

U.S. Department of Labor

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Issue Date: 13 January 2006

Case No.: 2006-SOX-5

IN THE MATTER OF

**PATRICK LEE,
Complainant**

vs.

**PITNEY BOWES, INC.,
Respondent.**

***MOTION IN LIMINE
DECISION & ORDER***

PROCEDURAL BACKGROUND

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002¹ (the Act) and the regulations promulgated pursuant thereto² brought by Complainant Patrick Lee against Respondent Pitney Bowes, Inc.

On 31 Mar 05, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) that Respondent had violated his rights under the Act. OSHA conducted an investigation and issued its findings on or about 8 Sep 05. On or about 12 Oct 05, Complainant objected to the findings and requested a formal hearing. On 22 Nov 05, in accordance with a stipulated scheduling motion, I issued an order setting the matter for formal hearing to be held on 24 Apr 06.

On or about 23 Dec 05, Respondent filed a Motion *in Limine* seeking to preclude the consideration of a legal expert's opinion testimony. On or about 9 Jan 06, Complainant filed his opposition.

¹ 18 U.S.C. § 1514A *et seq.*

² 29 C.F.R. Part 1980

POSITIONS OF THE PARTIES

Respondent moves to prevent the Complainant from calling an expert witness to testify regarding “the interpretation of securities laws or other legal matters.”³ Respondent argues the judge is the sole source of the law to apply in any case and an expert witness’ testimony as to the state of or interpretation of the law invades the judge’s province. Respondent cites the Federal Rules of Evidence and a number of appellate opinions in support of his position.

Complainant responds in agreement that an expert is not allowed to testify as to the law that governs a case and how that law applies to the facts. However, Complainant argues that he intends to elicit from the witness evidence which will shed light on the reasonableness of his interpretation of the securities laws in reporting Respondent’s conduct. Complainant would call an expert to offer information regarding industry interpretation and application of securities laws and the types of advice given to corporations concerning disclosures. He would ask the witness to discuss what type of material information is required to be reported to shareholders; the relationship of the conduct reported by Complainant to securities valuation, to emphasize the financial nature of the violations; the effect of published revenue recognition standards on security values; the details of Respondent’s revenue recognition standards; and how the reported conduct relates to Respondent’s revenue recognition standards.

APPLICABLE LAW

The Act protects employees who report conduct which the employee reasonably believes constitutes a violation.⁴ Consequently, a fact in issue in the case is whether Complainant reasonably believed he was reporting illegal conduct by Respondent.

In hearings under the Act before Administrative Law Judges, the formal rules of evidence do not apply. However evidence that is immaterial, irrelevant, or unduly repetitious should be excluded.⁵

ANALYSIS

In this case a pivotal issue is not whether Respondent’s conduct actually violated the law, but whether Complainant reasonably believed it violated the law. Thus, any evidence tending to show what the law actually is and that Respondent’s conduct violated the law would be relevant only to the extent that it would tend to make it more likely than not that Complainant reasonably believed Respondent’s conduct violated the law. However, Complainant specifically disavows any intention of offering an expert witness to explain what the law is, or to opine that Respondent’s conduct violated the law. Nevertheless, given the wide discretion afforded to ALJ’s in this area, it would not be error to accept testimony on what law should apply. However, I decline to do so. That subject is better left to counsel’s briefs.

³ CL’s brief.

⁴ 18 U.S.C. §1514A

⁵ 29 CFR § 1980.107 (d)

Nonetheless, if an adequate foundation was laid and an expert was otherwise competent to give an opinion on general industry practices and the “conventional wisdom” or “commonly accepted” interpretation of what the law proscribes, such testimony could be relevant to help the court determine whether Complainant’s beliefs were objectively reasonable.

Some of the topics proffered by Complainant appear not to be problematic in any case. For example, testimony about the relationship of the conduct to securities valuation, the effect of published revenue recognition standards on security values, the details of Respondent’s internal revenue recognition standards, and how the reported conduct relates to Respondent’s internal revenue recognition standards would appear more factual than legal in nature.

ORDER

Consistent with the above, the Motion *in Limine* is granted in part and denied in part. The motion is granted as to expert testimony about what law applies in the case and how it applies to the facts. It is denied as to expert testimony relating to industry practices and commonly accepted principles which would tend to show that Complainant’s belief that Respondent’s conduct was in violation of the law was consistent with those practices and principles and therefore reasonable.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge