedback.

When Ms. Robinson was presented with the June 2004 action plan, RX 212 and RX 31, one of the items noted was her failure to take the 360 comments to heart. She was advised to actively address the feedback in the 360 review. In her response, RX 32, after indicating that she was always open to constructive feedback, Ms. Robinson noted that her feedback from the auditees was quite favorable considering what might be expected from people who had been audited. Upon review of the 360 report, Ms. Robinson acknowledged not all the auditees' comments were favorable. Ms. Robinson also observed in her response that using comments in a performance document in response to SOX protected activities "smacks of retaliation" and that it was unfair to make her respond to the comments. In some areas, for most of her time at Discover, Ms. Robinson worked on improving her performance. For example, she made "significant efforts" to improve her peer relationships, although the investigation in the spring of 2004 changed that. She tried to be more proactive, gave advice when asked, and made a "concerted effort" to take extensive notes at staff meetings. On occasions, she solicited feedback from colleagues, particularly at the end of 2003.

Upon review of the June 2004 action plan presented by Ms. Zlateva, Ms. Robinson disagreed with first item related to management's perception that she displayed aggressive and disrespectful behavior. She disagreed with second and third points concerning a need for too much oversight in relation to her experience level on various aspects including audit scope and agreed actions. On the fourth point, she agreed that some of her peers might perceive her as uncooperative. However, Ms. Robinson did not believe that she was uncooperative. Similarly, Ms. Robinson disagreed with fifth and sixth improvement areas. She did not display inappropriate behavior or body language in the work place. Concerning criticism of others'

deficiencies, Ms. Robinson indicated that such action may be appropriate in an audit. She believed that point was included in the action plan in response to her February memorandum which highlighted numerous deficiencies about auditors' skills and experience. Ms. Robinson acknowledged that she had also made comments to her friends about other colleagues' competencies.

Although Ms. Robinson understood that she could improve, she disagreed with the general points because they could not provide specific examples of the deficiencies. Additionally, she was being critiqued for functions that were required under audit standards. Ms. Robinson believed:

they were trying to make me do what they wanted me to do. And what I mean by that is this was an environment where if you disagreed with someone, if you fought for something to try to fulfill your responsibilities, and if you disagreed with the wrong people, then you were scolded and punished for it. And there were other people in the department who disagreed very much with the same things. Some made the decision to leave; some made the decision to compromise their standards and ethics to get promoted and that worked. And I think that I was the last holdout that hadn't done that and I think that's what they were trying to do. And, I think that they were also punishing me for what happened in February.

Ms. Robinson agrees that she could have done a better job meeting deadlines. She also had serious work to do building trust with management and peers after the memorandum investigation. She didn't have very long to make those changes and doesn't recall any specifics.

Ms. Robinson's performance action plan, 2003 evaluation, and self evaluation form, RX 31, RX 17, and RX 16, reference an internal audit competency matrix, RX 3. However, the matrix doesn't establish professional work standards.

In her June 14, 2004 self evaluation for the mid-year performance evaluation, RX 34, Ms. Robinson did not list any of the deficiencies previously cited in her performance action plan. As strengths, Ms. Robinson listed ability to network and build relationships with the audit committee, as evidenced by very favorable comments on the 360 review.

On June 18, 2004, Ms. Robinson sent an e-mail to Ms. Navidad and Ms. Birk, thanking them for the opportunity to work with a coach, RX 37.

At the end of June 2004, about half way through the action plan process, Ms. Zlateva told Ms. Robinson that she was not seeing any improvement in the area of accepting feedback and urged her to make immediate and sustained correction of noted deficiencies. In discussing the objectives for the coaching, Ms. Zlateva commented that Ms. Robinson was not open to feedback. Ms. Zlateva also told Ms. Robinson that her tone was argumentative and unprofessional.

Because Ms. Robinson's files were taken during the investigation and not returned, she was unable to conduct the necessary completion actions for the Unix and LAN audits requested by Ms. Zlaveta. Ms. Robinson told her about the problem several times.

On another occasion about August 6, 2004, in response to a request from Ms. Zlaveta to complete some work on a check list, Ms. Robinson told her she couldn't proceed until Ms. Zlaveta had completed her work on an audit. At that time, Ms. Robinson was under either the action plan or JIJ process.

The week before she was fired, Ms. Robinson and Ms. Sandy Davis unsuccessfully looked for her missing working papers in the file room. Ms. Robinson did not have time to let Ms. Zlateva know that she hadn't found the files before she was fired.

In a December 2003 meeting with Mr. Cavaliero and Ms. Dollmeyer, Ms. Robinson was informed that the action plan was kept in the manager's file rather than her personnel file.

In October 2003, Ms. Robinson indicated to Mr. Sutter that some of her concerns should be referred to Mr. DeLuca. Mr. Sutter ordered her not to talk to anyone about her concerns and then subsequently placed her on an action plan, which Ms. Robinson believed was a precursor to a demotion. She received the action plan on October 23, 2003. Though Ms. Robinson has now seen a draft of the action plan, completed in August 2003, she still believes Mr. Sutter put her on the action plan partially in response to their exchange in October 2003.

Ms. Robinson worked on her February 2004 memorandum for "months." In a January 2003 draft version, RX 203, she indicated that based on Mr. Sutter's threats, she believed the memo would be her last act as a Morgan Stanley employee. Because she wanted the focus to be on the identified issues, Ms. Robinson did not include that assertion in the final version of the memorandum.

During a conversation about the 360 review with Ms. Piercy, Ms. Zlateva, and Ms. Navidad, Ms. Robinson indicated that she believed the process was so tainted that she had nothing further to say about it.

In her February 2004 memorandum, Ms. Robinson asserted that the fundamental cause of her disagreements with Mr. Sutter related to their individual levels of work experience, training, education, and certification. She attached her resume and Mr. Sutter's bio to illustrate the point. She also expressed various concerns about several audits dating from 2001.

Ms. Robinson was aware of the company's policy on post-termination obligations of employees. She was also aware of the information protection provisions and her obligation to protect company information. Terminated employees were expected to return company information. However, Ms. Robinson believes in practice getting items returned from terminated employees other than credit cards, cell phones, and laptops was not part of the regular process.

Around August 2004, Ms. Robinson received a document from Ms. Zlateva containing a list of deadlines, CX 41.

Due to stress associated with her intention to submit the memorandum, Ms. Robinson was out sick from January 5 through January 9, 2004. Although those days preceded her January 12, 2004 draft, she did not work on the memo while she was home sick.

In a June 2004 conversation, Ms. Robinson told Ms. Zlaveta that her management style was very negative and depressing because she was only waiting for an opportunity to criticize. Ms. Robinson indicated that little of her feedback was constructive. She also informed Ms. Zlaveta that at times her behavior was insulting.

At some point, as part of setting coaching goals, Ms. Zlateva gave Ms. Robinson a list of objectives which included the acceptance of feedback, CX 6. Based on advice from and with assistance of her coach, Mr. Tom Rosenak, Ms. Robinson prepared and presented a response to Ms. Zlateva, CX 6. She told Ms. Zlateva that she did not believe Ms. Zlateva was in any position to evaluate Ms. Robinson's communications. While Ms. Robinson was certainly willing to respond to constructive feedback, she was not getting any such feedback from Ms. Zlateva. Ms. Robinson wished she could get negative people like Ms. Zlateva to offer constructive feedback. Some revisions to the responses were made at Mr. Rosenak's suggestion.

[Redirect examination] Around March 20, 2005, upon return from a trip, Ms. Robinson learned that OSHA dismissed her SOX complaint.

When Ms. Robinson was terminated, she returned the company's laptop computer.

Ms. Robinson recalls that Mr. Sutter cancelled one of his scheduled reviews with her in December 2003 to go to basketball practice. She believed that cancellation was indicative of his view on the importance of their meetings.

Prior to the close out of the investigation, Ms. Robinson sent an e-mail to Ms. Piercy on May 5, 2004 indicating that she had been subject to retaliation for her participation, RX 20. Due to the location of the investigation meetings at the IAD office site and her travels between the IAD office and legal department, her colleagues were aware that she was involved in something with the legal department. The group calendar also showed that she was meeting regularly with HR. "Very, very few people" in IAD would even talk to Ms. Robinson. Ms. Robinson also believed the sudden use of perfume was retaliation.

Ms. Robinson believed that "a poor work record was being manufactured." She received criticisms for issues that others were not criticized for. "It seemed that they were trying to make it look like I was the only one not doing something or doing something." They used "very, very small incidents" and made "them appear to be something very major." For example, Ms. Robinson received criticism for not having the physical security audit closed yet Ms. Zlateva had not completed her work.

During her employment, Ms. Robinson "felt" implied threats several times that if she continued to fulfill her professional responsibilities she would be punished.

After completion of the investigation, Ms. Robinson's work load was increased. The more hours that she worked to complete her work, the more work they would "pile on."

Ms. Robinson's appraisal for January through June 2001 identified several strengths, including self-motivation, audit skills, and ability to work independently. Ms. Robinson believed her communication style was very open and honest.

Ms. Robinson displayed leadership by mentoring colleagues, leading audits, running the diabetes fund raising program, and instigating a birthday lunch program. She also was a meeting director and vice president for an professional auditor organization.

RX 108 is the copy of Ms. Robinson's personnel file that she received in response to her request after she was fired.

Ms. Robinson's business card indicated that she worked in the Morgan Stanley Internal Audit Department. The card did not reference Discover or Novus.

Since some of the 360 responses contained similar wording and comments, Ms. Robinson was suspicious that they were prepared by one person. She also believed some of the respondents were joking and discussing the survey with each other. The surveys were suppose to be completed individually and confidentially. Further, one of the persons on the 360 list did not get a chance to submit a response. Additionally, another person's feedback does not appear to be in the 360 summary.

The Discover Employee Handbook, CX 303, defines insubordination as refusing to follow legitimate instructions of a superior directly relating to the job performance.

Ms. Robinson believed fraud was committed on the shareholders by using company money "in a way that was presented in a way that was not the actual use." The expenses were claimed as business expense deductions and would probably be disallowed. Additionally, the financial statements would be "overstated because tax liability would actually be higher than it would be reported on the financial statements, on a balance sheet." Ms. Robinson reported one example of cell phone misuse. Other cell phones could not be located. The cost associated with the one cell phone "was very small in comparison" to the \$1.2 million spent each year on cell phones and pagers. However, Ms. Robinson believed that "if there was fraud involving someone who had responsibility or influence . . . over internal controls, then it needed to be reported whether it was material or not."

Ms. Robinson was also concerned the long-term contractors used by Discover were being incorrectly characterized as employees. If that characterization was changed, the company would potentially owe more taxes.⁶

Mr. Graczkowski told Ms. Robinson that she could use the title of audit supervisor. No one ever told her to stop using the title. Ms. Robinson never saw page 27 of CX 108 during her

⁶The remaining portion of the redirect examination testimony, the subsequent cross examination, and final redirect examination occurred on the last hearing day after all the witnesses had testified.

employment at Discover. Mr. Graczowski did not indicate the title change was related solely to restructuring. Instead, he indicated the change involved increased responsibility even though no raise in pay occurred.

In an October 2003 meeting, Mr. Sutter “blew up” at Ms. Robinson when she indicated a desire to take some of her concerns to Mr. DeLuca.

On April 29, 2004, Ms. Robinson met with Ms. McNamara-Corley about her retaliation complaints and how Ms. Jee was conducting the HR portion of the investigation. Ms. Jee indicated that she was going to interview numerous persons in IAD.

Between the departure of Mr. Graczowski and December 1, 2003, Mr. Sutter was Ms. Robinson’s sole supervisor.

In an initial meeting of auditors for the PBX audit, Mr. Graczowski noted that Ms. Robinson was the only person with prior PBX audit experience. Cell phones and calling cards certainly fell within the scope of the audit. From contacts in other companies, Ms. Robinson was aware that cell phones have been widely abused as company assets. In the situation Ms. Robinson audited, a Discover vice president was passing off the cell phone cost as a business expense, which “absolutely” constituted fraud. The vice president “knew that those costs were being charged to the company as legitimate company expenses, which they weren’t”; the “administrative assistant was getting thousands of dollars of benefit of it”; and, at the same time, the company was “losing money.”

When Mr. Sutter discussed the October 2003 action plan, he attributed some of the criticisms to Ms. Dollmeyer, in particular, the concerns about jumping the chain of command and unprofessional behavior. Ms. Robinson believed Ms. Dollmeyer’s inputs were “inappropriate” because she was using her position as an HR person to lodge a complaint, apparently due to a “personal grudge” that “happened as her being an auditee.” Ms. Robinson was not involved in the development of the action plan.

Ms. Robinson was never certain what standards her performance was to be measured against. Although she received year end appraisals in 2001, 2002, and 2003, she believed the evaluated areas only “vaguely” established standards. Collectively, the company’s feedback:

didn’t give enough information to help even understand necessarily what the person meant, let alone correct anything. I always saw them as, as rather than something to help the employee develop and grow as a professional, as a way to criticize, bash even. A lot of it was based on hearsay.”

According to Ms. Davis, while acknowledging he could not tell her how to pick her friends, Mr. Sutter criticized her for being a friend with Ms. Robinson.

Ms. Robinson did not tell Ms. Davis that she wanted to be fired.

When Ms. Robinson and Mr. Slusarz discussed her memorandum in February 2004, he roughly valued the potential value of the bankruptcy charge off issue at \$40 million.

Ms. Robinson made repeated requests to Mr. Sutter for the 360 review in November and December 2003. Mr. Sutter didn't seem to want to make time for the review.

Ms. Robinson never complained about Ms. Navidad. In early 2003, Ms. Robinson told Ms. Navidad that she wanted to discontinue the HR meetings.

Ms. Robinson was surprised that Ms. Birk was involved in the coaching process considering "the trust issues."

Ms. Robinson reported to Ms. McNamara-Corley and Mr. Slusarz the effort by Ms. Jee and Ms. Hoffman to "package" Ms. Robinson out of the company.

Ms. Robinson met with Mr. Osborne about employee terminations and cell phones before she met with Ms. Dollmeyer. Ms. Robinson approached Mr. Osborne to obtain the names of individuals responsible for various issues in the audit.

During the PBX audit, Ms. Robinson complained to Mr. Brad Bolomo about Mr. Sutter because "I felt that my work was, or potentially would be, compromised by what I felt was Dave's lack of auditor independence with certain people in business technology." Mr. Bolomo did not seem uncomfortable with the conversation.

During her various audits, Ms. Robinson did not disclose any confidential information.

During the investigation of her complaint, Ms. Robinson reported about 20 instances of retaliation.

Ms. Robinson went to Ms. Sara Horowitz on two or three occasions with questions about bankruptcy policy.

Ms. Robinson directly e-mailed Ms. McNamara-Corley about contractors based on comments from other individuals that they were having trouble with the law department getting the contracts in place.

[Cross examination] In the first coaching meeting, both Ms. Robinson and Ms. Zlateva were in the attack/defend mode.

Ms. Robinson believed the vice president who permitted the personal use of a company cell phone should be disciplined for fraud.

Ms. Robinson believes Ms. Dollmeyer was "instrumental" in the development of the action plan and involved in the year end review.

RX 76 is a professional development plan that Ms. Robinson may have seen sometime during her employment with Morgan Stanley/Discover.

While joking or venting, Ms. Robinson may have told Ms. Davis that she was not going to do Ms. Zlateva's work anymore.

Ms. Davis shared with Ms. Robinson some of the conversations Ms. Davis had with Mr. Sutter and Ms. Dollmeyer.

The reference in RX 416 about preparing to blow the whistle means that the stress associated with preparing the February 2004 memorandum caused her to stay out of work from January 5 through January 9, 2004. During that period, Ms. Robinson did not do anything.

[Redirect examination] Ms. Robinson intentionally omitted individual's names in her February 2004 memorandum to preserve anonymity. After the investigators requested specific names, Ms. Robinson went through the complaint and indexed the contents to names.

Mr. Anthony DeLuca
(TR, p. 741 to 852)

[Direct examination] Mr. DeLuca has been the global head of internal audit for Morgan Stanley since the spring of 2003. In that capacity, Mr. DeLuca works on behalf the of Audit Committee for Morgan Stanley Board of Directors, developing audit plans, assessing risks within the company, ensuring adequate resources for executing audit plans, and interacting with senior management.

Prior to joining Morgan Stanley, Mr. DeLuca worked with a public accounting firm for 15 years as a CPA in the audit practice. The Morgan Stanley IAD is structured into four business and two functional units: asset/investment management business, retail security business, institutional securities business, credit card services business, international operation, and shared service activities (which crosses all the businesses).

Within Morgan Stanley's business structure, as head of the internal audit function in the credit services division, Mr. Sutter reported directly to Mr. DeLuca. Mr. Sutter was directly employed by Novus, which is a holding company for the credit services business, Discover Card. Similarly, the individuals working for Mr. Sutter were employed by Novus.

Ms. Kelly McNamara-Corley did not report to Mr. DeLuca. She had no supervisory responsibilities in IAD.

Mr. DeLuca first heard about Ms. Robinson in May 2003 shortly after he joined the department. At that time, he called all his "direct reports" to New York City and asked them to list their very top performers and the very bottom performers. Mr. Sutter listed Ms. Robinson as one of his department's bottom performers.

On August 7, 2003, Mr. DeLuca met Ms. Robinson at an introductory breakfast meeting with about six audit employees at Riverwoods in Chicago. At the close of the meeting, Ms. Robinson asked Mr. DeLuca whether he understood the level of incompetence that existed within his management ranks. Mr. DeLuca doesn't recall his response. However, given the setting of the meeting, Mr. DeLuca considered the question "odd and inappropriate."

About a week later, Mr. DeLuca checked with Mr. Sutter to see if the participants had provided any feedback. Mr. Sutter told him a few of the participants provided negative feedback about Ms. Robinson's comment at the end of the meeting.

Around October 2003, while establishing compensation levels for IAD personnel, and in light of Ms. Robinson's performance appraisal, Mr. DeLuca had a conversation with Mr. Sutter about keeping Ms. Robinson's compensation "flat a second year in a row again due to performance problems." Mr. DeLuca has the final vote on the compensation decision. Later, Mr. DeLuca asked whether Ms. Robinson understood that performance was the reason that "she was being held flat." Mr. Sutter responded that he had delivered the compensation decision to Ms. Robinson and they would continue to work on the performance problems with an action plan.

During a four day "off site" conference with IAD personnel, Ms. Robinson did not raise any concerns or issues about IAD or Mr. Sutter.

In February 2004, the director of the Morgan Stanley law department informed Mr. DeLuca that the company had received a memorandum from Ms. Robinson containing allegations directly related to accounting, audit, and internal controls "matters." At that time, Mr. DeLuca was one of three members of the Morgan Stanley review team for whistleblower complaints. Since the allegations involved IAD functions, Mr. DeLuca recused himself as a decision maker on the team. In response to the memorandum, and to "early adopt" procedures that were to become effective mid-2004 to ensure compliance under SOX, the remaining two review team members decided to initiate an investigation with an outside audit firm, KPMG. The team also decided to rely principally on Ms. McNamara-Corley, general counsel for Discover, for legal matters during the investigation. Mr. DeLuca did not participate in the investigation. At the close of the investigation, KPMG presented their findings and determined no action was warranted by Morgan Stanley.

In early summer of 2004, Mr. DeLuca was advised of Ms. Robinson's continued performance issues. Some time in July to August 2004, Mr. DeLuca met with a Human Resources representative and an employment lawyer to discuss the "next steps in remediating Ms. Robinson's performance." They informed Mr. DeLuca that the next step was a JIJ letter. Mr. DeLuca decided a JIJ letter was warranted to give Ms. Robinson a last chance to address performance deficiencies. Mr. DeLuca made his decision because Ms. Robinson continued to have performance issues in "executing her responsibilities" despite having been notified numerous times of the "need to address those performance issues." Mr. DeLuca concluded it was in the best interests of Morgan Stanley and Ms. Robinson "to put a finalization to that process." About half way through the JIJ process, Mr. DeLuca was informed that no progress

was being made, so he decided to terminate her employment. Mr. Sutter did not participate in either the decision to give Ms. Robinson a JIJ letter or terminate her employment.

As the global head of audit for Morgan Stanley, Mr. DeLuca was aware of the job market for senior internal auditors. In his opinion, the past year was “probably the hottest job market anyone in the profession has ever seen.” A significant demand for internal audit professionals existed and there were not enough auditors to meet that demand. That demand included Chicago.

[Cross examination] In late 2004, Mr. Sutter was transferred out of IAD. He received a promotion to Operational Risk Director for Discover. His move did not have anything to do with his interactions with Ms. Robinson.

Ms. Robinson was employed by Novus, which is the parent holding company for the credit card business. He believes Morgan Stanley is the parent company for Novus. If an individual wished to invest in Discover Card business, he would probably have to purchase Morgan Stanley common stock because “Morgan Stanley owns Discover Card.” The financial reports of Discover are reported in Morgan Stanley’s financial statements to the SEC. The annual report has “segment disclosures” of each of its four principal businesses, including credit card services.

Mr. DeLuca believes the business cards for IAD employees said “Morgan Stanley” since the IAD “works for the Audit Committee of Morgan Stanley.” While Mr. Sutter and Ms. Robinson were paid by Novus, they reported to the Morgan Stanley Audit Committee. Their activities were control by the Morgan Stanley Audit Committee and Mr. DeLuca exercised managerial responsibility on behalf of the committee.

Mr. DeLuca doesn’t recall Ms. Robinson asking about a change in the tier audit report system, or risk assessments, but the subjects were raised at several employee meetings he attended. He indicated that all processes were under review. Since the purpose of the breakfast meeting was essentially just to get to know each other, and most of the conversation centered on career aspirations and personal activities, Mr. DeLuca considered Ms. Robinson’s question about competency in front of other employees to be inappropriate and disrespectful. She made the statement as everyone was getting ready to leave the conference room. Mr. DeLuca informed the attendees that he had an open door policy and he liked to hear direct feedback from individuals. His preferred method was direct contact by phone if he was not in the same location.

Mr. Sutter may have reported one or two other poor performers in addition to Ms. Robinson. At that time, Mr. DeLuca did not question the criteria Mr. Sutter used to identify his bottom performers. He believes Mr. Sutter would have used the core competencies set by the department for annual evaluations.

None of the issues Ms. Robinson presented in her February 2004 memorandum were tier 1 issues. Some may have been tier 2. Mr. DeLuca took no corrective action in light of the KPMG investigation report other than to make a mental note to review the department policies to

make sure the staff was capable of meeting the policies they had in place. Mr. DeLuca believes a complainant would be informed whether an investigation had been undertaken, whether the investigation was closed, and whether any additional information was needed from the complainant. The detail findings of the investigation are not communicated to the complainant.

Ms. Robinson had performance issues in the areas of judgment, teamwork, personal interaction, and execution of assignments. Since Mr. DeLuca never reviewed Ms. Robinson's work product, he couldn't make a judgment on her technical competency. His assessment was based on her performance evaluations. Concerning personal interaction, Ms. Robinson "lacked the ability to develop relationships with team members from a cooperative perspective." She also "lacked diplomacy in interviewing clients."

Ms. Robinson's remark about competency at the August 2003 breakfast meeting played no role in Mr. DeLuca's decision to terminate her employment.

When Mr. DeLuca asked about feedback from the breakfast meeting, Mr. Sutter told him that most of the participants were appreciative for his meeting with them. However, the staff felt awkward and uncomfortable with Ms. Robinson's comment.

Mr. DeLuca is aware that generally during an investigation, a participant is not supposed to discuss any issues outside the investigation. As a result, he was not surprised when Ms. Robinson didn't talk to him about work in the spring of 2004.

The Human Resource Department in Riverwoods (Chicago) explained the JIJ process to Mr. DeLuca. Until then, he was not aware of that process. At that point in time, July or August 2004, prior to issuance of the JIJ letter, Mr. DeLuca decided to terminate Ms. Robinson. He made the decision after learning during his meeting with HR that Ms. Robinson had not paid attention to the performance issues identified in the action plan and her repeated failures to improve. The meeting was conducted in response to his request for an update on Ms. Robinson's performance since they were approaching the "compensation season." He knew Ms. Robinson had been on an action plan.

Mr. DeLuca orally communicated to the Audit Committee a summary of Ms. Robinson's February 2004 memorandum.

Mr. DeLuca was told that halfway through the JIJ process, he could inquire as to Ms. Robinson's response. When he made the inquiry two to three weeks later, Mr. DeLuca was informed that Ms. Robinson had made no progress. As a result, Mr. DeLuca decided termination was warranted.

Mr. DeLuca learned that Ms. Robinson had been criticized for not meeting deadlines during the memorandum investigation when he asked during the JIJ discussions whether she was meeting objectives and the status of her assigned audits. Missing deadlines was one of the considerations Mr. DeLuca used in deciding to terminate Ms. Robinson. He did not use as a factor in the termination decision the fact that an investigation had been instituted based on her

February 2004 complaint. He did not consider the investigation an interruption to the IAD activities at Riverwoods.

The activities at Riverwoods are not regulated by the same regulators as the investment businesses. Instead, Discover is regulated by banking regulators.

Upon review of Ms. Robinson's February 2004 complaint, CX 1, Mr. DeLuca believes the items concerning failure to report management fraud "would be a matter the securities regulators would say the company should put forth to the Audit Committee." At the same time, since Morgan Stanley's SEC filings relate to its financial condition and financial internal controls, the memorandum issue about unauthorized access to account information is irrelevant to the financial reports.

Ms. Robinson's failure to get a pay increase at the end of 2003 was not a factor in his termination decision. He based his decision on her personnel record and "other communications" with HR personnel. Mr. DeLuca doesn't recall whether he was aware that Ms. Robinson's mid-year review for 2002 was "exceeds performance standards." He reviewed the year end appraisals for 2001, 2002, and 2003.

During a conference call with HR during the JIJ period, Mr. DeLuca asked whether Ms. Robinson was addressing the issues identified in the previous action plans and the constructive criticism concerns aimed at improving her performance. He did not review the actual performance plans. In his opinion, Ms. Robinson had failed to use diplomacy interacting with clients, build stronger relationships with her department colleagues, improve her organizational skills in executing work, spend more time focusing on judgment factors in assessing significance of findings, and apply professional skills in difficult situations. An HR representative informed Mr. DeLuca that Ms. Robinson disagreed with the performance observations and did not believe she needed to take any corrective action.

Upon his arrival at Morgan Stanley, Mr. DeLuca became aware that "Ms. Robinson was a low performance provider."

When Mr. Sutter told Mr. DeLuca before the breakfast meeting that Ms. Robinson had some concerns that she wanted to bring to him directly, Mr. DeLuca responded that would be great.

Had he been aware of Ms. Robinson's participation in the Juvenile Diabetes Research Foundation, Mr. DeLuca would have considered that work. However, her participation does not necessarily distinguish her since most employees are encouraged to "give back to the community." Mr. DeLuca believes Novus and Discover are subject to SOX as subsidiaries of Morgan Stanley. Usually, companies under common control are required to file a single consolidated federal tax return.

IAD experiences a 20% turnover and has lost over 100 people in the last two years due increased competition for talent.

[ALJ examination] Morgan Stanley is a publicly traded company. Neither Novus or Discover are publicly traded. Although IAD employees at Discover are paid by Norvus, Mr. DeLuca has supervisory control of the IAD members. He has authority to terminate IAD auditors working at Discover. Mr. DeLuca also has the authority to affect their level of compensation. He utilized both authorities in Ms. Robinson's case. Mr. DeLuca's employer is Morgan Stanley.

When he asked for a list of poor performers, Mr. Sutter probably identified two employees, including Ms. Robinson. Of those designated individuals, none are still at Discover. Mr. DeLuca has participated in one or two other performance-related terminations in Mr. Sutter's department.

Mr. DeLuca did not discuss Ms. Robinson's termination with Mr. Sutter because at that point he was no longer Ms. Robinson's direct supervisor. Instead, Ms. Zlateva supervised Ms. Robinson. Mr. DeLuca did not have any direct communication with Ms. Zlateva concerning Ms. Robinson's termination. He rendered his decision based on documents and conversations with HR representatives. Mr. DeLuca's direct reports can not terminate employees without his knowledge.

Had Mr. DeLuca not been informed of the JIJ process, he would have fired Ms. Robinson prior to issuing a JIJ letter.

Mr. DeLuca has no feelings about Ms. Robinson's complaint which caused Morgan Stanley to incur the expense of an outside audit company and resulted in a determination that there was no merit to her concerns.

Based on reports from HR personnel, Mr. DeLuca believes that all terminated Morgan Stanley auditors, with the exception of Ms. Robinson, have found re-employment.

Mr. Rocco Joseph DeGrasse
(TR, p. 1021 to 1067)

[Direct examination] An attorney, Mr. DeGrasse is a principal of KPMG, an accounting firm. One of his specialties is fraud investigations. About February 10, 2004, the Morgan Stanley Audit Committee, through Mr. Oppenheim of the Morgan Stanley law department, engaged KPMG for an investigation of Ms. Robinson's memorandum which included some allegations within the context of SOX. Mr. DeGrasse's role "was to find facts and to provide assistance to Morgan Stanley in terms of subject matter familiarity or experience." The process included data retrieval, review of data, witness interviews, interpretations, evaluations of witness statements, follow-up, and an oral report. Of the three general areas of issues raised by Ms. Robinson, Morgan Stanley retained responsibility for the personnel problems. The other two areas involved: a) specific transactions, which were individually investigated; and, b) general observations, which were evaluated by synthesizing information from the individual transactions for corroborating patterns.

During the investigation, Ms. Robinson was cooperative. She produced all requested documents and was available for briefings when requested.

At the conclusion of the investigation, Mr. DeGrasse discussed it with Mr. DeLuca for about five minutes. The KMPG portion of the investigation was delivered to Mr. Oppenheim. Later, during a May 6, 2004 meeting with Ms. Robinson, Mr. Oppenheim orally presented a summary of the investigation and conclusions concerning her allegations. After indicating that Morgan Stanley had taken her memorandum seriously and conducted an investigation “at some significant cost” with the assistance of KPMG, Mr. Oppenheim stated the investigated topics fell into three categories, or “buckets.”

First, several of Ms. Robinson’s allegations had some merit and were worthy of review. However, the investigation revealed that Morgan Stanley was already addressing those issues. Ms. Robinson was just not in a position to have known that. For example, the company’s cell phone policy was being revised.

The second group involved allegations for which Ms. Robinson bore partial responsibility. For example, delayed or incomplete audits. In other words, “Ms. Robinson had some responsibility for the problems of which she complained.”

Third, some of the allegations “simply had no merit.”

Mr. Oppenheim also added that overall the investigation found no evidence of intentional misconduct or fraudulent intent.

Although Ms. Robinson had stated that she felt she was being retaliated against during the investigation, Mr. DeGrasse did not investigate that statement because it related to the personnel portion of Ms. Robinson’s complaint which was being handled by Morgan Stanley and not within the scope of KPMG’s engagement. He informed Ms. Jee of the allegation.

During the investigation, Mr. DeGrasse met with Ms. McNamara-Corley between 5 to 15 times. Ms. McNamara-Corley was the general counsel for Discover Financial Services.

Mr. Tom Rosenak
(TR, p. 1168 to 1225)

[Direct examination] Mr. Rosenak is a training consultant and executive coach. He has been engaged by Discover Financial Services for executive coaching three times, including Ms. Robinson. In June 2004, Ms. Birk of HR contacted Mr. Rosenak because Ms. Robinson selected him. His contract called for a minimum of ten hours of coaching.

In their first meeting, Ms. Robinson indicated that she wanted to work on communication skills and develop skills of “graceful assertiveness” with difficult people. In the next meeting, Mr. Rosenak, Ms. Robinson and Ms. Zlateva unsuccessfully attempted to reach an agreement on how they were going to work together. The meeting was contentious because Ms. Robinson did

not believe Ms. Zlateva was being sincere in setting her objectives. She believed the stated objectives were moving targets.

Later, Mr. Rosenak described their interaction as “attack-defend.” Ms. Robinson was the aggressor because she vented a track record of Ms. Zlateva’s behavior that was inconsistent with her presentation at the meeting. Ms. Robinson had “a lot of passion” and “some negativity that had been building up.” Ms. Robinson was also very willing to try to develop her communication skills.

In his next meeting with Ms. Robinson, Mr. Rosenak helped her develop a way to constructively communicate her concerns because as long as she worked at Discover, she was going to have to communicate with Ms. Zlateva.

At the next meeting with Ms. Zlateva, they discussed several areas of needed improvement including time management, meeting deadlines, and communications. They were able to reach an agreement on the improvement areas. Both parties were going to work on mutual respect. Ms. Zlateva was going to focus on giving constructive feedback and setting clear deadlines. Ms. Zlateva acknowledged her need to improve in those areas and expressed a willingness to do so.

In his conversations with Ms. Robinson, Mr. Rosenak found her to be open to constructive feedback. She was able to take his feedback and put it into action. She needed to work on being able to communicate in challenging situations.

Mr. Rosenak conducted a few more meetings with Ms. Robinson. Eventually, Ms. Robinson told Mr. Rosenak about the ongoing corrective action process. However, her employment was terminated before they were able to have another meeting with Ms. Zlateva.

When Ms. Piercy called to ask about Ms. Robinson’s progress, Mr. Rosenak explained the general areas they were working on. However, because he had an agreement to only discuss progress with Ms. Robinson present, Mr. Rosenak felt uncomfortable about the call. That same day, Mr. Rosenak told Ms. Robinson about Ms. Piercy’s inquiry. Upon review of the comments in the JIJ letter about coaching, Mr. Rosenak agreed with the themes but would not have used the same language. At the same time, Mr. Rosenak didn’t believe any reference to the coaching in the JIJ letter was appropriate. His purpose was to help Ms. Robinson develop skills that would make her successful at Discover and not to be documentation for a termination action.

During his several coaching sessions with Ms. Robinson, she appeared sincere and willing to work on issues. At the same time, she believed that she was being singled out and treated unfairly. Ms. Robinson indicated that she had blown the whistle on some company activities.

[Cross examination] Mr. Rosenak derived the totality of understanding of the interaction between Ms. Robinson and Ms. Zlateva from his meetings with them.

Ms. Vesela Zlateva
(TR, p. 1271 to 1302, and 1393 to 1562))

[Direct examination] Ms. Zlateva works in the Internal Audit Department at Discover, Riverwoods, Chicago. Presently, she is a senior manager. Prior to December 2004, Ms. Zlateva was a manager in IAD. She became a manager on December 1, 2002.

Ms. Zlateva first met Ms. Robinson during Ms. Zlateva's pre-employment interviews at Discover. She was hired around August 2001 to work for Discover, which is part of Morgan Stanley. Her business card lists Morgan Stanley.

In the autumn of 2001, Ms. Zlateva was a team member with Ms. Robinson on the RACF audit, involving information security controls. Ms. Robinson was in charge of the audit.

After promotion to manager in 2003, her manager, Mr. Jerry Graczkowski, asked Ms. Zlateva to supervise Ms. Robinson during the PBX voice mail audit and monitor other audits. When Ms. Zlateva attempted to obtain status reports on the audit and the reason for delays, she had communication problems with Ms. Robinson. Upon inquiry, Ms. Robinson indicated that she didn't understand Ms. Zlateva's role in the project, what value she was bringing to the audit, or why she was involved. After Ms. Zlateva brought her communication problems to Mr. Graczkowski's attention, they met with Ms. Robinson to obtain a status report. Mr. Graczkowski explained that he asked Ms. Zlateva to track projects and be involved. He asked Ms. Robinson to cooperate and help Ms. Zlateva get the audit status. Eventually, after the PBX audit's name was changed to Telecommunications Equipment, the report was finally issued in 2005.

After Mr. Graczkowski left the company in 2003, Mr. Sutter asked Ms. Zlateva to continue with her supervision of Ms. Robinson. However, the communication problems persisted. At times, Ms. Robinson was confrontational or wouldn't answer her questions. Her body language was also a problem at times because she would show that she didn't respect the person she was talking to. During a subsequent meeting, Ms. Robinson was uncooperative and stated that if Ms. Zlateva wanted to fire her, well she was still there and Ms. Zlateva would have to cope with that. About that time, Ms. Zlateva shared with Mr. Sutter her communication problems with Ms. Robinson. Mr. Sutter indicated that he would discuss the issue with Ms. Robinson. Her communication problems with Ms. Robinson continued throughout the time she worked with her.

On December 1, 2003, following a reorganization of IAD, Ms. Zlateva became a group manager which included direct supervision of Ms. Robinson. When Ms. Zlateva asked about missed deadlines, Ms. Robinson would indicate that she didn't have time to discuss them with her. After the communication problem became more difficult and meetings more confrontational in 2004, Ms. Zlateva contacted HR for assistance.

In 2003, Ms. Zlateva worked with Ms. Robinson as a primary auditor testing internal controls of Discover for SOX certification, which was due at the end of November 2004. After Ms. Zlateva developed the program, Ms. Robinson indicated in March 2004 that she didn't understand it and provided her inputs. Eventually, the company took a modified approach.

As part of the initial coaching program, and developing an agreement, Ms. Zlateva met with Ms. Robinson and Mr. Rosenak a couple of times. Ms. Zlateva expressed her belief that the feedback she gave to Ms. Robinson was consistent and constructive, CX 302. For several years, Ms. Robinson was advised that she needed to accept constructive feedback, learn to communicate effectively, and meet deadlines. In terms of communication, Ms. Robinson “was often confrontational, belligerent, and very often didn’t want to discuss the facts but would rather start criticizing or blaming the other person.” For example, when Ms. Zlateva was setting out her objectives for her coaching sessions, Ms. Robinson interrupted and started blaming Ms. Zlateva. As another example, after a meeting during the physical security audit, Ms. Zlateva told Ms. Robinson that the meeting could have been more efficient, by presenting high-risk items first. However, Ms. Robinson indicated that Ms. Zlateva was interrupting her and she turned to criticizing Ms. Zlateva’s behavior at the meeting.

In general, Ms. Robinson needed to be more efficient and effective during meetings. For example, instead of covering the main points of the physical security audit with the vice president of security, Ms. Robinson engaged in a discussion about the ergonomics of office chairs. Ms. Robinson had difficulty adjusting the contents of a meeting based on who was attending. Additionally, at times, Ms. Robinson’s behavior was unprofessional. During one internal controls meeting, she started talking with another individual, laughed loudly and then left the meeting without asking first.

With IAD colleagues, Ms. Robinson’s principal issues were tone and sarcasm. She did not respect some of her colleagues and their experience. She showed her disrespect “with some facial expressions or . . . saying things like I’m the person with the most experience, audit experience in this department and I know what I’m doing.” Ms. Robinson would also query in a sarcastic tone how a person knew something or indicate the person didn’t know what he was talking about. Although Ms. Robinson had previous audit experience, many IAD auditors also had significant audit experience.

Another of Ms. Zlateva’s concerns about Ms. Robinson is that she raised inappropriate issues to higher levels of management. On one occasion, during the physical security audit, Ms. Robinson sent an e-mail directly to Ms. McNamara-Corley about the absence of a contract with a security company without telling Ms. Zlateva. After that incident, she asked Ms. Robinson to keep her informed of such correspondence. Although the problem identified by Ms. Robinson was important, Ms. Zlateva believed the e-mail was a problem because the subject could have been discussed at a lower level of management. Only extraordinary items should go to senior management. Ms. Robinson’s e-mail did not involve an extraordinary matter. As the manager of that project, Ms. Zlateva felt Ms. Robinson should have advised her about the e-mail.

Mr. Rosenak started coaching Ms. Robinson about June 2004. During Ms. Zlateva’s first meeting with Ms. Robinson and Mr. Rosenak, Ms. Robinson did most of the talking. A coaching agreement was not achieved until after a second meeting. The purpose of the coaching sessions was to help Ms. Robinson achieve some of the goals in her action plan. In the coaching agreement, Ms. Zlateva and Ms. Robinson agreed to work on respect and communication.

Ms. Zlateva became Ms. Robinson's direct manager on December 1, 2003. She initiated an action plan for Ms. Robinson on June 1, 2004, about the same time she prepared the mid-year review. In that review, Ms. Zlateva noted Ms. Robinson's ability to identify weaknesses in audits as a strengths. However, Ms. Robinson needed to work on accepting feedback and becoming more organized. Although the mid-year review identified communication and organization problems, an action plan was also necessary because Ms. Robinson had continuous problems in those areas for five or six months. The action plan also has a disciplinary aspect because the employee is notified that the absence of improvement could led to termination of employment. Due to her continued difficulty with Ms. Robinson and after consulting Ms. Piercy with HR, Ms. Zlateva decided an action plan was necessary, RX 31. Ms. Zlateva doesn't recall whether she signed the action plan.

Earlier, during the spring of 2004, HR informed her that "some sort of investigation not directed at her" had been going on and the results of an investigation did not "find anything." They advised her to keeping documenting performance problems and keep them informed. Ms. Zlateva had reviewed Mr. Sutter's prior action plan. While many of the items are "very similar," Ms. Zlateva added several items.

The June 2004 action plan was based on her direct observations of Ms. Robinson and scheduled to run 60 days. In response, Ms. Robinson provided a rebuttal. However, Ms. Zlateva did not believe the points raised by Ms. Robinson were valid. Ms. Piercy rather than Ms. Zlateva responded to Ms. Robinson's rebuttal, RX 33. During the plan, she and Ms. Robinson had weekly meetings with HR where Ms. Zlateva would provide feedback and an update. Initially, Ms. Robinson showed some improvement in communication. However, after several weeks, Ms. Zlateva did not "see significant sustained improvement."

At the end of July 2004, Ms. Zlateva went to HR for the next step. She was frustrated by the lack of improvement during the second action plan and wanted to know "how long is it going to continue." HR indicated that the next step was a JIJ letter, which gave an employee a final chance for immediate improvement to avoid termination. Ms. Zlateva wrote Ms. Robinson's JIJ letter. She indicated that Ms. Robinson need to improve her communication skills. Ms. Zlateva and Ms. Robinson continued to have confrontational meetings. Ms. Robinson continued to refuse to accept feedback and she missed deadlines.

The three items associated with an executive coach in the JIJ letter, RX 42, came from Ms. Piercy who had spoken with the coach. Mr. Rosenak did not make those observations to Ms. Zlateva and she is not the source of those comments in the JIJ letter. Ms. Zlateva reviewed the JIJ letter before it was presented to Ms. Robinson and did not make any changes relating to Mr. Rosenak's observations.

The JIJ period was to last 30 days. However, if Ms. Robinson did not improve in 15 days, she could be terminated. After 15 days, Ms. Zlateva did not see any improvement and decided to terminate Ms. Robinson's employment. As a result, she contacted HR. They told her to prepare a termination memorandum. As Ms. Robinson's manager, Ms. Zlateva had authority to terminate her employment with "certain additional approvals from management" above her. The two supervisors between Ms. Zlateva and Mr. DeLuca were Mr. John Wolf and Mr. Sutter.

Ms. Zlateva doesn't know whether her termination decision was approved or ratified by higher management. A day or two after Ms. Zlateva gave the termination memorandum to HR, either Ms. Dollmeyer or Ms. Piercy told her that she and HR representatives would meet with Ms. Robinson and the memorandum would be presented at that time. At that meeting, Ms. Zlateva gave the memorandum to Ms. Robinson. Ms. Robinson responded with "great or something like that" and left.

Ms. Zlateva never discussed Ms. Robinson's situation with Mr. DeLuca. Ms. Zlateva made the decision to fire Ms. Robinson. Essentially, she presented her decision to HR and they approved it.

[Cross examination] In February 2003 project meeting, after Mr. Graczkowski asked for Ms. Zlateva's help, Ms. Robinson told Ms. Zlateva that she didn't have time to teach her management skills.

In the summer of 2003, Mr. Sutter informed Ms. Zlateva that he was taking over the direct supervision of Ms. Robinson. He indicated that it was getting too difficult for Ms. Zlateva to do her audit work and also supervise Ms. Robinson.

Also in the middle of 2003, a client of the audit department told Ms. Zlateva that he had heard from Ms. Robinson that IAD was disorganized and in a state of flux. Ms. Zlateva was surprised by the comments since they had previously been raised in a IAD meeting about internal problems which was supposed to be confidential. In other words, it appeared Ms. Robinson had disclosed confidential information in front of a client. Ms. Zlateva passed on her concerns to Mr. Sutter and Ms. Weiler.

RX 18 contains Ms. Zlateva's February 4, 2004 response to the 360 survey. Ms. Zlateva prepared her response and no one reviewed or revised it.

Prior to the current lawsuit, Ms. Zlateva never saw a copy of Ms. Robinson's February 2004 memorandum regarding her concerns about internal controls.

In 2003, Ms. Zlateva occasionally wore perfume to work. She was unaware of any complaints by Ms. Robinson about the perfume. After she learned about Ms. Robinson's problem with perfume during a 2004 HR meeting, Ms. Zlateva didn't change her usage but she made an effort not to sit near Ms. Robinson. After Mr. Sutter sent out a memorandum about perfume, Ms. Zlateva stopped wearing it. At one point, Ms. Zlateva asked HR about medical certification but she never received anything official from a physician.

With a manager's approval, an employee could take "summer" hours by working longer on certain day and later taking a half day off. When Ms. Robinson asked about leaving early one day under summer hours, Ms. Zlateva expressed a concern that she would fall behind in her schedule and deadlines. Nevertheless, Ms. Zlateva allowed her to take summer hours that day, RX 26.

In December 2003 and January 2004, Ms. Zlateva did not have many problems with Ms. Robinson. However, after that period the issues with Ms. Robinson became more difficult and significant.

RX 120 is an e-mail Ms. Zlateva sent Ms. Robinson at the beginning of March 2004 about several projects and deadlines. For many of the items, Ms. Robinson never responded. RX 30 is an April 23, 2004 e-mail to Ms. Robinson from another senior manager asking her for an update on the close out of certain audits. She did not comply with the request. RX 29 and RX 27 are e-mails Ms. Zlateva sent to Ms. Piercy describing in part the difficulties she was having with Ms. Robinson.

As an example of missing a deadline, in the June 2004 audit plan, Ms. Robinson failed to complete the “change management” portion of the testing. In regards to setting priorities, Ms. Robinson spent an inordinate amount of time during the physical security audit discussing whether cameras should be placed in the janitor closets since some of them had been found to be sleeping. When a deadline was not going to be met, Ms. Zlateva expected Ms. Robinson to explain why, assign a new deadline, and have a plan to meet the new deadline. Concerning feedback, Ms. Zlateva wanted Ms. Robinson to respond to the issues identified in the 360 review.

Ms. Zlateva was “sadly surprised” when Ms. Robinson provided a rebuttal to the performance action plan, RX 31 and RX 32, because she had hoped Ms. Robinson would have addressed the action items. Instead, Ms. Robinson indicated that she didn’t feel that she needed to address them. Ms. Zlateva doesn’t think Ms. Robinson agreed with any of the feedback. The action plan was actually to last 60 days.

Ms. Robinson’s June 14, 2004 self evaluation, RX 34, did not identify any of the issues listed in the performance action plan.

In the June 18, 2004 mid-year evaluation, RX 35, Ms. Zlateva listed several development opportunities for Ms. Robinson. Ms. Robinson’s performance did not improve after this evaluation.

RX 38 is an update to the action plan that Ms. Zlateva presented to Ms. Robinson on June 28, 2004. Again, after this update, Ms. Zlateva did not notice any improvement.

In a July 19, 2004 e-mail, RX 39, Ms. Zlateva again asked for an update on deadlines. RX 40, dated July 28, 2004, is another performance action plan update. During one discussion with Ms. Robinson, she stated that “she knew what I was doing. That I was, she referred actually that she was blowing the whistle and this is why I was fishing for something or I was actually criticizing her.”

RX 41 is a spreadsheet that reflects the deadlines Ms. Robinson missed. Ms. Zlateva gave Ms. Piercy and Ms. Robinson a copy of the information.

Between the JIJ notification and Ms. Robinson's termination, Ms. Zlateva did not notice any significant improvement in her performance. In addition to a 30 effective period, the JIJ process indicates that a review will be accomplished at 15 days. During the presentation of the JIJ letter, Ms. Robinson seemed "defiant" since she indicated that she would write a rebuttal.

RX 45 is the termination memorandum. Ms. Zlateva read the memorandum to Ms. Robinson on the morning she was terminated.

[ALJ examination] Sometime in the spring of 2004, Ms. Zlateva was informed that Ms. Robinson was involved in an investigation. When Ms. Zlateva asked Ms. Piercy whether Ms. Robinson still had to meet her deadlines, Ms. Piercy told her that she could expect Ms. Robinson to meet them. On occasion, when Ms. Robinson would miss a meeting, she explained that she was working on the investigation. However, she never indicated to Ms. Zlateva how much time was involved with the investigation.

Ms. Robinson is the only employee Ms. Zlateva has terminated. At the time she was supervising Ms. Robinson, Mr. Sutter was Ms. Zlateva's second level supervisor as the vice president for IAD. Mr. Wolf was her immediate supervisor. Mr. Wolf was aware that she was talking to HR about terminating Ms. Robinson's employment. When she mentioned her problems, Mr. Wolf advised her to work with HR. After she worked with HR and decided to terminate Ms. Robinson, Ms. Zlateva told Mr. Sutter that Ms. Robinson was going to be terminated. Although Ms. Zlateva kept Mr. Sutter advised of her problems with Ms. Robinson since he was the vice president of internal audit, Mr. Sutter did not tell her what to do or to fire Ms. Robinson.

Ms. Zlateva did not talk to Mr. DeLuca about terminating Ms. Robinson's employment. Ms. Zlateva did talk to Ms. McNamara-Corley about terminating Ms. Robinson's employment.

Ms. Zlateva did not terminate Ms. Robinson for whistleblowing. According to Ms. Zlateva, "I didn't even at the time know exactly what the investigation was about or whether it was a whistle blowing investigation." During the investigation, no one talked to Ms. Zlateva about the investigation or its subject matter. Later, when she became aware that Ms. Robinson had made a complaint, Ms. Piercy told her an investigation had been conducted and the complaint was proven unfounded.

[Redirect examination] Ms. Robinson mentioned her allergy to perfume in front of Ms. Zlateva.

Ms. Zlateva objected to Ms. Robinson's tone at the meeting with Mr. Graczkowski rather than the inquiry itself as to her role.

Due to an organizational restructuring in December 2003, Ms. Zlateva formally became Ms. Robinson's manager. Mr. Sutter made the change. When Ms. Zlateva presented her concern about her ability to continue working with Ms. Robinson, Mr. Sutter said she would get HR support and would not be alone.

At the time of Ms. Robinson's comment to a client about disorganization, IAD was pursuing opportunities for improvement and leadership was changing.

Ms. Zlateva started talking to Ms. Piercy about Ms. Robinson's performance in early 2004.

Concerning the status of the Unix and LAN audits, Ms. Robinson told Ms. Zlateva about a problem getting some files. However, a considerable amount of time passed between Ms. Zlateva's initial inquiry and Ms. Robinson's information about the files problem.

At the time Ms. Zlateva sent RX 30, she was not aware that Ms. Robinson was working on the KPMG investigation. The term "BCC" on her e-mails means "blind copy," so only the addressee is receiving the communication.

In regards to the incident mentioned in RX 29, Ms. Robinson may have been carrying something when Ms. Zlateva approached her.

Ms. Zlateva didn't directly criticize Ms. Robinson for communicating with clients. Instead, she was concerned that Ms. Robinson was not keeping her advised of such communications. She wanted Ms. Robinson to keep her in the loop.

When Ms. Zlateva was asked for a prompt response to an update on wording from a meeting, and the initial author Paul wasn't at work, Ms. Zlateva asked Ms. Robinson for the rewrite because she had also attended the meeting. Ms. Robinson replied, "Paul wrote it, follow with him."

Ms. Zlateva was surprised that Ms. Robinson scheduled a meeting with Mr. John Wolf without first bringing the problem to her.

Ms. Robinson's work with Mr. Rosenak was as confidential as the performance action plan. Other employees were not supposed to be aware of it. Ms. Robinson did not tell Ms. Zlateva about her discussions with the coach. Similarly, other than the meetings when Ms. Zlateva, Ms. Robinson, and Mr. Rosenak met together, he did not further discuss his coaching with Ms. Zlateva.

In 2004, there wasn't an expectation that the mid-year reviews would be signed.

In evaluating Ms. Robinson's response to the action plan, Ms. Zlateva would have considered her observations of Ms. Robinson's performance from February through May 2004.

Ms. Sandy Davis
(TR, p. 1309 to 1392)

[Direct examination] Ms. Davis started at Riverwoods Discover/Morgan Stanley on January 22, 2001. A little over a year later, she moved to IAD to become the executive assistant for Mr. Sutter, who was a vice president in IAD. At that time, she first met Ms. Robinson. As

an executive assistant, Ms. Davis was required to keep information about personnel actions confidential. Ms. Davis continued to work for Mr. Sutter through October 2004 when he moved to a different part of the company. After a leave of absence for an injury, Ms. Davis returned to Discover in March 2005 as the executive assistant for Ms. Weiler.

As an executive assistant for Mr. Sutter, Ms. Davis received quarterly reports from several auditors, including Ms. Robinson. Neither Ms. Robinson nor Ms. Zlateva turned in all their quarterly reports on time. Ms. Robinson turned in about 30% of her reports on time; 40% of Ms. Zlateva's reports were timely.

In 2003, Ms. Davis worked on a business continuity plan with Ms. Robinson's assistance, CX 113. Ms. Robinson provided her assistance even though she wasn't assigned to the project. CX 23 is the business continuity plan score review.

Ms. Davis had two close friends at work, including Ms. Robinson. During a meeting in the spring of 2004, Mr. Sutter criticized Ms. Davis for being friends with Ms. Robinson. When Ms. Davis asked whether her loss of access to Mr. Sutter's e-mail and calendar had anything to do with her friendship with Ms. Robinson, Mr. Sutter responded that while he couldn't tell her how to select her friends, he believed she had not made a wise decision. Mr. Sutter indicated that 360 review information was coming in and he wanted to keep it in his e-mail.

Over the course of several meetings in the beginning of 2004, Ms. Piercy and Ms. Navidad asked Ms. Davis about her contacts with Ms. Robinson outside of work. They indicated that Ms. Davis should inform HR if she became aware of Ms. Robinson doing anything harmful to the business and that she could be terminated if she didn't divulge such information. She told them and Mr. Sutter that Ms. Robinson was harassed and suffering retaliation. At that point, Ms. Robinson was very frustrated about the way she was being treated. She talked about quitting or trying to get fired, and whether she'd have grounds to sue the company. Ms. Robinson told her that people were harassing her by saying "nasty things" about her work ethic.

In the beginning of 2004, Ms. Robinson told her that she was participating in an investigation. During that period, other employees were being unkind and not talking to Ms. Robinson. Ms. Davis also believes she suffered retaliation due to her friendship with Ms. Robinson. She was no longer invited to group lunches or included in outside activities. Several of the IAD employees told her that they were told not to associate with Ms. Robinson.

Ms. Davis was aware of Ms. Robinson's allergy to perfumes. She would cough, sneeze, and sometimes wear a mask. When a new employee arrived wearing perfume, Ms. Robinson spoke to her manager and the problem was resolved. Her allergy was widely known in the department. At one point, she overheard a remark by an employee that she was going to start to wear perfume to make Ms. Robinson sick. In the spring of 2004, there was daily gossip in IAD about Ms. Robinson. Many people were aware she was involved in an investigation with legal and may be suing the company. A few employees hoped her efforts would improve IAD. Ms. Davis observed Ms. Robinson going back and forth to the legal department with binders and papers. Several other employees noticed Ms. Robinson's activities and asked Ms. Davis if she knew what was going on.

On two occasions, based on the tone of his voice, Ms. Davis heard Mr. Sutter become angry during a conversation with Ms. Robinson, who can be “straight forward and to the point.”

At some point in 2004, Ms. Davis helped Ms. Robinson look for working papers associated with the Unix and LAN audits. They did not find the papers.

During the period when Ms. Robinson and Mr. Sutter were supposed to have weekly meetings, they each cancelled meetings. Around July 2004, Ms. Robinson had more problems with deadlines because her work load increased.

While Ms. Robinson was denied “summer” hours, other auditors were granted permission to take summer hours.

Ms. Robinson’s treatment of Ms. Davis as an executive assistant was “good.” She was helpful and supportive. When Ms. Davis was considering quitting her job, Ms. Robinson counseled her to stay.

On the day she was terminated, Ms. Robinson passed Ms. Davis’ desk and told her that she had been called to the HR office. As soon as she left, Mr. Tom Walz and Ms. Marie-France Weiler went to her desk and started packing things. When Ms. Davis took a break, she saw Ms. Robinson outside in front of a limo and gave her a hug.

During the summer of 2004, Ms. Davis was becoming frustrated with her work. She was being treated differently due to her friendship with Ms. Robinson.

At that time, IAD at Riverwoods had about 33 employees, with 10 of the auditors at Ms. Robinson’s level. After Ms. Robinson left, about half of those auditors left the company.

Ms. Davis is afraid that she will be fired for testifying at Ms. Robinson’s hearing.

[Cross examination] Ms. Davis recognizes an August 9, 2004 e-mail, RX 413.

Mr. Martin Slusarz
(TR, p. 1563 to 1578 and 2001 to 2032)

[Direct examination] Mr. Slusarz was previously the chief financial officer for Discover Financial Services. As the CFO, Ms. Slusarz reported to both Mr. David Nelms, the president of Discover, and another individual who was the chief financial officer for Morgan Stanley. Although his paycheck came from Discover and his business was located in Riverwoods, Mr. Slusarz’s function area came under Morgan Stanley in New York.

Around February 2004, Ms. Robinson sent Mr. Slusarz a copy of her memorandum, CX 1. At that time, he spent several hours with her in his office going over the memorandum, page by page, discussing her concerns. At the close of their meeting, Mr. Slusarz indicated that the

matters she was raising were important and he would deal with them. Mr. Slusarz believed Ms. Robinson was serious and sincere in bringing her complaint.

Mr. Slusarz particularly focused on two concerns presented by Ms. Robinson which might have financial implications, bankruptcy recognition and charge off policies. If Discover's policies were not proper, an understatement of charge offs might exist. They also discussed her concerns about the Medical Leave Act.

After Mr. Robinson left, Mr. Slusarz met with the company's general counsel and gave her the memorandum.

Later, Ms. Robinson informed Mr. Slusarz that she was being isolated by members of her department. However, Mr. Slusarz was focused on the financial implications of Ms. Robinson's memorandum.

After a thorough evaluation, Discover determined they were on solid ground. As a result, Morgan Stanley did not change its policies in the two noted areas. Mr. Slusarz is not aware of how other aspects of her memorandum were resolved.

Discover submits its financial information to Morgan Stanley which consolidates the reports from all its business units and files with the Securities and Exchange Commission.

Mr. Slusarz did not know that Ms. Robinson was going to be fired. He believes Ms. Robinson came to him because under SOX he was required to sign financial certifications.

[Cross examination] The dollar amounts in the SEC filings are rounded to the nearest million.

Mr. Slusarz did not have any involvement in the termination of Ms. Robinson's employment.

[Redirect examination] After thorough review, Discover concluded their policies regarding bankruptcies and charge offs were proper and they made no changes. The potential impact relating to Ms. Robinson's concern was two months of bankruptcies, which would have been between \$60 to \$80 million.

[Cross examination]⁷ Discover charges off bankrupt accounts 60 days after receipt of notification at the end of the month. As he initially understood Ms. Robinson's concern, she believed the charge off should occur immediately. If that 60 day period were eliminated, then Discover would take 14 months of charge offs in a 12 month period, which represented an additional \$60 to \$80 million.

⁷During his initial examination, Mr. Slusarz was called as a witness by the Complainant. Later in the proceedings, he was recalled by the Respondents. As a result, the cross examination at this point reflects the Respondent's questions.

However, upon review of Ms. Robinson's actual audit observation, Mr. Slusarz concluded her concern was an entirely different issue. Rather than being concerned with the 60 day charge off period, Ms. Robinson noted a delay of up to 5 business days between receipt of notification and entry of the notification into the Discover system, which represents a \$6 to \$8 million impact. Due to potential offsets, the actual effect is less and would not have a material impact on the financial statements of Discover and Morgan Stanley.

Although he was initially concerned about some of Ms. Robinson's allegations when she presented the February 2004 memorandum, in particular the charge off issue and allegations of fraud, he has since concluded the Discover and Morgan Stanley financial statements are accurate. The companies are also on solid regulatory footing. In discussing the charge off issue with colleagues, he became aware that the delay could occur because the bankruptcy notification may be received in an office in Utah, whereas the company's processing center is located in Ohio.

Concerning Discover's credit card operations, the loss of a physical facility would not prevent Discover from issuing credit cards because the company's banking charter would remain in effect.

[Redirect examination] Discover has converted to electronic receipt of bankruptcy notices which has accelerated the entry process.

Due to assertion of regulatory noncompliance and the associated consequences, Mr. Slusarz took Ms. Robinson's memorandum "very seriously."

Mr. Ricky ("Rick") L. Robison
(TR, p. 1578 to 1588)

[Direct examination] In the spring of 2001, Mr. Robison first met Ms. Robinson when she conducted an audit of the general ledger function in the finance department where he worked. During his interaction with Ms. Robinson, she was neither rude, confrontational, disrespectful, nor unprofessional. He considered Ms. Robinson to be a knowledgeable auditor and he sought her thoughts when his department started putting in new systems. He never witnessed any confrontations involving Ms. Robinson.

Sometime in late 2003 or the beginning of 2004, Ms. Robinson gave Mr. Robison a draft of her memorandum, CX 1.

On one occasion, in late 2003, Ms. Robinson indicated that she had been specifically asked not to talk to Mr. DeLuca at a meeting or bring up any issues.

Ms. Robinson is his friend.

[Cross examination] Because Ms. Robinson showed him the draft at lunch, Mr. Robison only had time to look at the first two pages of the draft. Additionally, after reading those pages,

he told Ms. Robinson that some people would consider her memorandum as an effort to build herself up and a personal attack on Mr. Sutter.

Ms. Kerry Piercy
(TR, p. 1596 to 1733)

[Direct examination] Ms. Piercy is the vice president for HR at Discover. She started that position full time at Riverwoods in December 2003. Discover's annual formal employee performance period closes out November 30, the same time as the company's fiscal year. The evaluation process also includes a recommended mid-year review.

Her first contact with Ms. Robinson occurred in late February 2004. Ms. Bernice Jee of the Morgan Stanley's Convenient Access to Resolution for Employee Concerns ("CARE") program referred Ms. Robinson to her. Ms. Robinson had expressed concerns to Ms. Jee about being unable to resolve issues with members of the Discover HR department. Ms. Jee asked Ms. Piercy to step in and try to assist Ms. Robinson.

In the initial meeting, Ms. Robinson explained that she did not agree with the performance feedback that she had been receiving over time. She had asked for assistance from HR and been frustrated. So, she wanted to elevate the problem to Ms. Piercy. Ms. Piercy responded that she was happy to work with Ms. Robinson and would research the issue and talk to HR personnel. Over the course of their meetings, Ms. Robinson also raised concerns about how the department was run, and retaliation in terms of salary increases and promotions.

Shortly after their initial meeting, Ms. Robinson also told Ms. Piercy that she was working on the KPMG investigation and gave her a copy of the memorandum. However, Ms. Piercy did not read it because her "focus was to be strictly on her performance on a going forward basis." No one else discussed the investigation with Ms. Piercy. Ms. Piercy played no role in the investigation.

Ms. Piercy talked to Mr. Sutter, Ms. Zlateva, Ms. Dollmeyer, and Ms. Navidad. After those conversations, Ms. Piercy returned to Ms. Robinson and indicated that they need to work on the performance issues with her manager. Ms. Robinson mentioned a desire for additional feedback and that a 360 review was being conducted.

In mid-March 2004, Ms. Birk, who conducted the 360 review, and Ms. Piercy discussed the results with Ms. Robinson, which were generally unfavorable. However, Ms. Robinson did not accept the results because she felt the process wasn't fair. She was concerned about the selection of the evaluators and delay in obtaining the feedback. Ms. Piercy did not believe Ms. Robinson's concerns were valid because they used the same process in dozens of 360 reviews at Discover each year. Ms. Birk urged Ms. Robinson to accept the feedback to address the performance issues. However, Ms. Robinson was so upset with Ms. Birk she asked Ms. Birk to leave the room and talked to Ms. Piercy privately. Ms. Piercy concluded Ms. Robinson was not going to accept the feedback.

In the meantime, Ms. Piercy encouraged Ms. Zlateva to continue to provide feedback to Ms. Robinson and let her know the performance expectations.

After Ms. Zlateva indicated that Ms. Robinson's performance had not improved, Ms. Piercy advised that the next step was a performance action plan. In their discussion, they reviewed the issues previously identified in the prior action plan. They wanted to be sure some continuity existed since they were addressing the same issues. Ms. Piercy reviewed the performance action plan prepared by Ms. Zlateva before it was presented to Ms. Robinson.

A performance plan at Discover can last from 30 to 90 days. At the conclusion of that period, if the employee has improved, they come off the plan. If the employee is unsuccessful, they move to the next step, the JIJ letter. Ms. Piercy believes that Ms. Robinson's prior action plan had been suspended due to the investigation and there was no formal resolution. Ms. Piercy "thought the most appropriate thing to do for Beverly's perspective was to be able to start a new process and hopefully see it through with her and Vesela to the end."

None of the actions involving Ms. Piercy and Ms. Robinson were based on anything that occurred prior to December 2003, when Ms. Piercy started full time at Discover.

RX 33 is Ms. Piercy's June 7, 2004 memo about Ms. Robinson's action plan that she prepared in response to Ms. Robinson's concerns about the action plan. The coaching referenced in the memo involved conversations with Ms. Robinson's managers. The memo relates that her prior action plan was successful but the improvement was not sustained. The investigation into retaliation complaints relates to Ms. Piercy's efforts to review Ms. Robinson's concerns about the performance management process and her assertions that her feedback was retaliation for raising SOX concerns. Ms. Piercy was not referencing the investigation generated by Ms. Robinson's SOX complaint. Ms. Piercy was unable to substantiate Ms. Robinson's retaliation complaints. Instead, "her manager was trying to manage Ms. Robinson's performance."

Ms. Piercy sent a copy of Ms. Robinson's company personnel record, CX 108, to her upon her request. Any coaching documents, such as the 360 review, would be contained in a manager's file rather than an individual's personnel file.

Three themes arose involving Ms. Robinson's job performance. First, Ms. Robinson had difficulties with planning, organization, and meeting deadlines. Second, Ms. Robinson needed to improve her interpersonal skills in terms of working with other employees within her department and management team. Third, she needed to become willing to accept feedback and address those performance issues.

Concerning interpersonal skills, Ms. Piercy attended several meetings where Ms. Zlateva "would be providing Beverly feedback, and Beverly would argue with that feedback. She would raise her voice. There was aggressive body language." At times, Ms. Robinson would "glare" and engage in "a very sort of combative adversarial dynamic." Ms. Piercy observed the same behavior during the 360 feedback discussion with Ms. Birk. Ms. Piercy was concerned about Ms. Robinson's arguing about feedback and her unwillingness to accept it.

As indicated in RX 103, dated May 7, 2004, Ms. Piercy made herself available to Ms. Robinson after she received the results of the KPMG investigation on May 17, 2004. On May 17, 2004, after Ms. Robinson was informed of the investigation results, Ms. Piercy met with Ms. Robinson in another room. She expressed a willingness to help Ms. Robinson get back to her normal job responsibilities, work on performance, and address the feedback. Due to an article Ms. Robinson sent her, they also talked about what constituted a SOX whistleblower complaint. Ms. Piercy was not in the room when Ms. Robinson received the investigation results. Ms. Piercy prepared the talking points for the meeting at the request of a company attorney who works for Ms. McNamara-Corley. It's customary to prepare talking points for significant meetings with employees. Ms. Piercy believed her meeting with Ms. Robinson would be contentious.

In response to Ms. Robinson's complaint that she was being isolated, Ms. Piercy talked to her manager and concluded that was not the situation and no retaliation was involved. Ms. Piercy believed people distanced themselves from Ms. Robinson when she indicated that she was going to lodge a complaint and her colleagues did not want to get involved. Ms. Sandy Davis told Ms. Piercy about Ms. Robinson's intention to file a complaint. She indicated that Ms. Robinson was talking openly about suing the company and bringing some sort of legal action. Ms. Davis was concerned because she didn't want to be part of the process.

Ms. Piercy did not believe Ms. Robinson's managers were biased against her. She didn't think the February 2004 complaint was a factor. She doesn't know whether Ms. Zlateva was included in that complaint. She believes Ms. Zlateva was fair and impartial.

On at least one occasion, Ms. Robinson complained that she was overworked.

In a May 6, 2004 correspondence, RX 24, Ms. Robinson reported that Ms. Zlateva had started to wear perfume which caused Ms. Robinson to experience headaches, lack of focus, and dizziness. In extreme cases, Ms. Robinson's throat closed up. In response, Ms. Piercy spoke to Ms. Zlateva who stated she was not wearing perfume. Ms. Piercy asked her not to wear perfume.

In the same document, Ms. Robinson complained about not being able to talk to Mr. Holstein without advance permission. However, Ms. Zlateva was just asking Ms. Robinson to keep her informed and updated on her contacts.

Concerning Ms. Robinson's complaints about being over-supervised, Ms. Piercy believed Ms. Zlateva was trying to manage her performance appropriately.

On one occasion, Ms. Robinson was not allowed summer hours because Ms. Zlateva did not believe she was effectively managing her workload and meeting deadlines. The summer hour program is discretionary.

In a late July 2004 conference call, Ms. Piercy spoke to Ms. McNamara-Corley and Mr. DeLuca about Ms. Zlateva's recommendation to move the performance action plan process to a JIJ letter. Ms. Piercy and Ms. Zlateva discussed Ms. Robinson's failure to successfully complete

the performance action plan. When she asked about the next step, Ms. Piercy told her about the JIJ process. Ms. Zlateva did not participate in the conference call. Mr. DeLuca agreed with the JIJ letter since Ms. Robinson's performance had not significantly improved.

Audit employees are on Novus Credit Services' payroll. However, they function in support of other business units and have a reporting relationship to Morgan Stanley.

Ms. Zlateva wrote the August 6, 2004 JIJ document, CX 116. Ms. Piercy reviewed the letter and made some edits. In her career at Riverwoods, Ms. Piercy has edited a few JIJ letters. Ms. Piercy had talked to Mr. Rosenak about Ms. Robinson's progress. She shared that information with Ms. Zlateva who put the coaching comments in the JIJ letter. Mr. Rosenak indicated that Ms. Robinson was open to constructive feedback. That comment was not included in the JIJ letter. Based on her experience with Ms. Robinson's response to feedback, Ms. Piercy disagreed with that assessment. She believed Mr. Rosenak "had too brief a time period in working with Beverly to have been able to establish any sort of sense of a pattern of behavior."

Due to Ms. Robinson's on-going performance problems, Ms. Piercy recommended that the company provide a coach. Ms. Zlateva agreed that it would be helpful and Ms. Birk's group handled getting the coach picked by Ms. Robinson. RX 37 shows that Ms. Robinson was positive about getting a coach.

Ms. Piercy perceived a communication problem between Ms. Zlateva and Ms. Robinson. Ms. Robinson believed Ms. Zlateva was not open to her ideas and overly critical. Ms. Zlateva believed Ms. Robinson was argumentative and unwilling to accept feedback. The coach, Mr. Rosenak, was to address both sides of that communication problem.

Upon initiation of the termination action, the coaching sessions were stopped. According to Ms. Piercy, "the core performance issues remained unresolved and we needed to take the next step in terms of the corrective action process."

When Ms. Robinson was presented the JIJ letter, she disagreed with the feedback and provided comments. Ms. Piercy, Ms. Zlateva, and Ms. Robinson continued to meet weekly for two sessions. However, no progress was being made.

When they initially copied Ms. Robinson's personnel file, the JIJ letter was not in it but should have been. When they located the JIJ letter, they sent Ms. Robinson a copy.

At the midpoint of the JIJ process, about the second or third week of August 2004, Ms. Zlateva concluded Ms. Robinson's performance was unsatisfactory.

On the day of her termination, August 23, 2004, Ms. Zlateva and Ms. Piercy communicated the decision to Ms. Robinson. They gave her a copy of RX 45. They had arranged for transportation and an outside counselor. Ms. Robinson declined the assistance of a counselor. At some point during the meeting, Ms. Robinson presented a medical certification about her perfume allergy. The prior medical certification did not contain any restrictions. Ms.

Robinson was escorted out of the building by security. Another employee collected her personal items from her work station.

On occasions, Ms. Robinson threatened to file a complaint with the SEC and go on television.

[Cross examination] Ms. Piercy first heard about Ms. Robinson in December 2003 when she met with Mr. Sutter in her new role at Discover. When she asked what needed to be improved in HR, Mr. Sutter indicated that he had been struggling Ms. Robinson's performance problems and asked whether a process could be put in place to help. Ms. Piercy dealt with Ms. Robinson's case because Ms. Robinson was dissatisfied with the performance of all the other HR employees.

Upon review of an e-mail exchange with Ms. Robinson, RX 212, Ms. Piercy recalls that revisions were made to her action plan. Ms. Piercy wanted the June 2004 action plan to be consistent with the earlier plan because they were still dealing with the same performance issues and she wanted Ms. Robinson to focus on the feedback she received earlier.

Ms. Piercy's HR department supports 14,000 employees at Discover.

[Redirect examination] In her December 2003 conversation with Mr. Sutter, Ms. Piercy offered to get involved. Mr. Sutter thought they were getting some performance improvement and he wanted to continue working through with Ms. Robinson and Ms. Dollmeyer. When Ms. Piercy followed up with her HR personnel, they told her Ms. Robinson had performance problems in communications, interpersonal skills, and deadlines.

Ms. Piercy has 200 employees in her department.

Discover has had other employee performance problems during her tenure. Ms. Piercy doesn't recall whether anyone else at Ms. Robinson's level has been fired since she was there.

When Ms. Piercy met with Mr. Sutter, Ms. Robinson was already on an action plan.

Ms. Robinson's performance issues were consistent. Although there were periods of improvement, the improvements were not sustained.

Mr. David W. Sutter

(TR, p. 1737 to 1893, 1953 to 1988, and 2033 to 2066)

[Direct examination] Mr. Sutter became the vice president of IAD at Discover in 2000. In December 2004, he moved to the Customer Service Division.

IAD conducts audits of business units on a frequency of one to five years, depending on the risk rank. The audit management team develops an annual audit plan based on this risk assessment. The three tier reporting system for audit findings was based on the exposure associated with the finding and the appropriate level of management. Tier One findings were

reported to the Morgan Stanley Board Audit Committee and the whole reporting chain. At any one time, they usually tracked a couple of Tier One findings. Tier Two findings were sent to Morgan Stanley executives and the Discover Bank Audit Committee. They usually had 60 to 80 Tier Two findings a year. At any one time, IAD had between six to eight open audits. At the end of each quarter, IAD would prepare a quarterly report, containing an executive summary, tracking on corrective actions, and the status of the open tier findings. The quarterly report for Discover was then combined with the other business units of Morgan Stanley and sent to Morgan Stanley executives.

The job responsibilities for an internal auditor are: execute audit procedures, identify risks, identify controls, test controls, make findings. The auditor is required to work with clients throughout the audit. If an internal auditor finds a risk, she is required to report that finding to the audit project leader and together they identify the appropriate tier characterization. Ultimately, an auditor is responsible to the company management.

Two types of supervision exist in IAD, project and administrative. Every person in IAD administratively reported to a manager or director. That supervisor conducted year-end evaluations, approved leave and help set professional development goals.

Ms. Robinson's first administrative supervisor was Ms. Dolores Wheeler. Ms. Marie France-Weiler and Mr. Jerry Graczkowski followed. While Mr. Sutter was always in Ms. Robinson's reporting chain, he eventually became Ms. Robinson's direct administrative supervisor. Mr. Sutter also approved all promotions. Between 2000 and 2004, Ms. Robinson was never promoted to manager.

When Mr. Graczkowski left the company in March 2003, Mr. Sutter took over the supervision of his technology team, which included Ms. Robinson.

When Mr. Graczkowski supervised Ms. Robinson, they had difficulty agreeing to the professional development goals for 2003. As a result, Mr. Sutter meet with them and Ms. Navidad and Mr. Tony Cavaliero. Mr. Graczkowski believed some development goals from the prior year should be included. Ms. Robinson disagreed. Based on comments from other employees of IAD, Mr. Sutter indicated at their meeting that some of Mr. Graczkowski's goals were supportable. In response, Ms. Robinson argued about whether the feedback Mr. Sutter had received was valid. She believed those assessments were one-sided. She also questioned Mr. Sutter's independence. Because Mr. Graczkowski filled out the development goals form first, Ms. Robinson believed he was not giving her an opportunity to provide input for her 2003 goals. Because they couldn't reach an agreement, the 2003 development goals plan was never completed.

In September 2003, when Mr. Sutter asked HR about putting Ms. Robinson on an action plan, they requested a chronology of events. RX 13 is the chronology that he prepared based on notes and his recollection. The first event discussed was the professional development plan meeting in early 2003. Mr. Sutter also observed that Ms. Robinson had difficulty compromising and working collaboratively. She also did not function well with ambiguity in directions to her.

Mr. Sutter also critiqued Ms. Robinson's professionalism based on an incident where she told a manager in the audit department of another business unit in New York that she had concerns about Mr. Sutter's independence. The manager told Mr. Sutter about the exchange because he felt uncomfortable. Mr. Sutter told Ms. Robinson that he believed her comment was unprofessional. He believed that if she had a problem with his independence, she should bring that concern directly to him or bring to the attention of his supervisors. Ms. Robinson apologized and indicated that the manager had "dragged it out of her" while she was emotional.

Also in March 2003, Mr. Sutter had a concern about Ms. Robinson's judgment. At that time, she was part of a team conducting an audit of the PBX voice mail system. While the "core elements" of the audit involved that system, Ms. Robinson spent the bulk of her time on calling cards and cell phones. In Mr. Sutter's opinion, those two areas had "lower risk." The voice mail system handled thousands of phone calls a day and the phone system was an essential element of customer service. The relative risk of inappropriate cell phone and calling card use was "much smaller." Mr. Sutter faulted Ms. Robinson's judgment in focusing on the lower risk items to the detriment of the higher risk elements and while the audit was running late on deadlines. The audit manager expressed the same concerns to Mr. Sutter. While the calling cards and cell phones were in the scope of the audit, Mr. Sutter disagreed with the level of effort Ms. Robinson spent on the two subjects. He expected Ms. Robinson to have better judgment by weighting her focus on the higher risk areas. Mr. Sutter shared his concern with Ms. Robinson but did not stop her from looking into cell phone and calling card usage.

In April 2003, Ms. Robinson announced in a meeting with Mr. Sutter that she was going to leave IAD and get another job. She complained about the promotion of Ms. Zlateva and Ms. Greco and told Mr. Sutter that he had created "two little monsters."

After Mr. Graczowski left, Mr. Sutter asked two managers, including Ms. Zlateva, to help him supervise people in the department. Mr. Sutter announced this change at an IAD meeting. Subsequently, Ms. Zlateva reported that she was struggling with supervising Ms. Robinson. Whenever she asked Ms. Robinson for status of an audit, she received a confrontational response. Ms. Robinson would ask Ms. Zlateva why she needed to know. In response, Mr. Sutter asked Ms. Robinson to work with Ms. Zlateva and she agreed. However, when the problem persisted, Mr. Sutter informed Ms. Zlateva that he would work with Ms. Robinson directly.

Another employee, Ms. Khosravani, in an e-mail, RX 61, complained that in attempting to conduct follow-up work on an audit Ms. Robinson had worked on a couple of years earlier, Ms. Robinson was not cooperating and being unprofessional.

In May 2003, Mr. Sutter received a complaint from Ms. Dollmeyer about Ms. Robinson going over her head to talk to her boss, Mr. Bruce Osborne, about transfers and terminations. Mr. Sutter believed Ms. Robinson should have gone up the supervisory chain.

Also in May 2003, Ms. Robinson was unprofessional when she attended a meeting with Mr. Sutter and Ms. Navidad about the development of professional goals. Apparently, because Ms. Robinson believed she was leaving the company, she came unprepared to the meeting. Ms.

Robinson stated that since she was going to leave the company, she didn't see any value in the goals process.

About the same time, early May 2003, Ms. Robinson asked Mr. Sutter about being promoted to manager. In response, he prepared a list of items that she needed to address in order to be considered for promotion, RX 53.

On June 5, 2003, Mr. Sutter met with Ms. Robinson and Ms. Navidad to again discuss promotion considerations and a potential 360 review. At that time, he gave Ms. Robinson a list of factors needed to be considered for manager, RX 55. After she read the list, Ms. Robinson became visibly upset and stated that the list wasn't objective or valid. She complained that many of the factors couldn't be measured. Mr. Sutter considered both her tone and body language inappropriate. Ms. Robinson raised her voice and glared at Mr. Sutter, which set the tone for the rest of the meeting.

During the same meeting, they unsuccessfully attempted to reconcile the list of respondents for a 360 review, which had been suggested by Ms. Navidad to facilitate feedback to Ms. Robinson. Ms. Navidad then asked Ms. Robinson to stay after Mr. Sutter left. Later, Ms. Navidad told Mr. Sutter that after he left she talked to Ms. Robinson about her behavior. She told Ms. Robinson that she was going to have to listen to some feedback if she wanted to move forward.

In the summer of 2003, two issues developed between Mr. John Marshall, an audit manager, and Ms. Robinson. First, believing he had developed some rapport with Ms. Robinson, Mr. Marshall tried to counsel her about her relationship difficulties. Ms. Robinson told him to "butt out." Second, when Ms. Robinson was not designated as the auditor-in-charge for an audit as she expected, she was very emotional and loud with Mr. Marshall.

While on vacation, Mr. Sutter received a voice mail from Ms. Weiler saying that she had received complaints about a question Ms. Robinson asked Mr. DeLuca at a breakfast meeting. Apparently, at the end of breakfast meeting, Ms. Robinson asked Mr. DeLuca whether he was aware that resources at Riverwoods were not being properly managed. Ms. Khosravani was one of the people who complained to Ms. Weiler. Later, when Mr. Sutter asked Ms. Khosravani what happened, she repeated a similar story. Ms. Khosravani indicated that she was embarrassed for the department.

About mid-June 2003, Mr. Sutter decided to forgo the informal mid-year review because despite his "direct feedback" to Ms. Robinson, she didn't acknowledge any of difficulties in her mid-year self evaluation that Mr. Sutter had brought to her attention the prior three months. Additionally, he and Ms. Robinson had been unable to agree on a professional development plan. Mr. Sutter sent a copy of the self evaluation with his comments, RX 59, to Ms. Rhonda Navidad, requesting help.

In the middle of August 2003, Mr. Sutter decided to place Ms. Robinson on an action plan. In response to his prior feedback, Ms. Robinson generally explained away all the incidents

as being some other person's fault. After four or five months attempting to get Ms. Robinson to respond, Mr. Sutter had become frustrated with her failure to address the issues.

In mid-August 2003, Mr. Sutter wrote notes related to the development of an action plan, RX 67. Then, on August 29, 2003, he sent a draft action plan for Ms. Robinson to HR, RX 73. The action plan and associated chronology went through a couple of iterations and were finalized in October 2003. During this period, Ms. Robinson's performance did not improve and he continued to receive complaints about Ms. Robinson, RX 74.

In October 2003, Mr. Sutter met with Ms. Robinson to discuss the PBX audit and related unclosed issues. He and Ms. Robinson disagreed with whether they could work with an auditee on responses to some issues, including how cell phones were being handled by the company. At some point, Ms. Robinson closed the room door and told him that she had worked for both world class and non-world class organizations and IAD fell in the later category. Based on her experience, Ms. Robinson believed IAD should essentially force a client to accept their requirements in an audit. She believed Mr. Sutter was not independent of management and expressed a desire to take her concerns to Mr. DeLuca. Mr. Sutter responded that she was free to do so. His only criteria was that she present her concerns in the appropriate forum, which he believed was a private meeting. As early as March 2003, Ms. Robinson expressed a desire to talk to Mr. Sutter's boss.

Because audits involve assessing operations, a "certain tension" exists between an auditor and auditee. However, Mr. Sutter believed, "the long term strategy was to build agreement and work together . . . not to force them with a stick to do it. That was a short-term strategy." In the end, however, in the absence of an agreement, an auditor would report on what he felt was important.

RX 14 is the action plan Mr. Sutter personally presented to Ms. Robinson on October 23, 2003. He does not know why the document isn't signed but he personally delivered the document to Ms. Robinson in Ms. Dollmeyer's office. After Mr. Sutter explained each of the performance concerns, Ms. Robinson indicated that she wanted an opportunity to review the plan before responding. The purpose of the action plan was to assist Ms. Robinson in meeting performance standards.

About a month later, in mid-November 2003, as part of the year end performance evaluation, Ms. Robinson completed another self evaluation, RX 16. In her self-assessment, Ms. Robinson did not mention any of the issues noted in the action plan. At that point, Mr. Sutter believed success with the action plan "was probably not going to happen." Mr. Sutter expressed his opinion to Ms. Robinson that "the fact that her year end self evaluation did not reflect anything that was in the action plan [was] evidence of, was another example of not accepting feedback." On December 9, 2003, Mr. Sutter emailed Ms. Dollmeyer a copy of Ms. Robinson's year end self evaluation, RX 46.

When Mr. Sutter gave Ms. Robinson her annual performance appraisal on December 9, 2003, RX 17, Ms. Dollmeyer was also present since she participated in the action plan process. During their meeting, Mr. Sutter emphasized teamwork as a "central and high priority concern."

Noting the differences between the action plan and Ms. Robinson's self evaluation, he also stressed her need to accept feedback. He added that "if she didn't start to accept feedback, we couldn't be successful in trying to get performance where it needed to be." Since the action plan was set to expire in a couple of weeks, "we talked about extending the action plan in order to allow more time for her to take the feedback to heart and perform some of the actions, and to get a 360 review completed." Mr. Sutter also complimented Ms. Robinson on her activities with the Juvenile Diabetes Foundation (JDF"). At the same time, he indicated her JDF work "wasn't something that could replace performance in the core audit areas."

Eventually, on January 30, 2004, Mr. Sutter sent Ms. Robinson a memo extending the action plan, RX 15.

In a January 12, 2004 e-mail, RX 204, Ms. Birk suggested a format for a 360 review. As part of the process, Mr. Sutter and Ms. Robinson were to agree on the evaluators. They both prepared lists of suggested evaluators, discussed the lists at a meeting, and removed a few individuals from their respective lists; page 3 of RX 90 commemorates that process. At the end of their meeting, they agreed to a list of evaluators. Mr. Sutter then sent the evaluator list to Ms. Birk, RX 90(a) and RX 90. The following Wednesday, Mr. Sutter met with Ms. Robinson and Ms. Birk. They agreed that the survey would be anonymous. He doesn't recall that Ms. Robinson expressed any concerns about the process. Mr. Sutter is unaware who responded to the 360 review. He did not talk to any of the evaluators about their reviews. Eventually, he was given the comments from the internal and external evaluators who addressed behavior in the categories of start, stop, and continue. He talked with Ms. Birk and Ms. Dollmeyer about how to deliver the 360 review results to Ms. Robinson. However, prior to discussing the results of the 360 review with Ms. Robinson, Mr. Sutter was informed of her complaint in early February 2004. When he asked whether he should continue to meet with Ms. Robinson, Ms. Piercy advised him not to meet with her. Based on that response, Mr. Sutter decided to stop interacting with Ms. Robinson as a supervisor and only retained indirect responsibility as the second supervisor in line above Ms. Zlateva.

Due to a reorganization in December 2003, Ms. Zlateva became the IT infrastructure audit team manager at Riverwoods and Ms. Robinson was on that team. Mr. Sutter made the decision to have Ms. Zlateva directly supervise Ms. Robinson. Although her earlier supervision of Ms. Robinson was "unsuccessful," Mr. Sutter was "hopeful" that Ms. Zlateva would have a better chance to effectively manage and coach Ms. Robinson as her direct supervisor. Based on her earlier experience, Ms. Zlateva expressed concern that her problems with Ms. Robinson would continue. Mr. Sutter responded that he would do "whatever I could to support her." He knew it was a difficult situation, but his sense "was we couldn't organize the whole department based on one person. We needed to organize it as we wanted to organize it."

At the same time, because Mr. Sutter and Ms. Robinson were already engaged in the action plan/360 review process, he only informed Ms. Zlateva about those actions and continued to "manage this situation" and work with Ms. Robinson. Under this arrangement, Ms. Zlateva continued to direct Ms. Robinson's day-to-day work. Mr. Sutter did not believe it was fair to Ms. Zlateva to put her in charge of a new team and also "force her to handle a whole difficult situation that we'd been unable to handle with a bunch of other managers."

Although he was informed that Ms. Robinson submitted a complaint, he never received a copy. During the investigation of the complaint, Mr. Sutter was interviewed five or six times.

Mr. Sutter played no role in Ms. Robinson's placement on another action plan in 2004. Ms. Zlateva informed Mr. Sutter that she was planning to initiate an action plan. The action didn't surprise Mr. Sutter since he didn't "perceive any change in Beverly's performance from the issues we had in October." Mr. Sutter made no recommendation about the action plan and Ms. Zlateva did not ask his permission to initiate the action plan.

Mr. Sutter also played no role in Ms. Zlateva's mid-year evaluation of Ms. Robinson. They did not discuss the appraisal. Similarly, Mr. Sutter was informed about the JIJ letter only after it was done.

Mr. Sutter played no role in the termination of Ms. Robinson's employment. He became aware of the action the afternoon before Ms. Robinson's termination when Ms. Piercy asked him to find someone to help pack her personal belongings at her desk.

[ALJ examination] Ms. Davis was Mr. Sutter's executive assistant. In January 2004, Ms. Davis called Mr. Sutter at home and told him that Ms. Robinson was planning to write a letter and make a complaint. Ms. Davis was concerned that she would get wrapped up in the action.

[Cross examination] As early as March 2003, Ms. Robinson indicated that she wanted to talk to Mr. Sutter's boss. She questioned his competence and wanted to take her concern to Mr. Tom Burr. He told her to go ahead.

In early May 2004, Mr. Sutter was informed that the investigation of Ms. Robinson's complaint was closed. He did not feel criticized by the investigation. Mr. Sutter was unhappy that he was being investigated. It was a stressful experience.

Sometime between February and August 2004, Mr. Sutter asked Ms. Piercy whether Ms. Zlateva was getting the "proper support" from HR. Based on conversations with Ms. Zlateva, Mr. Sutter believed she was getting frustrated working with Ms. Robinson. He became concerned that Ms. Zlateva might quit.

Although he was no longer involved in the day-to-day supervision of Ms. Robinson after February 2004, he was still responsible for the audit department and received e-mails about Ms. Robinson. For example, in a July 27, 2004 e-mail, he was informed about the coaching agreement for Ms. Robinson.

At one time, Mr. Sutter suggested that Ms. Zlateva also be provided an executive coach.

Mr. Sutter believes "constructive" feedback is "sincere feedback of observations" that assist in improving performance.

In 2003, Mr. Sutter attempted to initiate an 360 review and developed a list of evaluators. After a meeting, he decided not to initiate the review.

Ms. Birk constructed the three categories of the 360 review survey structure.

Mr. Sutter did not shout at Ms. Robinson.

Mr. Sutter discussed doing an action plan for Ms. Robinson with Ms. Birk in December 2003 and January 2004.

As vice president of the Riverwoods audit department, Mr. Sutter reported to Mr. Tony DeLuca in New York. Mr. DeLuca reported to the Morgan Stanley Audit Committee.

The tier reporting system was a department-wide concept. In setting the appropriate tier level, the auditor who discovered the discrepancy makes a first assessment. In turn, the in-charge auditor, manager, and then director set the tier levels. A tier one issue would have significant impact on Morgan Stanley, "either financially or through some other control failure." As a result, tier one issues were reported to Morgan Stanley management. A second tier issue would have a significant impact on Discover, but not Morgan Stanley. A third tier issue went to line management because senior management wasn't needed to correct the problem. The various factors considered in setting the tier level were regulatory impact, financial impact, and reputation risk.

At the completion of an audit, the project lead or in-charge auditor would evaluate the auditors in a review. Sometimes, comments from the auditees were included in the review.

Mr. Sutter heard both negative and positive comments from auditees about Ms. Robinson's performance.

If Ms. Robinson had concerns about Mr. Sutter's competence, she should have gone to his supervisor, Mr. DeLuca, in private, rather than complaining to an auditor-in-charge.

In spring 2003, Mr. Sutter agreed to bring performance issues to Ms. Robinson's attention as soon as he heard them. However, he did not immediately go to Ms. Robinson when heard adverse comments about her breakfast meeting question. Mr. Sutter mentioned the complaint to Ms. Robinson in October 2003, a few months after the breakfast meeting. Mr. Sutter was not concerned about what Ms. Robinson asked. He just believed the breakfast meeting was an inappropriate forum for her inquiry.

After reviewing notes that he made on vacation, RX 62, Mr. Sutter stated that he put Ms. Robinson on an action plan in August 2003 based on performance. Her breakfast meeting question to Mr. DeLuca was not the reason. Mr. Sutter may have given HR a copy of his notes. Upon request, after Mr. Sutter expressed an intention to put Ms. Robinson on an action plan, Mr. Sutter wrote a time line of events involving Ms. Robinson that occurred in the prior six months.

On one occasion, after passing on to HR a complaint from Ms. Zlateva about Ms. Robinson's comments that may have stemmed from employee opinion surveys, Mr. Cavaliero responded that they could not corroborate the incident.

In one meeting, Ms. Robinson stated that she had worked in world class audit departments and the IAD was not in that class. She stated Mr. Sutter should not strive to find agreed actions that were suitable to management. Mr. Sutter considered her comments to be "disrespectful or almost insulting." Mr. Sutter had been trying to work with Ms. Robinson, but "she wouldn't take any of the feedback to heart and was constantly criticizing me to my face or in other forums . . . I found it difficult to try to work with someone who was unwilling to work with me on this issue."

A September 22, 2003 memo, RX 74, commemorates his exchange with Mr. McMahon. Although Mr. McMahon has denied making any complaints about Ms. Robinson, Mr. Sutter believes his memo documents a concern raised by Mr. McMahon about Ms. Robinson's statements relating to Mr. McMahon's competence.

CX 108 is a personnel change notice that Mr. Sutter signed to update the company's system and document the change in Ms. Robinson's employment status. That form was not a termination document.

The personnel change of Ms. Robinson's grade 70 to 72 only reflects a job classification change, CX 108. It was not a promotion and did not increase her pay. She did not become a supervisor. Ms. Robinson remained a senior auditor.

After Ms. Robinson's departure, upon review of the PBX audit working papers, Mr. Sutter discovered that many of the core audit elements were incomplete.

Mr. Sutter was not angry with Ms. Robinson for filing the February 2004 memorandum. He did not raise his voice with her.

[Redirect examination] Reporting concerns associated with the company's non-use of social security numbers was part of Ms. Robinson's duties as an auditor.

When Mr. Sutter confronted Ms. Robinson about her question to Mr. DeLuca, she did not deny making the statement.

A March 6, 2003 memo, RX 49, commemorates Mr. Sutter's reply to Ms. Robinson indicating that she was free to speak to Mr. Tom Burke.

About August 2003, Mr. Sutter removed Ms. Davis' access to his e-mail/calendar because he had sensitive documents going through his e-mail.

Mr. Sutter took no action against Ms. Robinson because she filed a complaint on February 4, 2004.

[Redirect examination] Mr. Sutter considered Ms. Robinson disruptive in 2001 due to failed audits and her struggle with colleagues. In 2002, Ms. Robinson initially did “quite well.” However, in the second half of the year, some issues arose with her interactions with clients which she did not always handle appropriately. In 2003, in the course of her interactions with Ms. Zlateva, Ms. Robinson was disruptive. She also demonstrated a lack of respect and was unable to accept feedback.

Mr. Joseph I. Henning
(TR, p. 1902 to 1915)

[Direct examination] In late June 2004, Mr. Henning asked Ms. Robinson whether she would be willing to be his mentor. She agreed but suggested the arrangement needed to be formalized. When Mr. Henning went to the Director of his department, Ms. Marie-France Weiler, she told him that it was not a good idea because Ms. Robinson would be leaving soon. Subsequently, his manager, Ms. Susan Khosravani, advised that he should keep his distance from Ms. Robinson because something was going on. Although he stayed away from Ms. Robinson in the office, Mr. Henning saw her many times during their cigarette smoking breaks. During those periods, Ms. Robinson provided helpful advice on the risk assessment process.

Mr. Henning never observed Ms. Robinson being rude, disrespectful, or unprofessional. Mr. Henning believes some people in the audit department stayed away from him due to his friendship with Ms. Robinson.

Ms. Tammi Jo Kovach-Plonka
(TR, p. 1915 to 1928)

[Direct examination] Ms. Kovach-Plonka worked with Ms. Robinson in November 2002 as a liaison between the auditors and the business technology group. Ms. Robinson was very professional. Later, she worked with Ms. Robinson to develop a list of items related to compliance with SOX. They identified numerous “processes that needed further clarification in order to comply with the verbiage of Sarbanes-Oxley.” Her principal observation was a lack of checks and balances at Discover.

When Ms. Robinson inquired around December 2003, Ms. Kovach-Plonka indicated that she never received a request to do a 360 review of Ms. Robinson. About this time, Ms. Robinson complained that she was being retaliated against for audit issues she pushed.

Mr. Paul E. McMahon
(TR, p. 1929 to 1952)

[Direct examination] During his three years as a senior associate in internal audit, Ms. McMahon worked for Mr. Sutter and Ms. Zlateva. He also knew Ms. Khosravani as a co-worker. In his opinion, her technical skills were questionable. Mr. McMahon also believes Mr. Sutter mismanaged many issues involved in his department. Based on comments from other employees, many people believed Mr. Sutter had fumbled or dropped issues.

Mr. McMahon never complained about Ms. Robinson to Mr. Sutter. In working with other auditors, Ms. Robinson did not raise her voice or talk down to them. She was never unprofessional.

Mr. McMahon attended a breakfast meeting in the summer of 2003 with Mr. DeLuca. At that time, Ms. Robinson asked Mr. DeLuca about management recognizing expertise within the department and auditors with experience. She wanted to know if Mr. DeLuca valued such expertise. Mr. DeLuca responded that while he valued expertise, local managers were responsible for utilizing the expertise in their department.

Mr. Sutter supervised Mr. McMahon from the first half of 2003 to December 2003, when the internal audit department was reorganized.

On “just about every project,” deadlines were missed because they were “busy.”

Ms. Robinson had a good rapport with people. When he consulted her, Ms. Robinson was knowledgeable and helpful.

In 2004, most people in internal audit seemed to stay away from Ms. Robinson.

[Cross examination] During the 2003 year end review, Mr. Sutter indicated Mr. McMahon needed to improve in meeting deadlines. Mr. McMahon disagreed with that assessment.

[Redirect examination] Mr. McMahon objected to Mr. Sutter’s appraisal because his ratings did not match the ratings that Mr. McMahon had received on numerous projects.

Ms. Laura A. Birk
(TR, p. 2067 to 2118)

For the last four years, Ms. Birk has worked in HR at Discover. Part of her duties includes conducting 360 feedback reviews.

At the end of December 2003, Ms. Birk received a request for a 360 review of Ms. Robinson from Mr. Sutter. (The e-mail indicating the request incorrectly states the law department made the request – Mr. Sutter works on the same floor as the law department). The review’s purpose was to give Ms. Robinson insight for her development. Mr. Sutter indicated that Ms. Robinson was one of his direct reports. Mr. Sutter wanted to validate feedback that he had been giving Ms. Robinson in an anonymous and neutral manner.

Typically, a 360 review is designed to be open-ended and not targeted for a specific outcome. Evaluators provide comments on what a person should start doing, what the person should stop doing, and what the person should continue doing. Although not intended, some of the questions can produce negative feedback.

Mr. Sutter and Ms. Robinson worked out the list of evaluators. Ms. Birk was responsible for ensuring they obtained an adequate number of raters. The raters were selected from inside and outside IAD. As part of the arrangement, Ms. Birk agreed to deliver the review comments to Ms. Robinson and Mr. Sutter at the same time. However, Ms. Birk later discussed the release of the survey with Ms. Dollmeyer and decided to provide Mr. Sutter a copy before Ms. Robinson, which was their usual practice for non-manager 360 reviews. Ms. Birk gave Mr. Sutter a copy of the review to “go over it in advance to make sure, from my perspective, we want to make sure, we have a plan in place that we’re going to use the feedback to help the employee.”

Mr. Sutter received the review results on February 9th. However, Ms. Dollmeyer told Ms. Birk not to release the results to Ms. Robinson. Eventually, after clearance from the legal department, Ms. Birk delivered the 360 review to Ms. Robinson in mid-March 2004. When the review was presented to Ms. Robinson, she appeared to be upset. Ms. Robinson expressed concern for the length of time associated with getting the feedback to her. At that time, Ms. Robinson was not interested having the feedback explained to her. Ms. Robinson asked for an opportunity to go through the feedback. Ms. Piercy was also present when Ms. Birk gave Ms. Robinson the 360 review. (*See* RX 95 and RX 97).

Subsequently, a request was made to provide a coach for Ms. Robinson.

[Cross examination] The delay associated with delivering the 360 review to Ms. Robinson did not affect its content. Taking the review to a supervisor first ensures that steps are in place to enable an employee to move forward.

To ensure anonymity, Ms. Birk had to neutralize some of the comments by removing information that could identify the rater. For example, one rater indicated that he had managed Ms. Robinson.

In December 2003, Mr. Sutter and Ms. Birk discussed a 360 review for Ms. Robinson.

RX 18 contains the raters’ e-mail responses. Ms. Birk received 17 responses.

The meeting with Ms. Robinson to present the 360 results was “very hostile.” Ms. Robinson made it very clear that she did not trust the feedback. She did not believe the feedback was accurate. She also asked Ms. Birk to leave the room.

During the entire 360 review process, Ms. Birk was unaware that Ms. Robinson had filed a complaint alleging financial improprieties at Morgan Stanley.

When Ms. Birk met with Ms. Robinson about the selection of a coach, Ms. Robinson reiterated her lack of trust in Ms. Birk and suspicion of the coaching process. She did not want Ms. Birk involved.

[Redirect examination] Ms. Robinson indicated that she wanted to get started as soon as possible with a coach. Ms. Birk believes Ms. Robinson cooperated with the coach.

Ms. Birk noted that not all requested raters provided a response. She didn't conduct any follow-up on the reason for a non-response.

Some of the feedback Ms. Robinson received was "harsh."

Ms. Robinson indicated that she had misgivings about the review in part because Mr. Sutter had already seen the results.

Ms. Karen J. Dollmeyer
(TR, p. 2127 to 2245)

In the fall of 2003, Ms. Dollmeyer was the Director for employee relations at Discover. Ms. Rhonda Navidad and Mr. Tony Cavaliero reported to her. Following reorganization of the department in December 2003, Ms. Dollmeyer became specifically responsible for employee relations in the information technology branch.

In early 2003, Ms. Robinson had concerns about her performance appraisal conducted by Mr. Jerry Graczkowski. Ms. Navidad handled that situation. In the second quarter of 2003, Ms. Robinson indicated that she no longer wanted to work with Ms. Navidad.

Also, in the second quarter of 2003, Ms. Dollmeyer answered Mr. Robinson's questions about developing a plan to retrieve cell phones from terminated employees. Shortly thereafter, Ms. Dollmeyer received call from the vice president of administration about the issue. Ms. Robinson was in the vice president's office asking about the cell phones. The vice president asked Ms. Dollmeyer to work with Ms. Robinson on the issue. Ms. Dollmeyer was "stunned" by Ms. Robinson's action because they had just developed a plan.

In October 2003, Mr. Cavaliero asked Ms. Dollmeyer to get involved in Ms. Robinson's case and work directly with Mr. Sutter on an action plan, RX 14. Mr. Sutter and Mr. Cavaliero prepared a draft and Ms. Dollmeyer reviewed it. Based on the information Mr. Sutter presented, Ms. Dollmeyer concluded an action plan was warranted.

In conjunction with the action plan, Ms. Dollmeyer recommended a 360 review "to measure change or improvement."

In the later part of October 2003, Ms. Dollmeyer and Mr. Sutter presented the action plan to Ms. Robinson. As they went through the plan, Ms. Robinson did not agree to all the examples.

About a week later, Ms. Robinson called Ms. Dollmeyer and indicated that she wanted to meet and discuss specific questions about the action plan. In response, Ms. Dollmeyer met with Ms. Robinson the first part of December 2003. The delay was due to vacations, scheduling issues, and phone tag. In the meeting, with Mr. Cavaliero present, Ms. Dollmeyer indicated that Ms. Robinson was still in good standing but needed to meet the terms of the plan for the plan to end successfully. Ms. Robinson was "fairly aggressive" in expressing her dissatisfaction with HR and at one point "put her hands on the table and leaned forward in a loud aggressive tone."

In response, Ms. Dollmeyer informed Ms. Robinson about the company's dispute resolution program.

Ms. Dollmeyer was also present when Mr. Sutter presented his year end appraisal of Ms. Robinson's performance. Ms. Robinson just took notes and didn't have much to say. Mr. Sutter advised Ms. Robinson about her lack of communication, team work, and ability to receive feedback. Mr. Sutter also indicated that he intended to extend the action plan for 60 days to permit a 360 review. Ms. Dollmeyer took notes of the meeting, RX 84.

Ms. Dollmeyer then went to Ms. Birk to initiate the 360 review process. After the initial contact, Ms. Dollmeyer had no other involvement in the review process. After the review was conducted, Ms. Dollmeyer met with Mr. Sutter and Ms. Birk on February 9, 2004, RX 116. At that time, Ms. Dollmeyer was unaware of Ms. Robinson's complaint. A short time later, the legal department called Ms. Dollmeyer about the complaint. Due to the complaint, Ms. Dollmeyer put the 360 review report on hold and informed Ms. Robinson, RX 118.

Some time after Christmas 2003, Ms. Davis contacted Ms. Dollmeyer with concerns about her loss of access to Mr. Sutter's e-mail, RX 88. Ms. Davis queried whether her friendship with Ms. Robinson might have been part of the reason. Later, Mr. Sutter explained that due to confidential information coming from New York, Mr. Sutter removed Ms. Davis' access to his e-mail.

Ms. Dollmeyer was present when Ms. Zlateva presented the JIJ letter to Ms. Robinson, RX 107. She was not involved in the decision to give Ms. Robinson a JIJ letter. Ms. Piercy had spoken to the coach and Ms. Robinson objected to that communication. While calm, Ms. Robinson's tone was "sarcastic and condescending."

Ms. Dollmeyer was not involved in the decision to terminate Ms. Robinson's employment.

[Cross examination] The call from the vice president about Ms. Robinson's cell phone visit occurred in May 2003. Ms. Dollmeyer started assisting Mr. Sutter with the action plan in October 2003.

Ms. Dollmeyer believes Ms. Robinson was a "credit service employee" who reported to Morgan Stanley. In other words, Ms. Robinson reported to Morgan Stanley but she had Discover benefits.

Ms. Robinson indicated to Ms. Dollmeyer that she did not agree with how Mr. Sutter was handling her from a performance perspective. She was not comfortable working with Mr. Sutter.

As director of the employee relations, Ms. Dollmeyer had to approve Ms. Robinson's action plan.

In the summer of 2003, HR advised Mr. Sutter not to do an action plan at that time and pursue a more cautious path. They wanted to make sure Ms. Robinson had enough time to

improve and make corrections. Additionally, they hadn't received all the documentation and about Ms. Robinson from Mr. Sutter.

RX 78 is the draft action plan Mr. Cavaliero gave Ms. Dollmeyer for review. She doesn't recall why the reference to the PBX audit was not included in the final action plan.

In regards to communicating personal opinions to New York personnel, the way Ms. Robinson could improve in the area on the action plan was not to make such communications. Ms. Robinson was given an opportunity to provide input to the action plan and "some changes" were made.

As part of the action plan process, the supervisor and employee sign the action plan. However, in Ms. Robinson's case, Ms. Dollmeyer was unable to find a signed copy of the action plan. She has no explanation.

In mid-December 2003, in light of Ms. Robinson's year end appraisal, Mr. Sutter and Ms. Dollmeyer agreed that the action plan should be extended another 60 days to accomplish a 360 review.

Based on her conversations with Mr. Sutter, Ms. Dollmeyer believes he met weekly with Ms. Robinson to follow-up on the action plan. Ms. Dollmeyer believes Ms. Robinson showed some improvement in communication. However, she still struggled with teamwork and feedback.

When Ms. Davis contacted Ms. Dollmeyer, she was also concerned that she hadn't yet received her evaluation. Ms. Davis believed that delay might also be due to her friendship with Ms. Robinson. She indicated that Ms. Robinson wanted to get fired so she could get back at the company.

[Redirect examination] RX 15 indicates the action plan was extended to February 23, 2004. Based on her notes from the meeting that extended the action plan, RX 84, Ms. Dollmeyer believes they had not seen much improvement in Ms. Robinson's performance.

Although Ms. Robinson was struggling with accepting feedback, they proceeded with the 360 review, which provides "feedback from a broader range of individuals" other than the manager. A 360 review gives "an overall perspective" of how an employee is doing.

The reference to the PBX audit in the draft action plan was incorporated into another bullet point in the final draft which referred to audits in general.

[Cross examination] The company's written procedures include a provision for extending action plans.

Ms. Kelly McNamara-Corley
(TR, p. 2251 to 2318)

[Direct examination] For the past six years, Ms. McNamara-Corley has served as general counsel for Discover. About 20 attorneys work in her law department.

Ms. McNamara-Corley first met Ms. Robinson in February 2004, after she filed her complaint. In a meeting with Mr. Slusarz and Ms. Robinson, they went over her complaint. Ms. Robinson advised that she had retained an attorney and was considering suing the company over an employment grievance, which may have been a claim under the Federal Medical Leave Act. After the meeting, Ms. McNamara-Corley worked on assembling an appropriate team to look into the complaint. One member of her law department, Mr. David Oppenheim, and another lawyer at Morgan Stanley in New York were assigned to the team. While Ms. McNamara-Corley helped assemble the team and occasionally met with the team, she did not investigate any of Ms. Robinson's allegations.

Because Ms. Robinson's allegations involved IAD, the company brought in KPMG to help develop the facts and address technical accounting issues. Other than receiving the completed report, Mr. DeLuca played no role in the investigation, which ran about 11 weeks to May.

After the close-out of the investigation, Ms. Robinson sent Ms. McNamara-Corley e-mails alleging retaliation. She forwarded that correspondence to HR.

While an attorney in her law department may have provided legal advice in regards to Ms. Robinson's case, Ms. McNamara-Corley was not involved in any personnel action involving Ms. Robinson. Ms. McNamara-Corley was aware that a 360 review of Ms. Robinson was being conducted. She did not review the action plan or the 360 review. Ms. McNamara-Corley was also advised of the JIJ letter and the general deficiencies noted in the document, which included meeting deadlines, judgment, and professional conduct.

Ms. McNamara-Corley believes Ms. Zlateva decided to terminate Ms. Robinson's employment and that decision was affirmed by Mr. DeLuca. She talked to Ms. Piercy about the legal issues associated with termination. She also discussed legal issues with Mr. DeLuca before he affirmed the termination decision. As general counsel, Ms. McNamara-Corley had no authority to terminate Ms. Robinson's employment.

Ms. McNamara-Corley is the niece of the CEO of Morgan Stanley at the time of Ms. Robinson's employment. She did not discuss Ms. Robinson's case with her uncle.

[Cross examination] Ms. McNamara-Corley only provided legal advice during the termination process. She did not make any decision regarding the JIJ process or termination. She had neither direct nor indirect supervisory responsibilities over Ms. Robinson.

The investigation of Mr. Robinson's complaint determined there had not been any fraud, intentional misconduct, or retaliation.

Ms. McNamara-Corley considered the e-mails Ms. Robinson sent her, RX 414 and RX 415, unusual because they involved specific audit issues.

[Redirect examination] Ms. Robinson only received the general conclusions of the investigation for several reasons. First, usually a complainant does not receive the details of the investigation. Second, the investigation report may contain privileged information. Third, in Ms. Robinson's case, she made "strong statements" about the potential for future litigation.

The manager's decision to permit personal use of a company cell phone may have violated company policy but did not constitute fraud.

Ms. Robinson's e-mails related to vendors without contracts. Rather than e-mail Ms. McNamara-Corley, Ms. Robinson should have addressed the issue with the business unit being audited.

Ms. Sara L. Horowitz
(TR, p. 2319 to 2326)

[Direct examination] Ms. Horowitz is an attorney who works in card number operations for Discover. In June 2001, Ms. Robinson contacted Ms. Horowitz about a question regarding bankruptcy charge off policy. In an effort to assist Ms. Robinson, she looked into the financial institute's policies and found one sentence on bankruptcy charge offs. Ms. Horowitz believed the sentence was self-explanatory. The sentence indicated bankruptcies should be charged off within 60 days of receipt.

[Cross examination] Ms. Horowitz does not recall providing any advice to Ms. Robinson about charging off bankruptcies in 60 days.

Stipulated Testimony
(TR, p. 1999 to 2000)

The parties stipulated that if Mr. Jerry McGarvin had been called as a witness, he would testify as follows: Mr. McGarvin was the Physical Security Manager for Discover. On the day of Ms. Robinson's termination, he was instructed to escort her from the building and not permit her to return to her desk. When she departed the room where she had been terminated, Mr. McGarvin did not observe any memorandum. Ms. Robinson stood by a limo for about 30 minutes. When he was audited by Ms. Robinson, she was never unprofessional. She appeared to have good relations with the other employees.

Complainant's Documentary Exhibits⁸

Interoffice Memorandum, February 2, 2004

(CX 1)

In a 23 page memorandum addressed to Mr. David Nelms, President of Discover, and Mr. Marty Slusarz, Discover CFO, Ms. Robinson set out numerous concerns for their “review, investigation, and action.” Ms. Robinson asserted the various financial, operational, regulatory, and legal risks associated with the issues could result in financial loss to the company and seriously damage its reputation. The issues fell into the general categories of control insufficiencies, qualifications of IAD managers, and retaliation. To the extent Mr. Nelms and Mr. Slusarz found a difference of opinion between her and Mr. Sutter, Ms. Robinson observed the “fundamental root cause” of their disagreement was related to “our individual levels of work experience, training, education, and certification within the audit profession.” To emphasize her point, Ms. Robinson attached her resume and Mr. Sutter’s biography.⁹ Ms. Robinson was bringing her concerns forward due to her professional responsibility as an auditor, the employee code of conduct duty to identify unethical and illegal activity, and her inability to further tolerate “retaliation and mistreatment from within my own department for attempting to do my job.” Indicating that the “fraud triangle” contains the elements of opportunity, motive and rationalization, Ms. Robinson stressed that management must ensure controls are in place to limit the opportunity to commit fraud and internal auditors must be able to identify potential fraud opportunities.

In the first category, Ms. Robinson cited thirteen incidents of control weaknesses and financial exposure that IAD management either chose to ignore, failed to adequately investigate, or “allowed auditee management to unduly influence the outcome” as follows:

1. During the UNIX/Oracle audit, Ms. Robinson determined the information security group was purchasing software licenses without sufficiently developing acquisition and necessity criteria and misrepresenting the nature and extent of the license purchases. Although Mr. Sutter was privy to this audit information, he remained silent while the company spent hundreds of thousands of dollars with little benefit.

2. During a 2001 collections audit, Ms. Robinson determined the company was not complying with banking regulations on charging off bankruptcies within 60 days of receipt of notice. According to Ms. Sara Horowitz of the legal department, the banking regulations were clear and the practice needed to change. IAD was reluctant to report the issue. Later, Ms. Robinson was informed that another attorney from the legal department was not concerned about the company’s practice. As a result, no action was taken to correct the problem.

⁸While I have read and considered every admitted document, I have only summarized relevant portions of the 86 Complainant’s exhibits and 104 Respondents’ exhibits.

⁹Ms. Robinson holds a BSBA degree with accounting specialty (*see also* RX 2). She is certified as an information systems auditor. As of the date of the memorandum, Ms. Robinson had about 10 years experience as an auditor. Mr. Sutter holds an undergraduate degree in industrial engineering and an MBA. As of the date of the undated biography, Mr. Sutter had 12 years of varied business experience as a manager in the areas of systems integration and information technology.

3. Mr. Sutter requested Mr. Grackowski to hold the completed LAN audit report to prevent FDIC auditors from seeing it.

4. During the PBX/Voice Mail audit, Ms. Robinson noted one administrative assistant in business technology had extremely high cellular phone bills. Upon review, Ms. Robinson determined the cost center manager was aware that the assistant was using the phone for personal business but did not report that usage. After referral of the matter to Mr. Sutter, he determined the manager had permitted the personal use of the cell phone because the assistant had fallen on hard times. Mr. Sutter accepted that explanation and took no other action, thereby allowing “the fraud to go unreported.”

5. Another cost center manager was using a company calling card, placing calls from the town where she lived to places where her son attended college and other family and relatives lived. Mr. Sutter only advised the cost center’s supervisor of the problem and failed to report the fraud.

6. During an Orion system audit in 2001, Ms. Robinson noted several control weaknesses. Responses were obtained and prepared for issuance of the report. However, the audit report was never issued and the audit was later deemed cancelled, in violation of internal audit standards, which require timely reporting of audit findings.

7. Although the PBX/Voice Mail audit was completed in May 2003, as of February 2, 2004, the report had not been issued. Consequently, “Mr. Sutter allowed auditees to stall agreement for corrective action in these areas for 9 months, while the financial and legal exposures continued.”

8. In February 2002, Ms. Robinson identified a significant lack of segregation of duties in the internal purchasing function of business technology. Mr. Sutter responded that Ms. Robinson’s concerns would be addressed in a subsequent procurement audit. However, two years later, a procurement audit had not been accomplished. In her opinion, this situation highlighted IAD’s disregard for adequate risk assessment, IAD management’s lack of understanding of fraud, and “a lack of objectivity and independence” by Mr. Sutter.

9. According the Internal Revenue Code, significant tax consequences are associated with an individual’s designation as an employee or contractor. For several years, many contractors at Discover have been treated in the same manner as employees. Ms. Robinson encouraged Mr. Sutter to initiate an audit on outside services. However, to date, he has not responded.

10. Based on her past experience, most companies periodically review the payroll and HR departments. During other audits, Ms. Robinson noted terminated employees continued to have access to company systems and resources. Additionally, based on her experience, “some of the current HR personnel” demonstrated a “lack of knowledge of Illinois and federal employment laws.” Although Ms. Robinson raised numerous concerns in this area for three years, Mr. Sutter has not conducted such an audit.

11. Ms. Robinson has identified numerous information technology audit issues to Mr. Sutter, including information security and lack of experience. However, Mr. Sutter did not see the importance of her concerns.

12. Previous audit findings are resurfacing because the concerns are not sufficiently raised to the proper level of management or lack of attention by upper management.

13. Very few audit findings are reported to executive management under the Morgan Stanley three tier reporting system. The Audit Committee sees even less. By comparison, other companies' top management review every audit finding. Additionally, many of Ms. Robinson's findings, including insufficient fire suppression at system facilities, absence of critical information on customer accounts, shared access to sensitive information, and absence of disaster recovery plan for a computer server facility, were either relegated to the lowest tier of reporting or deemed to be outside an audit's scope.

In the second category of her memorandum, Ms. Robinson questioned the independence, professionalism, and qualifications of several IAD members. Ms. Robinson asserted on several occasions that Mr. Sutter threatened her independence. Typically, Ms. Robinson would identify a problem during an audit. The auditee would then complain to Mr. Sutter. Mr. Sutter would react by criticizing Ms. Robinson and "punishing me verbally and in performance appraisals." Additionally, Mr. Sutter and other IAD personnel were unaware of various audit standards. For example, limitations placed on the scope of audits are not being reported.

Finally, due to Ms. Robinson's refusal to compromise her responsibilities, Mr. Sutter has retaliated against her in several ways. Mr. Sutter criticized her in performance reports, placed her on an action plan, demoted her, and denied a raise. Some of the actions were due to Ms. Robinson being on medical leave, a violation of the Family Medical Leave Act. After Ms. Robinson expressed an intention to take her concerns to Mr. DeLuca, Mr. Sutter placed her on an action plan and threatened her employment if she spoke to anyone. His retaliation has continued and he "is attempting to use anything he can to end my employment with Morgan Stanley." In the most recent review, despite her extensive work with juvenile diabetes fund raising, Mr. Sutter rated her unsatisfactory in leadership. In contrast, "most auditees . . . say how much they appreciate my judgment in business and audit and my commitment to doing the right thing for the company, its employees, and stockholders."

Welcome Letter
(CX 1A and CX 108)

In a September 21, 2000 letter, carrying the letterhead, "Discover Financial Services" and the Discover address, Ms. Robinson is welcomed as a senior auditor to "Morgan Stanley Dean Witter & Co." Her office will be located in Riverwoods, Illinois. Her starting yearly salary is \$74,000.

E-Mail, April 9, 2004
(CX 1B)

Ms. Robinson informs Ms. McNamara and Mr. Slusarz that despite a meeting with investigation team members, she continues to be subject to retaliation. Very few people in IAD speak to her and she had not been included in many IAD functions. Although Ms. Zlateva had begun to treat Ms. Robinson “like a human being,” Ms. Robinson believed she was simply changing her tactics and doing everything behind Ms. Robinson’s back. For example, Ms. Zlateva instructed some people to give work directly to her even though Ms. Robinson was the auditor-in-charge. She believed the 360 reviews “were used by the Audit Department as an all-out attack.” Even though she had been kept busy with the investigation, Ms. Robinson was being held to the same deadlines.

E-Mail Attachment, May 6, 2004
(CX 1C)

Ms. Robinson lists several specific incidents of retaliation. As examples, Ms. Zlateva started wearing perfume when meeting with Ms. Robinson. Mr. Sutter cancelled his one-on-one meetings with Ms. Robinson. Ms. Zlateva was over-supervising her.

Executive Coach Documents
(CX 6)

In a June 28, 2004 interoffice memo, Ms. Piercy emphasizes to Ms. Robinson the need to maintain confidentiality related to various issues being investigated. The issues should not be discussed during the coaching sessions. The purpose of the coaching sessions was to “explore alternative strategies and points of feedback to assist you in meeting your business and performance related objectives.”

Five coaching goals were set out, consisting of meeting deadlines, communicating effectively, accepting feedback, enhancing relationships, and showing respect.

In response, Ms. Robinson challenged each goal. She believed the goal of meeting deadlines was constantly moving and that a different standard was being applied to her. However, Ms. Robinson recognized that she needed to take better control of her time. While Ms. Robinson found Ms. Zlateva’s communication skills to be lacking, she wanted to improve communication skills. Ms. Robinson expressed an open willingness to accept constructive feedback. However, she did not remember ever getting constructive feedback from Ms. Zlateva. Ms. Robinson expressed a desire to “learn how to get negative people, such as yourself, to offer constructive feedback.” Concerning relationships and respect, Ms. Robinson observed that trust was a two-way street and she had many reasons not to respect Ms. Zlateva. Ms. Robinson questioned Ms. Zlateva’s motives and believed “they are a sham.” Nevertheless, Ms. Robinson “was willing to proceed in good faith.”

Medical Certifications
(CX 7A)

On August 22, 2003, Dr Lisa Abrams indicated that Ms. Robinson has an “extremely high sensitivity to perfume and other fragrances.” Dr. Abrams annotated that neither an intermittent nor reduced work schedule was necessary.

On March 29, 2004, at Ms. Robinson’s request, Ms. Piercy sent her a blank medical certification form. According to Ms. Piercy, Mr. Tony Cavaliero had previously discussed the process with Ms. Robinson.

Interoffice Memorandum, August 19, 2004
(CX 7C)

Mr. Sutter advised IAD employees that certain individuals may be sensitive to perfumes and colognes to the extent that they suffer physical reactions. Mr. Sutter asked people to be considerate and courteous if advised of such a sensitivity.

Interoffice Memorandum, August 18, 2004
(CX 7D)

Ms. Piercy responded to a conversation she had with Ms. Robinson two days earlier. Ms. Piercy noted the company had asked on numerous occasions for a completed medical certification form for “further clarification of your condition.” Ms. Piercy indicated a notice would be published to IAD employees about perfume sensitivity and ask for their consideration. Ms. Piercy attached another blank medical certification form.

Interoffice Memorandum, August 13, 2004
(CX 7E)

Ms. Piercy responded to Ms. Robinson’s e-mail about fragrances in the workplace. Ms. Piercy acknowledged that the August 22, 2003 medical certification indicated Ms. Robinson had an extremely high sensitivity to perfume. When contacted, the physician stated Ms. Robinson should avoid perfumes. As a result, the company discussed the situation with the individual who was causing Ms. Robinson discomfort. In a December 2003 follow-up, Ms. Robinson told Ms. Dollmeyer the situation had been corrected to her satisfaction, however she was still working with her doctor for additional clarification. The company records show no additional medical certifications. In March 2004, Ms. Piercy asked for an updated medical certification. As of August 13, 2004, no additional certification had been provided. Once again, Ms. Piercy requested an updated medical certification.

E-Mail, May 1, 2003
(CX 10A)

Recognizing Ms. Robinson's expertise in purchasing, Mr. Nesler requested that she review a controls database for an upcoming audit. The next day, Ms. Robinson provided the information.

Interoffice Memorandum
(CX 13 and RX 419)

Mr. Sutter announces that effective December 1, 2003, the group is reorganizing. Ms. Zlateva will manage the information technology infrastructure team and supervise two auditors, including Ms. Robinson.

Morgan Stanley Publication
(CX 24)

In a Morgan Stanley publication, the company establishes an open door policy. Employees are encouraged to resolve issues with their immediate supervisor. However, if the issue remains unresolved, the employees are encouraged to bring their concerns to the next level of management. Employees are further advised to contact HR for continued unresolved issues.

E-Mail, June 18, 2002
(CX 26)

Mr. Graczkowski notifies Ms. Navidad that Ms. Robinson has "satisfied the conditions of the February 20, 2002 action plan," with one exception relating to the LAN audit that was not reflective of Ms. Robinson's performance.

Handwritten Note, February 3, 2004
(CX 28)

Ms. Robinson received the extension memo for the action plan.

Response to June 1, 2004 Memorandum
(CX 30 and RX 32)

Ms. Robinson provided numerous comments in response to the June 1, 2004 memorandum. In providing her comments, Ms. Robinson questioned the extent to which efforts were made to assist her since Mr. Sutter cancelled at least 8 of the action plan meetings.

In the areas of not cooperating with peers and displaying aggressive and disrespectful behavior towards management, Ms. Robinson disagreed that she engaged in that conduct. She indicated that specific details would be helpful.

Ms. Robinson disagreed that she set the scope of audits. In regards to developing agreeable solutions and options with business partners to resolve audit issues, Ms. Robinson responded, “By definition, ‘agreed actions’ are actions which have been agreed to by the participants. I do not understand how I can be criticized for a lack of ‘oversight.’ I would be grateful if you could provide specific examples in which I have failed to come up with resolutions with auditees.”

Ms. Robinson contested the assertions that she lacked focus, was not prepared for meetings, and jumped to conclusions. Again, she asked for specific examples. Ms. Robinson noted that on one occasion, as she was preparing for a meeting before the meeting was to occur, “as I believe is the case for most professionals,” she was told to stop the preparation and met with her supervisor.

In regards to being rude and unprofessional, Ms. Robinson disagreed and queried, “is it rude or unprofessional as an auditor to express my opinion?”

On meeting audit budgets and deadlines, Ms. Robinson replied that audit deadlines were “a moving target.” She asked whether meeting a deadline should compromise the quality of an audit, “leaving the company with unmitigated, unreported, or possibly undiscovered risk?”

In terms of demonstrating strong judgment on the scope of audits, Ms. Robinson presented her certifications and experience background and stated that she was “a highly respected audit professional.”

Concerning the stated deficiency on performing follow-ups, Ms. Robinson noted that the investigation generated by her February 5, 2004 memo interfered with her ability to conduct a follow-up on one audit.

Ms. Robinson was always open to feedback and constructive criticism. She observed that the “360 evaluations . . . from auditees were generally favorable.” On the other hand, the 360 comments from the auditors, “stylistically” appeared “to be written by one person. This holds true for formatting, punctuation, and even content . . . This seems to narrow it down to one person. These patterns make me question the authenticity of these responses.” Additionally, “much of the responses sound like written rebuttal to my February 5, memo. They appear to be written after the fact by someone I criticized in the memo. It appears many of these comments were made by someone who has been the target of an investigation who is trying to shift focus on me and are not an appropriate subject to address in a performance-related document.” According to Ms. Robinson, under SOX, using those comments in a performance document “in response to a protected activity smacks of retaliation. It is unfair to make me respond to them and is tantamount to retaliation.” Such comments were not the goal of the 360 review. Ms. Robinson expressed an interest in external coaching.

On building trust with management and peers, Ms. Robinson stated that her understanding of SOX “is that I may be required to talk to others in the company behind the backs of others, particularly in reference to an illegal act.” In regards to blaming others, Ms.

Robinson asked, “if others deserve blame, do I not have a professional, as well as legal, obligation to blame them?”

Regarding appropriate body language, Ms. Robinson replied, “I am not aware of any body language or tone of voice rules or regulations or of any circumstance where mine were aggressive or threatening.”

Concerning jumping the chain of command, Ms. Robinson highlighted the company’s “open door” policy. In some incidents, Ms. Robinson asserted that going through the chain of command could “later compromise an investigation or litigation.”

Mid-Year Self-Appraisal, June 9, 2003
(CX 31, RX 59, and RX 112)

In her self-appraisal, Ms. Robinson noted her achievement of several department and company goals. Her teambuilding efforts led to a program of colleague birthday lunches. Ms. Robinson volunteered to assist an audit team obtain proper access to information systems for testing.

Ms. Robinson noted several strengths. First, one of Ms. Robinson’s biggest strengths was “leadership,” best demonstrated by her fund raising efforts for the JD RF. She also served on the board of a professional association. Second, Ms. Robinson utilized her knowledge in a wide array of information technology, operational, and financial audits. Third, Ms. Robinson was able to network and established contacts throughout Morgan Stanley.

Ms. Robinson’s biggest struggle was “to adapt to the culture” within IAD. Unlike the IAD team, Ms. Robinson “has been in the audit profession for many years.” She “sometimes loses patience and does not communicate properly with management members of the department who do not come from audit backgrounds.” She could also “sometimes benefit from not expressing her opinions.”

Performance Appraisal, December 12, 2002
(CX 34, CX 108, and RX 12)

In all the observed categories, Mr. Graczkowski gave Ms. Robinson ratings of meets, exceeds, and consistently exceeds (distinguished). Ms. Robinson had done an “excellent” job of correcting the shortcomings set out in the February 2002 action plan. While some areas needed improvement, her turn around as “commendable.” Ms. Robinson was a strong auditor and established herself among clients as a thorough auditor.

In terms of improvement, Ms. Robinson “can occasionally resort to an extremely dogmatic, single-minded approach to her audit work.” While in some cases, such as fraud, the approach might be appropriate, in other situations, her style alienated clients “who did not believe that we were willing to partner with them to achieve a desired goal.” Ms. Robinson needed to learn to take a “more balanced, reserved approach.” An independent auditor, Ms. Robinson needed to work on group effort. In meeting 2002 professional development goals, Ms.

Robinson “has become much more approachable while maintaining her professional bearing. At times, however, she can still be too single-minded in her audit work, to the exclusion of client relationships and the long-term, overall goal of our work.”

E-Mail, September 26, 2002
(CX 38)

In an e-mail to IAD, Mr. Sutter recognized Ms. Robinson’s efforts in organizing a fund raising event for JDRF.

E-Mail, August 23, 2004
(CX 40)

Ms. Robinson declined to work for the JDRF drive because Mr. Sutter had characterized her prior work as “extracurricular” and criticized her involvement.

E-Mail, August 13, 2004
(CX 41 and RX 43)

Ms. Robinson advised Ms. Zlateva that she is unable to complete work on the UNIX and LAN issues because the legal department refuses to return her follow-up files. Additionally, the physical work papers for the audits had also disappeared.

E-Mail, August 19, 2004
(CX 42)

Ms. Robinson reminded Ms. Piercy of three items she “committed” to send to Ms. Robinson. The three items were audit responsibilities for a manager and auditor-in-charge, the names of HR persons involved in drafting the JIJ letter, and HR’s and IAD’s definitions of “insubordination.”

Discover Performance Counseling Procedures
(CX 45)

When employees failed to meet established standards after a reasonable opportunity, Discover HR prescribed a progressive discipline process, consisting of performance action plan, JIJ letter, and recommendation for termination.

IAD Charter
(CX 71)

IAD was established to assist senior management and the Audit Committee of Morgan Stanley “in the effective discharge of their oversight responsibilities or risk management, control, and governance processes.” While management retained ultimate responsibility for the company’s system of controls, IAD acted as a “an independent element of risk management.” In

particular, IAD was to “free from interference in determining audit scope, performing work, and communicating results.”

E-Mail, March 1, 2002
(CX 97)

Ms. Robinson agrees to help Mr. Nesler with a documentation process.

Interoffice Memorandum, July 26, 2004
(CX 102)

The memo provides notice that IAD will audit the business technology vendor management process. Ms. Robinson is designated as the auditor-in-charge. Ms. Zlateva will manage the audit.

Handwritten Note, February 10, 2004
(CX 106)

According to Ms. Dollmeyer, everything has been placed on hold due to the investigation, including the 360 and goals.

Personnel File Forwarded to Ms. Robinson, December 1 and December 9, 2004
(CX 108 and CX 116)

On August 16, 2001, Ms. Robinson was reclassified as an “EDP audit supervisor,” in the new pay grade of 72.

Effective August 25, 2004, Ms. Robinson was involuntarily terminated from employment due to performance.

Appraisal, February 21, 2002
(CX 108 and RX 9)

In his appraisal covering November 2, 2000 to November 30, 2001, Mr. Graczkowski gave Ms. Robinson a “needs improvement” rating, noting numerous areas for improvement. First, while Ms. Robinson showed great enthusiasm, she needed to improve in teamwork due to her “adversarial stance toward both her colleagues and her clients.” Rather than partner with clients to gather information, produce quality findings and establish “beneficial relationships,” Ms. Robinson was perceived as “overly demanding” and patronizing. Due to her approach, with few exceptions, the reputation of IAD had suffered and requests have been made to remove her from control improvement efforts. Within IAD, Ms. Robinson had “demeaned her colleagues and the IAD as a whole.” By stressing how things were accomplished in her prior employments, Ms. Robinson essentially questioned “the abilities of her colleagues and the expertise of the department.” In the future, Mr. Graczkowski expected Ms. Robinson to demonstrate the professionalism consistent with her years of experience.

In communications, Ms. Robinson had a “very open” writing style. However, her product could be disjointed and difficult to follow. She also needed to simplify her work product to enable clients to clearly understand her observations and develop a practical response.

Leadership ability was placed in question due to Ms. Robinson’s “free wheeling style and casual professional demeanor.”

Ms Robinson’s organizational skills were placed into question due to her failure on numerous occasions to “deliver quality work on time.” In one case, “an audit had to be abandoned altogether.” Ms. Robinson needed to work on meeting deadlines, handling concurrent projects, and living up to commitments.

To enhance personal effectiveness, Ms. Robinson needed to “show a willingness to learn from others and accept feedback.”

While Ms. Robinson had a good knowledge of some business aspects and possessed audit credentials and certifications, she tended to “react before thoroughly investigating findings and organizing her observations.” Additionally, after providing a specific example, Mr. Graczkowski stated Ms. Robinson’s performance “has not always been indicative of her training.”

Mr. Graczkowski concluded Ms. Robinson “had not lived up to the expectations the IAD had of her when she was hired. Despite her audit experience and credentials, as noted above, she has not demonstrated the skills expected of someone at her level.”

Performance Appraisal, December 8, 2003
(CX 108 and RX 17)

In the observed categories of communication, analytic ability, creativity, business and audit knowledge, and functional performance, Mr. Sutter rated Ms. Robinson as meeting expectations. In the area of technology knowledge, Ms. Robinson exceeded expectations. At the same time, Ms. Robinson’s teamwork was unsatisfactory and she need improvement in leadership, organizational ability, judgment, and commitment.

As accomplishments, Mr. Sutter noted Ms. Robinson led the DFS portion of the PBX/Voicemail audit and “identified opportunities for enhanced controls and cost savings.” She completed another audit and was engaged in a local professional organization. Ms. Robinson had “strong knowledge of business processes and controls.” Her advice was sought in many business function areas. Ms. Robinson also enhanced the company’s reputation through her efforts with JDRF activities.

As strengths, Mr. Sutter highlighted Ms. Robinson’s ability to identify control weaknesses. She also possessed a significant knowledge base relating to information systems, fraud, and general business. Finally, by developing both internal and external networks, Ms. Robinson was able to quickly obtain information and well positioned to offer advice.

However, Ms. Robinson “again is struggling with teamwork and her relationships in the department.” She “continues to take adversarial stances toward her colleagues and management.” Ms. Robinson was unprofessional in expressing “her dissatisfaction both inside and outside the team.” Although possessing a “high degree of audit, risk, and control knowledge,” Ms. Robinson did not consistently deliver audits in a timely manner. Consequently, Ms. Robinson required more supervision than should be necessary at her level. Mr. Sutter stressed that Ms. Robinson focus on organization. Finally, Ms. Robinson “does not accept feedback form management or co-workers.” Rather than listening to observations, Ms. Robinson “argues about the details of the comments.” For example, after receiving an action plan in October 2003 concerning her performance and behavior, Ms. Robinson did not mention any of the improvement points in her subsequent self evaluation. Ms. Robinson’s ‘inability to accept feedback and then work towards corrective action and improvement continues to negatively impact her ability to be successful.’”

Year End Self Appraisal, November 14, 2003
(CX 109 and RX 16)

In her self appraisal, after reiterating many of the accomplishments she listed in her June 2003 mid-year self appraisal (CX 31), Ms. Robinson added the she had made substantial contributions to company as the “first” or “continuous” choice of various business units for advice. Through her work as an “ambassador of volunteerism,” Ms. Robinson contributed to the recognition of IAD. Her organizational efforts during the JDRF fund raising effort produced a total contribution well above the goal. Ms. Robinson was also a “recognized leader” in a local professional auditor association.

Ms. Robinson gave herself a distinguished rating in leadership, analytical ability, creativity, commitment, and audit and technology knowledge. She exceeded expectations in teamwork, communication, judgment, business knowledge, and functional areas. Ms. Robinson met expectations for organizational ability.

As principal strengths, Ms. Robinson emphasized “her ability to network and build relationships with the auditee community.” Across several business units, Ms. Robinson formed long-term relationships. Ms. Robinson’s knowledge and versatility were also strong. She used her knowledge “to seek out business opportunities, to minimize risk, improve the quality and efficiency of business practices, and identify cost savings.” Due to the breadth of her experience, Ms. Robinson was able to perform audits in information technology, operations, finance, compliance, and fraud. Finally, Ms. Robinson highlighted her “can-do attitude” and willingness to work on any project. On her own initiative, Ms. Robinson assisted a colleague with completing a business plan. She also suggested ways to streamline various stages of the SOX project.

For development, Ms. Robinson recognized a need to become more proficient with programming languages of the company’s systems. She also planned to become up-to-date on the “latest accounting changes.” Further, Ms. Robinson planned to become more familiar with banking regulations relevant to the financial services industry.

Finally, given her “training, experience, and skills to perform most, if not all, tasks” within IAD, Ms. Robinson considered herself to be a “very valuable asset to the team.” Given the new direction of IAD, her expertise was of even higher value. Similarly, her fraud training would prove helpful in preventing, detecting, and investigating fraud. Ms. Robinson believed “she should be moved to a management position immediately” so that she might “mentor and train colleagues in an official manner.”

2002 Accomplishments
(CX 111)

As accomplishments in 2002, Ms. Robinson listed her diverse efforts in numerous audits. She served as a mentor for one auditor and pioneered a fund raising effort for JDRF in IAD.

Job In Jeopardy Interoffice Memorandum, August 6, 2004
(CX 116 and RX 42)

In a JIJ letter, Ms. Zlateva informed Ms. Robinson that she must take specific steps to meet “essential performance and behavioral requirements” of her job as a senior associate. Ms. Zlateva noted that Ms. Robinson had been placed on action plans in February 2002 and October 2003. Ms. Zlateva had also met with Ms. Robinson in June 2004 to initiate another 60 day action plan, which stressed several improvement areas relating to deadlines, judgment, feedback, and teamwork. Additionally, Ms. Zlateva met weekly with Ms. Robinson to discuss her performance.

Ms. Zlateva determined Ms. Robinson remained deficient in four areas. First, Ms. Robinson missed deadlines on “22 separate occasions,” resulting in 14 late submissions and 8 failures to produce required work. On some occasions, Ms. Robinson completed the tasks only after several reminders and additional managerial follow-up. Second, Ms. Robinson was “not proactive” in her communications with Ms. Zlateva. She did not provide updates or advise Ms. Zlateva when she initiated new actions. Additionally, Ms. Robinson discussed findings with a client without providing Ms. Zlateva an opportunity to review the findings. Third, Ms. Robinson continued to demonstrate insubordination and un-professionalism with Ms. Zlateva and HR personnel. As they were attempting to provide feedback, Ms. Robinson “used a threatening tone and comments.” She continued “to blatantly refuse to accept feedback” or address issues in the action plan. Fourth, while seeing improvement in Ms. Robinson’s communication, the external coach opined she had notable issues which required hard work and trust to progress.

Having failed to comply with the action plan requirements, and to remain in “good standing” with the company, Ms. Robinson had to “make immediate and sustained correction” in the areas identified in the action plan and JIJ letter, including proactive communication, timely completion of deadlines, and positive and professional communication. Ms. Zlateva intended to continue to meet with Ms. Robinson weekly.

The JIJ process was to be in effect for 30 days. A performance review would be conducted after 15 days, August 23, 2004. “At that time, if it is determined that your performance has not shown significant and sustained correction, or if your performance has

further declined in any way, the disciplinary process will be advance to the immediate termination.”

Coaching Agreement, July 26, 2004
(CX 302)

Mr. Rosenak summarized the results of a July 22, 2004 meeting and set out the four goals for the coaching sessions. First, both Ms. Zlateva and Ms. Robinson agreed to take the emotional charge out of their conversations. Mr. Rosenak intended to help Ms. Robinson become more effective in her communications. Second, Ms. Robinson agreed to accept and solicit more feedback and Ms. Zlateva agreed to present feedback in a respectful manner. Mr. Rosenak believed Ms. Robinson had received consistent and constructive feedback. Her response of criticizing the comments or the persons who provided the feedback put the individuals on the defensive. Third, neither Ms. Robinson nor Ms. Zlateva believed they had been treated with respect. Mr. Rosenak intended to coach Ms. Robinson on her tone of voice, body language, and facial expression. Fourth, while Ms. Robinson believed her deadlines are constantly shifting, Ms. Zlateva needed to see progress with Ms. Robinson meeting deadlines.

“Your Employee Handbook”
(CX 303)

The 2001 employee handbook’s top caption is “Morgan Stanley Dean Witter & Co. Credit Services.” The bottom caption is “Discover Financial Services.” In the preface, Mr. David Nelms, President, Discover Financial Services, Inc., “a Morgan Stanley Company,” welcomes the employee as a “Morgan Stanley – Credit Services” employee.

Respondents’ Documentary Exhibits

IAD Competency Matrix, January 24, 2002
(RX 3)

Based on the three job titles of project team member, project leader, and group leader, the competency matrix establishes various requirements and tasks for interpersonal, professional, knowledge (financial, information technology, and software development), and functional categories.

Internal Audit Job Evaluation, April 11, 2001
(RX 4)

Mr. Takada rated Ms. Robinson’s overall performance work as the auditor-in-charge on the General Ledger audit for January to March 2001 as “needs improvement/fair.” Ms. Robinson met expectations in the areas of analytical ability, judgment, written communications, and technical aptitude. Due to her experience, Ms. Robinson had a strong degree of technical expertise which she applied to the audit. Additionally, her work papers were clear.

However, Mr. Takada believed Ms. Robinson needed improvement in the areas of oral communications, professionalism, and leadership abilities. Mr. Takada noted that Ms. Robinson's meeting discussions were often diverted to tangents or went into unnecessary detail. Ms. Robinson did not demonstrate a "collaborative respectful relationship" with Mr. Takada during the audit. In terms of leadership, Mr. Takada urged Ms. Robinson to be more proactive. He encouraged her to spend less time on "making references to your past experiences." Instead, Ms. Robinson should "simply execute, produce, and lead by example." Finally, Mr. Takada rated Ms. Robinson's execution of work as "unsatisfactory." He observed planning and organization problems and a budget variance of 29%. Mr. Takada believed Ms. Robinson had failed to follow his guidance on work processes and working relationships during the course of the audit. She never really answered his budget questions and he "received little, if any, unsolicited on-going communications regarding progress of audit tasks."

Response to Internal Audit Job Evaluation, April 2001
(RX 5)

In response to Mr. Takada's evaluation, Ms. Robinson asserted that he was "unable to separate his personal feelings for me and objectively evaluate my performance." In many cases, his observations were either vague or inaccurate. She noted that Mr. Sutter had complimented her hard work and characterized the final report as excellent. On the issues of planning and work execution, Ms. Robinson indicated much of the problem related to Mr. Takada's refusal to make a decision on the scope of the audit. She also observed that Mr. Takada had "no background in accounting." Ms. Robinson asked for specific examples that justified the ratings. Mr. Takada "showed disrespect during the audit, by calling her 'dear'." Ms. Robinson believed her past experience was an asset which had been praised by Mr. Sutter.

Internal Audit Job Evaluation, June 13, 2001
(RX 6 and RX 111)

Ms. Weiler rated Ms. Robinson's overall performance on the General Ledger audit for January to March 2001 as "needs improvement/fair." According to the cover sheet, this rating means Ms. Robinson's performance did not fully meet expectations and results did not meet expectations.

Due to her experience, Ms. Robinson's review of various aspects of the audit demonstrated analytical ability and judgment that exceeded expectations. She met expectations in the areas of execution of work, written communications, and technical aptitude. While Ms. Robinson needed to develop management skills to keep a better budget and provide a balanced work schedule, Ms. Weiler opined the Ms. Robinson executed her work as expected. Her writing was proficient and consistent with her level of experience. During the moderately complex audit, Ms. Robinson exhibited a sound audit base.

At the same time, Ms. Robinson needed improvement in oral communications and professionalism. Ms. Robinson's presentations could "go off on tangents," and she was "often times uncompromising and her tone is not positive." Although Ms. Robinson had "very good relationships with clients," her professionalism suffers with team members. "In response to

conflicts,” Ms. Robinson “was abrasive, would talk down to staff, sometimes rude when addressing them.” She and the audit manager did not work together well. “Open communication and team spirit was absent.” Ms. Weiler stressed that “professionalism is required across the board when dealing with issues.” Although Ms. Robinson had expressed her preference not to be placed as “in-charge” on the audit, she agreed to take the audit. Again, while Ms. Robinson presented a “good image” of IAD to clients and had good customer relation skills, she could have been more effective as an auditor-in-charge by meeting deadlines and ensuring communication did not break down.

In response, Ms. Robinson added several comments. First, she observed that the new assessment was conducted by the Director, “who had very little contact with the audit and, therefore, very little first-hand knowledge other than reviewing working papers.” Second, the roles and responsibilities at the start of the audit were unclear or undefined. Third, although Ms. Robinson appreciated and welcomed feedback, “in some areas, such as the oral communications skills, the Director was unable or unwilling to give me specific examples to support some of the comments and make them useful.” Fourth, Ms. Robinson appreciated the time and effort associated with the second evaluation and intended to “use the input as constructive feedback.”

Mid-Year Evaluation, September 17, 2001
(RX 7)

Ms. Weiler listed several strengths for Ms. Robinson, including good working relationships with clients, self-motivation, good audit skills, and client focus. Among many improvement areas, Ms. Weiler noted Ms. Robinson needed to collaborate better with team members, maintain professional communication at all times, “accept constructive feedback as a means of self improvement,” and “be open to criticism and suggestions.” Ms. Weiler gave Ms. Robinson an overall rating of “meets” expectations.

Internal Audit Job Evaluation, October 4, 2001 and November 8, 2001
(RX 8)

On the CMA audit, Mr. Takada rated Ms. Robinson’s overall performance as a senior auditor as “needs improvement/fair.” Ms. Robinson met expectations in execution of work, analytical ability, judgment, communication skills, and technical abilities. Ms. Robinson’s work product was complete and thorough. She understood business processes and identified control weaknesses.

In Mr. Takada’s opinion, Ms. Robinson needed to improve her professionalism and leadership abilities. Within the audit team, Mr. Takada recommended that Ms. Robinson “keep issues of personal judgment out of the workplace.” While attributable in part to her unfamiliarity with the IAD structure, Ms. Robinson experienced difficulties during the audit and relinquished her responsibilities as auditor-in-charge.

Ms. Robinson provided extensive comments in response to “give the reader insight to the situation, and therefore, provide a perspective to this evaluation.” She first noted that due to Mr. Takada’s inability to write an objective evaluation on a prior audit, the Director had to write the

evaluation. Ms. Robinson objected to the areas rated as “meets” because Ms. Takada did not provide comments for improvement and did not recognize her lack of prior experience in bankruptcy. On professionalism, Ms. Robinson did not understand the rating because the only example Mr. Takada had been able to provide related to an incident when she told an audit member not to “chomp on gum in meetings.” In regards to the change in her status, Ms. Robinson observed that she initiated the actions with the Director that led to the change. In regards to “challenges,” Ms. Robinson objected to the lack of any specifics. Additionally, since the evaluation was not delivered until four months after the audit, Ms. Robinson did not consider the feedback to be timely.

Action Plan, March 21, 2002

(RX 10)

Mr. Graczowski initiated an action plan to assist Ms. Robinson “in meeting the goals for improvement set out in your last annual review” which they discussed on February 15, 2002. The action plan was to remain in effect through May 31, 2002. Mr. Graczowski indicated that Ms. Robinson’s failure to make immediate and sustained changes in her performance could lead to further disciplinary action, including termination.

The action plan contain five deficiencies requiring improvement. First, Ms. Robinson needed to correct her adversarial stance toward colleagues and clients and stop demeaning colleagues. Mr. Graczowski offered to assist Ms. Robinson if she was unsure of an approach to take. Second, Ms. Robinson needed to improve her communication skills by focusing on her audience, the goal of the interaction, and how her message is being received. Third, Mr. Graczowski expected the LAN audit to be completed by May 31, 2002 to establish improvement in organizational skills. Fourth, Ms. Robinson needed to enhance her personal effectiveness by increasing her ability to work without active supervision, showing a willingness to accept feedback, and learning from others. Fifth, since she reacted before thoroughly investigating findings and organizing observations, Ms. Robinson was directed to reflect upon and organize her findings. Mr. Graczowski offered to review documents once they were ready for presentation.

Interoffice Memorandum, September 19, 2003

(RX 13)

Mr. Sutter provided HR a summary of Ms. Robinson’s behavior between March and August 2003. During professional development plan meetings in March, Ms. Robinson “exhibited aggressive and disrespectful behavior” towards Mr. Graczowski, Mr. Sutter, and HR personnel. Ms. Robinson also complained about Mr. Sutter’s professionalism to a staff member in New York. Although Mr. Sutter informed Ms. Robinson she could express her concern to Mr. DeLuca, he considered her comments to the staff member unprofessional. Ms. Robinson’s judgment was called into question during the PBX audit when she expended time in the cell phone and calling card area versus the PBX infrastructure. In April 2003, Ms. Robinson announced that she was leaving the department because Mr. Sutter was using past events to deny her an opportunity to advance. She complained about Mr. Sutter’s appointment of Ms. Zlateva and Mr. Greco as managers, telling him he had created “two little monsters.” In the spring of

2003, after Mr. Graczkowski's departure, Mr. Sutter asked Ms. Zlateva "to oversee" Ms. Robinson's work, even though Ms. Robinson still reported directly to Mr. Sutter. Although Mr. Sutter explained the situation to Ms. Robinson, she was uncooperative with, and at times rude to, Ms. Zlateva. Her behavior led Mr. Sutter to return to overseeing Ms. Robinson's work. Over the course of several months, Ms. Robinson was uncooperative and rude when asked for audit status updates. During an HR meeting, Ms. Robinson had not completed agreed action steps, threatened to leave the company, and indicated she saw no need for the HR meetings. In June 2003, when Mr. Sutter presented critical items necessary for promotion consideration, Ms. Robinson became very aggressive toward Mr. Sutter in both tone and body language. In August 2003, Ms. Robinson raised a concern with Mr. DeLuca about how she was being utilized. Her comments made other staff members uncomfortable. In August 2003, Ms. Robinson had a client meeting that "resulted in shouting."

Performance Action Plan, October 23, 2003
(RX 14)

Mr. Sutter initiated an action plan to identify specific steps for Ms. Robinson to take to meet performance and behavior expectations. Mr. Sutter observed that while some improvements were observed during the 2002 action plan, Ms. Robinson "failed to make the necessary sustained improvements." The 2002 year end appraisal also highlighted several improvement areas. Over the course of meetings for six months, Ms. Robinson had "been unwilling to accept feedback given and [had] rejected the development actions and performance requirements necessary" for Ms. Robinson "to be successful in the department." Continued problems included the display of aggressive and disrespectful behavior, lack of focus, rude and unprofessional communications with coworkers, and lack of cooperation with peers.

Mr. Sutter set out area specific areas of improvement in meeting audit budgets, showing strong judgment, performing accurate updates, being open to feedback, working effectively within an environment with changing roles, showing "sustained and consistent ability to work with and gain the confidence of Credit Services IAD associates on teams, global IAD associates on audits, and clients," building trust, and demonstrating appropriate body language.

Mr. Sutter reiterated that "particular areas of your performance and conduct cited here are unacceptable and require you to make immediate and sustained improvement." Mr. Sutter offered his assistance and indicated they would meet weekly to assess performance. The action plan was effective for 60 days. Ms. Robinson was advised that failure to make immediate and sustained improvement could lead to additional action, including termination of employment.

Interoffice Memorandum, January 30, 2004
(RX 15)

Mr. Sutter informed Ms. Robinson that the action plan was being extended from the original termination date of December 23, 2003 to February 23, 2004.

360 Review Comments
(RX 18 and RX 21)

In January and February 2004, sixteen individuals provided comments during the 360 review. Several of the individuals were past and present supervisors and directors of Ms. Robinson (internal reviewers). Other correspondents were co-workers (internal reviewers) and a few auditees (external reviewers).

In the category of behavior to start, Ms. Robinson was advised to be more open-minded, listen to her clients, improve her relationships with peers, look to see if her points have been made, understand issues have varying importance, conform to IAD methodology, be organized and meet deadlines, be respectful and professional, “start doing what she is paid to do, not just what she wants to do or feels like doing,” be open to constructive feedback, partner with clients, work within a team, and be more aware of the impact of her communication style.

Correspondents indicated Ms. Robinson should continue to remain passionate about her work, share her wealth of knowledge, stay inquisitive, be a hard, sincere, dependable worker, preserve, be enthusiastic about IAD group activities, engage in volunteer work, be a dedicated and focused auditor, be thorough, and “care deeply about doing the right thing.”

Finally, the participants suggested Ms. Robinson stop taking things personally, “being the enemy,” losing focus, doing any extracurricular activity that is not favored at a higher level, being confrontational, feeling negative about IAD, blaming others, being difficult to work with, isolating herself, “comparing our company/audit department to other companies/audit departments that existed years ago,” being insubordinate, and being so adamant in her opinions.

Ms. Birk provided Ms. Robinson a summary of the 360 comments on March 15, 2004.

E-Mail, May 6, 2004
(RX 24)

Ms. Robinson informed Ms. Piercy about retaliation in the form of something that wasn't done. After she discovered a malicious computer virus on her laptop, Ms. Robinson quickly informed her colleagues to save their work, log off the network, and disconnect their computers. Due to her prompt action, the number of computers infected was minimized. From her perspective, “had this been someone else, they would have been loudly applauded for their efforts. Instead, because it was me, the department management has made no mention of my efforts at all.”

E-Mail, June 25, 2004
(RX 26)

Ms. Robinson asked Ms. Zlateva about whether she will be able to take “summer hours” that day. Ms. Zlateva gives her permission for summer hours and adds, “next week, we will discuss deadlines and summer hours.”

E-Mail, February 25, 2004
(RX 27)

Ms. Zlateva advises Ms. Piercy that when she asked Ms. Robinson for assistance on the wording for an audit issue because she had been in a meeting where the issue was discussed, Ms. Robinson responded, “Paul wrote it, sorry follow with him.” Due to Ms. Robinson’s response, Ms. Zlateva had to call Paul at home to get the wording. Ms. Zlateva was disappointed with Ms. Robinson’s unwillingness to cooperate on the matter.

E-Mail Series, April 29, 2004
(RX 29)

To ensure a consistent approach, Ms. Zlateva asked Ms. Robinson to “communicate first with me and then the client,” rather than forwarding reports directly to the client. In response, Ms. Robinson blamed Ms. Zlateva for any inconsistency because Ms. Zlateva had reported to a client without first discussing the report with Ms. Robinson. Ms. Zlateva explained that on the day the report was due, Ms. Robinson was busy so Ms. Zlateva presented the report. Ms. Robinson replied, “Oh yeah?” and asked Ms. Zlateva to send their exchange to her via e-mail.

E-Mail, April 23, 2004
(RX 30)

Ms. Zlateva directed Ms. Robinson to make closing out four audits a priority for the week.

Performance Action Plan, June 1, 2004
(RX 31)

Ms. Zlateva placed Ms. Robinson on a performance action plan to identify specific steps she needed to take to meet performance and conduct standards for her job. Ms. Zlateva observed that “during our meetings and discussions over the past several months, you have been unwilling to accept the feedback given.” Despite several months of meetings, Ms. Robinson had failed to make sufficient corrections and had not sustained the improvements from the prior action plan. Ms. Robinson continued to: display aggressive and disrespectful behavior to management, need oversight on scope of audits and setting agreed actions, need work on reaching agreeable solutions with clients, be uncooperative with peers, lack focus, and be rude and unprofessional in her communications with co-workers.

Applying the IAD competency matrix, Ms. Zlateva specified several deficiencies and the associated corrective action steps. To meet audit budgets and deadlines, Ms. Robinson needed to handle tasks concurrently and meet commitments. To show strong judgment relating to scope of audits, Ms. Robinson should focus on high risk items, assessing their impact and severity. More accurate follow-up was necessary and should not require requests. Ms. Robinson had to accept feedback as “an effort to increase your effectiveness.” During the feedback process, Ms. Robinson should avoid combativeness and actively address the comments presented in the 360 reviews. By understanding that her work environment involved changing roles and some

ambiguity, Ms. Robinson need to be open to “different ways” people worked together. She was advised to take initiative and work effectively even when all outcomes are not explicitly defined. Through professionalism commensurate with her experience, and “avoiding taking overly aggressive and confrontational postures,” Ms. Robinson needed to demonstrate a sustained and consistent ability to obtain the confidence of co-workers and clients. Similarly, to build trust, Ms. Robinson needed to stop complaining about her dissatisfaction and blaming others. Unless necessary, Ms. Robinson should avoid jumping the chain of command. Finally, Ms. Robinson needed to avoid aggressive and threatening body gestures.

The action plan was to remain in effect for 60 days (about the first week in August 2004). Ms. Zlateva offered to be available to assist Ms. Robinson with her corrective actions and indicated they would meet weekly to discuss performance issues.

Interoffice Memorandum, June 7, 2004
(RX 33 and RX 212)

In response to Ms. Robinson’s comments about the June 2004 performance action plan, Ms. Piercy advised her that her managers had identified numerous areas of performance deficiencies through counseling, two prior action plans, and the present action plan. Although Ms. Robinson successfully completed the February 2002 action plan, she did not sustain that improvement. The present action plan addressed many of the deficiencies previously noted in 2002. In the areas of aggressive behavior, unprofessional behavior, need for oversight, and lack of focus, Ms. Piercy cited several specific examples. Ms. Piercy also indicated that their investigation into Ms. Robinson’s SOX retaliation complaint did not substantiate her allegations. Ms. Piercy stated, “Whether you agree or disagree with the terms of the Action Plan, dated June 1, 2004, it is effective immediately and the performance requirements are clearly defined.”

Mid-Year Self-Assessment Evaluation, June 14, 2004
(RX 34)

In her self-evaluation, Ms. Robinson first observed that due to her participation in an investigation, her goals had been placed on hold and not finalized. Nevertheless, Ms. Robinson was able to attend a fraud seminar. “In her never-ending quest to do the right thing,” Ms. Robinson “uncovered and raised numerous legal, regulatory, and control issues to senior management.” She also served as source of information on general and information technology audits issues for a new IAD member. Mr. Robinson served on the board of a professional auditor organization through May 2004.

Ms. Robinson’s biggest strength was “her determination and commitment to doing the right thing,” as evidence by her “recent choice to fulfill her professional responsibilities even in the face of isolation and criticism for doing so.” Ms. Robinson was also able to network and build long-term, continuing relationships with “directors and vice presidents, as well as manager and staff personnel,” as evidenced by “the very favorable comments [she] received in the form of 360 feedback from many auditees.” As two other significant assets, noting two incidents when management specifically asked for her assistance, Ms. Robinson cited her knowledge and versatility.

For development, Ms. Robinson recognized a need to become more proficient with programming languages of the company's systems. She also planned to become up-to-date on the "latest accounting changes." Further, Ms. Robinson planned to become more familiar with banking regulations relevant to the financial services industry.

Mid-Year Performance Evaluation, June 18, 2004
(RX 35)

Ms. Zlateva recognized Ms. Robinson's work in the SOX documentation project and her efforts as auditor-in-charge for the physical security audit. Ms. Robinson also helped new IAD members on various auditing procedures. She served on the board of an auditor organization.

As strengths, Ms. Zlateva identified Ms. Robinson's ability to develop risk assessments and discover potential control weaknesses. She was able to apply her knowledge and experience to view situations from unique positions. Ms. Robinson developed a network of contacts with several business units, enhancing her ability to obtain information. Finally, Ms. Robinson was "enthusiastic and passionate about her profession."

Concerning improvement areas, Ms. Zlateva noted that her December 2003 appraisal identified specific areas for improvement. However, despite efforts by HR and Ms. Zlateva, they failed to formally develop a professional development plan. Ms. Robinson continued to struggle with communication, teamwork, and departmental relationships. For the past six months, Ms. Robinson was "often argumentative and confrontational in her discussions with the department management, other team members and HR." She was unprofessional, disparaging, and disrespectful. Several team members complained about her communication style. Due to a lack of good organizational skills, Ms. Robinson did not deliver results "in a timely manner and [of] consistent quality." On one project, her failure to meet deadlines caused other people to finish her work. Finally, Ms. Robinson does not accept feedback from management, co-workers, and clients. Notably, having received 360 reviews from internal and external reviewers in March 2004, Ms. Robinson did not include any of the suggestions in her recent self assessment. Likewise, Ms. Robinson did not identify the deficiencies in the recently initiated action plan as areas for improvement in her self appraisal. Ms. Robinson's "inability to accept feedback and be confrontational about it continues to hinder her ability to be successful and build trust."

E-Mail, June 18, 2004
(RX 37)

Ms. Robinson selected Mr. Rosenak as a coach and thanked Ms. Navidad for "this wonderful opportunity."

Action Plan Update, June 28, 2004
(RX 38)

During the first three weeks of the action plan, Ms. Robinson showed more effort to meet deadlines and keep Ms. Zlateva informed of her communications. She was also more approachable with co-workers. However, Ms. Robinson continued to miss several specific deadlines. Ms. Robinson also showed no improvement in accepting feedback. Specifically, she “refused to accept your 360 feedback or include it in your self-evaluation.” In coaching meetings with Ms. Zlateva, Ms. Robinson’s voice was “argumentative, combative, belligerent and unprofessional.” Ms. Zlateva emphasized that unless Ms. Robinson started to accept feedback, she could not successfully meet the objectives of the action plan. In terms of teamwork, Ms. Robinson appeared to avoid personal contact with Ms. Zlateva.

Overall, Ms. Zlateva concluded that Ms. Robinson had not made enough progress to be successful on the action plan. Since the plan was half over, Ms. Zlateva stressed the importance of immediate and sustained correction of the noted deficiencies.

E-Mail, July 19, 2004
(RX 39)

Since Ms. Zlateva had not heard from Ms. Robinson about updates on six audit tasks, Ms. Zlateva set new deadlines.

Update Notes, June 28, 2004
(RX 40)

Ms. Zlateva advised Ms. Robinson that she had not completed six tasks on time. Ms. Zlateva remained “in the dark” about the status of many other projects since on occasion Ms. Robinson ignored her update requests. In one meeting, Ms. Robinson presented new observations to a client which she hadn’t discussed with Ms. Zlateva. Ms. Robinson continued to characterize Ms. Zlateva’s feedback as “scolding” and “fishing for something.” Ms. Zlateva found providing Ms. Robinson any feedback very difficult due to her immediate confrontational or sarcastic response.

Deadline Summary, August 6, 2004
(RX 41)

Of 29 scheduled projects and tasks between June and August 2004, Ms. Robinson met the original or revised deadline 9 times. Many comments for missed deadlines annotate Ms. Zlateva’s reminders and inquiries about the status of the project or task.

E-Mail, August 18, 2004
(RX 44)

Ms. Zlateva informed Ms. Robinson that the Legal Department indicated her audit files had been returned in June 2004 and were available in the file room.

Interoffice Memorandum, August 23, 2004
(RX 45)

Ms. Zlateva advised Ms. Robinson that half way through the JIJ process many of the noted deficiencies continue to be issues. Ms. Zlateva cited a few examples of task failures and observed Ms. Robinson continued to exhibit aggressive and confrontational demeanor at an HR meeting and argumentative demeanor at a New York meeting. Additionally, Ms. Robinson's "tone in your email to me regarding verification of audit findings and the missing files was aggressive and accusatory." Ms. Zlateva concluded Ms. Robinson had "not shown significant and sustained correction in your overall performance, and as a result, your employment with the company is immediately terminated."

E-Mail, December 9, 2003
(RX 46)

Mr. Sutter sent Ms. Dollmeyer copies of his year end appraisal for Ms. Robinson and her self assessment. Due to the discrepancies between their two views, Mr. Sutter wanted to involve Ms. Dollmeyer. Mr. Sutter noted Ms. Robinson did not include any of the deficiencies identified in the action plan.

Meeting Notes, March 6, 2003
(RX 49)

Based on Ms. Robinson's concern that he wasn't getting both sides of the story, Mr. Sutter agreed to bring comments directly to her. In the PBX audit, Mr. Sutter indicated that in his opinion calling cards and cell phone usage were low risk items. After Ms. Robinson voiced concerns about his independence, Mr. Sutter advised her that she was free to go to his supervisors. At that same time, he expected her to be professional and not discuss the issue with other people. Finally, Ms. Robinson believed her promotion was being blocked by past events. Mr. Sutter responded that trust and building relationship were important considerations. He reminded her that many of the promotion criteria were in the professional development plan that they had attempted to implement.

Meeting Note, May 5, 2003
(RX 51)

Mr. Sutter discussed with Ms. Robinson an auditee's complaint that she jumped to conclusions and appeared to be going in 10 different directions. In discussing an upcoming HR meeting, Ms. Robinson indicated that she most likely would leave the company since there were no openings.

Meeting Note, May 7, 2003
(RX 53)

Ms. Robinson is advised to be open to feedback and constructive feedback and build trust with management and peers. She also needed to work on managing the scope of an audit and completing an audit, rather than spending inappropriate time on low risk areas. Finally, Ms. Robinson should strive to meet audit budgets and deadlines.

Meeting Note, June 5, 2003
(RX 55)

Mr. Sutter developed a list of items critical for promotion, which included meeting audit deadlines and budgets, conducting quarterly follow-up, showing strong judgment on audit scope, being open to feedback, and showing sustained ability to work with clients, associates, and management.

E-Mail, June 9, 2004
(RX 56)

Ms. Robinson provided examples to Mr. Sutter of her attempts to conduct timely follow-up on an audit.

E-Mail, June 19, 2003
(RX 59)

Mr. Sutter forwarded Ms. Robinson's mid-year self appraisal to Ms. Navidad and asked for her assistance.

E-Mail, July 11, 2003
(RX 61)

An auditee complains to Mr. Sutter that Ms. Robinson became angry during a telephone conversation about an audit follow-up because the auditee was taking so much of her time and she was busy.

Handwritten Notes, August 8 to August 13, 2003
(RX 62)

Mr. Sutter documented complaints he received about Ms. Robinson's questions to Mr. DeLuca at the breakfast and a heated exchange between Ms. Robinson and an auditee at another meeting.

E-Mail, July 19, 2004
(RX 71 and RX 418)

In response to Ms. Piercy's interoffice memorandum (RX 102) restoring some days Ms. Robinson was absent as PTO (paid time off) days, Ms. Robinson stated the memo contained no mention from the company president that approval of summer hours is at the manager's discretion to provide coverage for customers. Since in her opinion that exception was not applicable to IAD or her, she considered Ms. Piercy's refusal "to allow me to take summer hours as an additional form of retaliation. I will add this to the retaliation complaint I am filing with the SEC. Thank you for your assistance."

E-Mail Attachments, August 9, 2003
(RX 73)

Mr. Sutter sent a draft performance action plan to Mr. Cavaliero for further discussion. He also attached a chronology of Ms. Robinson's review, evaluations and prior performance action plan.

Meeting Note, September 22, 2003
(RX 74)

A colleague complained to Mr. Sutter that he was concerned about Ms. Robinson's negative comments about his ability to control work. Her comments would preclude him from seeking her technical advice and hurt trust in the department.

Meeting Note, October 8, 2003
(RX 77)

After suggesting to Ms. Robinson that they might be able to work on a proposed action that would get an auditee's support, Ms. Robinson closed Mr. Sutter's door and questioned his independence. He responded that senior management support was important if they wanted action taken on an observation. Ms. Robinson indicated that to be "world class" IAD should make auditees do what IAD wanted. She expressed an intention to talk to his supervisors. Mr. Sutter told her to go ahead. Mr. Sutter then mentioned his concern about her professionalism and mentioned the feedback he received about her August 2003 breakfast meeting with Mr. DeLuca.

Internal Audit Job Evaluation, October 10, 2003
(RX 80)

Mr. John Marshall concluded Ms. Robinson met performance standards in most categories. Her analysis and judgment were good and she developed a beneficial working relationship with the auditee. Her efforts raised awareness in several areas. However, "an altercation" with an audit manager resulted in strained relations at the completion of the audit. Mr. Marshall advised that Ms. Robinson to "keep her emotions in check and diplomatically address situations that are not to her liking" in order to advance to the next level.

Meeting Notes, December 11, 2003
(RX 84)

In a meeting with Ms. Robinson and Ms. Dollmeyer, Mr. Sutter discussed Ms. Robinson's performance issues and her need to accept feedback. Mr. Sutter expressed an intention to extend the action plan 60 days due to lack of improvement. He also was talked about getting a 360 review and advised Ms. Robinson that due to her performance, her salary would remain the same.

E-Mail, February 12, 2004
(RX 95)

Ms. Birk set out a chronology concerning the 360 review. The process was started on January 21, 2004 after HR received a request for a non-manager 360. By February 6th, management had received the feedback. On February 9, 2004, HR met with management "to discuss strategy to provide 360 feedback." Several options were considered. However, on February 10, 2004, Ms. Birk was advised to stop the process.

E-Mail, March 17, 2004
(RX 97)

Ms. Birk summarized the 360 feedback meeting with Ms. Robinson. Ms. Robinson was upset about the delayed start of the meeting. A "breakdown" occurred because employee and employee's manager were to receive the feedback at the same time. Although the manager received the 360 feedback by February 9, 2004, Ms. Robinson did not get it until the day of the meeting "due to legal council [sic]." As a result, Ms. Robinson "lashed out" at Ms. Birk about the low level of trust and her inability to believe in the 360 process. Ms. Birk advised that the feedback was accurate and encouraged Ms. Robinson to focus on a development discussion with her manager. Ms. Robinson did not review the eight pages of feedback and expressed an intention not to do so. Ms. Robinson then asked Ms. Birk to leave the room while Ms. Piercy remained.

Memorandum, June 28, 2004
(RX 105)

Ms. Zlateva met with Ms. Robinson to discuss objectives for the external coach. Ms. Robinson set three objectives: trust among auditors, ability to work with managers who are not certified, and ability to deal with a negative management style she attributed to cultural issues. Ms. Zlateva noted that she had a completely different perception of what needed to be worked on. Following closely with the action plan, Ms. Zlateva highlighted time management, effective communication, acceptance of feedback, and enhancement of relationships and respect.

After Ms. Zlateva indicated Ms. Robinson should start accepting feedback, Ms. Robinson provided feedback about Ms. Zlateva's management style. Ms. Robinson considered her management to be very negative and believed Ms. Zlateva was just waiting to for an opportunity to criticize her. According to Ms. Zlateva, Ms. Robinson indicated:

She found absolutely nothing constructive in what I had to say, certainly not after I became her manager. She found my behavior highly insulting . . . After this I said that this meeting is to determine Beverly's objectives and not my performance, but I could meet with her separately. Beverly responded that I totally dismissed the feedback given and was rude, because I didn't say I appreciated the feedback. She then said that she wouldn't lose time to meet with me to give me feedback.

Handwritten Notes, August 6, 2004
(RX 107)

At a meeting, Ms. Zlateva read the JIJ letter to Ms. Robinson. In response, Ms. Robinson asked for the definition of insubordinate in writing. She also asserted Ms. Piercy violated the coaching agreement by calling the coach. Ms. Robinson was advised that while the legal department was reviewing the action, they were neither encouraging or discouraging the JIJ process.

Handwritten Notes, February 10, 2004
(RX 118)

Ms. Dollmeyer advised Ms. Robinson that according to legal, everything is on hold during the investigation, including the 360 review. Ms. Robinson said she was looking forward to the 360 review. Ms. Dollmeyer indicated that even the goals were on hold.

E-Mail Exchange, March 5, 2004
(RX 120)

Ms. Zlateva requested a status update on two audits and closed/open items. Ms. Robinson responded "I have been working on another project all week and have had very little time to devote to anything else."

Professional Development Plan, March 21, 2002
(RX 123)

Mr. Grackowski set several goals for Ms. Robinson to achieve. By writing concisely and reviewing correspondence from her audience's perspective, Ms. Robinson could improve her written communications. To improve solutions, Ms. Robinson needed to consider whether her recommendations were reasonable for the environment and attempt to obtain a client's agreement.

E-Mail Exchange, February 18, 2004
(RX 124)

Ms. Zlateva forwarded to Ms. Robinson an inquiry from Mr. Sutter about a few audit issues. She asked Ms. Robinson for their status. In response, Ms. Robinson explained the

situation relating to the issues. Then, Ms. Robinson added, “I am confused as to why it appears you are following up on this item. Are you now following up on everything? Is there some reason why you seem to think I am not competent in following up on these issues?”

Draft E-Mail Attachment, January 12, 2004
(RX 203)

Thirty-five page draft containing Ms. Robinson’s multiple concerns at Morgan Stanley (forming the basis for the February 5, 2004 memorandum).

E-Mail, August 11, 2004
(RX 214)

Ms. Robinson advised Ms. Piercy that “the perfume in this area has once again become unbearable to me and is causing serious health concerns.” Ms. Robinson was experiencing “severe respiratory problems, headaches, and various other symptoms as a result.” Although her physician had advised the company about Ms. Robinson’s sensitivity, nothing was done.

Various E-Mails
(RX 402, RX 403, RX 405, RX 408, and RX 409)

On June 23, 2004, Ms. Zlateva informed Ms. Robinson that not all the dates were listed in the deadline spreadsheet. On July 1, 2004, Ms. Zlateva asked Ms. Robinson for a status report on several audit issues. On July 16, 2004, Ms. Zlateva asked Ms. Robinson for a testing update. On August 5, 2004, Ms. Zlateva indicated to Ms. Robinson that she had not received a response to an e-mail asking about closed/open issues. On August 6, 2004, Ms. Zlateva indicated that she has not yet received copies from Ms. Robinson of audits that she requested on July 26, 2004.

E-Mail, August 9, 2004
(RX 413)

Ms. Davis informed Ms. Piercy that Ms. Robinson is excited about her JIJ letter and plans to go to “major newspapers with an article.”

E-Mail, July 21, 2004
(RX 414)

Ms. Robinson sent Ms. McNamara-Corley the audit findings relating to contracts in the physical security audit. Ms. McNamara-Corley responds that the business entity for the vendor has contract administration responsibility.

DFS Cell Phone Policy
(RX 417)

Cell phone services under the Corporate Sponsored Option are for business use. Reasonable and occasional personal use by vice presidents and higher is also acceptable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Credibility and Probative Weight

While most of the witnesses were generally believable and provided credible testimony, some conflicts in testimony and inconsistencies require that I occasionally discuss in detail any assessments of such testimonial conflict. Such comments will be placed within double brackets ([[]) in the following specific findings.

Specific Findings

2000

Sometime in 2000. Mr. David Sutter becomes vice president of IAD at Discover in Chicago.

September 1, 2000. With a business undergraduate degree specializing in accounting, over ten years experience as an auditor, and certification as an information systems auditor, Ms. Robinson joins Morgan Stanley/Discover as a senior auditor within the Internal Audit Division. In a letter bearing the DFS letterhead and address, Ms. Robinson is welcomed to Morgan Stanley. Her base annual salary is \$75,000, which is paid by the DFS holding company, Novus.

The activities of IAD are controlled by the Audit Committee of the Morgan Stanley Board of Directors through an individual known as the global head of IAD in New York. The global head determines compensation levels within IAD and has ultimate authority to terminate the employment of IAD auditors. IAD's charter is to assist senior management and the Audit Committee in the discharge of their oversight responsibilities. As an independent element, IAD is to be free from interference in setting audit scope, conducting audits, and reporting results.

In her opinion, as an internal auditor, Ms. Robinson has an obligation to identify and report audit issues to her supervisor and up to the vice president level. The highest level of management to typically receive her audit reports were the Discover president. The Discover CFO and general counsel, and the Morgan Stanley audit director receive copies of her reports. IAD utilizes a three tier reporting system for reporting audit findings. Tier one issues are sent to the Morgan Stanley Audit Committee, tier two findings are presented to Discover management, and tier three problems are only sent to the auditee managers.

Morgan Stanley is a publicly traded company with several wholly owned subsidiaries. The company has four business units (investment management, retail security, institutional securities, and credit card services) and two functional units (international operations and shared services). Novus is the holding company for the credit card services business, Discover. Morgan Stanley files a consolidated balance sheet.

Discover HR has a progressive response to employee performance issues consisting of a performance action plan, JIJ process, and recommendation for termination.

December 2000. Due to a personal confrontation, Ms. Robinson joins a new audit team supervised by Ms. Marie-Frances Weiler. In turn, Mr. David Sutter supervises Ms. Weiler.

2001

Sometime in 2001. The employee handbook is captioned, “Morgan Stanley Dean Witter & Co. Credit Services.” The bottom caption states “Discover Financial Services.” In the preface, the Discover president welcomes the individual as a Morgan Stanley credit services employee.

During an audit of the collections function, Ms. Robinson discovers that DFS is not charging off bankruptcies with the 60 days of notice. After discussion with a DFS attorney and reviewing banking regulations, Ms. Robinson believes the 60 day charge off period is a regulatory requirement. She also concludes the irregularity would lead to inaccurate reporting on the company’s balance sheet.

During the Orion audit, Ms. Robinson discovers information security problems associated with credit card member account. Ms. Robinson shares her concern with Ms. Weiler and Mr. Sutter. Although Ms. Robinson completed her work on the audit in September 2001, the audit report is not issued until early 2002.

During the RACF audit, Ms. Robinson identifies software security issues to Mr. Sutter.

Ms. Robinson believes Mr. Takada has difficulty determining the scope of an audit. She notes that he had little audit experience outside of Stanley Morgan and believes that he is uncomfortable with working with people with more experience. She suggests that he bring in another manager to help him with the audit scope.

April 11, 2001. Mr. Takada rates Ms. Robinson’s performance as the auditor-in-charge for the general ledger audit as needs improvement. Due to her experience, Ms. Robinson had a strong technical expertise. However, her communications, professionalism, and leadership abilities need improvement and her work execution was unsatisfactory due to budget variance. He urges Ms. Robinson to be more proactive in simply executing her work in an effective manner.

In response, Ms. Robinson asserts Mr. Takada is unable to separate his personal feelings and objectively rate her performance. In many cases, she finds his observations to be vague or inaccurate. She attributes the delays to Mr. Takada’s inability to determine the scope of the audit. She requests specific examples to justify his rating.

June 13, 2001. Ms. Weiler re-evaluates Ms. Robinson’s performance on the general ledger audit. Ms. Weiler rates her overall performance as needs improvement. Due to her experience, Ms. Robinson’s analytic ability and judgment exceed expectations and she executed her work as expected. However, Ms. Weiler indicates Ms. Robinson needs improvement in teamwork, communications, organization, and acceptance of feedback. Ms. Weiler stresses the

need for professionalism in all situations, rather than Ms. Robinson's abrasive responses to conflict.

In response, Ms. Robinson observes the Ms. Weiler had very little contact with, or first hand knowledge of, the audit. She asserts the audit roles were unclear or undefined. While willing to accept feedback, she observes Ms. Weiler has been unable to provide specific examples, especially in the area of communications. Appreciating the second evaluation, Ms. Robinson intends to use the input as constructive feedback.

August 2001. Ms. Vesela Zlateva joins IAD in Chicago.

September 17, 2001. Ms. Weiler evaluates Ms. Robinson's mid-year performance. After noting Ms. Robinson's strengths in the areas of working relationships, self-motivation, audit skills, and client focus, Ms. Weiler stresses need for improvement in teamwork, professional communications, organization, and acceptance of feedback.

October 4 and November 8, 2001. Mr. Takada assess Ms. Robinson's overall performance on the collections audit as needs improvement. Ms. Robinson's execution of work, analytical ability, judgment, communications, and technical abilities met expectations. Her work was complete and thorough. However, Mr. Takada believes she needs to improve her professionalism and leadership abilities.

In response, Ms. Robinson disagrees that Mr. Takada has accurately reflected her performance due to his inability to be objective. Absent valid, specific examples, Ms. Robinson is unable to understand Mr. Takada's improvement comments. Further, since the assessment covered an audit conducted four months earlier, she does not consider the feedback to be timely.

November 2001. Ms. Robinson goes on medical leave for about two months.

2002

January 30, 2002. Ms. Robinson returns from medical leave.

February 21, 2002. In his appraisal of Ms. Robinson's performance for 2001, Mr. Graczkowski indicates that she has not meet his expectations for an auditor with her experience and gives her a "needs improvement" for an overall rating. Her adversarial stance hindered the development of teamwork and ability to partner with clients. Similarly, Ms. Robinson demeaned her IAD colleagues and questioned their competence by referencing how things were done in her prior employments. She had a free-wheeling style and casual professional demeanor. Ms. Robinson also struggled with delivering quality work on time and meeting deadlines. To improve her effectiveness, Mr. Graczkowski encourages Ms. Robinson to be more willing to accept feedback. Though she had good auditor expertise, Ms. Robinson tended to react before thoroughly investigating an issue.

March 21, 2002. Mr. Graczkowski initiates a performance action plan for Ms. Robinson. He establishes five areas for improvement. Ms. Robinson needs to correct her adversarial stance

toward co-workers and clients. She must improve her communications skills by recognizing her audience. To demonstrate improvement in organizational skills, she must complete the LAN audit by May 31, 2002. Ms. Robinson needs to develop a willingness to accept feedback. Finally, she needs to reflect upon and organize her findings before reacting. The plan remains effective through May 31, 2002.

Sometime in March 2002. Ms. Robinson receives a professional development plan. Ms. Robinson considers the proposed benchmarks for developing professional relationships to be vague and un-measurable.

Ms. Robinson agrees to help a co-worker with a documentation issue.

First half of 2002. Ms. Robinson participates in the LAN audit and develops concerns about access and physical security of the LAN. Ms. Robinson reports her concerns to Mr. Graczkowski and Mr. Sutter.

June 18, 2002. Mr. Graczkowski notifies HR that Ms. Robinson has successfully completed the action plan with one exception that was not indicative of her performance.

Second half of 2002. Which engaged in an audit of the Unix/Oracle database, Ms. Robinson observes insufficient internal data controls. Ms. Robinson also notes that the auditees are planning to purchase a software suite with a two year service period before they are actually ready to implement the software. She considers this proposal to be wasteful of a portion of the free maintenance period. Ms. Robinson reports her finding to Mr. Graczkowski and Mr. Sutter.

Some time in September 2002. Ms. Robinson engages in successful funding raising efforts for the Juvenile Diabetes Research Foundation. Mr. Sutter compliments her work in an e-mail.

Some time in November 2002. A co-worker finds Ms. Robinson to be very professional as a liaison between the auditors and auditees.

December 1, 2002. Ms. Zlateva is promoted to manager.

December 12, 2002. Mr. Graczkowski gives Ms. Robinson ratings of meets, exceeds, and consistently exceeds in all categories of her annual appraisal. He considers her turn around commendable and characterizes her as a strong and thorough auditor. In terms of improvement, Mr. Graczkowski suggests that Ms. Robinson take a more reserved, balance approach with auditees.

2003

Sometime in January 2003. At the start of the PBX audit, Mr. Graczkowski notes that Ms. Robinson is the only person with prior PBX audit experience. Mr. Graczkowski also asks Ms. Zlateva to help supervise several audits, including the PBX audit.

During the PBX voice mail audit, Ms. Robinson discovers problems with use of DFS cell phones and calling cards. In particular, Ms. Robinson identifies a vice president who permitted her administrative assistant to use a company cell phone for personal use. In addition to that being an abuse of company assets, Ms. Robinson is concerned about the vice president permitting the company to report the cell phone charge as a business expense. She believes the situation amounts to fraud by a corporate officer that must be reported. Ms. Robinson reports her findings to Mr. Sutter and the cost center vice president, who indicate that she is spending too much time on cell phones and calling cards. Mr. Sutter later advises Ms. Robinson that he does not believe any fraud was involved.

When Ms. Zlateva attempts to obtain status reports, Ms. Robinson indicates that she doesn't understand Ms. Zlateva's role or what value she is bringing to the audit.

At one point, Ms. Robinson expresses her concern to Mr. Brad Bolomo that her work could be potentially compromised by Mr. Sutter's lack of auditor independence with certain auditees.

Early in 2003. Ms. Robinson meets with Mr. Graczowski, Mr. Sutter, and an HR representative to discuss her drop in performance from the prior year end appraisal. Her performance issues include the ability to partner with clients and communication style. They attempt to develop professional goals. Ms. Graczowski desires to carry over goals from the prior year. Ms. Robinson objects that she wasn't provided an opportunity to provide input for the 2003 goals. Although Mr. Sutter finds some of Mr. Graczowski's goals supportable, the disagreement between Ms. Robinson and Mr. Graczowski prevents completion of the development goal plan for 2003.

Some time in March 2003. Mr. Graczowski leaves IAD and Mr. Sutter asks two of his managers, including Ms. Zlateva, to help supervise IAD. Mr. Sutter announces the change in an IAD meeting.

In an e-mail, Mr. Sutter expresses his support for Ms. Robinson's work with the juvenile diabetes charity.

March 6, 2003. Mr. Sutter shares his concerns with Ms. Robinson about her judgment in placing an inordinate amount of her attention on the low risk issues of calling cards and cell phones, rather than the core subjects of the PBX audit. Ms. Robinson tells Mr. Sutter that she questions his independence as an auditor and wanted to talk to his supervisor, Mr. Tom Burr. Mr. Sutter tells Ms. Robinson that she is free to talk to his supervisor. At the same time, he advises her to be professional and not discuss the issue with other individuals. In response to Ms. Robinson's concern that her promotion was being blocked by past events, Mr. Sutter reminds Ms. Robinson that many of the promotion criteria were in the professional development plan they unsuccessfully tried to implement.

Sometime in April 2003. Saying he has created "two little monsters," Ms. Robinson tells Mr. Sutter that she disagrees with his decision to make Ms. Zlateva and Ms. Greco managers.

Due to communication issues related to Ms. Robinson's confrontational responses, Ms. Zlateva informs Mr. Sutter that she is having difficulty supervising Ms. Robinson. As a result, Mr. Sutter decides to assume direct supervision of Ms. Robinson

Sometime in May 2003. In light of her expertise, a co-worker asks Ms. Robinson to review a controls database for a pending audit. Ms. Robinson provides a response the next day.

Ms. Dollmeyer in HR works with Ms. Robinson on developing a plan to retrieve cell phones from terminated employees. A short period later, Ms. Dollmeyer is stunned by a phone call from an administration vice president who has Ms. Robinson in his office. The vice president asks Ms. Dollmeyer to work on the cell phone retrieval issue with Ms. Robinson. Subsequently, Mr. Sutter relays feedback to Ms. Robinson about an HR worker's concern that Ms. Robinson had jumped the supervisory chain of authority.

Mr. Anthony DeLuca becomes the global head of internal audit for Morgan Stanley in New York. He works on behalf of the Morgan Stanley Audit Committee. Mr. Sutter, as the head of internal audit function at Discover, the credit card services business, reports directly to Mr. DeLuca. Mr. DeLuca asks his "direct reports" to identify both the very top and very bottom performers. In response, Mr. Sutter lists Ms. Robinson as one of his bottom performers.

May 5, 2003. Mr. Sutter advises that another co-worker expressed concern about Ms. Robinson jumping to conclusions and going in several directions at once. In discussing an upcoming HR meeting, Ms. Robinson indicates that she plans to leave the company since there are no openings.

May 7, 2003. Mr. Sutter advises Ms. Robinson that she needs to be open to constructive feedback and work on building trust. He asks her to focus on managing audit scope, meeting budgets and deadlines, and spending less time on low risks areas.

June 5, 2003. In response to Ms. Robinson's request, Mr. Sutter and Ms. Navidad meet with her to discuss criteria for promotion. Mr. Sutter presents several critical items for promotion, which include meeting deadlines, conducting quarterly follow-ups, showing strong judgment on audit scope, being open to feedback, and showing sustained ability to work with colleagues and clients. Ms. Robinson finds the list subjective and un-measurable. She does not believe being open to feedback is an appropriate item due to measurement difficulties. During this meeting, Mr. Sutter and Ms. Robinson are also unsuccessful in reconciling their list of participants for a possible 360 review.

June 6, 2003. In her mid-year self appraisal, Ms. Robinson lists leadership, expertise, and networking ability as her main strengths. In terms of development, Ms. Robinson indicates that she needs to better adapt to the IAD culture and express her opinions less.

June 9, 2003. Ms. Robinson provides Mr. Sutter examples of attempts to conduct timely audit follow-ups.

June 19, 2003. In light of Ms. Robinson's mid-year self-evaluation which did not mention any of the problems he had brought to her attention, and due to their inability to agree on a professional development plan, Mr. Sutter forgoes a mid-year evaluation of Ms. Robinson's performance. Instead, he forwards Ms. Robinson's self-evaluation to HR and requests their assistance.

Sometime in August 2003. Ms. Robinson begins to take notes for a memorandum that she will eventually submit in February 2004.

Early August 2003. While on vacation, Mr. Sutter decides to place Ms. Robinson on a performance action plan and begins work on a draft. In his initial discussions with HR, they advise that he give Ms. Robinson more time to improve and request that he provide further documentation to support the action plan.

August 7, 2003. [[The three participants of the August 2003 breakfast meeting who testified have differing recollections of the meaning of the questions asked by Ms. Robinson. According to Ms. Robinson, she inquired whether Mr. DeLuca considered eliminating IAD's three tier reporting system, valued experienced auditors, and intended to change how the annual audit plan/risk assessment was developed.

According to Mr. DeLuca, Ms. Robinson was one of six employees from IAD that he met for breakfast. At the end of the meeting, she asked him whether he understood the level of incompetence that existed within his management ranks. He doesn't recall whether Ms. Robinson also asked about a change in the tier reporting system or risk assessment. However, those subjects were frequently raised by employees at the breakfast meetings.

According to Mr. McMahon who was also present at the meeting, Ms. Robinson asked Mr. DeLuca about management recognizing auditor expertise within the department. She asked him whether he valued such expertise. Mr. DeLuca indicated that he did value such experience but that local managers were responsible for managing expertise in their departments.

Since I found all three witnesses to be credible, I attribute the varying recollections of Ms. Robinson and Mr. DeLuca to memory and personal filter issues. In other words, while Ms. Robinson may have perceived that she was merely asking whether he valued auditor experience, Mr. DeLuca, and apparently other participants, heard the question as a critique of management. Since Mr. McMahon did not participate in the exchange and merely listened to it, and because since his recollection of Ms. Robinson's question essentially provides a foundation for the perceptions of both Ms. Robinson and Mr. DeLuca, I find his testimony the more probative recollection.]]

At an employee breakfast meeting, Ms. Robinson asks Mr. DeLuca whether management recognized auditor expertise and he valued that experience.

August 8 to August 13, 2003. Mr. Sutter receives complaints about Ms. Robinson's questions at the breakfast meeting with Mr. DeLuca. One of the participants at the breakfast meetings tells Mr. Sutter that she was embarrassed by Ms. Robinson's question.

August 9, 2003. Mr. Sutter forwards a draft action plan for Ms. Robinson to HR for review and discussion. He attaches a chronology of Ms. Robinson's evaluations and prior performance action plan.

About August 14, 2003. Mr. DeLuca asks Mr. Sutter whether any of the participants had feedback from the breakfast meeting. Mr. Sutter indicates that while the attendees were appreciative of Mr. DeLuca's visit, some of the individuals complained about Ms. Robinson's question, saying it made them feel uncomfortable and awkward.

August 22, 2003. Dr. Abrams completes a medical certification form, indicating Ms. Robinson has a high sensitivity to perfume. The physician does not impose any work restrictions or limitations.

August 29, 2003. Mr. Sutter sends HR another draft action plan for Ms. Robinson and a chronology of events.

September 19, 2003. Mr. Sutter discusses with HR his intention to place Ms. Robinson on an action plan. He provides a chronology of Ms. Robinson's performance issues and sets out several incidents of her unprofessional and aggressive communication style.

September 22, 2003. A colleague complains to Mr. Sutter about Ms. Robinson's negative comments about his ability to control work. As a consequence, the individual no longer trusts Ms. Robinson and will not seek her advice.

Some time in October 2003. After a discussion with Mr. Sutter about Ms. Robinson's performance, Mr. DeLuca decides to keep her compensation "flat" for the next year.

Mr. Sutter, Mr. Cavaliero, and Ms. Dollmeyer work on an action plan for Ms. Robinson. In conjunction with the plan, Ms. Dollmeyer recommends a 360 review.

October 8, 2003. Ms. Robinson disagrees with Mr. Sutter about his concern that an audit plan needed to be developed that was agreeable to the auditee. She questions his independence and expresses an intention to take her concern to Mr. DeLuca. Mr. Sutter stresses the need for teamwork. On the issue of professionalism, Mr. Sutter criticizes Ms. Robinson for embarrassing her colleagues and the department by her questions to Mr. DeLuca during the August 2003 breakfast meeting. He believes the employee breakfast meeting was an inappropriate forum for her inquiry.

October 10, 2003. In an audit performance evaluation, Mr. John Marshall concludes Ms. Robinson met performance standards in most categories. Her analysis and judgment were good and she developed a beneficial working relationship with the auditee. However, her altercation with an audit manager strained relations. He advised Ms. Robinson to keep her emotions in check and diplomatically resolve issues in order to advance to the next level.

October 23, 2003. Mr. Sutter presents an action plan to Ms. Robinson. He notes that while some improvements occurred during the 2002 action plan, Ms. Robinson has not sustained the improvements. For the past six months, Ms. Robinson had been unwilling to accept feedback and rejected development actions and performance requirements necessary for success in the department. She continued to have problems with aggressive and disrespectful behavior, lack of focus, unprofessional communications, and lack of cooperation. He sets out specific areas for improvement. Mr. Sutter characterizes her performance as unacceptable and indicates that she must make immediate and sustained improvement.

Ms. Robinson does not agree with the blanket statements that she needs to improve in the areas of meeting deadlines, building teamwork and trust, working on scope of audits, completing quarterly follow-ups, and being open to criticism. Ms. Robinson requests the opportunity to review the plan and respond.

End of October 2003. Ms. Robinson asks to meet with Ms. Dollmeyer about the action plan.

November 14, 2003. Ms. Robinson completes a professional self-assessment. In the areas of teamwork, communication, and leadership, she rates herself as “exceeds” or “consistently exceeds.” Ms. Robinson lists among her strengths the ability to network and build relationships with auditees. She notes the need to develop her skill in computer languages and recommends that she be promoted to a management position.

In light of Ms. Robinson’s failure to include any issues from the action plan in her self-assessment, Mr. Sutter concludes its success is doubtful.

Some time in December 2003. Mr. Cavaliero of the HR department asks Ms. Robinson for an updated medical certification form about her perfume allergy.

Ms. Kerry Piercy becomes the vice president for HR at Discover. In a conversation with Mr. Sutter, he mentions Ms. Robinson’s performance issues. Ms. Piercy offers to get involved, but Mr. Sutter declines because he thinks they were seeing some improvement.

Mr. Sutter discusses with Ms. Birk about having a 360 review accomplished for Ms. Robinson.

December 1, 2003. Due to an IAD reorganization, Ms. Zlateva becomes a group manager for information technology infrastructure and takes over supervision of Ms. Robinson’s day-to-day work. Based on her prior experience, Ms. Zlateva expresses her concern to Mr. Sutter about supervising Ms. Robinson. Mr. Sutter promises to support her. In her dealing with Ms. Robinson, Ms. Zlateva continues to experience communication difficulties. At the same time, Mr. Sutter continues to work with Ms. Robinson on the current action plan and to develop the 360 review.

Early part of December 2003. Due to vacation, conflict of schedules, and communication disconnects, Ms. Dollmeyer does not meet with Ms. Robinson to discuss the action plan until

early December. Ms. Robinson strongly expresses her dissatisfaction with the action plan. Ms. Dollmeyer emphasizes that she must meet the requirements of the action plan for a successful outcome.

Mr. Sutter completes Ms. Robinson's 2003 appraisal and indicates that she meets expectations in the categories of communication, analytical ability, creativity, business knowledge, and functional performance. She exceeds expectations in the area of technology knowledge. Mr. Sutter indicates she needs improvement in leadership, organization, judgment, and commitment. In particular, Ms. Robinson did not consistently deliver audits in a timely manner. He gives her an unsatisfactory rating in teamwork due to her adversarial approach. He finds Ms. Robinson's expressed dissatisfaction both inside and outside of the IAD to be unprofessional. Finally, Ms. Robinson tended to argue about the details of comments rather than listen to feedback. In particular, in preparing her self-assessment, Ms. Robinson did not mention any of the improvement areas identified in the October 2003 performance action plan.

December 9, 2003. Mr. Sutter sends Ms. Dollmeyer a draft of his 2003 appraisal for Ms. Robinson and her self-appraisal. He seeks her assistance due to the differences in the two assessments and Ms. Robinson's failure to include any of the action plan deficiencies in her self-assessment.

December 11, 2003. In a meeting with Ms. Dollmeyer, Mr. Sutter gives Ms. Robinson her annual appraisal. He considers her to be a technically strong auditor. However, he has received complaints that she is being uncooperative, tactless, disrespectful, and unable to accept feedback. As an example of her difficulty accepting feedback, he observes that her self-appraisal and his performance appraisal were far apart. Mr. Sutter notes that while Ms. Robinson reacted positively to the 2002 action plan, she was not responding to the 2003 action plan. Mr. Sutter compliments Ms. Robinson for her charity work but indicates it does not replace performance in the core audit areas. Ms. Robinson disagrees that her team relationships are frayed. Mr. Sutter warns Ms. Robinson that if she doesn't adjust quickly, they are going to have a hard time. To allow more time for Ms. Robinson to absorb the feedback and to accomplish a 360 review, Mr. Sutter extends the action plan for 60 days. At the end of the meeting, Ms. Robinson believes Mr. Sutter's comments will wear off and her performance appraisals will go back up. She does not believe her job is in jeopardy.

2004

Sometime in 2004. Having become aware of Ms. Robinson's perfume allergy during an HR meeting, Ms. Zlateva makes an effort not to sit near her. Ms. Robinson also informs Ms. Zlateva of her fragrance sensitivity.

Beginning of 2004. Ms. Robinson starts a physical security audit and identifies problems with terminated employees' continued access to company systems to Ms. Zlateva.

January 5 through 9, 2004. Due to the stress of preparing her February memorandum, Ms. Robinson has to stay out of work.

January 12, 2004. Ms. Birk suggests the format for Ms. Robinson's 360 review. As part of the process, Mr. Sutter and Ms. Robinson need to agree on the list of evaluators.

Ms. Robinson completes a draft of her memorandum that will be presented in February.

January 16, 2004. Mr. Sutter, Ms. Birk, and Ms. Robinson meet to compile a list of evaluators for a 360 feedback review. They agree the survey will be anonymous.

January 21, 2004. Based on the list agreed to by Ms. Robinson and Mr. Sutter, Ms. Birk sends the 360 review survey to the evaluators who work both inside and outside of IAD. The survey asks the evaluator to advise Ms. Robinson what she should keep doing, stop doing, and start doing.

January 30, 2004. Mr. Sutter formally extends the termination date of Ms. Robinson's action plan from December 23, 2003 to February 23, 2004.

Early February 2004. About sixteen evaluators respond to the 360 review request. They advise Ms. Robinson to be more open minded, receptive to feedback, organized, respectful, and professional. She is encouraged to remain passionate about her work, willing to share her expertise, and engaged in volunteer work. Finally, the respondents suggest Ms. Robinson stop taking things personally, feeling negative about IAD, being so adamant in her opinions, and being insubordinate.

February 5, 2004. Since many of the issues that she raised in her various audits were not being addressed, Ms. Robinson decides to get the information to persons with authority to make corrections. Although the Discover president, Mr. David Nelms, was copied on her audit reports, Ms. Robinson prepares the memorandum because many of the problems identified in her audits were deemed to be too low a level to be in those reports or even identified at all. These issues included the lack of a disaster plan for the computer server farm and the bankruptcy charge off problem. Ms. Robinson presents her memorandum to Mr. Slusarz, Discover CFO, with a copy to Mr. David Nelms. Since SOX required these corporate officers to certify the sufficiency of internal controls, Ms. Robinson believes her memorandum brings SOX-related issues to their attention. She wants to be sure that someone outside of audit with authority and power will be able to address the issues.

Ms. Robinson's memorandum contains thirteen incidents related to control insufficiencies and financial exposures. Her examples include failure to charge off bankruptcies in a timely manner, personal use of company cell phones, failure to issue audit reports, continued access by terminated employees, and failure to raise audit findings to the appropriate level of management. Ms. Robinson also questions the independence, professionalism, and qualification of several IAD employees, including Mr. Sutter. Finally, due to her refusal to compromise her auditor responsibilities, Ms. Robinson alleges that Mr. Sutter had retaliated against her using poor performance reports, an action plan, demotion, and a salary freeze.

February 6, 2004. Mr. Slusarz calls Ms. Robinson to his office and they go over her memorandum with Ms. McNamara-Corley. Mr. Slusarz indicates that the matters in her

memorandum are important. He estimates the potential value of the bankruptcy charge off issue is \$40 million.

Ms. McNamara-Corley starts to assemble an investigation team and assigns an attorney from her department to provide legal counsel to the group. Ms. McNamara-Corley is aware that Ms. Robinson has been placed on an action plan and that a 360 review has been conducted.

February 9, 2004. Ms. Birk provides the 360 survey results to Mr. Sutter. Although Mr. Sutter and Ms. Robinson agreed to receive the results simultaneously, Ms. Dollmeyer told Ms. Birk to give the results first to Mr. Sutter since that was the usual practice and it would enable Mr. Sutter to develop a plan for utilizing the results to help Ms. Robinson. Neither Ms. Birk nor Ms. Dollmeyer are aware of Ms. Robinson's complaint.

February 10, 2004. The legal department informs Ms. Dollmeyer about Ms. Robinson's complaint. In light of the complaint, Ms. Dollmeyer places the 360 review process on hold. She informs Ms. Robinson that everything is on hold, including the 360 review. Ms. Robinson responds that she was looking forward to the 360 review.

February 10 to 28, 2004. Although he serves on the whistleblower review team for Morgan Stanley, Mr. DeLuca recuses himself from participating in the company response to Ms. Robinson's complaint since many of the allegations involve IAD functions. The other two review team members decide to initiate the investigation with an outside audit firm, KPMG. The team also uses Ms. McNamara-Corley for legal matters associated with the investigation.

Morgan Stanley hires KPMG to participate in an investigation of Ms. Robinson's memorandum. As principal at KPMG, Mr. Rocco DeGrasse participates in the investigation, reviewing both the specific incidents and general observations in the memorandum. During the investigation, he meets with Ms. McNamara-Corley five to fifteen times.

A few days after Ms. Robinson submitted her memorandum, a member of the Discover legal department and another individual from the outside audit company remove all the paperwork from Ms. Robinson's desk. Ms. Robinson meets with the investigation group in Ms. McNamara-Corley's office, located near the IAD work area. The group interviews her over the course of ten to twelve days.

Mid February 2004. Ms. Piercy meets Ms. Robinson who has become frustrated with the HR department and seeks her assistance. Ms. Robinson indicates that she does not agree with the performance feedback. Ms. Robinson gives her a copy of the February 2004 memorandum. Ms. Piercy declines to read the document because she wants to focus solely on performance issues. After discussing the situation with Mr. Sutter, Ms. Zlateva, Ms. Dollmeyer, and Ms. Navidad, she informs Ms. Robinson they need to work on performance issues and notes that a 360 review was being conducted.

In light of Ms. Robinson's complaint, Mr. Sutter inquires whether he should continue to work with Ms. Robinson concerning performance issues. Ms. Piercy tells him to stop meeting with her. Based on that response, he stops interacting with Ms. Robinson as a direct supervisor.

Mr. Sutter is interviewed several times by the investigation team.

Early March 2004. Shortly after presenting her memorandum, Ms. Robinson notices that Ms. Zlateva is wearing perfume to which Ms. Robinson is allergic. At one meeting, Ms. Robinson tells Ms. Zlateva about the problem and moves away from her. When Mr. Cavaliero asks for an updated medical certification, Ms. Robinson responds that her physician had previously discussed her allergy with the company and asked that Ms. Robinson be moved to a low traffic area.

March 5, 2004. In response to Ms. Zlateva's inquiry about two audits and closed items, Ms. Robinson indicates that another project has taken almost all of her time that week.

March 15, 2004. Having received clearance from the legal department, Ms. Birk and Ms. Piercy give the 360 review results to Ms. Robinson. Ms. Robinson questions the 360 process because Mr. Sutter already received the results, contrary to their agreement of simultaneous receipt. Based on comments from one evaluator and another co-worker, Ms. Robinson questions the integrity of the survey. She also believes the individuals conducting the survey may have taken responses out of the summary. Finally, noting the pattern of responses, including similar wording and comments, Ms. Robinson questions the authenticity of the responses. Ms. Piercy and Ms. Birk assure Ms. Robinson that the feedback is valid and encourage Ms. Robinson to focus on improving performance rather than challenging the results.

March 29, 2004. In response to Ms. Robinson's request, Ms. Piercy sends her a blank medical certification form.

Some time in April 2004. Ms. Robinson advises Ms. McNamara-Corley of her belief that she is becoming the focus of the investigation into her February memorandum. She notes IAD employees are avoiding her and asserts the 360 reviews were being used to attack her. Ms. McNamara-Corley forwards the correspondence to HR.

April 9, 2004. In an e-mail to Ms. Piercy and Ms. Navidad, Ms. Robinson cites various forms of retaliation that she is suffering.

April 23, 2004. Ms. Zlateva directs Ms. Robinson to make closing out four audits a priority for the week.

May 5, 2004. In an e-mail to Ms. Piercy, Ms. Robinson asserts that she is the subject of retaliation because IAD workers are avoiding her.

May 6, 2004. Ms. Robinson reports to Ms. Piercy that Ms. Zlateva is wearing perfume again which is causing Ms. Robinson physical discomfort. When Ms. Piercy discusses the problem, Ms. Zlateva states she is not wearing perfume.

May 6 or 7, 2004. The investigation group informs Ms. Robinson of their general findings which fall into three categories. First, while several of Ms. Robinson's complaints had

merit, Morgan Stanley was already addressing those issues. Ms. Robinson was just not in a position to know about the company's actions. Second, Ms. Robinson bore partial responsibility for some of the problems she identified, such as delayed audits. Third, several of her complaints had no merit. The investigation found no evidence of intentional misconduct or fraud. After the meeting, Ms. Piercy advises Ms. Robinson that she is going to help her.

Mr. DeGrasse discusses the investigation conclusions with Mr. DeLuca for about five minutes. Based on the investigation, Morgan Stanley and Mr. DeLuca determine no action is warranted other than a review of IAD policies to ensure the staff is capable of meeting the stated policies.

Ms. Zlateva also learns that an investigation was conducted that did not find anything significant. She does not see the February 2004 memorandum and she is not aware of its subject matter. An HR representative advises Ms. Zlateva to keep documenting Ms. Robinson's performance problems.

Later part of May 2004. After Ms. Zlateva notes the lack of improvement, Ms. Piercy indicates that another action plan is the next step because the most recent action plan was suspended by the investigation and came to no formal resolution. To ensure continuity with previously identified issues, they review prior action plans. Ms. Piercy reviews the draft action plan. Ms. Zlateva does not discuss her intentions about an action plan with Mr. Sutter.

Some time in June 2004. A co-worker asks Ms. Robinson to be his mentor. However, his manager advises him to keep his distance from Ms. Robinson because something was going on. He never observes Ms. Robinson being rude, disrespectful, or unprofessional.

June 1, 2004. Ms. Zlateva places Ms. Robinson on an action plan. She emphasizes Ms. Robinson's unwillingness to accept feedback. As an example, Ms. Zlateva notes that Ms. Robinson did not accept the 360 review comments. Ms. Robinson continues to display aggressive and unprofessional behavior. She needs improvement in working with clients and cooperation with co-workers. Ms. Zlateva stresses that Ms. Robinson must meet deadlines and work more effectively. To build trust, Ms. Robinson needed to stop complaining about her dissatisfaction and blaming others. The action plan was to remain in effect for 60 days.

In response, Ms. Robinson raises questions concerning each of the improvement areas. Ms. Robinson asks for specific examples of deficiencies and notes many of her deadlines are moving targets. She disagrees that she is aggressive, undisciplined, and unfocused. While willing to accept feedback, Ms. Robinson questions the validity of the 360 review responses. Based on style, she asserts that many of the derogatory comments appear to be written by the same person. She believes many of the responses were in retaliation for her SOX protected activity.

Ms. Zlateva does not believe Ms. Robinson's points are valid.

June 7, 2004. After reviewing Ms. Robinson's responses to the action plan, Ms. Piercy gives her specific examples of problem areas. She observes that her managers have identified

numerous deficiencies through counseling, two prior action plans, and the current action plan. Though she showed improvement in 2002, Ms. Robinson did not sustain that performance. Ms. Piercy advises Ms. Robinson that regardless of whether she agrees with the action plan, it remained effective and established clearly defined performance standards.

June 10 to August 23, 2004. Discover hires Mr. Tom Rosenak as a coach for Ms. Robinson. During the first coaching session, Ms. Robinson and Ms. Zlateva are in an attack/defend mode.

In a subsequent coaching meetings with Mr. Rosenak, Ms. Robinson expresses a willingness to work on communication skills. In the next couple of meetings, Ms. Robinson appears sincere and open to constructive feedback from Mr. Rosenak.

Ms. Piercy reminds Ms. Robinson that the goals of the coaching process include meeting deadlines, communicating effectively, accepting feedback, enhancing relationships, and showing respect. In response, while expressing a willingness to accept constructive feedback, Ms. Robinson challenges each goal for various reasons. She also does not trust or respect Ms. Zlateva and questions her motives in the process.

Later in the coaching process, Ms. Piercy asks Mr. Rosenak about Ms. Robinson's progress. He indicates that Ms. Robinson has notable issues which will require hard work and trust to resolve. Uncomfortable with Ms. Piercy's contact, Mr. Rosenak informs Ms. Robinson about the conversation.

Ms. Robinson is terminated before Mr. Rosenak completes all the planned coaching sessions.

June 14, 2004. In her mid-year self evaluation, Ms. Robinson cites her determination and commitment to do the right thing as her greatest strength. She also lists her ability to network and build relationships with the audit community as strong points. Notable areas for improvement are proficiency in programming languages, currency with the latest accounting changes, and familiarity with banking regulations associated with the financial services industry.

June 15, 2004. Ms. Zlateva permits Ms. Robinson to take summer hours that day but indicates they need to discuss missed deadlines.

June 18, 2004. [[RX 35 is an unsigned mid-year performance evaluation of Ms. Robinson by Ms. Zlateva, dated June 18, 2004. At the hearing, while Ms. Zlateva confirmed that she prepared the evaluation, she was not directly asked whether she gave it to Ms. Robinson. Ms. Robinson testified that she never saw this mid-year assessment.

Since I find both Ms. Zlateva and Ms. Robinson credible, and in the absence of Ms. Robinson's signature, I conclude that while Ms. Zlateva prepared the evaluation, it was not presented to Ms. Robinson at the time.]]

In her mid-year assessment of Ms. Robinson's performance, Ms. Zlateva recognizes Ms. Robinson's efforts in a SOX documentation project and the assistance she provided to new IAD members. The ability to identify risk assessments, knowledge and experience, and networking skills are notable strengths. Concerning improvement areas, Ms. Robinson continued to struggle with the performance issues identified in the December 2003 appraisal. She remained confrontational, unprofessional, disorganized, and unwilling to accept feedback. In particular, she rejected the feedback that she received in March 2004 from the 360 review.

June 28, 2004. While noting some improvement, Ms. Zlateva advises Ms. Robinson that she is still missing deadlines and has shown no improvement in accepting feedback. She observes that their perceptions of the coaching goals are completely different. Ms. Zlateva highlighted goals of time management, effective communication, acceptance of feedback, and enhancement of relationships and respect. Yet, in coaching sessions, Ms. Robinson remained argumentative, combative, belligerent, and unprofessional. Ms. Zlateva emphasizes that the objectives of the action plan cannot be achieved unless Ms. Robinson starts to accept feedback. Overall, Ms. Robinson has not made sufficient progress to succeed in the action plan. Ms. Zlateva urges Ms. Robinson to make immediate and sustained corrections of noted deficiencies. In response, Ms. Robinson objects to Ms. Zlateva's negative management style and indicates she finds nothing objective in her assessments and considered her behavior insulting.

In notes, Ms. Zlateva annotates that Ms. Robinson has not completed six tasks on time. Ms. Robinson continued to characterize Ms. Zlateva's feedback as scolding. Ms. Zlateva found providing feedback to Ms. Robinson difficult due to Ms. Robinson's immediate confrontational and sarcastic response.

Some time in July 2004. Ms. Robinson again advises Ms. Piercy about her perfume allergy and Ms. Zlateva. Subsequently, Ms. Piercy tells Ms. Robinson that she asked Ms. Zlateva to stop wearing perfume.

July 19, 2004. Ms. Zlateva advises Ms. Robinson that she has not received an update on six audit tasks.

July 26, 2004. Ms. Robinson and Ms. Zlateva enter into a coaching agreement. Both agree to take the emotional charge out of their communications and be more respectful. Ms. Robinson intends to be more accepting of feedback. Ms. Zlateva stresses the need to meet deadlines.

Late July 2004. [Concerning the reference to Mr. Rosenak's coaching observations in the JIJ letter, Ms. Zlateva testified at the hearing that Mr. Rosenak's coaching observations came from Ms. Piercy. In her testimony, Ms. Piercy stated that while she made some edits to the JIJ letter and shared her conversation with Mr. Rosenak with Ms. Zlateva, Ms. Zlateva placed the coaching reference in the JIJ letter.

To the extent their testimony represents a conflict on how the coach comments came to be placed in the JIJ letter, I find it fairly insignificant and reflective of poor memory. Whether Ms. Zlateva wrote the coaching comments or Ms. Piercy put them in the JIJ letter during her edit

is not particularly important since the evidence clearly establishes that Ms. Piercy obtained the comments from Mr. Rosenak and shared them with Ms. Zlateva. Thus, through their collaboration, Mr. Rosenak's observations were included in the JIJ letter.]]

Frustrated with the lack of improvement, Ms. Zlateva informs Ms. Piercy that she is not seeing any sustained improvement by Ms. Robinson during the action plan. Having been advised of the next step, Ms. Zlateva prepares a JIJ letter. She notes Ms. Robinson continues to miss deadlines, have communication problems, remain confrontational, and refuse to accept feedback. The letter also references comments from Mr. Rosenak about the need for hard work and trust.

Based on her year-end performance appraisals for 2001, 2002, and 2003, Mr. DeLuca believes Ms. Robinson has performance problems in the areas of judgment, teamwork, personal interaction, and execution of assignment. After Mr. DeLuca requested an update due to the approaching period for compensation determinations, Ms. Piercy in a conference call with Ms. McNamara-Corley advises Mr. DeLuca that Ms. Robinson's performance problems have continued despite the action plan; Ms. Robinson disagrees with the performance assessments; and she does not believe she needs to take corrective actions. Mr. DeLuca asks about the next step and Ms. Piercy indicates the next phase is JIJ letter which Ms. Robinson's supervisor, Ms. Zlateva, has recommended. Mr. DeLuca decides that Ms. Robinson should receive a JIJ letter because she had continued problems meeting her responsibilities, even though she was advised numerous times of her need to address her performance issues. He believes it's in everyone's interest to "finalize" the situation. Mr. DeLuca does not discuss the decision with Mr. Sutter because he was no longer her supervisor. He also does not have any direct contact with Ms. Robinson's current supervisor, Ms. Zlateva.

August 6, 2004. Ms. Zlateva presents a JIJ letter to Ms. Robinson, informing her that having failed to satisfy the action plan, she must take immediate steps to meet essential performance and behavioral requirements. After reviewing the numerous corrective actions taken since February 2002, Ms. Zlateva identifies four principal deficiencies, relating to deadlines, insufficient communications, insubordination/un-professionalism, and notable issues identified by the coach concerning hard work and trust. While the JIJ letter was effective for 30 days, a performance review would be accomplished by August 23, 2004. In response, Ms. Robinson asks for the definition of insubordination in writing. She also objects to Ms. Piercy talking to the coach.

August 6 to August 21, 2004. Although Ms. Robinson attempts to address the JIJ issues, she believes her supervisors are adding work to make it impossible for her to meet deadlines. Due to the removal of files from her desk during the investigation and inability to subsequently locate her working papers, Ms. Robinson is unable to take the necessary completion actions for the Unix and LAN audits.

August 9, 2004. Ms. Zlateva notes that Ms. Robinson has missed the original or revised deadlines for 9 of 29 scheduled audit tasks.

August 11, 2004. Ms. Robinson informs Ms. Piercy that the perfume in the work area has again become unbearable and is causing serious health concerns. As result, Ms. Robinson is experiencing headaches, severe respiratory problems, and other symptoms. Although her physician provided notice of her sensitivity to the company, nothing had been done.

August 13, 2004. Ms. Piercy responds to Ms. Robinson's perfume sensitivity e-mail, acknowledging the August 22, 2003 medical certification which showed a high sensitivity to fragrance. However, Ms. Piercy observes that the company spoke with the individual causing the problem and in December 2003, Ms. Robinson indicated the problem was resolved but she was working to obtain additional medical certification. In March 2004, Ms. Robinson was given a blank certification form. As of the date of the e-mail, Ms. Robinson had not provided any further medical certification. Ms. Piercy requested additional certification.

Ms. Robinson informs Ms. Zlateva that she is unable to complete work on the Unix and LAN audit issues because her follow-up files are missing.

August 18, 2004. Ms. Piercy reminds Ms. Robinson that the company previously asked on numerous occasions for a completed medical certification to clarify her condition.

August 19, 2004. Mr. Sutter issues an interoffice memorandum about employees' sensitivity to perfume and fragrances. In response, Ms. Zlateva stops wearing perfume.

About August 21, 2004. After about two weeks, Ms. Zlateva does not see any improvement and decides to terminate Ms. Robinson's employment. After contacting HR, she is informed to prepare the termination memorandum. After she prepares the termination letter, Ms. Zlateva gives the letter to HR. Two days later, either Ms. Dollmeyer or Ms. Piercy advise Ms. Zlateva that she and an HR representative will meet with Ms. Robinson to present the termination letter. Although she is aware that certain additional approvals must be obtained from higher management for the termination action, Ms. Zlateva does not know who approved her termination decision. She does not discuss her termination decision with Mr. DeLuca or Ms. McNamara-Corley. Ms. Zlateva informs Mr. Sutter of her decision.

Subsequently, when he is advised that Ms. Robinson is not making any progress half way through the JIJ process, Mr. DeLuca decides employment termination is warranted. Ms. McNamara-Corley advises him of the legal issues associated with the termination of Ms. Robinson's employment. Mr. Sutter does not participate in either the decision to issue the JIJ letter or terminate Ms. Robinson's employment.

August 22, 2004. Ms. Robinson declines an offer to work for a charity drive due to Mr. Sutter's previous criticism.

August 23, 2004. At 10 am, Ms. Robinson meets with Ms. Zlateva and Ms. Piercy. At the start of the meeting, Ms. Robinson turns in a second medical certification form. Ms. Zlateva reads a termination memorandum. Ms. Zlateva informs Ms. Robinson that half way through the JIJ process, many of the noted deficiencies remained. She continued to display aggressive and argumentative behavior. Ms. Zlateva concludes Ms. Robinson has not made significant or

sustained improvement in job performance. As a result, Ms. Robinson's employment is terminated. Ms. Robinson is escorted to the atrium and then outside to a limousine, where she waits for some time for her personal items to be retrieved from her desk.

Post August 2004. Ms. Robinson contacts a few people about re-employment and looks for auditor jobs on the internet. Between March and May 2005, Ms. Robinson earns about \$150 a week conducting an audit review class.

Jurisdiction

Title 18 U.S.C. § 1514A(a) prohibits a publicly traded company, or a company required to file with the SEC, "or any officer, employee, contractor, subcontractor of such company" from discriminating against an employee for engaging in a SOX protected activity. As a result, a complainant may establish jurisdiction to invoke the SOX employee protection provisions if she is an employee of a publicly traded company.

Although she worked in the Discover office facilities, audited its credit card service functions, and was compensated by Discover's holding company, Ms. Robinson was principally employed as a senior auditor for Morgan Stanley's IAD. That internal audit organization had a supervisory chain descending from the Audit Committee of Morgan Stanley Board of Directors, through the Morgan Stanley global head of audit services, Mr. DeLuca, to the vice president of audits at Discover, Mr. Sutter, to Ms. Robinson's immediate supervisor, Ms. Zlateva. Ms. Robinson's work was assigned by IAD supervisors and ultimate authority for her level of compensation and the termination decision resided with Mr. DeLuca, a senior executive officer of Morgan Stanley. Accordingly, I find that Ms. Robinson has established jurisdiction under SOX as an employee of Morgan Stanley, a publicly traded company.

Case in Chief

According to 18 U.S.C. § 1514A(b)(2)(B), the applicable rules and procedures to be applied during the adjudication of a SOX whistleblower complaint are governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").

Under 42 U.S.C. § 42121(b), as applied by 18 U.S.C. § 1514A and 29 C.F.R. §1980.102, to establish that a respondent has committed a violation of the employee protection provisions of SOX, a complainant must prove by a preponderance of the evidence that an activity protected under SOX was a contributing factor to the unfavorable personnel action alleged in the complaint. Based on these principles, to establish a violation of SOX, a complainant must prove three elements: 1) she engaged in a protected activity; 2) she was subjected to an unfavorable personnel action; and 3) her protected activity was a contributing cause for the unfavorable personnel action.

In Ms. Robinson's case, the termination of her employment on August 23, 2004 clearly satisfies the second requisite element. Consequently, I now turn to consideration of whether: 1)

she engaged in an activity protected under SOX, and 2) such activity was a contributing cause of her employment termination.

Issue # 1 – Protected Activity

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, U.S. Department of Labor, (“Secretary”) has broadly defined protected activity as a report of an act that the complainant reasonably believes is a violation of the subject statute. Although the allegation need not be ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations.” *Minard v. Nerco Delamar Co.*, 92 SWD 1 (Sec’y Jan. 25, 1995), slip op. at 8.

At the same time, the Administrative Review Board (“ARB” and “Board”), has clarified that SOX does not provide whistleblower protection for all employee complaints about a company’s financial operations. *Platone v. FLYi, Inc.*, ARB No. 04-154 (Sept. 29, 2006). Instead, to be protected under SOX, “the employee’s communications must ‘definitively and specifically’ relate to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1).” *Id.* at 17.¹⁰ Thus, under SOX, 18 U.S.C. § 1514A(a)(1), an employee engages in protected activity when she provides information regarding corporate conduct which the employee believes “constitutes a violation of” at least one of six specific categories of criminal fraud or security violations set out in the Act. The employee’s belief must be subjectively and objectively reasonable. Although an employee is not required to identify the specific criminal provision, SEC rule or regulation, or applicable provision of federal law, her protected communication must nevertheless relate to one. The six categories specified by 18 U.S.C. § 1514A(a)(1) in which violation may be reported by an employee are:

1. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1341, Frauds¹¹ and Swindles [mail fraud]. This provision establishes that use of the Post Service or a private or commercial interstate carrier as a means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

2. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1343, Fraud by Wire, Radio, or Television [wire fraud]. This provision establishes that use of wire, radio, or television communication as means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

¹⁰As an example, the Board indicated that an employee’s communication that the company was materially misstating its financial condition to its investors is protected under SOX.

¹¹Fraud is defined as “false representation of a matter of fact . . . which is intended to deceive another so that he will act upon it to his legal injury.” BLACK’S LAW DICTIONARY 788 (4th ed. 1968).

3. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1344, Bank Fraud [bank fraud]. This provision establishes that executing a scheme or artifice to defraud a financial institution is a felony crime punishable by not more than thirty years imprisonment.

4. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1348, Securities Fraud [securities fraud].¹² This provision establishes that executing a scheme or artifice a) to defraud any person in connection with any security of an issuer of a class of securities registered under Section 12 of the Securities Exchange Act or that is required to file reports under Section 15(d) of the Securities Exchange Act; or b) to obtain by means of false or fraudulent pretenses any money or property in connection with the purchase of such security identified in a) above is a felony crime punishable by not more than twenty-five years imprisonment.

5. Any rule or regulation of the Securities Exchange Commission.

6. Any provision of federal law relating to fraud against shareholders.

In *Platone*, the ARB also emphasized that the “relevant inquiry” in determining whether an employee engaged in protected activity is focused on the allegations the employee “actually communicated to [her] employer prior” to the termination action. *Platone*, No. 04-154 at 17. Although securities fraud and fraud against shareholders are not further defined in the Act, the Board also noted that elements of a cause of action for securities fraud “are rooted in common-law tort actions for deceit and misrepresentation.” *Id.* at 15. Those elements include a material misrepresentation, scienter, and causal connection between the misrepresentation and harm.¹³ *Id.*

Finally, in one type of employment situation, reporting violations may not be considered a protected activity. In *Sasse v. USDOL*, No. 04-3245 (6th Cir. May 31, 2005) (cases below ARB No. 02-077 and ALJ No. 1998 CAA 7), the appellate court affirmed an administrative law judge’s determination that an Assistant United States Attorney did not engage in whistleblower protected activities since his investigation of environmental violations and participation in related proceedings were accomplished in the course of his assigned duties. The court observed that “whistleblower protection provisions protect employees who risk their job security by taking steps to protect the public good.” *Id.* at 4. However, when those activities are part of an individual’s assigned work, then he “cannot be said to have risked his personal job security by performing duties required of him in that job.” *Id.*

Consequently, in Ms. Robinson’s case, consideration of whether she engaged in a SOX protected activity has four components. First, the report or action must relate to a purported violation of a federal law or SEC rule or regulation relating to fraud against shareholders. Second, the complainant’s belief about the purported violation must be subjectively and objectively reasonable. Third, the complainant must communicate her concern to either her

¹²This criminal provision was added by Section 807 of the Sarbanes-Oxley Act (2002).

¹³In *Platone*, the ARB concluded the employee’s communications were not protected under SOX because the concerns did “not even approximate any of the basic elements of a claim of security fraud.” *Platone*, No. 04-154 at 22.

employer, the federal government, or a member of Congress. Fourth, the report or complaint must involve actions outside the complainant's assigned duties.

Relatedness/Reasonableness

Ms. Robinson's submission of the February 2004 memorandum represents the alleged protected activity in this case. Upon assessment of her memorandum, I conclude that her stated concerns about the independence, professionalism, and qualification of IAD members, and Mr. Sutter in particular, and her allegations of employment discrimination do not sufficiently relate to the six categories of SOX violations.

In regards to the remaining thirteen other concerns, Ms. Robinson generally alleged that these incidents represent significant financial, operational, and regulatory risks that could result in financial loss and reflect insufficient internal control which interferes with the company's ability to disrupt the "triangle" of fraud.]]This generalized assertion does not satisfy the relatedness criteria for a SOX protected activity. Instead, I must evaluate the specific details the thirteen alleged problems. Upon such review, I first find that none of the incidents relate to mail, wire, bank, a securities fraud, or a violation of any specific SEC rule or regulation.

Likewise, in terms of violation of provisions of federal law relating to fraud against shareholders, I find following nine concerns fall short in terms of relatedness: internal misrepresentation of the nature and extent of software licenses, unreported audits, untimely audit reports, insufficient segregation of the business technology purchasing function, status of contractors, terminated employees' continued access, disagreement on importance of information technology audit issues, recurrent audits issues due to lack of management attention, and level of reporting audit findings.

The remaining four issues raised by Ms. Robinson either contained an alleged element of fraud or may have more specifically related to protecting shareholders from fraud. First, Ms. Robinson asserted that in 2002 Mr. Sutter directed Mr. Grackowski not to issue the completed LAN audit which noted some access and physical security issues to prevent FDIC auditors from seeing it. In considering this allegation, despite the implied adverse motive in Mr. Sutter's action, the record contains insufficient evidence to determine that the requisite relatedness of this charge. Notably, Ms. Robinson did not present a sufficient record to allow me to identify a provision of federal law that required release of the LAN audit to the FDIC auditors which Mr. Sutter may have allegedly circumvented.

Next, Ms. Robinson reported two separate incidents of unreported management fraud in which an executive permitted personal use of a company cell phone and another cost center manager appeared to have incurred hundreds of dollars of personal calls on a company calling card. While Ms. Robinson may have had a reasonably subjective belief that fraud was involved, the inappropriate use by two individuals of company cell phones and calling cards did not involve the four specific criminal fraud provisions contained in SOX and objectively fails to rise to the requisite level of materiality in regards to potential fraud against Morgan Stanley shareholders.

Finally, Ms. Robinson reported that audit management dropped her finding that Discover was not complying with banking regulations in regards to the prompt charge off of credit card bankruptcies and failed to take corrective action. Based on the testimony of Ms. Robinson and Mr. Slusarz, the Discover CFO, I find Ms. Robinson's concern that Discover was not complying with federal banking regulations to be subjectively and objectively reasonable. In terms of subjective belief, through the course of audit testing and upon review of a federal banking regulation, Ms. Robinson determined the regulation required Discover to charge off bankruptcies within 60 days of notification, and Discover was taking longer than 60 days. As an objective measure, based on his understanding of Ms. Robinson's complaint and considering the nature of Discover's credit card business, Mr. Slusarz, the Discover CFO, opined the potential impact of the delay was somewhat less than \$6 to \$8 million. Although subsequently Morgan Stanley/Discover determined they were on solid regulatory ground, concluded the delay would not adversely affect financial statements, and took action to accelerate the charge off process, Mr. Slusarz was sufficiently concerned in February 2004 about Ms. Robinson's memorandum containing this charge to initiate a significant investigation. Further, since this particular banking regulation relates to accurate reporting of credit card company bankrupt card member accounts, it implicitly protects shareholders from fraud.¹⁴ Accordingly, I find Ms. Robinson's report concerning Discover's failure to meet the regulatory 60 day bankruptcy charge off requirement satisfies the criteria of a SOX protected activity.

Communication

On February 5, 2004, Ms. Robinson presented her memorandum containing her allegation relating to bankruptcy charge offs to Mr. Slusarz, and sent a copy to the Discover president, Mr. Nelms.

Job Exemption

In 2002, Ms. Robinson discovered the bankruptcy charge off discrepancy during the course of her duties as a senior auditor at Discover. She tested the bankruptcy process, reviewed the banking regulation, and presented her findings to audit management. Up to that point, Ms. Robinson's identification of the bankruptcy charge off problem was not a SOX protected activity because she accomplished her investigation and report during the discharge of her auditor duties. She bore no employment risk in reporting the deficiency as an auditor.

However, in February 2004, while the noted discrepancy remained the same, Ms. Robinson clearly went well beyond her assigned duties as a Morgan Stanley senior auditor by presenting the bankruptcy charge off issue in a memorandum to the Discover President and CFO

¹⁴In closing the brief, Respondents' counsel states that Ms. Robinson admitted that at the time of the complaint she did not believe the bankruptcy charge off problem related to fraud against the shareholder. Upon review of the cited transcript provision (TR, p. 652-53) I note that counsel asked whether the cell phone and calling card issues were the only two incidents regarding fraud. She replied, "I would have to look, but I believe so." Based on the specific question, her less than definitive response, her introduction to the February 2004 memorandum asserting the need to ensure sufficient internal audit control to prevent fraud, and her additional hearing testimony that she believed the bankruptcy irregularities could lead to inaccurate representation on the company's balance sheet, I do not consider the exchange to be an admission.

based on her belief that the issue was not getting to a sufficiently high level of management for necessary corrective action. Thus, while she discovered the bankruptcy charge off problem in course of her auditor work, the manner and method she chose to convey that finding to the president and CFO went beyond her role as a senior auditor. Consequently, despite her job status as a senior auditor, Ms. Robinson engaged in a SOX protected activity on February 5, 2004 since she did not prepare and present the complaint as part of her assigned senior auditor duties.¹⁵

Issue # 2 – Contributing Factor

Having engaged in a protected activity and suffered an unfavorable personnel action, to establish discrimination under SOX, Ms. Robinson must also prove by a preponderance of the evidence a connection between her protected activity and the unfavorable personnel action. That is, Ms. Robinson must prove that her bankruptcy charge off allegation in the February 5, 2004 memorandum was a contributing factor in her employment termination by Morgan Stanley/DFS. Courts have defined “contributing factor” as “any factor which, alone or in connection with other factors, tends to affect in any way” the decision concerning the adverse personnel action, *Marano v. U. S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

In determining whether Ms. Robinson’s protected activity contributed to her employment discharge, due to the absence of direct evidence of the requisite causation, I must assess the circumstantial evidence contained in the extensive record. That analysis is facilitated by reviewing significant highlights of Ms. Robinson’s employment history before and after her February 2004 protected activity.

Pre-Protected Activity Employment History

Ms. Robinson’s employment history with Morgan Stanley prior to her February 2004 protected activity had three distinct phases.

2001 through Spring 2002

In the spring of 2001, when Mr. Takada assessed Ms. Robinson’s work during the general ledger audit, he gave her an overall rating of needs improvement. After noting Ms. Robinson’s strong audit expertise, Mr. Takada concluded that she needed improvement in the areas of communication, professionalism, and leadership. Additionally, since she exceeded the budget estimate, Mr. Takada determined her job execution was unsatisfactory. Consistent with a pattern that followed Ms. Robinson from that appraisal through her termination, she contested her supervisor’s adverse evaluation. Believing the job execution was due to Mr. Takada’s lack of experience, Ms. Robinson challenged his objectivity and requested more specific examples of her deficiencies.

¹⁵In the opening comments of her February 2004 memorandum, Ms. Robinson states that she is bringing the complaint forward as part of her professional responsibility as an auditor and due to the company’s code of conduct to report illegal activities. However, I consider the appropriate standard on this issue is whether the memorandum was completed as part of her auditor duties assigned by Morgan Stanley.

A couple of months later, in apparent response to Ms. Robinson's objections to Mr. Takada's evaluation, his supervisor, Ms. Weiler, re-assessed her work on the general ledger audit and changed the work execution rating to satisfactory. However, the overall rating remained "needs improvement" and Ms. Weiler again emphasized Ms. Robinson's improvement areas were teamwork, communications, organization, and acceptance of feedback. In response, after expressing appreciation for the re-assessment and an intention to improve, Ms. Robinson nevertheless challenged the validity of the evaluation since Ms. Weiler did not have first hand knowledge of her work. She also questioned the value of the feedback in the absence of specific examples.

In September 2001, in Ms. Robinson's mid-year appraisal, Ms. Weiler again highlighted her strengths in the areas of audit skills, and self-motivation and the improvement areas of teamwork, professionalism, and acceptance of feedback.

In the fall of 2001, Mr. Takada again appraised Ms. Robinson's work during the collections audit. Her work execution, analytic skills, and technical abilities met expectations. Her leadership and professionalism needed improvement. Again, Ms. Robinson disagreed. Questioning Mr. Takada's objectivity, citing the delay in the evaluation, and noting the absence of specific examples, Ms. Robinson was unable to understand his improvement comments.

In his spring 2002 assessment of Ms. Robinson's first year as a Morgan Stanley senior auditor, while indicating she had good audit expertise, Mr. Graczkowski concluded that she had not met expectations and gave her a needs improvement overall rating. Although an experienced auditor, Ms. Robinson's adversarial stance, demeaning attitude to colleagues, free wheeling style, and casual professional demeanor hindered her ability to work in a team and partner with clients. She also struggled with delivering quality work on time. To emphasize the need to improve, Mr. Graczkowski placed Ms. Robinson on a performance action plan. Over the course of the next several weeks, Mr. Graczkowski expected Ms. Robinson to improve her communication skills, adjust her approach to colleagues, improve her organizational skills, organize her work before acting, and accept feedback.

Spring 2002 through December 2002

In the second phase, Ms. Robinson made significant improvements in the previously noted deficient areas.

In June 2, 2002, Mr. Graczkowski concluded Ms. Robinson had successfully satisfied all the relevant improvement requirements in the performance action plan.

In December 2002, Mr. Graczkowski commended her turnaround in performance during 2002. He described Ms. Robinson as a strong and thorough auditor. In every category, Ms. Robinson had met, exceeded, or consistently met expectations. Mr. Graczkowski's only suggested improvement was a more reserved, balanced approach with auditees.

Spring 2003 through February 5, 2004

In the third phase, Ms. Robinson's performance issues re-emerged.

In spring 2003, Mr. Graczkowski and Mr. Sutter advised Ms. Robinson that her inability to partner with clients and communication style were becoming performance issues.

In March 2003, after the departure of Mr. Graczkowski, Mr. Sutter advised Ms. Robinson that she was spending an inordinate amount of time on non-core audit issues. In response, Ms. Robinson questioned Mr. Sutter's independence as an auditor.

About the same time, after Ms. Zlateva had been promoted to manager and asked to help supervise Ms. Robinson, Ms. Robinson expressed a concern to Mr. Sutter that her own promotion was being blocked due to past events. Mr. Sutter reminded her that many of the criteria for promotion were contained in the professional development plan she had rejected when presented earlier by Mr. Graczkowski.

By May 2003, due to confrontational communication difficulties, Mr. Sutter replaced Ms. Zlateva as Ms. Robinson's direct supervisor. Mr. Sutter advised Ms. Robinson that she needed to become open to feedback and work on building trust. During this period, Mr. Sutter advised Mr. DeLuca that Ms. Robinson was one of his poor performers.

In June 2003, in response to her inquiry, Mr. Sutter reviewed with Ms. Robinson the criteria for promotion, including meeting deadlines, using strong judgment, being open to feedback, and showing sustained ability to work with colleagues and clients. In response, Ms. Robinson found the list to be subjective and un-measurable. In particular, she refused to accept being open to feedback as a criterion due to measurement difficulties. The next day, in her self-appraisal, Ms. Robinson listed leadership and networking ability among her strengths.

In September 2003, Mr. Sutter presented to HR a chronology of Ms. Robinson's performance difficulties that year. He provided examples of her aggressive and confrontational style, unprofessional communications, poor audit judgment, and uncooperative attitude with Ms. Zlateva.

In October 2003, Ms. Robinson met performance standards in an audit review. Mr. Marshall determined her analysis and judgment were good. At the same time, he stressed her need to keep her emotions under control to better resolve conflicts.

On October 23, 2003, after noting Ms. Robinson's improvement in 2002, Mr. Sutter placed Ms. Robinson a 60 day performance action plan because she had not sustained that performance in 2003. Mr. Sutter cited Ms. Robinson's failure to accept feedback and continued problems in the areas of aggressive behavior, lack of focus, unprofessional communication, and lack of cooperation. In implementing the performance plan, Mr. Sutter set out several required improvement areas which included meeting deadlines, exercising strong judgment, being open to feedback, working effectively in dynamic situations, and showing sustained ability to work with colleagues and clients. He also advised that unsuccessful completion of the action plan might

lead to employment termination. In response, Ms. Robinson disagreed with his blanket assertions.

In the fall of 2003, based on Ms. Robinson's performance for the year, Mr. DeLuca decided not to increase her compensation level for 2004.

In her November 2003 self appraisal, Ms. Robinson rated herself as exceeds or consistently exceeds in the areas of teamwork, communication, and leadership. She recommended that she be promoted to manager. Her only development needs were in the areas of computer language, banking regulations, and latest accounting changes.

In December 2003, in an annual appraisal, Mr. Sutter rated Ms. Robinson as meeting expectations in several areas, including analytic ability, audit knowledge, and functional performance. However, in his opinion, Ms Robinson needed to improve her leadership, organizational ability, judgment, and commitment. He considered her teamwork to be unsatisfactory due to her inability to accept feedback and adversarial approach to colleagues and management. In particular, Mr. Sutter stressed that her inability to accept and respond to feedback was negatively impacting her ability to succeed. In response, Ms. Robinson disagreed that her employment relationships were frayed. Due to his rating, Mr. Sutter extended the performance action plan another 60 days. Although Ms. Zlateva had become Ms. Robinson's direct supervisor at the beginning of the month, Mr. Sutter retained responsibility for the performance plan. He also requested a 360 review.

In mid January 2004, Mr. Sutter and Ms. Robinson prepared a list of evaluators for a 360 review. Ms. Birk sent the 360 surveys out on January 21, 2004. She received responses through early February 2004.

Post-Protected Activity Employment History

On February 9, 2004, Ms. Birk presented the 360 responses to Mr. Sutter. However, because Ms. Robinson's February 5, 2004 memorandum contained a complaint about Mr. Sutter, he stopped being involved with Ms. Robinson's performance issues. Ms. Zlateva became responsible for all aspects of Ms. Robinson's supervision.

Between February 10, 2004 and mid-March 2004, personnel actions involving Ms. Robinson were suspended due to the investigation of her complaints. As a consequence, there was no formal close out of the pending performance action plan initiated by Mr. Sutter.

By the beginning of March 2004, Ms. Zlateva started inquiring Ms. Robinson about the status of various audits and associated items.

In mid-March 2004, Ms. Birk and Ms. Piercy presented to Ms. Robinson the results of the 360 review. Although the survey respondents highlighted Ms. Robinson's audit expertise, many participants advised her to improve her communication style, peer relationships, and ability to accept feedback. Ms. Robinson objected to her delayed notification of the survey results and questioned both the authenticity and validity of the responses. Indicating that the

survey results were valid, Ms. Piercy encouraged Ms. Robinson to focus on improving her performance rather than challenging the feedback.

In early May 2004, upon completion of its investigation of Ms. Robinson's February 2004 memorandum, the investigation group informed Ms. Robinson of their general findings.

By late May 2004, Ms. Zlateva concluded Ms. Robinson was having performance problems with deadlines and professional communications.

At the beginning of June 2004, Ms. Zlateva placed Ms. Robinson on her third performance action plan for 60 days. In addition to improving her ability to work with clients and co-workers and meet deadlines, Ms. Zlateva emphasized the need for Ms. Robinson to stop her unprofessional behavior. In light of her response to the 360 survey, Ms. Zlateva also stressed that Ms. Robinson needed to start to accept and respond to feedback. In response, Ms. Robinson questioned every improvement area in the action plan. Disagreeing with the characterization of behavior, Ms. Robinson asked for specific examples. She again challenged the validity of the 360 review responses.

On June 7, 2004, Ms. Piercy provided Ms. Robinson specific examples of her problem areas. She noted that several supervisors identified the deficiencies through counseling, two prior action plans, and the present performance action plan. Although Ms. Robinson had improved in 2002, she did not sustain the improvements. Ms. Piercy advised Ms. Robinson that she should comply with plan's performance standards regardless of whether she agreed with them.

In her mid-year self appraisal prepared on June 14, 2004, Ms. Robinson highlighted determination, commitment, and ability to network as her strengths. She recognized the need to improve her computer programming language skills, become up to date with accounting changes, and be more familiar with banking regulations.

On June 28, 2004, Ms. Zlateva advised Ms. Robinson that she was not making sufficient progress in the action plan. She was still missing deadlines, continued to be confrontational, and showed no improvement in accepting feedback. Ms. Zlateva stressed that Ms. Robinson must make immediate correction. Ms. Robinson responded by objecting to Ms. Zlateva's negative management style, lack of objectivity, and insulting behavior.

During July 2004, Ms. Robinson attended several coaching sessions and expressed a willingness to accept constructive feedback.

In late July 2004, inquiring about the corrective actions, Ms. Zlateva informed Ms. Piercy that Ms. Robinson had not shown any sustained improvement during the performance action plan. Ms. Piercy advised the next step was a JIJ letter, which Ms. Zlateva prepared. Correspondingly, in preparation for setting compensation levels for the upcoming year, upon receiving an update on Ms. Robinson's performance and lack of progress during the action plan, When Mr. DeLuca asked about the next step in addressing Ms. Robinson's continued

employment issues, he was advised that the next step prior to formal termination was the JIJ letter.

On August 6, 2004, Ms. Zlateva presented the JIJ letter directing Ms. Robinson to make immediate corrections and Ms. Robinson asked for the definition of insubordination in writing.

About fifteen days later, Ms. Zlateva concluded Ms. Robinson had not shown any progress. Upon consulting Ms. Piercy, Ms. Zlateva prepared a termination letter. After learning Ms. Robinson had not make any progress in the first two weeks of the JIJ evaluation, Mr. DeLuca determined her employment should be terminated.

On August 23, 2004, Ms. Zlateva formally terminated Ms. Robinson's employment as a Morgan Stanley senior auditor.

Discussion

Ms. Robinson understandably highlights several events following her presentation of the February 2004 memorandum as circumstantial evidence of impermissible discrimination under SOX. Additionally, her employment termination within six months of memorandum submission provides some circumstantial evidence of causation based on temporal proximity. However, for numerous reasons, I find the preponderance of the evidence in this record establishes that Ms. Robinson's February 2004 protected activity did not contribute to her loss of employment on August 23, 2004.

As a starting point, Ms. Robinson's employment history at Morgan Stanley prior to the February 2004 protected activity weighs significantly against her on the causation issue because it a) documents Ms. Robinson's pre-existing performance issues in the areas of professional communications, timely work product, and acceptance of feedback, and b) establishes a reasonable foundation unrelated to any SOX protected activity for the employment actions taken by her supervisor in 2004 when the same performance deficiencies persisted.

When Ms. Robinson arrived at Morgan Stanley/Discover in late 2000, she was already an experienced auditor. That expertise enhanced her value as an senior internal auditor, while at the same time apparently hindered her ability to work well with less experienced auditors and supervisors and accept performance feedback. In part due to this dichotomy, which was first identified in the spring of 2001 in Mr. Takada's appraisal, Ms. Robinson's performance as a senior auditor waxed and waned prior to her protected activity.

After struggling with issues of professional communication, deadlines, and acceptance of feedback identified by Mr. Takada, Ms. Weiler, and Mr. Grackowski in her first year, Ms. Robinson demonstrated in 2002 that she was capable of more than successfully meeting all the performance criteria of a Morgan Stanley senior auditor.

However, in 2003, Mr. Grackowski and Mr. Sutter again concluded Ms. Robinson was not meeting standards in terms of professional communication, teamwork, and acceptance of feedback. For the next year, Ms. Robinson's supervisors unsuccessfully worked with her in an

attempt to correct her recurring performance problems. Consequently, by the time she engaged in her protected activity on February 5, 2004, Ms. Robinson was on her second performance action plan, failed to acknowledge management's stated improvement concerns in her most recent self appraisal, received an unsatisfactory rating in teamwork on her most recent annual appraisal, and was considered by the senior IAD manager at Discover, Mr. Sutter, to be a poor performer. In other words, despite her stated belief to the contrary, by the beginning of February 2004, Ms. Robinson's employment record already put her at risk of losing her employment with Morgan Stanley. Further, and of particular significance on the causation issue, none of the adverse performance evaluations and personnel actions by Mr. Takada, Ms. Weiler, Mr. Graczkowski, and Mr. Sutter before February 5, 2004 were motivated by Ms. Robinson's subsequent protected activity.

Turning to the post-protected activity employment history to examine the pivotal role Ms. Zlateva played in Ms. Robinson's employment termination, I first reiterate that I found Ms. Zlateva to be a credible witness. With that credibility determination in mind, three significant features of Ms. Zlateva's supervision in 2004 also negate a causal connection between her personnel actions involving Ms. Robinson and the protected activity in this case.

First, during her 2004 supervision of Ms. Robinson, Ms. Zlateva was only aware that Ms. Robinson had submitted a memorandum that generated an investigation. Ms. Zlateva did not know the nature or extent of the memorandum and related investigation. Ms. Robinson did not discuss the memorandum with Ms. Zlateva. No one from the investigation or HR contacted Ms. Zlateva about the memorandum. As a result, Ms. Robinson's February 2004 complaint that management was not taking sufficient action on correcting Discover's failure to properly charge off bankruptcies would not have been a basis for Ms. Zlateva's August 2004 decision to terminate Ms. Robinson's employment.

Second, while as observed by Mr. Rosenak, Ms. Zlateva may have borne some responsibility for the communication difficulties between herself and Ms. Robinson, the performance problems she experienced with Ms. Robinson were recurring issues. Mr. Takada, Ms. Weiler, Mr. Graczkowski, and Mr. Sutter previously identified Ms. Robinson's need to address the aggressive nature of her communications. Similarly, while attempting to assist Ms. Robinson, Ms. Piercy and Ms. Birk experienced her confrontational communicative style. The predecessor managers and supervisors also previously highlighted and documented Ms. Robinson's failure in meeting deadlines and inability to accept adverse feedback. Ms. Robinson's post-protected activity employment record chronicled by Ms. Zlateva sufficiently documents that she continued to miss deadlines, engage in confrontational exchanges, and refuse to accept performance feedback through her employment termination in August 2004.

These three principal, long-standing performance problems were further corroborated by the 360 review responses. At the beginning of 2004, many of the respondents identified the same organizational, professionalism, and communication difficulties that Ms. Robinson's former managers and supervisors consistently attempted to have her correct and which eventually formed the basis for Ms. Zlateva's personnel actions. Additionally, although her concern about the process of the earlier disclosure to Mr. Sutter is understandable, Ms. Robinson's complete refusal to consider the significant 360 review feedback on the basis that it

was possibly fabricated by one individual and represented retaliation for whistle blowing¹⁶ vividly reveals the extent of the challenge Ms. Zlateva faced in getting Ms. Robinson to accept performance feedback.

I have considered whether Ms. Zlateva's use of perfume may have been indicative of an extreme animosity towards Ms. Robinson such that Ms. Zlateva would contrive to separate Ms. Robinson from employment for non-performance related reasons, such as her protected activity. In that regard, while Ms. Robinson may have informed Ms. Zlateva about her fragrance sensitivity, the record does not demonstrate that either Morgan Stanley or Ms. Zlateva had sufficient medical documentation that Ms. Robinson's allergy required her supervisor and colleagues to stop wearing perfume when in contact with her. In fact, despite repeated management requests over the course of several months for further clarification and certification from Ms. Robinson's physician, she did not submit additional medical certification until the morning of her termination.

Third, based on the additional credible testimony of Mr. Sutter and Mr. DeLuca, I conclude that all the adverse actions that occurred after Ms. Robinson's February 2004 memorandum, including the third performance action plan, the JIJ letter, and termination action, were initiated by Ms. Zlateva on her own accord. This determination is significant because unlike Ms. Zlateva, Mr. Sutter and Mr. DeLuca were well aware of Ms. Robinson's protected activity.

Mr. Sutter was named in the complaint and candidly indicated he was stressed by the investigation. Yet, other than being made aware of the pending actions, Mr. Sutter purposefully played no role in the post-protected activity personnel actions.

As a member of the Morgan Stanley's review team, Mr. DeLuca was almost immediately made aware of Ms. Robinson's protected activity and he played a significant role in Ms. Robinson's termination. Additionally, while he recused himself from the investigation, Mr. DeLuca was also in a position to be well aware of the expense incurred by Morgan Stanley due to Ms. Robinson's memorandum, which upon investigation led to no significant findings. Nevertheless, Mr. DeLuca presented credible testimony that Ms. Robinson's documented performance issues, refusal to accept feedback, and failure to improve – and not her February 2004 memorandum – formed the basis for his approval of the adverse personnel actions. Further, the critical point remains that rather than acting in response to Mr. DeLuca's wishes, Ms. Zlateva took all the initial the personnel actions, including contact with HR, that eventually led to the performance action plan, the JIJ letter, and termination action, without any direction from Mr. DeLuca.

Similarly, none of the HR personnel, including Ms. Piercy, who may have been aware of Ms. Robinson's protected activity, caused Ms. Zlateva to take the personnel actions. Instead, as

¹⁶Contrary to her belief that the 360 survey was another form of retaliation for her protected activity, the 360 review responses were returned, the survey was completed, and Mr. Sutter was informed of the results before the initiation of the investigation into Ms. Robinson's February 2004 memorandum. In other words, although Ms. Robinson did not receive the results until March 2004, the 360 review respondents were not be reacting to her protected activity; they were assessing her job performance.

demonstrated by her testimony, supervisory notes, and various e-mails in 2004, Ms. Zlateva initiated each action, and in particular the termination decision, when she concluded that Ms. Robinson had not sufficiently responded to the performance feedback and met performance standards.

In summary, motivated in part by on her principles as a professional auditor, Ms. Robinson engaged in a SOX-protected activity by bringing to the attention of Morgan Stanley/Discover senior executives the company's non-complying bankruptcy charge off practice. Less than half a year later, she lost her job. Such temporal proximity between Ms. Robinson's protected activity and her employment termination provides some circumstantial evidence of causation. However, upon consideration of the credible testimony and evidentiary record, I find the preponderance of the probative evidence establishes that Ms. Robinson's February 5, 2004 memorandum did not contribute to the end of her employment as a Morgan Stanley senior auditor on August 23, 2004. Instead, Ms. Zlateva initiated the employment termination and Mr. DeLuca approved the action based on their determinations that Ms. Robinson failed to meet work-related performance standards.

During her employment with Morgan Stanley, Ms. Robinson demonstrated that she was capable of two responses to adverse performance feedback. In 2002, Ms. Robinson accepted the noted deficiencies relating to professional communications, deadlines, and acceptance of feedback and made suitable corrections. However, in 2003 and 2004, though she made an effort to meet deadlines and make other corrections, Ms. Robinson also clearly refused to accept the validity of most of the adverse feedback she was receiving from Mr. Sutter, Ms. Zlateva, and the 360 review respondents. As Ms. Piercy attempted to explain to Ms. Robinson in late spring of 2004, whether Ms. Robinson agreed or disagreed, her rejection of performance feedback significantly interfered with her ability to succeed at Morgan Stanley.

CONCLUSION¹⁷

Ms. Robinson's complaint in her February 5, 2004 memorandum presented to senior executives that Discover had not taken suitable corrective action to ensure the charge off of credit card account bankruptcies in compliance with banking regulations meets the criteria for a communicated protected activity under SOX. However, based on the preponderance of the evidence, I find Ms. Robinson's SOX-protected activity did not contribute to termination of her employment with Morgan Stanley on August 23, 2004. Accordingly, since Ms. Robinson failed to prove the requisite entitlement element of causation, her SOX employee discrimination complaint must be dismissed.

¹⁷Since I have determined that Ms. Robinson's discrimination complaint must be dismissed because she has failed to prove that her protected activity contributed to her employment termination, I need not address whether: a) the Respondents would have terminated her employment in the absence of her protected activity, and b) the respective Respondents, Discover, Ms. McNamara-Corley, and Mr. David Sutter should be dismissed from the case as improperly named respondents.

ORDER

The discrimination complaint of MS. BEVERLY E. ROBINSON against MORGAN STANLEY, DISCOVER FINANCIAL SERVICES, MS. KELLY MCNAMARA-CORLEY, and MR. DAVID SUTTER, brought under the employee protection provisions of SOX, is **DISMISSED**.

SO ORDERED:

A
RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: March 26, 2007
Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. See 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 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).