

## Former Employee's SOX Whistleblower Claim Fails, Federal Appeals Court Rules

By Richard J. Cino

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Finding a former employee failed to “put up” sufficient facts to support the nexus between his termination and whistleblower activity protected by the Sarbanes-Oxley Act (SOX), the federal appeals court in Philadelphia, in effect, has told him to “shut up,” affirming summary judgment unanimously in favor of the employer. *Wiest et al. v. Tyco Electronics Corp.*, No. 15-2034 (3d Cir. Feb. 2, 2016). Moreover, the Court clarified that a “contributing factor” to a SOX retaliatory firing must affect the outcome of the adverse employment decision.

### Background

Jeffrey Wiest, a former accountant for Tyco Electronics Corp., was fired for sexual harassment and inappropriate sexual relations with several female subordinates. Wiest then filed a complaint alleging his former employer, in violation of SOX, had terminated his employment after he raised concerns to his supervisors about certain corporate expenditures.

The District Court granted summary judgment to the employer.

### SOX Summary Judgment

To withstand summary judgment under SOX, the plaintiff must identify evidence in the record from which a jury could deduce or infer the following:

1. he “engaged in a protected activity”;
2. the employer “knew or suspected that he engaged in the protected activity”;
3. he “suffered an adverse action”; and
4. “the protected activity was a contributing factor in the adverse action alleged in the complaint.”

If the plaintiff satisfies his burden to identify evidence to support all four elements, the burden will shift to the employer to demonstrate “by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.”

### Nexus

In the latest skirmish in a series of legal battles between Jeffrey Wiest and Tyco Electronics Corp., a Third Circuit panel unanimously backed the employer, holding that Wiest, in fact, was discharged for sexual harassment, not for whistleblowing activity protected under SOX.

The panel held that Wiest failed to offer facts sufficient to provide the necessary connection between his protected activity and his firing. It emphasized that Tyco’s thorough and fully documented investigation surrounding the allegations of Wiest’s sexual misbehavior demonstrated it would have taken the same steps toward termination despite Wiest’s voicing concerns over improper corporate expenses.

### Contributing Factor

Significantly, the Third Circuit, looking to its sister circuits, clarified the meaning of a “contributing factor” to a retaliatory firing under the Sarbanes-Oxley Act. It found that a contributing factor is “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.”

Accordingly, the panel quickly found that Wiest did not meet his burden. In fact, the Court cited with approval Tyco’s evidence that Wiest’s involvement with the corporate expense issues was limited and was not temporally related to the termination decision, and that Wiest received favorable treatment in the form of positive accolades for his loyal 30-year tenure with Tyco following his protected activities.

### Motion to Dismiss or for Summary Judgment

The Court also distinguished between a *motion to dismiss*, in which the court accepts the allegations in a

### Meet the Author



[Richard J. Cino](#)

Office Managing Principal  
Berkeley Heights 908-795-5131  
Email

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plaintiff's complaint as true, and a *motion for summary judgment* under Rule 56 of the Federal Rules of Civil Procedure, which the court said is “essentially ‘put up or shut up’ time for the non-moving party, who must rebut the motion with facts in the record.”

The panel affirmed the lower court's holding that Wiest failed to “put up” the necessary facts for a reasonable jury to find the allegations in his complaint to be true. Thus, it found Tyco did not violate the Sarbanes-Oxley Act when it took the adverse action against Wiest by discharging him without warning or probation.

### Constructive Discharge

Wiest also raised a constructive discharge claim, stating that his colleagues were “less communicative” with him after his protected actions. The panel, however, rejected this claim as well, ruling the conduct of coworkers being less communicative “is insufficient to constitute a constructive discharge.”

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Jeffrey Wiest reportedly is considering filing a petition for an en banc, or full bench, hearing before the Third Circuit. The Court's decision whether to grant the petition is uncertain. Jackson Lewis will continue to monitor this matter and provide updates. The Jackson Lewis [Corporate Governance and Internal Investigations](#) practice can assist employers in defending SOX claims. Please contact your Jackson Lewis attorney if you have any questions about this case or would like assistance.

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