

6th Circuit: Proper Documentation of Application Process Protected Employer from Whistle-Blower Claim

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The Secretary of Labor's denial of an employee's whistle-blowing complaint must be upheld when an employer proves that the complaining employee would not have been promoted regardless of the employee's protected activities, according to the 6th U.S. Circuit Court of Appeals.

In 2005, Mark Hoffman, a pilot with NetJets Aviation, Inc., filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that NetJets had violated the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) when it failed to promote him to the position of Initial Operating Experience (IOE) instructor in retaliation for reporting safety and regulatory concerns to his supervisors and the Federal Aviation Administration (FAA) on multiple occasions.

During his employment with NetJets, Hoffman had unsuccessfully applied for the IOE instructor position over 25 times. In May 2004, NetJets posted an announcement for the IOE instructor position. The announcement, however, did not mention that international flight experience was preferred. During the evaluation process, NetJets ranked the applicants using a point system based on three categories: international experience, program-manager feedback and peer feedback. Although NetJets relied on this point system to evaluate the IOE instructor candidates, the system was not a formal, well-documented process.

Out of the 30 pilots who applied for the IOE instructor position, 26 of the 30 applicants scored higher than Hoffman. During the evaluation process, Hoffman interviewed poorly, failed to completely answer some of the interview questions, and did not display the level of knowledge needed for the position. Further, he admitted to having limited international flight experience. After Hoffman was denied the promotion, he filed his complaint with OSHA.

After OSHA investigated and denied his complaint, Hoffman requested a hearing before an administrative law judge (ALJ). The ALJ denied Hoffman's complaint and found that although Hoffman engaged in protected activities and suffered an adverse employment action when he was denied the promotion, NetJets established that it would have denied Hoffman the promotion regardless of his protected activities.

The Administrative Review Board (ARB), who acts for the Secretary of Labor and is responsible for issuing final agency decisions, affirmed the ALJ's finding and likewise dismissed Hoffman's complaint. On appeal, the 6th Circuit agreed with the ARB's decision and determined that a reasonable person could conclude from the record that NetJets had proven, by clear and convincing evidence, that it would have denied Hoffman the promotion, regardless of his AIR 21-protected activities, because he was not a strong candidate.

The court concluded that because NetJets had used the same point system to evaluate all

of the IOE instructor candidates, NetJets' stated purpose to make the selection of the instructors more objective was not a cover-up developed after Hoffman's interview in order to justify denying him the promotion. Further, credible testimony and documentation assisted NetJets to undercut Hoffman's argument that international experience, like the point system, was only a pretext to deny him a promotion.

Hoffman v. Solis, 6th Cir., No. 08-4128, (March 29, 2011).

Professional Pointer: This case presents a reminder of how important it is to facilitate an objective and well-documented candidate review process. Your legitimate, nonretaliatory reason for not hiring a person may only be as strong as the document that proves it.

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Editor's Note: *This article should not be construed as legal advice.*

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