

# 7th Circ. 401(K) Ruling Supports Early ERISA Claim Dismissal

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The [U.S. Court of Appeals for the Seventh Circuit](#) recently [provided](#) a ray of sunshine in what has largely been a gloomy stretch for plan sponsors and fiduciaries defending ERISA breach of fiduciary duty claims based on allegedly excessive investment and administrative fees, and investment underperformance.

In *Albert v. Oshkosh Corp.*, [\[1\]](#) Oshkosh emerged victorious with the Seventh Circuit affirming the dismissal — at the motion to dismiss stage — of claims that it mismanaged its 401(k) plan by paying excessive record-keeping fees, failed to ensure investment options were prudent, and unreasonably maintained high-cost investment advisers.

## Background

Andrew Albert, a former employee and participant in the Oshkosh 401(k) plan, advanced several breach of fiduciary duty and prohibited transaction claims under the Employee Retirement Income Security Act based on what have become relatively common allegations related to excessive fees and investment underperformance.

First, Albert alleged that the plan paid excessive record-keeping fees and failed to regularly solicit competitive bids.

Second, Albert alleged that the plan paid excessive investment management fees and, in particular, that the plan would have paid lower fees by investing in a more expensive share class with a revenue-sharing component that theoretically would rebate all revenue-sharing fees to the plan participants.

Third, Albert alleged that certain actively managed funds should not have been offered because they are more expensive than passively managed funds.

Fourth, Albert alleged that the plan offered personalized investment adviser services that were unreasonably expensive.

Lastly, in addition to these more commonly asserted claims, Albert also alleged that the plan failed to provide a detailed explanation of how revenue-sharing payments were calculated in Form 5500 filings and that the plan's payment of fees to its service providers resulted in violations of ERISA's prohibited transaction rules.

The [U.S. District Court for the Eastern District of Wisconsin](#) dismissed the complaint prior to the [U.S. Supreme Court's](#) January decision in *Hughes v. Northwestern University*, [2] which notably vacated and remanded another Seventh Circuit ruling affirming dismissal of fee and investment claims.

### **The Seventh Circuit's Decision**

The Seventh Circuit affirmed the dismissal of all claims.

As a preliminary matter, the court concluded that Albert had Article III standing to pursue his claims because his investment in "at least some actively managed funds" was sufficient to confer standing on a motion to dismiss, but the issue could be revived with additional discovery and on class certification.

Turning to Albert's substantive allegations, the court made the following rulings:

- Allegations about record-keeping fees, devoid of context regarding the actual record-keeping services provided, did not move the "claim from possibility to " [3] In so ruling, the court explained that there is no requirement for fiduciaries to regularly solicit bids from service providers.
- Addressing Albert's novel share class theory, the court observed that the complaint's basis for alleging that revenue sharing would have caused the plan participants to pay a lower amount of net fees was flawed because Albert had no basis for alleging that the revenue-sharing proceeds would have actually been rebated to plan The court observed that the plan's Form 5500 did not disclose to whom revenue sharing proceeds are paid — to the record-keeper as profits, or to the plan participants. As revenue-sharing proceeds do not always entirely redound to the investors' benefit, one cannot arrive at net cost figures simply by subtracting revenue sharing from the investment management expense ratio, and Albert did not allege more.
- Albert's allegation that certain actively managed funds in the plan were imprudent because they were more expensive than passively managed funds was threadbare and failed to provide a comparison to a meaningful benchmark.

- Albert provided no basis for comparison between the investment adviser service fees paid and fees paid to other service providers, and merely stating on information and belief that defendants did not solicit competitive bids from other service providers was insufficient to state a claim.
- Albert's prohibited transaction claims were circular. The court explained that it would lead to absurd results and frustrate ERISA's purpose to hold that a viable prohibited transaction claim was asserted merely because an entity providing services to a plan, which, by definition, is a party-in-interest, received a fee for those services.
- There is no requirement to disclose detailed information on how revenue sharing is calculated in Forms 5500.

## Perspective

The ruling in Oshkosh tends to validate our advice that the Supreme Court's decision in Hughes was a much narrower decision than the plaintiffs bar — and some in the defense bar — initially pronounced, and thus should not lead to a trend toward denying motions to dismiss.

The Supreme Court did not address the plausibility of any of the underlying claims that the Seventh Circuit dismissed but merely held that the Seventh Circuit relied on an inappropriate "investor choice" theory to support dismissal.

In so ruling, the Supreme Court also instructed courts considering motions to dismiss ERISA complaints to apply the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, [\[4\]](#) which allowed for the consideration of obvious and lawful explanations for the alleged wrongdoing, and set forth that due regard must be given to the "reasonable judgments a fiduciary may make based on her experience and expertise." [\[5\]](#)

Notwithstanding an initial set of discouraging post-Hughes opinions denying motions to dismiss, [\[6\]](#) the more recent trend has turned in a favorable direction.

In addition to the ruling in Oshkosh, the [U.S. Court of Appeals for the Sixth Circuit](#) — in *Smith v. Common Spirit Health* [\[7\]](#) in June and *Forman v. TriHealth Inc.* [\[8\]](#) in July — has dismissed similar fee and investment claims. Recent rulings from the [U.S. District Court for the Eastern District of Missouri](#) [\[9\]](#) and the U.S. District Court of the District of Utah [\[10\]](#) have done so as well. [\[11\]](#)

These decisions show that in a post-Hughes environment, courts will still — and arguably must — dismiss complaints that fail to strictly adhere to the applicable pleading standards.

Nevertheless, many courts continue to deny motions to dismiss based on substantially similar allegations. In those instances where prevailing on a motion to dismiss remains unlikely, consideration should be given to filing instead an early motion for summary judgment, in which the court will have an opportunity to resolve factual issues that would otherwise have prevented the motion to dismiss from being granted.

In all events, with weekly — sometimes daily — class action complaints being filed, plan sponsors and fiduciaries are well advised to continue making sure that they have implemented appropriate procedures for monitoring plan administrative and investment management fees, and investment performance.

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[1] [Albert v. Oshkosh Corp.](#), No. 21-2789, 2022 WL 3714638, \_\_F.4th\_\_\_\_ (7th Cir. Aug. 29, 2022). On Sept. 12, the plaintiff petitioned the Seventh Circuit for panel rehearing.

[2] [Hughes v. Northwestern University](#), 142 S. Ct. 737 (2022).

[3] Albert at 18.

[4] [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 127 S. Ct. 1955 (2007).

[5] Hughes, 142 S. Ct. at 742.

[6] We wrote about one of those cases [here](#).

[7] [Smith v. CommonSpirit Health](#), 37 F.4th 1160 (6th Cir. 2022).

[8] [Forman v. TriHealth, Inc.](#), 40 F.4th 443 (6th Cir. 2022) (affirming dismissal of most claims but reversing dismissal of share class fee claim).

[9] [Riley v. Olin Corp.](#), No. 21-cv-1328, 2022 WL 2208953 (E.D. Mo. June 21, 2022).

[10] [Matney v. Barrick Gold of N. Am. Inc.](#), No. 20-cv-275, 2022 WL 1186532 (D. Utah Apr. 21, 2022).

[11] We discussed those cases [here](#) and [here](#).

#### Related Professionals

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- **Myron D. Rumeld**  
Partner
- **Russell L. Hirschhorn**  
Partner