

SIXTH CIRCUIT REVIEW

**Whistle While You Work:
The Gap in Whistleblower Protection Exposed
by the Sixth Circuit**

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Commenting on *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056 (6th Cir. 2014).

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I. INTRODUCTION

On November 18, 2014, the Sixth Circuit Court of Appeals decided *Vander Boegh v. EnergySolutions, Inc.*,¹ holding that EnergySolutions had not violated Vander Boegh’s rights as a whistleblower. Although the Sixth Circuit correctly decided *Vander Boegh v. EnergySolutions, Inc.* under current law, the decision has far reaching policy implications that should spur the legislature into amending the existing protections for whistleblowers. In its decision, the court focused on the definition of “employee” as used in whistleblower protection statutes. By refuting the argument that “applicants” are “employees” for standing purposes, the Sixth Circuit ignored and reinforced the largest gap in whistleblower protection: the practice of blacklisting applicants with whistleblower history during the interview process.

II. FACTUAL BACKGROUND

Gary Vander Boegh was employed by the U.S. Department of Energy (DOE) to work at the Paducah Gaseous Diffusion Plant (PGDP).² The PGDP contract to manage the plant was originally awarded to Bechtel Jacobs Company, LLC (BJC). Vander Boegh worked for one of BJC’s subcontractors

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¹ *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056 (6th Cir. 2014).

² *Id.* at 1058.

(WESKM) as a landfill manager. Both parties agree that while Vander Boegh worked for this subcontractor, he participated in a range of protected activities, including reporting environmental violations, both through internal reporting and external reporting to the DOE.³ In December 2001 and January 2002, Vander Boegh filed complaints with the DOE's Employee Concern Program (ECP).⁴ After filing complaints, he was the victim of harassment at BJC. In July 2003, a DOE officer found for Vander Boegh in a retaliation claim and prohibited BJC from interfering with Vander Boegh's employment for one year.⁵

In 2005, the DOE awarded the PGDP contract to Paducah Remediation Services, LLC (PRS). PRS subcontracted EnergySolutions to provide waste management services. In January 2006, the transition from WESKEM to EnergySolutions began. On February 21, 2006, Vander Boegh filed another ECP complaint regarding a former coworker, Kevin Barber.⁶ Barber was an actor in the retaliation Vander Boegh faced at BJC. Barber became a member of the transition team and an influence on hiring decisions, which caused Vander Boegh concern given their history.⁷ In late February of that year, a landfill manager position that Vander Boegh was considered for was offered to another candidate. John Kelly, the leader of the transition team officially making hiring decisions, stated that he was both unaware that Vander Boegh was told he was to be considered for the position and of his past whistleblowing experience.⁸

On February 24, 2006, Vander Boegh filed his fourth ECP complaint with the DOE alleging conspiracy between BJC, WESKEM, and EnergySolutions to terminate his employment because of his whistleblowing activity.⁹ While the complaint was pending, another landfill position opened at EnergySolutions on March 14, 2006.¹⁰ Vander Boegh applied to be the new landfill manager and interviewed for the position. However, he was told after his interview that the position was no longer available. After the PGDP contract was fully transferred on April 23, 2006, Vander Boegh's employment was terminated and the new landfill manager assumed his duties. Believing this to be in retaliation for his previous whistleblowing actions, Vander Boegh filed an employment discrimination complaint with the Department of Labor.

Vander Boegh removed to federal court and brought suit against EnergySolutions, BJC, and PRS (the defendants). He alleged violations of six federal employee protection statutes.¹¹ Two relevant laws to the Sixth

³ *Id.*

⁴ Vander Boegh v. EnergySolutions, Inc., 536 F. App'x 522, 524 (6th Cir. 2013).

⁵ *Id.* at 524–25.

⁶ *Id.* at 525–26.

⁷ *Id.* at 524–26.

⁸ *Id.* at 526.

⁹ *Id.* at 527.

¹⁰ Vander Boegh, 536 F. App'x at 527.

¹¹ Vander Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1058 (6th Cir. 2014).

Circuit's decision are the Energy Reorganization Act (ERA)¹² and the False Claims Act (FCA).¹³ The Western District of Kentucky granted the defendants' motion for summary judgment on May 3, 2012.¹⁴ Vander Boegh appealed, and on August 14, 2013, the Sixth Circuit affirmed in part, reversed in part, and remanded, holding that there were factual issues that precluded the summary judgment and that there was no evidence that there was improper influence over hiring decisions.¹⁵ On December 17, 2013, the Western District of Kentucky granted EnergySolutions' (the only named defendant's) motion for summary judgment.¹⁶ Vander Boegh again appealed to the Sixth Circuit. On November 18, 2014, the Sixth Circuit affirmed the summary judgment.

On the second appeal, Vander Boegh argued that he met the qualifications of an employee under the ERA and FCA when he applied for the new landfill manager position and that, as such, deserved protection against retaliation for whistleblowing activity.¹⁷ He reasoned that the term "employee" was ambiguous and that the court had the ability to extend protection to applicants.¹⁸ EnergySolutions argued that Vander Boegh was not an "employee" as defined by the statutes. Furthermore, the company maintained that there was not improper influence on hiring decisions.

The Sixth Circuit ruled that Vander Boegh, as an applicant to the landfill manager position, was not an "employee" as defined by the statutes.¹⁹ Therefore, he lacked standing to sue under those federal statutes and would not receive protection.²⁰ Under common law, legislative interpretation, and dictionary definitions, Vander Boegh did not meet any of the qualifications of an "employee" with regards to EnergySolutions. The court considered congressional intent when interpreting the scope of the definition of "employee." There was no indication Congress meant to expand the definition to include applicants. Furthermore, because the common law meaning of "employee" does not include applicants, the court found that applicants were not included in the definition of an employee receiving standing.²¹ As an applicant, Vander Boegh did not meet the threshold requirement of being an

¹² *Id.* (citing 42 U.S.C. § 5851).

¹³ *Id.* (citing 31 U.S.C. § 3730(h)(1)). The court ruled that it did not have subject matter jurisdiction over the remaining claims. *Id.*

¹⁴ Vander Boegh v. EnergySolutions, Inc., No. 5:10-CV-31, 2012 WL 1576158, at *1 (W.D. Ky. May 3, 2012).

¹⁵ Vander Boegh, 536 F. App'x at 532.

¹⁶ Vander Boegh v. EnergySolutions, Inc., No. 5:10-CV-000310-TBR, 2013 WL 7141237, at *5 (W.D. Ky. Dec. 17 2013).

¹⁷ Vander Boegh v. EnergySolutions, Inc., 772 F.3d 1056, 1059 (6th Cir. 2014).

¹⁸ *Id.*

¹⁹ *Id.* at 1062, 1064.

²⁰ *Id.* at 1062, 1064.

²¹ *Id.* at 1061–62, 1064.

employee with standing to sue under the ERA and FCA.²² He was not subject to EnergySolutions' control at the time of his application and interview process and never officially worked for the company. Given the common law interpretation of the word "employee" and the operable statutes, the Sixth Circuit was not wrong in its decision. However, the correct decision highlights a massive hole in whistleblower protections.

III. THE GAP IN PROTECTION

The current whistleblower protection and interpretation of "employee" and standing does not provide adequate protection to whistleblowers against retaliation, as evidenced by the Sixth Circuit's decision in *Vander Boegh v. EnergySolutions, Inc.* Although there is current whistleblower protection, applicants with a prior history of whistleblowing are not sufficiently protected from adverse employment retaliation or harassment.

Current whistleblower protection focuses on employees while they are still employed by the company or employers who committed the wrong. Society expects whistleblowers to receive protection after reporting illegal or unethical activity.²³ The societal benefit of stopping illegal or unethical activity outweighs the cost of protecting these employees. For the most part, whistleblowers do receive an adequate amount of official protection, even if it is not always effective. Employers are forbidden from retaliating against whistleblowers, either with harassment or job retaliation.²⁴ The protection is necessary. Many employees list job retaliation as a main fear preventing them from reporting illegal or unethical activity.²⁵ They have come to expect a certain amount of protection in the case that they report illegal activity.²⁶ The protection currently provided to whistleblowers is effective when the whistleblower experiences retaliation as an employee of the organization subject to whistleblower's report.

Despite the focus and public support, protective whistleblower legislative schemes have their shortcomings. The official protection extended to whistleblowers falls drastically short of covering the real impact of reporting an employer for illegal or unethical actions. The gap exposed by the Sixth

²² John Mitchell, *An Applicant Is Not an Employee Under the ERA and FCA*, FED'N OF DEF. & CORP. COUNSEL, INC. (Nov. 19, 2014), <http://www.thefederation.org/hotcase.cfm?hotcase=9109> [<http://perma.cc/4KVG-FL7S>].

²³ Eletta Sangrey Callahan & John W. Collins, *Employee Attitudes Toward Whistleblowing*, 11 J. BUS. ETHICS 939, 946 (1992).

²⁴ Occupational Safety and Health Administration, *Other Workplace Standards: Whistleblower and Retaliation Protections*, U.S. DEP'T OF LABOR, <http://www.dol.gov/compliance/guide/whistle.htm> [<http://perma.cc/3EVA-UEFH>].

²⁵ See Karen L. Soeken & Donald R. Soeken, *A Survey of Whistleblowers: Their Stressor and Coping Strategies* 11 (1987) (unpublished paper) (on file with Laurel, Maryland: Association of Mental Health Specialties), <http://www.whistleblower-net.de/pdf/Soeken.pdf> [<http://perma.cc/X5ZF-W72Q>].

²⁶ Callahan, *supra* note 23, at 944.

Circuit is the limbo period between leaving a previous employer and seeking new work. It is unrealistic to expect many whistleblowers to comfortably remain with their employers for long periods of time after blowing the whistle on them. Although a workplace may have protections for whistleblowers, subtle harassment and resentment directed at a whistleblower—adversities that might not rise to the level of triggering protection—would likely drive some whistleblowers to seek new employment. After leaving their job, those employees must seek work suitable to their resumes. Inevitably, those positions will almost always be in the same field as their previous employment. At this point, a new fear enters a whistleblower's mind: blacklisting.

Blacklisting, or blackballing, is an outside form of retaliation in which the whistleblower's previous employer will alert the industry to the whistleblower's actions, preventing him or her from obtaining comparable employment.²⁷ Employees list blackballing through loss of promotions or career changes as a real fear when deciding whether or not to report illegal activity.²⁸ Blacklisting has become so common that it is almost an expected result of whistleblowing.²⁹

While there are some broad protections against blacklisting in the work place, the Sixth Circuit's decision circumvents those protections. For example, under Title VII, retaliation against employees or job applicants that have complained about discrimination at previous employment is illegal.³⁰ Individuals may also file complaints with the U.S. Department of Labor in the case of job retaliation.³¹ But the Sixth Circuit's decision separates discrimination complaints and whistleblowing into two separate actions, weakening Title VII's influence.

Furthermore, even with some protection, it is difficult for whistleblowers to successfully bring blacklisting claims. Whistleblowers are protected from unfavorable work retaliation, which can include blacklisting. However, there needs to be concrete proof that the former employer's actions were the exact reason the whistleblower did not receive consideration for a different position

²⁷ See, e.g., *Blacklist*, DICTIONARY.COM (last visited Feb. 3, 2015), <http://dictionary.reference.com/browse/blacklist> [<http://perma.cc/ZNS7-C8QL>].

²⁸ See *Soeken*, *supra* note 25, at 11.

²⁹ See *id.* at 15.

³⁰ See David Barmak, *Sixth Circuit Decision Confirms that Employers May Lawfully Choose Not to Hire a Job Applicant with a Prior History as a False Claims Act Whistleblower*, MINTZ LEVIN (Nov. 21, 2014), <http://www.employmentmattersblog.com/2014/11/sixth-circuit-decision-confirms-that-employers-may-lawfully-choose-not-to-hire-a-job-applicant-with-a-prior-history-as-a-false-claims-act-whistleblower/> [<http://perma.cc/BRX8-5UFS>].

³¹ OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, YOUR RIGHTS AS A WHISTLEBLOWER (2015), https://www.osha.gov/OshDoc/data_General_Facts/whistleblower_rights.pdf [<https://perma.cc/V3VU-C3HG>].

in the same industry.³² In one key blacklisting decision, the whistleblower was only successful because there was an employment verification form that stated he did not meet his previous company's standards, while the real cause of his job departure was whistleblowing.³³ In Vander Boegh's case, there was no such form that could be pointed to as directly influencing the hiring decision.

Beyond evidence of blacklisting, the greatest challenge Vander Boegh faced in his claim was proving his standing as an employee. The ERA and FCA only protect employees. This distinction is the crux of this case and the foundation for the court's refusal to extend protection to Vander Boegh as an applicant.³⁴ By focusing on Vander Boegh's status at the time of the alleged employment retaliation, the court decided that whistleblower protection currently provided, specifically under the ERA and FCA, does not extend to protect whistleblowers as applicants after they leave their previous positions where they reported illegal or unethical activity.

The court's ruling exposes a major gap in whistleblower protection. The lack of protection applicants are given is a serious problem because this time gap is a situation that all whistleblowers will inevitably enter when they leave their previous employment. Although they are protected as employees of their previous employers, there is no protection once they leave and try to reenter the workforce.

IV. CONCLUSION

A solution to this problem, however, will not come from the courts. The judiciary lacks the power to rewrite the definition of "employee" currently purported by the legislature. Instead, Congress must act.

The legislature needs to amend whistleblowing protection to guard against the very real threat of blacklisting in the workforce felt by applicants through an amendment or the creation of new legislation. In the absence of legislative action extending whistleblower protection beyond its current scope, the incentive to report illegal or unethical activity is heavily outweighed by the threat of job retaliation or blacklisting. Societal interests in reporting illegal or unethical activity, however, far outweigh any complications that would result from expanding the definition of "employee" or creating new legislation that may be presently hindering Congress from taking action. In sum, this problem must be addressed and the protection for applicants with a history of whistleblowing should be enacted.

³² See generally *Timmons v. CRST Dedicated Servs., Inc.*, ARB No. 14-051, ALJ No. 2014-STA-009 (Dep't of Labor Sept. 29, 2014).

³³ Steven J. Pearlman & Allison Lynn Martin, *ARB Affirms Blacklisting Award to Whistleblower*, PROSKAUER ROSE LLP (Oct. 15, 2014), <http://www.whistleblower-defense.com/2014/10/15/arb-affirms-blacklisting-award-to-whistleblower/> [<http://perma.cc/T5US-ZYTZ>].

³⁴ *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1058 (6th Cir. 2014).

The Sixth Circuit's decision in *Vander Boegh v. EnergySolutions, Inc.* exposed a large gap in whistleblower protection that the legislature should address by expanding the definition of "employee" to include applicants or by crafting a separate set of regulations for applicants with a history of whistleblowing.