

Sixth Circuit: Job Applicant Cannot Claim Retaliation under FCA for Prior Whistleblowing Activities

2 min read

Nov 26, 2014

Gary Vander Boegh worked as a landfill manager for the U.S. Department of Energy. While there, Vander Boegh engaged in what he claimed was protected whistleblowing activity, including reporting environmental violations that occurred at the plant. When Vander Boegh's employer lost its contract to provide waste management services for the plant, Vander Boegh applied at EnergySolutions, Inc., which had taken over the waste management contract, in the hopes that he would continue his job as landfill manager at the plant. EnergySolutions refused to hire him.

Vander Boegh brought suit under the anti-retaliation provisions of the [False Claims Act \(FCA\)](#) and other environmental statutes claiming he was refused employment because of his prior whistleblowing activities. The anti-retaliation provisions of the FCA protect employees from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of his employment by his or her employer" because of lawful acts in furtherance of a qui tam action or an effort to stop a violation of the FCA.

The federal district court dismissed the complaint and Vander Boegh appealed. The Sixth Circuit Court of Appeals, in *Vander Boegh v. EnergySolutions, Inc.*, No. 14-5047 (6th Cir. 2014), ruled in favor of EnergySolutions, finding that the anti-retaliation provisions of the FCA [did not apply to Vander Boegh](#) because he was an "applicant" and not an "employee" of EnergySolutions. The Court noted that Vander Boegh did not fall within the plain or common meaning of the term "employee," and the Court also reasoned that Vander Boegh did not receive compensation from EnergySolutions and was not under the company's control. The Sixth Circuit also affirmed the dismissal of Vander Boegh's claims brought under various federal environmental statutes, finding it lacked subject matter jurisdiction to hear the claims because Vander Boegh failed to exhaust his administrative remedies before seeking judicial review.

The Sixth Circuit decision in the *Vander Boegh* case supports employers who choose not to hire job applicants with a history of whistleblowing activity. This decision could potentially open the door for employers located

within the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) to inquire directly about whistleblowing activity during the application process. Notwithstanding, employers should always take caution when using such information to decline employment or to take an adverse employment action against a current employee. Employers should consult with counsel before taking such action.

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