

**U.S. Department of Labor** Occupational Safety and Health Administration  
Atlanta Regional Office  
61 Forsyth Street NW, Room 6T50  
Atlanta, GA 30303  
(404) 562-2300 Fax (404) 562-2295



MAR 17 2010

Tennessee Commerce Bancorp, Inc.  
381 Mallory Station Road  
Suite 207  
Franklin, Tennessee 37067

Waverly D. Crenshaw Jr.  
Waller Lansden Dortch & Davis, LLP  
511 Union Street, Suite 2700  
Nashville, Tennessee 37219

RE: Tennessee Commerce Bancorp, Inc./Fort/4-1760-08-017

Dear: Mr. Crenshaw:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by George Fort (Complainant) against Tennessee Commerce Bank and Tennessee Commerce Bancorp, Inc. (Respondent) on April 4, 2008 as amended on May 9, 2008, under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A (SOX). In brief, Complainant alleged being placed on administrative leave on March 7, 2008, suffering damage to his personal and professional reputations, and subsequently terminated on May 5, 2008, in retaliation for raising numerous concerns relating to internal controls, insider trading, and other SOX-related matters.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region IV, issues the following findings:

**Secretary's Findings**

Tennessee Commerce Bancorp Inc. is a company within the meaning of 18 USC §1514A in that it is a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).

Tennessee Commerce Bank is a wholly-owned, consolidated subsidiary of Tennessee Commerce Bancorp, Inc. OSHA applies the integrated employer test in determining whether subsidiaries of a covered employer are viewed as a single enterprise for statutory coverage purposes. OSHA finds that Tennessee Commerce Bank and Tennessee Commerce Bancorp Inc. constitute an integrated employer and are therefore covered under SOX.

Complainant was employed by Tennessee Commerce Bank as Chief Financial Officer (CFO), and assigned to the finance division. Complainant is an employee covered under 18 USC §1514A.

On April 4, 2008, Complainant filed a complaint with the Secretary of Labor and amended the complaint on May 9, 2008, alleging Tennessee Commerce Bancorp discriminated against him in violation of SOX. As this complaint was filed within 90 days of the alleged adverse actions, it is deemed timely.

Complainant was hired by Tennessee Commerce Bank on February 1, 2004 as the Vice President of Finance and promoted to Chief Financial Officer (CFO) on September 1, 2005. Complainant entered into an employment contract with Tennessee Commerce Bank as the CFO on January 19, 2006 with an annual pay rate of \$110,000.00. Complainant was also a member of the SOX Steering Committee and Tennessee Commerce Bank's SOX and Securities and Exchange Commission (SEC) compliance officer.

Three months after Complainant was promoted to CFO, Tennessee Commerce Bancorp became publicly traded on the NASDAQ. As Tennessee Commerce Bank's SOX and SEC compliance officer, Complainant was responsible for identifying policies and procedures that would bring Tennessee Commerce Bank into compliance with SEC guidelines. SEC compliance was required starting in 2007.

On January 20, 2006, Chief Executive Officer Arthur Helf wrote a letter to Complainant to acknowledge the fine job Complainant was doing by handling a myriad of details and procedures necessary to bring everything in line for the SEC, Tennessee Department of Financial Institutions (TDFI) and Federal Deposit Insurance Corporation (FDIC), as well as facilitating Tennessee Commerce Bank's year end closing. Mr. Helf noted that Complainant handled the challenges well.

On August 6, 2006, Mr. Helf issued a memo to Complainant, in recognition for Complainant's performance as CFO, with a compensation increase to an annual salary of \$150,000 and year-end bonus of \$150,000. On June 1, 2007, Complainant, President Mike Sapp, Chief Administrative Officer (CAO) Lamar Cox and Mr. Helf received significant pay increases of over 100% each. Complainant's pay increased to \$335,000.00 per year. Because of the large pay increases to Complainant, Mr. Helf, Mr. Sapp and Mr. Cox on June 1, 2007, three board members resigned. In January of 2008, Complainant, Mr. Sapp, Mr. Cox and Mr. Helf received bonuses equal to their annual salary.

Mr. Helf sent an email to Complainant with a copy to Mr. Sapp on June 11, 2007, in which Mr. Helf said "*I would like to exercise my options this week. I will be out Thursday and Friday...Let*

*me know how much cash I will need for taxes. I would (like) to sell these prior to any blackout."* Total options were 165,872 shares for a total of \$1,134,360.00. Mr. Helf said *"Let me know if you envision any problems bringing this off."* This transaction was questionable to Complainant because he knew Mr. Helf had insider knowledge that the large pay increases would soon be publicized in an 8k and that the three board members were going to resign because of the large pay increases. Complainant cautioned Mr. Helf about the timing of the transaction and that it could cause Tennessee Commerce Bank's stock to drop. Mr. Helf told Complainant the sale had been approved by Tennessee Commerce Bank's law firm so Complainant did not pursue the issue at that time.

**Complainant engaged in numerous protected activities, as follows:**

Complainant requested via emails to Mr. Sapp and Mr. Helf that position descriptions be put in place on May 26, 2006, November 6, 2006, November 16, 2006, December 5, 2006, January 31, 2007, May 22, 2007, July 10, 2007, November 28, 2007 and January 31, 2008. In the January 31, 2007 email, Complainant specifically noted that position descriptions would help address many of the *"internal control issues"* that were making it hard for him to have confidence in the financials. Complainant also stated in the email that the *"job description would address internal control issues that are inherent in the reporting structure at Tennessee Commerce Bank."* Complainant further addressed a concern about some of Mr. Cox's areas of responsibility that should be under Complainant as the CFO.

On or about August 31, 2007, the Deposit Operations Manager, who reported to Mr. Cox, confronted Complainant and one of Complainant's employees. In the days after the incidents, Complainant accused Mr. Helf and Mr. Sapp of not sufficiently addressing the situation. Complainant sent a memo to Mr. Helf describing the confrontation and expressing concerns about work place safety. Mr. Helf made memos to the file about Complainant's subsequent behavior on September 12, September 13 and September 17, 2007. Mr. Helf also made a memo to the file about his investigation of the "dust up" but did not terminate the Deposit Operations Manager.

On September 3, 2007, Complainant sent an email to Mr. Helf, Mr. Sapp and Mr. Cox about new policies and revisions. Complainant noted that they had locked down the policies and procedures and suggested it would prevent a SOX noncompliance if the procedures for changing policy are followed.

Complainant sent an email to Mr. Helf and Mr. Sapp on September 30, 2007 about file maintenance procedures not being followed. Complainant noted after meeting with internal and external auditors that it appears Tennessee Commerce Bank would not be able to pass SOX compliance. Complainant complained this area was *"completely out of my control"* and asked for Mr. Helf and Mr. Sapp to make the issue a priority.

Complainant sent an email to the *"TEAM"* on October 16, 2007 regarding *"Insider Trading"*. Complainant said there had been several questions that came up recently about stock trading and provided a copy of Tennessee Commerce Bank's *"Insider Trading Policy"* which should answer most of their questions. Complainant advised if they had any questions to contact him.

Mr. Helf made a memo to the file on November 6, 2007 about a stock purchase that he made on August 9, 2007. Mr. Helf noted in that memo that he and Mr. Sapp met with attorneys Marlee Mitchell, Sheila Sawyer and Waverly Crenshaw of the Waller Lansden law firm at their office to discuss their dissatisfaction with Complainant's behavior. Mr. Helf noted that he had concerns regarding Complainant's SEC expertise. Mr. Helf also recorded that Ms. Mitchell discussed Complainant's allegation that Mr. Helf caused SEC violations by making trades when Complainant was out of the office. At the end of the memo, Mr. Helf stated "*George has a serious problem.*"

As part of Crowell and Crowell's (Tennessee Commerce Bank's internal auditors) audit, they identified suspicious activity in employee accounts on or about November 30, 2007. The suspicious activity was shared with Complainant but he did not receive a copy of the report until January 17, 2008. Complainant shared Crowell and Crowell's verbal findings with Mr. Helf and Mr. Sapp on or about December 19, 2007. Complainant raised concerns again with Mr. Helf and Mr. Sapp on January 18, 2008 and January 24, 2008.

Complainant informed Mr. Sapp and Mr. Helf on January 24, 2008 that he could not sign the upcoming 10k on March 17, 2008 because of his concerns about internal controls, employee accounts, insider trading, wire transfers, check kiting and the fabrication of Asset Liability Committee (ALCO) minutes. As Tennessee Commerce Bank's CFO, Complainant had signed all 10Q's and 10K's since November 10, 2005. Complainant signed the last 10Q on November 14, 2007. Complainant signed the 10Q at that time because Crowell and Crowell did not identify the suspicious activity until November 30, 2007. Complainant informed Mr. Sapp and Mr. Helf in the January 24, 2008 discussion that he was taking his concerns to Tennessee Commerce Bank's audit committee. Complainant alleged Mr. Helf told him that he better not go to the Audit Committee. In Complainant's presentation to the Audit Committee on February 15, 2008, he noted Mr. Helf told him "it would not be a good idea for you to go the audit committee."

Complainant sent an email to Mr. Helf and Mr. Sapp on January 31, 2008 regarding problems with internal controls and the impact of the weaknesses on the bank. Complainant noted he had raised several related issues on occasions too numerous to count but no corrective action had taken place. The most recent issue Complainant raised was about position descriptions that he had asked to be completed for one and a half years. Complainant stated if the position descriptions were in place, it would "clearly delineate authority and responsibility for all areas that impact the accuracy of the financial reports that I certify." Complainant specifically identified "suspicious activity" in Mr. Cox's area of responsibility. Complainant asked to meet with Mr. Helf and Mr. Sapp to determine how they intend to resolve the issues. Complainant noted in light of the audit and soon to be submitted 10k about Tennessee Commerce Bank's attempt to raise capital, he suggested they meet before the following Wednesday.

Complainant shared his concerns with Kraft CPAs (Tennessee Commerce Bank's external auditors) on or about February 5, 2008.

Because of the significance of Complainant's concerns about certain improper activities as defined by Tennessee Commerce Bank's Whistleblower policy, Complainant obtained personal

counsel (Miller and Martin PLLC, later replaced by Shine and Mason) to assist him in fulfilling his legal obligations under SOX and related securities and banking laws. Complainant's counsel sent a letter to Tennessee Commerce Bank on February 8, 2008 and noted that Complainant was required to provide certain certifications in connection with Tennessee Commerce Bank's upcoming SEC filings. The letter noted that Complainant was not in a position to provide the certifications because of his awareness of improper activities and material weaknesses in internal control structure. Complainant elaborated on his concerns in a presentation to the audit committee on February 15, 2008. Subsequently, Complainant determined that Tennessee Commerce Bank was not fully investigating his concerns and he informed the bank's counsel that he intended to meet with the FDIC and TDFI. Complainant met with the FDIC and TDFI on March 6, 2008 to further raise his concerns.

Complainant specifically raised concerns with Mr. Helf on February 12, 2008 about Mr. Helf's June 2007 insider trading. After a heated discussion, Complainant left Mr. Helf's office and Mr. Helf followed Complainant down the hall, trying to talk about Complainant's concerns. Two of Complainant's employees sent emails to Complainant about the incident later that evening. Both emails indicated that Mr. Helf was the aggressor and wanted Complainant to talk about the issues Complainant would be raising to the audit committee on February 15, 2008. Complainant told Mr. Helf that he could not talk about the meeting and that Complainant was following Tennessee Commerce Bank's whistleblower policy. Complainant alleged that he also raised Mr. Helf's insider trading with Tennessee Commerce Bank's counsel, Ms. Mitchell, on March 3, 2008. In addition, the FDIC received a letter from an unnamed "Concerned Depositor" on February 26, 2008. The letter to the FDIC raised concerns about Mr. Helf's June 2007 insider trading as well as the same concerns raised by Complainant about internal controls. The FDIC verbally notified Tennessee Commerce Bank about the letter by at least March 3, 2008 and Tennessee Commerce Bank suspected that Complainant wrote the letter. Complainant and his personal counsel met with the FDIC on March 6, 2008 and discussed his concerns. Kraft CPAs' audit confirmed two material weaknesses in internal controls in their April 17, 2008 report.

Tennessee Commerce Bank was aware of Complainant's protected activity because the concerns were raised directly to Tennessee Commerce Bank's executive officers, audit committee, counsel and the FDIC.

Complainant was subjected to adverse actions on March 7, 2008, when he was placed on administrative leave and thereby suffered damage to his personal and professional reputations, and on May 5, 2008, when he was terminated from his employment with Tennessee Commerce Bank.

When Complainant was placed on administrative leave, he was instructed to have no contact with any Tennessee Commerce Bank employee without going through Mr. Helf, Mr. Sapp or Mr. Cox, as the acting CFO. In addition, Complainant was instructed to not go to the office without permission. The supposed purpose of the administrative leave was to allow Complainant to focus his full attention on the investigation of the internal control allegations he raised. However, Complainant could not access Tennessee Commerce Bank's computer system or information necessary for him to assist the independent auditor's (Horne LLP) investigation of his concerns.

The temporal proximity of the adverse actions to Complainant's protected activity, culminating in his meeting with the FDIC on March 6, 2008, creates a strong inference of retaliation. Moreover, Tennessee Commerce Bank's explanations of its actions are not supported by the evidence. With respect to placing Complainant on leave, Tennessee Commerce Bank asserts that the board of directors made that decision in a special board meeting on March 7, 2008. However, Tennessee Commerce Bank began the process of issuing an 8K, in which it stated that Complainant has been placed on administrative leave before March 7<sup>th</sup>. Moreover, it submitted the 8K to be "EDGAR-ized", five hours before the board meeting and submitted a press release 20 minutes after the board meeting began (at 1:50 p.m.), even though the board meeting did not end until 2:45 p.m. Further, with respect to Complainant's termination, although the bank states that the board of directors made the decision to terminate Complainant on April 22, 2008, the evidence shows that the decision was actually made earlier. For instance, Mr. Cox sent an email to the internal auditor on March 27, 2008 stating Tennessee Commerce Bank wanted "*to take our time to search for the right CFO this time!!*" Additionally, one of Complainant's employees stated that he had been seeking employment elsewhere because of Complainant's actions and had been offered another job. However, the employee rejected the offer when he learned that Complainant was not returning to work with Tennessee Commerce Bank. The employee rejected the alternative offer of employment on March 16, 2008, long before the date on which Tennessee Commerce Bank purports that the board of directors decided to terminate Complainant's employment. Thus, credible evidence shows that the decisions about Complainant's administrative leave and termination were not made in the manner or timing that Tennessee Commerce Bank asserts.

There is also evidence of animus and intent to retaliate against Complainant in emails from Mr. Cox to Crowell and Crowell on February 25, 2008 and February 29, 2008, before Complainant's administrative leave on March 7, 2008. Mr. Cox stated in one email that he was "*in a 'get even' mode and I am enjoying every minute of it.*"

Tennessee Commerce Bank asserted it would have taken the same adverse actions regardless of any protected activity, but the evidence does not support this claim. Tennessee Commerce Bank asserts both external auditors stated Complainant grossly neglected his duties as SOX compliance officer and that Complainant displayed poor management and communications skills. However, both auditors deny telling Tennessee Commerce Bank that Complainant was grossly negligent. Also, Tennessee Commerce Bank did not take any action against Complainant because of his supposed performance, behavior, or conduct until after he raised protected concerns.

Tennessee Commerce Bank also asserted that Complainant showed little interest in the SOX program and failed to begin required SOX testing until it was too late. Based on Complainant's expertise and knowledge as an experienced certified public accountant and chief financial officer, Tennessee Commerce Bank asserts Complainant could not have reasonably believed that the complained of conduct, violated securities laws. However, the evidence does not support Tennessee Commerce Bank's assertions. 2007 was the first year Tennessee Commerce Bank was required to be SOX compliant and Complainant had raised policy concerns several times before December 2007. Crowell and Crowell and Kraft CPAs conducted SOX testing throughout 2007 and it was Crowell and Crowell's testing that first identified suspicious activity and possible

violations that Complainant later took to executive officers, Kraft CPAs and the audit committee. Kraft CPAs' findings dated April 17, 2008, concluded there were two material weaknesses in the areas of concern raised by Complainant, thereby confirming Complainant's concerns.

On August 24, 2009, OSHA sent its initial findings to the Tennessee Commerce Bank advising that it had reasonable cause to believe that Complainant's protected activity was a contributing factor in the adverse actions taken by Tennessee Commerce Bank. Tennessee Commerce Bank was offered an opportunity to meet with OSHA and provide additional evidence. On September 23, 2009, the OSHA investigator, the Nashville Area Director and a Solicitor's representative met with Tennessee Commerce Bank's attorneys. No new evidence was proffered in this meeting. After the meeting, the parties requested and were granted additional time to try to mediate a resolution of the case. The parties were given until November 30, 2009 to complete mediation. However, the parties could not reach agreement on a resolution. On December 8, 2009, Tennessee Commerce Bank submitted additional arguments and documentation to OSHA, including a letter from the SEC dated December 3, 2009 stating the SEC would not recommend any enforcement actions against Tennessee Commerce Bank as a result of Complainant's concerns. Tennessee Commerce Bank also requested to meet with OSHA again to discuss how the SEC's findings affect Complainant's allegations that he participated in protected activity. OSHA decided no further meetings were necessary.

The new information submitted by Tennessee Commerce Bank has not persuaded OSHA to alter its findings that there is reasonable cause to believe Tennessee Commerce Bank violated SOX.

A preponderance of the evidence indicates that Complainant's protected activity was a contributing factor in the adverse actions taken against him. Accordingly, OSHA finds that there is reasonable cause to believe that Tennessee Commerce Bank violated SOX. OSHA hereby orders the following to remedy the violations:

### Order

1. Upon receipt of this Secretary's Findings and Preliminary Order, Tennessee Commerce Bank shall immediately reinstate Complainant to his former position at the rate of **\$335,000.00** (earnings at the time of termination) per year. Such reinstatement shall include all rights, seniority and benefits that Complainant would have enjoyed had he never been discharged. Such reinstatement is not stayed by an appeal of this order.
2. Tennessee Commerce Bank shall pay Complainant back pay, minus interim earnings, for the period of May 9, 2008 until Respondents make Complainant a bona fide offer of reinstatement, at the rate of \$6,442.40 per week
3. Tennessee Commerce Bank shall pay Complainant \$301,500.00 as a bonus for January of 2009 (based on Tennessee Commerce Bank's earnings in 2008)
4. Tennessee Commerce Bank shall pay interest on the back wages and bonus in accordance with 26 USC 6621.
5. \$35,000.00 in Board member payments for seven Board meetings he would have attended but for his termination.
6. Reinstatement of Complainant's right to exercise stock options on 152,308 shares (50,000 for 2007, 2008 and 2009 plus 2,308 additional shares that would have been granted in June

- of 2009), pursuant to Respondent's equity plan(s). Complainant's employment shall be deemed to have been continuous for purposes of vesting requirements.
7. Pay Complainant compensatory damages in the amount of **\$31,601.41** for the following:
    - a. Out-of-pocket medical expenses in the amount of **\$7,908.62**
      - i. **\$2,897.19** for the difference between the amount Complainant formerly paid for health insurance and his premiums under COBRA
      - ii. Medical plan payments **\$5,011.43**, after COBRA coverage ended.
    - b. Car allowance in the amount of **\$21,000.00** (calculated at \$1,000 per month up to February 2010)
    - c. Car insurance that had been previously been paid for by Respondent at \$984.00 per year for a total amount of **\$1,652.79**
    - d. Job hunting expenses in the amount of **\$1,040.00**
  8. Pay Complainant's attorney's fees in the amount of **\$129,794.19**
    - a. **Miller & Martin \$72,429.47**
    - b. **Shine & Mason \$57,364.72**
  9. Expunge Complainant's employment records of any reference to the exercise of his rights under the SOX.
  10. Tennessee Commerce Bank shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to SOX.
  11. Post immediately the "Notice to Employees" in a conspicuous place in or about Tennessee Commerce Bancorp's facility, including all places where notices for employees are customarily posted, and maintain for a period of at least 60 consecutive days from the date of posting, said Notice to Employees to be signed by a responsible official of the Tennessee Commerce Bancorp and the date of actual posting to be shown thereon. Said Notice to Employees is attached.

Tennessee Commerce Bancorp and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge  
USDOL-Office of Administrative Law Judges  
800 K Street NW, Suite 400  
Washington, D.C. 20001-8002  
(202) 693-7542, Fax (202) 693-7365

With a copy to:

George Fort  
5569 Wilkins Branch Road  
Franklin, Tennessee 37064


D. Bruce Shine  
Shine & Mason  
433 East Center Street  
Kingsport, Tennessee 37660

Cindy A. Coe, Regional Administrator  
U. S. Department of Labor/OSHA  
61 Forsyth Street, SW, Room 6T50  
Atlanta, Georgia 30303

U.S. Department of Labor, Associate Solicitor  
Division of Fair Labor Standards  
200 Constitution Avenue, NW N2716  
Washington, DC 20210

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence *de novo* for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under SOX. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of the complaint. The rules and procedures for the handling of SOX cases can be found in Title 29, Code of Federal Regulations Part 1980, may be obtained at [www.osha.gov](http://www.osha.gov).

Sincerely,

  
CINDY A. COE  
Regional Administrator

cc: George Fort  
5569 Wilkins Branch Road  
Franklin, Tennessee 37064

D. Bruce Shine  
Shine & Mason

433 East Center Street  
Kingsport, Tennessee 37660

Deputy Director  
Division of Enforcement  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Administrative Law Judge, USDOL  
USDOL/SOL