

Judge Denies American Airlines' Motion to Dismiss

Federal judge allows lawsuit against American Airlines' defined contribution plans to proceed.

Reported by [NOAH ZUSS](#)

A federal judge in Texas this week [denied the motion to dismiss](#) a lawsuit against American Airlines, and allowed two fiduciary breach claims asserted by the plaintiff Bryan Spence to proceed.

Judge Reed O'Connor on Wednesday determined the plaintiff Spence had argued sufficient facts under the Employee Retirement Income Security Act for the case to proceed, according to the court docket.

"Plaintiff articulates a plausible story: Defendants' public commitment to ESG initiatives motivated the disloyal decision to invest plan assets with managers who pursue non-economic ESG [environmental, social and governance] objectives through select investments that underperform relative to non-ESG investments, all while failing to faithfully investigate the availability of other investment managers whose exclusive focus would maximize financial benefits for plan participants," wrote O'Connor.

The statements by the court were surprising, explains Josh Lichtenstein, partner and head of the ERISA fiduciary practice at Ropes & Gray.

"The decision is not consistent with the way ERISA is intended to operate," Lichtenstein says, by email. "ERISA is meant to be deferential to decisions by fiduciaries, and the fact that a fund may include ESG factors or (in this case) just have ESG considerations as part of proxy voting should not result in a finding of breach of fiduciary duties, as long as the plan fiduciary made the decision based on an appropriate process considering the full range of investment considerations."

The threshold for a motion to dismiss is high, which could help to explain this decision, Lichtenstein adds.

"The funds at issue are not ESG funds, and I think these types of arguments could theoretically be applied to a large universe of investment products that would not be thought of as 'ESG products,'" he says.

American Airlines [in September filed a motion to dismiss](#), arguing the lawsuit must be tossed. The airline argued Spence's allegations are insufficient to state a claim because the plaintiff provides no benchmark by which to compare performance of the investments in question.

The court disagreed.

"The court determines that requiring a benchmark for measuring performance is not required at this stage given the inherent fact questions such a comparison involves," O'Connor wrote. "The Fifth Circuit has not imposed a performance benchmark requirement."

It is unclear how this case would fare under a standard set in several federal appeals circuits in recent years and joined most recently by the [10th Circuit Court of Appeals](#) in September 2023 that ruled that a "meaningful benchmark" must apply to 401(k) participant lawsuits.

Spence's [amended class action complaint](#) alleged two theories of liability: the challenged fund theory, which challenged the American Airlines plans' alleged inclusion of ESG funds as investment options, and the challenged manager theory, which challenged the plans' use of investment management firms that allegedly used their proxy voting power to support ESG-related initiatives.

“This particular court has shown a propensity to support contentions more likely to be made on the Republican side of the aisle,” explains Drew Oringer, a partner in and general counsel at the Wagner Law Group, which was not involved in the litigation. “While it remains to be seen what will happen on appeal, or at trial if it gets to that, the prospect that a case like this can continue past its initial stages is itself significant to those interested in or otherwise concerned about ESG.”

Earlier this year, more than two dozen [Republican state attorneys general appealed](#) to the 5th Circuit Court of Appeals, requesting it strike down the Department of Labor rule, which permits ESG factors to be considered when selecting retirement plan investments.

The [initial lawsuit](#), *Bryan P. Spence v American Airlines et al.*, was filed in June 2023 in the U.S. District Court for the Northern District of Texas Fort Worth Division.

Neither representatives of American Airlines nor Spence responded to requests for comment.

Tags

[American Airlines](#), [defined contribution retirement plans](#), [Department of Labor](#), [Employee Retirement Income Security Act](#), [environmental social and governance](#), [fiduciary breach](#), [proxy voting](#), [retirement planning](#), [retirement savings](#)

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