

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 03 January 2005

Case No.: 2004-SOX-0076

In the Matter of

CHARLES WAYNE TUTTLE,
Complainant,

v.

JOHNSON CONTROLS, BATTERY DIVISION,
Respondent.

**RECOMMENDED DECISION AND ORDER GRANTING
RESPONDENT'S MOTION FOR SUMMARY DECISION**

On November 23, 2004, Johnson Controls, Battery Division ("Respondent") filed a Motion for Summary Decision, pursuant to 29 C.F.R. §§ 18.40 and 18.41(a). Respondent argues that Charles W. Tuttle ("Complainant") raises no genuine issues of material fact and cannot make a prima facie showing that he engaged in protected activities within the meaning of § 806 of the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act"). On December 8, 2004, Complainant filed a Response.

FACTS

The following facts are not disputed:

1. Respondent is a publicly traded company that manufactures automotive and marine batteries. Respondent is an entity covered by the provisions of SOX.
2. Complainant was employed continuously by Respondent from January 8, 1979, to January 8, 2004.
3. Complainant was on medical leave of absence from October 1, 2002, to November 3, 2003.
4. Complainant was terminated from employment on January 9, 2004.

5. On March 21, 2004, Complainant filed a SOX complaint. Therein, Complainant alleges he was terminated due to complainants about defective batteries.
6. In the Response to Motion for Summary Decision, the only "protected activity" alleged is that "it is uncontroverted that Johnson Controls was informed by Mr. Tuttle that significant numbers of its batteries were defective." (Response at page 1).

DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds "the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Id. Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003); Green v. Ingalls Shipbuilding, Inc., 29 BRBS 81 (1995) (stating the purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact). However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)

SOX provides protection for employees of publicly traded companies. SOX provided that no such company or its officers, employees, contractors, subcontractors, or agents "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because the employee engaged in certain lawful acts:

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes

constitutes a violation of section 1341 [*fraud and swindles*], 1342 [*fraud by wire, radio, or television*], 1344 [*bank fraud*], or 1348 [*securities fraud*], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1342, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. See, e.g. S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company.") The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." *Id.* In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." *Ames Department Stores Inc., Stock Litigation*, 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit.

Protected activity is defined under SOX as reporting an employer's conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders. While the employee is not required to show the reported conduct actually caused a violation of the law, he must show that he reasonably believed the employer violated one of the laws or regulations enumerated in the Act. Thus, the employee's belief "must be scrutinized under both subjective and objective standards." *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051 (July 14, 2000).

The protected activity alleged in the complaint involves the Complainant's reporting to Respondent that significant numbers of its batteries were defective. The complaint does not address any kind of fraud or any transactions relating to securities.

Moreover, there has been no allegation that the activities complained of involved intentional deceit or resulted in a fraud against shareholders or investors. There is nothing in the complaint or in the Response to the Motion for Summary Decision indicating that Complainant objectively or actually believed that Respondent was committing a violation of any of the enumerated securities laws or that Respondent was committing fraud on its shareholders. Therefore, the matters complained of do not fall within the purview of the employee protection provisions of the Act.

CONCLUSION

Based on the foregoing discussion, construing all facts in the light most favorable to Complainant, the Court finds that Complainant did not engage in activities protected under the Act. Respondent is thus entitled to summary decision as a matter of law.

RECOMMENDED ORDER

It is RECOMMENDED that Respondent's Motion for Summary Decision be GRANTED.

A

LARRY PRICE
Administrative Law Judge

LWP/lpr